Identifying and Assessing Human Rights Risks Related to End-Use

A B-Tech Foundational Paper

Overview

The UN Guiding Principles on Business and Human Rights (UNGPs) provide technology companies with a robust approach to focus attention as and resources as they seek to address risks to people related to the products and services they provide. This is especially valuable for those companies that will have to regularly review and make decisions about products and services that can be used at scale, almost anywhere and by a large number of different private and public institutions, or individuals.

When it comes to identifying and assessing human rights risks - the first step of human rights due diligence - the UNGPs expect companies to:

- **Maintain a wide view of possible impacts:** This means identifying the risks to all human rights related to the full range of a company’s business activities and relationships. This includes whether and how the design, development, promotion, sales, licensing, contracting and use of its products and services could lead to adverse human rights impacts.

- **Focus on the most serious harms:** This means that any prioritisation of focus should be based on where the company’s business activities have – or could have - the most serious, widespread or lasting harms on people.

- **Engage and communicate meaningfully with stakeholders:** This means that a company should engage with relevant external stakeholders to first inform, and later explain, its human rights risks assessment and prioritisation.
About this Paper

This paper is written for leaders from across the technology sector, investor community, civil society, and government seeking to understand the basic expectations of the UN Guiding Principles when it comes to identifying and assessing human rights risks related to tech products and services.

The paper is part of the UN Human Rights B-Tech Project foundational paper series. The series has been released to frame discussions among diverse stakeholders as part of a global process to produce guidance, tools and practical recommendations to advance implementation of the UN Guiding Principles in the technology sector.

The additional papers in the series are listed below:

- An Introduction to the UN Guiding Principles in the Age of Technology.
- Key Characteristics of Business Respect for Human Rights.
- Taking Action to Address Human Rights Risks Related to End-Use.
- Paths for Accountability and Remedy in the Technology Industry (forthcoming).
- The State Duty to Protect and Tech: Advancing a "Smart-Mix" (forthcoming).
Headlines

1. The scope of a company’s analysis to identify and assess human rights risks includes whether and how the design, development, promotion, deployment, sales, licensing and use of its products and services is leading to, or could lead to, adverse human rights impacts.

2. Where a technology company has a large number of products, services or users, it will likely need to undertake an initial assessment to inform which products, services, solutions, business relationships or use contexts are higher risk from a human rights perspective and so should be prioritised for more detailed human rights due diligence.

3. Once a company has prioritised a specific product/service, type of user, or use context for deeper human rights due diligence, the company should conduct an analysis of the potential and actual adverse human rights impacts associated with these.

4. Whenever a company needs to prioritise where to focus, it should use a principled approach that focuses on “severity” of risks to people. Under the UNGPs severity of impacts will be judged by their scale, scope and irremediable character where:

   - **Scale** is concerned with how grave or serious the impact is.
   - **Scope** is concerned with how widespread the impact is, or the numbers of people impacted.
   - **Remediability** means that ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the impact.

5. When a company is identifying and assessing actual and potential adverse human rights impacts, the company should meaningfully involve credible experts and affected stakeholders.
The scope of a company’s analysis to identify and assess human rights risks includes whether and how the design, development, promotion, deployment, sales, licensing and use of its products and services is leading to, or could lead to, adverse human rights impacts.

Identifying and assessing human rights risks is the first step in the Human Rights Due Diligence process. As per the UNGPs: “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” (UNGP 18).

The assessment of actual or potential human rights impacts should cover any impacts a technology company may cause, those that it may contribute to through its own activities, and those that may be directly linked to its operations, products or services by their business relationships even if they have not contributed to those impacts. A technology company’s “own activities” in this context includes the design, development, marketing, sale, licensing and deployment of products, services and solutions.
The assessment should be done with reference to all internationally recognised human rights – “Because business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.” (Commentary UNGP 12).

For many in the technology sector, questions will almost certainly arise about the company’s impacts on privacy and freedom of expression. However, there is already evidence that the use and misuse of technologies can have online and offline impacts on a wide range of other human rights. For example: the use of AI tools by law enforcement and the criminal justice system could impact an individual’s freedom for arbitrary arrest or their right to equality before the law; surveillance technologies could impact on the right to peaceful assembly; the use of social media platforms may impact the right to mental health; and property rental platforms could alter housing markets, possibly impacting the right to an adequate standard of living.
Where a technology company has a large number of products, services or users, it will likely need to undertake an initial assessment to inform which products, services, solutions, business relationships or use contexts are higher risk from a human rights perspective and so should be prioritised for more detailed human rights due diligence.

The number and variety of a technology company’s product, end users, use cases and use contexts (i.e. region, country or local community) will all influence the complexity of a technology company’s risk picture and the severity of the potential human rights risks associated with its activities and relationships. The more complex a company’s portfolio of products, services and solutions and end-use scenarios, the more extensive and sophisticated its systems will need to be to make sure that it identifies and addresses all relevant risks. The corollary to this is that some small enterprise or start-up with one product or solution and a small number of target customers or end-uses may find it fairly straightforward to identify and assess related human rights risks.

By way of illustration:

- **For technology companies that have a large and/or complex portfolio of products, services, and solutions or types of end-users (existing and prospective),** the company’s human rights policies and systems should be developed with an aim to identify general areas where the human rights risks might be most significant and prioritise these for human rights due diligence. This will likely require basic, ongoing human rights risk identification for all products and services, and their related end users and end-use scenarios, with more detailed analysis prioritised for scenarios of high human rights risk. It may be appropriate for senior and cross-functional governance entities with visibility of the company’s strategy and product/service development activities to be tasked with overseeing this regular review. Where employees are empowered to pursue their own research and product ideas with limited oversight, the process of identifying general human rights risks may need to involve bottom-up risk identification supported by training, tools and steps integrated into engineering and research processes.

- **For technology companies that have a small number and/or relatively simple portfolio of products, services and solutions that are used in diverse operating contexts and at scale,** that company’s human rights policies and systems should also be developed with an aim to identify general areas of risks for the use of the company’s technologies in all relevant local contexts. This may require a senior and cross-functional governance entity with visibility of the company’s strategy, expansion into new markets and business development activities being tasked with conducting this review.
For some technology companies, they will need to navigate both i.e. a large and/or complex portfolio of products/services/solutions and types of end-users, as well as uses in diverse operating contexts at scale.

Where severe risks are clearly present, it may be sensible to start with obvious high-risk areas without first conducting an overall analysis. Either way, a company should ensure that a company-wide assessment that is ongoing and dynamic is in place. This will aid in the company altering and broadening its due diligence focus over time while not missing or ignoring severe risks to people.

THREE Once a company has prioritised a specific product/service, type of user, or use context for deeper human rights due diligence, the company should conduct an analysis of the potential and actual adverse human rights impacts associated with these.

In most cases, identifying actual and potential human rights impacts at a more granular level will require a few layers of analysis, and will probably vary depending on the starting point of analysis. At a high-level:

- **If the starting point of analysis is a specific product/service**, then a company will need to have a systematic way to consider the universe of likely users, the multiple use cases for that user (including unintended or intended misuse), and the actual or potential human rights impacts connected to that use case.

- **If the starting point of analysis is a specific user or category of user** (e.g. a prospective private sector customer, a target industry, a State agency in a given country or a peer in the technology sector) then a company will likely need to follow the same logic of mapping out the possible use cases for that user (including unintended or intended use) and the actual or potential human rights impacts connected to those use case. This may also involve building on existing processes such as Know Your Customer due diligence. Where such existing processes are used, companies should take care to focus on customer characteristics that are relevant from the perspective of risks to people such as the customer’s track record in addressing human rights risks, or whether the customer’s business model might carry inherent risks to human rights. It may also be feasible for human rights due diligence to be conducted jointly between a technology company and customer to support collaborative efforts to prevent, mitigate and even remediate adverse human rights impacts.

- **If the starting point of analysis is the geographic region, country or local community** in which use may lead to adverse impacts, then a company will most likely want to deepen its understanding of the user universe, potential use cases and associated impacts in that locality. This will invariably require regularly updated intelligence about how the local socio-economic, political and human rights realities could exacerbate human rights harms.
Two key features of the above type of analyses are worth specific attention. First, there is no single “correct” way to conduct the analysis. Companies will have to make choices about how they approach the task and who within the company is involved.

Second, the UNGPs do not expect that a company’s analysis will ever be 100% complete and absolute. There is uncertainty and therefore subjective judgment in any such analysis. The expectation is that a company takes all reasonable steps to achieve an analysis based on the available facts, intelligent foresight and sound judgment. Engaging with relevant internal and external stakeholders should minimise mis-judgment and blind spots. Companies should be prepared to explain their process to their stakeholders.

Whenever a company needs to prioritise where to focus, it should use a principled approach that focuses on “severity” of risks to people.

Even when a technology company is focused on a specific technology, user or use context, its assessment of human rights risks will sometimes result in identifying a large number of users, use cases and human rights risks. This might require a company to prioritise where to focus its attention. If so, the company should first seek to prioritise based on the severity of human rights risks, with attention also paid to the likelihood of the adverse impact occurring. It should then go on to address other areas.

As the UNGPs note “Where it is necessary to prioritise 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.” (UNGP 24). The commentary to UNGP 24 states that “severity of impacts will be judged by their scale, scope and irremediability” where:

- **Scale** is concerned with how grave or serious the impact is;
- **Scope** is concerned with how widespread the impact is, or the numbers of people impacted; And
- **Remediability** means that ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the impact.
It is also important for companies to consider how scale, scope and remediability may differ for different individuals or groups at heightened risks of becoming vulnerable or marginalised, and that there may be different risks faced by different groups, depending on race, religion, ethnicity, disability, gender, gender identity or sexual orientation.

As explained in the UN Human Rights interpretative guidance for the UNGPs “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 prioritise 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.” This extra consideration of whether the use of technology products and services can have differential impacts on certain groups may have special utility where the “scope” of impacts is particularly broad (for example, in the hundreds of thousands, millions or even billions).

Even once a company has considered the severity of human rights impacts across all possible users and use cases, this may still leave a large universe of issues that require attention. If a company needs to prioritise further, it should use the lens of likelihood. Here, the company will likely want to consider such things as:

- **User interests, motivations and incentives**: Is it in the interests of users to use or misuse the product, service or solution in ways that may pose risks?
- **User’s technological know-how and capability**: Does the user’s know-how (or lack of it) alter the likelihood that the use-case and adverse impacts identified will occur? Are there any existing technical barriers (e.g. access to computing power) that will make the use-case unlikely in practice?
- **Enterprise customer’s own due diligence**: Does the customer have a clear commitment to responsible business conduct? Is there evidence that they conduct meaningful human rights due diligence?
- **Local policy and laws**: Are there government policies and laws that will make the use-case more or less likely to occur in practice?

Publicly communicating the rationale behind how prioritisation decisions are made and why are important for establishing trust in a company’s due diligence approach.
When a company is identifying and assessing actual and potential adverse human rights impacts, the company should meaningfully involve credible experts and affected stakeholders.

Engaging credible experts and affected stakeholders can help to ensure that the assessment of human rights risks is comprehensive. This can be especially important if a company lacks internal diversity to help it understand and empathize with the experiences of affected groups. As per the UNGPs, “To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society”.

(Commentary UNGP 18).

Technology companies will need to establish ways to achieve this even in the context of fast-paced innovation while taking into account legitimate concerns about Intellectual Property and commercial sensitivity. Just as “translation” of expectations and standards for internal stakeholders can be critical, some external stakeholders will need to be supported to learn about technical issues relevant to a company’s efforts to respect human rights. Moreover, because the identification and assessment of human rights risks should be ongoing it follows that ongoing, two-way and mutually beneficial relationships with experts and affected stakeholders will be a key foundation to a company’s ability to operate with respect for human rights.

UN Human Rights invites engagement from all stakeholders across all focus areas of the B-Tech Project. For more information please see the project Scoping Paper.

Please contact us if you would like to engage with our work, including if you have recommendations for practical tools, case studies and guidance that will advance company, investor and State implementation of the UN Guiding Principles on Business and Human Rights in the business of technology.