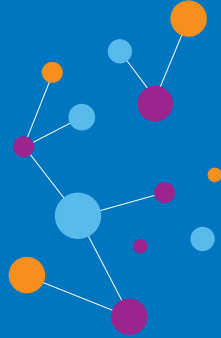


Taking Action to Address Human Rights Risks Related to End-Use

A B-Tech Foundational Paper



OVERVIEW

The *UN Guiding Principles on Business and Human Rights* (UNGPs) were drafted to establish a global expectation of business conduct, with the goal of effectively embedding respect and dignity for all into how business gets done.

To this end, the UNGPs require a company to take positive and pro-active steps to scrutinize, improve and where necessary transform their own business practices and culture. This extends to expecting companies to seek to influence peers, business partners and others to act responsibly and with respect for all human rights. When it comes to companies in the technology sector, this focus on enhancing and innovating new business practices and relationships is critical for society, as well as sustained trust in the industry.

At the same time, **the UNGPs offer technology companies and their stakeholder a principled and pragmatic approach to what should be expected of companies based on the nature of a company's involvement with actual or potential risks to people.** In short, where a technology company is causing or contributing to a harm—which can include situations when a third party is using a product or service to cause harm—the company should take action to stop or prevent this. Where a company's technology product or service is linked to a harm through a business relationship, they should seek to influence the actions of the entity causing the harm. **Taking all reasonable steps to ensure that their activities — including product design, promotion, deployment, selling/licensing and oversight of use—do not contribute to human rights harms will often need to be a central focus of human rights due diligence for tech companies.**

ABOUT THIS PAPER

This paper is written primarily for leaders within technology companies seeking to **understand the basic expectations of the UNGPs when it comes to identifying and assessing human rights risks related to products and services.** It is part of the UN Human Rights *B-Tech Project* foundational paper series that re-state, explain and clarify the implications of the UNGPs for technology companies and States.

This paper does not provide details about every aspects of human rights due diligence, nor does it seek to replace or replicate existing cross-industry guidance such as the [UN Guiding Principles Interpretive Guide](#) or the [OECD Due Diligence Guidance for Responsible Business Conduct](#).

The series of papers aims to provide a shared starting point for all stakeholders working to embed respect for human rights in the business of technology, including policy makers/regulators, civil society, investors and business. The papers will also set a **common framework of understanding to underpin B-Tech Project activities, guidance and recommendations** across the project's focus areas. They are the starting point, not the end, of the project's work.

Link to the foundational paper series

- Link to [B-Tech Project Portal](#)
- Link to the [UN Guiding Principles on Business and Human Rights](#)

THE HUMAN RIGHTS DUE DILIGENCE PROCESS



1. **Identifying and Assessing Impacts** to gauge the nature and extent of human rights risks
2. **Acting to prevent and mitigate risks to people**, including via integration within internal functions and processes
3. **Tracking of effectiveness of risk mitigation** responses over time; and
4. **Appropriate communication** of performance with respect to addressing human rights impacts

HEADLINES

1. The UNGPs define what a company should do to address human rights risks based on whether it has **caused, contributed or is linked to the harm**.
2. In the context of the end-use of its products and services, **a technology company can cause, contribute or be linked to an adverse human rights harm**.
3. Taking **all reasonable steps to prevent contribution via acts or omissions** related to product design, development, promotion, deployment, contracting, sales/licensing and use will need to be a central focus of human rights due diligence for tech companies.
4. One of the unique aspects of the UNGPs is the idea that **companies should use their leverage to address human rights issues that they may be involved in**, even if they are not causing or contributing to the adverse impacts in question.
5. When addressing human rights risks for a certain individual or group, technology **companies will need to devise ways to mitigate any unintended consequences** on competing human rights including the human rights of others. The international human rights community has extensive experience that can support rights-based deliberation and decision making.

ONE

The UNGPs clarify define what a company should do to address human rights risks based on whether it has caused, contributed or is linked to the harm.

The UNGPs distinguish between a company's responsibility in situations where it is causing or contributing to adverse human rights impacts on the one hand, and where its products, services and solutions are directly linked to harm through a business relationship on the other hand. In summary:

- **Cause:** Where a company causes or may cause an adverse human rights impact, it should **cease or prevent the actual impact**. In situations of actual impacts having already occurs, the company should also provide remedy to affected individuals.
- **Contribution:** Where a company contributes to, or may contribute to, an adverse impact it should **cease or prevent its contribution** and **use leverage** to mitigate any remaining impacts to the greatest extent possible. A company can contribute to human rights impacts through, or in parallel to, third parties including other business enterprises or States. In situations where a company has contributed to actual impacts, the company should also **provide remedy to affected individuals**.
- **Linkage:** Where a company's operations, products or services are linked through a business relationship to an adverse impact, it should **use leverage to influence the entity causing the adverse impact** to prevent or mitigate the impact.

The above construct creates an expansive, but not limitless, view of a company's responsibilities, **Part of the function of the UNGPs is to set some boundaries about what—using a human rights lens—is expected of companies.** This simply means that companies are not expected to address every negative impact on human rights that is occurring in their value chain or industry. Rather, they should do so when they are involved in the adverse impact via causing, contributing or being linked to it. This does not preclude a company seeking to address wider societal or ethical concerns or engage in efforts to promote human rights causes. But this is not expected under the UNGPs.

The cause, contribution and linkage construct can also be invoked to help galvanize action from all of the companies that need to act to prevent human rights harm. For example, consider the risk of facial recognition technology being abused to racially profile and evict people from a private venue. The UNGPs would call to action all of the companies involved such as the provider of the facial recognition technology, the supplier of cameras or sensors, and the owner of the private venue.

Finally, **the construct also supports root cause analyses of the specific human rights impacts** that companies and their stakeholders are seeking to prevent or mitigate. Who is causing this abuse? Might we be contributing as a company? Who else is involved? This increases the chances that company actions will be effective.

TWO

In the context of the end-use of its products and services, a technology company can cause, contribute or be linked to an adverse human rights harm.

A technology company can **cause** an adverse impact where its activities (its actions or omissions) on their own 'remove or reduce a person's (or group of persons') ability to enjoy a human right, i.e. where the company's activities are sufficient to result in harm. A technology company may for example cause an adverse human rights impact if their actions result in violations of the right to privacy, or where the design of product results in discriminatory access or user experience.

Of course, causing a human rights impact can also occur in relation to a technology company's own workforce. Examples would include if a company discriminates against women or minority populations in its hiring practices; or if contingency workers who are de facto employees are not treated as such. These workforce risks are critically important and may be the most salient human rights risks for some technology companies. This paper does not address these situations, but companies should turn to the extensive guidance available relating to international labour standards and engage with workers and worker organizations as part of its human rights due diligence.

A technology company can **contribute** to an adverse impact through its own activities (actions or omissions) when its activities are combined with those of other actors in ways that cause harm. Contribution implies that a technology company's actions and decisions—including in the course of product design, promotion, deployment, selling/licensing and oversight of use—facilitated or incentivized the user in such a way as to make the adverse human rights impact more likely. This element may in practice exclude activities that have only a 'trivial or minor' effect on the actions of the user, and thus may not be considered a contribution.

If a company has taken all the necessary steps to prevent its contribution to potential and actual harms, the impacts associated with the use of a technology company's products, services and solutions may fall into the **'linkage'** category. Linkage refers to situations where a company has not caused or contributed to an adverse human rights impact, but there is nevertheless a link between the operations, products or services of the technology company and that impact through the company's business relationships. A situation of linkage may occur where a company has provided technology to an entity and it, in the context of using this product or service, act in such a way that it causes (or is at risk of causing) an adverse impact.

Situations of linkage may also occur where the end-use occurs beyond a company's first-tier customer and user relationships. An example of this would be when a company's technology is used by a third party (with or without express permission) as a component of a new technology product, service or solution that is then sold to another actor whose use of the new technology results in human rights harms.

In practice, **a technology company's involvement with an impact may shift over time depending on its own actions, omissions and evolving standards of good practice.** For example, if the company identifies or is made aware of an ongoing human rights issue that is directly linked to its technology through the behaviour of a government agency, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact—such as through restricting the use of certain features or somehow engaging with the client about the company's concerns—it could eventually be seen to be facilitating the continuance of the agency's behaviour, and thus be in a situation of 'contributing'.

THREE

Taking all reasonable steps to prevent contribution via acts or omissions related to product design, development, promotion, selling/licensing and use will need to be a central focus of human rights due diligence for tech companies.

The purpose of technology and the motivation of many entrepreneurs, researchers, and engineers in the industry is to enable people and organizations to act in new ways, or to change how they do what they are already doing. This does not mean that technology companies are always in a position of contributing to adverse human rights impacts under the UNGPs. It simply means that **taking all reasonable steps to prevent contribution via acts or omissions related to the products and services it provides is especially important.**

The UNGPs state that "Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible" (Commentary to UNGP 19). **In order to meet this expectation, a company will first need to discern if and how its own actions or omission have contributed, or may contribute to, an adverse human rights impact.**

While it is not possible to provide an exhaustive *ex ante* "check list" of situations that would fall within one category or the other, the following section sets out a non-exhaustive list of factors that may be used to determine whether a technology company is contributing to an adverse impact. *Further deliberations involving technology companies together and other relevant stakeholders are needed to*

explore the practical implications of applying such factors in the tech industry context to understand how they would apply to a wide range of real-world scenarios.

- **Facilitating or Enabling:** Facilitating or enabling would suggest that the company's actions or decisions add to the conditions that make it possible for use of the product, service or solution by a third party to cause a harm, if it is inclined to do so. It may often be that the primary activity, i.e. providing a product, service or solution may not be inherently problematic— and could in fact be important for commerce or rights realization. However, a technology may facilitate someone else to use the product or service to cause harm in a number of ways including, for example: Through customizing products, services or solutions in ways that increase the possibility of use (including misuse) that leads to harm; or through providing a component or input (for example mapping or location tools) into an existing technology that ends up being a critical factor in that technology being used to cause harm.
- **Incentivizing or Motivating:** Incentivizing or motivating would suggest that the company's actions or decisions— including during design, promotion and marketing - make it more likely that a product or service will be used in ways that cause a harm. A technology company may not have in place traditional commercial incentives for how its products, services or solutions are used by third parties. Many technology companies may choose to remain neutral about how their technologies are used. However, there may be situations where the design, promotion and marketing of products and services can exacerbate or perpetuate behaviours that lead to harm. Examples could include designing consent processes in ways that users are less able to make informed privacy choices and third parties are then able exploit user data to cause harms, or the use of bias training data that ends up perpetuating discriminatory decisions by users.
- **The effectiveness of the company's human rights due diligence in identifying and seeking to prevent and mitigate harms.** If the technology company knows or should have known that there is human rights risk associated with a particular technology, customer or user, but it omits to take any action to address this then it may find itself in a situation of contribution. For example, failure to require, encourage or support a customer or end-user to prevent or mitigate these risks may create a permissive environment for these actors to more easily take actions that result in abuses. Similarly, where certain design features of a product are well-known, or could have reasonably been foreseen, to increase the risk of adverse human rights impacts in the end-use phase, failure to address these will over-time put the company in a position of contribution.

Once actions or omissions that may contribute to the use of products, services and technologies in ways that adversely impact human rights have been identified, the company can take the necessary steps to cease or prevent its contribution and begin to use its leverage to try and mitigate any remaining impact.

Just as further deliberations are needed to explore the factors above in real-world contexts, it is equally **urgent for technology companies and other relevant stakeholders to identify meaningful ways, and supporting examples of good practice, to cease or prevent contribution** to adverse human rights impacts. This will be one focus of the B-Tech project.

One of the unique aspects of the UNGPs is the idea that companies should use their leverage to address human rights issues that they may be involved in, even if they are not causing or contributing to the adverse impacts in question.

The UNGPs set an expectation that companies use their leverage to “effect change in the wrongful practices of an entity that causes a harm” (Commentary UNGP 19). Companies should use their leverage both when they have taken the necessary steps to cease or prevent their contribution to an adverse human rights impact, and “to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships” (UNGP 13).

The degree of leverage that a company has in a given situation can change. As the UNGPs note **“If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors”** (Commentary to UNGP 19).

It is notable that in certain situations, technology companies may have on-going relationships with their users that companies in some sectors lack. This ongoing relationship (e.g. via customer support, software updates, maintaining networks) could well be a helpful source of leverage.

The UNGPs do not set out a definitive list of ways that a company can establish and use leverage. Such a list would risk narrowing down the space for creative problem-solving and innovation, whereas the intent of the UNGPs is to galvanize businesses and other actors to problem-solve. Since the endorsement of the UNGPs, the trend has instead been for companies and stakeholders to work within broad typologies setting out the broad ways leverage might be exercised. These tend to include leverage being exercised:

- **Bilaterally** with third parties in the context of commercial relationships. For example, via enforcing contractual terms and incentives, or undertaking capacity building.
- **With other companies**—whether industry peers or companies from other industries. For example, through the development of standards and associated efforts to ensure implementation.
- **Via partnerships** with an institution or actor that can play an effective supporting role in influencing the actions of the third party in question. This might include with a home or host State, an international organization or a civil society organization.
- **Through multi-stakeholder collaboration**—whether in the context of formal initiatives or not, and possibly with the aim of establishing relevant public policy and law.

**EXPLAINER BOX****Ending Relationships**

The UNGPs recognize that “There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so” (Commentary to UNGP 19). The UNGPs set out considerations that will factor into the appropriate response by a company, including how crucial the relationship is to the company, the severity of the abuse and whether terminating the relationship would itself have adverse human rights consequences.

However, the practical implications of these considerations in the context of impacts that flow from the use of a technologies would be useful to explore and elaborate through multi-stakeholder processes. For example, it may not be feasible for a company to stop an entity using or abusing a technology once it has been sold to that customer. And ending a relationship may have its own negative human rights impacts. (See point 5 below)

What is clear is that, as further noted by the UNGPs “...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”.

FIVE

When addressing human rights risks for a certain individual or group, technology companies will need to devise ways to mitigate any unintended consequences on competing human rights including the human rights of others. The international human rights community has extensive experience that can support rights-based deliberation and decision making.

Human Rights Due Diligence can often involve a company having to navigate situations of competing rights or policy objectives. In the context of a technology company conducting human rights due diligence in relation to the use of their products and services, this may become a recurring issue. For example: Demoting or removing harmful content from a social media platform may unduly impact the freedom of expression of those who posted the content; Withdrawing a government’s access to facial recognition tools could unduly impact public safety; and product blacklisting might unintentionally lead to discrimination of access to technology solutions based on gender or race.

Companies should avoid the actions that they take to prevent and mitigate averse human rights resulting in other human rights harms. Where this is not possible, **companies can, and should, draw on the considerable experience of the international human rights community in dealing with situations of competing rights.** Companies should also engage affected stakeholders and relevant experts in their decision-making processes and be prepared to explain the logic of their decision-making and actions.

Ultimately, navigating these challenges using rights-based approaches may also be a source of innovation and improvements in user experience.

 b-techproject@ohchr.org

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.



September 2020