

Distr.: Restricted  
4 July 2012

English only

---

**Human Rights Council**  
**Expert Mechanism on the Rights of Indigenous Peoples**  
**Fifth session**  
9 – 13 July 2012

**Comment on the Human Rights Council's Guiding Principles  
on Business and Human Rights as related to Indigenous  
Peoples and the Right to Participate in Decision-Making with  
a Focus on Extractive Industries**

## Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction .....	1	3
II. Background .....	2–4	3
III. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework and its application to situations facing indigenous peoples .....	5–62	3
A. The State Duty to Protect Related Human Rights .....	5–27	3
B. The Corporate Responsibility to Respect Human Rights .....	28–48	9
C. Access to Remedy.....	49–62	16
IV. Conclusion .....	63	19

## **I. Introduction**

1. This analysis provides an initial review of Human Rights Council's Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework as they relate to Indigenous peoples and the right to participate in decision-making with a focus on extractive industries.<sup>1</sup> It builds upon the analysis provided in the Expert Mechanism on the Rights of Indigenous Peoples' follow-up report on indigenous peoples and the right to participate in decision-making with a focus on extractive industries.<sup>2</sup> Further collaborative work on the Guiding Principles is expected, with the Special Rapporteur on the rights of indigenous peoples, the Working Group on the issue of human rights and transnational corporations and business enterprises, and the Permanent Forum on Indigenous Issues.

## **II. Background**

2. The international legal and policy framework in relation to business and human rights has been clarified in recent years, and is applicable to the human rights situations often facing indigenous peoples where extractive industries operate in or near their territories. It includes the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, endorsed by the Human Rights Council in June 2011 in Resolution 17/4.<sup>3</sup>

3. The Guiding Principles Framework consists of three main categories: 1) the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication; 2) corporate responsibility to respect human rights, including business enterprises' requirement to act with due diligence to avoid infringement of the rights of others and to address adverse impacts with which they are involved; and 3) the need for greater access to remedy where human rights abuse occurs.<sup>4</sup> It is important for all States and all business enterprises to apply all of these Guiding Principles specifically to indigenous peoples.

4. This analysis is briefly set out below, with an emphasis on principles of particular importance for the exercise of indigenous peoples' right to participate in decision-making with a focus on extractive industries.

## **III. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework and its application to situations facing indigenous peoples**

### **A. The State Duty to Protect Related Human Rights**

#### **1. Foundational Principles**

**Principle 1. States must protect against human rights abuse within their territory**

---

<sup>1</sup> A/HRC/17/31.

<sup>2</sup> A/HRC/EMRIP/2012/2.

<sup>3</sup> A/HRC/17/31.

**and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.**

5. Any standard of conduct must take into account the specific rights and needs of indigenous peoples, including their unique human rights. Thus, particular policies, legislation, regulations and adjudications that address abuse by business enterprises must consider the UN Declaration on the Rights of Indigenous Peoples as well as domestic policies, laws and alternative dispute mechanisms that have been developed in relation to indigenous peoples. Where domestic mechanisms do not exist, specific measures should be taken to develop them.<sup>5</sup>

6. The duty of States to protect against human rights abuses of indigenous peoples by third parties, including business enterprises, should be a pre-condition for granting development licences and permits on Indigenous peoples' lands, territories and resources, and must include the full participation of Indigenous peoples at all stages of decision-making.<sup>6</sup>

**Principle 2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.**

7. When developing regulatory systems applicable to industries operating abroad, states must consider the international laws, norms and standards applicable to indigenous peoples, including conventions that may only be adopted by the state in which the business is located.<sup>7</sup>

8. This principle must apply to all relevant human rights. For example, if a transnational company is operating in another country where the ILO Convention No. 169 has not been ratified, the company should nonetheless be held to that standard, especially where it has been adopted in the company's state of origin.

## **2. Operational principles**

*General State regulatory and policy functions*

**Principle 3. In meeting their duty to protect, States should:**

---

<sup>4</sup> A/HRC/17/31, Guiding Principles, para. 6.

<sup>5</sup> For example, the Philippines Indigenous Peoples Rights Act requires companies to obtain a Free, Prior and Informed Consent certificate; while most countries require companies to do EIA or SIA to be done before any project starts. In Sabah, Malaysia, preconditions for licenses to access biological resources and associated traditional knowledge in indigenous territories includes assessment on impacts to Indigenous peoples' lifestyles and livelihoods (but after 10 years, the detailed Regulations have not been finalized). See: Philippines Indigenous Peoples Rights Act; "Haini Tainsong & Jannie Lasimbang (2006) "Draft Rules to the Sabah Biodiversity Enactment 2000: a Case Study of Indigenous Peoples' Involvement in Sabah, Malaysia."

<sup>6</sup> A/HRC/18/43, page 5.

<sup>7</sup> CERD/C/CAN/CO/18 25 May 2007 at para. 17; CERD/C/CAN/CO/19-20, 9 March 2012 at para. 14.

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

9. Principle 3(c) requires States to provide guidance to industries on how to respect human rights, including in the area of governing access to lands, territories and resources, such as entitlements to ownership and use of land. The provisions of the Declaration on the Rights of Indigenous Peoples that relate to sustainable development and lands, territories and resources are particularly important here.

10. This principle also directs States to provide effective guidance to business on how to respect human rights throughout their operations. The corresponding commentary states that such guidance "...should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples (...)." <sup>8</sup>

11. This Guiding Principle refers to the need for laws, such as corporate law, governing the operation of business enterprises, to enable business respect for human rights. However, other relevant laws and policies specific to Indigenous peoples must also be enforced effectively. For example, free, prior and informed consent policies, laws and legal standards including relevant International Labour Organization Conventions, the Convention on the Rights of the Child, national legislation and regulations should be adopted to ensure compliance with indigenous peoples' rights. Consideration must also be given to relevant Declarations on indigenous peoples. <sup>9</sup>

#### *The State-business nexus*

**Principle 4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.**

12. It is incumbent upon states to ensure that business enterprises that are owned or controlled by the State, or receive significant support from the State, are operated in a non-discriminatory manner and consistent with all other international human rights.

13. State controlled extractive industry corporations must establish policies and practices to ensure compliance with all relevant international human rights norms, standards and laws, especially as they impact or potentially impact Indigenous peoples. For

<sup>8</sup> Guiding Principles.

<sup>9</sup> *Declaration of Convening of Indigenous Peoples for the Healing of Mother Earth* (March 2008, Palenque, Chiapas, Mexico); *Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples* (23-25 March 2009, Legend Villas, Metro Manila, Philippines); *Mother Earth Accord* (September 2011); and *the Law of Mother Earth* (April 2011, Bolivia); IEN, *Bemidji Declaration* (Bemidji, October 2011).

example, state-owned oil and gas corporations must ensure that they live up to the same, or higher, standards as all other corporations. Using political power to shield against human rights review should not be tolerated. This includes attempts to shield actions by business ventures that have a mandate to implement poverty-alleviation objectives. Rather, state-owned corporations should show leadership by ensuring human rights policies and practices are in place.<sup>10</sup>

**Principle 5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.**

14. The commentary for this Guiding Principle also directs that host and home states should coordinate legal and policy frameworks to “...ensure that they can effectively oversee the enterprises’ activities, including through the provision of adequate independent monitoring and accountability mechanisms.”<sup>11</sup> Of particular relevance in this regard are articles 27, 28 and 40 of the Declaration on the Rights of Indigenous Peoples, which provide for conflict resolution mechanisms in dealings between indigenous peoples, states and third parties.

15. The Permanent Forum on Indigenous Issues has recommended that states, “...develop national legislation to ensure that the engagement of corporations with indigenous peoples is consistent with the Declaration on the Rights of Indigenous Peoples regarding forest resource extraction activities taking place on their lands. Such activities must be undertaken only with their free, prior and informed consent, and they must share in any benefits that accrue.”<sup>12</sup>

16. This principle should be applicable to all natural resource extraction activities. The United Nations Food and Agricultural Organisation has established a progressive policy that is instructive of the right to free, prior and informed consent of Indigenous peoples.<sup>13</sup>

**Principle 6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.**

17. This could be achieved by states, in all their commercial transactions, requiring compliance with international legal standards. Awareness could be promoted by including specific reference to the rights of Indigenous peoples in paragraphs of relevant contracts.

*Supporting business respect for human rights in conflict-affected areas*

**Principle 7. Because the risk of gross human rights abuses is heightened in conflict-**

---

<sup>10</sup> Canadian International Institution on Extractive Industries and Development, announced in December 2011.

<sup>11</sup> A/HRC/17/31, page 10.

<sup>12</sup> E/C.19/2011/5, para. 49.

<sup>13</sup> FAO, “FAO Policy on Indigenous and Tribal Peoples,” available online at: <http://www.fao.org/docrep/013/i1857e/i1857e00.pdf>, p. 11 which states, “The principle and right of ‘free, prior and informed consent’ demands that states and organizations of all kinds and at all levels obtain indigenous peoples’ authorization before adopting and implementing projects, programmes or legislative and administrative measures that may affect them. It emphasizes that indigenous peoples must be included in consultative processes, that the time requirements for these processes be respected and that information on the likely impact of activities be disclosed in advance. Legitimate consultation measures ensure that activities or actions planned respond to indigenous peoples’ concerns and interests, thereby allowing a self-determined development process.” See also A/HRC/18/42, p. 22-29.

**affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:**

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

18. Engagement by states with business enterprises must include the involvement of indigenous peoples from the outset, where proposed business activity may affect indigenous peoples and/or occur on or near their territories.

19. Globally, there are many examples of reports of human rights abuses by business enterprises that take place in conflict-affected areas. For example, there have been instances of Indigenous peoples being denied access to National Parks identified for conservation, especially by tourism-associated business.<sup>14</sup>

20. More extreme cases involve states hiring private security companies, or armies, whose actions violate human rights laws, norms and standards. This has included sexual crimes against indigenous women, including sexual assault and rape as a weapon of war,<sup>15</sup> contrary to the right to live free from violence and discrimination, as specifically provided for under article 22 of the Declaration on the Rights of Indigenous Peoples, which protects indigenous women and children against all forms of violence and discrimination. Further, article 30 of the Declaration prevents military activities from taking place on indigenous peoples' lands or territories without their free, prior and informed consent.

21. A frequent human rights violation engaged in by business enterprises in heightened conflict-affected areas (and indeed, at times, the cause of conflict) is the global practice of land grabbing in the context of extractive industries, including outsourced food production:

“This latest trend in global land grabbing – that for outsourced food production – is only one part of a larger attack on land, territories and resources. Land grabs for mining, tourism, biofuels, dam construction, infrastructure projects, timber and now carbon trading are all part of the same process, turning communities into refugees on their own land. Living from the land is becoming more difficult and, in many parts of the world, more dangerous by the day.’ – Henk Hobbelink; GRAIN”<sup>16</sup>

<sup>14</sup> ILO and OHCHR, *Overview Report of the Research Project by the International Labour Organization and the African Commission on Human Rights and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries*.

<sup>15</sup> International Indigenous Women's Forum (FIMI). *Mairin Iwanka Ray: Indigenous Women Stand against Violence: A Companion Report to the United Nations Secretary-General's Study on Violence against Women*. New York: International Indigenous Women's Forum, 2006.

<sup>16</sup> Sibaud, Philippe, *Opening Pandora's Box: The New Wave of Land Grabbing by the Extractive Industries and The Devastating Impact on Earth* (London: The Gaia Foundation, 2012), page 11.

22. In all of these examples, article 8(2)(b) and (c) of the UN Declaration is instructive of the obligations owed by States and business enterprises:

“8. 2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(b) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights...”

23. Such mechanisms could provide for the denial, withdrawal, or suspending of licences or permits that allow access to Indigenous peoples’ lands, territories and resources in violation of their rights, including free, prior and informed consent.

24. Furthermore, article 29(2) requires States to take effective measures to prevent hazardous material storage or disposal on Indigenous peoples’ lands or territories without their free, prior and informed consent.<sup>17</sup>

*Ensuring policy coherence*

**Principle 8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.**

25. Of particular relevance for Indigenous peoples in this regard are national or local level government departments (where they exist) that are specifically mandated to address Indigenous affairs. Such departments should provide mandatory information, training and support to ensure that human rights violations do not occur due to lack of knowledge or awareness of pertinent international standards. This is consistent with article 38 of the Declaration on the Rights of Indigenous Peoples that calls for States, in conjunction with Indigenous peoples, to take legislative and other measures to achieve the ends of the Declaration.

**Principle 9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.**

**Principle 10. States, when acting as members of multilateral institutions that deal with business-related issues, should:**

---

<sup>17</sup> Article 29(2).



(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

26. In relation to Guiding Principles 9 and 10, States have an obligation to referentially incorporate the Declaration on the Rights of Indigenous Peoples into bilateral and multilateral agreements, including investment treaties or contracts. States must ensure that they protect existing human rights obligations under existing treaties, conventions and covenants when entering into new treaties. Unfortunately, this does not always occur. For example, in the context of water and culture, States are overriding indigenous peoples' right to water in multilateral trade agreements. In relation to dealings with pharmaceutical companies, Indigenous peoples' rights related to sacred or traditional knowledge and medicines are often violated by the practices of these companies, particularly rights contained in article 31 of the Declaration.<sup>18</sup> Such negative impacts can be mitigated by greater lateral coherency within state departments on the awareness of their legal obligations.

27. Cooperation between States, multilateral institutions and other stakeholders can play an important role to ensure specific consideration of indigenous peoples' rights through assistance, capacity-building and awareness-raising for cumulative positive effects.

(d) States must ensure that bilateral or multilateral investments or trade agreements do not breach, violate or override existing Treaties, Agreements or other constructive arrangements between Indigenous peoples and states, in accordance with article 37 of the Declaration.

## **B. The Corporate Responsibility to Respect Human Rights**

### **1. Foundational principles**

**Principle 11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.**

**Principle 12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.**

28. In relation to Guiding Principles 11 and 12, it must be emphasized that the responsibility to respect human rights owed by business enterprises is a global standard of expected conduct that applies to everyone, including Indigenous peoples. The Commentary

<sup>18</sup> WIPO, relevant UN articles

to Guiding Principle 12, notes that business enterprises have the responsibility to respect human rights, specifically those of Indigenous peoples, where enterprises “may have adverse human rights impacts on them.” In this regard, the Commentary signals, inter alia, the applicability of the Declaration on the Rights of Indigenous Peoples.<sup>19</sup> Of particular relevance is article 17: the right to enjoy fully all rights established under applicable international and domestic labour law, requiring states and Indigenous peoples to take measures to protect against economic exploitation of Indigenous children and to prohibit discriminatory labour conditions.

29. The eight ILO core Conventions as set out in the Declaration on Fundamental Principles and Rights at Work must be read together with the ILO Convention No. 169. In particular, article 4(1) specifically directs States to adopt measures for labour safeguards, inter alia, in accordance with the free, prior and informed consent of indigenous peoples. Article 6 sets out the requirement of States to seek consultation on legislative and administrative measures and to establish the means for the free participation of Indigenous peoples at all levels of decision-making at least equivalent to that of others.

30. Article 7 provides for indigenous peoples’ right to development, and identifies improved working conditions, inter alia, as a priority in economic development plans. Article 15 sets out the right of indigenous peoples to use, manage and conserve their resources and article 16 prohibits forced relocation (requiring the free, prior and informed consent of Indigenous peoples to be obtained if relocation is to take place). These are particularly relevant for business enterprises operating in States that have ratified the ILO Convention 169. In addition to ILO Convention 169, business enterprises should be aware of other relevant regional human rights instruments, including the African Charter on Human and Peoples’ Rights<sup>20</sup> In this region, the African Commission on Human and Peoples’ Rights has expressed concern about the exclusion of indigenous peoples from decision-making about the treatment of their lands.”<sup>21</sup>

**Principle 13. The responsibility to respect human rights requires that business enterprises:**

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

**Principle 14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.**

31. In addressing the activities of business enterprises, it is important to note that such activities must be understood to include both “actions” and “omissions.” An example of omissions practiced by businesses is the non-recognition of Indigenous peoples’ human rights.

---

<sup>19</sup> Guiding Principles and relevant Declaration articles.

<sup>20</sup> A/HRC/AMRIP/2012/2, pages 4-10 and 15-20; Advice No. 2.

<sup>21</sup> Advice No. 2, para. 6.

32. Business enterprises should have a policy commitment regarding the human rights of Indigenous peoples which sets out due diligence and remediation processes to respect Indigenous peoples' rights. A Code of Ethics is one example of how this commitment can be implemented.

33. Corporate social responsibility policies that set out the ways in which business enterprises can avoid human rights violations are a positive step towards preventing human rights abuses. However, such policies should not be used to deflect legitimate public criticism, such as by the media. Furthermore, corporate social responsibility policies have been criticized as being paternalistic and inadequate in building and maintaining a social license to operate in communities. The solution to these inadequacies is to ensure that Indigenous peoples are represented in decision-making at all levels and through equity stakes in companies.<sup>22</sup>

**Principle 15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:**

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

34. Any policy commitment made in relation to human rights and Indigenous peoples should include how the business enterprise will seek to obtain the free, prior and informed consent of Indigenous peoples, and respect, protect and fulfill all the rights and obligations contained in the UN Declaration on the Rights of Indigenous Peoples. This has been the practice of some business enterprises, in terms of respecting Indigenous peoples' right to free, prior and informed consent, such as Sakhalin.<sup>23</sup> Others have been working towards adopting this standard.<sup>24</sup>

35. Further, "the UN Global Compact: Corporate Sustainability in the World Economy" is a positive model that could be adapted to the specific rights of indigenous peoples.<sup>25</sup> This Global Compact sets out 10 principles that contain a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. Another promising model is the 10 Sustainable Development Principles developed by the International Council on Mining and Metals (ICMM) which are used by ICMM's CEO-led Council of committed

<sup>22</sup> Institute for the Study of International Development, "Public-Private Partnerships for Sustainable Development: Towards a Framework for Resource Extraction Industries" (ISID, 2012), p. 14.

<sup>23</sup> Permanent Forum 10<sup>th</sup> Session, 18 May 2011. See also: Steven Heim, "Corporations Meeting the Challenges of Implementing Indigenous Peoples' Rights" Presentation at the International Funders for Indigenous Peoples, (Boston Common Asset Management, Inc., May 2012).

<sup>24</sup> Talisman Energy website: [http://www.talisman-energy.com/upload/important\\_links/11/11/pbce\\_2010.pdf](http://www.talisman-energy.com/upload/important_links/11/11/pbce_2010.pdf); See also: Rio Tinto, "Participation Agreements and Regional Standards: A guidance summary for Rio Tinto Iron Ore employees" (Rio Tinto, 2011); International Council on Mining and Metals, "Human rights in the mining and metal industry: Integrating human rights due diligence into corporate risk management processes" (March 2012); International Council on Mining and Metals, "Good Practice Guide: Indigenous Peoples and Mining" (2012); Foley Hoag, *Implementing a Corporate Free, Prior and Informed Consent Policy: Benefits and Challenges* (2010).

<sup>25</sup> UN Global Compact: Corporate Sustainability in the World Economy.

member companies that implement and measure their performance against 10 sustainable development principles.<sup>26</sup>

## 2. Operational principles

### *Policy commitment*

**Principle 16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:**

- (a) Is approved at the most senior level of the business enterprise;
- (b) Is informed by relevant internal and/or external expertise;
- (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
- (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
- (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

36. As noted above, while it is too early to assess effectiveness, practices and policy statements do exist that specifically address the human rights of Indigenous peoples that can be adapted by business enterprises. As referred to in 16(c) above, "other parties" must include Indigenous peoples, ensuring that the specific human rights expectations of Indigenous peoples are included. For example, Conoco-Philips is developing a policy for engagement with indigenous peoples that focuses on high level executives consulting with Indigenous experts on how to best meet the human rights of indigenous peoples, including the right to free, prior and informed consent.<sup>27</sup>

37. In some regions, business enterprises are seeking to reach a form of reconciliation with indigenous peoples. For example, in Australia, Reconciliation Australia has been established "to progress reconciliation between Aboriginal and Torres Strait Islander persons and other Australians." Reconciliation Action Plans (RAPs) are entered into between business enterprises and Indigenous peoples with the goal of improving relationships and generating greater respect and equality through sustainable employment and business opportunities.<sup>28</sup> Over 280 organizations participate, representing over 1.4 million employees, 45% of the total market capitalization of the Australian share market and 200,000 students.<sup>29</sup>

### *Human rights due diligence*

**Principle 17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human**

---

<sup>26</sup> International Council on Mining and Metals, "10 Principles." See also Maura Grogan, *Native American Lands and Natural Resources Development*, (New York: Revenue Watch Institute, 2011).

<sup>27</sup> Further, Talisman engaged in a dialogue with socially responsible investors, which has led to the establishment of a Corporate Social Responsibility practice group which may lead to a corporate policy on free, prior and informed consent. See the Foley-Hoag Report on Free, Prior and Informed Consent, available online at: [http://www.talisman-energy.com/responsibility/foley-hoag\\_report\\_on\\_fpic.html](http://www.talisman-energy.com/responsibility/foley-hoag_report_on_fpic.html).

<sup>28</sup> Reconciliation Australia, "Reconciliation Action Plan: Impact Measurement Report 2011.

<sup>29</sup> *Ibid* at 4.

**rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:**

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

38. In accordance with article 32 of the Declaration on the Rights of Indigenous Peoples, once Indigenous peoples identify impacts or potential impacts, it is incumbent upon business enterprises to exercise due diligence related to preventing and mitigating against these impacts. As stated above, where impacts or potential impacts so warrant, States may have an obligation to refuse to issue a licence or permit to respect the rights of Indigenous peoples.<sup>30</sup> States should play this role in relation to businesses operating in their jurisdictions as well as businesses registered in their State but operating in foreign countries.<sup>31</sup>

**Principle 18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:**

- (a) Draw on internal and/or independent external human rights expertise;
- (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

39. The commentary states “in this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization (...).”

40. As noted above, this must include specific attention to the unique internationally recognized human rights of Indigenous peoples. Further, any adverse human rights impacts must be assessed and addressed prior to development, in accordance with the right to free, prior and informed consent as set out in article 32 of the Declaration.

**Principle 19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.**

- (a) Effective integration requires that:
  - (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
  - (ii) Internal decision-making, budget allocations and oversight processes enable

<sup>30</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

<sup>31</sup> CERD/C/CAN/CO/19-20, para. 14.

effective responses to such impacts.

- (b) Appropriate action will vary according to:
  - (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
  - (ii) The extent of its leverage in addressing the adverse impact.

41. In the Commentary for this Guiding Principle it states that:

“Potential impacts should be prevented or mitigated...while actual impacts ...should be a subject for remediation (Principle 22).

Where a business enterprise causes or may cause an adverse...impact, it should cease or prevent the impact.”

42. This is especially the case for businesses affecting indigenous peoples’ lands, territories and resources. As noted above, another example of this type of integration is the establishment of Reconciliation Australia, which has instituted employment equity measures – there is a requirement to hire a minimum of 2.5% of Indigenous individuals at all levels, including at the executive level. The result is fostering an environment where internal decision-making, budget allocations and oversight processes are more effective, given that Indigenous individuals have a greater capacity to determine the impacts and respond effectively.

**Principle 20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:**

- (a) Be based on appropriate qualitative and quantitative indicators;
- (b) Draw on feedback from both internal and external sources, including affected stakeholders.

43. The Commentary states that, “business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.”

44. As noted above, such efforts must be specifically tailored to the needs and rights of Indigenous peoples.

**Principle 21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:**

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

45. Such communication measures should include at least publicly available annual reporting and voluntary assessment measures. While there are examples of such measures in relation to economic development and hiring practices, human rights compliance models are not frequently developed. States and indigenous peoples should encourage business enterprises to establish practices specific to human rights obligations and consider issuing human rights impact reports in indigenous languages, in accordance with article 13(2) of the UN Declaration on the Rights of Indigenous Peoples.

#### *Remediation*

**Principle 22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.**

46. Remediation concerning Indigenous peoples and their lands, territories and resources should be informed by the framework set out in the Declaration on the Rights of Indigenous Peoples. In particular, article 27 requires States to implement "a fair, independent, impartial, open and transparent [adjudication] process" in which Indigenous peoples have a right to participate. Article 28 states that Indigenous peoples have a right to redress, including restitution or just, fair and equitable compensation where restitution is not possible. This article also provides for compensation equivalent to the lands, territories and resources in question or other forms of appropriate redress. As noted above, article 32 provides for the right to free, prior and informed consent of Indigenous peoples. Article 40 provides the right of Indigenous peoples to access conflict resolutions procedures to resolve conflicts and disputes with States or other parties, which include business enterprises where their rights are infringed upon. Such procedures must take into account the customs, traditions, rules and legal systems of Indigenous peoples concerned.

#### *Issues of context*

**Principle 23. In all contexts, business enterprises should:**

(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;

(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;

(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

47. The Commentary to this Guiding Principle states that, "All business enterprises have the same responsibility to respect human rights wherever they operate." The collective and individual human rights of indigenous peoples must be respected, in accordance with articles 1, 27, 28, 32 and 40 of the UN Declaration on the Rights of Indigenous Peoples and article 3 of the ILO Convention 169. Customary laws and institutions of Indigenous peoples must be given due regard in accordance with articles 5, 8, 9, 11, 12, 13 and 15, inter alia as well as articles 3, 8(2) 9(2) and 10(1) of the ILO Convention 169.

**Principle 24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.**

48. Given the historic record around the world of dispossession of lands, territories and resources of Indigenous peoples and their related exclusion and marginalization, the actual and potential adverse human rights impacts of indigenous peoples should be prioritized by business enterprises. In this regard, reference should be made to preambular paragraphs 6, 7, 8, 10, 11 and 16 and articles 20 and 25 of the Declaration on the Rights of Indigenous Peoples.

## **C. Access to Remedy**

### **1. Foundational principle**

**Principle 25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.**

49. As noted under Guiding Principle 22, consideration of the appropriate access to remedy in relation to Indigenous peoples calls for implementation of articles 27, 28, 32 and 40 of the Declaration on the Rights of Indigenous Peoples.<sup>32</sup> One positive example is the ILO Conventions' monitoring process where complaints can be brought before a Committee of Experts. However, it only applies to States that have ratified the ILO Conventions.

### **2. Operational principles**

#### *State-based judicial mechanisms*

**Principle 26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.**

50. While the commentary notes that "effective judicial mechanisms are at the core of ensuring access to remedy," this is an area where Indigenous peoples can be most affected, for example, by legal barriers. The commentary highlights that "Indigenous peoples are excluded from the same level of legal protection of their human rights that applies to the wider population." As to "practical and procedural barriers," Indigenous peoples "experience difficulty in securing legal representation due to a lack of resources." Whether through active discrimination or systemic barriers, indigenous peoples often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms.

51. Particular attention should be given to the rights and specific needs of Indigenous peoples at each stage of the remedial process – access, procedures and outcome. Where formal Indigenous legal systems exist, states can work in partnership to ensure that

---

<sup>32</sup> See also CERD/C/CAN/CO/19-20, 9 March 2012.



business-related human rights abuses are governed under the jurisdiction of Indigenous peoples' legal systems.

52. Another avenue of recourse for Indigenous peoples is the use of human rights tribunals where they exist nationally or regionally. Where regional human rights mechanisms are available, States should accede to their jurisdiction.

*State-based non-judicial grievance mechanisms*

**Principle 27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.**

*Non-State based grievance mechanisms*

**Principle 28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.**

**Principle 29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.**

53. The mechanisms:

“...may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.”<sup>33</sup>

54. The Commentary notes the important role to be played by national human rights institutions in this regard. It emphasizes the need for states to address imbalances between the parties and any barriers to access that may be faced by Indigenous peoples.

55. This allows consideration of traditional mechanisms like justice circles and restorative justice models where indigenous elders and other traditional knowledge keepers may be helpful.

56. Operational-level grievance mechanisms should engage all affected stakeholders in dialogue to ensure their design and performance will meet their needs. Dialogue with stakeholders will also ensure that operational-level grievance mechanisms will be used in practice, foster trust and build a shared interest in ensuring its success. Such mechanisms should be developed in conformity with articles 27, 28, 32 and 40 of the Declaration. It is important for States to recognize and support the roles of Indigenous organizations and non-governmental organizations that work with Indigenous peoples to facilitate their effective participation in such mechanisms.

57. In relation to Guiding Principle 28, non-judicial traditional mechanisms may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes.

58. In relation to the Commentary under Guiding Principle 29, in some instances, operational-level mechanisms that are accessible directly to Indigenous individuals and

<sup>33</sup> A/HRC/17/31, Commentary under Guiding Principle 27, page 24.

communities may be preferable, especially when such mechanisms are culturally appropriate and therefore, more effective in practice. This should be consistent with the criteria set out under Principle 31.

**Principle 30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.**

59. Codes of conduct, performance standards, global framework agreements, whether or not they are collaborative initiatives, must take into consideration relevant Indigenous peoples' cultural or customary practices and work ethics.

*Effectiveness criteria for non-judicial grievance mechanisms*

**Principle 31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:**

(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 recognized 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 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.

60. There are three sub-paragraphs of particular relevance to indigenous peoples above. First, in relation to subparagraph (b), barriers to access (including a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal) identified in the Commentary are all relevant to Indigenous peoples. Second, subparagraph (d) is also of particular relevance. The Commentary states that affected stakeholders "...frequently have much less access to information and expert resources, and often lack the financial resources to pay for them." Unique measures should be considered to reduce or eliminate such barriers to ensure equitability. Otherwise, Indigenous peoples will be excluded from benefits.

61. Regarding sub-paragraph (f), it is noted that grievances, regardless of whether they are framed as human rights violations, "where outcomes have implications for human

rights, care should be taken to ensure that they are in line with internationally recognized human rights,” including the Declaration on the Rights of Indigenous Peoples, ILO Convention 169, and relevant regional instruments. It should be noted that all effectiveness criteria can be met by traditional mechanisms and at an operational level, engagement and dialogue will provide best solutions, as applicable to (a) to (h) above.

62. An underlying theme of permanent sovereignty of Indigenous peoples over natural resources, the Declaration on the Rights of Indigenous Peoples and the Guiding Principles on Business and Human Rights is Indigenous peoples’ global concerns for engaging with extractive industries in a manner that supports sustainable development, where indigenous peoples’ rights related to self-determination and lands, territories and resources are upheld in a manner that also respects the environmental responsibilities that Indigenous peoples highly value.

#### **IV. Conclusion**

**63. In all aspects of implementation of the “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework,” it is clear that the full inclusion of Indigenous peoples at all stages is the best solution. This analysis seeks to set out how such inclusion can be advanced to protect and respect the rights of Indigenous peoples and remedy human rights violations that have or do occur in relation to the right of Indigenous peoples to participate in decision making in the context of extractive industries.**

---