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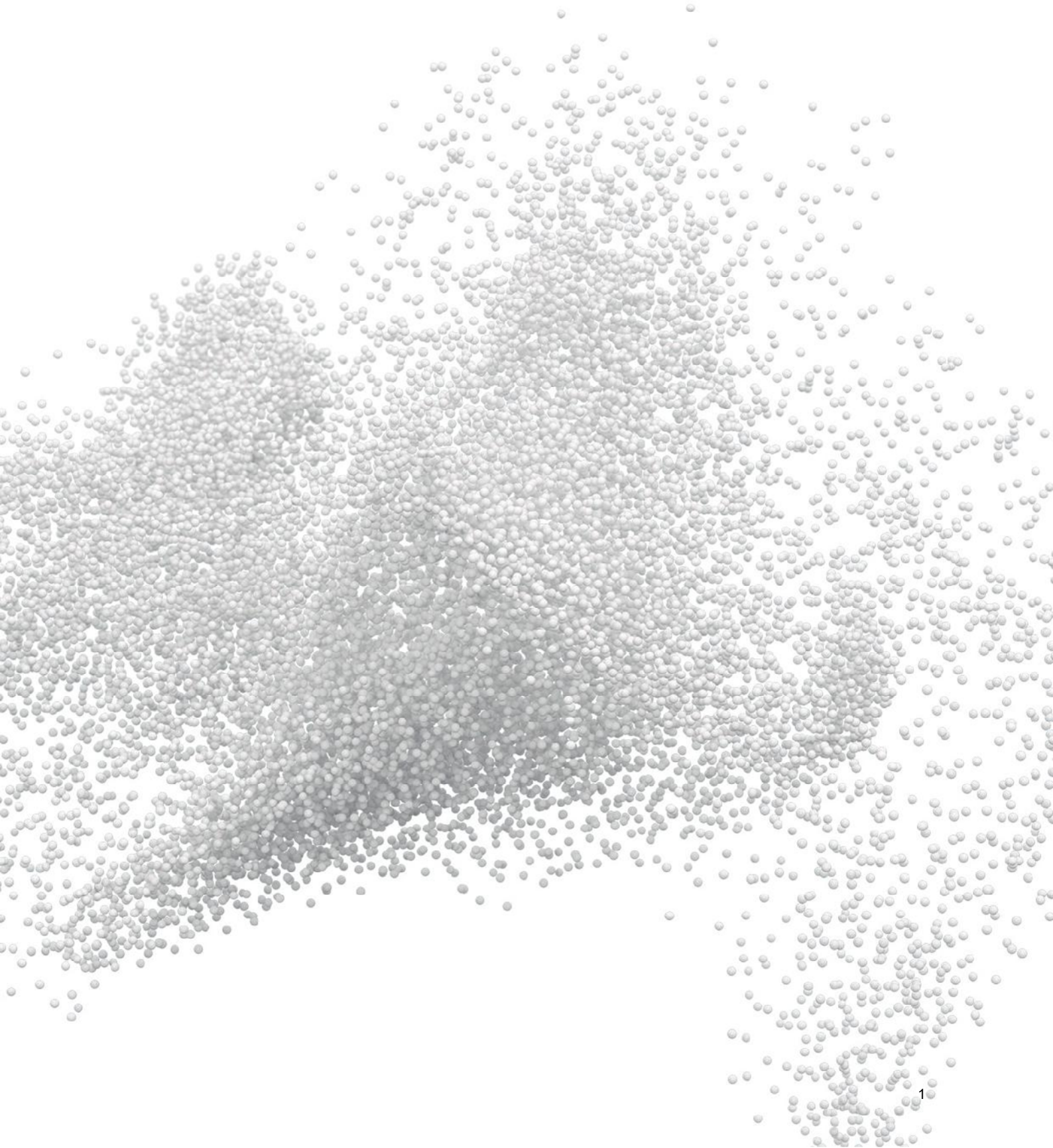
Human Rights Defenders' Toolbox



Simmons & Simmons has produced a highly innovative and unique Human Rights Defenders Toolbox for Peace Brigades International. The Toolbox is comprised of a range of fact sheets on specific legal topics which will be disseminated to human rights defenders around the world to assist with their imperative work. The Human Rights Defenders Toolbox is the first centralised online resource for rural communities and lawyers and focusses on the obligations of companies to respect human rights, as set out in the United Nations Guiding Principles on Business and Human Rights (UNGPs).

For more information contact:

- Susi Bascon, UK Director, Peace Brigades International
- Victoria Channing, Pro Bono Manager, Simmons & Simmons LLP

Or visit the following website: Human Rights Defenders' Toolbox

The Toolbox covers the following topics:

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Human Rights Defenders' Fact Sheet

United Nations Guiding Principles on Business and Human Rights

Human Rights Policy Statements

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1. Corporate Responsibility to Respect Human Rights

1.1 The United Nations Guiding Principles on Business and Human Rights ("**UNGPs**") is global, non-legally-binding standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. [1]

1.2 The corporate responsibility to respect human rights, as set out in the second pillar[2] of the UNGPs, is a standard of conduct for business enterprises. The UNGPs make clear that business enterprises should have in place

(A) a Human Rights Policy Statement demonstrating commitment to respect human rights ("**Statement**");

(B) a human rights due diligence procedure; and

(C) processes to enable the remediation of any adverse human rights impacts that the business enterprise causes or to which it contributes.

1.3 This Fact Sheet focuses on the requirement for a Human Rights Policy Statement. Please refer to separate Fact Sheets for information on human rights due diligence, grievance mechanisms and remediation, and leverage.

2. Human Rights Policy Statement

2.1 Guiding Principle 16 of the UNGPs states that business enterprises should adopt a Statement that sets out their human rights responsibilities.

2.2 The Statement should:

(A) be approved at the most senior level of the business enterprise;

(B) be informed by relevant internal and/or external expertise;

(C) stipulate the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;

[1] For further information on the UNGPs see: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[2] The pillars are sometimes referred to as "chapters".

(D) be publicly-available, and communicated internally and externally to all personnel, business partners and other relevant parties; and

(E) be reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

2.3 The Statement may take any form, provided that it sets out the enterprise's responsibilities, commitments and expectations.

2.4 The Statement should be communicated to: organisations with which the enterprise has contractual relationships; staff and others directly linked to the enterprise's operations (which may include, for example, investors or other potentially affected stakeholders). External communication can be effected by posting the Statement on the internet, through negotiations, contractual terms, training, written guidance, translation of documents and oral communication to communities that may be negatively affected.

2.5 Importantly, the Statement should be embedded from the top of the business enterprise through all of its functions, and it should identify who has operational responsibility, and ultimate accountability for, the Statement's implementation.

2.6 Accordingly, the Statement should be reflected in the procedures and policies that govern the enterprise's wider business activities and relationships. This may involve, for example, financial and performance incentives for personnel and procurement practices where human rights are at stake. The Statement should also be supported by training.

3. Evaluating the Statement

3.1 Human rights defenders ("**HRDs**") can assess the strength of a Statement by taking the following steps:

(A) checking that the business enterprise has made its Statement publicly-available and, if this is not the case, write to the business enterprise to request a copy of the Statement.

(B) checking whether the Statement identifies which board member and department is responsible for human rights and, if not, write to the business enterprise to request this information.

(C) contacting business partners and other parties directly linked to the operation of the business enterprise to establish whether they are aware of the Statement.

(D) checking other documents published by the business enterprise, including corporate social responsibility reports, and checking whether human rights clauses are incorporated into contracts to establish whether the Statement is reflected in the policies and procedures of the business enterprise.

(E) checking whether the Statement refers to internationally-recognised human rights standards that are relevant to the circumstances in which the business enterprise operates. For example, consider whether the ILO Convention 169 on Indigenous and Tribal Peoples[3], OECD Guidance for Multinational Enterprises and/or the Equator Principles should be referred to; and

(F) enquiring as to whether the business enterprise is using the UNGP reporting framework to assess compliance with the UNGPs, or whether it is using alternative indicators for this purpose.

[3] For further information [on ILO Convention 169], see Fact Sheet on Free, Prior and Informed Consent.

3.2 Asking questions regarding the Statement can also be a useful first step towards raising awareness within business enterprise and to encourage it to improve its Statement. When taking these practical steps, HRDs may also decide to inform UN Special Procedures, the British Embassy and/or the Business and Human Rights Resource Centre. This will help raise awareness of the deficiencies in the Statement published by the business enterprise.

3.3 If necessary, HRDs should engage the UK Government or British Embassy to contact the business enterprise on its behalf.

4. Encouraging Business Enterprises to Produce and Develop Statements

4.1 HRDs may have already approached the business enterprise while assessing the strength of its Statement. In addition to asking questions about the Statement, it may be helpful for HRDs to communicate to the business enterprise the benefits of publishing a Statement and/or the legal requirement to do so.[4]

4.2 Are there any legal requirements for enterprises to produce a Statement and to report on human rights?

4.3 The UNGPs are non-binding on enterprises, but they have been increasingly embedded into the national laws of many states. HRDs should consider whether national law requires business enterprises to produce a statement regarding human rights and whether the policy statement of the enterprise meets national requirements.

4.4 There may be legal sanctions for failing to produce a public report. For example, Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups[5] requires certain large EU companies to report publicly on their human rights policies and due diligence process. The Modern Slavery Act 2015, which applies to certain commercial organisations that carry on business in the United Kingdom[6], also requires certain businesses to produce slavery and human trafficking statements setting out the steps that they have taken to ensure that there is no modern slavery in their own businesses and supply chains.

4.5 Are enterprises aware of the positive impacts of respecting human rights and the importance of a Statement in achieving this?

4.6 There are many benefits associated with good human rights practice. These include:

(A) attracting investment;

(B) increasing brand value;

(C) attracting/maintaining customers and business partners;

(D) improving relations with state entities and pressure groups; and

(E) improving employee retention.

4.7 In addition, the development of a Statement can:

(A) provide a basis for embedding the responsibility to respect human rights through all business functions;

[4] Peace Brigades International can also help to encourage business enterprises to produce and develop Statements.
[5] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0095&from=EN. See also paragraph 5.2 of Fact Sheet on the National Action Plan for the United Kingdom.
[6] See paragraph 2.1 of Fact Sheet on the National Action Plan for the United Kingdom.

(B) respond to relevant stakeholder expectations;

(C) identify policy gaps and initiate a process that alerts the business to new areas of human rights risks;

(D) elaborate on the business' commitment to support human rights;

(E) build increased trust with external stakeholders and kick-start the process of understanding and addressing their concerns;

(F) foster development of in-house learning, management capacity and leadership on human rights abuses; and

(G) demonstrate good business practice.

4.8 The UN Global Compact Guide to how to develop a Human Rights Policy[7] expands upon the benefits to companies associated with respecting human rights and creating a Statement.

5. What Happens When a Business Enterprise Fails to Adhere to a Published Statement or Equivalent?

5.1 The publication of a Statement may create a legitimate expectation that a business enterprise will put in place certain safeguards or comply with certain guidelines. There is a possibility that a business, which has published a policy in good faith and fails subsequently to live up to expectations, may face an increased litigation risk.[8] Such businesses are also likely to experience adverse publicity.

[7] https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/HR_Policy_Guide_2nd_Edition.pdf
[8] Legal advice in the relevant jurisdiction should be sought in such situations.

Human Rights Defenders' Fact Sheet

United Nations Guiding Principles on Business and Human Rights

Human Rights Due Diligence

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1. Corporate Responsibility to Respect Human Rights

1.1 The United Nations Guiding Principles on Business and Human Rights ("**UNGPs**")[1] is a global, non-legally binding standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

1.2 The corporate responsibility to respect human rights, as set out in the second pillar of the UNGPs, is a standard of conduct for businesses. The UNGPs make clear that business enterprises should have in place:

(A) a Human Rights Policy Statement demonstrating commitment to respect human rights;

(B) a human rights due diligence procedure ("**HRDD**"); and

(A) processes to enable the remediation of any adverse human rights impacts that the business enterprise causes or to which it contributes.

1.3 This Fact Sheet focuses on the requirement for business entities to carry out HRDD.[2] Please refer to separate Fact Sheets for information on human rights policy statements, grievance mechanisms and remediation, and leverage.

2. Human Rights Due Diligence

2.1 Guiding Principle 17 of the UNGPs states that businesses should carry out HRDD in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts. This should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. The key parameters are set out in Guiding Principle 17 and are expanded in Guiding Principles 18 to 21.

[1] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[2] The scope of this Fact Sheet does not extend to state engagement regarding HRDD.

(A) **Guiding Principle 17: Key parameters**

(1) HRDD should cover adverse human rights impacts that the business 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.

(2) The approach adopted will vary in complexity depending on the size of the business, the risk of severe human rights impacts, and the nature and context of its operations.

(3) HRDD should be ongoing.

(B) **Guiding Principle 18: Identification of risks**

(1) Any actual or potential adverse human rights impacts with which the business may be involved either through its own activities or as a result of its business relationships should be identified and assessed.

(2) An assessment should be undertaken at regular intervals, for example, prior to engaging in a new activity, forming a new relationship, making major decisions or changing operations.

(3) HRDD should be carried out periodically in relation to ongoing activities or relationships.

(4) Appropriate expertise should be used to identify the potential risks (this could be an internal expert, external consultant or an independent expert).

(5) Meaningful consultation should be carried out 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.

(C) **Guiding Principle 19: Integrate findings internally and take action**

(1) Findings from impact assessments should be implemented across functions and processes. Businesses should work with their main suppliers and non-governmental organisations, and learn from each other.

(2) Businesses should ensure that responsibility for addressing impacts is assigned to the appropriate level and function, and that internal decision-making, budgets and oversight enable effective integration.

(3) Appropriate action should be taken to mitigate any adverse impact on human rights. This may include using leverage, where appropriate.[3]

(D) **Guiding Principle 20: Tracking effectiveness and obtaining feedback**

Businesses should track the effectiveness of their responses to adverse human rights impacts that have been caused (or contributed to) by their operations.

In doing so, they should:

(1) use qualitative and quantitative indicators. For example, businesses should not only record how many grievances have been logged but should also

[3] For further information, see Fact Sheet on Leverage.

consider how grievances have been dealt with and whether there has been a change in process to prevent further grievances; and

(2) obtain feedback from internal and external sources, including stakeholders.

(E) **Guiding Principle 21: Reporting on findings**

(1) Findings should be externally communicated, for example, by way of online forums, in meetings, through consultations with stakeholders, and in annual reports and corporate social responsibility reports.

(2) Where operations pose risks of severe adverse impacts, businesses should report formally on how they address them. In doing so, they should:

(a) cover specific topics and give explanations as to how impacts have been identified and dealt with; and

(b) consider independent verification to strengthen the content and credibility of any reports produced.

(3) Any communications must be accessible, sufficient to evaluate the business' responses to the impact, and must not pose risks to affected stakeholders.

3. Reporting on human rights performance

3.1 Effective reporting on human rights performance by businesses is crucial, as it allows risks to be identified and progress to be monitored. The UNGP Reporting Framework[4] is a comprehensive guide that assists business enterprises with reporting on human rights issues, as required under the UNGPs.

3.2 The Reporting Framework is comprised of questions that enable business enterprises to report meaningfully on their human rights performance, regardless of size or how far they have progressed in implementing their responsibility to respect human rights. These questions are divided into three parts:

(A) Part A focuses on the business enterprise's commitment to, and governance of, human rights risk management.

(B) Part B enables the business enterprise to narrow the range of human rights issues on which it will focus, being those issues that are "salient" within its activities and business relationships.

(C) Part C focuses on the effective management of the salient human rights issues identified.

Identifying salient risks

3.3 Salient human rights issues are those that stand out because they are at risk of the most severe negative impact through the enterprise's activities or business relationships. The focus is on whether there is a risk to people, not to the business.

3.4 The emphasis on salience focuses on those impacts that are:

(A) **Most severe:** most serious, widespread and hard to rectify.

[4] https://www.ungpreporting.org/resources/the-ungp-reporting-framework-and-integrated-reporting/

(B) **Potential**: have some likelihood of occurring in the future.

(C) **Negative**: focus on the avoidance of harm to human rights.

(D) **Impacts on human rights**: focus on risk to people.

3.5 Identifying salient human rights issues is critical for any business enterprise: it is the first stage of HRDD, which then enables a business enterprise to address the issues proactively.[5]

Materiality assessments and human rights reporting

3.6 Many businesses carry out materiality assessments to identify whether risks should be addressed. Materiality depends on the choice of a particular audience (such as shareholders) or a goal (such as profit-making) for which the level of importance is then judged. By contrast, salient human rights issues are not defined by reference to any one audience or goal; the focus is on the human rights risk.

3.7 Human rights defenders ("**HRDs**") therefore need to be alive to the fact that many business enterprises' existing materiality processes fail to adequately reflect human rights issues and that a shift in approach may be required in order for businesses to comply with their responsibilities under the UNGPs.

4. Methods of carrying out HRDD

4.1 There is no standard method of carrying out HRDD. However, businesses must identify and address any human rights impacts across their operations and products, and throughout their supply chains. This should include assessments of internal procedures and systems, and external engagement with groups potentially affected by the operations of the businesses.

4.2 Most businesses take a commercial, risk-based approach to human rights. However, this may not be adequate to understand the true risks faced by individuals who might be adversely affected by its operations. Businesses are therefore encouraged to undertake separate risk assessments from a human rights perspective, and to take steps to integrate the findings of their HRDD processes into their policies and procedures.

4.3 HRDD may be incorporated by one or more of the following tools:

(A) **Environmental and Social Impact Assessments** ("**ESIAs**"). These assessments are designed to predict and assess the potential environmental and social impacts of a proposed project, to evaluate alternatives and to design appropriate mitigation, management and monitoring measures. The International Petroleum Industry Environmental Conservation Association has produced sector specific guidance for expanding ESIAs to include HRDD.[6]

(B) **Human Rights Impact Assessments** ("**HRIAs**"): HRIAs focus specifically on the potential human rights impact of a project, agreement, relationship or policy and are designed to complement a more general impact assessment. Guides to HRIAs

[5] For further information, see http://www.ungpreporting.org/key-concepts/salient-human-rights-issues/
[6] http://www.ipieca.org/resources/good-practice/human-rights-due-diligence-process-a-practical-guide-to-implementation-for-oil-and-gas-companies/

have been produced by the International Finance Corporation and the Danish Institute for Human Rights.[7]

(C) **Human Rights Audit ("HR Audit")**: This includes a more general review of the business' supply chain and typically includes mapping out the business' supply chain and prioritising certain entities in that supply chain by: (i) identifying where there are higher risks of adverse human rights impacts; and (ii) focusing on Tier 1 suppliers (i.e. those entities the business can influence).

(D) **Human Rights Policy:** Under Guiding Principle 16 of the UNGPs, businesses should develop a statement of policy on human rights.[8] This should contain reference to any HRDD carried out by the business and how the business' policy is to be embedded throughout the business.

5. Engagement with stakeholders

5.1 There is a need for stakeholder engagement at different stages of the HRDD process in order to effectively assess and mitigate human rights impacts:

(A) Planning and scoping: identification of relevant stakeholders.

(B) Data collection and baseline development: interviews with stakeholders.

(C) Analysing impact: stakeholder perspectives used to assess severity of impacts.

(D) Impact mitigation and management: stakeholder involvement in design and implementation of actions that prevent, mitigate and remediate adverse impacts.

(E) Reporting and evaluation: information shared with stakeholders.[9]

5.2 Businesses need to understand their actual or potential impacts on affected groups. Engagement with both internal and external stakeholders throughout the process is important to effectively identify these impacts, which often may not be immediately obvious. There is no standardised approach, as it will vary according to an entity's impact, size, sector and business relationships.[10]

5.3 Some countries have passed legislation that requires businesses to consult certain stakeholders when commencing a new project or carrying out operations.[11] Furthermore, international organisations and industry bodies have issued guidance to encourage businesses to engage with stakeholders.[12]

5.4 For example, the Organisation for Economic Co-operation and Development encourages stakeholder engagement as responsible business conduct and best practice.[13] The guidance notes to Guiding Principle 18 states that businesses should seek to understand the concerns of potentially affected stakeholders by consulting them directly, taking into account language and other barriers to effective engagement. Where consultation is not

[7] https://www.ifc.org/wps/wcm/connect/169808004885530ead84ff6a6515bb18/HRIA_presentation_May15_2007.pdf?MOD=AJPERES and http://www.humanrights.dk/files/media/dokumenter/tools/hria_methodology_toolbox_description_2015.pdf
[8] See Fact Sheet on Human Rights Policy Statements.
[9] https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/stakeholder_engagement/stakeholder_engagement_final_jan2016.pdf
[10] https://www.globalcompact.de/wAssets/docs/Menschenrechte/Publikationen/stakeholder_engagement_in_humanrights_due_diligence.pdf
[11] Legal advice should be sought in the relevant jurisdiction to understand whether such requirements exist (and the scope of such requirements).
[12] See the UN's interpretative guide on the corporate responsibility to respect human rights" (http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) and the OECD Due Diligence Guidance for Responsible Business Conduct (https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf).
[13] https://mneguidelines.oecd.org/mneguidelines_rbcmatters.pdf

possible, businesses should consider reasonable alternatives, such as credible independent expert resources including HRDs.[14]

6. HRD/Community-led HRIA

6.1 HRDs or civil society organisations may carry out a HRIA in order to identify the rights that have been or may be affected by an entity's business activities. While *ex ante* HRIAs (those conducted prior to the commencement of a project) offer more opportunities to prevent abuses before they occur, often the assessments are *ex post* (conducted after a project has commenced), when information may be more accessible and problems more apparent.

6.2 *Ex post* HRIAs can be less effective as the recommendations relate to operations aspects that should have been incorporated prior to the commencement of the project. Often, relationships and communications between stakeholders will have become strained once the impact or the risks of the project has materialised.

6.3 HRIAs carried out by HRDs for litigation purposes should be avoided, as it risks entrenching conflict between stakeholders. It can also lead to divisions between the community and the business and may jeopardise the potential for future successful resolution of issues.

6.4 To mitigate this risk, it is important to engage communities in discussions with businesses on an equal footing, to seek balanced negotiations and to use the results of the HRIAs to inform human rights campaigning, assess the impact of the business activities and promote longer-term objectives (such as implementing monitoring mechanisms to prevent potential future abuses).[15]

6.5 HRDs should assess the personal risk of carrying out any HRIAs before doing so, as undertaking such activities may result in HRDs receiving threats or being otherwise targeted by those with an interest in seeing a project progress.

7. What are the consequences when a business enterprise fails to conduct HRDD?

The publication of HRDD reports may create a legitimate expectation that a business will remedy or put in place certain safeguards in respect of the risks identified. There is a possibility that a business that has failed to address those risks may face increased litigation risk. Such businesses are also likely to experience adverse publicity.

8. Practical steps for HRDs

8.1 There are several steps that can be taken by HRDs as follows:

(A) Contact the business and inquire who is responsible for implementing HRDD, to inquire about the business's approach to HRDD.

(B) Contact the business and inquire what indicators it is using to assess compliance with HRDD.

(C) If the impact assessments are publicly available, check whether the concerns of potentially impacted rights holders are included and addressed.

[14] For further information, see Fact Sheet on Free Prior and Informed Consent.
[15] See the following for further commentary on this subject: http://ccsi.columbia.edu/files/2014/12/Human-Rights-Impact-Assessments-A-Collaborative-Reflection.pdf.

(D) If the impact assessment is not publicly available, request this directly from the business enterprise or contact the relevant regulatory agencies or inspectorates.

(E) If there are any mitigating or preventative actions planned, verify whether these have been taken.

(F) Engage the relevant government or embassy to contact the business enterprise on the HRDs' behalf if necessary, or request that the embassy facilitate a safe forum for HRDs to meet with businesses to address salient human rights risks.[16]

(G) When taking these practical steps, HRDs may also decide to copy in, as appropriate, UN Special Procedures,[17] Inter-American Commission on Human Rights Thematic Rapporteurships and Units,[18] African Commission on Human and Peoples' Rights Special Mechanisms,[19] or the Business and Human Rights Resource Centre,[20] to help raise awareness of any concerns raised or request ongoing monitoring and support.

[16] This is in line with the UK Government's commitments under the UK National Action Plan. See separate fact sheet regarding the UK National Action Plan
[17] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
[18] The Inter-American Commission on Human Rights Thematic Rapporteurships website can be found at http://www.oas.org/en/iachr/mandate/rapporteurships.asp
[19] The African Commission on Human and Peoples' Rights website can be found at http://www.achpr.org/mechanisms/
[20] The Business and Human Rights resource centre can be found online at https://www.business-humanrights.org/

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Human Rights Defenders' Fact Sheet

United Nations Guiding Principles on Business and Human Rights

Grievance Mechanisms and Remediation

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1.2 The corporate responsibility to respect human rights, as set out in the second pillar of the UNGPs, is a standard of conduct for business enterprises. The UNGPs make clear that businesses should have in place:

(A) a statement of policy demonstrating commitment to respect human rights;

(B) a human rights due diligence procedure ("**HRDD**"); and

(C) processes to enable the remediation of any adverse human rights impacts that the business enterprise causes or to which it contributes.

1.3 This Fact Sheet focuses on the requirement for grievance mechanisms and remediation. Please refer to separate Fact Sheets for information on human rights policy statements, human rights due diligence and leverage.

2. Requirement for Remediation

2.1 Guiding Principle 22 of the UNGPs states that where business enterprises identify that they have caused or contributed to adverse impacts on human rights, they should provide for or cooperate in their remediation through "legitimate processes".[2] One way of doing this is by implementing an operational-level grievance mechanism for those potentially impacted (discussed further below).

2.2 More specifically:

(A) Where a business enterprise identifies (whether through its HRDD process or otherwise) a situation where it causes or contributes to an adverse human rights impact that it has not foreseen or been able to prevent, its responsibility to respect

[1] See: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[2] See separate Fact Sheet regarding HRDD for further information on identification of adverse impacts.

human rights requires active engagement in remediation, by itself or in cooperation with other actors.[3]

(B) Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.[4]

3. Grievance Mechanisms

3.1 "Grievance" is defined widely in the context of the UNGPs. It is considered to be a perceived injustice, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.[5]

3.2 Guiding Principle 29 requires enterprises to establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. The aim of this is to make it possible for grievances to be addressed early and remediated directly. Such mechanisms support the identification of adverse human rights impacts as a part of an enterprise's ongoing HRDD and also complement wider stakeholder engagement.

3.3 Guiding Principle 31 sets out the core criteria of an effective grievance mechanism:[6]

(A) Legitimate: having a clear, transparent and sufficiently independent governance structure to ensure that no party to a grievance process can interfere with its fair conduct, enabling trust from the stakeholder groups and ensuring accountability for the fair conduct of grievance processes.

(B) Accessible: being publicised to those who may wish to access it and providing adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal.

(C) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcomes it can (and cannot) offer, as well as a means of monitoring implementation of any outcome.

(D) Equitable: ensuring 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.

[3] See commentary to GP22. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[4] See commentary to GP22. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[5] See commentary to GP25. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[6] See commentary to GP31. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

4. Implementing a UNGP-Compliant Grievance Mechanism

4.1 The vast majority of existing grievance mechanisms are designed and implemented by businesses themselves. This is a clear conflict of interest and often means that grievance mechanisms either provide no remedies, or provide remedies that are inappropriate to the culture or situation.

4.2 Guiding Principle 31 requires that operational level mechanisms should be based on engagement and dialogue with those stakeholder groups for whose use they are intended. This requires the business to consult stakeholder groups on the design and performance of the grievance mechanism, and to focus on dialogue to address grievances. The need to ensure that businesses have grievance mechanisms in place for non-contractual parties affected by a project is echoed in Principle 9 of the UN Principles for Responsible Contracts.[7]

4.3 In light of this, businesses should consider implementing a Community Driven Operational Rights Grievance Mechanism ("**Community-Driven OGM**"). This might include:[8]

(A) community led impact assessments;

(B) community designed impact and benefit agreements (formal contracts between business entities and communities that set out how the community will benefit from the project); and

(C) community-driven Free Prior and Informed Consent.[9]

4.4 Earth Rights International is developing materials that can assist the design and implementation of Community-Driven OGMs.[10]

4.5 There are several steps an enterprise can take to implement a UNGP-compliant grievance mechanism, such as:

(A) hire a project manager to take charge of the design, development and running of the grievance mechanism;

(B) identify any existing grievances/conflicts and consult with external stakeholders when designing the grievance mechanism;

(C) carry out internal consultations with selected individuals to create initial buy-in within the company;

(D) use an electronic database to record and monitor those grievances received, processed and the decisions made in order to analyse any trends and to identify areas for improvement in operations;

(E) train staff in relation to the grievance mechanism procedure and any software used as part of the procedure;

(F) pilot the grievance mechanism system for several months and then engage in further consultation with (i) staff (at operational and managerial levels) and (ii) external stakeholders to identify areas for improvement;

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[7] See http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf

[8] See Kaufman and McDonnell, "Community-Driven Operational Grievance Mechanisms" Business and Human Rights Journal, 1 (2015), pp. 127-132

[9] See separate Fact Sheet on Free Prior and Informed Consent

[10] See https://www.earthrights.org/legal/community-driven-ogms

(G) hold workshops for contractors; and

(H) publicise the grievance procedure to local communities in a culturally appropriate manner (for example, orally in the local language at a local meeting if dealing with an illiterate community).

5. Practical Steps for Human Rights Defenders ("HRDs")

5.1 There are many steps that can be taken by HRDs in the context of ensuring that a business has an effective grievance mechanism in place:

(A) Review the business' grievance mechanisms:

(1) If this is publicly available, check whether this meets the effectiveness criteria.

(2) If this is not publicly available, request this directly from the business enterprise.

(B) Assess the strength of the grievance mechanism by considering whether it meets the criteria set out at Guiding Principle 31.

(C) Engage in a consultation with the affected rights holders to evaluate whether the grievance mechanisms have been used and whether they are effective.

(D) Engage in a consultation between the affected rights holders and the business to further develop and review appropriate grievance mechanisms.

(E) Engage the UK Government or embassy to contact the business on behalf of the HRD if necessary.

5.2 HRDs may also lobby the relevant government to (i) increase public awareness and understanding of the importance of businesses implementing effective grievance mechanisms; (ii) disseminate information regarding how such mechanisms can be implemented; and (iii) provide expert and financial support to businesses to encourage them to comply with the UNGPs.

5.3 When taking these practical steps, HRDs may also decide to copy in, as appropriate, the relevant embassy, UN Special Procedures,[11] Inter-American Commission on Human Rights Thematic Rapporteurships and Units,[12] African Commission on Human and Peoples' Rights Special Mechanisms,[13] or the Business and Human Rights Resource Centre,[14] to help raise awareness of any concerns raised or request ongoing monitoring and support.

[11] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
[12] http://www.oas.org/en/iachr/mandate/rapporteurships.asp
[13] http://www.achpr.org/mechanisms/
[14] https://www.business-humanrights.org/

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Human Rights Defenders' Fact Sheet

United Nations Guiding Principles on Business and Human Rights

"Appropriate Action" and the use of Leverage

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1. Corporate responsibility to respect human rights

1.1 The United Nations Guideline Principles on Business and Human Rights ("**UNGPs**") are a global, non-legally binding standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.[1]

1.2 The corporate responsibility to respect human rights, as set out in the second pillar of the UNGPs, is a standard of conduct for business enterprises. The UNGPs state that businesses should have in place:

(A) a Human Rights Policy Statement demonstrating commitment to respect human rights;

(B) a human rights due diligence procedure ("**HRDD**"); and

(C) processes to enable the remediation of any adverse human rights impacts that the business enterprise causes or to which it contributes.

1.3 This Fact Sheet focuses on leverage under the UNGPs. Please refer to separate Fact Sheets for information on human rights policy statements, human rights due diligence, grievance mechanisms and remediation.

2. Leverage and the UNGPs

2.1 Under the UNGPs, the influence or leverage of a business becomes relevant in identifying what it can reasonably do to address an adverse human rights impact. Specifically, Guiding Principle 19 (and commentary) provides that, when integrating findings from HRDD (often in the form of an impact assessment), a business is required to take "appropriate action" to mitigate any adverse impacts of its business activities on human rights.

2.2 "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; and

[1] See: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

(ii) the extent of its leverage in addressing the adverse impact.

3. When should leverage be used?

3.1 It is important to note that if a business enterprise has not caused the impact itself, the leverage it has over the perpetrator will shape its range of options to prevent or mitigate the impact. However, it does not affect the scope of the responsibility itself. Leverage is considered to exist where the enterprise is able to effect change in the wrongful practices of an entity that causes harm.[2]

3.2 The commentary to Guiding Principle 19 gives further details on what is considered "appropriate action" and when leverage should be used. This is summarised below.

Where the business enterprise has caused/may cause harm	⇨	Business enterprise must take steps to cease or prevent the harm (no need to use leverage)
Where the business enterprise contributes/may contribute to harm	⇨	Business enterprise must take steps to cease or prevent its contribution and use leverage to mitigate remaining impact
Where the harm is directly linked to the business enterprise's operations, products or services by a business relationship with another entity	⇨	Response depends on leverage over the other entity, how crucial the relationship is, the severity of harm and the effects of terminating the relationship

3.3 If it is necessary to prioritise actions to address human rights risks, business enterprises should be guided by the severity of the potential or actual impact identified, including whether a delayed response may make the impact irremediable.[3] The more complex the situation and its implications for human rights, the stronger the case is for the enterprise to draw on independent expert advice in deciding how to respond.

4. How can leverage be increased?

4.1 If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. However, if a business lacks leverage, it should seek to increase it.

4.2 There are several steps that the business can take to try to increase its leverage. For example:

[2] See commentary to GP19. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[3] See: http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf

(A) terminate orders/contracts with substandard suppliers to encourage better practices;

(B) liaise with competitors to agree joint actions or standards;

(C) engage with industry or sector groups and/or non-governmental organisations to encourage the development of best practices;

(D) ensure that contracts adequately reflect and incorporate the cost of labour, health, and safety compliance;

(E) carry out regular (impromptu) on-site audits; and/or

(F) offer capacity-building incentives.

4.3 Many of these steps overlap with standard HRDD and may need to be tailored to the specific situation to ensure that harm is prevented/mitigated.

4.4 Collective action is generally considered the most powerful way of increasing leverage. For example, Action Collaboration Transformation is an initiative in which fashion brands, manufacturers and trade unions work together to address the issue of living wages in garment supply chains.[4] This leverage is important as even big brands, such as H&M and Primark, may only represent 5% of a factory's production.

5. What are the consequences when a business enterprise fails to use leverage?

5.1 If the business enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage, the business should consider ending the relationship. Before doing this, it should consider whether ending the relationship might result in further adverse human rights impacts.

5.2 As long as the abuse continues, and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences of the continuing connection. These consequences could be reputational, financial or legal.[5]

6. Practical steps for Human Rights Defenders ("HRDs")

6.1 HRDs can take the following steps:

(A) Review the businesses impact assessment.

(1) If this is publicly available, check whether the concerns of potentially impacted rights holders are included and addressed.

(2) If this is not publicly available, request this directly from the business enterprise or contact the relevant regulatory agencies or inspectorates.

(B) Engage in a consultation between the affected rights holders and the business to develop actions to address the impact.

(C) Consider whether the business has any subsidiaries, contractors or suppliers over which it could exercise leverage.

[4] The Action Collaboration Transformation website is available at: https://www.ethicaltrade.org/act-initiative-living-wages
[5] See commentary to GP19. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

(D) Contact the business and make enquiries regarding its approach to the human rights impact and any action plan developed to address the impact effectively.

(E) Request information from the business enterprise regarding tracking the effectiveness of its responses to the human rights impacts through qualitative and quantitative indicators.

(F) Engage the relevant government or embassy to contact the business on the HRDs' behalf if necessary.

(G) When taking these practical steps, HRDs may also decide to copy in, as appropriate, UN Special Procedures,[6] Inter-American Commission on Human Rights Thematic Rapporteurships and Units,[7] African Commission on Human and Peoples' Rights Special Mechanisms,[8] or the Business and Human Rights Resource Centre,[9] to help raise awareness of any concerns raised or request ongoing monitoring and support.

[6] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
[7] http://www.oas.org/en/iachr/mandate/rapporteurships.asp
[8] http://www.achpr.org/mechanisms/
[9] https://www.business-humanrights.org/

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Human Rights Defenders' Fact Sheet

Dealing with Defamation Allegations

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1. Introduction

1.1 It is important to be aware that some things said or written – even unintentionally – can result in you being sued for defamation.

1.2 Whilst Article 17 of the UN International Covenant on Civil and Political Rights grants everyone the *'right to the protection of the law against… interferences or attacks'* amounting to *'unlawful attacks on his honour or reputation'*, the relevant legal framework that governs allegations of defamation against human rights defenders ("**HRDs**") is determined by local law in the relevant jurisdiction.

1.3 This fact sheet provides a brief overview of the law in England and assumes that the contentious statement has been made or published in England.

1.4 To the extent that the English courts do not have jurisdiction over the contentious statement, a different legal framework will apply.[1] However, the practical guidance on limiting the risks and dealing with a threatened claim (see paragraphs 3 and 4 below) are likely to be generally applicable.

2. Defamation: An Overview

2.1 Nature and sources of law

2.2 Defamation is concerned with damage to a person's reputation. It covers both libel and slander – the former being the publication of material in lasting form (such as print), and the latter concerned with transient statements (such as words or gestures).

2.3 The law in England is based on both common law and statute (principally the Defamation Acts 1996 and 2013, although the Human Rights Act 1998 is also relevant).

2.4 Jurisdiction

2.5 Only the person who has allegedly been defamed can bring a claim against the defendant HRD; a claim cannot be assigned or brought on someone else's behalf.

2.6 The English court will accept jurisdiction to hear a claim in a number of instances. However, if the defendant HRD is not domiciled (i.e. lives/ is based) in an EU member state, Switzerland, Norway or Iceland the court will not accept jurisdiction unless it is satisfied that, of all the places in which the statement complained of has been published, England and

[1] We understand that the bulk of HRDs are based in South America. We are not able to advise on the local law position in any of the relevant South America jurisdictions. However an initial high level primer on criminal defamation law in each South American jurisdiction has been published by the Committee to Protect Journalists and is available at https://cpj.org/reports/2016/03/south-america.php.

Wales is clearly the most appropriate place to bring an action in respect of the statement. Where a statement has been published in the UK and also abroad, the court is required to consider the overall global picture in determining where it would be most appropriate for a claim to be heard. Where the claimant is domiciled is likely to be a relevant factor for the purposes of this assessment.

2.7 **The cause of action**

While there is no single, agreed definition of what constitutes a "defamatory" statement, a common description is that the statement *"tends to lower the claimant in the estimation of right-thinking members of society generally"*.

However, for a statement actually to be defamatory, a number of important elements must be present (and proved by the claimant):

(A) The claimant must establish that the words complained of were published to a third party by the defendant.

(B) The claimant must be identified in the publication (or objectively identifiable if not explicitly named).

(C) In the case of a company, it must be shown that the words complained of have caused, or are likely to cause, serious financial loss (the so-called "serious harm" threshold).

The meaning of the words in question are of critical importance in determining whether the claimant's reputation has been damaged. Generally, words have their natural and ordinary meaning – being the meaning that the words would convey to the ordinary reasonable reader who reads the entire article or publication once.

2.8 **Defences**

Assuming the court determines that the statement in question is defamatory (with reference to all the elements considered above), the burden of proof then switches to the defendant to prove a defence which exonerates their making the statement in question.

Key defences include (but are not limited to):

(A) **Truth** – the defendant must prove that the defamatory statement is substantially true. The defendant does not need to prove that *every* word published was true, only that the *essential substance* of the statement is true. This is closely linked to the meaning of the words in question.

If a statement contains several different allegations, the defence of truth will still succeed even if a number of those allegations are proven to be false – providing that those false allegations do not seriously harm the claimant's reputation. Equally, the defence will fail if the defendant cannot prove the truth of all its statements and the unproven accusations do cause harm over and above the true statements.

(B) **Honest opinion** – the defendant must establish that the defamatory statement was a statement of opinion that an honest person could hold, knowing the facts as they existed at the time. The defence can be defeated if the statement was made maliciously (but note: the fact that the allegations may be false is not necessarily an indication of malice).

The defence is not available if the defamatory statement makes allegations of fact, which have to be defended by the defences of truth or privilege. Whether words are fact or opinion is typically difficult to establish.

(C) **Publication on a matter of public interest** – having regard to all circumstances, the defendant must establish that the statement complained of was, or formed part of, a statement on a matter of public interest, and that it reasonably believed that publishing the statement complained of was in the public interest.

(D) **Qualified privilege** – very broadly, the defendant must establish that it had an interest in publishing the statement, and that the third party had a corresponding interest in receiving it. Again, the defence can be defeated if the statement is made maliciously.

2.9 Remedies

Monetary damages are the primary remedy for a defamation action in jurisdictions where defamation is a civil wrong. A successful claimant may also seek a statement in open court that summarises the dispute and explains why the defamatory statements were inappropriate.

If the defendant recognises that it has made a mistake, under English law, it is able to make an offer of amends (per sections 2-4 of the Defamation Act 1996). This can include a written apology, the publication of a correction or retraction, and the payment of compensation and legal costs, if appropriate. Such an offer must be made before a defence is served.

3. Limiting the risk of being accused of defamation

HRDs can limit their risk of being accused of defamation by being careful with the statements they are making and by controlling the meaning of their statements.

3.1 Only say or publish what you can prove

Truth is usually the most important defence against any defamation claim. Therefore, ensuring statements can be proven true is the best way of limiting the risk of a defamation claim. Statements should only be made if HRDs can prove them directly, or through a credible and independently corroborated, or authenticated source. Where the sources are people, HRDs should verify whether they have first-hand knowledge and are willing to give evidence if necessary.

It is also safer to make statements about a person's objectively verifiable conduct rather than a subjective and assumed state of mind. Ambiguity should be avoided, as this can be interpreted unfavourably. Only statements which can be proved or are backed by sources should be made and any gaps in information should be pointed out.

3.2 Be aware of the implication of statements made or published

In a defamation case, you are likely to be liable not just for what you say expressly, but also for what an ordinary person may read between the lines. Put another way, innuendo is capable of being defamatory. Attention should therefore be paid to how people will interpret a statement, not just what is expressly said.

3.3 Use the language of opinion

The risk of defamation liability can be reduced by phrasing any allegation as a suggestion or inference and without any assertions of fact. Framing your statements as opinion can be helpful. The statement of opinion should be based on verified facts unless the facts are in

the public domain, in which case they should be referred to. However, if the opinion itself implies facts which are incorrect, this may give rise to liability.

3.4 Avoid repeating potentially defamatory statements made by others

In defamation cases, you are also liable for publishing a defamatory statement made by someone else, even if you quote them accurately. HRDs must therefore consider the veracity and any implications of statements made by others before repeating them.[2]

3.5 Consider seeking input from the claimant prior to publication

In some instances, it may be sensible to seek the potential claimant's input into any publication. This gives them the opportunity to present their side of the story, and potentially provides some balance.

This is important as defamatory statements will be assessed in their context, not in isolation. If the potential claimant has been given the opportunity to comment, they may find it harder to establish that the statements are damaging to their reputation, when matters are viewed in the round. It is appreciated, however, that seeking the potential claimant's input may not be suitable in all circumstances.

4. Practical advice in dealing with a threatened claim

4.1 Seek legal advice

HRDs should immediately seek independent local legal advice on how to proceed. HRDs should also consider whether any of the defences to a defamation claim in the relevant jurisdiction may apply in the circumstances.

4.2 Consider editing or removing the offending article

If the allegedly defamatory statement has been made online, and HRDs feel it is appropriate to do so, steps can be taken to limit the damage by toning down, or even taking down, the article. This will limit the number of people to whom the statements are published and may prevent the claimant from escalating its claim (but will not guarantee this).

4.3 Consider an apology or retraction

The risk of threatened claims can be reduced by making an offer of amends to the claimant. This can be an important negotiating tool when defamation has actually occurred, whether through an honest mistake, or if the defendant is unable or unwilling to defend a defamation claim. However, an offer to make amends usually includes payment of damages and costs to the claimant, and the claimant may refuse to accept any offer made. The English law position is that if an offer is not accepted, the claimant may only recover damages in court if it is able to prove that the defendant acted maliciously.

It is important to seek legal advice prior to issuing such an offer of amends. Publishing a retraction or apology can be damaging to any defence you might have to bring if not handled properly.

4.4 Ensure that you document your statements and any sources used to support those statements

Truth is often the most important defence to any potentially defamation liability. Meticulous record keeping, particularly regarding the content of any public statements you make and

[2] This can include linking, on your own website, to defamatory statements in third party publications.

the sources which you have used to support any such statements, is key to founding a defence if one is required.

Human Rights Defenders' Fact Sheet

Environmental Hazards / Degradation

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1. Environmental Hazards and Human Rights

1.1 Many human rights defenders ("**HRDs**") seek to defend human rights as they relate to the enjoyment of a safe, healthy and sustainable environment. This can be a challenging area for HRDs due to:

(A) the acceleration of development and urbanisation;

(B) the complexity of the interplay between environmental law and human rights law and the array of enforcement mechanisms;

(C) the fact that businesses and state officials often lack awareness of their obligations under local laws, and/or international human rights and environmental laws (or intentionally flout those obligations); and

(D) the heightened personal risk that HRDs and their clients often face, particularly if their actions affect plans for development of an area.[1] This is a specific risk that is faced by indigenous groups (and other rural communities), who have a special relationship with their land and resources. and who often have difficulty accessing adequate advice when their human rights are impacted by environmental hazards and/or degradation.

1.2 This Fact Sheet focusses on the interplay between international human rights law and international environmental law. Most states have relatively comprehensive domestic environmental laws in respect of which HRDs should seek local advice.

2. The legal framework

2.1 The International Court of Justice has stated that *"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"*.[2] There is, therefore, a recognised link between international human rights law and international environmental law. However, interplay between the two is not straightforward.[3]

[1] For further details, see Global Witness Report "Defenders of the Earth", 2016, available at: https://www.globalwitness.org/en/campaigns/environmental-activists/defenders-earth/

[2] ICJ's Opinion on the "Legality of the Threat or Use of Nuclear Weapons", 1996, ICJ Rep. 242, para. 29

[3] In 2013, the Independent Expert on human rights and the environment (John Knox) undertook an extensive research project to map the statements made by important sources of human rights obligations relating to the environment. See the following link for further information: http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx

2.2 The UN Environment Programme has identified three main dimensions of the interrelationship between human rights and environmental protection: [4]

(A) the right to a safe, healthy and ecologically-balanced environment as a human right in itself;

(B) certain human rights (particularly procedural rights, such as access to information, participation in decision-making, and access to justice) as essential to good environmental decision-making; and

(C) the environment as a pre-requisite for the enjoyment of substantive human rights, including civil, political, cultural and social rights (such as the right to life, religion, property, health, water, food and culture).

Is there a specific right to a healthy environment?

2.3 There was an initial effort at UN level to form a direct link between human rights and the environment. For example, the preamble to the 1972 Stockholm Declaration indicates that the environment is essential for the well-being of man and for the full enjoyment of his fundamental rights, including the right to life itself.[5] In a similar vein, Principle 1 of the 1992 Rio Declaration on Environment and Development refers to a right to *"a healthy and productive life in harmony with nature".*[6]

2.4 Environmental treaties have made vague links between the environment and human rights rather than granting a specific right to a healthy environment.[7] Express recognition in treaties of such a right is rare. For example:

(A) The Preamble to the EU Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "**Aarthus Convention**") declares the right of everyone to live in an environment adequate to his health and well-being.[8]

(B) Article 24 of the African Charter on Human and Peoples' Rights[9] states that all peoples have a right to a general satisfactory environment (echoed in decisions made by the African Commission on Human and Peoples' Rights).[10]

(C) Article 1 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (known as the "**Ezcazú Agreement**") recognises "*the right of every person of present and future generations to live in a healthy environment and to sustainable development*".[11]

2.5 However, the tide appears to be turning. In February 2018, the Inter-American Court of Human Rights issued an opinion in response to a request made by Colombia seeking

[4] See the UNEP website: http://web.unep.org/divisions/delc/human-rights-and-environment
[5] UN Declaration on the UN Conference on the Human Environment (known as the "Stockholm Declaration"): http://www.un-documents.net/aconf48-14r1.pdf. This is expounded, for example, in Principle 7, which prescribes that states shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.
[6] http://www.unesco.org/education/pdf/RIO_E.PDF.
[7] See, for example:
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
- Rotterdam Convention (regarding hazardous chemicals and pesticides)
- Stockholm Convention (regarding persistent organic pollutants)

[8] Aarthus Convention: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[9] Also known as the Banjul Charter.
[10] http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf. See, for example: Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, Afr. Comm'n H. & Peoples' R., No. 155/96, (May 27, 2002).
[11] Ezcazú Agreement: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf Note: At least 11 countries must sign and ratify the Ezcazú Agreement by 27 September 2020 for it to come into force.

clarification on the scope of State responsibility for environmental harm under the American Convention on Human Rights.[12] The Court confirmed that human rights depend on the existence of a healthy environment. It stated that, in relation to transboundary damage, *"the exercise of jurisdiction arises when the state of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights"*.[13] This means that states must take measures to prevent significant environmental harm to individuals inside and outside their territory. Given that international judicial bodies often echo each other's decisions, it is possible that a similar approach will be adopted in other international or regional courts.

2.6 Recent international initiatives also show that there is a desire to recognise more explicitly the link between human rights and the environment:

(A) At the UN General Assembly in September 2017, France launched the Global Pact for the Environment initiative at the General Assembly, the goal of which is to codify and unite the guiding principles of environmental law into a single legally binding instrument.[14]

(B) In March 2018, John Knox, UN Special Rapporteur on human rights and the environment, presented to the Human Rights Council on Frameworks Principles on human rights and the environment, in which he proposed that the UN recognise the right to a safe, clean, healthy and sustainable environment.[15] The 16 principles set out the basic obligations of states under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment.

Interplay between international environmental law and substantive and procedural human rights

2.7 The Paris climate agreement is the first international environmental treaty to specifically mention human rights in the context of environmental degradation. Its preamble states that:

"Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity"[16]

2.8 Links between the environment and human rights can be found in other treaties that generally relate to the protection of procedural rights. For example:

(A) Article 2 of the Aarhus Convention provides for rights of access to information, public participation and access to justice regarding the environment.[17] The Aarhus

[12] The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf
Request for Advisory Opinion OC-23, Inter-Am. Ct. H.R. (Mar. 14, 2016), available at http://www.corteidh.or.cr/solicitudoc/solicitud_14_03_16_ing.pdf

[13] https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human; see also http://www.ciel.org/news/inter-american-court-human-rights-solidifies-right-healthy-environment-decision-bolsters-access-rights-extraterritorial-obligations-precautionary-principle/ and https://www.theguardian.com/commentisfree/2018/feb/21/international-law-cross-border-victims-environment-rulings.

[14] For further information, see http://pactenvironment.org/.

[15] http://srenvironment.org/wp-content/uploads/2018/02/A_HRC_37_59_AdvanceEditedVersion.pdf

[16] http://pactenvironment.org/

[17] Aarhus Convention: https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

Compliance Committee operates a complaints mechanism and has interpreted these principles. The Ezcazú Agreement includes similar provisions.[18]

(B) Conventions, including the UN Convention on the Law of the Sea and the Convention on Biological Diversity, provide procedural protections unique to environmental law, such as environmental impact assessments.[19] These are linked to rights to information and public protection.

(C) The Convention on the Rights of the Child specifically refers to the environment in connection with a child's right to health.[20]

(D) ILO Convention 169 on Indigenous and Tribal Peoples outlines the rights of indigenous groups and contains many references to their environment. For example, consultation with indigenous groups must take place in connection with the development of their land and the passing of any general legislation that may affect the way such developments are approved or carried out.[21]

2.9 Non-binding instruments and guidance have also made express links, such as:

(A) The UN Declaration on the Rights of Indigenous Peoples, which includes the requirement to seek free, prior and informed consent when planning any project on an indigenous group's land, or when contemplating the storage and disposal of hazardous materials on such land.[22]

(B) The Voluntary Principles on Security and Human Rights provides guidance to companies on tangible steps that they can take to minimise the risk of human rights abuses on communities located near extraction sites.[23]

2.10 Governing bodies of conventions and international and regional courts are interpreting substantive and procedural human rights in light of environmental hazards. For example:

(A) The ICJ has recognised that the quality of the environment in which humans live constitutes a condition for the effective enjoyment of the rights and freedoms of international human rights law, such as the right to health and the right to life itself.[24]

(B) The European Court of Human Rights has held that environmental degradation can affect rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, including rights to life,[25] respect for private and family life,[26] fair trial,[27] and the peaceful enjoyment of property.[28]

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[18] Ezcazú Agreement: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf Note: At least 11 countries must sign and ratify the Ezcazú Agreement by 27 September 2020 for it to come into force.
[19] See Article 206 of the UN Convention on the Law of the Sea (http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) and Article 14 of the Convention on Biological Diversity (https://www.cbd.int/doc/legal/cbd-en.pdf).
[20] See Articles 24(2)(a) and 24(2)(e) among others: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx.
[21] See Articles 4, 6, 7 and 8 of ILO Convention 169: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.
Further information can be found in our Fact Sheet on Free, Prior and Informed Consent.
[22] See Articles 29 and 32 in particular: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
[23] http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/
Further information on this can be found in our Fact Sheet on Private/Military Security Companies
[24] See the International Court of Justice Case, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, pp 91-92: http://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf
[25] Öneryildiz v. Turkey, Eur. Ct. H.R. App. No. 48939/99 (2004): http://www.globalhealthrights.org/wp-content/uploads/2013/02/ECtHR-2004-Oneryildiz-v-Turkey.pdf
[26] Taşkin and Others v. Turkey, Eur. Ct. H.R. App. No. 46117/99, (2004): https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1185902-1231526&filename=003-1185902-1231526.pdf
[27] For example: Zimmerman and Steiner v. Switzerland, Eur. Ct. H.R. App. No. 8737/79 (1983: https://www.informea.org/sites/default/files/court-decisions/COU-157036.pdf; Zander v. Sweden, Eur. Ct. H.R. App. No. 14282/88

(C) The Inter-American Commission and/or Court of Human Rights have interpreted the following rights, set out in the American Convention on Human Rights, to be relevant in cases regarding environmental degradation: rights to life,[29] humane treatment,[30] fair trial,[31] freedom of expression and access to information,[32] property,[33] the participation in government and judicial protection,[34] and the right of freedom from discrimination (in the context of indigenous people and racial minorities).[35]

(D) The African Commission on Human and Peoples' Rights found that the failure to conduct an environmental impact assessment violated the right to property.**[36]** The ICJ has gone further and recognised that environmental impact assessments have become an obligation of general international law.**[37]**

(E) Regional human rights courts have also recognised the overlap between environmental law and collective human rights, particularly those held by indigenous groups, in cases such as *Mayagna*.[38]

(F) The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have recognised the link between environmental degradation and certain rights set out in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[39]

2.11 An analysis of the relevant laws (including case law) indicates that the obligations of a state in the area of human rights and the environment can be (broadly) summarised as the

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(1993): http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-62419&filename=001-62419.pdf; Kyrtatos v. Greece , Eur. Ct. H.R. App. No. 41666/98 (2003): http://hudoc.echr.coe.int/ENG?i=001-61099

[28] Öneryildiz v. Turkey, Eur. Ct. H.R. App. No. 48939/99 (2004).

[29] Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador, Inter-Am. Comm'n H.R. Report No. 62/04 (2004): https://iachr.lls.edu/sites/default/files/iachr/Cases/kelly_kichwa_indigenous_people_of_sarayaku_v._ecuador.pdf; Community of La Oroya, Peru, Inter-Am. Comm'n H.R. Report No. 76/09 (2009) (Admissibility): http://www.globalhealthrights.org/wp-content/uploads/2013/02/IAComHR-2009-Community-of-La-Oroya-v.-Peru.pdf; Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017 requested by the Republic of Colombia (rights to life and personal integrity): http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf

[30] Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124 (2005): http://www.globalhealthrights.org/wp-content/uploads/2013/08/Moiwana-IACtHR-Suriname-2005.pdf

[31] Sawhoyamaxa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 (2006): http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf

[32] Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/VI/II.96, doc. 10, rev. 1 (1997): http://www.cidh.org/countryrep/ecuador-eng/Index%20-%20Ecuador.htm

[33] Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (2007): http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

[34] Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/VI/II.96, doc. 10, rev. 1 (1997): http://www.cidh.org/countryrep/ecuador-eng/Index%20-%20Ecuador.htm

[35] Maya Indigenous Communities of the Toledo District v. Belize, Inter-Am. Comm'n H.R., Report No. 40/04, (2004): http://hrlibrary.umn.edu/cases/40-04.html
Mossville Environmental Action Now v. United States, Inter-Am. Comm'n H.R., Report No. 43/10, (Mar. 17, 2010) (admissibility decision): http://www.cidh.org/annualrep/2010eng/usad242-05en.doc

[36] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr. Comm'n H. & Peoples' R., No. 276/2003 (Feb. 4, 2010): http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf

[37] Pulp Mills on the River Uruguay (Argentina v. Uruguay) 2010 I.C.J. (20 April 2010): http://www.icj-cij.org/files/case-related/135/15895.pdf

[38] See, for example, Mayagna (Sumo) Awas Tingni Community v Nicaragua, Inter-An, Ct, (ser. C) No. 79 (Aug 31 2001): https://www.escr-net.org/sites/default/files/seriec_79_ing_0.pdf
See also Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr. Comm'n H. & Peoples' R., No. 276/2003 (Feb. 4, 2010): http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf

[39] See, for example,

- Human Rights Committee, General Comment 23, paragraph 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (April 26, 1994) in respect of the rights of minorities to their own culture (Article 27 ICCPR): http://indianlaw.org/sites/default/files/resources/UN%20OHCHR%20Comments%20on%20Article%2027.pdf
- Committee on Economic, Social and Cultural Rights, 43rd Sess., General Comment 21, ¶ 16(a), U.N. Doc. E/C.12/ GC/21 (Dec. 21, 2009) in respect of the right to culture (Article 15 ICESCR): http://www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc

duty to prevent an environmental risk and to regulate potentially dangerous industrial activities (to include licensing and monitoring).[40]

3. Obligations of companies

3.1 It is generally understood that international human rights law and international environmental law is only binding on states, not on companies, and that states should translate their international obligations into domestic law and provide for their enforcement.

3.2 There are some multilateral treaties that directly impose obligations on companies. For example, the 1969 Convention on Civil Liability for Oil Pollution Damage (as amended) provides that the owner of a ship (which may be a company) shall be liable for any pollution damage caused by it.[41] However, such direct obligations are rare.

3.3 Although not generally bound by environmental and human rights treaties, companies are under increasing pressure to consider their human rights obligations. The United Nations Guiding Principles on Business and Human Rights ("**UNGPs**") is a set of international, non-binding standards for preventing and addressing the risk of adverse impacts on human rights linked to business activity.[42] Further information on the obligations of companies under the UNGPs can be found in other Fact Sheets in this series.[43]

3.4 There exist other sets of guidelines that companies can consult to understand what steps they should take to operate in a manner consistent with internationally-recognised standards. See, for example, the OECD Guidelines for Multinational Enterprises (particularly Chapter VI. Environment).[44]

3.5 Companies may, however, be in breach of environmental or human rights obligations under domestic law. Often, claimants wish to take legal action against a parent company in its "home" State in respect of a breach of domestic law by of one of its subsidiaries in another jurisdiction (the "host" State), particularly where the laws of the "host" State are not as developed as one might like. This is a complex, and developing, area of law. The Fact Sheet on Mass Tort Claims contains further information on this subject.

4. Practical steps for HRDs

4.1 As indicated above, the legal landscape regarding international human rights and international environmental law is complex and there remains no express global right to a healthy environment.

4.2 One needs to consider the relevant actors, the relevant legal instruments and the interpretation of these instruments to establish the degree of overlap between environmental obligations and international human rights law in a particular scenario.

4.3 There are several steps that HRDs could consider taking when faced with a situation where a state or a company appears to be breaching human rights linked to environmental degradation or hazards.

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[40] See pages 15-16 of the UNEP Compendium on Human Rights and the Environment: http://wedocs.unep.org/bitstream/handle/20.500.11822/9943/UNEP_Compendium_HRE.pdf?sequence=1&isAllowed=y Note that the Compendium gives a detailed overview of the relevant legal materials to 2014.
[41] Art. III, International Convention on Civil Liability for Oil Pollution Damage (1969): https://treaties.un.org/doc/Publication/UNTS/Volume%201225/volume-1225-I-14097-English.pdf
[42] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[43] Human Rights Policy Statements, Human Rights Due Diligence, Grievance Mechanisms and Remediation, Leverage, Operating in Conflict-Affected Areas and Free, Prior and Informed Consent: https://www.international-alert.org/sites/default/files/Economy_HumanRightsDueDiligenceGuidance_EN_2018.pdf
[44] http://www.oecd.org/daf/inv/mne/48004323.pdf

4.4 Breach by a state

(A) Check whether the state is a party to a relevant convention and whether that convention has entered into force. Consider whether there is any relevant "soft law" (non-legally binding instruments that have persuasive effect) that addresses the specific issue.

(B) Remind the relevant government of its obligations under international law.

(C) Seek local advice as to whether there is a domestic dispute resolution mechanism that can be used to address a breach.

(D) Consider alerting the governing body of the relevant treaty to the breach (which may, in turn, refer the case to a relevant international or regional court).

(E) When drafting a complaint, bear in mind that many governing bodies and international/regional courts have: (i) made an express link between human rights and environmental hazards; and (ii) considered findings of other international bodies when making decisions on such issues.

4.5 Breach by a company

(A) Check whether the relevant state has issued laws or regulations regarding the relevant issue. If it appears that a company is violating local laws, seek local legal advice.

(B) Investigate whether any relevant guidance or principles are applicable to, or have been adopted by, the company.

(C) Check to see whether the company has complied with the UNGPs and, in particular, whether it has: (i) published any human rights policy statement; (ii) carried out any relevant human rights due diligence; and/or (iii) put in place any grievance mechanism.[45]

(D) Check whether the company is a member of any applicable forum or organisation and, if so, follow the relevant grievance procedure.

(E) Engage the relevant government or embassy to contact the business enterprise on the HRDs' behalf if necessary, or request that the embassy facilitate a safe forum for HRDs to meet with the company regarding the relevant issue.

(F) Consider whether there might be scope to seek legal action against a parent company located in a different jurisdiction.[46]

[45] As to which, see Fact Sheets on Human Rights Policy Statements, Human Rights Due Diligence and Grievance Mechanisms and Remediation.
[46] As to which, see Fact Sheet on Mass Tort Claims

4.6 When taking these practical steps, HRDs may also decide to copy in, as appropriate, the relevant government or embassy, UN Special Procedures,[47] Inter-American Commission on Human Rights Thematic Rapporteurships and Units,[48] African Commission on Human and Peoples' Rights Special Mechanisms,[49] or the Business and Human Rights Resource Centre,[50] to help raise awareness of any concerns raised or request ongoing monitoring and support.

[47] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
[48] The Inter-American Commission on Human Rights Thematic Rapporteurships website can be found at http://www.oas.org/en/iachr/mandate/rapporteurships.asp
[49] The African Commission on Human and Peoples' Rights website can be found at http://www.achpr.org/mechanisms/
[50] The Business and Human Rights resource centre can be found online at https://www.business-humanrights.org/

Human Rights Defenders' Fact Sheet

Free, Prior and Informed Consent

Disclaimer

This document is solely the property of Peace Brigades International. It does not necessarily reflect the views of Peace Brigades International but has been published in order to inform debate and discussion of this important issue. It is the culmination of work by Peace Brigades International and Simmons & Simmons LLP. Legal research covered in the report was undertaken on a pro bono basis which includes the analysis of the law in England and Wales.

This document does not constitute legal advice nor does the report represent the views of Simmons & Simmons LLP. For a definitive view as to the laws and application of those laws in other jurisdictions, advice must be sought from counsel in that jurisdiction. This Fact Sheet was produced in May 2018 and reflects the law at that point.

1. Overview

1.1 Free prior and informed consent ("**FPIC**") is a specific right that allows indigenous peoples[1] to give, withhold or withdraw consent to a project or activity that may affect the lands, territories and natural resources that they customarily own, occupy or otherwise use. FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. FPIC is not just a requirement for governments: businesses must also respect this right.

1.2 The aim of FPIC is to establish the participation and consultation of an indigenous or tribal population prior to the beginning of a development on their land/or land they occupy and/or using resources within that territory, and to avoid activities that could negatively impact cultures, resource-based livelihoods and ways of life.

2. What is FPIC?

2.1 The right to FPIC is embedded within the right to self-determination and is not codified in any one universally-binding treaty. It derives from a series of international legal instruments, which includes ILO Convention 169 on Indigenous and Tribal Peoples ("**ILO 169**") and the UN Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"). Further information on these legal instruments can be found in the Schedule to this Fact Sheet.

2.2 It is important to note that the scope and implementation of FPIC in a given situation will depend upon the treaties or conventions that the relevant state has ratified, the applicable administrative regulations, case law and the factual matrix of the specific scenario considered.[2]

2.3 There are some general principles of FPIC that can be drawn from the numerous instruments that refer either directly or indirectly to FPIC. These (see further below) generally reflect the components of FPIC that have been accepted by the Inter American Court of Human Rights ("**IACtHR**") and/or the ILO Committee of Experts on the Application of Conventions and Recommendations ("**CEACR**").

2.4 All elements within FPIC are interlinked. Consent should be: sought before any project, plan or action takes place (prior); independently decided upon (free); and based on accurate, timely and sufficient information provided in a culturally-appropriate way

[1] In this Fact Sheet, the term 'indigenous peoples' is used to refer to all people who have the right to FPIC.
[2] **IMPORTANT NOTE: This Fact Sheet focuses on the position in Latin America and does not discuss the position under the African Charter on Human and Peoples' Rights or decisions made by the African Court on Human and Peoples' Rights.**

(informed) for it to be considered a valid result or outcome of a collective decision-making process.[3]

Consultation or consent?

2.5 There is considerable debate about whether "consent" equates to a right to veto, or whether it simply requires mere consultation. Generally, the rule under international law is that good faith consultation undertaken with a view to receiving consensus is required. Consent of the indigenous group, however, is not an absolute requirement in most circumstances.

2.6 However, there is an exception to this where the proposals under consideration involve large-scale or major projects that could have the effect of denying the cultural survival of the indigenous group in question or lead to forcible displacement. In that case, free, prior and informed consent in its full sense is required.[4]

Free, prior and informed consultation (as opposed to consent)

2.7 The key requirements of free, prior and informed consultation can be summarised as follows:

(A) Consultations must be entered into in good faith, and must involve a real engagement and dialogue, with a view to achieving consensus. They must not be a mere formality without any real engagement.

(B) Consultations must be carried out in a culturally-appropriate manner, using language that can be understood by the indigenous peoples. They should respect traditional forms of authority and decision-making; in some circumstances this will require consulting directly with an entire community, not merely with community representatives that are recognised by other state administrative laws (where community decision-making processes would not give those representatives authority to make such decisions without internal consultation or consensus).

(C) Consultations should not be undertaken in a way that deliberately undermines the social cohesion of the indigenous or Afro-descendant group. Actions such as bribing individual community leaders or members are inconsistent with appropriate and effective consultations.

(D) Indigenous or Afro-descendant groups must be given full information about the project, including its nature, scope and duration, and likely positive and negative effects upon the community, including environmental and health risks. Furthermore, the state must be prepared to receive information from the community, i.e. there must be an exchange of information.

(E) Proper information and dialogue is an essential requirement. If a community consents (for example, because it has been promised material rewards) without having been informed properly about the project, its consent is void.

(F) An environmental impact assessment ("**EIA**") that takes into account environmental, social, economic, cultural and spiritual risks must be undertaken at an early stage, and that information provided to the community. Where this is delegated to a private company contracted by the developer, it must be subject to strict state monitoring and oversight to ensure that the assessment is fair and comprehensive. Where

[3] Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities, Food and Agricultural Organisation of the United Nations October 2016, p.15 http://www.fao.org/3/a-i6190e.pdf

[4] Note that in many cases the indigenous group may be divided between those willing to accept the project for compensation and those who do not want the project to occur.

states do not require a formal EIA, companies should undertake one as part of their due diligence process.

(G) Consultation must occur at the earliest possible stage of the project and should continue throughout the life of the project.

(H) It is insufficient for the state to delegate consultation to the company that is interested in pursuing the development, at least without substantial monitoring and oversight.

(I) The presence of military or other coercion measures may prevent free participation in consultation and undermine good faith dialogue; militarisation should be avoided.

3. Who has a right to FPIC?

3.1 It is often difficult to establish precisely which communities benefit from the right to FPIC. FPIC is generally considered to apply to indigenous and tribal peoples but the right may extend to other groups.

3.2 ILO 169, which includes a requirement that governments seek FPIC, states that self-identification as indigenous or tribal shall be regarded as the fundamental criterion for determining the groups to which the provisions of the convention apply.[5]

(A) Article 1(a) states that the convention applies to *"tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations"*

(B) Article 1(b) states that the convention also applies to *"peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."* [6]

3.3 The IACtHR has applied its jurisprudence on indigenous land rights equally to Afro-descendant groups, where such groups *"an 'all-encompassing relationship' to their traditional lands, and [where] their concept of ownership regarding that territory is not centred on the individual, but rather on the community as whole"*.[7]

3.4 Certain human rights enshrined in international treaties such as the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**") have been interpreted to extend the right to FPIC to non-indigenous communities. For example:

(A) The right to take part in cultural life[8] requires that states obtain the FPIC of persons belonging to minority groups, indigenous peoples or to other communities when the preservation of their cultural resources (especially those associated with their way of life and cultural expression) are at risk.[9]

[5] Article 1(2) of ILO 169
[6] International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) (see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
[7] *Moiwana v Suriname*, IACtHR, 2005, Series C, No 124, paragraph 133. The full judgment can be found here: http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf
[8] Set out at Article 15(1) of the ICESCR
[9] Committee on Economic, Social and Cultural Rights, "General Comment No. 21: Right of Everyone to Take Part in Cultural Life," [E/C. 12/GC/21] (December 21, 2009), para 55(e)

(B) The right to adequate housing[10] requires states to obtain the FPIC of affected persons, groups and communities regarding their resettlement.[11]

3.5 When determining precisely who has the right to FPIC, one must consider the circumstances of the affected community and which conventions the relevant state has ratified.

4. Issues faced by Human Rights defenders ("HRDs") in relation to FPIC

4.1 Indigenous peoples often find themselves competing with powerful government and corporate interests over natural resources. HRDs can work with indigenous peoples to provide support regarding the right to FPIC. In doing so, HRDs may be faced with individuals or entities that:

(A) lack awareness of their obligations under local laws and/or international human rights law;

(B) commence a project that may affect the lands, territories and resources that indigenous peoples customarily own, occupy or otherwise use: (i) without identifying the indigenous people's concerns and their representatives; or (ii) without taking the interests and priorities of the indigenous peoples into account;

(C) marginalise and/or discriminate against indigenous peoples;

(D) enter into disputes and other forms of conflict directly with, or otherwise harmful to, indigenous peoples and their territories; and/or

(E) otherwise fail to protect and respect FPIC rights and related principles throughout their operations.

5. Practical steps for HRDs

5.1 Some suggestions of practical steps that could be taken by HRDs are set out below:

(A) Identify the land affected by the project, the land usage and natural resources.

(B) Establish which indigenous peoples are potentially affected by the project. Identify any minority groups within the wider community, the existence of any mobile communities (such as nomadic or hunter-gatherer communities) and any bordering communities that may make use of resources within the targeted project area.

(C) Explain who you are, your mandate and the nature of the project. Ask the relevant community whether it has any concerns about the project.

(D) Understand the self-governance structure and decision-making process of the relevant community and ascertain who has the authority to speak on behalf of the indigenous group. For example, consider whether decisions are made by consensus or by majority, whether everyone in the community will discuss an issue prior to a decision being made, whether there are selected groups of community members who are culturally "authorised" to make decisions and/or whether different subgroups have "cultural custody" of particular cultural places or resources.

(E) Explain the principle of FPIC and discuss with the community how this might work in practice. Where there is mistrust of company intentions, or of company-led or state-

[10] Set out at Article 11(1) of the ICESCR (among other conventions)
[11] United Nations, "Basic Principles and Guidelines on Development –Based Evictions and Displacement," A/HRC/4/18, paragraph 56e

led FPIC processes, communities often prefer to engage in traditional decision-making processes.

(F) Ascertain the legal status of the land, i.e. determine who has (state and customary) rights over the area.

(G) Understand which treaties the relevant state has ratified, and how the relevant provisions have been interpreted by relevant courts and governing bodies. Research local laws in relation to FPIC.

(H) Carry out a mapping exercise to identify the relevant actors in the project (to include private entities and government entities).

(I) Try to ascertain whether relevant companies have signed up to any voluntary guidelines relating to FPIC, whether there are any applicable sector-specific guidelines or whether they have issued their own guidance that requires compliance with the right of FPIC.[12]

(J) Assess what threats or risks might result from the community engaging in the FPIC process, and the scope for remedy if the community is likely to be adversely affected by the project or FPIC process.

(K) Seek to engage with companies and government entities to ensure that they understand their obligations in respect of FPIC.[13]

5.2 This is, by no means, an exhaustive list. There are additional resources available that give further guidance on the scope of the right to FPIC and advice on how to engage with relevant stakeholders (see Schedule 2 for further information).

6. Strategy planning

6.1 Certain communities may wish to take tactical steps to strengthen their position in the face of developments on their land.

Communication via an intermediary

6.2 In many cases, communities will not want to engage directly with companies or the government for fear of reprisals, or because of concerns that the process will be used to: (i) identify (and eliminate) opposing voices within communities; or (ii) argue that consent has been obtained, when this is not the case.

6.3 In such cases, HRDs may assist in:

(A) facilitating contact with possible mediators who could aid communication between the relevant community and the company and/or government;

(B) making requests for human rights and environmental due diligence information, information regarding licences or due process;

(C) sharing community feedback with the company and/or government; and

[12] See Oxfam "Community Consent Index 2015: Oil, gas and mining company public positions on Free, Prior and Informed Consent" which assists in verifying companies' commitments to FPIC and other consultation processes https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp207-community-consent-index-230715-en.pdf. See also voluntary standards in 3.4 of Schedule 1.

[13] International Service for Human Rights, "A Human Rights Defender Toolkit for Promoting Business Respect for Human Rights" (2015), Chapter 4 (Strategic Engagement): http://www.ishr.ch/sites/default/files/article/files/ishr_hrd_toolkit_english_web.pdf. See also para. 6.2(F) of this Fact Sheet.

(D) arranging safe spaces for consultation or dialogue to take place with the company and/or government.

Community documentation of consultation requirements and procedures

6.4 A recurring theme in FPIC cases is the existence of a (usually inadequate) consultation procedure that the government or company involved seeks to rely upon as evidence that it has satisfied its FPIC obligations. Often, these are characterised by token engagement with a few individuals, a lack of notification or provision of information to the relevant communities (or all members thereof) and, in some circumstances, fraud and deliberate undermining (often by bribery) of community cohesion.

6.5 One way of proactively combatting these inadequate consultation procedures is for indigenous communities to develop their own consultation guidelines and to disseminate this to other project stakeholders. It would then be very difficult for any entity to claim that it had conducted appropriate consultation in circumstances where it had ignored the processes that the community identified as appropriate.

6.6 The consultation guidelines could include details regarding:

(A) who should be notified about proposals potentially affecting the land, and how that notification should take place;

(B) how community decisions are to be made (consider in particular the issues raised at paragraph 5.1(D)**;**

(C) any areas of particular cultural significance that would require a more significant consultation (or possibly consent) or that developers should seek to work around in any proposals;

(D) any factors that may affect a consultation process (for example, specific festival periods during which consultation will not be possible); and

(E) any checks and balances the community wishes to have in place for consultation (i.e. meetings taking place physically in the community or the opportunity for cross-community discussions).

Local development planning

6.7 In circumstances where communities would like to see development, HRDs could assist indigenous peoples in participating in any open consultation process relating to a project proposal. This would enable companies to understand community expectations at an early stage, and may result in the designing of projects that are more likely to be acceptable to the community or assist in solidifying the negotiating position of communities who are to be affected by an unwelcome project.

SCHEDULE 1: THE LEGAL AND REGULATORY FRAMEWORK OF FPIC

1. The development of the right to FPIC

1.1 The principle of FPIC was initially based on other human rights principles that were enshrined in international treaties, and has developed slowly through case law and the introduction of other international instruments. Therefore, one must consider several sources to understand the principle of FPIC and how it is implemented.

2. FPIC and international treaties

2.1 Other international human rights principles that are explicitly recognised in international treaties, and from which the principle of FPIC was first derived, include:

(A) the right of peoples to economic self-determination (which, for many indigenous peoples, means control of their natural resources) as set out in the International Covenant of Civil and Political Rights ("**ICCPR**")[14] and the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**");[15] and

(B) the principle of non-discrimination based on race, as set out in ICCPR, ICESCR and the International Covenant on the Elimination of All Forms of Racial Discrimination ("**ICERD**").[16]

2.2 Certain provisions of these treaties (among others) have been interpreted to include a right to FPIC. For example:

(A) In its interpretation of Article 27 of ICCPR (which provides that minorities shall not be denied access to their culture), the Human Rights Committee has stated that states have a positive duty to engage with indigenous peoples prior to any development or granting of resource concession in their lands.[17]

(B) The UN Committee on the Elimination of Racial Discrimination General Recommendation 23 on indigenous peoples urges that no decisions directly affecting the interests of indigenous peoples be taken without its consent.[18]

2.3 Human rights conventions also exist at a regional level. The relevant convention for Latin America is the American Convention of Human Rights ("**ACHR**")[19]. Although there is no express protection of FPIC in the ACHR, the principle has been recognised indirectly by the Inter-American Court of Human Rights ("**IACtHR**") and the Inter-American Commission of Human Rights ("**IACHR**"). For example:

(A) In the *Saramaka* case, the IACtHR held that consent is required in the cases of development, investment, exploration or extraction plans, and specifically large-scale projects, that have a significant impact on the right of use and enjoyment of ancestral territories or property rights.[20]

[14] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[15] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
[16] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx
[17] See General comment No. 23, which can be found at: http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx
[18] file:///C:/Users/DAFI/Downloads/cerd%20(1).pdf. See paragraph 4(d) of the Recommendation.
[19] https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm
[20] Case of the Saramaka People v Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) paras. 129 and 137: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

(B) In the *Mayagna* case, the IACtHR found in favour of a community whose lands (which were not officially titled or otherwise recognised by the state) had been subject to a Nicaraguan government grant of a natural resource concession. Although there was no explicit reference to a requirement for consent in the judgment, such a requirement is impliedly read in across the jurisprudence.[21]

(C) In the *Kichwa* case, the IACtHR found that the Ecuadorian state had an obligation to adopt all necessary measures to guarantee the participation of the Sarayaku people, through their own institutions and mechanisms and in accordance with their values, practices, customs and forms of organisation, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life, and their cultural and social identity.[22]

2.4 Another regional treaty of note in relation to FPIC is the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (known as the "**Ezcazú Agreement**"). Under that agreement, the participating states commit to implement open and inclusive participation by the public in environmental decision-making processes.[23]

2.5 One international treaty includes a direct reference to a principle akin to FPIC: ILO Convention 169 on Indigenous and Tribal Peoples.[24] Although only 22 countries have ratified this convention, its provisions are instructive.

2.6 The key provision is Article 6, which reads as follows:

> *"1. In applying the provisions of this Convention, governments shall:*
>
> *(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;*
>
> *(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;*
>
> *(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.*
>
> *2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."*

2.7 There are several Articles in ILO 169, which when read together with Article 6, require some level of consultation with indigenous and tribal peoples in connection with: (i) the development of their land; and (ii) the passage of any general legislation that may affect

[21] Inter-American Commission on Human Rights Report No. 27/98 (March 1998); Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001), para. 25 (http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf). This refers to the Inter-American Commission on Human Rights' Report No. 27/98 (March 1998). See also the Commission's Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/ Ser.L/V/II.62, doc.26. (1984), 120.

[22] *Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations)* (2012) IACtHR (Ser C) No 245 (27 June 2012) [232]

[23] See Article 7: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf Note: At least 11 countries must sign and ratify the Ezcazú Agreement by 27 September 2020 for it to come into force.

[24] See also paragraphs 2.1 and 3.2 of the body of this Fact Sheet.

the way such developments are approved or carried out. Although consent is not required under ILO 169, consultation must take place "with the objective of achieving agreement or consent".[25]

2.8 The application of Article 6 of ILO has been considered by the ILO Governing Body and the ILO Committee of Experts on the Application of Conventions and Recommendations, whose comments have been largely captured in the jurisprudence of the IACtHR.

2.9 One further convention that addresses the right of FPIC is the Convention on Biological Diversity ("**CBD**").[26] Although the text of the CBD does not directly provide for FPIC, the Nagoya Protocol on Access and Benefit-sharing[27] (a supplementary agreement to the CBD) sets out the need to seek FPIC in relation to: (i) access to genetic resources; and (ii) access to traditional knowledge associated with genetic resources.[28]

2.10 It is also worth noting, in the context of REDD+,[29] that the Cancun Agreements (as part of the "Cancun Safeguards") require states to promote and support respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations and laws (including the UN Declaration on the Rights of Indigenous Peoples).[30]

3. FPIC and "soft-law" instruments and industry standards

3.1 Although they are non-binding, soft-law instruments and industry standards are aspirational and may be relied upon as evidence of emerging international consensus in the interpretation of binding treaties or conventions. Certain soft law rules become obligatory as a condition of receiving financing from certain organisations.[31]

3.2 The most notable non-binding instruments is the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"), which contains the following key provisions:

(A) Article 10: *"No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned"*

(B) Article 19: *"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."*

(C) Article 29(2): *"No storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."*

(D) Article 32(2) *"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."*

[25] ILO 169 Article 6(2)
[26] https://www.cbd.int/doc/legal/cbd-en.pdf
[27] https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf
[28] See also the Decision adopted by the Conference of the Parties to the CBD XIII/18 (December 2016): Voluntary guidelines on the application of article 8(j) of the CBD and the need to seek FPIC.
[29] REDD+ stands for countries' efforts to reduce emissions from deforestation and forest degradation, and foster conservation, sustainable management of forests, and enhancement of forest carbon stocks.
[30] Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1 Appendix 1, paragraph 2(c) https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf
[31] For example, the International Finance Corporation Performance Standards apply to all investment and advisory clients whose projects go through IFC's initial credit review process.

3.3 While Articles 19 and 32(2) only require consultation, Articles 10 and 20(2) require that there be informed consent.

3.4 Other soft-law instruments and industry standards of note are listed below:

(A) The Universal Declaration of Human Rights does not mention FPIC directly but emphasises the importance of "self-determination", equality before the law and the right to own property.[32]

(B) The United Nations Guiding Principles on Business and Human Rights requires businesses to undertake meaningful consultation with groups and stakeholders potentially affected by business operations (Guiding Principles 18 and 21).[33] The commentary to Guiding Principle 3 points out the need for states to enforce laws conducive to business respect for human rights, and to address legislative gaps, particularly in relation to land and indigenous peoples.

(C) The Equator Principles III applies to advisory services, project finance, corporate loans and bridge loans of a signatory financial institution in its support of a new project. Principle 5 requires that indigenous peoples be consulted when potentially affected by projects.[34]

(D) The International Finance Corporation Policy and Performance Standards on Environmental and Social Sustainability[35] states that projects that adversely impact indigenous peoples require engagement in a process of Informed Consultation and Participation (Performance Standard 7).[36]

(E) The European Bank for Reconstruction and Development's Environmental and Social Policy states that FPIC must be obtained before any of the activities described below are commenced:[37]

(1) those that impact on traditional or customary lands under use;

(2) those that involve relocating indigenous peoples from traditional or customary lands; and

(3) those that propose to use the cultural resources, knowledge, innovation or practices of Indigenous Peoples for commercial purposes.

(F) The Initiative for Responsible Mining Assurance Standard for Responsible Mining requires companies to obtain FPIC from affected indigenous communities before commencing any mining-related activities that may affect indigenous peoples' rights or interests.[38]

[32] Articles 1,7 and 17 http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.
[33] See commentary to UNGP 18 and 21 (http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).
[34] http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf (see page 7).
[35] https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES
[36] See Performance Standards 1, 7 and 12 (https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES) Note that under Performance Standard 7, FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree. This is echoed by the World Bank Guidelines: see paragraphs 24 and 25 of Environmental and Social Standard 7. http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf#page=89&zoom=80
[37] file:///C:/Users/DAFI/Downloads/esp-english.pdf. For further information, please see paragraphs 29-35 of the Policy.
[38] http://www.responsiblemining.net/images/uploads/IRMA_Standard_Draft_v2.0_with_MOV.pdf (see Chapter 2.8 (Community and Stakeholder Engagement) and Chapter 2.10 (Free Prior and Informed Consent FPIC)).

(G) The International Council on Mining and Metals' Position Statement on Indigenous Peoples and Mining requires members to engage and consult with indigenous peoples and to work to obtain their consent, where required.[39]

[39] https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statementhttps://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement

SCHEDULE 2: PRACTICAL GUIDANCE ON FPIC

1. Organisation for Economic Cooperation and Development: "Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector" (2017)[40]

2. Danish Institute for Human Rights: "Cross-Cutting: Stakeholder Engagement" (2016)[41]

3. United Nations: "Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities" (2016)[42]

4. Due Process of Law Foundation: "Derecho a la consulta y al consentimiento previo, libre e informado en América Latina" (2015)[43]

5. United Nations Reducing Emissions from Deforestation and Forest Degradation Programme: "Guidelines on Free, Prior and Informed Consent" (2015)[44]

6. International Service for Human Rights: "A Human Rights Defender Toolkit for Promoting Business Respect for Human Rights" (2015)[45]

7. Oxfam, Australia: "Guide to Free, Prior and Informed Consent" (2013)[46]

8. United Nations: "Guidance for Effective Mediation" (2012) [47]

[40] http://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm
[41] https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/stakeholder_engagement/stakeholder_engagement_final_jan2016.pdf
[42] http://www.fao.org/3/a-i6190e.pdfc
[43] http://www.dplf.org/sites/default/files/informe_consulta_previa_2015_web-2.pdf
[44] https://www.uncclearn.org/sites/default/files/inventory/un-redd05.pdf
[45] http://www.ishr.ch/sites/default/files/article/files/ishr_hrd_toolkit_english_web.pdf
[46] http://resources.oxfam.org.au/pages/preview.php?ref=1321&ext=jpg&k=0edfe94f91&search=%21collection145&offset=0&order_by=relevance&sort=DESC&archive=0&
[47] http://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf

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Human Rights Defenders' Fact Sheet

Operating in Conflict-Affected Areas

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1. Definition of conflict-affected areas

1.1 Some of the worst human rights violations take place in conflict-affected areas. It is essential that, when operating in conflict-affected areas, States and companies comply with their obligations so as not to exacerbate human rights abuses.

1.2 There is no settled definition of conflict-affected areas.[1] However, they can be identified by:

(A) armed conflict (intrastate), which usually includes state forces and non-state armed groups, regarding the control of governments, territories or resources;

(B) armed violence, where there are high violence rates and localised armed violence (but such violence does not meet the criteria required for categorisation as an armed conflict under international humanitarian law ("**IHL**"));

(C) post-conflict, where armed conflict has recently ended; and

(D) social unrest where there is (or there is a risk of) violence and/or conflict (for example, riots, isolated and sporadic acts of violence and acts of criminality).

1.3 This Fact Sheet highlights the main issues that can arise in conflict-affected areas. It also gives an overview of the main relevant legal instruments, and the obligations of states and corporations in this area. Finally, it provides suggestions on actions that could be taken by human rights defenders ("**HRDs**") when dealing with state or non-state actors in conflict-affected areas.

2. Issues arising in conflict-affected areas

2.1 State and non-state actors must be conscious of their obligations in conflict-affected areas and mindful of the issues that might arise in such situations. Such issues may include:

(A) the suspension or complete disregard of obligations under local laws designed to protect human rights and/or international human rights law;

[1] The commentary to Guiding Principle 23 (Issues of Context) of the United Nations Guiding Principles on Business and Human Rights singles out conflict-affected areas as operating environments that "may increase the risks of enterprises being complicit in gross human rights abused committed by other actors". The Organisation for Economic Co-operation and Development (OECD) considers that conflict-affected and high-risk areas can be "identified by the presence of armed conflict, widespread violence or other risks of harm to people." In 2013, the Geneva Academy proposed criteria and guidelines to identify conflict-affected and high-risk areas (see http://www.ohchr.org/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal_GenevaAcademy.pdf).

(B) the attack or harassment of a community, or parts thereof;

(C) gender-based sexual or physical violence;

(D) forced displacement and issues of refugee law;

(E) acts in contravention of IHL or international criminal law;

(F) high degrees of militarisation, including the use of private security or state security, the priority of which is to protect business enterprises at the expense of a regard for human rights; and

(G) an absence of civilian state institutions to enforce the rule of law.

2.2 The deterioration of the stability of an area often leads to the hiring of private companies that provide military and/or other security services to protect economic interests or strategic targets. This subject is considered further in the Fact Sheet on Private/Military Security Companies ("**PMSCs**").

3. The legal framework

3.1 When assessing the obligations of State and non-state actors in conflict-affected areas, one must consider IHL, international human rights law and international criminal law.

International humanitarian law

3.2 IHL binds state and non-state actors whose activities are closely linked to an armed conflict. It is based on treaties, particularly the Geneva Conventions (and their Additional Protocols), and various other conventions on specific topics. It regulates the methods of warfare and seeks to limit the impact of conflict on non-participants. The principal relevant conventions are set out in the Schedule to this Fact Sheet.

3.3 There is also a substantial body of customary IHL that is binding on all states and parties to a conflict. Customary IHL consists of rule that derive from the consistent practice of States, accompanied by a belief that the practice is legally required. A database of customary IHL is maintained by the International Committee of the Red Cross.[2]

3.4 The basic rules of IHL can be summarised as follows:

(A) parties to an armed conflict must always distinguish between combatants and civilians; attacks against civilians are prohibited;

(B) people who do not (or no longer) take part in hostilities are entitled to respect for their lives and for their physical and mental integrity;

(C) parties to an armed conflict do not have an unlimited right to choose methods and means of warfare;

(D) wounded and sick must be cared for by the party to the conflict that has them in its power; and

(E) captured combatants and civilians are entitled to respect for their lives, their dignity, their personal rights, and their political and religious rights.

[2] https://ihl-databases.icrc.org/customary-ihl/eng/docs/home
See also J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, 3rd ed., ICRC/Cambridge University Press, Cambridge, 2009: https://www.icrc.org/eng/resources/documents/publication/pcustom.htm.

3.5 IHL distinguishes between international and non-international armed conflicts. As a matter of law, armed violence and social unrest does not amount to non-international armed conflict (although such events may escalate into non-international armed conflict). When considering the scope of a state's obligations under IHL, it is important to understand the nature of the conflict addressed by the relevant convention and whether the relevant State has ratified that convention.

International human rights law

3.6 International human rights law is applicable to all conflict-affected areas (unlike IHL, which is only applicable in situations of armed conflict). The international human rights movement was strengthened by the adoption in 1948 of the UN Universal Declaration of Human Rights.[3] Although not legally binding, the declaration has been elaborated in subsequent international treaties, which have developed further international human rights law.[4]

3.7 In situations of armed conflict, human rights will often be interpreted based on standards of IHL (for example, the right to life must be interpreted in light of IHL, which permits attacks against combatants).

3.8 It is generally understood that international human rights law is binding on states, but not on companies. However, this is a subject of fierce debate, particularly since the publication of the UN General Principles of Business and Human Rights ("**UNGPs**", discussed in greater detail below).

3.9 It is important to note that there may also be national human rights law that is applicable to individuals and/or companies, in respect of which legal advice in the relevant jurisdiction should be sought.

International criminal law

3.10 International criminal law relates to genocide, crimes against humanity and war crimes, and applies to armed conflicts in countries that have ratified the Rome Statute of the International Criminal Court ("**ICC**").[5] The ICC does not have jurisdiction over companies, but can prosecute individual company executives or any individual who is alleged to have committed crimes within the jurisdiction of the ICC.[6]

4. Guidance for businesses operating in conflict-affected areas

4.1 IHL applies to companies that operate in an armed conflict and carry out activities that are linked to the conflict. However, where business actors carry out regular activities that are not related to armed conflict, they are likely to be considered as civilians.

4.2 Although not bound by international human rights law, companies are under increasing pressure to consider their wider human rights obligations. The United Nations Guiding Principles on Business and Human Rights ("**UNGPs**") is a set of international, non-binding standards for preventing, and addressing, the risk of adverse impacts on human rights linked to business activity.[7]

[3] http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf
[4] For a list of the core international human rights instruments, see: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx
[5] https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.
[6] This is discussed at page 5 of "Understanding the International Criminal Court" International Criminal Court: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf.
[7] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

4.3 The UNGPs provide that, wherever they operate, business enterprises should comply with all applicable laws and respect internationally-recognised human rights.[8] When faced with conflicting requirements, business enterprises should seek ways to honour internationally-recognised human rights and should treat the risk of causing, or contributing to, gross human rights abuses as an issue of legal compliance.[9]

4.4 This is particularly relevant when operating in conflict-affected areas, where there are heightened risks of gross human rights abuses. In such scenarios, business must take care not to exacerbate the situation and should consult internally and externally with independent experts when determining how to respond.[10]

4.5 The UNGPs set out further steps businesses should take steps to ensure that they do not cause, or contribute to, human rights breaches, either through their own activities or through business relationships. These steps include the publication of a human rights policy statement, the conducting of human rights due diligence, and the provision of effective grievance mechanisms and remediation where human rights have been breached.[11] In particular, specific care should be taken to ensure that adequate human rights due diligence is carried out when operating in conflict-affected areas.[12]

4.6 Even if business accept that they should adhere to the (non-binding) UNGPs, they often find it difficult to determine what they should be doing to meet their obligations. This has led to the publication of numerous texts that provide guidance for companies operating in conflict-affected areas, including:

(A) the International Committee of the Red Cross;[13]

(B) the UN Global Compact Office;[14]

(C) International Alert;[15]

(D) SOMO (the Centre for Research on Multinational Companies);[16]

(E) Shift;[17]

(F) the Institute for Human Rights and Business;[18] and

(G) the Danish Institute for Human Rights.[19]

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[8] Guiding Principle 23(a)
[9] Guiding Principle 23(b) and (c)
[10] Commentary to Guiding Principle 23
[11] See the following Fact Sheets for further information on the obligations of business enterprises under the UNGPs: (i) UNGPs: Human Rights Policy Statement; (ii) UNGPs: Human Rights Due Diligence; (iii) UNGPs: Grievance Mechanisms and Remediation; and (iv) UNGPs: Leverage
[12] See also additional guidance regarding conducting human rights due diligence in conflict-affected areas. For example: OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf
[13] International Committee of the Red Cross, "Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law", September 2006 https://www.icrc.org/en/publication/0882-business-and-international-humanitarian-law-introduction-rights-and-obligations
[14] UN Global Compact, "Guidance on Responsible Business in Conflict-Affected and High Risk Areas", 2010 https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf
[15] International Alert, "Human Rights Due Diligence in Conflict-Affected Settings" 2018 https://www.international-alert.org/sites/default/files/Economy_HumanRightsDueDiligenceGuidance_EN_2018.pdf
[16] SOMO "Fragile" Handle with Care: Multinationals and Conflict", November 2016 https://www.somo.nl/wp-content/uploads/2016/11/Report-Fragile.pdf
[17] Shift "Human Rights Due Diligence in High Risk Circumstances" March 2015 https://www.shiftproject.org/media/resources/docs/Shift_HRDDinhighriskcircumstances_Mar2015.pdf
[18] IHRB, "From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries", 2011 https://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf
[19] DIHR, "Decision Map: Doing Business in High-Risk Human Rights Environments", 2010 http://www.ideaspaz.org/tools/download/59446

4.7 States are also obliged under the UNGPs (Guiding Principle 7) to help to ensure that business enterprises operating in conflict-affected areas are not involved in human rights abuses. They can do so by:

(A) engaging with relevant business enterprises to help to identify, prevent and mitigate human rights abuses;

(B) providing assistance to business enterprises to address the heightened risk of human rights abuses;

(C) denying to business enterprises involved in gross human rights abuses access to public support and services; and

(D) ensuring that they have policies, laws and enforcement mechanisms to address the risk of business involvement in human rights abuses.

4.8 The commentary to Guiding Principle 7 flags that, where transnational corporations are involved, their "home" states also have roles to play in assisting both corporations and "host" states to ensure that businesses are not involved in human rights abuses (particularly when the "host" state is struggling to protect human rights due to a lack of effective control). Neighbouring states can also provide additional support.

4.9 Furthermore, where states identify that business enterprises are involved in human rights abuses, they should take steps to address this. This may include exploring civil, administrative and criminal liability against the corporation for committing, or contributing to, the human rights violation(s) in question.

5. Practical steps for human rights defenders when operating in conflict-affected areas

5.1 Conflict-affected areas pose a heightened risk to HRDs in their daily work. In light of this, HRDs should:

(A) carry out periodic risk assessments of their own security (and that of their associates) to identify the sources of threats against them, any points of operational, legal or political vulnerability, and any strategies that can be developed to mitigate such risks.[20]

(B) share with other HRDs, civil society stakeholders and experts best-practice in collective or individual protection mechanisms and protocols. PBI has created an online tool providing information to HRDs on security and protection.[21]

(C) encourage states to introduce or strengthen protection for HRDs at risk in conflict-affected areas. Make use of any local or regional protection mechanisms that have already been implemented.[22]

(D) seek coordination and support from different stakeholders to engage with state and/or non-state actors where direct or unilateral HRD engagement by the HRD with these entities may increase the threats and risks to HRDs.

5.2 Having assessed the risks to their own security (and that of their associates), HRDs may consider taking the following steps:

(A) Engage with other stakeholders to formulate a strategy for preventing and

[20] http://www.pbi-mexico.org/fileadmin/user_files/projects/mexico/images/News/Reducido_GuiaFacilitacion.pdf
[21] http://www.herramientadefensorasderechostierra.org/en/security-protection
[22] Such as the Inter-American Commission of Human Rights and the African Commission on Human and Peoples' Rights.

addressing the risks of business involvement in gross human rights abuses in the relevant conflict-affected area.

(B) Remind state and non-state actors of their obligations under IHL and international criminal law, and of their (international/national) human rights obligations.

(C) Flag, as necessary, gaps in policies, legislation, regulations and enforcement mechanisms regarding the protection of human rights to "host" or "home" states.

(D) Develop (or assist NGOs to develop) early-warning indicators to alert government agencies and business enterprises to humanitarian and human rights problems in conflict-affected areas.

(E) Advocate for states to develop intra and extra-territorial remedies for failure by companies to remedy human rights abuses (which may include the introduction of criminal, civil and administrative sanctions and/or the withdrawal of public support or services from such companies).

(F) Check whether the relevant company has published a human rights statement, or has adopted any voluntary principles or guidelines. Remind companies of their (non-binding) obligations under these documents, the UNGPs and any other associated guidelines.

(G) Remind companies that heightened due diligence should be conducted in conflict-affected areas to ensure that their operations do not cause or exacerbate human rights abuses.

(H) Consider the practical steps for HRDs that are set out in the following Fact Sheets:

(1) UNGPs: Human Rights Policy Statement;

(2) UNGPs: Human Rights Due Diligence;

(3) UNGPs: Grievance Mechanisms and Remediation;

(4) UNGPs: Leverage; and

(5) Private Military/Security Companies.

(I) When taking these practical steps, HRDs may also decide to copy in, as appropriate, UN Special Procedures,[23] Inter-American Commission on Human Rights Thematic Rapporteurships and Units,[24] African Commission on Human and Peoples' Rights Special Mechanisms,[25] or the Business and Human Rights Resource Centre,[26] to help raise awareness of any concerns raised or request ongoing monitoring and support.

[23] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
[24] http://www.oas.org/en/iachr/mandate/rapporteurships.asp
[25] http://www.achpr.org/mechanisms/
[26] https://www.business-humanrights.org/

SCHEDULE 1 PRINCIPAL CONVENTIONS REGARDING IHL

The principal conventions regarding international humanitarian law are:[27]

(A) the four Geneva Conventions of 1949 and the Additional Protocols of 1977[28] (in particular, Additional Protocols I and II) which deal with the Protection of Victims of International Armed Conflicts and the Protection of Victims of non-International Armed Conflicts, respectively); [29]

(B) the Convention on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (sometimes referred to as the Ottawa Treaty or the Mine Ban Treaty);[30]

(C) the Convention on Cluster Munitions;[31]

(D) the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and their Destruction (sometimes referred to as the Biological Weapons Convention);[32]

(E) the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (sometimes referred to as the Chemical Weapons Convention);[33]

(F) the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects;[34]

(G) the Convention on the Rights of the Child;[35]

(H) Council Regulation (EC) No 2368/2002 of 20 December 2002, implementing the Kimberley Process certification scheme for the international trade in rough diamonds; and

(I) EU Regulation 2017/821 of 17 May 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum, tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

[27] For a complete list see the website of the International Committee of the Red Cross: https://ihl-databases.icrc.org/ihl#view:_id1:_id2:_id250:repeat1:1:labelAnchor
[28] See https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm. A third protocol, Additional Protocol III, was adopted in 2005 and relates to the red cross emblem.
[29] Additional Protocol III, which was adopted in 2005, relates to the red cross emblem.
[30] https://www.apminebanconvention.org/fileadmin/APMBC/text_status/Ottawa_Convention_English.pdf
[31] http://www.clusterconvention.org/files/2011/01/Convention-ENG.pdf
[32] http://disarmament.un.org/treaties/t/bwc/text
[33] https://www.opcw.org/fileadmin/OPCW/CWC/CWC_en.pdf
[34] https://www.icrc.org/eng/assets/files/other/icrc_002_0811.pdf
[35] See paragraphs 49 - 52 of General comment No. 16 on State obligations regarding the impact of the business sector on children's rights (http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf)

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Human Rights Defenders' Fact Sheet

Private Military/Security Companies

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This document does not constitute legal advice nor does the report represent the views of Simmons & Simmons LLP. For a definitive view as to the laws and application of those laws in other jurisdictions, advice must be sought from counsel in that jurisdiction. This Fact Sheet was produced in May 2018 and reflects the law at that point.

1. Introduction

1.1 Peace Brigades International ("**PBI**") provides protection, support and recognition to human rights defenders ("**HRDs**") working in areas of repression and conflict who have requested support. This may involve assisting HRDs in situations where private military/security companies ("**PMSCs**") are present.

2. What Are PMSCs?

2.1 PMSCs are private companies that provide military and/or other security services. Such services may include:

(A) the provision of armed guards and the protection of personnel, conveys and buildings;

(B) the maintenance and operation of weapon systems;

(C) prisoner detention; and

(D) advising and training local police and military forces.

2.2 PMSC personnel are not necessarily "*mercenaries*".[1] The definition of a "*mercenary*" requires that certain narrow criteria set out in the relevant instruments of international law agreements (described in paragraph 4 below) are met. A State that has ratified one or both of the UN and African conventions against mercenaries has an obligation to prosecute mercenaries.

2.3 Whether or not the personnel of a PMSC may be defined as a "*mercenary*" makes little difference in practical terms. The only consequence in law is that a mercenary captured while participating in an international armed conflict is not entitled to be classified as an enemy combatant or prisoner of war. They are, however, still entitled to adequate conditions of detention and the right to a fair trial.

2.4 While States have an obligation to prosecute mercenaries, the reality is that HRDs who deal with mercenaries are likely to seek recourse against the party engaging the PMSC, whether a State or a company.

[1] For the purposes of this note, PMSC personnel include persons employed by, or contracted to, a PMSC, including its employees and managers.

3. Issues Faced by HRDs in Relation to PMSCs

3.1 Historically, PMSCs have had a reputation for violating human rights. Issues faced by HRDs may arise in relation to PMSC personnel who:

(A) lack awareness of their obligations under local laws and/or international human rights law;

(B) attack or harass a community or parts of communities;

(C) inflame local conflict situations;

(D) commit gender-based sexual or physical violence; and/or

(E) transfer arms between public and private security forces.

3.2 These issues can be exacerbated by PMSC personnel being poorly paid, trained and commanded, and by their perception that there are no, or no likely, consequences for their actions.

4. The Legal and Regulatory Framework

4.1 The construction of international law and, in particular, international human rights law, enables it to act as an agent of control over PMSCs and their personnel. The following are of particular relevance:

(A) Article 47 of the Protocol Additional to the Geneva Convention (1949) and relating to the Protection of Victims of International Armed Conflicts ("**Protocol I**").[2]

Protocol I defines a "*mercenary*" and confirms that a "*mercenary*" shall not have the right to be a combatant or a prisoner of war.

(B) The Organisation of African Unity Convention for the Elimination of Mercenarism in Africa (1977) ("**African Convention of Mercenarism**").[3]

The African Convention on Mercenarism provides a definition of "*mercenary,*" provides for criminal liability and sets out the responsibility of signatory States and their representatives for the acts of "*mercenaries*". It has been ratified by 31 African States.[4]

(C) The International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Resolution 44/34-1989) ("**UN Mercenary Convention**").[5]

The UN Mercenary Convention prevents the recruitment, training, use and financing of mercenaries. It has been ratified by 35 States.[6]

[2] The full text of Protocol I can be found at: https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf
[3] The full text of the African Convention on Mercenarism can be found at: https://treaties.un.org/doc/Publication/UNTS/Volume%201490/volume-1490-I-25573-English.pdf
[4] A full list of parties can be found at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=485
[5] A link to the UN Mercenary Convention can be found at: https://treaties.un.org/doc/Treaties/1989/12/19891204%2008-54%20AM/Ch_XVIII_6p.pdf
[6] A full list of signatories can be found at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&clang=_en.

(D) 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies ("**Montreux Document**").[7]

The Montreux Document was proposed and developed by the International Committee of the Red Cross and the Swiss Government, together with contributions from PMSCs and non-governmental organisations ("**NGOs**"). It reaffirms States' legal obligations regarding PMSCs and recommends a series of non-binding good practices for the practical implementation of existing legal obligations (See Schedule 1 for a summary of the good practices). 54 States have now endorsed the Montreux Document.[8]

(E) International Code of Conduct for Private Security Service Providers (2010) ("**International Code of Conduct**").[9]

The International Code of Conduct builds upon the principles of the Montreux Document and the "*Respect, Protect, Remedy*" framework developed by the Special Representative of the UN Secretary-General on Business and Human Rights. It sets out a commonly-agreed set of principles for the conduct of PMSC personnel, including in relation to: the use of force; detention; the prohibition on torture and gender-based violence; and discrimination (See Schedule 2 for a summary of the International Code of Conduct principles).

The International Code of Conduct also sets out governance and oversight mechanisms for PMSCs, including in relation to: the selection and vetting of personnel; training; management of weapons; incident reporting; grievance procedures and meeting liabilities.

The International Code of Conduct has been adopted by seven Governments, 98 PMSCs and 18 Civil Society Organisations, all of which are members of the International Code of Conduct Association ("**ICoCA**").[10] The functions of the ICoCA are threefold:

(1) To certify member companies and assess whether their systems and policies meet the requirements of the International Code of Conduct.

(2) To report, monitor and assess the performance of member companies' compliance with the International Code of Conduct based on established human rights methodologies, including in the field.

(3) To handle complaints or alleged violations of the International Code of Conduct.

4.2 Furthermore, there are other non-binding codes of conduct applicable to specific sectors or industries.

4.3 For example, the Voluntary Principles on Security and Human Rights (the "**Voluntary Principles**") are a collaborative effort by governments, major multinational extractive companies and NGOs to provide guidance on practical steps that can be taken to minimise the risk of human rights abuses by PMSCs and their personnel in communities

[7] The full text of the Montreux Document with explanatory comments can be found at: https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf
[8] A full list can be found at: https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html
[9] The full text of the International Code of Conduct can be found at https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf
[10] A full list of ICoCA members can be found at www.icoca.ch/en/membership.

located near extraction sites (See Schedule 3 for a summary of the practical steps).[11] Member organisations have also collaborated to produce associated guidance documents to assist companies and civil society actors to work within the Voluntary Principles.[12]

5. Practical Steps for HRDs When Dealing with PMSCs

5.1 Dealing with PMSCs and their personnel

5.2 HRDs should not engage directly with PMSCs and their personnel. If PMSCs and their personnel are operating in the same area as HRDs, the HRDs should (if possible):

(A) Identify (i) the PMSC; and (ii) the body that has engaged the PMSC.

(B) Document the conduct of the PMSC personnel as against guidance set out in the Montreux Document, the International Code of Conduct and/or the Voluntary Principles (as to which, see Schedules 1 to 3).

(C) Document the impact of the PMSC personnel's conduct on local HRDs and the community.

PBI can then assist by raising concerns about breaches of the Montreux Document, the International Code of Conduct or the Voluntary Principles through the appropriate channel.

5.3 Dealing with States that engage PMSCs

5.4 States cannot absolve themselves of their obligations under local or international human rights law by hiring PMSCs; they remain responsible for ensuring that relevant standards are maintained and law respected. The State may be responsible for violations of local and/or international human rights law by the personnel of PMSCs, particularly if the PMSC acts on the instruction of the State or their representatives.

5.5 Furthermore, all States have an obligation to ensure that international human rights law is respected. This includes States in which PMSCs are incorporated or otherwise operate.

5.6 If it appears that PMSC personnel are violating local laws, local legal advice should be sought. HRDs should check whether that State issues licences or has otherwise established a regulatory framework in which PMSCs must operate. If so, HRDs should seek local legal advice in relation to the apparent breach of these standards.

5.7 If it appears that PMSC personnel are violating international human rights laws, HRDs should:

(A) Check whether the State in which the infringement has occurred or the PMSC itself is a member of ICoCA. If so, HRDs should consider following the ICoCA complaints procedure.

(B) Check whether the State in which the PMSC is incorporated is a member of ICoCA. If so, consider following the ICoCA complaints procedure.

5.8 PBI can also assist by raising concerns about breaches of the Montreux Document, the International Code of Conduct and Voluntary Principles through the ICoCA complaints procedure, with the State or with the UK Government, either directly or as part of an NGO coalition, as appropriate.

[11] Available at: http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf
[12] For example, in 2015 the Global Compact launched a Guidance Document on the Assurance of the Voluntary Principles to assist companies in assessing their degree of implementation of the Voluntary Principles.

5.9 **Dealing with companies that engage PMSCs**

5.10 Companies often engage PMSCs, particularly when operating in dangerous or unstable environments. If a HRD is dealing with a company that has engaged a PMSC, it should:

(A) Check whether the company has internal guidance on the use of PMSC on, for example, its website.

(B) Check whether any voluntary or non-binding codes have been adopted by, or are applicable to the company and/or its operations.

(C) Check whether the company or the PMSC is a member of ICoCA.

5.11 PBI can then assist by raising concerns about breaches of the Montreux Document, the International Code of Conduct or the Voluntary Principles through the ICoCA complaints procedure or with a UK parent company, either directly or as part of an NGO coalition, as appropriate.

5.12 For further information on operating in conflict-affect areas, see the separate Fact Sheet on this topic.

SCHEDULE 1 –THE MONTREUX DOCUMENT (GOOD PRACTICES RELATING TO PRIVATE MILITARY AND SECURITY COMPANIES)

1. **Good Practices for Contracting States**

1.1 Contracting States are States that contract with a PMSC for its services, whether directly or indirectly. Good practices for Contracting States include the following:

(A) In determining which services may or may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

(B) Introducing an adequate procedure for the selection and contracting of PMSCs which, amongst other things, ensures transparency and supervision.

(C) Adopting criteria for the selection of PMSCs that considers a wide range of quality indicators.

(D) Including contractual clauses and performance requirements in agreements with PMSCs to ensure adherence with national law, international humanitarian law and human rights law.

(E) Monitoring compliance and ensuring accountability of PMSCs for their conduct.

2. **Good Practices for Territorial States**

2.1 Territorial States are States in whose territory PMSCs operate. Good practices for Territorial States include the following:

(A) In determining which services may or may not be carried out on their territory by PMSCs, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

(B) Requiring PMSCs to obtain authorisation to provide military and security services in their territory.

(C) Introducing an authorisation procedure which, amongst other things, ensures transparency in granting authorisations.

(D) Ensuring that PMSCs fulfil certain quality relevant for the respect of national law, international humanitarian law and human rights law before granting authorisation.

(E) Including, as terms of the authorisation, requirements to respect human rights.

(F) Adopting rules on the provision of services by PMSCs and their personnel.

(G) Monitoring compliance and ensuring accountability of PMSCs for their conduct.

3. **Good Practices for Home States**

3.1 Home States are States in which a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the Home State. Good practices include:

(A) In determining which services may or may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

(B) Establishing a system of authorisation for the provision of military and security services abroad.

(C) Introducing an authorisation procedure which, amongst other things, ensures transparency in granting authorisations.

(D) Ensuring that PMSCs fulfil certain quality criteria relevant for the respect of national law, international law and human rights law before granting authorisation.

(E) Including, as terms of the authorisation, requirements to respect human rights.

(F) Monitoring compliance and ensuring accountability of PMSCs for their conduct.

SCHEDULE 2 – INTERNATIONAL CODE OF CONDUCT (SPECIFIC PRINCIPLES REGARDING THE CONDUCT OF PERSONNEL)

The International Code of Conduct sets out a commonly-agreed set of principles regarding the conduct of PMSCs and their personnel. The principles require the following conduct:

1. **General Conduct**

1.1 Treat all persons humanely and with respect for their dignity and privacy and will report any breach of the code.

2. **Rules on the Use of Force**

2.1 To adopt rules on the use of force.

3. **Use of Force**

3.1 Take all reasonable steps to avoid the use of force. Any use of force should be proportionate and in a manner consistent with applicable law.

3.2 Not to use firearms except in certain circumstances.

3.3 Any use of force or weapons by personnel, when authorised to assist in the exercise of a State's law enforcement authority, to comply with all national and international obligations applicable to regular law enforcement officials of that State.

4. **Detention**

4.1 Only guard, transport or question detainees if: (a) the company has been specifically contracted to do so by a State; and (b) its personnel are trained in the applicable national and international law.

4.2 Treat all detained persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law.

5. **Apprehending Persons**

5.1 Not to take or hold any persons unless in defined circumstances.

5.2 Treat all apprehended persons humanely and consistent with their status and protection under applicable human rights law or international humanitarian law.

6. **Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment**

6.1 Not to engage in torture or other cruel, inhuman or degrading treatment or punishment.

6.2 Report any acts of torture or other cruel, inhuman or degrading treatment or punishment, known to them, or of which they have reasonable suspicion.

7. **Sexual Exploitation and Abuse or Gender-Based Violence**

7.1 Not to engage in or benefit from, sexual exploitation and abuse or gender-based violence or crimes, either within the company or externally.

7.2 Remain vigilant for all instances of sexual or gender-based violence and, where discovered, report such instances to competent authorities.

8. **Human Trafficking**

8.1 Not to engage in trafficking persons.

8.2 Remain vigilant for all instances of trafficking persons and, where discovered, report such instances to competent authorities.

9. **Prohibition of Slavery and Forced Labour**

9.1 Not to use slavery, forced or compulsory labour, or be complicit in any other entity's use of such labour.

10. **Prohibition on the Worst Forms of Child Labour**

10.1 Respect the rights of children to be protected from the worst forms of child labour.

10.2 Report any instances of child labour that personnel know of, or have reasonable suspicion of, to competent authorities.

11. **Discrimination**

11.1 Not discriminate on grounds of race, colour, sex, religion, social origin, social status, indigenous status, disability, or sexual orientation when hiring personnel and will select personnel on the basis of the inherent requirements of the contract.

12. **Identification and Registration**

12.1 Be individually identifiable when carrying out activities in discharge of contractual responsibilities.

12.2 Ensure that vehicles are registered and licensed with the relevant national authorities when they are carrying out activities in discharge of contractual responsibilities.

12.3 Ensure that all hazardous materials are registered and licensed with the relevant national authorities.

SCHEDULE 3 – VOLUNTARY PRINCIPLES (INTERACTIONS BETWEEN COMPANIES AND PRIVATE SECURITY)

1. Voluntary Principles

1.1 The Voluntary Principles provide guidance to companies on practical steps that they can take to minimise the risk of human rights abuses by PMSCs:

(A) Companies should include the voluntary principles to guide private security conduct as contractual provisions in agreements with private security providers and ensure that private security personnel are adequately trained to respect the rights of employees and the local community.

(B) Agreements between companies and PMSCs should require investigation of unlawful or abusive behaviour and appropriate disciplinary action. Agreements should also permit termination of the relationship by companies where there is credible evidence of unlawful or abusive behaviour by private security personnel.

(C) Companies should consult and monitor PMSCs to ensure they fulfil their obligation to provide security in a manner consistent with the principles. Where appropriate, companies should seek to employ private security providers that are representative of the local population.

(D) Companies should review the background of the PMSC they intend to employ, particularly with regard to the use of excessive force. Such reviews should include an assessment of previous services provided to a host government and whether these services raise concern about the PMSCs dual role as a private security provider and government contractor.

(E) Companies should consult with other companies, home country officials, host country officials, and civil society regarding experiences with private security. Where appropriate and lawful, companies should facilitate the exchange of information about unlawful activity and abuses committed by PMSCs.

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Human Rights Defenders' Fact Sheet

Internal Displacement and Resettlement of Communities

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1. Scope of this Fact Sheet

1.1 Involuntary displacement and resettlement of communities can occur for a variety of reasons, which may include: physical displacement (relocation or loss of shelter); environmental harm (destruction of habitat and/or natural resources); and/or economic displacement (loss of assets that leads to loss of income sources or other means of livelihood).

1.2 This Fact Sheet focuses on *internal* displacement and resettlement. Internally displaced peoples ("**IDPs**") can be defined as:

> *"persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."*[1]

1.3 This Fact Sheets considers the key international legal instruments that relate to internal displacement and resettlement, and the obligations of companies in respect of this issue. It also sets out suggested practical steps that can be taken by human rights defenders ("**HRDs**") when faced with communities that have been (or may be) displaced or resettled due to the activities of companies.

2. The legal landscape

2.1 To understand fully the obligations of state and non-state actors regarding displacement and resettlement, one must consider the position under international human rights law and international humanitarian law ("**IHL**"), and how they overlap.

2.2 IHL is only applicable in situations of armed conflict. It regulates methods of warfare and seeks to limit the impact of conflict on non-participants. IHL violations (such as direct attacks on civilians, destruction of property not as a result of military necessity, sexual violence, and unlawful restrictions on access to health care) are major causes of displacement. International human rights law is applicable to all scenarios, including where internal displacement and resettlement results from any sort of conflict (rather than just armed conflict), environmental damage, development or natural disasters. However, in situations of armed conflict, human rights will often be interpreted in light of IHL.

2.3 This means that conventions and "soft-law" instruments (non-legally-binding instruments that have persuasive effect) that address all forms of internal displacement and settlement

[1] http://www.unhcr.org/uk/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html

(including resulting from conflict) include elements of both IHL and international human rights law. The key instruments are:

(A) The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (known as the "Kampala Convention") is the first legally-binding regional convention that addresses internal displacement.[2] It sets out the obligations of states, non-state armed groups and international organisations, and provides a framework for African states to adopt domestic norms and policies to deal with internal displacement.

(B) The UN Guiding Principles on Internal Displacement ("**GPID**")[3] identifies the rights and guarantees relevant to internally displaced persons, and provides guidance for state and non-state actors. Although non-binding, the GPID has also been recognised by the UN General Assembly. It reflects, and is consistent with, international human rights law and IHL. The key obligations under the GPID are summarised below:

(1) Obligation to provide protection and humanitarian assistance to IDPs within their jurisdiction;

(2) Obligation to provide IDPs with adequate food, shelter and drinking water, documentation and free primary education;

(3) Obligation to consider the specific needs of groups of IDPs, including children, the disabled and the elderly; and

(4) Obligation to ensure that conditions and means are in place to enable IDPs to return voluntarily to their homes, in safety and with dignity, or to resettle voluntarily in other parts of the country.

2.4 Refer to Schedule 1 of this Fact Sheet for further examples of soft law that addresses specifically internal displacement and resettlement.

2.5 Other IHL and international human rights law instruments include provisions that are relevant to internal displacement and resettlement. The main instruments of note are referred to below.

International human rights law

2.6 Fundamental human rights relevant to displacement and resettlement include the rights to: culture; life; liberty and security of person; an adequate standard of living; equal recognition; self-determination; non-discrimination; property; family; and home.

2.7 These rights are set out in several binding international instruments, including:

(A) International Covenant on Economic, Social and Cultural Rights;[4]

(B) International Covenant on Civil and Political Rights;[5]

(C) Convention on the Elimination of All Forms of Discrimination against Women;[6]

[2] https://au.int/sites/default/files/treaties/7796-treaty-0039_-_kampala_convention_african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_africa_e.pdf. See Article 4(4) for a non-exhaustive list of the prohibited categories of arbitrary displacement under the Kampala Convention
[3] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement
[4] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx. See Article 11(1), in particular
[5] http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. See Article 17, in particular

(D) Convention on the Rights of the Child;[7] and

(E) International Convention on the Elimination of All Forms of Racial Discrimination.[8]

2.8 The right to free prior and informed consultation, and/or (in certain circumstances) consent, is also important when dealing with the displacement and resettlement of indigenous and tribal groups.

2.9 Article 16 of the International Labour Organisation Convention 169 on Indigenous and Tribal Peoples[9] deals specifically with the displacement and resettlement of these groups, and can be summarised as follows:

(A) Peoples shall not be removed from the lands which they occupy except where relocation is considered necessary as an exceptional measure, in which case relocation shall take place only with their free and informed consent.

(B) Where consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national law and regulations, which provide the opportunity for effective representation of the peoples concerned.

(C) Whenever possible, these peoples shall have the right to return to their traditional lands as soon as the grounds for relocation cease to exist.

(D) When return is not possible these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them.

(E) Where the peoples concerned express a preference for compensation in money or in kind, they shall be compensated under appropriate guarantees.

(F) Relocated persons shall be fully compensated for any resulting loss or injury.

2.10 For further information regarding the right to Free Prior and Informed Consent, refer to the separate Fact Sheet on this topic.

International Humanitarian Law

2.11 IHL binds state and non-state actors whose activities are closely linked to an armed conflict. The main IHL treaties that contain provisions relating to internal displacement are the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention) and Additional Protocols I and II of 1977. These are supplemented by customary IHL, which consists of rules derived from the consistent practice of states, accompanied by a belief that the practice is legally required.[10]

2.12 The International Committee of the Red Cross has summarised the key provisions of IHL in the context of internal displacement as follows:[11]

(A) prohibition of forced displacement and the right to voluntary return in safety;

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[6] http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf. See Article 14(2)(h) in particular
[7] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. See Articles 16(1) and 27(3) in particular
[8] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx. See Article 5(d)(iii) and (iv) in particular
[9] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169. See Articles 13-19 under Part II (Land), in particular.
[10] A database of customary IHL is maintained by the International Committee of the Red Cross at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home
See also J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, 3rd ed., ICRC/Cambridge University Press, Cambridge, 2009: https://www.icrc.org/eng/resources/documents/publication/pcustom.htm
[11] See the following link for further details: https://www.icrc.org/en/document/internally-displaced-persons-and-international-humanitarian-law-factsheet

(B) non-discrimination;

(C) protection as part of the civilian population;

(D) respect for life, dignity and humane treatment (including the right to choose a residence and to move freely in and out of camps);

(E) adequate standards of living and humanitarian assistance;

(F) respect for family life and family unity (including that that all possible measures must be taken to ensure that those displaced are not separated from their families);

(G) right to documentation;

(H) prohibition of the destruction or seizure of property, unless required by imperative military necessity

(I) employment and social protection (which includes the prohibition of uncompensated or abusive forced labour);

(J) education of children; and

(K) prohibition of forcible recruitment of children and their use in hostilities

2.13 For further information regarding operating in conflict-affected areas, refer to the separate Fact Sheet in this series on this topic.

3. The obligations of companies regarding internal displacement and resettlement?

3.1 Internal displacement and resettlement is often directly linked to (lawful and/or unlawful) business activity. This might include land acquisition by a company, subsequent development of that land, the carrying out of extractive operations, and/or the imposition of temporary or permanent restrictions on land use, or other negotiated settlements that result in the same.

3.2 In such scenarios, there is potential for the rights of communities to be disregarded due to unlawful acquisition, lack of consultation and ongoing discussions with those affected peoples, the use of threats or coercion to obtain communities' consent, and/or the exploitation of divisions within communities.

3.3 IHL applies to companies that operate in an armed conflict and carry out activities that are linked to the conflict. However, where business actors carry out regular activities that are not related to armed conflict, they are likely to be considered as civilians.

3.4 Although not bound by international human rights law, companies are under increasing pressure to consider their wider human rights obligations. The United Nations Guiding Principles on Business and Human Rights ("**UNGPs**") is a set of international, non-binding standards for preventing and addressing the risk of adverse impacts on human rights linked to business activity.[12] They require that business enterprises: avoid causing, or contributing to, adverse human rights impacts; mitigate any adverse impact that are directly linked to their operations, products or services by their business relationships; and address such impacts when they occur.[13]

[12] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[13] Guiding Principle 13

4. Practical steps for HRDs

4.1 Where a company undertakes (or is intending to take) unlawful displacement action against local communities, HRDs should consider whether any of the following events have taken (or will take) place:

(A) forcible removal of such communities from the land without (or with inadequate) consultation, disregarding their existing legal rights to land, territories and natural resources;

(B) customs, traditions, culture and economic wellbeing of indigenous groups being disregarded;

(C) mass expulsions, ethnic cleansing or population transfers;

(D) no benefit to the local community, including lack of adequate compensation;

(E) removal or loss or home and/or livelihood;

(F) coercion, threats or violence against those individuals who are forcibly removed; and/or

(G) adverse environmental and socio-economic impact in areas to which individuals have been displaced.

4.2 HRDs should assist communities to identify the rights, or claims, to the land, and compile an inventory of assets on the land or use of the land of those communities through consultation. It may not be a simple process to identify the rights that members of local communities possess, which will depend on whether they have:

(A) formal legal rights to the land/assets;

(B) a claim to land/assets that is recognisable under domestic law;

(C) collective ownership of land/assets (as opposed to private ownership); or

(D) no recognisable legal right/claim to land/assets occupied or used.

4.3 HRDs should identify those groups that are (or will be) affected by the actions of the company, paying particular attention to the most vulnerable groups or groups that may not be properly represented (such as women, children, those who are disabled, and/or indigenous or tribal groups).

4.4 HRDs should arm the representatives of the affected communities with information that will assist them in their discussions and negotiations with companies, including any steps that companies should take and principles they should adhere to before they proceed with any displacement action. These include, but are not limited to:

(A) conducting research and due diligence to identify whether the land is presently, or was historically, inhabited and/or used by local communities, including indigenous communities and, if so, the customs, traditions and religious rights of such

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For further information regarding the obligations of companies under the UNGPs, refer to separate Fact Sheets on human rights policy statements, human rights due diligence, grievance mechanisms and remediation and leverage. Also consider the Fact Sheets on operating in conflict-affected areas and on private/military security companies.

communities;[14]

(B) developing a specific and tailored consultation procedure based on the results of research and due diligence carried out and keeping affected communities informed about the company's plans;

(C) negotiating with the community in its native language and in accordance with its traditions;

(D) respecting the social structure and governance mechanisms of the community;

(E) conducting consultations with representatives of all groups in the relevant community;[15]

(F) where the project is large-scale and will have a major impact on the communities, companies must obtain free, prior and informed consent to any action that will impact the human rights or other rights of affected communities;

(G) where the project is of a smaller scale, engaging in good faith, free, prior and informed consultation about the project (including redesigning the project to avoid damaging sites of major cultural importance where necessary);

(H) implementing training programmes for company employees so that they can better understand the communities with whom they are engaging;

(I) implementing community engagement programmes (which may include enterprise development, training, employment, health, social and cultural initiatives);

(J) creating a community feedback system which is accessible and transparent and communicating the existence of these procedures and systems to relevant communities in a format that can be easily understood;

(K) establishing fair and efficient complaints and grievance procedures;[16]

(L) involving independent institutions to investigate claims and complaints.

4.5 HRDs may also be able to assist communities in assessing the results of the due diligence/consultation exercise and consider negotiation options, which may include the possibility of designing/amending the project to avoid displacement; resettlement outside the existing site; or adopting a no development option if detrimental human rights impacts are unavoidable.

4.6 Companies may seek to resettle and/or negotiate settlement pay-outs with affected communities by lawful means, such as by compulsory acquisition. In this case, HRDs should ensure that communities are aware of the specific impact of the proposed development and of their rights.

4.7 Where affected communities are willing to enter negotiations for resettlement, HRDs should work with them to ensure there is consultation with the company with informed participation of, and disclosure of information to, those affected individuals. As part of those negotiations, HRDs can assist the communities to ensure that housing and infrastructure for resettlement is completed prior to displacement, that displaced persons are resettled to a site that they can lawfully occupy, and that resettlement meets the

[14] UNGPs 15(b), 17 and 18
[15] UNGP 18(b)
[16] UNGPs 22, 29 and 31

conditions set out in the instruments referred to in this Fact Sheet.

4.8 Where it is not possible to provide land or similar resources as compensation, HRDs can work with the affected communities to consider other options, including:

(A) seeking education, training, jobs, alternative means of living;

(B) creating a Resettlement and/or Livelihood Restoration Plan to mitigate the negative impacts of displacement and to establish the entitlements of those affected;[17] and

(C) seeking adequate compensation from companies for loss of assets at replacement cost (such compensation schemes to be transparent and applied consistently).

4.9 Where such resettlement, compensation, livelihood restoration or other schemes are put in place, HRDs can assist communities to insist on the regular monitoring of the implementation of such schemes by the implementation by the company of a framework to provide: (i) regular feedback from representatives of the affected communities; and (ii) an adequate (and preferably independent) grievance mechanism for the local community.[18]

4.10 Should forced eviction, displacement or resettlement occur, HRDs should, if the community agrees, monitor and observe the process and, as appropriate, report their findings to regional or multilateral human rights organisms, including the relevant UN Special Mechanisms, the international community, human rights networks, and national authorities.

4.11 When faced with a situation of displacement and resettlement, HRDs should also consider the practical steps for HRDs that are set out in the following Fact Sheets:

(A) UNGPs: Human Rights Policy Statement;

(B) UNGPs: Human Rights Due Diligence;

(C) UNGPs: Grievance Mechanisms and Remediation;

(D) UNGPs: Leverage;

(E) Free, Prior and Informed Consent;

(F) Operating in Conflict-Affected Areas;

(G) Private Military/Security Companies; and

(H) Environmental Hazards and Degradation.

[17] See suggestion under IFC Performance Standard 5 (1 January 2012); page 4
[18] UNGPs 22, 29 and 31

SCEDULE1: NON-BINDING INSTRUMENTS AND GUIDELINES RELATING TO INTERNAL DISPLACEMENT AND RESETTLEMENT

Below is a selection of non-binding instruments and guidelines that relate to internal displacement and resettlement.

1. **2030 Agenda for Sustainable Development[19]:** This notes the importance of considering the rights of, *inter alia*, vulnerable persons, indigenous peoples and displaced peoples within the overall commitment for global sustainable development.

2. **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law:**[20] These have been adopted by the UN General Assembly and oblige states to ensure respect for, and implement, international human rights law and international humanitarian law by: (i) taking appropriate legislative and administrative measures; (ii) investigating violations effectively, promptly and impartially, and taking action against those responsible; and (iii) providing victims with access to justice.

3. **Principles on Housing and Property Restitution for Refugees and IDPs (known as the "Pinheiro Principles"):**[21] The Pinheiro Principles articulate the right of refugees and displaced persons to repossess property lost as the result of armed conflict.

3.1 **Basic Principles and Guidelines on Development-Based Evictions and Displacement**:[22] These Principles address the human rights implications of development-linked evictions and related displacement. This includes including coerced or involuntary displacement, and displacement resulting from environmental destruction or degradation, conflict, development and infrastructure projects.

The aim of the guidelines is to assist states and agencies in developing policies, legislation, procedures and preventive measures to ensure that forced evictions do not take place, and to provide effective remedies to those whose human rights have been violated, should prevention fail.

The Principles address:

(A) the content of eviction notices, the length of notice periods and the circumstances in which evictions should not be carried out (including in inclement weather or at night);

(B) the provision of legal and technical advice to affected populations;

(C) the right to a public hearing and to challenge the eviction;

(D) the fact that any legal use of force must respect the principles of necessity and proportionality; and

(E) the obligation to construct and provide resettlement measures, such as homes and potable water prior to the eviction taking place.

[19] https://sustainabledevelopment.un.org/post2015/transformingourworld
[20] http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
[21] http://www.unhcr.org/uk/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html See also the Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the Pinheiro Principles: https://www.un.org/ruleoflaw/files/pinheiro_principles.pdf
[22] http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf

The Principles also emphasise the importance of protecting the rights of women, children and indigenous peoples, and ensure that they are represented in the process. They restate that affected persons have the right to full and prior informed consent regarding relocation.

4. **Voluntary Principles on Security and Human Rights ("Voluntary Principles"):**[23] The Voluntary Principles is a collaborative effort by governments, major multinational extractive companies and NGOs to provide guidance to companies on tangible steps that they can take to minimise the risk of human rights abuses in communities specifically located near extraction sites. Member organisations have also collaborated to produce associated guidance documents to assist companies and civil society actors to work within the Voluntary Principles.[24]

5. **European Bank for Reconstruction and Development ("ERBD") Performance Requirement 5 on Land Acquisition, Involuntary Resettlement and Economic Displacement:**[25] EBRD-financed projects are expected to be designed and operated in compliance with good international practices relating to sustainable development. The objectives of this guidance (aimed at the EBRD's clients) is to: avoid or minimise involuntary resettlement by exploring alternative project designs; mitigate adverse economic and social impact on communities' use of, and access, to assets and land; restore the standards of living of displaced people to pre-displacement levels; and improve living conditions of displaced people.

6. **EU Council Conclusions on Indigenous Peoples:**[26] The Counsel has emphasised that, in the context of development, specific attention should be given to women, children, youths and persons with disabilities, as well as to those in situations of forced displacement or in violent/armed conflict.

[23] http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf
[24] For example, in 2015 the Global Compact launched a Guidance Document on the Assurance of the Voluntary Principles (VPs) on Security and Human Rights to assist companies in assessing their degree of implementation of the VPs.
[25] http://www.ebrd.com/downloads/about/sustainability/ESP_PR05_Eng.pdf
[26] Paragraph 6: http://data.consilium.europa.eu/doc/document/ST-8814-2017-INIT/en/pdf

Human Rights Defenders' Fact Sheet

Mass Tort Claims and Parent Company Liability

Disclaimer

This document is solely the property of Peace Brigades International. It does not necessarily reflect the views of Peace Brigades International but has been published in order to inform debate and discussion of this important issue. It is the culmination of work by Peace Brigades International and Simmons & Simmons LLP. Lawyers at Simmons & Simmons LLP undertook the legal research covered in the report on a pro bono basis which includes the analysis of the law in England and Wales.

This document does not constitute legal advice nor does the report represent the views of Simmons & Simmons LLP. For a definitive view as to the laws and application of those laws in other jurisdictions, advice must be sought from counsel in that jurisdiction. This Fact Sheet was revised in October 2019 and reflects the law at that point.

1. Introduction

1.1 Peace Brigades International ("**PBI**") provides protection, support and recognition to human rights defenders ("**HRDs**") who work in areas of repression and conflict, and who have requested support. This may involve assisting HRDs in situations in which mass tort claims have arisen.

2. What are Mass Tort Claims?

2.1 A tort is a civil (as opposed to a criminal) wrong that causes someone else to suffer loss or harm, resulting in legal liability for the person who commits the tortious act (the "tortfeasor").

2.2 A mass tort claim arises where a civil wrong (a "tortious act") results in harm to numerous victims, and therefore, leads to multiple claimants bringing a claim against the tortfeasor(s).

2.3 This Fact Sheet focuses on the jurisdiction of the English courts to hear mass tort claims against English parent companies in relation to the overseas acts of their overseas subsidiaries.

3. Issues faced by HRDs in relation to Mass Tort Claims

3.1 The question of whether or not an English parent company can be sued for the actions of its overseas subsidiaries is relevant to the work of HRDs, as the victims of such torts often face access to justice barriers. For example, overseas claimants may seek to bring a claim in the English courts in circumstances in which:

(A) their local courts are unable or unwilling to grant appropriate relief (for example, due to corruption, limited enforcement powers etc.); and/or

(B) the claimants do not have adequate financial resources: the availability in England and Wales of funding arrangements such as Conditional Fee Arrangements,[1] Damages Based Agreements[2] (little-used at present) and a variety of third-party sources of funding can enable claimants to bring claims notwithstanding a lack of personal financial resources.

3.2 If claimants can establish parent company liability, it offers a chance to hold multi-nationals to account in their home jurisdiction. This often imposes far greater financial and

[1] Often called "Conditional Fee Agreements" or simply, "CFAs". In general terms, these are fee structures whereby a client only pays for its lawyers' work on the condition that its case is won.
[2] Often referred to as "DBAs". In general terms, these are fee structures whereby the client's fee depends on the success of the case and is calculated as a percentage of the compensation that it receives.

reputational pressures, and may help to ensure that the parent company takes steps to improve its governance and overseas operations in future.

4. The Legal Framework

4.1 Demonstrating parent company liability is a key hurdle to establishing jurisdiction in mass tort claims. There is limited case law on the jurisdiction of English courts to hear claims against English parent companies relating to the alleged overseas acts of an overseas subsidiary.

4.2 However, the English courts have examined this question in three recent cases:

(A) **Okpabi:**[3] In this case, two Nigerian communities have commenced separate High Court proceedings against Royal Dutch Shell PLC ("**RDS**") and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd ("**SPDC**"), a joint venture with Nigerian shareholders and the Nigerian government. The Ogale and Bille communities sought damages and remedial works in respect of oil spills from SPDC-operated pipelines.

(B) **Unilever:**[4] In this case, 218 Kenyan nationals have brought claims against Unilever Plc ("**UPLC**") and its Kenyan subsidiary, Unilever Tea Kenya Limited ("**UTKL**"). Following the 2007 Kenyan elections, the claimants suffered ethnic violence carried out by third-party criminals at a plantation. The claimants alleged that: (i) the risk of this violence was foreseeable by the defendants; (ii) the defendants owed them a duty of care to protect them from the risks of such violence; and (iii) the defendants breached that duty of care.

(C) **Vedanta**:[5] In this case, 1,826 Zambian villagers have brought proceedings against Vedanta Resources Plc ("**VRP**") and Konkola Copper Mines Plc ("**Konkola**") alleging personal injury, damage to property and loss of income, amenity and enjoyment of land, due to alleged pollution and environmental damage caused by discharges from the Nchanga copper mine, which is owned and operated by VRP.

4.3 In all three cases the central issue for the court's jurisdictional analysis has been whether there is an arguable duty of care between the parent company and the claimants, such that there is a real issue to be tried by the court between the claimants and parent company.

4.4 In each of the three cases the court identified the relevant law for establishing a parent company duty of care as follows:

(A) The claimants need to satisfy the three-part test (the "***Caparo Test***") established in *Caparo v Dickman*[6]:

(1) harm must be reasonably foreseeable as a result of the defendant's conduct;

(2) the parties must be in a relationship of proximity; and

(3) it must be fair, just and reasonable to impose liability.

[3] Okpabi and others v Royal Dutch Shell plc and another [2017] EWHC 89 (TCC) (26 January 2017) http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/TCC/2017/89.html
[4] AAA & Ors v Unilever & Ors [2017] EWHC 371 (QB) http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2017/371.html
[5] Lungowe and Ors v Vedanta Resource Plc and Konkola Copper Mines Plc [2017] EWCA Civ 1528 http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2017/1528.html
[6] *Caparo* Industries Plc v Dickman [1990] UKHL 2 (08 February 1990) http://www.bailii.org/uk/cases/UKHL/1990/2.html

(B) Depending on the facts, a parent company may be liable for the operations of its subsidiary. The case of *Chandler v Cape*[7] provides four descriptive factors that may indicate the presence of a duty of care owed by the parent company, which are relevant to the proximity and reasonableness limbs of the *Caparo* Test:

(1) the business of the parent and subsidiary are in a relevant respect the same;

(2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;

(3) the subsidiary's system of work is unsafe and the parent company knew, or ought to have known; and

(4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

(C) Such a claim is more likely succeed if advanced by former employees, but claims made by residents are still arguable.[8]

4.5 This is a factual analysis which turns on the particular circumstances in each case.

5. The Cases

5.1 In Unilever the High Court declined jurisdiction; this decision was upheld by the Court of Appeal. In Okpabi, the High Court declined jurisdiction; this decision was upheld by the Court of Appeal. However, in the potentially landmark Vedanta judgment, the Court of Appeal and subsequently the Supreme Court upheld the High Court's decision to accept jurisdiction.

Unilever

5.2 The High Court granted the defendants' applications to strike out the claim on the basis that the first (foreseeability) and third (reasonableness) limbs of the *Caparo* test were not made out.

5.3 It was held that UPLC had no means of foreseeing what would happen at the plantation and nothing comparable had ever happened before. It was also not foreseeable that law and order would break down generally and that the Kenyan police would then fail to protect the claimants.

5.4 In addition, it would not be fair, just and reasonable to impose a duty on UPLC because the claimants were seeking to impose liability on UPLC for the criminal acts of third parties, rather than the tortious acts of UTKL. Such a duty would be wider than the duty imposed on UTKL as the actual occupier of the plantation.

5.5 An appeal against this decision was heard in April 2018; the Court of Appeal upheld the High Court's decision. The Supreme Court has since refused to grant the claimants permission to appeal.

[7] Chandler v Cape Plc [2012] EWCA Civ 525 (25 April 2012) http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html
[8] For example, see Lubbe and Others v Cape Plc and Related Appeals [2000] UKHL 41 (20 July 2000) http://www.bailii.org/uk/cases/UKHL/2000/41.html

Vedanta

5.6 Currently, this is the most recent decision in this line of cases. The Supreme Court held that the case could proceed in the English courts, as it was sufficiently arguable that the English parent company owed a duty of care to the overseas claimants. Although VRP did not own the relevant mine licence or have day-to-day control of the mine's operations, several key factors evidenced a material level of control by VRP over Konkola.

5.7 Although VRP did not have material control of the mine's operations, the Supreme Court held that the claimants' case on VRP's duty of care was arguable. The claimants had identified multiple circumstances which indicated that VRP had superior knowledge and expertise regarding, and control over, Konkola's operations. In particular, VRP had:

(A) provided extensive financial support for Konkola;

(B) exercised a high degree of control over Konkola's operational affairs;

(C) entered into a management and shareholders' agreement by which VRP had a contractual obligation to provide Konkola with various support and supervisory functions; and

(D) published a public sustainability report that stressed that the oversight of all VRP's subsidiaries rests with the board of VRP itself, and made express reference to the particular problems at the mine in Zambia.

5.8 The Supreme Court emphasised that it would not engage in a mini-trial regarding the actual existence of a duty of care. It ruled that a trial judge's decision - a summary finding of fact derived from a limited body of available evidence at the pre-disclosure stage - cannot be overturned by appellate courts. No further fact-finding or analysis beyond that conducted by the trial judge was necessary in order to uphold his summary decision.

5.9 One key issue on appeal was access to justice. In the present case, access to justice arguments persuaded the Supreme Court that there was not only a real risk, but a probability, that the claimants would be unable to obtain substantial justice before the Zambian courts.

5.10 The Supreme Court focused on two points: (i) the practical difficulties involved in funding mass tort claims being brought by claimants unable to fund their claims themselves in the absence of legal aid, conditional fee arrangements (which are unlawful in Zambia) and other funding mechanisms which are at the disposal of claimants before the English courts; and (ii) the lack of legal practices in Zambia with the requisite level of experience and resources to mount and sustain mass tort claims against defendants which, on the other hand, are sufficiently resourced to instruct such firms.

5.11 Interestingly, the Supreme Court's closing remarks suggested that, had it not been for VRP's and Konkola's failure on this access to justice issue, it may have been minded to allow their appeal.

5.12 The case will now return to the High Court for a full substantive trial.

Okpabi

5.13 Before the Court of Appeal, the parties agreed that the first limb (foreseeability) of the *Caparo* Test had been established. The focus was whether RDS exercised sufficient control over SPDC to establish the necessary level of proximity in order to satisfy the second limb of the *Caparo* Test. The Court gave limited separate consideration to the third

limb (reasonableness) of the *Caparo* Test (as it was accepted that the issues of proximity and reasonableness tend to run together).

5.14 All three judges in the Court of Appeal confirmed a primary distinction between:

(A) instances where a parent company exercises control over the material operations of a subsidiary; and

(B) instances where a parent company issues mandatory policies and standards that are intended to apply throughout a group of companies to ensure conformity with those standards.

This distinction formed the heart of the Court's analysis and disagreement as to whether RDS owed a duty of care to the claimants. The majority held that this was an instance that fell into the latter category (although one judge considered that it fell in the former category).

5.15 The claimants relied on five main factors to demonstrate RDS's arguable control of SPDC's operations:

(A) the issue of mandatory policies, standards and manuals that applied to SPDC;

(B) the imposition of mandatory design and engineering practices;

(C) the imposition of a system of supervision and oversight of the implementation of RDS's standards, which bore directly on the pleaded allegations of negligence;

(D) the imposition of financial control over SPDC; and

(E) a high level of direction and oversight of SPDC's operations.

5.16 The judgment concluded that, based on the evidence, none of the five factors demonstrated a sufficient degree of control by RDS of SPDC's operations in Nigeria, either individually or cumulatively. As such, the claimants had not demonstrated an arguable case that RDS controlled SPDC's operations, or that RDS had direct responsibility for the practices or failures that were the subject of the claim.

5.17 Crucially, SPDC retained autonomy in relation to the imposition of group standards, policies and practices. Although it was clear that RDS was keen to ensure that there were proper controls and policies in place within SPDC, the claimants had not demonstrated that RDS actively attempted to impose those controls and polices on SPDC. Instead, RDS simply expected SPDC to apply them itself. It was also noted that reporting requirements between a subsidiary and its parent do not imply the existence of control.

5.18 The claimants have been granted permission to appeal the Court of Appeal's decision to the Supreme Court.

6. **Practical Steps for HRDs**

6.1 If (in any of these cases) the court finds at substantive trial that a duty of care was owed by a parent company to the claimants, it would be the first reported case in which a parent company has been found to owe a duty of care to a third-party/non-employee affected by the operations of a subsidiary (overseas or domestic).

6.2 This would open the door to HRDs launching further cases against English parent companies whose subsidiaries have committed tortious acts that have resulted in harm to victims and would put pressure on English parent companies to take greater care to

ensure that their subsidiaries do not cause harm to third parties when carrying out their operations.

6.3 However, this area of law is very uncertain and fact-specific. Even if the claimants are successful in these test cases, comments by the Court of Appeal in the Vedanta case indicate that the English courts may be reluctant to become a long-term forum for this type of dispute and consider that it would be preferable for such cases to be tried locally.[9]

6.4 This Fact Sheet sets out the current position on mass tort claims and parent company liability in England and Wales. However, this is a developing area of law and it is crucial that an HRD seeks legal advice in the relevant jurisdiction should they wish to consider such an action.

[9] "There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally". Lungowe and Ors v Vedanta Resource Plc and Konkola Copper Mines Plc [2017] EWCA Civ 1528 at [133]:http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2017/1528.html

Human Rights Defenders' Fact Sheet

National Action Plan for the United Kingdom

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1. Overview

1.1 On 4 September 2013, the United Kingdom ("**UK**") became the first country to produce a National Action Plan ("**NAP**") to implement the United Nations Guiding Principles on Business and Human Rights ("**UNGPs**").[1]

1.2 The UK's NAP follows the structure of the UNGPs, which are based around three pillars: (i) the State duty to protect human rights; (ii) the corporate responsibility to respect human rights; and (iii) access to remedy.

1.3 This Fact Sheet focuses on the actions taken by the UK in implementing the UNGPs since the first version of its NAP and outlines the UK government's commitments to reinforce implementation of the UNGPs.

2. The State Duty to Protect Human Rights: Actions Taken

2.1 Enacted the Modern Slavery Act 2015, which introduces the requirement, amongst other things, for certain commercial organisations that carry on business in the UK, to produce a "slavery and human trafficking" statement setting out the steps taken to ensure that slavery and human trafficking are not taking place in their business and supply chains.

2.2 Implemented the requirements of the Organisation for Economic Co-operation and Development 2012 Common Approaches,[2] and considered relevant adverse project-related human rights impacts in providing applicable Export Credit Agency support through UK Export Finance ("**UKEF**"). UKEF now considers publicly-available reports recording the human rights record of companies when considering a project for export credit.

2.3 Taken account of business activity in conflict and fragile states, or countries with high levels of criminal violence, within the Building Stability Overseas Strategy[3].

2.4 During the UK Government's chairmanship of the Voluntary Principles Initiative ("**Voluntary Principles**")[4] the Government worked to: raise awareness of the VPI in

[1] https://www.gov.uk/government/publications/bhr-action-plan
[2] http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en
[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/67475/Building-stability-overseas-strategy.pdf

priority countries for membership; support UK oil, gas and mining companies in their use of the Voluntary Principles to manage security and human rights risks more effectively; and encourage greater openness by business entities in relation to their compliance with the UNGPs.[5]

2.5 Introduced a certification process for Private Security Companies through the ISO 28007 maritime standard[6] and the ISO 18788 land standard.[7]

2.6 Supported the UN Working Group on the issue of human rights and transnational corporations and other business enterprises[8] in its role to promote the uptake of the UNGPs, and develop guidance and best practice.[9]

2.7 Invested around £1.5 million from the Foreign and Commonwealth Office's ("**FCO**") Magna Carta Fund for Human Rights and Democracy[10] in projects promoting the UNGPs and supporting business and human rights.[11]

2.8 Developed partnerships with other countries seeking to implement the UNGPs, such as the government of Colombia**.**

2.9 Strengthened international rules relating to digital surveillance, including leading work in the Wassenaar Arrangement to adopt new controls on specific technologies of concern.[12]

2.10 Continued to promote the Government's "Business and Human Rights Toolkit"[13], and developed new resources and training for FCO and UK Trade and Investment ("**UKTI**") staff, trade envoys and visiting delegations.

3. The State duty to Protect Human Rights: Government Commitments

3.1 Continue to support the implementation of the UNGPs in other countries, including through the development of NAPs and by lobbying foreign states.

3.2 Work with EU partners to implement the UNGPs across member states and internationally, starting with the undertaking made by member states to develop their own national plans.

3.3 Continue to ensure that the UK Government procurement rules allow for human rights-related matters to be reflected in the procurement of public goods, works and services, taking into account the 2014 EU Public Procurement Directives and Crown Commercial

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[4] See http://www.voluntaryprinciples.org/
[5] For further information on the VPI, see Fact Sheet on Private Military/Security Companies
[6] For further information, see https://www.iso.org/obp/ui/#iso:std:iso:28007:-1:ed-1:v1:en
[7] For further information, see https://www.iso.org/standard/63380.html
[8] For further information, see http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx
[9] See http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx
[10] Prior to 18 January 2016, the Fund was known as the Human Rights and Democracy Programme.
[11] See https://www.gov.uk/guidance/magna-carta-fund-for-human-rights-and-democracy#human-rights-themes
[12] See http://www.wassenaar.org/
[13] See https://www.gov.uk/government/publications/business-and-human-rights-toolkit

Service guidance on compliance with wider international obligations when letting public contracts.[14]

3.4 Work with government, industry and civil society members of the International Code of Conduct Association ("**ICoCA**") to establish an international mechanism to monitor compliance with the Code.[15]

3.5 Continue to work closely with the Voluntary Principles member governments, extractive companies and civil society organisations, to promote greater understanding of the Voluntary Principles and to strengthen implementation, effectiveness and membership.[16]

3.6 Consider new project activity on raising awareness and tackling the negative impacts of business activity (including on the human rights of certain groups) by tasking diplomatic missions in countries where there are concerns.

3.7 Continue to work through embassies and high commissions to support human rights defenders ("**HRDs**") working on issues related to business and human rights in line with EU Guidelines on HRDs.

4. Corporate Responsibility to Respect Human Rights: Actions Taken

4.1 Updated the UK NAP setting out the government's actions and expectations on business and human rights.

4.2 Provided guidance to companies on transparency in supply chains and implementing the reporting requirement in the Modern Slavery Act 2015[17] (see paragraph 2.1 of this Fact Sheet).

4.3 Partnered with the Cyber Growth Partnership industry guidance on assessing human rights risks relating to cyber security exports, with the company, techUK, and input from civil society.[18]

4.4 Provided funding to the Corporate Human Rights Benchmark Initiative, the first wide-scale project to rank companies on their human rights performance.[19]

4.5 Supported the UNGP Reporting Framework, the world's first comprehensive guidance for business entities to report on how they respect human rights.[20]

4.6 Provided funding for the Economist Intelligence Unit research report on business leadership attitudes to, and actions on, the corporate responsibility to respect human rights.[21]

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[14] See https://www.gov.uk/guidance/public-sector-procurement-policy
[15] See https://icoca.ch/en. For further information on the International Code of Conduct Association and the Code see the Fact Sheet on Private Military/Security Companies
[16] See http://www.voluntaryprinciples.org/. For further information on the VPI see the Fact Sheet on Private Military/Security Companies
[17] See https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide
[18] See https://www.techuk.org/images/CGP_Docs/Assessing_Cyber_Security_Export_Risks_website_FINAL_3.pdf
[19] See https://www.corporatebenchmark.org/
[20] See http://www.ungpreporting.org/
[21] See http://perspectives.eiu.com/strategy-leadership/road-principles-practice/

4.7 Continued to update and promote the joint FCO-UKTI Overseas Business Risk service, which provides information about business environments in the countries where the UKTI has a presence, to ensure that it includes specific country human rights information, and links to the UNGPs and other relevant tools and guidance.[22]

4.8 Continued to provide financial support to the UN Global Compact, a global mechanism that encourages and enables companies to align their operations and strategies with ten universally-accepted principles in the areas of human rights, labour, environment and anti-corruption. [23]

5. Corporate Responsibility to Respect Human Rights: Government Commitments

5.1 Provide support to board directors on human rights reporting and practical guidance for companies in the care and security sectors in the UK, through projects funded by the Equality and Human Rights Commission.[24]

5.2 Ensure the provisions of an EU Directive on non-financial disclosure[25] are transposed in the UK to enable greater consistency and comparability of public information on the human rights policies and performance of listed companies in Europe.[26]

5.3 Facilitate dialogue between business people, parliamentarians and civil society on the implementation of the business and human rights agenda as requested.

5.4 Instruct diplomatic missions to work with host governments, local and UK business, trade unions, non-governmental organisations, HRDs, academics, lawyers and other local experts so that the UK Government can help inform companies of the human rights risks they face.

5.5 Instruct diplomatic missions to raise with local authorities the concerns in situations where companies have problems implementing their human rights responsibilities because local law is incompatible with international human rights law.

6. Access to Remedy: Actions Taken

6.1 Tasked UKTI teams in the markets where they operate to advise UK companies on establishing or participating in grievance mechanisms for those potentially affected by their activities and to collaborate with local authorities in situations where further State action is warranted to provide an effective remedy.

6.2 Encouraged companies to extend their domestic UK practice of providing effective grievance mechanisms to their overseas operations, adapting them where necessary according to local circumstances, and consulting interested parties. This also applies to

[22] See https://www.gov.uk/government/collections/overseas-business-risk
[23] See https://www.unglobalcompact.org/
[24] See https://www.equalityhumanrights.com/en
[25] Directive 2014/95/EU. See https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0095&from=EN and paragraph 4.4 of Fact Sheet on Human Rights Policy Statements.
[26] The Companies Act 2006 has now been amended by the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 to include these requirements. Section 414CA of the Companies Act 2006 now requires certain companies to include a non-financial information statement in their strategic report (including information regarding the company's respect for human rights).

dispute arbitration/mediation mechanisms through their sector of activity or collective industry organisations.

6.3 Supported projects through the FCO Magna Carta Fund for Human Rights and Democracy on remedy procedures in other countries.[27]

6.4 Commissioned an independent survey of the UK provision of remedies to assist the Government in understanding the judicial and non-judicial remedies available to victims of human rights harms involving business enterprises.[28]

7. Access to Remedy: Government Commitments

7.1 Continue to ensure that the UK provides access to judicial and non-judicial remedies to victims of human rights harms linked to business activity.

7.2 Continue to support work on remedy procedures in other countries, including providing help to other states, civil society and trade union efforts, and supporting to business efforts.

7.3 Continue to promote the protection of HRDs.

8. The role of HRDs

8.1 The UK Government has demonstrated its continued commitment to reinforce implementation of the UNGPs in this latest UK NAP.

8.2 However, the NAP fails to propose any significant changes to law or policy. It also fails to provide sufficient detail regarding the future commitments of the UK Government; it mainly summarises existing practice.

8.3 To ensure the continuous improvement of the NAP, processes should exist for assessing periodically, and reporting on, whether policy commitments are put into practice. In addition, the impact of the commitments should be analysed to establish whether they achieve the desired results. If not, alternatives or additional measures should be identified and implemented.

8.4 HRDs can, therefore, help to develop the UK NAP and its effectiveness by lobbying for a coordination space to monitor and ensure implementation of the outlined commitments.

8.5 HRDs can also take the following practical steps to assess the NAP policy commitments and to improve the NAP:

(A) lobby for changes to the Companies Act 2006 to extend the human rights reporting requirements to all UK companies operating in high risk environments.

(B) lobby for the provisions of the Modern Slavery Act 2015 to be strengthened;

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[27] See https://www.gov.uk/guidance/magna-carta-fund-for-human-rights-and-democracy#human-rights-themes

[28] See https://www.biicl.org/documents/724_uk_access_to_remedies.pdf?showdocument=1

(C) review the independent survey regarding the UK provision of remedies and lobby for the policy suggestions contained within the survey;

(D) request that the UK Government support HRDs in addressing risks/concerns about business enterprises and their compliance with the UNGPs; and

(E) request information from the UK Government about FCO projects on remedies.

8.6 When taking these practical steps, HRDs may also decide to inform, as appropriate, the British Embassy, UN Special Procedures,[29] or the Business and Human Rights Resource Centre,[30] to help raise awareness of any concerns raised or to request ongoing monitoring and support.

[29] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
[30] https://www.business-humanrights.org/

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Human Rights Defenders' Fact Sheet

National Action Plan for the United States of America

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1. Overview

1.1 The National Action Plan ("**NAP**") for the United States of America ("**U.S.**") was published on 16 December 2016 and focuses on a broad range of issues, including: human rights; the rights of indigenous people; labour rights; land tenure and property rights; anti-corruption; and transparency.[1]

1.2 The government of the U.S. recognises that Responsible Business Conduct ("**RBC**") principles are encompassed in both the UN Guiding Principles on Business and Human Rights ("**UNGPs**")[2] and the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises ("**OECD Guidelines**").[3]

1.3 While the UNGPs are a core part of the NAP, its scope is wider and it addresses other areas, such as environmental issues, to the extent that they overlap with RBC.[4] This Fact Sheet focuses on actions regarding human rights.

1.4 The NAP is organised into five categories of action:

(A) leading by example;

(B) collaborating with stakeholders;

(C) facilitating RBC by companies;

(D) recognising positive performance; and

(E) providing access to remedy.

1.5 Each of the five categories contains descriptions of the government's ongoing, and future, commitments and initiatives to further RBC.

[1] https://www.state.gov/documents/organization/265918.pdf
[2] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[3] http://www.oecd.org/daf/inv/mne/48004323.pdf
[4] Further information on the rationale behind the NAP can be found here: https://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/

2. **Leading by Example**

New actions

2.1 Continuing participation in, and hosting of, discussions on UNGPs, including through the ongoing UNGP Workshop Series. For example, a 2016 workshop focused on the relevance of human rights and the application of the UNGP framework to the selection of sites, and preparations for, and activities related to, large-scale, global sporting events.

2.2 Funding the development of online tools to help companies analyse, prevent and address human trafficking risks in global supply chains.

2.3 Designation of agency "Labour Compliance Advisors", who will enhance RBC awareness of federal contractors.

2.4 Enhancing the standards of both the Overseas Private Investment Corporation and the Export-Import Bank of the United States ("**EXIM**"), which require companies who receive their support to implement RBC principles. EXIM will also enhance its complaint mechanism to allow interested parties greater input on the RBC performance of companies with which it transacts.

2.5 The U.S. Agency for International Development ("**USAID**")[5] will:

(A) develop a social safeguard screening questionnaire for new projects;

(B) establish a library of resources for social analyses;

(C) conduct a gap analysis on current guidance;

(D) convene stakeholder consultations regarding recommendations for future guidance/policies; and

(E) pilot the social safeguards assessment tool with USAID missions.

Ongoing commitments

2.6 Requiring private security companies to demonstrate conformance with standards consistent with the International Code of Conduct for Private Security Service Providers.[6]

2.7 Reviewing the status and effectiveness of the implementation of "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labour" Executive Order 13126[7] and "Strengthening Protections against Trafficking in Persons in Federal Contracts" Executive Order 13627.[8]

3. **Collaborating with Stakeholders**

New actions

3.1 Establishing a formal mechanism for facilitating coordination among agencies engaged in relevant multi-stakeholder initiatives.

[5] https://www.usaid.gov/
[6] https://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf
[7] https://www.dol.gov/ilab/reports/pdf/2013eo_faq.pdf
[8] https://www.hsdl.org/?view&did=723091

3.2 Promoting worker voice and empowerment through global supply chains, and promoting best practices for key performance indicators to measure and manage labour rights impacts in supply chains.

3.3 Launch by USAID of Broad Agency Announcement, which calls for organisations to collaborate in the development, piloting, testing and scaling, of innovative, practical and cost-effective interventions to address human rights and anti-corruption in business activities globally. [9]

Ongoing commitments

3.4 Commitment to the Open Government Partnership,[10] launched in 2011 by President Obama and seven other heads of state. This partnership provides a global platform between governments and civil society to promote government transparency, participation and accountability to citizens.

3.5 Implementation of the International Labour Organisation-International Finance Corporation Better Work Program in 1,343 apparel export factories.[11]

3.6 Engaging with the international cocoa and chocolate industry to address child labour.

3.7 Encouraging the implementation of the Sustainable Development Goals.[12]

4. Facilitating RBC by Companies

New actions

4.1 Creation of a repository of U.S. government reports to make it easy for companies to review all available U.S. government reporting relevant to the operating environment in particular countries.

4.2 U.S. State and other agencies will welcome and recognise new methods of reporting in support of RBC, and will create an online resource to that end.

Ongoing commitments

4.3 Continued publication of child labour and forced labour reports,[13] and human rights reports.[14]

4.4 Continued provision of U.S. Department of Labour ("**DOL**") online toolkit, "Reducing Child Labour and Forced Labour: A Toolkit for Responsible Businesses".[15]

4.5 Increased focus on RBC in U.S. State's annual country reports on investment climates, including descriptions of labour rights and corporate responsibility practices.

4.6 Labour Attaché programme, through which staff members from the DOL are stationed in U.S. embassies overseas to: engage with various stakeholders; analyse relevant legal and

[9] https://www.usaid.gov/partnership-opportunities/respond-solicitation/broad-agency-announcements
[10] https://www.opengovpartnership.org/
[11] For further information, see https://www.dol.gov/agencies/ilab/our-work/projects/better-work
[12] The 2030 Agenda for the Sustainable Development and its 17 Goals provide a framework to make progress on fundamental social, economic and environmental challenges facing the world over the next 15 years (https://sustainabledevelopment.un.org/post2015/transformingourworld).
[13] The DOL publishes and updates three reports on international child labour and forced labour: the *Findings on the Worst Forms of Child Labour,* the *List of Goods Produced by Child Labour or Forced Labour*, and the *List of Products Produced by Forced or Indentured Child Labour*.
[14] https://www.state.gov/j/drl/rls/hrrpt/
[15] https://www.dol.gov/ilab/child-forced-labor/

policy developments; articulate U.S. government interests and objectives; and work to promote awareness of international labour standards and best practices.

4.7 Introducing for economic growth officers a new USAID training module on effective approaches to counter labour trafficking and other labour abuses in specific sectors and supply chains.

4.8 Introducing Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to support regional and international efforts to break the link between conflict and natural resources, and to prevent armed group or abusive state forces in the African Great Lakes region from benefiting from the sale of certain natural resources that are sourced from the Democratic Republic of the Congo or an adjoining country.

4.9 Continuing efforts to eliminate child and forced labour in agricultural supply chains e.g. through wider adoption of the 2011 "Guidelines for Eliminating Child and Forced Labour in Agricultural Supply Chains."[16]

4.10 Establishing International Law Enforcement Academies, which cover a variety of topics including people-trafficking and money-laundering.[17]

5. Recognising Positive Performance

New actions

5.1 Development of a mechanism to identify, document and publicise lessons learned and best practices related to corporate actions that promote and protect human rights online and, more generally, in the information, communication and technology sector.

5.2 Modernisation of the Secretary of State's Award for Corporate Excellence ("**ACE**") which, until recently, focused principally on corporate philanthropy rather than a company's efforts to ensure that its core business was conducted responsibly. The ACE will continue to focus on highlighting RBC best practices, and will be awarded for transparent operations, inclusive hiring, sustainable oceans management, and with a focus on small or medium enterprises.[18]

Ongoing commitments

5.3 Continuation of consideration for outstanding private sector efforts through the annual presentation by the U.S Secretary of Labour of the Iqbal Masih Award, which recognises the exceptional efforts made by an individual, company, organisation or national government to reduce the worst forms of child labour internationally.

6. Providing access to remedy

New actions

6.1 The U.S. National Contact Point for the OECD Guidelines ("**USNCP**") promotes awareness, and encourages implementation of, the OECD Guidelines. The USNCP also facilitates practical application and offers mediation.[19] Efforts to improve the performance of the USNCP include undertaking a peer review to enhance access to remedies through the OECD complaint process (known as the "Specific Instance" process), publishing a

[16] https://www.federalregister.gov/documents/2011/04/12/2011-8587/consultative-group-to-eliminate-the-use-of-child-labor-and-forced-labor-in-imported-agricultural. See also the frequently-asked questions and their corresponding answers that were published with the guidelines: https://www.dol.gov/ilab/reports/pdf/20110412faq.htm.
[17] For further information, see https://www.state.gov/j/inl/c/crime/ilea/.
[18] https://www.state.gov/e/eb/ace/
[19] https://www.state.gov/e/eb/oecd/usncp/us/

2017 outreach plan[20], and implementing procedures to reduce barriers for stakeholders who would like to engage in the USNCP process but who do not speak and/or read English.

6.2 Hosting stakeholder outreach procedures and exploring with U.S. advisory committee(s) how government can work with companies to help address concerns about the perceived lack of accessible and effective remedies available to those who feel they have been negatively impacted by U.S. business conduct abroad.

7. The role of Human Rights Defenders

7.1 The U.S. NAP does not propose new legislation; rather, it seeks to build on existing laws and policies to hold companies more accountable for their conduct by leveraging the government's contracting power and by increasing transparency of responsible business conduct.

7.2 Human Rights Defenders ("**HRDs**") can help to develop the NAP and improve its effectiveness by:

(A) monitoring the implementation of the outlined commitments;

(B) campaigning for improvements to the U.S. NAP;

(C) requesting information from the U.S. government as to how it is currently working with the business community, civil society, labour and other stakeholders to advance human rights; and

(D) requesting that the U.S. government support HRDs in addressing risks surrounding, and/or concerns about, companies and their compliance with the UNGPs.

7.3 When taking these practical steps, HRDs may also decide to inform, as appropriate, the U.S. Embassy, UN Special Procedures,[21] or the Business and Human Rights Resource Centre,[22] to help raise awareness of any concerns raised, or to request ongoing monitoring and support.

[20] For further information, see https://www.state.gov/e/eb/eppd/csr/events/2017/index.htm
[21] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
[22] https://www.business-humanrights.org/

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Human Rights Defenders' Fact Sheet

National Action Plan for Colombia

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1. Overview

1.1 On 09 December 2015, Colombia became the first non-European State to adopt a National Action Plan ("**NAP**") to implement the United Nations Guiding Principles on Business and Human Rights ("**UNGPs**").[1]

1.2 Colombia's NAP follows the structure of the UNGPs which are based around three pillars: the State duty to protect human rights; the corporate responsibility to respect human rights; and access to remedies.[2]

1.3 Colombia's NAP is aligned with its National Human Rights Strategy 2014-2034, as well as the Colombian Government's Guidelines for Public Policy on Business and Human Rights (adopted in 2014).[3] The NAP was produced in a participatory manner with input from businesses, civil society organisations and with the support of the international community.

1.4 Due to its history of armed conflict, Colombia's NAP focuses on peace building post-conflict. Colombia's NAP also focuses on (i) its implementation at the regional level (the Government recognises that human rights challenges are more prevalent at that level); and (ii) its prioritisation of three sectors that have the greatest potential to generate social conflict due to their impact on human rights and the environment – the energy and mining, agroindustry and road infrastructure sectors.

1.5 This fact sheet will focus on the actions taken by Colombia in implementing the UNGPs since its first NAP and on the Government's commitments to reinforce implementation of the UNGPs. These are outlined in the Government's report on advancements in

[1] NAP available in English through the following link: http://www.derechoshumanos.gov.co/observatorio/publicaciones/Documents/160105-PNA-COLOMBIA-Eng.pdf

[2] Dedicated Government's internet site to Business and Human Rights available here: http://www.derechoshumanos.gov.co/Prensa/Especiales/DerechosHumanosYEmpresa/index.html

[3] National Human Rights Strategy 2014-2034 is available here: http://www.derechoshumanos.gov.co/Observatorio/Publicaciones/Documents/2014/140815-estrategia_web.pdf and Guidelines for Public Policy on Business and Human Rights available here: http://www.derechoshumanos.gov.co/Observatorio/Publicaciones/Documents/2014/140724-lineamientos-politica_web.pdf

implementation published in May 2017, which stated that Colombia was advancing in the implementation of 59% of the action in its NAP.[4]

1.6 Colombia was assisted by the Danish Institute for Human Rights when developing its NAP. As a result, Colombia has produced a NAP which clearly assigns each action to a specific ministry together with a timeline, system of evaluation, follow up, and the involvement of a dedicated Advisory Body. However, the Colombian NAP is also considered somewhat arbitrary in respect of its selection of priorities, as it was developed without completing a proper National Baseline Assessment.[5]

2. The State duty to protect human rights

2.1 Actions taken by the State

2.2 Created the Inter-Institutional Working Group ("**IWG**") as the main governance mechanism of the NAP, together with the Advisory Commission. The IWG is composed of various governmental institutions and is collectively responsible for 25% of the actions established by the NAP.[6]

2.3 Established the Advisory Commission, a body in charge of advising the IWG and monitoring and implementing the NAP.[7]

2.4 Supported several training and dialogue initiatives to encourage integration of components of the National Human Rights Strategy within Departmental (regional) Development Plans.

2.5 Created mechanisms for cooperation and social dialogue with communities and companies, to create formal spaces for exchange between actors with different interests. These mechanisms include the National Mining Agency's Relationship Program in the Territory and the Territorial Strategy for Hydrocarbons.

2.6 Strengthened the implementation of the NAP by encouraging civil society's role in its implementation, e.g. through dialogues held with various civil society organisations, international bodies and academics, and through its establishment of the Advisory Commission.

2.7 Held workshops during the first year of the implementation of the NAP to include companies, civil society organisations and national and regional Government entities with the aim of increasing knowledge and awareness of the NAP and to push the business and human rights agenda in different sectors.

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4 Latest annual report published in May 2017 available in English through the following link: http://www.derechoshumanos.gov.co/observatorio/publicaciones/Documents/2017/170602_InformeAnualEmpresa_English.pdf

5 Implementation of the UN Guiding Principles on Business and Human Rights study. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf

6 Composition of the IWG: Department for Social Welfare; National Department for Planning; Ministry of the Interior; Ministry of Education; Ministry of Culture; Ministry of Labour; Ministry of the Environment; Ministry of Agriculture; Ministry of Commerce; Ministry of Mines; Ministry of Finances; Ministry of Foreign Affairs; Ministry of Health; Ministry of Transportation; Ministry of Housing; SENA; Coldeportes; Colciencia; the Ombudsman's Office; the Treasury Inspector's Office of the Republic; the Attorney General's Office of the Country; and the Office of the Senior Presidential Advisor for the Post-Conflict, Human Rights and Security.

7 As at May 2017, it was composed of representatives from: National Indigenous Organisations; Afro-Colombian Organisations; National Confederation of NGOs; Confederation of Workers' Unions; Colombian Association of Universities; National Guild Council; and Multi-actor Initiatives. In addition, a representative of multilateral organisations that carry out activities related to business and human rights and a representative appointed by the international community are invited as guests.

2.8 Designed a training module on the type of culture that respects Human Rights, which includes a chapter about business and human rights. This module, initially conceived for organisations of human rights defenders, is part of several tools that are being designed for different audiences. The course is available on the National Vocational Training Agency (SENA) platform.

2.9 Disseminated the NAP at international, national, and regional level.

2.10 Entered into a bi-national agreement with Peru to assist it in developing the Enterprise and Human Rights chapter of its National Human Rights Policy.

2.11 Reinforced State enterprises' role in the business and human rights agenda by giving powers to the Ministry of Finance regarding the management of State enterprises. This department can select and evaluate board members and has introduced a reporting format and developed a General Corporate Governance Code for State enterprises.

2.12 Entered various alliances with private sector companies to create opportunities (housing, employment etc.) for the victims of the armed conflict that the public sector cannot provide.

2.13 Developed the 'Safe Work Pact' for the construction of fourth generation national transport infrastructure. This consists of the prevention of accidents and diseases and the promotion of workers' health.

2.14 Created the Gender Subcommittee which reports to the Permanent Commission for the Agreement on Wage and Labour Policies in order to implement the Government's policy on Gender issues.

2.15 In collaboration with UNICEF, developed a tool for the Self-Diagnosis of Risk by means of which companies can evaluate their corporate management and social impact in terms of complying with their responsibility to respect child rights, mitigate risks, and identify opportunities to support their rights.

2.16 **Government commitments**

2.17 Make the training module on the type of culture that respects Human Rights available for consultation and use by those interested through 'Vive Digital' points.

2.18 Coordinate with academia to produce courses that strengthen the knowledge that companies, Government entities and civil society organisation have of the UNGP and NAP.

3. Corporate responsibility to respect human rights

3.1 **Actions taken**

3.2 The Working Group on Human Rights and Coal held workshops in line with its agreement to implement a 'Pilot on best practices in human rights with coal-producing companies

located in Cesar and Guajira'.[8] The workshops covered issues such as complaints and grievances, risk analysis, and dialogue with communities.

3.3 The Government participated in and organised dialogues and consultations held with companies and civil society to promote the proliferation of good practices at regional and municipal levels.

3.4 The Guías Colombia initiative, a multi-stakeholder initiative, produced seven best practice guides to assist companies in the management of their operations in the regions.[9] The guides are on the topics of safety; complaints and grievances; decent work; purchase of land; land rights and use of land; due diligence in supply chains; and institutional strengthening.

3.5 Adapted the indicators of the Global Reporting Initiative Standards for sustainability reporting to the Colombian context. This offers tools for private sector companies to report on (amongst others) dissemination, awareness-raising and knowledge management on human rights reporting, and training and follow-up for companies that already report on human rights.

3.6 Developed the Superintendence of Industry and Commerce ("**SIC**") Movil initiative aimed at promoting dialogue between companies and consumers.[10] In addition, the SIC acts as facilitator for consumers and companies to meet through an online chat in order to resolve any issues so that legal disputes are avoided.

3.7 Developed the First Steps in Social Responsibility program in conjunction with a university, whereby companies' performance against a set of criteria (economic, labour, environment, human rights, transparency, and relationship with communities and clients) were diagnosed.[11] Following diagnosis, an action plan for each company participating in the program was elaborated.

3.8 Published copies of major national and international guidelines on its dedicated business and human rights website, which the Government hopes small, medium and large companies will use to ensure they respect human rights.

4. Access to remedy

4.1 Actions taken

4.2 Carried out a study of the types of conflicts associated with mining activities. Three major types of conflicts were identified: (i) conflicts with institutional actions and the effectiveness and application of standards; (ii) conflicts associated with failures in due diligence of

8 Members of the Working Group are the Office of the Presidential Advisor for Human Rights, the Vice Ministry of Mines, the National Mining Agency and the companies Drummond Ltda., the Prodeco Group in Colombia and Cerrejón Ltda.

9 The Government is represented within this initiative by the memberships of the Office of the Presidential Advisor on Human Rights, the Presidential Agency for Cooperation Colombia and the Ombudsman. *Guías* are available here: http://www.derechoshumanos.gov.co/Prensa/Especiales/DerechosHumanosYEmpresa/RESPETAR.html

10 http://www.sic.gov.co/recursos_user/Sic_movil/

11 Companies participating: Yeapdata SAS, Travelclub Ltda, Inversiones Parra Piñeros y Cia Ltda, Vifares SAS, Dicermex SA, Paantec SAS, Telmacom Ltda, Dreamteam Publicidad SAS, Diper Ltda, Forteco S.A., Servicios Online S.A.S., Solutions Group, Xperience Construction Group S.A.S., Arbo S.A.S., and Tecnología Ecología del Oriente SAS.

companies and mining enterprises; and (iii) conflicts associated with the absence, or illegitimacy, of information.[12]

4.3 Carried out a diagnosis and mapping of the actors and institutions to deal with conflicts and complaints in the three prioritised sectors which are the focus of the NAP (i.e. energy and mining, agroindustry and road infrastructure).

4.4 Together with British Embassy, developed the project 'Elements of a system for access to non-judicial remedy for companies and human rights' to establish a coherent system that provides efficient and effective access to non-judicial remedy mechanisms for affected parties in the context of business operations, particularly in the three prioritised sectors.

4.5 Published a position paper (with multi-actor input) on the main conflicts that arise in business activities and operations, the most relevant complaints from the communities associated with such conflicts, related rights, the actors responsible for care and access, and barriers to remedy as well as possible opportunities to overcome them.

4.6 **Government commitments**

4.7 Deepen the actions of the Working Group on Human Rights and Coal related to non-judicial remedies (both state and company mechanisms).

4.8 Create a map of existing national judicial and non-judicial remediation mechanisms. The map will include access routes to each mechanism, information on their effectiveness and efficiency as well as obstacles they present.

4.9 Develop a policy of conflict resolution in mining environments.

4.10 Build proposals and recommendations on the operational, administrative, legal and technological parameters for the construction of a non-judicial remedy access system for groups affected by business operations in the three prioritised sectors.

4.11 The Colombian Government now plays an important role by acting as a regional leader for South America. By sharing its experiences from the NAP process and providing capacity-building support, Colombia encourages UNGP implementation by other states.[13]

5. The role of Human Rights Defenders

5.1 The role of Human Rights Defenders ("**HRDs**") is not featured in Colombia's NAP. Instead, the Government supports HRDs through a programme known as the "National Process of Guarantees for the work of Human Rights Defenders, Social and Communal Leaders". This programme was established on 30 April 2009 in response to the stagnation to agree a NAP.[14]

[12] Study available here http://creer-ihrb.org/wp-content/uploads/2016/06/Evaluaci%C3%B3n-Integral-de-Impactos-de-la-mineria-en-Colombia.pdf

[13] Implementation of the UN Guiding Principles on Business and Human Rights study. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf

[14] See here for a timeline of events of the National Process of Guarantees: http://www.tudefiendesmisderechos.com/linea.php

5.2 There are several steps that can be taken by HRDs in the context of ensuring the implementation of the UNGPs:

(A) lobby for improvements to the NAP, for example, by broadening the scope, rather than focussing on the three prioritised sectors;

(B) ask the Government to support HRDs in addressing risks and concerns about a company;

(C) request information from the Government as to how it is currently working with the business community, civil society, labour and other stakeholders to advance human rights;

(D) request information from the Government as to how it has improved the dissemination of information on operating practices and how it actively promotes human rights at both national and international level as well as future plans and proposals;

(E) request information from companies as to how they are addressing human rights issues; and

(F) ask the Government about what actions it is taking to level the playing field between HRDs and companies.

5.3 When taking these practical steps, human rights defenders may also decide to copy in, as appropriate, the UK Government or Embassy, UN Special Procedures,[15] Inter-American Commission on Human Rights Thematic Rapporteurships and Units,[16] or the Business and Human Rights Resource Centre,[17] to help raise awareness of any concerns raised or request ongoing monitoring and support.

5.4 A second version of the Colombian NAP is expected to be published in 2019. HRDs should strive to engage with the Colombian Government in the preparation of this document to ensure that relevant stakeholders are consulted during the drafting process.

15 http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM
16 http://www.oas.org/en/iachr/mandate/rapporteurships.asp
17 https://www.business-humanrights.org/

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Human Rights Defenders' Fact Sheet

Evaluation of National Action Plans

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1. Introduction

Where does the obligation to create an NAP come from?

1.1 In 2011 the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights ("**UNGPs**"), which is a framework for addressing business-related human rights abuses. Since this endorsement, the international community has taken steps to produce National Action Plans ("**NAPs**") to promote the implementation of business and human rights frameworks, including the UNGPs.

1.2 NAPs are policy documents in which a government articulates priorities and actions that it will adopt to protect against adverse human rights impacts by business enterprises, in conformity with the UNGPs.

1.3 The UN Human Rights Council, European Union bodies, the Council of Europe, individual governments, civil society groups, national human rights institutions, and business associations have all issued formal statements calling for governments to develop NAPs. At the inter-American level, the Organisation of American States has called on its member states to implement the UNGPs.

Implementation of NAPs

1.4 At the time of writing, 20 states have produced NAPs, and many others are in the process of developing NAPs.[1] However, some NAPs are not as comprehensive as they could be and many states have approached NAPs as a box-ticking exercise.

1.5 It is important to ensure that NAPs are developed and reviewed, with input from relevant stakeholders, to identify adequately any gaps in UNGP compliance, and to determine how to address these gaps.

1.6 In doing this, States should use the tools summarised in this Fact Sheet.

[1] A list of the States that have produced NAPs, and States that are in the process of doing so, can be found at http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx

2. National Action Plan Toolkit

What is the National Action Plan Toolkit?

2.1 The "NAP on Business and Human Rights: A Toolkit for the Development, Implementation and Review of State Commitments to Business and Human Rights Frameworks" was published in 2014 ("**NAP Toolkit**").[2] The NAP Toolkit includes a NAP Guide, the aim of which is to promote inclusive, transparent NAP processes that are empowering for rights-holders and that lead to coherent, robust and meaningful NAPs.

2.2 The NAP Toolkit also includes a NAP Checklist,[3] which reflects the NAP Guide. The NAP Checklist should be deployed as follows:[4]

(A) For countries where a NAP has not yet been issued, the NAP Checklist should be used in conjunction with the National Baseline Assessment Template ("**NBA Template**") in respect of which, see paragraph 3, below) to assist in the development and drafting of the new NAP**.**

(B) For countries that have developed a NAP, the NAP Checklist should be used to evaluate the NAP, and to support developments and revisions thereto.

(C) For countries that have already developed a NAP without first completing a National Baseline Assessment ("**NBA**") (or that have completed an NBA that substantially diverges from the NBA Template), the NAP Checklist should be used to evaluate the existing NAP, while a full (NBA Template-compliant) NBA should be undertaken before a new NAP is developed or revisions undertaken.

2.3 The NAP Guide and the NAP Checklist identify a set of criteria for NAPs that cover six areas, the key elements of which are set out below:

(A) **Governance and resources**

(1) The government must set a firm and long-term commitment to the development and implementation of the NAP to ensure that it is adequately resourced and prioritised. The NAP should be developed jointly with other societal actors, such as human rights experts (including Human Rights Defenders ("**HRDs**")).

(2) Responsibility for the NAP must be clearly established and communicated. An all-inclusive approach must be taken across government. This can be achieved by creating a cross-departmental advisory group or a steering committee.

(B) **Stakeholder participation**

(1) All rights-holders and other stakeholders should be identified. Such stakeholders are likely to include executive government, judiciary and administrative tribunals, parliament, companies (and other business enterprises), labour unions and workers' representative associations, representatives of affected groups or communities of rights-holders and HRDs, civil society organisations, the media, academia, and international and

[2] Guidance issued by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable. The NAP Guide can be found at Chapter 6 of the NAP Toolkit http://hrbaportal.org/wp-content/files/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf

[3] The NAP Checklist can be found at Annex 5 of the NAP Toolkit http://hrbaportal.org/wp-content/files/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf

[4] See page 40 of the NAP Toolkit: http://hrbaportal.org/wp-content/files/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf

regional actors. To assist in this process, consideration should be given to the establishment of an advisory committee or steering group.

(2) A clear plan and timeline for stakeholder participation should be developed and published. Adequate information and capacity-building should also be provided (such as introductory training) to facilitate effective dialogue.

(3) This is the key phase during which HRDs should participate to influence the development of the NAP. HRDs should review a draft NAP against the NAP Guide to identify any areas for development before the NAP is finalised.

(C) **National Baseline Assessment**

(1) The process of the development of a NAP should commence with completion of a comprehensive NBA, such task to be allocated to an appropriate body or committee.

(2) Stakeholders should be fully involved in the development of the NBA.

(D) **Scope, content and priorities**

(1) The measures contained in the NAP should address all of the UNGPs and should also give a clear indication of how the actions identified relate to the relevant UNGP.

(2) The NAP should address the full scope of the State's jurisdiction and should extend to the State's interactions with relevant regional and international organisations, such as trade bodies.

(3) The NAP should address thematic and sector specific human rights issues, such as women's rights, children's rights, indigenous and minorities' rights, labour rights, anti-trafficking and anti-slavery.

(4) In order to respond to gaps in implementation, the NAP should comprise action points that are linked to the results of the NBA. These action points should be specific, measurable, achievable, relevant and time-specific.

(E) **Transparency**

(1) All information contributing to the development of the NAP should be published and accessible to all stakeholders, subject to any need to withhold material to safeguard HRDs or others at risk.

(F) **Accountability and follow-up**

(1) Each action point should identify who is responsible for implementation, and should outline a framework for monitoring and reporting on progress to ensure accountability. HRDs should ensure that each action point is allocated appropriately.

3. National Baseline Assessment Template

What is the National Baseline Assessment Template?

3.1 An NBA is a structured methodology employed by a state to assess the progress that has been made in complying with the UN Guiding Principles on Business and Human Rights ("**UNGPs**").[5] This will often involve the use of both quantitative and qualitative methods.

3.2 Carrying out an NBA will assist a state to: (i) identify any gaps in the state's compliance with the UNGPs; (ii) identify the measures to be included in a State's NAP; and (iii) enable the state to evaluate the impact of its NAP.

3.3 The NBA Template[6] was developed in 2014 by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable. It mirrors the UNGPs, and divides each guiding principle into "Indicators", which are applicable across different jurisdictions and which assess the state's compliance with the relevant UNGP. Many of the Indicators are derived from relevant international law and standards from inter-governmental organisations. They are also based on other business and human rights frameworks, such as multi-stakeholder initiatives and frameworks that focus on industry sectors, or that address specific thematic concerns.

3.4 The Indicators are neither exclusive nor exhaustive. This is because the UNGPs are open-ended and overarching, in that they span all human rights. It is, therefore, unlikely that any given state will be able to answer positively in relation to each one. The Indicators can either be completed in full to give a comprehensive picture of a state's compliance with the UNGPs, or be used selectively to analyse a state's progress in respect of particular issues and/or individual UNGPs.

3.5 The NBA Template includes a number of scoping questions in respect of each Indicator in order to assess whether or not each Indicator has been met. Once the NBA has been completed, a state can assess whether it is on track to reach any previously-set targets and/or whether to set new targets to achieve closer alignment with the UNGPs.

3.6 It is envisaged that the NBA Template will be supplemented with additional "Thematic Templates", which will focus on particular groups of rights-holders such as children, indigenous peoples, and women.

Carrying out the National Baseline Assessment

3.7 The NBA should be carried out by a body with relevant expertise and competence. That entity should have knowledge, and experience of, national, regional and international standards, and should understand the key issues faced by the state and companies in the context of human rights.

3.8 Stakeholder analysis should be undertaken when carrying out the NBA. Government, companies (and other business enterprises), national human rights institutions, civil society, and international and regional actors should be consulted to identify relevant stakeholders and ensure that they inform the development of the NBA. Those stakeholders should include HRDs.

3.9 Information documenting abuses, data on remediation and recommendations of international and regional human rights bodies feed into the NBA to identify any gaps where national measures are inadequate.

[5] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[6] http://hrbaportal.org/wp-content/files/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf

3.10 Once a final-draft NBA has been produced, it should be reviewed by the stakeholders. This is the stage in the process during which HRDs have the greatest input. HRDs should be encouraged to review a draft NBA against the NBA Template to identify any shortcomings.

4. Monitoring and review of NAPs

4.1 Once a NAP has been implemented, periodic reviews should be carried out to scrutinise the successes and failures of the NAP. Such reviews can foster information exchange, and the sharing of best practices among governments and wider society. Monitoring can be carried out at a national or international level.

National review

4.2 A national review can be carried out by a specific steering committee. Alternatively, an independent body can be given the role of monitoring the implementation of the NAP. Independent review is required by certain international instruments. For example, Article 33 of the UN Convention on the Rights of Persons with Disabilities requires the establishment of a national framework to promote and monitor the Convention's implementation within the relevant state.[7]

4.3 The national bodies carrying out the review of the NAP can then engage in dialogue, information exchange and the sharing of best practices with their counterparts in other jurisdictions, which encourages convergence in approach and increased transnational cooperation. HRDs can assist with these reviews and dialogues.

International review

4.4 There are several ways the NAP is carried out at an international level:

(A) The UN Human Rights Council facilitates the Universal Periodic Review ("**UPR**")[8]. UPR is a peer review process whereby the human rights record of each member state is reviewed every four years. The appraisal is based on information provided by the state, experts and other UN organs, and stakeholders. A review of a state's NAP can be incorporated into the UPR process.[9]

(B) Several UN core human rights conventions provide for the establishment of a treaty monitoring committee (members of which are independent experts) to promote implementation by states of their obligations and to review compliance.[10] Generally, the relevant committee compiles a list of issues for the state to address in a written response. The state's delegation then presents its report to the committee and responds to questions posed by the committee. Finally, the committee issues concluding observations and recommendations for improvements.[11]

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[7] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-33-national-implementation-and-monitoring.html

[8] For further information, visit http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

[9] Chapter 7, page 50 of the ICAR-DIHR NAPs Toolkit

[10] For example, the Committee on Economic, Social and Cultural Rights monitors the implementation by State parties of the International Covenant on Economic, Social and Cultural Rights.
There are ten human rights treaty bodies that monitor implementation of the core international human rights treaties. These include:

- Human Rights Committee (monitors implementation of the International Covenant on Civil and Political Rights)
- Committee on Economic, Social and Cultural Rights (monitors implementation of the International Covenant on Economic, Social and Cultural Right)
- Committee on the Elimination of Racial Discrimination (monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination)

[11] See Chapter 7, page 51 of the NAP Toolkit: http://hrbaportal.org/wp-content/files/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf

(C) The UN Working Group on Business and Human Rights ("**UNWG**") has also launched a repository that features all finalised NAPs, and encourages states and stakeholders to provide information by way of annual updates.[12]

5. Practical Points for HRDs

5.1 HRDs should ask to be included as stakeholders when states undertake a NBA. HRDs should review, and comment on, any draft NBA produced and check to see whether the NBA Template has been followed.

5.2 When states draft their NAPs, HRDs should be included as stakeholders, so that they can influence the development thereof, ensure that States recognise circumstances and risks of human rights abuses, and include actions in the relevant NAP, accordingly. In the consultation process, HRDs should:

(A) ask States to follow the "Human Rights Defenders in NAP Processes Checklist", to establish positive precedents in involving HRDs when developing NAPs. This checklist can be found in the International Service for Human Rights' guidance on HRD involvement in NAP development.[13]

(B) consult guidance issued by the UN Working Group on Business and Human Rights ("**UNWG**"), which includes recommendations on the development, implementation, and update, of NAPs.[14] This guidance emphasises four criteria essential for a NAP to be effective:

(1) The NAP must be based on the UNGPs and be informed by core human rights principles;

(2) The NAP must respond to challenges in the national context, and must reflect country-specific priorities or particularly important sectors in the national economy;

(3) The NAP must be developed through an inclusive and transparent process taking the views of affected parties into account; and

(4) The NAP must be regularly reviewed to ensure continuous progress and to respond to changing conditions.

5.3 HRDs should push for regular review and revision of the NAP by raising issues with national bodies responsible for its implementation HRDs could also petition the UNWG to amend its website, to allow stakeholders to submit assessments of a state's NAP, which could then be considered by the UNWG.

[12] http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx
[13] See Table 1, Page 12 of the ISHR Human Rights Defenders in National Action Plans on Human Rights http://www.ishr.ch/sites/default/files/documents/ishr_icar_hrds_in_naps_guidance_eng.pdf
[14] http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf

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Human Rights Defenders' Toolbox

Practical Application of Fact Sheets

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1. Fictional case study

1.1 Tierra y Paz is a peaceful coalition created by the San Fernando farming community and a neighbouring indigenous Nahuatl community, located in Colombia. Its aim is to voice the concerns of the communities and advocate for protecting their human and environmental rights. The coalition was formed after the community began seeing significant contamination from a local copper mine that started operations in 2014. That contamination has affected the health of the local community and their crops.

1.2 The copper mine is owned by Cobre Mex SA ("**CM**"), a subsidiary of UK Copper PLC ("**UK Copper**"). Global Bank Plc ("**Global Bank**") financed the exploration and operation of the mine through a £20 million loan to UK Copper.

1.3 Tierra y Paz has raised some concerns:

(A) Part of the land on which the mine was built belonged to local families who did not authorise any contract of sale. The Nahuatl people claim that some of the land on which the mine is built is part of their community's communally owned land, which is of sacred value to them. However, CM states that it lawfully bought the land from a member of the Nahuatl community (who now works for the mine) and from Mr Comprado, who is a member of the San Fernando farming community. Neither community was consulted prior to the mine being granted an operating licence and commencing activities.

(B) An environmental impact assessment ("**EIA**") has recently been unearthed, which was produced before operations commenced. Although it states that contamination of local water tables might occur, it provides no suggestions for improvements in procedures to prevent harm from taking place, nor does it provide for any remediation process should harm occur.

(C) CM has no human rights policy. UK Copper has no human rights policy, but it does say on its website that *"Corporate social responsibility is an utmost priority for UK Copper PLC. The welfare of local communities is a cornerstone of our operating policies."*

(D) Tierra y Paz do not want to meet representatives of CM directly because they fear targeting and reprisals.

2. Objectives of Tierra y Paz

2.1 For there to be a genuine, complete and independent environmental and social impact assessment ("**ESIA**") of the mine's activities, which includes protection measures and remedial actions.

2.2 For the ESIA to be communicated to the communities so that they can be consulted on the activities and any proposed remediation.

2.3 Monetary compensation for the environmental impacts and for the land which was illegally appropriated to be put into a fund for a local health centre and agricultural school.

3. Legal Issues for Consideration

This section considers international law and guidance. Tierra y Paz should ensure that they obtain local Colombian legal advice, particularly regarding environmental law and land tenure. They should also consider the existence of any local dispute resolution procedures that should be followed.

3.1 Free Prior and Informed Consent ("FPIC")

(A) **Issue**

The Nahuatl people claim that some of the land on which the mine is built is part of their community's communally owned land, which is of sacred value to them. The community was not consulted prior to the mine being granted an operating licence and commencing activities. CM claims to have bought the land from a member of the Nahuatl people who now works at the mine.

(B) **What is the obligation?**

The right of FPIC allows indigenous peoples to give, withhold or withdraw consent to a project or activity that affects the the lands, territories and natural resources that they customarily own, occupy or otherwise use. There is an ongoing debate regarding the situations in which consent, rather than consultation, is required. Article 29(2) of the UN Declaration on the Rights of Indigenous Peoples indicates that consent (and not just consultation) is required where hazardous materials are disposed of in the lands of indigenous communities (as has occurred in this scenario).[1] As a bare minimum, CM should be consulting the Nahuatl people regarding any future plans.

(C) **Has the obligation been met?**

[1] See Schedule 1 to Fact Sheet on FPIC

There is no evidence to suggest that a FPIC compliant consultation has taken place or any consent from the Nahuatl people obtained.[2] Specifically, actions such as bribing members of the community (e.g. by offering a job for consent) or excluding the wider community in dialogue are inconsistent with effective consultations. Furthermore, the community were not provided with the contamination report. The community should be consulted in respect of any future development plans and/or impact assessments.

(D) **Practical steps**

(1) Identify the scope of the indigenous land/resources that have been affected by the mine, the legal status of the land, and identify those people that have been (or may be) affected by operations.[3]

(2) Consider whether CM, UK Copper or Global Bank have signed up to any applicable sector-specific guidelines, or whether they have issued their own guidance, that requires compliance with FPIC principles.

(3) Flag to the corporate entities their obligations regarding FPIC, drawing on relevant legal instruments and case law.[4]

(4) Consider drafting consultation guidelines that have been designed by the community. Inform the company/State of the procedure that they should adopt in the future when consulting the community.[5]

(5) Consider using a mediator to aid communication between the relevant parties / provide a safe forum for communications.[6]

3.2 **Human Rights Due Diligence ("HRDD"), Appropriate Action and Leverage**

(A) **Issue**

An EIA was recently unearthed, which was produced before operations commenced. The EIA states that contamination of local water might occur if operations were to commence. Although it states that contamination of local water tables might occur, it provides no suggestions for improvements in procedures to prevent harm from taking place, nor does it provide for any remediation process should harm occur. The EIA has not previously been seen by the Nahuatl people or San Fernando farming community.

[2] See specifically para 2.7 of Fact Sheet on FPIC
[3] Consider other practical steps set out at paragraph 5 of Fact Sheet on FPIC
[4] See Fact Sheet on FPIC for overview of FPIC requirements and relevant legal instruments. Colombia is a member of the ILO and has ratified ILO 169 (now in force). It is bound by the decisions of the Inter-American Court of Human Rights. It originally abstained from the vote on UNDRIP but has since endorsed it.
[5] See paragraph 6 of Fact Sheet on FPIC
[6] See paragraph 6 of Fact Sheet on FPIC

(B) **What is the obligation?**

Pursuant to UNGP Guiding Principle 17, businesses should carry out HRDD to identify, prevent, mitigate and account for how they address their adverse human rights impacts.[7]

UNGP Guiding Principle 19 provides that, when integrating findings from HRDD, a business is required to take "appropriate action" to mitigate any adverse impacts of its business activities on human rights. In this case, to prevent damage to human health resulting from an environmental hazard (i.e. the contaminated water) caused by the operations of the mine.[8]

"Appropriate action" will vary according to: (i) whether the business enterprise causes an adverse impact (CM), or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship (UK Copper and Global Bank); and (ii) the extent of a business' leverage in addressing the adverse impact (i.e. the extent to which the enterprise is able to effect change in the wrongful practices of the entity that causes the harm).[9]

(C) **Has the obligation been met?**

The EIA falls short in that it does not meet the key parameters set out in UNGP Guiding Principles 17 to 21, which require businesses to assess actual and potential human rights impacts, integrate and act upon the findings, track responses, and communicate how impacts are addressed.[10] Notably, there was no consultation with potentially affected groups prior to, or following the production of the EIA, and no action has been taken to mitigate against the negative impacts of operations.

UK Copper and Global Bank have not exercised any leverage over CM to address the human rights impacts of CM's operations.

(D) **Practical steps**

(1) Start a dialogue with CM (perhaps by way of an intermediary) to convey the key concerns of Tierra y Paz and highlight the obligations of CM under the United Nations Guiding Principles on Business and Human Rights ("**UNGPs**") (including the need to issue a Human Rights Policy).[11]

(2) Communicate the expectations of Tierra y Paz to CM, including:

(a) The format/content of any future impact assessment. An ESIA (or equivalent) should be carried out which must consider the

[7] See Fact Sheet on UNGPs: Human Rights Due Diligence
[8] See Fact Sheet on Environmental Hazards/Degradation for a discussion of whether there is a specific right to a healthy environment and the interplay between international environmental law and international human rights law
[9] See Fact Sheet on UNGPs: Appropriate Action and Leverage
[10] See paragraph 2.1 of Fact Sheet on UNGPs: Human Rights Due Diligence
[11] See Fact Sheet on UNGPs: Human Rights Policy Statements

environmental hazards, the specific human rights impact of operations and identify and address salient human rights risks.[12]

(b) The requirement for CM to engage with stakeholders (including the communities) during the carrying out of the ESIAs. All consultations with the communities should be carried out in accordance with the FPIC principles.[13]

(3) Consider copying the parent company, UK Copper, to any communications to encourage it to use (and increase) leverage over its subsidiary to ensure that comprehensive HRDD is carried out and that the salient risks identified are addressed and tracked.[14]

3.3 Grievance Mechanisms/Remediation

(A) Issue

The adverse human rights impacts that have been caused by the operations of CM include: (i) the illegal appropriation of land from the Nahuatl people and the San Fernando farming community; and (ii) the significant contamination of the local environment, which has affected the health of the local community and their crops.

(B) What is the obligation?

Pursuant to UNGP Guiding Principle 22, where business enterprises identify that they have caused or contributed to adverse impacts on human rights, they should provide for, or cooperate in, their remediation through "legitimate processes", e.g by way of a grievance mechanism. UNGP Guiding Principle 31 sets out the core criteria of an effective grievance mechanism. Although UK Copper and Global Bank are not required to provide for remediation under the UNGPs, they may take a role in doing so.[15]

(C) Has the obligation been met?

No grievance mechanism has been implemented or remediation provided by CM to address the concern that community land was obtained illegally, nor the adverse human rights impacts identified in the EIA.

(D) Practical steps

(1) Ask that CM consults the communities (in accordance with FPIC) regarding the design/implementation of a UNGP-compliant grievance mechanism.[16]

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[12] See paragraphs 3.3 to 3.5 and 4 of Fact Sheet on UNGPs: Human Rights Due Diligence. See also Fact Sheet on FPIC
[13] See paragraph 5 of Fact Sheet on UNGPs: Human Rights Due Diligence
[14] See paragraph 4 of Fact Sheet on UNGPs: Appropriate Action and Leverage
[15] See Fact Sheet on UNGPs: Grievance Mechanisms and Remediation
[16] See Fact Sheet on FPIC

(2) Ask CM to implement a Community Driven Operational Rights Grievance Mechanism, to include a community impact and benefit agreement (a contract between CM and the communities that set out how the communities will benefit from the mine).[17]

(3) If no progress is made with CM, consider contacting UK Copper and the UK embassy to put pressure on CM to engage.

(4) If no action is taken by the UK Copper, consider whether there might be scope to bring/threaten legal action against that entity in the form of a mass tort claim (noting that this area of English law is very uncertain and fact-specific).[18]

4. Involvement of other entities

4.1 When taking practical steps, Tierra y Paz may also decide to update, as appropriate, the UK embassy, UN Special Procedures, the Inter-American Commission on Human Rights Thematic Rapporteurships and Units and/or the Business and Human Rights Resource Centre, to help raise awareness of any concerns and/or request ongoing monitoring and support.

[17] See paragraph 4 of Fact Sheet on UNGPs: Grievance Mechanisms and Remediation
[18] See Fact Sheet on Mass Tort Claims and Parent Company Liability