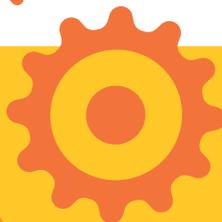




HUMAN RIGHTS DUE DILIGENCE: AN INTERPRETIVE GUIDE



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This document is an excerpt of Chapter III of The Corporate Responsibility to Respect Human Rights, An Interpretive Guide. The guide is developed by the Office of the High Commissioner for Human Rights (OHCHR) and can be accessed via this link: https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf.



HUMAN RIGHTS DUE DILIGENCE

GUIDING PRINCIPLE 17

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

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

Q 26. Why does this matter?

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

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

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

As the Guiding Principles state, human rights due diligence “should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.

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



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

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

Human rights due diligence is necessary for any enterprise to know and show that it is respecting human rights in practice. It will need to include all the elements set out in this Guiding Principle: assessing actual and potential human rights impact, integrating and acting upon the findings, tracking responses, and communicating how impact is addressed. However, the scale and complexity of these processes will vary according to the size of the enterprise, as well as its sector, operational context, ownership and structure. The single most important factor, however, in determining the processes needed will be the severity of its human rights impact. Guiding Principle 24 explores further the concept of “severity”.

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

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

Q 30. What is the role of stakeholder engagement?

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

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

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

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

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



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

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

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

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

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

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

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



QUESTIONS TO ASK

- ① Do we already have systems on which we may build as we develop our human rights due diligence processes?

- ② Are these systems effective and fit for the purpose of addressing human rights risks? What changes may be needed to make them fit for this purpose?

- ③ Are there circumstances in which we will need separate processes for human rights?

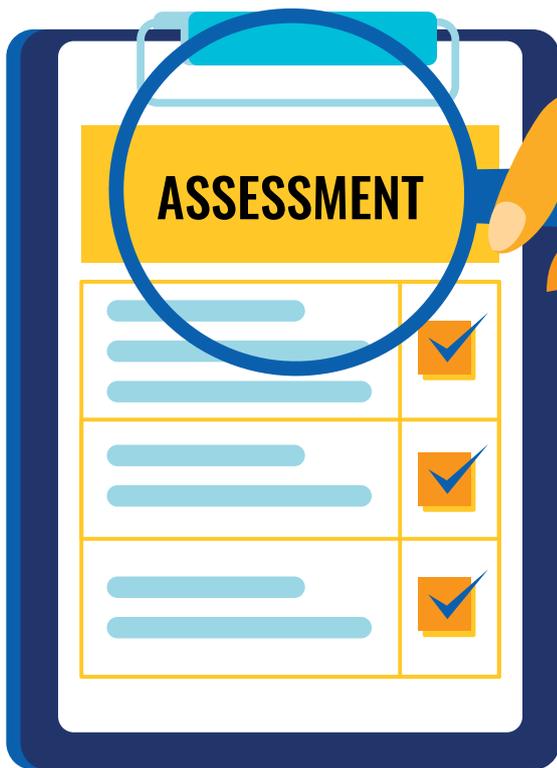
- ④ Who should lead on human rights due diligence? Who needs to have oversight?

- ⑤ What departments will most likely need to be involved in aspects of human rights due diligence? How could we involve them in the development of the processes? How could we structure and motivate collaboration?

- ⑥ What external expertise are we likely to need? If we use external experts, how can we ensure that this supports, rather than detracts from, the embedding of respect for human rights in our internal values and practices?

- ⑦ How and at what points in the human rights due diligence process should we seek to engage with our directly affected stakeholders or their representatives? If we cannot do so, how else can we gain an understanding of their likely concerns and perspectives?

- ⑧ How will we make sure that we keep our human rights due diligence up to date so that we may recognize changes that may require renewed assessments of and responses to our impact?



GUIDING PRINCIPLE 18

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

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

Q 34. Why does this matter?

For any enterprise, gauging its human rights risks is the starting point for understanding how to translate its human rights policy statement—and therefore its responsibility to respect human rights—into practice. It is

the prerequisite for knowing how to prevent or mitigate potential adverse impact and remedy any actual impact that it causes or contributes to. It is therefore the essential first step in human rights risk management.

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

Much of human rights due diligence is focused on human rights risks—or the potential impact on human rights in which an enterprise may be involved. Actual human rights impact is a matter primarily for remediation, although it is also an important indicator of potential impact. It is worth highlighting again that an enterprise’s human rights risks are the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

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

Q 36. When should impact be assessed?

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

The most effective is to begin to assess impact as early as possible in the life of a particular activity or relationship. The terms of contracts at the start of new investments or business relationships can

often dictate how easy or difficult it will be to ensure respect for human rights for their duration. An early exercise to gauge human rights risks can help set the right terms of contract to ensure respect for human rights.

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

BOX 4. Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations - guidance for negotiators

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

The 10 principles are:

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

BOX 4. (cont.)

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

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

Q 37. How should human rights impact be assessed?

Standard approaches to risk assessment may suggest that the probability of an adverse human rights impact is as important as its severity. However, if a potential human rights impact has low probability but high severity, the former does not offset the latter. The severity of the impact, understood as its "scale, scope and irremediable character", is paramount. Equally, human rights risks cannot be the subject of a simple cost-benefit analysis, whereby the costs to the enterprise of preventing or mitigating an adverse impact on human rights are weighed against the costs to the enterprise of being held to account for that harm.

As the commentary to Guiding Principle 18 explains, the process of assessing actual and potential adverse human rights impact typically includes "assessing the human rights context prior

to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified".

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

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

When assessing their actual or potential human rights impact, companies should pay particular attention to marginalized or vulnerable groups. In some societies, inherent patterns of discrimination can be pervasive (but not necessarily apparent to outsiders). While companies are not responsible for such wider discriminatory practices, they should pay particular attention to the rights and needs of, and challenges faced by, these vulnerable and marginalized groups in order to ensure that they do not contribute to, or exacerbate, such discrimination.

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

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

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

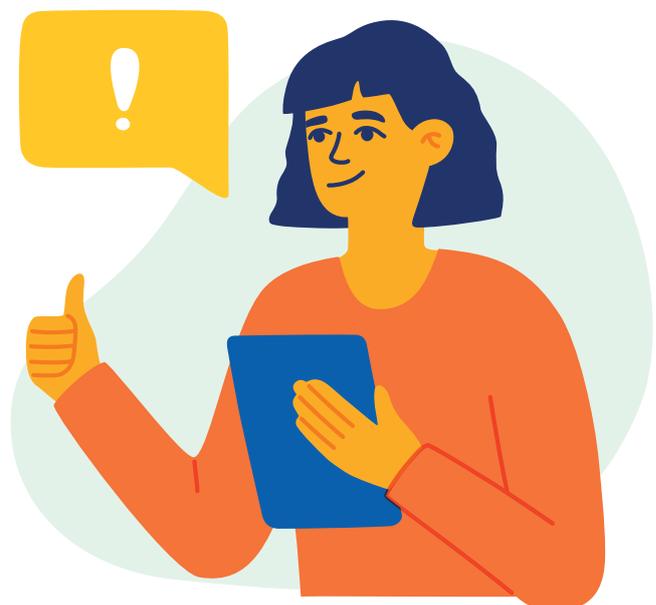
Q 39. What does it mean to assess the impact that occurs through an enterprise's own activities?

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

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

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

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



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

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

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



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

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

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

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

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

Engagement with stakeholders plays a number of roles. It enables an enterprise to identify whether stakeholders have the same or different perspectives (than the enterprise and than each other) on what constitutes an impact on their human rights and on how significant an impact may be. For instance, damage to land that belongs to an indigenous community but is not farmed

or otherwise used for economic purposes might seem to the enterprise to represent a low-level impact on the right to property that can easily be addressed through financial compensation or the provision of alternative land; whereas an indigenous community may consider that there is a far greater impact related to the role of that land in its culture, traditions and beliefs. Changes to factory shift hours that seem to make sense to the management of an enterprise may have a particular impact on women with childcare responsibilities or individuals with whose religious practices the new hours would interfere. It is often only through talking to those who may be affected that these issues come to light and can be addressed.

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

BOX 5. Engagement with potentially affected groups and other relevant stakeholders

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

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

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

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

QUESTIONS TO ASK



- ① What internal and external individuals or groups are at risk of being adversely affected by our operations? Are any of them particularly vulnerable in any of our operating environments?

- ① What processes do we have in place into which we might integrate additional steps to help us assess human rights impact? Are they strong, well-tested processes that can be made fit for this added purpose?

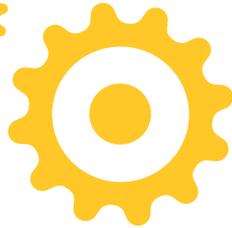
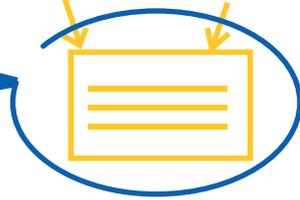
- ① Are there circumstances in which we should do stand-alone human rights impact assessments, including where there are heightened human rights risks?

- ① What other processes and sources can we draw on as part of our ongoing assessment of our impact: media, expert reports, feedback from staff and stakeholders, grievance mechanism?

- ① Can we reasonably review all our business relationships to identify the risk of our being involved, through them, in adverse human rights impact? If not, where are the greatest risk areas across our business relationships, and how can we at least ensure full due diligence with regard to those risks?

- ① Can we engage directly with those groups we potentially have an impact on? If not, what other credible sources can help us understand their likely perspectives and concerns?

- ① What written resources or experts could help us test our assumptions about whom we may have an impact on and how?



GUIDING PRINCIPLE 19

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

- (a) Effective integration requires that:
 - (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
 - (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
- (b) Appropriate action will vary according to:
 - (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
 - (ii) The extent of its leverage in addressing the adverse impact.

Q 43. Why does this matter?

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

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

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

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

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

Q 45. How does integration relate to business relationships?

If an enterprise's own activities may contribute to a human rights impact, integrating that finding across those departments that generate the activity is essential to be able to address that risk. Equally, those individuals or departments that determine the terms of the enterprise's relationships with business partners, suppliers and others are essential to the integration process. The provisions of contracts or other formal agreements can play an important role in requiring or creating incentives for those other parties to respect human rights. Moreover, if these provisions have been put in place, the ability of the enterprise to leverage appropriate behaviour by that other party is increased.

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

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

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

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

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

BOX 6.

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

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

It arises, for example, if a supplier acts contrary to the terms of its contract and uses child or bonded labour to manufacture a product for the enterprise, without any intended or unintended pressure from the enterprise to do so; or if an agribusiness enterprise gains a concession from a Government to develop land, and the Government then contracts another company to clear that land of individuals who have traditionally used it, without due consultation or compensation, and

contrary to the clear understanding that no such action would be necessary. As in these examples, it is often the occurrence of an actual abuse that highlights the risk of its continuation or recurrence.

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

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

* Decisions on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so.
 ** If the relationship is deemed crucial, the severity of the impact should also be considered when assessing the appropriate course of action.

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

The above applies to existing business relationships. An enterprise may also be considering entering into a new relationship with a third party which it identifies has been involved in human rights abuses in the past. In this case, the enterprise should first assess whether it is likely to be able to use its relationship to mitigate the occurrence of such abuse in connection with its own operations, products or services and try to ensure—through the terms of contract or other means—that it has the leverage to do so. If it assesses that this is possible, then the risks of entering the relationship may be deemed acceptable, provided the enterprise then pursues action to mitigate

them. If it assesses that it will not be able to mitigate the risk of human rights abuses by the other party or that the risks to human rights are simply too high, it will be ill-advised to enter the relationship.

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

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





QUESTIONS TO ASK

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

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

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

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

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

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

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

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

GUIDING PRINCIPLE 20

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

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

Q 48. Why does this matter?

It is generally recognized that “what gets measured gets managed”. Tracking how an enterprise has responded to both potential and actual adverse human rights impact is essential if its personnel are to be able to account for its success in respecting human rights, whether internally to management or externally to shareholders and wider stakeholders. Guiding Principle 21 looks at the separate question of how much of the information obtained through tracking the enterprise should communicate externally. Regardless, by maximizing the information it has about its human rights performance, the enterprise enables robust internal accountability and lays the basis for whatever external communication is required or advisable.

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



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

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

If there are human rights issues that result from environmental impacts—for example, related to water and health—there may be established and quite precise international as well as national standards that offer ready metrics. This does not necessarily mean that those who believe they are being harmed trust those standards or trust the enterprise (or any third party paid by the enterprise) to be honest in the measurements it provides. In situations such as these, the enterprise should consider the scope for agreeing with affected stakeholders on an individual or organization that all concerned will trust to provide accurate

assessments. Alternatively, joint fact-finding by company and community representatives may be possible. This will often require either that affected stakeholders are able freely to identify an expert to represent them in that process, or that one or more of the affected stakeholders are themselves trained so they have the necessary expertise to participate in the joint process.

Q 50. How far should the tracking system go?

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

Q 51. What indicators should an enterprise use?

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

to community consultation and community resettlement, there is also increasing guidance from international organizations and other credible bodies on how to assess performance.

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

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

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

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

Various sources may be useful. It may be that individuals within the enterprise have seen or heard things that provide evidence of how well the enterprise is doing, and it can be valuable to provide a channel for them to raise their voices (of course, without fear of retaliation if that feedback

is negative). Expert observers (local authorities, civil society, etc.) and directly affected stakeholders outside the enterprise may also have valuable insights. For a small enterprise with limited impact, a simple means for people to give feedback may be sufficient, such as a known and accessible e-mail address or phone number. For enterprises with more significant human rights risks, a more proactive approach to solicit feedback will likely be appropriate.

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

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

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



QUESTIONS TO ASK

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

? What measures should we use?

? Are there established and widely accepted indicators we can draw on?

? Are there quantitative metrics that can be applied?

? What qualitative measures do we need to ensure we are interpreting quantitative data correctly and to give us a full picture?

? What indicators can we reasonably include to help us see how our responses to impact relate to women and men separately, and to vulnerable groups?

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

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



GUIDING PRINCIPLE 21

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

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

Q 54. Why does this matter?

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

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

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

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

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

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

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

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

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

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

should be able to communicate how it is addressing the resulting human rights abuses and the risk of their recurrence.

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

The form of the communication should fit the purpose.

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

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

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

There may even be reasons for some enterprises with lesser human rights risk profiles to include information on their human rights performance in regular, formal public reports. For instance, the internal process of writing a report can help to embed within an enterprise an understanding of human rights issues and of the importance that

respecting human rights holds for the business itself. The additional transparency that reporting of this kind provides can help protect the enterprise's reputation and build wider trust in its efforts to respect human rights. These strengthened stakeholder relationships may be helpful if or when the enterprise needs to deal with unforeseen challenges.

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

Q 58. When is external communication required?

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

When an enterprise is challenged by external parties on how it is addressing its alleged human rights impact, it should consider whether and what it can reasonably communicate to address that concern. If the parties raising the challenge are themselves claiming to be directly affected or are the legitimate representatives of such individuals

or groups, the case for direct communication is most compelling. A lack of communication carries risk for the enterprise and will often be taken to imply that the allegation is correct or that the enterprise does not have the processes in place to know and show that it is not involved in the alleged impact.

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

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

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

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

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

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

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

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

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

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

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





QUESTIONS TO ASK

- ① Do we have the necessary internal communications and reporting systems to gather all relevant information on how we address our adverse human rights impact? If not, what additional systems do we need?

- ② What different groups can we envisage we may need to communicate to and about what types of issues?

- ③ What means of communication do we need for those different groups, taking account of how they can access information, and what will be the most effective?

- ④ Should those communications be driven by a set timetable, be in response to particular events or both?

- ⑤ What processes do we have in place to make reasoned and defensible judgements on when we should communicate publicly?

- ⑥ If our operations or operational contexts pose significant risk to human rights, how do we provide formal public reporting on how we address that risk?

- ⑦ If we are not in a context of heightened human rights risk and are not required to report publicly on our human rights performance, would there nevertheless be other benefits to formal public reporting?

- ⑧ How will we ensure that our communications do not pose a risk to individuals inside or outside the enterprise?

- ⑨ How might we solicit feedback on our public communication to test how it is viewed and see whether there are ways to improve it?



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