



PROTECT RESPECT REMEDY: BUSINESS AND HUMAN RIGHTS

Professor John Ruggie and Dr Puvan Selvanathan discuss the challenges in implementing the UN's Guiding Principles.

01

COBIS

01 Where human rights are at their most fragile: a Congolese victim of sexual violence takes refuge inside a women's shelter in eastern Congo, having fled the violence there



More and more businesses are recognising that corporate responsibility to respect human rights is a social responsibility that goes beyond legal compliance. Major players in the mining industry are in the vanguard, with the International Council on Mining and Metals (whose council of CEOs is chaired by Anglo American's chief executive Mark Cutifani) recently announcing a significant strengthening of its commitments to Indigenous Peoples.

In particular, this requires organisations to gain their consent for new projects (and changes to existing projects) on lands which they traditionally own or customarily use. These come into effect from May 2015.

Much of the heavy lifting to create the conditions for such initiatives to thrive has been done by Harvard professor and former United Nations Assistant Secretary-General **John Ruggie**.

His ground-breaking Guiding Principles on Business and Human Rights, unanimously endorsed by the UN in 2011 and six years in the making, set a global standard for business and human rights, building a consensus among countries, companies and other stakeholders and helping to release the debate from acrimonious and divisive deadlock.

The Guiding Principles have been widely praised by non-governmental organisations (NGOs) and endorsed by major corporations but, he says, the hard work in implementing them lies ahead.



HERE, IN AN EXCLUSIVE INTERVIEW WITH OPTIMA, JOHN RUGGIE DISCUSSES THE CHALLENGES INVOLVED...

01 John Ruggie (centre) at the Colombian government's 16th Army Brigade Human Rights Training Centre at Casanare

02 Miners demonstrate outside the Ministry of Labor in Lima. Peru's mining industry has a long history of adversarial relations with the government and affected communities

03 Artisanal mining is a real challenge everywhere, which has not yet been dealt with properly. Here, women pan for gold along the Mekong river in Laos

The three pillars of the Guiding Principles are 'protect, respect and remedy'. Could you elaborate?

In terms of the first pillar, it is a fundamental duty of states to protect against human rights abuses – not only those committed by state agents, but by third parties such as business. The second pillar is about the corporate responsibility to respect human rights, taking the concept of corporate social responsibility beyond legal compliance. It is the minimum expectation society has of business in relation to human rights and not infringing on others' human rights. The third pillar relates to judicial remedy – which is a duty of the state – as well as the non-judicial grievance mechanisms companies have realised it's sensible to create to address issues that involve them before they escalate.

Do you think the extractives industry has been supportive of the UN's human rights agenda, and how do you see the industry's development path in this regard?

We (the UN and the extractives industry) had a good constructive engagement from the start, I think in part because the extractives industry itself – which has had to confront issues concerning taking over land and community resettlement, and which has experience of operating in conflict zones – has been hit by more lawsuits than any other sector, and thus appreciates the business case around human rights. And also partly because I was familiar with

many of the companies and individuals involved, due to my previous life at the UN.

Within the extractives industry, though, my sense is that there are differences between the miners and the oil and gas companies. The miners have a much larger footprint, so in terms of community relations and push-back from communities they are even more exposed than the oil and gas industry. I think that has raised levels of awareness among the miners a bit more than within the average oil and gas company.

That would be one factor that accounts for the differences. The other is the existence of the International Council on Mining and Metals (ICMM), which I think has made a significant contribution. The council meets at the CEO level – it's not a large number of companies and so they get to know one another. The existence of the ICMM has helped take some of these issues out of a competitive realm among the companies, so that you have more mutual learning taking place than might otherwise be the case.

Also ICMM membership isn't as large or as diverse as, say, IPIECA, its oil and gas industry counterpart. So I think, on average, large miners have been more aware and have also communicated externally more, in part because of their greater exposure to communities and in part because of the institutional presence of the ICMM.

“We (the UN and the extractives industry) had a good constructive engagement from the start, I think in part because the extractives industry itself – which has had to confront issues concerning taking over land and community resettlement – appreciates the business case around human rights.”

02
CORBIS



A lot of the progress that has been made in the human rights field took place when it was a boom time for the mining industry, and it's generally the big miners who can afford such interventions. Are we continuing to see follow-through, and are the smaller players some way behind?

I think that's right. I mean the juniors are still creating major problems. Artisanal mining is a real challenge everywhere, which hasn't yet been dealt with adequately. The bigger players are generally staying the course on the human rights front, but the exposure of the major mining companies to community push-back is not costless for them. There are opportunity, financial, legal and reputational costs – as we know from experiences all over the place, and particularly in a country like Peru, where we have the example of protests against the Minas Conga gold and copper mining project and, just recently, the suspension of the Pascua-Lama gold mining project.

How well do you feel the Guiding Principles have been, and are being, implemented? Do you have any favourite success stories where they have led to a significant change?

These are early days. You know how long it takes to drive significant policy change through a company – and it certainly takes at least as long to drive it through governments.

Even during the course of the mandate¹, a number of companies shared with me ideas that they were pursuing for adopting human rights policies and translating them into



03
CORBIS

management systems. I followed some of those with interest, but it takes a good three to four years for that sort of policy change to become deeply institutionalised and to get to the point where you can actually assess performance on a systematic basis.

In terms of governance, I guess the most comprehensive approach is coming out of the European Commission. The EU's corporate social responsibility (CSR) policy, which came out in October 2011, endorsed the Guiding Principles and requested that member states come forward with national action plans for how to implement those. A number of countries are getting ready to announce theirs and they will be fairly comprehensive policy statements and priorities.

The EU itself has followed up on the mandate to develop more granular sectoral guidance for a number of sectors, including information technology, the oil and gas industry and labour brokers – people who hire migrant workers and ship them to other countries. The EU is also developing a mandatory reporting requirement.

¹Ruggie's initial mandate from the UN was for three years. He was tasked with looking at the contentious issue of corporate responsibility and accountability for human rights and the respective roles of states and corporations in this field.

“It took six years and an enormous amount of effort, but the task of laying out the Guiding Principles itself was manageable. The implementation, of course, is much harder.”

The International Finance Corporation (IFC) incorporated elements of the Guiding Principles into their sustainability policy, on which they base performance standards their clients are required to meet. These standards, in turn, are tracked by the so-called Equator Banks – covering three-quarters of all project financing worldwide.

The Organisation for Economic Co-operation and Development (OECD) introduced new guidelines for multinational enterprises, which for the first time include a human rights chapter, drawn directly from the Guiding Principles. The OECD requires that every adhering government (there are 42) establish a complaints procedure (National Contact Point) whereby anybody can bring a complaint against a multinational operating in or from that jurisdiction. There have already been several cases under the new guidelines.

I am now paying a fair amount of attention to emerging economies. I figure there are a number of people working on the North American and European fronts, so I am increasingly working with governments and companies in Latin America, Africa and Asia. I am much more involved than I thought I would be at this stage, but it is hard to say no when you see that you are making a difference.

Do you see a gap between having a policy on paper and implementing those policies from the corporate side?

Implementation is always a challenge. The mining industry – at least the companies I am familiar with – is fairly decentralised and it is often a challenge to get organisations to sort out corporate-level policies and get them deeply ingrained on the ground. It takes time and a lot of work translating overall policy statements into bite-sized tools. The timing is important, too, in terms of incorporating these behaviours into incentive systems.

Every major company in the mining industry asks employees, as part of their assessment: how many injury-free days did you have, or how many days were lost due to safety issues? That focuses people’s attention on the subject, and that is starting to happen with regards to community relations issues and other human rights challenges.

Carbones del Cerrejón² in Colombia helped test the Guiding Principles’ complaints and grievance mechanism. Can you explain what this involved?

Cerrejón was one of five companies that agreed to participate in the pilot projects I conducted under the mandate. This was extraordinarily helpful to us because one of the things I was very conscious of in running the mandate was making

² Anglo American has a one-third interest in Carbones del Cerrejón, Colombia’s largest coal mining company.



sure I didn't put forward proposals that would be impossible to achieve in the real world.

The idea of pilot projects in a variety of the recommendations that we made, including the due-diligence processes and the grievance mechanisms, was a very important component of the mandate, which led to the Guiding Principles. Cerrejón was an important participant in that and we issued a report based on the experience.

What is your advice to the succession Working Group on taking your work forward and making it easy to provide guidance for companies and governments to implement?

In some respects I had the easier job, which was to come up with the Guiding Principles for laying out the respective responsibilities of states and companies and how to discharge those obligations. It took six years and an enormous amount of effort, but the task of laying out the Guiding Principles itself was manageable. The implementation, of course, is much harder.

The UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises is now concentrated on implementation. It is focused on shared dissemination of best practices,

capacity building – particularly in the smaller developing countries – and small and medium-sized enterprises whose resource base is limited. The IFC affects access to capital and the export credit agencies have now also come around for the first time to systematically addressing the human rights issues. And the OECD national contact point system, too, raises awareness because it has a complaints mechanism.

So we now have a much broader portfolio of drivers at the international level to encourage implementation. In some cases, this even extends to not just encouraging but requiring implementation – for example, the US now has financial regulation legislation in the form of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Working Group fortunately doesn't have to bear the entire weight of these challenges on its own shoulders.

So, looking ahead, what are the main challenges over the next decade or so?

I'm not sure this is a useful metaphor, but let's try it: there is a vertical dimension, which is driving these things deeper into companies that are already aware of the issues. Then there is the horizontal dimension,

At Anglo American's Quellaveco copper project in Peru, a model of the proposed mine and processing facilities is shown to representatives from the local Moquegua community as part of a successful 'dialogue table' between the company and the host community



which is to make companies and countries who aren't yet fully in this game aware of human rights and begin to embed the principles.

Those are the two implementation-related challenges that I see and, as I say, I have started to pay attention to the horizontal issue more than the vertical issue, for obvious reasons. I think it is important to make sure countries and companies outside of the OECD area get in this game in a serious way.

We have recently had a Supreme Court ruling [US Supreme Court judgement in *Kiobel v. Royal Dutch Petroleum*, April 2013], which has seemingly narrowed the scope of the Alien Tort Statute (whereby US domestic courts may apply international standards) to be used as a means of legal redress for victims of corporate misconduct. I wonder if that might be seen in the developing world as Uncle Sam overly protecting business?

That is certainly one framing that some people have given to the decision. The US Supreme Court is not known for its eagerness to regulate business. But given the specific case that was at issue here, I don't think the ruling that dismissed the case against Shell came as a huge surprise to anybody. All nine judges agreed that the case should be dismissed because there was simply not an adequate nexus to the United States: more than 'a mere business presence' will be required.

My best guess is that when the dust settles – and it will take time and more test cases before it does – what we will have is a statute that will require a closer nationality link to the United States. It will, therefore, inevitably focus more on US companies' conduct than on companies from other countries, except for very unusual case-specific circumstances.

Even then, I suspect that it will require conduct such as gross human rights violations, acts or complicity in acts that rise to the level of internationally recognised crimes – such as crimes against humanity, torture and forced labour. That is my best guess of where the US courts are headed.

Obviously, this will have an impact outside of the US, in that it makes it more difficult for advocates to be able to 'thread the needle' and get business-related cases into US courts. At the same time, it might also lead advocates abroad to focus more on their own domestic legislature to develop laws that hold their nationals to account for such overseas conduct.

I don't see that happening in all countries, but I certainly think that in the Netherlands, the UK, Canada and Australia it is not a far-fetched scenario.



BACK AROUND THE NEGOTIATING TABLE

In the Navajo Nation – 27,425 square miles of Native American-governed territory in the deep south-west of the US – copper mining is high on the agenda.



When **Puvan Selvanathan**, one of the five members of the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, visited the region, he found deep

distrust between the community and the mining company and deadlock in negotiations. The Nation has long-standing issues with the way mining concessions have historically been handed out, and was adamant that the situation could only be brokered by the US Government.

“My question was: if this approach hasn't really worked in the last hundred years – why should we continue expecting that a government will ride to the rescue?” says Puvan. “Today, it's the companies who are willing to talk. Whether communities are looking for compensation, or for ways to do things better, companies now have a vested interest in getting it right.”

That vested interest is enshrined in the UN Guiding Principles on Business and Human Rights. Puvan sees the Principles as a spark that could re-ignite conversations between corporations and communities that have long been smothered under bureaucracy and self-interest.



NOT OUR PROBLEM

The deep-seated mistrust of big corporations among communities like the Navajo Nation is hardly irrational. Until quite recently, companies struggled to see what human rights issues had to do with them at all.

“There was a view that it wasn’t their problem,” says Puvan. “That’s what they pay taxes for – for the government to look after all that. While an issue may affect 200 people in one community, if the company’s products ultimately served millions in hundreds of countries that was a trade-off they could rationalise and live with.”

Most corporations have since changed their outlook, he believes, and intransigent traditional positions have been corrected by the Guiding Principles. So why are communities still so wary?

“Civil society groups fought long and hard over the Principles. What we’re seeing now, two years on, is frustration over why they haven’t changed the game yet.

“Part of the reason is that civil society groups don’t get to look inside companies. They don’t see that it can take two years just to get a letterhead changed – and to implement a human rights policy in an organisation whose culture is tied to risk management, to compensation for abuses, to compliance with the law, is a whole paradigm shift in business thinking.

“And business is not prone to wearing its heart on its sleeve. Companies do not advertise the fact that they have been struggling over how to handle the Principles for the last couple of years.”

TARRED WITH THE SAME BRUSH

The mining industry had to respond to human rights issues long before there were official Guiding Principles. As a result, many mining companies are already advanced in this area. Of course, not everyone outside the industry sees it that way.

“One of the frustrating things is that there’s still so much distrust that even good companies cannot move forward to resolve problems,” says Puvan. “Change is generally abhorrent to companies that have invested a lot in doing something a particular way, but if you look at top management, if you look at progressive companies, the Extractive Industries Transparency Initiative and so forth, they’ve more or less accepted that change is unavoidable. Now the question is: how do you make it happen?”

“If a company is going to be on a project site for 50 years, the generation they are negotiating with today is not the one who will be renegotiating the concession in 25 years’ time. Indeed, the very prospect of ‘renegotiation’ mid-way through a concession is novel if your business model was forged in colonial times. So now businesses need to think about this for a dynamic longer term – but that presumes that communities are willing to come to the table to talk both now and later, and I think distrust built up from the past hinders effective conversations from happening.”

TELL IT LIKE IT IS

In Puvan’s view, “Both companies and governments have to first get their houses in order. Companies should have a human rights policy, and also be able to demonstrate that they’re not doing anything wrong. They must also be explicit about how they interact or dovetail with government actions and, critically, where governance gaps exist. Reciprocally, governments should continually highlight progress with business, and at the very least in their Universal Periodic Review (UPR) – the reporting mechanism of each UN member state to the Human Rights Council every four years.

“But appreciating that most consumers, investors and typical corporate stakeholders do not read UPRs, a company’s annual report should also provide enough information such that shareholders understand why businesses take decisions to avoid investment in particular countries... that’s the kind of thing that will actually drive change across the board. You need that kind of groundswell of information and transparency to keep all actors in check and balance.

“It’s not about naming and shaming. It’s just telling it like it is.” 