



# Investing the Rights Way

A Guide for Investors on  
Business and Human Rights



Institute for  
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# **Investing the Rights Way**

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## What This Guide Contains:

- ✓ An overview of **key business and human rights developments** relevant to investors.
- ✓ A **detailed explanation** of the **United Nations (UN) Guiding Principles on Business & Human Rights**, including:
  - an explanation of their **relevance to investors** and
  - **suggested questions** to companies.
- ✓ An overview of other **relevant standards, guidelines** and **tools** that complement and reinforce the UN Guiding Principles, organised by:
  - group
  - context
  - sector
- ✓ An overview of **corporate accountability and reporting** with regard to business and human rights, focusing on issues of relevance to investors.

## How Investors Can Use This Guide:

1. As a basis to **engage with companies on human rights**, bilaterally or jointly with other investors.
2. To **benchmark or rank** companies on their human rights performance against their peers.
3. To **screen companies** in or out of a fund.
4. To explore **what lies behind a company's public reporting statements**. The Guide's questions should reveal whether a company has the policies and management system(s) to systematically address human rights.
5. To establish whether a fund, **investor or company should invest in a particular region, country or sector**. The Guide's questions may be used to probe whether companies have carried out appropriate due diligence, and understand the implications of their choices.
6. To **engage with Environmental, Social and Governance (ESG) initiatives** about human rights issues in an informed manner.
7. As an aid to **research**. The Guide will help investors and analysts identify new trends and developments on relevant human rights issues.
8. As an aid to **advocacy**. Investors can draw on the Guide when they evaluate legislation, policies or new international standards.

Some investors already engage with companies on specific human rights issues or already apply criteria for evaluating their performance, generally in countries with poor human rights records, in specific sectors, or on specific issues (labour rights and conditions in supply chains, discrimination, land, displacement, freedom of expression, security, etc.). These approaches remain valid. The Guide draws attention to questions that show whether a company's processes enable it to understand and manage its potential and actual human rights impacts, and communicate about such impacts. If a company has sound processes it should be able to answer such topic- or country-based questions as a matter of routine. Investors are therefore encouraged to raise the issues addressed by the UN Guiding Principles on Business and Human Rights covered in this Guide first, then focus on more specific contextual, sectoral or topical issues with companies.

# Introduction

Human rights are not a new concern for investors. Over recent years the principle that companies have a responsibility to respect human rights has gained unprecedented acceptance. As a result, companies are not only expected to meet their responsibilities but may face reputational, legal or other consequences if they do not. In parallel, it has become clearer what companies are not accountable for, and what lies in the domain of states. Companies are now in a position to address and diminish human rights-related risks within an internationally accepted framework, while other stakeholders - including shareholders - can apply the same framework to hold companies to account.

At the centre of this change are the UN “Protect, Respect and Remedy” Framework for Business and Human Rights (2008) and the subsequent UN “Guiding Principles on Business and Human Rights”, based on the UN Framework, which were unanimously endorsed by the Human Rights Council in 2011 (the UN Framework and the UN Guiding Principles, respectively).<sup>1</sup> This Guide is based on these two documents, as well as other recent codes, standards and principles (many also based on the UN Framework and UN Guiding Principles), and on new and potential legislation that relates to business and human rights.

Investors can play a major role in drawing attention to human rights issues, using their influence as shareholders. As owners of capital, they can encourage companies to prevent, mitigate and address the negative human rights impacts of their activities, and take advantage of opportunities to create positive impacts. They have the power to influence the way investment managers address human rights and other environmental, social and governance (ESG) issues with investee companies through their mandate, contractual arrangements and oversight. Equally important, investors themselves have a responsibility under the UN Guiding Principles to respect human rights in their operations and their business relationships with the companies in which they invest.

## What is this Guide?

This Guide suggests how investors can use the UN Guiding Principles as a due diligence and risk assessment framework to assess human rights-related risks across their portfolios and hold companies accountable with respect to human rights. The UN Guiding Principles clarify the respective roles and responsibilities of states and businesses in relation to human rights and make recommendations that can assist investors to develop policies and systems for managing human rights issues. The UN Guiding Principles are generic in nature, rather than issue-specific: the Guide therefore positions them in the broader, fast-evolving landscape of business and human rights. It highlights specific groups

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1 John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, April 2008. At: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>; and John Ruggie, *UN Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework*, Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, A/HRC/17/31, March 2011.

and contexts; identifies emerging human rights issues; analyses standards and tools, legislative developments and accountability mechanisms that have recently generated significant attention; and examines potential opportunities as well as risks for companies. All the above developments reinforce two essential points. One, companies in every sector are now expected to address specific risks and responsibilities related to human rights. Two, investors have a newly defined opportunity to engage companies on a broad range of human rights issues (from conflict minerals and gender equality, to indigenous people's rights), using emerging benchmarks and tools based on the UN Framework and UN Guiding Principles. In Appendix II, the Guide provides a list of additional resources for those who want to focus further on specific topics.

### **Why Now?**

The Guide's key message to investors is that "the train is leaving the station" and it is time to get on board. Many other international standards and principles align with the UN Framework and UN Guiding Principles. As a result expectations of business with respect to human rights are much clearer. Investors therefore now possess a shared, consistent framework they can use to benchmark and evaluate company performance and hold companies accountable. Companies that disregard or abuse human rights are much more likely to be sanctioned by legislation or lawsuits, and investors need to take account of these risks. Although most jurisdictions do not oblige companies to produce reports on sustainability, current and proposed legislation in a number of areas is beginning to require companies to be more transparent about their human rights performance and abuses of human rights that occur. This trend will also improve investors' ability to assess the extent to which companies manage their human rights impacts competently.

### **For Whom?**

The Guide addresses mainstream investors across all asset classes, including hedge funds and private equity, established or new responsible investors as well as managers and service providers, all of whom can benefit from an annotated snapshot of recent developments and key issues in this field.

## **Structure of the Guide**

Part One outlines why human rights should matter to investors, and introduces the UN Framework and UN Guiding Principles.

Part Two discusses the application of the UN Framework and UN Guiding Principles. It sets out and explains key provisions that are particularly relevant to investors.

Part Three examines the larger environment, highlighting a range of specific thematic and contextual issues that investors need to consider and the emergence of new standards and tools.

Part Four explores the degree to which the new developments described in Parts Two and Three enhance and extend the human rights accountability of companies, including their legal accountability.

The Conclusion draws together the key messages from the Guide and points to further trends and work to be developed.

Appendix I lists the key questions from Part Two for investors to ask companies about their implementation of the UN Guiding Principles. This can assist investors to develop their own questionnaires and criteria for assessing both company performance and their own investment strategies in this area.

Appendix II provides a select list of additional resources.



# Part One: Why Human Rights Matter to Investors

Human rights have long been a key issue for responsible investors, notably socially responsible pension and mutual funds and faith-based investors. Investors were important participants in divestment movements driven by human rights concerns, in apartheid South Africa and in Sudan, for example; they have dialogued with companies for many years on supply chain and labour rights issues in a variety of sectors; they currently participate in multi-stakeholder initiatives to examine new questions such as freedom of expression and the right to privacy on the internet; and have worked together in coalitions and associations - from the US, UK, Eurosif and the UN supported investor initiative Principles for Responsible Investment (PRI), to the Interfaith Center on Corporate Responsibility (ICCR) to As You Sow and the Conflict Risk Network.

A growing body of research suggests that investment due diligence processes should examine environmental, social and governance (ESG) factors, including human rights, as these issues may create material risks.<sup>2</sup> Companies associated with human rights abuses expose themselves to operational risks (such as project delays or cancellation), legal and regulatory risks (lawsuits or fines), and reputational risks (negative press coverage and brand damage). For companies that operate in emerging markets, human rights controversies may represent their most evident threat, yet company attention to these risks often lags behind attention to environmental and governance matters.<sup>3</sup>

Many investors “accept that good fiduciaries should take them into account in investment decision-making”.<sup>4</sup> The fiduciary and reporting responsibilities of boards and company managers require them to identify and manage material risks, which can include risks associated with human rights, and disclose them to their companies and their investors.

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- 2 United Nations Environment Programme Finance Initiative (UNEPFI), *Asset Management Working Group, Fiduciary Responsibility: Legal and practical aspects of integrating environmental, social and governance issues into institutional investment, A follow up to the AMWG's 2005 'Freshfields Report'*, July 2009, pp. 28-29. At: <http://www.unepfi.org/fileadmin/documents/fiduciaryll.pdf>; and Freshfields report, *A legal framework for the integration of environmental, social and governance issues into institutional investment*, October 2005. At: [http://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf).
  - 3 Daan Schoemaker, *Raising the Bar on Human Rights: What the Ruggie Principles Mean for Responsible Investors*, Sustainalytics, August 2011, pp. 9-11. At: [http://www.sustainalytics.com/sites/default/files/ruggie\\_principles\\_and\\_human\\_rights.pdf](http://www.sustainalytics.com/sites/default/files/ruggie_principles_and_human_rights.pdf); and Ashamdeep Kaur, *Ruggie's Legal Legacy: Could Human Rights Become the Biggest Investor ESG Risk?*, Responsible Investor, March 2012.
  - 4 NEI Investments, letter to UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, December 2011. At: <http://www.ohchr.org/Documents/Issues/TransCorporations/Submissions/Business/NEIInvestments.pdf>.

There is growing evidence that, in addition to avoiding or diminishing certain risks, companies benefit financially when they uphold human rights (for example, by applying policies that prevent discrimination or respect freedom of association).<sup>5</sup> As compelling as the business case for respecting human rights has become - focusing in particular on diminishing or avoiding risk to the company - human rights are intrinsically worthy of respect and not simply on the condition that this respect brings a financial benefit.<sup>6</sup> Equally important, international treaties and other instruments that give human rights legal standing impose binding obligations on governments, which undertake to adopt legislation and take other actions to implement their human rights obligations. These instruments in turn become applicable to businesses.<sup>7</sup>

A stakeholder approach, which many responsible investors adopt, aligns with human rights principles.<sup>8</sup> While focusing on reputational, financial or legal risks to the company, the stakeholder approach recognises that risks have effects on all the company's stakeholders - including its employees, surrounding communities, and customers. This broader interpretation of risk and impact is already embraced by investors who take a long-term view of return on investment. For universal owners, who invest over the long term in a wide range of stocks, respect for human rights, the rule of law, and strong institutions of governance, underpin a just and stable society and a sustainable economy, and therefore their interests.<sup>9</sup>

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- 5 On the business case for unions, see Association of Canadian Financial Officers, *Assets or Liabilities? A Business Case for Canadian Unions in the 21st Century*, 2011. At: [http://www.acfo-acaf.com/sites/default/files/assets\\_or\\_liabilities\\_final.pdf](http://www.acfo-acaf.com/sites/default/files/assets_or_liabilities_final.pdf). On the financial arguments for gender equality in the workplace, see Catalyst, *The Bottom Line: Corporate Performance and Women's Representation on Boards*, 2007. At: <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards>; and McKinsey & Co., *Women Matter: Gender Diversity, a Corporate Performance Driver*, 2007. At: [http://www.mckinsey.com/~media/McKinsey/dotcom/client\\_service/Organization/PDFs/Women\\_matter\\_oct2007\\_english.ashx](http://www.mckinsey.com/~media/McKinsey/dotcom/client_service/Organization/PDFs/Women_matter_oct2007_english.ashx). On the business case for community consent for development projects, see Steven Herz et al, *Development without Conflict: The Business Case for Community Consent*, World Resources Institute, May 2007. At: [http://pdf.wri.org/development\\_without\\_conflict\\_fpic.pdf](http://pdf.wri.org/development_without_conflict_fpic.pdf). On financial losses to mining companies for "operational disruptions by communities", see Business Ethics, *Business and Human Rights: Interview with John Ruggie*, October 2011. At: <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>; and Rachel Davis and Daniel Franks, The costs of conflict with local communities in the extractive industry, 2011. At: [http://shiftproject.org/sites/default/files/Davis%20&%20Franks\\_Costs%20of%20Conflict\\_SRM.pdf](http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf). International Corporate Accountability Roundtable (ICAR), *Human Rights Due Diligence: The Role of States*, December 2012. At: <http://accountabilityroundtable.org/analysis-and-updates/hrdd>.
  - 6 As Rory Sullivan and Nicolas Hachez argue in a critique of the UN Guiding Principles, respect for human rights is not simply a "risk management issue" but is a "responsibility in its own right". Sullivan and Hachez, *Human Rights Norms for Business: The Missing Piece of the Ruggie Jigsaw – The Case of Institutional Investors*, in Radu Mares, ed., *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Martinus Nijhoff Publishers, 2012.
  - 7 International Corporate Accountability Roundtable (ICAR), *Human Rights Due Diligence: The Role of States*, December 2012. At: <http://accountabilityroundtable.org/analysis-and-updates/hrdd/>.
  - 8 ICCR, *Social Sustainability Resource Guide: Building Sustainable Communities through Multi-Party Collaboration*, June 2011. At: <http://www.iccr.org/publications/2011SSRG.pdf>.
  - 9 See for example, IFC, *Financial Valuation Tool for Sustainable Investments* (interactive). At: <http://www.ftvtool.com/>.

## Financial Consequences of Failure to Respect Human Rights

The following examples illustrate how issues relevant to human rights may expose companies to financial costs in several ways.

- **Lawsuits.**

In 2007, the families of two Chinese dissidents sued Yahoo!, alleging that information the company had provided to the Chinese authorities had led to the dissidents' imprisonment for sentences of 10 years. In 2008, the company settled with the families for an undisclosed amount.<sup>10</sup> Yahoo!'s co-founder, Jerry Yang, offered a personal apology to the mother of one of the dissidents in 2007, expressing remorse at the company's actions.<sup>11</sup>

Walmart Stores Inc. has been involved in a class action suit since 2001 for gender discrimination in a case that at one point involved approximately 1.5 million current and former female Walmart employees, making it the largest workplace bias case in US history.<sup>12</sup>

In 2007 the Brazilian Ministry of Labour and a number of workers' associations filed a lawsuit in Brazilian court against Shell Brazil and BASF. The lawsuit alleged that people employed at and living near a pesticide plant in Paulinia, Brazil, had suffered severe health problems as a result of land and groundwater contamination around the plant. In 2010 the court ruled in favour of the plaintiffs and ordered the companies to pay a total of \$653 million in fines and damages.<sup>13</sup> In March 2012 the defendants were reportedly in settlement talks to determine which party would pay the monetary award.<sup>14</sup>

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10 Catherine Rampell, *Yahoo Settles with Chinese Families*, Washington Post, 14 November 2007. At: <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111300885.html>; and Business and Human Rights Resource Centre, *Case Profile: Yahoo! Lawsuit (re China)*. At: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/YahoolawsuitreChina>.

11 Amnesty International, *Yahoo! in China – Background*. At: <http://www.amnestyusa.org/our-work/countries/asia-and-the-pacific/china/yahoo-in-china-background>.

12 Business and Human Rights Resource Centre (BHRR), *Case profile: Walmart lawsuit (re gender discrimination in USA)*. At: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Wal-MartlawsuitregenderdiscriminationinUSA>.

13 Laurence Price, *Shell, Basf Ordered to Pay \$354 Million in Brazil Contamination Case*, Bloomberg, August 2010. At: <http://www.bloomberg.com/news/2010-08-20/shell-basf-ordered-to-pay-354-million-in-brazil-plant-contamination-case.html>.

14 BHRR, *Annual Briefing: Corporate Legal Accountability*, June 2012. At: <http://www.business-humanrights.org/media/documents/corporate-legal-accountability-annual-briefing-final-20-jun-2012.pdf>.

- **Legislative penalties and fines.**

The Brazilian Institute of Environment and Renewable Natural Resources recently fined 35 companies, mostly domestic cosmetic and pharmaceutical multinationals, 88 million Brazilian reais (around US\$44 million) for not sharing benefits with indigenous communities from exploitation of the country's biodiversity. The Brazilian agency is further looking into developing a methodology to ensure the money from such fines reaches local people.<sup>15</sup>

- **Suspension of operations.**

In a recent interview, SRSJ John Ruggie, noted that failures to respect human rights generate financial risks. Drawing on figures from the mining industry, where projects are often impeded by protests or social controversy, he pointed out that: "For a world-class mining operation, which requires about \$3-5 billion capital cost to get started, there's a cost somewhere between \$20 million and \$30 million a week for operational disruptions by communities".<sup>16</sup>

- **Divestment.**

The Norwegian Government Pension Fund, a major sovereign wealth fund, has divested or withheld funds from certain companies on human rights and ethical grounds. It announces its decisions publicly, and gives reasons.<sup>17</sup> Though the additional costs of such decisions beyond the withdrawal of funds is difficult to quantify, they cause reputational damage and reduce a company's access to investment capital.

- **Reputational damage.**

A recent Vigeo analysis of the human rights record of 1,500 companies listed in North America, Europe and Asia revealed that, in the previous three years, almost one in five had faced at least one allegation that it had abused or failed to respect human rights.<sup>18</sup> While reputational damage is difficult to quantify, it is possible to calculate the time that staff and senior management spend dealing with such allegations (investigating, responding, and reporting to stakeholders, investors, the press and the public).

15 Morgan Erickson-Davis, *Biopiracy crackdown results in \$59M in fines for Brazilian companies, receives mixed reviews*, Mongabay.com, December 2012. At: [http://news.mongabay.com/2010/1230-morgan\\_biopiracy\\_brazil.html](http://news.mongabay.com/2010/1230-morgan_biopiracy_brazil.html).

16 See above n. 5, Business Ethics.

17 See for example, Council on Ethics for the Government Pension Fund Global, *Annual Report 2010*. At: [http://www.spainsif.es/sites/default/files/upload/publicaciones/AnnualReport\\_2010%20Fondo%20Noruego.pdf](http://www.spainsif.es/sites/default/files/upload/publicaciones/AnnualReport_2010%20Fondo%20Noruego.pdf).

18 Vigeo, *What Measures are Listed Companies Taking to Protect, Respect and Promote Human Rights?*, 2012. At: [http://www.vigeo.com/csr-rating-agency/images/PDF/Publications/Executive\\_Summary\\_HR\\_EN.pdf](http://www.vigeo.com/csr-rating-agency/images/PDF/Publications/Executive_Summary_HR_EN.pdf).

## **A Key Development: the UN Protect, Respect and Remedy Framework and the UN Guiding Principles on Business and Human Rights**

What do human rights mean for business? The UN Guiding Principles not only reaffirm that governments have an obligation to protect against human rights abuses by third parties, including businesses, but also for the first time clarify that all companies have a responsibility to respect human rights. This means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The strong support by governments of the UN Framework and UN Guiding Principles ended a long international debate about the human rights responsibilities of companies.<sup>19</sup> The unanimous endorsement<sup>20</sup> of the UN Guiding Principles by the UN Human Rights Council in 2011 means the argument as to whether business has human rights-related responsibilities should be over, with the focus now turning to how companies should implement these responsibilities in practice, using the UN Guiding Principles as a guide.<sup>21</sup>

The UN Framework, and the UN Guiding Principles which “operationalises” the Framework, are organised around three interdependent pillars:

- **Pillar I** confirms that states have a legal obligation to “respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction”. This pillar includes the duty to protect against human rights abuses by third parties, including companies.
- **Pillar II**, explored in more detail below, defines a global standard of expected conduct for all companies wherever they operate. The “corporate responsibility to respect” requires companies to avoid infringing the human rights of others, and to address adverse human rights impacts with which they are involved. Central to this pillar is the principle that a company has a responsibility not only in regard to its own activities but also with regard to human rights impacts directly linked to their operations, products or services by their business relationships. **Human rights due diligence** is fundamental to implementing the responsibility to respect, because it is the process through which companies “**know and show**” what they do to respect human rights.

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19 The draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) aimed to spell out business responsibilities. Specifically, the document listed in a single succinct statement the human rights obligations of companies. While many civil society organisations welcomed the Norms, business generally opposed them, rejecting the notion that companies had direct legal obligations in relation to human rights. States, for the most part, came out on the same side as business.

20 Member states on the Human Rights Council at the time included, notably, China, Russia, Brazil, the United States, the United Kingdom and Saudi Arabia.

21 The Human Rights Council set up a Working Group on Business and Human Rights with a three-year mandate to “promote the effective and comprehensive dissemination and implementation of the UN Guiding Principles”. UN Human Rights Council, *17/4 Human rights and transnational corporations and other business enterprises*, A/HRC/RES/17/4, July 2011. At: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

**Pillar III** emphasises that victims of corporate-related human rights abuse should have access to judicial or non-judicial remedies and highlights the importance of accountability mechanisms for victims. These may include state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance mechanisms that companies provide or organise themselves.

The UN Guiding Principles are not an all-encompassing solution to corporate-related human rights abuses. Important questions remain to be addressed, not least the issue of enforcement, because no relevant UN human rights mechanism has enforcement powers.<sup>22</sup> For this reason, human rights groups have argued that many victims of abuse - especially abuse associated with companies' overseas operations - have no access to justice in the short or medium term. Because states have failed to regulate adequately, and large gaps in extraterritorial law exist, they conclude that it will be necessary to establish binding international legal standards for companies.<sup>23</sup> The UN Guiding Principles have also been criticised for focusing too narrowly on processes and management at the expense of "substance and outcomes".<sup>24</sup> However, they were not designed to be issue, sector or region-specific: they provide a floor or minimum expected standard of conduct for all companies of all sizes and in all sectors and regions.

In May 2011, investors representing \$2.7 trillion of assets under management, and who have signed the UN supported Principles on Responsible Investment (PRI), publicly declared their support for the UN Guiding Principles and the UN Framework. They noted that these documents would help them to analyze how companies address human rights risks, and would "enable credible benchmarking of company efforts in a way that has not been possible to date".<sup>25</sup> They also pointed to "significant gaps" in the UN Guiding Principles. Specifically, they suggested that the UN Guiding Principles do not take enough account of investors' "special position of influence" with regard to companies' human rights due diligence processes, and had missed an opportunity to examine fiduciary duty "with a human rights lens".<sup>26</sup> In a report published in August 2011, Sustainalytics, a

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22 The UN Working Group on Business and Human Rights does not have enforcement powers and is "not in a position to investigate individual cases of alleged business-related human rights abuses". OHCHR, *Methods of Work*. At: <http://www.ohchr.org/EN/Issues/Business/Pages/WorkingMethods.aspx>. See also UN Human Rights Council, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/20/29*, 10 April 2012, paragraph 89. At: [http://www.ohchr.org/Documents/Issues/Business/A.HRC.20.29\\_en.pdf](http://www.ohchr.org/Documents/Issues/Business/A.HRC.20.29_en.pdf).

23 See for example, Amnesty International et al, *Joint Civil Society Statement to the 17th Session of the Human Rights Council*, May 2011. At: <http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council>.

24 See above n. 6, p. 230.

25 *Investor Statement in Support of the UN Guiding Principles on Business and Human Rights*, multiple signatories, May 2011. At: [http://www.iccr.org/news/press\\_releases/pdf%20files/InvestorStatementHR\\_052311.pdf](http://www.iccr.org/news/press_releases/pdf%20files/InvestorStatementHR_052311.pdf).

26 See above n. 4.

research firm specialising in ESG matters, outlined the implications for investors of the UN Guiding Principles.<sup>27</sup>

The UN Guiding Principles have already acted as a catalyst, aligning different standards and guidelines that address specific aspects of business responsibility with regard to human rights. Over time, moreover, some of the core precepts of the UN Guiding Principles “may slowly become binding” as states adopt legislation “consistent with Ruggie’s recommendations”.<sup>28</sup> For these reasons, the UN Guiding Principles provide a robust analytical framework for investors and are likely to remain the most widely accepted global standard on business and human rights.

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27 See above n. 3, Schoemaker.

28 *Ibid*, pp. 9-11.



# Part Two: Applying the UN Guiding Principles on Business and Human Rights

This part explores **Pillar II of the UN Framework**, the “corporate responsibility to respect human rights”. It focuses on helping investors understand at a minimum whether the companies they have invested in have the appropriate policies and processes in place to assess and manage human rights impacts. With such policies and processes in place, companies should be better able to identify and manage relevant human rights challenges. Investors can then delve into and develop more detailed tools and understandings around the more specific human rights issues highlighted in Part Three for their relevant asset class.

Specifically, this part:

- Identifies **three elements of the UN Guiding Principles important to investors**. They are:
  1. A company’s human rights policy commitment (Guiding Principle 16).
  2. Its human rights due diligence processes (Guiding Principles 7-21).
  3. Its grievance mechanisms (Guiding Principles 22 and 29).
- Explains why **human rights due diligence processes** are particularly relevant to investors and proposes **questions** that investors should consider on the **policies, systems and reporting** procedures that companies put in place to address human rights.

## Exploring Substantive Human Rights Questions by Asset Class

The questions below and in Appendix I focus on relevant company processes to address human rights. Investors are encouraged to develop further questions on substantive human rights issues that are relevant to each asset type, to ensure they address the key issues for the class, industry and country. There are many different vehicles through which investors manage assets, such as through private equity, fixed income, listed equity and hedge funds. Each presents its own type of exposure to risk and its own leverage points for integrating human rights issues into the management of the asset type. For example:

- Real estate investments should address human rights issues related to in particular, land acquisition, including displacement and relocation and the claims of vulnerable groups (such as women, children, indigenous peoples and those who do not have formal legal rights to land or assets, but who have a claim to land that is recognised or recognisable under national law).
- Investments in private equity infrastructure funds in emerging markets may have negative impacts on a range of human rights including with respect to land, food, and water as well as on vulnerable groups including migrant workers and children.
- Trading and investing in commodities, particularly agricultural commodities, can affect the rights to food, water and health as well as land use.
- Widespread human rights abuses that create political risk, as well as non-achievement of economic and social rights such as the right to education and the right to health can be relevant to sovereign debt funds.

## 1. Making a Statement: A Company's Policy Commitment to Human Rights

### Human Rights Policy Commitment

#### *Guiding Principle 16*

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

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

The essence of this Guiding Principle is company acknowledgement of its responsibility for the human rights impacts of its activities. This refers to the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. The policy commitment should be endorsed by the highest levels of senior management. Larger companies will often need to supplement their general commitment with additional internal policies and processes that elaborate in more detail its implications for different departments in areas such as procurement, human resources, operations, and sales.

Many companies have understandably focused on what the UN Guiding Principles mean specifically for their own operations, but no company acts in a silo. The UN Framework and UN Guiding Principles are built on business practices that often link the smallest enterprises into a web of business relationships that may extend locally, regionally or increasingly internationally. Business relationships are now squarely on the business and human rights map.<sup>29</sup> Responsibility is determined by the impact of a company's activities on human rights – impacts that a company causes or contributes to or impacts directly linked through its business relationships. A company's policy commitment should therefore set out its expectations of business partners. This reference in the overarching policy commitment then serves as a starting point for referring to human rights expectations in contracts and in other relationship management processes with partners.

<sup>29</sup> Institute for Human Rights and Business, Global Business Initiative on Human Rights, *State of Play: The Corporate Responsibility to Respect in Business Relationships*, December 2012. At: <http://www.ihrb.org/publications/reports/state-of-play.html>.

The UN Guiding Principles call on companies to embed oversight of human rights issues in their management and operational structures and processes. This approach is not new and follows the same path of addressing other ESG risks: if not incorporated into existing company management systems, human rights risks are unlikely to be addressed in an efficient and systematic manner. Embedding requires senior level support for human rights and designated individuals with explicit responsibility and accountability in relevant functions within the company.

#### Why a policy commitment is important to investors

- The presence of a human rights policy commitment helps investors differentiate between companies that publicly acknowledge their human rights responsibilities and those that do not. It underpins a company's efforts to meet its responsibility to respect rights. It defines the company's ambition, and guides and frames processes that implement the commitment.
- The adoption of a human rights policy commitment indicates that a company has considered the potentially negative impacts of its activity and its business relationships, and ideally discussed these with key stakeholder groups inside and outside the company.
- High level oversight signals that a company attaches importance to human rights, recognises their significance in terms of governance and accountability, and understands the financial consequences of human rights risks.
- Embedding management of human rights into company processes regularises the handling of human rights issues and makes it more likely that they will be dealt with swiftly and efficiently before potentially escalating into more grievous situations.

#### Investors should ask or determine

- *Has the company publicly affirmed that it will address human rights in a policy commitment that is based on an assessment of its potential impacts and is endorsed at the most senior level?*
- *Who has oversight of the policy commitment and due diligence process?*
- *Is the commitment integrated in the overall risk management system of the company and supported by internal policies, procedures, budgets and assigned across relevant functions in the company?*

## **2. From Commitment to Action: Human Rights Due Diligence**

UN Guiding Principles 17-21 set out the key elements of a human rights due diligence process. They state that, to fulfil the corporate responsibility to respect, companies must take action to assess, integrate and manage, and track and communicate, potential and actual human rights impacts. These principles are of the greatest relevance and practical usefulness, not only to companies, but to investors, because they provide the elements of a process that can identify, prevent and mitigate adverse human rights impacts.

## Human Rights Due Diligence - Overview

### Guiding Principle 17

*"In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:*

*(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;*

*(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;*

*(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."*

A company's own operations and those operations, products or services of its business partners through its business relationships can have negative impacts on human rights, which in turn can affect a company's reputation and its financial and investment performance. To understand and manage these impacts, a company should carry out human rights due diligence. This is the first element of the UN Guiding Principles' expectation that companies should "know and show" what their potential human rights impacts are.

The nature and seriousness of the human rights risks that a company's operations or relationships generate will be influenced by its activity, where it operates, and broader societal circumstances. While a company is likely to be increasingly familiar with key human rights issues in its sector, neither country contexts nor risks related to business relationships will necessarily be consistent. To reduce the chance that it will miss key risks and impacts, companies should therefore start the due diligence process by making a broad assessment of potential negative human rights impacts, considering all human rights, and using the assessment process to identify the rights most salient to the specific context of operations.<sup>30</sup> Though such an assessment may stand alone, companies usually integrate human rights assessments in other due diligence processes; in such cases, the human rights considerations of the assessment should remain distinct.

The scale of a due diligence process will be influenced by a company's size, sector and operational context. The test is whether the process addresses the potential human

30 International Organisation of Employers, *UN Guiding Principles on Business and Human Rights – An Employers Guide*, 2011. At: [http://www.ioe-emp.org/fileadmin/ioe\\_documents/publications/Policy%20Areas/business\\_and\\_human\\_rights/EN/\\_2012-02\\_\\_UN\\_Guiding\\_Principles\\_on\\_Business\\_and\\_Human\\_Rights\\_-\\_Employers\\_Guide.pdf](http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2012-02__UN_Guiding_Principles_on_Business_and_Human_Rights_-_Employers_Guide.pdf).

rights risks to people, rather than looking only at risks to the company. The UN Guiding Principles signpost a number of specific concerns to be taken into account in a due diligence process. The single most important factor that should determine its scale and complexity is the severity of possible human rights impacts. For this reason, the UN Guiding Principles pay particular attention to operating in conflict zones where the risk of severe human rights impacts is often highest.<sup>31</sup> In line with human rights norms, the UN Guiding Principles also call on companies to pay particular attention to vulnerable individuals and groups, because negative impacts often affect them more severely. Where local conditions prevent a business from fully respecting human rights (for example, because national laws conflict with international standards), companies are expected to find ways to honour internationally recognised human rights standards to the greatest extent possible and to be able to demonstrate that they have made a serious effort to do so.<sup>32</sup>

#### What the UN Guiding Principles Say about Operating in Particular Countries

The UN Guiding Principles do not address whether a company should enter or remain in a country with a poor human rights record. Instead they provide guidance on the steps and issues that companies should consider during their human rights due diligence process. In deciding whether to enter a country with a poor human rights record, companies should take the following steps:

- **Draw on expertise.** Particularly when they work in complex environments, companies should engage credible independent experts and consult meaningfully stakeholders who are likely to be affected by their activities or business relationships.<sup>33</sup>
- **Engage as early as possible with the government in conflict-affected areas.** Where a viable government exists, a company should establish working relations quickly with it and with its home government (if the business is operating abroad).<sup>34</sup>
- **Be prepared to carry out enhanced due diligence** that reflects the complexity of the context of its business operations and severity of potential human rights impacts.<sup>35</sup>
- **Be prepared to report formally on how the business has addressed its human rights impacts.** Where the operating context is likely to generate severe

31 Guiding Principle 7 highlights the heightened risk of gross human rights abuses in conflict-affected areas and the support states should provide in these circumstances, while Guiding Principle 24 draws attention to the risk of complicity in gross human rights abuses and the need to treat this as a legal compliance issue.

32 Guiding Principle 23 and Commentary.

33 Guiding Principles 18 and 23.

34 Guiding Principle 7.

35 Guiding Principle 17.

human rights impacts, it is appropriate to report formally, covering relevant topics and using indicators to show how the company has addressed human rights risks and impacts. Independent verification can strengthen the content and credibility of reporting.<sup>36</sup>

A company should also consider whether it can operate in line with the following cautionary principles:

- **Do not exacerbate the situation.** Particularly in complex situations, companies should not make matters worse.<sup>37</sup>
- **Use utmost caution where gross human rights abuses are possible.** Companies should act with the utmost caution when they risk causing, contributing or being linked to gross human rights abuses. They should treat this risk as a legal compliance issue.<sup>38</sup>
- **Prioritise the most severe or irreversible risks.** In situations of numerous actual or potential human rights impacts, companies should prioritise action to address the most severe impacts, including those where a delayed response may cause irreparable effects. An inability to address severe impacts because of the country context should have a major influence on decision-making about whether to enter the country.<sup>39</sup>

As investors assess human rights due diligence processes, they should be aware of three significant differences between a human rights due diligence process and typical transactional due diligence. Human rights due diligence:

1. Examines the **impacts or potential impacts on people and their rights** that result from a business's operations or relationships, rather than focusing on risks to the business itself (the usual focus of due diligence). Increasingly there is a convergence between these risks – risks that have a negative impact on people can pose risks to a business as well.
2. Encompasses the **process of ongoing management of impacts identified** during the identification and assessment process (most uses of the term “due diligence” refer to identifying issues or initial management but not on-going management).
3. Includes a **continuing process of assessment**, recognising that human rights risks may persist or evolve, as may the environment, throughout the period of the company's operations.

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36 Guiding Principle 21.

37 Guiding Principle 23.

38 *Ibid.*

39 Guiding Principles 14 and 24.

### Why human rights due diligence processes are important to investors

- Human rights due diligence processes can and should be incorporated into a company's overall risk-management system. They show that companies are actively taking steps to determine and address human rights risks to people and their related reputational, financial, and operational risks to the company.
- They help companies to comply with international and domestic law. Companies often grow by operational expansion or acquisitions in other legal jurisdictions. Companies that fail to conduct human rights due diligence may not identify and manage their exposure to new human rights risks, especially in jurisdictions where the legal system or enforcement is weak.
- They can help companies to: build relationships with stakeholders and engage positively with local communities; establish a "social license" to operate; strengthen relations with employees, consumers and partners; and demonstrate leadership in the area of risk management.
- They can enable a company to access new markets that it might otherwise avoid on grounds of risk by providing a process for appropriately managing operations in higher risk zones, thereby giving them a competitive advantage.

### Investors should ask or determine

- *Has the company developed a human rights due diligence process to implement its policy commitment and assess its impacts? Is the process initiated early so that results can be incorporated into decision making? Does it assess the company's potential impact on people? If an urgent human rights problem arises, do the company's procedures prevent its involvement or enable it to address human rights abuses immediately?*
- *Does the due diligence process enable the company to manage the complexity of its business environment, including its business relationships (e.g. conflict zones, countries with poor human rights records, emerging markets, etc.)?*
- *Does the company have a process for carrying out periodic assessments? Does it re-assess when it makes significant new transactions, when it creates important new relationships, or when its operating environment changes in important ways?*
- *Does the process examine potential negative impacts that are directly linked to it by the company's business relationships, such as in its supply chain, mergers and acquisitions, joint ventures, franchising, or licensing? What steps does the company take to encourage or require its business partners to conduct their own human rights due diligence?*

## Involving Stakeholders and Experts in Human Rights Due Diligence

### Guiding Principle 18

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

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

Human rights due diligence focuses on a company’s relationships with people who may be affected by its activities or business links. Understanding their perspective is therefore central to the human rights due diligence exercise. A due diligence process should involve direct and meaningful consultation with those who may be affected, taking account of the size of the company and the nature and context of its operations. Consultation is particularly important when operations or the operating context create significant human rights risks,<sup>40</sup> or where human rights standards formally require detailed consultation. (For example, certain decisions that affect indigenous peoples require free, prior and informed consent: see Part Three).<sup>41</sup> Where direct consultation is not possible, companies should find other means to obtain information about their human rights impacts by consulting experts, human rights defenders and civil society organisations.

### Why consultation is important to investors

- A company that draws on human rights expertise shows that it takes human rights risks seriously; and its due diligence processes are more likely to be effective.
- External consultation reassures investors that a company bases its human rights policies on a diversity of perspectives, including the views of people who may be affected by its activities and relationships. It is evidence that a company understands its stakeholders, including those it affects.
- Consultation with potentially affected parties early on enables a company to address their concerns before negative impacts or complaints become serious or irreparable. Many problems can be resolved if addressed promptly, for example by amending a project’s design. Such actions can also reduce the risk of local or international protest, which can disrupt company operations.

40 OHCHR, *The Corporate Responsibility to Respect Human Rights - An Interpretive Guide*, 2011, pp. 35-36. At: <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>.

41 UN, *UN Declaration on the Rights of Indigenous Peoples*, 2007. At: [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

- It indicates that the organisation is open and willing to learn, and a learning organisation is better positioned to adapt to internal or external changes and to risks and opportunities in general.

#### Investors should ask or determine

- *Does the company possess the human rights expertise and capacity it needs to carry out human rights due diligence? Is it making use of appropriate external expertise?*
- *Does the company identify on an ongoing basis potentially affected stakeholders and involve them in its human rights due diligence in a meaningful way?*
- *How does the company ensure that its consultation efforts include all relevant parties and that its processes are inclusive and accessible to relevant groups, including those who may be particularly vulnerable or at risk?*
- *Does the company participate in multi-stakeholder initiatives or other sector initiatives that address human rights issues?*

### **Integrating Human Rights Due Diligence into Company Processes**

#### *Guiding Principle 19*

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

*(a) Effective integration requires:*

- i. Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;*
- ii. Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.*

*(b) Appropriate action will vary according to:*

- i. Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;*
- ii. The extent of its leverage in addressing the adverse impact.”*

This step in the due diligence process is a crucial one: it is about what companies actually do to prevent and mitigate potential and actual human rights impacts. In this step, companies should get to real action on the specific findings of their due diligence. Policy commitments give important signals internally and externally as noted above, but this is the point where companies must put words into action.

Integrating the findings from assessments should enable a company to take what the UN Guiding Principles call “appropriate action”. By identifying potential negative human rights impacts in advance, companies should be able to prevent or cease negative impacts; this should be the primary objective (particularly with respect to potential gross human rights violations or severe impacts).<sup>42</sup> Where prevention is not possible, companies should seek to minimise negative impacts. Where that does not work, companies must right the wrong (remediation), which includes preventing repetition of the harm, and providing an apology or compensation.<sup>43</sup> As an example of mitigating an impact on the right to privacy in the ICT sector, a company may design services to provide the highest degree of privacy as a default setting in combination with a clear and understandable statement of its privacy policy made readily accessible to users.

Where companies enter into business relationships, they should work with their business partners to address the human rights impacts of their joint relationship. This can happen a number of ways, such as through contractual requirements, incentives and disincentives (e.g. continued business), capacity building, and collective action. The extensive action some companies take to address human rights in their supply chains is evidence of this principle in real terms.<sup>44</sup>

#### Why integration into company management systems is important to investors

- Sound human rights due diligence will result in operational changes that will minimise future business risks and impacts to stakeholders, therefore making the company a more attractive investment.
- Given that a company will often be exposed to risks through its business relationships, systematically addressing these issues early on with business partners can help reduce risk to people and the company. This approach multiplies the uptake of the responsibility to respect throughout value chains, contributing to a more level playing field.

#### Investors should ask or determine

- *Does the company integrate the results of its human rights due diligence into its business decisions and operations, and does it take action at an early stage?*
- *Does the company use due diligence findings to influence the conduct of its business partners?*
- *When the company’s due diligence reveals that negative human rights impacts are likely, are significant findings escalated to senior management and the Board? If so, what operational and policy decisions do senior managers and the Board take in response?*

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42 Guiding Principles 23 and 24.

43 See point 3 on operational level grievance mechanisms below.

44 See for example the work of the Ethical Trading Initiative and the Fair Labour Association in working with companies to improve human rights practices in supply chains. Where a company has a large numbers of entities in its value chain, the Guiding Principles suggest a practical, risk driven approach to due diligence. See Guiding Principles 17 and 24.

## Tracking Human Rights Performance

### *Guiding Principle 20*

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

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

Investors regularly ask companies to develop and disclose key performance indicators (KPIs) and increasingly request third party audit access to the data systems behind KPIs, on the assumption that “what gets measured gets managed”. The same principle applies to managing human rights impacts. As a result of carrying out human rights due diligence, companies should identify actions they can take to prevent negative impacts, or mitigate them when prevention is not possible. Those actions should be assigned to appropriate company functions, for implementation, tracking and monitoring, to determine whether the company is following through on the actions identified, modifying plans where action has been ineffective, and responding appropriately to new developments. Data should be accurate, signed off locally, and should be compatible across different jurisdictions so the company can compare and learn.

### Why tracking performance is important to investors

- Tracking effectiveness demonstrates to investors and other stakeholders that a company has developed and implements appropriate systems and procedures to minimise human rights impacts.
- Tracking helps to identify patterns of impacts where remedial action is needed, and assists managers to establish goals and targets for reducing negative impacts in the future and to assess trends over time.
- Tracking, and the communication of performance to affected stakeholders, builds accountability at the operational level, close to affected stakeholders.
- Tracking, and eventual disclosure, are an important tool for benchmarking companies against peers.

### Investors should ask or determine

- *Does the company apply qualitative and quantitative indicators to evaluate its human rights performance? Have these been developed with the participation of affected stakeholders?*
- *Does the company employ a sound monitoring system to track how it handles human rights impacts across its operations?*

## Communicating about Human Rights Impacts and Responses

### Guiding Principle 21

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

- (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;*
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;*
- (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.”*

For investors, regular reporting and communication are relevant because they are elements of corporate disclosure and transparency, which are vital to due diligence processes. The benefits of corporate disclosure are clear: they provide insight into accountability, build trust, enhance brand value, and reveal the quality of risk management. Moreover, regular reporting - ideally annual - demonstrates a commitment to transparency and helps investors to track a company’s human rights impacts and record over time. It is a key aspect of the UN Guiding Principles concept that companies should “know *and show*” what they are doing to address human rights impacts, including the dilemmas most struggle with. Under the UN Guiding Principles, companies are expected to report formally whenever their activities might generate severe human rights impacts. Investors often expect formal reporting to occur more routinely. A company should present its KPIs and other data in context. It should demonstrate that it understands why its indicators are relevant, taking account of its operational scale, its sector, the environment and other specific factors that affect its performance and situation.

While corporate disclosure can take a variety of formats, investors can encourage companies to standardise their reporting, as the Global Reporting Initiative (GRI) Guidelines do. The GRI provides the most widely used sustainability reporting standard to date and have integrated several dimensions of human rights, thereby enabling investors to assess a company’s performance more objectively relative to its peers in the same industry.

### Why communication is important to investors

- A company that reports on its human rights impacts demonstrates that it takes responsibility for these impacts and is accountable to investors and other stakeholders.
- Investors largely rely on corporate reports to assess a company's performance on human rights.

### Investors should ask or determine

- *Does the company communicate its results locally to stakeholders?*
- *Does the company report formally on its human rights impacts and responses? If it does, is the company's report informed by relevant reporting standards and specific human rights performance indicators?*<sup>45</sup>

## **3. Righting the Wrong: Remediation and Operational Level Grievance Mechanisms**

### **Operational Level Grievance Mechanisms**

#### *Guiding Principle 22*

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

#### *Guiding Principle 29*

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

Even with the best policies and practices, a business may cause or contribute to adverse human rights impacts that it had not foreseen or could not prevent. In such cases, its responsibility to respect human rights requires the company to engage actively in remedying the wrong. Grievance mechanisms at operational level are not a substitute for judicial or other formal mechanisms, but they can provide accessible and timely local remedies to workers, communities and customers. They may be implemented by the company, by the company in collaboration with others, or by a mutually acceptable external expert or body.

<sup>45</sup> See the G3.1 Reporting Guidelines, publications and relevant sector supplements. At: <https://www.globalreporting.org/reporting/latest-guidelines/g3-1-guidelines/Pages/default.aspx>. See also, SOMO, *Use of the Global Reporting Initiative (GRI) in Sustainability Reporting by European Electricity Companies*, January 2013. At: [http://somo.nl/publications-en/Publication\\_3918](http://somo.nl/publications-en/Publication_3918).

Grievance mechanisms at this level serve several important purposes. They help identify adverse impacts by enabling those who are directly affected to raise their concerns directly with a company. They make it possible to address grievances early and directly, and so prevent their escalation. They go beyond typical whistle-blower systems that usually are limited to raising concerns about violations of company codes of conduct that may not necessarily be the same as concerns regarding impacts on individuals or groups.<sup>46</sup> The UN Guiding Principles set out criteria for assessing the effectiveness of non-judicial grievance mechanisms. These can also assist investors who want to understand whether companies are addressing grievances appropriately.<sup>47</sup>

#### Why grievance mechanisms at operational level are important to investors

- They show that a company's systems enable it to identify but also track and address allegations of human rights abuse. They provide companies and investors with an early warning system for monitoring human rights performance.
- They enable a company to tackle problems before they generate legal penalties, blockades, protests, or other reputational, financial or operational costs.
- They give investors access to third party, objective information that indicates whether businesses are properly managing their risks and have learned from past problems.
- They can promote transparency and disclosure (although it may not always be appropriate to disclose information about grievance resolution).

#### Investors should ask or determine

- *Has the company developed accessible and effective grievance mechanisms at operational level to address human rights issues raised by workers or other affected stakeholders?*
- *Does the company's grievance mechanism align with the UN Guiding Principles' effectiveness criteria?<sup>48</sup>*
- *What is the company doing with the information and lessons it obtains from its grievance mechanisms? Does it track information over time to identify trends, improve its procedures, or report to stakeholders and investors?*

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46 See above n. 40, *OHCHR Interpretive Guide* pp. 67-72.

47 Guiding Principle 31, the Effectiveness Criteria assess whether Non-Judicial Grievance Mechanisms are: legitimate, accessible, predictable, equitable, transparent, rights-compliant, and a source of continuous learning.

48 *Ibid.*

# Part Three: Building on the UN Guiding Principles – the Bigger Picture

As investors have noted, the UN Framework and UN Guiding Principles are general in nature and are not issue- or sector-specific.<sup>49</sup> This part highlights selected groups of people, specific contexts, emerging human rights issues, and legislative developments that have generated significant recent attention in the business and human rights field, because they represent potential risks and opportunities for companies, and should therefore be on investors' radar screens. It also discusses emerging principles, standards, guidelines and tools (many influenced by and aligned with the UN Guiding Principles) that advise companies on how to address human rights impacts on particular groups, or in specific contexts and sectors. Investors can use these documents to further evaluate the human rights performance of companies they monitor. (See Appendix II for a more complete listing of resources.)

## 1. International Frameworks Aligned with the UN Guiding Principles

The close alignment of recent selected standards with the UN Guiding Principles confirms that major regional and international institutions have converging expectations of business with regard to human rights. The importance of this trend should not be underestimated. It affirms and clarifies the behaviour that is expected of companies, and consolidates the expectation that companies have a responsibility to respect human rights. Investors therefore have access to an increasingly consistent and shared framework they can use to engage companies on human rights risks.

The **Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises** (OECD Guidelines) were updated in 2011.<sup>50</sup> The Guidelines are recommendations made by governments to multinational enterprises that operate in, or operate from, the forty two adhering countries plus the European Union; the signatories include countries that are not members of the OECD. The 2011 version contains an entirely new chapter on human rights that incorporates and draws on the UN Framework and the UN Guiding Principles. Although the recommendations and guidance are not binding on companies, OECD member countries have made a "binding commitment to implement them" and have established a system for hearing complaints from affected stakeholders (called "specific instances") by means of "National Contact Points (NCP)".<sup>51</sup>

In 2010, the International Standards Organisation (ISO) released its social responsibility standard, **ISO 26000: Guidance for Social Responsibility**.<sup>52</sup> It provides extensive guidance on Corporate Social Responsibility (CSR). The standard's human rights chapter incorporates the principles and concepts of the UN Framework and UN Guiding Principles. ISO 26000 is aimed at business and public sector organisations. Though

49 See above n. 3, p. 21.

50 OECD, *OECD Guidelines for Multinational Enterprises*, 2011 edition. At: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/>.

51 *Ibid.*

52 ISO, *ISO 26000 – Social Responsibility*. At: <http://www.iso.org/iso/iso26000>.

it is not a management system standard or certification scheme, it is being used as a benchmark to create CSR certification mechanisms.<sup>53</sup>

The **European Commission** (EC) published a new **corporate social responsibility policy** in late 2011. It includes a new definition of CSR as “the responsibility of enterprises for their impacts on society”.<sup>54</sup> The policy states that the EC is committed to implementing the UN Guiding Principles, and expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles.<sup>55</sup>

The **International Finance Corporation** (IFC, part of the World Bank Group) revised its **Performance Standards** in 2012. In doing so, it adopted a specific provision recognising the corporate responsibility to respect human rights, drawing on the UN Guiding Principles.<sup>56</sup> The IFC’s alignment with the UN Guiding Principles approach is significant, because its standards are used as a *de facto* benchmark by multilateral development banks, and have become a standard for OECD export credit agencies (ECA), which use the IFC Performance Standards as a benchmark for OECD ECAs under the “Common Approaches”. The 2012 revised version of the Common Approaches specifically refers to the UN Guiding Principles and requires the incorporation of human rights in ECA due diligence.<sup>57</sup> In addition, and of particular interest to investors, the IFC Performance Standards are a basis for the **Equator Principles**, a credit risk management framework for determining, assessing and managing environmental and social risks in project finance transactions. The Equator Principles are applied by 77 major international banks around the world. Revisions proposed to the Equator Principles in 2012 put greater emphasis on human rights considerations in due diligence, and acknowledge the UN Framework and UN Guiding Principles.<sup>58</sup>

## 2. Emerging Codes, Principles, Standards and Guidance Concerning Specific Groups

The UN Guiding Principles mention specific groups and populations that require particular attention because any harmful effects of corporate activity are likely to affect them more severely. They may lack protection under national or traditional laws, frequently suffer

53 Mara Chiorean, *ISO 26000: implementation beyond certification*, CSR Asia Weekly, 22 June 2011. At: [http://www.csr-asia.com/weekly\\_detail.php?id=12388](http://www.csr-asia.com/weekly_detail.php?id=12388).

54 European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, October 2011. At: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

55 *Ibid.*

56 IFC Performance Standard 1, *Assessment and Management of Environmental and Social Risks and Impacts*, 2012, para. 3. At: [http://www1.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1\\_English\\_2012.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES). And see the accompanying Guidance Note, paras GN44-47. At: [http://www1.ifc.org/wps/wcm/connect/b29a4600498009cfa7fcf7336b93d75f/Updated\\_GN1-2012.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/b29a4600498009cfa7fcf7336b93d75f/Updated_GN1-2012.pdf?MOD=AJPERES).

57 OECD, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the “Common Approaches”)*, June 2012. At: <http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en>.

58 *Equator Principles*. At: <http://www.equator-principles.com/>.

from discrimination, and are often economically insecure. They may also be marginalised in engagement processes with local communities, or benefit sharing and compensation schemes. Businesses may need to take additional steps to fulfil their human rights responsibilities to these groups, which include “indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families”.<sup>59</sup> Though the UN Guiding Principles do not elaborate, a growing number of standards broadly consistent with the UN Guiding Principles examine corporate impacts on specific populations, and how companies can address them.

### Children

Children make up almost one-third of the world’s population, and companies can have a profound, “long-lasting and even irreversible” impact on this population.<sup>60</sup> Yet, until recently, work on the private sector’s responsibility for children has focused primarily on child labour, which is important but only a small part of the story.

#### *Emerging guidance*

Seeking to fill this gap, in March 2012, UNICEF, the UN Global Compact and Save the Children released the **Children’s Rights and Business Principles (CRBP)**. Based on key international instruments on children’s rights,<sup>61</sup> the CRBP highlight “the diversity of ways in which business affects children”, including in the workplace, marketplace and community. They consider the impact of core business operations, as well as the ways in which companies’ relationships with governments and others can affect children’s rights. Because they describe a broad range of corporate impacts, in addition to child labour, the CRBP provides an agenda for investors and for others who wish to engage companies in a discussion of their impact on children’s lives.

#### *Investor involvement*

Where investors focus at all on children’s rights, emphasis has been on the elimination of child labour in supply chains and more recently child sex tourism in the hospitality and travel industries.<sup>62</sup> Institutional investors have been involved in the steering committee of the Child Labor Platform, which facilitates the exchange of good practices and promotes practical steps that businesses can take to eliminate child labour. The Platform is based on the UN Guiding Principles and is developing recommendations on investment.<sup>63</sup> For

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59 The UN Guiding Principles direct business initially to the specialised human rights conventions and other texts that cover many of these groups. See Guiding Principle 12 Commentary.

60 UNICEF et al, *Children’s Rights and Business Principles (CRBP)*, 2012, pp. 2-3. At: <http://www.unicef.org/csr/12.htm>.

61 These include the *Convention on the Rights of the Child*; *ILO Convention No. 138 (Minimum Age)*; and *ILO Convention 182 (Worst Forms of Child Labour)*. The CRBP also draw on the UN Guiding Principles and other principles (for example, those of the UN Global Compact).

62 A growing number of companies in these industries participate in the self-regulatory *Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism* (The Code). At: <http://www.thecode.org/>.

63 ILO, *Child Labour Platform*. At: [http://www.ilo.org/ipec/Events/WCMS\\_173670/lang--en/index.htm](http://www.ilo.org/ipec/Events/WCMS_173670/lang--en/index.htm).

investors, a key issue is whether companies demonstrate that they consider children to be important stakeholders, not merely receivers of charity.

### Women

Gender inequality persists in all parts of the world. It can be seen, for example, in the pay gap between men and women. ILO research shows that in most countries women earn 70-90% of what men earn; they earn even less in some countries and occupations.<sup>64</sup> Women are also disproportionately affected by war and violence, and remain under-represented in the political sphere and the economy.<sup>65</sup> They “lag far behind men in access to land, credit and decent jobs”, though research shows that “enhancing women’s economic options boosts national economies”.<sup>66</sup> Businesses contribute to the perpetuation of gender inequality when they discriminate against women in the workplace or fail to change their operations when these negatively affect women and girls, for example in local communities.

### *Emerging guidance*

Focusing on the role that companies can play to address these inequalities,<sup>67</sup> in 2004 Calvert Investments and the UN Development Fund for Women (UNIFEM, now part of UN Women) launched the **Calvert Women’s Principles**, the “first global code of corporate conduct focused exclusively on empowering, advancing and investing in women worldwide”.<sup>68</sup> The Calvert Principles are standards to which companies can aspire, as well as tools for investors who wish to evaluate corporate performance on gender equity and women’s empowerment.<sup>69</sup> Among other issues, they cover: employment and compensation; work/life balance and career development; health, safety and freedom from violence; and management and governance. They served as the basis for developing the UN Women and UN Global Compact **Women’s Empowerment Principles (2010)**.<sup>70</sup>

With regard to legislation, Malaysia and a growing number of European countries have established mandatory quotas for women on corporate boards. Although controversial, quotas are thought by some to be an effective way to increase the representation

64 ILO, *Global Wage Report 2008/2009*, cited in: UN Department of Economic and Social Affairs, *The World’s Women 2010: Trends and Statistics*, p. 97. At: <http://unstats.un.org/unsd/demographic/products/Worldswomen/WW2010pub.htm>.

65 To give just one example, a recent Calvert Investments report found that over half the S&P100 companies in the U.S. have no women or minorities in the highest paid executive positions. Calvert Investments, *Examining the Cracks in the Ceiling: A Survey of Corporate Diversity Practices of the S&P100*, October 2010, p. 13. At: <http://www.calvert.com/nrc/literature/documents/BR10063.pdf>.

66 UN Women, *Focus Area: Economic Empowerment*. At: <http://www.unwomen.org/focus-areas/>.

67 Calvert Investments, *The Calvert Women’s Principles*. At: <http://www.calvert.com/nrc/literature/documents/8753.pdf?litID=8753>.

68 *Ibid.*

69 *Ibid.*

70 UN Women, *Women’s Empowerment Principles*, 2010. At: [http://www.unifem.org/partnerships/womens\\_empowerment\\_principles/](http://www.unifem.org/partnerships/womens_empowerment_principles/).

of women in boardrooms.<sup>71</sup> As of early 2012, the EU was considering gender quota legislation.<sup>72</sup>

#### *Investor involvement*

Only a few investment funds focus specifically on gender equality issues.<sup>73</sup> The Calvert Women's Principles, the Women's Empowerment Principles, and other recent documents that guide companies on how to promote gender equality and women's empowerment, now provide investors with benchmarks and mechanisms for engaging companies on this topic.

#### Migrant Workers

Abuses of the rights of those working in the supply chains of global companies have long been a concern of responsible investors. Supply chains, including those of global brands, are increasingly reliant on migrant workers, who may have moved from another region in their own country or from other countries. The number of migrant workers has risen by 50 million since 2000, according to one source.<sup>74</sup> Both internal and international migrants are exposed to abuse: to becoming bonded labour as a result of excessive recruitment fees; to trafficking by unscrupulous recruitment agencies; to exploitation by employers and gangmasters; and to human smuggling.<sup>75</sup> For labour unions, they are also difficult to organise, for linguistic and cultural reasons and, in certain countries, because of legal obstacles. Some migrant workers are undocumented and lack legal status, further weakening their protection in the workplace.

In recent years, more attention has been devoted to the rights and wellbeing of migrant workers. This is partly because international brands' purchasing practices can drive the demand for temporary labour in global supply chains, and depending on their leverage, can directly influence working conditions. As a result, the conditions under which international companies produce consumer goods and services have been the subject of more detailed scrutiny. Exposés continue to reveal poor working conditions and human

71 See GlobeWomen, *2011 CWDI Report: Women Directors of the Fortune Global 200*. At: <http://www.globewomen.org/cwdi/CWDI%202011%20Fortune%20Global%20200%20Key%20Findings.htm>.

72 Valentina Opp, *EU commissioner up for 'fight' on gender quotas*, EUObserver.com, October 2012. At: <http://euobserver.com/economic/117715>.

73 For example, the *Pax World Global Women's Equality Fund*. At: <http://www.paxworld.com/news-resources/pax-world-news/Pax-World-News/56>.

74 Khalid Koser, *Migration, Displacement and the Arab Spring: Lessons to Learn*, Brookings Institution, March 2012. At: <http://www.brookings.edu/research/opinions/2012/03/22-arab-spring-migration-koser>. See also ILO, *International Labour Migration: A Rights Based Approach citing UN Population Division figures*, 2010. At: [http://www.ilo.org/public/english/protection/migrant/download/rights\\_based\\_approach.pdf](http://www.ilo.org/public/english/protection/migrant/download/rights_based_approach.pdf). There was a total of 214 million migrants in 2010. The number had doubled since 1980 when it stood at 102 million. Migrant workers represent 90% of this total.

75 See for example, Verité, *Indian Workers in Domestic Textile Production and Middle East-Based Manufacturing, Infrastructure, and Construction, Regional Report*, June 2010. At: [http://www.verite.org/sites/default/files/images/HELP%20WANTED\\_A%20Verite%CC%81%20Report\\_Indian%20Migrant%20Workers.pdf](http://www.verite.org/sites/default/files/images/HELP%20WANTED_A%20Verite%CC%81%20Report_Indian%20Migrant%20Workers.pdf).

rights violations in overseas factories that subcontract for global brands. Migrant workers in other industries (notably construction, hospitality and agriculture) may also be at risk of exploitation, both in the manner of their recruitment and their working and living conditions.

### *Emerging guidance*

On International Migrants Day, 18 December 2012, the **Dhaka Principles for Migration with Dignity** were launched to address problems facing migrant workers. The product of a three year multi-stakeholder process led by the Institute for Human Rights and Business, they provide companies with guidance on due diligence and best practice to “ensure migration with dignity”.<sup>76</sup> A key tenet of The Dhaka Principles is that the employers’ duty of care and due diligence should extend further into the supply chain and include safe recruitment and return. The Principles cover core labour rights based on international standards that apply to all workers (e.g. freedom of association), and protections that are particularly relevant to migrant workers (for example, the abolition of worker fees at recruitment, and non-retention of identity documents).

In addition to these emerging standards with regard to migrant workers, both industry and civil society organisations have begun to produce guidelines and toolkits that advise businesses on what they can do to mitigate, prevent or eliminate abuses of migrant workers that result from their operations.<sup>77</sup> Much of the guidance is grounded in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>78</sup> and related ILO conventions. These instruments set out important protections for migrant workers and their families, but have gone largely unratified by states receiving high numbers of migrants, leaving a significant governance gap on this cross-border issue.

### *Investor involvement*

In advance of the 2012 London Olympics, a coalition of US and UK based socially responsible investors called on corporations in the tourism industry to train staff and suppliers to recognise and avoid involvement in the trafficking of workers into slavery and to examine the actions of their supply chains as well as their own recruitment practices. The coalition includes Christian Brothers Investment Services, the Interfaith Center on Corporate Responsibility (ICCR), The Ecumenical Council for Corporate Responsibility (ECCR), U.S. SIF, The Forum for Sustainable and Responsible Investment, FairPensions, René Cassin, The Code, and ECPAT-USA. It also urged the International

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76 Institute for Human Rights and Business, *The Dhaka Principles for Migration with Dignity*. At: <http://www.dhaka-principles.org/>.

77 See for example, BSR, *Migrant Worker Management Tool Kit: A Global Framework*, September 2010. At: [http://www.bsr.org/reports/BSR\\_Migrant\\_Worker\\_Management\\_Toolkit.pdf](http://www.bsr.org/reports/BSR_Migrant_Worker_Management_Toolkit.pdf). See also, Verité, *Help Wanted: the Verité Toolkit for Fair Hiring Worldwide*. At: <http://www.verite.org/node/647>.

78 OHCHR, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res 45/158, December 1990. At: <http://www2.ohchr.org/english/law/cmw.htm>.

Olympic Committee (IOC) to require that all Olympic corporate sponsors, suppliers, contractors and host cities take concrete steps to eliminate labour trafficking and sexual exploitation of children.<sup>79</sup>

### Indigenous Peoples

The UN Special Rapporteur on the Rights of Indigenous Peoples concluded recently that natural resource extraction and major development projects in or near indigenous territories constitute “one of the most significant sources of abuse of the rights of indigenous peoples worldwide”.<sup>80</sup> Adverse impacts of business operations on indigenous peoples include: loss of control over land and resources; environmental damage; erosion of social structures and cultures; and social conflict.<sup>81</sup>

### *Emerging guidance*

Recent years have seen a number of developments at the international and national levels in relation to indigenous people’s rights. In 2007, the UN General Assembly adopted the **Declaration on the Rights of Indigenous Peoples** (UNDRIP), a document that Australia, Canada, New Zealand, and the U.S., all with significant indigenous populations, agreed to support, reversing their earlier rejections. Both UNDRIP and ILO Convention 169<sup>82</sup> affirm the principle of free, prior and informed consent (FPIC) in certain circumstances.<sup>83</sup> Underlining the usefulness of the UN Framework and UN Guiding Principles, the Special Rapporteur on the Rights of Indigenous Peoples has proposed that specific guidelines or principles should be drafted to assist states, companies and indigenous peoples to operationalise and fulfil the responsibilities that are set out in international indigenous rights standards.<sup>84</sup> The IFC’s Performance Standards now require FPIC for certain projects that will affect indigenous peoples.<sup>85</sup>

79 At: [http://www.iccr.org/issues/subpages/olympics\\_aboutthecampaign.php](http://www.iccr.org/issues/subpages/olympics_aboutthecampaign.php).

80 James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries Operating Within or Near Indigenous Territories*, UN Human Rights Council, A/HRC/18/35, July 2011, pp. 18. At: [http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35\\_en.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35_en.pdf).

81 *Ibid.*, pp. 9-11.

82 ILO, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169). At: <http://www2.ohchr.org/english/law/indigenous.htm>.

83 Amy Lehr and Gare Smith, *Implementing a Corporate Free, Prior and Informed Consent Policy: Benefits and Challenges*, 2010. At: [http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing\\_Informed\\_Consent\\_Policy.aspx](http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx).

84 See above n. 80, p. 19. Along those lines, on 10 December 2012 the UN Global Compact opened for public consultation through June 2013 an “Exposure Draft” of their *Business Reference Guide to the UNDRIP*. At: <http://www.unglobalcompact.org/news/287-12-10-2012>.

85 IFC, *Performance Standard 7 on Indigenous Peoples*. At: [http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7\\_English\\_2012.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES). While welcoming the addition of FPIC as a requirement, some NGOs concluded that the IFC’s revision of FPIC “falls short” because it does not require human rights assessments. *Joint Civil Society Statement on IFC’s Draft Sustainability Framework*, multiple signatories, March 2011. At: <http://www.brettonwoodsproject.org/art-567851>.

The concept of FPIC has acquired increasing legislative and judicial recognition. In 2011, Peru passed a law guaranteeing FPIC to its indigenous peoples. In 2010, the Indian environment ministry rejected a proposal by Vedanta Resources to mine bauxite in the state of Orissa because of concerns about abuses of the rights and way of life of the indigenous Dongria Kondh and Kutia peoples; as of 2012, the project remained suspended. In 2011, a Colombian court ruled in favour of FPIC for indigenous peoples and suspended two construction projects and a mine for failing to properly consult affected communities.<sup>86</sup> In 2012, a Brazilian judge suspended the construction license of a hydroelectric dam in the Amazon, citing rights violations and threats to the livelihoods of several indigenous groups, as well as the government environmental agency's failure to consult affected communities.<sup>87</sup>

### Free, Prior and Informed Consent

Investors have sought to hold companies accountable in relation to free, prior and informed consent (FPIC). The impact on indigenous communities of company activities in the extractive sector and in conflict zones has been a particular concern. Investors have increasingly urged companies to engage in good faith consultations with indigenous communities and to obtain their free, prior and informed consent whenever their activities will affect indigenous communities' lands, culture, resources, security or survival. In 2009, Canadian shareholders asked Talisman Energy to evaluate the merits of adopting FPIC principles. The report Talisman commissioned concluded in 2010 that, in the long term, the benefits of securing community agreement were likely to outweigh the challenges and costs of doing so. Talisman adopted a community relations policy that commits it to respect FPIC principles. As of 2012, the company nevertheless continued to be criticised for the impacts of its oil exploration in Peru on indigenous communities, underscoring the complex nature of this issue even for companies that have attempted to address it.<sup>88</sup>

86 Cultural Survival, *Colombian Court Confirms Indigenous Peoples' Right to Free, Prior and Informed Consent*, May 2011. At: <http://www.culturalsurvival.org/news/colombia/colombian-court-confirms-indigenous-peoples-right-free-prior-and-informed-consent>.

87 International Rivers, *Judge Suspends Construction License for Controversial Teles Pires Dam in the Brazilian Amazon*, March 2012. At: <http://www.internationalrivers.org/resources/judge-suspends-construction-license-for-controversial-teles-pires-dam-in-the-brazilian>.

88 See for example, Barbara J. Fraser, *Peru: Oil Drilling Divides Community*, Latinamerica Press, May 2012. At: <http://www.eurasiareview.com/05052012-peru-oil-drilling-divides-community/>.

### *Investor involvement*

Investors are among those who “recognize that [FPIC] is not only a basic right for indigenous communities and a principle that should be respected for all affected communities, but it also makes bottom-line sense”.<sup>89</sup> In a case involving the mining company Vedanta, UK pension funds criticised Vedanta for ignoring concerns they had raised since 2008 and suggested that the fall in its share price was linked to poor management of ESG issues.<sup>90</sup> Investment research firm EIRIS concluded that, “by failing to adequately consult with indigenous communities, the company has subjected itself to intense scrutiny and criticism from international civil society organizations”.<sup>91</sup> Widening support for FPIC may enable investors and other stakeholders to persuade more companies to give appropriate attention to the rights of indigenous peoples.

## **3. Emerging Codes, Principles, Standards and Guidance for Specific Contexts and Issues**

### Corporate Activity in Conflict-Affected Zones

During his research and consultation for the UN Guiding Principles, SRSJ John Ruggie studied the problem of **corporate activity in conflict-affected zones**, where he found “the most egregious business-related human rights abuses take place”.<sup>92</sup> Given the high risk and grave effects of corporate complicity in abuse in conflict-affected areas, the SRSJ concluded that companies should treat it as a legal compliance issue. Corporate directors, officers and employees may be subject to individual liability in such cases; the company and its employees may face criminal prosecution; and the consequences for victims are often irremediable. He recommended that companies should “ensure they do not exacerbate the situation” and seek appropriate advice.<sup>93</sup> Much work remains to be done in this area, and a supplementary report by the SRSJ explores how states might start to address business-related human rights abuses in conflict zones.<sup>94</sup>

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89 Ian Gary, *Growing Support for Community Consent Rights for Natural Resource Development: Can ‘Free, Prior and Informed Consent’ Implementation Reduce Conflict Over Natural Resource Development?*, United States Institute for Peace, June 2011. At: <http://inec.usip.org/blog/2011/jun/03/growing-support-community-consent-rights-natural-resource-development-can-%E2%80%9Cfree-pri>.

90 Hugh Wheelan, *UK Pension Funds Slam Vedanta on ESG Issues as Share Price Tanks*, Responsible Investor, August 2010. At: [http://www.responsible-investor.com/home/article/uk\\_vedanta/](http://www.responsible-investor.com/home/article/uk_vedanta/).

91 Robert Kropp, *Investors Urge US to Support Rights of Indigenous Peoples*, SRI News Alerts, July 2010. At: <http://www.socialfunds.com/news/article.cgi?sfArticleId=3003>.

92 John Ruggie, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, Report of the SRSJ on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 27 May 2011, A/HRC/17/32, pp. 1. At: <http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf>.

93 Guiding Principle 23 Commentary.

94 See above n. 92, p. 1. See also *Red Flags: Liability Risks for Companies Operating in High-Risk Zones* (interactive). At: <http://www.redflags.info/>. Institute for Human Rights and Business, *From Red Flags to Green Flags: The corporate responsibility to respect human rights in high-risk countries*, May 2011. At: [http://www.ihrb.org/news/2011/from\\_red\\_to\\_green\\_flags.html](http://www.ihrb.org/news/2011/from_red_to_green_flags.html).

### *Emerging guidance*

In the past five years, a growing number of civil society, industry and investor groups, as well as multilateral organisations, have produced guidance on how companies can address, mitigate, prevent or eliminate human rights risks when operating in conflict zones or other high-risk environments. The International Committee of the Red Cross (ICRC) has published **guidance on business enterprises' rights and obligations under international humanitarian law (IHL)**, the body of law that governs armed conflict and war.<sup>95</sup> The UN Global Compact and UN Principles for Responsible Investment jointly prepared **Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: a Resource for Companies and Investors**. Industry- or issue-specific guidance has primarily considered the extractive industries. Other materials examine international law and country-based risks more broadly. (See Appendix II for guidance on extractive industries and conflict zones.)

Attention has focused not only on companies' direct involvement in conflicts but also on supply chains. Work in this area began with research into conflict diamonds, which gave birth to the Kimberley Process.<sup>96</sup> It has long been evident that the presence of mineral resources can fuel or ignite conflict. More recently attention has shifted to developing guidance and legislation addressing how companies should deal with "**conflict minerals**" in their supply chains.<sup>97</sup>

### *Investor involvement*

If companies associate themselves with or are complicit in grave human rights abuses in conflict zones, they may expose themselves to criminal or civil liabilities and serious reputational and financial threats, which can affect investor confidence. Investors who have shares in companies that operate in conflict-affected regions should familiarise themselves with available guidance, particularly the guidance which is specifically addressed to investors. Investors should encourage businesses to understand and observe internationally recognised human rights standards (and international humanitarian law where it applies) and enhance due diligence procedures and management oversight whenever they operate in or near conflict zones.

### Use of Private Security Forces

Companies commonly employ **private security forces** in conflict-affected zones to protect staff, assets and property. The UN Guiding Principles observe that, when

<sup>95</sup> ICRC, *Business and International Humanitarian Law: an introduction to the rights and obligations of business enterprises under international humanitarian law*, 2006. At: <http://www.icrc.org/eng/resources/documents/publication/p0882.htm>.

<sup>96</sup> *The Kimberly Process*. At: <http://www.kimberleyprocess.com/>.

<sup>97</sup> See for example, OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, second edition, 2011. At: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/mining.htm>. See also rules of the US Securities and Exchange Commission (SEC). At: <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>.

companies employ public or private security forces in conflict zones, they increase the risk of “being complicit in gross human rights abuses committed by other actors”.<sup>98</sup>

The involvement of private security companies (PSCs) in human rights abuses has come under intense scrutiny in recent years, after governments and multinational corporations used their services extensively during the wars in Iraq and Afghanistan. In war zones but also in areas marked by conflict over natural resources (such as mining operations in Peru, Colombia, Papua New Guinea and Tanzania), PSCs and the multinational companies that hire them have been embroiled in controversy. Some cases have resulted in lawsuits, while others have led to delays or suspension of operations.

#### *Emerging guidance*

National regulation of PSCs is generally weak. At international level, a voluntary accountability mechanism is being established in the context of the **International Code of Conduct for Private Security Providers (ICoC)**, an initiative led by the Swiss government. The ICoC was launched in late 2010 in response to allegations of serious human rights abuses by PSCs in conflict zones. It establishes standards for PSCs (for example, on the use of force and the vetting of private security personnel). Clients of PSCs, including companies, are expected to hold service providers to the Code through their contracts with them.<sup>99</sup>

While the ICoC focuses on the behaviour of PSCs, the **Voluntary Principles on Security and Human Rights (VPs)** specifically address company use of private security. Established in 2000, the Voluntary Principles have a multi-stakeholder governance structure: the initiative’s members include states, companies, and NGOs. The principles advise companies on how to respect human rights while ensuring the security of their operations, and set out standards for risk assessment with respect to public and private security forces. The VPs have been criticised because the initiative has struggled to develop credible governance and accountability mechanisms. Verification of implementation has been an issue; and it has also proved difficult to establish a public reporting model for a standard that focuses primarily on corporate responsibility but implicates the security forces of sovereign host country governments. Nonetheless, membership is widening, some companies now include the VPs in their contracts, and the momentum of the ICoC process has reinvigorated interest in the issue of security and human rights in conflict zones.

#### *Investor involvement*

The above tools create opportunities for investors to engage companies on these complex issues. Some are doing so. For example, investors have discussed with Newmont Mining the fatalities in July 2012 that were connected to community protests near its operations in Peru.

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98 Guiding Principle 23 Commentary.

99 *The International Code of Conduct for Private Security Service Providers (ICoC)*. At: <http://www.icoc-ppsp.org/>.

### Land Acquisition

It is increasingly recognised that **land acquisition**, notably in countries without well-developed land regulation, exposes businesses to a risk of complicity in human rights violations, not least when governments acquire land on their behalf. This issue increasingly concerns civil society, governments, and investors. From Cambodia to Cameroon to Colombia, controversies have arisen over “land-grabbing” by foreign companies, host governments and institutional investors that have sometimes involved violent evictions and serious abuses to the rights of local communities.<sup>100</sup> Such acquisitions create substantial risks for investors who own the companies involved, because the protests and legal disputes they generate can cause substantial financial, reputational and legal harm to their interests.<sup>101</sup> Land acquisitions have particularly significant impacts on indigenous peoples (as noted above). Food insecurity can generally increase following large land acquisitions that focus on producing food for export; and sharp rises in food prices tend to be highly destabilising, both socially and politically.<sup>102</sup> Universal investors are especially likely to take note of such risks.

### *Emerging guidance*

In May 2012, the UN Food and Agriculture Organization (FAO) adopted **Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security**. These state that investors have a responsibility to respect existing tenure rights.<sup>103</sup> The **IFC’s Performance Standard 5 on Land Acquisition and Involuntary Resettlement** (with an accompanying Guidance Note)

100 On Cambodia, see for example, the compilation of articles by the Business and Human Rights Resource Centre on allegations of forced evictions in the Borei Keila section of Phnom Penh. At: <http://www.business-humanrights.org/Documents/BoreiKeila>. On Cameroon, see for example, Samuel Nguiffo and Brendan Schwartz, *Herakles’ 13th Labour? A Study of SGSOC’s Land Concession in South-West Cameroon*, Centre pour l’Environnement et le Développement, February 2012. At: [http://www.rightsandresources.org/publication\\_details.php?publicationID=4763](http://www.rightsandresources.org/publication_details.php?publicationID=4763). The company’s response is available at: [http://www.business-humanrights.org/media/documents/company\\_responses/herakles-farms-response-ngo-director-and-colleagues-arrested-cameroon-18-dec-2012.pdf](http://www.business-humanrights.org/media/documents/company_responses/herakles-farms-response-ngo-director-and-colleagues-arrested-cameroon-18-dec-2012.pdf). On Colombia, see for example, Miller Dusán, *El desalojo violento de los afectados por el P.H. El Quimbo compromete al estado colombiano y a Emgesa por la connivencia de intereses económicos*, Asociación de Afectados por el Proyecto Hidroeléctrico El Quimbo, Asoquimbo, March 2012, and the company’s response. At: [http://www.business-humanrights.org/media/documents/company\\_responses/respuesta-centro-informacion-empresas-derechoshumanos-marzo27-2012.pdf](http://www.business-humanrights.org/media/documents/company_responses/respuesta-centro-informacion-empresas-derechoshumanos-marzo27-2012.pdf). See also, Global Witness, *A Hidden Crisis? Increase in Killings as Tensions Rise Over Land and Forests*, June 2012 (discussing the death toll associated with rising competition for land and forests). At: [http://www.globalwitness.org/sites/default/files/library/A\\_hidden\\_crisis-FINAL%20190612%20v2.pdf](http://www.globalwitness.org/sites/default/files/library/A_hidden_crisis-FINAL%20190612%20v2.pdf).

101 Institute for Human Rights and Business, *Guidelines on Business, Land Acquisition, and Land Use: A Human Rights Approach*, consultation draft, November 2011, footnote 3. At: <http://www.ihrb.org/commentary/staff/developing-practical-tools-for-business-on-land-and-human-rights.html>.

102 See the website of the UN Special Rapporteur on the Right to Food, whose work has highlighted private sector impacts such as those around agribusiness sourcing, pricing and wage policies on this right. At: <http://www.srfood.org/>.

103 Food and Agriculture Organisation, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, May 2012. At: [http://www.fao.org/fileadmin/user\\_upload/nr/land\\_tenure/pdf/VG\\_Final\\_May\\_2012.pdf](http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_Final_May_2012.pdf).

provide further detailed advice in this area.<sup>104</sup> The UN Special Rapporteur on the Right to Food released a set of **Core Principles and Measures to Address Human Rights Challenges in Large-Scale Land Acquisitions and Leases** in light of the growing interest from private investors and governments in the acquisition or long-term lease of large portions of arable land in countries, mostly in the developing countries.<sup>105</sup> As the report notes, “[a]ccording to an estimate from IFPRI [International Food Policy Research Institute], between 15 and 20 million hectares of farmland in developing countries have been subject to transactions or negotiations involving foreign investors since 2006.” The growing interest in large scale land acquisition prompted the World Bank to undertake a large scale study on land acquisition in 2011<sup>106</sup> and agree on a joint set of **Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources**.<sup>107</sup>

#### *Investor involvement*

It is already clear that investors are concerned about land acquisition. In early 2012, the Interfaith Center on Corporate Responsibility (ICCR) launched a campaign entitled *A Land Grab is a Water Grab* to raise investors’ awareness of “the impacts on food and water security of the acquisition of large areas of farmland”. The campaign calls on institutional investors to “embed basic human rights” in their investment decisions.<sup>108</sup> ICCR also recently published **Recommended Guidelines for Responsible Land Investments**. Drawing on the FAO Guidelines and the UN Guiding Principles, its recommendations specifically address institutional investors.<sup>109</sup>

#### Water and Sanitation

**Water** scarcity that results from economic and population growth presents multiple challenges for water users. Large-scale agricultural and industrial consumers compete with domestic users and ecosystems, which rely on water for their survival. Water catchment degradation, drought, pollution of waterways by industries, and inefficient

104 IFC, *Performance Standard 5 on Land Acquisition and Involuntary Resettlement*. At: [http://www1.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5\\_English\\_2012.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES).

105 UN Special Rapporteur on the right to food, *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*, June 2009. At: [http://www.srfood.org/images/stories/pdf/otherdocuments/20090611\\_large-scale-land-acquisitions\\_en.pdf](http://www.srfood.org/images/stories/pdf/otherdocuments/20090611_large-scale-land-acquisitions_en.pdf).

106 The World Bank, *Rising Global Interest in Farmland: Can it yield sustainable and equitable benefits?*, 2011. At: <http://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf>.

107 FAO et al, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, January 2010. At: [http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453364/Principles\\_Abridged.pdf](http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453364/Principles_Abridged.pdf).

108 Robert Kropp, *Investors Observe World Water Day 2012 with Focus on Land Grabs*, SRI News Alerts, March 2012. At: <http://www.socialfunds.com/news/article.cgi?sfArticleId=3482>.

109 ICCR, *Recommended Guidelines for Responsible Land Investments*, 2012. At: <http://www.iccr.org/resources/2012/ICCR-ResponsibleLandInvestments.pdf>. UN General Assembly, *The human right to water and sanitation*, A/RES/64/292. At: <https://www.un.org/en/ga/64/resolutions.shtml>; and UN Human Rights Council, *Human rights and access to safe drinking water and sanitation*, A/HRC/15/L.14, September 2010. At: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G10/163/09/PDF/G1016309.pdf?OpenElement>.

water use also concern investors, given that millions of people who still lack access to adequate water and sanitation. The UN General Assembly Resolution of 2010 recognising the right to safe and clean drinking water and sanitation as a human right essential for the full enjoyment of life and all other human rights. Companies therefore need to consider water and sanitation when they evaluate their human rights impacts, and have a responsibility to ensure that their own water management and use is efficient and responsible.

### *Emerging guidance*

Practical guidance for companies on the human right to water and sanitation has now begun to emerge. A report published in 2011 by the Institute for Human Rights and Business, **More than a Resource: Water, Business and Human Rights**,<sup>110</sup> clarifies the roles and responsibilities of business users and service providers. It covers access to water and sanitation, and its prioritisation, especially where water is scarce. Grounded explicitly in the UN Framework and UN Guiding Principles, the report outlines a human rights due diligence process, and identifies key considerations for corporate water users. The UN **CEO Water Mandate**, a Global Compact public-private initiative, also advises companies on how to achieve water sustainability by means of collective action and shared risk. Signatories are required to produce annual progress reports.<sup>111</sup>

### *Investor involvement*

Institutional investors recently published the ICCR **Statement of Principles and Recommended Practices for Corporate Water Stewardship**. It describes the protection of water as a “moral mandate” and “a matter of both environmental and social justice”, but also points out the business risks associated with water issues, which include “major business disruptions stemming from supply chain interruptions and a possible loss of license to operate”.<sup>112</sup> Ceres, with its network of over 130 institutional and socially responsible investors, also works to ensure global sustainability. It identifies and minimises financial risks by constructively engaging with companies and policy makers to improve water management and increase reporting on water issues that pose risks to business, communities and the environment. Recent reports by Ceres include **Murky Waters? Corporate Reporting on Water Risk (2010)**<sup>113</sup> and **Clearing the Waters: A Review of Corporate Water Risk of Disclosure in SEC Filings (2012)**.<sup>114</sup>

110 Institute for Human Rights and Business, *More Than a Resource: Water, Business and Human Rights*, 2011. At: [http://www.ihrb.org/pdf/More\\_than\\_a\\_resource\\_Water\\_business\\_and\\_human\\_rights.pdf](http://www.ihrb.org/pdf/More_than_a_resource_Water_business_and_human_rights.pdf).

111 *CEO Water Mandate*. At: <http://ceowatermandate.org/>.

112 ICCR, *Statement of Principles and Recommended Practices for Corporate Water Stewardship*, January 2012. At: <http://www.iccr.org/resources/2012/2012WaterStatementOfPrinciples.pdf>.

113 Brooke Barton, *Murky Waters? Corporate Reporting on Water Risk*, Ceres, 2010. At: <http://www.ceres.org/resources/reports/corporate-reporting-on-water-risk-2010/view>.

114 Ceres, *Clearing the Waters: A Review of Corporate Water Risk of Disclosure in SEC Filings*, 2012. At: <http://www.ceres.org/resources/reports/clearing-the-waters-a-review-of-corporate-water-risk-disclosure-in-sec-filings/view>.

The findings point out that, though corporate disclosure of water-related risks in financial filings has increased, reporting has remained weak and inconsistent, especially with regard to overall water use, financial exposure and supply chains.

#### 4. Emerging Codes, Principles, Standards and Guidance for Specific Sectors

In recent years, sectoral approaches to human rights have begun to emerge: industry-related codes of conduct, multi-stakeholder initiatives that focus on specific sectors or target single industries. Industry-wide or sectoral approaches allow the parties involved (companies, investors, civil society organisations, government officials and others) to develop guidance that is specific and relevant to the industry in question. It can also encourage companies to collaborate on human rights issues. On the other hand, such approaches create challenges. It can be difficult to sustain a broad multi-stakeholder alliance, or agree a sufficiently demanding standard of conduct.

Investors too can take a sector-level approach when looking at human rights. In December 2011, for example, the global fund manager Standard Life Investments issued a report on business and human rights in the extractive industries, which reviewed how companies in the sector have implemented the UN Guiding Principles.<sup>115</sup>

##### Extractives

According to the SRSF's research, the extractive sector accounts for the largest proportion of allegations of corporate-related human rights abuses.<sup>116</sup> A number of initiatives and tools, many dating from before the adoption of the UN Guiding Principles, advise companies in the extractive sector on human rights or establish principles of conduct for the industry. They include:

- **The Voluntary Principles on Security and Human Rights.** This joint initiative by extractive industry companies, governments and civil society aims to ensure that companies protect the safety and security of their operations in a manner that is consistent with human rights.

115 Standard Life Investments, *Business and Human Rights Report*, December 2011. At: <http://www.churchofengland.org/media/1377459/standard%20life%20business%20and%20human%20rights%20report%20dec%202011%20final.pdf>.

116 See John Ruggie, *Promotion and Protection of Human Rights*, Interim Report of the UN SRSF on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2006/97, February 2006. At: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement>; See also Michael Wright, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*, a study conducted for John Ruggie UN SRSF, Harvard University, April 2008. At: [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_44\\_Wright.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_44_Wright.pdf).

- The **Kimberley Process Certification Scheme**. A joint initiative of governments, the diamond industry and civil society, the Scheme enables diamonds to be certified as “conflict-free” and prevents trade in conflict diamonds.<sup>117</sup>
- The **Extractive Industries Transparency Initiative**. This has established a global standard for reporting what companies pay and governments receive when natural resources are extracted.<sup>118</sup>
- **International Council on Mining and Metals**. Its guide to *Integrating Human Rights Due Diligence into Corporate Risk Management Processes* (2012) helps mining companies to review their risk management systems and ensure they are aligned with the UN Guiding Principles.<sup>119</sup>
- **International Petroleum Industry Environmental Conservation Association**. The Association has initiated a three-year Business and Human Rights project to develop practical advice for companies on implementing the UN Guiding Principles.<sup>120</sup>

In 2012, the European Commission launched a project to provide three sectors with guidance on implementing the UN Guiding Principles: employment and recruitment agencies, information communications and technology, and oil and gas.<sup>121</sup>

### Information and Communications Technology (ICT)

Human rights have been the subject of a growing debate in the ICT sector. Several multi-stakeholder and industry-led initiatives address the human rights responsibilities of the sector. They include:

#### *Internet freedom of expression and privacy*

- The **Global Network Initiative**. This effort provides guidance to ICT companies on how to uphold freedom of expression and privacy on the internet in the face of government pressure. Investors have been among its stakeholders, with companies, NGOs and academics.<sup>122</sup>

117 See above n. 96.

118 *Extractive Industries Transparency Initiative*. At: <http://eiti.org/>.

119 ICMM, *Integrating human rights due diligence into corporate risk management processes*, March 2012. At: <http://www.icmm.com/page/75929/integrating-human-rights-due-diligence-into-corporate-risk-management-processes>.

120 IPIECA, *Human rights due diligence process: a practical guide to implementation for oil and gas companies*, November 2012. At: <http://www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies>.

121 Institute for Human Rights and Business and Shift, *European Commission Sector Guidance Project: Draft Guidance Consultation*. At: <http://www.ihrb.org/project/eu-sector-guidance/draft-guidance-consultation.html>.

122 *Global Network Initiative*. At: <http://www.globalnetworkinitiative.org/about/index.php>.

- **Telecoms Industry Dialogue on Freedom of Expression and Privacy.** The Dialogue involves several European telecommunications operators and vendors and recently launched an industry discussion of freedom of expression and privacy, based on the UN Guiding Principles. It aims to explore the boundaries between the state's responsibilities and those of companies, in relation to freedom of expression and privacy.

*Labour rights in the manufacture of ICT equipment*

- **Electronics Industry Citizenship Coalition.** This industry coalition is focused on improving efficiency and social, ethical, and environmental responsibility in the global electronic industry supply chain.<sup>123</sup>
- **Global e-Sustainability Initiative.** Formed primarily by European ICT companies, with the UN Environment Programme and the International Trade Union Confederation, this initiative focuses on achieving integrated social and environmental sustainability through ICT.<sup>124</sup>

## Finance

Financial service providers have a direct impact on human rights, through their employment standards and their contracts with service providers, for example. However, they may have a far greater indirect impact via the capital and other financial products and services they provide to other businesses. The UN Framework and UN Guiding Principles make clear that financial sector actors may be linked to abuses even though their actions are not the direct cause of negative impacts. The financial sector and its observers, including investors, are increasingly asking how financial actors should assess their linkage to impacts through their business relationships and what human rights due diligence processes they should set for themselves.

*Project finance*

- The International Finance Corporation's **Performance Standards on Environmental and Social Sustainability**, updated in January 2012,<sup>125</sup> refer to the UN Guiding Principles and the corporate responsibility to respect human rights and reflect human rights issues both through the process of carrying out wide due diligence on environmental and social issues and in substantive requirements linked to human rights standards in numerous Performance Standards. In turn, they were the basis for revisions in 2012 of:

123 *Electronics Industry Citizenship Coalition*. At: [http://www.eicc.info/eicc\\_code.shtml](http://www.eicc.info/eicc_code.shtml).

124 *Global e-Sustainability Initiative*. At: <http://www.gesi.org>.

125 See above n. 56.

- The **Equator Principles**, which acknowledge the UN Framework and UN Guiding Principles and expect to provide for greater emphasis on human rights considerations in due diligence.<sup>126</sup>
- The **OECD Common Approaches for OECD Export Credit Agencies** which also acknowledge the UN Guiding Principles.<sup>127</sup>

#### *Universal banks*

- The **UN Environment Programme Finance Initiative's (UNEP FI) online Human Rights Guidance Tool** for the finance sector is designed to provide information to lenders on human rights risks.<sup>128</sup>
- The **Thun Group**, an association of four major international banks, is preparing a practical guide aimed at assisting universal banks to operationalise the UN Guiding Principles. Its guide will identify challenges and provide examples of best practice; publication is expected in 2013.<sup>129</sup>

#### *Forthcoming*

- The **OECD Directorate for Financial and Enterprise Affairs** has commissioned research on human rights in the financial services sector. It is expected to examine a wide range of players, services and products, including potentially: corporate services (loans and credits, guarantees and investments); payments, brokerage and asset advisory; stock exchanges; bonds and equity issuance; discretionary asset management; and project, trade, freight and other insurance. The project is part of the OECD's support to the OECD Guidelines for Multinational Enterprises.

## **Apparel Industry: Moving Beyond Compliance**

Exposés of human rights abuses in the supply chains of multinational corporations emerge regularly in many industries (apparel and textiles, electronics, toys, agribusiness, retail, footwear). Sweatshop allegations have dogged the apparel industry since at least the mid-1980s. Allegations of human rights abuses damage companies' reputations – especially those of name brands – and in some cases have led to lawsuits and boycotts of brands.

In response to accusations that they profited from child labour, poor and dangerous working conditions in factories, and other human rights abuses in their supply chains, global apparel companies were among the first to establish codes of

126 See above n. 58.

127 See above n. 57.

128 UNEP FI, *Human Rights Toolkit*. At: <http://www.unepfi.org/humanrightstoolkit/>.

129 *Statement by the Thun Group of banks on the "Guiding principles for the implementation of the United Nations 'protect, respect and remedy' framework" on human rights*, October 2011. At: [http://www.menschenrechte.uzh.ch/index/Thun\\_Group\\_Statement\\_Final.pdf](http://www.menschenrechte.uzh.ch/index/Thun_Group_Statement_Final.pdf).

conduct and auditing systems to verify code compliance. However, these systems often failed to address the causes of abuse, which sometimes include companies' own purchasing practices. They have also been criticised for fostering a "tick-box" approach to compliance that cannot identify or prevent serious abuses in supply chains, including discrimination and violation of trade union rights.

Responding to advocacy and research by rights groups and universities, several companies and multi-stakeholder initiatives, primarily in the apparel and footwear industry, are moving beyond relying exclusively on auditing. The work they are beginning suggests that sectoral responses to human rights abuses can mature as companies, trade unions and civil society organisations learn from failures and successes and address the deeper causes of violations. For example, these new approaches:

- Examine internal purchasing practices to see how they affect labour conditions striving for internal coherence between company codes of conduct and company procurement practices.
- Train shop floor workers on their rights so that workers, rather than auditors, become the primary watchdog on working conditions.
- Work with local trade unions, civil society organisations and government officials (including labour inspectors) to address the cause of persistent violations of labour rights, and on core underlying issues such as living wage.

Factory auditing remains common, even though its weaknesses are widely understood. While monitoring and inspection can help to diagnose problems, they cannot solve them and in some cases can make them worse. There is evidence that a "beyond compliance" approach, that includes elements such as worker empowerment, can benefit workers (by improving their quality of life and protecting their rights) and companies (by enhanced productivity and reducing staff turnover).<sup>130</sup>

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130 See for example, Business for Social Responsibility, *Moving the Needle: Protecting the Rights of Garment Factory Workers*, a report commissioned by the Levi Strauss Foundation, October 2009. At: [http://www.bsr.org/reports/BSR\\_LeviStraussFoundation2009.pdf](http://www.bsr.org/reports/BSR_LeviStraussFoundation2009.pdf). On the potential for approaches beyond compliance to bring about improved working conditions and labor rights, see also the work of Richard M. Locke et al, e.g. *Does Monitoring Improve Labor Standards? Lessons from Nike*, MIT Sloan School of Management, July 2006. At: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=916771](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916771); and *Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains*, Politics & Society, 37:3, September 2009. At: <http://pas.sagepub.com/content/37/3/319.abstract>.



# Part Four: Enhanced Accountability for Business on Human Rights

The UN Framework attaches equal importance to effective remedies and accountability for human rights abuses under Pillar III as it gives to the other two pillars of the Framework. A key concern for human rights groups is whether the UN Guiding Principles will have practical consequences for businesses when they harm human rights. Some continue to call for binding international standards; however, currently there are no plans to create additional binding UN standards. In their absence, attention will continue to focus on other international and national instruments and mechanisms that might strengthen accountability.<sup>131</sup> It is worth reviewing those that could be most relevant to investors when they engage companies on human rights matters.

## 1. Accountability through Judicial Mechanisms

Though cross-border human rights litigation often attracts the greatest attention, cases are regularly brought in **national courts**. These can determine liability and impose sanctions. Many such cases address issues of labour law, discrimination and privacy, but there is a growing trend towards considering a wider range of human rights issues. Investors should be informed of national case law on human rights-related liability where it is relevant to companies in which they hold shares.<sup>132</sup>

Corporate accountability for **human rights abuses associated with companies' overseas operations** is hotly debated. Through exercise of extraterritorial jurisdiction states seek to regulate individuals, companies and their activities abroad. The UN Guiding Principles conclude that, while states "are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction", neither are they "generally prohibited from doing so".<sup>133</sup> The UN Guiding Principles also note the "expanding web of potential corporate legal liability arising from extraterritorial civil claims and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility". Further, "corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses".<sup>134</sup>

In the United States, the Alien Tort Claims Act (ATCA, or Alien Tort Statute, ATS) has been used repeatedly in recent years to sue companies for alleged complicity in gross human rights abuses overseas, though of the 150+ cases brought in the ATCA's history most have been dismissed and the rest settled. Very few cases have been successfully concluded.<sup>135</sup> The law gives US federal courts jurisdiction over civil actions filed by aliens

131 See for example, FIDH, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms*, updated version, March 2012. At: <http://www.fidh.org/Updated-version-Corporate>.

132 See above n. 14.

133 Guiding Principle 2 Commentary.

134 Guiding Principle 23 Commentary.

135 Jonathan Drimmer and Sarah Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, Berkeley Journal of International Law, vol. 29:2, 2011. At: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1407&context=bjil>.

for alleged violations of international law, regardless of where they are committed. Given the high threshold of evidence required to prosecute international crimes, tort laws (like the ATCA and similar legislation that permit cross-border lawsuits in other jurisdictions) are the most accessible, though still arduous, option for victims of corporate-related human rights abuses. Major human rights organisations consider the ATCA to be a crucial tool for bringing human rights claims against companies.<sup>136</sup> The US Supreme Court is currently reviewing whether companies can be held liable under ATCA for violations of international law, and whether ATCA can be applied to extraterritorial (i.e. ex-US) cases. A ruling is expected in spring 2013.

One legal expert has written recently of an “emerging consensus” that, “even without the ATCA, potential plaintiffs will have the capacity to submit their claims to other local or international tribunals”.<sup>137</sup> In the Netherlands, Canada,<sup>138</sup> the EU and Ivory Coast, cases “demonstrate the willingness of some States to extend their jurisdictional reach in the context of human rights violations or other serious crimes”. In early 2012, for example, the Canadian Parliament introduced a bill, modelled on the ATCA, to hold Canadian companies accountable for respecting human rights overseas.<sup>139</sup> Debate also continues in the EU about corporate overseas accountability.<sup>140</sup>

The Legal Aid, Sentencing and Punishment of Offenders Act, adopted in 2012 in the UK, took a regressive step on legal accountability and access to remedy in the context of corporate liability for alleged human rights abuses. Human rights NGOs criticised the Act because it will prevent victims of serious human rights abuses, including abuses committed abroad, from seeking justice due to legal aid restrictions, and would shift liability for court costs from multinationals to victims in developing countries, thus

136 See for example, Arvind Ganesan, *Corporate Crime and Punishment*, Huffington Post, February 2012. At: [http://www.huffingtonpost.com/arvind-ganesan/corporate-immunity-supreme-court\\_b\\_1305321.html](http://www.huffingtonpost.com/arvind-ganesan/corporate-immunity-supreme-court_b_1305321.html).

137 In March 2012, a Canadian NGO filed an application with the Supreme Court of Canada on behalf of Congolese families. The families were appealing the dismissal of a class action lawsuit against Anvil Mining Company for alleged complicity in gross human rights violations by the Congolese army. They pointed out that their earlier efforts to seek justice in the Democratic Republic of Congo, where the violations were committed, and in Australia, where Anvil was previously headquartered, had been useless, and that they “truly believe that Canada is our last resort”. In 2012 the Canadian Supreme Court refused the appeal. At: <http://www.cbc.ca/news/canada/montreal/story/2012/11/01/quebec-anvil-mining-appeal-refused-supreme-court.html>.

138 Xander Meise Bay, *Would the End of the Alien Tort Statute Mean an End to Corporate Liability for Human Rights Abuses?*, Foley Hoag LLP, April 2012. At: <http://www.csrandthelaw.com/2012/04/would-the-end-of-the-alien-tort-statute-mean-an-end-to-corporate-liability-for-human-rights-abuses/>. See also, Oona Hathaway, *Online Kiobel Symposium: The ATS Is in Good Company*, ScotusBlog, July 2012. At: [www.scotusblog.com/2012/07/online-kiobel-symposium-the-ats-is-in-good-company/](http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-ats-is-in-good-company/).

139 NDP, *The International Protection and Promotion of Human Rights Act*, Bill C-323. At: <http://peterjulian.ndp.ca/post/c-323-the-intl-protection-promotion-of-human-rights-act-loi-de-promotion-et-de-protection-des-droits-de-la-personne>. (The full text of the bill is available at the bottom of the website page).

140 European NGOs have called for EU legislation that will hold parent companies liable for harms caused by their subsidiaries, including overseas. See European Coalition for Corporate Justice (ECCJ), Friends of the Earth, *The EU Must Take Further Steps to Hold Companies Accountable*, October 2011. At: [http://www.foeeurope.org/press/2011/Oct25\\_ECCJ\\_EU\\_must\\_take\\_further\\_steps\\_to\\_hold\\_companies\\_accountable.html](http://www.foeeurope.org/press/2011/Oct25_ECCJ_EU_must_take_further_steps_to_hold_companies_accountable.html).

effectively closing UK courts to extraterritorial claims. The SRSB also expressed his misgivings to the UK government because the Act would limit access to justice in human rights abuse cases linked to corporate activity.<sup>141</sup>

## 2. Other Accountability Mechanisms

### Grievance Mechanisms

The UN Guiding Principles' focus on access to remedy, in particular on **non-state grievance mechanisms**, is echoed in the wider landscape of business and human rights, with an increasing number of multi-stakeholder initiatives building accountability mechanisms into their structures. Examples include the Global Network Initiative, the Voluntary Principles on Security and Human Rights, and the Fair Labour Association. In the UN Guiding Principles, the term 'grievance mechanism' refers to a range of rapid and local mechanisms that stakeholders (individuals or groups) can use to address concerns and seek remedy from a company. For companies, they offer a practical and accessible method for resolving complaints.<sup>142</sup>

#### **Non-judicial Grievance Mechanisms: The UN Guiding Principles' Effectiveness Criteria**

During preparation of the UN Framework and UN Guiding Principles, extensive research, consultation and testing of grievance mechanisms took place. This led to the development of "effectiveness criteria" for non-judicial grievance mechanisms, whether managed by the state or non-state entities. The criteria set benchmarks that companies and investors may use to establish whether operational-level grievance mechanisms are properly designed and achieve their purpose, which is to resolve grievances promptly, efficiently and effectively. To be effective, a grievance mechanism should be: legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning; and (for operational-level mechanisms) based on engagement and dialogue.<sup>143</sup>

At multilateral level, the OECD Guidelines provide a form of grievance mechanism through National Contact Points mandated to take "specific instance" complaints made against a company by "an interested party" (e.g. a trade union, NGO, individual or company with a justified interest in the matter). These are official or independent

141 Amnesty International et al, *Government Reforms Undermine UN Guiding Principles on Business and Human Rights and Encourage Impunity for Abuses*, March 2012. At: [http://amnesty.org.uk/uploads/documents/doc\\_22403.pdf](http://amnesty.org.uk/uploads/documents/doc_22403.pdf); and John Ruggie, *Letter to Justice Minister Jonathan Djanogly*, May 2011. At: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-ltr-to-uk-justice-minister-djanogly-16-may-2011.pdf>.

142 See above n. 40, pp. 82-86.

143 Guiding Principle 31. The UN Framework process also resulted in the creation of a dedicated wiki on dispute resolution mechanisms between business and society. At: [http://baseswiki.org/en/Main\\_Page](http://baseswiki.org/en/Main_Page).

offices, established by adhering governments that provide mediation or conciliation to resolve issues that may arise during implementation of the OECD Guidelines by relevant companies when they operate in or outside the OECD.<sup>144</sup> The OECD manages a public database, which includes any statements that NCPs have issued on implementation of the Guidelines and any resolutions reached. In this way, the NCP system provides investors with useful information on corporate performance with respect to ESG issues.<sup>145</sup> Some institutional investors have used NCP determinations to guide their investment decisions.

### The Relevance of NCPs to Investors

Following pressure from investors and activists, Vedanta embarked on a review of its sustainability policies and programs with the assistance of a third-party consultant. The company hired a chief sustainability officer, updated its sustainable development framework including aligning its policies and approach with international standards, and committed to use the IFC Performance Standards and IFC EHS Guidelines at all assets globally.<sup>146</sup>

In connection with the allegation (see above in Part III) that Vedanta Resources' plan to establish a bauxite mine in Orissa would violate indigenous communities' environmental and human rights, the NGO Survival International filed a complaint against Vedanta with the UK NCP in 2008. In 2009, the NCP judged that the company had acted in violation of the OECD Guidelines. When the Church of England sold its shares in Vedanta in 2010, it cited Survival International's subsequent claim that that the company had "completely ignored" the NCP's recommendations.<sup>147</sup>

OECD Watch, an NGO, and Eurosif, a multistakeholder initiative to promote sustainability through financial markets, worked together on **Promoting Convergence of CSR Practices and Tools among European Socially Responsible Investors (SRI) and National Contact Points for the OECD Guidelines for Multinational Enterprises**.<sup>148</sup> This EU-funded project encouraged responsible investors and extra-financial ranking and rating agencies to use the OECD Guidelines.

144 See in particular, Jernej Letnar Cernic, *Global Witness v. Afrimex Ltd.: Decision Applying OECD Guidelines on Corporate Responsibility for Human Rights*, American Society of International Law Insight. At: <http://www.asil.org/insights090123.cfm>.

145 For more on the OECD NCPs: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/ncps.htm>.

146 At: [http://sustainability.vedantaresources.com/our\\_approach/scott\\_wilson](http://sustainability.vedantaresources.com/our_approach/scott_wilson).

147 Eurosif, *OECD Factsheets*. At: <http://www.eurosif.org/sri-resources/oecd-factsheets>.

148 *Ibid*.

### 3. Corporate Reporting

**Corporate responsibility reporting** is an accountability mechanism of particular relevance to investors. Corporate communication is an important element of the UN Guiding Principles' human rights due diligence process, and can take many forms, from personal meetings to formal public reports. While the UN Guiding Principles state that formal reporting is expected where risks of "severe human rights impacts" exist,<sup>149</sup> many investors increasingly expect all companies to report formally on ESG issues, regardless of whether risks are severe.

Several legislative initiatives signal a trend towards mandatory company reporting on environmental and social issues, including human rights. The Danish government requires large companies to report on their approach to social responsibility or explain why they have not adopted a policy on social responsibility.<sup>150</sup> The government has announced plans to amend the law to require companies to report in specific terms on the actions they have taken to respect human rights.<sup>151</sup> The French government requires mandatory reporting on the sustainability of company environmental and social performance.<sup>152</sup> The European Union will propose legislation on the transparency of social and environmental information that companies provide, across all sectors.<sup>153</sup> It may make specific reference to human rights. The US Government has issued a draft reporting requirement that would require US companies investing over \$500,000 in Burma/Myanmar to report on their policies and procedures with respect to human rights, workers' rights, environmental stewardship, land acquisitions, and arrangements with security service providers. The draft regulation makes specific reference to the UN Guiding Principles as guidance for companies in developing appropriate human rights policies and procedures.<sup>154</sup>

In addition, legislation at state, federal and regional level has started to require companies to be transparent about human rights due diligence in the context of their operations and business relationships, including their operations abroad. Such legislation will contribute to global practice on human rights due diligence, especially down the supply chain. In 2010, the US Congress passed the **Dodd-Frank Wall Street Reform and Consumer Protection Act**. Section 1502 requires US-listed companies to report annually to the Securities and Exchange Commission (SEC) on the use of "conflict minerals" in their products, based on due diligence on their conflict mineral supply

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149 Guiding Principle 21 Commentary.

150 Danish Business Authority, *Statutory requirements on reporting CSR*. At: <http://www.csrgov.dk/sw51190.asp>.

151 Global CSR, *New Danish Action Plan on CSR emphasises the importance of Human Rights*, March 2012. At: <http://www.global-csr.com/news-detail+M51b3769f4bb.html>.

152 Social Funds, *New French Law Mandates Corporate Social and Environmental Reporting*, March 2002. At: <http://www.socialfunds.com/news/article.cgi?sfArticleId=798>.

153 European Commission, *Sustainable and responsible business: CSR - Reporting and disclosure*. At: [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/index_en.htm).

154 US State Department, *Reporting Requirements on Responsible Investment in Burma*, 2012. At: <http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf>.

chains.<sup>155</sup> The main purpose of the legislation is to inhibit the ability of armed groups in the Democratic Republic of Congo and adjoining countries to fund their activities by exploiting the trade in conflict minerals. Other legislation mandating due diligence on the supply chain includes the **California Transparency in Supply Chains Act**,<sup>156</sup> which entered into force in January 2012, and requires any retail and manufacturing company that does business in the state and enjoys annual global gross receipts of more than \$100 million to report on measures they take to eliminate slavery and human trafficking from their supply chains. A proposed law, the **Business Transparency on Trafficking and Slavery Act**, which cited similar human rights concerns, was introduced in the US House of Representatives in August 2011.<sup>157</sup> In May 2012, legislation modelled on the California law was proposed in the UK Parliament.<sup>158</sup>

Transparency on payments to governments in the extractive sector has been under the spotlight for years. The Extractive Industries Transparency Initiative, a multi-stakeholder initiative involving governments, companies and civil society established a methodology for monitoring and reconciling company payments for natural resources and government revenues at the country level.<sup>159</sup> Revenue transparency is now beginning to be reflected in binding legislation. The **Dodd-Frank Wall Street Reform and Consumer Protection Act** Section 1504 requires US-listed extraction companies to publicly disclose certain payments that they make to governments for the extraction of oil, gas and minerals. In 2012, the US Securities and Exchange Commission issued long-delayed rules to guide companies in meeting these requirements.<sup>160</sup> The **European Union** is also proposing a **country-by-country reporting system**, which would apply to large, privately-owned EU companies or EU-listed companies in the oil, gas, mining or logging sectors. Companies would be required to provide key financial information (on taxes, royalties and bonuses paid to a host government, for example) for every country in which they operate. This information would indicate a company's financial impact on host countries. The objective of the proposal is to increase transparency and foster more sustainable businesses.<sup>161</sup> In relation to extractives, recent research has shown a positive correlation between

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155 See above. n. 97, SEC.

156 *The California Transparency in Supply Chains Act*, 2010. At: <http://www.state.gov/documents/organization/164934.pdf>.

157 *The Business Transparency on Trafficking and Slavery Act*, H.R. 2759. At: <http://beta.congress.gov/bill/112th-congress/house-bill/2759>.

158 The proposed legislation is the *Transparency in UK Company Supply Chains (Eradication of Slavery) Bill*. At: <http://services.parliament.uk/bills/2012-13/transparencyinukcompaniesupplychainseradicationofslavery.html>.

159 See above n. 118.

160 See above n. 97.

161 European Commission, *More responsible businesses can foster more growth in Europe*, October 2011. At: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1238&format=HTML&aged=0&language=EN&guiLanguage=en>.

transparency and financial performance, challenging the industry's argument "that transparency hurts business".<sup>162</sup>

While the above legislation is relatively nascent, stock exchanges have required some ESG reporting for over a decade. The London Stock Exchange launched the **FTSE4Good Index Series** in 2001. However, though mandatory reporting (by law or via listing requirements) has increased, most sustainability reporting remains voluntary.

The GRI mentioned previously is considered an important standard of ESG reporting, and is used by thousands of companies.<sup>163</sup> GRI reporting guidelines include key principles regarding the content and quality of reports, standard disclosures that companies are expected to make, and performance indicators across six categories (including human rights). Guidelines for selected sectors are also available. Through a multi-stakeholder process involving civil society organisations, organised labour, industry, investors and others, the GRI continuously updates its framework and indicators and is currently working on its "G4" version, which is due to be released in 2013 and is expected to reflect the UN Guiding Principles and other developments. GRI-compliant reports are an important benchmark for investors and others who wish to measure corporate performance and assess companies relative to their peers. Investors should therefore encourage companies to use standardised reporting frameworks like the GRI. Although the quality of corporate reporting on human rights is generally poor by comparison with other ESG issues, guidance in this area has begun to emerge from GRI, the Global Compact and other sources. (See Appendix II).

### **KPIs for Investors on Labour and Human Rights Risks in Global Supply Chains**

In January 2012, the Fair Labour Association (FLA) and the Pension and Capital Stewardship Project at Harvard Law School published a set of key performance indicators (KPIs) that enable investors to assess labour and human rights risks that global companies face in their supply chains. Developed in collaboration with global asset owners and asset managers, the KPIs may help to advance "policy discussions about mandatory corporate ESG reporting" in the European Commission and the US SEC, by providing model indicators that stakeholders can agree on and use to evaluate ESG performance.<sup>164</sup>

162 Lisa Sachs and Shefa Siegel, *Openness in Extraction*, Project Syndicate, June 2012. At: <http://www.project-syndicate.org/online-commentary/openness-in-extraction>.

163 *Sustainability Disclosure Database*. At: <http://database.globalreporting.org/>.

164 Fair Labor Association and the Pensions and Capital Stewardship Project at Harvard Law School, *Key Performance Indicators for Investors to Assess Labor and Human Rights Risks Faced by Global Corporations in Supply Chains*, January 2012 (with funding from the Investor Responsibility Research Center Institute), p. 3. At: <http://www.irrcinstitute.org/pdf/HR-Summary-Report-Jan-2012.pdf>.

### Investor involvement

As part of the responsible investment community's efforts to encourage compliance with the California Trafficking Law, Calvert Investments, the ICCR and Christian Brothers Investment Services published **Effective Supply Chain Accountability: Investor Guidance on Implementation of the California Transparency in Supply Chains Act and Beyond** in November 2011. It outlines the business case for addressing human rights risks in supply chains, discusses shareholder expectations in this area, and provides examples of good practice. Institutional investors cited the UN Framework's emphasis on reporting when they called for passage of the California Trafficking Law. They argued that it would "put all businesses on an even playing field" and avoid a "patchwork of state laws", and would provide information "critical to investors" for evaluating a company's human rights-related risks and opportunities.

Investors should monitor carefully these developments on mandatory disclosure, because the quality of information that is publicly available directly affects their ability to assess whether companies are managing their human rights impacts soundly. As governments incorporate human rights issues in mandatory reporting, investors should employ their leverage to make sure that the companies in which they invest report accountably.

# Conclusion: Looking Forward

Building on developments outlined in this Guide, investors now have a historic opportunity to hold companies accountable for their negative human rights impacts. The UN Framework and its accompanying UN Guiding Principles offer clear guidance on the duty of states to protect human rights, the corporate responsibility to respect human rights, and the need for access to remedy for victims of corporate-related human rights abuses. They mark the start of a new era not only of awareness but broad acceptance of the imperative to integrate human rights considerations into business and investment decisions based on the fundamental proposition that companies have responsibilities in this area regardless of whether states fulfil their human rights obligations. As owners of capital, investors also have a responsibility to respect human rights and now have the opportunity to exercise it as never before. To the extent they do so, they will diminish their risks and enhance the rights of others – and prove themselves to be responsible investors and asset owners.

With the new UN Framework, and complementary standards and guidelines, investors can be better prepared to integrate human rights risk analysis into their investment decisions and elevate human rights in shareholder advocacy. And with these fundamentals now in place, investors, analysts, service providers, companies and other stakeholders can set their sights on deepening their approaches. There is much-needed further development that should be taken forward with interested stakeholders. A few suggestions are included below.

**Developing better tools and approaches that are fit for purpose by asset type and asset class is a key priority for future action.** Different types of assets will have different human rights impacts and opportunities associated with them. Developing tools to better understand the human rights impacts of types of assets, whether these are property, commodities or other resources, will help investors to be more precise in their analysis and engagement. Investors in different asset classes have different points of leverage in integrating human rights and bringing broader ESG concerns into their investment decisions, engagement and arrangements with managers. Exploring how to better use that leverage is a next step forward.

**With respect to improving the tracking of performance and communication around human rights performance, two areas require further attention:**

**(1) Developing appropriate KPIs** that provide a clear picture of whether a company is implementing the UN Guiding Principles with a focus on outcomes. In other words, is the company addressing human rights in a meaningful way?

**(2) Better quantified data to back up the KPIs**, that can help companies and investors benchmark company performance with the goal of improving it. Quantifying the corporate responsibility to respect human rights, including reflecting core concepts such as human dignity that are at the heart of international human rights standards, are significant challenges. There are nonetheless promising approaches inside and outside the human rights field that could be built on to bring human rights considerations further into the core of ESG quantitative methodology. In the end, human rights considerations

can never entirely be reduced to numbers. Many benchmarks for ESG information are based on a useful combination of qualitative data that reflect many of the process points highlighted in the UN Guiding Principles, combined with quantitative indicators where appropriate. Getting this balance right is a next frontier in the rapidly evolving human rights and business agenda.

**Prompting deeper reflection on what the UN Guiding Principles mean for investors themselves should also be on the agenda** as investors are increasingly becoming the focus of attention with respect to human rights. Questions are being raised about the potential exclusionary effect of private equity investments in infrastructure projects,<sup>165</sup> and about “land grabs” by sovereign wealth funds,<sup>166</sup> while the G20 has discussed the financialisation of food commodities crucial for poor families.<sup>167</sup> Just as the environmental movement has had a significant impact on energy choices for a growing number of investors, will human rights have the same impact?

On a broader scale, at the same time as the UN Guiding Principles have been developed with a strong emphasis on accountability to individuals whose human rights have been abused, the financialisation of many sectors has been moving the world in the opposite direction where accountability of a particular company for the impact of operations becomes harder and harder to pin down. How to reconcile these approaches will require innovative thinking. These developments are beginning to shine a spotlight on the industry’s choices and approaches that may start the reflection process rolling.

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165 Nicholas Hildyard, *More than Bricks and Mortar, Infrastructure-as-asset-class: Financing Development or developing finance? A critical look at private equity infrastructure funds*, 2012. At: <http://www.thecornerhouse.org.uk/resource/more-bricks-and-mortar>.

166 See for example, IMF, *Global Land Rush*, Finance & Development, March 2012, Vol. 49, No. 1. See also: [http://www.telegraph.co.uk/finance/comment/ambroseevans\\_pritchard/7997910/The-backlash-begins-against-the-world-landgrab.html](http://www.telegraph.co.uk/finance/comment/ambroseevans_pritchard/7997910/The-backlash-begins-against-the-world-landgrab.html); <http://www.imf.org/external/pubs/ft/fandd/2012/03/arezki.htm>; and GRAIN, *Land Grab Deals*, at: <http://www.grain.org/article/entries/4479-grain-releases-data-set-with-over-400-global-land-grabs>.

167 Cannes Summit Final Declaration: “*Building our common future: Renewed collective action for the benefit of all*”, November 2011. At: [http://www.g20civil.com/documents/Cannes\\_Declaration\\_4\\_November\\_2011.pdf](http://www.g20civil.com/documents/Cannes_Declaration_4_November_2011.pdf); and UNCTAD, *Price formation in financialized commodity markets*, June 2011. At: [http://unctad.org/en/Docs/gds20111\\_en.pdf](http://unctad.org/en/Docs/gds20111_en.pdf); and Institute for Agriculture and Trade Policy, *More evidence on speculators and food prices*, June 2011. At: <http://www.iatp.org/blog/201106/more-evidence-on-speculators-and-food-prices>.

# Appendix I: Questions for Engagement

## 1. Making a Statement: A Company's Policy Commitment to Human Rights

- Has the company publicly affirmed that it will address human rights in a policy commitment that is based on an assessment of its potential impacts and is endorsed at the most senior level?
- Who has oversight of the policy commitment and due diligence process?
- Is the commitment integrated in the overall risk management system of the company and supported by internal policies, procedures, budgets and assigned across relevant functions of the company?

## 2. Human Rights Due Diligence

- Has the company developed a human rights due diligence process to implement its policy commitment and assess its impacts? Is the process initiated early so that results can be incorporated into decision making? Does it assess the company's potential impact on people? If an urgent human rights problem arises, do the company's procedures prevent its involvement or enable it to address human rights abuses immediately?
- Does the due diligence process enable the company to manage the complexity of its business environment, including its business relationships (e.g. conflict zones, countries with poor human rights records, emerging markets, etc.)?
- Does the company have a process for carrying out periodic assessments? Does it reassess when it makes significant new transactions, when it creates important new relationships, or when its operating environment changes in important ways?
- Does the process examine potential negative impacts that are directly linked to it by the company's business relationships, such as in its supply chain, mergers and acquisitions, joint ventures, franchising, or licensing? What steps does the company take to encourage or require its business partners to conduct their own human rights due diligence?

### Involving Stakeholders and Experts in Human Rights Due Diligence

- Does the company possess the human rights expertise and capacity it needs to carry out human rights due diligence? Is it making appropriate use of external expertise?
- Does the company identify on an ongoing basis potentially affected stakeholders and involve them in its human rights due diligence in a meaningful way?
- How does the company ensure that its consultation efforts include all relevant parties and that its processes are inclusive and accessible to relevant groups, including those who may be particularly vulnerable or at risk?
- Does the company participate in multi-stakeholder initiatives or other sector initiatives that address human rights issues?

### Integrating Human Rights Due Diligence into Company Processes

- Does the company integrate the results of its human rights due diligence into its business decisions and operations, and does it take action at an early stage?
- Does the company integrate use due diligence findings to influence the conduct of its business partners?
- When the company's due diligence reveals that negative human rights impacts are likely, are significant findings reported to senior management and the Board? If so, what operational and policy decisions do senior managers and the Board take in response?

### Tracking Human Rights Performance

- Does the company apply qualitative and quantitative indicators to evaluate its human rights performance? Have these been developed with the participation of affected stakeholders?
- Does the company employ a sound monitoring system to track how it handles human rights impacts across its operations?

### Communicating about Human Rights Impacts and Responses

- Does the company communicate its results locally to stakeholders?
- Does the company report formally on its human rights impacts and responses? If it does, is the company's report informed by relevant reporting standards and specific human rights performance indicators?

## **3. Righting the Wrong: Remediation and Operational Level Grievance Mechanisms**

- Has the company developed accessible and effective grievance mechanisms at operational level to address human rights issues raised by workers or affected stakeholders?
- Does the company's grievance mechanism satisfy the UN Guiding Principles' effectiveness criteria?
- What is the company doing with the information and lessons it obtains from its grievance mechanisms? Does it track information over time to identify trends, improve its procedures, or report to stakeholders and investors?

# Appendix II: Selected Sources for Investors\*

## General References to Business and Human Rights

The Business and Human Rights Resource Centre. At: [www.business-humanrights.org](http://www.business-humanrights.org).

Castan Centre for Human Rights Law, International Business Leaders Forum, UN Human Rights, and UN Global Compact, *Human Rights Translated. A Business Reference Guide*, 2008. At: [http://human-rights.unglobalcompact.org/doc/human\\_rights\\_translated.pdf](http://human-rights.unglobalcompact.org/doc/human_rights_translated.pdf).

Danish Institute for Human Rights, *Human Rights and Business Country Portal* (interactive). At: <http://www.humanrightsbusiness.org/country+portal>.

UN Global Compact, *Human Rights and Business Dilemmas Forum* (interactive, containing issues briefings, examples of good practice and thematic case studies). At: [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/Some\\_key\\_business\\_and\\_human\\_rights\\_guidance\\_materials\\_and\\_how\\_to\\_use\\_them.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Some_key_business_and_human_rights_guidance_materials_and_how_to_use_them.pdf).

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UN Office of the High Commissioner for Human Rights (OHCHR), *List of Tools*. At: <http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx>.

## The UN Framework and UN Guiding Principles

John Ruggie, *Complete list of documents prepared by and submitted to the SRSG on business and human rights* as of August 2010. At: <http://www.reports-and-materials.org/Ruggie-docs-list.pdf>.

John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008. At: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

John Ruggie, *UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/17/31, 21 March 2011. At: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

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\* References are listed by subject in the order in which they appear in the Guide and within each section, references are listed alphabetically.

UN Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*. At: <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>.

### Investors and Human Rights

Business and Human Rights Resource Centre, *Finance-related section of the SRSG's portal during the 2005-2011 mandate*. At: <http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Sector-specificcontributions/Finance>.

Business and Human Rights Resource Centre, *Investment-related section of the SRSG's portal during the 2005-2011 mandate*. At: <http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Investment>.

Daan Schoemaker, *Raising the Bar on Human Rights: What the Ruggie Principles Mean for Responsible Investors*, Sustainalytics, August 2011. At: [http://www.sustainalytics.com/sites/default/files/ruggie\\_principles\\_and\\_human\\_rights.pdf](http://www.sustainalytics.com/sites/default/files/ruggie_principles_and_human_rights.pdf).

### Human Rights Impact Assessments

International Business Leaders Forum (IBLF), International Finance Corporation (IFC), and UN Global Compact, *Guide to Human Rights Impact Assessment and Management*, 2007. At: [http://www-dev.iblf.org/what\\_we\\_do/Social\\_Development/Human\\_Rights/HRIA.jsp](http://www-dev.iblf.org/what_we_do/Social_Development/Human_Rights/HRIA.jsp). For the online tool, see: <http://www.guidetohriam.org/welcome>.

Human Rights Impact Resource Centre. At: <http://www.humanrightsimpact.org/introduction-to-hria/hria-tutorial/introduction/>.

### Grievance Mechanisms

Baseswiki.org. At: [http://baseswiki.org/en/Main\\_Page](http://baseswiki.org/en/Main_Page).

The Centre for Research on Multinational Corporations (SOMO), Human Rights and Grievance Mechanisms program, [http://somo.nl/publications-en/Publication\\_3823?set\\_language=en](http://somo.nl/publications-en/Publication_3823?set_language=en).

Corporate Responsibility Coalition (CORE), *Protecting Rights, Repairing Harm: How State-based Non-judicial Mechanisms Can Help Fill Gaps in Existing Frameworks for the Protection of Human Rights of People Affected by Corporate Activities*, November 2010. At: [http://baseswiki.org/en/Protecting\\_Rights,\\_Repairing\\_Harm:\\_How\\_State-based\\_Non-judicial\\_Mechanisms\\_Can\\_Help\\_Fill\\_Gaps\\_in\\_Existing\\_Frameworks\\_for\\_the\\_Protection\\_of\\_Human\\_Rights\\_of\\_People\\_Affected\\_by\\_Corporate\\_Activities,\\_November\\_2010](http://baseswiki.org/en/Protecting_Rights,_Repairing_Harm:_How_State-based_Non-judicial_Mechanisms_Can_Help_Fill_Gaps_in_Existing_Frameworks_for_the_Protection_of_Human_Rights_of_People_Affected_by_Corporate_Activities,_November_2010).

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International Commission of Jurists (ICJ), *Access to Justice country series* (with reports on India, the Philippines, China, the Netherlands, Poland and South Africa). At: <http://www.icj.org/default.asp?nodeID=423&langage=1&myPage=Others>.

International Council on Mining and Metals (ICMM), *Handling and Resolving Local-Level Concerns and Grievances*. At: <http://www.icmm.com/page/15822/> icmm-presents-newguidance-note-on-handling-and-resolving-local-level-concerns-and-grievances.

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Human rights are not a new concern for the investment community. A growing number of investors engage with companies on particular human rights issues and apply criteria for evaluating their performance. The adoption in 2011 of UN Guiding Principles on Business and Human Rights has deepened and sharpened this interest. This Guide suggests how investors can use the UN Guiding Principles as a due diligence and risk assessment framework to assess human rights-related risks across their portfolios and to hold companies accountable with respect to human rights. It examines specific groups and contexts; emerging human rights issues; recent standards and tools; legislative developments and emerging accountability mechanisms; and risks as well as opportunities for companies and investors.

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