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Multinational Mining Companies and Indigenous Peoples’ Rights

Author: Emil Lindblad Kernell
Supervisor: Professor Maja Kirilova Eriksson
Abbreviations

CEO  Chief Executive Officer
CERD  Committee on the Elimination of Racial Discrimination
CESCR  Committee on Economic, Social and Cultural Rights
EMRIP  Expert Mechanism on the Rights of Indigenous Peoples
EU  European Union
FIDH  International Federation for Human Rights
FPIC  Free, Prior and Informed Consent
Global Compact  UN Global Compact
Guidelines  OECD Guidelines for Multinational Enterprises
Guiding Principles  UN Guiding Principles on Business and Human Rights
HRC  UN Human Rights Council
HRDD  Human Rights Due Diligence
IACHR  Inter-American Commission on Human Rights
IACtHR  Inter-American Court of Human Rights
ICCPR  International Covenant on Civil and Political Rights
ICERD  International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR  International Covenant on Economic, Social and Cultural Rights
ICJ  International Court of Justice in the Hague
ILO 169  International Labour Organization Convention C169 – Indigenous and Tribal Peoples Convention
MNC  Multinational Company
NAP  National Action Plan
NCP  National Contact Point
NGO  Non-governmental Organization
OAS  Organization of American States
OECD  Organisation for Economic Cooperation and Development
OHCHR  Office of the High Commissioner for Human Rights
Special Rapporteur  Special Rapporteur on the rights of indigenous peoples
SRSR  Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises
UDHR  Universal Declaration on Human Rights
UN  United Nations
UN Norms  UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
UNDRIP  UN Declaration on the Rights of Indigenous Peoples
UNPFII  UN Permanent Forum on Indigenous Issues
UNWG  UN Working Group on the issue of human rights and transnational corporations and other business enterprises
“Because we all share this planet earth, we have to learn to live in harmony and peace with each other and with nature. This is not just a dream, but a necessity.”

— Dalai Lama
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1 Introduction

1.1 Background – Mining industry and indigenous peoples

Today, more than 35 of the world’s largest economies are multinational corporations, which means that some corporations have significantly greater economic power than small States. Due to their power, multinational corporations may, through their operations, have serious adverse impacts on peoples’ lives. Mining companies are specifically signalled by many indigenous communities as a major threat against the future of their culture and their existence as peoples, because of the nature of their operations.

The only mechanisms developed to address corporate responsibility for human rights are soft law frameworks, which rely on market forces in order to ensure that companies comply with international human rights standards. However, it could be questioned whether such mechanisms sufficiently protect indigenous peoples that are threatened to have their rights violated by mining corporations.

Mining companies are powerful, often multinational, and operate wherever natural resources are found. The mining sector is expanding and the near 30,000 active mines around the world are often located on indigenous peoples’ lands and territories, since these lands generally have important reserves of natural resources. States have significant interests in the revenue from foreign investment in their national mining industry. As such, mining companies are allowed to operate under national human rights standards that are less stringent than internationally recognized human rights. Due to their impact on indigenous peoples’ lands and territories, mining activities in such regions have become one of the major concerns for indigenous peoples worldwide. Therefore, the situation should be addressed.

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The issue of corporate responsibility for human rights has been widely discussed and has even been called “the major human rights issue facing us in the 21st century” by the former President of the European Court of Human Rights.\(^6\) This has led to an increased willingness to not merely discuss “corporate social responsibility” but to address fundamental questions concerning business and human rights, which can also be seen in the ongoing debate.\(^7\) In order to illustrate the current situation of indigenous peoples and their interests in and relation to their lands, on the one hand, and multinational mining corporations’ interests on the other, two case studies, which are still ongoing, will follow.

1.2 Case studies

1.2.1 Kallak – Iron mine in Sweden

Mineral extraction is one of Sweden’s most important exports, and as such of great significance for the country’s overall economy. In an effort to strengthen its economy Sweden adopted a new mining strategy in 2013, which was revised and updated in 2015. It states that Sweden will expand its mining industry in order to continue as the European Union’s major mining nation. In 2015, Sweden had 16 active mines but it was calculated that in 15 years’ time, if all goes according to the plan, this number will grow drastically and there may be as many as 50 operating mines in Sweden.\(^8\) Furthermore, it is stated in the mining strategy that the expansion of the mining industry shall be carried out “with respect for and in harmony with reindeer herding rights.”\(^9\)

In Kallak (Gållok)\(^10\) in Sweden’s far north, Beowulf Mining plc (Beowulf) has started planning for its future mining project. Beowulf is headquartered in the UK but runs the operation in Kallak through a wholly owned Swedish subsidiary.\(^11\) In the area where the mine is supposed to be located, the company has found one of the major iron ore deposits

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\(^9\) Ibid., 23.

\(^10\) In the local Sami language the name is Gållok. However, since “Kallak” is the most commonly used name in other texts and reports, that name will be used from now on.

in Sweden that has yet to be exploited. The company has promised that the mine project will bring jobs and other benefits to the region. As such, it has received support from the local government since there has been a decline in jobs in the region for quite some time. However, the lands where the mine is supposed to be located are used by the Sami, a local indigenous group, for reindeer herding. It is the traditional livelihood of the Sami and it is a culture that has managed to survive, even if fewer Sami people are following their ancestors’ footsteps today.\(^\text{12}\)

Since the proposed mining project is situated in the middle of grazing grounds, which are used for the reindeers in autumn and spring, the affected Sami communities have stated that it will significantly affect their traditional livelihood.\(^\text{13}\) Even if it only concerns a small part of the lands that the Sami use for their reindeer herding activities, the adverse impacts could be devastating. As one local Sami reindeer herder said: “If you throw a knife in the heart it is only a small cut but the result is death.”\(^\text{14}\) Only a small part of the Sami population are reindeer herders, however, due to the traditional livelihood’s importance to the overall Sami culture, many fear that if reindeer herding ceases to exist as a livelihood, the culture will effectively die with it. Lawyers representing the Swedish Sami Association stated that the Beowulf should terminate its mining activities in Kallak completely since that is the only way of ensuring the future existence of the Sami and their reindeer herding traditions.\(^\text{15}\)

The Sami have protested against the mine ever since the project began and have had representatives present on many of Beowulf’s annual general meetings to protest against the planned mine.\(^\text{16}\) In the most recent event, the Chairmen of the two most threatened local Sami groups posed several questions to Beowulf, the most central being whether Beowulf would continue with the mining project despite the Sami people’s refusal to give their consent. Beowulf’s Chief Executive Officer (CEO) responded in an open letter directed to the Chairmen, which said that Beowulf would continue with the project since it has an outstanding orebody. However, the CEO stated that he hoped to meet with the

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15 Ibid.

two Chairmen in person “to hear their concerns and objections and to learn more about their reindeer herding business.” The affected Sami communities and the Swedish Sami National Association stated that they “will never accept a mine and will pursue the issue legally, nationally and internationally.”

1.2.2 Pascua Lama – Gold and silver mine in Chile

In a completely different part of the world, on the Argentinian-Chilean border, Barrick Gold Corporation (Barrick) is developing a mining project called Pascua Lama. Barrick is a Canadian mining company, but it runs the operations at Pascua Lama through a wholly owned Chilean subsidiary. The mine is situated in the Andes and it is one of the world’s largest undeveloped gold reserves. The mining company has stated that the project will “generate enduring and substantial benefits” for all stakeholders, and that significant consultative measures were carried out to involve local residents, including indigenous communities, in the assessment of the project. The construction of the mine began in the 1990s and proceeded until 2013 when it was temporarily suspended, which means that the mine has yet to be operative. According to the company, the decision to suspend the project came after a court ruling concerning environmental issues that were raised by local indigenous communities, which the company set out to address, as well as due to falling gold prices.

A significant part of the population near the mine are Diaguita, a group identified as indigenous by the Chilean government in 2006. The project has led to important resistance from the local community. In an effort to oppose the construction of the mine,

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the organization Comunidad Agrícola Diaguita de los Huascoaltinos, which is a Diaguita interest group, turned to the Inter-American Commission on Human Rights (IACHR) with a complaint in 2007. The group stated that Chile had violated their right to free, prior and informed consent (FPIC) since the Diaguita had never given their consent to the Pascua Lama project prior to its approval by the Chilean government. In 2010, the IACHR accepted the complaint, and the case is still ongoing.24

One of the main concerns of the Diaguita is that the mine is situated next to the Huasco Valley, one of the most fertile valleys of the country. Representatives of the Diaguita have stated that the project will affect the glaciers next to the mine, which will contaminate the water and therefore have a negative impact on the lands they use for agriculture. A local indigenous resident even went so far as to say that “[i]f the mine goes ahead, we would all die, or we would have to leave.”25 Barrick has denied all allegations regarding serious adverse impacts on the community. Human rights organizations and other Non-Governmental Organizations (NGOs) have lamented the existing governance gap concerning Multinational Corporations (MNCs) and the fact that local indigenous have small chances of targeting Barrick, and other mining companies, in Canada.26

1.3 Aim of study
In the past, most indigenous groups have suffered from colonization, and even if they were not affected in the past, they have in recent years seen their rights threatened by corporate interests related to the natural resources found on indigenous lands.27 Seeing the problematic relationship that exists between indigenous peoples and multinational corporations, the aim of this thesis is to assess whether the current overall regulatory system for corporate responsibility sufficiently protects indigenous peoples’ rights. The questions that therefore will be studied are: When States are not fulfilling their international human rights obligations, what means are there to protect the indigenous peoples’ rights? Is the current system – based on soft law frameworks – sufficiently

24 See IACHR, Diaguita Agricultural Communities of the Huascoaltinos and Their Members v. Chile, Petition 415/07, Report 141/09, 30 December 2009.
26 Ibid.
protecting indigenous peoples’ rights? What are the arguments for and against a binding treaty on human rights that would be directly applicable to corporations, as opposed to soft law frameworks?

1.4 Scope and limitations
The thesis will primarily be limited to a study of the international standards concerning indigenous peoples’ rights and soft law frameworks regarding corporate responsibility. National standards will only be discussed if they are specifically relevant to either of the case studies. Furthermore, the State responsibility to protect human rights will only be discussed briefly and in general terms. In order to illustrate States’ failure to protect indigenous peoples’ rights, the study will include critique that has been put forward by the UN Treaty Bodies and addressed at Sweden and Chile, the two countries featured in the case studies, for such failures. To serve the purpose of the thesis and to focus on the responsibility of corporations, the presented critique will be accepted as justified and well-founded, and the premise is that States sometimes fail to fulfil their obligations to protect international human rights. Measures taken by States to specifically address corporate responsibility will be also be discussed, in short, in order to illustrate attempts to bridge the governance gap.

The focus on international standards for corporate responsibility is motivated by the fact that MNCs often evade national legislation on human rights in one State by operating in another state with lower standards. Another reason for the focus on MNCs is that a single State might be unwilling to regulate corporate behaviour in order to attract foreign investments through low national human rights standards. Enforcement and sanction mechanisms will only be discussed briefly, how such mechanisms should be structured falls outside the scope of the thesis. The discussions of and the arguments for and against a binding treaty on business and human rights will also be outlined. However, the idea is not to elaborate on the specific content of a binding treaty, but rather to comment on the arguments to give the reader an idea of the ongoing discussions. The questions of political feasibility and legal enforceability of a similar treaty will be left aside.

Even if environmental regulation might be used by indigenous communities in order to protect their lands, it is outside the scope of the thesis – environmental regulation

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primarily concerns the environment and not the rights of indigenous peoples. Furthermore, I will not look at the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy since it is mainly focused on labour rights. Even though such rights are important, they have little or no direct relation to indigenous peoples’ rights. As a result of the thesis’ space constraints, directives, policies and regulations concerning human rights developed by financial entities such as the World Bank, the International Finance Corporation, the Inter-American Development Bank and the Asian Development Bank will not be looked at, even if they may have an important impact on corporate behaviour.

1.5 Method and material

In order to assess the international standards concerning indigenous peoples’ rights and corporate responsibility, the material discussed in the thesis is mainly international conventions and relevant soft law frameworks. This includes the International Labour Organization Convention C169 – Indigenous and Tribal Peoples Convention, 1989 (ILO 169), United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). They are all of importance since there is an interplay between the norms in the conventions and the soft law frameworks regarding corporate responsibility. Since there are no international legally binding conventions in place regarding business and human rights, the focus will mainly be on soft law frameworks and voluntary regulatory mechanisms, more specifically the UN Guiding Principles on Business and Human Rights (Guiding Principles), the UN Global Compact (Global Compact) and the OECD Guidelines for Multinational Enterprises (Guidelines). However, discussions and relevant UN resolutions regarding a binding treaty on business and human rights will be presented and discussed.

For interpreting the conventions and the soft law instruments, reference is made to statements from relevant UN Treaty Bodies as well as articles and other scholarly work. The above mentioned standards will furthermore be used to assess the case studies to see what impact the standards seem to have had in practice. Since the purpose of the thesis is to look at the corporate responsibility for human rights and indigenous peoples’ rights,
State responsibility will only be discussed in general terms. The two States featured in the case studies, Sweden and Chile, will be assessed to study which international standards are applicable and what obligations the two States have.

One of the difficulties concerning this study has been to assess what the current status of indigenous peoples’ rights is since the views of what is and what is not yet customary international law differ significantly. In order to give the reader an idea of the differences in opinion, contrasting views are presented. The most significant difficulty has however been the discussion regarding an international binding treaty that would be directly applicable to multinational corporations. It is a sensitive and political issue and since a similar treaty has not existed before the views differ from some scholars considering it to be an impossible option, to others calling for it to be introduced sooner rather than later. To highlight the differences, the chapter on a binding treaty will present the differing views of several authors, followed by my own comments and conclusions.

To illustrate the conflict between the mining industry and indigenous peoples’ rights, two case studies were outlined in the beginning of the thesis. They were chosen to illustrate the current situation of indigenous peoples in both a developed economy and an emerging economy. The Swedish case study was selected because it is the case study that first drew my attention to the conflict between the mining industry and indigenous peoples’ rights. Furthermore, it concerns a multinational corporation, which makes the governance gap relevant. Moreover, the case is still ongoing, which illustrates the topicality of the issue. The case of Pascua Lama was chosen in order to illustrate the situation in an emerging economy in Latin America, which is a region that is home to many indigenous groups and has an important mining industry. Furthermore, Chile has ratified the ILO 169 and acknowledged the jurisdiction of the IACtHR. As such, it is an interesting case in order to see whether the ratifications have led to visible improvements for indigenous peoples and their right to lands, especially regarding the mining industry.

The case studies are intended to highlight certain aspects of the current situation, and not to give a comprehensive image of the conflict between the interests of mining corporations and indigenous peoples’ rights. The facts concerning the case studies will not be scrutinized since the case studies are used merely to illustrate and exemplify the conflict. In the end of the thesis, concluding remarks will be made regarding the case studies and how the frameworks for corporate responsibility have impacted on them. Remarks will also be made regarding whether a binding treaty would have made any difference.
1.6 Definitions

1.6.1 Multinational corporations

Different terms have been used to describe corporate entities that are operating in more than one State. However, in this thesis no distinction is being made between the terms multinational and transnational, or between the terms companies, corporations and businesses. The different terms are being used as synonyms to describe companies that have business operations in various countries and that have facilities and/or other assets in various countries. For the purpose of this thesis it is important that all types of multinational businesses can be discussed and a wide and flexible definition of MNCs will therefore be used. Unless otherwise specified, the definition of MNCs in this thesis is the one used in the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms):

\[\text{an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.}\]

1.6.2 Home and host countries

Violations of human rights committed by western MNCs are often taking place in developing countries with less rigorous national human rights standards. Since this is a recurring theme, the terms home country and host country will be used to distinguish a corporation’s country of origin from a country where a corporation merely operates directly or through subsidiaries. Distinguishing home countries from host countries is important since complying with the host country’s norms and standards could prove to be insufficient in order to comply with international human rights standards.

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1.7 Outline

In order to fulfil the aim of the study and to answer the posed questions some background is first needed. The second chapter will therefore outline what rights indigenous peoples are entitled to according to international human rights law, especially with regard to lands, territories and resources. The third chapter will briefly assess States’ responsibility to protect indigenous peoples’ rights and whether they are taking their responsibility. Subsequently, the fourth chapter will discuss the corporate responsibility to respect human rights in order to examine what obligations corporations have when States are not taking their responsibility. The chapter will also assess the arguments for why corporations should take their due responsibility. After the general framework is outlined there will be a brief discussion concerning the idea of a legally binding treaty on business and human rights in the fifth chapter. This will be assessed in order to see whether such a treaty could effectively improve the situation of indigenous peoples. Finally, the sixth chapter is where the case studies are looked at again, in order to see what the frameworks for corporate responsibility mean for the affected indigenous communities in each case. After the discussion of the case studies, final concluding comments will be made.
2 Indigenous peoples’ rights

2.1 Introduction

Indigenous peoples have historically been overlooked and discriminated by States. Although there are many issues that need to be dealt with, the indigenous peoples’ loss of their lands is a significant historical issue. This concern for indigenous peoples was highlighted by the UN General Assembly, which in the preamble to the UNDRIP stated that:

“[I]ndigenous peoples have suffered from historic injustices as a result of [...] their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”

Because of the history of colonization, indigenous peoples are often positioned outside of the mainstream political systems, and as such they are deemed to be in need of extra and special protection. For achieving positive relations between multinational mining companies and indigenous peoples it is, according to UN Permanent Forum on Indigenous Issues (UNPFII), necessary that the human rights of indigenous peoples are duly respected. Although indigenous peoples’ rights cover a series of issues, the most relevant in relation to the mining industry is 1) the right to self-determination, 2) the right to lands, territories and resources and 3) the right to free, prior and informed consent (FPIC). While the right to their own language and the right to their own cultural traditions and customs are important rights as well, multinational mining companies are not threatening these rights in the same way that they are threatening to violate indigenous peoples’ relationship with their lands.

The most significant instruments regarding indigenous peoples’ rights will be outlined below, followed by a discussion of the above mentioned indigenous peoples’ rights.

32 See e.g. John Morrison, The Social License : How to Keep Your Organization Legitimate (2014), 73.
34 See UNDRIP, art. 14(3).
35 See ibid., art. 11(1).
2.2 ILO (No. 169) – Indigenous and Tribal Peoples Convention
The main instrument addressing the human rights of indigenous peoples is the Indigenous
and Tribal Peoples Convention No. 169 (ILO 169) that was developed by the International
Labour Organization.\textsuperscript{36} It is an international binding convention that applies to “tribal
peoples in independent countries” who populated the lands before colonization and that
can be distinguished from other parts of the national population.\textsuperscript{37} The ILO 169 covers a
vast amount of topics, including topics on non-discrimination, health, education and
indigenous languages.\textsuperscript{38} Most important for this thesis is however the rights related to
indigenous peoples’ lands, which can be found in Articles 13 to 19. Even though it is an
international binding convention on indigenous peoples’ rights it is problematic that only
22 of the world’s nearly 200 states have ratified it. Several countries in Latin America
have ratified the treaty, including Chile. It should however be noted that among the
countries that have not yet ratified the ILO 169 there are several developed countries with
significant indigenous populations, including the USA, Canada, Australia, Finland, New
Zealand and Sweden.\textsuperscript{39}

2.3 The UN Declaration on the Rights of Indigenous Peoples
The second important instrument concerning indigenous peoples’ rights is the UN
Declaration on the Rights of Indigenous Peoples (UNDRIP). It was adopted in 2007 by
the General Assembly with overwhelming majority.\textsuperscript{40} The Declaration was intended to
“make up” for the historical discrimination against indigenous peoples and the denial of
their right to self-determination and other fundamental human rights. It draws on pre-
existing fundamental human rights and interprets them in the light of the special cultural,
historic, economic and social context of indigenous peoples.\textsuperscript{41} The Declaration consists

\textsuperscript{36} International Labour Organization, \textit{Indigenous and Tribal Peoples Convention, 1989 (No. 169)}, vol.
C169, 1991. [Hereinafter ILO 169].
\textsuperscript{37} Ibid., art. 1(a) and 1(b).
\textsuperscript{38} See ibid., art. 3, 25-31.
\textsuperscript{39} “Ratifications of ILO Conventions: Ratifications of C169 – Indigenous and Tribal Peoples Convention,
\textsuperscript{40} E. Pulitano, \textit{Indigenous Rights in the Age of the UN Declaration} (2012), 1-2; At the time 143 States voted
in favour and four voted against. Since then, the four countries that voted against the UNDRIP (USA,
Canada, New Zealand and Australia, notably all countries with important indigenous populations) have
changed their position and are now supporting the UNDRIP.
\textsuperscript{41} UN General Assembly, “Rights of Indigenous Peoples: Note by the Secretary-General,” A/66/288 (10
August 2011), para. 63.
of 46 articles on various topics that provide “the minimum standards for the survival, dignity and well-being of indigenous peoples of the world.”42 The focus is not only on territorial and political rights, but also on economic, social and cultural rights, and it is considered an essential step forward “towards the recognition, promotion and protection of indigenous peoples’ rights and freedoms”.43

Even though the Declaration itself is not binding it has according to Anaya, Special Rapporteur (2008-2014), significant legitimacy since it was endorsed by a wide majority of States worldwide.44 This implies that most, even if not all, of the norms of the UNDRIP reaffirm customary international law, which means that it is binding for States.45 The standards in the Declaration are derived from the norms in the Universal Declaration of Human Rights (UDHR), the ICCPR and the ICESCR as well as other multilateral human rights treaties. The Declaration merely spells out how fundamental rights such as self-determination, non-discrimination and “cultural integrity”46 are applicable to indigenous peoples.47 As such, the Special Rapporteur has stated that the implementation of the UNDRIP into national legislation is not only a political and a moral obligation, but a legal obligation.48 The support of the Declaration showed a great degree of global and international consensus on the question of indigenous peoples’ rights, which in turn demonstrates the legal significance of the Declaration.49

A problematic aspect regarding the Declaration is that governments often claim that the norms in the UNDRIP are not legally binding since it is merely a declaration and not a convention that requires ratification.50 The fear is that such claims eventually may decrease the Declaration’s value as a normative framework.51 In a response to such claims

42 UNDRIP, art. 43.
46 UN General Assembly, “Rights of Indigenous Peoples: Note by the Secretary-General,” A/66/288 (10 August 2011), para. 68.
49 UN General Assembly, “Rights of Indigenous Peoples: Note by the Secretary-General,” A/68/317 (14 August 2013), para. 63.
made by States, the Special Rapporteur (2008-2014) concluded that it was a “manifestly untenable position” to claim that the Declaration is not binding as customary international law, even if he acknowledged that not all of the norms necessarily have become customary law yet.\textsuperscript{52} Stavenhagen, Special Rapporteur (2001-2008), had a different view from his successor and claimed that the Declaration merely constituted soft law since there were no enforcement mechanisms available and States could ignore it without consequences.\textsuperscript{53} He did however state that much like the UDHR, the UNDRIP might eventually become customary international law as long as “national, regional and international jurisprudence and practice can be nudged in the right direction.”\textsuperscript{54} The two statements are not necessarily contradictory since Anaya succeeded Stavenhagen, which means that a greater part of the UNDRIP might have become customary international since Stavenhagen was the Special Rapporteur.

2.4 Indigenous peoples – who are they?
To be able to discuss indigenous peoples’ rights, one must clarify which peoples are defined as indigenous. Groups are considered as \textit{indigenous} if they are spiritually rooted in their ancestral lands to a greater extent than other parts of society living on, or nearby, the same lands. Furthermore, they are deemed certain \textit{peoples} if they make up separate communities that have existed as such for an extended period of time.\textsuperscript{55} In addition, one of the most commonly used criteria for any definition of indigenous peoples is “self-identification”. When a group defines itself as indigenous, it should be respected unless it clearly constitutes an illegitimate identification.\textsuperscript{56} It is important to keep in mind that indigenous identity differs from country to country and that it is based on the context of the relevant country.\textsuperscript{57} The global consensus is that “no single definition of indigenous

\textsuperscript{54} Ibid., 145.
\textsuperscript{56} See e.g. \textit{ILO 169}, art. 1(2).
peoples is necessary” and that instead, indigenous groups may be identified by using “a combination of subjective and objective criteria”.

It is essential that States and non-State actors keep that in mind when they are operating in an area where there might be indigenous peoples. Even if a community is not defining itself as indigenous it might still be designated as such by international human rights standards, which would require specific actions by States or non-State actors, as will be shown in the coming chapters.

2.5 Right to self-determination

The arguably most central human right of indigenous peoples is the right to self-determination, which can be found in the ICCPR,59 the ICESCR60 as well as the UNDRIP.61 It was one of the most sensitive issues in the negotiations regarding the UNDRIP, since several States did not consider indigenous groups as peoples, which automatically disqualified such groups from the right.62 States feared what the right could entail in terms of indigenous peoples’ calls for independency. It was therefore explained that the indigenous peoples’ right to self-determination was completely compatible with the principle of territorial integrity of States, meaning there was no right for complete independency.63

The right to self-determination is considered a “foundational principle” that establishes the rest of indigenous peoples’ rights and it is therefore one of the most important rights.64 Instead of an individual right, it is a collective right belonging to peoples.65 Therefore, the right does not merely refer to certain populations of “colonial territories” and States, but also to indigenous peoples and other minorities.66 Even if the right does not include a right to independency, it is considered to involve a right to exercise a certain degree of autonomy. Moreover, it includes a right to engage and interact with the rest of society in

58 Ibid., 8.
59 *International Covenant on Civil and Political Rights*, 1976, art. 1. [Hereinafter ICCPR].
60 *International Covenant on Economic, Social and Cultural Rights*, 1976, art. 1. [Hereinafter ICESCR].
61 UNDRIP, art. 3.
63 UN General Assembly, “Rights of Indigenous Peoples: Note by the Secretary-General,” A/66/288 (10 August 2011), para. 64.
64 UN General Assembly, “Rights of Indigenous Peoples: Note by the Secretary-General,” A/68/317 (14 August 2013), para. 73.
the States where the indigenous community resides. According to Cambou and Smis, a degree of indigenous autonomy is however not sufficient. Instead, the right to self-determination must be supported by protection of indigenous peoples’ interests in their natural resources and the management of such resources. Only then will it be ensured that the right to natural resources is realized, which is an important part of the right to self-determination. A proper understanding of the right to self-determination is important in order to ensure that the right to FPIC, which is discussed in Chapter 2.7, is implemented correctly.

2.6 Right to lands, territories and resources

Ever since indigenous peoples first came in contact with colonizers, they have suffered from exploitation and have been dispossessed of their lands, territories and resources. These historical events have had severe impacts on indigenous peoples’ way of life and it is one of the major arguments behind the special protection of indigenous peoples outlined in the UNDRIP. According to the Special Rapporteur Anaya, the indigenous peoples’ right to land, territories and resources is drawn from their own customary law and is therefore “prior to and independent of State recognition”, which means that indigenous peoples do not need a property title to prove their right to lands. The right is directly addressed in the UNDRIP and the ILO 169.

Indigenous peoples have a special bond with their lands, territories and resources, which must be protected. This spiritual bond is, according to UNPFII, an essential part of indigenous peoples’ identity and it is a central aspect of their history and traditional culture. To many indigenous peoples their land is considered “the source of all life”, and

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71 See e.g. the preamble of the UNDRIP.
73 UNDRIP, art. 25-29.
74 ILO 169, art. 13-17.
75 See ILO 169, art. 13 and UNDRIP, art. 25.
as such their lands are the guarantee for the existence of current and future generations. In addition, the right to lands, territories and resources is considered fundamental for the exercise of the right to self-determination. According to Anaya, securing the right is even in some cases a condition for the group’s existence as separate peoples.

In order to protect indigenous peoples’ right to self-determination it is fundamental to recognize and respect indigenous peoples’ territories. As such, UNDRIP art. 26 stipulates that indigenous peoples have the “right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use”. It is every States’ responsibility to ensure legal recognition and protection of these lands. However, it should be noted that according to Anaya, a State’s failure to acknowledge these rights does not imply that MNCs are freed from all responsibilities.

Since the ICERD is applicable to indigenous peoples, CERD has weighed in on the subject as well and stated that all available measures need to be taken in order to fight and eliminate discrimination against indigenous peoples. After that initial statement CERD called on States parties to both recognize and protect indigenous peoples’ right “to own, develop, control and use their communal lands, territories and resources.” For situations where indigenous peoples have lost their lands, territories and natural resources, they have a right to redress, in the form of restitution or just compensation. Redress should be available in situations when indigenous peoples have been disposed of their lands, territories and resources without their “free, prior and informed consent.” Finally, the environment of indigenous lands, territories and resources must also be protected.

Even if States are the primary subjects of the UNDRIP and the ILO 169, MNCs should consider that if indigenous peoples live or otherwise operate in an area where they are about to initiate a project, they should be vary of the likelihood that the indigenous

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78 UNDRIP, art. 26.
79 See UNDRIP, art. 26 and ILO 169, art. 14-15.
82 Ibid., para. 5.
83 See UNDRIP, art. 28 and ILO 169, art. 15-16.
84 UNDRIP, art. 29.
peoples there have “some sort of rights” over those lands and resources, even if the content of these rights and the actual implications for a corporation might be discussed.

2.7 Right to free, prior and informed consent
The right to FPIC is considered a fundamental principle for ensuring indigenous peoples’ right to effective participation, which is an essential part of the right to self-determination. It is a collective right for indigenous peoples, which means that, in order to obtain the indigenous peoples’ FPIC consultation must be carried out in good faith with them through their representative bodies prior to the approval of a project that affects them. Ward reiterates that consultations with affected indigenous communities must therefore occur ahead of all relevant parts of a project developed within indigenous lands and territories.

The Special Rapporteur (2008-2014) claimed that “consultation in good faith” is not sufficient in order to uphold the right to FPIC. Instead, there is an important presumption that a planned activity should be discontinued if it would have “a significant, direct impact on indigenous peoples’ lives” and the indigenous community’s FPIC has not been obtained. The presumption may under certain circumstances even amount to a prohibition of the activity if local indigenous peoples refuse to offer their consent. Such a scenario could for example arise when affected indigenous peoples refuse to give their consent to a proposed mining activity on or near their lands.

Ward on the one hand, stated that he did not consider the principle of consultation in good faith to necessarily include an absolute consent requirement. However, he acknowledged that through the development of customary international law the right to FPIC might eventually include an obligation to ensure indigenous peoples’ consent prior

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88 UNDRIP, art. 32; See also ILO 169, art. 16.
92 Ibid.
to an activity.\textsuperscript{93} Morrison on the other hand, concluded that since the customary international law is in development regarding the consultation process, “governments should not allow a project to proceed when the consent of an indigenous community is absent”, even if there are no such prohibitions in national laws.\textsuperscript{94}

2.7.1 Quasi-judicial decisions and interpretations by UN Treaty Bodies
The right to FPIC has also been addressed by various UN Treaty Bodies. Even though the decisions and statements made by the expert committees are explicitly non-binding they are still of significant relevance, since the developed “jurisprudence” may be used to prove the meaning of international human rights law standards.\textsuperscript{95} This was confirmed by the International Court of Justice (ICJ), which said that the opinion of the Human Rights Committee has “great weight” since it is “an independent body established specifically to supervise the application of [the ICCPR]”.\textsuperscript{96}

In 2004, an individual complaint under the ICCPR was submitted to the Human Rights Committee by a Peruvian farmer belonging to the ethnic minority Aymara.\textsuperscript{97} The claimant stated that Peru had violated her right under Article 27 of the ICCPR to enjoy her own culture in community with members of her group, since the government’s decision to divert water from the area where she had her farm had caused the death of her livestock. The committee first concluded that economic development, which was the primary reason for the water diversion, generally is a legitimate aim of a State. It however added, that a State cannot undermine the rights protected under Article 27 in pursuit of a goal of this type. The committee reached the conclusion that if a measure only has a minor impact on indigenous peoples’ lives, it is not necessarily a violation of the article.\textsuperscript{98} However, for a measure to be acceptable the affected indigenous peoples have to be ensured their right

\textsuperscript{94} J. Morrison, The Social License (2014), 76.
\textsuperscript{95} D. Moeckli et al., International Human Rights Law (2014), 90.
\textsuperscript{96} ICJ, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment ICJ Reports (30 November 2010), 664.; This opinion had also been previously held by the Human Rights Committee, see Human Rights Committee, “General Comment No. 33: The Obligations of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights,” CCPR/C/GC/33 (5 November 2008), para. 11-13.
\textsuperscript{98} Ibid., para. 7.4.
to participate in the decision-making process. In order to ensure effective participation, the affected indigenous peoples must have their right to FPIC respected.  

Indigenous peoples’ right to FPIC has also been referred to in interpretations of human rights made by the UN Treaty Bodies, including General Comments and General Recommendations. Even though they are not mentioned in Art. 38 of the ICJ Statute as a source of international law, interpretations of treaty norms made by international bodies provide the norms with added content and help shape customary international law. The UN Treaty Bodies may in their interpretations of treaty norms define State obligations under the relevant treaty. According to several authors, such interpretations should be considered as secondary treaty law since States have accepted this procedure by ratifying the treaties.

In the commentary concerning Article 15 of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) concluded that indigenous peoples’ relationship to land and nature needs to be protected to warrant the future of indigenous culture. In order to protect this special relationship it is a legal obligation for States to ensure indigenous peoples’ right to FPIC. CESCR added that States should protect indigenous peoples from having their rights violated by third parties, such as mining companies. The Committee on the Elimination of Racial Discrimination (CERD) has also elaborated on the right to FPIC in one of its General Recommendations. After noting that the ICERD is applicable to indigenous peoples, CERD called on States to ensure indigenous peoples’ right to non-discrimination and their equal participation in public life and that “no decisions directly relating to their rights and interests are taken without their informed consent”. In addition, CERD stated that States should take steps to return indigenous territories and lands that indigenous peoples were deprived of without their free and informed consent. If not possible, the affected indigenous peoples should be awarded with “just, fair and prompt compensation”, preferably in “the form of lands or

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99 Ibid., para. 7.6.
100 See Statute of the International Court of Justice, art. 38.
102 D. Moeckli et al., International Human Rights Law (2014), 89.
104 Ibid., para. 37.
105 Ibid., para. 54(a).
106 Ibid., para. 4(d).
2.7.2 Breaking down the requirements
As shown above, the right to FPIC has several parts to it and for a State to successfully fulfil the obligation to protect the right, a series of conditions must be met. According to Ward, parties first need to show special attention to the conditions of the consultation process in order to ensure that consent has not been achieved by means of coercion. According to the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), free therefore means that manipulation or other similar coercive measures cannot be used in order to achieve the consent. Secondly, any consent must be obtained prior to the activity that will affect the indigenous peoples. It implies that affected indigenous communities have to be engaged early on in the decision-making process. This is considered important in order to ensure that they have sufficient time to make a group-decision, using their own decision-making process.

Thirdly, indigenous communities often lack political power, economic power and even knowledge, which is why they need some extra support in the consultation process. In order for the consent to be informed it is therefore essential that the parties involved in the process have access to all relevant information and that this information is accurate regarding the impacts of the proposed activity or measure. In addition, the processes of the consultation needs to respect cultural traditions and certain cultural differences, ensure that a language the affected indigenous peoples understand is used when information is shared and that all information is shared through the correct channels, respecting

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108 Ibid., para. 5.
109 Ibid.
traditional decision-making mechanisms. The information offered to the relevant indigenous community has to be correct and understandable. In order to satisfy the last requirement it is therefore important that both the State and the corporation understand the affected indigenous community’s culture, to be able to engage properly.

Lastly, the indigenous peoples’ possible refusal to give their consent to the project needs to have an impact on the final decision, even if it does not amount to a full veto. Consent is especially important concerning activities that have significant impact on indigenous peoples, such as “large-scale natural resource extraction on their territories.” The consent part of the principle means that the indigenous community involved in the process should have a right to oppose a measure or an activity, and not only that they should be informed spectators of the decision-making process. The right to FPIC is supposed to ensure meaningful engagement with local indigenous groups concerning their resources, lands and territories. It is therefore necessary that consultations with the local indigenous groups are not merely considered an administrative hurdle.

Anaya elaborated on the few and strict exceptions to the consent requirement concerning extractive activities. The first exception is if it is evident that the proposed activities within indigenous territories will not have any substantial effects on indigenous peoples’ right to lands, territories and resources. This is however mainly a hypothetical possibility due to the impact extractive activities have on lands. Secondly, consent is not required when it is clear that the proposed project limit indigenous peoples’ rights to an extent that is accepted according to principles of international human rights law. States may accordingly limit the exercise of various human rights if it is deemed necessary and

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114 Ibid., 84.
the limitations are proportional “with regard to a valid public purpose”. In deciding whether a limitation to indigenous peoples’ rights meets the requirements it is important to consider the importance of the rights potentially affected for “the survival of indigenous peoples”.

2.8 Discussion
The human rights of indigenous peoples are relatively clear. Indigenous peoples’ right to self-determination implies that they should be guaranteed a certain amount of autonomy within a State, even if this does not amount to a right to independency. Indigenous communities should be allowed to have their own institutions and political bodies and they should partake in decision-making concerning activities and measures that affect them. In addition, the spiritual relationship indigenous peoples have with their lands must be protected, both culturally and legally. To be able to ensure such protection, indigenous peoples’ FPIC must be achieved before any approval of a project, measure or activity that might affect the indigenous peoples. It is however problematic, as the case studies later will highlight, when indigenous peoples are not giving their FPIC and yet, the activities proceed irrespective of the “no”. This is arguably not an acceptable approach according to international human rights law and interpretations of such standards.

Another pressing issue regarding indigenous peoples’ rights is that even though the standards are derived from norms in binding treaties that most States have ratified, the detailed rights may only be found in non-binding frameworks or non-binding commentaries and interpretations. Customary international law is however also binding on States irrespective of any ratification or non-ratification of a treaty. That leaves us with the question of which parts of these norms and standards have become customary international law and what is not. Even if the right to FPIC has yet to fully be a part of customary international law, Ward considers that the requirement to undertake “consultations in good faith” probably is. Regrettably, that principle awards indigenous peoples with insignificant bargaining power in comparison to their, often powerful, counterparts. Since indigenous peoples often lack both knowledge and significant power

121 Ibid., para. 32. See also UNDRIP, art. 46(2).
122 Ibid., para. 36.
it is furthermore important that they have the support of the right to FPIC in order to correct the imbalances that inherently exist.

However, the most significant question is what impact the affected indigenous refusal to give their consent has on the consultation and the decision-making process. Even though some human rights advocates, such as Anaya, consider that indigenous peoples have something similar to a veto, that seems to be rejected by States and corporations, which might imply that such a veto is not yet part of customary law. Regardless of how true this might be, what must be said on the contrary is that if indigenous peoples’ refusal to give their consent has no impact on the decision-making process it erodes the right to lands, territories and resources. It would make the right to FPIC seemingly irrelevant since the consent can never really be free. To make the right valuable for indigenous peoples, a “no” must have some implications. There needs to exist a genuine will to engage on behalf of States and corporations. If the only role of indigenous peoples is to offer their consent with no possibilities of withholding their consent for proposed activities, it should be questioned if carrying out “consultations in good faith” is sufficient to protect indigenous peoples’ right to self-determination and to lands, territories and resources. It should be added that it clearly is beneficial for an indigenous community to be informed rather than to not be informed at all. However, a right to merely be informed is something utterly different from a right to FPIC, and does not grant indigenous peoples the leverage that they need.

Therefore, Anaya’s position that there is a presumption that activities should normally be discontinued if no consent has been given by affected indigenous peoples, seems like a reasonable position. If the refusal to consent has no impact, consultation becomes nothing more than an administrative hurdle, which probably was never the intention. A veto right, or similar, does not mean that no mining projects will ever occur, but it means that mining companies must be prepared to walk away from a project if they cannot obtain indigenous peoples’ consent. It is easy to understand why corporations are not thrilled about giving away such power and that they are not inclined to support such an interpretation. However, it is important to discuss what rights are being discussed. It is not the corporate right to exploit natural resources, but indigenous peoples’ right to self-determination and right to lands, territories and natural resources, which most countries in the world have claimed to be in favour of.

As has been shown in this chapter, indigenous peoples have a certain set of rights that needs to be protected, especially in relation to their lands, territories and resources. The
following chapters address whose responsibility it is to protect the discussed rights and points to what measures States and corporations ought to take.
3 State responsibility for human rights and indigenous peoples’ rights

3.1 Introduction

International human rights law primarily targets and regulates the actions and measures of States. The States are bound by the treaties they have ratified as well as by customary international law. However, it should be noted that what is and what is not yet customary international law is often discussed by States, professionals and scholars. States are the principal subjects of human rights law and therefore, they have a duty to ensure that non-state actors are not involved in violations of human rights. All human rights treaties, including the ICCPR, the ICESCR, the ICERD and the ILO 169, impose duties on States primarily.

The Guiding Principles address the State responsibility to protect and to promote human rights. Even if States are not directly responsible for corporate violations of human rights, such an incident implies that a State has not complied with its obligations under international human rights law. States should therefore take all necessary measures in order to “prevent, investigate, punish and redress” corporate violations. The Guiding Principles also call on States to make it clear for corporations domiciled within their territories that they are expected to respect human rights while operating in other host countries.

As part of their obligations under international human rights law, States must “establish legal and policy frameworks that effectively monitor and enforce relevant international laws, norms and standards”. It is therefore the duty of a State to ensure that the right to self-determination of all peoples, including indigenous peoples, are effectively protected. Since customary international law is binding for States the UNDRIP

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126 The Guiding Principles will be discussed primarily in chapter 4.4.
128 Ibid., principle 2.
and the norms therein also impose duties. This includes the responsibility to protect indigenous peoples’ right to lands, territories and resources and the right to FPIC (as discussed in the previous chapter). Since States have the primary responsibility to protect the indigenous peoples’ rights outlined in chapter 2, it is of interest to see whether the States involved in the case studies, Sweden and Chile, have fulfilled their obligations and duties. The countries’ ratifications of relevant treaties will be assessed, as well as the UN Treaty Bodies’ observations of the two countries’ compliance with indigenous peoples’ rights.

3.2 Sweden’s responsibility for indigenous peoples’ rights

In 2011, Sweden improved the status of the Sami when it updated the Swedish Constitution and added a paragraph stating that the Sami’s possibilities to retain and develop their own social life and culture must be promoted. Sweden voted in favour of the UNDRIP. However, it has not ratified the ILO 169 even though it on several occasions has been recommended by UN Treaty Bodies to do so. Several other States have also, through the Universal Periodic Review, called on Sweden to ratify the treaty. Even if it has not ratified the ILO 169, it is still bound by the customary international law reaffirmed in the UNDRIP.

CERD has criticized Sweden’s failure to fully protect indigenous peoples’ rights and denounced Sweden in 2008 for postponing the ratification of the ILO 169. In the subsequent concluding observations made by CERD in 2013, it once more expressed concern for the situation of the Sami. It was especially concerned with issues regarding the significant industrial and extractive activities carried out on Sami lands and territories and the fact that such activities proceeded without the Sami’s FPIC. CERD recommended

130 Ibid.
that Sweden produce legislation to “ensure respect for the right of Sami communities to offer free, prior and informed consent” when proposed activities, such as mining projects, may affect the Sami.\footnote{CERD, “Concluding Observations on the Combined Nineteenth to Twenty-First Periodic Reports of Sweden, Adopted by the Committee at Its Eighty-Third Session (12–30 August 2013),” CERD/C/SWE/CO/19-21 (23 September 2013), para. 17.} CESC\footnote{CESCR, “Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden,” E/C.12/SWE/CO/5 (1 December 2008), para. 15.}R criticized Sweden’s failure to ratify the ILO 169 and asked Sweden to consider the ratification of the treaty.\footnote{CERD, “Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Nineteenth to Twenty-First Periodic Reports of States Parties Due in 2013: Sweden,” CERD/C/SWE/19-21 (5 November 2012), para. 108.} The Swedish Government has claimed it is in the process of ratifying the ILO 169 but that it however considers it to be complicated due to the question of land rights in Article 14.\footnote{Ibid., para. 106.} One of the Swedish government’s arguments for suspending the ratification of the ILO 169 is that the Swedish Government since 2011 has discussed and negotiated a Nordic Sami Convention, which would reiterate the rights of the Sami as indigenous peoples and strengthen their rights.\footnote{See T. Koivurova, “The Draft for a Nordic Saami Convention,” \textit{European Yearbook of Minority Issues} Vol.6 (2006/7), 103-136.} The process of the Nordic Sami Convention did however start even earlier, namely in 2005 when a draft of the Nordic Sami Convention was provided by an expert group composed of scholars and professionals from the Nordic countries.\footnote{See e.g. CERD, “Concluding Observations on the Combined Nineteenth to Twenty-First Periodic Reports of Sweden, Adopted by the Committee at Its Eighty-Third Session (12–30 August 2013),” CERD/C/SWE/CO/19-21 (23 September 2013), para. 19.} So far little progress has been made and UN Treaty Bodies have on several occasions called on Sweden to finalize the process of drafting and negotiation the convention.\footnote{The Sami Parliamentary Council, “Pronouncement : The Declaration by the Sami Parliamentary Conference on the Nordic Sami Convention.” Sametinget, Umeå, 20 February 2014, Available: https://www.sametinget.se/73165.} In 2014, a Sami Parliamentary Conference lamented the slow development of the Nordic Sami Convention and reiterated that the Nordic Sami Convention cannot be approved without the support of the Sami parliaments of Sweden, Norway and Finland. It stated that the convention must be based on international human rights standards and that such standards are not subject to negotiations. Lastly, the Conference demanded that the negotiations of the Nordic Sami Convention are completed in 2016.\footnote{“Nordisk samekonvention” (1 June 2015), \textit{Government Offices of Sweden (Regeringskansliet)}, Available: http://www.regeringen.se/artiklar/2015/06/nordisk-samekonvention/.”} The negotiations are supposed to be finalized in March 2016.\footnote{“Nordisk samekonvention” (1 June 2015), \textit{Government Offices of Sweden (Regeringskansliet)}, Available: http://www.regeringen.se/artiklar/2015/06/nordisk-samekonvention/.”}
3.3 Chile’s responsibility for indigenous peoples’ rights

In Chile, international law has had significant impact on national laws, ensuring that international human rights law is not merely considered as soft law, which States are not obligated to comply with. Among other things, this has promoted the principle that indigenous peoples and other communities are considered as rights-holders and that they therefore may use standards from international law, such as international human rights, in support of their claims. Since the ILO 169 has been ratified by Chile, the standards therein have been used by individuals and communities to support their claims in cases where such groups otherwise would have little leverage. Chile has also ratified the ICCPR, the ICESCR and the ICERD.

Another institution that has proved to be a significant support for indigenous peoples’ rights is the Inter-American Court of Human Rights. Chile, in comparison to the likes of the USA and Canada, has both ratified the American Convention on Human Rights and recognized the jurisdiction of the IACtHR, which means that Chile has accepted to be bound by the decisions of the court. This is important since the Inter-American Court of Human Rights, allegedly, has the most progressive jurisprudence on the right to FPIC and the right to consultation.

148 T. Ward, “The Right to Free, Prior and Informed Consent: Indigenous Peoples’ Participation Rights within International Law,” Northwestern University Journal of International Human Rights Vol. 10:2 (2011), 84. The Inter-American system, including the IACHR and the Inter-American Court of Human Rights (IACtHR), deserves to be mentioned since it established protection of indigenous peoples’ rights as early as 1971. In 1972, the OAS issued a resolution that called on members to undertake all appropriate measures to defend indigenous peoples’ rights, ensuring especially that they were not subject to racism and discrimination (See: UNPFII, “Study on Indigenous Peoples and Corporations to Examine Existing Mechanisms and Policies Related to Corporations and Indigenous Peoples and to Identify Good Practices,” E/C.19/2011/12 (10 March 2011), para. 20). One example of this is the Saramaka v. Suriname case. It concerned land concessions for mining projects awarded by the State of Suriname regarding lands of the Saramaka peoples, an indigenous community. In the final decision, the IACHR claimed that Suriname had to respect the Saramaka peoples’ right to their lands unless the State manages to obtain FPIC from the Saramaka people. (See: IACtHR, Case of the Saramaka People v. Suriname (28 November 2007), para. 124 and 214(5)).
Considering Chile’s ratification of the ILO 169 and the acceptance of the IACtHR’s jurisdiction it seems as if indigenous peoples’ rights would be well-protected in Chile. However, Chile has also received criticism from the UN Treaty Bodies concerning the protection for indigenous peoples’ rights. In 2007, the Human Rights Committee recommended that Chile respect indigenous peoples’ right to lands in negotiations with indigenous communities. It suggested that Chile should respect the right to consultation before any exploitative activities are granted on indigenous lands.\textsuperscript{149} Seven years later, the Committee directed similar criticism towards the Chilean government and recommended, among other things, that Chile establish an efficient consultation system, to ensure that indigenous peoples’ FPIC is obtained concerning activities that affect them. It also called on Chile to “[i]ntensify its efforts to guarantee the full enjoyment of the right of indigenous peoples to their ancestral lands.”\textsuperscript{150} Similar recommendations have been made by CERD\textsuperscript{151} and CESCR.\textsuperscript{152}

Chile, similar to Sweden, seems to fail to fulfil its obligations under international human rights law, regardless of its seemingly strong support for indigenous peoples’ rights. It means that there is a governance gap in Chile, which allows multinational mining corporations and other MNCs to be involved in violations of international human rights without being held accountable.

3.4 State responses to business and human rights issues

3.4.1 National Action Plans

In order to remedy the existing governance gap concerning business and human rights, several States have adopted National Action Plans (NAPs) addressing such issues.\textsuperscript{153} Developing NAPs is part of the responsibility for States to protect human rights discussed

\textsuperscript{150} Human Rights Committee, “Concluding Observations on the Sixth Periodic Report of Chile,” CCPR/C/CHL/CO/6 (13 August 2014), para. 10.
\textsuperscript{151} CERD, “Concluding Observations on the Combined Nineteenth to Twenty-First Periodic Reports of Chile, Adopted by the Committee at Its Eighty-Third Session (12–30 August 2013),” CERD/C/CHL/CO/19-21 (23 September 2013), para. 12-13.
in the Guiding Principles (which will be further discussed in chapter 4). In their action plans, Governments should include a commitment to protect against corporate violations of human rights as well as a call for corporations to follow the Guiding Principles and respect human rights. In addition, States should ensure access to remedies for victims of adverse corporate impacts on human rights.

The idea of NAPs on business and human rights received great acceptance among EU members States. The EU adopted an Action Plan on Human Rights and Democracy, involving all EU institutions and the Member States. The EU Action Plan includes a call on EU members to develop and implement NAPs on business and human rights. This had a considerable effect and in 2016 eight EU Members had already launched their respective action plans. There are also 19 other countries that have either begun to develop their NAPs or that have stated their intentions initiate the process.

Sweden is one of the countries that has adopted a NAP. It states that “[t]he Government’s goal is to ensure full respect for human rights in Sweden.” It is also stated in the action plan that state-owned companies should strive “to comply with international guidelines such as the UN Guiding Principles.” Finally, it is stated that the “action plan marks the start of Sweden’s efforts to implement the [Guiding Principles].” The Swedish Government will furthermore assess whether national legislation is fulfilling the obligations set out in the Guiding Principles to see if there are any legislative gaps that need to be sorted out.

Sweden’s commitments and intentions might be genuine but the vague and abstract language used in the NAP makes it difficult to use when assessing whether the protection

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159 Ibid. The 19 countries consist of both EU Members and Non-Members.

160 See ibid. Chile has however not adopted a NAP but is said to currently undertake a “national baseline assessment.”


162 Ibid.

163 Ibid., 19.

164 Ibid., 27.
of human rights improves or not. Since the NAP mostly highlights Sweden’s intentions to protect human rights it becomes difficult to claim that Sweden has not fulfilled the commitments outlined in the NAP. After all, it is not particularly difficult to “start efforts” and “strive to comply”. Even though the NAPs show good intentions on behalf of States, it seems to be just that. Action plans are only describing States’ intentions and are not legally binding. Since the responsibility to adhere to standards in binding treaties and to protect human rights is already legally binding, it seems as if at best NAPs are achieving minimal improvements. In fact, it is possible that the actions plans initially are a step backwards since legal responsibility is transformed into an intention to protect human rights in the future.

3.5 Discussion
After having considered the duties and responsibilities of States and the UN criticism directed towards Chile and Sweden it is clear that States are not always fulfilling their obligations under international human rights law. It highlights that the States in question are not taking their due responsibility and that they are failing to protect indigenous peoples’ rights. The calls made by the UN Treaty Bodies to ratify treaties may eventually have an impact on national norms and standards but does not seem instantly efficient. It must also be noted that if the UN criticism is factual, Chile’s ratification of the ILO 169 does not seem to have ensured the protection of indigenous peoples’ right to lands, territories and resources and the right to FPIC. Even if no significant assumptions can be drawn from this, it implies that even if Sweden would listen to the recommendations and ratify the ILO 169 it would not necessarily ensure indigenous peoples of their rights.

Another important question is what importance NAPs on business and human rights have in relation to States’ prior responsibility for upholding international human rights standards. The vague language of the NAPs and the fact that they are non-binding implies that States are not bound by existing conventions and customary international law. The risk is that NAPs, because of the wording of the intentions, are undermining the legally binding commitments that States have already made, since the commitments in the NAPs seem completely based on goodwill rather than legal commitments.

From what has been shown regarding State’s protection, or failed protection, of indigenous peoples’ rights, it seems fair to say that indigenous communities are not
effectively protected from having their rights violated. When a State fails to act in the appropriate way there are not many options left for indigenous peoples and other vulnerable groups. Therefore, it is important to look at the regulatory framework on corporate responsibility for human rights and whether those frameworks help close the governance gap and ensure due protection.
4 Corporate responsibility for human rights and indigenous peoples’ rights

4.1 Introduction
Even if the primary responsibility to protect human rights lies with States, primarily host States, corporations also have responsibilities since it is not uncommon that States are not willing or not able to ensure that corporations can be and are held accountable for being involved in human rights violations. This lack of political will to successfully protect international human rights has become a major concern. Since States often have important interests in the economic benefit that large MNCs may bring to their countries there is a risk of a “race to the bottom” if corporations are only obligated to respect national legislation. States that are interested in foreign investment may in similar cases be tempted to lower their human rights standards in order to attract MNCs that are looking for significant profit margins at the expense of low human rights standards. The risk for a never-ending race to the bottom is significant if a company only needs to adhere to national legislation regarding human rights, evading all international regulations.

In 2008, on the discussion of this existing governance gap, the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG) said:

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization. [...] These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”

The question is whether the gaps Ruggie addressed have been closed. In order to assess the efficacy of the current regulatory initiatives that address corporations’ human rights responsibilities, Deva has suggested that they should be considered effective only if they successfully manage to ensure that corporations fulfil their human rights obligations, and ensure that companies that are not fulfilling such obligations are brought to justice. In order words, a framework should include a redressive element. However, he reiterated that such an element does not necessarily have to entail legal sanctions or penalties.171

As the previous chapter illustrated, States are not always taking their due responsibility to protect indigenous peoples’ rights. A State’s failure to comply with international human rights law does however not imply that corporations only have to consider national legislation when they operate. In order to close the governance gap, several regulatory frameworks have been developed and introduced to address the responsibilities of multinational corporations to respect international human rights when they operate. Three of these frameworks, the Global Compact, the Guidelines and the Guiding Principles, will be presented and discussed below.

4.2 UN Global Compact

In 1999, UN Secretary-General Kofi Annan recognized the increasing importance of MNCs as promoters for the values of the UN. The increased power of MNCs meant that some corporations could have greater impact on global affairs and international development than UN Member States.172 Around a year later the UN Global Compact was officially launched in an effort to address the widening governance gaps resulting from globalization and extended supply and value chains.173 It was intended to be complementary to States’ actions and measures, and not as a substitute for State regulation.174 The approach enjoyed strong support from governments and was also

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endorsed by the UN General Assembly.\textsuperscript{175} Furthermore, a central aspect of the framework’s success is how it has managed to appeal to all kinds of businesses from both developed and developing countries worldwide,\textsuperscript{176} which has led to greater awareness concerning corporate responsibility for human rights globally.\textsuperscript{177}

The Global Compact is a cooperative voluntary framework developed together by businesses and the UN in order to promote shared values and principles that aim to ensure that globalization is beneficial to all of society.\textsuperscript{178} Since it is not “a compliance based initiative”\textsuperscript{179} it uses a variety of other strategies in order to achieve results, including concepts of enlightened self-interest and a system for corporations to share best business practices.\textsuperscript{180} It is based on ten principles in the areas of human rights as well as labour standards, the environment and anti-corruption. Apart from following the principles, participating corporations are expected to help the Global Compact fulfil its two main objectives. The first objective is to ensure that the Global Compact principles are spread to and integrated in business activities worldwide, and the second objective is that participants should support broader UN goals.\textsuperscript{181} The idea is that the Global Compact should function as a social contract for corporations. As such, it intends to determine under what “conditions society grants private corporations the right to pursue the maximization of profits.”\textsuperscript{182} It has therefore been stated that the idea behind the Global Compact changed the perspective from corporations being a part of the problem of globalization, to instead seeing corporations as part of the solution.\textsuperscript{183}

To become a participant of the Global Compact, the CEO of a corporation merely has to send a letter to the UN Secretary General where he/she endorses the Global Compact

\textsuperscript{176} Currently more than 1300, although less than 9000 are deemed “active”. See: “Our Participants,” \textit{UN Global Compact}, Available: https://www.unglobalcompact.org/what-is-gc/participants (Accessed 25 January 2016).  
\textsuperscript{177} See Deva’s discussion on this: S. Deva, “Global Compact: A Critique of the UN’s ‘Public-Private’ Partnership for Promoting Corporate Citizenship,” \textit{Syracuse Journal of International Law and Commerce} Vol. 34:1 (Fall 2006), 149.  
\textsuperscript{179} UN Global Compact, “Note on Integrity Measures,” (14 April 2011), para. 4.  
and its principles. Because of this structure it allows for corporations that are not fulfilling their human rights obligations to mix with responsible businesses, which therefore undermines the efforts of “moral” companies. The idea to invite all corporations as participants was criticized by Thérien and Pouliot since it risks undermining the traditional values of the UN.

Baughen also directed critique towards the Global Compact and claimed that it was undemanding. Even if it may persuade some participants to adopt policies for the protection of human rights it does not ensure that they comply with their own standards since there is no enforcement mechanism available. The only kind of enforcement that the Global Compact relies on seems to be social accountability, which might not be effective for all situations. Furthermore, a problematic aspect of a voluntary framework like the Global Compact is, according to Liubicic, that it mainly focuses on financial and reputational risks. It means that corporations which are not particularly concerned with their image or goodwill, and corporations that merely work with “intermediate-use goods”, are less likely than other corporations to uphold the standards in the frameworks.

The undemanding nature has furthermore led to claims that the Global Compact is used for “bluewashing”. The use of the UN logo implies that a corporation respects the values of the UN, yet there are few safeguards in place to ensure compliance. According to Deva, a lot needs to be done in order to make sure the Global Compact effectively leads to improved respect for human rights and that it does not merely help MNCs to improve their goodwill. He therefore stated that the Global Compact Office should develop new mechanisms and strategies in order to ensure that corporations not only state their intent to fulfil their human rights obligations, but that they take action to

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ensure such fulfilments. Oshionebo, on the other hand, suggested that the Global Compact should at a minimum have a certain set of social standards that corporations have to comply with to be able to participate, to ensure that the ideas of the Global Compact are not undermined.

In order to ensure that participants are complying with Global Compact standards, they are expected to communicate, each year, what measures they have taken in order to implement the Global Compact principles in their business operations. A company that does not fulfil the communication requirements will be listed as non-communicating by the Global Compact Office. If a company does not fulfil the communication requirements for another year it will be expelled as a participant of the Global Compact. However, when a corporation is expelled, there is only limited information available as to why it was expelled. Therefore, it cannot be seen whether a company has failed to comply with the Global Compact principles or not. As a means of warranting its reputation, the Global Compact has introduced a mechanism to address allegations of systematic or egregious abuses of the Global Compact principles, including involvement in torture, forced labour etc.

The purpose of the complaints mechanism is to facilitate dialogue between the complainant and the targeted corporation to pressure the target to act differently in the future. If the targeted company completely refuses to partake in any dialogue it will eventually be listed as “non-communicative” and could potentially be delisted. If the allegations are found to be “frivolous” or if another institution is better suited to handle the issue, the Global Compact does not get involved.

193 UN Global Compact, “Note on Integrity Measures,” (14 April 2011), para. 3.
195 UN Global Compact, “Note on Integrity Measures,” (14 April 2011), para. 4.
197 UN Global Compact, “Note on Integrity Measures,” (14 April 2011), para. 4.
4.2.1 The human rights principles

Two out of the ten principles of the Global Compact concern human rights. They are:

_Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and_

_Principle 2: make sure that they are not complicit in human rights abuses._\(^{199}\)

As seen, the Global Compact uses vague and general language, which has led to questions regarding whether the framework may actually achieve promoting “responsible corporate citizenship” and respect for human rights.\(^{200}\) The Global Compact is in certain aspects more ambitious than other similar frameworks (like those discussed in the following chapters), since it does not only call on its participants to respect human rights but also to support human rights.\(^{201}\) On this note, Wynhoven concludes that the reason for why corporations are keen to not merely respect human rights is because corporations understand the value of societal improvements and how they are important for growth and long-term sustainability. In addition, there are often significant incentives for achieving positive impacts on human rights rather than merely avoiding harm, since the former may be part of a business strategy to be an “ethical” corporation.\(^{202}\) It is made clear that internationally proclaimed human rights includes indigenous peoples’ rights.\(^{203}\)

In order to respect and promote indigenous peoples’ rights a company should first of all adopt a code of conduct that specifically addresses such rights and commits to respect them. It should conduct Human Rights Due Diligence (HRDD) (which will be further discussed under chapter 4.4) to see whether the business operations have adverse impacts on indigenous peoples’ rights. Furthermore, a corporation should “consult in good faith” with affected indigenous peoples and “commit to obtain the (and maintain) the free, prior and informed consent of indigenous peoples”.\(^{204}\) It is stated that corporations that ensure

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\(^{202}\) Ibid., 95.


their fulfilment of the right to FPIC “are better positioned to avoid significant legal and reputational risk.”

It is explained that a corporation that fails to comply with indigenous peoples’ rights risks not achieving a “social license to operate”, which may lead to serious operational risks, including lawsuits, halts in its operations and other obstructions. In a reference guide provided by the Global Compact Office to participants it was furthermore stated that collaborating with indigenous peoples could lead to various benefits for the company, such as “stronger relationships with communities and other stakeholders resulting in fewer conflicts and disputes”, “reputational benefits” and “recognition by investors”. The idea seems to be that it is inherently beneficial to take actions that respect human rights. However, Oshionebo has criticized this idea and called it both untrue and “a myth” since there are instances when it is not financially beneficial act accordingly.

4.2.2 Discussion

Even though the spread of the Global Compact might have led to greater awareness concerning corporate responsibility for human rights globally, it should be questioned on its effectiveness on achieving improved protection for indigenous peoples’ rights, as well as other human rights. Especially when those rights are in conflict with strong corporate interests. Deva has stated that any regulatory framework may and should be assessed on its efficacy on two different levels, the preventive and the redressive level. However, the Global Compact almost completely lacks a redressive element. The arguments for why a corporation should respect human rights primarily concern financial and reputational risks rather than that it is stated as an obligation. In a situation where a Global Compact participant fails to comply with international human rights standards the only redressive element seems to be delisting and expulsion as a participant. In a situation where a claim is made that a participant has been involved in systematic and/or egregious

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205 Ibid., 25.
abuses of human rights the Global Compact merely facilitates dialogue, which can hardly be called redressive.

Rather than focus on redressive elements, the idea is that companies will comply with the standards they have stated that they will uphold because of enlightened self-interest and because of the financial and reputational risks they might face if they are not compliant. If they fail, the idea seems to be that stakeholders, such as civil society and local communities, will hold the corporations accountable. The problem with similar arguments is that smaller companies are unlikely to be persuaded since they are not being scrutinized by the public and the media to the same extent as large companies. Inevitably, this will also impact different business sectors in different ways, depending on whether consumers demand change or not. Finally, if economic interests are the main reasons for complying with international human rights law it loses its moral value and effectively erodes the fundamental principles of human rights.

For the purpose of this thesis, the most problematic aspect is that financial risks might not be convincing for a mining industry that might have to abort a project because of affected indigenous peoples’ refusal to give their consent. That it is easy to become a member in order to improve the corporation’s image, might also be used by a mining company that wishes to present an image of itself as a corporation that respects human rights. This might occur regardless of the human rights standards that the corporation operates by since there is no threshold for participation. Even if it is positive that the Global Compact calls on corporations to support human rights, rather than merely respect, it is probably more important still, that corporations effectively respect human rights, rather than that certain companies in only certain sectors support and respect human rights.

While it is an achievement that the Global Compact, to some extent, changed the perspective from corporations as being a part of the problem of globalization, to instead seeing corporations as part of the solution, it could be questioned whether this holds true in all cases. Even though there is no obvious reason for why a clothing company would not be able to support labour rights, the situation is somewhat different for a mining company and indigenous peoples’ rights to self-determination, to lands and to FPIC. Due to the inherent invasive nature of the mining industry it is difficult to see such corporations as part of the solution to ensure the protection of indigenous peoples’ lands, since what the companies want might in fact be the lands.
4.3 OECD Guidelines for Multinational Enterprises

The OECD is made up of 34 member countries and its goal is to promote improved “economic and social well-being of people around the world”; 210 In 1976, the OECD adopted the first version of its Guidelines for Multinational Enterprises (Guidelines). Since then, the Guidelines have been updated and reviewed six times to adequately address emerging issues and developments on the national and international level. 211 The Guidelines regulate the operations of multinational enterprises operating within or from an OECD Member State or another adhering country. They cover several themes, including environmental issues, bribery issues and labour rights, and since the 2000 update they also include specific human rights provisions. 212 The Guidelines are recommendations addressed to multinational enterprises on behalf of governments and it is clarified that since they are merely recommendations, compliance with the Guidelines cannot be legally enforced. 213 Instead, the idea is that voluntary implementation is essential to ensure effective corporate responsibility. 214 It is however noted that some of the standards in the framework may already be regulated by international or national laws, which could entail that they are binding under certain circumstances. 215

The framework is made up of eleven chapters. 216 Chapter 4 concerns human rights and it includes calls on enterprises to 1) respect human rights, 2) avoid causing or contributing to negative human rights impacts, 3) prevent or mitigate adverse human rights impacts, 4) have a human rights policy in place, 5) undertake HRDD and 6) help remediate any adverse human rights impacts the companies have caused. The chapter was structured on the basis of the Guiding Principles (which will be studied in chapter 4.4). 217 As such, the two frameworks share much of the same positive and negative aspects, apart from some exceptions. 218

216 Ibid., 5.
217 Ibid., 31.
It is stated that a multinational enterprise is expected to respect human rights regardless if a state has failed to comply with its international human rights obligations. Therefore, a company should always refer to the standards in the UDHR, the ICCPR and the ICESCR when it assesses its operations and activities. Even if some industries may impact more on certain rights than others, the Guidelines calls on each company to review its impact on the whole spectrum of rights since virtually all rights are at risk. A business should consider both its actions and its omissions as equally relevant and the more powerful a corporation is, the more it should use its leverage to lessen its negative impact on human rights. Moreover, corporations should undertake “risk-based due diligence” in order to find human rights risks and steer clear of involvements in human rights violations. The due diligence procedure outlined in the Guidelines is based on the concept of HRDD in the Guiding Principles, and will be discussed in the following chapter.

It is suggested that companies should pay extra attention to the rights of individuals belonging to vulnerable groups, including the rights of indigenous peoples. Furthermore, it is stated that corporations in the extractive industries, such as mining companies, should pay special attention to the distinct characteristics of indigenous peoples, such as their right to self-determination, their special bond with their lands as well as their special status and recognition under international and national laws. When a mining company is assessing its potential adverse impacts while carrying out the HRDD it should consider that the area of impact may be broader when the affected are indigenous peoples. An activity might adversely impact indigenous peoples’ lands, which might be an essential part of their heritage and culture. Even though the Guidelines do not include direct references to indigenous peoples’ right to FPIC, the commentary refers to the UNDRIP which includes the right. In a guide for extractive companies’ HRDD process produced by the OECD, it is stated that in the event that indigenous peoples refuse to give their consent, “material risks to the enterprise and adverse impact to indigenous peoples may be generated.” The major issue is however why MNCs should follow

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219 See OECD Guidelines, part I, para. 3. It states “A precise definition of multinational enterprises is not required for the purposes of the Guidelines.”
220 Ibid., 31-32.
221 OECD Guidelines, p. 18 (paras II.10-12 and 13).
222 Ibid., p. 31 (para. 36).
223 Ibid., 32.
224 OECD, Responsible Business Conduct: OECD Due Diligence for Meaningful Stakeholder Engagement in the Extractive Sector (2016), 82.
225 Ibid., 85.
226 Ibid., 87.
these suggestions, especially when they are explicitly stated not to be legally enforceable.

4.3.1 National Contact Points
The most unique feature of the Guidelines framework is the function of the National Contact Points (NCPs) as implementation mechanisms. The NCPs are government “watchdogs” set out to promote the Guidelines and suggest what measures a corporation should take to effectively implement the Guidelines and as such, respect human rights. In order to achieve this and resolve ongoing issues, the NCPs provide a platform for mediation and conciliation. The NCPs include a complaints procedure, which allows individuals to bring claims regarding an individual corporation’s failure to comply with Guidelines. They effectively overcome issues regarding jurisdiction and territoriality, since a parent company domiciled in an OECD or adhering country is responsible to comply with the Guidelines regardless of the location of its operations. Furthermore, all OECD Member Countries and other adhering countries are required to set up the NCPs and they must ensure that all interested parties, including members of the public, are informed of their existence and availability. In addition, the NCPs have the responsibility to raise awareness of the Guidelines among the general public.

Deva stated that the issue with the NCPs is that, even though they are designed to resolve issues regarding violations of the Guidelines and ensure the implementation of and compliance with the Guidelines, they have no power to enforce their suggestions. In addition, the NCPs’ complaints procedure is not transparent, which is problematic since it leads to a lack of “social enforceability” of the Guidelines. Deva added that even if there are legitimate arguments for why a conciliation process concerning a

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228 See OECD Guidelines, 3.
230 OECD Guidelines, 3.
232 OECD Guidelines, 68.
233 Ibid., 73.
commercial dispute should be held confidential, the same can hardly be said when the issue concerns human rights. At that point, the public and the society should be deemed to have a reasonable interest in learning about the issue, especially when the regulatory system relies on social enforceability. Even though the NCPs can make suggestions, they lack the power to determine whether a corporation has breached the Guidelines or not. If it had such a power, it would at least allow the public and civil society to put social pressure on the corporation in question.  

4.3.2 Discussion

It is positive that the Guidelines apply to all corporations in OECD Members States and other adhering States, which ensures that MNCs from such countries must consider human rights in all their operations. However, they, similar to the Global Compact, seem to rely too much on voluntary implementation. It becomes an issue when the positive arguments are not convincing corporations to comply with the Guidelines. When a corporation for example is not carrying out its HRDD, there are no sanctions or penalties that can force them to change their behaviour or take certain measures. Instead of sanctions the Guidelines rely on the NCPs to ensure compliance. However, it is difficult to see exactly how the NCP mechanism should convince corporations to respect human rights in all situations since the NCPs lack the power to decide that a corporation has failed to comply with the Guidelines.

The reliance on voluntary compliance and the focus on the risks it might imply to not respect human rights, including indigenous peoples’ right to FPIC, seems to be related to the idea of enlightened self-interest (as previously discussed in chapter 4.2). Again, much like for the Global Compact, the idea seems to be that self-interest leads to a corporation’s decision to respect human rights in order to avoid reputational and financial risks. If that is the case, the Guidelines seem to rely on a feature they explicitly lack since the complaints procedure at the NCP is not transparent. If the NCP process was public that could, at a minimum, lead to some amount of social pressure on the company and social enforceability of the norms. However, that is not the case. Furthermore, the complaints procedure and the NCPs seem likely to receive wide support from corporations since they can keep the complaint away from the public. In some cases, it should be questioned if

237 Ibid., 87-88.
the NCPs even do more harm than good. A party which considers that its fundamental human rights have been violated might not be interested in a dialogue with its counterpart. The positive aspect of the NCPs is that they are in fact mandatory and that all OECD Member States and states adhering to the Guidelines must have such an institution in place. In comparison to the other frameworks that will be studied throughout this thesis (the Guiding Principles and the Global Compact), the Guidelines at least has a redressive element in form of the NCP complaints procedure. The issue is however the lack of enforcement, which is a recurring theme present in all the regulatory frameworks for corporate responsibility to protect human rights that will be studied.

Even though indigenous peoples’ rights are referred to in the commentary of the Guidelines the commitment to respect and promote such rights seems relatively weak. The NCPs are not providing an effective outlet for solving issues where indigenous peoples’ rights have already been overlooked since they only provide dialogue and mediation. If the affected indigenous peoples’ requirement is reparations and restitution for previous violations of their rights to land and to FPIC, the NCPs do not have the power to solve the issue. Furthermore, the fact that the NCPs only facilitate dialogue between the complainant and the targeted corporation means that if a corporation will not take into account the affected indigenous peoples’ refusal to give their consent, the NCPs are unable to provide solutions.

4.4 UN Guiding Principles on Business and Human Rights

The last, and perhaps most important, framework to be mentioned is the UN Guiding Principles on Business and Human Rights. In 2011, the Guiding Principles were endorsed by the Human Rights Council (HRC). After the endorsement the Guiding Principles became a global minimum standard for States and corporations with regard to business and human rights. The Guiding Principles were the result of consultations with the business community, States, civil society, concerned communities and individuals and other stakeholders. Even though they are not in themselves legally binding, the Guiding Principles are drawn from pre-existing practices and norms for States and corporations.

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The framework contains 31 principles, which are divided into three pillars. The first pillar concerns the State duty to protect human rights, which was discussed in the previous chapter. The second pillar addresses the corporate responsibility to respect human rights. Finally, the third pillar concerns access to remedy for victims of corporate violations of human rights. To serve the purpose of this thesis, the second pillar is of the most importance.

4.4.1 Corporate responsibility to respect human rights

Principles 11 to 24 of the Guiding Principles concern the corporate responsibility to respect human rights. It is set out that corporations should respect human rights, avoid harm and address any potential human rights violations that they have been involved in. The corporate responsibility to respect human rights is drawn from “internationally recognized human rights”, such as the UDHR, the ICCPR and the ICESCR. Additional standards, such as those in the UNDRIP and the ILO 169, may need to be considered depending on what industry the corporation operates in. This is specifically important if the business activities could have adverse impacts on the human rights of vulnerable groups, such as indigenous peoples. It is noted that all human rights are relevant to corporations since they can impact, directly or indirectly, on “virtually the entire spectrum of […] rights.”

The Guiding Principles do not assign different responsibilities to corporations depending on their size, sector and structure. However, the measures a company should undertake may differ depending on the context of each case.

In order to fulfil their responsibility to respect human rights, corporations should adopt a policy statement that addresses such questions. The statement should be approved at the most senior level of the company and should be publicly available and communicated to all personnel within and outside of the corporation. The idea is that it will encourage

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240 Ibid., 1-2.
242 Ibid., principle 11.
243 Ibid., principle 12.
245 Ibid., 13.
247 Ibid., principle 16.
corporations into developing and integrating respect for human rights in their business operations.248

It is clearly stated that the Guiding Principles do not create new international legal obligations.249 The corporate responsibility to respect human rights is therefore not about legal compliance but rather constitutes “a global standard of expected conduct” which corporations are measured against.250 In order to explain how and why the responsibility to respect human rights is not optional, the commentary refers to financial and reputational consequences, as well as potential legal consequences, and the affected corporation’s reduced ability to attract staff members. It is held that a failure to respect human rights will eventually “pose a risk to [a corporation’s] own long-term investments.”251 The question of enforceability of the Guiding Principles was furthermore answered in this manner, “[f]ailure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society as well as investors – and occasionally to charges in actual courts”.252

It is stated that corporations should respect international human rights, regardless of where they are operating. If national laws, in any given situation, would pose a conflict with international human rights, corporations should always strive to live up to the “principles of internationally recognized human rights”.253 According to the Guiding Principles, the risk of violating human rights while operating in a host country should furthermore be treated as an issue of legal compliance, even when it is not.254 It means that international human rights standards should be applied even if national laws provide no protection whatsoever. Corporations should in other words, not take advantage of a country’s less stringent human rights standards.255 The reason to treat involvement in violations of human rights as a legal compliance issue is motivated by recent cases of civil liability lawsuits against MNCs.256 However, it is added that such cases are mainly related to “gross human rights abuses”, such as slave labour, or treatment of individuals that amount to “cruel, inhuman or degrading treatment”.257

249 See Guiding Principles, preamble.
251 Ibid., 14.
252 Ruggie Report, para. 54.
253 Guiding Principles, principle 23.
254 Ibid.
256 Ibid., 80.
257 Ibid., 79.
An important number of human rights organizations and civil society groups have criticized the non-binding nature of the Guiding Principles and the subsequent failure to close the international governance gap regarding transnational corporations. In a statement that was drafted by the international non-governmental organization International Federation for Human Rights (FIDH) and that was endorsed by more than 140 human rights organizations, other organizations and individuals, FIDH criticized the Guiding Principles. It claimed that they failed to close the governance gap, which had been previously been highlighted by the SRSG himself. FIDH also criticized the Guiding Principles for taking a less progressive approach to corporate responsibility than existing authoritative interpretations of international human rights law. The focus on the financial benefits of respecting human rights risked undermining efforts to ensure that corporations effectively behave in accordance with human rights. Finally, the groups found it regrettable that the Guiding Principles failed to specifically address the human rights of vulnerable groups, such as indigenous peoples’ rights, even though it was a part of the SRSGs mandate.

In a response, the SRSG said that the statements were “bizarre on several accounts”. Contrary to the received critique, he stated that the Guiding Principles would vastly improve standards regarding business and human rights. He added that the critics, as human rights organizations, would have had a hard time if they opposed the only initiative on business and human rights endorsed by the HRC. He also noted that Amnesty International, as well as other organizations, had previously offered significant support to the UN Norms and as such, they had delivered nothing to victims since the UN Norms were never adopted. The SRSG had previously strongly opposed the UN Norms since he considered that there was nothing which suggested that international law could be binding on corporations in the same way it is binding on States.

260 Ibid.
262 Ibid.
Even though the Guiding Principles were endorsed by the HRC and received support from the business community and States, it has not been free from criticism. Mares has criticized the Guiding Principles for their failure to clearly define the corporate human rights obligations. The focus on HRDD instead of “substance and outcomes” concerning the corporate responsibility to respect human rights implies that corporations should manage risk rather than actually respect human rights.\(^\text{264}\) He added that the vague language and standards would lead to difficulties to assess whether a corporation has in fact complied with the Guiding Principles or not.\(^\text{265}\) Baughen has also criticized the Guiding Principles for their reliance on voluntarism and self-interest,\(^\text{266}\) and stated that when corporations are only asked to adhere to non-binding frameworks the only potential sanction they might face is damaged reputation and lost profits.\(^\text{267}\) For similar reasons, Lopez directed critique towards the Guiding Principles since they are effectively handing over corporations’ compliance with international human rights to “market forces.”\(^\text{268}\)

4.4.2 Human Rights Due Diligence

Much like the Guidelines have the NCPs as its unique feature to ensure compliance, a significant contribution by the Guiding Principles is that corporations are called on to carry out Human Rights Due Diligence.\(^\text{269}\) The due diligence process entails that a corporation should identify potential human rights issues related to its business operations, in order to avoid and mitigate adverse human rights impacts. Corporations should carry out an analysis of current and potential human rights impacts their activities might have, follow up on findings and be transparent regarding the measures that are taken in response to the identified impacts. A corporation should not merely assess its own operations, but also operations that are somehow connected to the corporation.\(^\text{270}\) It is stated to be important that corporations carry out the HRDD effectively since it allows


\(^{265}\) Ibid.


\(^{267}\) Ibid., 243.


\(^{269}\) *Guiding Principles*, principle 15.

\(^{270}\) Ibid., principle 17.
them to have correct and relevant information regarding their potential impacts. The information may later be used in order to take appropriate measures to avoid impacts on human rights. Furthermore, it enables a corporation to show to others that it respects human rights, thus improving the company’s goodwill.\textsuperscript{271} During the HRDD a corporation should not merely make reference to national legislation in the State where it is operating, since such legislation might be inadequate. Rather, it should refer to international human rights standards binding on the State in question and standards that are binding on the entire international community, i.e. customary international law.\textsuperscript{272}

With regard to indigenous peoples’ rights, it means that a corporation should fulfil their responsibility to respect such rights regardless of a host country’s failure to do so.\textsuperscript{273} According to Anaya, this includes complying with the standards of the UNDRIP and the ILO 169, even when it is not ratified by the host country.\textsuperscript{274} It therefore includes recognizing indigenous peoples’ use of land, territories and natural resources and the responsibility to consult indigenous peoples whenever they may be affected by a project.\textsuperscript{275} HRDD should be carried out to ensure that all possible measures are taken to eliminate the adverse impacts an activity might have on indigenous peoples’ cultural, social, economic and spiritual life.\textsuperscript{276} Corporations should also be aware of the indigenous peoples’ right to FPIC in the due diligence process.\textsuperscript{277} To consult affected communities is an important part of the impact assessment carried out during the HRDD process since it allows the corporation to gather all relevant information ahead of a planned activity. What to a corporation might look like unused land, might by affected indigenous peoples be of significant importance due to lands relevance for their culture and beliefs.\textsuperscript{278}

\textsuperscript{272} \textit{Guiding Principles}, commentary to principle 23.
\textsuperscript{276} Ibid., para. 74.
\textsuperscript{278} OHCHR, \textit{The Corporate Responsibility to Respect Human Rights : An Interpretive Guide} (2012), 44.
4.4.3 Discussion
The positive aspect of the Guiding Principles is the wide support that they received and that this eventually meant that they actually address the responsibilities of all corporations, in contrast to the Global Compact and the Guidelines that only apply to certain corporations. This is achieved not by creating new legal standards but by drawing the corporate responsibility from pre-existing internationally recognized human rights and treaties on human rights. It is however claimed that it is not optional for corporations to respect human rights. This implies that the standards are in fact pre-existing obligations. At the same time it is clear that the obligations are in fact not binding, at least not legally. Since the standards in the Guiding Principles are not legal in nature, they have to be different kind of standards.

The arguments and discussions concerning financial and reputational risks suggest that the obligations to respect human rights, adopt a policy statement on human rights or carry out HRDD are economic, rather than based on the universality of human rights. If it would always be financially beneficial for a corporation to respect international human rights it would be great. In such a scenario it would only be of academic interest to discuss the reasons for why a corporation should respect human rights. The problem with this system becomes evident when the economic argument is not convincing. When the reputational and financial consequences of violating human rights are found to be insignificant, human rights are not protected from corporate wrongs. In the end, it means that what can be defined as an obligation if the economic arguments are sufficiently convincing, transforms into a non-obligation when the economic arguments are insufficient. This seems to adversely impact groups that are threatened to see their rights violated by extractive industries more than other groups.

As mentioned above, the Guiding Principles rely on market forces in order to ensure that corporations comply with international human rights standards. Compliance through market forces only seems to work if consumers and investors are aware of a corporation’s non-compliance and this awareness has an impact on the consumers’ and investors’ subsequent decision-making. As such, the responsibility for human rights is deferred to human rights organization and other NGOs, which through their studies and reporting should ensure that the general public has information to act on. This structure is problematic since it hands over the responsibility to ensure that corporations respect human rights to organizations, instead of having enforcement mechanisms in place that can ensure corporations are held accountable for their violations. If and when
organizations fail to find out the facts and communicate them to consumers, there is no effective enforcement mechanism in place and corporations may continue to violate human rights without sanctions or penalties. While a Global Compact participant can be expelled and a complaint concerning a corporation’s violation of the Guidelines can be brought to an NCP, there is no visible redressive element to the Guiding Principles. Rather, it focuses everything on the preventive elements but achieves similar results as the two other frameworks in this respect.

The concept of HRDD, which is also referred to in the commentary to the Guidelines and the Global Compact, is well structured and provides corporations with a platform they can use if they want to stay clear from involvement in violations of human rights. However, it seems likely that corporations will only do this to assess whether any planned operation involves financial, reputational or legal risks. In other words, corporations are primarily encouraged to find out whether potential human rights violations imply risks, rather than treating any violation of human rights as relevant. Regarding the situation of indigenous peoples, a mining corporation that is planning a project in a foreign country would probably want to find out whether national laws provide strong protection for indigenous peoples, whether the potentially affected communities might obstruct the operations and whether there is a risk to be sued in court. The focus on risks therefore diverts attention from the human rights of indigenous peoples and their importance, to the risks local indigenous communities may pose to a corporation.

4.5 Concluding comments
All of the frameworks previously discussed are positive for the overall protection of human rights since they have provided a platform for corporations that want to respect human rights and since they have elaborated on the applicable standards. In addition, they offer standards to which corporations can measure their own actions to see how they rank within their sector or within the entire business community. Therefore, they can be said to be good for businesses that intend to be ethical companies. The basic idea behind all of the frameworks addressing corporate responsibility is however to ensure that corporations do not adversely impact on internationally recognized human rights, including indigenous peoples’ rights. It is therefore important to consider the current system’s imperfections.
As previously mentioned in relation to all of the frameworks, the main issue is that it is not a legal obligation but rather an economic obligation for corporations to respect human rights. The focus on potential financial, economic and reputational costs of human rights violations, distances the discourse from morals and universal human rights. In addition, the idea that corporations should respect human rights because of their “enlightened self-interest” is dangerous since it risks undermining the essence of human rights. Moreover, it may even provide corporations with arguments for deciding not to respect human rights. The main concern should be whether people worldwide are suffering from human rights violations committed by corporations or not. The issue with a business focused self-interest model is that it does not provide any arguments for why a corporation should respect human rights in a sector, or a situation, where it is proven not to be financially viable to respect human rights, and thus, is not in its interest. If a company has looked at the numbers and found that conducting extensive HRDD cost more than it would produce economic benefits there are few arguments left to support carrying out the due diligence. This seems especially problematic for indigenous peoples, which therefore risk having their rights violated to a higher degree than other groups.

MNCs may adversely affect the enjoyment of most internationally recognized human rights. If most people agree on this being an issue it seems prudent to try to amend it. However, for this particular issue there is a lack of regulation and redressive elements in place that address the protection of potential victims from human rights violations committed by corporations. There are surely various reasons for this but it is regrettable that the victims generally seem to be poor, side-lined and vulnerable people who often lack the support of their own governments.

HRDD is one major aspect of the Guiding Principles, which is also referenced to in the commentary to both the Global Compact and the Guidelines. It is an important feature of the overall regulatory framework for corporate responsibility that has the potential to ensure that corporations are not involved in human rights violations. However, the question remains why a corporation should carry out due diligence in situations in situations when it implies greater costs than benefits. A company that carries out HRDD has probably done the math and found that it is an economically viable option in order to ensure that it avoids risks. The underlying assumption, or philosophy if you will, seems to be that it is and that it should be profitable for a company to be moral and to respect human rights. However, the studied regulatory frameworks show that there are embedded problems with this assumption. As such, the introduction of non-voluntary regulatory
mechanisms and redressive elements seem inevitable if corporations are to fully respect human rights.

The Guiding Principles, the Guidelines and the Global Compact have all contributed to the improvement of business and human rights and they have ensured that the topic has been widely discussed among the business community as well as among governments. They have achieved this through gaining strong support from both governments and corporations. However, strong support of a regulatory framework does not automatically imply that the framework is or will be successful in practice. Moreover, the accomplished progress made so far does not imply that the end-goal will be reached. As Amerson concluded regarding the Guiding Principles, their endorsement should be considered nothing more than “the end of the beginning”. 279

Since a system that relies on market-forces does not seem to sufficiently protect indigenous peoples and other vulnerable groups that are threatened to have their rights violated by multinational mining corporations, it is important to take further steps towards ensuring that MNCs can be held accountable for violations of such rights, if and when they occur. As such, the following chapter will address the discussions of a possible future binding human rights treaty that would be directly applicable to MNCs.

5 Binding treaty on business and human rights

5.1 Past attempt – The UN Norms

A first attempt at creating a binding treaty on business and human rights was the draft of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The UN Norms were approved by the Sub-commission of Human Rights in 2003 and were subsequently submitted to the Human Rights Commission for review. The initiative was met with a great deal of scepticism and the UN Norms were never adopted by the Commission. Even if they were never used in practice, the UN Norms provided what still is claimed to be “the most comprehensive and detailed statement of the human rights obligations of companies.”

Article 1 stated:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

When the article is read together with the preamble, the UN Norms seem to suggest that companies were already bound by international human rights law. The UN Norms merely confirmed the notion that corporations already had a similar status as States within the human rights sphere. The approach was criticized by Karavias who considered it to be overly simplistic and that it did not sufficiently take into account all the inherit differences between corporations and States. Since the UN Norms represent such an extensive instrument regarding the business operations of corporations and the

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280 See UN Norms.
285 UN Norms, art. 1.
286 See UN Norms, preamble and art. 1.
287 M. Karavias, Corporate Obligations under International Law (2013), 166.
relationship with human rights they have frequently been used to promote awareness and provide for discussions and debates on the matter of business and human rights.  

A significant difference in comparison to the above mentioned frameworks is that the UN Norms introduced an enforcement mechanism through a dual monitoring system of businesses and states. States would have had a direct obligation to ensure that sufficient legislation was in place in order to ensure that the UN Norms were implemented by corporations. In addition, the UN Norms proposed direct monitoring conducted by both international and national mechanisms over corporate activities. Lastly, MNCs and other companies would have to provide reparation to victims of corporate violations of the UN Norms. This was a radical feature since the enforcement still today lies only in the hands of States.

For the purpose of this thesis it is furthermore important to note that the UN Norms directly addressed indigenous peoples’ rights and the rights of other vulnerable groups. In addition, they provided corporations with specific guidance on how to protect the rights of such groups. That was a stark contrast to the Guidelines, the Guiding Principles and the Global Compact that, as has been shown above, merely address indigenous peoples’ rights indirectly through the commentaries.

Deva held that the drafters committed one significant failure when they were drafting the UN Norms, that they were referencing other international treaties rather than setting their own standards. It became problematic for the acceptance of the UN Norms since several of the referenced treaties were not ratified by all or even most States. First, it was unreasonable to expect corporations to consider all the referenced treaties in order to understand their obligations. Second, it was difficult to see that States would agree to a treaty that covered norms they had not yet accepted to be bound by. Deva also concluded that the UN Norms did not find the correct balance between operational and

289 UN Norms, para. 16-17.
290 Ibid., para. 18.
291 P. Rinwigati Waagstein, Corporate Human Rights Responsibility : A Continuous Quest for an Effective Regulatory Framework (2009), 197, see also UN Norms, art. 2 and 22.
aspirational standards, making it difficult to measure violations of human rights. It has also been claimed that since the UN Norms would have implied an extra burden for corporations, the introduction of the UN Norms, or a similar binding treaty, could pose a risk to competition between MNCs. In addition, there was a fear that such regulation would imply that States have less responsibility for protecting human rights. Even if the UN Norms were shelved and never used in practice, new efforts have recently been made in order to promote a binding treaty on business and human rights. This has made the discussions regarding the UN Norms relevant once again.

5.2 New treaty on business and human rights – The future?
The discussions on a binding treaty on business and human rights gained new momentum in 2014, when a resolution was passed to “establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.” This is clearly a politically sensitive issue since voting patterns showed that developed countries generally were against the resolution and developing and emerging economies supported it. The global dichotomy is of great interest, politically and otherwise, but is however not essential for the discussion of what the impact of a binding treaty would be, especially with regard to the above mentioned situation of indigenous peoples.

Another resolution regarding human rights and transnational corporations was also passed at around the same time. Among calls on corporations to fulfil their responsibility to respect human rights that resolution also called on the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) to carry out consultations with States and other stakeholders regarding “the benefits and limitations of a legally binding instrument” regarding business and human rights. The

ball is in other words in rolling again, after the previous failure of the UN Norms and the work on the Guiding Principles, which seemed to stop such progression for a while.

It should be noted that the expectations the general public has on businesses have been found to often be greater than that they should merely respect human rights and avoid adverse impacts on human rights. The public also frequently demands corporations to promote human rights and to actively support such rights. At the same time, Baughen has concluded that a soft law approach like the current regulatory mechanism, will always have an evident appeal to businesses since it does not imply any direct legal obligations or costs. Rather, it means that MNCs may decide to respect human rights when it is beneficial for themselves.

Vázquez, with negative views on a binding treaty, has stated that a reason for the lack of sanctions and penalties in the current frameworks for corporate responsibility, is that international law only indirectly applies to non-state actors. Therefore, any change to this system would risk changing the meaning of international law, which until now is defined as contracts between states. Rinwigati Waagstein, on the other hand, considers that international law could and can impose obligations on corporations both indirectly and directly. This is highlighted by the, previously mentioned, soft law mechanisms that directly target corporate behaviour.

Those opposing the development of a binding treaty have also claimed that it would be premature, since the voluntary regulatory mechanisms are still relatively new and need time to become integrated in the business community and their operations. Furthermore, it is claimed that negotiations would be complex and slow and that there is no guarantee that a binding treaty would enter into force in the near future. One of the principal critics of the elaboration of an internationally binding treaty on business and human rights is the former SRSG, Ruggie, the founder of the Guiding Principles. He has stated that such a treaty would inevitably have to be drafted in overly abstract terms, which means that it would not succeed in improving the lives of people. Instead, he concluded that any discussions regarding a binding treaty should only focus on certain aspects and specific

governance gaps, and not on the entire business community. Moreover, he argued against a treaty since he also found it impossible that States would agree on the content of one comprehensive treaty that would cover all international human rights. Seeing as negotiations of such a treaty are already on their way, he hoped that the focus would not be to only achieve a binding treaty, but to effectively improve the daily lives of people.

Bilchitz, who has supported a binding treaty on business and human rights, has rebutted most views held by Ruggie. In contrast to Ruggie, he has concluded that a treaty on business and human rights is in fact a good idea, since treaties are intended to cover a variety of issues. Not everything would, or even could, be set in stone at the outset, but through establishing a system for norm development and adjudication the overarching treaty would establish a framework under which corporations are legally responsible for human rights. As such, a binding treaty would in fact have significant consequences for “real people in real places”. Deva has also expressed views supportive of a binding treaty. He stated that one must not forget that corporations are primarily focused on profit maximization, which means that legally binding standards might be necessary to achieve compliance. In a recent event, Selvanathan criticized the UN’s work on business and human rights. In an open letter to the President of the HRC, Selvanathan stated that it was a systemic failure that corporations can have adverse impacts on human rights and yet at the same time operate legally. Moreover, he claimed that since corporations are created in order to maximize profits, human rights standards must be binding if corporations are supposed to respect human rights. Since it is States that have created corporations, States can also decide to give corporations new frameworks to act within.

Among the scholars who do not necessarily object to a binding treaty, the question is instead how such a treaty should be structured in order to effectively improve the situations of groups threatened by corporate violations of human rights. As such, Rinwigati Waagstein has questioned whether a binding treaty would be effective. On the one hand, she considered that a treaty on business and human rights could potentially

306 Ibid., 6.
307 Ibid., 9.
309 Ibid., 16.
streamline and harmonize standards for MNCs and thus ensure its efficiency. On the other hand, its success will in the end depend on whether it is merely symbolic or if it can be enforced efficiently in order to provide real change.\textsuperscript{312} Taking a more pragmatic position, de Schutter claimed that for any solution, whether that be a treaty that is directly binding on corporations or not, it is important to find a balance between improved protection for human rights and political feasibility.\textsuperscript{313} Černič has concluded that the dilemma is how a corporation in an effective manner can respect human rights while not giving up on its principal business objectives. He considered that all regulatory initiatives should be discussed, and that the aim must be that businesses not just respect human rights but also protect and implement them. As such, a binding treaty on business and human rights should be complementary to the already existing non-binding mechanisms, rather than undermine the value of those mechanisms.\textsuperscript{314}

If a binding treaty is supposed to have any real effect, it has been claimed by Baughen, that it must include ways of bringing parent companies to court in their home countries, since a potential judgement in only the host country is likely to be unenforceable in the home country. In addition, it is important since courts in the host country may not want to accept the lawsuit and the plaintiffs may fear reprisals in the host country, which they would not fear in the relevant corporation’s home country.\textsuperscript{315} An entirely different view is that a treaty on business and human rights should not target corporations directly. Instead, a new treaty should merely clarify what measures States must take in order to regulate corporate behaviour. The UNPFII argued that if States’ duties were clear they could easily implement sanctions in the national legislation for corporate violations of human rights.\textsuperscript{316}

\textsuperscript{312} P. Rinwigati Waagstein, Corporate Human Rights Responsibility: A Continuous Quest for an Effective Regulatory Framework (2009), 178.
\textsuperscript{316} UNPFII, “Analysis of the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises,” E/C.19/2012/3 (23 February 2012), para. 54.
5.3 Discussion
The idea with the Guiding Principles and the other frameworks that address the corporate responsibility for human rights, has been to close the governance gap that has widened as a consequence of globalization. As illustrated in the previous chapter, this does not seem to have been fully achieved since MNCs are still in a legal vacuum where they seem to be able to reap the benefits of globalization while they are carrying only a limited amount of the “burden” of having to ensure respect for human rights. As Selvanathan pointed out, corporations are entities created by governments and thus the people, therefore it should be up to governments to alter the playing field if they aim to solve the issue of corporate violations of human rights. Corporations are designed to make profits for their shareholders and investors, which implies that when a corporation faces non-binding standards concerning human rights it is still ultimately supposed to ensure profit maximization. Therefore, the least we can do is to discuss possible solutions to situations when the profit objective conflicts with such standards.

It is evident from the above mentioned discussions concerning a binding treaty that it is sure to be a challenging process to negotiate the treaty, and that there are a lot of issues that must be addressed and resolved. Since a binding treaty that applies directly to corporations has never been used in practice there are a lot of questions that require answers. Will it be binding directly for corporations? Will it apply to all corporations or only certain ones? What human rights will apply – all internationally recognized human rights or only certain ones? Should it refer to international human rights standards in other treaties or should it consist of its own standards? How will a binding treaty be enforced? Who or what institution will enforce it? Will it be possible to take a parent company to court even if it is the subsidiary that has violated human rights?

This clearly makes the political feasibility of a binding treaty questionable. However, the most important questions often seem to be forgotten: is the current system sufficient for protecting all human rights, including those of vulnerable groups, such as indigenous peoples? If not, how can we protect and promote human rights for all? These are the questions to keep in mind and it is a possible solution to these questions that would make the lengthy negotiations worth it. In addition, if the conclusion is that negotiations concerning a binding treaty on business and human rights would be lengthy and extensive, that is a good an argument as any to start the negotiations as soon as possible.

It has, previously in the thesis, been made clear that indigenous peoples’ rights are not well protected by States or corporations against corporate violations, especially with
regard to mining companies. As such, even if a binding treaty on business and human rights would not be considered politically feasible, it seems as the best option if there is a will to protect indigenous peoples’ rights. The self-interest model does not work when commercial interests are in conflict with human rights standards that are not legally enforceable, since corporations ultimately are supposed to create profits. Therefore, international legally binding standards should be considered necessary. In order to assess the potential and feasibility of a binding treaty the arguments for and against both the UN Norms and a future binding treaty outlined above will be commented on.

One of the major obstacles is clearly the political feasibility. It is as de Schutter says significant for any discussion. However, it should primarily be of interest to consider what a binding treaty on business and human rights could achieve. In addition, it should be noted that the fact that something seems remote or difficult does not imply that it is impossible. In the same way as the migrant crisis in Europe, caused by the ongoing tragedies in Syria and in the Mediterranean Sea, cannot easily be solved and the countries in the European Union do not seem to be able to come to an agreement over how to act, it is still important to try and find common ground and sustainable solutions. In addition, the fact that the Guiding Principles received overwhelming support should not be taken as a sign that they alone may solve the governance gap. Instead, the Guiding Principles should be considered as equally important for the discussion of business and human rights, as the introduction of the UDHR was for the discussion of human rights in general. Much like the UDHR was a stepping stone in order for the binding ICCPR and ICESCR to eventually become reality, the Guiding Principles are likely to prove necessary in order to reach an agreement concerning an international binding treaty on business and human rights.

There are several lessons that may be drawn from the UN Norms as an instrument and the framework’s failure. Firstly, there was a discussion that a treaty binding on corporations would risk undermining the responsibility of States. That however, seems like an unnecessary fear since the treaties that are already binding for States will not disappear due to the introduction of a treaty that targets corporate behaviour. Moreover, it is possible to compare such a system with complicity in crimes. That one subject or entity is complicit in a crime does not make the primary perpetrator less responsible, it only makes two actors responsible for each of their own actions. Second, it should be added that MNCs have probably been and are among the actors that have benefitted the most from globalization and it only seems fair that they have an added responsibility.
Another interesting aspect that was discussed regarding the UN Norms is how they directly addressed indigenous peoples’ rights and the rights of other vulnerable groups. This could be considered to have been both a failure and a success. If a new binding treaty would consist of its own standards rather than merely referring to other human rights treaties it is difficult to see why States that have not ratified the ILO 169 would consider ratifying a treaty that suddenly accepts that corporations have to fully respect indigenous peoples’ rights. It is however not impossible that this could work if a majority of countries were supportive of it. If that happened, it would stop the race to the bottom between countries with regard to human rights standards. As such, countries would not need to compete for foreign investment through lowering their human rights standards, but by providing other incentives for corporations to invest in their countries. This could as an example be related to improved infrastructure, fiscal systems or alike.

Considering the critique that Sweden and Chile has received from the UN Treaty Bodies, it does however regrettably seem improbable that this could be achieved. The two countries must clearly be aware of the criticism, yet they seem reluctant to accept the recommendations. For that reason it would perhaps be wiser to in a future binding treaty refer to internationally recognized human rights, in the same way as the previously studied frameworks all do.

Something that a future binding treaty would have to introduce if it is supposed to lead to any improvements is an enforcement mechanism and possibilities for victims to receive reparations. As may be seen in the previous chapter, a system that intends to regulate corporate behaviour must have a redressive element if it genuinely intends to ensure that no corporations, regardless of their sector or size, violate human rights. When there is an enforcement mechanism in place, a MNC does no longer only fear social actions and pressure but actual sanctions, which in a more effective way should ensure that most companies abstain from violations.

Considering Deva’s critique concerning the aspirational standards and how enforcement will prove difficult with such standards, a binding treaty should focus mainly on the protection of human rights rather than other more aspirational obligations. As such, Černič’s conclusion that a binding treaty should be complementary to current soft law frameworks would also be taken into consideration. First, the Global Compact could still provide a platform for corporations who want to support and not merely respect human rights. Second, the Guidelines and the NCPs could be used to solve disputes through dialogue and communication. Finally, the Guiding Principles would still provide
corporations with the necessary tools to ensure that they are not involved in human rights violations by conducting HRDD, thus steering clear from sanctions and penalties.

The argument that was primarily raised in relation to the UN Norms concerning how they could potentially threaten competition, is also an argument that should be rebutted. First, if the basis behind the argument was that corporations cannot compete if they have to comply with human rights where they operate, something is inherently wrong with the system itself. Such an argument seems to suggest that globalization inherently implies exploitation and violations of international human rights standards. Even if that would be the views of some, it is a difficult position to hold publicly, especially since it is often claimed that globalization should and will bring welfare and societal improvements. Second, a binding treaty on business and human rights would inevitably change the framework which corporations compete within, that would be the entire purpose. As such, some companies will probably no longer be able to compete and in that sense it “threatens competition”. At the same time, it would imply that all MNCs would play by the same rules, which can be used for competition on equal terms. Rather than seeing this as a negative aspect of a binding treaty, it should be sought for. In the same way that some companies would no longer be financially viable due to more stringent environmental regulations, it should not be considered as a negative aspect of a binding treaty if some corporations would no longer be able to compete because they had to comply with international human rights law.

Within the fear that a binding treat would distort competition, which it inevitably would, lies another signalled issue. Since a significant amount of corporations will not benefit from a treaty that is directly applicable to them, support from the business community cannot be used as a measurement as to whether a suggestion is good or not. While it seems probable that the public would be inclined to support binding legislation targeting corporate behaviour, it is at least difficult to see why it would not, it seems highly unlikely that MNCs would support a binding treaty that directly targeted them. Therefore, even if it should be seen as positive to get input from corporations, to understand their situation and experiences, ahead of drafting a binding treaty, they cannot be relied on for support of a binding treaty. The primary interest is, as mentioned before, profit maximization and that will inherently end up in conflict with most ideas of regulation, especially if they do not imply equal terms.

As mentioned above, Ruggie concluded that a binding treaty would inevitably have to be abstract and drafted in general terms, which he stated would not help to improve
people’s lives. On this note, I respectfully disagree. The current system, which allows corporations to act in ways that violate international human rights without significant consequences is what threatens real people. As MNCs are increasingly more powerful, it only seems fair that they too carry some direct responsibility. Whereas States at least can be held politically accountable, MNCs move freely across borders and can steer clear from accountability. Even if it would be difficult politically to negotiate a binding treaty on business and human rights, it should be considered a necessity if vulnerable groups, such as indigenous peoples, are to be effectively protected against corporate violations of human rights.

Apart from protecting indigenous peoples and other vulnerable groups from having their rights violated by corporations, there are seemingly some positive aspects of a binding treaty that should encourage even the business community to support such an effort. The main positive aspect is that it would level the playing field for corporations. With the current system a corporation has to respect human rights to a higher or lesser degree depending on its size, name recognition and the industry it operates in. A binding treaty that would apply to all businesses irrespective of their sector, size and structure would mean that all corporations would have to consider the same human rights standards. The major obstacle still seems to be to ensure that Western States support a binding treaty, which they at the moment seem reluctant to do. However, that something does not seem promising or seems unlikely should not be used as an argument for not trying, especially if it is truly important. If that would have been the case, Obama would have never become President of the USA and Malala Yousafzai would have never won the Nobel Peace Prize.
6 Concluding observations

6.1 The case studies

6.1.1 Kallak – Iron mine in Sweden

After having looked at the failure of States to take their due responsibility, studied three soft law frameworks for corporate responsibility for human rights and discussed a binding treaty it is in order to once again look at the case studies. In the case concerning Beowulf’s mining project in Kallak, there is no doubt that the affected Sami are considered as indigenous peoples, which entails that the norms of the UNDRIP become applicable since they, for most part, reaffirm customary international law. However, Sweden has not ratified the ILO 169, which means that the State is not directly bound by its standards. Even if there are doubts as to whether the Sami, according to customary international law, have a veto or not in the decision-making process, the opinion of the Sami must be considered as part of the “consultation in good faith”. If not, the consultation becomes merely an obstacle that needs to be passed, which hardly could have been the intention.

As seen in a recent statement made by the two affected Sami communities to Beowulf, they “will never accept a mine and will pursue the issue legally, nationally and internationally.”317 However, the Sami communities’ position seems to have had little or no impact on Sweden’s decisions regarding the mine.318

What are Beowulf’s responsibilities when the State does not protect human rights then? First of all, Beowulf is not a participant of the Global Compact.319 As such, it does not impose any obligations on Beowulf, which highlights a concern with the Global Compact. It might only succeed to attract companies that are already respecting human rights and that are interested in showcasing it. Whereas other companies with poorer human rights records might never become participants. However, if Beowulf would have been a participant that would perhaps have be even more worrying, since that could imply that the company merely used the Global Compact for bluewashing the company, in order to improve its goodwill.

The Guidelines do however apply to Beowulf as a UK company operating in Sweden, which means that Beowulf should respect internationally recognized human rights in all of its operations. Since Beowulf does not seem to respect the right to FPIC, that would allow the affected Sami communities to bring a claim to the Swedish and the British NCP for a breach of the Guidelines. However, the NCPs only facilitate dialogue and since the Sami communities have made it clear they do not want a dialogue, the NCPs are unlikely to provide them with help. Since the complaints procedure with the NCPs is not transparent it would furthermore not help the affected Sami community in their pursuit to halt the mining project through social accountability. It should furthermore be noted that no such complaint seems to have been made in Sweden or the UK.\footnote{See the website of the Swedish NCP: “Nationella kontaktpunkten (NKP),” Government Offices of Sweden (Regeringskansliet), Available: http://www.regeringen.se/artiklar/2015/12/nationella-kontaktpunkten-nkp/ (Accessed 20 March 2016), and the UK NCP: “UK National Contact Point Case Statements,” UK Home Office, Available: https://www.gov.uk/government/collections/uk-national-contact-point-statements (Accessed 19 March 2016).}

The Guiding Principles, similar to the Guidelines, clarify that Beowulf should consider all internationally recognized human rights. As mentioned earlier, this includes indigenous peoples’ rights and consideration of the ILO 169 even when it is not ratified by the host country. Beowulf should furthermore carry out HRDD all through the process of the mining project in order to assess its potential human rights impacts. In this case, the affected Sami community have been vocal about their opposition to the project and in that regard the impact could easily be assessed by the company.

It is not optional to respect human rights according to the Guiding Principles, since there are financial and reputational risks related to a company’s failure to comply with international human rights. However, as mentioned in chapter 4 this does not always seem to be the case. From the perspective of Beowulf, it will likely be questioned what poses a more significant financial risk: walking away from a profitable mining project due to the affected indigenous peoples’ refusal to offer their consent or proceed with the project and risk potential disruptions from the Sami community and damaged goodwill? Seeing as the company has not walked away from the project despite the Sami people’s clear opposition, it seems as if Beowulf has chosen the second option.

The case study is merely one example that illustrates how the current regulatory frameworks for corporate responsibility does not sufficiently protect indigenous peoples and their rights against corporate violations. If the overall framework included a binding treaty that could be enforced, a company like Beowulf would be sanctioned if it was not
complying with internationally recognized standards on indigenous peoples’ rights. Today, that seems not to be the case. Instead, the system provides Beowulf with tools to deal with affected indigenous peoples if it wishes to do so, but if the arguments for respecting human rights in the Guidelines and the Guiding Principles are unconvincing, and the risks are insignificant, the company has the opportunity to do nothing, with only minor consequences. This, arguably, leaves the affected indigenous peoples in a situation where they are insufficiently protected. Rather than rely on international standards for support in this situation, they can only hope that investors disinvest, that companies that deal with iron ore would decide not to purchase it from Beowulf, that environmental concerns obstructs the project or that prices on iron ore plummet even more in order for the mine to be unprofitable.

An international binding treaty on business and human rights, which ensured accountability for parent companies in their home countries, would allow the Sami to file a civil lawsuit against the company in the UK for violating human rights. As such, even if Sweden did not take its responsibility, a company would likely abort the project if proceeding with it would imply that it could be held legally accountable instead of only socially. Regardless of the political feasibility of such a treaty, it is at least one effort that could, arguably, improve the situation of indigenous peoples worldwide.

6.1.2 Pascua Lama – Gold and silver mine in Chile
In the Pascua Lama case it is, as previously stated, no doubt that the Diaguita are considered as indigenous peoples. Since Chile has ratified both the ILO 169 and voted in favour of the UNDRIP it is obligated to comply with all of the indigenous peoples’ rights outlined in chapter 2. Similar to the Swedish case, it is questionable whether the Chilean State has fulfilled its duties concerning the right to FPIC, since the Diaguita seem to oppose the mine at Pascua Lama.

If the project is allowed to continue regardless of Chile’s failure to fulfil its obligations, Barrick Gold and its subsidiary still has responsibilities to respect indigenous peoples’ rights. Regarding the need to achieve FPIC from affected indigenous peoples, Barrick stated in May 2014, that it had signed a Memorandum of Understanding (MOU) with the
affected Diaguita communities, which would allow the mine to open again.\textsuperscript{321} According to Barrick, the MOU not only fulfilled, but exceeded the standards in the ILO 169 regarding FPIC. However, several issues have been raised regarding the agreement.\textsuperscript{322} Rather than a good example, the agreement was found not to comply with the standards of the ILO 169 and the UNDRIP. Instead, MiningWatch Canada and Observatorio Latinoamericano de Conflictos Ambientales, stated in a report that they had found that Barrick had used its resources to support state registration of previously unregistered Diaguita, in order to create indigenous organizations that would support the Pascua Lama project and give their consent. The report stated, that by only inviting certain Diaguita groups, which were supportive of the project, to the negotiation of the MOU, Barrick had violated the indigenous communities’ “right to prior consultation, to free, prior and informed consent, and to self-determination.”\textsuperscript{323} As such, the MOU and the offered consent is, at best, questionable.

It must be considered whether the previously discussed frameworks for corporate responsibility could successfully ensure that Barrick respects the affected indigenous peoples’ right to FPIC. The situation is similar to the situation of the Sami in the Kallak case study. Both the Guiding Principles and the Guidelines call on corporations to respect human rights and carry out HRDD but the arguments to do so seem unconvincing, for the same reasons presented in the previous case study. The major risk for Barrick seems to be that reports like the one produced by MiningWatch Canada are released and damage Barrick’s reputation, or that Diaguita communities physically obstruct the operations at the mine. The refusal from many affected Diaguita communities to give their consent has not seemed to convince Barrick to walk away from one of the world’s major unexploited gold reserves. On the contrary, Barrick has allegedly gone great lengths in order to be able to “produce” a consent.

In relation to Barrick’s responsibility to respect human rights the major difference from the Kallak case study is that Barrick Gold is a participant to the Global Compact.\textsuperscript{324} It


\textsuperscript{323} Ibid., 15.

means that the company should, according to the Global Compact, respect as well as support indigenous peoples’ rights since it may lead to reputational benefits as well as improve relationship with the local indigenous communities. However, it seems as if Barrick has focused only on the benefits part, rather than the respect for human rights. It has seemingly collaborated with some of the Diaguita, but it seems to have rejected the idea that an opposition to the project would have to be respected.

At some point, Barrick may decide that it has done what is necessary to avoid financial and reputational risks, and proceed with the project with the hope that the operations at the mine will not be obstructed by the Diaguita and their supporters and that it will not lose investors. Even if Barrick Gold would lose some goodwill because of the reports made by human rights organizations and civil society, this will probably not have an impact on their sale of gold, which means that it will entail no significant harm for the company. Similar to the Sami, it seems as if the Diaguita have to rely on investors to disinvest from Barrick because of its “unethical” operations and ensure that the right to FPIC is respected that way. However, as long as the company continues to be profitable, that does not seem to be a likely event. Moreover, even if it was plausible, it is a backwards solution to an issue that really concerns the human rights of indigenous peoples rather than the profits of MNCs.

Even though Chile has ratified the ILO 169 and is bound by the judgements of the IACtHR, indigenous peoples’ rights to FPIC, lands and self-determination still do not seem to be fully protected. If the Chilean State, as well as all other States bound by the ILO 169 and the standards in the UNDRIP, would effectively protect indigenous peoples’ rights, that would be a great solution for indigenous peoples and this piece would have never been written. However, the Pascua Lama as well as the Kallak case illustrate how States time and time again are not committed to protect such rights. If MNCs could be held accountable in their home countries for involvement in violations of internationally recognized human rights, even when host countries are failing to take their due responsibility, situations like the ones in the case study are likely to occur with significantly less frequency.
6.2 Concluding comments

The purpose of this thesis was to look at the conflict between the mining industry and indigenous peoples’ rights, which has become more evident as the world is more globalized, and whether current regulatory systems can effectively protect such rights. It is, as previously mentioned, an inherent conflict, since both the indigenous peoples and the mining companies often have interests in the same lands, territories and resources. An important difference however, is that indigenous peoples’ right to their specifically designated lands is internationally recognized, whereas corporations’ right to operate on the same lands is not. Regrettably, this notion does not seem to have helped indigenous peoples since their own governments often have significant interests in mining projects and the foreign investment and revenue they entail. It should, as an example, be noted that while Sweden has clearly laid out its plans to expand the Swedish mining sector, which will use lands, it has also stated to the UN that the reason for the non-ratification of the ILO 169 are the issues concerning land rights in Article 14.\textsuperscript{325}

If all countries complied with internationally recognized human rights the current regulatory mechanism for corporate responsibility would not have to be discussed, since there would be no governance gap regarding such issues. However, since corporations, under the current system, can adversely impact on international human rights while they operate legally there is an evident risk of a race to the bottom, which countries may have to enter in order to attract MNCs and foreign investment. Such an event may occur when it is proved more attractive for a mining company to set up a mine in a specific country because it has less regulations and less stringent national human rights standards in place.

The indigenous peoples’ rights that States are supposed to protect are clear and have generally been accepted through the adoption of the UNDRIP, and in some cases through the ratification of the ILO 169. The right to free, prior and informed consent might not necessarily imply that indigenous peoples have a veto right but at a minimum, consultations must be carried out in good faith. As previously discussed, this cannot have been meant as a mere bureaucratic hurdle, which is what it implies if the affected indigenous peoples’ opposition to a project has no impact on the decision-making. Instead, the right must necessarily mean something more than this, because if not, it becomes only a right to be informed. If indigenous peoples’ opposition to a project has

\textsuperscript{325} Compare chapter 1.2.1 and chapter 3.2.
no impact on the proceedings, a consent can hardly be said to be needed, it can never truly be free and there is therefore insignificant need for it to be prior.

As can be seen from the UN Treaty Bodies’ critique of Chile and Sweden, as well as the Special Rapporteurs concern for indigenous peoples’ rights, States are not always taking their due responsibility to protect indigenous peoples’ rights. As such, the responsibility falls on corporations. The corporate responsibility to respect human rights, including indigenous peoples’ rights, is outlined in the Global Compact, the Guidelines and the Guiding Principles. They are all non-binding or voluntary and rely on market forces as well as consumers in order to ensure compliance. With no legal enforcement mechanisms in place, the arguments for why corporations should respect human rights are instead motivated by financial, economic and reputational reasons. Therefore, it means that a corporation has an obligation to respect human rights because it, supposedly, is in its own best interest, since the corporation otherwise would lose profits.

The financial and reputational arguments might function under certain circumstances and for specific situations. However, it does not seem to function for the mining industry, when mining corporations’ interests conflict with indigenous peoples’ rights. If a mining corporation on the one hand, would want to comply with internationally recognized human rights it means that it would have to respect the indigenous peoples’ right to FPIC, which entails that a project should not proceed if affected indigenous peoples oppose it. If it on the other hand, would proceed with the project in spite of indigenous peoples’ opposition, it may still make significant profits. At the same time, the corporations cannot, under the current system, be held legally accountable for violations of internationally recognized human rights, unless they are implemented nationally. Instead, the risks companies may elaborate on and calculate seem primarily related to being held socially accountable by human rights organizations or in the, so called, courts of public opinion.

This illustrates that the corporate interest to maximize profits and the “duty” to respect indigenous peoples’ rights at times cannot be pursued simultaneously, leaving the management of a company to decide to proceed with the project, when it in any given case is the financially correct option. Furthermore, it means that the current framework deflects the responsibility to respect and protect human rights, to human rights organizations, civil society and in the end to consumers, which leads to an uneven playing field for corporations. The need for corporations to respect human rights will, under the current system, almost completely depend on the sector, size and structure of each company, and whether they are susceptible to social pressure or not. The insufficiencies
of the current overall regulatory framework for corporate responsibility for human rights calls for active measures.

The first steps towards addressing these issues and deal with corporate violations of human rights have already been taken, in the form of the discussions and UN resolutions regarding a binding treaty on business and human rights. If there are intentions to effectively protect indigenous peoples’ rights from being violated such a treaty seems to be the best, if not the only, option. The major difficulty seems to be that drafting a binding treaty which a sufficient number of States would support, is likely to entail complex and extensive negotiations. This notion has on the one hand been used to argue that it is useless to even start negotiations since there is no guarantee that they will ever be finalized. On the other hand, it could be said that if all stakeholders agree that the negotiations will be extensive, they might as well start as soon as possible if change is ever going to happen. That these potential negotiations would be difficult or that a treaty that directly targets corporations has never been used in practice before, should not be used as arguments for not trying. After all, the UDHR was adopted as late as 1948, and was probably seen as unfathomable not many years before its adoption.326

Finally, it is regrettable that the international human rights system which was constructed, among other objectives, in order to address the historical injustices and concerns of colonized peoples again neglects indigenous peoples and fails to sufficiently protect their rights. It is important that steps are taken to address their concerns and as have been shown, steps have already been taken in that direction. The question is however how long we can afford to wait for such a change to take effect. Whereas other vulnerable groups, such as women, children and persons with disabilities will not cease to exist, indigenous peoples’ culture and traditions are clearly connected to their lands, territories and resources as long as their collective memory is alive. If that relationship is once lost, it might be too late to restore later on.

When States fail to comply with their international human rights obligations, the Global Compact, the Guidelines and the Guiding Principles are supposed to ensure that corporations abstain from violating human rights. However, the framework’s focus on financial risks means that there are situations when it cannot function correctly. Therefore, it is not the time to sit back and let human rights have its organic development. Instead, there is a need to see that the current regulatory system – based on soft law

frameworks – is not sufficiently protecting indigenous peoples’ rights from corporate violations. A binding treaty on business and human rights would, at the very least, ensure that corporations face heightened financial and legal risks, when they are involved in operations that might violate indigenous peoples’ rights. As such, it would improve the situation of indigenous peoples, and ensure that corporations respect and protect their rights, as well as other fundamental human rights. In addition, multinational corporations, as well as indigenous peoples, would be ensured a global and levelled playing field, on more equal terms.
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