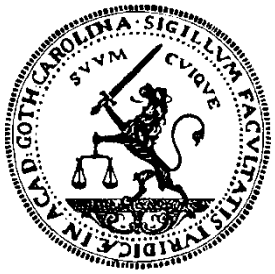

FACULTY OF LAW

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The responsibilities of LKAB to respect the rights of the Sami people

a Business and Human Rights perspective on access to remedy in the Swedish mining sector

JURM02 Graduate thesis

Graduate thesis, Master of Laws program

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Table of contents

Summary

In 2023, the Swedish state-owned enterprise LKAB revealed that it had found Europe's largest deposit of critical minerals, which are needed in green technology. Being located on indigenous territory, a mine would impact the migration of reindeers, a Sami practice which form the basis of their culture and status as indigenous peoples under international law. This prompted questions about what responsibilities LKAB, as a state-owned enterprise, has to respect the rights of the Sami people to meaningfully participate and influence decisions that may impact them under the business and human rights framework.

First, it was discovered that the state has an obligation to take *additional steps* to ensure compliance of its state-owned enterprises with human rights due diligence requirements. Although accountability can be attributed to the state for the conduct of its state-owned enterprises under international law, the emerging business and human rights framework in relation to state-owned enterprises builds on the principle of separate legal personality. Second, indigenous peoples right to self-determination and to give or withhold their free, prior, and informed consent in matters of importance to their culture and way of life is to be understood as a *sliding scale*, i.e., the requirement to obtain consent depends on the degree of impact. Third, although the principle of free, prior and informed consent is a standard for states, it is emerging as a business standard and responsibility through international sector guidelines. Human rights impact assessments shall be conducted by companies continuously and before the go no-go decision, i.e., at the start of the exploration phase. Imbalance of power between rightsholders and companies shall not be exacerbated in mitigation efforts and remediation. However, there is an implementation gap in the global mining sector between recognised corporate responsibilities and practice on the ground. The inherent business centricity together with exclusion of social and cultural aspects, ignores the particularities of indigenous experiences.

The Sami people have limited formal ability to influence the permitting of a mining concession – forming a regulatory gap between Sweden's international obligations and domestic law. Coupled with issues of claiming formal title to land and narrow routes to accessing justice, Sami Communities are often left to defend their rights by participating in corporate-owned consultation procedures. Although recognising their role as a state-owned enterprise to lead by example, LKAB's conduct does not reach up to international standards for best practice in terms of engagement and dialogue with the Sami people. The knowledge gap in the Swedish mining sector about indigenous peoples' rights and corporate responsibilities under emerging international legal frameworks lead to exacerbated power imbalances and one-sided agreements. The thesis concludes that the significant resource imbalance between mining companies and Sami Communities as well as hate crimes needs to be addressed by legislation to ensure removal of barriers to effective remedies.

Sammanfattning

I början av 2023 publicerade det svenska statsägda bolaget LKAB att man funnit Europas största fyndighet av sällsynta jordartsmetaller – vilka är viktiga komponenter i grön teknologi. Eftersom fyndigheterna finns på samiskt område, skulle en gruvetablering påverka samernas möjlighet att migrera sina renar – en tradition som utgör grunden för samisk kultur och deras status som urfolk i internationell rätt. Därför väcktes frågan om vilket ansvar LKAB, som ett statsägt bolag, har att respektera samernas rätt att delta och påverka i beslut som rör dem under FN:s vägledande principer för företag och mänskliga rättigheter.

För det första, har stater en förpliktelse att *vidta ytterligare åtgärder* genom att kräva att statsägda företag genomför human rights due diligence. Även om ett statsägt bolags agerande kan generera statsansvar enligt de internationella reglerna i ARSIWA, så bygger de internationella principerna om företags ansvar för mänskliga rättigheter på separationsprincipen. För det andra, ska ursprungsbefolkningars rätt till ett fritt och informerat förhandssamtycke förstås som en glidande skala där staters förpliktelse att säkra samtycke beror på graden av påverkan av det beslut som ska fattas. För det tredje, så har principen om ett fritt och informerat förhandssamtycke utvecklats till branschpraxis i gruvindustrin genom internationella riktlinjer. För att vara effektiv bör konsekvensbedömning av mänskliga rättigheter kontinuerligt genomföras av företag samt före det slutliga investeringsbeslutet, dvs i början av prospekteringsfasen. Den inneboende maktobalansen mellan rättsinnehavare och företag bör också mildras av de åtgärder som vidtas. Det finns dock ett implementeringsglapp mellan det erkända företagsansvaret och vad som sker på marken. Möjligheterna för företagen att själva besluta om tillräckliga åtgärder tillsammans med exkludering av sociala och kulturella aspekter från konsekvensbedömningar ignorerar ursprungsbefolkningars speciella ställning.

Det samiska folket har begränsade möjligheter att påverka beslut om gruvetableringar i Sverige– vilket skapar en diskrepans mellan statens internationella förpliktelser och nationell lagstiftning. Tillsammans med problem för samerna att tillerkännas formellt ägande till deras traditionella marker och få möjligheter till upprättelse i domstol, är samer ofta tvungna att försvara sina rättigheter genom att delta i företagsägda konsultationsprocesser. Även om LKAB vidgår att man som statsägt bolag har ett ansvar att respektera mänskliga rättigheter, når inte deras agerande upp till internationell branschpraxis gällande engagemang och dialog med samerna. Kunskapsluckan i den svenska gruvindustrin om ursprungsbefolkningars rättigheter och företags ansvar att respektera mänskliga rättigheter leder till förstärkta maktobalanser och ensidiga avtal. Den stora skillnaden i resurser mellan samer och gruvföretaget samt ökningen av hatbrott riktade mot samer behöver adresseras av lagstiftning för att säkra det samiska folkets tillgång till effektiva rättsmedel.

Preface

Sometimes, you don't end up where you thought you would. After seven years of studies and a change of direction from business to law, I have finally come full circle.

To all my teachers who haven't always provided the answers, but instead asked the right questions – thank you. I would also like to thank my supervisor, Radu Mares, for getting me properly started. Thank you to Christine for your interest in my thesis and for taking the time to provide me with valuable insights. Thank you to Josefine for making the process feel less lonely.

This thesis is a testament to the people in my life who have always believed in me – my family and friends, thank you. I hope you know your impact.

Lastly, I want to direct a special thank you to two people who have experienced the highs and lows of this semester together with me. To Emil, thank you for your unwavering support and never-ending optimism – you are the light. To Elton, thank you for keeping me present and for filling every day with joy.

Malmö, 24 May 2023
Izabell Zaza

Abbreviations

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BHR	Business and Human Rights
CBIA	Community-Based Impact Assessment
CCPR	Human Rights Committee
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRD	Civil Right Defenders
CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
EU	European Union
FPIC	Free, prior, and informed consent
HRC	Human Rights Council
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
HRIAM	Human Rights Impact Assessment and Management
IA	Impact Assessment
IBA	Impact Benefit Agreement
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
ICMM	International Council on Mining and Metals
IFC	International Finance Cooperation
ILO	International Labour Organization
LKAB	Luossavaara-Kiirunavaara Aktiebolag
MNE	Multinational Enterprise
NAP	National Action Plan
NCP	National Contact Point
NHRI	National Human Rights Institutions
NJA	*Nytt Juridiskt Arkiv* (Judgments from the Swedish High Court)
NJGM	Non-judicial grievance mechanism
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OLGM	Operations-level grievance mechanism
Prop.	Swedish Government Bill (*Proposition*)

REE	Rare Earth Elements
RMF	Responsible Mining Foundation
SGU	Geological Survey of Sweden
SOE	State-Owned Enterprise
SOU	Swedish Government Official Reports (*Statens offentliga utredningar*)
SRIP	Special Rapporteur on the Rights of Indigenous Peoples
SRSG	Special Representative of the Secretary General
UDHR	Universal Declaration of Human Rights
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNGA	UN General Assembly
UNGPs	UN Guiding Principles on Business and Human Rights
Working Group	UN Working Group on the issue of human rights and transnational corporations and other business enterprises

1 Introduction

1.1 Background

The world's rarest mineral resources are in our hands, literally. These rare mineral sources, so-called critical minerals, are currently needed for our smartphones, laptops, and other modern technologies. Critical minerals are also needed as components in the technology that will enable the transition to a green economy, such as the production of electric vehicles, solar panels, and wind turbines.[1] As clean energy is essential for reaching the goals in the Paris Agreement[2] and combatting climate change, it is expected that there will be a steep increase in demand for critical minerals.[3] The concentrated supply of critical minerals needed for green technology and high-tech industry, such as rare earth elements (REE)[4], has geopolitical implications for the European Union (EU) as it is heavily dependent on imports from China.[5] To achieve energy security, the EU has set out to diversify its sourcing of critical metals and minerals.[6]

Although the extraction of critical minerals has the potential to enable the green transition and further economic growth, it faces several challenges. Most relevant for this thesis, is the fact that the mineral extraction sector has long struggled with accusations of serious human rights abuses.[7] As part of

[1] Kerry Lotzof, 'Your mobile phone is powered by precious metals and minerals', Natural History Museum (*Natural History Museum UK*, 7 October 2020) https://www.nhm.ac.uk/discover/your-mobile-phone-is-powered-by-precious-metals-and-minerals.html accessed 22 February 2023.

[2] Conference of the Parties, Adoption of the Paris Agreement to the UN Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016). UN Doc. FCCC/CP/2015/l.9/Rev1 (Paris Agreement)

[3] International Energy Agency, 'The Role of Critical Minerals in Clean Energy Transition. World Energy Outlook Special Report' (March 2022), 5 https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/executive-summary accessed 24 February 2023.

[4] Rare earth elements (divided into light and heavy) are a group of 17 chemical elements that are used in green technology and high-tech industries. See: European Commission, '2017 list of Critical Raw Materials for the EU' COM(2017) 490 final; Anders Hallberg & Helge Reginiussen, 'Translation of government assignment: Mapping of innovation-critical metals and minerals' Geological Survey of Sweden (SGU) Report 2019:20 (December 2019), 76-77 https://www.sgu.se/en/about-sgu/tasks-and-activities-new/regeringsuppdrag/avslutade-regeringsuppdrag/innovation-critical-metals-and-minerals/ accessed 17 April 2023.

[5] China provides 98% of EU's supply of REE. See more: European Commission, 'Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability' Communication (2020) 474 final.

[6] 'EU Policy' (*European Raw Materials Alliance*) https://erma.eu/eu-policy/ accessed 23 February 2023; Laura He, 'Sweden finds the largest rare earth deposit in Europe. It could cut dependence on China' *CNN* (13 January 2023) https://edition.cnn.com/2023/01/13/tech/sweden-biggest-rare-earth-mine-china-dependence-intl-hnk/index.html accessed 28 February 2023.

[7] 'Extractives & Transition Minerals' (*Business & Human Rights Resource Centre*) https://www.business-humanrights.org/en/big-issues/natural-resources/extractives-transition-minerals/ accessed 22 February 2023.

these issues, extractive companies have a history of failing to obtain the acceptance of their stakeholders such as local or indigenous communities for its operations, the so-called social license to operate.[8] The social license to operate was developed by the mining industry and is especially present in the context of extractive industry operations.[9] The leading examples of business recognition of the social license to operate are the Corporate Social Responsibility (CSR) initiatives taken by Nike and Shell in the 1990's due to them being targeted with widespread public campaigns condemning human rights abuse within their operations.[10] Additionally, extractive companies are known to have the power to transform the life of communities, which results in often leaving victims of human rights abuses without redress.[11]

The issue of human rights abuses by the extractive sector is often discussed in the context of developing countries with weak legal systems.[12] Internationally, it is seldom focused on the operations of extractive companies within a rule of law-context in a highly developed State such as Sweden.[13] But although Sweden is renowned for its gender equality, extensive social safety net and progressive stance on the climate crisis, there is a current backlash against the green transition's effect on its indigenous peoples, the Sami.[14] The Sami people are one of 5 000 indigenous peoples communities in the world and one

[8] Emilie McConaughey & Baptiste Rigaudeau, 'Social license to operate' (Kabir A.N. Duggal (ed.)) (*Jus Mundi*, 10 March 2023) https://jusmundi.com/en/document/publication/en-social-license-to-operate accessed 26 March 2023.

[9] Daniela Chimisso dos Santos & Sara L. Seck, 'Human rights due diligence and extractive industries' in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 151-175, 151; McConaughey & Rigaudeau (2023), 'Social license to operate'.

[10] John Ruggie, 'The social construction of the UN Guiding Principles on Business and Human Rights', in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 63-86, 69-70; John Ruggie, 'The paradox of corporate globalization: disembedding and reembedding governing norms' (2020) Harvard Kennedy School Working Paper No. RWP20-023, M-RCBG Faculty Working Paper Series, 2020-01, 13-14 https://dx.doi.org/10.2139/ssrn.3556577 accessed 22 February 2023.

[11] dos Santos & Seck (2020), 151.

[12] Within the human rights literature, focus is often on extraction activities in developing nations by companies headquartered in the developed world – almost 50% are based in Canada. See: 'Canadian Mining Assets' (*Government of Canada*, February 2023) https://naturalresources.canada.ca/maps-tools-and-publications/publications/minerals-mining-publications/canadian-mining-assets/19323 accessed 23 March 2023; dos Santos & Seck (2020), 151 and 155-157.

[13] In 2022, Sweden was ranked 4th on the World Justice Rule of Law Index. See more: 'Sweden Overall Score 2022' (*World Justice Project*) https://worldjusticeproject.org/rule-of-law-index/country/Sweden accessed 23 March 2023. See also: Christina Allard & Deborah Curran, 'Indigenous Influence and Engagement in Mining Permitting in British Columbia, Canada: Lessons for Sweden and Norway? (2021) Environmental Management https://doi.org/10.1007/s00267-021-01536-0 accessed 23 March 2023.

[14] Karen McVeigh & Klaus Thymann, ''We borrow our lands from our children": Sami say they are paying for Sweden going green' *The Guardian* (10 August 2022) https://www.theguardian.com/global-development/2022/aug/10/indigenous-sami-reindeer-herders-sweden-green-transition accessed 28 February 2023.

of few in Europe.[15] There are between 20.000 and 40.000 Sami in Sweden today, but only a small minority of the Sami (4 600) keep reindeers, which is the foundation for de facto recognition of indigenous rights in Swedish legislation.[16] The lack of legal protection of Sami people's human rights has resulted in repeated international critique of Sweden for its treatment of its indigenous population.[17] Heavy criticism is continuously directed towards issues connected to extractive activities on Sami traditional territory.[18]

The study of the impact of extractive industries on the human rights of indigenous peoples focus on the general status of indigenous peoples under international law and the principle of free, prior and informed consent (FPIC).[19] Especially the provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) on the state's obligation to consult indigenous peoples in matters that may impact them are central in international legal development.[20] However, not as much attention has been brought to consider the issues of human rights abuses by extractive industries under the evolving business and human rights (BHR) framework when indigenous persons are the alleged

[15] Peter Sköld & Jon Moen, 'Introduction – Conflicts over Natural Resources: Causes, Consequences and Solutions' in Peter Sköld & Krister Stoor (eds), *Rivers to Cross: Sami Land Use and the Human Dimension* (Centre for Sami Research, Umeå University, 2012), 7-15, 7.

[16] 'Samerna i Sverige' (*Sametinget*, 7 December 2022) https://www.sametinget.se/samer accessed 2 May 2023; 'Rennäringen i Sverige' (*Sametinget*, 15 December 2022) https://www.sametinget.se/rennaring_sverige accessed 2 May 2023.

[17] See: United Nations Human Rights Council (HRC), 'The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland. Report of the Special Rapporteur on the rights of indigenous peoples (SRIP), James Anaya' (6 June 2011) UN Doc A/HRC/18/35/add.2; HRC, 'Report of the SRIP on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland' (9 August 2016) UN Doc. A/HRC/33/42/Add.3; United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'Concluding observations on the 6th periodic report of Sweden' (14 July 2016) UN Doc E/C.12/SWE/CO/6, 3-4; United Nations Committee on the Elimination of Racial Discrimination (CERD), 'Concluding observations on the combined 22nd and 23rd periodic reports of Sweden' (6 June 2018) UN Doc CERD/C/SWE/CO/22-23, 2-3; Council of Europe Committee of Ministers, 'Resolution on the Implementation of the Framework Convention for the Protection of National Minorities by Sweden (adopted 12 September 2018) CM/Res/CMN(2018)9.

[18] See: HRC (2011), 'Report of SRIP' A/HRC/18/35/add.2, § 55; HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 42-48.

[19] Jernej Letnar Černič, 'Business and indigenous peoples' human rights' in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 335-353, 338-342.

[20] United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN doc. UNGA/A/RES/61/295 (UNDRIP); Felipe Gómez Isa, 'The UNDRIP: an increasingly robust legal parameter' (2019) 23(1-2) The International Journal of Human Rights 7-21, 10 https://doi.org/10.1080/13642987.2019.1568994 accessed 22 April 2023.

victims.[21] Even less has this issue been addressed when that business is a state-owned enterprises (SOE).[22]

It is within this context that it becomes interesting to consider a Swedish SOE active in the extractive industry that recently discovered a deposit consisting of critical minerals in northern Sweden. It was in January 2023 that it became world news[23] that the Swedish state-owned international mining company, LKAB, has found Europe's largest deposit of the iron ore apatite from which REE can be extracted[24], in Kiruna.[25] LKAB is fully owned by the Swedish State and its mines in Gällivare and Kiruna produces 80 % of all iron ore in the EU.[26] Moreover, LKAB's mines are the world's two largest underground iron ore mines.[27]

The BHR framework consist of several guiding documents concerning corporate responsibility to respect human rights in their operations. At the centre of development is the UN Guiding Principles on Business and Human Rights (UNGPs) which is based on existing international norms and standards.[28] The

[21] Černič (2020), 337-338.

[22] See for example: Larry Catá Backer, 'Human rights responsibilities of state-owned enterprises' in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 223-244, 243-244.

[23] 'Sweden's LKAB finds Europe's largest deposit of rare earth metals' (*Reuters*, 13 January 2023) https://www.reuters.com/markets/commodities/swedens-lkab-finds-europes-biggest-deposit-rare-earth-metals-2023-01-12/ accessed 22 February 2023; 'Sweden discovers largest rare earth deposit in Europe' (*Aljazeera*, 12 January 2023), https://www.aljazeera.com/news/2023/1/12/sweden-discovers-europes-largest-rare-earth-mine accessed 28 February 2023; Phelan Chatterjee, 'Huge rare earth metals discovery in Arctic Sweden' *BBC* (12 January 2023) https://www.bbc.com/news/world-europe-64253708 accessed 28 February 2023.

[24] SGU Report 2019:20, 'Mapping of innovation-critical metals and minerals', 78.

[25] 'Europe's largest deposit of rare earth elements is located in the Kiruna area' (*LKAB*, 12 January 2023) https://lkab.com/en/press/europes-largest-deposit-of-rare-earth-metals-is-located-in-the-kiruna-area/ accessed 17 April 2023; LKAB, 'Underlag för samråd enligt miljöbalken – avseende ansökan om bearbetningskoncession enligt minerallagen för fyndigheten Per Geijer (Luossavaara K nr 2)' (Material for consultation according to the Environmental Code – concerning the application for mining concession according to the Minerals Act for the Per Geijer deposit (Luossavaara K nr 2)) 2023-123159 (15 February 2023), 9 https://share.mediaflow.com/se/?G1GEWD98S6 accessed 16 April 2023. See also: Rudyard Frietsch & Jan-Anders Perdahl, 'Rare earth elements in apatite and magnetite in Kiruna-type iron ores and some other iron ore types' (1995) 9/6 Ore Geology Review 489-510, 490 https://doi.org/10.1016/0169-1368(94)00015-G accessed 26 April 2023.

[26] Government Offices of Sweden, 'Annual report for state-owned enterprises 2021', 56 https://www.government.se/reports/2022/09/annual-report-for-state-owned-enterprises-2021/ accessed 3 April 2023; 'Our organisation' (*LKAB*) https://lkab.com/en/who-we-are/our-organisation/ accessed 17 April 2023; 'What we do' (*LKAB*) https://lkab.com/en/what-we-do/ accessed 3 May 2023.

[27] 'A history of LKAB' (*LKAB*) https://lkab.com/en/who-we-are/a-history-of-lkab/ accessed 3 May 2023.

[28] HRC, 'Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy Framework"' (2011) UN Doc HR/PUB/11/04 (UNGPs); Stéphanie Lagoutte, 'The UN Guiding Principles on Business and Human Rights: A Confusing 'Smart Mix' of Soft and Hard International Human Rights Law' in Stéphanie

UNGPs, unanimously endorsed by the United Nations Human Rights Council (HRC) in 2011, are built on three pillars: (1) the state obligation to protect human rights; (2) the responsibility of business to respect human rights; and (3) the need for greater access to effective remedy for victims of business-related human rights abuses, both judicial and non-judicial.[29] As expressed in the UNGPs, corporations respect human rights when they avoid causing or contributing to the infringement on the human rights of others.[30] To ensure compliance, corporations need to carry out human rights due diligence – a process that aims to identify, prevent, mitigate and account for how they address their adverse human rights impacts.[31]

The UNGPs have managed to align international standards and language regarding business responsibility to respect human rights in such a way that the principles have gained overall acceptance by governments, industries and civil society.[32] A notable example is the alignment of the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD MNE Guidelines) with the UNGPs.[33] Although being a soft-law instrument, the UNGPs are authoritative in this area of law and are currently being hardened into legislation within the EU through the proposed Corporate Sustainability Due Diligence Directive.[34] In the proposed Directive, the extractive industry is mentioned as a high-risk sector for human rights abuses, drawing from the OECD framework.[35] Moreover, in January 2023 the Corporate Sustainability Reporting Directive that entered into force in the EU, will require large and listed companies to publish regular reports

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Lagoutte, Thomas Gammeltoft-Hansen & John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford Academic, 2017) 235-254, 237.

[29] UNGP 1; HRC, 'Guiding Principles on Business and Human Rights At 10: Taking stock of the first decade'. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (Working Group) (22 April 2021) UN Doc A/HRC/47/39, § 1.

[30] UNGPs 11 and 13.

[31] UNGP 17.

[32] Surya Deva, 'From "business or human rights" to "business and human rights": what's next?' in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 1-22, 4; Ruggie (2020), 'The social construction of the UNGPs', 79.

[33] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD Publishing Paris, 2011) Chapter IV Commentary §36 http://dx.doi.org/10.1787/9789264115415-en accessed 17 May 2023.

[34] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence amending Directive (EU) 2019/1937' COM/2022/71 final, preamble 12; UNGPs; HRC (2021), 'Report of the Working Group: UNGPs At 10' UN Doc A/HRC/47/39, §§ 1 and 6; Mark B. Taylor, 'Human rights due diligence in theory and practice' in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 88-107, 88.

[35] See: COM/2022/71 final, preamble 22 and Article 2.1.b.iii.

on the social and environmental risks posed by their operations and how their activities impact people and the environment.[36]

Against this background, it is relevant to study the UNGPs third pillar (access to remedy) in the context of a Swedish state-owned mineral extraction company impacting the human rights of the indigenous Sami peoples. Investigating how the application of the human rights due diligence requirements, especially the access to remedy pillar, within the UNGPs changes when the company is wholly owned by a state is also a novelty in the field and deserves attention.[37]

1.2 Purpose, choice of case and research question

The main purpose of this thesis is to contribute to a greater understanding of, if and how the field of business and human rights law advances access to remedies for human rights abuse committed by corporations. More specifically, the aims are to investigate how the Sami people's access to judicial and non-judicial remedial mechanisms as defined under the third pillar of the UNGPs are affected by the fact that they are impacted by the operations of a state-owned extractive company. To achieve this aim, the thesis will focus on the effect that the context has on the human rights due diligence that needs to be conducted for a business to fulfil its obligation to respect human rights. Given that many extractive companies are state-owned it is relevant to include this aspect in the research.[38]

Therefore, the research questions are as follows:

1. How is the application of the human rights due diligence requirements affected when a company is owned by a state?

2. How is the assessment under the human rights due diligence framework affected by the operations of mineral extraction?

3. How do the indigenous Sami people experience injustice connected to mineral extraction in Sweden?

4. What are the challenges to ensure the effective access to remedies for the Sami people when their rights are adversely impacted by a Swedish state-owned extractive company?

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[36] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU, as regards sustainability reporting [2022] OJ L 123.

[37] See for example: Mikko Rajavuori, 'Governing the Good State Shareholder: The Case of the OECD Guidelines on Corporate Governance of State-Owned Enterprises' (2018) 29(1) European Business Law Review, 103-142, 111.

[38] dos Santos & Seck (2020), 151.

The motivation behind the research lies in the fact that while the possibilities of holding MNEs accountable for human rights abuses have been thoroughly debated within the framework of BHR for the last decade, the access to remedy pillar has been overlooked.[39]

The choice to research the Swedish setting is because Sweden is one of the top countries in the world when it comes to rule of law.[40] Paradoxically, Sweden has received widespread criticism for how it treats its indigenous people by failing to protect their right to participate in matters that affect their traditional lands and culture. The criticism is often followed with a recommendation directed towards Sweden to ratify the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent countries (ILO Convention 169).[41]

1.3 Delimitation and definitions

For clarity, it is necessary to briefly comment on some of the larger delimitations and particularities regarding this thesis.

First, the focus of this thesis is on the application and effects of the BHR framework on access to remedy for victims of human rights abuse by corporations. Due to the context of the investigation, the thesis discusses the relevant human rights of indigenous peoples, such as the principle of FPIC as part of a business responsibility to conduct human rights due diligence. However, it is not the ambition of the thesis to generally review the status of the rights of indigenous peoples under international law. Thus, the thesis is limited in scope to provisions regarding participation and consultation. Additionally, due to time and space constraints the thesis will not explore further the environmental aspects connected to issues of mineral extraction. Moreover, although the Swedish State has acknowledged its historic abuse on the Sami

[39] See for example: HRC, 'Improving accountability and access to remedy for victims of business-related human rights abuse. Report of the United Nations High Commissioner for Human Rights' (10 May 2016) Un Doc A/HRC/32/19, § 8. The access to remedy pillar is gaining more attention through the Working Group on Business and Human Rights' 'Accountability and Remedy Project' (*Office of the High Commissioner for Human Rights* (OHCHR)) https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project accessed 1 March 2023.

[40] World Justice Rule of Law Index (2022).

[41] UN Human Rights Committee (CCPR), 'Considerations of reports submitted by states parties under article 40 of the covenant – Concluding observations: Sweden' (24 April 2002) UN Doc CCPR/CO/74/SWE, § 15; CERD, 'Concluding observations on the combined 19th to 21st periodic reports of Sweden, adopted by the Committee at its 83rd session (12-30 August 2013)' (23 September 2013) UN Doc CERD/C/SWE/CO/19-21, §§ 17-19; CCPR, 'Concluding observations on the 7th periodic report of Sweden' (28 April 2016) UN Doc CCPR/C/SWE/CO/7, §§ 38–39; CESCR (2016), 'Concluding observations on the 6th periodic report of Sweden' E/C.12/SWE/CO/6, §§13-16; CERD (2018), 'Concluding observations on the combined 22nd and 23rd periodic reports of Sweden' CERD/C/SWE/CO/22-23, §§ 16–17; CERD, 'Opinion adopted by the Committee under article 14 of the Convention concerning communication No 54/2013' (18 December 2020) UN Doc. CERD/C/102/D/54/2013.

people and the works of a truth commission to uncover past atrocities is on its way, this thesis will not examine in greater detail transitional justice mechanisms in post-colonial settings.[42] The Sami people are considered a national minority making Swedish and EU minority regulation applicable on them. However, this is considered outside the scope of this thesis which will focus exclusively on the recognition of Sami people as indigenous.

Second, when discussing human rights abuse risks in the extractive industry, it is often done within the regime of international investment law.[43] For example, the well-known *Gállok* case concerns a Swedish subsidiary of the British company Beuwolf Mining and the potential impact of its operations on Sami people.[44] Moreover, the sourcing of critical minerals has made its way into recent EU free trade agreements.[45] There have also been efforts to embed human rights obligations on SOEs in trade agreements.[46] However, as there is no transnational element in this case, the human rights challenges associated with the international investment law regime will not be further extrapolated. Moreover, the presentation concerns mining operations and focuses on the exploration and exploitation stage, thus excluding reviewing trading of minerals in global supply chains.

Third, the thesis notes that issues of state responsibility and sovereign immunity are actualized when discussing SOEs. Although this thesis outlines part of the academic discussion and brings to light some of the problems with the approach of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UN Working Group)[47] and OECD, it will generally operate under the assumption that the

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[42] Swedish Ministry of Culture, Committee Directive (Dir.) 2021:103 'Kartläggning och granskning av den politik som förts gentemot samerna och dess konsekvenser för det samiska folket' (Mapping and examination of Sami policies and its consequences for the Sami people). For further readings on the topic, see for example: Christine Evans, 'A Truth Commission in Sweden' (*Raoul Wallenberg Institute*, 5 May 2023) https://rwi.lu.se/blog/a-truth-commission-in-sweden/ accessed 18 May 2023.

[43] See for example: Columbia Center on Sustainable Investment, 'International Investment Law and the Extractive Industries' (July 2022) https://ccsi.columbia.edu/sites/default/files/content/docs/International-Investment-Law-Extractive-Industries-2022-09-01-Final.pdf accessed 2 May 2023.

[44] 'Sweden: Open pit mine will endanger indigenous lands – UN experts' (*UN*, 10 February 2022) https://unric.org/en/sweden-open-pit-mine-will-endanger-indigenous-lands-and-the-environment-un-experts/ accessed 17 April 2023.

[45] Victor Crochet & Weihuan Zhou, 'Critical insecurities? The European Union's trade and investment strategy for a stable supply of minerals for the green transition' (*EJIL:Talk!*, 23 February 2023) https://www.ejiltalk.org/critical-insecurities-the-european-unions-trade-and-investment-strategy-for-a-stable-supply-of-minerals-for-the-green-transition/ accessed 17 April 2023.

[46] Larry Catá Backer, 'The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy' (2017) 50(4) Vanderbilt Journal of Transnational Law 827-888, 842.

[47] Shortly after the endorsement of the UNGPs in 2011, the HRC established the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, also known as the Working Group on business and human rights. The

separation principle applies to SOEs. Additionally, as LKAB is fully owned by the Swedish State, this thesis will not discuss various ownership designs and how these can influence the application of state responsibility.[48]

Lastly, regarding scope, the thesis has no ambition to cover all extractive sector initiatives regarding human rights due diligence in general but will focus on the ones that have been specifically acknowledged and discussed in the literature reviewed. Moreover, the analysis does not include a full case law review. Any cases referred to are included as examples.

For stringency, some of the terminology that is used throughout this thesis is clarified. The term 'critical minerals' will be used when referring to minerals needed to facilitate the green technological and economical transition from fossil fuel dependency. As explained above, REEs are one of these critical minerals. 'The green transition' refers to the process of the EU to reduce net greenhouse gas emissions in efforts to become climate neutral. The EU has adopted a set of proposals to achieve this goal that is called 'The EU Green Deal', under which the proposed Corporate Sustainability Due Diligence Directive is included.[49]

The term 'human rights abuses' refer to all types of adverse human rights impacts. Human rights due diligence (HRDD) is used as an umbrella term that includes risk assessment tools such as human rights impact assessments (HRIAs). A SOE is a corporation that is partly or fully owned by the public or the government.[50] When referring to the right to self-determination, it is in the context of its application to indigenous peoples unless stated otherwise.

1.4 Method and material

This thesis has an overarching human rights perspective, as it employs a human rights-based approach and is primarily based on international human rights law sources. The legal area of business and human rights, in and of

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Working Group consists of five independent experts from different geographical regions and forms part of the UN Special Procedures system. The primary task of the Working Group is to 'promote the effective and comprehensive dissemination and implementation of the [UNGPs]'. See: HRC, Resolution 17/4 Human rights and transnational corporations and other business enterprises (16 June 2011) UN Doc A/HRC/RES/17/4, § 6. For more information about the work of the Working Group see: 'Working Group on Business and Human Rights' (*OHCHR*) https://www.ohchr.org/en/special-procedures/wg-business accessed 22 March 2023.

[48] Sweden (2021), 'Annual report for SOEs', 56. See more on ownership design of SOEs in: Mihaela Maria Barnes, *State-Owned Entities and Human Rights: The Role of International Law* (Cambridge University Press, 2021), 20.

[49] European Commission, ''Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality' COM(2021) 550 final; 'Council gives final green light to corporate sustainability reporting directive' (*Council of the European Union*, 28 November 2022) https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-green-light-to-corporate-sustainability-reporting-directive/ accessed 22 February 2023.

[50] Barnes (2021), 4.

itself, is an interdisciplinary field that allows for the examination of complex issues from different perspectives.[51] This thesis builds on hard as well as soft legal sources and employs a mixed methodological approach consisting of a legal dogmatic method as well as critical analysis of the law.

First, the legal dogmatic method allows for the use of generally recognised legal sources.[52] This 'black-letter' legal research method aims to explain, systematize, and clarify the law. In international law, a list of those sources can be found in Article 38(1) of the Statute of the International Court of Justice. The generally recognised legal sources consist of treaties, customary law (including jus cogens), general principles of law and subsidiary means for determining the law such as writings of jurists. However, other sources that do not fit into these strict categories can carry normative value, so called 'soft law' sources. Especially if one considers their importance in explaining the content of hard law sources. Depending on if they can be backed up by treaties or customary law, different soft law sources carry different normative values.[53] The fundamental principles of human rights are grounded in general international law and form an integral part of customary international law and the general principles of law.[54] Grounding human rights in general international law rather than just treaties give them a wider sphere of application.[55]

The area of BHR contains soft law instruments that do not by themselves create legally binding obligations.[56] However, guiding principles issued by international and regional intra- and intergovernmental organizations like the UN compile existing human rights principles. They reflect and are consistent with international human rights law and aim to restate the relevant rights in the context of business operations.[57] Such principles derive normative force through the recognition of expectations by states and other actors.[58] Additionally, the UNGPs, that are the legal foundation of this thesis, reflect binding state obligations under core human rights treaties that are also generally considered to exist under customary international law, thus rendering it binding

[51] Minna Gränd, 'Allmänt om användningen av andra vetenskaper inom juridiken' in Maria Nääv & Mauro Zamboni (eds), *Juridisk Metodlära* (2nd edition, Lund: Studentlitteratur, 2018) 429–441, 436.

[52] Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv & Mauro Zamboni (eds), *Juridisk Metodlära* (2nd edition, Lund: Studentlitteratur, 2019) 21–46, 21.

[53] Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System*, (Oxford Academic, 2016), 72 and 76.

[54] James Crawford, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press, 2019), 613-614 and 618.

[55] Olivier De Schutter, International Human Rights Law: Cases, Materials, Commentary (3rd edition, Cambridge University Press, 2019), 59-70.

[56] HRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' – Report of the Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (19 February 2007) UN Doc. A/HRC/4/35, §§ 45-52.

[57] Lagoutte (2016), 242-243.

[58] HRC (2007), 'Report of SRSG: Mapping International Standards' A/HRC/4/35, § 45.

effect in part.[59] Additionally, the principles of the UNGPs are currently being hardened into legislation in the EU.

Second, as pure doctrinal legal research can be rigid, narrow, and inflexible in addressing diverse contexts, a critical analysis of the law method will also be employed. Critical analysis allows for explaining the cause and effect of complex issues as the methodology allows for a contextual and interdisciplinary mode of conducting research. As critical analysis of law pursues contextualization it fits well in researching international legal systems and how it connects to domestic legal orders. Further, it recognises that law is not facts, but also norms and thus reviews a legal order's legitimacy.[60]

The research is conducted through a desk study with the use of diverse materials consisting of primary and secondary sources. The primary sources consist of binding and non-binding international legal instruments; Swedish national legislation and jurisprudence; and official documents issued by the UN and EU bodies as well as other international organizations such as the OECD and sector-specific initiatives. As the core of the thesis is the UNGPs and its commentaries, the thesis will also engage with reports from the UN Working Group as well as reports produced by the Accountability and Remedy Project and jurisprudence from UN treaty bodies. Official documents and reports from the Sami Parliament of Sweden, LKAB and the Swedish government are also consulted.

The secondary sources used are academic sources such as books, articles, and blog posts published by scholars researching business and human rights. The sourcing of these has been conducted through a literature review which has helped with the mapping of relevant material in the initial stages of writing this thesis. For contextualization, additional reports from NGO's and other organizations and bodies are used as well.

1.5 Outline

This thesis is outlined in seven chapters. In the above, *Chapter 1* has introduced the problem, purpose, choice of case and research questions of this thesis. It has also discussed the delimitations and terminology as well as presented the choice of method and material.

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[59] Ibid, § 10; Iona Cismas & Sarah Macrory, 'The Business and Human Rights Regime under International Law: Remedy without Law?' in James Summers & Alex Gough (eds), *Non-state Actors and International Obligations* (Brill, Nijhoff, 2018) 222-259, 228-229. See also: HRC, 'State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries' – Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises (13 February 2007) Un Doc. A/HRC/4/35/Add.1.

[60] Markus D. Dubber, 'Critical Analysis of Law: Interdisciplinarity, Contextuality and the Future of Legal Studies' (2014) 1(1) Critical Analysis of Law: An International & Interdisciplinary Law Review https://dx.doi.org/10.2139/ssrn.2385656 accessed 20 February 2023.

Chapter 2 provides an overview of the BHR framework that has guided the research. First, the question of responsibility for human rights abuses will be addressed from the perspective of the state, the corporation, and the SOE. Second, the UNGPs will be outlined in general and as to how they relate to SOEs. Lastly, Sweden's reception of the UNGPs and the OECD MNE Guidelines will be reviewed.

Chapter 3 introduces the indigenous human rights regime as it pertains to extractive operations. First, indigenous peoples particular right to participation and consultation (FPIC) is outlined. Thereafter, the references to indigenous peoples' particular rights in the UNGPs is reviewed. Finally, Sweden's recognition and protection of the Sami people's human rights is assessed.

Chapter 4 introduces the particularities of human rights due diligence in the extractive mining sector. Additionally, international guidelines as to how corporations best identify and prevent adverse human rights impacts on indigenous peoples in their operation is outlined, delimited to the ones that are directly applicable to LKAB. The chapter concludes by introducing the formal process for permitting mining exploration and exploitation in Sweden together with Swedish industry guidelines.

Chapter 5 analyses the Swedish governance gap as it pertains to the rights of the Sami people and how LKAB, as a SOE, address their human rights responsibility to provide meaningful participation options and facilitate good faith consultations in the context of the Per Geijer critical mineral deposit. The chapter concludes by contextualizing Sami people's experience with participation opportunities.

Chapter 6 draws on the findings in chapter 5 and reflects on the challenges for providing effective access to remedy in the Swedish context.

Chapter 7 provides the conclusion.

2 Business and human rights framework

This chapter aims to set the foundation for the research conducted in this thesis by introducing the framework for business and human rights. To do so, the first subchapter addresses the state obligation for protecting against human rights abuses in international law and international human rights law as well as the evolving role of corporations within this context and the particularities of SOEs. Subsequently the development of the UNGPs and their role will be explained. The final subchapter will outline Sweden's reception of the UNGPs and OECD Guidelines as well as the Sweden's position in questions regarding business responsibility for human rights. The section ends with a brief outline of the key issues identified.

2.1 Responsibility for human rights abuses

States are considered the main lawmakers and bearers of responsibility for violations of international law. This state-centric view of international law can be traced as far back as to the Westphalian Peace in 1648.[61] Thus, the international legal system rests on the premise that states are the creators of international law, i.e., no law can exist above them. However, a cornerstone in the international legal system is that once established, international law is objective and external to state behaviour, will or interest. A state cannot opt out of a norm due to a change of will.[62]

In recent decades, globalization has contributed to the diminishing power of governments and increasing influence of non-state actors such as corporations.[63] These developments have fuelled a debate on the responsibility of corporations for human rights abuse.[64] The following sections outlines the responsibility for human rights abuse by the state, corporation, and SOE.

2.1.1 Obligation of the State to protect

International human rights law places three obligations on states: the duties to respect, protect and fulfil human rights.[65] Due to the limited scope of this thesis, only the state duty to protect human rights will be further elaborated on as it also imposes an obligation to protect persons from the acts of third

[61] Crawford (2019), 3; Edith Brown Weiss, 'Invoking state responsibility in the twenty first century' (2002) 96(4) The American Journal of International Law 798-816, 798 https://doi-org.ludwig.lub.lu.se/10.2307/3070679 accessed 18 April 2023.

[62] Åhrén (2016), 66.

[63] Ruggie (2020), 'The social construction of the UNGPs', 66-69.

[64] Jose E. Alvarez, 'Are corporations 'subjects' of international law?' (2011) 9(1) Santa Clara Journal of International Law 1-36, 32 and 34-35.

[65] Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) Melbourne Journal of International Law 1-36, 11; David Jason Karp, 'What is the responsibility to respect human rights? Reconsidering the "respect, protect and fulfil" framework' (2020) 12(1) International Theory 83-108, 84.

parties, such as corporations.[66] Within the state duty to protect, states have discretion as to how to fulfil their obligation – here the main human rights treaties contemplate legislative, administrative and judicial measures and human rights treaty bodies interpret and provide more specific recommendations on measures such as consulting with communities before approving mining operations.[67]

Under the principle of *pacta sunt servanda,* states have a legal obligation to comply with the provisions of a treaty that they choose to be party to.[68] Looking at the International Covenant on Civil and Political Rights (ICCPR) as an example, it can be shown that international human rights law provides for a direct obligation of the state to protect persons from the abuse of corporations through treaties.[69] Specifically, the state's duty to protect human rights entails three obligations: 1) to prevent violations of human rights in the private sphere, 2) to regulate and control private actors and 3) to investigate violations, punish perpetrators and provide effective remedies to victims.[70] Thus, state responsibility for human rights abuse can be invoked due to the conduct of private companies.

State responsibility for human rights abuses can also be invoked through customary international law as expressed in the secondary rules of the *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA).[71] For that, two conditions must be met: 1) there is an act or omission that is attributable to the state under international law and 2) the act or omission is a breach of the state's international obligations.[72] The doctrine of state responsibility recognises the obligation of the state to protect individuals from human rights violations of non-state actors, such as corporations. However, to actualize state responsibility, the conduct of the corporation must qualify as 'an act of the state' and establishing such a direct link is difficult.[73] The sole criterion on whether there is a direct link is the degree of control the state

[66] HRC (2007), 'Report of the SRSG: State responsibilities' A/HRC/4/35/Add.1, § 7; Chirwa (2004), 11.

[67] Barnes (2021), 43.

[68] Ibid, 41.

[69] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2(2); CCPR, 'General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant', (26 May 2004), UN Doc CCPR/C/2/21/Rev.1/Add.13, § 8.

[70] ICCPR, Article 2; Chirwa (2004), 4.

[71] International Law Commission, 'Report of the International Law Commission on the Work of its 53rd Session: Draft Articles on Responsibility of States for Internationally Wrongful Acts' (23 April – June and 2 July – 10 August 2001) UN Doc Supp No 10 A/56/10 (ARSIWA), Articles 1-3; Chirwa (2004), 3; Robert McCorquodale & Penelope Simons, 'Responsibility beyond borders: state responsibility for extraterritorial violations by corporations of international law' (2007) 70(4) The Modern Law Review Limited 598-625, 601-602.

[72] ARSIWA, Article 2.

[73] Chirwa (2004), 9.

exercises over the company – hence ownership does not matter in this context.[74]

2.1.2 Responsibility of the corporation to respect

The development of corporate responsibility for human rights builds on the recognition that with power comes responsibility.[75] Noting what has previously been elaborated regarding the state obligation to protect human rights, it is nevertheless apparent that states are at times unable or unwilling to safeguard human rights.[76] It is not unusual that states, where there is a perceived conflict of interest, give priority to economic interests such as the ability to attract foreign investments over the protection of human rights.[77] After World War II, the international community saw a commitment to economic liberalization through removal of trade barriers as well as practices to protect national social communities through control of capital flows (embedded liberalism).[78]

With a new mode of organizing economic activities across countries, the MNE intensified the friction between human rights and economic development.[79] In form, the MNE is structured as a corporation, but as it consists of different entities states only have authority of the subsidiary that is incorporated within its jurisdiction – not the entire MNE.[80] The increasing dominance (in 2013, 80% of global trade was linked to MNEs)[81] and complex corporate structures of MNEs coupled with their decreasing dependence on national governments amplified the need to address the issue of corporate responsibility for human rights abuses.[82] There is a significant scale mismatch problem

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[74] Judith Schönsteiner, 'Attribution of state responsibility for actions or omissions of state-owned enterprises in human rights matters' (2019) 40(4) University of Pennsylvania Journal of International Law 895-936, 907.

[75] David Kinley & Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) Virginia Journal of International Law 931-1024, 1021.

[76] This understanding is articulated in the Commentary to UNGP 11.

[77] dos Santos & Seck (2020), 153.

[78] Ruggie (2020), 'The social construction of the UNGPs', 65.

[79] Ibid, 66.

[80] Kinley & Tadaki (2004), 938; Ruggie (2020), 'The paradox of corporate globalization', 12.

[81] Ruggie (2020), 'The social construction of the UNGPs', 67.

[82] Kinley & Tadaki (2004), 934 and 960; John Sherman III, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' (March 2020) Harvard Kennedy School Working Paper No. 71, Corporate Responsibility Initiative, 6 https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/CRI_71.pdf accessed 25 March 2023; Ruggie (2020), 'The paradox of corporate globalization' 12-13; Florian Wettstein, 'The history of "business and human rights" and its relationship with corporate social responsibility' in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 23-45, 25.

as the effects of globalization are global, but the authority to address the issues is national.[83]

The early debates during the 1970's centred around the rights and possibilities of MNEs as well as the development of soft law instruments in the form of international standards for business conduct.[84] It is as a result of these debates that the OECD MNE Guidelines, which now align with the UNGPs, came into being.[85] A well-established conception at the time that had long-lasting implications on the perceived role of business in society was Friedman's shareholder primacy model which recognised only the objective of profit maximization and not social responsibilities such as respecting human rights.[86] This notion also translated into focus on short-term performance for corporations.[87] Although the shareholder primacy model dominated the neoliberal era, it was evident and generally accepted that MNEs possessed at least some international rights and duties in relation to international investment law and environmental damage.[88]

It was first during the 1990's that there was a general recognition that companies have human rights responsibilities.[89]As global markets expanded rapidly through trade agreements, liberalization and privatization, so did claims about corporate human rights abuses.[90] The most well-known examples are poor working conditions in retail factories in Asia and extractive companies land conflicts and connection to military juntas in countries with poor governance structures.[91] It had become evident that MNEs held a unique position in affecting the level of enjoyment of human rights.[92]

Businesses responded to claims of human rights abuse by introducing voluntary initiatives and self-regulation, such as CSR.[93] This sparked a debate about voluntary versus binding regulations.[94] Although the relationship between CSR and the BHR framework is complex, it is somewhat clear in legal scholarly that BHR should be viewed as a critical response to CSR practices.[95]

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[83] Ruggie (2020), 'The social construction of the UNGPs', 68.
[84] Deva (2020), 3.
[85] OECD (2011), *MNE Guidelines*; Wettstein (2020), 26.
[86] Deva (2020), 2; Ruggie (2020), 'The paradox of corporate globalization', 2.
[87] Ruggie (2020), 'The paradox of corporate globalization', 11-12.
[88] Kinley & Tadaki (2004), 946.
[89] Ibid, 961 and 966; Ruggie (2020), 'The social construction of the UNGPs', 63.
[90] HRC (2007), 'Report of SRSG: Mapping International Standards' A/HRC/4/35, § 2.
[91] See for example: Ruggie (2020), 'The paradox of corporate globalization', 13-14; Ruggie (2020), 'The social construction of the UNGPs', 69-70. See also: Amnesty International, 'A criminal enterprise? Shell's involvement in human rights violations in Nigeria in the 1990s' (2017) https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4473932017ENGLISH.pdf accessed 17 May 2023.
[92] Kinley & Tadaki (2004), 933.
[93] Sherman III (2020), 6.
[94] Deva (2020), 4; Sherman III (2020), 6.
[95] Ruggie (2020), 'The paradox of corporate globalization', 13-15.

However, a contribution of CSR that has made its way into the BHR framework is the centrality of the social license to operate.[96]

2.1.3 Responsibility of the state-owned enterprise

As noted above, the human rights obligations of states are well established in international law. And for the past couple of decades, the human rights responsibilities of corporations have become increasingly established as well. However, in the case of SOEs, the state obligation and corporate responsibility meet which adds complexity to the application of international human rights standards.[97] Within the ideology of globalization where the primary role of the state is to regulate under the rule of law and the primary actors in the market are private, the SOE is an anomaly. On the one hand, it is an instrumentality of the state. On the other hand, it operates and is treated as a private enterprise by the international community.[98]

Historically, SOEs were an instrument in the European colonization during a period where the interests of the state and the enterprise were much the same.[99] Since the end of World War II, SOEs have undergone large changes in both operation and framework ideology.[100] In the era of embedded liberalism, the state retreated from the economy. This trend lasted until the 2007 financial crisis when SOEs, once again, have become the largest and most important players in the world economy.[101] Together with Asia, Europe holds most of SOEs worldwide.[102] In Europe, the Nordic States are a current driving force regarding SOEs under the Nordic Capitalism policy which is guided by principles of profitability and exemplary responsibility. For example, the Swedish State recognises a responsibility to be an active and professional owner.[103]

SOEs compete with their private counterparts for global business and are deeply embedded at all levels in global production chains.[104] There is no consensus on a definition of SOEs.[105] However, despite varied terminology all SOEs are generally characterised as 1) owned by a state and 2) engages in

[96] See more: Ruggie (2020), 'The paradox of corporate globalization', 13-14; Ruggie (2020), 'The social construction of the UNGPs', 69-70.
[97] Ibid, 887.
[98] Backer (2020), 225.
[99] Ibid, 223.
[100] Backer (2017), 833.
[101] Barnes (2021), 3 and 9–10.
[102] See figure 1.1 Global reach of state-owned enterprises (IMF) reproduced in Barnes (2021), 18.
[103] Government Offices of Sweden, 'State Ownership Policy and principles for state-owned enterprises 2020' (last updated February 2020) 1 and 8 https://www.government.se/contentassets/aef85fbd7beb4319a70af9a30d6723a1/state-ownership-policy-2020.pdf accessed 3 April 2023; Backer (2017), 836–837.
[104] Backer (2017), 840.
[105] Rajavuori (2018), 113; Backer (2020), 226.

economic activity.[106] The state thus has a dual role: it is both the regulator and the owner of the SOE.[107] Compared to private ownership whose rationale is profit maximization, state ownership can be justified by non-commercial considerations such as resource security.[108] By virtue of its close relationship with the state, the traditional concerns with SOEs are that they are in a position to enjoy privileges not generally available to private companies which relate to unfair competition, national security and resource security.[109]

A notable issue is that it is not yet settled in international legal doctrine if and to what extent the acts or omissions of SOEs regarding human rights can be attributed directly to the state, i.e., generate state responsibility.[110] To start, the rule of separate legal personality of corporations is also valid for a SOE. For state responsibility to be invoked for the acts of a SOE, the company needs to exercise elements of governmental authority or it has to be shown that the state exercises control.[111] According to Article 8 ARSIWA, a direct link is established through the degree of control – here the ownership status does not matter.[112] State responsibility for human rights abuse by SOEs can be invoked under international law, although there is substantial challenge to clarify a direct link between the company conduct and the state, even if it is an SOE. As many human rights abuses committed by companies cannot be connected to the state, these acts fall outside of the scope of international state responsibility and the ARSIWA articles.[113] In doctrinal debate, the most relevant question is whether SOEs qualify as 'state organ' under Article 4 ARSIWA.[114]

Importantly, as public international law concerns the obligations of states to one another, it does not recognise the right of individuals to bring claims against states, as does international human rights law which concerns state obligations towards individuals.[115] Barnes finds that the rules of attribution of state responsibility in the ARSIWA articles have high thresholds, meaning that a large portion of the conduct of SOEs could be unattributable – leading to an accountability void. However, states can be held responsible for a failure to act diligently, to take all the measures available to prevent or punish the occurrence of a specific act.[116]

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[106] Barnes (2021), 22.
[107] Backer (2017), 834
[108] Barnes (2021), 6.
[109] Ibid, 28–29.
[110] Schönsteiner (2019), 906.
[111] Chirwa (2004), 7-8.
[112] Schönsteiner (2019), 907.
[113] Chirwa (2004), 10.
[114] Schönsteiner (2019), 908.
[115] Chirwa (2004), 10; Malcolm N. Shaw, *International law* (9th edition, Cambridge University Press, 2021) 677.
[116] Barnes (2021), 202.

2.2 The UNGPs

In 2011, the HRC unanimously endorsed the UNGPs which gave the principles significant normative authority.[117] Although recognised as a soft law instrument, the UNGPs reflect existing internationally binding obligations on states to protect and responsibilities for businesses to respect human rights. The UNGPs are unique in that they have aligned standards and thus gained overall acceptance by governments, industries, and civil society.[118]

2.2.1 The UNGPs and the governance gap

The initial mandate of the Special Representative of the Secretary General (SRSG) Ruggie was to identify and clarify international standards and best practices in the area of BHR.[119] Due to the complexity and sensitivity of the issue, as well as the need to engage with a wide range of stakeholders including governments, businesses and civil society the mandate was prolonged with the aim of developing a comprehensive framework that could guide the actions of all relevant actors in the field thus resulting in the endorsement of the UNGPs by the HRC.[120]

The UNGPs encompass all internationally recognised human rights and apply to all states and business enterprises. The success of the UNGPs lies in their multiperspective framing, its anchoring in international social norms, reflexive dynamics and the legitimacy of the process leading up to them.[121] By the time of their endorsement by the HRC, the UNGPs enjoyed strong support from governments, businesses, and human rights organizations as they were built on empirical data, consulted on by multiple stakeholders worldwide and adequately explained.[122]

The UNGPs are based on the empirical observation that global corporate conduct is shaped by three governance systems: 1) public governance through domestic and international legislation, 2) civil governance through social pressure from stakeholders in the form of campaigns and lawsuits etc, and 3) corporate governance through corporate strategy, policy, and risk-management systems.[123] The UNGPs succeeded in aligning several international guidelines for business conducts, such as the OECD MNE Guidelines and

[117] UNGPs; HRC (2021), 'Report of the Working Group: UNGPs At 10' A/HRC/47/39, §§ 1 and 6; Taylor (2020), 88.

[118] Deva (2020), 4; Ruggie (2020), 'The social construction of the UNGPs', 79.

[119] Ruggie (2020), 'The social construction of the UNGPs', 73.

[120] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Martinus Nijhoff Publishers, Leiden, Boston, 2012), 39 https://rwi.lu.se/app/uploads/2012/06/Business-and-Human-Rights-After-Ruggie.pdf accessed 17 May 2023.

[121] Ruggie (2020), 'The social construction of the UNGPs', 64, 74-79.

[122] See for example: HRC (2007), 'Report of SRSG: Mapping International Standards' A/HRC/4/35, § 7. See also: Ruggie (2020), 'The social construction of the UNGPs', 79.

[123] Ruggie (2020), 'The social construction of the UNGPs', 74.

guidance from the International Finance Cooperation (IFC). The EU has endorsed the UNGPs, and the European Commission requested all member states to adopt National Action Plans (NAPs) for their implementation.[124] Extractive industry organization as well as the company under investigation, LKAB, have also incorporated the mentioning of the UNGPs in their policies.[125]

The three pillars of the UNGPs are interrelated as they 1) reflect the functions of the Protect, Respect and Remedy Framework and 2) seek to engage the public, civil and corporate governance systems. A coherent framework such as the UNGPs has the potential to contribute to the advancement of the respect for human rights by both states and businesses.[126] The Protect, Respect and Remedy Framework as well as the UNGPs represents one of the dominant discourses on BHR as it engages businesses, State parties and stakeholders.[127]

2.2.1.1 Obligation of the State to protect

The first pillar of the UNGPs emphasises the legal obligation of states to protect against human rights abuses by third parties, including businesses within their jurisdiction.[128] In doing so, it reaffirms the hierarchy under international human rights law in which the state is the primary duty bearer for human rights.[129] The obligation to protect entails that the state secures preventative (pillar I) as well as remedial (pillar III) measures.[130] More specifically, this means the enforcement of laws that require businesses to respect human rights, providing guidance and encourage businesses to communicate how they address their human rights impacts.[131]

States are not held responsible for corporate-related human rights abuse per se but may be considered in breach of their obligations where they fail to take appropriate steps to prevent, investigate, punish, and redress abuses when they occur. Due to the connection between the state and its SOEs, states have an obligation to ensure that they appropriately regulate their SOEs in order to properly protect human rights.[132]

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[124] Ibid, 80-84.

[125] LKAB, 'Annual and Sustainability Report 2022', 142 https://lkab.mediaflowportal.com/documents/folder/215713/ accessed 6 May 2023.

[126] Ruggie (2020), 'The social construction of the UNGPs,', 77-78.

[127] See for example: Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles' (2016) 16 Human Rights Law Review 55-75, 57.

[128] UNGP 1; Ruggie (2020), 'The social construction of the UNGPs', 74.

[129] Taylor (2020), 89.

[130] UNGP 1; Commentary to UNGP 1.

[131] UNGP 3.

[132] Barnes (2021), 43 and 45.

2.2.1.2 The responsibility of the corporation to respect

The second pillar of the UNGPs emphasises the independent responsibility of business to respect all internationally recognised human rights irrespective of the state's willingness or ability to enforce laws to that effect.[133] The rationale behind business responsibility to respect human rights is the recognition that corporations operate in societies and are thus dependent on social acceptance (social license to operate).[134] However, note that the UNGPs do not create direct human rights obligations for companies under international law, as such an attempt has previously failed.[135]

To respect is to avoid infringing on others rights.[136] At a minimum, corporations have a responsibility to respect the human rights expressed in the International Bill of Human Rights[137] and in the eight core ILO Conventions[138].[139] It is the emphasis on respect of *rights* instead of laws that contribute to the acceptance of the UNGPs, as this framing avoids doctrinal debates regarding if corporations can be duty bearers under public international law.[140]

Specifically, the responsibility of corporations is to prevent, mitigate and where appropriate remedy their adverse human rights impact.[141] Corporations manage the risk of involvement in human rights abuses, i.e. *potential impact*, through conducting due diligence, which includes meaningful dialogue and engagement with affected individuals and communities.[142] Where business have caused or contributed to human rights abuses, i.e. *actual impact*, they should provide for or contribute to remediation.[143] In the instance where business can be directly linked to the human rights abuse because of a business relationship, it should exercise leverage to prevent or mitigate the harm.[144]

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[133] UNGPs 11-12; Commentary to UNGPs 11-12; Ruggie (2020), 'The social construction of the UNGPs', 75-76.

[134] UNGP, General principles; McCorquodale (2021), 124.

[135] See: Alvarez (2011), 32; Lagoutte (2016), 239.

[136] UNGP 11.

[137] The International Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR) and the main instruments through which it has been codified: ICCPR and the International Convention on Economic, Social and Cultural Rights (ICESCR). See more at OHCHR website, with direct links to the three documents: 'International Bill of Human Rights' (*OHCHR*) https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights accessed 17 March 2023.

[138] The principles in the eight core ILO Conventions are set out in the Declaration on Fundamental Principles and Rights at Work and concern freedom of association, elimination of forced labour, child labour and discrimination as well as the right to a safe and healthy working environment. See more about the principles and the ILO Declaration: 'ILO Declaration on Fundamental Principles and Rights to Work' (*International Labour Organization*) https://www.ilo.org/declaration/lang--en/index.htm accessed 17 March 2023.

[139] Commentary to UNGP 12.

[140] Ruggie (2020), 'The social construction of the UNGPs', 76; Alvarez (2011), 32.

[141] UNGP 13; Commentary to UNGP 11.

[142] UNGPs 15(b), 17 and 18(a); Ruggie (2020), 'The social construction of the UNGPs', 75.

[143] UNGPs 13(a) and 22; Ruggie (2020), 'The social construction of the UNGPs', 76.

[144] UNGP 13(b); Ruggie (2020), 'The social construction of the UNGPs', 76.

The HRDD process has four steps: 1) assess actual and potential human rights impacts, 2) integrate and act on the findings, 3) track responses and 4) communicate how impacts are addressed.[145]

In 2011, the OECD MNE Guidelines were revised to mirror the UNGPs concerning business obligation to respect human rights.[146] The OECD MNE Guidelines are recommendations addressed by governments to MNEs. Their objective is to provide a soft law framework for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.[147] Like the UNGPs, the OECD MNE Guidelines sets out that businesses should avoid causing or contributing as well as prevent and mitigate any adverse human rights impact; issue policy commitments to respect human rights; carry out HRDD as appropriate to the nature and complexity of the business operation and severity of risk; and provide or cooperate in the creation of effective and legitimate processes of remediation for victims of human rights impacts.[148] The affiliated states have committed to establish National Contact Points (NCPs) which oversees the implementation of and compliance with the OECD MNE Guidelines while acting as a dispute resolution mechanism.[149]

2.2.1.3 The state-business nexus

In the mid 2000's, human rights concerns connected to SOEs started to enter into legal doctrinal debates.[150] There is now an increasing focus on SOEs as human rights-bearing institutions in international soft law and norms.[151] Already in the beginning of the mandate, SRSG Ruggie identified that SOEs can be worse offenders of human rights abuse than MNEs and private enterprises.[152] This recognition has worked its way into the UNGPs. Regarding the state-business nexus, UNGP 4 provides that 'States should take *additional steps* to protect against human rights abuses by business enterprises that are owned or controlled by the State, […], including, where appropriate, by requiring human rights due diligence'.[153] The meaning of this particular guiding principle and its application on states and SOEs is developed upon in the UNGP Commentary, by the UN Working Group as well as in academic literature.

[145] UNGP 17; Ruggie (2020), 'The social construction of the UNGPs', 76.

[146] OECD (2011), *MNE Guidelines*, Chapter IV Commentary §36; dos Santos & Seck (2020), 160.

[147] OECD (2011), *MNE Guidelines*, Preface §1.

[148] dos Santos & Seck (2020), 160.

[149] OECD (2011), *MNE Guidelines*, Chapter 1 §11.

[150] Barnes (2021), 30 and 33.

[151] Backer (2017), 828.

[152] HRC (2007), 'Report of SRSG: Mapping International Standards' A/HRC/4/35, § 3; Barnes (2021), 30.

[153] UNGP 4 (own emphasis).

The Commentary to UNGP 4 develops the reasoning behind this *additional step* principle. Where the state owns or controls a business enterprise, it has the means to ensure the implementation of relevant policies, legislations, and regulations regarding respect for human rights. In the instance that an SOE abuses human rights, it may even entail a violation of the state's own international law obligations.[154] The UNGPs thus pinpoints the extended role of states to show leadership concerning human rights. The public nature of the SOE requires recognition of its dual role as both market participant and as an expression of state interest. Building on the UNGPs, the state acquires positive obligations beyond the usual expectations of shareholder engagement.[155] This approach is reiterated by the UN Working Group whose engagement with the application of soft-law frameworks on SOEs work to extend the scope of the UNGPs and the OECD MNE Guidelines as well as making their application more coherent.[156] It is worth noting that as SOEs are considered an enterprise as well as a state instrumentality, they are also subject to the review mechanism under the OECD MNE Guidelines.[157]

The value of the Working Group's report on SOEs is that it constructs a more unified approach on the application of the UNGPs on SOEs.[158] *First*, the Working Group relies on the OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD SOE Guidelines) when defining a SOE as an enterprise that engages in economic activity in which the state exercises ownership, and that this is recognised in national law.[159] The OECD SOE Guidelines are recommendations to governments on how they can exercise state ownership and is an internationally agreed upon standard.[160] Regarding control, the OECD SOE Guidelines notes that SOEs are 'enterprises that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control'.[161] As the OECD SOE Guidelines, unlike the OECD MNE Guidelines, are directed towards states instead of corporations, Schönsteiner argues that the actions and omissions of SOEs cannot easily be separated from the state and its obligations.[162] Thus the separation principle governing the attribution of state responsibility for acts or omissions of companies comes into question regarding their SOEs.

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[154] Commentary to UNGP 4.

[155] Backer (2020), 240-241; Commentary to UNGP 4.

[156] Backer (2017), 845.

[157] OECD (2011), *MNE Guidelines*, II General Policies: Commentary on General Policies, Section 10; Backer (2020), 228.

[158] Backer (2017), 855.

[159] HRC, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (4 May 2016) UN Doc. A/HRC/32/45, §§9-11.

[160] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, (OECD Publishing Paris, 2015), 3 https://doi.org/10.1787/9789264244160-en accessed 10 May 2023.

[161] OECD (2015), *SOE Guidelines*, 15.

[162] Schönsteiner (2019), 911.

On their role as owner, the OECD SOE Guidelines note that the state should act as an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness.'.[163] Based on these findings, Rajavuori argues that the OECD SOE Guidelines outline best practices for the behaviour of the state as a shareholder, and less about how the SOE itself ought to act.[164] Moreover, the importance of the separation of a state's ownership function and other state functions is highlighted in Section III(A) of the OECD SOE Guidelines. As a principle, Section III provides that the SOE governing framework 'should ensure a level playing field and fair competition in the marketplace when SOEs undertake economic activities.'.

Backer criticises the Working Group's reliance on OECD SOE frameworks as it is too strongly grounded in European historicism (which ignores China) and because its institutional approach to defining SOEs ignores the aim of the UNGPs to manage economic activity regardless of its form.[165] Moreover, Backer notes that in referring to a Good State Shareholder model as a mode for evaluating state ownership, the OECD SOE Guidelines fail to take note of its human rights dimension. As the UNGPs understanding of SOEs builds on the OECD framework, this dissonance is extended into the guiding principles and the interpretations made by the Working Group.[166] Furthermore, Backer argues that the *additional steps* principle clashes with the shareholder-entity framework of the OECD SOE Guidelines which builds on autonomous governance of the SOE.[167]

Second, the Working Group explains that the state's ownership relationship adds another layer to the duty to protect beyond the general obligation as a regulator since the state has the means to ensure the implementation of human rights policies and regulations.[168] As corporate responsibility to respect human rights extend beyond the legal obligations that are tied to the state obligation to protect, the question becomes how far-reaching obligations can be put on the SOE. Thus, the relationship between Pillar I and II becomes increasingly complex as the UNGPs move to shape regulatory governance through markets.[169] Backer argues that the Working Groups engagement with the international law implications for the *additional steps* principle suggests that the UNGPs are hierarchically arranged.[170] When Pillar I and II share governing space, as in the instance with SOEs, then Pillar 1 (state obligation) comes first. Looking at the Commentary to UNGP 23, one could conclude

[163] OECD (2015), *SOE Guidelines*, Section II.
[164] Rajavuori (2018), 112.
[165] Backer (2017), 877.
[166] Rajavuori (2018), 104–105.
[167] OECD (2015), *SOE Guidelines*, Chapter 2; Backer (2020), 241.
[168] HRC (2016), 'Report of the Working Group on SOEs' A/HRC/32/45, §25.
[169] Backer (2020), 239–240.
[170] Backer (2017), 862. See also: HRC (2016), 'Report of the Working Group on SOEs' A/HRC/32/45, §33 and Commentary to UNGP 23.

that when there is a contradiction between the state's obligation and corporate responsibility, as can be the case when the state does not live up to its international law obligations, states may limit compliance with the requirements in Pillar II. Naturally, states would not want their SOEs to apply international law under Pillar II that the state has rejected as a legal obligation under international law.[171] This is the core of the issue at hand for this thesis.

However, the possibility of opting out of Pillar II based on being an SOE cannot be consistent with the implications and underlying philosophy of the UNGPs.[172] Backer argues that a state duty-based approach to management of SOEs undermines the unity of the UNGPs. Moreover, in recognising that the modern SOE is both state and enterprise at the same time Backer argues that past realities, such as legal rules based on the separation principle, do not make any sense. Based on these findings, Backer questions the OECD and Working Group approach. Following this thought to its end will entail that if one recognises that the narrative of SOEs responsibility to respect and state obligation to protect human rights are exclusively structured around the state responsibility under international law, then questions regarding the extension of sovereign immunity to SOEs are actualised.[173] However, Backer's approach departs from the UN and human rights bodies approach.[174]

In 2019, Schönsteiner argued that SOEs are the only business entity that has direct responsibilities under international law. Although setting out with such a strong statement, Schönsteiner admits that it is not yet settled in international legal doctrine if and to what extent SOEs acts or omissions regarding human rights can be attributed directly to the state.[175] In justifying the direct attribution of state responsibility regarding the acts or omissions of SOEs, Schönsteiner note that human rights violations committed by SOEs add three problems which aggravate the challenges of holding corporations accountable for human rights abuse. First, the uncertainty of in which case responsibility can be attributed to the state. Second, SOEs can in some cases claim state immunity in international fora. Third, privatization or liquidation of SOEs would make access to justice impossible (and thus arbitrary) for historic damage if state responsibility could not be attributed. However, it is clearly established in international law that businesses do not have direct obligations for human rights protection.[176] Here, Schönsteiner argues for enhanced state accountability in relation to SOEs human rights violations based on its direct link to the state in term of control or function – thus rejecting any notion on 'state organ'.[177] When discussing UNGP 4, Schönsteiner reads that SOEs must respect human rights just as any other companies, but that they must

[171] Backer (2017), 862–864.
[172] Ibid, 864
[173] Ibid, 878–879, 883.
[174] Schönsteiner (2019), 913.
[175] Ibid, 895, 906.
[176] Ibid, 899-900, 904-905; Alvarez (2011), 32.
[177] Schönsteiner (2019), 914.

perform better and that state responsibility can arise pursuant to their violations.[178] In fact, the UNGPs stipulate that pillar II is applicable to every corporation regardless of their ownership situation.[179]

Third, the Working Group reiterates the *additional step* principle and connect it to an expectation on states to lead by example. Two areas in which the state is required to lead by example is when it comes to requiring the conduct of HRDD and ensuring access to remedies. In the case that due diligence is not yet mandatory, the Working Group suggest that states define under which criteria SOEs are to conduct HRDD such as the size and type of enterprise, its operations, the political and human rights context as well as the relevant industry sector.[180] Moreover, the issue of integrating remedies in human rights frameworks are magnified in the case of SOEs. The problems revolve around representation, coordination, and engagement with significant obstacles.[181] The Working Group clarifies that states should make sure that their SOEs do not obstruct justice, that they cooperate fully with judicial and non-judicial grievance mechanisms and fully comply with their responsibility to respect human rights including providing remediation for human rights abuses that they may be causing or contributing to.[182]

Evidently, when it comes to issues of state responsibility and sovereign immunity, there is no uniform approach in international law or international human rights law.[183] There is an apparent tension in emerging BHR structures that differentiate between state and corporate responsibilities with regards to SOEs.[184] Barnes argues, like Schönsteiner, that it is widely accepted that SOEs have an obligation, not merely a responsibility to respect human rights.[185] Backer rejects the separation principle that governs the BHR framework's understanding of the SOE and state relationship and which is the foundation on which the framework builds. However, after review of the challenges facing the BHR framework in aligning the particularities of the SOE this author concludes, that as of now the prevalence of the separation principle seems to continue until there has been a quite radical shift in international legal doctrine and state practice. For the continuation of this thesis, the Working Groups understanding of the state and SOE relationship will be incorporated.

[178] Ibid, 913.
[179] UNGP 14.
[180] HRC (2016), 'Report of the Working Group on SOEs' A/HRC/32/45, §§45, 74-77 and 83-87.
[181] Backer (2017), 874.
[182] HRC (2016), 'Report of the Working Group on SOEs' A/HRC/32/45, §85.
[183] Schönsteiner (2019), 934–935.
[184] Backer (2020), 229.
[185] Barnes (2021), 92 and 100; Schönsteiner (2019), 914 and 935.

2.2.1.4 Access to remedy

The right to an effective remedy is a core tenet of international human rights law as it relates to notions of justice and fairness.[186] For rights to have meaning and effect, there must be sanction and remedy for their breach.[187] Problems of accessing justice in cases of corporate human rights violations is well documented. Effective access to remedies is hindered by a lack of recognition or justiciability of certain human rights at the national level (especially social and cultural rights) as well as a lack of legal aid.[188]

The third pillar of the UNGPs emphasizes that ensuring effective access to remedy through State-based judicial and non-judicial grievance mechanisms (NJGMs) is part of a state's obligation to protect against human rights abuses.[189] For business enterprises to ensure that they respect human rights, they should establish or participate in grievance mechanisms.[190] To improve accountability and access to remedy, stakeholders should be provided options for seeking redress through a 'bouquet of remedies'. This bouquet could involve judicial or non-judicial mechanisms or a combination.[191]

2.2.1.4.1 Judicial

The UNGPs highlight that state-based mechanisms are the foundation of the remedy system.[192] Thus, the state has a leading role in providing effective access to remedy for victims of business-related human rights abuse.[193] The UNGPs consider judicial grievance mechanisms to be at the core of ensuring access to remedy, where NJGMs have a complementary and supportive role.[194] The reason for the centrality of judicial mechanisms is that courts have the exclusive authority and ability to enforce decisions through imposing sanctions on businesses – they are thus more effective.[195] To improve access to judicial remedy, states should reduce any barrier such as imbalance in financial resources as well as access to information and expertise, corruption, discrimination, high costs of bringing claims, difficulty in securing legal

[186] HRC (2016), 'Report of the OHCHR' A/HRC/32/19, § 6.
[187] Kinley & Tadaki (2004), 993; Cismas & Macrory (2018), 222.
[188] Schönsteiner (2019), 897.
[189] UNGP 25.
[190] UNGP 29.
[191] HRC, 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms. Report of the United Nations High Commissioner for Human Rights.' (19 May 2020) UN doc. A/HRC/44/32, §29.
[192] Commentary to UNGP 25.
[193] See for example UNGP 25.
[194] Commentary to UNGPs 26, 27 and 29.
[195] HRC (2016), 'Report of the OHCHR' A/HRC/32/19, § 11.1; Mariëtte van Huijstee & Joseph Wilde-Ramsing, 'Remedy is the reason: non-judicial grievance mechanisms and access to remedy' in Surya Deva & David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenhamn UK, Edward Elgar Publishing, 2020) 471-491.

representation and lack of resources to investigate human-rights related crimes.[196]

2.2.1.4.2 Non-judicial

Effective judicial mechanisms impact the effectiveness of NJGM by providing incentives to participate and a means of enforcement of outcomes.[197] van Huijstee and Wilde-Ramsing draws a metaphor from human anatomy to describe this relationship: the judicial mechanism is the spine, a system that handles the most serious cases; while the non-judicial mechanisms are the fingertips, which are more sensitive and can reach into other places than the spine.[198] The best-known examples of state-based NJGMs are National human rights institutions (NHRIs) and the OECD facilitated NCPs.[199] However, the NCPs have significant inherent shortcomings such as its reliance on the willingness of the companies to engage with the process, the excessively high burden of proof on claimants, impartiality in how some cases have been handled and a lack of 'teeth', for encouraging companies to follow recommendations.[200] Moreover, an OECD Watch report analysing 15 year of NCP experience (where the majority of the cases related to mining operations) found that only one percent of cases had led to any improvement in conditions for the victims of corporate abuse.[201]

Any NJGM, regardless of if they are state-based or not has to meet the effectiveness criteria set out in Principle 31.[202] To be considered effective, the NJGMs should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.[203] Additionally, for corporations, any operational-level grievance mechanism (OLGM) should also be based on engagement and dialogue.[204] A challenge noted by the Accountability and Remedy Project of the Office of the High Commissioner for Human Rights (OHCHR) is that while OLGM may be well placed to deliver

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[196] UNGP 26; Commentary to UNGP 26.

[197] HRC, 'Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance' (12 May 2016) A/HRC/32/19/Add.1, § 3.

[198] van Huijstee & Wilde-Ramsing (2020), 471.

[199] Ibid, 473-474. See also: HRC, 'Improving accountability and access to remedy for victims of business-related human rights abuse through state-based non-judicial mechanisms. Report of the OHCHR.' (14 May 2018) UN doc. A/HRC/38/20, §10 and 15.

[200] van Huijstee & Wilde-Ramsing (2020), 478; Responsible Mining Foundation (RMF), 'Closing the Gaps… and accelerating progress on responsible mining' (2022) 38 https://www.responsibleminingfoundation.org/app/uploads/RMF_Closing_The_Gaps.pdf accessed 1 May 2023.

[201] Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, *Remedy Remains Rare. An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduc*' (OECD Watch, 1 June 2015) https://www.oecdwatch.org/remedy-remains-rare/ accessed 12 May 2023.

[202] UNGPs 27, 29 and 31.

[203] UNGP 31(a-g).

[204] UNGP 31(h).

effective remedies to affected stakeholders, it may lack the independence necessary to engender a high level of stakeholder trust.[205]

Non-state-based NJGMs offer potential benefits such as speed of access, reduced costs and may handle grievances that are not entirely legal in nature.[206] The UNGPs note that an effective OLGM can contribute to HRDD processes.[207] Presently however, few non-state-based NJGM are fulfilling their envisaged role a rights-holders continue to report problems with identifying, accessing, and using these mechanisms in practice.[208] Although these mechanisms are non-state-based, it is part of the state's obligation to protect human rights to facilitate access to these mechanisms as well.[209]

Another issue is that actual cases of remedy remain rare among NJGMs. In some cases, NJGMs have even resulted in negative impact through the reinforcement of power imbalance between the business and affected stakeholders as well as entrenchment of business practices.[210] There are ongoing debates regarding the purpose of NJGMs and their appropriateness for offering remedy as well as a hierarchy of remedial mechanisms.[211]

2.3 Sweden's reception of the UNGPs and OECD Guidelines

Formally, a variety of mechanisms are available to consider cases involving corporate human rights infringement, including Swedish courts and other state-based non-judicial or quasi-judicial mechanisms.[212] Following its obligations towards OECD, Sweden established its NCP in 2000 which is located in the Ministry of Foreign Affairs. However, the 2022 NCP Peer Review concluded that the absence of an official document establishing the NCP or its structure, engagement with civil society or academia and its close connection to the Ministry reduces its transparency and accessibility as well as questions its impartiality.[213] According to the evaluation conducted by OECD Watch, there are no indications that the Swedish NCP has committed to apply

[205] HRC (2020), 'Report of the OHCHR' A/HRC/44/32, §28.

[206] Ibid, §6.

[207] UNGP 29; Commentary to UNGP 29; HRC (2020), 'Report of the OHCHR' A/HRC/44/32, §6

[208] HRC (2020), 'Report of the OHCHR' A/HRC/44/32, §7.

[209] UNGP 28; HRC (2020), 'Report of the OHCHR' A/HRC/44/32, §8.

[210] van Huijstee & Wilde-Ramsing (2020), 472, 489.

[211] See section 3 in van Huijstee & Wilde-Ramsing (2020), 478-481.

[212] Gabrielle Holly, Linnea Kristiansson & Signe Andreasen Lysgaard, '"Smart mix" in the Nordics – A stocktake on the measure to foster business respect for human rights' (Danish Institute for Human Rights, 2021) 52 https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Smart%20Mix%20in%20the%20Nordics_2021.pdf accessed 17 May 2023; 'Uppdrag och organisation' (*Institutet för mänskliga rättigheter*) https://mrinstitutet.se/om-institutet/ accessed 3 April 2023.

[213] OECD, *OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Sweden* (2022), 5 and 8 https://mneguidelines.oecd.org/ncppeerreviews.htm accessed 3 April 2023.

consequences for companies who refuse to engage with the process, nor are there developed follow-up or monitoring processes.[214]

In 2015, as one of the first countries in the EU, Sweden adopted its NAP to implement the UNGPs after facilitating four public consultation meetings in which more than 100 stakeholders took part.[215] A critique towards the NAP process was that the consultations did not include at-risk stakeholders, such as the indigenous community of the Sami people.[216] Turning to Swedish SOE's, the Swedish Government has a mandate from the Swedish Parliament to "actively manage" SOEs to ensure long-term value performance. Swedish SOEs are governed in the same way as privately owned companies with the general meeting of shareholders as their highest decision-making body.[217] They are subject to the same laws as privately owned companies.[218] Since 2007 Sweden demands that SOEs provide sustainability reports in compliance with the Global Reporting Initiative which is the most used standard for sustainability reporting.[219] However, the reliance on the reporting company to select the issues to report on limits its effectiveness as a tool for meaningful information sharing.[220] Moreover, no evidence is required for any of the information reported. In 2012 Sweden asked its SOEs to set sustainability goals with a focus on, among other, human rights and business ethics. Sweden also expects all companies to respect human rights and follow the OECD MNE Guidelines and the UNGPs.[221]

The Swedish Government management principles for SOEs *largely* follow the OECD SOE Guidelines (which Sweden participated in drafting). The adoption of the language of the UNGPs is recognised in that SOEs must act exemplary and be role models in terms of sustainable business – thus recognising the *additional steps* principle in UNGP 4.[222] In 2018, the Agency for Public Management recommended Sweden to clarify in which situations SOEs should conduct HRDD in order to comply with its NAP and the

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[214] Holly et al (2021), 52; 'NCP Sweden' (*OECD Watch*) https://www.oecdwatch.org/ncp/ncp-sweden/ accessed 1 May 2023.

[215] Government Offices of Sweden, *Handlingsplan för företagande och mänskliga rättigheter* (ISBN: 978-91-7496-465-3, August 2015) (National Action Plan on Business and Human Rights), 3 and 6 https://globalnaps.org/country/sweden/ accessed 14 March 2023.

[216] International Corporate Accountability Roundtable (ICAR) & European Coalition for Corporate Justice (ECCJ), 'Assessment of the National Action Plan (NAP) on Business and Human Rights of Sweden' (November 2015), 2 https://corporatejustice.org/news/updated-assessment-of-existing-national-action-plans-on-business-and-human-rights/ accessed 14 March 2023.

[217] Sweden (2021), 'Annual report for SOEs', 15-16.

[218] Sweden (2020), 'State Ownership Policy', 2.

[219] Holly et al (2021) 51; Global Reporting Initative, https://www.globalreporting.org/ accessed 10 May 2023.

[220] RMF (2022), 'Closing the Gaps', 33.

[221] Sweden (2021), 'Annual report for SOEs', 17; Sweden (2020), 'State Ownership Policy', principle 5.1.3.

[222] Sweden (2020), 'State Ownership Policy, principle 1.1'; Sweden (2021), 'Annual report for SOEs', 16 and 29.

UNGPs, reinforcing the Working Groups understanding of the *additional steps* principle.[223] Notably, Sweden has failed to report on their actions to further implementing the UNGPs to the Council of Europe, thus showcasing an inconsistency in their devotion to the framework.[224] Moreover, Sweden has contributed actively by sharing input and good practice of their SOEs with the Working Group and providing information on the role of SOEs and Sweden's implementation of the UNGPs.[225] The Swedish Government has identified the UNGPs and OECD MNE Guidelines to be material principles for SOEs to abide by.[226]

2.4 Summary of key findings

States are considered the main lawmakers and bearers of responsibility to respect, protect, and fulfil human rights. As globalization has contributed to the diminishing power of governments and increasing influence of MNEs, international law has come to recognise that corporations have a responsibility to respect human rights and contribute to effective access to remedy for victims of human rights abuse. In this respect, the UNGPs reflect existing international norms and provide guidance on how companies should prevent, mitigate, and remedy their human rights impacts.

As SOEs can be worse offenders of human rights abuse than private enterprises, states should take *additional steps* to protect against human rights abuse committed by their SOEs. Here, the state has positive obligations beyond the usual expectations of shareholder engagement. However, the SOE, as a market participant, is subject to expectations on companies – but, due to their state connection, should aim to 'act better'. Moreover, international law is not clear on whether the state and its SOEs are so connected that responsibility can be attributed to the state for the acts or omissions of its SOE. It seems that the separation principle prevails. Due to the special position of SOEs, issues regarding access to remedy are more complex in this context.

Sweden has endorsed the UNGPs and OECD MNE Guidelines, and enhances the responsibility of SOEs to act as role models. Human rights are, for example, an integral part in the State Ownership Policy which applies to LKAB. The Swedish SOE management principles largely follow the UNGPs and OECD Guidelines.

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[223] Swedish Agency for Public Management, 'FN:s vägledande principer för företag och mänskliga rättigheter – utmaningar i statens arbete (2018:8)' (The UNGPs – challenges for the State) (13 March 2018), 71 https://www.statskontoret.se/publicerat/publikationer/publikationer-2018/fns-vagledande-principer-for-foretag-och-manskliga-rattigheter--utmaningar-i-statens-arbete/ accessed 14 March 2023.; HRC (2016), 'Report of the Working Group on SOEs' A/HRC/32/45, §§45, 74-77 and 83-87.

[224] 'Implementing Actions' (*Council of Europe*) https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/implementing-actions accessed 14 March 2023.

[225] HRC (2016), 'Report of the Working Group on SOEs' A/HRC/32/45, § 8.

[226] Sweden (2020), State Ownership Policy, principle 5.1.3.

3 Human rights of indigenous peoples

This chapter starts by outlining the international legal development of indigenous peoples' rights to participation and consultation (FPIC). Thereafter, the references to indigenous peoples' particular rights in the UNGPs is reviewed. Finally, Sweden's recognition and protection of the Sami people's human rights is assessed.

3.1 Human rights of indigenous peoples

The particularization of indigenous peoples' rights is based on the recognition that they have, historically, been subjected to unjust dispossession of their lands and consequent destruction of their culture and way of life.[227] The traditional territories used by indigenous peoples constitute the very foundation on which indigenous societies and cultures rest. Without access to it, indigenous peoples will cease to exist.[228] The indigenous rights regime recognises that indigenous peoples should be allowed to preserve and develop their distinct collective cultures and societies side by side with the majority society. Indigenous territorial rights, right to land and natural resources are not granted by states but are based on customary use of traditional land.[229]

3.1.1 International instruments on human rights

In the following, the international human rights treaties referred to in the thesis will briefly be presented. As will the provisions that pertain to participation and consultation and how they have been interpreted by the UN monitoring bodies.

3.1.1.1 International Bill of Human Rights

The Universal Declaration of Human Rights (UDHR) enshrine the fundamental rights and freedoms to be universally protected and express a common standard of achievement for all peoples and nations.[230] Although no legal obligations derive directly from the Declaration, the two Covenants, ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[231], contain many of the rights enshrined. A tenet in the

[227] Kinley & Tadaki (2004), 987; Åhrén (2016), 84; Gómez Isa (2019), 9; Håkan Tarras-Wahlberg & John Southalan, 'Mining and indigenous rights in Sweden: what is at stake and the role for legislation' (2022) 35 Mineral Economics, 239-252, 239 https://doi.org/10.1007/s13563-021-00280-5 accessed 6 April 2023.

[228] Åhrén (2016), 222; Leena Heinämäki, 'Global Context – Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples' in T Herrmann & T Martin (eds.), *Indigenous Peoples's Governance of Land and Protected Territories in the Arctic* (Springer International Publishing Switzerland, 2016) 209-240, 237.

[229] Åhrén (2016), 86.

[230] Universal Declaration of Human Rights (adopted 1948) UN Doc. A/RES/3/217 (UDHR), preamble.

[231] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, in force 3 January 1976) 993 UNTS 3 (ICESCR).

international human rights regime is that everyone has the right to freely participate in the cultural life of their community.[232]

The ICCPR proclaims in its (common to ICESCR) Article 1 that:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

In Article 27, the ICCPR further states that persons belonging to an ethnic minority '[…] shall not be denied the right, in community with the other members of their group, to enjoy their own culture, […]'. The Human Rights Committee has in its 'General Comment No. 23' stated that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples'. Furthermore, the '[…] enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.[233]

The ICESCR enshrines the right to take part in cultural life in its Article 15(a). In relation to the right to culture and building on the provisions in ILO Convention 169 Article 6(a) and UNDRIP Article 19, the CESCR has stated in its 'General Comment No. 21' that 'States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights."[234]

3.1.1.2 ICERD

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the UN General Assembly (UNGA) in

[232] UDHR, Article 27(1).

[233] CCPR, 'General Comment No. 23: Article 27 (Rights of Minorities)' (26 April 1994) UN Doc. CCPR/C/21//Rev.1/Add.5, § 7.

[234] CESCR, 'General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights)' (21 December 2019) UN Doc. E/C.12/GC/21, § 37.

1965. Similar to the monitoring bodies of the two Covenant, the Committee on the Elimination of Racial Discrimination (CERD) receives regular reports and publish Concluding recommendations' and 'thematic discussions'.[235]

Article 6 ICERD provides that states are obliged to protect people against racial discrimination as well as assure that everyone can enjoy effective remedies through national courts and institutions which includes being able to seek just and adequate reparation or satisfaction for any damage suffered as a result of racial discrimination. Indigenous peoples fall within the scope of the ICERD – and their effective participation in public life builds on that 'no decisions directly relating to their rights and interests are taken without their informed consent'.[236] Moreover, CERD calls upon states to protect indigenous peoples' right to own and control their territories and resources, and where they have been deprived of their land traditionally owned or used without their FPIC the territory should be returned. Only if this is not possible can the right to restitution be substituted by compensation, which should take the form of lands and territories.[237]

3.1.1.3 ILO Convention 169

The ILO Convention 169 promotes the respect for indigenous groups' distinct societies, cultures and ways of life, with the aim that indigenous peoples should have the opportunity to continuously exist side by side with the majority society. [238] The Convention focus on collective, rather than individual rights which can be seen in its use of the term 'peoples'.[239] Although not recognising a particular right to self-determination of indigenous peoples, ILO Convention 169 confirmed the particular status of indigenous peoples in international law for the first time and that they hold collective rights.[240]

The ILO Convention 169 proclaims in its Article 6(1)(a) that states shall *consult* with indigenous peoples through appropriate procedures in their representative institutions regarding legislative or administrative measures that may affect them directly. Article 6(2) states that consultations are to be carried out in a form appropriate to the circumstances and in good faith with the objective of achieving agreement or consent to the proposed measures. According to Article 7(1), indigenous peoples shall exercise control over their economic, social, and cultural development to the extent possible and 'shall *participate* in the formulation, implementation and evaluation of plans and

[235] Convention on the Elimination of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD), Article 41.

[236] CERD, 'General Recommendation No. 23: Indigenous Peoples' (18 August 1997) UN Doc. A/52/18 Annex V, §§ 1 and 4(d).

[237] CERD (1997), 'General Recommendation No. 23' A/52/18 Annex V, §5.

[238] Åhrén (2016), 95.

[239] ILO Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention 169), Article 1(3); Åhrén (2016), 95.

[240] Åhrén (2016), 96.

programmes for national and regional development which may affect them directly.'. Additionally, Article 7(3) proclaims that the state shall ensure that studies are carried out *in co-operation* with the indigenous peoples to assess the social, cultural, and environmental impact of planned development activities – of which the result shall affect the implementation of these development activities.

Article 13(1) provides that states shall recognise the right of indigenous peoples of ownership and possession over the lands they traditionally occupy. Article 14(1) provides that states shall protect the right of indigenous peoples to use lands to which they have traditionally had access for their subsistence and traditional activities, though not exclusively occupied by them. Article 15(1) protects the rights of indigenous peoples to *participate* in the use, management and conservation of the natural resources pertaining to their lands. Article 15(2) states that indigenous peoples shall be *consulted* when the state undertakes or permits any programmes for the exploration or exploitation of mineral resources pertaining to their lands. Furthermore, indigenous peoples shall participate in the benefit of mining activities and shall receive fair compensation for any damages they may sustain as a result of such activities. Article 16 of the Convention states that any necessary reallocation of indigenous peoples requires their FPIC, they should be able to return once the activity has ended and compensated for any resulting loss or injury of relocation.

3.1.1.4 UNDRIP

UNDRIP was adopted by the UNGA in 2007.[241] The declaration contains a comprehensive collection of the rights of indigenous peoples. However, as a declaration, UNDRIP is not legally binding upon states. Despite this fact, the content of the provisions within UNDRIP can reflect or be indicative of binding international norms.[242] Seen as UNDRIP was adopted with overwhelming support this is indicative that, where a provision mirrors a treaty provision, it reflects binding international norms.[243] UNDRIP can be said to constitute an agreed interpretation of UN treaty bodies jurisprudence regarding indigenous peoples' rights and the recognition of them as peoples with rights as such.[244] It is clear that UNDRIP has become an increasingly robust legal instrument that cannot be ignored when dealing with indigenous peoples' rights.[245]

UNDRIP contains several provisions relevant to the participation and consultation of indigenous peoples. The right to self-determination is enshrined in UNDRIP Articles 3 and 4. Article 3 UNDRIP proclaims that 'Indigenous

[241] UNDRIP.

[242] Åhrén (2016), 103; De Schutter (2019), 60. See also: Crawford (2019) 623-624.

[243] Åhrén (2016), 77 and 104. See also: 'United Nations Declaration on the Rights of Indigenous Peoples' (*UN Department of Economic and Social Affairs*) https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples accessed 3 May 2023.

[244] Åhrén (2016), 104.

[245] Crawford (2019), 625; Gómez Isa (2019), 16.

peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'. And Article 4 UNDRIP states that when indigenous peoples exercise their right to self-determination, they 'have the right to autonomous or self-government in matters relating to their internal and local affairs'. The provisions of Article 8 UNDRIP provides that states shall provide effective mechanisms for the prevention of and redress for, among other, any action which has the aim or *effect* of dispossessing them of their lands, territories, or resources.[246] Article 19 UNDRIP outlines the state obligation to *consult* and *cooperate in good faith* with indigenous peoples through their own representative institutions in order to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them.

Article 20(2) UNDRIP provides that indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress. Article 28 UNDRIP further refers to indigenous peoples right to redress:

> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair, and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their [FPIC].
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories, and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Moreover, Article 32 UNDRIP provides the following:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their [FPIC] prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be

[246] UNDRIP Article 8(2)b.

taken to mitigate adverse environmental, economic, social, cultural, or spiritual impact.

Moreover, states should obtain the FPIC of indigenous peoples through good faith consultations when decision are being made regarding any project affecting the lands, territories, and other resources of the indigenous peoples. Any environmental, economic, social, cultural, or spiritual impact shall be mitigated and effective mechanisms for a just and fair redress available.[247]

3.1.2 Right to self-determination

Although initially not intended to apply to indigenous peoples, the right to self-determination has evolved from a principle of international law to a right expressed in international conventions.[248] It is important to note that the right to self-determination of indigenous peoples concerns the internal aspect of self-determination.[249] As such, it does not encompass a right to secede. Instead, international law requires that indigenous people exercise their right to self-determination within existing state borders.[250] However, up until recently the precise content and scope of the internal aspect as applied to indigenous peoples has been limited in international legal sources.[251] The Human Rights Committee has systematically applied the right to self-determination as expressed in Article 1 ICCPR to indigenous peoples, although always when reviewing the collective element under Article 27.[252]

Indigenous peoples have rights of property over land and natural resources arising out of their own customary land tenure systems. These property rights include collective ownership of their lands and attract all the protections attached to property generally. They are further reinforced by the cultural content of indigenous peoples' connection with their lands.[253] The right to self-determination is more than a right to be *involved* in decision-making processes (i.e., a right to consultation), but a right to exercise genuine influence over the outcome of such processes.[254] Indigenous right to self-determination builds on recognition of group rights and the need to ensure equal

[247] UNDRIP, Articles 32(2) and 32(3).

[248] Åhrén (2016), 222; Crawford (2019), 621-622.

[249] The only instance when the external aspect of self-determination applies to indigenous peoples is that it bestows them with the right to represent themselves internationally, see: Åhrén (2016), 224.

[250] Åhrén (2016), 121.

[251] Ibid, 225.

[252] Ibid, 98; Crawford (2019), 624.

[253] James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22(1) Arizona Journal of International and Comparative Law 7-17, 17.

[254] Åhrén (2016), 233.

opportunities and proactive means of participation in decision-making.[255] It is from this understanding that the principle of FPIC has developed.

3.1.3 Free, prior, and informed consent

The principle of indigenous peoples right to give or withhold FPIC in relation to land and natural resource developments on their territories (as enshrined in UNDRIP) is a central principle supporting indigenous self-determination. As such, FPIC goes to the core of what effective indigenous participation and negotiations in decision-making entails.[256] The following is a summary of the general debate regarding FPIC.

Due to the sensitive question of indigenous right to self-determination, the legal concept of FPIC, its extent and content, has so far remained unclear.[257] Although there is agreed wording on FPIC, there is no consensus on what it means or requires in different situations. Tarras-Wahlberg and Southalan argue that there are some generally accepted basics when impartial evaluations are made as to whether the requirements of FPIC have been met. There is an emphasis on the *process* (consultation and its objective) not always an *outcome* (consent).[258] Åhrén notes that indigenous right to self-determination is expressed in the level of influence over the outcome of a decision.[259] At a minimum indigenous peoples have a right to be consulted on matters that are of importance to their way of life. To be able to participate meaningfully, indigenous peoples are to have access to necessary information. Any consultation needs to be conducted in a culturally appropriate way and in good faith with the aim of reaching an agreement.[260] As to what FPIC requires in terms of the outcome of these consultations is thus the more contested issue.

Generally, three types of approaches to FPIC can be distinguished.[261] The minimalist approach argues that FPIC should be interpreted as a requirement to *consult* while the maximalist approach understands FPIC notion of consent as a *carte blanche veto-right*. The main difference between these two concepts is that the consultation approach focuses on the right to process (procedural right) while the consent-veto approach takes aim of the requirement of genuine influence over material outcome (material right).[262] The minimalist

[255] Rasmus Kløcker Larsen, 'Impact assessment and indigenous self-determination: a scalar framework of participation options' (2018). Impact Assessment and Project Appraisal, 36(3), 208-219, 210 https://doi.org/10.1080/14615517.2017.1390874 accessed 14 April 2023.

[256] Åhrén (2016), 134-135 and 138-139; Larsen (2018), 210.

[257] Anaya (2005), 7; Heinämäki (2016), 238; Černič (2020), 341.

[258] Tarras-Wahlberg & Southalan (2022), 241–242.

[259] Åhrén (2016), 225.

[260] UNDRIP, Articles 19 and 32(2); Anaya (2005) 16; Heinämäki (2016), 238.

[261] Rebecca Lawrence & Sara Moritz, 'Mining industry perspective on indigenous rights: Corporate complacency and political uncertainty' (2019) 6 The Extractive Industries and Society 41-49, 42 https://doi.org/10.1016/j.exis.2018.05.008 accessed 9 May 2023.

[262] Åhrén (2016), 135; Lawrence & Moritz (2019), 42.

approach is often employed by states as this serves to safeguard their control over natural resource extraction and development projects.[263]

The third approach is known as the flexible approach which holds that the extent of the requirement to obtain consent depends on the proposed activity's degree of impact – also known as the *sliding scale* or *scalar participation* framework.[264] This approach allows for consultation when the impact is small, but also requires consent (understood as veto-right) if the impact is severe or threatens the survival of the indigenous group. The sliding scale approach also finds its basis in recent developments regarding interpretation of FPIC in international law.[265] The guidance from human rights treaty bodies can be summarized as follows: Where indigenous rights or their interests *may be impacted*, they should be guaranteed *meaningful consultation* that *aims to obtain* their FPIC.[266] In situations where indigenous rights will be *significantly impacted* by a proposed development, their *consent ought to be obtained* before proceeding.[267] However, *how* significant an impact must be to actualize the state's obligation to obtain the consent of indigenous peoples for business activity on their traditional land or provide remediation is not clear and is assessed on a case by case basis.[268] Regardless of any uncertainties regarding certain aspects of FPIC, the principle should be understood as a well-established notion in human rights law expanding the scope of indigenous participatory rights.[269] A issue with the sliding scale approach is a lack of clarity on who is considered to own the decision on severity of impact. However, being founded on the right to self-determination, the decision should consequently be in the hands of indigenous peoples.

3.2 The UNGPs and rights of indigenous peoples

The scope of indigenous rights as defined in the international instruments elaborated on above is addressed in the UNGPs which extends the responsibility for safeguarding indigenous rights to companies and businesses. The UNGPs and its commentaries mention indigenous peoples in three places: concerning the state's obligation to protect by providing guidance to businesses; the scope of human rights to be respected by businesses; and the state obligation to remove barriers to access to judicial remedies.

UNGP 3(c) state that, in meeting their obligation to protect, states should issue guidance to businesses which should indicate expected outcomes and help share best practices as well as advice on appropriate methods on how to

[263] Lawrence & Moritz (2019), 42-43

[264] Åhren (2016), 139; Larsen (2018), 210; Lawrence & Moritz (2019), 43.

[265] Åhren (2016), 139.

[266] HRC (2011), 'Report of SRIP' A/HRC/18/35/add.2, § 76.

[267] CCPR (1994), 'General Comment No. 23' CCPR/C/21//Rev.1/Add.5, § 7; CERD (1997), 'General Recommendation No. 23' A/52/18 Annex V, § 4(d); See also: Tarras-Wahlberg & Southalan (2022), 242.

[268] Anaya (2005), 17; Tarras-Wahlberg & Southalan (2022), 242.

[269] Heinämäki (2016), 235 and 238.

effectively consider issues of vulnerability and marginalization. In doing so, the specific challenges that may be faced by indigenous peoples should be particularly recognised.[270]

UNGP 12 outline the human rights to be respected by businesses, understood as a minimum requirement. Specifically, the minimum benchmark against which businesses are to be evaluated is the provisions in the UDHR, ICCPR and ICESCR. Moreover, 'enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous people […]'.[271]

It has become a generally accepted principle in international law that indigenous peoples should be consulted as to any decision affecting them. This norm has been reflected in the ILO Convention 169, by UN treaty bodies when considering resource extraction on indigenous lands and by states in their contributions to discussions surrounding the UNDRIP.[272] It is accepted in academic literature that indigenous peoples enjoy both collective and individual human rights.[273] The overall consensus among legal scholars seems to be that although states are required to consult with indigenous peoples in matters that are of importance to their way of life, this does not entail a *carte blanche* right to veto in all circumstances.[274] The international instruments elaborated on above, whether or not directly binding by themselves, represent a larger development under international law which contributes to the emergence of customary international law regarding indigenous human rights.[275]

UNGP 26 notes that the state obligation to ensure effective access to judicial mechanisms includes the removal of barriers. It is further recognised that a barrier for indigenous peoples to access effective remedy is for example if they are excluded from the 'same level of legal protection of their human rights that applies to the wider population'.[276]

3.3 Sweden's recognition of indigenous rights

In 1971, Sweden ratified ICCPR, ICESCR and ICERD. However, Sweden has not incorporated ICCPR into domestic law, which is required in a dualist system in order to be able to invoke its provisions in national courts as a legal source. However, national courts are allowed to interpret national rules in

[270] Commentary to UNGP 3.
[271] Commentary to UNGP 12.
[272] Anaya (2005), 7.
[273] Åhrén (2016), 94; Černič (2020), 338.
[274] Åhrén (2016), 139; Heniämäki (2016), 239.
[275] Anaya (2005), 7; Åhrén (2016), 231; Heinämäki (2016), 225 and 237.
[276] Commentary to UNGP 26.

accordance with the aim of ICCPR provisions.[277] Sweden has signed, but not ratified ILO Convention 169. Additionally, Sweden voted to adopt UNDRIP after actively promoting it during negotiations. However, Sweden made its position clear that it does not consider the collective element of indigenous rights to be part of international law and that the state needs to maintain a balance between competing land claims.[278] Generally, international standards for the rights of indigenous peoples has had relatively little influence on Swedish legislation regarding Sami rights.[279] This follows the trend that the states in which indigenous peoples are most present particularly object to binding obligations to protect indigenous peoples' individual and collective rights.[280]

Sweden's formal recognition of the Sami as indigenous was made in 1977.[281] But it was first in 2011 that this recognition was implemented in the Swedish Instrument of Government.[282] The inauguration of the Sami Parliament in 1993 institutionalized Sami self-determination in Sweden. However, its functioning and decision-making capabilities as a representative body of Sami people is hampered by its role as a Swedish Government agency.[283] The primary task of the Sami Parliament is to monitor issues concerning the Sami culture in Sweden.[284] In the 2015 report on the rights of Sami peoples, the UN Special Rapporteur on the Rights of Indigenous Peoples (SRIP) encourages Sweden to ensure the independent decision-making powers of the Sami Parliament together with additional funding.[285] Moreover, Swedish law does not provide a definition of who is to be considered a Sami. The only provision can be found in the Sami Parliament Act which builds on self-identification and a language requirement or having at least one parent eligible to vote in elections to the Sami Parliament.[286]

3.3.1 Reindeer Husbandry Act

Northern Sweden is a place where people have lived for at least 10 000 years where the basis for existence has been fishing, hunting, reindeer herding, mining, or agriculture. During the past 400 years there has been a process of

[277] Kaisa Raitio, Christina Allard & Rebecca Lawrence, 'Mineral extraction in Swedish Sápmi: The regulatory gap between Sami rights and Sweden's mining permitting practices' (2020) 99 Land Use Policy, 5 https://doi.org/10.1016/j.landusepol.2020.105001 accessed 8 May 2023.

[278] 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President' (*United Nations*, 13 September 2007) https://press.un.org/en/2007/ga10612.doc.htm accessed 18 May 2023.

[279] Raitio et al (2020), 5.

[280] Černič (2020), 340.

[281] Government Bill (Proposition) (Prop.) 1976/77:80 *Om insatser för samerna* (Concerning Contributions for the Sami), 1.

[282] SFS 1974:152 *Regeringsform* (Instrument of Government), Chapter 1 Section 2 § 6; Prop. 2009/10:80 *En reformerad grundlag* (A reformed Constitution), 188.

[283] SFS 1992:1433 *Sametingslag* (Sami Parliament Act), Chapter 2 Section 2; Åhrén (2016), 111; Raitio et al (2020), 5.

[284] Sami Parliament Act, Chapter 1 Section 1.

[285] HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 81.

[286] Sami Parliament Act, Chapter 1 Section 2.

colonization of these parts of Sweden that can be characterized by rational co-existence.[287] Reindeer herding is a traditional, collective, and cultural practice of the Sami people which creates the foundation of the Sami culture. From the high mountains to the boreal forests and Baltic Sea coastlands and archipelago, Sami reindeer herding areas cover around half of Sweden's land surface. As reindeers eat plants, lichen, and mushrooms, which vary by season, the reindeers need to be moved up to hundreds of kilometres between suitable pasture areas.[288]

The land rights of the Sami people in Sweden are closely connected to the right to pursue reindeer herding which belongs exclusively to the Sami people and is founded on prescription from time immemorial (*urminnes hävd*).[289] It entails that reindeer can graze on land irrespective of the title and ownership of the land.[290] Hence, reindeer herding has to be carried out in conjunction with other land-uses. The right to pursue reindeer herding may exclusively be exercised by a Sami who is a member of a Sami Reindeer Herding Community (*sameby)* (Sami Community), thus excluding non-reindeer herding Sami.[291] The 51 Sami Communities are autonomous legal entities and a form of economic association.[292] The right to pursue reindeer herding is restricted to certain geographical areas which are divided between different Sami Communities by the Sami Parliament.[293] The Reindeer Husbandry Act regulates the Sami people's land rights and their collective reindeer herding right.[294]

Reindeer husbandry rights as a right to property is protected under the constitutional regulations in the Swedish Instrument of Government and can only be restricted to protect pressing public interests.[295] The Government may expropriate land for purposes given in the Expropriation Act.[296] When deciding on expropriation, the Government has the possibility to prescribe measures to prevent harm or negative impact on reindeer herding.[297] If reindeer herding or the right to hunt and fish is harmed or negatively impacted, the Sami have right to be adequately compensated.[298]

[287] Sköld & Moen (2012), 8
[288] Raitio et al (2020), 3-4
[289] SFS 1971:437 *Rennäringslag* (Reindeer Husbandry Act), Section 1.
[290] Raitio et al (2020), 2-4.
[291] Reindeer Husbandry Act, Section 1.
[292] Raitio et al (2020), 4.
[293] Reindeer Husbandry Act, Sections 6-7.
[294] Tarras-Wahlberg & Southalan (2022), 243.
[295] Instrument of Government, Chapter 2 Section 15.
[296] Reindeer Husbandry Act, Section 26; SFS 1972 *Expropriationslag* (Expropriation Act), Chapter 2.
[297] Reindeer Husbandry Act, Section 27.
[298] Reindeer Husbandry Act, Sections 28 and 29.

3.3.2 Act on Consultation in Matters of Special Importance to the Sami People

Due to the international critique that Sweden has received concerning their treatment of the rights of the Sami people, the Swedish Parliament voted on the Act on Consultation in matters of Special Importance to the Sami People (Consultation Act) which entered into force in 2022.[299] The purpose of consultations under the Consultation Act is to promote the influence of the Sami people over their affairs.[300] Government, public authorities, and from a later period (1 March 2024) regions and municipalities will be obliged to consult Sami representatives (the Sami Parliament and Sami Communities) before decisions are made in matters that may have special significance for the Sami people. The Sami Parliament, Sami Communities and Sami organisations also have the right to initiate consultations in matters that it considers to be of special importance to them.[301] The Consultation Act states that consultation is to be conducted in good faith and continued until an agreement or consent is reached. However, consultations can be cancelled if either of the parties believe that no agreement or consent will be reached.[302]

Uncertainty about the required level of influence and reference to knowledge-sharing exacerbates the fundamental problem regarding inadequate participation facilitation in Sweden. The Consultation Act does not state what level of influence the consultation process has on decisions. The Government Bill states that a decision can be made even if the Sami representative oppose it. It is noted that consultations are a way for the Sami to share their knowledge and inform on the potential effects of a decision on their interests.[303] However, the more negative impact a decision will have on the rights of the Sami people, the more weight should be attached to Sami interests compared to the opposing interests in the matter (*scalar participation*). This view reinforces the validity and recognition of the scalar participatory framework in the Swedish context. The balancing of interests can be interpreted in light of the protection afforded to the Sami people under the Swedish Constitution and in international law.[304] The Swedish High Court has recently clarified that the Sami peoples' interest to maintain their culture as expressed in general principles under international law, including reindeer herding, shall be considered in any balancing act.[305]

There are exceptions to the obligation to consult with the Sami. If another public authority has already consulted in the same or similar matters, there is

[299] Prop. 2021/22:19 *En konsultationsordning i frågor som rör det samiska folket* (A consultation act in matters of special importance to the Sami people), 20-21.

[300] SFS 2022:66 *Lag om konsultation i frågor som rör det samiska folket* (Act on Consultation in Matters of Special Importance to the Sami People, Section 1.

[301] Consultation Act, Sections 6 and 7.

[302] Consultation Act, Section 11.

[303] Prop. 2021/22:19, 112.

[304] Ibid, 114.

[305] NJA 2020 s. 3, Girjasdomen (Girjas case) § 92.

no need to consult. However, the possibility to apply exceptions is very restricted.[306] Interestingly, the obligation to consult is not extended to SOEs. As an SOE is not a public authority it ends up outside the scope of the Consultation Act, in line with the separation principle. There is no deeper analysis in the Governments Bill as to the role and impact of its SOEs on the rights of the Sami people.[307]

3.1 Summary of key findings

The recognition of indigenous rights to self-determination and the right to give or withhold their FPIC regarding activity on their traditional territory has crystalized into generally accepted international norms. The right to give or withhold consent is to at least be understood as a *sliding scale* framework, i.e., the requirement to obtain consent depends on the proposed activity's degree of impact. Consultations should be meaningful and conducted in good faith, and at least aim to achieve consent before proceeding. The scope of indigenous rights as defined in international instruments is addressed in the UNGPs which extends the responsibility for safeguarding indigenous rights to companies. Sweden has ratified ICCPR, ICESCR and ICERD, although they are not incorporated into domestic law. Sweden has not ratified ILO Convention 169 but voted to adopt UNDRIP in 2007.

The Sami people were officially recognised as indigenous in 1977. But it was first in 2011 that this recognition was protected in the Swedish Instrument of Government. The Sami Parliament acts as a representative body and a Swedish public authority at the same time. Moreover, Swedish law does not provide a definition on who is to be considered Sami. The land rights of the Sami people in Sweden are closely connected to the right to pursue reindeer herding. Any indigenous rights are contingent on the ownership of reindeers and membership in an official Sami Community. Sweden has recognised the State obligation to consult the Sami people in matters that are of special importance to them through the enactment of the 2022 Consultation Act. However, the obligation to consult in the Act does not extend to SOEs. Sweden rejects any interpretation of FPIC as a right to veto.

[306] Consultation Act, Sections 4 and 5; Prop. 2021/22:19, 79-80.
[307] See Prop. 2021/22:19, 44.

4 Extractive mining industries

The business of extracting minerals is characterised by long-term timeframes, capital intensive development and a high risk-reward balance. Mining also has a clear political profile as it can relate to issues of national security. Unlike other industries, mining companies cannot choose jurisdiction as their location is based on ore discoveries.[308] The following introduces the particularities of human rights due diligence in the extractive mining sector. Thereafter, international guidelines as to how corporations best identify and prevent adverse human rights impacts on indigenous peoples in their operation is outlined, delimited to the ones that are directly applicable to LKAB. The chapter concludes by introducing the formal process for permitting mining exploration and exploitation in Sweden together with Swedish industry guidelines.

4.1 Particularities of HRDD in the extractive sector

Overall, the mining industry confronts a legitimacy problem which can only be solved by demonstrating respect for human rights. The minimum requirement for businesses in this regard is the responsibility not to infringe on human rights.[309] The rapid expansion of extractive companies in weak governance zones and the lack of accountability for its human rights abuses was a large contributory factor to the legitimacy crisis for global corporate capitalism during the 1990's.[310] The adverse effects of extractive operations on the rights of indigenous peoples are well-documented.[311] Thus, conflicts between the extractive sector and indigenous peoples have long been a subject of study. Lately, there has been an increasing focus on the Nordics.[312]

dos Santos and Seck distinguish three main circumstances that affect how mining industries impact human rights. First, the environmental and social footprint of a mining activity depends on the type of extractive method used, the location of the resource and how the product is transported from site to market. Second, a lack of funding at the exploration stage of mining contributes to failure of the companies to address human rights problems at the outset. This is particularly the case for smaller prospectors. Third, the large number of actors in the mining industry contributes to fragmentation and large differences between companies that are considered leaders when it comes to human rights and those that lag behind.[313] Of relevance to this thesis is that

[308] dos Santos & Seck (2020), 152.

[309] Radu Mares, 'Disruption and Institutional Development: Corporate Standards and Practices on Responible Mining' in Isabel Feichtner, Markus Krajewski & Ricarda Roesch (eds), *Human Rights in the Extractive Industries*: *Transparency, Participation, Resistance* (Interdisciplinary Studies in Human Rights Vol. 3, Springer Nature Switzerland, 2019) 375-412, 376.

[310] Davitti (2016), 58.

[311] Kinley & Tadaki (2004), 987; dos Santos & Seck (2020), 151.

[312] See for example: Tarras-Wahlberg & Southalan (2022), 239.

[313] dos Santos & Seck (2020), 153-154.

the mining of iron ores, such as the LKAB apatite find in Per Geijer (Luossavaara K nr 2), leave a larger environmental and social footprint than the extraction of other metals and minerals such as gold and platinum, due to the longer life of the iron ore mine.[314]

In the mining industry, the most critical HRDD-decision is the 'go-no go decision', i.e., if a mining project should go ahead at all or not. However, it is yet to be determined if HRDD is an effective tool to prevent harm in this context.[315] When exploring the relationship between HRDD and the extractive sector dos Santos and Seck made two main findings. First, they found that HRDD is a tool to mitigate legal risk, while not actually preventing harm. Second, they found that HRDD can be and are undertaken by communities, not only businesses.[316]

Not surprisingly, the *timing* of a human rights impact assessment (HRIA) affects if a harm can be prevented or not. Following their finding, dos Santos and Seck argue that the *continuous* undertaking of HRDD throughout the lifetime of a project may be the best practical solution in order to understand and prevent human rights harm as the mining project progresses.[317] This is in line with a general understanding of HRDD as an ongoing process.[318] When outlining the lifecycle of a mine, they identify at least seven instances where it is necessary to conduct HRIA. The first is at the start of exploration, the second is during exploration when the final investment decision is made, the third is right after development and before operations begins, the fourth is during the operations, the fifth is before an expansion, the sixth is just before closure of the mine and the seventh when the mine is closed.[319]

As noted by Barakos and Mischo when they looked at the REE mining practices in Sweden and the USA, the timing of evaluating social and environmental impacts and obtaining the social license to operate is rarely done at the outset of mining operations.[320] By not conducting thorough impact assessments (IAs) at the exploration phase, mining projects are often allowed to move forward without taking into consideration potential social concerns. These concerns surface at the end of the evaluation process, often after a legally required environmental impact assessment (EIA) has been conducted and when the final feasibility study is prepared. However, now, directions for the project have already been set. Instead of taking proper action, mining

[314] Ibid, 153.
[315] Ibid, 168-169.
[316] Ibid, 155.
[317] Ibid, 156 and 169.
[318] Taylor (2020), 91.
[319] These seven steps are outlined in Figure 8 in dos Santos & Seck (2020), 168.
[320] Georgios Barakos & Helmut Mischo, 'Insertion of the the social license to operate into the early evaluation of technical and economic aspects of mining projects: Experiences from the Norra Kärr and Bokan Dotson rare earth element projects' (2021) 8(2) The Extractive Industries and Society, 3 https://doi.org/10.1016/j.exis.2020.09.008 accessed 4 May 2023.

companies then tend to implement last-minute adjustments that lack sufficient analysis and accuracy which damages the credibility of the entire project and any mitigation efforts taken.[321] In its report on Harmful Impacts, the Responsible Mining Foundation (RMF) highlighted the importance of normalizing prevention of adverse impact and that the industry generally knows what is needed in that respect.[322]

In addition to timing issues of when in the lifecycle of a mine HRIA is to be conducted, Larsen has found that there is differences in the level of indigenous participation within IA practices between jurisdictions (he evaluated practices in Canada, Australia, New Zeeland, Norway and Sweden).[323] A *scalar participation* approach evaluates (1) the timing of the IAs and (2) the degree of influence in IAs by indigenous peoples.[324] An IA generally consists of four stages: 1) scoping, 2) evidence generation, 3) significance determination and 4) follow-up. The final go-no-go decision is after these four steps have been conducted.[325] Factors influencing the level of participation in IAs is the existence of strong indigenous demand in securing political recognition of rights to self-determination that results in concrete legal instruments.[326]

There is an implementation gap understood as rights in law versus rights in practice especially in the ambit of indigenous peoples and extraction activities.[327] The RMF notes that there is a slowing momentum among leading companies as most of the stronger performing companies show limited evidence of improvement in their responsible policies and practices at corporate level since 2020.[328] Although more companies are integrating human rights issues in their public reporting, they fail to translate corporate commitment into action plans, thorough due diligence processes and tracking the effectiveness of implementation.[329] Some companies even argue that there is no need

[321] Ibid, 2-3.

[322] RMF, 'Harmful Impacts of Mining: when extraction harms people, environments and economies' (2021) https://www.responsibleminingfoundation.org/app/uploads/RMF_Harmful_Impacts_Report_EN.pdf accessed 1 May 2023.

[323] Larsen (2018), 208.

[324] Ibid, 210.

[325] Ibid, 211.

[326] Ibid, 216.

[327] Almut Schilling-Vacaflor, 'Norm Contestation and (Non) Compliance: The Right to Prior Consultation and FPIC in the Extractive Industries' in Isabel Feichtner, Markus Krajewski & Ricarda Roesch (eds), *Human Rights in the Extractive Industries*: *Transparency, Participation, Resistance* (Interdisciplinary Studies in Human Rights Vol. 3, Springer Nature Switzerland, 2019) 311-338, 311-312.

[328] RMF, 'Responsible Mining Index Report 2022 Summary', 6 https://2022.responsibleminingindex.org/en/summary accessed 1 May 2023.

[329] 'Research Insight – Time to normalise respect and remedy for Human Rights in mining' (18 February 2021) Responsible Mining Foundation, 1 https://www.responsibleminingfoundation.org/research/humanrights2021/ accessed 1 May 2023.

for specific policies, e.g. on FPIC when an overarching commitment to human rights is in place.[330]

There are an increasing number of examples in the extractive sector of companies initiating their own HRDD efforts. Many of the major mining companies have issued human rights policies and guides that incorporate HRDD principles. The standard for all HRDD steps is set by a business' analysis of its own activities. For example, the extent of stakeholder participation is determined by the business itself. Many of the HRDD guides recommend using existing management processes and just adding on the HRDD dimension. An important aspect of HRDD that risks being set aside is the fact that it incorporates the international human rights law framework as well as the parameters and standards set out in existing international human rights law jurisprudence. However, the business-centricity of current practices is a limitation. dos Santos and Seck question that businesses have any incentive to improve their practices due to this limitation. Nonetheless, they also note that less-business centric HRDD initiatives that promotes increased collaboration and participation such as community-led assessments are both needed and under development.[331] On the same note, academic literature outlines a wide scepticism towards any corporate accountability concerning indigenous peoples' rights.[332] However, some scholars argue that, through adoption of sector instruments and best practice, FPIC has become a standard of conduct for companies.[333] Furthermore, both UNDRIP and ILO Convention 169 have been considered in the development of many of these standards, such as the OECD MNE Guidelines as well as in ICMM Guidelines.[334] The lack of consensus on the content of FPIC is, of course, translated into this context as well.

After assessing 40 of the largest mining companies in the world, the RMF notes that the overall mining industry performance on human rights issues is low. There is also a lack of systematic action regarding efforts to track and improve the performance of grievance mechanisms.[335] The most important goal of the UNGPs is arguably the prevention of human rights violations.[336] Accordingly, OLGMs are specifically designed to handle situations that are related to land-intensive operations with potentially large-scale impacts for communities, such as mining.[337] From the perspective of the industry, when

[330] Ibid, 3; RMF (2022), 'Closing the Gaps', 22.

[331] dos Santos & Seck (2020), 165-167. See also: Kaitlin Y Cordes, Sam Szoke-Burke, Tulika Bansal, Manon Aubry, Adrien Le Louarn, Jeremy Perelman & Marie Poirot, 'A Collaborative Approach to Human Rights Impact Assessments' (March 2017) Columbia Center on Sustainable Dvelopment, Danish Institute for Human Rights and Sciences Po Law School Clinic https://ccsi.columbia.edu/sites/default/files/content/A-Collaborative-Approach-to-HRIAs_Web.pdf accessed 2 May 2023.

[332] Černič (2020), 338.

[333] Ibid, 348; Tarras-Wahlberg & Southalan (2022), 241.

[334] OECD (2011), *MNE Guidelines*; Tarras-Wahlberg & Southalan (2022), 241.

[335] RMF (2022), 'RMI Report Summary', 32.

[336] dos Santos & Seck (2020), 168.

[337] van Huijstee and Wilde-Ramsing (2020), 475.

operating effectively, OLGM enable companies to identify concerns before they escalate into unmanageable conflict and thus help to avoid opposition to mining projects and costly legal battles.[338] In their lack of attention to OLGM and their effectiveness, the mining industry as a whole fail to show commitment to the UNGP precepts of respect and remedy.[339] Notably, mine-site information on community grievance mechanisms is rare. Hence, it's hard to draw any conclusions on the issues raised, any action taken, and remedy provided.[340]

There has been a significant increase in the number of guidelines and standards developed that seek to govern the behaviour of MNEs. With regards to extractive operations on indigenous territories, most international guides and industry standards have specifically adopted FPIC and the general consensus is that companies must respect human rights even when the laws of nation-states do not.[341] Although FPIC is a standard for states, some scholars suggest that FPIC is emerging as an expected standard and corporate obligation due to the adoption of sector instruments.[342] While most companies mention their position on FPIC in their policies, only a few companies have made formal commitments to respect the principle.[343]

4.2 International best practice

As a response to negative publicity and company failure to obtain a social license to operate, extractive companies and industry associations have actively been promoting HRDD tools to prevent and remedy human rights violations.[344] For the past 50 years, the use of environmental and recently social IAs have been increasingly used by the extractive sector.[345] In these assessment standards, the norms of the state obligation to consult and the right of indigenous peoples to give or withhold consent if severely impacted by industry operations is generally reflected.[346] Importantly, there is a trend in the change of attitudes of extractive companies towards indigenous rights as well as attempts of victims to sue companies for committing human rights violations which is reflected in the development of international best practice guides.[347] The following section extrapolates on the best standard guides that

[338] RMF (2021), 'Research Insight', 4.
[339] Ibid, 5.
[340] RMF (2022), 'RMI Report Summary', 33.
[341] Lawrence & Moritz (2019), 41.
[342] Černič (2020), 348; Tarras-Wahlberg & Southalan (2022), 241.
[343] 'Result on Community Wellbeing', see D.09.1 on FPIC (*Responsible Mining Index*, 2022) https://2022.responsibleminingindex.org/en/results/thematic/1453 accessed 1 May 2023.
[344] dos Santos & Seck (2020), 151.
[345] Ibid, 154.
[346] Rasmus Kløcker Larsen, Kaisa Raitio, Marita Stinnerbom & Jenny Wik-Karlsson, 'Sami-state collaboration in the governance of cumulative effects assessment: A critical action research approach' (2017) 64 Environmental Impact Assessment Review 64-76, 64 https://doi.org/10.1016/j.eiar.2017.03.003 accessed 11 May 2023.
[347] Černič (2020), 340.

LKAB mention that they abide by and policies from organisations that LKAB is a member of.[348]

4.2.1 OECD Extractive Sector Guidance

The OECD has issued several guidelines regarding responsible business conduct. Due to time and space constraints as well as the ambition of being stringent, this thesis engages with three relevant guidelines. The OECD MNE Guidelines and the OECD SOE Guidelines have been introduced in Chapter 2. Here follows an overview of the extractive sector specific guidance.

The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector was posted in 2017 and aligns with the OECD MNE Guidelines.[349] The purpose of the OECD Extractive Sector Guidance is to provide a due diligence framework to the industry in meeting international standards and preventing adverse human rights impacts, among other.[350] While the OECD MNE Guidelines refer to UN instruments on the rights of indigenous peoples in the context of adverse human rights impacts it does not include any language on FPIC. In its Guide for NCPs on issues regarding indigenous peoples' rights, the OECD clearly notes that enterprises should 'seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law' in cases where domestic law is in conflict with the principles and standards of the OECD MNE Guidelines.[351]

The OECD Extractive Sector Guidance state that consent may be required in the context of engagement with indigenous peoples and prior to project exploration or major expansions.[352] In countries where FPIC is not mandated, the OECD Extractive Sector Guidance set out that enterprises should consider local expectations, the risk posed to indigenous peoples and to the operation as result of local opposition. OECD recommends that enterprises should formally commit to a consultation process that has been agreed upon with affected indigenous peoples. Furthermore, enterprises should consult and agree on what constitutes appropriate consent and should seek consent before exploration activities start.[353]

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[348] See for example: dos Santos & Seck (2020), 158-163 and Backer (2020), 229.

[349] OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (OECD Publishing Paris, 2017), 17 https://doi.org/10.1787/9789264252462-en accessed 1 May 2023.

[350] OECD (2017), *Guidance for Extractive Sector*, 10.

[351] OECD, *Guide for National Contact Points on the Rights of Indigenous Peoples when handling Specific Instances* (OECD, 2022), 8 http://mneguidelines.oecd.org/guide-for-national-contact-points-on-the-rights-of-indigenous-peoples-when-handling-specific-instances.pdf accessed 1 May 2023.

[352] OECD (2017), *Guidance for Extractive Sector*, Step 4: B. See also Annex B to the OECD (2017), *Guidance for Extractive Sector*: Engaging with Indigenous Peoples.

[353] Annex B to the OECD (2017), *Guidance for Extractive Sector*, Consideration 4: A.

The OECD Extractive Sector Guidance outlines 'meaningful stakeholder engagement' in four categories[354]. *First*, as a two-way engagement, i.e., sharing of decision-making power, thus moving away from the company as sole decision-maker. *Second*, as a good faith engagement, i.e., showing a genuine intention to understand how stakeholders are affected by enterprise operations. *Third*, as a responsive engagement, i.e., following through on outcomes of stakeholder engagement by ensuring that adverse impacts are appropriately addressed and includes adequate remedies. And *fourth*, as an ongoing engagement, i.e., engagement is continued throughout the entire lifecycle of an operation and is not a one-off endeavour.

4.2.2 ICMM

As a response to issues of obtaining the social license to operate and rising public concerns regarding environmental and social harm attributed to the extractive industry, a group of mining companies initiated the work of the International Council on Mining and Metals (ICMM) in 2001. At the outset, ICMM created 10 guiding principles called the Sustainable Development Framework.[355] However, these principles have suffered critique for merely being inspirational and unspecific.[356] Today, the international industry organization comprises of one third of the global metals and mining industry.[357] Contrary to the work undertaken by the OECD, ICMM does not focus on stakeholder engagement.[358] Instead its members are directed to its ICMM's Community Development Toolkit which sets out a step- by-step guide.[359] The toolkit draws upon the UNGPs and includes human rights considerations.[360]

The ICMM Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes (ICMM HRDD Guide) incorporates the UNGPs.[361] Its goal is to assist companies to build on existing risk management processes, such as environmental and social IAs, and assist in determining to choose among the most useful

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[354] OECD (2017), *Guidance for Extractive Sector*, 18.

[355] 'Our principles' (*International Council on Mining and Metals)* https://www.icmm.com/en-gb/our-principles accessed 13 May 2023; S. Prakash Sethi & Olga Emelianova, 'International Council on Mining and Metals Sustainable Development Framework' in S.P. Sethi (ed), *Globalization and Self-Regulation* (New York, Palgrave Macmillan, 2011) 161-188, 161 and 164.

[356] Sethi & Emelianova (2011), 165 and 174-175.

[357] 'Our Members' (*ICMM)* https://www.icmm.com/en-gb/our-story/our-members accessed 1 May 2023.

[358] dos Santos & Seck (2020), 163.

[359] ICMM, *Community Development Toolkit* (ICMM, 2012) https://www.icmm.com/website/publications/pdfs/social-performance/2012/guidance_community-development-toolkit.pdf accessed 2 May 2023.

[360] Ibid, 20 and 73.

[361] ICMM, *Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes* (ICMM, 2012), 4 https://www.icmm.com/website/publications/pdfs/social-performance/2012/guidance_human-rights-due-diligence.pdf accessed 2 May 2023.

tools and when to use them.[362] The focus of the ICMM HRDD Guide is on the first impact assessment step (of the four steps set out in the UNGPs) – i.e., assessing actual and potential human rights impacts.[363]

In 2013, ICMM's recognised FPIC as both a process and an outcome, in that indigenous peoples are entitled to give or withhold consent to a project.[364] However, in the same document ICMM clarifies that when the host country does not recognise FPIC as a right to veto, members should aim to respect the principle to the greatest degree possible.[365] This minimalist approach to FPIC as a right to *consultation* has continued to be enshrined in ICMM policies.

In its 2015 Good Practice Guide, ICMM has developed 13 tools that give effect to good practice principles.[366] It sets out that good practice community engagement includes *working to obtain* FPIC where applicable or at least working to obtain broad and overall support.[367] The Guide specifically notes that the work to obtain consent is a process embodied in good faith negotiations.[368] Interestingly, ICMM's position is that where FPIC has not been obtained, but the government has reached a decision that a project should proceed and specifying the conditions that should apply, it is up to the mining company to determine whether they ought to remain involved with a project or not.[369] It is ambiguous if this position aligns with the UNGPs understanding that corporate responsibility to respect human rights builds on the development of international human rights norms and not exclusively on their recognition in domestic legislation or jurisprudence. From a human rights perspective, this provision can be read as an implementation of the *sliding scale* framework. However, that reading would overlook the foundation of FPIC as expressing indigenous peoples' right to self-determination. The decision to proceed could or should be in the hands of the indigenous communities, not the corporation.

Moreover, ICMM recognises the importance of indigenous advisors in facilitating engagement and acting as a liaison point – hiring of which is a good practice.[370] ICMM outlines that an OLGM should deepen community involvement in the grievance process to increase its effectivity in line with

[362] Ibid, 3-4.
[363] Ibid, 8.
[364] ICMM, 'Indigenous Peoples and Mining: Position Statement' (16 May 2013), 2 https://www.icmm.com/en-gb/our-principles/position-statements/indigenous-peoples accessed 1 May 2023.
[365] Ibid, 4.
[366] ICMM, '*Indigenous Peoples and Mining: Good Practice Guide* (2nd edition, ICMM, 28 October 2015), 14 https://www.icmm.com/en-gb/guidance/social-performance/2015/indigenous-peoples-mining accessed 5 April 2023.
[367] Ibid, Section 2.2 (own emphasis).
[368] Ibid, Tool 11.
[369] Ibid, Section 2.5.
[370] Ibid, Tool 2.

UNGP 31, especially in context where there is a historic lack of trust and legitimacy issues.[371]

4.2.3 IFC/UN Global Compact

In association with the UN Global Compact, the IFC[372] and the International Business Leaders Forum issued a comprehensive Guide to Human Rights Impact Assessment and Management (HRIAM).[373] The HRIAM Guide does not mention FPIC but in one place it talks about 'free, prior and informed *consultation*' with stakeholders.[374] The HRIAM Guide interacts with risks in the mining sector. When discussing potential impact on indigenous communities, it is the rights contained in the International Bill of Human Rights that are mapped.[375] The approach of HRIAM is to assist companies in identifying their human rights risks and impacts to be able to integrate them into the company's management system – thus linking human rights assessment to existing management processes.[376] Most notably, the HRIAM created two interactive tools: a human rights identification tool and a HRDD mapping tool, which can be used by the mining sector.[377] The HRIAM Guide notes that when the national government is not a signatory to ILO 169, this can pose a human rights challenge for the company. The company risks being 'accused of complicity if caught between indigenous peoples' expectations and national government indifference'.[378]

4.3 Regulating minerals in Sweden

Contemporary international approaches to mining regulation emphasise the importance of the state achieving a balance between the benefits and impacts of mining. When looking to recent industry, international and academic guidance, it shows that the emphasis is on structuring mining to contribute to the community.[379] In the spring of 2023, the European Commission proposed a regulation for establishing a framework to secure and supply critical raw

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[371] Ibid, Tool 12; ICMM, 'Handling and Resolving Local-level Concerns and Grievances: Human Rights in the Mining and Metals Sector' (2009, updated 10 December 2019), 45 https://www.icmm.com/en-gb/guidance/social-performance/2019/grievance-mechanism accessed 5 April 2023.

[372] IFC is the private sector branch of the World Bank that establishes environmental and social performance standards used in project finance. See more: 'About IFC' (*IFC*) https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new accessed 1 May 2023.

[373] Desiree Abrahams & Yann Wyss, 'Guide to Human Rights Impact Assessment and Management (HRIAM)' (IFC & International Business Leaders Forum (IBLF), 2010, updated in 2011) https://unglobalcompact.org/library/25 accessed 1 May 2023; dos Santos & Seck (2020), 158.

[374] Ibid, 20.

[375] Ibid, 87-92.

[376] Ibid, 6.

[377] Ibid, 15, 87-92.

[378] Ibid, 32.

[379] Tarras-Wahlberg & Southalan (2022), 240.

minerals.[380] The Swedish Government has in the last decade enhanced Sweden's position as the leading mining nation within the EU.[381]

The Swedish mineral regulation is similar to that of most countries which have a substantial mining sector.[382] It is not explicitly stated in law who owns precious minerals, referred to as 'concession minerals' but it is the state that grants the right to explore and exploit.[383]

4.3.1 Minerals Act

The main legislation governing mining activities in Sweden is the Minerals Act and the accompanied Minerals Ordinance.[384] Several permits are needed before starting exploration and, later, exploitation of concession minerals. The permits under the Minerals Act are granted by the Swedish Mining Inspectorate, a special decision-making body that is also responsible for overseeing compliance with the Minerals Act.[385] In the instance that a mining concession is of particular significance, the Swedish government will instead process the application.[386]

First, before the initial exploration can start an exploration permit needs to be granted together with an approved work plan.[387] If reindeer herding is conducted on the land where exploration is considered, the Sami Parliament are offered to give their opinion on the exploration application.[388] As owner of special property (reindeers), reindeer herding Sami are considered a concerned party and shall have the work plan sent to them. The work plan is sent to the relevant Sami Community, and any objection shall be communicated to the public authority in writing within three weeks.[389] However, the decision whether to approve a exploration permit or not can be reached without reindeer herding Sami having an opportunity to give their opinion on the matter.[390] Reindeer herding Samis are as shown instead given an opportunity to

[380] European Commission, 'Proposal for a regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858 and (EU) 2019/1020' COM(2023) 160 final.

[381] Ministry of Enterprise, Energy and Communications, 'Sweden's Minerals Strategy. For sustainable use of Sweden's mineral resources that create growth throughout the country' (2013) 3–4 https://www.regeringen.se/rapporter/2013/02/n2013.02 accessed 3 April 2023.

[382] Tarras-Wahlberg & Southalan (2022), 244.

[383] Ibid.

[384] SFS 1991:45 *Minerallag* (Minerals Act); SFS 1992:285 *Mineralförordning* (Minerals Ordinance).

[385] Minerals Act, Chapter 8 Sections 1 and 3.

[386] Minerals Act, Chapter 8 Section 2.

[387] Minerals Act, Chapter 1 Section 4 and Chapter 3 Section 5§.

[388] Minerals Ordinance, Section 3 §4.

[389] Minerals Act, Chapter 3 Section 5a; Minerals Ordinance Section 3 §2; Swedish Government Official Reports (SOU) 2012:73 *Undersökningstillstånd och arbetsplaner* (Exploration permits and work plans), 126-127.

[390] Minerals Act, Chapter 8 Section 1 §2.

opine on the work plan and the land designation.[391] Any appeal of the work plan is to be handled by the Land and Environmental Court.[392] The developer thus has no formal obligation to consult with the Sami Communities at this stage in the process as any objection is reviewed by the Mining Inspectorate when an application is considered.

In their mapping of the Swedish permit system for mining activities from a Sami perspective, Raitio et al are critical of the fact that objections and appeals against the exploration permit and work plan are processed by two different courts (1) the Mining Inspectorate and (2) the Land and Environmental Court. Moreover, Raitio et al note that, an exploration permit is to be granted by law as soon as any formal requirements are met – thus any attempt by Sami Communities to appeal has so far been fruitless.[393]

Second, once the mineral is found, a mining concession needs to be approved in order to start exploitation.[394] The application for a mining concession needs to be accompanied by an EIA in accordance with the Environmental Code.[395] The mining company is tasked with arranging a *meaningful consultation* to *outline the relevant areas to be assessed*, where relevant stakeholders are provided with the opportunity to give their opinion on the planned concession, its location, extent and potential environmental impact. There is thus a formal legal requirement for consultation in these examinations. Worth noting is that the legal requirements to consult refers to a so called 'consultation on demarcation', i.e., as to what areas are to be considered in the EIA. Thereafter, it is the company that writes the assessment. In this part, there is no formal requirement to consult with the Sami Communities as to the conclusions of the assessment.[396] It is first when the EIA has been lodged together with the application that the relevant stakeholders, together with the general public, have an opportunity to give their opinion on the final assessment made by the company.[397] When the Mining Inspectorate then make its overall assessment it considers the operation's impact on reindeer herding.[398]

Raitio et al has identified that the concession permit is the most important permit from a Sami perspective, as it indicates permissibility of the project as a whole.[399] If granted, a mining concession permit is typically valid for 25 years and can be extended.[400] Notably, if conditions regarding the value of

[391] Minerals Act, Chapter 3 Section 5a and Chapter 9 Sections 13-18.
[392] Minerals Act, Chapter 16 Section 1.
[393] Raitio et al (2020), 6-7.
[394] Minerals Act, Chapter 1 Section 4.
[395] Minerals Act, Chapter 4 Section 2 §5; SFS 1998:808 *Miljöbalk* (Environmental Code), Chapter 6 Sections 28-46.
[396] See: Environmental Code, Chapter 6 Sections 28-29.
[397] Environmental Code, Chapter 6 Section 39.
[398] Environmental Code, Chapter 6 Section 43 and Chapter 3 Section 5.
[399] Raitio et al (2020), 7.
[400] Minerals Act, Chapter 4 Section 7-8.

and access to the mineral deposit are met, the Mining Inspector *must* grant a concession.[401] As noted, Swedish mineral legislation favours the granting of mining concessions as it is viewed to be in society's best interest that minerals be mined, even in cases where landowners and land right owners oppose such activities.[402] Conditions to protect Sami reindeer herding can be defined in the concession permit.[403]

4.3.2 Environmental Code

Mining activity is considered an environmentally hazardous activity that therefore requires permits.[404] An application for such an environmental permit is considered by the Land and Environmental Court.[405] The application needs to be accompanied by an EIA.[406] The conduct is the same as under the application for a mining concession.[407] However, as the impact on reindeer herding is considered for the mining concession exploitation permit, it will not be considered as part of the application for an environmental permit.[408] Notably, the Environmental Code is not designed to hinder environmentally hazardous activities, but rather to mitigate and manage potentially significant negative impacts from these activities on the environment and human health. As can be viewed, the Swedish EIA practice treats Sami people as any other stakeholder rather than specifically indigenous peoples whose cultural rights are an integral part of their status under international law.[409]

The Environmental Code calls for a balancing act when areas are protected due to several national interests such as reindeer herding or mineral exploitation.[410] When national interests collide or overlap, which is not uncommon, precedence should be given to the interest that best promotes long-term sustainable land-and water use.[411] The *Norra Kärr* case has clarified that in granting a mining concession, adjoining activities and infrastructure surrounding the concession has to be assessed and included in an EIA.[412]

4.3.3 SveMin

The Swedish mining industry organization, SveMin, recognises that there is a land related conflict between reindeer herding and mineral extraction in

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[401] Minerals Act, Chapter 4 Section 2.

[402] Raitio et al (2020), 7; Tarras-Wahlberg & Southalan (2022), 248-249.

[403] Minerals Act, Chapter 4 Section 4.

[404] Environmental Code, Chapter 9 Sections 1 and 6; SFS 2013:251 *Miljöprövningsförordning* (Environmental Regulation), Chapter 4 Sections 11-16.

[405] Environmental Code, Chapter 9 Section 8.

[406] Environmental Code, Chapter 6 Section 20.

[407] Environmental Code, Chapter 6 Sections 28-46§§.

[408] Minerals Act, Chapter 4 Section 2 §4; Environmental Code, Chapter 3 Section 5.

[409] Raitio et al (2020), 8-9.

[410] Environmental Code, Chapter 3 Sections 5 and 7; HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3 § 44.

[411] Environmental Code, Chapter 3 Section 10; Tarras-Wahlberg & Southalan (2022), 240.

[412] Raitio et al (2020), 11.

Sweden. Notably, the SveMin position document on indigenous people and mineral extraction has not been updated to reflect its position on the Consultation Act.[413] In direct contradiction with the UNGPs, SveMin notes that individual companies' compliance with international law is on a voluntary basis only. In any case, the organisation rejects any application of international law norms. Instead, the position of SveMin is that any interpretation and application of international human rights law is to be reached between individual Sami Communities and mining companies. This view clashes with international sector policies, guidelines, and best practice.

SveMin encourages voluntary consultations in the exploration phase when the risk for potential impact is bigger, however consultation seems to be synonymous with giving information.[414] SveMin recognises the vulnerability of cumulative effects on reindeer herding and states that any adverse impact shall be mitigated.[415] Regarding the timing of consultations, SveMin holds the rigid position that they should not be conducted before or during the exploration phase whereas international best practice recognises the *sliding scale* rationale at a minimum. In SveMin's view the Minerals Act's provisions regarding consultation requirements are sufficient. Interestingly, SveMin refers to issues with 'alarm' being raised in connection to discovery of mineral deposit and that it is important to 'reduce the procedural burden' that this concern eventually poses for the prospecting company.

SveMin recommends that IAs should be made as a balancing act 'regarding the project's anticipated impact on reindeer husbandry by the Sámi village in relation to the significance of the project to the company and wider society'. There are two issues with this approach. *First*, this poses a resource burden on the Sami Communities to be responsible for the IA (which goes against both Swedish legislation and international best practice), although participation should be financially recompensed. *Second*, this statement is troublesome as an IA by itself should not set out to balance interests. It should assess impacts. After the assessment there will be a balancing of interest by public authorities when reviewing permit applications. If the assessment has already been taking other interests into consideration, the public authority assessment will not properly reflect the reality.

Even more troublesome is the statement on how any agreement should be viewed as consent. This is regardless of the content of the agreement.

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[413] SveMin, 'Position Document – Indigenous People and Mineral Extraction' (28 November 2019) https://www.svemin.se/en/position-document-indigenous-people-and-mineral-extraction/ accessed 4 May 2023.

[414] SveMin, 'Vägledning för prospektering' (Guidance for exploration) (version 1.1, 2018), 32 and 35 https://www.svemin.se/vart-material/publikationer/prospektering-och-mark/ accessed 14 May 2023.

[415] Ibid, 33.

> ‘An agreement must be sought with the Sámi village concerned regarding the actual consequences, potential measures to minimize the impact and relevant compensation so that such an agreement may then, in turn, be used as a basis for consent.’

The reference to that when ‘actual consequences’ have happened, potential measures are to be agreed upon is confusing. When the damage is done, actual measures to mitigate and compensate are to be developed. In view of the UNGPs due diligence requirement to identify potential risks and prevent and mitigate potential adverse impacts – this statement is evidently blind to international legal developments concerning extractive operations. Moreover, the lack of reference to international guidelines (i.e., none) such as the UNGPs, OECD or ICMM is noteworthy. The guidance however referred to the conduct and policies of LKAB as good practice.

4.4 Summary of key findings

The business of extracting minerals is featured by long-term timeframes, capital intensive development and a high risk-reward balance. There is a general low human rights performance in the mining sector. Due to the industry’s impact on human rights and the attached legitimacy issues, there has been an explosion of international guidelines and best practice guides for how to conduct human rights due diligence processes in this context. Common traits are a flexible, yet minimalist approach to FPIC, i.e., that the obligation is procedural, to *consult* and that it should aim for reaching an agreement and consent *where possible*. Moreover, research shows that the timing of when a HRIA is conducted in the lifecycle of a mine affects the possibilities to prevent and mitigate harm. The most critical human rights impact decision is the ‘go-no go decision’ or also known as the ‘final investment decision’ which is taken during the exploration phase. HRDD should be continuously conducted. However, as this is rarely done an implementation gap is evident.

In Sweden, mining companies are formally required to consult on the *outline* of an EIA. This consultation is conducted as a step in the application to be able to start exploitation, i.e., when the go-no go decision has already been taken. The Swedish industry organization, SveMin, encourages ‘voluntary consultations’ in the exploration phase if there is significant impact, however consultation seems to be synonymous with ‘giving information’. Here it also seems that it is the company’s assessment of the impact not the indigenous communities’, that will guide the go-no-go decision. Adding to the implementation gap, there is an apparent gap between international best practice and Swedish industry practice where participatory processes are framed as voluntary stakeholder practice, a privilege.

5 The case of Sweden and LKAB

Sweden is generally viewed as an international pioneer of human rights, including the state's support of indigenous rights internationally. Yet, the Swedish domestic mineral policies have resulted in increased conflicts between the state, mining corporations, indigenous Sami (Reindeer Herding) Communities and non-indigenous local communities.[416] There is thus a regulatory gap in Swedish legislation concerning the effective protection of Sami indigenous rights in ensuring right to effective participation.[417]

5.1 Regulatory gap

As much of Sweden's ore deposits exist within the traditional Sami territory (in 2019, twelve of fifteen active metal mines were located within Sápmi), state policy to support growth in the mining sector will undoubtedly impact Sami people's access to their traditional lands. In their analysis of the regulatory gap and the mining permit system from a Sami rights perspective, Raitio et al found that political priorities have favoured the establishment of mines while not engaging the question of indigenous rights. The gaps between international and Swedish national law, along with gaps within the Swedish legal system mean that Sami rights are not effectively recognised within the mining permitting system. This void explains a permitting process in favour of the approval of mining activities without effective possibilities for Sami Communities to influence its outcome.[418]

5.1.1 Importance of property rights

The Sami people have established a property right to their land through traditional use, which is accepted under both Swedish domestic and international law. Under Swedish national law, indigenous peoples right to land is closely tied to owning and managing reindeers. As the right to reindeer herding is a usufruct right, i.e., not an exclusive property right in Swedish law, Sami Communities experience increasing competing land use and cumulative effects from operations such as mining, wind energy, forestry, and infrastructure development.[419] Within Sami territory, reindeer husbandry also suffers from small changes imposed by other land users. This gradual loss of land has ramifications beyond the area loss itself. As the landscape becomes more fragmented, and remaining grazing areas smaller and isolated, use becomes more difficult. Due to the fragmentation of land, the costs of reindeer herding may increase as management becomes more intensive with the need for transportation or supplemental feeding. The acute problem of cumulative effects is

[416] Raitio et al (2020), 1.

[417] Rasmus Kløcker-Larsen, Jannie Staffansson, Inger-Ann Omma and Rebecca Lawrence, 'Avtal mellan samebyar och exploatörer. Hur påverkas renens välmående?' Samisk Senters Skriftserie nr 22 (2022), 14 https://doi.org/10.7557/10.6421 accessed 14 April 2023.

[418] Raitio et al (2020), 1–2 and 12.

[419] Larsen et al (2017), 67.

shown in that every new loss of land increases the risk of reaching a threshold where it is no longer possible to continue with reindeer husbandry in its current form, making each one of the changes imposed by other land users a potential for conflict.[420]

The Minerals Act, Environmental Code and Consultation Act are the legal frameworks in Sweden under which consultations regarding matters of importance for the Sami peoples are regulated. An important difference is that while the Consultation Act targets Sami people and their right to consultation based on their status as indigenous people, the Minerals Act and Environmental Code take note of the rights of Sami people as owners of property (reindeer herding).[421] Moreover, the Minerals Act and Environmental Code target the conduct of the developer while the Consultation Act imposes obligations on the Government and other public authorities in their process of reviewing permit applications. Furthermore, consultations under the Consultation Act are conducted with Sami representatives – not individual concerned Sami.

The Sami people's indigenous rights to their land have been tried in important and landmark cases in Swedish courts, including the High Court of Sweden. Overall, it has been established that the rights of reindeer herding Sami to land are based on either use "from time immemorial" or through customary use.[422] In the 2011 Nordmaling case, the Sami representatives proved customary use based on historic documents. The 2020 Girjas case was the first time that the Swedish High Court based its decision on international human rights in regard to the rights afforded to the Sami as indigenous peoples instead of the provisions in the Reindeer Husbandry Act.[423] The judgment affirms that ILO Convention 169, although not ratified by Sweden, in part is binding on the state as customary international law. Moreover, the Swedish High Court also referred to Article 26 UNDRIP as well as Article 27 ICCPR in its judgment.[424] Raitio et al note that although the High Court has held that Sami reindeer herding rights is a strong usufruct right with the same constitutional protection as other property rights, there has been no related amendments in the Reindeer Husbandry Act or Minerals Act to account for reindeer herding as a full property right.[425]

A clear conflict is what Sami right to property based on customary law and tradition entails. The Swedish government continues to reiterate its position

[420] Sköld & Moen (2012), 8-9

[421] See for example Prop. 2021/22:19, 14.

[422] NJA 2011 s. 109 Nordmalingmålet (Nordmaling case) §10; Tarras-Wahlberg & Southalan (2022), 244.

[423] Christina Allard & Malin Brännström, 'Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case' (2021) 12 Arctic Review on Law and Politics 56-79, 64 https://arcticreview.no/index.php/arctic/article/view/2678/5159 accessed 12 May 2023.

[424] NJA 2020, s. 3 Girjas case, §§ 130-131 and 162.

[425] Raitio et al (2020), 6.

that indigenous right to land is not a right of ownership of land but a right to use and benefit from a property which may belong to someone else.[426] However, CERD recalls that indigenous people's land rights differ from the common understanding of civil law property rights as it is a 'central element of the [Sami peoples] cultural identity and traditional livelihood'.[427] The CERD view is that the Swedish mining legislation and policies discriminate against the group of Sami reindeer herders by being blind to the particularities of the indigenous Sami culture being dependent on reindeer herding for survival.[428]

Where natural resource extraction directly affects the property rights of indigenous peoples, the international norm has developed as to require consent. Where extraction of subsoil natural resources indirectly but still significantly affects the property rights of indigenous peoples, the consultation must at least have the objective of achieving consent. Without FPIC, there is a strong presumption that the project should not go forward.[429] The more negative the impact indigenous people would experience by extraction activities, the more influence (*sliding scale)* they should have over the go-no go decision.[430] If the operation proceeds without the FPIC, indigenous peoples should share in the benefits and measures to mitigate the negative effects must be taken.[431]

5.1.2 Balancing of opposing interests

During the last decade there has been a significant increase in the accumulated land designated for mining activities in Sápmi (more than a doubling) and the number of exploration permits granted (four to six times increase). As reindeer herding is dependent on access to and quality of pastures, connectivity and diversity of pasture areas and peaceful grazing the land-use for mining operations risks leading to loss and fragmentation of reindeer herding and grazing areas.[432] The conflict over access to and use of land between Sami Communities and the mining industry is no different from that experienced in other parts of the world.

In the case that there is a conflict of interest regarding land use, Swedish law provides for a balancing act. As Swedish law considers reindeer herding as an exclusive right to pursue economic activity, reindeer herding and mining are in essence treated as competing economic interests.[433] The decision regarding balancing of national interests during the concession permitting process is binding in the environmental permit decision and cannot be reassessed even if the adverse impacts are greater than assumed, thus marking this phase

[426] CERD (2020), 'Opinion' CERD/C/102/D/54/2013, § 4.1
[427] Ibid, § 6.14.
[428] Ibid, § 6.23.
[429] Anaya (2005), 17.
[430] Åhrén (2016), 139; Lawrence & Moritz (2019), 43; dos Santos & Seck (2020), 168.
[431] Anaya (2005), 17.
[432] Raitio et al (2020), 2 and 4.
[433] Ibid, 6.

the most important from a Sami perspective.[434] The SRIP has as recently as 2020 expressed concern that the balancing act is rarely done, and when it is done reindeer herding is exclusively assessed from an economic perspective. In the view of the SRIP, pure economic interests are not a valid public purpose that can justify limiting Sami rights to their property.[435]

An inherent issue in the balancing act is the assumption that reindeer herding pastures are so vast that reindeer herding easily can co-exist with mining operations. However, data shows that there is a pattern of dispossession rather than co-existence.[436] Thus actualising a right to restitution in accordance with UNDRIP Article 32. However, only in a few cases have incompatibility of land use been recognised and thus resulted in an actual prioritisation of interests, such as in the Rönnbäcken case which was lodged with CERD in 2013. In the decision CERD noted that Sweden had discriminated against the concerned Sami by failing to adequately consult the Vapsten Sami Community before granting a mining concession and called on Sweden to revise the concession.[437] Sweden's failure to comply with the decision has raised strong reactions from the Sami Council, among others.[438]

Adding to the list of examples of dissonance between international human rights bodies' interpretation of states' obligations to protect the rights of indigenous peoples and the practice of Sweden to promote mining projects is the controversy around Jokkmokk Iron Mines (subsidiary of Beuwolf Mining) in Gállok (northern Sweden). The case drew international attention when the SRIP initiated a Special Procedure. In the Gállok case, the land in question was a national interest due to both its mineral deposits and its use for reindeer herding. When granting the Gállok concession, the Swedish Government noted that both mining and reindeer herding activities could not take place at the same time, therefore a balancing act was conducted where the national interest of mineral deposits overruled the national interest of reindeer herding. The granting of the mining concession was however contingent on the company to take precautionary measures to minimise the negative impact on reindeer herding and compensate the Sami Communities where impact could not

[434] Ibid, 8 and 12.

[435] HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 45-46.

[436] Rasmus Kløcker Larsen, Maria Boström, Muonio Reindeer Herding District, Vilhelmina Södra Reindeer Herdin District, Voernese Reindeer Herdin District, Jenny Wik-Karlsson, 'The impacts of mining on Sámi lands: A knowledge synthesis from three reindeer herding districts' (2022) 9 The Extractive Industries and Society https://doi.org/10.1016/j.exis.2022.101051 accessed 14 April 2023.

[437] CERD (2020), 'Opinion' CERD/C/102/D/54/2013, § 6.12.

[438] 'Open Letter from the Saami Council and Vapsten Sami Community' (Saami Council & Vapsten Sami Reindeer Herding Community , 16 June 2021) https://static1.squarespace.com/static/5dfb35a66f00d54ab0729b75/t/60cce4bdcde909003d10473d/1624040641577/R%C3%B6nnb%C3%A4cken+SC+Open+Letter+06.2021.pdf accessed 11 May 2023.

be avoided.[439] As noted by Raitio et al, the lack of a merits-based appeals process regarding the Government's final decision, as it can only be appealed to the Supreme Administrative Court on technical points of law, hinders an independent judicial review of the merits of the decision. This leads to a gap in access to remedies which is a serious flaw in the regulatory framework with respect to Sami rights.[440]

In the Gállok process, several Swedish indigenous organisations raised concern regarding the mine's impact on the rights of the Sami and reindeer herding. The Sami Parliament position to object a permit being granted was based on the negative cumulative effects a mining concession would generate as the area already hosted forest industry, hydropower facilities, infrastructure etc.[441] The National Union of the Swedish Sami argued on the necessity of granting the concession as iron, not being a critical mineral, would not contribute to the green transition. Additionally, questions were raised regarding the economic gains a mine would generate when considering the overall costs including environmental clean-up.[442] Another issue raised was the inadequacy of the EIA conducted by the company.[443] While the inadequacy of an EIA and failure to obtain a social license to operate can lead to a concession permit not being granted, and by extension lead to a closing of a mine – this was not the case in this instance where the preparations for applying for an environmental permit is under construction by the developer during the spring of 2023.[444]

5.1.3 Consultation and participation

The Consultation Act does not impose an immediate obligation to conduct consultation in the exploration stage unless in exceptional cases.[445] The reason given by the Swedish Government is that explorations do not significantly impact the Sami people, and that it's only a small number of explorations that make it to the concession stage. Situations that will warrant an obligation to consult in the exploration stage would be if the land in question is of central importance to reindeer herding – here the Sami Parliament has an opportunity to opine on the relevant permit application. Furthermore, the Government Bill

[439] Regeringsbeslut (Government Decision) N2017/04553, *Ansökan om bearbetningskoncession enligt minerallagen (1991:45) för området Kallak K nr 1 i Jokkmokks kommun, Norrbottens län* (Application for mining concession in accordance with the Minerals Act (1991:45) for Kallak K nr 1 in Jokkmokk Municipality, Norrbotten County), den 22 mars 2022 1 and 30–32.

[440] Raitio et al (2020), 8.

[441] Regeringsbeslut N2017/04553, den 22 Mars 2022, 14.

[442] Ibid, 15.

[443] UNESCO, the county board, Jåhkågasska tjiellde, Sirges, Unna tjerusj and Tuorpon Sameby as well as the National Union of the Swedish Sami expressed concern regarding the inadequacy of the company's impact assessment. See: Regeringsbeslut N2017/04553, den 22 Mars 2022, 6, 13, 16, 20-21.

[444] See Barakos & Mischo (2021), 8; 'Jokkmokk Iron' (*Jokkmok Iron*) https://www.jokkmokkiron.se/ accessed 10 May 2023.

[445] See Prop. 2021/22:19, 64.

provides that concerned property owners will be informed of the work plan that is created for an exploration application and concerned Sami Communities have the possibility to voice concerns. If an agreement cannot be reached with the Sami Community, the mining company can request that the Mining Inspectorate decide on the work plan and add any terms necessary. In this matter, the Mining Inspectorate may need to consult with the affected Sami Community. Consultation may also be necessary in the processing of concession application if the application impacts on land where reindeer herding is conducted.[446]

Consistent with general state practice, Sweden stops short of incorporating a state obligation to consult in accordance with UNDRIP's statement on FPIC.[447] Sweden has made it clear that it does not consider the FPIC principle to constitute a right to veto.[448] Drawing on UN treaty bodies interpretation and developments in international legal doctrine on the understanding of *scalar participation*, it is not merely the presence or absence of consent that is relevant when assessing Sweden's compliance with its human rights obligations under international law.[449] By not adequately consulting Sami Communities before granting a mining concession the Swedish State risks violating its international obligation to protect Sami reindeer herding communities against racial discrimination.[450] The state cannot delegate its obligation to consult to private companies without supervision.[451] If Sweden would delegate its obligation to consult, directly or indirectly, to private companies or its SOEs it would still have the responsibility to ensure that adequate consultation are conducted as per international human rights law standards. One avenue would be to clarify when its SOEs are to conduct HRDD in the context of impacts on indigenous rights.[452]

CERD notes that to comply with its international obligations, Sweden should conduct environmental and social impact studies as part of consultation with indigenous peoples. They should be independently conducted by competent entities prior to the awarding of a concession for any development or investment project affecting traditional territories. Moreover, consultations involve constant communications at all stages of a project – not merely to obtain approval on an already predefined idea.[453] Moreover, Swedish law lacks

[446] Ibid.

[447] Larsen (2018), 217.

[448] Reply of Sweden (4 April 2022) to OHCHR Communication from UN Special Procedures AL SWE 2/2022 (3 February 2022), §29 https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=36876 accessed 18 May 2023; CERD (2020), 'Opinion' CERD/C/102/D/54/2013, §2.12; Prop. 2021/22:19.

[449] Tarras-Wahlberg & Southalan (2022), 245.

[450] CERD (2020), 'Opinion' CERD/C/102/D/54/2013, § 6.12.

[451] Ibid, § 6.17.

[452] HRC (2016), 'Report of the Working Group on SOEs' A/HRC/32/45, §§45, 74-77 and 83-87; Swedish Agency for Public Management (2018), 'The UNGPs – challenges for the State' (2018:8), 71.

[453] CERD (2020), 'Opinion' CERD/C/102/D/54/2013, § 6.18.

provisions on social and cultural IAs regarding the Sami as an indigenous people specifically.[454]

5.2 The case of LKAB

Swedish legislation treats SOEs as any other private company, with few exceptions. In line with the separation principle forwarded by the OECD SOE Guidelines, LKAB falls under the scope of Pillar II when it comes to responsibilities to respect human rights. However, as the sole investor, the Swedish State has an obligation to ensure that LKAB lead by example when it comes to respecting human rights in their operations.

As a SOE, LKAB operates under the Swedish State Ownership Policy. In accordance with the Policy, LKAB report on their work with sustainability according to the Global Reporting Initiative guidelines. In its 2022 Annual and Sustainability Report, LKAB acknowledges the special position of the Sami people as stakeholders due to their status as indigenous peoples. As such, LKAB maintain dialogue and cooperation with three Sami Communities within whose territories they conduct their operation. As part of this, cooperation agreements have been drawn up, based on 'FPIC as expressed in international law on the rights of indigenous peoples'.[455] It is noted that the agreements, "where applicable" are based on FPIC "that has been expressed in international law on the rights of indigenous peoples".[456] An acknowledged business risk of LKAB is the failure to obtain a social license to operate.[457] Moreover, LKAB *aims* to comply with the OECD MNE Guidelines and *aims to act in accordance* with the UNGPs which is reflected in the company's Code of Conduct, Sustainability Policy, Human Rights Guidelines and Supplier Code of Conduct.[458] Furthermore, LKAB is a member of UN Global Compact and SveMin.[459]

When reviewing LKAB's internal documents referred to as reflecting the provisions set out in the OECD MNE Guidelines and the UNGPs, no further elaboration on how the company applies them in practice is made except for in the Human rights guidelines. In its Code of Conduct[460], LKAB lists the OECD MNE Guidelines and the UNGPs as general guidelines but does not further engage with the content of the obligations contained therein. In its Supplier Code of Conduct[461], LKAB makes note that their suppliers must act

[454] Raitio et al (2020), 9.
[455] LKAB (2022), 'Annual and Sustainability Report', 157.
[456] Sweden (2021), 'Annual report for SOEs', 57.
[457] LKAB (2022), 'Annual and Sustainability Report', 50.
[458] Ibid, 143.
[459] Ibid, 142.
[460] LKAB, 'Code of Conduct' (version 4 adopted by LKAB Board of Directors on 12 February 2021), 6 https://lkab.mediaflowportal.com/documents/folder/240538/ accessed 13 May 2023.
[461] LKAB, 'Supplier Code of Conduct' (version 2.2.) https://lkab.mediaflowportal.com/documents/folder/184234/ accessed 13 May 2023.

with 'respect for people in the local area and must respect the rights of indigenous peoples' but fail to elaborate more on the issue. In its Sustainability Policy[462], LKAB mirrors the language of the UNGPs when the company provides that 'We aim to identify, prevent and remedy negative impacts on human rights through open communication and collaboration with stakeholders'. However, no further explanation is given on how to proceed.

In its Human rights guidelines[463], LKAB notes that as a SOE they have a duty to act in an exemplary manner by respecting human rights thus acknowledging the *additional step* principle expressed in UNGP 4. The guideline is a tool to identify and manage risks associated with direct and indirect negative human rights impact. For this thesis, the internal guideline is based on the International Bill of Human Rights, the UNGPs, the UN Global Compact, the Swedish Mineral strategy, ICMM Sustainable Development Framework and the Swedish NAP. Any human rights risk is managed in accordance with the internal risk management policy and identified risks are registered in an internal management system. Impact on society and on indigenous peoples are two focus areas of LKAB. The aim of any dialogue with stakeholders such as indigenous peoples aim to build knowledge and understand the impact. LKAB also notes that they have a responsibility of informing the stakeholders about their rights. Interestingly, LKAB's position is that remediation shall be conducted through 'cooperation and consensus' with the relevant violated group or individual. Although referring to ICMM, LKAB is not a member and thus not bound to apply to the organisation's principles or abide by the statements or guidelines.[464]

5.2.1 The Per Geijer deposit

The Per Geijer deposit and planned concession lies within the territory of Gabna Sami Community while the existing mining industry area is within the territory of Laeva Sami Community.[465] There is an apparent conflict of national interests in this case as the deposit contains valuable natural elements and materials.[466] Part of the planned concession coincides with territory deemed as national interest due to reindeer herding.[467] The reindeer migration path of Gabna Sami Community stretches though the planned concession area and in direct connection to it there are several strategic areas, such as moving paths and fences with associated resting areas for the reindeers. Importantly, the proposed concession area will block the Gabna Sami Community reindeer

[462] LKAB, 'Sustainability Policy' (16 February 2022), 3 https://lkab.mediaflowportal.com/documents/folder/240523/ accessed 13 May 2023.

[463] LKAB, 'Human rights guidelines' Adopted by the president and CEO of Luossavaara-Kiirunavaara AB (publ) 18 February 2021 https://lkab.mediaflowportal.com/documents/folder/240538/ accessed 6 May 2023.

[464] 'Our members' (*ICMM*).

[465] LKAB (2023), 'Material for consultation – Per Geijer (Luossavaara K nr 2)', 16.

[466] Ibid, 22.

[467] Ibid, 29.

migratory route as it will cut the small passage in two.[468] Already today, the area is impacted by previous mining operations, thus actualising questions of cumulative effects.[469] Evidently, there will be an adverse impact on the human rights of the Sami people by this proposed development.

The Summary Technical Report finds that there are no protected areas governing the actual deposit, however the surrounding landscape is protected as explained above. Notably, the report states that since the project is in a 'very early stage, there are currently major uncertainties in the assessments regarding how extraction of the deposit could be carried out and the environmental consequences of this'. Since there already is a mine and necessary infrastructure in the area, the report suggest that this may reduce additional land claims when developing the Per Geijer deposit.[470] Although the plan is for the mining to be conducted below ground, some infrastructure will inevitably be above ground.[471] However, there were no mentions as to how another mine would contribute to any cumulative effects.

Already in December 2022, an application for an exploitation concession in accordance with the Minerals Act was under preparation to be submitted in 2023 together with an EIA.[472] The Summary Technical Report assesses that detailed permits and issues regarding accessibility to land are two risks that may impact the project. On risks associated with stakeholder engagement the report makes the following observations: 'there is a threat that the inferior relationship with the Sami arises from LKAB developing plans both for mining operations and the transition to renewable energy sources, by consuming more wind power generated electricity and the need for more wind turbines that may affect reindeer husbandry''. Additionally, there is an acknowledgement of the issue of not gaining social acceptance for planned measures, ongoing operations, and urban transition. Moreover, LKAB notes that they need to consult with their stakeholders as not doing so could lead to permits not being granted or that a lengthier permitting process be required.[473]

As late as in January 2023, the affected Sami Community was critical of not being given any information beforehand on the plans for applying for an exploitation concession due to the apatite finds. In response, representatives for LKAB have communicated that affected Sami Communities will be given the

[468] Ibid, 16; See Figure 10 in LKAB (2023), 'Material for consultation – Per Geijer (Luossavaara K nr 2)', 131.
[469] Ibid, 44.
[470] LKAB, 'A Summary Technical Report on the Mineral Resources of LKAB, Sweden – Per Geijer Iron Ore Apatite Deposit' (December 2022), 63 https://lkab.mediaflowportal.com/documents/folder/446946/ accessed 6 May 2023.
[471] LKAB (2023), 'Material for consultation – Per Geijer (Luossavaara K nr 2)', 44.
[472] LKAB (2022), Summary Technical Report, 64.
[473] Ibid, 64-65.

opportunity to participate in the planning stage.[474] Access to information is an important element of ensuring adequate access to effective remedies.[475] To understand where in the planning stage the company is, it should be mentioned that LKAB plans on sending their exploitation concession application before the summer of 2023.[476] Evidently, the exploration phase had already passed beyond the investment decision as the company in December 2022 started to prepare for a concession permit. LKAB notes that a consultation process for the Per Geijer deposit is going to happen as a step of conducting the EIA that will be attached to the application.[477] In its 'Material for consultation', LKAB notes that their obligation to consult with local and Sami Communities is based on requirements under national law.[478] LKAB notes that those opinions expressed through the consultation *may* come to impact the operations concerning this concession.[479] The nuances of the *sliding scale* framework, although allowing for different levels of influence, is clear on the fact that indigenous peoples' right to participate in decisions that may impact them means that they need to have real, meaningful influence over outcomes – even if it is not always a right to veto. Evidently, this nuance is lacking in LKAB's position going into consultation processes.

LKAB acknowledges that the use of land for mining operations is the single most important impact on reindeer herding in the area. For one, grazing areas are affected but the possibility of reindeers to move is disturbed by transport and noise pollution. The passage for reindeers on the north side of Kiruna (where the Luossavaara K nr 2 is planned), already today is just a small corridor that is also used by the local community which puts further stress on reindeer herding in terms of increased costs and work for the Sami Community. Additionally, as Gabna Sami Community suffer from cumulative effects due to other exploitation in the area, further stress is put on the Sami Community.[480]

In connection to the planned concession for the Per Geijer deposit, LKAB acknowledges that its operations will negatively impact Gabna Sami Community. Being able to reach these conclusions before conducting a proper IA, indicates that LKAB is aware of the strained situation of the Sami people. However, at the same time as opening up to understanding the particularities of the Sami people's experience, LKAB states that any negative impact will be further assessed in an IA which will include any cumulative effects as well

[474] Jörgen Heikki & Maria Unga, 'LKAB svarar: Samebyarna har möjligheter att påverka oss' *Sveriges Radio* (SR) (13 January 2023) https://sverigesradio.se/artikel/lkab-svarar-samebyarna-har-mojligheter-att-paverka-oss accessed 2 May 2023.

[475] See UNGP 26; Commentary to UNGP 26.

[476] LKAB (2023), 'Material for consultation – Per Geijer (Luossavaara K nr 2)', 15.

[477] Ibid, 8.

[478] Ibid, 15.

[479] Ibid, 23.

[480] Ibid, 49.

as proposed actions that can limit the negative impact.[481] Within this section it becomes evident that LKAB does not recognise the *sliding scale* framework – as the impacts have not been properly assessed the affected Sami Community could potentially be found to be so adversely impacted by the planned activity that they should enjoy a right to veto as understood in international law.

LKAB reports that the main form of communication with indigenous peoples affected by their operations is through meetings – both individually and public as well as consultation. Topics discussed relate to land use and management, remediation through restoration, mitigating negative impact, consultation, and the rights of indigenous peoples. LKAB note that the dialogue will enable them to understand the impact of their operations.[482] After reviewing these official documents from LKAB, it is apparent that the focus on the consultation procedures is primarily to gather information and knowledge and not necessarily to share in the decision-making.

As previous research has indicated and critique from UN human rights bodies has highlighted, Sami Communities are involved, not from the start and with a de facto FPIC, but first later in the process when the investment plan is already made. Their role is then to contribute to possible mitigation solutions, without any possibility to veto. Moreover, the focus on knowledge-gathering as a goal for consultations, although not inaccurate, spikes interest. In conformity with international law, the goal should at least be to map the level of impact (knowledge) *and* aim to reach consent regarding to project (outcome).

5.3 Sami experience with participation

As elaborated above, due to a regulatory gap the Sami people have limited ability to influence the permitting of a mining concession. Coupled with issues of claiming formal property title to land based on traditional use and narrow or sometimes non-existent routes to accessing justice, affected Sami Communities are left to defend their rights through participation in corporate-owned consultation procedures.[483]

As a consequence of increasing resistance from Sami Communities for mining projects, some mining companies undertake specific 'reindeer herding impact assessments'. However, the performance of these voluntary measures remains poor due to a lack of clarity on methods and limited analysis of the consequences of the social impacts and cumulative effects.[484] In 2015 LKAB

[481] Ibid, 50.

[482] LKAB (2022), 'Annual and Sustainability Report, 141.

[483] Raitio et al (2020), 12; Larsen (2018), 211.

[484] Rasmus Kløcker Larsen, Carl Österlin & Laura Guia, 'Do voluntary corporate actions improve cumulative effects assessments? Mining companies' performance on Sami lands' (2018) 5(3) The Extractive Industries and Society 375-383, 381-382

developed a handbook on how to handle the cumulative effects its operations have on reindeer herding.[485] The handbook, developed in cooperation with representatives from Gabna and Laeva Sami Communities, is a tool aimed to help Sami Communities contribute to LKAB's EIA by describing its impact on reindeer herding.[486] This handbook is also referred by SveMin as good practice.[487] However, the *responsibility* for assessing the potential adverse effects is put on the stakeholder which is not consistent with the UNGPs and international best practice. Although it is important that indigenous peoples can participate in all phases of assessing impact, the burden is not solely theirs. In the method handbook, not only should the Sami Communities assess data, they also need to manage a mapping tool (RenGIS).[488]

Although the existence of a policy document does not mean that it is used as intended, it still indicates how the company considers where the responsibility for evidence gathering lie. This puts a significant resource constraint on the Sami Communities. As Larsen et.al. found in their 2022 study, it is generally the case that companies use Sami Communities for gathering data, sometimes without adequate compensation for time used.[489] It is then seldom the case that indigenous peoples participate meaningfully in the significance determination or scoping stage of any IA which are the decisive phases where the developer or public authority retain control over the outcome. Compared to other 'mining jurisdictions' such as Canada and Australia, Sweden is dominated by a limited consultation approach and corporate ownership over IAs. The limited participation options available to the Sami people in Sweden is likely due to the absence of successful land claims.[490] In the case of the Per Geijer deposit, it is incorporated into LKAB procedures that Gabna and Laeva Sami Communities own the cumulative impact assessment. This is seen in the statement that the IAs regarding the existing mines in Kiruna will be updated by Gabna and Laeva Sami Communities. However, it is not yet decided who will make the assessment regarding the Luossavaara K nr 2 although it is clear that a cumulative assessment will be included.[491]

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https://doi.org/10.1016/j.exis.2018.04.003 accessed 8 May 2023; RMF (2022), 'Closing the Gaps', 41.

[485] LKAB, 'Metodhandbok – Kumulativa konsekvenser för rennäringen' (Method handbook – Cumulative effects on reindeer herding) (April 2015) https://lkab.mediaflowportal.com/documents/folder/223594/ accessed 16 April 2023.

[486] Ibid, 2 and 17.

[487] SveMin, 'Svemin Position Document' 4.

[488] LKAB (2015), 'Method handbook, 2–3.

[489] Larsen et al (2022), 'Avtal mellan samebyar och exploatörer', 26; See also: SveMin, 'Svemins rekommendation for ersättning vid prospektering' (Svemin's recommendation for compensation during exploration) (21 December 2021) where compensation to the affected Sami Commnunity for time used is recommended to amount to 450 SEK/hour https://www.svemin.se/vart-material/publikationer/prospektering-och-mark/ accessed 14 May 2023.

[490] Larsen (2018), 211, 215–217.

[491] LKAB (2023), 'Material for consultation – Per Geijer (Luossavaara K nr 2)', 52.

In this context, Community-based impact assessments (CBIAs) provide a potential route for Sami Communities. In some instances, arguments from these CBIAs have been adopted by the County Administrative Board in its official submissions to the Mining Inspectorate. However, an accompanied issue is the considerable drain on resources that corporate consultations already put on Sami Communities as there are no legal requirements to facilitate public or corporate funds to cover Sami engagement which is considered best practice in for example Canada.[492] The resource inequality is particularly addressed in international best practice, where it is clear that indigenous advisors should be adequately compensated for their time.[493] However, empirical evidence shows that there is an overall practice in the Swedish context, although not specific to the mining industry, of not compensating the Sami Communities for the time used in consultation and participation engagements.[494]

Moreover, the SRIP is sceptical that the requirement on companies is only to submit an EIA and that there is no preclusion of mining activities if the impacts on Sami culture and livelihood is found to be negative. The lack of requirements for conducting a social IA and the fact that permits are not evaluated against existing projects and the cumulative impact on affected Sami communities is also subject to critique.[495] A related issue is that mining companies and affected Sami Communities seem to have different perception of if a consultation has been conducted or not. In the Gállok case, the mining company expressed that they were in dialogue with the affected Sami Community at the same time that the affected Sami Community stated that no such dialogue had been conducted with them.[496] Similarly, in the case of the Per Geijer deposit, Gabna Sami Community has been critical to the lack of information provided to the Sami Community at the same time as LKAB representatives mean that they are properly consulting the affected Sami Community by involving them in the work towards an EIA.

[492] Raitio et al (2020), 9.
[493] See for example: ICMM (2015), *Good Practice Guide*, Tool 2.
[494] Larsen et.al. (2022), 'Avtal mellan samebyar och exploatörer', 26.
[495] HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 41-42.
[496] Regeringsbeslut N2017/04553, den 22 Mars 2022, 17.

6 Access to remedy

6.1 Access to remedial mechanisms

6.1.1 Sweden's compliance with its obligations

When looking to the Swedish legislative framework concerning indigenous participation in decisions regarding mines on traditional land, a picture emerges of a legislative system whose features have contributed to cumulative negative impacts on Sami rights. As the Environmental Code only requires assessment of environmental and not social or cultural impacts, important aspects of Sami experiences are ignored. Moreover, the Minerals Act limits the participation possibilities of Sami Communities when IAs are developed. Consequently, Sami Communities are involved late, if at all, and most often only invited to comment on already determined investment plans and permit applications, which, when considering the development of FPIC under international law, does not reach up to the obligations to consult in respect of timing.[497] However, no efforts to revise the Minerals Act to comply with FPIC at all stages of the permit process together with mitigation measures, compensation and fair-and equitable benefit-sharing has been put forward, outside the enactment of the Consultation Act.[498]

The failure to address this regulatory gap in the mining legislation brings with it the issue that the state also has failed to provide effective guidance for mining corporations to conduct HRDD throughout their operations in accordance with the UNGPs.[499] Already in 2018 the Swedish Agency for Public Management noted that the state's directions to its SOEs, although enhancing the responsibility to lead by example, lacked clear criteria as to *when* HRDD is required.[500] In effect, it is left up to the SOEs themselves to decide when and how HRDD is to be conducted which is the root of the problem with ineffective measures that fail to prevent and mitigate adverse human rights impacts that is due to the business-centricity of HRDD requirements under the BHR framework.

On the note of effective access to remedy, the Supreme Administrative Court is only allowed to review the application of domestic law when it is the law itself that has caused the breach of rights. By not providing any domestic institution to evaluate the rights of the Sami people to traditional property and whether mining activities should be disallowed due to negative impact on Sami reindeer herding, Sweden continuously violates its international

[497] Larsen (2018), 212–213.
[498] HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 83.
[499] See UNGP 3(a) and (c).
[500] Swedish Agency for Public Management (2018), 'The UNGPs – challenges for the State' (2018:8), 69-70; Government Offices of Sweden (2020), 'State Ownership Policy', 9.

obligations.[501] As Sweden treats the Sami as any landowner and thus not considering the potential irreversibility of the consequences of mining operations, it violates Article 6 ICERD. In cases of a violation, Sweden should return the lands and territories or, if that is impossible, provide new lands and territories. A monetary compensation as to any Swedish landowner does not consider the particularities of indigenous peoples and their livelihood as reindeer pasturelands are indispensable and forms the basis of Sami cultural identity.[502]

Sweden's approach to access to judicial remedies is that access to courts is good as the administrative fee for bringing a civil action is relatively low.[503] However, this disregards the additional costs associated with bringing claims – for example cost of counsel.[504] In the 2015 report on the rights of the Sami peoples, the SRIP, noted that the exclusion of Sami communities from financial support under the Legal Aid Act[505] has limited their ability to effectively assert their rights in the face of natural resource investment on their traditional territories and in disputes concerning reindeer grazing rights.[506]

There have been two instances where Sami organizations have lodged a complaint with the Swedish NCP. The first was not accepted due to that the case was formally reviewed by national authorities. In the second, the Swedish and Norwegian NCP concluded that there were no grounds to find that the company had failed to comply with the OECD MNE Guidelines. Additionally, the NCPs recommended that the company promote indigenous rights. In both cases there were no follow up.[507] Although the cases did not concern LKAB, this review shows that NCP is rarely used and when it is there are concerns with follow-up.

Even if the Consultation Act can contribute to increasing awareness of Sami interests, rights, and knowledge for public authorities it is vague on how the position taken by Sami representatives will be weighed in on the decisions taken. Notably, Civil Rights Defenders (CRD) have raised concern that the Consultation Act will not change the current situation where the interest of the Sami people is not impacting the outcome of decisions made.[508]

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[501] Raitio et al (2020), 8 and 12.

[502] CERD (2020), 'Opinion' CERD/C/102/D/54/2013, §§ 3.8 and 6.25-29.

[503] Government Offices of Sweden, 'Sweden's submission to UNWG's report "Business and human rights: towards a decade of global implementation"' (OHCHR, 30 November 2020), 10 https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPsBHRnext10/inputs/states-igos/Sweden.pdf accessed 18 May 2023.

[504] See also: HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 81.

[505] SFS 1996:1619 *Rättshjälpslag* (Legal Aid Act).

[506] HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 39.

[507] OECD (2022), *NCP Peer Review: Sweden* (Annex D), 40.

[508] Civil Rights Defenders (CRD), 'Kommentar till ny lag om konsultationsordning för det samiska folket' (Commentary on the new Consultation Act concerning the Sami people) (Stockholm, 1 March 2022) https://crd.org/wp-content/uploads/2022/03/Kommentar-till-ny-lag-om-konsultationsordning-for-det-samiska-folket.pdf accessed 3 May 2023.

A highly relevant issue when considering access to remedy is the occurrence of retaliation. Hate crimes and racist attacks against Sami have increased notably after the Girjas case where the Swedish High Court affirmed that Girjas Sami Community had exclusive right to hunt and fish on their territory based on customary use.[509] Part of these attacks are directed towards the reindeers which are hurt or killed, and sometimes left to suffer – aiming at the core of Sami culture.[510] Moreover, Sami experience death threats, sabotage, taunts and insults as well as intimidation both physically and digitally. Due to the particular issue facing the Sami peoples, the Swedish government issued a national Action programme to combat racism against Sami in February 2023. The focus of the measures is to improve knowledge about the Sami people, their living conditions, culture, history, and rights as indigenous peoples as well as surveying of related issues in digital environments.[511]

6.1.2 LKAB's compliance with its responsibilities

Seeing as Sweden and LKAB have acknowledged the responsibility of SOEs to lead by example when it comes to respecting human rights, the internal LKAB policy writings on the content of the UNGPs and OECD Guidelines comes across as cosmetic. By recognising the importance of obtaining a social license to operate, as well as a legal license to ensure the smooth operation of their business, it would be unsurprising if LKAB took on a leading role and implemented a HRDD process in line with the UNGPs and international best practice. As the author of this thesis hasn't had access to the internal management systems which are part of the company's HRDD practice, no final conclusions can be drawn on the specific practice of LKAB in this case. However, as LKAB discloses how they track and account for human rights impacts, some general conclusions can be drawn when considering the broader context.

After reviewing the preparatory documents for the Per Geijer deposit and internal policy documents, it is evident that LKAB consider that any obligation they have to consult with the Sami people is under national law.[512] The implementation gap, in line with the international trend of slowing momentum of improving practice on the ground[513], could be explained by a knowledge gap. The result of Lawrence and Moritz case study of Swedish mining

[509] Soledad Cartagena, 'Vad händer efter domen där Girjas sameby vann över staten?' *AmnestyPress* (4 November 2020) https://www.amnestypress.se/artiklar/reportage/26645/vad-hander-efter-domen-dar-girjas-sameby-vann-over/ accessed 10 May 2023; Nils Eklund, 'Hatbrott mot samer efter Girjasdom' *Sveriges Radio* (29 January 2020) https://sverigesradio.se/artikel/7394922 accessed 10 May 2023.

[510] Johanna Tjäder, 'Här hittades den plågade renen: "Det är fruktansvärt"' *SVT Nyheter* (22 November 2022) https://www.svt.se/nyheter/sapmi/renvaja-plagad-sameby-har-polisanmalt-hatbrott accessed 10 May 2023.

[511] Government Offices of Sweden, 'Action programme to combat racism against Sami' (10 February 2023) https://www.government.se/information-material/2023/02/action-programme-to-combat-racism-against-sami/ accessed 3 May 2023.

[512] LKAB (2023), 'Material for consultation – Per Geijer (Luossavaara K nr 2)', 15.

[513] RMF (2022), 'RMI Report Summary', 6; Schilling-Vacaflor (2019), 311-312.

industry perspectives on indigenous rights showed that there is a considerable knowledge gap on Sami people's right to participate in decision-making. This knowledge gap is evident as industry representatives based its rejection of FPIC on the maximalist approach of it as a *carte blanche veto-right*, considering that Sami people do not share considerable common traits with other indigenous peoples and that while FPIC is political, mining operations are apolitical.[514] However, today a gap in knowledge is no reasonable explanation to disregard a responsibility to respect human rights.

From the gathered material it appears that a HRIA of Sami people's indigenous rights by the Per Geijer deposit (as understood as reindeer herding rights in the Swedish context) is conducted after the exploration phase, in connection with preparation of a concession application (summer 2023).[515] Building on international best practice and international legal doctrine in connection to extractive operations – HRIAs are to be conducted before the 'go no-go decision'.[516] This decision was taken sometime before December 2022, the point in time where LKAB had started to prepare an application for an exploitation concession permit.[517] As evidenced by the affected Sami Community's public critique towards being reached by the news on go-ahead of the Per Geijer deposit, they had not been consulted or even informed properly.[518] Moreover, compared to the developed understanding of HRDD in international legal doctrine as an 'ongoing process that takes place before, during and after business project', it appears that LKAB considers HRIAs as a one-time event. When considering international best practice, the OECD Extractive Sector Guidance state that consent may be required prior to project exploration. Furthermore, 'meaningful stakeholder engagement' is to be understood as a two-way engagement, i.e., sharing of decision-making power and moving away from the company as sole decision-maker and as an ongoing engagement, i.e., engagement is continued throughout the entire lifecycle of an operation and are not a one-off endeavour.[519]

Larsen argues that CBIAs which Sami Communities may launch, such as the LKAB 'Method Handbook' (typically without cost recovery) is more a crisis response than a proper IA.[520] This approach to IAs has been criticized by the SRIP and CERD.[521] Recent empirical studies indicate that Swedish Sami Communities do not enter into co-management agreements (also called

[514] Lawrence & Moritz (2019), 47–48.

[515] LKAB (2023), 'Material for consultation – Per Geijer (Luossavaara K nr 2)', 49–50.

[516] ICMM (2015) *Good Practice Guide*, 28; dos Santos & Seck (2020), 168; Barakos & Mischo (2021), 2-3.

[517] LKAB (2022), Summary Technical Report, 64.

[518] Heikki & Unga (2023), 'LKAB svarar: Samebyarna har möjligheter att påverka oss' (SR). See also UNGP 26.

[519] OECD (2017), *Guidance for Extractive Sector*, 18, Step 4 and Annex B, Consideration 4A.

[520] Larsen (2018), 213.

[521] HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 83; CERD (2020), 'Opinion' CERD/C/102/D/54/2013, § 6.17.

Impact Benefit Agreements (IBAs)) with mining developers freely, but because they don't have another possibility to have their human rights respected and protected through legislation.[522]

Turning to OLGMs, Larsen's mapping shows that the consequence of limited participation options that consequently lead to a breach of their right to give or withhold FPIC, is that Sami Communities tend to opt for either protesting the development through courts or settling early on for confidential compensation agreements with the developer.[523] The shift towards private agreements as a solution to ensure the respect for indigenous rights is done to fill the regulatory gap.[524] Companies increasingly use these agreements to obtain both a legal and a social license to operate.[525] However, following the analysis made in international research, many times the power dimensions are either cemented or worsened, resulting in a worse outcome than before the Sami Communities entered into the agreements, indicating the need for state-based mechanisms to ensure that their rights are respected.[526]

Regardless of the negative outcome of private agreements indicated by recent empirical studies, the potential of using private agreements cannot be overlooked. There have been international examples of how these agreements can be used to raise the bar concerning the treatment of indigenous peoples and to ensure the effective enjoyment of their right to self-determination.[527] CBIAs that are integrated into legally binding IBAs empower the communities to shape project outcome and secure benefits.[528] In this way, the complementarity of non-judicial mechanisms to judicial mechanisms is apparent. However, as Sami Communities enter into co-management agreements after concessions have been permitted, the agreements revolve around trying to mitigate any adverse impact by investment and exploitation projects without any real possibility to give or withhold FPIC.[529] Furthermore, it appears that Sami Communities risk entering into worse agreements when the project is bigger in scale, which is in direct contradiction to the principle of *scalar participation* expressed in international legal developments and to the requirements in the UNGPs to cease, prevent, mitigate or remedy adverse impacts.[530] Another significant problem with the agreements is that compensation appears to be negotiated prior to, without or disconnected from any IAs and this without full knowledge of the impacts or the infringement on Sami rights.

[522] Larsen et.al. (2022), 'Avtal mellan samebyar och exploatörer', 20 and 23.
[523] Larsen (2018), 213.
[524] Larsen et.al. (2022), 'Avtal mellan samebyar och exploatörer', 14.
[525] Ibid, 15.
[526] van Huijstee & Wilde-Ramsing (2020), 489; Larsen et.al. (2022), 'Avtal mellan samebyar och exploatörer', 23 and 28.
[527] Larsen et.al. (2022), 'Avtal mellan samebyar och exploatörer', 28.
[528] Larsen (2018), 214.
[529] Larsen et.al. (2022), 'Avtal mellan samebyar och exploatörer', 19 and 23.
[530] UNGPs 17 and 22; Taylor (2020), 91; Larsen et.al. (2022), 'Avtal mellan samebyar och exploatörer', 24.

Such private contracts allow the parties to negotiate compensatory payments for land dispossession without the impacts on Sami rights being tried in public, a major concern to government authorities.[531]

6.2 Obstacles to access to remedy for rightsholders

As extrapolated on in the above, IAs are essential for the mapping of potential harm as well as future compensation claims if the harm is not mitigated or prevented. Here, the Swedish standard practice is an entirely corporate-owned process. The developer has a responsibility to meet with and hear the views of affected Sami Communities but retains full authority to decide how to interpret and use community inputs.[532] However, this might change after the enactment of the Consultation Act.

A problem that goes to the core of ensuring access to remedy is the lack of resources to engage in meaningful consultations and seek remediation.[533] The adverse effects of the lack of resources are shown in the empirical study conducted by Larsen et al. The imbalance of resources and access to information risks cementing existing power structures and contribute to co-management agreements between local communities and developers where the developer enjoys one-sided benefits. There have even been instances of clauses containing a ban on seeking compensation for future damage that have not been foreseen at the timing of negotiations.[534] While it is hard to access information on the issues raised, actions taken and remedies provided through OLGM in the mining sector, some conclusions can be drawn from remediation efforts in the Swedish Sami context.

Already today the Sami Parliament and Sami Communities lack resources to engage in consultations and planning. According to CRD the lack of resources risks making the Consultation Act void of any meaning. To add on, by not ensuring increasing funds to Sami representatives the Consultation Act works to cement an imbalance of power that has been everlastingly present in the relationship between the Sami people and the Swedish State. CRD questions if it is possible to consult in good faith against the background of these realities. Moreover, the Consultation Act does not create a specific right of appeal in matters where Sami people's rights have not been adequately respected throughout the consultation processes.[535] To ensure that the obligation to consult the Sami people live up to Sweden's international obligations, CRD argues that the Consultation Act be amended to express FPIC as understood under international law, include sanctions if the requirement for consultations

[531] Larsen (2018), 213.

[532] Ibid, 211.

[533] CESCR (2016), 'Concluding observations on the 6th periodic report of Sweden' E/C.12/SWE/CO/6, §§13–16; Larsen et al (2022), 'Avtal mellan samebyar och exploatörer', 20.

[534] Larsen et.al (2022), 'Avtal mellan samebyar och exploatörer', 26.

[535] HRC (2016), 'Report of SRIP' A/HRC/33/42/Add.3, § 81; CRD (2022).

is not reached and require that any decision that goes against the expressed position of Sami representatives be adequately motivated.[536]

An overarching challenge is that HRDD should be conducted more times during the lifecycle of a mine than it is now. Sami Communities should be involved in consultation at an earlier stage before a final investment decision is made. By leaving the HRIA to the end of the evaluation process, when an EIA is legally required, there is a risk that LKAB, and other mining companies implement last minute adjustments instead of taking proper action as warranted by a sufficient analysis.[537] In their study, Larsen et. al. reviewed 15 IBAs from five Sami Communities in Sweden.[538] As Sami Communities entered into these agreements after a concession had been granted, the focus was to mitigate any adverse impact by the investment project. While the study was not specific to the mining industry (in fact only one agreement was partnered with a mine), it was shown that this mode of OLGM and remediation efforts often worked to enhance and cement existing power structures and sometimes even contributed to adverse effects.[539] The result of IBAs contributing to a worse outcome than when Sami Communities entered into the agreements and that the agreements were worse when the impact was significant is in direct contradiction to the principle of scalar participation expressed under international human rights law.[540] While remediation efforts such as these have the potential of filling a regulatory gap and elevate compensation above the minimum legal requirements, the adverse outcomes indicate an imbalance in power and resources between the companies and the Sami Communities.[541]

Reindeer herding communities do not have legal possibilities of sharing in the benefits of mining. The best they can hope for is to through the permitting process be compensated for impacts caused, or through a mining company agreeing to compensate or — as a last resort — sue a mining company for identified damages caused once a project has been initiated. Similarly, the Sami Parliament (and by inference non reindeer herding Sami) do not receive any direct benefits from allowing a mining project to go ahead.[542]

[536] CRD (2022).
[537] Barakos & Mischo (2021), 2–3.
[538] Larsen et al (2022), 'Avtal mellan samebyar och exploatörer', 16.
[539] Ibid, 29.
[540] Ibid, 23–24.
[541] Ibid, 15.
[542] Tarras-Wahlberg & Southalan (2022), 249.

7 Conclusion

In 2023, the Swedish state-owned enterprise LKAB made international media headlines when it revealed that it had found Europe's largest deposit of critical minerals. As these minerals are needed in modern technology which facilitates the green transition, the focus was on the geopolitical ramifications as to decreased dependency on import from China in line with EU and Swedish mineral strategy. The fact that the exploitation of this deposit will impact the possibility for local Sami Communities to migrate their reindeers, a practice which forms the basis of their culture and status as indigenous peoples under international law, was barely mentioned as a side note. This prompted the question as to what responsibilities LKAB, as a state-owned enterprise, has to respect the rights of the Sami people to meaningfully participate and influence decisions that may impact them under the evolving business and human rights framework.

The research took the form of a gap analysis. First, the responsibilities of state-owned enterprises as understood under the business and human rights framework was explored. When a company is owned by a state it is expected to *lead by example* by respecting human rights. As a shareholder, the state's obligation to protect human rights from abuse of its state-owned enterprises encompass a responsibility to *take additional steps* to ensure the enterprise's compliance with human rights due diligence requirements and in providing access to effective remedies. This includes providing effective guidance on how and when to conduct human rights due diligence. Although the *additional steps* principle is indicative that the state can be held accountable for the acts and omissions of its state-owned enterprise under the international rules on state responsibility (ARSIWA) it is not yet settled in international legal doctrine the scope and extent of this responsibility. As of now, the principle of separate legal personality is the foundation on which the emerging international business and human rights framework builds its guidelines.

Second, indigenous peoples right to self-determination and to give or withhold their free, prior and informed consent in matters of importance to their culture and way of life was outlined. The minimum accepted international norm is that indigenous peoples' rights to free, prior and informed consent is to be understood as a *sliding scale* or *scalar participatory* framework, i.e., the requirement to obtain consent depends on the proposed activity's degree of impact. Consultations should be meaningful and conducted in good faith, and at least aim to achieve consent before proceeding. The *sliding scale* framework is reiterated in the work leading up to the Swedish Consultation Act. However, Sweden continues to reject an interpretation of FPIC as a right to veto in any circumstance. Moreover, the UNGPs also include wordings on indigenous peoples and that their vulnerable situation may require that companies pay particular attention to their rights.

Third, the responsibility of corporations to respect human rights in the context of mineral extraction was reviewed. To attend to overall low industry performance concerning human rights and attached legitimacy problems, international sector initiatives have produced multiple guidelines as to how mining companies should conduct human rights due diligence mirroring the language in the UNGPs. To effectively prevent and mitigate harm during the operations of extracting minerals, human rights impact assessments are to be continuously conducted throughout the lifecycle of a mine – in line with the understanding of human rights due diligence as an ongoing process. These assessments should include environmental, social, and cultural aspects. The most important decision from a human rights impact perspective is the go-no go decision, i.e., if a mining project should go ahead or not. The first impact assessment should be conducted at the start of exploration, the second is before the final investment (go-no go) decision, the third is after development and before exploitation begin, the fourth is during the exploitation, the fifth is before an expansion, the sixth is just before closure of the mine and the seventh when the mine is closed. However, there is an implementation gap between recognised corporate responsibilities and practice on the ground.

Although the principle of free, prior and informed consent is a standard for states, the development of international industry guidelines furthers the emergence of the principle as a business standard and corporate responsibility. In the instance that mining operations impact the human rights of indigenous peoples, the principle of free, prior, and informed consent necessitates their meaningful participation in, at least, the go-no go decision where their level of influence is based on the level of the impact, understood as a *sliding scale*.

The indigenous people living in Sweden, the Sami people, have limited ability to influence the permitting of a mining concession through legal provisions – forming a regulatory gap between Sweden's international obligations to protect the rights of indigenous peoples and domestic law that favours the establishment of mines. Sami Communities are involved late, if at all, and most often only invited to comment on already determined investment plans and permit applications, which, when considering the development of the principle of free, prior, and informed consent under international law, does not reach up to the obligations to good faith consultations. By not providing any domestic institution to evaluate the rights of the Sami people to traditional property and whether mining activities should be disallowed due to negative impact on Sami reindeer herding, Sweden continuously violates its international obligations. Coupled with issues of claiming formal title to land and narrow routes to accessing justice, Sami Communities are often left to defend their rights by participating in corporate-owned consultation procedures.

The consequence of limited participation options is that Sami Communities tend to opt for protesting the development through courts or settling early on for confidential compensation agreements with the developer. As Sami

Communities enter into co-management agreements after concessions have been permitted, the agreements revolve around trying to mitigate any adverse impact by investment and exploitation projects without any real possibility to give or withhold their free, prior, and informed consent. Any compensation appears to be negotiated prior to, without or disconnected from any impact assessment and without full knowledge of the impacts on Sami rights. The imbalance of resources between mining companies and Sami Communities as well as imbalanced access to information risks cementing existing power structures and contribute to co-management agreements between local communities and developers where the developer enjoys one-sided benefits. Consequently, these agreements lead to a worse outcome than when Sami Communities entered into the agreements.

Moreover, research shows that the outcomes were worse when the impact was significant which in direct contradiction to the *sliding scale* principle expressed under international human rights law. Moreover, reindeer herding communities do not have legal possibilities of sharing in the benefits of mining. The best they can hope for is to through the permitting process be compensated for impacts caused, or through a mining company agreeing to compensate or — as a last resort — sue a mining company for identified damages caused once project has been initiated. Unfortunately, empirical data show that the entering into impact-benefit-agreements may lead to worse outcome for the Sami people as they may agree to terms that work against their own interests in the longer run. Due to the adverse outcome of these agreements, it can be questioned if the negotiations and consultations are conducted in good faith. These issues are a consequence of the business-centricity of human rights due diligence requirements. Regardless of the negative outcome of private agreements indicated by recent empirical studies, the potential of using private agreements cannot be overlooked. There have been international examples of how these agreements can be used to raise the bar concerning the treatment of indigenous peoples and to ensure the effective enjoyment of their right to self-determination.

The implementation gap in the mining industry, between recognised responsibilities to conduct human rights impact assessments and the practice on the ground, is heightened by the knowledge gap in the Swedish mining sector concerning the rights of indigenous peoples to participate in decision-making and the responsibilities of enterprises to respect human rights. Although the conduct of LKAB is referred to as good practice by the Swedish mining industry organisation SveMin, little evidence is shown that LKAB complies with the international best practice that it has committed to. The significant resource imbalance between mining companies and Sami Communities as well as retaliation in the form of hate crimes and threats against the Sami needs to be addressed by legislation as to ensure removal of barriers to effective remedies.

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