

3. Background reader

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Background reader

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The reader was prepared by the Danish Institute for Human Rights and does not necessarily represent Rio Tinto's views. It is not specific to Rio Tinto but provides a general introduction to human rights and business. For relevant Rio Tinto policies and practices practitioners should refer to Part 1 of this guide.

What does this background reader cover?

The aim of this reader is to help practitioners to deepen their knowledge about human rights in the natural resources context

The reader is the companion piece to Part 1 – Guidance on “How to” and has six main sections:

1. What are human rights?

This section explains human rights and their international framework, including the respective roles and responsibilities of government and business.

2. Business and human rights.

This section outlines the United Nations’ “Protect, Respect and Remedy” Framework and Guiding Principles on Business and Human Rights, the corporate responsibility to respect, and the concept of human rights due diligence.

3. Human rights in Communities work.

This section deals specifically with the role of human rights in communities work and discusses key areas where natural resources companies and human rights interface.

4. Human rights in a country context.

This section discusses the challenges relating to human rights at a country-level and provides an overview of factors that shape local human rights situations where natural resources companies operate.

5. Human rights and Indigenous peoples.

This section provides an overview of Indigenous peoples’ rights as they relate to the natural resources sector.

6. Reference standards and resources.

This section contains a bibliography of reference standards and resources for practitioners interested in further exploring the field of human rights and business in the natural resources context.

3.1 What are human rights?

3.1.1 Human rights basics

Human rights are a set of principles and standards which seek to promote fundamental freedoms and human dignity.

According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), the principal United Nations office for human rights: *“Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”*

Furthermore, human rights are:

- **universal and inalienable:** held regardless of political, economic and cultural systems, and not to be taken away (international human rights law recognises some rights as ‘non-derogable’, meaning they cannot be taken away under any circumstances, while other human rights may be restricted but only in specific circumstances and following due process);
- **interdependent and indivisible:** all rights are equally important, the improvement of one right facilitates advancement of the others and likewise the deprivation of one right adversely affects the others (this means there is no hierarchy between civil, cultural, economic, political and social rights);
- **equal and non-discriminatory:** all humans have the same rights regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These are the grounds for freedom from discrimination outlined in Article 2 of the Universal Declaration of Human Rights, but these categories should not be considered exhaustive.

International law enshrines human rights through treaties, customary international law, general principles and other sources of international law. These instruments lay obligations on states to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals and groups (OHCHR). Human rights are also protected through national laws such as non-discrimination laws, criminal laws and privacy laws.

The **United Nations Universal Declaration of Human Rights** (UDHR), adopted in 1948, is the key repository of international human rights principles and standards. Almost all countries that are members of the United Nations (UN) have confirmed their commitment and support of the Declaration. As a declaration, rather than a treaty or other form of binding agreement, the UDHR itself is not legally binding under international law. However, most of the human rights set out in the UDHR have subsequently been codified and elaborated in legally binding human rights agreements between states. The two most significant are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966. These conventions have been ratified by the vast majority of countries in the world, which means that they have agreed to take on legal obligations as set out in these agreements. Together these three instruments are referred to as the **International Bill of Rights**.

3.1.2 Human rights in a business context

Companies operating in the natural resources sector interface with human rights in numerous ways. For example, by creating jobs and generating economic growth a company may contribute to creating an environment in which individuals and communities are better able to enjoy their rights, such as the right to work or the right to an adequate standard of living. However, company activities can also adversely impact on human rights. For example, if communities are resettled without adequate compensation their rights to property and adequate housing may be impacted, or where a company does not consult women in making such decisions, the right to non-discrimination will be adversely affected.

Through the UN Human Rights Council, the international community has now recognised business's responsibility to respect human rights. This responsibility means that businesses should avoid infringing upon the human rights of others and should address adverse human rights impacts with which they are involved, including through human rights due diligence.

Many natural resources companies see respect for human rights as a key business enabler:

- as a cornerstone of corporate values and business ethics;
- as a means of attracting and retaining the best people;
- as a way to protect their reputation and brand against damage caused by involvement in human rights abuses;
- by attracting and retaining investors and consumers;
- a way to avoid litigation, delays or production stoppages;
- gaining a 'social licence to operate' by being accepted as a respected member of local communities;
- gaining public procurement opportunities; and
- facilitating access to project finance, export credit and insurance.

Few industry sectors are as exposed to human rights risks as the natural resources sector, including mining and related processing industries. Companies in this sector depend on being able to operate in some of the world's most remote and challenging contexts with a significant physical footprint. In such environments, companies that are seen to respect and support human rights are in a better position to operate effectively and efficiently, building long-term partnerships with mutual benefits for all stakeholders.

The table below lists a selection of human rights drawn from the UN Universal Declaration of Human Rights, and gives examples of how they may be adversely impacted in practice by businesses operating in the natural resources sector.

Human rights <i>Selected rights from the Universal Declaration of Human Rights (1948).</i>	Business relevance <i>Examples of potential human rights issues for business in the natural resources sector.</i>
The right to freedom from discrimination, <i>UDHR, art. 2</i>	<ul style="list-style-type: none"> - Women are not employed in on-site work because of local gender stereotypes. - A subsidiary does not consult adequately with ethnic minorities when engaging with a community.
The right to life, liberty and security of person, <i>UDHR, art. 3</i>	<ul style="list-style-type: none"> - Security staff employed by the company harass women in the local communities. - Excessive use of force by security staff.
Land rights <i>Eg The right to own property, UDHR, art. 17</i> <i>Eg The right to adequate housing, UDHR, art. 25</i>	<ul style="list-style-type: none"> - The company is granted exploration rights by the government over land from which the government has forcefully evicted local Indigenous communities. - The company negotiates land acquisition with formal land title holders, but local title registration systems are not updated and as a result many informal land users are excluded from negotiations and compensation.
The right to peaceful assembly and freedom of association, <i>UDHR, art. 20</i>	<ul style="list-style-type: none"> - Preventing workers from forming or joining a trade union. - The company expressly or implicitly requests the government to put a stop to community protests in relation to its mine sites.
The right to work and just and favourable conditions of work, <i>UDHR, art. 23</i>	<ul style="list-style-type: none"> - Paying wages that are inadequate to cover basic needs, even if they meet national minimum wage standards. - Poor health and safety standards.
The right to an adequate standard of living (including food, housing and health), <i>UDHR, art. 25</i>	<ul style="list-style-type: none"> - Adverse effects on community health arising from environmental impacts caused by company operations, eg groundwater pollution from a tailings dam, toxins in dust created by a mine. - Company use of land restricts local peoples' access to farming and fishing areas used for subsistence. - Declining affordability of housing, in particular for lower-income members of communities, as a result of house price inflation caused by project-induced in-migration.
The right to participate in cultural life, <i>UDHR, art. 27</i>	<ul style="list-style-type: none"> - Degrading or destroying cultural heritage, eg mining activities disturb a site designated for spiritual ceremony. - Erosion of local community culture due to company presence or activities.

3.1.3 International human rights framework

International human rights law encompasses the International Bill of Rights, other international and regional human rights instruments, international humanitarian law, international criminal law and international labour standards, as set out in the International Labour Organization (ILO) conventions. Some of these are elaborated in the table below.

As well as legally binding conventions, there are also non-binding declarations on particular human rights issues. Some of these may be especially relevant to natural resources companies - for example, the 2007 UN Declaration on the Rights of Indigenous Peoples. Whilst such declarations may be non-binding under international law, they nevertheless represent an international consensus regarding expected norms and therefore provide an authoritative source of international standards. In elaborating on specific human rights issues, non-binding declarations also offer helpful practical guidance on what it means to respect human rights in practice. Furthermore, non-binding declarations may subsequently become binding laws, such as when the rights of the non-binding Universal Declaration of Human Rights were re-iterated in the two binding covenants on civil and political, and economic, social and cultural rights. Non-binding norms can also become binding when they become customary law due to consistent conduct of states in conformance with the norms.

Relevant resources:

More information on international human rights and labour rights instruments can be found on the websites of the two United Nations agencies dealing with human rights and labour standards. These websites also indicate which human rights and labour rights conventions individual countries have ratified:

- Office of the High Commissioner for Human Rights.
- International Labour Organization.

Human rights conventions	<p>In addition to the International Bill of Rights, a large number of specialised human rights agreements have been put in place, these often respond to the needs of particular rights-holders, such as the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child, or to a particular type of human rights violation, such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.</p>
Regional human rights systems	<p>In addition to global instruments, several regional human rights systems are in place:</p> <ul style="list-style-type: none"> - Council of Europe: The Convention on Human Rights and Fundamental Freedoms (1950); - The African Union: The African Charter on Human and Peoples' Rights (1983); - The Organization of American States: The American Convention on Human Rights (1969); - ASEAN: ASEAN Intergovernmental Commission on Human Rights (2009). <p>The European, African and inter-American systems include specific human rights treaties as well as active commissions and, in some instances, courts mandated to oversee protection of human rights by the regional member states. The ASEAN Intergovernmental Commission on Human Rights is operational and currently drafting a human rights declaration for the region.</p>
International labour standards	<p>International human rights law also includes international labour standards. These are codified in more than 100 conventions under the United Nations International Labour Organization (ILO). ILO conventions cover a wide range of topics, including: trade union rights, working hours, annual leave provisions, minimum age standards for employment, prohibitions on forced labour, restrictions on child labour, workplace discrimination, and more. Included in the ILO systems is also the Indigenous and Tribal Peoples Convention (C169, 1989), which contains a number of important provisions on the rights of Indigenous peoples.</p>
International humanitarian law and international criminal law	<p>International humanitarian law may also apply in contexts of armed conflict. This body of law includes the Geneva Conventions and imposes specific obligations on participants in armed conflict. Some of these obligations may be directly applicable to businesses.</p> <p>International criminal law provides for legal accountability for involvement in war crimes, crimes against humanity, and genocide.</p> <p>The International Criminal Court (ICC), established in 2002, provides direct international legal liability for persons involved in such international crimes. It does not currently extend to legal persons including companies.</p> <p>Possible scenarios where this might happen include allegations of corporate complicity or other involvement in international crimes such as human trafficking, financing of armed conflict, or illegal arms trading.</p>

3.1.4 Human rights duties and responsibilities

International human rights law makes a distinction between rights holders and duty bearers.

- *Rights holders* are all human beings, who as individuals are entitled to all human rights. In certain cases people may be entitled to various human rights as a group, as in the case of Indigenous peoples. Organisations or entities such as states, companies or religious institutions generally are not themselves considered human rights holders.
- *Duty bearers* are generally the governments that sign legally binding human rights agreements, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Individuals may also have binding international human rights obligations. Generally, companies do not have direct legal obligations under international human rights law.

As the primary duty bearers, states have three types of duties: to respect, protect and fulfil.

- To *respect* human rights means to refrain from interfering with the rights of others, essentially to do no harm. However, this is not purely a negative duty – it may entail positive steps.
- To *protect* human rights implies preventing someone else's rights from being abused by a third party. For instance, the United Nations Human Rights Council has recognised that states have a duty to protect against human rights abuses by third parties, including companies, through appropriate policies, regulation and adjudication.
- To *fulfil* human rights means to actively provide people with the means required to enjoy human rights. For example, a state may need to build courts to ensure a functioning judicial system, or schools and hospitals to realise the rights to education and health respectively.

States hold all three of these duties. Businesses do not generally have direct legal obligations under international human rights law, but it is now widely accepted that they have the responsibility to respect human rights, that is, to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved. This responsibility has been expressed most recently in the UN Guiding Principles on Business and Human Rights, put forward by the former Special Representative to the United Nations Secretary-General on Business and Human Rights, Harvard Professor, John Ruggie.

3.1.5 Range of human rights

Human rights are interrelated, interdependent and indivisible. This means there is no hierarchy between different rights but that all civil, cultural, economic, political and social rights are equally important. It also means that the improvement of one right facilitates advancement of the others and likewise the deprivation of one right adversely affects the others. For example, consider the link between the right to education and the right to work: often people with more education will have better access to the job market, enabling a higher enjoyment of the right to work. Or consider the relationship between the right to participate in government and the right to food: people who do not have adequate basic nourishment may be unlikely to participate in public life, for example by voting.

Human rights are sometimes spoken about in groups, for example: civil and political rights, such as the right to security of person and the right to freedom of assembly; economic, social and cultural rights, such as the rights to health, education and an adequate standard of living; and collective rights, such as the right to self-determination and the right to development. However, it has also been suggested that such categorisation is unhelpful, as it can serve to prioritise one group of rights over another, thereby undermining the principles of interdependence and indivisibility.

Under international human rights law, civil and political rights must be fulfilled immediately by states, economic, social and cultural rights are generally subject to what is known as the principle of progressive realisation. This recognises that not all states have the resources to immediately guarantee access to economic, social and cultural rights, such as adequate health care or clean water. However, this does not make these rights any less important or binding; on the contrary, it requires that states must use the maximum available resources to fulfil these rights by all appropriate means, including through economic and institutional development. Moreover, states must ensure they meet minimum core obligations in relation to these rights, such as abiding by the principle of non-discrimination and avoiding measures that might worsen the situation.

Human rights should not be regarded as unchanging and fixed – indeed, they evolve continuously and are constantly being clarified. For example, the UN Human Rights Council adopted the Convention on the Rights of Persons with Disabilities, and in 2010, the UN Human Rights Council affirmed the status of the right to water and sanitation as a human right with binding obligations for states. Previously, access to safe drinking water and sanitation were considered important aspects of the right to health, but is now recognised as a right in and of itself.

3.2 Business and human rights

3.2.1 The UN Special Representative on Business and Human Rights: the “Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights

In 2005 the then UN Secretary-General appointed a special representative (SRSG) on business and human rights to address the lack of clarity on the roles of states and businesses with regard to human rights. In 2008 the SRSG presented a policy framework consisting of three complementary pillars:

1. *The state duty to protect* against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication.
2. *The corporate responsibility to respect* human rights, through which companies are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved.
3. *Access to remedy*, greater access by victims to effective remedy, judicial and non-judicial.

After welcoming this framework in 2008 the UN Human Rights Council asked the SRSG to provide further guidance so it could be implemented. This led to the United Nations’ Guiding Principles on Business and Human Rights (Guiding Principles) which were then unanimously endorsed by the UN Human Rights Council in June 2011. They have also received support from a number of international organisations, business and civil society actors, including the International Council on Mining and Metals, the OECD and the European Union. Following the end of the SRSG’s mandate the UN Human Rights Council established a working group in 2011 to continue the work on business and human rights at the UN level, including through the dissemination and implementation of the Guiding Principles.

Relevant resources:

- Business and Human Rights Resource Centre: Portal on the Special Representative of the United Nations Secretary General on Business and Human Rights.
- International Council on Mining and Metals: Business and human rights page.
- Website for the UN Working Group on Business and Human Rights.

The state duty to protect

As introduced above, under international human rights law, states are the primary duty bearers for human rights. This is reiterated in pillar one of the “Protect, Respect and Remedy” Framework which outlines that the state duty to protect includes developing and implementing appropriate policies, regulation and adjudication to protect people against human rights abuses by third parties, including businesses.

The state duty to protect affects businesses in numerous ways. For example, a company is obliged to uphold the labour and mining laws and regulations that are enacted by a state. Companies are also expected to cooperate with state judicial systems in the countries in which they operate. Through their duty to protect, states may also put in place a number of measures to help business to respect human rights such as providing advice through diplomatic posts about potential human rights challenges and opportunities in new frontiers.

The corporate responsibility to respect

The corporate responsibility to respect means that businesses are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved. The Guiding Principles outline that in order to meet this responsibility, businesses should have in place policies and processes appropriate to their size and circumstances, including:

- a policy commitment to respect human rights;
- a human rights due diligence process to identify, prevent, mitigate and account for addressing adverse impacts on human rights; and
- processes to enable the remediation of any adverse human rights impacts the company causes or contributes to.

The corporate responsibility to respect applies to all companies, recognising that the scale and complexity of the measures taken by a company to meet its responsibility to respect will vary according to its size, sector, severity of the company’s adverse human rights impacts and so on. Severity of impacts will be judged by their scale, scope and irremediable character.

The Guiding Principles outline the due diligence steps a company should take in order to identify, prevent, mitigate and account for how it addresses adverse human rights impacts:

- assessing actual and potential adverse human rights impacts;
- integrating and acting upon the findings of such assessments;
- tracking responses; and
- communicating how impacts are addressed.

Human rights due diligence will vary in complexity according to the size of the business, the risk of severe human rights impacts and the nature and context of its operations. It should also be ongoing, in recognition of changes in business operations and operating contexts.

The Guiding Principles indicate that human rights due diligence may be included within broader enterprise risk-management systems providing that considerations extend beyond risks identified as material to the company, to also encompass risks to rights-holders.

It is important to note that the Guiding Principles expect a company to consider adverse human rights impacts that the business enterprise causes or contributes to through its own activities and business relationships, as well as those which may be directly linked to its operations, products or services by its business relationships. Such relationships may include relationships with business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products or services. Consideration should include both contractual and non-contractual relationships, recognising that the company's leverage to influence (and prevent or address its involvement in) impacts will differ according to the relationship.

An example of causing an adverse human rights impact is where a company avoids hiring women of child-bearing age, an act of discrimination directly caused by the company. An example of a contribution to an adverse impact could be where a company expressly or implicitly asks a security provider to use excessive force in breaking up a community protest. Examples of a direct link to a human rights impact include:

- a *supplier* to the company denies its employees the right to join a trade union;
- the company acquires a piece of land which the *authorities* have unlawfully acquired from the previous owners; and

What is the corporate responsibility to respect human rights?

It is worth noting that the Guiding Principles use the term "responsibility" rather than "duty" to respect, reflecting that current international human rights law generally is not directly binding on companies. However, company respect for human rights has become a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility. And the corporate responsibility to respect has now been affirmed by the UN Human Rights Council as the baseline responsibility for all companies in all situations.

What is leverage?

The Guiding Principles explain that appropriate action to prevent or address an adverse human rights impact will depend, among other things on the extent of the company's leverage in addressing the adverse impact. This is particularly relevant when it comes to involvement in an adverse impact through a business relationship.

They elaborate that "Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes harm".

The Guiding Principles clearly envisage the use of leverage to be proactive: "If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it, and if it lacks leverage, there may be ways for the enterprise to increase it. Leverage may be increased, for example, by offering capacity-building or other incentives to the related entity, or collaborating with other actors".

– the company’s products are used by an *end-user* or *customer* in a way that harms human rights, for example rare metals or chemicals compounds are used to make illegal weapons.

The categories of cause harm, contribute to harm and being directly linked to harm are not exact – the essence is to consider the company’s potential or actual involvement in harm, rather than trying to fit it into black-and-white-categories.

Access to remedy

The access to remedy pillar relates to both the state duty to protect and the corporate responsibility to respect. For example, states are expected to have in place effective domestic judicial mechanisms, and other non-judicial grievance mechanisms, whereby people can seek remedy for business-related human rights abuses. Where a company has identified that it has caused or contributed to adverse human rights impacts, it is expected that the company provides for or cooperates in the remediation of these adverse impacts through legitimate processes. This can be through establishing or participating in an effective operational-level grievance mechanism. This is not only a valuable way of facilitating access to remedy, but also contributes to human rights due diligence by:

- allowing grievances to be addressed and remediated quickly and directly by the business itself, thereby preventing harms from compounding and grievances from escalating; and
- enabling the early and ongoing identification of adverse human rights impacts, including the identification of systemic problems and appropriate adaptation of practices by analysing grievance trends and patterns.

The Guiding Principles state clearly that it is important that non-judicial (including operational-level) grievance mechanisms sit within the wider state-based system (including judicial mechanisms) and are complementary, and do not replace or in any way impede access to state-based remedies such as the courts or broader systems such as collective bargaining processes.

The Guiding Principles also outline eight effectiveness criteria for non-judicial grievance mechanisms, including operational-level grievance mechanisms.

UN Guiding Principles: effectiveness criteria for non-judicial grievance mechanisms

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Operational-level mechanisms should also be:

- (h) Based on engagement and dialogue: consulting with the stakeholder groups for whose use they are intended, on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

3.2.2 Accountability mechanisms

The corporate responsibility to respect is globally expected of business. It may include legal duties of companies under domestic laws and via contractual arrangements. The question of corporate liability for human rights under international law has been the subject of extensive international debate. International human rights laws generally impose direct legal obligations only on states. However non-state actors such as companies may face legally binding human rights responsibilities when international human rights commitments are integrated into the domestic legal system in the country where the company operates ('host country'), or in the country where it is incorporated ('home country'). For example, domestic workplace, environmental or constitutional laws may provide avenues whereby people can hold companies to account for business-related human rights abuses.

In some cases, a home country may have domestic laws that impose human rights obligations on companies incorporated in its territory – even with respect to operations outside the home country – this is known as extraterritorial liability. For example, criminal laws may hold a company liable for complicity in international offences such as crimes against humanity, genocide or war crimes even if those crimes occurred overseas.

The United States Alien Tort Claims Act (ATCA) allows plaintiffs to sue companies registered in the United States over alleged violations of international law regardless of where the alleged violations have occurred. During the past decade a number of cases have been brought by human rights groups against multinational companies.

The majority of ATCA cases involve companies in the natural resources industries and a small number of cases have resulted in settlement payments. The ongoing applicability of ATCA to company involvement in human rights abuses overseas is subject to review by the US Supreme Court.

There are also several situations in which companies may be held accountable for adverse human rights impacts even though legal liability may not exist.

For example, OECD member countries have national contact points (NCP) that are able to investigate and help mediate complaints based on the OECD Guidelines for Multinational Enterprises over alleged human rights and labour rights violations carried out by companies operating in or headquartered in that country.

Contractual obligations may also contribute to accountability – as in the case of requirements stipulated by financial service providers, such as the International Finance Corporation (IFC) or regional development banks. IFC Performance Standards, for example, can be contractually binding on companies as part of a lending requirement.

Both the OECD Guidelines and the IFC Performance Standards were updated in 2010-11 to align with the UN Guiding Principles on Business and Human Rights. Other initiatives, including ISO26000 Guidance on Social Responsibility, the UN Global Compact and the Global Reporting Initiative are already, or are currently taking steps to, incorporate the Guiding Principles.

Relevant resources:

- The Business and Human Rights Resource Centre: Corporate Legal Accountability Portal.
- UN Global Compact: legal accountability section
- OECD Guidelines on Multinational Enterprises.
- IFC Performance Standards on Environmental and Social Sustainability.
- OECD Watch: database of cases under the OECD National Contact Points.

3.2.3 Complicity

In the context of human rights and business the term complicity can have both legal and non-legal meanings. In a non-legal context, phrases such as 'business complicity in human rights abuses' are frequently used by human rights organisations and activists, international policy makers, government experts and businesses themselves to describe what they consider undesirable business involvement in human rights abuses (International Commission of Jurists, 2006) such as a company taking over land where people have been forcefully displaced by the government, or child labour in the supply chain. But allegations of complicity in a non-legal sense may also extend to situations where company revenues are paid to an oppressive state. In a legal context, the term has more specific dimensions, including a specific and technical meaning in criminal law, which is closely linked to the concept of 'aiding and abetting' (International Commission of Jurists, 2006) and generally requires a substantial contribution to the ultimate crime and knowledge or intention of this contribution.

For instance, civil or criminal legal sanction will generally require proving that the company:

- *caused or contributed* to the human rights abuse(s), by enabling, exacerbating or facilitating the abuse;
- *knew* or should have *foreseen* that human rights abuse(s) would be likely to result from its conduct; and
- was *proximate* to the human rights abuse(s), either geographically or through the strength, duration or tone of its relationships.

Legal liability may be attracted by the company entity and/or company official, depending on the jurisdiction and body of law in question. Legal tests depend on the jurisdiction and whether the case is civil or criminal, so companies should always obtain appropriate legal advice when facing such claims.

The Guiding Principles call for consideration of legal and non-legal, actual or potential instances of complicity, and recognise that legally, contribution to harm is relevant in both criminal and civil law. They also acknowledge the evolving nature of this area, particularly as it relates to gross human rights abuses, such as international crimes, and advise companies to treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

Is only law relevant when we talk about complicity?

A study of corporate complicity and legal accountability that looked at both the criminal and civil liabilities of companies for complicity in gross human rights abuses, and conducted by the International Commission of Jurists (ICJ), noted the 'evolving' nature of legal accountability for complicity: "*The law is also changing and evolving rapidly and complicit conduct for which businesses may not face legal responsibility today, may well attract legal liability in the future, as the law responds to developing concepts of moral responsibility. Businesses should therefore also be guided by public policy and ethical considerations, as well as market-place realities, beyond a technical appreciation of whether they currently could face allegations of legal liability or legal sanctions.*" (ICJ, 2006).

Relevant resources:

- International Commission of Jurists: Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes.
- 2008 report by the SRSG on Complicity and Sphere of Influence.
- Interpretive Guide to the UN Guiding Principles.

3.2.4 Business contribution to the realisation of human rights

Companies have a responsibility to respect human rights. However, many natural resources companies go beyond this responsibility by undertaking activities and initiatives that contribute to the realisation of human rights. For example, contributions to job creation, innovation and economic growth can play an important role in creating an enabling environment for the realisation of human rights. Frequently, companies also engage in community development initiatives that can play a key role in supporting human rights in local communities and broader society. Companies can enable access to electricity, healthcare services, roads and other infrastructure, and can support small business development. Many natural resources companies do this voluntarily, or as part of agreements with local authorities or host communities. Where such initiatives are based on thorough and rights-compatible needs assessment, and are designed to ensure long-term sustainability, they can make a considerable contribution to human rights and development.

In some remote or weak governance regions, companies may be, or be perceived to be, better placed and resourced to effectively create development benefits than state actors. In such circumstances, community expectations on the company to 'deliver' development projects that contribute to human rights enjoyment can be significant. However, states still remain the primary duty bearers for human rights. It is therefore important, in these circumstances that the company's contribution to human rights and development is carried out in a way that supports and reinforces state duties in these regards, rather than replacing the state as primary duty bearer.

One important point regarding company contributions to human rights enjoyment and development is that such initiatives cannot be used to offset or compensate for a robust whole-of-business human rights due diligence system: *"because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere"* (Ruggie, 2008).

Business community development and engagement activities and initiatives, standards, processes and outcomes remain varied. For example, the precise reasoning behind choosing to undertake some

community development activities may not be clear. In this regard, the principles of the human rights-based approach to development (explained further in section 3 below) may make a valuable contribution by providing a framework for development that is based on international human rights standards. Whilst the mandates and drivers of development actors and companies may vary, core principles of the human rights-based approach to development (eg participation and non-discrimination) can already be seen in the sustainability and communities frameworks of progressive companies.

A Human Rights-Based Approach to development

A Human Rights-Based Approach to development (HRBA) can be defined as: *"a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights"* (Office of the High Commissioner of Human Rights, 2006). This means that both the process and outcomes of a development project or activity should be consistent with human rights principles and standards. Some of these principles, such as non-discrimination and participation, are already reflected in the communities' work of some mining companies. Deepening understanding of how a human rights-based approach might relate to mining companies' communities work may assist in ensuring respect for human rights, as well as making meaningful contributions to development through strategic social investment activities and initiatives.

Broadly speaking, a human rights-based approach to development rests on four principles (Office of the High Commissioner of Human Rights, 2006):

- **Explicit link to human rights.** A human rights-based approach implies that practices are guided by human rights principles and standards. For example, whereas ordinary approaches to land acquisition might only involve compensation to legal title holders, a human rights-based approach would consider impacts on the rights and livelihoods of all affected individuals, including legal and informal title holders, and the usage and passage rights of non-owners.
- **Equality and non-discrimination.** This includes paying particular attention to vulnerable and marginalised groups, as well as gender. It also involves taking steps to ensure that all affected

and impacted women and men, girls and boys, are empowered to understand and participate in decisions that affect them.

- **Participation.** In a human rights-based approach participation is both an objective and a means of development. Participation should aim to create genuine involvement of people in the development processes which impact on them. For this, participation should be ‘active, free and meaningful’. From a rights-based perspective, participation is more than consultation, or a technical add-on to development activities, but an integral part of shaping them.
- **Accountability, transparency and the rule of law.** In a human rights-based approach to development, development is seen as an *entitlement*, rather than an act of *charity*. This has important implications for how a company relates to affected communities and other stakeholders. For example, in a rights-based approach the individuals affected by the project are seen as *rights-holders* rather than as *stakeholders*, that is, as people who have entitlements, rather than interests. A rights-based approach delineates between rights-holders and duty-bearers, and seeks to ensure that rights-holders have the capacity to claim their rights, and that duty-bearers correspondingly uphold these rights.

Relevant resources:

- Office of the United Nations High Commissioner for Human Rights: Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation.

3.3 Human rights in Communities work

3.3.1 Key issue areas related to human rights in Communities work

Companies are expected to consider and respect all internationally recognised human rights in their Communities work. This section provides examples of human rights issues that may occur in particular. These issues should be considered as illustrative, rather than exhaustive.

Environmental impacts

Environmental impacts in the natural resources sector can have human rights consequences related to the health and livelihoods of communities. Current impact assessment methodologies (environmental, social and health impact assessment) may capture many of these impacts, but do not tend to articulate the impacts in terms of their human rights consequences, such as undermining a community's right to an adequate standard of living.

Relevant resources:

- International Finance Corporation Guide to Human Rights Impact Assessment and Management.
- Human Rights Impact Resource Centre (business section).
- International Finance Corporation Performance Standard 1, 3, 4, and 6.

Water and sanitation

As a human right recognised by the United Nations Human Rights Council, among other authorities, the right to water and sanitation includes the right of all persons to have access to safe water for personal use, including for drinking, cooking and sanitation. Several specific criteria further define the meaning, scope and content of the right to water and sanitation:

- Quality: water must be safe to drink.
- Availability: water must be available in adequate quantities.

- Accessibility: water must be physically accessible and equally accessible for women, children, men and people of different social backgrounds.
- Affordability: water does not necessarily have to be free, but must be affordable for people of all incomes.

The human right to water is a precondition of the enjoyment of other human rights, such as the right to health (eg freedom from water-borne diseases).

Development of natural resources can be very water intensive and may impact on all of these criteria either through water use, changes to waterways or ground water tables, or through discharges to ground or surface water. Company operations can also affect, and indeed improve, access of communities to water wells or collection points.

Methodologies for understanding the human rights impacts associated with the water footprint of companies are currently under development, in recognition that natural resources companies have an important role to play in ensuring that the human right to water is upheld. This can involve improving water stewardship in company operations, but also in advocating for better water governance by national and local governments.

Relevant resources:

- UN Global Compact CEO Water Mandate.
- CEO Water Mandate: White Paper, the Human Right to Water – Emerging Corporate Practice and Stakeholder Expectations.
- United Nations Special Rapporteur on the issue of human rights obligations related to access to safe drinking water and sanitation.
- Institute for Human Rights and Business: Business, Human Rights and the Right to Water.

Land management and resettlement

Natural resources sector activities are, by nature, land intensive requiring regular acquisition, lease, decommissioning and rehabilitation of land. Loss of land, or access to land, can have serious human rights consequences for housing, livelihoods, and cultural identity.

Resettlement of local communities should be avoided whenever possible. When unavoidable, resettlement should be carried out in line with international standards so as to minimise impacts on the affected communities, including the restoration of livelihoods and ways of life.

There are several types of resettlement:

- physical resettlement - the relocation of a community's place of living;
- economic resettlement - the relocation of a community's economic and livelihood generating activities such as farming, hunting or fishing;
- involuntary resettlement - where communities are resettled following a lawful expropriation or threat of lawful expropriation; and
- forced eviction - where individuals are removed from an area without access to adequate legal or other remedies.

When resettlement is carried out by authorities or other third parties, the company needs to be mindful of the potential for forced evictions. This also applies when acquiring land where resettlements may previously have occurred. The International Finance Corporation Performance Standard 5, for example, provides some guidance on private sector responsibilities under government-managed resettlement.

When seeking to compensate individuals affected by resettlement, it is important to ensure that compensations actually result in restoration of livelihoods for the affected people. Monetary compensation may not always be sufficient. For livelihood restoration to succeed, resettled communities may require, for example, transfer of new skills or other forms of technical assistance. Resettlement may also necessitate the preservation or restoration of distinct social, cultural and governance patterns of the resettled community.

Relevant resources:

- International Finance Corporation Handbook for Preparing a Resettlement Action Plan.
- International Finance Corporation Performance Standard 5: Land Acquisition and Involuntary Resettlement.
- The Institute for Human Rights and Business (section on Land issues).

Security

Natural resources sector operations may be located in remote or insecure areas where there may be high rates of poverty, criminality or violence, or where the area may be emerging from recent conflict. In such circumstances companies are responsible for ensuring the safety of employees and assets. Companies also need to ensure due diligence is completed with respect to the conduct of privately contracted security guards, and of company interactions with government security agencies such as police or military. For example, security forces around company assets may make arbitrary detentions, unlawful arrests or searches. Security forces may also harass company employees or local community members, including engaging in sexual harassment and sexual violence, or otherwise abuse their power or use excessive force. Such acts impact adversely on human rights, such as the right to security of person or the right to freedom from arbitrary attention. In extreme cases they may amount to international crimes such as genocide, crimes against humanity and war crimes. At times a company may be considered to have contributed to such abuses or to be directly linked with them, even if there is no formal or contractual arrangement between the company and the government security forces and even if the company did not ask or expect that the security providers would act in that way. Therefore it is important that company human rights due diligence addresses both private security providers as well as public security forces as applicable.

The Voluntary Principles on Security and Human Rights, which were established for the extractives industry, provide guidance on what is appropriate, including background checks on security guards, training and incident reporting.

Relevant resources:

- Voluntary Principles on Security and Human Rights.
- ICM, ICRC, IFC and IPIECA: Voluntary Principles on Security and Human Rights: Implementation Guidance Tools.
- The Voluntary Principles on Security and Human Rights – An Implementation Toolkit for Major Project Sites.

Conflict-affected and weak governance zones

Natural resources sector companies often operate in areas with weak governance or which are or have been in conflict or recent conflict. In such circumstances natural resource extraction may be woven into political, social and/or armed conflicts in complex ways. In such an environment, a company will need to take care not to become part of conflict, while at the same time being sensitive to the risk that its presence may have an impact on conflict dynamics.

Natural resource companies run the risk of being seen to cause, contribute to or be directly linked to human rights abuses in weak governance, conflict and post-conflict areas, for example, by:

- providing revenue that enables government authorities or paramilitary groups to initiate, prolong or escalate conflict activities;
- creating a struggle for access to benefits from the company's presence, including supply contracts, jobs, compensation payments or community development funds;
- collaborating with or providing equipment for state security agencies or paramilitary groups that commit human rights abuses; and
- being seen to influence government officials or community leaders to marginalise and oppress opponents or populations.

In such circumstances, companies risk being associated with human rights abuses, including through allegations of legal complicity (see section 3.2.2 above).

Increasing attention is being given to the ability of trade in natural resources to fuel violent conflict, particularly in certain parts of the world. As a result, companies face greater legal scrutiny of their mining, supply and use of minerals. This will continue to have important implications for companies throughout the natural resources sector, including stakeholders' requirements for revenue transparency and traceability of products.

Relevant resources:

- International Alert: Conflict Sensitive Business Practices and the Extractive Industries.
- International Alert: Red Flags: Liability Risks for Companies Operating in High-Risk Zones.
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.
- Global Compact and Principles for Responsible Investment: Guidance on Responsible Business in Conflict-Affected & High-Risk Areas.
- Global Compact: Doing business while advancing peace and development.
- Kimberley Process Certification Scheme.

Community development

Natural resources companies often operate in remote and rural areas affected by poverty. Here in particular, there is great potential for companies to make contributions to the realisation of human rights and development, for example, through designated community development programmes and projects.

The process and outcomes of community development projects can be closely aligned with human rights. For example, development outcomes can be directed towards human rights impacts such as health, education or equality. The development process can also include vulnerable groups who do not usually benefit from private sector activities.

The United Nations Millennium Development Goals (MDGs) offer guidance for companies wishing to support human development, both globally and at a country-level. The Poverty Reduction Strategy Papers issued by the World Bank are another useful reference point for ensuring that corporate development contributions are aligned with national development goals on a country-by-country basis.

Relevant resources:

- United Nations Millennium Development Goals (MDG).
- World Bank Poverty Reduction Strategy Papers (PRSP).
- ICMM: Community Development Toolkit.
- Luc Zandvliet: Getting it Right – Making Corporate–Community Relations Work.

Community consultation

In the natural resources context, community consultation is an integral part of identifying and managing human rights in communities work. This may be in relation to land management, environmental impacts, community development projects, security arrangements or site decommissioning. Many natural resources companies now see consultation not only as a part of legislative requirements, such as those associated with permitting or impact assessments, but also as an integral aspect of community-company relations and building long-lasting productive relationships. As part of building effective and equitable company-community relations, consultation processes should be sensitive to local context and should be inclusive, paying attention to gender and the involvement of potentially vulnerable, or marginalised groups. In certain circumstances, natural resources companies also need to be aware of particular standards for consultation, for example, principles of Free Prior Informed Consent, when consulting with communities on certain aspects (see How to guide, section 2.1 on inclusive engagement and Indigenous peoples on page 23).

Relevant resources:

World Resources Institute: Breaking Ground, Engaging Communities in Extractive and Infrastructure Projects.

Cultural heritage

Natural resources sector activities can have significant impacts on cultural heritage, with implications for local communities' ability to enjoy their human rights. For example, company activities may impact on access to spiritual and ceremonial sites, or rapid economic and social development brought about by natural resources development can have impacts on the cultural fabric of local communities. It is important that companies understand the operational cultural heritage context in order to minimise and mitigate any potential adverse impacts.

Relevant resources:

- Rio Tinto (2011): Why cultural heritage matters.
- IFC Performance Standard and Guidance Note 8: Cultural Heritage.

Project induced in-migration

Large-scale investment projects may attract significant numbers of people into the area seeking jobs, business opportunities or other benefits. This includes workers brought in by the company itself. Especially in poor regions of the world “boom-town” effects can have profound impacts on the host community, including impacts on human rights. Potential adverse impacts may include:

- price inflation of food, housing and other essential resources;
- increased pressure on natural resources and ecosystems including: water for drinking and sanitation, fishing areas, farmland, forests, wildlife etc;
- increased pollution and waste problems;
- increased crime and corruption;
- inter- and intra-communal conflicts over land, jobs, compensation payments and other benefits;
- introduction or spread of diseases, including sexually transmitted diseases; and
- trafficking of children, women and migrant labour for low skilled labour, domestic services or prostitution.

Companies may not contribute to these adverse impacts but they may be directly linked to their activities. Even if this is not the case, companies may decide to take steps to minimise such impacts.

Prevention and management of issues associated with in-migration requires careful planning. Key strategies can include:

- spreading the benefits from core business projects as well as community development projects to neighbouring communities to reduce in-migration;
- initiatives to prevent price inflation, for example, through housing and agriculture development;
- improving education and health services; and
- regional and urban planning exercises, in conjunction with local and national government authorities and/or other operators in the area.

Relevant resources:

- International Finance Corporation: A Handbook for Addressing Project Induced In-migration.

Revenue management

Many concerns about human rights in communities work in the natural resources sector arise from the sharing of benefits with affected communities, particularly in countries or regions where there are concerns about the quality, transparency and accountability of government revenue management. Host communities may be concerned that they are deprived of a share in the benefits of their country's natural resources. While the root causes of poor revenue management are often beyond the company's control the *effects* of it may be very much felt in communities work and so impact on the company's social licence to operate.

Good revenue management can boost human development, contributing to the realisation of human rights while poor revenue management can exacerbate poverty, corruption and conflict, adversely impacting civil, political, economic, social and cultural rights. Companies should avoid any involvement in revenue management that adversely impacts human rights.

Sector-wide transparency initiatives and partnerships in community development are ways companies may address this challenge. For example, companies can include revenue distribution mechanisms in agreements and memoranda of understanding with the affected community. Such mechanisms might take the form of community development foundations with joint funding from government and companies.

Relevant resources:

- Extractive Industries Transparency Initiative.
- International Council of Mining and Metals on revenue transparency.
- Revenue Watch Institute.

Labour and supply chain

Communities work is also concerned with labour conditions set by local suppliers and contractors. For instance, low capacity local contractors or suppliers may not initially be able to meet all workplace standards set by domestic laws and international labour standards. With a view to continuous improvement, in some situations, and the need to avoid causing or contributing to any adverse human rights impacts, companies may need to support their local suppliers and contractors to address human rights issues such as:

- child labour and young workers;
- forced and bonded labour;
- transparency and non-discrimination in recruitment practices;
- workplace discrimination and harassment;
- freedom of association and collective bargaining;
- health and safety;
- working hours, rest periods and breaks;
- wages, benefits and leave provisions; and
- employee privacy.

A key aim of communities work in the supply chain is to help build a sustainable local economy with continuous improvement of labour standards in suppliers and contractors. This may involve monitoring and capacity building, where possible in synergy with community development projects, local content requirements and relevant government or industry initiatives.

Relevant resources:

- UN Global Compact and Business for Social Responsibility: Supply Chain Sustainability: A Practical Guide for Continuous Improvement.
- International Finance Corporation Performance Standard 2: Labor and Working Conditions.
- UN Global Compact (supply chain section).

Vulnerable or 'at risk' groups

A focus on vulnerable or 'at risk' groups is a part of recognising the right to non-discrimination. All societies have vulnerable or 'at risk' groups who are systematically disadvantaged or discriminated against with respect to their human rights.

Individuals and groups who are vulnerable or 'at risk' are likely to be overexposed to the adverse impacts of natural resources company activities, while being underexposed to any benefits generated. It is therefore important for companies to be aware of the individuals or groups within a society who may be vulnerable or 'at risk' in the area of company operation. This includes awareness and understanding of pre-existing and systematic patterns of discrimination within local communities.

Vulnerability depends on context. Individuals and groups commonly found to be vulnerable or 'at risk' in the communities where natural resources companies operate may include:

- minorities (for example national, ethnic, linguistic, religious);
- women;
- children and young people;
- elderly people;
- landless people;
- informal and casual workers;
- migrants, refugees and displaced persons;
- Indigenous peoples;
- people with disabilities;
- lesbian, gay, transgender groups and other sexual minorities; and
- persons living with HIV.

The challenge for the company is to ensure that vulnerable and 'at risk' women and men, girls and boys, are identified and included in communities work, including company-community relations. This should include proactive identification and inclusion, assessment of capacity of vulnerable and 'at risk' groups to participate, and contributions towards capacity building to engage in and shape communities work.

Gender impacts

Many human rights impacts caused by natural resources sector activities are 'gendered' in that they impact women and men, girls and boys, differently. Women and girls are likely to experience the adverse impacts of company operations differently, as well as bearing a disproportionate burden of adverse impacts. Frequently, women and girls are also less likely to benefit from positive impacts, such as job

creation, supply contracts or compensation. On the basis of the right to non-discrimination, gendered impacts of mining need to be addressed.

Women can also play a key role in Communities work and community development. For example, women are often the primary care-takers of agriculture, fishing, commerce and water collection activities, which underpin family and community livelihoods. Their reproductive and care-giver roles are also important in development.

Nevertheless in many communities women and girls are likely to suffer disproportionately from gendered impacts caused by natural resources sector operations. For example:

- Women are more vulnerable to disruptions to farming, fishing, water sources and other traditional means of livelihood.
- Women are less likely to be compensated for loss of, or damages to, property and assets.
- Boom-town effects such as increased crime rates, sexual violence, sexually transmitted diseases, alcohol and monetisation of local economies tend to have a disproportionately negative impact on women.
- Community governance processes often exclude women from participating effectively in consultations and engagement in decision-making concerning community development.
- Women are less likely to benefit from positive impacts of private sector development such as job creation, supply contracts or compensation.

It is important to note that gender is not the same as sex. Gender refers instead to the different social roles assigned to men and women in various societies. Debates on gender roles and human rights often centre on women's rights for the simple reason that women are traditionally much more likely to be subject to gender discrimination and inequality. However, these inequalities cannot be tackled by treating women's rights in isolation from the roles and responsibilities of men.

Relevant resources:

- UN Global Compact and UNIFEM: Women's Empowerment Principles.
- Rio Tinto (2009): Why gender matters.
- Oxfam Australia (2009): Women, communities and mining: The gender impacts of mining and the role of gender impact assessment.

3.4 Human rights in a country context

3.4.1 Implementation of human rights in domestic law

In spite of many international human rights treaties obliging states to respect, protect and fulfil internationally recognised human rights, human rights violations occur in every country around the world due to both state and non-state actors. Nowhere is free from human rights issues, and everywhere the challenges and solutions will be different. For a company, being familiar with the local human rights situation is an important aspect of managing human rights successfully. This may mean going beyond an understanding of the overarching national human rights landscape to more regional and local contexts, depending on where the company is operating.

States are obligated to implement and enforce the provisions of the international human rights treaties which they have agreed to follow. This includes putting in place domestic laws, policies and institutions to ensure that rights are respected and fulfilled in practice, while also safeguarding against human rights abuses by third parties, including business.

For example, a country that ratifies the UN Convention on the Rights of the Child must take appropriate steps to fulfil its commitments, although there is discretion in exactly how they do so. This might include passing laws establishing the minimum working age at 15. Countries ratifying the Convention on the Elimination of All Forms of Discrimination Against Women must not only outlaw gender discrimination, but take proactive measures to increase women's ability to exercise and enjoy their rights.

3.4.2 Enforcement of human rights in practice

Not all states ratify all international human rights agreements, or they may do so with reservations by committing only to certain aspects of the treaty or a particular right. When they do, they may still fail to carry out the steps needed to give practical effect to their commitments. Weak enforcement of domestic human rights laws can be due to many different factors, including:

- Poverty and lack of resources to protect and fulfil human rights. For example, a country may lack the resources to hire more than a few dozen labour inspectors to cover the entire country and verify the implementation of labour protections set out in national law.
- Cultural and religious norms which may not have been reconciled with international human rights principles. For example, traditional gender roles and perceptions may not have been reconciled with human rights principles of equality and non-discrimination.
- Lack of transparency, accountability and rule of law, including factors such as corruption, conflict, weak judiciaries, undemocratic political frameworks or ethnic favouritism.
- Government ideologies and priorities which may be inconsistent with the protection and realisation of human rights. For example, governments may prioritise economic development over the rights of Indigenous peoples. Or they may undermine labour rights in order to maintain 'flexible' labour markets.

In such circumstances, following domestic laws and practices may not be sufficient to ensure respect for international human rights standards. Where domestic implementation and enforcement of international human rights is weak companies may need to be guided by international standards to ensure that they respect human rights. A common example is where a company commits to upholding international health and safety standards in all operations, including operations in countries where international health, safety and environment standards exceed domestic legal requirements.

What is the role of context in human rights due diligence?

The Guiding Principles make numerous references to the role of context in shaping human rights due diligence, to make sure that due diligence systems and processes are appropriate and effective. For example, the responsibility to respect human rights applies the International Bill of Rights and the core International Labour Organization conventions as a baseline, but depending on circumstances additional standards need to be considered. For instance, if baseline studies indicate that there are Indigenous peoples living in the area, the rights of Indigenous peoples should be considered, or if the operation is in a conflict-affected area, the applicability of international humanitarian law should be considered.

In relation to differences between host-country, home-country and international human rights laws, the Guiding Principles state that in all contexts business enterprises should:

- a. comply with all applicable laws and respect internationally recognised human rights, wherever they operate;
- b. seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements; and
- c. treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

3.4.3 Conflicts between domestic laws and international human rights

While the issue of effective enforcement is more prevalent, there may also be instances of conflicts between domestic laws and international human rights principles, for example, where domestic laws prohibit independent trade unions, or inheritance laws do not accord women the same property rights as men, or Indigenous peoples are not recognised in domestic law. In such situations, companies may face conflicting requirements when they seek to follow both international human rights standards and national law.

According to the UN Guiding Principles, where the domestic law is silent on a particular issue, a company is not prevented from upholding international human rights standards, and should endeavour to do so. Where domestic legislation is in outright contradiction of international human rights standards, companies may face the dilemma whereby compliance with domestic law may result in a breach of international human rights standards or the domestic laws of the company's home country. In such cases, the UN Guiding Principles recommend that companies should attempt to uphold the spirit and intent of international human rights principles without violating local laws. For example, if independent trade unions are not allowed, companies may find other means to have a constructive worker-management dialogue. Prior to developing such measures, however, companies should always seek legal advice. It may also be helpful to engage in dialogue with other companies within the industry sector and country.

Relevant resources:

- Business and Human Rights Resource Centre: country pages.
- International Business Leaders Forum and Amnesty International: A Geography of Corporate Risk.
- Maplecroft: Country Risk Maps.
- Danish Institute for Human Rights: The Human Rights and Business Country Portal.
- International Alert: Red Flags - Liability Risks for Companies Operating in High-Risk Zones.

3.5 Human rights and Indigenous peoples

3.5.1 Human rights and Indigenous peoples

Indigenous peoples are entitled to the full range of internationally recognised human rights. They also enjoy additional rights under international law, intended to preserve the distinctiveness of an Indigenous people as a group. This body of rights is primarily concerned with collective rights, for example: self-determination, entitlements to lands, territories and resources, maintenance of cultures, and engagement and consent requirements regarding decisions affecting Indigenous peoples.

Some countries formally recognise Indigenous peoples and officially use this term. In such cases, these groups may enjoy special protections and entitlements under national law, for example, a claim to particular land areas. These provisions may translate into legal obligations for natural resources companies engaging with Indigenous peoples.

In other cases, domestic legal systems may neither formally recognise, nor protect the rights of Indigenous peoples. In such contexts, it will be necessary for companies to take steps to ensure that their operations do not adversely interfere with the internationally recognised rights of Indigenous peoples.

Under international human rights law, Indigenous peoples' rights are expressed in two key instruments:

- ILO Convention 169 Indigenous and Tribal Peoples Convention (1989); and
- the UN Declaration on the Rights of Indigenous Peoples (2007).

Convention ILO169 is a binding international convention, whereas the UN Declaration on the Rights of Indigenous peoples is a declaration, and as such is not legally binding. However, there are numerous aspects of the Declaration which have been adopted into international standards or domestic laws, and where this is the case, these aspects are binding by law. Even where these standards are not legally binding, natural resources companies can be usefully guided by the Declaration, as this provides an authoritative statement of current expectations regarding respect for Indigenous peoples' rights, and indeed, many natural resources companies have already expressed commitment to the Declaration.

Who are Indigenous peoples?

There are an estimated 300-400 million Indigenous peoples living across the world. In recognition of their diversity there is no set definition of what constitutes an Indigenous people, and some Indigenous groups themselves have resisted such a definition. However, a range of general characteristics have been outlined:

- self-identification as Indigenous;
- historical continuity with pre-colonial and/or pre-settler societies;
- a shared experience of oppression or colonisation;
- attachment to particular lands, territories and natural resources;
- distinct social, economic, and governance systems or distinctive languages, cultural traditions and belief systems;
- non-dominant sectors of society; and
- a shared wish to preserve a distinctive shared identity.

Based on ILO Convention 169 and the work of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples.

Examples of frameworks and resources providing guidance to natural resources sector companies interacting with Indigenous peoples:

- The Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples (2009).
- International Finance Corporation Performance Standard 7 on Indigenous Peoples.
- International Council on Mining and Metals on Indigenous Peoples: Good Practice Guide: Indigenous Peoples and Mining and ICMM Position Statement on Mining and Indigenous Peoples.
- UN Permanent Forum on Indigenous Issues.
- UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples.
- The World Bank on Indigenous Peoples.
- International Work Group for Indigenous Affairs.

3.5.2 Indigenous peoples and natural resources industries

There has been a growing attention to the relationship between Indigenous peoples, their rights, and natural resources development, particularly as companies increasingly undertake activities in remote locations that are occupied by, or of importance to, Indigenous peoples.

The International Council on Mining and Metals summarises several ways in which the natural resources sector may interface with Indigenous peoples and their rights (ICMM 2010):

- They may have a claim or legally recognised ownership or control over the lands, territories and resources that a company wishes to access or use.
- They may be customary owners or occupants or users of the lands, territories or resources (with or without formal legal recognition of ownership).
- The lands may contain sites, objects or resources of significance; the landscape may have special significance.
- They may be residents of an affected community whose social, economic and physical environment are or will be affected by natural resources development and associated activities.

Against this background, there is growing legal recognition of Indigenous peoples' rights as they relate to natural resources development, for example, in negotiating terms and conditions under which natural resources development will take place. As a result, companies are expected or required to ensure the early and ongoing engagement and participation of Indigenous peoples impacted by their activities, including fostering cross-cultural understanding between companies and communities. In some cases, these trends and expectations are implemented through agreements made between natural resources companies and Indigenous peoples, and in some jurisdictions, such agreements form an integral part of the legal and practical landscape of how companies and Indigenous peoples interact. Formal agreements can cover a variety of issues that are key in managing impacts and sharing benefits of natural resources development, for example: land access and use, preservation of local cultural sites and traditions, benefit sharing, training and employment, and opportunities for economic development of local communities (ICMM 2010).

3.5.3 The corporate responsibility to respect, due diligence and Indigenous peoples

In relation to the corporate responsibility to respect Indigenous peoples' rights, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples has identified five areas of company due diligence (Anaya, 2010):

1. Recognition of Indigenous peoples: companies should take steps to determine whether Indigenous groups are present and to recognise them as such, even when the host country has not.
2. Rights to lands, territories and natural resources: where such groups are present, the company should identify their claims to lands, territories and natural resources.
3. The state's duty to consult, and related corporate responsibilities: states have the duty to consult with Indigenous peoples concerning any activity that may impact on their rights. A state may delegate this function to the company, or may simply fail to perform it. In any case, the company should be aware of whether adequate consultation has taken place and, where necessary, engage in such consultations prior to commencing its activities.
4. Impact studies and compensation measures: company impact studies, including environmental and/or social impact assessments, should include assessment and remediation of potential human rights impacts, including impacts on the rights of Indigenous peoples.
5. Benefit sharing: Indigenous peoples are entitled to share in the benefits arising from activities, including natural resource extraction, on their traditional lands. However, were states to fail to provide such benefit sharing, companies should take steps to ensure this through, for example, community development projects or job creation.

International human rights norms, including those stated in the UN Declaration on the Rights of Indigenous Peoples, highlight the importance of consultation with Indigenous peoples about decisions which affect them, including the requirement for Free, Prior and Informed Consent (FPIC) regarding some issues. The text box below provides some more information about FPIC and surrounding debates.

Free, Prior and Informed Consent

The principle of *free, prior and informed consent* (FPIC) establishes criteria for how to engage and involve Indigenous peoples in decisions which affect them, including regarding their lands, territories and natural resources. FPIC is recognised in a number of international instruments, including the UN Declaration on the Rights of Indigenous Peoples, it is reflected in some national jurisdictions, and is recognised in the 2012 version of the International Finance Corporation (IFC) Performance Standards as applicable to certain circumstances (impacts on lands and natural resources subject to traditional ownership or under customary use; relocation from traditional lands; and critical cultural heritage).

However, there is no universally accepted definition of FPIC. In some interpretations, the principle is effectively viewed as a right of veto, for example, the right to refuse or to stop a natural resources development. Other interpretations of FPIC focus on engagement, consultation and participation, emphasising that consultations with Indigenous peoples must be undertaken in good faith, with the aim of reaching consent, but that the requirement of consent does not constitute a veto.

The International Council on Mining and Metals (ICMM) defines FPIC as: “*a process whereby affected Indigenous peoples freely have the choice, based on sufficient information concerning the benefits and disadvantages of the project, of whether and how these activities occur, according to their systems of customary decision making*” (ICMM, 2010). The ICMM emphasises that consultations with Indigenous peoples must be fair, timely, culturally appropriate and aimed at reaching broad based community support. According to this position, where such support cannot be obtained, companies may decide not to proceed with the project (ICMM, 2008).

According to the current United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, FPIC should be seen as a *process* to ensure mutual agreement in a dialogue where neither party imposes its will on the other. However, consent may still be a requirement for projects that will have a particularly profound impact on the lives of Indigenous people, for example relocation (Anaya, 2009). The UN Special Rapporteur emphasises the requirement that consultations be in good faith, with the objective of achieving agreement or consent, and points to *confidence building* as a critical element. This includes ensuring the consultation process is mutually agreed upon and addresses imbalances of power between parties, including ensuring that Indigenous peoples have timely, full and objective information about all aspects of the project, and the financial, technical and other assistance they need to participate in consultation (Anaya, 2009).