

Chapter Two: The UN Guiding Principles and Business Relationships

This chapter provides an overview of how business relationships are treated in the UN Guiding Principles in the context of the **Corporate Responsibility to Respect Human Rights**. It seeks to “anchor” the discussion of issues and practices in later chapters, and is organised in two parts:

- The **Overview** summarises what the Guiding Principles say companies should do to respect human rights, including in their business relationships. The chapter mirrors the Guiding Principles by addressing “Foundational Principles” (Guiding Principles 12 to 15) and “Operational Principles” (Guiding Principles 16 to 22).
- **Key Concepts: Human Rights Risk, Degree of Involvement, and Leverage.** The chapter explains concepts in the Guiding Principles that should guide companies when they address human rights impacts in the context of their business relationships.

A table in Appendix A supports this chapter by citing aspects in each Guiding Principle and its commentary that are relevant to business relationships.

Overview of Business Relationships in the Guiding Principles

“Foundational Principles” (Guiding Principles 12 to 15) and business relationships

The Guiding Principles make clear that a company may be involved with adverse human rights impacts in different ways: through its own activities; and through its business relationships. They provide guidance on how companies should prevent and address negative impacts.²⁰

As defined by the Guiding Principles, “**business relationships**” include an enterprise’s relationships 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.²¹ This definition covers the business relationships explored in this report.

The responsibility of business enterprises to respect human rights applies to all enterprises, regardless of their size, sector, operational context, ownership and structure.²² **Where companies cause an adverse human rights impact through their own operations, they have primary responsibility for those impacts.** With respect to business relationships, the essential message of the Guiding Principles is that all businesses need to:

- **Avoid contributing to adverse human rights impacts (through or in parallel with others),** and address impacts when they occur, including by participating in remediation.²³

20 Guiding Principle 13.

21 Commentary to Guiding Principle 13.

22 Guiding Principle 14.

23 Guiding Principle 13.

- Seek to prevent and mitigate adverse impacts directly linked to their operations, products or services through their business relationships, even where they have not contributed to such an impact. The Guiding Principles do not require a company to provide remediation, though it may take a role in doing so.

To act effectively, businesses need to **know** if and how they may be involved in adverse human rights impacts through their business relationships, and to **show** they have taken action to prevent, mitigate and address these impacts. This requires them to have adequate policies, capabilities, and processes.²⁴

Because many companies have a very wide range of business relationships – in number, scale and location – the Guiding Principles do not advocate a single approach. Approaches should be influenced by companies' size, sector, ownership and structure (including whether they conduct business through a corporate group or individually). Each industry and company is therefore likely to adopt a different mix of approaches.²⁵

The Guiding Principles make clear that businesses can have impacts on virtually all human rights.²⁶ They suggest that companies should engage with business partners on human rights issues that are particularly salient to their relationship, but review their choice and consider all internationally recognised human rights periodically, because the nature of impacts is influenced both by context and by the activities executed via the relationship, which often change over time.

Guiding Principle 15 – The Essence of the Corporate Responsibility to Respect

"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."

24 Guiding Principle 15.

25 Commentary to Guiding Principle 14.

26 Guiding Principle 12.

"Operational Principles" (Guiding Principles 16 to 21) and business relationships

Policy commitment (Guiding Principle 16)

- *Set and communicate expectations.* A company's human rights policy should set out its expectations of business partners and these should be communicated to partners.²⁷ The Guiding Principles do not specify how expectations should be communicated. The research for this project suggests that, among other means, companies can raise awareness, provide training, and include human rights considerations in contracts and pre-qualification procedures.
- *Embed commitments in operational policies and procedures.* Policy commitments should be set out in a statement that is then also reflected in "operational policies and procedures necessary to embed it" throughout the enterprise.²⁸ It follows that businesses should embed their commitment in policies and processes relevant to their business relationships. The aim is to integrate the commitment in day-to-day business, including relations with prospective or existing business partners.

Human rights due diligence (Guiding Principles 17 to 21)

- *Assess Impacts.* When companies undertake human rights due diligence, they should assess adverse human rights impacts that the business 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.²⁹ The Guiding Principles state that "human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions". Further, because situations change, assessments should be "undertaken at regular intervals: 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 in anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship".³⁰ This process should draw on internal and external human rights expertise and, where possible, should involve meaningful consultation with stakeholders.³¹ Where consultation is not possible (for example, due to resource constraints or lack of direct access to stakeholders), the Guiding Principles say that "business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society".

27 Guiding Principle 16 c and d.

28 Guiding Principle 16e.

29 Guiding Principle 18.

30 Commentary to Guiding Principles 17 and 18.

31 Guiding Principle 17.

- *Integrate responses.* Responses to existing or potential adverse impacts that are associated with a business relationship should be integrated effectively in the business functions linked with that relationship.³² This may require companies to change budget allocations, oversight mechanisms, and incentives. Key functions linked to business relationships may include legal, M&A, sales, compliance, procurement, and government relations.
- *Track effectiveness.* A company is expected to track the effectiveness of actions it takes to address human rights issues that arise out of its business relationships, in order to be able to show, confidently and credibly, that it has addressed the concerns in question.³³ Where companies have systems in place to review the actions of business partners (such as compliance audits in the supply chain, or monitoring systems for joint ventures) these may be adapted to address human rights impacts.
- *Engage and communicate.* A company that conducts effective human rights due diligence with respect to its business relationships will engage, collaborate, and communicate with a range of stakeholders.³⁴ These include: relevant functions within the business; the company's business partners; and other individuals and sources who can provide relevant information about the company's business relationships and their impacts (including members of civil society, human rights experts, government officials, investors etc.). Depending on the closeness of a company's relationship (it will be more heavily implicated in a 50:50 joint venture, for example, than with a supplier down the supply chain), a company may want to engage directly with stakeholders who are affected by its business relationships.

Remediation (Guiding Principles 22 and 29 to 30)

- Where a business has **caused or contributed to** adverse human rights impacts, it should provide or cooperate in providing remediation, including (where appropriate) by means of effective local grievance mechanisms.
- Where a business is **directly linked** to adverse human rights impacts through its business relationships, but did not cause or contribute to the impacts, the Guiding Principles do not expect it to provide remediation, though it may take a role in doing so.³⁵

Remediation may be achieved via official judicial (court-based) and non-judicial mechanisms.³⁶ Non-judicial mechanisms include company-level processes and multistakeholder or other collaborative mechanisms.³⁷

³² Guiding Principle 19a.

³³ Guiding Principle 20.

³⁴ Guiding Principles 18, 20b and 21.

³⁵ Guiding Principle 22.

³⁶ Guiding Principles 26 and 27.

³⁷ Guiding Principles 28 to 30.

Guiding Principle 31 – Effectiveness Criteria for Non-State Grievance Mechanisms

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

- **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- **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;
- **Predictable:** providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- **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;
- **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;
- **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognised human rights;
- **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:

- **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.”

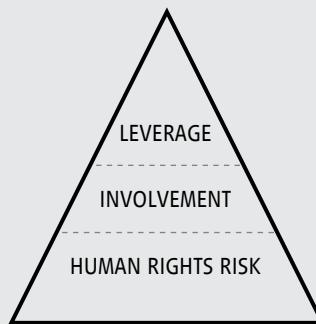
Key Concepts: Human Rights Risk, Involvement and Leverage

It is recognised that companies, including smaller enterprises, may have extremely large and complex value chains. Bearing that in mind, what should guide companies when they seek to respect human rights in the context of their business relationships? The Guiding Principles propose a number of useful concepts, three of which are presented here:

- **Human rights risk.** First, the risk of having an adverse impact on human rights.
- **Degree of involvement.** Second, the nature of a company’s involvement in an impact informs the nature and extent of its responsibility, and its duty to take “appropriate action”.

- **Leverage.** Third, “[t]he ability to effect change in the wrongful practices of the party that is causing or contributing to the impact.”

As illustrated by the diagram, human rights due diligence should first and foremost be about impacts, or be “risk-based” where risk is understood as risk to human rights. A company should then consider the nature of its involvement. With regard to leverage, the Guiding Principles change the paradigm of most previous models and expectations regarding responsible behaviour in the context of business relationships. These generally considered leverage to be a legitimate starting point for determining responsibility. Under the Guiding Principles, responsibility is determined by a company’s impacts. Leverage can be an important consideration when discharging responsibility but does not determine it.



Concept One: Human Rights Risk

When making decisions about where to focus attention and effort with respect to a business relationship, the Guiding Principles take a risk-based approach, where the risk of adverse impacts on people is the primary driver. The Guiding Principles address three circumstances:

- Prioritising *among* relationships in complex value chains with large numbers of entities.³⁸
- Prioritising which impacts and issues to address first *within* a specific relationship.³⁹
- Contexts of enhanced human rights risk including where there is a risk of complicity in gross human rights abuses.⁴⁰

38 Commentary to Guiding Principle 17.

39 Guiding Principle 24.

40 Guiding Principle 23.

| | Prioritising Among Relationships | Prioritising Issues Within a Relationship | In Especially High Risk Situations |
|----------------|---|---|--|
| The Situation | <p>The Guiding Principles recognise that there may be good reasons, including legitimate resource and logistical constraints, for businesses to prioritise attention to some business relationships over others, and to certain impacts within those relationships.</p> | <p>The Guiding Principles recognise that while business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. This could apply to situations when multiple human rights impacts need to be addressed with a business partner.</p> | <p>The context in which products and services are delivered and used, or in which business partners operate could provide reason for enhanced attention and action (because the risk of involvement in abuse is clearly enhanced). The Guiding Principles mention two specific situations:</p> <ul style="list-style-type: none"> Where national laws explicitly contradict international human rights standards: Where complicity in gross human rights abuses is a possibility, such as in conflict-affected areas: |
| Considerations | <p>If companies must prioritise certain business relationships over others for human rights due diligence, or certain issues within a single relationship and no specific legal guidance exists, the key factors for decision-making should be: how significant the risk to human rights is, and the severity of potential or actual adverse human rights impacts.</p> <p>When assessing how significant a risk is, companies should be guided by:</p> <ul style="list-style-type: none"> • The operating context • The products or services involved and • Other relevant considerations (including information in the public domain or provided by stakeholders). <p>Severity depends on the following:</p> <ul style="list-style-type: none"> • Scale of impact: the gravity of impact. • Scope of impact: the number of individuals impacted at present or potentially in the future, and whether the impact is temporary or permanent. • The irremediable nature (or not) of the impact: Impacts that cannot be reversed or mitigated. This may include in particular the rights to life and health, fundamental effects on the welfare of entire groups or communities, gross human rights abuses and disproportionate, and potentially cumulative impacts on the most vulnerable groups. <p>Prioritising relationships or issues within relationships based on the volume of a contract or the percentage of business a contract represents, may not be the most appropriate approach to prioritisation.</p> | <p>Companies should:</p> <ul style="list-style-type: none"> • Seek ways to honour the principles of internationally recognised human rights: Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard. | <p>Companies should:</p> <ul style="list-style-type: none"> • Treat this risk as a legal compliance issue. In the context of business relationships this may include binding contractual provisions or other mechanisms within the relationship. • Understand the concerns and vulnerability of potentially affected stakeholders and engage relevant expertise: This should ideally be done directly with stakeholders or if this is not possible through other experts including from government and civil society. • Report formally: Companies are encouraged to report formally about how they address their human rights impacts. At the same time, this should not pose risks to affected stakeholders. |

A risk-based approach to prioritisation requires a company to make an initial assessment to identify the areas of highest risk, taking into account such factors as the severity of the potential impact, the partner's country of operation, the sector, and the nature of the operation.⁴¹ In all cases, potentially severe human rights impacts should head the list of risks to address first, and any risk of involvement in gross human rights abuses should be addressed as a legal compliance issue.⁴² Once a company is satisfied that it has addressed an issue, it should start to address other impacts (even if these are initially judged to be less significant or severe).⁴³

Concept Two: Degree of Involvement

The conduct expected of companies – what the Guiding Principles term “appropriate action” – depends in part on a business’s level of involvement with a potential or actual adverse human rights impact.⁴⁴

- **Cause.** **A business enterprise causes or may cause adverse human rights impacts through its own activities.** For example, an employer adopts discriminatory practices; a factory harms the health of a local community by polluting the environment; an extractive company violates the cultural rights of a local indigenous community by mining a sacred site without obtaining consent; or company employees intimidate union representatives.⁴⁵
- **Contribute.** **A business enterprise contributes or may contribute to adverse human rights impacts by its own activities.** For example, a company: expressly or impliedly authorises a public or private security provider to use excessive force to break up a protest; provides customer data to a government that requests it for political purposes; provides buildings or equipment to a government or other actors to use on a prison site where inhumane treatment is alleged; imposes unreasonable buying policies that affect safe working practices among its suppliers.
- **Directly Linked.** **Adverse impacts are directly linked to a business enterprise’s operations, products or services through its business relationships.** For example, a company: provides finance to an enterprise for a project that involves illegally evicting people from land; contracts suppliers that use forced labour; sells technology that is used for purposes other than those intended to perpetuate a human rights abuse.

41 Guiding Principle 17.

42 Guiding Principle 23.

43 Commentary to Guiding Principle 24.

44 Guiding Principle 13a.

45 The illustrations here are based on examples in Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012), pp. XVII. At: http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

| | CAUSE | CONTRIBUTE | DIRECTLY LINKED |
|--|--|--|--|
| APPROPRIATE ACTION Prevention and Mitigation | <p>Company A → Action → Affected Person</p> | <p>Company A → Third Party → Affected Person</p> | <p>Company A → Third Party → Affected Person (dashed line)</p> |
| | DEGREE OF INVOLVEMENT | | |
| Remediation | Provide for or cooperate in remediation through legitimate processes | Provide for or cooperate in remediation through legitimate processes | Business may take a role in remediation |

When a company is “directly linked” to an adverse impact, the Guiding Principles say that appropriate action depends on a range of factors, such as the **severity of abuse**, the amount of **leverage**, the human rights **consequences of termination**,⁴⁶ and how **crucial** the relationship is.

- If a business has leverage it should use it and, if necessary and possible, increase it (for example, by offering incentives, building capacity, or cooperating with other actors).⁴⁷ (See the discussion of leverage below.)
- If it has no leverage, and cannot increase leverage to help improve the situation, a business should consider ending the relationship.
- When considering whether to end a relationship, a business should consider:
 - The severity of the human rights abuse. The more severe the abuse, the more quickly it needs to see change.⁴⁸

46 Guiding Principle 19 and Commentary.

47 Commentary to Guiding Principle 19.

48 Commentary to Guiding Principle 19.

- The human rights consequences of terminating the relationship. For example, will termination increase the vulnerability of workers or communities, or deprive vulnerable groups of access to basic services?
- If a business decides not to terminate a relationship because it is crucial (that is, both essential and without alternative), it should be prepared to demonstrate a continuing effort to mitigate adverse human rights impacts and should be prepared to accept the consequences of continuing the connection.⁴⁹

Guidance in the Guiding Principles with regard to levels of involvement does not provide a strict formula or legal test independent of context. Determining whether a company is contributing to or is directly linked to human rights impact is arguably more an art than a science; there are parameters, nonetheless. In addition, one relationship may involve all three different levels of involvement in impacts (cause, contribute, directly linked), meaning that the distinctions may not always be so neat. The absence of a strict legal test or normative formula is likely to focus attention on a company's ability to show that it has taken reasonable steps to address adverse impacts that it may be involved with, and be prepared to explain any prioritisation of resources and focus. For example, if a company has taken meaningful pro-active steps to address a potential or actual impact, but abuses continue to occur, this suggests that it is "directly linked" to the abuse rather than "contributing" to it. By contrast, a company that has taken no action to prevent or mitigate the same abuse, when it could have done so, is likely to be described as "contributing" to the harm and will therefore face the higher expectations associated with that status.

Companies have overlapping responsibilities with their business partners. The Guiding Principles expect business partners to work together to prevent, mitigate and if necessary remediate harmful outcomes; and to decide who will take specific actions in support of these purposes. Ultimately, the Guiding Principles expect companies to conduct human rights due diligence so that they *know* whether their business relationships are likely to generate human rights impacts, and can respond in a manner that *shows* that they have acted to address them, directly or through their business partners. Procedures and policies, including those relevant to prioritisation, should be in place, regardless of where a relationship sits on the continuum of involvement above.

Complicity and the UN Guiding Principles

Many companies are used to framing human rights risks associated with business relationships in terms of "complicity", because it is understood by lawyers and non-lawyers alike to convey a sense of partial responsibility for the acts of another.

The Guiding Principles explain that there may be both non-legal and legal forms

of complicity.⁵⁰ "As a non-legal matter, business enterprises may be perceived as being 'complicit' in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.... As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number provide for criminal liability of business 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."

With respect to business relationships, in its everyday, non-legal sense, "complicity" may fall somewhere in the "contribute" category, but extend to "directly linked". In its legal sense, "complicity" is more likely to fit within the "contribute" category, moving towards the "cause" category. This is because international criminal law jurisprudence indicates that the relevant standard for complicity, or aiding and abetting, is 'knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime'.

Concept Three: Leverage

The Guiding Principles define leverage to mean "the ability to effect change in the wrongful practices of the party that is causing or contributing to the impact".⁵¹ Leverage is an important concept in the Guiding Principles because it acknowledges that a spectrum of actions may (or may not) be available to a company that seeks to prevent or mitigate adverse human rights impacts, which it has not itself caused. Whilst a business rarely has full control over the actions of a business partner, it may have leverage to encourage the partner to respect human rights and therefore prevent or mitigate adverse impacts with which the business may be involved.

The Guiding Principles recognise that leverage can often be established at the start of a relationship, and this is therefore often an opportune moment for business partners to consider human rights issues and set and communicate expectations with regard to them. It permits all parties to structure the relationship appropriately, by contractual and other means.⁵²

Later chapters show how some companies create and apply leverage in their relationships, and the challenges they face when they do so. An *Interpretive Guide* published by the Office of the United Nations High Commissioner for Human Rights suggests how companies and external stakeholders can establish and apply leverage to strengthen the respect of business partners for human rights.⁵³ Factors include:

50 Commentary to Guiding Principle 17.

51 Guiding Principle 19 and Commentary Guiding Principle 19.

52 Guiding Principles 16 and 17.

53 OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012), pp. XLIX. At: http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

The Nature of the relationship

- The degree to which a business has direct control over the partner.
- The proportion of work the business represents for the partner.
- The ability of the business to incentivise the partner by promising future work, increasing its capacity, etc.
- The reputational benefits for the partner of the partnership, and the reputational harm that severance would cause.

The Contractual relationship

- The terms of contract between the business and the partner.

Ability to effect change in the relationship

- The ability of a business to involve other organisations in incentivising the partner (business associations, investor groups, multistakeholder initiatives).
- The ability of the business to involve local or central government in requiring the partner to improve its human rights performance (by means of regulation, monitoring, sanctions etc.).

Contracts and Respect for Human Rights

An enterprise cannot contract out of its responsibility to respect human rights. In other words, it cannot use contract clauses to evade its responsibility to know and show that it respects human rights on an ongoing basis, including through its business relationships.

Contracts enable parties to articulate the purpose, roles, responsibilities, and modalities of how they will work together in relationships. Contracts can promote respect for human rights. They do so, for example: when they clarify expectations about who will act to address potential or actual human rights impacts; or include requirements to comply with human rights policies and codes of conduct, and conduct audit, monitoring or reporting procedures to provide evidence of compliance. Contracts can also be used to allocate risks and liabilities in relationships.

While a contract may allocate responsibilities for action, and liability, the Guiding Principles are clear that each company remains responsible for respecting human rights. A company cannot contract out its responsibility to respect, because the responsibility is rooted in societal expectations, as well as legal instruments that reinforce and enforce it. Accordingly, contracts that shift responsibility and liability to one party, particularly to a business partner that is not capable of carrying out effective human rights due diligence, will not diminish a partner's responsibility under the Guiding Principles and can create a false impression of security. Business partners will still be exposed to the risks created by any adverse human rights impacts associated with their activities, including their activities in association with partners.