

Minerals Council South Africa: HUMAN RIGHTS FRAMEWORK Policy



**MINERALS COUNCIL
SOUTH AFRICA**



Royal Bafokeng Platinum

“The Minerals Council is taking the lead by providing guidance on the notion of business respect for human rights.”

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It is now the internationally accepted norm that business enterprises should respect human rights. In business' quest to do so, it should understand what human rights are and how they relate to business and in the perspective of mining, how operations could potentially impact on human rights. This means that business should avoid infringing on the human rights of others and where violations are unavoidable, business should address the impacts, within the areas of influence.

Human rights obligations of business emanate from three main sources: international law and practice; domestic law and practice and; individual company policies. Traditionally, human rights were only applicable to the relationship between individuals and the State. This changed in the past two years. At the international stage, there have been developments in the field of business and human rights and locally, Section 8 of the Constitution, binds the State as well as natural and juristic persons.

While most human rights standards are voluntary, there has been a general desire by some governments informed by the states' obligations to protect human rights and the interests of civil society, to shift from voluntary to mandatory principles through the development of an international treaty, to enforce compliance with human rights standards. South Africa and Ecuador in the United Nations are advocating for this position. The Department of International Relations and Cooperation (DIRCO) is of the view that in a few years, there could be agreements for adoption of a binding human rights standard.

Recently, the United Nation's Human Rights Council mandated the Inter-Governmental Working Group (IGWG) to prepare elements of a Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, (Draft Treaty) for substantive negotiations at the third session of the IGWG held in Geneva in October 2018.

It is against this background that informed the Minerals Council to make a proposal to Board to consider adopting the United Nations Guiding Principles on Business

and Human Rights (UNGPs) as the industry's human rights standard, in May 2017. The Board mandated the Minerals Council to convene a meeting of relevant representatives of companies to discuss the approach to implementation of the UNGPs. The initial meeting took place in March 2018, attended by representatives of member companies. The discussion covered different internationally recognised human rights standards; due diligence and grievance processes; and reporting expectations. The meeting then resolved for the development of a South African mining industry's Framework, for discussion purposes. At the Board meeting of May 2018, the Minerals Council gave feedback and was mandated to proceed with drafting the Framework for consideration.

The adoption of the Framework could play a key role in enhancing acceptability of mining operations in the country.

2. APPLICABLE INTERNATIONAL HUMAN RIGHTS

The industry's Human Rights Framework has been drawn from the principles of international human rights standards. However, industry issues prioritised in the Framework are specific to the South African mining context. The issues are informed by potential impacts in these areas also, the need to strengthen compliance mechanisms and to provide equitable redress where impacts are unavoidable.

From the international human rights perspective, all rights in the International Bill of Human Rights; International Labour Organisation Fundamental Principles and Rights at Work as well as Supplementary international and domestic human rights instruments are applicable. For reference purposes, they are listed below:

- International Bill of Human Rights (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights)
- International Labour Organisation (ILO) Fundamental Principles and Rights at Work
- Supplementary international and domestic human rights instruments:

Including instruments focusing on the rights of indigenous peoples, women, national or ethnic, religious and linguistic minorities, children, persons with disabilities, migrant workers and their families, as well as other groups in a society whose situation may render them particularly vulnerable to adverse impacts on their rights.

3. CONTEXT OF HUMAN RIGHTS FRAMEWORK FOR THE SOUTH AFRICA MINING INDUSTRY

The Framework outlines a set of management practices the industry aspires to implement to demonstrate a responsible approach to respecting human rights. In developing the Framework, reference and guide has been drawn from globally accepted frameworks, for example, the United Nations Guiding Principles of Human Rights (UNGPs), the International Finance Corporation's (IFC) Performance Standards on Environmental and Social Sustainability and the International Council of Mining and Metals (ICMM) Standards.

The Framework draws its principles from the United Nations Guiding Principles (UNGPs) which are based on the premise that:

- The government has a duty to protect, respect, promote and fulfil human rights;
- Business has a duty to respect human rights. The process includes the identification of potential human rights risks and incorporation of management responsibilities in company policies and systems; and
- Both the government and business should ensure there are accessible channels to raise concerns and to provide equitable remedies where there have been unavoidable human rights impacts.

Adherence to the obligation to respect human rights requires:

1. human rights policy statements;
2. human rights due diligence practices, and
3. grievance mechanisms

The UNGPs recommend the following four steps in human rights due diligence processes:

- Identification and assessment of actual and potential adverse human rights impacts;
- Respond to and act on the findings of these assessments;
- Tracking the effectiveness of responses; and
- Communication and reporting to stakeholders on progress

The Minerals Council members are expected to comply with all regulatory and other legal requirements. However, in consideration of potential impacts during mining operations, the following priority themes as indicated below in section 4, have been identified as industry's human rights priority areas.

4. THE FRAMEWORK

Several international and domestic legislative obligations aligned to human rights exist, including those contained in the Constitution's Bill of Rights, as well as voluntary instruments. However, in line with Membership Compact's guiding principles, the Minerals Council is taking the lead by providing guidance on the notion of 'business respect for human rights' for the South African mining context. As such, the Minerals Council has identified the following priority areas for the industry:

- Environmental management and conservation
- Health and safety
- Governance and ethics
- Security and human rights
- Transformation
- Human rights at the workplace
- Land-use and resettlements
- Development of grievance mechanisms

Appendix A below, outlines the Key Performance Areas of the Framework with supporting indicators and minimum standards.

The Framework does not replace compliance with existing laws or limit any legal obligation. It encourages compliance with existing laws, taking adequate measures for prevention, mitigation and provision of mediation where impacts are not avoidable.

5. RECOMMENDED IMPLEMENTATION PROCESS

The processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments. It is recommended that assessment processes should include all internationally recognized human rights as a reference point, since mining operations may potentially impact any of these rights. A duly constituted due diligence process will determine the legal obligations in terms of international human rights standards as well as rights enshrined in the South African Constitutional provisions, especially the Bill of Rights in Section Two.

The process below has been adapted from the UNGPs recommended steps. It is acknowledged that companies may require additional resources to implement a meaningful process.

Process: Human Rights Implementation

PHASE	ACTIVITIES
Phase 1: Leadership Commitment	Internal message of commitment from top Leadership to respect human rights
Phase 2: Policy Statement	Constituting a Human Rights Working Group with senior representation from all relevant disciplines with the Chair/Coordinator nominated by the CEO
	Developing a Policy Statement <ul style="list-style-type: none"> • Highlighting the human rights of staff, business partners and other parties linked to operations, products and services • Publicise and communicate policy statement to stakeholders • Ensure that human rights commitments are reflected in operational policies and procedures • Commitment to developing a grievance mechanism
Phase 3: Human Rights Due Diligence and Stakeholder Engagement	Industry's Key Performance Areas <ul style="list-style-type: none"> • Environmental management and conservation • Health and safety • Governance and ethics • Security and human rights • Transformation • Human rights at the workplace • Land-use and resettlements • Development of grievance mechanisms
	A due diligence process to identify, prevent, mitigate and account how impacts on human rights are addressed
	Assess actual and potential human rights impacts, integrating upon findings, tracking responses, communicating how impacts are addressed
	Cover all adverse human rights impacts that the business may cause or contribute through its own activities or those linked to suppliers, products and services
	Engagement with affected stakeholders to understand specific impacts and to assess impacts prior to proposed business activity
Phase 4: Internal integration	Continuously review, as human rights risks change over time and operating conditions evolve
	Integrate findings across relevant internal functions, process and take corrective measures at appropriate levels and functions
Phase 5: Monitoring	Track effectiveness through qualitative and quantitative indicators
Phase 6: Communication	Communicate how known impacts are being addressed
Phase 7: Remediation	Where there have been impacts, companies to provide or cooperate in the remediation process, through a legitimate process
	Together with the State to the extent necessary, take appropriate means to ensure thorough administrative, legislative and other means that those affected have access to remedy
Phase 8: Grievance Management	Publishing of the grievance mechanism
	Participation in effective operational level grievance mechanisms for both individuals and communities impacted
	Grievance systems are typically administered internally, or in collaboration with other stakeholders. Some companies could prefer to utilise services of an acceptable external expert or a body

6. STAKEHOLDER ENGAGEMENT AND REPORTING

Each company has a responsibility to engage its stakeholders on actual and on potential human rights impacts. It is recommended that reporting is broadened to include engagement with all three spheres of government (subject to the issue at hand); the community through local stakeholder forums and other existing channels to engage society. It is advisable to consider the approach of the International Association for Public Participation's goals of public participation when planning consultation which are to 'inform, consult, involve, collaborate and empower'.

Furthermore, numerous pieces of South African legislation provide for the requirement to consult. Section 27 (5) (b) of the Minerals and Petroleum Resources Development Act (MPRDA) prescribes that the Regional Manager must 'consult with the land owner and lawful occupier and any other affected parties and submit the result of the said consultation within 30 days from the date of the notice'. Section 10 (1) (b) of the MPRDA provides for a 'call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.' In terms of informal land rights, the Interim Protection of Informal Land Rights Act (IPILRA) Section 2 (1) states that, 'no person may be deprived of any informal right to land without his or her consent'.

In addition, the engagement must always include reporting on the Grievance Management Process and reporting on the progress of identified impacts.

6.1 Free Prior and Informed Consent

Considering recent public interest on Free, Prior and Informed Consent (FPIC) principle, the Minerals Council maintains its view for an industry Policy around this matter. Free, Prior and Informed Consent is a specific right that pertains to indigenous peoples and is recognised in the United Nations Declaration on the Rights of Indigenous Peoples. It allows them to give or withhold consent to a project that may affect them or their territories. It also enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated.

In unpacking this (abbreviated) definition of FPIC, a key question is: who are "indigenous peoples"? An explanation from another UN document, states:

Practicing unique traditions, they retain social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Spread across the world from the Arctic to the South Pacific, they are the descendants - according to a common definition - of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived. The new arrivals later became dominant through conquest, occupation, settlement or other means. Among the indigenous peoples are those of the Americas (for example,

the Lakota in the USA, the Mayas in Guatemala or the Aymaras in Bolivia), the Inuit and Aleutians of the circumpolar region, the Saami of northern Europe, the Aborigines and Torres Strait Islanders of Australia and the Maori of New Zealand. These and most other indigenous peoples have retained distinct characteristics which are clearly different from those of other segments of the national populations.

This is an important explanation, because it has become common among various NGO groupings and others (including the SAHRC in its recent report) to demand recognition of the FPIC principle for a much broader range of people. Yet, it is important to adopt a position that is compatible with international norms.

Given that the country's mineral wealth is administered by the state on behalf of the entire society, it cannot be argued that any mining community should have the right to veto the exploitation of an orebody. The exploitation of minerals is intended to benefit the entire society. Mining communities clearly cannot be described as indigenous peoples since they are almost invariably integrated parts of South African society (notwithstanding the issues of inequality, poverty etc). Hence FPIC should not apply to the mining sector and mining communities.

However, it is also the case that communities in areas that will be affected by mining are entitled to expect that their material wellbeing should not be negatively affected by the advent of mining. And the mining industry should, both because it's the right thing to do and to protect its reputation, be willing to advocate such a position.

One international standard that sets out this position is the IFC guideline: Performance Standard 5. http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES. This approach also appears to be in line with section 48 of the Minerals and Petroleum Resources Development Act (MPRDA).

Discussions on FPIC have not been exhausted, subject to further engagements with stakeholders including the DMR; COGTA and DRDLR.

7. GRIEVANCE MANAGEMENT MECHANISMS

Acknowledging that in the process of mineral exploitation conflict potential exist with communities and other interested and affected groups, the Minerals Council encourages its members to follow the IFC Grievance Process, highlighted below, to develop individual company grievance processes.

In circumstances where grievances are brought before the Minerals Council, for example, Stakeholder petitions delivered to the Minerals Council; the SAHRC report and similar others, the Minerals Council will have its own grievance management process and mechanisms to respond directly to aggrieved parties or to refer cases to affected companies, where applicable.

GRIEVANCE MANAGEMENT PROCESS

STEPS	IFC GRIEVANCE PROCESS	INDIVIDUAL COMPANY'S ROLE	MINERALS COUNCIL'S ROLE
1	Publicizing grievance management procedures	Companies to publicize grievance processes through various channels	Minerals Council publicize its grievance management process
2	Receiving and keeping track of grievances	Members to follow well defined processes of grievance management <ul style="list-style-type: none"> • Acknowledge receipt • Commit to respond within set timelines 	Industry related grievances addressed with the Minerals Council directly or, identified through other sources, to be acknowledged and responded to Company specific grievances referred to affected company
3	Reviewing and investigating grievances	Reviewing of grievances and preparing responses, preferably, at Operations level. The internal Human Rights Working Group to monitor compliance	Review and investigate industry-related grievances
4	Developing resolution options and preparing a response	Recommended that, responses are supported by evidence-based materials: scientific; international best practice; and/or local legislation If need be, a face to face engagement with aggrieved party to craft mutual way forward Remedies might include involvement of the State Taking corrective action and close out	Responses supported by evidence: scientific; international best practice; local legislation. Where applicable, a face to face engagement with aggrieved party to craft mutual way forward. Taking corrective action and close out
5	Monitoring and reporting	Reporting through multiple streams (internal and external)	Reporting through multiple streams (internal and external)

It is advisable to report on impacts through existing governance structures for example, the Social and Ethics Committees, JSE and other regulatory requirements and periodically to the Minerals Council. Some remedy options might include face to face engagement with stakeholders and possibly, amendment of applicable laws by the government as part of remedial solutions.

8. RESETTLEMENT GUIDELINES

There is a need to develop Resettlement Guiding Principles. The recommendation is informed by alleged inconsistencies on standards applied by the industry. This has been highlighted in the recent SA Human Rights Commission's Report - national hearing on the underlying socio-economic challenges of mining affected communities in South Africa; the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change and by the Department of Rural Development and Land Reform.

The development of resettlement guidelines will provide involuntary resettlement guidelines that outline the identification of resettlement-related impacts; legal requirements; compensation and valuation considerations; livelihood restoration and development; organisational and institutional arrangements, as well as funding, implementation and monitoring.

9. CONCLUSION

The Minerals Council welcomes members' participation in the development of the Framework. The Framework will be treated as a living document, members will be consulted as human rights issues develop. The next steps will include consultations on the implementation of the Framework and capacity building on the Voluntary Principles on Security and Human Rights; development of grievance management mechanisms and conducting of due diligence, to assess actual and potential human rights impacts. There will be further discussions on the FPIC principle and Resettlement Guidelines.

10. REFERENCES

- Interim Protection of Informal Land Rights Act.
- International Association for Public Participation.
- International Finance Corporation. Performance Standards on Environmental and Social Sustainability and the International Council of Mining and Metals. Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.
- Minerals and Petroleum Resources Development Act.
- The Constitution of the Republic of South Africa. 1996
- The Mining Association of Canada. Towards Sustainable Mining.
- United Nations. Guiding Principles on Business and Human Rights.

APPENDIX A

Minerals Council South Africa: Human Rights Framework

A. ENVIRONMENTAL MANAGEMENT AND CONSERVATION				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> SA Constitution National Environmental Management Act (NEMA) National Water Act NEM: Air Quality Act NEM: Waste Act NEM: Protected Areas Act & NEM: Biodiversity Act Conservation of Agricultural Resources Act 	<ul style="list-style-type: none"> Waste Management Water resources management Conservation and biodiversity management Air Quality Management Rehabilitation and Mine Closure 	<ul style="list-style-type: none"> Mines with Environmental Authorisation and with approved Environmental Management Programme Water use licences and compliance with conditions Best practice guidelines: e.g. Water Conservation and Water Demand Management, biodiversity conservation Rehabilitation Guidelines National water resource strategy 2 	<ul style="list-style-type: none"> Full compliance with existing environmental and water legislation and associated regulations Environmental authorisation conditions met Application of various best practices/ guidelines: <ul style="list-style-type: none"> Water Conservation and Water Demand Management Plans for the Mining Sector Biodiversity management, water resources Sustainable mine closure practices Implementation of the water use license conditions 	<ul style="list-style-type: none"> Dept of Environmental Affairs (DEA) Dept of Mineral Resources Dept of Water and Sanitation (DWS) South African Local Government Association NGOs (Centre for Environmental Rights; Society, Work and Development Institute; Benchmarks; Federation for a Sustainable Environment; Wits Centre for Applied Legal Studies; Human Rights Watch; Centre for Human Rights (UP); Socio-Economic Rights Institute of South Africa; Alternative Information Development Centre)
B. HEALTH AND SAFETY				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> SA Constitution Mine Health and Safety Act Occupational Diseases in Mines and Works Act (ODMWA) NEM: Air Quality Act Occupational Diseases in Mines and Works Act (ODMWA) Compensation for Occupational Injuries and Diseases Act (COIDA) National Health Act 	<ul style="list-style-type: none"> Right to a safe work environment Occupational diseases (including occupational exposure limits) Lifestyle diseases Safety culture training Control vs uncontrolled mines compensation challenges Compensation and unclaimed benefits Air quality and blasting 	<ul style="list-style-type: none"> Mine Health and Safety Milestones 	<ul style="list-style-type: none"> Mine Health and Safety Milestones Culture Transformation Framework Mine Health and Safety Regulations: Blasting guidelines 	<ul style="list-style-type: none"> Mine Health and Safety Council Dept of Labour Dept of Health Dept of Mineral Resources Compensation Commissioner National Union of Mineworkers Solidarity United Association of SA Association of Mineworkers and Construction Union National Union of Metal Workers of SA Parliament

APPENDIX A *continued*

C. GOVERNANCE & ETHICS				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> SA Constitution Minerals & Petroleum Resources Development Act Royalties Act Income Tax Act Companies Act Prevention and Combating of Corrupt Activities Act Funding of political parties Act 	<ul style="list-style-type: none"> Base Erosion and Profit Shifting and Transfer pricing Political party funding and donations Conflicts of interest Bribes and facilitation payments 	<ul style="list-style-type: none"> Membership Compact King IV guidelines Annual audit function 	<ul style="list-style-type: none"> Leadership message of commitment to respect human rights Compliance with recommendations on Audit findings 	<ul style="list-style-type: none"> Host communities DMR DTI Unions Standing Committee on Finance PC on Trade & Industry PC on Mineral Resources Political parties Employees Investors Treasury
D. SECURITY AND HUMAN RIGHTS				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> SA Constitution Mine Health & Safety Act Labour Relations Act Prevention of Organised Crime Act Prevention and Combating of Corrupt Activities Act 	<ul style="list-style-type: none"> Relations with private and the public security Illegal mining - mine closures Security operations during violent protests in mine communities 	<ul style="list-style-type: none"> Safety and Security assessment 	<ul style="list-style-type: none"> Voluntary Principles on Security and Human Rights 	<ul style="list-style-type: none"> SAPS Dept of Justice DMR SA Human Rights Commission SALGA Parliament Host Municipalities Host communities
E. TRANSFORMATION				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> Minerals & Petroleum Resources Development Act Employment Equity Act Basic Conditions of Employment Act Labour Relations Act Skills Development Act 	<ul style="list-style-type: none"> Migrant labour practices Gender mainstreaming Economic inclusivity 	<ul style="list-style-type: none"> Mining Charter Housing and Living Standards Codes of Good Practice Social and Labour Plans Framework Agreement for a Sustainable Mining Industry 	<ul style="list-style-type: none"> Compliance with the Charter: Ringfenced elements 	<ul style="list-style-type: none"> Dept of Planning Monitoring and Evaluation Dept of Human Settlements DMR Dti Dept of Labour Dept of Higher Education and Training Business Unity South Africa National Economic Development and Labour Council Mining Qualifications Authority Dept of Cooperative Governance and Traditional Affairs District and Local Municipalities SALGA

APPENDIX A *continued*

F. HUMAN RIGHTS IN THE WORKPLACE				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> SA Constitution Labour Relations Act Skills Development Act Employee Equity Act Conditions of Employment Act 	<ul style="list-style-type: none"> Discrimination and inequality Decent work Safety of employees at workplace Sexual harassment 	<ul style="list-style-type: none"> Remuneration policy Grievance policy Diversity and inclusion policy Human resources development strategy Security policy Employee relations policy Smoking policy Travel policy Whistleblowing policy Protection of personal information 	<ul style="list-style-type: none"> Compliance with Human Resources policies 	<ul style="list-style-type: none"> Employees Unions
G. LAND RIGHTS AND RESETTLEMENTS				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> SA Constitution Municipal Systems Act Spatial Land Use Management Act Protection of Informal Land Rights Act Communal Property Associations Act Community Property Bill Mineral and Petroleum Resources Development Act Agricultural Land Act Property Valuation Act Traditional Leadership and Governance Framework Act of 2003 Restitution of Land Rights Act Arbitration Act 	<ul style="list-style-type: none"> Mining on communal land principles Right to say, 'no to mining' and the Free Prior and Informed Consent (FPIC) Economic displacements Respect for culture and cultural practices 	<ul style="list-style-type: none"> Resettlement models/guidelines Grievance mechanism 	<ul style="list-style-type: none"> Compliance with lease/compensation agreements Compliance with Resettlement models/guidelines once developed Grievance mechanisms 	<ul style="list-style-type: none"> DRDLR DMR COGTA SALGA NGOs Communities Parliament
H. DEVELOPMENT OF GRIEVANCE MECHANISMS				
Legislation	Issues	Performance Indicator	Standard	Stakeholders
<ul style="list-style-type: none"> Constitution Minerals & Petroleum Resources Development Act Interim Protection of Informal Land Rights Act Traditional Leadership and Governance Framework Act 41 of 2003 	<ul style="list-style-type: none"> Meaningful consultation 	<ul style="list-style-type: none"> Mining Charter Housing and Living Standards Social and Labour Plans Framework Agreement for a Sustainable Mining Industry 	<ul style="list-style-type: none"> Published and properly administered grievance mechanisms 	<ul style="list-style-type: none"> Dept of Planning Monitoring and Evaluation Dept of Human Settlements DMR Dept of Cooperative Governance and Traditional Affairs District and Local Municipalities SALGA Host communities NGOs