

Working Group on Business and Human Rights

Companion note I to the Working Group's 2018 report to the General Assembly (A/73/163)

Corporate human rights due diligence – Background note elaborating on key aspects

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Background

This note is an annex to the [Working Group's General Assembly report, A/73/163](#), which takes stock of business and government action to advance the implementation of corporate human rights due diligence as set out in the [Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework](#). The report highlights emerging good practices that should be built upon and scaled up in order to address gaps in current practice. The present note seeks to complement the report's chapter II, which addresses key features of human rights due diligence and why it matters. It provides further background to the concept of human rights due diligence and a list of answers to some frequently asked questions. Further considerations are clarified in OHCHR's [Interpretive Guide on the corporate responsibility to respect human rights](#).

A separate companion paper ([companion note II](#)) by the Working Group contains lessons from getting started on corporate human rights due diligence and an overview of tools and resources. Scaling up effective human rights due diligence in business practice worldwide is a key objective for the Working Group. Further information on its thematic work on this topic is available at <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

What is the basis for the requirement that business enterprises undertake human rights due diligence?

The Guiding Principles on Business and Human Rights clarify that all business enterprises have a responsibility to respect human rights, which means they should avoid infringing on the human rights of individuals and communities and address adverse human rights impacts with which they are involved. Involvement with such impacts can occur in three basic ways, as a business enterprise may:

- (a) Cause the impact through its own activities;
- (b) Contribute to the impact through its own activities – either directly or through a third party (Government, business or other); or
- (c) 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.

The corporate responsibility to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those set out in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

Business enterprises need also to take into account the international human rights instruments concerning specific thematic issues and vulnerable groups, including children, indigenous peoples, migrant workers and their families, minorities, persons with disabilities, women and others. Moreover, in situations of armed conflicts, standards of international humanitarian law can also apply to non-state actors, including business enterprises.

In operational terms, the responsibility to respect human rights requires that business enterprises are able to “know and show” that they are respecting human rights by having in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to respect human rights, to serve as basis for embedding this commitment throughout the enterprise and in business relationships;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how the enterprise addresses its impacts on human rights.
- (c) Processes to enable the remediation of any adverse human rights impacts the enterprise causes or to which it contributes.

What are some key considerations for each component of the human rights due diligence process?

Guiding Principle 17 clarifies that the process(es) of undertaking human rights due diligence should involve four core components:

1. Assessing actual and potential human rights impacts;
2. Integrating and acting upon the findings;
3. Tracking the effectiveness of responses;
4. Communicating on how impacts are addressed.

Principle 17 further clarifies that 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.

Principles 18-21 elaborate on the essential components of human rights due diligence. A non-exhaustive list of essential aspects to consider for each of the four core components – drawn from Principles 18-21 as well as the Interpretive Guide – is included in the following.

For the process of **assessing impacts**, the business enterprise should:

- Take into account the nature and context of the operation and undertake **meaningful consultation** with potentially affected individuals (workers, communities, consumers) as well as other relevant stakeholders (for example trade unions and NGOs with particular expertise on relevant issues and contexts), as appropriate to the size of the business enterprise and the nature and context of the operation.
- Draw on **human rights expertise** to understand how issues are arising and being dealt with in a particular sector, good practice in assessing impacts and changes to the enterprises operating

environment. This is especially important where meaningful consultation with stakeholders is not possible or has not happened.

- Focus on **risks that the enterprise’s operations pose to human rights, or “risks to people”**, as human rights risks concern potential and actual adverse impacts on people’s rights and dignity. This is separate from any risks that involvement in human rights impacts may pose to the business enterprise (although the two are increasingly related, there is not always correspondence between the two).
- Take into account **specific risks and how they affect different groups**, paying particular attention to vulnerable groups or groups at heightened risk of adverse impacts, such as applying a gender lens or taking into account how actual or potential adverse impacts may differ for or may be specific to women.
- Take into account the **important role of human rights defenders** as a source for identifying potential and actual human rights risks, as well as the **risks faced by human rights defenders in certain contexts** and the risk that the enterprise’s operations or business relationships may be linked to attacks against human rights defenders.
- Assess potential and actual impacts **throughout the business enterprise (both HQ and subsidiaries) as well as those directly linked to its operations, products or services by business relationships**.
- In order to assess involvement in human rights impacts **beyond first tier business relationships**, require or set incentives for immediate/first tier business partners to carry out their own assessments and require the same from their suppliers and business partners.
- Establish an **ongoing evaluation process**, which might include one-off assessments as part of an ongoing process that takes into account changing circumstances. Stand-alone human rights impact assessments may be necessary for operations and business relationships in a high-risk context or to better understand the perspectives of affected stakeholders.
- Understand the role of **remediation and grievance mechanisms** in an ongoing system of risk identification and human rights due diligence.

For the process of **integrating and acting on findings**, the enterprise should:

- Take the necessary actions to prevent and mitigate specific human rights impacts at the **local level**, including by empowering specific local knowledge and ownership over issues.
- **Prioritize severe human rights impacts** (if unable to mitigate and address all impacts at the same time).
- **Understand how the company is involved in human rights impacts**, and whether it is causing, contributing or directly linked to actual or potential abuse. This has implications for what action to take in terms of ceasing, preventing and mitigating the adverse impact.
- When contributing to or directly linked to abuse, **find ways to exercise leverage** in order to help prevent or address the abuse caused by the business partner/relationship.
- **Explore different types of leverage** and traction points during the different stages of a business relationship.
- **Decide whether to terminate relationships** depending on whether leverage can be built and depending on the human rights risks of exit.

For the process of **tracking the effectiveness of its action**, the enterprise should:

- Understand that measuring human rights performance often has strong **qualitative elements**.

- Develop **company-specific indicators**, whilst also taking care to ensure there is interaction between the local context and company-wide standards so that implementation of these standards also considers the specific local environments.
- **Track performance of suppliers and other business relationships.** This may involve audits, but at the same time the limitations of auditing alone need to be recognized and processes should be developed to complement and improve audits and data collection.
- **Evaluate the performance** – including by considering perspectives of affected stakeholders.
- Commit to **continuous improvement**.

For the process of **communicating on risks and impacts and how they are being addressed**, the enterprise should:

- Adapt the form and frequency of its communication so that it appropriately **reflects the severity of its human rights impacts** and so that it is **accessible** to its intended audiences.
- Ensure that the communication **does not pose risks** to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.
- Carry out **formal reporting when operations pose risks of severe human rights impacts**.
- Meet **principles for good reporting**: be specific, clear and forward-looking.

Additionally, while not a part of the human rights due diligence components, remediation also needs to be built into the system.

What is the connection between human rights due diligence and remediation of impacts?

Remediation of identified impacts, which the enterprise has caused or contributed to, is essential for meeting the corporate responsibility to respect. It is also a matter of future prevention. Establishing or participating in effective operational-level grievance mechanism is the way for business enterprises to do this in practice. The commentary to Guiding Principle 29 explains how an operational-level grievance mechanism is intrinsically connected with effective due diligence, by reinforcing prevention in two fundamental ways:

- “First, they **support the identification of adverse human rights impacts as a part of an enterprise’s ongoing human rights due diligence**. They do so by providing a channel for those directly impacted by the enterprise’s operation to raise concerns when they believe they are being or will be adversely impacted. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly.
- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse **impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.**”

What is the relationship between human rights due diligence and legal risk management?

A report by the UN High Commissioner for Human Rights (OHCHR) that elaborates on the relationship between human rights due diligence as set out in the Guiding Principles and legal liability,¹ clarifies that human rights due diligence “should not be confused with other forms of legal due diligence activities, such as those carried out in preparation for corporate mergers and acquisitions, or those required for compliance monitoring purposes in areas such as banking or anti-corruption. The key difference between these concepts is that the latter group is generally concerned

¹ A/HRC/38/20/Add.2

with identifying, preventing, and mitigating risks to business; whereas human rights due diligence is concerned with risks to people.” The report also clarifies that corporate responsibility to respect human rights exists over and above legal compliance, and business enterprises should not wait for the law to carry out human rights due diligence, nor assume that compliance with legal requirements on human rights due diligence will be consistent with the Guiding Principles.

However, human rights due diligence is relevant from a legal risk management perspective. As noted in the Commentary to the Guiding Principles: “conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.”

The OHCHR report explains that exercising human rights due diligence could be a basis for a possible defense to liability in *some* cases, depending on the type of harm and the connection to it, as well as other factors that will be specific to each jurisdiction and legal system. However, two critical points, the report argues, for the appropriateness of permitting a defense to liability based on due diligence activities include:

- Whether it is fair to victims; and/or
- Whether the company actually undertook meaningful due diligence genuinely aimed at identifying, mitigating and addressing risks to people, and not merely a superficial “check box” approach.

Human rights due diligence may also be relevant in questions of “complicity” (secondary liability) in situations of adverse human rights impacts caused by other parties, both in criminal and civil cases. While thresholds for liability vary between jurisdictions (e.g. with respect to degree of negligence and contribution), conducting human rights due diligence may help companies to reduce legal risks “by showing that they took every reasonable step to avoid involvement with or contribution to alleged human rights abuse.”

A recent study on supply chain due diligence also highlights the “escalating trend in case law toward the recognition of a legal duty of care based on control” and use of international law standards in domestic courts. Claimants have explored different avenues for remedy for corporate-related human rights abuse including, for example:

- Tort law
- Competition and consumer law (e.g. for misleading and deceptive conduct)
- Criminal and terrorist financing law
- Advertising law
- Specialist statutory mechanisms

In addition, complaints against business enterprises for human rights impacts in supply chain activities are being brought through non-judicial mechanisms, such as OECD National Contact Point (NCP) processes and arbitral processes such as the Bangladesh Accord arbitrations at the Permanent Court of Arbitration. The study concludes that “the developments in global jurisprudence and complementary processes mean that a company with active control over its suppliers is increasingly less likely to be in

a position to exclude liability through complex corporate structures and reliance on separate corporate personality.”²

With the launch of the OECD Due Diligence Guidance, it is expected that the relevance of due diligence approaches for managing legal risks relating to responsible business conduct will only increase further. As the interplay between international soft law standards and national hard law standards continue to increase, it is likely that the due diligence standard set out in the Guiding Principles and the OECD Guidance will become an ever more important source for how to interpret what is expected of a responsible business enterprise also in legal terms.

In brief, the best insurance against liability is not to avoid human rights due diligence for fear of liability, but to actually conduct robust due diligence in line with the Guiding Principles.

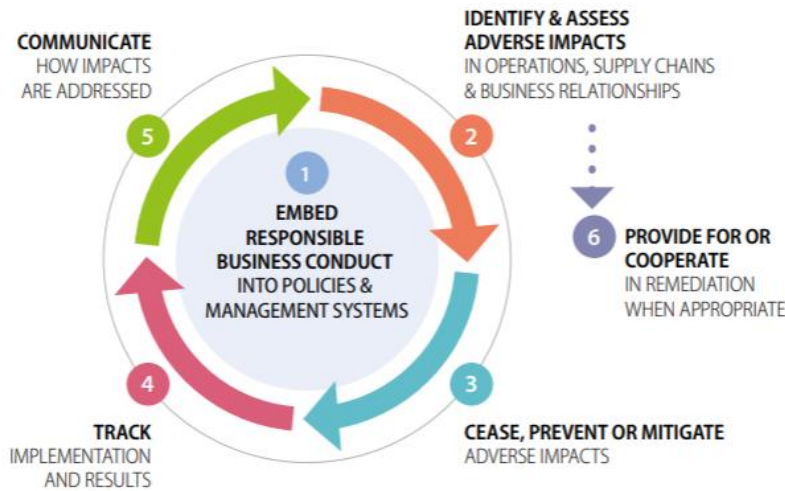
How does the human rights due diligence concept in the Guiding Principles align with the OECD guidance on due diligence?

The recently issued OECD Due Diligence Guidance for Responsible Business Conduct provides general guidance on due diligence, including for managing human rights risks and impacts, alongside other concerns for responsible business conduct, such as anti-bribery, environment and employment and industrial relations. It provides a comprehensive practical tool for supporting implementation of human rights due diligence in line with the Guiding Principles, which is based on comprehensive multi-stakeholder inputs and dialogue. Importantly it acknowledges that human rights due diligence can and should be embedded into strong company management systems and provides practical guidance related to the different steps of due diligence reflected in the Guiding Principles. Applying a human rights lens to policies and due diligence processes embedded across company management systems can be a means of achieving greater operational consistency across borders (domestic nuances notwithstanding) and for staying ahead of the curve regarding regulatory developments across a range of responsible business conduct issue areas.

The OECD’s Due Diligence Guidance explains that the due diligence process involves a dynamic system of six core elements, of which four describe the activities of the diligence process (identify and assess; cease, prevent and mitigate; track implementation; communicate) and two are “supporting” measures (embed responsible business conduct in policies and management systems; and provide for or cooperate in remediation). These are illustrated in the figure below.

² Norton Rose Fulbright and British Institute of International and Comparative Law (BIICL), “Making sense of managing human rights issues in supply chains”, 2018.

FIGURE 1. DUE DILIGENCE PROCESS & SUPPORTING MEASURES



(Source: OECD Due Diligence Guidance)

These six elements are fully aligned with the Guiding Principles, as elements 2-5 correspond with the core elements of the human rights due diligence process set out in Guiding Principles 17-21. Element 1 corresponds with Guiding Principle 16, which states that “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 among other things “Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise”. Element 6 corresponds with Guiding Principle 22 on the business enterprise’s responsibility to provide for or cooperate in remediation, as well as with Principles 29 and 31. Guiding Principle 17 provides the parameters for human rights due diligence and cuts across above-mentioned elements 2-5.

There is also close alignment on the descriptive characteristics of the due diligence process. The OECD Guidance includes the following characteristics, all of which align with key features of human rights due diligence as set out in the Guiding Principles and outlined in the Working Group’s report³:

- Due diligence is **preventative**.
- Due diligence **involves multiple processes and objectives**.
- Due diligence is **commensurate with risk (risk-based)**.
- Due diligence **can involve prioritization (risk-based)**.
- Due diligence is **dynamic**.
- Due diligence **does not shift responsibilities**.
- Due diligence is **appropriate to an enterprise’s circumstances**.
- Due diligence **can be adapted to deal with the limitations of working with business relationships**.
- Due diligence is **informed by engagement with stakeholders**.
- Due diligence **involves ongoing communication**.

³ See paragraphs 13-14 of A/73/163.

What considerations apply for specific sectors and contexts?

The Guiding Principles apply to all sectors, but specific considerations may arise in different contexts. Both the Working Group and OHCHR have issued clarifications on application of the Guiding Principles in some sectors, notably:

- Financial sector ([OHCHR](#) and [Working Group](#))
- Bank sector ([OHCHR](#) and [Working Group](#))
- Institutional investors and minority shareholdings ([OHCHR](#))
- State-owned enterprises (Working Group)⁴
- Export credit agencies (Working Group)⁵

A companion piece to the Guiding Principles – the “Principles for Responsible Contracts” – also provide guidance for Government and private sector negotiators on how to manage human rights risks resulting from State-investor contracts.⁶

The Working Group has previously elaborated on the [connection between the corporate human rights due diligence and the Sustainable Development Goals](#).⁷

The OECD has also developed sector-focused guidance which provide useful tools for supporting implementation of responsible business conduct (including human rights) due diligence for enterprises in specific sectors:⁸

- Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
- Meaningful Stakeholder Engagement in the Extractive Sector
- Responsible Supply Chains in the Garment and Footwear Sector
- Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence
- OECD-FAO Guidance for responsible agricultural supply chains

The Due Diligence Guidance states that sector-specific guidance aligns with the Guidance. The Guidance also states that it is not intended to replace or modify existing OECD sector- or theme-specific guidance, but that it can supplement them.

Going forward it will be important to ensure that where provisions may appear contradictory, that the provision that is most conducive to ensuring prevention of adverse impacts is the one being applied. Similarly, for aspects where sector/theme guidance is incomplete, it would be important to use the Guidance (and the Guiding Principles) to elaborate on expectations.

A unique feature of the OECD system compared to other international corporate responsibility frameworks is its follow-up mechanism, the national contact points (NCP). While the NCPs have

⁴ Working Group report A/HRC/32/45. Executive summary: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/ExSummary-WGBHR-SOE_report-HRC32.pdf.

⁵ Working Group report A/HRC/38/48. Executive summary: <https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryReportEconomicDiplomacy.pdf>

⁶ “Principles for responsible contracts: Integrating the management of human rights risks into State-investor contract negotiations – Guidance for negotiators” (A/HRC/17/31/Add.3).

⁷ See also Working Group work on implications of the Guiding Principles (including considerations for human rights due diligence) in relation to [gender](#) and to [human rights defenders](#).

⁸ Available at: <http://mneguidelines.oecd.org/sectors/>

significant room for improvement⁹, they provide a mechanism for promoting human rights due diligence in concrete cases of alleged business-related human rights abuse.

Moreover, the OECD's programme to promote the Due Diligence Guidance is expected to unpack practical considerations for other sectors facing significant human rights risks and gaps in current practice, such as construction and fisheries. The Working Group intends to remain closely engaged with the OECD to promote continued convergence and alignment with the Guiding Principles.

⁹ Working Group, "Aligning NCP processes with the UN Guiding Principles", <http://blog.journals.cambridge.org/2017/11/28/the-national-contact-point-ncp-system-aligning-ncp-processes-with-the-un-guiding-principles-on-business-and-human-rights/>.