



**The United Nations “Protect, Respect, Remedy” Framework for
Business and Human Rights and the United Nations Guiding
Principles for Business and Human Rights**

A Guide for Trade Unionists

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Background Note for Trade Unionists

Introduction – the “UN Framework” and the “Guiding Principles”

In April 2008, Professor John Ruggie, the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations, (referred to here as the “Special Representative”) presented a report to the United Nations Human Rights Council containing “a conceptual and policy framework intended to anchor the business and human rights debate”. The Framework was based on three pillars: first, the State duty to protect against human rights abuses by third parties, including business; second, the corporate (business) responsibility to respect human rights; and third, the need for more effective access to remedies. These pillars are often referred to as “the Ruggie Framework” and are more formally known as the “UN ‘Protect, Respect Remedy’ Framework for Business and Human Rights” (referred to here as “the UN Framework”).

The UN Framework was recommended by the Special Representative following three years of consultation and research. The recommendation sought to clarify the relative responsibilities of the state and business in a way that would be broadly accepted and that could provide the basis for further debate and development on the subject. In June 2008, the proposed Framework was formally welcomed by the UN Human Rights Council giving it official status and marking the first occasion that the UN body mandated for human rights adopted substantive policy on Business and Human Rights. (<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>).

In March 2011, the Special Representative presented a report to the UN Human Rights Council containing “Guiding Principles on Business and Human rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31_en.pdf)

These “Guiding Principles”, were intended to “operationalize” the UN Framework and were unanimously endorsed in June 2011 by the UN Human Rights Council.

The Special Representative was appointed in 2005 in order to explore controversial issues that arose in the development the “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights” (referred to as the “Draft UN Norms”), proposed by the Sub-commission of the then UN Commission on Human Rights, but abandoned at the request of the Commission. How the UN Framework addressed these controversial issues is explained in this note. Professor Ruggie was given a three year mandate to: (among other tasks) identify and clarify standards of corporate responsibility for human rights; to elaborate on the role of states; and to

clarify concepts such as “complicity” and “sphere of influence”. In 2006, the UN Commission on Human Rights was replaced by the UN Human Rights Council. In 2008, the Council extended the mandate for the Special Representative for an additional three years during which the “Guiding Principles” were developed.

The UN Framework and the Guiding Principles are products of six years of extensive consultations – including 47 international consultations held across all regions - together with an elaborate programme of research and publications. The process involved governments, national human rights institutions (NHRIs), civil society, trade unions, academics, legal experts as well as business and business organisations. The results have been endorsed and positively applied by a broad range of organisations and can fairly be characterised as the current international consensus on this subject.

The ITUC and one of its predecessor organisations the ICFTU, has followed work on business and human rights including on the “Draft UN Norms” and the mandates of the Special Representative. This has involved participation in consultations and in informal meetings with the Special Representative and his staff. As part of the Council of Global Unions, the ITUC participated in a consultation with the Special Representative and submitted joint comments on the Guiding Principles. In 2011, the ITUC welcomed the adoption of the Guiding Principles.

The importance of the “UN Framework” and the “Guiding Principles”

The UN Framework and the Guiding Principles constitute the most significant development in over 30 years with respect to international standards of behaviour for business. It was in 1976 and 1977 that the two most important international instruments addressing the social responsibilities of business were adopted: The OECD Guidelines for Multinational Enterprises (The OECD Guidelines) and the International Labour Organisation’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (The ILO MNE Declaration). The UN Guiding Principles should be regarded as a third authoritative, non-legally binding international instrument addressing the behaviour of business.

[The Guiding Principles are]...the global standard of practice that is now expected of all governments and business with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for states and businesses and include points covered variously in international law and practice.” (From the Introduction of “The Corporate Responsibility to respect Human Rights – an Interpretative Guide” Office of the High Commissioner for Human Rights, November 2011).

The Guiding Principles do not come with a UN mechanism to consider questions over their meaning, to handle grievances against specific companies, to resolve disputes, or to investigate charges of corporate wrong-doing. The UN Human Rights Council established a five member Working Group of independent experts in 2011 at the time that it endorsed the Guiding Principles. The mandate for this Working Group includes such functions as promoting the Guiding Principles, identifying and exchanging best practices and making recommendations. The significance of the Guiding Principles does not lie in the follow up procedure, however. Their importance must be measured by their influence on other organisations and institutions, by their influence on public policy and by the possibilities that are created when they are applied by governments or by business. Their importance should also be seen in the light of establishing preconditions for further progress in

development of international governance institutions. The Guiding Principles can be used to link the most important social impacts of economic activity to business behaviour in investment treaties, in procedures of international financial institutions, through requirements of export credit agencies and in procurement policies.

This means that the use, impact and ultimate value of the Guiding Principles will, for the most part, be determined beyond the UN Human Rights Council and this Working Group. Trade Union strategy and action over the UN Framework and the Guiding Principles will involve using the consensus in a wide range of activities involving many organisations and institutions.

Early and significant uptake of the Guiding Principles

Many of the most important instruments and initiatives concerning the social responsibility of business have been, or are in the process of being, updated in the light of the UN Guiding Principles. The most significant development in this regard has been the revision of the OECD Guidelines for Multinational Enterprises, adopted in May 2011. The Guidelines now have a new chapter on human rights based on the Guiding Principles. Just as importantly, they also incorporate the Guiding Principles' concept of due diligence (dealt with later in this Briefing Note) as a general principle setting an expectation for responsible behaviour in areas other than human rights. The OECD worked with the Special Representative in this revision which took place shortly before the Guiding Principles were formally adopted.

The International Standard Organisation's (ISO) Working Group on Social Responsibility also worked with the Special Representative and the ISO 26000 standard on social responsibility, adopted in late 2010, reflects the UN Framework and is fully compatible with the Guiding Principles. The International Finance Corporation's (IFC) Sustainability Framework revised in May 2011 also reflects the new expectations set out in the Guiding Principles. The IFC-related Equator Principles used by many financial institutions, and in the process of being updated, are expected to reflect the Guiding Principles as is the revision of the Global Reporting Initiative's Sustainability Reporting Guidelines scheduled to be completed in 2013. Other initiatives are also likely to be changed in order to reflect the Guiding Principles.

The UN Framework and Guiding Principles have already led to converging expectations over business behaviour that can be expected to influence public policy in a positive way. They are a welcome antidote to the challenges posed by the promotion of "Corporate Social Responsibility" (CSR). Many governments have promoted CSR as a so-called "voluntary concept" that can be used as an alternative to regulation. Although business can, and does, violate human rights, business cannot by itself ensure that human rights are respected. It is government through the rule of law that has the indispensable role in the realisation of human rights.

The UN Framework and the Guiding Principles clearly make the distinction between the duty of the state and the responsibility of business. Because they get this distinction right, they can be used to effect changes in public policy over CSR and greater acceptance for a more realistic vision of business responsibility that is more in the interest of workers.

The UN Framework and Guiding Principles were significant factors in the adoption of a new definition of CSR by the European Commission in its Communication on CSR released in October

2011. The new EU definition of CSR is “the responsibility of enterprises for their impacts on society”. This replaced the definition that limited CSR to activities that were voluntary. The European Union has endorsed the Guiding Principles and has invited Member States to develop national plans for implementing the Guiding Principles by the end of 2012.

Another area where the UN Framework and the Guiding Principles could make a significant contribution to expectations for business concerns sustainable development. The concept of due diligence as elaborated by the Guiding Principles is a sound basis for expectations of responsible business behaviour for all three dimensions of sustainable development: economic, environment and social. Moreover the range of internationally agreed human rights (civil and political rights as well as economic, social and cultural rights) – provides a much-needed basis for a common understanding of the social dimension of sustainable development.

The UN Framework and the Guiding Principles are of great importance for workers and their trade unions. They can be used to shape public policy debates over such fundamental issues as the relationship between business and the state. They are one of few positive international responses to the deepening governance crises that have accompanied the growing integration of the global economy. The UN Framework and the Guiding Principles were intended to provide a basis for further development of international norms. All of this is of importance to workers and their trade unions.

This briefing will focus on six essential elements of the Guiding Principles that make them valuable for trade unionists:

1. The distinction between the role of the state and the role of business;
2. The clarification of the responsibilities of business (including the so-called “voluntary” issue);
3. A new expectation of what constitutes responsible behavior (due diligence);
4. The scope of responsibility (the “supply chain” issue);
5. The importance of remedy; and
6. The UN Framework and the Guiding Principles as a foundation for further development including binding rules.

Each of these six elements is considered below.

1. The distinction between the role of the state and the role of business

As noted above, one of the major values of the UN Framework and of the Guiding Principles is that they get the relationships between business and government right. They relate to the real responsibilities of the real actors and do not confuse what are, at times, complementary and, at times, conflicting roles. Governments are not permitted to avoid obligations by transferring them to business or arguing that business is “too powerful”. Business cannot avoid their responsibilities to rights-holders because a government fails in its duty to protect.

The Guiding Principles are organised by each of the three pillar of the UN Framework. Each pillar begins with what are called “Foundational Principles” which are followed by “Operational Principles”, which set out what business should actually do.

The role of the State

The first pillar of the UN Framework is about the role of governments. The first “Foundational Principle” of the Guiding Principles is that States must protect against human rights abuse within their territory or jurisdiction including abuse by business. The principle makes it clear that this is a State’s obligation under international law and that it requires States to act through “policies, legislation, regulations and adjudication”. The commentary recalls that States have a duty to protect and promote the rule of law.

For trade unions, the most serious challenges of globalization are related to governance crises brought about by the failure of national governments to fulfil their role and by the failure to develop international governance institutions appropriate for a global economy. In the area of labour practices, CSR initiatives and the promotion of CSR by home country governments of multinational enterprises seek to show that businesses can ensure respect for human rights even where the government has failed in its duty to do so.

For this reason participation in CSR initiatives challenge trade unions to avoid being implicated in support for the idea that there is a substitute for the role of government. Even with respect to situations where companies can guarantee their good behaviour they cannot ensure that human rights will be respected. This is certainly true for the human right to form or join a trade union and for the right to bargain collectively. In order to function properly trade unions are dependent on a range of civil and political rights that can only be protected by the State. Other serious problems exist where business is expected or encouraged to substitute for the State. This is certainly true for the judicial function of the state. Business should not be expected or encouraged to decide between competing claims involving human rights.

The Guiding Principles are not based on the assumption that all States do their duty. The second “Foundational Principle” says that States should set the expectation that all businesses enterprises domiciled in their territory should respect human rights “throughout their operations”. This recognises the reality of State failure. This principle in effect encourages states to regulate the activities of companies domiciled in their territory abroad. At present states are not generally required under international law to regulate such activities.

There are eight additional “Operational Principles” setting forth expectations of what governments should do. Some of these principles concern State duty when acting internationally such as in investment treaties or when acting as a member of multilateral institutions. One principle addresses what the home states of MNEs should do with respect to businesses operating in conflict-affected areas of other countries.

In conjunction with the Guiding Principles, the Special Representative submitted a guidance note for host governments in negotiating investment agreements with foreign investors. The note contains 10 “Principles for responsible contracts” intended to deal with human rights risks in these agreements. ([Link A/HRC/17/31/Add.3](#))

One of the most important reasons that many companies and business organisations welcomed the UN Framework is because it distinguishes the responsibilities of the State from those of business. Business argued that protection of human rights is, first and foremost, the duty of the state and did

not want the same obligations as governments imposed on business, which was one reason that they had strongly objected to the “Draft UN Norms”, which did just that.

The role of business

One of the central issues concerning business responsibility relates to situations where a government, for one reason or another, fails in its duty to protect human rights. The second pillar of the Framework – the corporate responsibility to respect human rights - is clear that the responsibility of business to respect human rights “is a global standard of expected conduct for all businesses wherever they operate. It exists independently of states’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.”

There are two key messages: First, the responsibility of business to respect is not the same as the duty of governments to protect and second, this responsibility is independent of whether the government does what it is supposed to do.

The first “Foundational Principle” of the second pillar states that business should respect human rights. It then goes on to make two points: First, the responsibility to respect means that business should *avoid* infringing on the human rights of others and second, that business *should address adverse human right impacts with which they are involved*. (Italics added). The implications of these points are profound. Responsibility in the area of human rights concerns the problem of harming others. These can include people who do not necessarily have any relationship to the business or interest in its success other than that their rights are negatively affected by its activities or relationships.

A fundamental concept in the Guiding Principles is “adverse impacts on human rights”. The responsibilities of business lie in how adverse impacts are avoided or what must be done in the event that they are not avoided. This is not about the “sustainability” of the company. It is about the affected right-holder and the universal interest in having a world in which human rights are respected.

2. The responsibilities of business

The Guiding Principles are clear that the responsibility to respect human rights applies to all of the internationally recognized human rights. No attempt is made to identify or enumerate a specific set of human rights that business must respect. Stating the human rights that business must respect was the main activity in the development of the “Draft UN Norms”. In this case, lengthy, but fruitless, debates have been avoided.

Human rights specifically included and mentioned are those contained in the International Bill of Human Rights (this consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the ILO Declaration on Fundamental Principles and Rights at Work. However, it is made clear that other UN instruments such as those addressing the human rights of indigenous peoples, women, or children must be respected as must the standards of international humanitarian law. Trade unionists should recall that the right to join trade unions are explicit in the Universal Declaration and in both of the Covenants as well as in ILO Declaration on Fundamental Principles

and Rights at Work. Other human rights of workers such as those contained in the 2008 ILO Declaration on Social Justice for a Fair Globalisation would also be included.

One of the preoccupations of company, industry and “multi-stakeholder” CSR initiatives has been the promulgation of public declarations such as “codes of conduct”, “principles”, “voluntary standards” and “guidelines” that set forth what are considered to be the responsibilities of companies. The “Draft UN Norms” also sought to do this and borrowed heavily from the CSR initiatives of the time. One problem is that these declarations involve businesses “picking and choosing” what they consider to be their responsibilities. The result is usually a unilateral redefining or re- interpreting of what are already established expectations. Since these declarations are “voluntary” they are considered by the businesses adopting them to be “optional” or “aspirational”.

The treatment of CSR as a “voluntary concept” equated “voluntary” and “optional”. It also created a “new” meaning of “responsibility” that is quite different from how “responsibility” is commonly understood. Most people understand “responsibility” as accountability for the consequences of one’s actions. The focus of this common understanding of responsibility is on the negative consequences of behaviour and how they could be avoided or mitigated and what should be done about the negative consequences that are not avoided. In contrast the CSR discourse focused most on positive actions (“contributions to sustainable development”) by business and often defined regulation as being beyond the scope of CSR. In this respect, the interest by governments in CSR became an excuse for failing to develop public policy addressing the negative consequences of business behaviour.

The UN Framework did not make any false link between responsibility and voluntary behaviour. The responsibility of business to respect human rights exists “over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses in all situations.” Moreover, this responsibility to respect “exists independently of the enterprise’s own commitments with regard to human rights” (Guiding Principles Commentary on Principle No. 11). To the extent that CSR declarations were used by companies to self-define their responsibilities, they now have lost their value. As a result of the UN Framework and the Guiding Principles, the value of declarations should be now understood as a means to “embed” values within the business or as part of a due diligence process where the danger of specific human rights abuses in a specific context are recognised.

Another reason that businesses should not choose which human rights to respect is that human rights are considered to be indivisible and interdependent. Nevertheless, business management will want to be able to “prioritize” the human rights that they must respect. The guidance in the Guiding Principles is that a business should concentrate on those rights that are most at risk because of the activities and relationships of the company. These are referred to as the “salient human rights”. The priority should be given to preventing or mitigating the most severe adverse impacts or where “delayed response would make them irremediable”.

Some critics consider the UN Framework and the Guiding Principles inadequate because the business responsibility is only “to respect” human rights. It was felt that, if business was only being asked “to do no harm”, then important contributions toward the realisation of human rights that business could make would be discouraged. There is considerable interest in using the capacity of mainly large corporations to address social issues including human rights. Such activity is not

discouraged by the Framework, but is considered beyond its scope. The standard of respect applies to all businesses regardless of “size, sector, operational context, ownership and structure”. This standard is basic, universal and fundamental. Moreover, respecting human rights requires an understanding of how one’s actions affect the human rights of others. More often than not this understanding requires that steps be taken in order for it to be achieved.

Even in situations where businesses can make desirable contributions by promoting human rights, the responsibility to respect human rights is more important. This is true even when the human right can be related to the activities of the business concerned. Consider child labour. The obligation of a business to avoid and remediate child labour is more important than “promoting the abolition of child labour” through participation in charitable programmes. “There is no equivalent of a “carbon offset” for a harm caused to human rights: a failure to respect human rights in one area cannot be cancelled out by a benefit provided in another.” (Part 1.8 of the Interpretative Guide)

3. The scope of responsibility including the supply chain

One vital issue for trade unions is the organisation of work in ways that put workers in indirect relationships with those that control the conditions under which work is performed. This includes sub-contracting and supply chain relationships. It also includes indirect employment relationships such as agency work. Indirect relationships can impose insurmountable impediments to organising, to union recognition and to collective bargaining. The Guiding Principles bring a fresh approach to the responsibility of an enterprise for the actions of other enterprises such as suppliers or other business partners. For trade unionists this is likely to be the most valuable contribution of the Guiding Principles.

The Guiding Principles state that enterprises have responsibilities for adverse human rights impacts that they cause or contribute to through their own activities but also for adverse human rights impacts “*that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts*”. (Italics added) This “Foundational Principle” (No. 13) establishes the responsibility of a business by its relationship to adverse human rights impacts.

Responsibility for a business is created in three ways:

1. By *causing* adverse impacts;
2. By *contributing* to adverse impacts;
3. By the adverse impacts *linked* to the business through a business relationship but that are caused by others. (This captures the situation where the adverse impact is caused by another business but where the adverse impact can be linked to the business. This would be the adverse impacts on human rights caused by a supplier in the course of supplying to the business concerned.)

The difference between “contributing” to an adverse impact and being “linked” to an adverse impact is sometimes confused. Contributing to adverse impacts can be done in two ways: One is by being one of several parties causing the adverse human right abuse. The other is by causing, encouraging or enabling another to violate human rights. An example would be by imposing unreasonable deadlines or inadequate compensation on suppliers that cause the suppliers to violate

workers' human rights. Linkage is established where the business may neither cause nor contribute to the impact, but is involved because the impact is both carried out by an entity with which it has a business relationship and is linked to its own operations, products or services.

The Principles distinguish the nature of the responsibility in these situations:

- In cases where the business causes or contributes to an adverse impact, its responsibility is to remediate its impacts. Remediation could mean a wide range of actions including apologies, restitution, rehabilitation, compensation, paying punitive sanctions, and observing injunctions or guarantees of non-repetition. The business could provide direct remediation or it could cooperate through legitimate processes. In many instances the most appropriate mechanisms for remediation are state-based but the absence of such mechanisms does not affect the responsibility of the business.
- With respect to adverse impacts caused by others that can be linked to the business by a business relationship, the responsibility of the business is to prevent or mitigate the adverse impacts. However, there is no responsibility to remediate as there is in cases where the business has directly caused or contributed to the adverse impact.

Influence VS impact

This is a considerable departure from the conventional thinking that underlies CSR supply chain initiatives where "sourcing companies" demand that their suppliers observe a "code of conduct". This thinking was based on the idea that the boundary of business responsibility was determined by its "sphere of influence". Sphere of influence was based on ideas of "control" or "leverage", where leverage is understood to be the ability to influence the behaviour of another organisation. Implicit in this concept is that the responsibility of a business declines with the ability of the company to influence. Often companies, claiming that they had little influence, would not accept responsibility for abusive labour practices beyond the first tier of their supply chain.

The original mandate for the Special Representative included clarifying the concept of "sphere of influence" which was a controversial part of the "UN Draft Norms". Using "sphere of influence" to define a company's responsibility was advanced by the UN Global Compact and had considerable uptake by CSR initiatives, especially those dealing with supply chain issues. The sphere of influence concept was interpreted by the drafters of the "UN Draft Norms" to mean that the obligations for governments and business were the same differing only because of their different "spheres of influence". The idea of the ability to effect change in the behaviour of another organisation - downplayed the considerably different roles of government and business. The concept contributed to the implicit acceptance that sourcing companies through their "codes of conduct" could substitute for the failure of governments to do their duty

The practical interpretation of "sphere of influence" is that if a company had little or no influence, then it had little or no responsibility, even for the adverse impacts that it caused. The concept confused two different situations: One where a company causes or contributes to an adverse impact and the other where a company has enough influence to dissuade others from causing adverse impacts.

The “sphere of influence” concept made it difficult for trade unions to get companies to accept responsibility for the conditions under which work was performed where an indirect relationship was involved. Companies would claim that they had no influence because they were not the employer even where the situations was created by their decision to contract out the work in the first place and even though they were a party to, and benefited from, the indirect relationship.

The UN Framework and the Guiding Principles change the determinant of responsibility from one of leverage that comes with control or influence of the business to one that is determined by the impact of the activities of the business. One of the many advantages is that the focus is shifted from the company to the rights-holder and the broader societal interest. Moreover, the boundary of a “sphere of influence” is harder to measure and easier for a company to manipulate than the more objective adverse impact on rights-holders.

The Guiding Principles recognize a role for “influence” or what the Special Representative prefers to call “leverage” - but not as the means of determining responsibility. A business can have responsibility for adverse impacts on human rights caused by a business relationship where it lacks the influence over the business relationship to prevent or to stop the adverse impacts. Operational Principle No. 19 considers the amount of leverage to be a factor to be taken into account by a business in determining the appropriate action to take with respect to preventing or mitigating an adverse human rights impact. Where there is no leverage or influence over the business relationship it should consider ways to increase its leverage or it may consider ending the business relationship.

The Guiding Principles make an additional contribution to problems of respecting human rights that can be posed by business relationships. This concerns the meaning of the term “complicity” or in other words when a company should be considered an accomplice in a human rights abuse. The commentary on Principle No. 17 recognises that the term “complicity” has both legal and non-legal meanings and that the non-legal meaning would include being seen to benefit from an abuse committed by another party. The scope of what is understood to be complicity will be an important part of defining future international liability

4. Due Diligence - The new expectation of responsible behaviour

The Guiding Principles were intended to “operationalize” the UN Framework. For the second pillar, the responsibility of business to respect, the Guiding Principles are clear how companies should address their human rights responsibilities.

Principle No. 15 sets forth three “policies and processes” that business enterprises should have “appropriate to their size and circumstances”. They are:

1. a policy commitment;
2. human rights due-diligence processes; and
3. Remediation processes.

It is the expectation that businesses must exercise due diligence that is easily the best known and certainly destined to become the most debated part of the Guiding Principles. Most of the debate

over the Guiding Principles and the effect that they should be given by business will be about the meaning of “due diligence”.

The Guiding Principles consider due diligence to be an on-going process undertaken by a business to identify, prevent, mitigate and account for how it addresses actual and potential adverse human rights impacts.

Due diligence is a term used in both business and in law and applies to both legal obligations and to voluntary processes. Due diligence processes usually involve acquiring information about the potential consequences of a decision prior to making a decision. It is similar to another concept; “duty of care” which also has both legal and non-legal uses involving avoiding harm to others.

The expectation that businesses should conduct a due diligence process with respect to human rights is logical and appropriate. It is a term and concept with which business is familiar. It is based on the idea that responsibility is about the negative consequences of business behaviour on the human rights of others. Where negative consequences of behaviour are concerned (“adverse impacts”) responsibility is about avoiding them or addressing (“remediating”) what is not avoided. Potential impacts are to be addressed through prevention or mitigation and actual impacts are to be addressed through remediation.

Although due diligence comprise several processes, it should not be regarded as a “tool” to be used if needed and then returned to the “toolbox”. Due diligence is an on-going obligation. Respecting human rights is not a static situation of “doing no harm”- it is the positive action of due diligence required to avoid, mitigate or address the harm of potential and actual adverse impacts. The expectation is that business makes an effort to understand the impacts of its actions on others. These impacts are determined objectively as a matter of fact and on an on-going basis.

Another reason that due diligence is especially appropriate is that it requires that the context in which the business activity takes place be taken into account. Important contexts would include the actual activities carried out by the company or its business relationships, the general practices and institutional frameworks associated with these activities, as well as the actual situation with respect to the government performance of its duty to protect human rights. This last point would include whether the government imposes obligations on businesses that conflict with the internationally recognised human rights. Broadly speaking two determinants would be the economic sector and the country. The extent of due diligence would need to reflect the likelihood as well as the severity of adverse human rights impacts.

5. The importance of remedy

The UN Framework attaches great importance to remedy which is treated as one of its three pillars. This is logical because the obligations for governments or businesses may not be meaningful without remedy for those who have had their human rights abused. In reality States do not always uphold their duty and businesses often fail to meet their responsibility.

As with other concepts in the UN Framework and Guiding Principles, “remedy” has both legal and non-legal meanings. Remedy is how a court enforces a right that it has determined is breached and could include, among other things, an injunction against further harmful behaviour or payment to

the victim to compensate for the wrong or penalties against the doer of harm. Remedy also means to correct a wrong or to make things right again.

Access to Remedy is the least developed of the three pillars. There is only one “foundational principle” for this pillar and it is about the State duty to ensure that the victims of human rights abuse “have access to effective remedy”. Two operational principles are developed to “State-based judicial mechanisms” and to “State-based non-judicial mechanisms” respectively.

The most controversial aspect of the treatment of remedy in the Guiding Principles will likely involve “Non-state-based grievance mechanisms”. This term refers to mechanisms administered by “a business alone or with stakeholders, by an industry association or a multi-stakeholder group.” An “operational-level grievance mechanism” is one that is “directly accessible to individuals and communities directly affected by a business enterprise”. The Guiding Principles state that the value of these mechanisms is to help the enterprise identify its impacts and facilitate the early remediation by the enterprise.

The non-judicial mechanisms referred to are, for the most part, CSR initiatives. Principle No. 30 calls on initiatives dealing with human rights to ensure that effective grievance mechanisms are available. The trade union experience with CSR initiatives in the area of labour practices is that they are seriously flawed. Grievance mechanisms (a complaints procedure) can be more effective in limiting negative publicity for the enterprises than in providing remediation for the rights-holders.

CSR initiatives addressing supply chain labour practices have done little about abuses of trade union rights and have been used by employers to discourage workers from exercising their rights to join trade unions and to bargain collectively. The Guiding Principles recognise this problem and state that operational-level grievance mechanisms “should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes”.

The Guiding Principles set forth 7 criteria for the effectiveness of non-judicial mechanisms which should be: legitimate; accessible; predictable; equitable; transparent; rights-compatible; and a source of continuous learning. There is an eighth criterion for operational-level mechanisms which is that they should be based on engagement and dialogue. To be effective a mechanism must meet all of these criteria. Unfortunately, with respect to labour practices, there are no good examples of operational level grievance mechanisms that meet all of the criteria.

6. A foundation for more development including binding rules for business

The Guiding Principles are not intended to be an alternative to legally binding mechanisms or international regulation. They are written so as not to be self-limiting. They would be compatible with future binding rules and legal issues such as extraterritorial regulation. Although they do not establish new obligations, the UN Framework and the Guiding Principles clarify the implications of already established instruments with respect to business behaviour so as to provide a solid foundation for the further developments including treaties. The Guiding Principles are intended to encourage the emergence of “soft law”. The UN Framework and the Guiding Principles will contribute to developing the scope of what is meant by terms such as “due diligence” and “complicity”.

In making recommendations for follow-up activities in 2011 the Special Representative suggested that clarifying the applicability to business enterprises of international standards prohibiting gross human rights violations might be the subject of a new international legal instrument. He had in mind binding obligations on business enterprises in situations such as where there is armed conflict and the government does not perform its functions. TUAC, the ITUC and the ICEM are following international cooperation to develop due diligence for business in connection with mineral supply chains in conflict and High Risk areas such as in the Democratic Republic of the Congo and other areas in Central Africa.

The International Organisation of Employers, the International Chamber of Commerce and the Business and Industry Advisory Group to the OECD welcomed the UN Guiding Principles as did many large multinational Corporations. However some business interests began to get nervous during the final stages in the development of the Guiding Principles. The US Chamber of Commerce in a January 2011 letter commenting on the Draft Guiding Principles expressed concerns that they would “encourage an enhanced regulatory scheme” and that they may be “abused by labor unions”. Business support for the Framework also made it difficult for business to water down the most far-reaching and positive changes to date in the OECD Guidelines for Multinational Enterprises. The Guiding Principles should be a means of ratcheting up expectations of business behaviour.

The UN Framework and the Guiding Principles do not limit in any way future possibilities for international instruments or procedures. Indeed, they will likely have the effect of encouraging their development. The main limiting factor will be the degree of interest by governments in protecting human rights.

A legally-binding treaty?

Some NGOs are disappointed in, or even dismissive of, the UN Framework and the Guiding Principles. This is usually because they want an international instrument that creates binding obligations for companies accompanied by procedures and sanctions. Some of these NGOs had supported the “Draft UN Norms” because they were ultimately intended to be the basis of a treaty. The “Draft UN Norms” never achieved anywhere near the necessary support that they would have needed from governments and were considered flawed even by many observers who wanted international liability for companies involved in human rights abuse.

The Special Representative could have, but did not, recommend that work begin on an instrument with binding obligations. His reasons included the time that negotiations over a treaty would take and that the process would halt or limit other effective actions that could be taken more immediately.

There are serious concerns over launching treaty negotiations at this time. The likely consequence is that any treaty would be based on a lowest common denominator of national practice which would lower the existing international expectations of business behaviour. Moreover, it is doubtful that any procedure established by the treaty would be sufficiently robust to provide adequate remedy or to change business behaviour. A real danger is that national governments would use the negotiations to reduce their duty. Trade Unionists should be concerned over the effect of any procedures in the treaty would have on the established procedures at the ILO for interpreting the meaning of freedom

of association and other international labour standards. Generally these ILO procedures work well for workers and workers have an interest in protecting them.

Trade unions and the further development of the UN Framework and Guiding Principles

The UN Framework and the Guiding Principles is a new way of thinking that can be a “game changer” in many of the most important public policy debates affecting workers and their trade unions. Trade unions can use the UN Framework and the Guiding Principles to reshape the understanding of CSR, to influence governmental and intergovernmental organisations in a variety of policy and legislative areas and in dealing directly with companies. A list of these possibilities is provided in the next section of this note.

However, the UN Framework and the Guiding Principles should not be regarded as only a tool or an instrument which may, or may not, be useful or used. The Guiding Principles provide the context for what will be some of the most important public policy debates for workers. The issues will be questions raised by the application of the Guiding Principles. These would include questions such as: What constitutes due diligence in specific situations or industries? What are appropriate remedies in specific situations? And What is an effective operational level-grievance procedure? The debates will also include how the Guiding Principles are used to answer old questions such as: What is the responsibility of business in countries that do not protect the exercise of human rights? and What is the responsibility of a business that has an enormous and complex supply chain?

Trade unions will have an interest in building on the consensus of the UN Framework and the Guiding Principles to achieve a broad-based acceptance for the best answers to these questions and to others.

Some companies are claiming that their existing CSR initiatives or practices are the “due diligence” that they need. Indeed, there is a real danger that companies will recast existing CSR practices as “best practice” applications of the Guiding Principles. Many of these claims and “best practice” examples are not credible. Often they overlook important ideas in the Guiding principles: that the amount of due diligence must be related to risk and the severity of the impact for instance. The fundamental obligation to avoid adverse impacts is often absent in the “best practices” as is remediation which is often confused with philanthropy. The language of CSR with its emphasis on the business case for making positive contributions is corrupting the discourse over what business should do concerning the adverse impacts of business activities. In the CSR world the positive impacts of a company must be taken into account where the negative impacts are considered and the risks to others by a company’s activities are confused with the “risks and opportunities” that management should take into account when making any decision.

The Guiding Principles will lead to demands from business for “tools” to use in carrying out due diligence. There will be a demand for “contextual” information to help business identify potential adverse impacts. This could include information about specific industries or countries. There will be an interest in how adverse impacts can be measured or what should be reported on. Trade unions will have an interest in the “tools” that are developed and how they are used.

In addition to countering the inappropriate CSR influence, trade unionists have important issues to raise. One is the responsibility of business for the adverse human rights impacts of precarious work. Many of today's indirect work relationships have an adverse impact on the human rights of the workers concerned. This can involve harsh and dangerous working conditions, lack of social protection and unequal treatment. Often these relationships mean the effective denial of the right to join a trade union and to bargain collectively.

Trade unions will need to ensure that the human rights of workers to form or join trade unions and to bargain collectively over their working conditions are not violated by "operational-level grievance mechanisms".

Trade Union Action Plan – Using the UN Framework on business and Human Rights

Trade unions can use the Guiding principles to resolve problems and further develop the meaning of due diligence through OECD Guidelines cases and in other international intergovernmental mechanisms such as the IFC Performance standards.

The Guiding Principles can be used by trade unions to influence government policy and legislation toward business behaviour to

- Build policy coherence within government
- Strengthen judicial mechanisms;
- Discourage national non-judicial mechanisms from substituting for the rule of law;
- Improve International and bilateral trade and investment treaties and agreements;
- Condition export credits;
- Modify procurement policies;
- Change rules of corporate governance;
- Improve non-financial reporting and disclosure requirement; and
- Influence Government policy toward "corporate social responsibility".

Trade unions can use the Guiding Principles to influence intergovernmental organisations over the social dimension of globalization to build support for:

- Policy coherence over the role of governments to protect human rights;
- Multilateral trade and investment agreements; and
- Development of non-judicial grievance mechanisms in additional international institutions.

Trade unions can use the Guiding Principles as a basis to assess or to influence the development of CSR initiatives such as:

- Global Reporting Initiative;
- Global Compact and its many related initiatives; and
- Multi-stake-holder supply chain initiatives.

Trade unions can use the Guiding Principles in engaging Companies by:

- invoking the Guiding Principles to deal with specific problems;
- demanding that company policy fully reflect the Guiding Principles;

- using them as the basis for broadening the scope of global framework agreements particularly with respect to suppliers and business partners;
- using them to change the framework for social dialogue;
- using them to address issues relating to precarious work relationships and to supply chain relationships; and
- using them to assess company policies and non-financial reporting.

Conclusion

The approach taken by the United Nations ‘Protect, Respect, Remedy’ Framework for Business and Human Rights changes the global debate on human rights in a positive way. In the same way that the concept of sustainable development was a breakthrough because it linked economic, social, and environmental sustainability, the UN Framework is a breakthrough because it links, while at the same time distinguishing between, government and business roles with respect to human rights. It clarifies that the responsibility to respect human rights applies to all business enterprises wherever they operate and that this responsibility includes all internationally recognised human rights.

The Guiding Principles for Business and Human Rights is a new international instrument addressing business behaviour of importance for workers and their trade unions. It establishes the basis for determining the responsibility of any business by the relationship of that business to adverse impacts on human rights. The basis for this responsibility constitutes an important breakthrough with respect to the relationship of the business with other enterprises such as those in the supply chain. The Guiding Principles set forth a new expectation for responsible business behaviour, due diligence. The emphasis on impacts and on remedy shift the focus to where it belongs which is with the rights-holders and the victims of human rights abuse.

The UN Framework and the Guiding Principles have already had influence on other organisations and institutions most notably in the revision of the OECD Guidelines for Multinational Enterprises. They have the potential to change the public policy debate over CSR and other issues of importance to workers and their trade unions. They provide a foundation and increase the chances that there can be further development of international governance institutions.

Summary of the UN Guiding Principles for Business and Human Rights

The Guiding principles consist of 31 Principles organised into the three pillars of the UN Framework. The principles for each pillar consist of “foundational Principles” and “Operational principles” each principle is accompanied by a Commentary. The Operational Principles are an elaboration of the policies and processes that business should put in place. In November 2011 the Office of the High Commissioner for Human Rights issued “the Corporate Responsibility to

Respect Human Rights an Interpretative Guide” consisting of additional commentary for each principle under the second pillar.

The First Pillar: The State Duty to protect Human Rights

The first 10 principles apply to the first pillar. The first two principles are Foundational Principles. Principle **No. 1** sets forth the state’s obligation to protect against human rights abuse within their territory and jurisdiction. Principle **No. 2** is that states must set out clearly the expectation that business enterprises domiciled in their territory or jurisdiction respect human rights throughout their operations. The first Operational Principle mainly involves the legal requirements that states should make with respect to protecting human rights from business behaviour. The remaining principles concern situations such as state-owned enterprises, responsibilities when contracting out for of services, state commercial transactions between the state and business enterprises, home state responsibility for businesses operating in conflict-affected areas. Three principles concern “policy coherence” which involves having adequate laws and policies and coordination between different parts of government; maintaining “adequate policy space”, that is not allowing contracts or agreements such as investment treaties to prevent the state from fulfilling its responsibility of protecting human rights; and the role of states with respect to multilateral institutions so that these institutions do not restrain member states ability to protect human rights and that the international institutions actually promote respect for human rights by business.

The Second Pillar: the responsibility to respect

There are 13 principles for the second pillar of which the first five are foundational principles. Principle **No. 11**, the first foundational principle for this pillar, states that business should “avoid infringing on the human rights of others and should *address adverse human rights impacts* with which they are involved.” (Italics added). The second foundational principle for this pillar (**No. 12**) establishes that the responsibility to respect human rights refers “to internationally recognised human rights”. The third foundational principle (**No. 13**) establishes the responsibility of a business enterprise based on the relationship between an adverse human right impact and the business. It contains two clauses: the first is about the responsibility of business “to avoid *causing or contributing* to adverse human rights impacts through their own activities and to address such impacts when they occur” and the second is about the responsibility to “prevent or mitigate adverse human rights impacts that are directly linked to their operations ...by their *business relationships*, even if they have not contributed to those impacts. (Italics added) This Principle, together with Principle No. 19, are the two principles related to supply chain and business relationships. The fourth foundational principle (**No. 14**) states that the responsibility to respect *applies to all enterprises* regardless of their size, sector, operational context, ownership and structure”. (Italics added). This principle also states that it is the severity of the adverse human rights impact, and not the size of the company, that should determine the scale and complexity of the processes that the company should put in place and use. The fifth foundational principle (**No. 15**) states that business should have policies and process to meet their responsibility to respect and sets forth three elements that should be included: a policy commitment; a due diligence process and process to enable remediation of adverse impacts.

The operational principles elaborate on the foundational principles: Principle **No. 16** on the “policy commitment” and Principle **No. 17** on “due diligence”. This is the principle that sets out the four purposes of due diligence: to identify, prevent, and mitigate adverse human rights impacts as well as to account for how these impacts are addressed. The commentary to this principle considers the meaning of “complicity”. Principle **No. 18** expands on the identification aspect of due diligence and calls for the use of expertise and for consultation with stakeholders. Principle **No. 19** expands upon the prevention and mitigation aspects of due diligence. This principle is in two parts. The first part concerns how a business should “integrate” the findings of “impact assessments” and the second part concerns how the “appropriate actions” that business should take should be determined. This principle is where the use of “leverage” is dealt with. Principles **No. 20** and **No. 21** refer to management processes related to “tracking” and “communication”. Principle **No. 22** concerns “remediation” and Principle **No. 23** and **No. 24** are about issues related to “context”. Principle **No. 23** concerns the problem of “conflicting requirements” that businesses may face with respect to observing internationally recognised human rights in a specific country. Principle **No. 24** concerns how a business might prioritize addressing actual and potential adverse impacts.

The third pillar: Access to Remedy

There is only one foundational principle and it applies to states; Principle **No. 25** concerns the duty of states to ensure that those affected by human rights abuse within their territory or jurisdiction have access to effective remedy. The operational principles address four aspects: State –based judicial systems (**No. 26**); State-based non-judicial systems (**No. 27**); Non-state based grievance mechanism (**No. 28** and “operational-level grievance mechanisms (**No. 29**). Principle **No. 30** concerns “industry, multi-stakeholder and other collaborative initiatives. The final principle (**No. 31**) provides a list of criteria by which non-judicial grievance mechanisms should be assessed.