



THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS



An Interpretive Guide



UNITED NATIONS



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

An Interpretive Guide



UNITED NATIONS

New York and Geneva, 2012



UNITED NATIONS
HUMAN RIGHTS

OFFICE OF THE HIGH COMMISSIONER



Note

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a figure indicates a reference to a United Nations document.

HR/PUB/12/02

© 2012 United Nations

All worldwide rights reserved



CONTENTS

	<i>Page</i>
Introduction	1
<i>Chapters</i>	
I. KEY CONCEPTS	5
II. FOUNDATIONAL PRINCIPLES	9
Guiding Principles 11 and 12	9
Guiding Principle 13	15
Guiding Principle 14	18
Guiding Principle 15	23
III. OPERATIONAL PRINCIPLES	26
A. POLICY COMMITMENT	26
Guiding Principle 16	26
B. HUMAN RIGHTS DUE DILIGENCE	31
Guiding Principle 17	31
Guiding Principle 18	36
Guiding Principle 19	46
Guiding Principle 20	52
Guiding Principle 21	57
C. REMEDIATION	63
Guiding Principle 22	63
Guiding Principle 29	67
Guiding Principle 31	73
D. ISSUES OF CONTEXT	76
Guiding Principle 23	76
Guiding Principle 24	82
<i>Annexes</i>	87
I. The rights contained in the International Bill of Human Rights and the International Labour Organization's core conventions	87
II. Examples of external expert resources	90

It is impossible to distil six years of research, consultation and reflection into a document the length of the Guiding Principles. This Interpretive Guide is a means to provide some further explanation of those Principles that relate to the corporate responsibility to respect human rights. As work continues to elaborate the implications of this responsibility for different sectors, issues and situations, I hope that this Guide will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves.

Professor John Ruggie

INTRODUCTION

In June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights presented to it by the Special Representative of the United Nations Secretary-General, Professor John Ruggie.

This move established the Guiding Principles as the global standard of practice that is now expected of all States and businesses with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law.

THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK

The Guiding Principles are based on six years of work by the former Special Representative, including in-depth research; extensive consultations with businesses, Governments, civil society, affected individuals and communities, lawyers, investors and other stakeholders; and the practical road-testing of proposals. They were developed to put into operation the “Protect, Respect and Remedy” Framework presented by the Special Representative to the United Nations in 2008. This three-pillar Framework consists of:

- The State duty to protect human rights
- The corporate responsibility to respect human rights
- The need for greater access to remedy for victims of business-related abuse.

The United Nations High Commissioner for Human Rights welcomed the “Protect, Respect and Remedy” Framework, which set:

“both a new and clear benchmark and represents an important milestone in the evolving understanding of human rights in our societies... Clarity about the baseline expectations of business with regard to human rights is a first important step towards developing appropriate and effective responses to such problems”.¹

¹ Navanethem Pillay, “The corporate responsibility to respect: a human rights milestone”, *International Labour and Social Policy Review* (2009).

THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The Guiding Principles reflect and build on the three-pillar structure of the “Protect, Respect and Remedy” Framework. They comprise 31 principles, each followed by a brief commentary. Together, the Guiding Principles outline steps for States to foster business respect for human rights; provide a blueprint for companies to manage the risk of having an adverse impact on human rights; and offer a set of benchmarks for stakeholders to assess business respect for human rights.

The Guiding Principles have gained extensive support from businesses and civil society as well as States. A number of other international and regional organizations have reflected them in their own standards, and more are expected to do so in the months and years to come. Many businesses around the world are already looking at how they can implement the Guiding Principles in their operations.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has supported the six-year long process that led to the Principles under the stewardship of the Special Representative. Before their endorsement by the Human Rights Council, the High Commissioner stated that:

“These Guiding Principles clarify the human rights responsibilities of business. They seek to provide the first global standard for preventing and addressing the risk of adverse human rights impact linked to business activities. If endorsed, the Guiding Principles will constitute an authoritative normative platform which will also provide guidance regarding legal and policy measures that, in compliance with their existing human rights obligations, States can put in place to ensure corporate respect for human rights.”²

As Professor Ruggie has stated, the Guiding Principles will not bring all human rights challenges to an end, but their endorsement marks the end of the beginning. They provide a solid and practical foundation on which more learning and good practice can be built.

² Statement to the Employers’ Group at the International Labour Conference, 7 June 2011.

The first task now is to ensure their effective implementation. This Interpretive Guide, which was developed in full collaboration with the former Special Representative, is designed to support this process.³

THE PURPOSE OF THIS INTERPRETIVE GUIDE

This Guide does not change or add to the provisions of the Guiding Principles or to the expectations that they set for businesses. Its purpose is to provide additional background explanation to the Guiding Principles to support a full understanding of their meaning and intent. The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together.

The Guide is not an operational manual that will explain exactly how to put the Guiding Principles into practice. Further work will be needed to develop such operational guidance, which will vary depending on the sector, operating context and other factors. The United Nations Working Group on Business and Human Rights will play a central role in this regard. In addition, other organizations with particular sectoral or issue-based focuses are already preparing their own thinking on implementation. As they do so, it is hoped that this Guide will assist them by explaining further the intent behind the Guiding Principles that address the corporate responsibility to respect human rights. As such it is a resource not just for businesses, but also for Governments, civil society, investors, lawyers and others who engage with business on these issues.

While this Guide focuses on the corporate responsibility to respect human rights, it in no way reduces the equally important duty of States to protect human rights against abuse by third parties, including business.

THE STRUCTURE OF THIS INTERPRETIVE GUIDE

Chapter I briefly defines some key concepts used in the Guiding Principles.

Chapters II and III focus on the substance of those Guiding Principles that address the corporate responsibility to respect human rights, with a series of basic questions and answers to help interpret each principle, its intent and

³ Special thanks go to Caroline Rees of the Harvard Kennedy School of Government, who served as a senior adviser to the Special Representative's team.

the implications of its implementation. Chapter II covers the five “foundational principles” of the corporate responsibility to respect human rights, which are the basis for all the “operational principles” of chapter III. These operational principles elaborate on the policies and processes businesses need to have in place to ensure that they respect human rights. They follow the same structure as the Guiding Principles:

- A. Policy commitment
- B. Human rights due diligence
- C. Remediation
- D. Issues of context

The Guiding Principles address the issue of remediation both under the second pillar (the corporate responsibility to respect) and under the third (access to remedy). Those Guiding Principles on access to remedy that are relevant to businesses are included here under “Remediation”, for the sake of completeness. Section D focuses on dilemmas where the operating context of a business seems to preclude or limit its ability to respect all human rights in practice.

The annexes contain useful reference material.

THE STATUS OF THIS INTERPRETIVE GUIDE

The formal commentary provided in the Guiding Principles is not reproduced in this Guide, although it is at times quoted. The questions and answers provided here go beyond that commentary to provide additional detail and assistance in understanding the Guiding Principles. As such, they complement the commentary but do not replace or supersede it.

I. KEY CONCEPTS

Actual human rights impact

An “actual human rights impact” is an adverse impact that has already occurred or is occurring.

Adverse human rights impact

An “adverse human rights impact” occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

Business relationships

Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.

Complicity

Complicity has both legal and non-legal meanings. As a legal matter, most national legislations prohibit complicity in the commission of a crime, and a number allow for the criminal liability of business enterprises in such cases. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is “knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime”.

Examples of non-legal “complicity” could be situations where a business enterprise is seen to benefit from abuses committed by others, such as when it reduces costs because of slave-like practices in its supply chain or fails to speak out in the face of abuse related to its own operations, products or services, despite there being principled reasons for it to do so. Even though enterprises have not yet been found complicit by a court of law for this kind of involvement in abuses, public opinion sets the bar lower and can inflict significant costs on them.

The human rights due diligence process should uncover risks of non-legal (or perceived) as well as legal complicity and generate appropriate responses.

Due diligence

Due diligence has been defined as “such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case”.⁴ In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.

Gross human rights abuses

There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.

Human rights and international crimes

Some of the most serious human rights violations may constitute international crimes. International crimes have been defined by States under the Rome Statute of the International Criminal Court. They are genocide (“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”), crimes against humanity (widespread and systematic attacks against civilians that include murder, enslavement, torture, rape, discriminatory persecution, etc.), war crimes (as defined by international humanitarian law) and the crime of aggression.

Human rights risks

A business enterprise’s human rights risks are any risks that its operations may lead to one or more adverse human rights impacts. They therefore relate to its

⁴ *Black’s Law Dictionary*, 6th ed. (St. Paul, Minnesota, West, 1990).

potential human rights impact. In traditional risk assessment, risk factors in both the consequences of an event (its severity) and its probability. In the context of human rights risk, severity is the predominant factor. Probability may be relevant in helping prioritize the order in which potential impacts are addressed in some circumstances (see “severe human rights impact” below). Importantly, an enterprise’s human rights risks are the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

Leverage

Leverage is an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.

Mitigation

The mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.

Potential human rights impact

A “potential human rights impact” is an adverse impact that may occur but has not yet done so.

Prevention

The prevention of adverse human rights impact refers to actions taken to ensure such impact does not occur.

Remediation/remedy

Remediation and remedy refer to both the *processes* of providing remedy for an adverse human rights impact and the substantive *outcomes* that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Salient human rights

The most salient human rights for a business enterprise are those that stand out as being most at risk. This will typically vary according to its sector and operating context. The Guiding Principles make clear that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise. But the most salient rights will logically be the ones on which it concentrates its primary efforts.

Severe human rights impact

The commentary to the Guiding Principles defines severe human rights impact with reference to its scale, scope and irremediable character. This means that its gravity and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will both be relevant considerations. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

Stakeholder/affected stakeholder

A stakeholder refers to any individual who may affect or be affected by an organization’s activities. An affected stakeholder refers here specifically to an individual whose human rights has been affected by an enterprise’s operations, products or services.

Stakeholder engagement/consultation

Stakeholder engagement or consultation refers here to an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.

Value chain

A business enterprise’s value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise’s own products or services, or (b) receive products or services from the enterprise.

II. FOUNDATIONAL PRINCIPLES

GUIDING PRINCIPLE 11

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

GUIDING PRINCIPLE 12

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

Question 1. What are human rights?

The idea of human rights is as simple as it is powerful: that people have a right to be treated with dignity. Human rights are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Every individual is entitled to enjoy human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations on States to act in certain ways or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.

The 1948 Universal Declaration of Human Rights was drawn up by representatives from many nations to prevent a recurrence of the atrocities of the Second World War and is the cornerstone of modern human rights law. At the World Conference on Human Rights in Vienna in 1993, all 171 participating countries reaffirmed their commitment to the aspirations expressed in that Declaration.

The Universal Declaration is codified in international law through the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966. Each of the Covenants has been ratified by over 150 States. Collectively all three documents are known as the International Bill of Human Rights.

In the sphere of human rights for workers, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work commits all its member States to four categories of principles and rights: freedom of association and the right to collective bargaining; the elimination of compulsory labour; the abolition of child labour; and the elimination of discrimination in respect of employment and occupation. These are covered by the eight core conventions of the International Labour Organization (ILO).

Together these documents constitute the minimum reference point for what the Guiding Principles describe as internationally recognized human rights.

Q 2. How are human rights relevant to States?

States have the legal obligation to respect, protect and fulfil the human rights set out in the international human rights conventions they ratify. Similar responsibilities, though usually not legally binding, result from the human rights declarations and other such political commitments that States make.

The obligation of States to respect human rights means that they must refrain from interfering with or curtailing the enjoyment of human rights. Their obligation to protect human rights requires them to protect individuals and groups against human rights abuses, including by business enterprises. Their obligation to fulfil human rights means that States must take positive action to facilitate the enjoyment of basic human rights.

Q 3. How are human rights relevant to businesses?

International human rights treaties generally do not impose direct legal obligations on business enterprises. Legal liability and enforcement for the infringement by businesses of international human rights standards are therefore defined largely by national law.⁵ However, the actions of business enterprises, just like the actions of other non-State actors, can affect the enjoyment of human rights by others, either positively or negatively. Enterprises can affect the human rights of their employees, their customers, workers in their supply

⁵ It is important to note that national law provisions, and some human rights requirements in contracts, may result from or be heavily influenced by international human rights treaties.

chains or communities around their operations. Indeed, experience shows that enterprises can and do infringe human rights where they are not paying sufficient attention to this risk and how to reduce it.

The International Bill of Human Rights and the core ILO conventions provide basic reference points for businesses in starting to understand what human rights are; how their own activities may affect them; and how to ensure that they prevent or mitigate the risk of adverse impact. *Human Rights Translated: A Business Reference Guide* provides a range of examples under each human right.⁶ (See also box 2 for examples of different ways in which enterprises may be involved in adverse human rights impact.)

Q 4. What additional human right standards may be relevant?

Depending on the circumstances of their operations, enterprises may need to consider additional standards beyond the International Bill of Human Rights and core ILO conventions, in order to ensure that they act with respect for human rights: for instance, if their activities could pose a risk to the human rights of individuals belonging to specific groups or populations that require special attention. Certain United Nations human rights instruments have elaborated the human rights of persons belonging to such groups or populations, recognizing that they may need particular accommodation or protection in order to fully enjoy human rights without discrimination (see box 1).

Vulnerable individuals, groups and communities are those that face a particular risk of being exposed to discrimination and other adverse human rights impact. People who are disadvantaged, marginalized or excluded from society are often particularly vulnerable. Examples may be children, women, indigenous peoples, people belonging to ethnic or other minorities, or persons with disabilities. Vulnerability can depend on context. For example, while women are more vulnerable to abuse than men in some contexts, they are not necessarily vulnerable in all contexts. Conversely, in some situations women from marginalized groups may be doubly vulnerable: because they are marginalized and because they are women.

In armed conflict, the standards of international humanitarian law apply to business enterprises as well as to others. On the one hand, international humanitarian law grants protection to business personnel—provided they

⁶ *Human Rights Translated: A Business Reference Guide* (Monash University, the International Business Leaders Forum, OHCHR and the United Nations Global Compact, 2008). Available from www.ohchr.org.

BOX 1

United Nations human rights instruments elaborating the rights of persons belonging to particular groups or populations

The International Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Rights of the Child

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The Convention on the Rights of Persons with Disabilities

The United Nations Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

In most instances, the rights in these instruments relate to the *individuals* in the groups they address. The United Nations Declaration on the Rights of Indigenous Peoples addresses both the human rights of indigenous individuals and the collective rights of indigenous peoples.

do not take part directly in armed hostilities—as well as to the assets and capital investments of enterprises. On the other, it imposes obligations on managers and staff not to breach international humanitarian law and exposes them—and the enterprises themselves—to the risk of criminal or civil liability in the event that they do so. The International Committee of the Red Cross has developed guidance on the rights and obligations of business enterprises under international humanitarian law.⁷

Q 5. How can all internationally recognized human rights be relevant to business?

The corporate responsibility to respect human rights applies to all internationally recognized human rights, because business enterprises can have an impact—

⁷ *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law* (International Committee of the Red Cross, 2006).

directly or indirectly—on virtually the entire spectrum of these rights. Even rights such as the right to a fair trial, which is clearly directed at States, can be adversely affected if, for example, an enterprise obstructs evidence or interferes with witnesses. In practice, some rights will be more relevant or salient than others in particular industries and circumstances, and companies will pay more attention to them. For example, the human rights risks that are most salient for enterprises in the apparel sector with products made by workers in factories across several countries, will differ from those of enterprises in the extractive sector that have to relocate an indigenous community. But there is nothing *in principle* that precludes any enterprise from causing or contributing to adverse impact on any internationally recognized human right. It is therefore not possible to limit the application of the responsibility to respect human rights to a particular subset of rights for particular sectors.

Q 6. What does “avoid infringing” human rights mean?

This means that enterprises can go about their activities, within the law, so long as they do not cause harm to individuals’ human rights in the process. For example, if a factory or a mine pollutes the water source of the surrounding communities so that people do not have the same access to safe drinking water as before, it has infringed on the enjoyment of the right to safe drinking water. Or, if an enterprise evicts a community without due process, consultation and compensation, it will infringe the right to adequate housing.

Q 7. Is the responsibility to respect human rights optional for business enterprises?

No. In many cases the responsibility of enterprises to respect human rights is reflected at least in part in domestic law or regulations corresponding to international human rights standards. For instance, laws that protect people against contaminated food or polluted water, or that mandate workplace standards in line with the ILO conventions and safeguards against discrimination, or that require individuals’ informed consent before they take part in drug trials, are all different ways in which domestic laws can regulate the behaviour of enterprises to help ensure that they respect human rights.

The responsibility to respect human rights is not, however, limited to compliance with such domestic law provisions. It exists over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses

in all situations. It therefore also exists independently of an enterprise's own commitment to human rights. It is reflected in soft law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). There can be legal, financial and reputational consequences if enterprises fail to meet the responsibility to respect. Such failure may also hamper an enterprise's ability to recruit and retain staff, to gain permits, investment, new project opportunities or similar benefits essential to a successful, sustainable business. As a result, where business poses a risk to human rights, it increasingly also poses a risk to its own long-term interests.

Q 8. Do enterprises have any additional human rights responsibilities?

The Guiding Principles set the baseline responsibility of all enterprises as *respect* for human rights wherever they operate. Beyond that, enterprises may voluntarily undertake additional human rights commitments—such as the *promotion* of certain human rights—for philanthropic reasons, to protect and enhance their reputation, or to develop new business opportunities. National laws and regulations may require additional activities by enterprises regarding human rights in some situations, as may contracts with public authorities for particular projects. For example, a contract with a State for the provision of water services may require a business enterprise to help fulfil the human right to water. Operational conditions may also lead enterprises to take on additional responsibilities in specific circumstances. For example, enterprises may identify a need to make social investments, such as in local health care or education, in order to achieve or maintain support for its operations from surrounding communities (a so-called social licence to operate). Supporting human rights also forms part of the commitment undertaken by signatories to the United Nations Global Compact.

Debate continues over whether there may be a *responsibility* for some enterprises in some situations to go beyond respect for human rights and also to seek to promote them. This falls beyond the scope of the Guiding Principles, which constitute a global standard of responsibility for *all* businesses in *all* situations and therefore focus on the responsibility to respect human rights. Respect for human rights is about an enterprise's core operations—how it goes about its daily business. It is not about voluntary activities outside its core operations, however welcome these may be.

It is also important to note in this context that there is no equivalent of a carbon off-set for harm caused to human rights: a failure to respect human rights in one area cannot be cancelled out by a benefit provided in another.

GUIDING PRINCIPLE 13

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Q 9. *How can enterprises be involved in adverse human rights impact?*

There are three basic ways in which an enterprise can be involved in an adverse impact on human rights:

- (a) It may cause the impact through its own activities;
- (b) It may contribute to the impact through its own activities—either directly or through some outside entity (Government, business or other);
- (c) It may neither cause nor contribute to the impact, but be involved because the impact is caused by an entity with which it has a business relationship *and* is linked to its own operations, products or services.

Each scenario has different implications for the nature of an enterprise's responsibilities, as discussed in question 11 below and further elaborated under Guiding Principle 19.

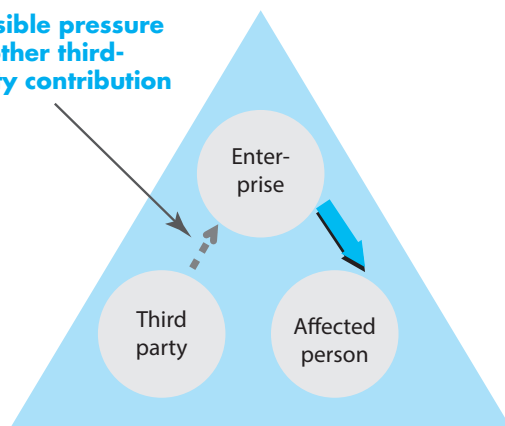
Q 10. *What is meant by “adverse human rights impact”?*

An “adverse human rights impact” occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

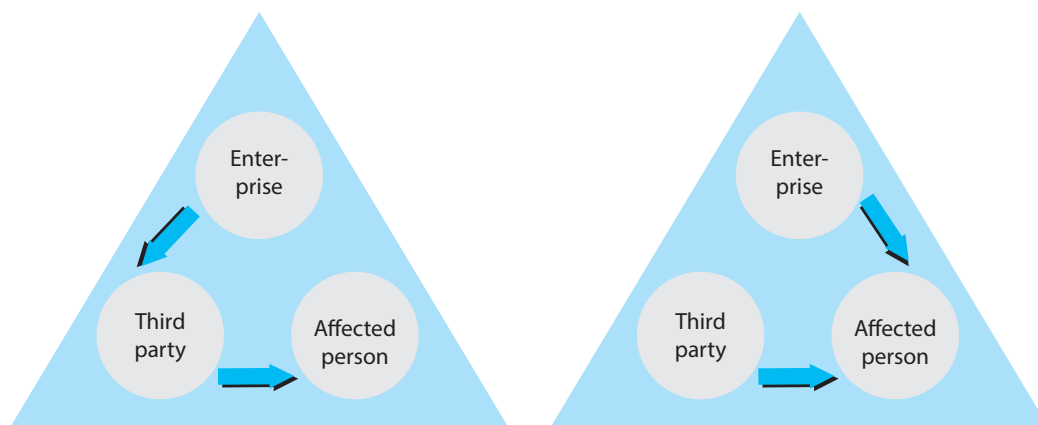
The Guiding Principles distinguish between “actual” and “potential” human rights impact. Actual impact is one that has occurred or is occurring. Potential impact is one that may occur but has not yet done so.

I. Cause

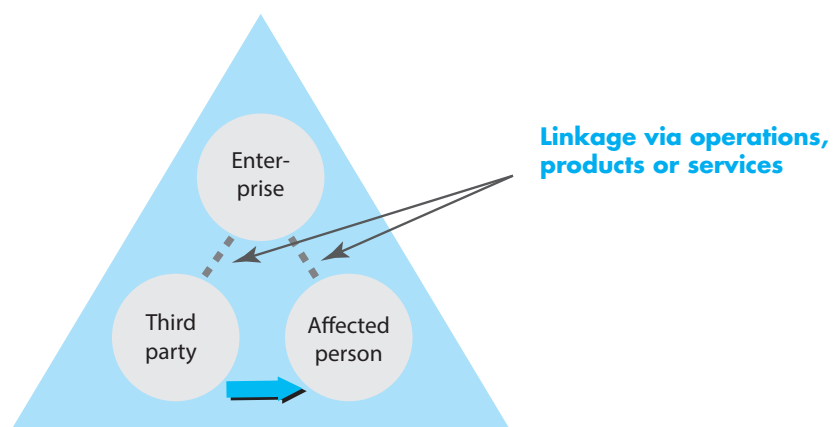
Possible pressure
or other third-
party contribution



II. Contribution



III. No contribution, but linkage



BOX 2

Examples of business impact on human rights

Examples of situations where business enterprises may be deemed to have caused adverse human rights impact:

- Routine racial discrimination by a restaurant in its treatment of customers;
- Exposure of factory workers to hazardous working conditions without adequate safety equipment;
- Being the sole or main source of pollution in a community's drinking water supply due to chemical effluents from production processes.

Examples of enterprises being accused of contributing to adverse human rights impact:

- Providing data about Internet service users to a Government that uses the data to trace and prosecute political dissidents contrary to human rights;
- Performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment;
- Targeting high-sugar foods and drinks at children, with an impact on child obesity;
- Changing product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver.

Examples of adverse impact that is directly linked to an enterprise's operations, products or services by its business relationships, but where the enterprise itself may not to have contributed to it:

- Providing financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities;
- Embroidery on a retail company's clothing products being subcontracted by the supplier to child labourers in homes, counter to contractual obligations;
- Use of scans by medical institutions to screen for female fetuses, facilitating their abortion in favour of boys.

Human Rights Translated contains further examples of how business enterprises can be involved in adverse impact on human rights.

Actual impact requires remediation (see Guiding Principle 22). Potential impact—or human rights risk—requires action to prevent it from materializing, or at least to mitigate (reduce) as far as possible the extent to which it may do so (see Guiding Principles 17–21 on human rights due diligence). Where some residual impact on human rights is unavoidable, this in turn requires remediation.

Q 11. What should enterprises do if they are at risk of involvement in adverse human rights impact?

The appropriate responses in these different situations are explored in some detail under Guiding Principle 19. In summary:

- (a) If an enterprise is at risk of causing or contributing to an adverse human rights impact through its own activities, it should cease or change the activity that is responsible, in order to prevent or mitigate the chance of the impact occurring or recurring. If an impact nevertheless takes place, the enterprise should engage actively in its remediation either directly or in cooperation with others (be it the courts, the Government, other enterprises involved or other third parties);
- (b) If an enterprise is at risk of involvement in an adverse impact solely because the impact is linked to its operations, products or services by a business relationship, it does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.

GUIDING PRINCIPLE 14

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

Q 12. What is the relevance of the “severity” of an enterprise’s human rights impact to other factors listed here?

The severity of a potential adverse human rights impact is the most important factor in determining the scale and complexity of the processes the enterprise needs to have in place in order to know and show that it is respecting human rights. The processes must therefore first and foremost be proportionate to the human rights risks of its operations.

Q 13. What is meant by a “severe” human rights impact?

The commentary to this Principle states that “severity of impacts will be judged by their scale, scope and irremediable character”. This means that the gravity of the impact (its scale) and the number of individuals that are or will be affected (its scope) will both be relevant. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact.

It is not necessary for an impact to have more than one of these characteristics to be reasonably considered “severe”, although it is often the case that the greater the scale or the scope of an impact, the less it is “remediable”.

The concept of “severity” is discussed further under Guiding Principle 24, including in the context of risk assessment.

Q 14. How is the size of an enterprise relevant to its responsibility to respect human rights?

All enterprises have the same responsibility to respect human rights as they go about their business. However, size will often influence the kinds of approaches they take to meet that responsibility.

A large enterprise will have more employees, typically undertake more activities and be engaged in more relationships than a small one. This may increase its human rights risks. Large enterprises are also likely to have more complex systems and procedures in place for decision-making, communications, control and oversight. They are more likely than small enterprises to have operations, value chain relationships, clients or customers that span multiple countries, making the implementation and monitoring of standards more challenging.

They may have longer and more complex value chains with multiple forms of relationships, some of them entailing more human rights risks than others.

The policies and processes that a large enterprise needs to ensure respect for human rights by the enterprise as a whole will need to reflect all these factors. They will need to extend to all those in the enterprise who deal with the activities and relationships with which its human rights risks are associated. The significance of embedding respect for human rights across all relevant functions and units of the enterprise is discussed further under Guiding Principle 16.

Small and medium-sized enterprises may have less capacity and more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. With fewer employees, communications across functions may be easier and less formal. Internal systems and oversight functions will typically be less complex.

In many instances, the approaches needed to embed respect for human rights in a smaller enterprise's operations can mirror the lesser complexity of its operations. However, size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity of its actual and potential human rights impact will be the more significant factor. For instance, a small company of fewer than 10 staff that trades minerals or metals from an area characterized by conflict and human rights abuses linked to mining has a very high human rights risk profile. Its policies and processes for ensuring that it is not involved in such abuses will need to be proportionate to that risk.

The commentary to Guiding Principle 17 discusses further how external expertise and pooled resources can assist all enterprises, and particularly small and medium-sized ones, in conducting human rights due diligence that is both effective and proportionate to their human rights risks and their resources.

Q 15. *How is an enterprise's sector and operational context relevant to its responsibility to respect human rights?*

All enterprises have the same responsibility to respect all internationally recognized human rights (see Guiding Principle 12). That said, an enterprise's sector and its operational context will typically determine which human rights it is at greatest risk of having an impact on in the normal course of its operations.

Engagement with local stakeholders will often enable a business enterprise to better understand the context in which it operates.

An enterprise's sector determines many of the activities it engages in, some of which may carry particular human rights risks. For example, agribusiness enterprises often invest in land for new agricultural activities. This land may be inhabited or used by communities for their livelihoods, whether or not they are recognized as having legal title. This creates a particular risk for the right of the individuals concerned to an adequate standard of living. An information and communications technology company may be at particular risk of impacting the rights to privacy and/or information of its users as a result of data sharing or censorship. Enterprises in sectors that routinely work with toxic products, such as chemical companies, many manufacturing companies, as well as mining companies, may pose a particular risk to the right to safe water. (These are mere illustrations. Other rights may also be at risk in these sectors.)

An enterprise's operational context can also make a significant difference. If labour laws are poorly implemented and enforced by the State authorities, then working with suppliers from that region will carry a higher risk of becoming involved in labour rights abuses. If the area is affected by, or prone to, conflict, there may be particular risks with regard to security, the right to life and ethnic discrimination. If the region suffers from water scarcity, then the risk of adverse impact on the right to safe water will be high. If the affected communities include indigenous peoples, then their rights, including their cultural rights, may be at particular risk.

These factors of sector and operational context are therefore especially relevant, or salient, in determining which human rights are at greatest risk from a particular enterprise's operations. As stressed above, this does not mean they should become its exclusive focus. But they will likely need to be the subject of the most systematized and regular attention.

Q 16. *How is an enterprise's ownership relevant to its responsibility to respect human rights?*

All enterprises have the same responsibility to respect human rights regardless of ownership. It applies whether they are publicly listed, privately owned, State-owned, joint ventures or have some other, or hybrid, form of ownership.

Abuse by State-owned enterprises, that is to say, where the State controls the enterprise or where the enterprise's acts can otherwise be attributed to the State, may constitute a violation of the State's own international law obligations.⁸ If States own or control business enterprises, they have the greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. The legal obligations of the State to respect and protect human rights are additional to the enterprise's own responsibility to respect human rights and do not diminish it in any regard.

For joint ventures with significant human rights risks, it is particularly important to ensure that the legal and other agreements underpinning the ventures provide the necessary basis to ensure that human rights are respected in their operations.

Q 17. How is an enterprise's structure relevant to its responsibility to respect human rights?

Business enterprises can have various structures. For instance, some are wholly separate—legally and functionally—from any other enterprise; others follow a franchise model with greater or lesser degrees of contractual constraint on franchisees; others are part of cooperatives or create a holding company to link a group of enterprises. Some others operate as a parent company and subsidiaries, with varying degrees of control exercised by the parent company and correspondingly varied levels of devolved authority to the subsidiaries.

The corporate group structure does not make any difference to *whether* entities within the group have to respect human rights. It simply affects *how* they go about ensuring that rights are respected in practice, for instance through their contractual arrangements, internal management systems, governance or accountability structures. If human rights abuses occur, it will be the national law in the relevant jurisdiction that determines where liability rests.

⁸ See the State duty to protect human rights, in particular Guiding Principle 4, not covered in this publication.

GUIDING PRINCIPLE 15

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Q 18. Why are policies and processes required if this is just a question of avoiding harm?

Respecting human rights is not a passive responsibility: it requires *action* on the part of businesses. It is relatively easy for an enterprise to say that it respects human rights and it may genuinely believe that this is the case. But to make that claim with legitimacy, an enterprise needs to know and be able to show that it is indeed respecting human rights in practice. That, in turn, requires it to have certain policies and processes in place. The Guiding Principles define these as: a statement of policy commitment, a human rights due diligence process and processes to enable remediation.

Chapter II elaborates on the factors an enterprise should take into consideration in developing these policies and processes and ensuring that they collectively meet the objective of enabling it to manage its human rights risks effectively. Specifically, section A elaborates on the policy commitment, section B elaborates on human rights due diligence and section C elaborates on remediation. Finally, section D elaborates on issues and challenges arising in particular contexts.

Q 19. What makes policies and processes “appropriate to size and circumstances”?

There is no single answer to this question. It will depend on all the factors discussed under Guiding Principle 14, with the most attention due to the severity of the enterprise’s adverse human rights impact.

Good policies and processes are not necessarily resource-intensive. If a business's human rights risk profile is low, its processes for addressing such risk may be correspondingly simple. Moreover, any business may benefit from drawing on external resources to keep the costs manageable (see box 3 and annex II).

Q 20. *How fast can an enterprise be expected to achieve all this?*

It is relatively easy for an enterprise to assert that it respects human rights or that it is committed to doing so. Meeting that commitment can be notably more complex, particularly in large companies that have vast numbers of personnel, multiple and complex business relationships, and operate in different locations. It is also challenging for enterprises for which these issues are relatively new. Moreover, maintaining respect for human rights will often require constant work to keep up with new challenges.

So even if an enterprise is quick to recognize that it has a responsibility to respect human rights, the reality is that it may take time to know and show that it is actually meeting that responsibility. An enterprise should not try to overcome this hurdle by suggesting that its policy commitment is merely aspirational. This almost inevitably suggests that the commitment is fluid or negotiable, and

BOX 3

Many business enterprises—not just small and medium-sized ones—will benefit from external expert resources that can support and assist their efforts to meet their responsibility to respect human rights. The primary focus should be on the credibility of such resources—written, audio-visual or human. There may be various ways of assessing this. For instance:

- Is there evidence of their successful use by other business enterprises?
- Were they developed by an individual or organization that is trusted by stakeholders and respected in this field?
- Are they referred to, used or trusted by other respected individuals or organizations (in the industry, academia, civil society, including human rights experts, etc.)?

lowers expectations and incentives for its achievement among personnel and business partners. Moreover, the responsibility to respect human rights exists regardless of the enterprise's own commitment: it is not the commitment to meet it that creates the responsibility.

An enterprise is well advised to be transparent about the efforts it makes to manage the transition as it develops or adjusts the policies and processes it needs. It could, for example, provide public information on the timelines it has set for various stages of implementation. It could engage a group of independent experts—respected individuals from civil society, national human rights institutions, academia or other fields—to advise it on the development of these new processes or oversee its own efforts to do so. If it uses a stakeholder or expert panel of this kind, some independent reporting from the panel can provide important transparency and credibility to the ongoing efforts.

In short, if an enterprise is able to demonstrate that it has serious processes under way to put its policy commitment into practice, this can help create the space it needs to develop the internal policies, procedures and practices to deliver on that commitment. Indeed, if an enterprise's human rights challenges are changing over time and require adjustments to the systems that address them, approaches of this kind may be of ongoing benefit.

III. OPERATIONAL PRINCIPLES

A. POLICY COMMITMENT

GUIDING PRINCIPLE 16

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

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

Q 21. Why does this matter?

The term "policy commitment" is used here to mean a high-level and public statement by an enterprise to set out its commitment to meet its responsibility to respect human rights. It makes this commitment a clear, overarching policy that will determine its actions. The policy commitment is distinct from the operational policies and procedures referred to in subparagraph (e) of this Guiding Principle, which are typically not public, are more detailed in nature and help translate the high-level commitment into operational terms.

A policy commitment to meet the enterprise's responsibility to respect human rights:

- (a) Demonstrates both inside and outside the enterprise that management understands this is a minimum standard for conducting business with legitimacy;

- (b) Clearly communicates the expectation of top management as to how all personnel, as well as business partners and others the enterprise works with, should act;
- (c) Triggers the development of internal procedures and systems necessary to meet the commitment in practice;
- (d) Is the first essential step for embedding respect for human rights into the values of the enterprise.

This Principle states that the policy commitment should stipulate the enterprise's human rights expectations also of business partners and other parties directly linked to its operations, products or services. Doing so provides a starting point from which the enterprise can better leverage respect for human rights in these relationships, should this be necessary. For example, it can facilitate the inclusion of provisions for the respect of human rights in contracts with suppliers and partners; and it can provide the basis for auditing or monitoring performance and for factoring the results into decisions on future business relationships. Conversely, if it is not clear that these expectations with regard to human rights are a firm policy of the enterprise, they can easily become "negotiable" and be sidelined in particular relationships or circumstances. This weakens the ability of the enterprise to ensure it is not involved in human rights abuses by others, which in turn increases its own risks.

Q 22. How detailed should a policy commitment be?

An enterprise's policy commitment will typically remain static for an extended period of time, although it may be updated as lessons are learned. It is a constant reference point for employees, parties with which the enterprise works and its wider stakeholders. It sets the foundational expectation from which the operational policies and processes for its implementation follow. It is therefore not the place for details of policy and process that are likely to shift frequently as circumstances change.

So the degree of detail in a policy commitment may vary. It may simply be expressed as a general commitment to respect all internationally recognized human rights and an expectation that those with whom the enterprise works do the same. It could also include a summary of those human rights that the business recognizes as likely to be the most salient for its operations and information

on how it will account for its actions to meet its responsibility to respect human rights. Nevertheless, the policy should reflect a commitment to respect *all* internationally recognized human rights, even if some are highlighted as being particularly salient.

Q 23. Which human rights issues are most salient to your business?

Those responsible for developing the human rights policy commitment and processes will need to know which human rights the enterprise is most likely to have an impact on—that is, which rights are the most salient to its operations—while also ensuring that these do not become its exclusive focus. Question 15 explores the frequent linkage between salient human rights and an enterprise’s sector or operational context.

For instance, one of the most typical risks for a toy or footwear company will be involvement in labour rights abuses through its supply chain. For a beverage or food company, typical risks are both labour rights and impact on water and/or land use and consumer health. For a pharmaceutical company, the right to health will be particularly salient, as will freedom of expression and the right to privacy for an information and communications technology enterprise.

If an enterprise is typically or regularly operating in contexts that increase the risks to human rights, these may add to the list of salient human rights that its policy commitment could highlight. For instance, a logging or construction company that often operates in areas inhabited by indigenous peoples will particularly need to understand the impact these peoples may suffer; an electronic goods company sourcing largely from a State or region where labour laws are weak or weakly enforced will need to take that into account; an oil company developing new fields in conflict-affected areas may highlight security-related risks in its policy commitment.

Q 24. What relevant expertise can an enterprise draw upon?

There are various sources an enterprise can turn to in order to help it work out which human rights issues it should highlight in its overarching policy commitment and how. In the first instance, the enterprise’s own experience will be an important indicator of the most salient issues, albeit not the only one. The enterprise may have internal human rights expertise to draw on as well.

Looking beyond the enterprise itself, various resources are available, many of them at no cost (see examples in annex II).

In many situations, large enterprises or those with significant human rights risks, in particular, will find it invaluable to consult individuals who are representative of those stakeholder groups most likely to be affected by their operations. These representatives can bring important perspectives on how the enterprises could have an impact on human rights and the potential significance of that impact. They will also be able to advise how the wording of the draft policy commitment is likely to be viewed by these important stakeholders groups.

Q 25. How does the public policy commitment relate to internal policies and procedures?

The implications of the overarching policy commitment need to be understood internally and reflected in relevant internal policies and procedures. It is through them that the commitment is put into practice and can be embedded in the values of the enterprise.

In a small enterprise with very limited human rights risks, it may be sufficient to provide a policy note to staff, highlighting the responsibility to respect human rights and key issues for their attention (for example, non-discrimination), what this means for staff practices and what accountability there will be (including the consequences for breaches).

In a large enterprise, it will often be necessary to have additional internal human rights policies that elaborate the implications of the policy commitment. These might be particular to different departments, such as procurement, human resources, production, sales, etc. It will also be necessary to make sure that other policy areas and procedures are aligned with those related to human rights. If such alignment does not take place, it can be much more difficult for the enterprise to meet its responsibility to respect human rights when problems arise.

For instance, if the buying division of a toy company makes decisions without regard to how they may impact the ability of suppliers to comply with labour rights standards, the enterprise risks contributing to adverse human rights impact. If a construction company rewards operational staff purely on their speed in building new infrastructure and without regard to whether they harm

communities in doing so, it is likely to incentivize behaviours that lead to adverse human rights impact. If an Internet company's staff automatically defer to every Government request for information about users, regardless of the human rights implications, it runs the risk of being involved in any human rights abuses that result.

Several factors are likely to influence the extent to which internal policies and procedures are effective in embedding respect for human rights across an enterprise. Existing systems may provide relevant and effective models, for example systems related to health and safety or non-discrimination that can be built on. Senior management attention and accountability for human rights risk management can also help, as can staff training. Including indicators related to human rights policies and procedures in the performance assessments of staff across *all* relevant functions—not just those that lead on human rights—can be particularly important.

QUESTIONS TO ASK

What elements does our statement of policy commitment to respect human rights need to include in order to:

- (a) Set clear expectations for the behaviour of personnel, business partners and other relevant parties linked to our activities?
- (b) Trigger the necessary internal attention, resources and action for its delivery?
- (c) Be credible in the eyes of our key stakeholder groups?

What sources can we use to help us identify our key human rights risks?

With whom can we test our ideas about which human rights risks are most salient in our sector and in the areas where we operate?

How can we make sure that in focusing on the most salient human rights we do not forget that we might have an impact on others?

Which credible experts could we ask to comment on our draft policy commitment, perhaps as part of a group of external stakeholders?

What additional internal policies and procedures are we going to need to put this policy commitment into practice?

Which departments need to have understanding and ownership of these policies and procedures, and how can we involve them in their development?

Who should sign off on the final policy commitment at the top of the enterprise, to send the signal to all personnel that this is a priority?

How will we communicate our policy commitment publicly, bearing in mind the different ways our stakeholders are able to access information?

B. HUMAN RIGHTS DUE DILIGENCE

GUIDING PRINCIPLE 17

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

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Q 26. *Why does this matter?*

It is through human rights due diligence that an enterprise identifies the information it needs in order to understand its specific human rights risks at any specific point in time and in any specific operating context, as well as the actions it needs to take to prevent and mitigate them. "Human rights risks" refers to the risks of having an adverse impact on human rights, as against risks to the enterprise itself, although the former increasingly leads to the latter.

Human rights due diligence is not a single prescriptive formula. Enterprises of different sizes, in different industries, with different corporate structures and in different operating circumstances will need to tailor their processes to meet those needs. However, the key elements of human rights due diligence—assessing, integrating and acting, tracking, and communicating—when taken together with remediation processes, provide the management of any enterprise with the framework it needs in order to know and show that it is respecting human rights in practice.

Q 27. What should the scope of human rights due diligence be?

As the Guiding Principles state, human rights due diligence “should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”. See Guiding Principle 13 for more on these three possible forms of involvement in adverse human rights impact.

The focus of due diligence is on identifying and addressing the relevant impact on human rights, i.e., that which is connected to the enterprise’s own activities and to its business relationships. Consequently, these activities and business relationships set the scope of human rights due diligence.

“Business relationships”, as defined in the Guiding Principles, refer to the relationships an enterprise has with “business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services”. When looking at business relationships, the focus is not on the risks the related party poses to human rights *in general*, but on the risks that it may harm human rights *in connection with the enterprise’s own operations, products or services*.

Q 28. How can size and other characteristics affect an enterprise’s human rights due diligence process?

Human rights due diligence is necessary for *any* enterprise to know and show that it is respecting human rights in practice. It will need to include all the elements set out in this Guiding Principle: assessing actual and potential human rights impact, integrating and acting upon the findings, tracking responses, and communicating how impact is addressed. However, the scale and complexity

of these processes will vary according to the size of the enterprise, as well as its sector, operational context, ownership and structure. The single most important factor, however, in determining the processes needed will be the severity of its human rights impact. The commentary to Guiding Principle 14 sets out these distinctions more fully, while Guiding Principle 24 explores further the concept of “severity”.

Q 29. Why should human rights due diligence be “ongoing”?

Human rights due diligence is intended to help an enterprise know and show that it respects human rights throughout its operations and over time, including when there are changes in its operations or operating contexts. It therefore requires ongoing or iterative processes, rather than a one-off undertaking, except where those operations and contexts do not change significantly.

Q 30. What is the role of stakeholder engagement?

Human rights due diligence is about people. It reflects the entitlement of every human being to be treated with dignity. It therefore involves relationships—between an enterprise and those on whom it may have an impact.

Hence, the key to human rights due diligence is the need to understand the perspective of potentially affected individuals and groups. Where possible and appropriate to the enterprise’s size or human rights risk profile, this should involve direct consultation with those who may be affected or their legitimate representatives, as discussed further under Guiding Principle 18.

Q 31. What capacity does an enterprise need to conduct human right due diligence?

There is no single answer to this question. If an enterprise does not meet its responsibility to respect human rights, this implies risk to the enterprise as well as risk to people. As with any other risk, the enterprise needs to allocate the necessary internal capacity in order to manage it effectively. This should be commensurate with the enterprise’s human rights risk profile. For a small enterprise with limited human rights risks, it will likely be a task that can be allocated to an existing member of staff, requiring a limited amount of his or her time. For an enterprise with significant human rights risks, proportionately more dedicated staff time as well as budget resources will be required.

For many enterprises, there will already be processes in place for other forms of due diligence (environmental, health and safety, etc.) that can be drawn on or built on to provide for human rights due diligence. Care should be taken to ensure that such systems are adapted to the particular task of managing human rights risks effectively. It is important for all enterprises to ensure that the personnel responsible for human rights due diligence have the necessary skills and training opportunities. They also need to have sufficient influence within the organization.

In the first instance, an enterprise's overall human rights risk profile will have been assessed to develop its human rights policy commitment and any supporting policies and procedures. But the enterprise should keep under review any shifts that might affect that general profile. Such a shift could flow from a number of factors, for example if the enterprise moves into a new geographic area with rule-of-law or conflict challenges or launches new product lines requiring sourcing from regions with known labour rights problems. It could result from the development of new services for clients who are linked to human rights abuses or from long-standing products or services that start to be used for unintended purposes.

Surveying these and other relevant developments will help highlight emerging issues that will change the enterprise's general risk profile and may require the allocation of greater resources to address any increase in risk.

Q 32. How does human rights due diligence relate to remediation?

Human rights due diligence aims to prevent and mitigate *potential* human rights impact in which an enterprise might be involved. Remediation aims to put right any actual human rights impact that an enterprise causes or contributes to. The two processes are separate but interrelated. For example, an effective grievance mechanism through which those directly affected can raise concerns about how they are or may be harmed can be a good indicator of potential and recurring human rights impact. Tracking the effectiveness of the enterprise's responses to human rights impact will similarly benefit from feedback via an effective grievance mechanism, as well as from wider stakeholder engagement. And enterprises should be in a position to communicate, as appropriate, both on how they address human rights risks in general and how they have remedied significant human rights impact.

Q 33. Can human rights due diligence or parts of it be carried out by external experts?

It is certainly possible to use external experts to carry out some human rights due diligence processes, and at times this may be both reasonable and necessary. However, it should always be done with due care. Respect for human rights relates to an enterprise's core operations. The best way to ensure it is achieved sustainably is for it to be embedded in the values of the enterprise. The more the enterprise uses third parties to carry out some key due diligence processes, the less likely this "embedding" into the enterprise will take place. It is particularly important that any findings regarding the enterprise's human rights impact that are identified through the work of external experts are effectively internalized and integrated across the enterprise in order to enable effective action (see Guiding Principle 19).

It is also ill-advised for an enterprise to delegate engagement with its potentially affected stakeholders entirely to external experts, since this undermines its capacity to truly understand the perspectives of those it may have an impact on and to build trusting and productive relationships with them. However, involving local third parties in the enterprise's own engagement efforts may help to bridge cultural gaps. In particular, where relationships with affected stakeholders already have a history of distrust, it may well be important to identify a neutral third party who can support and assist such stakeholder engagement, at least at the initial stages.

QUESTIONS TO ASK

Do we already have systems on which we may build as we develop our human rights due diligence processes?

Are these systems effective and fit for the purpose of addressing human rights risks? What changes may be needed to make them fit for this purpose?

Are there circumstances in which we will need separate processes for human rights?

Who should lead on human rights due diligence? Who needs to have oversight?

What departments will most likely need to be involved in aspects of human rights due diligence? How could we involve them in the development of the processes? How could we structure and motivate collaboration?

What external expertise are we likely to need? If we use external experts, how can we ensure that this supports, rather than detracts from, the embedding of respect for human rights in our internal values and practices?

How and at what points in the human rights due diligence process should we seek to engage with our directly affected stakeholders or their representatives? If we cannot do so, how else can we gain an understanding of their likely concerns and perspectives?

How will we make sure that we keep our human rights due diligence up to date so that we may recognize changes that may require renewed assessments of and responses to our impact?

GUIDING PRINCIPLE 18

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

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

Q 34. Why does this matter?

For any enterprise, gauging its human rights risks is the starting point for understanding how to translate its human rights policy statement—and therefore its responsibility to respect human rights—into practice. It is the prerequisite for knowing how to prevent or mitigate potential adverse impact and remedy any actual impact that it causes or contributes to. It is therefore the essential first step in human rights risk management.

Q 35. What is meant by “human rights risks” and whose human rights are relevant?

Much of human rights due diligence is focused on human rights risks—or the *potential* impact on human rights in which an enterprise may be involved.

Actual human rights impact is a matter primarily for remediation, although it is also an important indicator of potential impact. It is worth highlighting again that an enterprise's human rights risks are the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

An enterprise's operations may pose risks to the human rights of various groups. Direct employees are always a relevant group in this regard. But potentially affected stakeholders may also be communities around the enterprise's facilities, workers of other enterprises in its value chain (insofar as they can be affected by its own actions or decisions), users of its products or services, others involved in product development (such as in product trials) and so forth. It is important for enterprises to look beyond the most obvious groups and not assume, for instance, that the challenges lie in addressing impact on external stakeholders while forgetting direct employees; or assume that those affected are employees alone, ignoring other affected stakeholders beyond the walls of the enterprise. Individuals from population groups that are more vulnerable to human rights impact require particular attention. (See question 4 for more on vulnerable populations and groups.)

Q 36. When should impact be assessed?

Human rights due diligence requires ongoing processes to assess human rights impact in order for an enterprise to maintain a true picture of its human rights risks over time, taking into account changing circumstances. This cannot be accomplished through one single human rights impact assessment, unless the enterprise's operations and operating context remain largely unchanged. The commentary to Guiding Principle 18 makes clear that repeat assessments are likely to be necessary at various critical moments: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g., market entry, product launch, policy change or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g., rising social tensions); and periodically throughout the life of an activity or relationship.

The most effective is to begin to assess impact as early as possible in the life of a particular activity or relationship. The terms of contracts at the start of new investments or business relationships can often dictate how easy or difficult it will be to ensure respect for human rights for their duration. An early exercise

to gauge human rights risks can help set the right terms of contract to ensure respect for human rights.

Similarly, if an enterprise is involved in a merger or acquisition that brings new projects, activities and relationships into its portfolio, its due diligence processes should include human rights due diligence, beginning with an assessment of any human rights risks it is taking on. Moreover, if an enterprise acquires another enterprise that it identifies as being, or having been, involved in human rights abuses, it acquires the responsibilities of that enterprise to prevent or mitigate their continuation or recurrence. If the enterprise it is acquiring actually caused or contributed to the abuses but has not provided for their remediation, and no other source of effective remedy is accessible, the responsibility to respect human rights requires that the acquiring enterprise should enable effective remediation itself, to the extent of the contribution. Early assessments will be important in bringing such situations to light.

BOX 4

Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations - guidance for negotiators

The principles for responsible contracts identify 10 principles to help States and business investors integrate the management of human rights risks into investment project contract negotiations. Each principle is explained in brief, along with its key implications and a recommended checklist for negotiators. The guide was developed through four years of research and inclusive, multi-stakeholder dialogue carried out under the mandate of the Special Representative of the Secretary-General for Business and Human Rights, Professor John Ruggie. It reflects the collective experiences of experts involved in major investment projects from Government, commercial enterprises, non-governmental organizations and lending institutions.

The 10 principles are:

1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.
2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.

3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.
4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.
5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.
6. Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.
7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.
8. Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.
9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.
10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

Source: A/HRC/17/31/Add.3.

Q 37. How should human rights impact be assessed?

Standard approaches to risk assessment may suggest that the *probability* of an adverse human rights impact is as important as its *severity*. However, if a

potential human rights impact has low probability but high severity, the former does not offset the latter. The severity of the impact, understood as its “scale, scope and irremediable character”, is paramount (see Guiding Principle 14). Equally, human rights risks cannot be the subject of a simple cost-benefit analysis, whereby the costs to the enterprise of preventing or mitigating an adverse impact on human rights are weighed against the costs to the enterprise of being held to account for that harm.

As the commentary to Guiding Principle 18 explains, the process of assessing actual and potential adverse human rights impact typically includes “assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified”.

An enterprise may choose to do self-standing assessments of its human rights impact or to integrate human rights considerations into its wider social and environmental impact assessments. It may be necessary to do a stand-alone assessment of human rights impact if the enterprise’s activities or operating context pose a heightened risk to human rights. A number of tools and methodologies for human rights impact assessments have been and will continue to be developed. However, as noted, this Principle does not aim at a single such assessment, but at an ongoing process of assessing impact that will draw on various sources.

Besides the formal assessments initiated by the enterprise itself, other sources may contribute too. For example, a grievance mechanism through which affected stakeholders can raise concerns may provide indications of actual or potential human rights impact. News or expert reports on particular operating contexts or industry developments will likely be another source. Campaigns by non-governmental organizations (NGOs) or other third parties may well be another. All these sources can feed into an ongoing process of assessing impact.

When assessing their actual or potential human rights impact, companies should pay particular attention to marginalized or vulnerable groups. In some societies, inherent patterns of discrimination can be pervasive (but not necessarily apparent to outsiders). While companies are not responsible for such wider discriminatory practices, they should pay particular attention

to the rights and needs of, and challenges faced by, these vulnerable and marginalized groups in order to ensure that they do not contribute to, or exacerbate, such discrimination.

In sum, the processes for assessing human rights impact should be systematic so that the various elements add up to a coherent overview of actual and potential human rights impact associated with an enterprise's activities and relationships and can accurately inform the subsequent steps in the due diligence process.

Q 38. *How far afield should an enterprise look when assessing human rights impact?*

The purpose of assessing impact is to identify any adverse impact in which an enterprise might be involved. As set out in Guiding Principle 13, this includes impact it may cause or contribute to through its own activities, and impact to which it has not contributed, but which is linked to its operations, products or services by a business relationship. Therefore, when assessing actual and potential human rights impact, an enterprise should look both at its own activities and at its business relationships.

Q 39. *What does it mean to assess the impact that occurs through an enterprise's own activities?*

An enterprise may either cause or contribute to an adverse human rights impact through its own activities. It may contribute to an impact, for example, if it keeps employees at work until late at night in an area where it is unsafe for women to walk home after dark, and some women are subsequently attacked going home; or if it lends vehicles to security forces that use them to travel to local villages and commit atrocities.

Q 40. *What does it mean to assess the impact in which an enterprise is involved as a result of business relationships?*

Guiding Principle 18 is not intended to require enterprises to assess the human rights record of every entity with which they have a relationship. It is about assessing the risk that those entities may harm human rights when acting in connection with the enterprise's own operations, products or services.

For instance, if an enterprise's facilities will be protected by State security forces, the enterprise is not being asked to assess the general human rights

record of the security forces or the State, but the risks that human rights abuses may occur as a result of the security forces' presence at its facilities. While their past human rights record will be one consideration, other factors will include the general stability and rule of law in the area in question; local circumstances, such as any current or likely tensions among communities, between communities and local authorities or between communities and the enterprise; local attitudes to the Government or the armed forces; and, of course, the training and skills of the armed forces in handling such assignments in line with human rights.

In multi-tiered and complex value chains, and for companies with thousands of suppliers even in their first tier, it is even less feasible to assess every individual business relationship. The same may be true for a small or medium-sized enterprise with a large number of business relationships relative to its own resources. However, this does not reduce its responsibility to respect human rights: not knowing about human rights abuses linked to its operations, products or services is unlikely *by itself* to satisfy key stakeholders, and may be challenged in a legal context, if the enterprise should reasonably have known of, and acted on, the risk through due diligence.

As the commentary to Guiding Principle 17 explains, if due diligence on every individual relationship is impossible, "business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence". This would include, for example, agricultural products sourced from suppliers in an area known for child labour; security services provided by contractors or forces in areas of conflict or weak governance and rule of law; and drug trials conducted through partners in areas of low education, literacy and legal safeguards. If abuses do occur where they could not reasonably have been foreseen, the enterprise's stakeholders will assess it on its response: how well and how swiftly it takes action to prevent or mitigate their recurrence and to provide for or support their remediation (see Guiding Principles 22 and 29).

Q 41. What is the role of internal and external expertise in the assessment of human rights impact?

Guiding Principle 18 states that the process of assessing adverse human rights impact should “draw on internal and/or independent external human rights expertise”. Even if an enterprise has internal expertise on human rights, those personnel will need to consult external sources that reflect evolving understanding of how enterprises in the sector can have an impact on human rights, best practice in assessing impact, as well as information on changes in the enterprise’s operating environments and their implications for human rights. Many of these sources will be in writing and publicly available. Insights and advice from individual experts in Government, academic, practitioner and civil society circles are also frequently available and accessible.

These kinds of resources can also be particularly important in helping small and medium-sized enterprises, which will rarely have internal human rights expertise, to keep the resource implications of meeting the responsibility to respect human rights proportionate to the human rights risk that they need to address. If direct consultation with affected stakeholders is not possible (see question 42), expert resources of this type become more important, as do the insights offered by organizations or individuals that legitimately convey the perspectives—or likely perspectives—of those who may be affected by the enterprise’s activities or relationships.

Q 42. What is the role of consultation with directly affected groups and other relevant stakeholders in the assessment of human rights impact?

Guiding Principle 18 also states that the process of assessing adverse human rights impact should “involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation”. As the commentary makes clear, enterprises need to understand, as far as possible, the concerns of those who may be directly affected by their operations. This is particularly important for enterprises whose operations or operating contexts suggest they will have significant human rights risks.

Engagement with stakeholders plays a number of roles. It enables an enterprise to identify whether stakeholders have the same or different perspectives (than the enterprise and than each other) on what constitutes an impact on their human rights and on how significant an impact may be. For instance, damage to land that belongs to an indigenous community but is not farmed or otherwise used for economic purposes might seem to the enterprise to represent a low-level impact on the right to property that can easily be addressed through financial compensation or the provision of alternative land; whereas an indigenous community may consider that there is a far greater impact related to the role of that land in its culture, traditions and beliefs. Changes to factory shift hours that seem to make sense to the management of an enterprise may have a particular impact on women with childcare responsibilities or individuals with whose religious practices the new hours would interfere. It is often only through talking to those who may be affected that these issues come to light and can be addressed.

This Guiding Principle also recognizes that, for many small and medium-sized enterprises, consultations with directly affected stakeholders may not be feasible, owing to legitimate financial, geographical or other constraints. The Guiding Principles point to other ways of maximizing the information the company can obtain about its human rights impact and how it is perceived, including through sources of external expertise, as discussed under question 41.

BOX 5

Engagement with potentially affected groups and other relevant stakeholders

Engaging with potentially affected groups and other relevant stakeholders provides important insights into their perspectives and concerns regarding the enterprise's operations and the implications these have for human rights. Effective engagement can also help demonstrate that the enterprise takes stakeholders' views and their dignity, welfare and human rights seriously. This can help to build trust and make it easier to find ways to address impact in an agreed and sustainable way, avoiding unnecessary grievances and disputes.

Consultation with potentially affected stakeholders can require particular sensitivity. It necessitates attention to any barriers—linguistic, cultural, gender or other—that stakeholders may face in speaking openly to the enterprise's representatives. It requires sensitivity to cultural differences and perceived power imbalances, where these exist.

Some individuals or groups may be at risk of exclusion from the consultation process unless targeted efforts are made to reach out to them. There may be competing views among and within stakeholder groups about the relative significance of certain impacts. Where there is a legacy of distrust between the enterprise and stakeholders, there may be a need for a neutral, trusted individual to facilitate the engagement process.

There are a number of tools that look in more detail at how to conduct stakeholder engagement in a manner most likely to meet the objectives of drawing a full picture of the enterprise's potential adverse human rights impact, as perceived by all involved. Many are available on the United Nations Global Compact's website at: www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html#stakeholder (accessed 5 March 2012).

QUESTIONS TO ASK

What internal and external individuals or groups are at risk of being adversely affected by our operations? Are any of them particularly vulnerable in any of our operating environments?

What processes do we have in place into which we might integrate additional steps to help us assess human rights impact? Are they strong, well-tested processes that can be made fit for this added purpose?

Are there circumstances in which we should do stand-alone human rights impact assessments, including where there are heightened human rights risks?

What other processes and sources can we draw on as part of our ongoing assessment of our impact: media, expert reports, feedback from staff and stakeholders, grievance mechanism?

Can we reasonably review all our business relationships to identify the risk of our being involved, through them, in adverse human rights impact? If not, where are the greatest risk areas across our business relationships, and how can we at least ensure full due diligence with regard to those risks?

Can we engage directly with those groups we potentially have an impact on? If not, what other credible sources can help us understand their likely perspectives and concerns?

What written resources or experts could help us test our assumptions about whom we may have an impact on and how?

GUIDING PRINCIPLE 19

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

(a) Effective integration requires that:

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

(b) Appropriate action will vary according to:

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

Q 43. Why does this matter?

The larger the enterprise, the more likely it is that the individual or team responsible for assessing human rights impact sits apart from the personnel conducting the activities or overseeing the relationships that typically generate that impact. So those assessing the impact do not control the decisions and actions that can prevent, mitigate or remedy it. The departments that do control those decisions and actions therefore have to be involved in identifying and implementing solutions. Integration enables this to happen.

The speed and ease with which an enterprise responds to potential human rights impact can be decisive for its effectiveness in managing its human rights risks. This is where the success of the enterprise in embedding its human rights policy commitment throughout the enterprise makes a significant difference.

“Embedding” is the *macro* process of ensuring that all personnel are aware of the enterprise’s human rights policy commitment, understand its implications

for how they conduct their work, are trained, empowered and incentivized to act in ways that support the commitment, and regard it as intrinsic to the core values of the workplace. It is one continual process, generally driven from the top of the company. “Integration”, as used in Guiding Principle 19, is the *micro* process of taking the findings about a particular potential impact, identifying who in the enterprise needs to be involved in addressing it and securing effective action. It is repeated as each new impact is identified and will often be driven from the department with responsibility for human rights. If the embedding process has been successful, the potential for a successful integration of findings and timely and sustainable responses to them is greater, and human rights risks are reduced.

Q 44. What processes will be most appropriate for enabling integration?

This will depend on the size of the enterprise and the regularity or predictability of the human rights issues that arise, among other factors. In a small enterprise where communication between personnel is relatively easy and day-to-day interaction is frequent, integration may occur naturally. In enterprises that lack such ease of interaction due to their size or the dispersion of their staff, it will likely require a more systematized approach. A systematized approach is also likely to be most effective if an enterprise faces an ongoing high probability of a particular human rights impact. This may involve structured collaboration across departments, clear internal reporting requirements, regular interactions with external experts, collective action with others in industry or Government or similar. By developing up front a shared understanding of the key human rights risks identified and of how to prevent or mitigate their materialization, the enterprise will be best positioned to respond to specific cases as they arise.

Q 45. How does integration relate to business relationships?

If an enterprise’s own activities may contribute to a human rights impact, integrating that finding across those departments that generate the activity is essential to be able to address that risk. Equally, those individuals or departments that determine the terms of the enterprise’s relationships with business partners, suppliers and others are essential to the integration process. The provisions of

contracts or other formal agreements can play an important role in requiring or creating incentives for those other parties to respect human rights. Moreover, if these provisions have been put in place, the ability of the enterprise to leverage appropriate behaviour by that other party is increased.

Indeed, if a new activity or project will be governed by a negotiated contract with external parties, early communication between the staff that draw up the contract, those departments that will be involved in its execution and those that have oversight of human rights issues, can help to prevent problems later on. If a contract locks in terms that increase human rights risks or constrain the enterprise's ability to address them, the enterprise places in jeopardy its own capacity to meet its responsibility to respect human rights.

That said, concluding terms of contract that require or incentivize respect for human rights when, in fact, there is no reasonable evidence that the other party is both willing and able to meet the requirements renders this less meaningful both as a preventive mechanism and in terms of leverage, and leaves the enterprise exposed to human rights risks. (See box 4 for more on Principles for Responsible Contracts with regard to State-investor contracts.)

Q 46. What kinds of action need to be considered in response to human rights risks that are identified?

As the commentary to Guiding Principle 19 explains, “where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact”. Where it contributes or may contribute to such an impact, it should similarly take action to cease or prevent the contribution, and also use its leverage to mitigate any remaining impact (by other parties involved) to the greatest extent possible. In this context, “leverage” means the ability to effect change in the wrongful practices of the party that is causing or contributing to the impact (see box 6). In both these cases, additional action will be required to enable remediation, which is addressed under Guiding Principle 22.

The more complex situation is where an enterprise identifies a risk of adverse human rights impact linked to its operations, products or services and caused by a party with which it has a business relationship. In this situation, the enterprise has the least direct control or influence over whether that impact occurs.

BOX 6

“Leverage” over an entity (business, governmental or non-governmental) in this context may reflect one or more factors, such as:

- (a) Whether there is a degree of direct control by the enterprise over the entity;
- (b) The terms of contract between the enterprise and the entity;
- (c) The proportion of business the enterprise represents for the entity;
- (d) The ability of the enterprise to incentivize the entity to improve human rights performance in terms of future business, reputational advantage, capacity-building assistance, etc.;
- (e) The benefits of working with the enterprise to the entity’s reputation and the harm to its reputation if that relationship is withdrawn;
- (f) The ability of the enterprise to incentivize other enterprises or organizations to improve their own human rights performance, including through business associations and multi-stakeholder initiatives;
- (g) The ability of the enterprise to engage local or central government in requiring improved human rights performance by the entity through the implementation of regulations, monitoring, sanctions, etc.

It arises, for example, if a supplier acts contrary to the terms of its contract and uses child or bonded labour to manufacture a product for the enterprise, without any intended or unintended pressure from the enterprise to do so; or if an agribusiness enterprise gains a concession from a Government to develop land, and the Government then contracts another company to clear that land of individuals who have traditionally used it, without due consultation or compensation, and contrary to the clear understanding that no such action would be necessary. As in these examples, it is often the occurrence of an *actual* abuse that highlights the risk of its continuation or recurrence.

The commentary to Guiding Principle 19 sets out the issues that need to be considered in responding appropriately to this situation. These can be represented, in general terms, in the following decision matrix:

	Have leverage	Lack leverage
Crucial business relationship	<p>A.</p> <ul style="list-style-type: none"> ➤ Mitigate the risk that the abuse continues/recurs ➤ If unsuccessful 	<p>B.</p> <ul style="list-style-type: none"> ➤ Seek to increase leverage ➤ If successful, seek to mitigate risk that the abuse continues/recurs ➤ If unsuccessful, consider ending the relationship;^{**} or demonstrate efforts made to mitigate abuse, recognizing possible consequences of remaining
Non-crucial business relationship	<p>C.</p> <ul style="list-style-type: none"> ➤ Try to mitigate the risk that the abuse continues/recurs ➤ If unsuccessful, take steps to end the relationship[*] 	<p>D.</p> <ul style="list-style-type: none"> ➤ Assess reasonable options for increasing leverage to mitigate the risk that the abuse continues/recurs ➤ If impossible or unsuccessful, consider ending the relationship[*]

* Decisions on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so.

** If the relationship is deemed crucial, the severity of the impact should also be considered when assessing the appropriate course of action.

For the purposes of this model, a relationship could be deemed crucial if it provides a product or service that is essential to the enterprise's business and for which no reasonable alternative source exists. In this situation, ending the relationship raises particular challenges. The severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether to end the relationship. In any case, as the commentary states, "for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact

and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection”.

The above applies to existing business relationships. An enterprise may also be considering entering into a *new* relationship with a third party which it identifies has been involved in human rights abuses in the past. In this case, the enterprise should first assess whether it is likely to be able to use its relationship to mitigate the occurrence of such abuse in connection with its own operations, products or services and try to ensure—through the terms of contract or other means—that it has the leverage to do so. If it assesses that this is possible, then the risks of entering the relationship may be deemed acceptable, provided the enterprise then pursues action to mitigate them. If it assesses that it will not be able to mitigate the risk of human rights abuses by the other party or that the risks to human rights are simply too high, it will be ill-advised to enter the relationship.

Q 47. How should an enterprise approach complex situations with no obvious or easy solutions?

In some situations it will be relatively straightforward to prevent or mitigate potential human rights abuse that has been identified. In others, it may be more difficult. If complex challenges arise, they will often necessitate greater participation of senior management in reaching decisions on appropriate action. Decision processes should then draw on all the relevant expertise available within the enterprise. Moreover, in many cases an enterprise will benefit from independent, trusted expert advice from outside in helping it reach decisions that are credible and seen by others as credible, including from a human rights perspective. There may be respected sources of advice within the Government, national human rights institutions, civil society, multi-stakeholder initiatives, etc. If direct engagement with those affected is feasible without exposing them or others to more human rights abuse, this should be pursued.

QUESTIONS TO ASK

What lines of responsibility and accountability exist for addressing our findings of potential human rights impact?

What systematized approaches might help us integrate findings from our assessments across the relevant business units or functions, so that we can take effective action?

Should we have one or more cross-functional groups to liaise on ongoing human rights challenges or cross-functional communication requirements before certain decisions or actions?

Can we build scenarios or decision trees for action across the company so that we are prepared to respond to the most likely or severe potential impact? Do staff need training and guidance on these issues?

How can we best integrate measures to address potential impact at the contract stage of new projects, partnerships or activities?

If we find that human rights impact is linked to our operations, products or services, are we equipped to address the risk of its continuation or recurrence appropriately and swiftly? How will decisions be made? What credible sources can we turn to for advice?

How do we assess our leverage in business relationships, especially those in areas of heightened risk to human rights? How can we maximize that leverage from the start of relationships? What opportunities for exercising or increasing our leverage can we see?

Do we have any “crucial” business relationships? How should we respond if these relationships lead to adverse human rights impact being linked to our operations, products or services? Are we equipped in terms of internal and external advice for this situation?

GUIDING PRINCIPLE 20

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

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

Q 48. Why does this matter?

It is generally recognized that “what gets measured gets managed”. Tracking how an enterprise has responded to both potential and actual adverse human rights impact is essential if its personnel are to be able to account for its success in respecting human rights, whether internally to management or externally to shareholders and wider stakeholders. Guiding Principle 21 looks at the

separate question of how much of the information obtained through tracking the enterprise should communicate externally. Regardless, by maximizing the information it has about its human rights performance, the enterprise enables robust internal accountability and lays the basis for whatever external communication is required or advisable.

Tracking human rights issues and responses will also help it to identify trends and patterns. This provides senior management and others with the “big picture”: it highlights repeated problems that may require more systemic changes to policies or processes, and it brings out best practices that can be disseminated across the enterprise to further reduce risk and improve performance.

Q 49. *How should the effectiveness of responses be tracked?*

There is no single answer to this question. The tracking processes must make sense within the enterprise’s wider systems and culture if they are to contribute to embedding respect for human rights. There may be other tracking systems within the enterprise that offer relevant and effective models—perhaps in the area of health and safety or environmental performance. Processes for tracking responses to human rights impact that are integrated into other tracking systems may bring benefits by “normalizing” attention to human rights. They may also bring risks if they do not allow for the kind of qualitative feedback—including, where possible, feedback from those potentially affected—that is necessary to address impact on human rights.

If there are human rights issues that result from environmental impacts—for example, related to water and health—there may be established and quite precise international as well as national standards that offer ready metrics. This does not necessarily mean that those who believe they are being harmed trust those standards or trust the enterprise (or any third party paid by the enterprise) to be honest in the measurements it provides. In situations such as these, the enterprise should consider the scope for agreeing with affected stakeholders on an individual or organization that all concerned will trust to provide accurate assessments. Alternatively, joint fact-finding by company and community representatives may be possible. This will often require either that affected stakeholders are able freely to identify an expert to represent them in that process, or that one or more of the affected stakeholders are themselves trained so they have the necessary expertise to participate in the joint process.

Q 50. *How far should the tracking system go?*

A system for tracking an enterprise's responses to human rights impact may simply review how it has responded to the potential impact identified, and whether—or to what extent—these responses prevented the impact. But wherever a significant human rights impact has occurred, the enterprise is well advised also to undertake a root cause analysis or equivalent process to identify *how* and *why* it occurred. This kind of process can be important if the enterprise is to prevent or mitigate its continuation or recurrence. A root cause analysis can help pinpoint what actions by which parts of the enterprise, or by which other parties related to the enterprise, played a role in generating the impact, and how. If the evidence is sufficiently clear, linking this kind of analysis to staff incentives and disincentives—whether financial compensation, promotion or other rewards—can play an important role in helping to embed respect for human rights into the practices of the enterprise.

Q 51. *What indicators should an enterprise use?*

When identifying appropriate indicators, much will depend on: the combination of human rights issues that the enterprise is typically having to address; whether there are already well-established indicators for those issues; what data can reasonably be obtained by the enterprise; how easy it is to solicit direct feedback from affected stakeholders, and so forth. In labour rights, for example, audits and indicators are relatively well established. In other areas such as health and safety and environmental impact, technical standards also exist, including at the international level, though there may be differing views on which standards to use. With regard to community consultation and community resettlement, there is also increasing guidance from international organizations and other credible bodies on how to assess performance.

These types of guidance can help an enterprise to craft appropriate indicators to track the effectiveness of its response to adverse human rights impact. For large enterprises or those with significant human rights risks, it will be important to include indicators that track how they are addressing the different impact they may have on women and men and on individuals from any particularly vulnerable groups.

Some indicators will be quantitative and others qualitative. There can be advantages to quantitative indicators, given the precision they offer and the ease with which they can be integrated into, or correlated with, indicators used in other areas of the business. However, since respect for human rights is about the dignity of people, qualitative indicators—that include, as far as possible, the perspectives of affected stakeholder groups—will always be important. In some situations, qualitative indicators will be important for the accurate interpretation of quantitative ones: for instance, assessing whether a reduction in reports of worker safety breaches reflects a reduction in such incidents, a lack of faith in the reporting system or intimidation that prevents reporting.

Q 52. What is the appropriate role of feedback from internal and external sources?

The purpose of engaging with relevant “internal and external sources, including affected stakeholders” in the tracking process is to draw as accurate a picture as possible of how well an enterprise is responding to human rights impact. It helps reduce the risk of bias that may arise when those being measured do the measuring.

Various sources may be useful. It may be that individuals within the enterprise have seen or heard things that provide evidence of how well the enterprise is doing, and it can be valuable to provide a channel for them to raise their voices (of course, without fear of retaliation if that feedback is negative). Expert observers (local authorities, civil society, etc.) and directly affected stakeholders outside the enterprise may also have valuable insights. For a small enterprise with limited impact, a simple means for people to give feedback may be sufficient, such as a known and accessible e-mail address or phone number. For enterprises with more significant human rights risks, a more proactive approach to solicit feedback will likely be appropriate.

An operational-level grievance mechanism can also play an important role in this regard. Such a mechanism can provide a channel for feedback on whether human rights impact is being addressed effectively from the perspective of the affected stakeholders. Equivalent mechanisms for employees can be similarly important with regard to impact on their own labour or other human rights and in enabling them to speak up when they see problems with the enterprise’s response to impact on the human rights of individuals outside the enterprise.

To maximize their effectiveness, such mechanisms should meet the minimum criteria set out in Guiding Principle 31 and discussed in section C below.

Q 53. *How can the credibility of a tracking system be demonstrated?*

Tracking systems must be credible and robust if they are to help an enterprise know and show that it is respecting human rights. The clearer the indicators and the more comprehensive the processes for gathering information about the enterprise's effectiveness, the better placed it will be to respond to criticism, should it either need or choose to do so. If the enterprise has sought the input from respected, independent external experts or stakeholders, this can also help reinforce the credibility of the resulting information.

QUESTIONS TO ASK

Do we already have tracking systems into which we could effectively integrate some or all aspects of tracking our human rights impact and responses? If so, are they fit for this additional purpose?

What measures should we use?

- Are there established and widely accepted indicators we can draw on?
- Are there quantitative metrics that can be applied?
- What qualitative measures do we need to ensure we are interpreting quantitative data correctly and to give us a full picture?
- What indicators can we reasonably include to help us see how our responses to impact relate to women and men separately, and to vulnerable groups?

What means do we have for gaining feedback from directly affected stakeholder groups or their legitimate representatives? Can our wider stakeholder engagement processes or our grievance mechanism(s) contribute to this process?

In what kinds of situations should we conduct deeper root cause analyses of impact and our response to it as part of tracking? How can we ensure that lessons are learned across the enterprise?

GUIDING PRINCIPLE 21

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

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

Q 54. Why does this matter?

The concept of accountability is familiar to enterprises. They typically recognize the importance of internal accountability for achieving business objectives and—in the case of publicly traded companies—of accounting for their performance to shareholders. When it comes to how enterprises address their actual and potential impact on human rights, wider issues of public interest have additional implications for accountability.

Businesses therefore need to be able to show that they are meeting their responsibility to respect human rights in practice. That means, at a minimum, having internal information-gathering and accountability systems and being able to account externally for their actions if faced with allegations of human rights abuse.

Q 55. How much is an enterprise expected to communicate?

The focus of Guiding Principle 21 is on *being able to* communicate how an enterprise addresses its adverse human rights impact. This means having the information available so that it is in a position to communicate. The timing, recipients and means of that communication are then the subject of separate decisions.

This Principle does not propose that an enterprise should reveal publicly all the issues identified in its ongoing assessments of human rights impact or the steps it takes to mitigate every risk identified. It is first and foremost about being able to communicate its general approaches to addressing its human rights risks, and may include, in some instances, communication on its specific responses to a particular human rights impact.

If the enterprise has significant human rights risks, the higher public interest dictates a need for more formal and regular public reporting to account for the systems the enterprise has in place to mitigate those risks and to address any harm that may occur.

Q 56. What should an enterprise be able to communicate?

The prior steps in the human rights due diligence process enable an enterprise to identify its actual and potential human rights impact, to act on the findings and to track how effectively it is responding. These processes and their results provide the body of information an enterprise needs to have available to it in order to communicate as and when appropriate.

Some communications may focus on the enterprise's general approaches to addressing human rights risks, in particular potential impact on those human rights that are most salient to its operations. For instance, a retail company should be able to communicate how it addresses potential or actual human rights abuses in its supply chain. Enterprises with high water use should be able to communicate how they address the related risks to human rights. Pharmaceutical companies should be able to communicate how they ensure that drug trials are conducted safely and with adequate information and consent.

Some communications may be specific to an individual impact and how it is or will be addressed. For instance, a mine with a spill from a tailings pond should be able to communicate how it has addressed, or is addressing, the potential or actual human rights impact of that incident. If security forces that guard an oil and gas company's installations attack local villagers, the enterprise should be able to communicate how it is addressing the resulting human rights abuses and the risk of their recurrence.

Q 57. What form(s) should communications take?

The form of the communication should fit the purpose.

If the purpose is to communicate to potentially affected stakeholders how the enterprise is addressing a human rights risk it has identified, then the communication could be limited to that group and should take account of literacy, language and cultural communication barriers (for instance whether verbal communications are considered more respectful than written communications). Meetings with the group or its legitimate representatives may be the most appropriate and successful.

If the purpose is to account also to shareholders and other interested parties, including civil society, for how the enterprise is addressing a specific risk or risks in general, then documents and presentations at an annual general meeting, web updates, messages to electronic mailing lists of those who self-identify as interested parties or similar means of communication might be appropriate.

The question then arises as to when an enterprise should produce formal public reports on how it is addressing human rights. As Guiding Principle 21 makes clear, enterprises whose operations or operating contexts pose a risk of severe human rights impact should report formally on how they address it. A wider public interest is engaged wherever the enterprise is at risk of involvement in human rights impact that is extensive or irremediable (see Guiding Principle 14). Public reporting is therefore appropriate.

There may even be reasons for some enterprises with lesser human rights risk profiles to include information on their human rights performance in regular, formal public reports. For instance, the internal process of writing a report can help to embed within an enterprise an understanding of human rights issues and of the importance that respecting human rights holds for the business itself. The additional transparency that reporting of this kind provides can help protect the enterprise's reputation and build wider trust in its efforts to respect human rights. These strengthened stakeholder relationships may be helpful if or when the enterprise needs to deal with unforeseen challenges.

Formal reports may be self-standing reports on the enterprise's human rights performance alone, part of a wider report on non-financial performance covering social and environmental issues or part of an integrated report on both financial and non-financial performance. If the enterprise is able to integrate reporting on human rights into its financial reports, with appropriate metrics, this can start to demonstrate that respecting rights is understood as truly integral to the business and relevant to its bottom line. Reports may be in hard copy, in electronic form or both (and these choices should reflect an awareness of the report's accessibility to its intended readers). They may be produced periodically (annually or more frequently) or when a particular impact arises or both.

Q 58. When is external communication required?

If an enterprise identifies an actual or potential impact on human rights which the affected individuals or groups need to know about for their safety and welfare, this should be communicated to them as directly and quickly as possible. The enterprise should also inform them how it is seeking to address the impact. It should not await a request for such information before taking these steps.

When an enterprise is challenged by external parties on how it is addressing its alleged human rights impact, it should consider whether and what it can reasonably communicate to address that concern. If the parties raising the challenge are themselves claiming to be directly affected or are the legitimate representatives of such individuals or groups, the case for direct communication is most compelling. A lack of communication carries risk for the enterprise and will often be taken to imply that the allegation is correct or that the enterprise does not have the processes in place to know and show that it is not involved in the alleged impact.

There may be times when an enterprise concludes that an external party raising a concern lacks legitimacy and that it is not necessary or appropriate to respond. In the absence of any legal requirements, that is a judgement for the enterprise to make. Even if it chooses not to communicate in response to an allegation, it should take that decision based on internal knowledge of the situation and clear criteria.

Q 59. What makes the external communication of information “sufficient”?

All communications, including formal reporting, should be accurate and honest. If the information being communicated relates to a specific impact on stakeholders, it should convey all the facts necessary for those affected to make informed decisions regarding their own interests.

Communications that are obviously an exercise in obfuscation or self-promotion will not reap the benefits of transparency, and risk leading to criticism and distrust of the enterprise. Conversely, enterprises that have pushed the boundaries of transparency to discuss the human rights challenges they face and the kind of human rights impact they are trying to address are generally seen as more credible in their claims of respecting human rights. This in no way precludes the possibility of refuting claims or allegations of human rights impact that the enterprise has clear grounds to reject—wherever possible explaining those grounds.

Q 60. What is meant by the risks communications may pose to affected stakeholders, personnel or the legitimate requirements of commercial confidentiality?

Some kinds of information about how human rights impact is being addressed could pose risks to affected stakeholders or personnel. This may be because they would reveal, by implication, the identity either of a complainant or of individuals responsible for actions that are judged harmful, making them the potential targets of retaliation. Publicizing information about discussions with a Government, police or security forces aimed at halting or preventing harmful action against individuals might jeopardize that process. However, care should be taken that blanket assumptions about such risks do not become an easy justification to avoid sharing information that can legitimately be made public.

The legitimate requirements of commercial confidentiality would typically extend to information crucial to negotiations regarding a significant business transaction, for the duration of those negotiations. They would also include information legally protected against disclosure to third parties.

If there are no risks to these groups or requirements, other considerations on whether, when and how to communicate will be the subject of decisions based on the kinds of factors previously discussed.

Q 61. How does communication relate to general stakeholder engagement?

As noted, it can be particularly important for an enterprise to engage directly with potentially affected stakeholders about how it addresses its human rights impact. This might be to explain how it is addressing potential impact in general terms or a particular impact that has occurred.

For any enterprise with a significant risk of human rights impact, this is just one of the ways in which it should engage with potentially affected stakeholders. Stakeholder engagement should also feature as a part of the enterprise's efforts to assess its impact and to gain feedback on how effectively it has responded to impact. More generally, it is an important means of understanding the concerns and interests of affected stakeholders and of building effective relationships with these crucial groups on an ongoing basis.

QUESTIONS TO ASK

Do we have the necessary internal communications and reporting systems to gather all relevant information on how we address our adverse human rights impact? If not, what additional systems do we need?

What different groups can we envisage we may need to communicate to and about what types of issues?

What means of communication do we need for those different groups, taking account of how they can access information, and what will be the most effective?

Should those communications be driven by a set timetable, be in response to particular events or both?

What processes do we have in place to make reasoned and defensible judgements on when we should communicate publicly?

If our operations or operational contexts pose significant risk to human rights, how do we provide formal public reporting on how we address that risk?

If we are not in a context of heightened human rights risk and are not required to report publicly on our human rights performance, would there nevertheless be other benefits to formal public reporting?

How will we ensure that our communications do not pose a risk to individuals inside or outside the enterprise?

How might we solicit feedback on our public communication to test how it is viewed and see whether there are ways to improve it?

C. REMEDIATION

GUIDING PRINCIPLE 22

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

Q 62. Why does this matter?

An enterprise cannot, by definition, meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation.

Having systems in place to enable the remediation of such impact in no way implies that the enterprise does not intend to respect human rights. On the contrary, it demonstrates a recognition that impact may occur despite its best efforts, and intent to ensure that respect for human rights is restored as swiftly and effectively as possible should this happen.

Q 63. Does this apply even if the allegations are unfounded?

No. This Guiding Principle is limited to situations where the enterprise *itself* recognizes that it has caused or contributed to an adverse human rights impact. It is in these situations that the enterprise is necessarily expected to enable the remediation of that impact. It may find that it has caused or contributed to adverse impact through its own impact assessments, grievance mechanism or other internal processes, or the impact may be brought to its attention by other sources and confirmed by its own investigations.

Q 64. When should an enterprise provide directly for remediation?

If an enterprise recognizes it has caused or contributed to adverse human rights impact, it will in many cases be well positioned to play a direct role in providing timely and effective remedy. Remedies can take a variety of forms and it is important to understand what those affected would view as effective remedy, in addition to the enterprise's own view. This may be an apology, provisions to ensure the harm cannot recur, compensation (financial or other) for the harm, cessation of a particular activity or relationship, or some other form of remedy agreed by the parties.

In some circumstances, it may be most appropriate for remediation to be provided by an entity other than the enterprise. For instance, if a court process or some other State-based proceeding is under way, it may be necessary or appropriate for the enterprise to defer to that process rather than pursuing direct remediation. As the commentary to Guiding Principle 22 makes clear, such deferral is likely to be necessary if crimes are alleged. Wherever possible, those affected should have the opportunity to make an informed decision about how they wish to proceed, based on an understanding of the alternatives.

If the enterprise has contributed to the impact but another entity (for instance, a contractor, supplier or the armed forces) is the primary cause and is either providing remediation or being held to account through a legitimate State-based mechanism, it will typically be appropriate to defer to that process whenever a parallel remediation process would undermine it. Such State-based mechanisms could be an ombudsman's office, a labour office, a National Contact Point or national human rights institution. In these and similar cases, the enterprise should cooperate in the remediation process.

Q 65. What kind of remediation processes should an enterprise provide for?

The focus of Guiding Principle 22 is on achieving remediation. That said, the means of providing for remediation can influence the effectiveness of that outcome. For instance, if an enterprise relies entirely on ad hoc processes to remedy any impact it has caused or contributed to, there is unlikely to be a shared understanding within the enterprise as to what kind of response is

appropriate. This creates a risk of internal dispute over how to proceed and of delays in remediation.

Some enterprises may have formalized processes for specific adverse impact that is a particular risk for their operations—for instance, if a pollutant escapes into a waterway or if an employee is injured. The risk of such an issue-specific approach is that there is no clear process available when a less foreseeable impact occurs.

It is therefore generally preferable to have in place agreed processes for the remediation of adverse human rights impact arising in any area of operations, even if this requires more than one type of process (for instance, for direct employees and for external stakeholders).

In many instances, the most effective and efficient way to provide for remediation processes is through an operational-level grievance mechanism. A grievance *mechanism* is not just an internal administrative procedure for handling impact or grievances. Whereas an internal procedure is typically passive, i.e., waiting for problems to arise and then responding, a grievance mechanism is active: it aims to facilitate the identification of grievances and address them as early as possible. It does so by ensuring it is known to, and trusted by, those stakeholders for whom it is intended. The key processes provided by the mechanism are public, as are the general timelines it provides for handling grievances and the ways in which individuals can register their concerns. There is transparency of communication with complainants and accountability to them for the provision of a fair process. A grievance mechanism of course also requires some internal procedures, but these are just part of the larger process it provides.

Grievance mechanisms and criteria for their effectiveness are discussed further under Guiding Principles 29 and 31.

Q 66. What kinds of “legitimate processes” could provide remediation other than those of the enterprise itself?

There may be one or more kinds of State-based mechanisms that are appropriate for providing remediation if the enterprise cannot or should not do so itself. These obviously include the courts and may also include State ombudsman or complaints offices (sometimes specific to an industry), a labour standards office, a National Contact Point (in States that have signed up to

the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development), a national human rights institution, or any other State-administered or statutory body empowered to take on this kind of role. They may also include local, traditional mechanisms used by indigenous or other communities. In some instances, a mechanism administered by a multi-stakeholder initiative might have a role, for example, if complaints involve a supplier or contractor to more than one of its corporate members.

Not all these mechanisms are present or effective in all States. An enterprise will need to seek expert advice on the extent to which such mechanisms in their local operating environment are likely to be able to perform this role in practice, free of corruption or manipulation, and with sufficient credibility in the eyes of complainants for outcomes to be sustainable.

Q 67. What if an enterprise agrees that it has caused or contributed to an impact but does not agree with those affected on the appropriate remedy?

If the enterprise and those affected cannot reach agreement on the appropriate remedy, it may prove necessary either to involve a neutral third party as a mediator or to turn to adjudication.

Any third-party mediator should be freely accepted by all involved. The mediator's role is to assist the parties in the search for an agreed solution and no party to mediation can be forced to accept a particular outcome. If they do agree on an outcome, the parties are free to agree also that it will be binding on them.

Adjudication does not require the parties' agreement to the outcome and is often binding. It could take place through the courts, a governmental or statutory body such as an ombudsman or a national human rights institution, or another mechanism that has jurisdiction or is agreed upon by the enterprise and those affected.

Q 68. What if an enterprise does not accept that it has caused or contributed to a human rights impact?

If an enterprise contests an allegation that it has caused or contributed to an adverse impact, it cannot be expected to provide for remediation itself unless

and until it is obliged to do so (for instance, by a court). Nevertheless, if credible opportunities are available for seeking an agreed resolution to the dispute, whether through negotiation or mediation, an enterprise is often well advised to cooperate in these efforts.

QUESTIONS TO ASK

What processes do we already have in place for remedying any adverse impact we cause or to which we contribute?

How effective have those processes proven to be in the past? Do they involve all relevant parts of the enterprise? Can they be strengthened to make them more effective?

Do they cover all the areas where adverse impact may arise? If not, what gaps do we need to cover with existing or additional processes?

Can we systematize these processes within one or more operational-level grievance mechanisms?

What judicial and non-judicial remedial processes exist in the State(s) where we operate? How effective are they and to what extent can or should we typically defer to them? Who can provide us with expert advice in this regard?

Have there been situations where we could have benefited from a neutral third party to help us agree with those affected on solutions and remedies? Can we envisage such situations in the future? If so, where would we find expert mediators who could assist us in this way and who would be acceptable to all involved?

GUIDING PRINCIPLE 29

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

Q 69. Why does this matter?

As noted under Guiding Principle 22, an enterprise cannot meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation. One of the most systematic ways for an enterprise to provide for the remediation of such impact is through an operational-level grievance mechanism.

Unlike many State-based mechanisms (courts, ombudsman's offices and so forth), an operational-level grievance mechanism does not have to wait until an issue amounts to an alleged human rights abuse or a breach of other standards before it can address it. It can receive and address concerns well before they reach that level and before an individual's or a community's sense of grievance has escalated.

Effective grievance mechanisms also help reinforce aspects of the human rights due diligence process. They can help in identifying adverse human rights impact in a timely manner and in tracking the effectiveness of responses to impact raised through the mechanism. They can also help build positive relationships with stakeholders by demonstrating that the enterprise takes their concerns and the impact on their human rights seriously.

Q 70. What is an operational-level grievance mechanism?

An operational-level grievance mechanism is a formalized means through which individuals or groups can raise concerns about the impact an enterprise has on them—including, but not exclusively, on their human rights—and can seek remedy. As explained in the commentary to Guiding Principle 29, operational-level grievance mechanisms are:

“... accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.”

In sum, their primary purpose is to provide an early point of recourse to identify and address the concerns of directly affected stakeholders before they escalate or lead to otherwise preventable harm.

These mechanisms are distinct from whistle-blower systems, which enable employees to raise concerns about breaches of company codes and ethics, which may or may not harm those individuals, but are of concern to the enterprise as a whole. Operational-level grievance mechanisms are specifically a channel for individuals – inside or outside the enterprise—to raise concern about impact on themselves and they do not require the individual to show a breach of a company code.

Q 71. Does it have to be called a “grievance mechanism”?

“Grievance mechanism” is used in the Guiding Principles and their commentary as a term of art to cover a whole range of mechanisms that address complaints and disputes involving enterprises and their stakeholders. It is possible that the term may have unhelpful connotations in some cultures or contexts, and it is certainly not necessary to label every grievance mechanism with this name. However, it is risky to call a grievance mechanism by a name that its potential users may find inappropriate, for instance one that diminishes or glosses over its real purpose. Doing so may make it more palatable for the enterprise but leave those with grievances feeling belittled and disrespected.

Q 72. To whom should an operational-level grievance mechanism be available?

Most operational-level grievance mechanisms are accessible only to individuals or groups that are directly affected by an enterprise’s operations, or to their legitimate representatives, rather than being open to a wider array of groups that may have concerns or criticisms about its operations. This should not exclude other means of engaging with the wider array of voices and it may be in the interest of the enterprise to do so in at least some instances.

As discussed in the context of Guiding Principle 22, it is fairly usual to have separate grievance mechanisms for direct employees and for external affected stakeholders, though it is not always necessary to separate the two. It may also be important to have tailored grievance mechanisms for particular situations, such as community resettlement, or for particular groups, such as indigenous

peoples. However, the more streamlined the mechanisms, the more easily their effectiveness can be monitored, and the more successful they can be at identifying generalized patterns and trends in how the enterprise is addressing its human rights impact.

Q 73. *What issues should an operational-level grievance mechanism be able to address?*

To be fully effective, a grievance mechanism should not be limited to addressing complaints that amount to alleged breaches of human rights or other specific standards. Such limitations will exclude a host of concerns that may, if neglected, harm human rights or lead to protests or violent action, which in turn may increase the risk of human rights abuses. For instance, communities that find that an enterprise persistently ignores their concerns about noise, dust or work opportunities may feel driven to take action to disrupt its operations as the only way to get its attention, perhaps leading to physical confrontation and even risk to life. One of the comparative advantages of an operational-level grievance mechanism over formal third-party mechanisms is precisely its ability to identify and address problems early, before they escalate.

It is reasonable for a mechanism to exclude clearly vexatious complaints, but great care should be taken before concluding that a complaint falls into this relatively rare category. A complaint that appears vexatious may mask other, genuine concerns with potential human rights implications or wider risks to the enterprise. The default should be to take every complaint seriously in the first instance.

Q 74. *Who should oversee the mechanism?*

A grievance mechanism will rarely be effective without adequate senior-level oversight and accountability within the enterprise. In a small enterprise, this may mean a simple reporting line to the head of the enterprise from whoever handles incoming complaints. In a larger enterprise, it will typically entail more formal internal control and oversight systems. The allocation of oversight roles should avoid any conflicts of interest, for instance, between ensuring the effectiveness of the mechanism and defending the actions or decisions of certain parts of the business.

If trust between the enterprise and affected stakeholders is low or human rights risks significant, it can be highly beneficial to provide for joint oversight of the mechanism by representatives of both the enterprise and the affected stakeholder groups. This can help ensure that the mechanism is trusted by its intended user groups, and that its accessibility and processes are best tailored to their needs. If joint oversight is not deemed necessary or appropriate, there should at a minimum be input to its design or evaluation from the affected stakeholders, as provided under Guiding Principle 31.

Q 75. How does an operational-level grievance mechanism relate to an enterprise's wider operations?

The staff or departments in an enterprise that are responsible for human rights and social issues will need to play a key, coordinating role in any grievance mechanism. But the mechanism will fail if it is seen as solely their responsibility. Resolving and remedying impact will often necessitate the participation of others across the enterprise. The role of senior management becomes particularly significant in ensuring that this kind of cross-functional response to grievances is feasible and prioritized throughout the enterprise, for example through appropriate incentives to relevant staff.

It may be necessary and appropriate for those personnel or departments within the enterprise whose decisions or actions are relevant to an alleged human rights impact to take a role in initial internal investigations. Where that would be inappropriate—for instance, owing to a potential conflict of interest or risk to individuals—they will still have a role in providing information to those conducting the investigation. They may help to craft possible solutions for remediation—again, where this is appropriate. And they will be essential in ensuring the enterprise learns lessons so it can prevent or mitigate any repetition.

Q 76. How does the mechanism relate to wider stakeholder engagement?

The Guiding Principles and this Interpretative Guide repeatedly highlight the role of stakeholder engagement in human rights due diligence for any enterprise with significant human rights risks. An effective grievance mechanism is not a substitute for this broad stakeholder engagement. Rather, it is an important

complement. Having a grievance mechanism, however good, without wider stakeholder engagement processes, risks signalling to affected stakeholders that the enterprise wants to hear from them only when they have real problems.

That said, the Guiding Principles also recognize that small or medium-sized enterprises may not need to engage directly with affected stakeholders if they have limited human rights risks and engagement is a genuine challenge for geographical, financial or other reasons. Such enterprises will look to other means of gathering information and perspectives about their potential human rights impact, as discussed under Guiding Principle 18. For these enterprises, having a simple but effective grievance mechanism can be one way of ensuring that they are still able to identify problems raised directly by those who may be affected.

Q 77. When might an enterprise “participate in” a grievance mechanism rather than establish one itself?

It will typically be appropriate for a large enterprise or one with significant human rights risks to have its own grievance mechanism. Small and medium-sized enterprises with limited human rights risks can also develop grievance mechanisms that are simple in form, yet able to meet the effectiveness criteria set out in Guiding Principle 31. However, enterprises may also consider participating in a grievance mechanism provided by an external organization, if it provides similar opportunities for the early identification and remedy of adverse impact. Examples include a hotline and remediation provided by an external organization—Government, business, NGO or multi-stakeholder—or a traditional mechanism run by the local communities or administration as part of their local practices. Such mechanisms should be reviewed to see whether they meet the effectiveness criteria and how any gaps could be addressed.

Alternatively, an enterprise may establish its own mechanism but use external and shared resources to help reduce its costs and/or increase its capacity and effectiveness. Examples include enabling an NGO trusted by stakeholders to act as an access point and to engage with the enterprise in finding solutions to legitimate complaints. Such an NGO might take on this role for more than one enterprise, whether with independent funding or with pooled funding from the enterprises, provided this does not damage its credibility. Legitimate trade unions should play this kind of role with regard, at a minimum, to the workers

they represent. A number of enterprises might also pool small financial contributions to support a local institution in providing expert advice to complainants or to enable the use of mediation should it be needed.

QUESTIONS TO ASK

Do we already have a mechanism that deals, at least in part, with grievances?

If so, is it available to all potentially affected stakeholders or does its reach need to be broadened? Is it able to address any kind of impact or does it need to be extended to do so?

Is there senior-level oversight of the grievance mechanism and accountability for its performance within the enterprise?

Is there an opportunity for or advantage in having joint oversight of the mechanism with representatives of stakeholder groups? If not, how can we at least solicit feedback from affected stakeholder groups on its performance and possible improvements?

Does the mechanism provide for all relevant business units or functions in the enterprise to be involved in investigating and resolving grievances, while avoiding conflicts of interest or risk to individuals?

If resource constraints make it difficult to run a self-standing grievance mechanism, can we benefit from shared resources to make it feasible or, alternatively, participate in an effective external mechanism?

GUIDING PRINCIPLE 31

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Operational-level mechanisms should also be:

- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Q 78. Why does this matter?

Both State-based and operational-level grievance mechanisms need to be effective in order to provide remedy to those affected by corporate-related human rights abuse. A truly effective operational-level grievance mechanism can generate the kinds of benefits discussed under Guiding Principle 29, including the early identification of problems, early and agreed solutions, increased trust, and the avoidance of public protest, litigation or other forms of opposition.

A poorly designed or administered grievance mechanism may distort assessments of how well human rights risks are being managed. It may raise expectations that concerns will be addressed, without providing the processes to deliver on that expectation. In the worst instances, an ineffective grievance mechanism may compound stakeholders' sense of grievance.

It is therefore important that operational-level grievance mechanisms should meet certain criteria that help ensure their effectiveness.

Q 79. Why these criteria?

The criteria in this Guiding Principle were developed through a process of research, consultation and road-testing. There are other ways in which some of them could be articulated or in which the issues they cover could be labelled or clustered. But the core elements they reflect provide a set of benchmarks for ensuring that a mechanism can achieve the benefits and avoid the pitfalls identified in response to question 78. These criteria should be taken as a whole as they are inter-related—excluding one will weaken the ability to meet others and make the mechanism as a whole less effective. The individual criteria are explained further in the commentary to the Guiding Principles.

As noted above, a grievance mechanism's effectiveness requires all relevant departments or functions, as well as senior management, to support it in principle and in practice. It will also be beneficial to include relevant personnel or departments in the development of a grievance mechanism so that they understand its aims and the standards it needs to meet, and support the model developed. It is particularly important for personnel to feel that hearing about problems is not a threat, but constructive and necessary to enable the enterprise to learn and succeed over time.

Q 80. How should a grievance mechanism's effectiveness be assessed?

It will be important for the enterprise to develop appropriate measurements that can help it assess the mechanism's effectiveness in practice. There can be advantages to getting stakeholders' input on what these measurements should include, so as to ensure that their perspective on what "success" looks like is adequately reflected.

An enterprise should be wary of easy assumptions about what certain numerical indicators might mean. A decrease in the number of complaints over time may indicate that the enterprise is learning from past complaints and preventing their recurrence; it may equally indicate that stakeholders are losing trust in the grievance mechanism and perhaps looking at other ways to vent their grievances. Conversely, an increase in complaints—at least initially or after a major new development—may indicate either that the mechanism is trusted and working, or that problems are on the rise. Qualitative indicators—

including feedback from those for whom the mechanism is intended (and not just those who have actually used it)—are important in helping to interpret these kinds of data accurately.

QUESTIONS TO ASK

How does any grievance mechanism we have in place measure up against these criteria?

How can we solicit the views of the intended users of the mechanism on how well it measures up?

Can any gaps we identify be addressed through adjustments to what we have in place or is there merit in redesigning a new process? If the latter, can we involve representatives of the intended user groups (affected stakeholders) in the design?

What long-term measures should we have in place to assess the mechanism's ongoing effectiveness?

How confident are we of how to interpret quantitative data on its performance and how might this be complemented by qualitative measures?

D. ISSUES OF CONTEXT

GUIDING PRINCIPLE 23

In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

Q 81. Why does this matter?

The responsibility to respect human rights applies in all contexts. It is a uniform standard, reflecting its roots in the universal expectation that enterprises should not harm the dignity of people as they go about their business. This provides predictability for both enterprises and their stakeholders. However, the human rights risks related to an enterprise's activities and business relationships will often vary depending on the specific contexts in which it operates. Those contexts may pose particular challenges or dilemmas for enterprises in their efforts to meet the responsibility to respect human rights, for example when local requirements appear to compel a business to act in a manner that is contrary to internationally recognized human rights. Enterprises need to be prepared with a basic "compass" for when they find themselves in such situations, since, by definition, there will be no easy or standard answers.

Q 82. How does legal compliance relate to respect for human rights?

Enterprises recognize that their social responsibilities begin with legal compliance. The responsibility to respect human rights is itself often reflected—at least in part—in laws and regulations. The concept of legal compliance requires enterprises to comply with national laws and regulations protecting human rights even if the capacity of the State to enforce such laws effectively is weak.

However, the responsibility to respect human rights extends beyond compliance with national laws and regulations protecting human rights and entails respect for all internationally recognized human rights. It therefore also applies where there are no national laws and regulations to protect these rights. For the same reason, where national laws and regulations offer a level of human rights protection that falls short of internationally recognized human rights standards, enterprises should operate to the higher standard.

In sum, the responsibility to respect human rights, as a global standard expected of all enterprises in all situations, provides clarity and predictability for enterprises facing differing expectations and demands. It also means that enterprises should not take advantage of operating environments that provide insufficient protection for human rights to lower their own standard of conduct.

Q 83. How should an enterprise deal with conflicting requirements?

In some operating contexts, domestic laws, regulations or customs may require (as against merely allowing for) enterprises to act in ways that are in conflict with their responsibility to respect internationally recognized human rights. Such requirements could for example be in relation to women's rights, labour rights or the right to privacy. This type of situation presents enterprises with a dilemma when having both to comply with all applicable laws and also to meet the responsibility to respect human rights in all contexts.

An enterprise's human rights due diligence process should reveal where it may be faced with this kind of dilemma and what measures could prevent or mitigate the risk. If there is a direct conflict of requirements, the challenge is to find ways of honouring the principles of internationally recognized rights. As with other issues, there is no blueprint for how to respond. However, the more an enterprise has embedded respect for human rights into its values and the more it has prepared its personnel for ethical dilemmas, through training, scenarios, lessons learned, decision trees and similar processes, the more likely it will be able to identify appropriate and timely responses.

Understanding the exact nature, scope and implications of the conflicting requirements is an important first step in identifying ways of addressing the dilemma. It may be that local requirements are more ambiguous than first thought or that the conflict is in some other way overstated. Recognizing this may provide opportunities for mitigating the conflict. It may be possible to seek clarification from the Government or local authorities about the scope of the conflicting requirement and even to challenge it. This may both help reduce risks to people and to the company, as well as signal to stakeholders the commitment of the enterprise to respect human rights. It may also be possible that others within the industry or country have approaches that mitigate the harm to human rights which can be replicated. For example, some enterprises operating in countries where freedom of association is restricted have established parallel processes to engage with workers.

If an enterprise cannot find immediate or obvious solutions, it will be well advised to engage with relevant expert stakeholders—including, where possible, any groups or individuals whose rights may be affected by the

conflicting requirements. At all times, enterprises need to be aware of any risks that a particular course of action may pose to affected stakeholders and take these into account in their decisions.

It is particularly likely that where enterprises face challenges of this type, their conduct will be under closer scrutiny from stakeholders. Enterprises should be able to account for their efforts to maintain respect for human rights in these situations and it will often be advisable to report on them, provided that doing so does not increase risks to human rights.

In the rare situations where local law or other requirements put an enterprise at risk of being involved in gross abuses of human rights such as international crimes, it should carefully consider whether and how it can continue to operate with integrity in such circumstances, while also being aware of the human rights impact that could result from terminating its activities.

Q 84. Why should the risk of being involved in gross human rights abuses be considered a matter of legal compliance?

If enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable. This is so both because of the severity of the human rights abuses at stake and also because of the growing legal risks to companies as a result of involvement in such abuses.

Enterprises can cause gross human rights abuses through their own activities, for example if they use slave labour or treat workers in a manner that amounts to cruel, inhuman or degrading treatment. They may also contribute to gross human rights abuses that are committed by other parties, for example security forces. Such indirect contribution to gross human rights abuse can give rise to allegations of either legal or non-legal complicity.

The commentary to Guiding Principle 17 states that “as a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of enterprises in such cases. Typically, civil actions can also be based on an enterprise’s alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard

for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.” For example, enterprises have faced charges of legal complicity based on allegations that they provided chemicals to another party that then uses them to commit acts of genocide or that they provided logistical support to Government forces engaged in war crimes.

The recent history of legal action—mostly in the form of civil liability lawsuits—against multinational corporations for involvement in gross human rights abuse reveals an uneven, yet expanding web of potential corporate legal liability. Because of the nature of the human rights risks involved, but also because of the expanding legal boundaries, including territorial boundaries in some instances, enterprises should treat all cases of risk of involvement in gross human rights abuses as a matter of legal compliance, irrespective of the status of the law where the business activity is taking place.⁹

Q 85. *What situations pose a particular risk of business involvement in gross human rights abuses?*

The risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection or where there are entrenched patterns of severe discrimination. Perhaps the greatest risks arise in conflict-affected areas, though they are not limited to such regions. Such contexts should automatically raise red flags within the enterprise and trigger human rights due diligence processes that are finely tuned and sensitive to this higher level of risk. Such heightened human rights due diligence should also be seen as essential if the enterprise has, or is considering entering into, business activities in countries that are under sanctions by the United Nations or regional intergovernmental organizations.

Q 86. *Where can an enterprise seek help in assessing and addressing challenges that arise in difficult contexts?*

When planning or doing business in contexts that pose particular challenges to the ability of an enterprise to respect human rights, such as conflict-affected areas, many enterprises will find it difficult to assess the risks adequately. If that

⁹ The Business and Human Rights Resource Centre maintains a portal with information on lawsuits regarding alleged business involvement in human rights abuses: www.business-humanrights.org.

is the case, they should seek advice from credible external sources, including civil society organizations working in or reporting from the area. Where appropriate, they can also seek advice from Governments, including that of their home State. National human rights institutions can be another valuable source of advice. Working with business partners, industry bodies or multi-stakeholder initiatives can also help enterprises in devising approaches that are more finely tuned to the human rights risks posed by complex circumstances. (See annex II for more examples of external resources.)

QUESTIONS TO ASK

Are we operating in a context where domestic law related to human rights is weak, unenforced or inexistent? Does our due diligence assess these factors and their implications for human rights risks?

Is it clear to all personnel and to those with whom we have business relationships in those contexts that we work to the standard of respect for all internationally recognized human rights? Do they understand what that entails?

Are we operating in a context where there are conflicting requirements between domestic law and internationally recognized human rights?

If so, how certain are we that the law and international standards cannot be reconciled? Is there scope to approach the authorities in the search for a solution, without increasing risks to human rights?

Are there any well-established ways of dealing with this conflict of requirements or any successful examples from other enterprises?

Faced with real dilemmas, who would we turn to for help in identifying the best possible response? Is it possible to include representatives of affected stakeholders in this process?

What processes do we have in place to account for our decisions and actions in such scenarios?

Where local requirements place us at risk of involvement in gross abuses of human rights such as international crimes, through what processes, and with what senior-level participation, will we determine whether we can remain and, if so, on what terms?

Is the potential of involvement in gross human rights abuses handled within our enterprise as would be a legal compliance issue? Who needs to be involved at what stage to ensure that this is the case?

If we or those with whom we have business relationships are active in conflict-affected areas, do these situations automatically lead to a more rigorous due diligence process within the enterprise?

How will we assess the human rights situation and its implications for us in such conflict-affected areas? On what resources will we draw?

GUIDING PRINCIPLE 24

Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Q 87. *Why does this matter?*

There is no hierarchy in international human rights law. Rather, human rights are treated as indivisible, interdependent and interrelated. However, it may not always be possible for an enterprise to address all adverse human rights impact immediately. Many enterprises operate in different contexts and have complex supply chains and a multitude of partners. They may be at risk of involvement in a range of adverse human rights impacts, and there may be legitimate resource and logistical constraints on the ability of the enterprise to address them all immediately.

Human rights due diligence and remediation processes aim to help enterprises minimize human rights impact linked to their operations, products and services. If these impacts cannot reasonably be addressed all at once, the focus must be on those that would cause the greatest harm to people. That means prioritizing those impacts that are, or would be, most severe in their scope or scale or where a delayed response would render them irremediable. As soon as the most severe impacts are addressed, the enterprise should turn to those with the next greatest severity and so on until it has addressed all its actual and potential impacts on human rights (bearing in mind that this is likely to be an ongoing exercise that adjusts to changing circumstances).

Q 88. What would count as “severe” impact?

The commentary to Guiding Principle 14 states that the severity of human rights impacts “will be judged by their scale, scope and irremediable character”. This means that both the gravity of the impact and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will be relevant considerations. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

It is not necessary for an impact to have more than one of these three characteristics to be reasonably considered “severe”. That said, it is often the case that the greater the scale or the scope of an impact, the less it can be remedied. In addition, Guiding Principle 24 highlights the fact that a delay in addressing a certain impact may itself make it less remediable and that this should be taken into account in the prioritization. For example, if workers are unfairly dismissed, an extended delay in remediation may oblige them to move in search of other work, making their reinstatement more difficult.

If an adverse impact is potential rather than actual, standard approaches to risk management suggest that the *probability* of it occurring becomes a primary factor, alongside its severity. However, a low probability of a severe human rights impact alone cannot justify reducing the priority of efforts to mitigate the risk. Instead, the remediability of the potential impact must be a key factor in determining the legitimacy of delaying such efforts. In sum, in the context of risks to human rights, the severity of actual or potential risks must be the dominant factor.

In many cases it may be self-evident what kind of impact is “severe” or “irremediable”, for example impact on the right to life and health of individuals or which fundamentally affects the welfare of entire groups or communities. And in cases where an enterprise has identified that it risks being involved in gross human rights abuse addressing this risk should always be given priority.

In other situations it may be less clear what human rights impact should be considered most severe or what factors might affect its remediability. Moreover,

as the commentary to Guiding Principle 24 states, “severity” should not be seen as an absolute concept, but as relative to the other human rights impact the enterprise has identified. Where possible, enterprises are advised to engage with those whose rights are at risk in order to ensure they have understood what impact they may have.

Depending on the operational context, the most severe human rights impact may be faced by persons belonging to groups that are at higher risk of vulnerability or marginalization, such as children, women, indigenous peoples, or people belonging to ethnic or other minorities. If the enterprise decides it needs to prioritize its responses to human rights impacts, it should take into account the vulnerability of such groups and the risk that a delayed response to certain impacts could affect them disproportionately.

Q 89. What does this mean for impact that is not deemed severe?

Addressing the issues deemed as most severe in no way implies that other human rights impact identified through the enterprise’s due diligence process do not need to be addressed. Rather, this principle is about sequencing responses in the event that not all impact can be addressed at once. An enterprise is still accountable for addressing *all* its actual and potential human rights impact. It is also worth keeping in mind that even impact that initially is not considered severe may evolve into more serious abuses (or be perceived to do so) if not addressed properly.

QUESTIONS TO ASK

Do we need to sequence our responses to any adverse human rights impacts we have identified or are they such that we can address them all in parallel?

If we need to prioritize them in order to sequence our responses, do we have a means of assessing the severity of our impacts?

Do our systems for assessing the severity of impacts take account of scope, scale and remediability?

Do they reflect that if a potential impact is severe, it should be a priority for action, regardless of its probability?

Do they pay particular attention to individuals belonging to vulnerable groups who may suffer the most severe human rights impact?

Do they identify situations where a delay in responding to an actual impact may make it harder to remedy?

Once the most severe human rights impacts have been addressed, do our systems automatically move on to the next most severe impacts until all have been addressed?

ANNEX I

The rights contained in the International Bill of Human Rights and the International Labour Organization's core conventions

A. The International Bill of Human Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Similar provisions in the two Covenants stipulate non-discrimination and gender equality as overarching principles to be applied in conjunction with specific rights. Both Covenants recognize and define in more detail the rights in the Universal Declaration in the following manner:

International Covenant on Civil and Political Rights

Article 1:	Right of self-determination
Articles 2 to 5:	Overarching principles
Article 6:	Right to life
Article 7:	Right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment
Article 8:	Right not to be subjected to slavery, servitude or forced labour
Article 9:	Rights to liberty and security of the person
Article 10:	Right of detained persons to humane treatment
Article 11:	Right not to be subjected to imprisonment for inability to fulfil a contract
Article 12:	Right to freedom of movement
Article 13:	Right of aliens to due process when facing expulsion
Article 14:	Right to a fair trial
Article 15:	Right to be free from retroactive criminal law

Article 16:	Right to recognition as a person before the law
Article 17:	Right to privacy
Article 18:	Rights to freedom of thought, conscience and religion
Article 19:	Rights to freedom of opinion and expression
Article 20:	Rights to freedom from war propaganda, and freedom from incitement to racial, religious or national hatred
Article 21:	Right to freedom of assembly
Article 22:	Right to freedom of association
Article 23:	Rights of protection of the family and the right to marry
Article 24:	Rights of protection for the child
Article 25:	Right to participate in public life
Article 26:	Right to equality before the law, equal protection of the law, and rights of non-discrimination
Article 27:	Rights of minorities

International Covenant on Economic, Social and Cultural Rights

Article 1:	Right of self-determination
Articles 2–5:	Overarching principles
Article 6:	Right to work
Article 7:	Right to enjoy just and favourable conditions of work
Article 8:	Right to form and join trade unions, and the right to strike
Article 9:	Right to social security, including social insurance
Article 10:	Right to a family life
Article 11:	Right to an adequate standard of living. (This includes the right to adequate food, the right to adequate housing, and the prohibition of forced evictions. This right has also been interpreted to comprise the right to safe drinking water and sanitation.)

- Article 12: Right to health
- Articles 13 and 14: Right to education
- Article 15: Rights to take part in cultural life, to benefit from scientific progress, and of the material and moral rights of authors and inventors

B. ILO core conventions

In 1998, ILO adopted the Declaration on Fundamental Principles and Rights at Work. The Declaration committed members to respect four fundamental principles and rights at work: freedom of association and collective bargaining; elimination of forced and compulsory labour; elimination of discrimination in employment and occupation; and abolition of child labour. Each of these is supported by two ILO conventions, which together make up the eight ILO core labour standards.

1. Freedom of Association and Protection of the Right to Organise Convention, 1949 (N° 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (N° 98)
3. Forced Labour Convention, 1930 (N° 29)
4. Abolition of Forced Labour Convention, 1957 (N° 105)
5. Equal Remuneration Convention, 1951 (N° 100)
6. Discrimination (Employment and Occupation) Convention, 1958 (N° 111)
7. Minimum Age Convention, 1973 (N° 138)
8. Worst Forms of Child Labour Convention, 1999 (N° 182)

ANNEX II

Examples of external expert resources

- Information and advice on human rights risks is increasingly available from some government offices or agencies, whether in general terms, for particular industries, in particular geographical contexts, or for particular issues such as labour rights or indigenous peoples' rights.
- Authoritative online information resources can assist, such as the websites of the Office of the United Nations High Commissioner for Human Rights (www.ohchr.org) and the International Labour Organization (www.ilo.org).
- Other credible sources of advice may be available, such as many national human rights institutions, the ILO Helpdesk for Business on International Labour Standards, as well as respected NGOs and academic institutions focusing on business-related human rights issues.
- The Global Compact is the United Nations global corporate responsibility initiative. The relationship between the Guiding Principles on business and human rights and the Global Compact is outlined here: www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf (accessed 8 March 2012). A range of tools and guidance materials, many of which are also relevant to small and medium-sized enterprises, can be downloaded directly from the website of the United Nations Global Compact (UNGC) (www.unglobalcompact.org/Issues/human_rights, Guidance Material), for example:
 - **Business and Human Rights Learning Tool** (UNGC/OHCHR, 2011): Web-based modules integrate exercises and case studies on current trends and expectations from business on the implementation of human rights principles, as reflected in the United Nations "Protect, Respect and Remedy" Framework. Upon successful completion of a test, users can obtain a certificate.
 - **The Human Rights Matrix** (Business Leaders Initiative on Human Rights/Global Business Initiative on Human Rights/Credit 360, updated 2010): The Human Rights Matrix is an initial self-assessment and learning tool that enables a company to begin

to understand and address its human rights performance, by identifying its policies on human rights and the approaches it has taken towards human rights. It will help companies visualize, assess and manage their human rights programmes and performance.

- **How to do Business with Respect for Human Rights** (Global Compact Network Netherlands, 2010): This publication builds on the “Protect, Respect and Remedy” Framework of the United Nations Special Representative for Business and Human Rights. Its descriptions, learnings and guidance points are based on the experiences of ten multinational companies of the Global Compact Network Netherlands and are intended to help companies implement a commitment to respect human rights in line with the Framework.
- **Human Rights Translated: A Business Reference Guide** (UNGC/OHCHR/Castan Centre for Human Rights Law/International Business Leaders Forum, 2008): The purpose of this publication is to explain universally recognized human rights in a way that makes sense to business. The publication illustrates, through the use of examples and suggested practical actions, how human rights are relevant in a corporate context.
- **Guide to Human Rights Impact Assessment and Management** (UNGC/International Finance Corporation/International Business Leaders Forum, updated 2010): This interactive online tool is designed to provide companies with guidance on how to assess and manage human rights risks and impacts of their business activities. While the Guide may benefit different types of organizations, companies are its main and intended audience. The Guide can be accessed free of charge, following registration.
- **Guide on How to Develop a Human Rights Policy** (UNGC/OHCHR, 2011): Provides instruction on how companies can develop and implement a human rights policy.

- OECD also provides some widely used tools and guidance, including its Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (2006). Available from www.oecd.org/dataoecd/26/21/36885821.pdf (accessed 8 March 2012).
- Information on human rights impacts for which others in the same industry have been criticized or even taken to court provides a very good indicator of some issues an enterprise should focus on. News coverage can point to the hot human rights issues faced by a particular industry. One widely respected source of such information is the Business and Human Rights Resource Centre (www.business-humanrights.org).
- The web pages of various NGOs that critically assess the activities of enterprises can provide an indication of relevant issues.
- There is often relevant experience and advice available within the enterprise's own industry. Examples of industry initiatives can be found on the website of the Business and Human Rights Resource Centre. Some business associations may also be able to provide guidance to members. Some Global Compact Local Networks have also included human rights in their areas of work and may have relevant information for enterprises seeking guidance with respect to a particular geographic area. See www.unglobalcompact.org/networksaroundtheworld/index.html (accessed 8 March 2012).
- Respected multi-stakeholder or industry initiatives can be a particularly valuable source of advice and experience in addressing business and human rights challenges.
- Collaborative opportunities for addressing shared human rights challenges may exist. For instance, brands and their suppliers may have a common interest in reducing human rights risks in the value chain, enabling the pooling of resources to achieve common objectives.
- For guidance related to business enterprises operating in conflict-affected areas, see "Red Flags: Liability risks for companies operating in high-risk zones", produced by International Alert and Fafo. Available from www.redflags.info/index.php?page_id=14&style_id=0 (accessed 8 March 2012).

