

Incorporating human rights considerations into management decision making in mining

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ABSTRACT

There is growing acceptance within the mining industry that to maintain its social licence to operate it must systematically consider the human rights dimensions of its impacts. As the nature of decision making in mining is becoming more complex, particularly in relation to social dimensions, many companies are incorporating human rights commitments into their policies, standards and social management systems, including impact and risk assessment processes. If these responses are to be effective, they need to provide company decision makers with information that can be utilised to ensure that company activities avoid infringing upon the human rights of communities, groups and individuals who might be impacted. This information should also help decision makers identify opportunities for how their company can work to enhance the ability of people in areas where they operate to enjoy and exercise their human rights.

The article is largely based upon the authors' combined body of work which has involved independent research as well as direct work for mining companies to assess human rights risks and impacts and deliver management systems solutions. The authors draw out learnings from these direct experiences and make suggestions for more effectively incorporating human rights considerations into management processes and systems so that they appropriately and directly inform key management decisions. The suggestions for greater internal effectiveness focus on how to present the results of human rights impact assessments for management consideration, how to successfully build or adapt management systems to incorporate human rights and how to 'sell' the value of human rights considerations to senior decision makers.

INTRODUCTION

The 1990s brought about heightened social awareness of businesses' impacts on human rights following increased transnational economic activity and corresponding gaps in governance (Ruggie, 2009, 2011). From initial debates focused on whether the responsibility to uphold human rights rested with states or businesses, the agenda is now shifting to define the differentiated and complementary roles of government and business.

The 2008 'Protect, Respect and Remedy' Framework presented by the UN Special Representative of the Secretary General on Business and Human Rights was instrumental to this shift. Combined with the resulting Guiding Principles on Business and Human Rights finalised in 2011, the Framework provides an anchor for the business and human rights debate and has given increased clarity to the differentiated, yet complementary, responsibilities of states and businesses in regards to human rights. The Framework acknowledges states' duty to 'protect' human rights and businesses' responsibility to 'respect' human rights, in addition to the responsibilities of both to provide access to effective remedy via judicial and non-judicial grievance mechanisms.

The corporate responsibility to respect requires that companies avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved (Ruggie, 2011). That is, the corporate responsibility requires companies to exercise due diligence to identify, prevent and address human rights impacts caused by, or directly linked to, the company's operations, products or services (Ruggie, 2011). This includes having in place: a policy commitment, a human rights due-diligence process to identify, prevent, mitigate and account for how the company addresses its impacts on human rights and having processes in place for the remediation of any adverse human rights impacts (Ruggie, 2011). Support for the Framework and Guiding Principles is reflected in an increasing uptake within the mining sector. This support is also reflected at an industry level with endorsement from the ICMM and national mining bodies.

Mining companies have long understood that viable operations require the support of local communities in order to gain and maintain their 'social licence to operate'. In this sense, responding to social impacts, including those that have a human rights dimension, is not new to the industry, even if they have not been framed in human rights language. However, addressing human rights more explicitly and systematically—to capture both the human rights dimensions of social and environmental impacts as well as any human rights issues that may not be covered by these existing frameworks—are recent and significant challenges. This requires applying a human rights lens to existing policies, procedures and practices, as well as being open to adapting and improving these to incorporate human rights considerations not previously captured.

This article will identify challenges—as well as opportunities—and provide an overview of the broader context of human rights developments in the mining industry. Our analysis draws on the collective experience of the authors in independent research as well as direct work for mining companies to assess human rights risks and impacts and deliver management systems solutions. This work has included desk top research on human rights best practice in the mining industry, development of industry best practice guidance on select human rights topics as well as human rights impact assessments for several mine sites in Australia and abroad.

HUMAN RIGHTS AND THE MINING INDUSTRY

Mining companies are increasingly developing public statements outlining their commitment to human rights. Companies that have adopted formal company policy statements explicitly referring to human rights include Alcoa, Anglo American, ArcelorMittal, Areva, Barrick Gold, BP, BHP Billiton, Codelco, ExxonMobil, Freeport-McMoRan, GoldCorp, Gold Fields, Implats, Kinross, Lonmin, Newmont, OceanaGold, OZ Minerals, Philex Mining, Rio Tinto, Vale and Xstrata (Business & Human Rights Resource Centre, n.d.). In addition, a number of mining companies participate in voluntary multi-stakeholder initiatives with human rights foundations such as the United Nations Global Compact (UNGC), the Voluntary Principles on Security and Human Rights and the Kimberly Process. Some companies also support initiatives aimed at strengthening governance and transparency, such as the Extractive Industries Transparency Initiative (EITI).

There are also indications that mining companies are beginning to engage more responsively with civil society around human rights. For example, in 2004, Freeport McMoRan commissioned an independent non-government organisation to undertake a social and human rights audit of its operations in West Papua (ICMM, 2009). This year Rio Tinto has entered into a three-year funding partnership with the Danish Institute for Human Rights (DIHR), as has Anglo American with the peace-building organisation International Alert. UNGC Working Groups on Human Rights are emerging in many countries including Australia, where mining companies such as BHP Billiton, Rio Tinto and Xstrata are key participants.

A number of industry-level frameworks and tools also encourage mining companies to pay greater attention to human rights in impact assessments and management systems. Examples include the International Council on Mining and Metals' (ICMM, 2009) guidance documents on Human Rights in the Mining & Metals Industry¹, the Prospectors and Developers Association of Canada's (PDAC) Framework for Responsible Exploration and the Minerals Council of Australia's Enduring Value (Kemp & Gotzmann, 2009). These frameworks highlight that in mining, human rights considerations are multi-dimensional and cut across a range of considerations, including environment, cultural heritage, conflict, community engagement and development, as well as issues of complicity.

CHALLENGES AND DILEMMAS

Despite these developments, stronger connections could be made between corporate-level commitments and operational-level practice in terms of respecting human rights. This section provides a sense of some of the practical challenges involved in doing so.

Language and terminology

Human rights language and terminology is complex and nuanced and there are a myriad of human rights instruments that companies are expected to understand and be familiar with. The language in these instruments can often be legalistic; indeed the concept of due diligence has both a legal and commercial heritage, such as its use within mergers and acquisitions. As a result, senior managers

¹ For example, ICMM (May 2009) Human Rights in the Mining & Metals Industry: Overview, Management Approach and Issues available at <http://www.icmm.com/document/642> and ICMM (October 2009) Human Rights in the Mining & Metals Industry: Handling and Resolving Local Level Concerns & Grievances available at <http://www.icmm.com/document/691>

can struggle to understand what is required of them and their operation from a human rights perspective, in regards to communities as well as their own workforce and supply chain.

Departmental tensions

The human rights agenda in mining has largely been driven by civil society campaigning on behalf of communities impacted by mining and unions representing workers in mining. As a result, human rights discourse has tended to penetrate mining companies via specific functional disciplines. This has somewhat hindered companies in linking human rights considerations to other areas of business, such as supply chain, employee relations and cultural heritage.

It is often challenging for companies to engage with human rights in ways that they are comfortable with. Many companies have occupational health and safety (OH&S), diversity, community development and gender programmes in place that already address a number of human rights without framing them as such (ICMM, 2006a). For example, there is a strong argument for situating OH&S procedures for preventing fatalities as a response to Article 3 of the Universal Declaration of Human Rights (UDHR) and the right to life. However, in our work with companies, we have encountered significant resistance to framing such issues in human rights terms even though a growing number of companies have human rights policies. This is partly because doing so represents a challenge to pre-existing structures within the company. For example, Freeport McMoRan has found that many of the concerns raised as 'human rights' through its management system for addressing human rights allegations have traditionally been considered as industrial relations, human resources or employee issues (ICMM, 2009).

'Impact' or 'abuse'

There is not always a clear-cut delineation between social impacts and human rights abuses. For example, if an operation diminishes livelihoods on one hand, but responds on the other with a livelihood restoration programme, the company may still be accused of having infringed on the rights of a community. Similarly, how to balance different rights in an operational reality brings distinct challenges. For example, the question of how a company balances local cultural practices that may sit in contrast to a company's international human rights commitments is enormously complex. When mining companies operate in a community that does not give voice to women, or does not recognise a woman's right to work in a mine, what is the company's responsibility? The company has made commitments to international human rights that provide for gender equality and non-discrimination. What are the implications for community engagement, for development, and for employment?

Human rights and development

The fact that many economic and social rights are asserted independent of the resources to deliver them creates issues for how and whether a company prioritises human rights when making development decisions. The UN Framework stipulates that a company's first priority must be to avoid and mitigate human rights harm as companies do not have primary responsibility for the promotion of human rights. However, in practice harm mitigation and positive contribution to human rights beyond the baseline to respect can be interlinked, and in both cases a prioritisation of resources will be required. For example, if the company is operating in an area where education is inadequate, water infrastructure is lacking and livelihoods are affected by conflict, how does the

mining company prioritise the correlating human rights? A decision about where to direct resources to mitigate harm or contribute to development or another activity has to be made. It should be noted that many companies contribute positively to human rights through social investment that can often increase the enjoyment of economic and social ‘rights’.

Sharing practice

Among the biggest challenges for the mining industry is that best practice in the area of human rights is limited to a relatively small group of companies and countries (ICMM, 2006b). Additionally, as human rights assessments are often sensitive and subject to legal privilege, the space is not particularly conducive to ‘shared practice’. Whilst industry-level initiatives are attempting to address this gap, there is surprisingly little available in the public domain by way of applied work. It is difficult to access examples of the methodologies mining companies are applying, reports they are commissioning and the tools they are using (and adapting) to address human rights.

Contextual challenges

Similar challenges have arisen with human rights discourse in on-the-ground research. Using human rights language may be ‘off limits’ in some countries, and doing so can put researchers and communities at risk of persecution by in some jurisdictions. In such situations companies may need to be careful about using human rights language in the field. From our perspective, the use of appropriate language in these environments should not preclude addressing human rights in substance, despite sensitivities in context.

An evolving debate

Business and human rights is also a moving and evolving space. For example, the question of whether water and sanitation is a stand-alone human right has been on-going for some time, as it had not been explicitly mentioned in the UDHR. This changed, however, with the UN General Assembly affirming the right to water and sanitation as a stand-alone human right last year, followed later by the United Nations Human Rights Council (UNHRC). Whilst UN General Assembly pronouncements do not have binding force in international law, they can contribute to legal development and in the future it is likely that significant impacts on potable water are seen as a human rights abuse, rather than just environmental or social impacts. For mining companies, with their myriad of impacts on water—whether they are operating in areas of water abundance or scarcity—this may present a significant challenge.

MOVING THE AGENDA FORWARD

The human rights and business agenda represents a significant shift in the dynamic between companies and communities in terms of impacts. It invites mining company managers to acknowledge that communities are not simply receivers of impacts that they as responsible company managers should mitigate but rather, that mining companies have a responsibility to respect the rights of communities. In this way a human rights discourse, when adopted and internalised by a mining company, has the potential to create more equitable power relationships between communities and miners.

Focus on human rights awareness

Many managers want to do the right thing, but don't know where to start when it comes to human rights. The findings of our practical experience with mining companies correspond with ICMM's recent work on human rights, which emphasises the importance of awareness raising and capacity building as the first step in successfully adapting management systems to incorporate human rights (ICMM, 2006b). Training is important, both in general human rights issues and for specific functional or operational areas.

Working with companies on the design of corporate-level social audit and assessment systems, we have found that assessing 'human rights awareness' rather than 'human rights performance' can be an effective way of beginning dialogue with a company about its rights obligations. It provides a permissive space within which to talk with key people at operations, for example security managers, about what they know about human rights and the company's human rights responsibilities, in relation to how they are training and screening security staff, how they are contracting security personnel, how they are engaging with government forces and other key issues. Whilst somewhat limited in scope, as human rights awareness does not necessarily indicate positive human rights performance, this can be a 'gentler' way of starting to talk about human rights at the operational level than immediately introducing questions about performance.

Consider human rights risks

How existing risk management systems and criteria are adapted and, if necessary, supplemented by new methodologies remains a space for consideration as we work towards the integration of human rights into mining operation management. The mining industry is familiar with the concept of risk management and assessment as well as, in more recent years, a systems-based response to managing community relations impacts. Further embedding human rights into already-existing risk management systems is potentially a powerful step forward for decision makers to understand and respond to their human rights impacts. BHP Billiton has taken this approach by embedding human rights into its 'enterprise-wide risk management' system to ensure that human rights issues are comparable with the company's social, environmental and financial risks (ICMM, 2009).

Despite the industry's mature approach to risk management in other disciplines such as health and safety and environment, many risk assessment processes do not consider risks in terms of consequence to the community. The typical orientation of risk assessments is risk to the company, rather than the community. As the concept of 'social licence to operate' has gained traction within the mining sector, the ability to understand the operation's impacts from a community and 'rights holder' perspective is critical. Without this mining companies are less able to understand what they need to do to generate social licence to operate. Business and social risk can overlap, but they are not the same thing. An advantage of relating impacts to internationally recognised human rights is that companies are given a lens through which they can identify and consider their impacts from a community and rights-holder perspective.

Use a human rights framework

One of the most effective approaches to placing the 'human rights lens' over an operation's social impacts is to recognise that there may be a human rights dimension to each impact. This provides an opportunity to acknowledge what human rights impacts the company is already responding to,

how they are responding and where it may have gaps. It also provides a more accurate assessment of the consequences of the risks related to an impact. Other sectors that conduct social impact assessments are moving towards social impact assessments delivered within a human rights framework. For example, the International Hydro Association's recently released Sustainability Protocol requires that results of social impact assessments for hydro projects are presented using a human rights structure.

One area of debate has been the issue of whether human rights impacts should be assessed via stand-alone human rights impact assessments or whether human rights should be integrated into existing impact assessment processes and methodologies, such as environmental and social impact assessments. A human rights impact assessment can provide a valuable forum for discussion of existing social and environmental impacts from a rights perspective and without constraint address aspects that are not usually covered by environmental or social impact assessments as it systematically maps impacts against internationally agreed human rights standards. Conversely, an integrated approach can be useful for connecting human rights thinking with more established processes and discipline areas. There appears to be a view emerging that either is an acceptable approach, as long as human rights are considered explicitly. BHP Billiton is one company that has taken the progressive step of requiring assets to conduct Human Rights Impact Assessments.

Apply human rights-compatible methodologies

In terms of process, assessing human rights impacts requires human rights compatible methodologies that would include an emphasis on the principles of participation, accountability and non-discrimination. From our practice, we can observe that some mining companies are already well familiar with these principles, particularly in the community relations domain. For example, we have observed some community relations practice and impact assessment processes (both social and human rights) that show both familiarity with these principles and their considered application in practice. For example, through joint company-community decision making on a community investment project that is targeted at the most vulnerable groups within a community, and is conducted in an open and transparent manner. However, our application of these principles should be deepened and developed further. The point to emphasise is that these principles are not necessarily new to mining, and can easily be situated within many existing sustainability and social accountability frameworks that form the basis of company policy, procedure and practice. The next step is to broaden the application of such principles across the business, and to cross-check existing sustainability principles with those offered by the human rights framework, including the human rights based approach to development.

Take a multi-disciplinary approach to assessment

Assessing human rights risks and impacts requires looking broadly across the business, as well as ensuring the inclusion of external stakeholders such as communities, government, contractors and suppliers. Assessment requires an inclusive process, both internally and externally.

Some external involvement, for example, through drawing on external human rights expertise, can help to ensure neutrality and to facilitate open dialogue with assessment stakeholders such as employees, communities or other third parties. Involving a range of internal staff integrates and builds on their knowledge and capacity, and is complemented by the neutrality and impartiality of external assessors. For example, community relations staff may have knowledge and insights into

communities that has been built over many years, and should be reflected in assessment processes and outcomes. External assessors, on the other hand, may provide the neutrality necessary for some external stakeholders to speak openly about their experiences and situation.

In our experience, team-based workshops focused on human rights impacts can be a valuable way of allowing decision makers to explore the nature of those impacts for themselves and deepen their understanding. Human rights impact assessments are still emergent and are primarily conducted by consultants. Workshops can help transfer knowledge and understanding from the consultants to the operation's community relations professionals as well as other senior decision makers.

'Pitching' human rights to decision makers

Integrating human rights into the business can be a way for companies not only to 'do the right thing' but can also be a valuable way to situate as operator of choice, enhancing access to finance and markets, avoid human rights complicity, financial and reputational damage and be a valued member of both international and local communities. Addressing impacts in human rights terms also represents a significant opportunity for companies to better understand the consequences of their impacts and respond to human rights risks. Resources of tomorrow will be found in more remote, more challenging contexts such as under Indigenous land, closer to major population centres or under land that has had a high value alternative land use until recently. This can include areas such as water catchments, rich or agricultural land, many of which are now already being explored. Rights-based thinking will help resource companies in the future to better navigate these complex operating contexts.

CONCLUSION

Many companies have already made, and will continue to make, commitments to supporting human rights as part of their social licence to operate. However, there is room for improvement. As practice in this area evolves, one thing is clear, dialogue on the issue of human rights, both within a company and externally, is essential to making the best decisions possible and showing leadership in very challenging circumstances.

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