

The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities

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Abstract

The UN Guiding Principles on Business and Human Rights provide authoritative guidance for states and businesses on how to prevent and address business-related human rights harms, including in conflict-affected areas. States need to explore a more innovative range of policy and regulatory options in such situations, whether they are engaging with cooperating companies or dealing with uncooperative ones. Companies need to be able to know and show that they can operate with integrity – and avoid being involved in gross abuses of human rights – and that

* See www.shiftproject.org. All internet references were accessed in November 2012, unless otherwise stated.

their risk assessment, mitigation, and remediation processes take full account of the potential risks to affected stakeholders, not just risks to the business.

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In June 2011, the United Nations (UN) Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights, developed by the former Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie of Harvard Kennedy School. The Guiding Principles implement the UN Protect, Respect and Remedy Framework, also developed by Ruggie.

When Ruggie began his mandate in 2005, there was no authoritative point of reference for states, business, or civil society on how to prevent and address business-related human rights abuses. Ruggie sought to build consensus among stakeholders by holding consultations and conducting extensive research with the support of experts from around the world. Out of that process came the Protect, Respect and Remedy Framework, which was presented to the UN Human Rights Council in 2008. The Framework rests on three independent but mutually supporting pillars:

1. The **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
2. The **corporate responsibility to respect** human rights, which means to avoid infringing on the rights of others and to address adverse impacts with which a business is involved; and
3. The need for greater access by victims to **effective remedy**, both judicial and non-judicial.

The UN Human Rights Council unanimously welcomed the Framework, and extended Ruggie's mandate as Special Representative until 2011 with the task of 'operationalising' and promoting the Framework. In June 2011, the Council unanimously endorsed the Guiding Principles, making them the authoritative global reference point on business and human rights.¹

The Protect, Respect and Remedy Framework ('what should be done') and the Guiding Principles ('how to do it') reflect a broad consensus on how to address the risks that business can pose to human rights. The Guiding Principles had gained extensive support from businesses, trade unions, NGOs, investors, and other stakeholders already, before their formal consideration by the UN Human Rights

1 See UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011. The Council also created a new expert Working Group on business and human rights to take forward the dissemination and implementation of the Guiding Principles.

Council in June 2011. There has since been a further convergence of standards around the Guiding Principles at the global level. In particular, the Organisation for Economic Cooperation and Development (OECD), in revising its Guidelines for Multinational Enterprises in 2011, added a new human rights chapter that closely mirrors the Guiding Principles.² The recent International Organization for Standardization *ISO 26000 Guidance on Corporate Social Responsibility* standard also reflects the Guiding Principles in its human rights provisions.³ The International Finance Corporation (IFC) has incorporated the corporate responsibility to respect human rights in its revised Sustainability Framework and Performance Standards, which have in turn been picked up and applied by the private 'Equator Principles' banks and the OECD 'Common Approaches' for Export Credit Agency.⁴ Finally, the European Commission has issued a new communication on corporate social responsibility that calls on all companies operating in the EU to respect human rights in line with the UN Guiding Principles.⁵

For states, the Guiding Principles do not articulate new legal obligations – that was never their intent. Rather, they spell out the policy implications of states' existing duties under international human rights law when it comes to protecting against business-related human rights harms. They place particular stress on the need for greater policy coherence between states' human rights obligations and their regulatory and other actions with respect to business.

For business, the strong convergence around the UN Guiding Principles provides clarity and predictability regarding their responsibility to respect human rights and helps establish a level playing field of expectations. There is an incentive for business to engage with these expectations as governments, investors, civil society organisations, and others increasingly use the Guiding Principles as the benchmark for assessing companies' human rights performance, including in conflict-affected areas.

Ruggie identified the particular, often acute, challenges posed by conflict-affected areas as one of the most significant 'governance gaps' existing at the international level. This short article explores how the respective obligations and responsibilities of states and companies under the Guiding Principles can be relevant to conflict situations. The first part of the article looks at the implications for states, focusing on the outputs from a series of off-the-record discussions convened under Ruggie's mandate with 'home' and 'host' state representatives. The second part turns to the implications for companies and particularly the various

2 See OECD, *OECD Guidelines for Multinational Enterprises*, 25 May 2011 (updated), available at: www.oecd.org/daff/internationalinvestment/guidelinesformultinationalenterprises/oecdguidelinesformultinationalenterprises.htm.

3 See International Organization for Standardization, *ISO 26000 Guidance on Social Responsibility*, 2010, available at: www.iso.org/iso/iso_catalogue/management_standards/iso26000.

4 See International Finance Corporation, *IFC Sustainability Framework and IFC Performance Standards on Environmental and Social Sustainability*, 1 January 2012, available at: www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework.

5 See European Commission, *A Renewed EU strategy 2011–14 for Corporate Social Responsibility*, 25 October 2011, available at: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm.

ways in which companies may be involved in human rights harms, including gross abuses of human rights, in such situations. The final part provides a brief conclusion.

Implications for states

This section briefly sketches the main contours of the ‘state duty to protect’; it then focuses on Guiding Principle 7, which addresses the particular challenge of businesses operating in conflict-affected areas and the series of confidential workshops held with home and host state representatives during Ruggie’s mandate. It outlines the main recommendations arising from those workshops for states when engaging with both cooperative and uncooperative companies in such contexts – recommendations which are yet to be fully reflected in any single state’s practice. It concludes with a discussion of the relevance of multilateral approaches, particularly with respect to remedying gross human rights abuses.

The state duty to protect

The Guiding Principles that address the first pillar of the UN Framework elaborate on how states can create an environment that is conducive to business respect for human rights, including by:

- generating greater policy coherence between their human rights obligations and their actions with respect to business by improving enforcement of existing laws, identifying and addressing key policy or regulatory gaps, and providing effective guidance to business;
- fostering business respect for human rights both at home and abroad, including where there is a state–business nexus (such as with state-owned or state-controlled enterprises, or when a state engages in commercial transactions such as procurement);
- helping ensure that businesses operating in conflict-affected areas do not commit or contribute to human rights abuses (discussed in detail below); and
- meeting their duty to protect in their roles as participants in multilateral institutions.

States also have obligations in relation to remedy under the third pillar of the UN Framework. Even where states and businesses operate optimally, adverse human rights impacts may still result from a company’s activities, and affected individuals and communities must be able to seek redress. Effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect. The Guiding Principles for the third pillar set out how such grievance mechanisms can be strengthened by states and businesses:

- as part of their duty to protect, states must take appropriate steps to ensure that when abuses occur, those affected have access to effective judicial and non-judicial state-based mechanisms;

- non-state-based mechanisms (including company mechanisms at the operational level) should provide an effective complement to state-based mechanisms; and
- all non-judicial grievance mechanisms should meet specific effectiveness criteria by being legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and (in the case of operational-level mechanisms) based on dialogue and engagement.

The duty to protect in conflict-affected areas

Guiding Principle 7 (an operational principle under the state duty to protect) addresses the particular challenge posed by conflict-affected areas, providing that:

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:
 - a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
 - b) providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
 - c) denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
 - d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

The commentary notes that all the measures identified in Principle 7 are ‘in addition to States’ obligations under international humanitarian law in situations of armed conflict, and under international criminal law’.⁶

This principle arose in part from a body of work conducted during Ruggie’s mandate on the particular challenges posed by the implementation of the state duty to protect in conflict-affected areas. As Ruggie explained:

The most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence. Human rights abuses may spark or intensify conflict, and conflict may in turn lead to further human rights abuses. The gravity of the human rights abuses demands a response, yet in conflict zones the international human rights regime cannot possibly be expected to function as intended. Such situations require that States take action

6 The Guiding Principles focus on the implications of international human rights law for states, while acknowledging that international humanitarian law exists as *lex specialis* that must be adhered to by states whenever it applies.

as a matter of urgency, but there remains a lack of clarity among States with regard to what innovative, proactive and, above all, practical policies and tools have the greatest potential for preventing or mitigating business-related abuses in situations of conflict.⁷

He therefore convened three workshops, involving officials from a small but representative group of states, to help generate such proposals. Countries who agreed to participate included Belgium, Brazil, Canada, China, Colombia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom, and the United States. The workshops were structured as brainstorming sessions built around a different scenario each time. Participants were asked to respond with possible policy options to help prevent and deter business-related human rights abuses in conflict-affected areas for home states (where a multinational company is incorporated or has its headquarters); host states (a place other than the home state where the company has operations); and neighbouring states that are in close proximity to the relevant host state.⁸ Participating states were not expected to reach consensus or endorse any particular proposal.

The workshops confirmed the importance of all states – home, host and neighbouring – seeking to address issues early before conditions on the ground deteriorate. Where a host state is unable to meet its duty to protect (for example, due to a lack of effective control over its territory), home states of transnational corporations have a role to play in helping both those companies and the host state to prevent business-related human rights abuses. Neighbouring states can provide important additional support, whether the situation involves transnational or national companies.

A core observation underpinning the Guiding Principles is that states should not assume that businesses prefer governmental inaction. The workshops highlighted the importance of *proactive engagement by states* with businesses to help those enterprises meet the challenges of operating in conflict-affected areas, including avoiding contributing to human rights abuses. While this engagement should occur at the earliest possible opportunity, states should remain engaged with businesses throughout the conflict cycle as conditions change and/or deteriorate. But while responsible companies increasingly seek guidance from states, not all companies are responsible. Ruggie's recommendations arising from the conflict workshops were divided therefore into those where a business is *willing to cooperate* with the state in preventing and addressing human rights harms, and those where a business is *uncooperative*.

7 See Business and Human Rights in Conflict-Affected Regions: Challenges and Options for State Responses, UN Doc. A/HRC/17/32, 27 May 2011. The report on the workshops was included as one of the four addenda to the report containing the Guiding Principles in 2011.

8 The workshops addressed three scenarios: where business enterprises are physically present in conflict situations; where businesses are involved in foreign investment and trade activities that extend to conflict situations; and states' individual and collective roles in responding where companies refuse to constructively engage. Each scenario assumed conflict situations involving escalating or changing patterns of violence.

Engaging with cooperating companies

In general, states do not currently effectively convey their expectations of business in relation to human rights in conflict situations through policies, laws, or other means (compared to, say, the way state expectations are conveyed in the area of anti-corruption). This means that capitals and in-country embassies lack a clear basis for engaging or advising companies in such contexts. There is also a general lack of awareness of existing information that might help businesses assess and address the risks of human rights abuses, including by identifying useful tools.

The workshops confirmed that home states could do much more to foster cooperation among their own development assistance agencies, foreign and trade ministries, and export credit/development finance institutions in capitals, as well as between those various agencies and the home state's embassies in the relevant country. The lack of cooperation between these various actors and the host state's agencies was also highlighted. A number of practical policy options emerged from the discussions, which are reproduced here in full:

- a) Rules requiring a human rights/conflict sensitivity policy (analogous to an anti-bribery pledge) on the part of business enterprises operating in a violent context;
- b) Gathering and communicating information on legal obligations (for example, home State legislation, Security Council and other sanctions) and advisories (such as advice from the State concerning particular operating contexts, human rights responsibilities and corporate social responsibility tools);
- c) Gathering or making available public domain information about the human rights situation in a particular conflict area;
- d) Establishing and communicating heightened due diligence standards in conflict situations, such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas;
- e) 'White listing' cooperative business enterprises for State procurement, investment, export credit and other transactions based on due diligence policies and practices;
- f) Recommending caution or adopting certain steps/measures in risk areas, for example, a 'travel advisory' model that would trigger greater – or different kinds of – engagement between State agencies and business enterprises;
- g) Ensuring that agencies are able to meet the State's obligations to prevent stolen and looted goods from entering their jurisdiction;
- h) Offering governmental or other conciliation or mediation services where local conflicts arise involving the business;
- i) Offering confidential advice by foreign, trade or industry ministries, either in capitals or via embassies. In addition to trade promotion activities, a number of countries make it an obligation of trade promotion officers to

discourage business enterprises from ... problematic activities, such as corruption. To create a parallel duty concerning, for example, international crimes, would require mandating and training commercial and political officers/sections in embassies and foreign ministries;

- j) Working bilaterally with partner States to ensure effective cooperation among all relevant States with regard to the operation of business enterprises in a particular conflict situation. For example, where a host State requires business enterprises [to engage in] payment directly to the military or security forces (i.e., directly to units and not via taxes to the treasury) or the provision of logistical assistance, bilateral diplomacy could attest that signed and transparent agreements govern those business enterprise-military relationships;
- k) A peer review model could address State responses to business in conflict-affected regions, as adapted from the African Peer Review [Mechanism], which is focused on governance.⁹

Dealing with uncooperative companies

Where a business is unwilling to meet relevant standards, does not implement the necessary policies and processes in good faith, or otherwise refuses to take steps to prevent against human rights risk, a range of steps are possible. Those identified through the workshops included:

- an investigation by an embassy or other agency, or by an official mission, national ombudsperson or similar function;
- an intervention at a senior level (for example, the CEO) if the company is a large business enterprise;
- media statements or statements in parliament questioning the company's behaviour or distancing the state from it;
- the involvement by neighbouring states of partner countries (for example, through regional organisations) in investigation, mediation or conciliation;
- threatened withdrawal of consular and/or business development support; or
- exclusion from procurement, export credit or other state transactions or markets.¹⁰

Where a company commits or contributes to gross human rights abuses, additional measures should be considered, including: exploring appropriate civil or criminal liability (for example, for involvement in international crimes, or for money laundering) on the part of an individual officer or the company, including freezing assets or issuing arrest warrants; imposing unilateral or multilateral sanctions on the individual or business; seizing shipments of goods where there is a reasonable risk that they are illicit or where a ban has been imposed by

⁹ See above note 7, para. 16.

¹⁰ *Ibid.*, para. 17.

a sourcing country or other body; and putting the name of an individual or company forward for listing by the UN Security Council for supporting parties to a conflict.¹¹

Multilateral approaches

Reflecting on the conflict workshops, Ruggie commented that states should consider defining the risks, or activities, that would prompt the sorts of responses identified above in relation to uncooperative companies through a multilateral standard-setting exercise, given states' general reluctance to put their own businesses at a disadvantage.¹² At the conclusion of his mandate, Ruggie submitted to the UN Human Rights Council (in addition to the final Guiding Principles and the four addenda) a note regarding options for follow-up measures.¹³ In addition to recommending measures for embedding the Guiding Principles, he emphasised the need to clarify international legal standards applying to business involvement in gross human rights abuses. In particular:¹⁴

The [Special Representative] has noted that national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes. These typically arise in areas where the human rights regime cannot be expected to function as intended, such as armed conflict or other situations of heightened risk. Such divergence can only lead to increasing uncertainty for victims and business alike.

The [Special Representative's] consultations with all stakeholder groups have indicated a broad recognition that this is an area where greater consistency in legal protection is highly desirable, and that it could best be advanced through a multilateral approach. Any such effort should help clarify standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of jurisdiction abroad may be appropriate, and the acceptable bases for the exercise of such jurisdiction. It could also foster international cooperation, including in resolving jurisdictional disputes and providing for technical assistance. . . . The UN Convention against Corruption could provide an appropriate precedent and model for such an effort.

This recommendation was not taken up by the UN Human Rights Council, however, and it remains an outstanding gap in the international framework for the prevention and redress of gross human rights abuses.

11 *Ibid.*, para. 18.

12 *Ibid.*, para. 21.

13 UN Human Rights Council, 'Recommendations on follow-up to the mandate', note presented to the UN Human Rights Council, 11 February 2011, available at: www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf.

14 *Ibid.*, pp. 4–5.

Implications for companies

This section starts by outlining some foundational concepts in the corporate responsibility to respect; it then discusses the various modes in which companies may be ‘involved’ with adverse human rights impacts and their implications, before turning to an examination of Guiding Principle 23(c) on the risk of complicity in gross human rights abuses and some of its implications in practice.

The corporate responsibility to respect

The second pillar of the UN Framework is the corporate responsibility to respect human rights, which means to avoid infringing on the rights of others and to address negative impacts with which a business is involved. The responsibility to respect is a global standard of expected conduct acknowledged in virtually every voluntary and softlaw instrument related to corporate responsibility, and now affirmed by the UN Human Rights Council itself.¹⁵ It is the baseline expectation of all businesses in all situations. Companies may, and many do, choose to support or promote human rights, but a failure to respect rights in one part of a company’s operations cannot be ‘offset’ by philanthropic or other contributions to promoting rights elsewhere.

The Guiding Principles make clear that companies should respect all internationally recognised human rights – understood, at a minimum, as those rights contained in the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the ILO Declaration on Fundamental Principles and Rights at Work. In certain situations businesses will need to respect additional standards, including international humanitarian law in situations of armed conflict.¹⁶ However, the focus of the Guiding Principles is on the kinds of policies and processes that a business needs in order to ‘know and show’ that it respects human rights in its own activities and through its business relationships. There are six elements that are essential in this regard, four of which are grouped together under the concept of ‘human rights due diligence’.¹⁷ These elements are:

1. **Policy commitment and embedding:** developing and articulating a human rights policy commitment and embedding it through leadership, accountability, and training throughout the company;

15 Although international human rights instruments generally do not currently impose this obligation directly on businesses (hence the term ‘responsibility’ rather than ‘duty’), elements of it are often reflected in domestic laws. However, the responsibility to respect exists apart from national laws.

16 See above note 1, Guiding Principle 12, Commentary. The Interpretive Guide referenced in note 24 below specifically cites the ICRC’s publication in this regard: see ICRC, *Business and International Humanitarian Law: an Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, ICRC, Geneva, December 2006. See also above note 6 regarding states’ obligations.

17 See above note 1, Guiding Principle 15; Guiding Principles 17–21 address human rights due diligence in detail.

2. **Human rights due diligence:**
 - a. **Assessing** the company's actual and potential human rights impacts;
 - b. **Integrating** findings from such assessments into the company's decision-making and taking actions to address them;
 - c. **Tracking** how effectively the company is managing to address its impacts;
 - d. **Communicating** to stakeholders about how it addresses its impacts;
3. **Remediation:** helping remediate any negative impacts that the company causes or contributes to.

Importantly, the elements of human rights due diligence are described as ongoing processes, not one-off 'things' (for example, 'an assessment' or 'a report'). The Guiding Principles take no position on whether the policies and processes that companies need to adopt should be stand-alone or integrated into existing systems; many companies are already managing a range of potential human rights impacts through existing health and safety, environmental, and ethics and compliance systems, among others. However, they stress the need for existing and new systems to recognise what is unique about human rights risks – namely, that understandings of impacts take full account of the perspective of 'affected stakeholders', meaning those whose human rights may be affected by a company's operations, products, or services.

Understanding risks to affected stakeholders distinct from risks to the business

Human rights due diligence and remediation processes need to incorporate an understanding of the severity of impacts – meaning their scale, scope, and irremediable nature – in order to determine what are appropriate measures to prevent or address them.¹⁸ As in traditional risk management approaches, a company's prioritisation of responses to identified impacts is driven by both likelihood and severity – but unlike traditional risk matrices or 'heat maps', which measure severity of impact on the business, understanding the severity of human rights risks is driven by the impact on the affected stakeholder(s).

In order to understand severity in this way, the Guiding Principles stress the importance of meaningful consultation or engagement with stakeholders, including affected stakeholders, as a cross-cutting principle, particularly important when assessing impacts, tracking performance, and handling grievances. For example, while the loss of a field to a farmer may be easily addressed through financial compensation, it may represent half of his livelihood and lead to significant adverse effects over time, including loss of social standing. For women in some societies, it may mean disenfranchisement if they had a stake in the land while the compensation goes to the men. Taking another example, cutting off access to an individual's, or entire community's, mobile phone service in a conflict-affected area

18 *Ibid.*, Guiding Principle 24, Commentary.

may contribute to significant adverse impacts on their personal safety, well beyond the impact on their freedom of expression.

The Guiding Principles recognise that consulting directly with affected stakeholders may not always be feasible, particularly for small companies or those with highly geographically dispersed users (such as Internet service companies). In such cases, the Principles recommend reliance on expert resources (whether human or written) that can credibly convey the likely perspectives and concerns of those directly affected. In complex environments, like conflict-affected areas, such engagement may be all the more challenging; however, company experience demonstrates that it is in these situations that it becomes even more critical. This issue is discussed further below.

While the Guiding Principles are focused on risk to human rights, not risk to the company, the two are increasingly related, as recent research demonstrates. Focusing on the extractive sector, a 2008 study of 190 projects operated by the major international oil companies showed that the time taken for projects to come online has nearly doubled in the last decade, causing significant increase in costs.¹⁹ A confidential follow-up of a subset of those projects, conducted in support of Ruggie's mandate, found that non-technical risks accounted for nearly half of the total project risks faced by these companies, and that stakeholder-related risks constituted the single largest category.²⁰

Building on this, further research was conducted by the author through the Corporate Social Responsibility Initiative at Harvard Kennedy School, together with the Centre for Social Responsibility in Mining at the University of Queensland in Australia, into the costs of conflict with local communities for companies in the extractive industry.²¹ The research found that:

- the most frequent costs are those arising from lost productivity due to delay (for example, an operation with capital expenditure in the US \$3–US \$5 billion range can suffer losses of roughly US \$20 million per week of delayed production, in net present value terms);
- the greatest costs are seen to be the opportunity costs arising from the inability to pursue future projects and/or opportunities for expansion or for sale; and
- the single most often overlooked cost is the additional staff time needed when conflicts arise or escalate. For example, from a working assumption in the industry that such issues should take up about 5 per cent of an asset manager's time, in some cases the proportion was found to be as high as 50 per cent or even, in one instance, 80 per cent.

19 Goldman Sachs Global Investment Research, 'Top 190 projects to change the world', April 2008.

20 See UN Doc. A/HRC/14/27, Business and Human Rights: Further Steps Towards the Operationalisation of the 'Protect, Respect and Remedy' Framework, 9 April 2010, para. 72.

21 Rachel Davis and Daniel Franks, 'The costs of conflict with local communities in the extractive industry', paper presented at the First International Seminar on Social Responsibility in Mining, Santiago, Chile, 19–21 October 2011, available at: www.shiftproject.org/publication/costs-conflict-local-communities-extractive-industry. The research drew on over 40 confidential interviews, including with industry representatives, and an analysis of 25 cases, to focus on the costs incurred by companies in such instances of conflict.

The research found that the costs incurred by companies as a *result* of conflict typically are not aggregated into a single category or number that would get the attention of senior management or boards. They tend to be rolled into operating costs, while the costs incurred by companies trying to *prevent* such conflict show up as direct costs, creating a distorted picture. Understanding and mitigating the potential for such conflict is thus an essential element of corporate risk management, and part of a company's efforts to meet its responsibility to respect.

Modes of involvement in adverse impacts and the concept of leverage

The Guiding Principles identify three distinct ways in which a company may be involved with adverse human rights impacts: (1) by causing an adverse impact, (2) by contributing to an adverse impact, or (3) where an adverse impact is directly linked to the company's operations, products, or services by a business relationship. Each has very different implications for what constitutes an appropriate response.

The concept where a company directly causes a negative human rights impact is clear. An example might be the resettlement by a company of a community that is not in line with international good practice (for example, as set out in the IFC Performance Standards), or a failure to respect freedom of association among the company's own workers.

The concept of 'contribution' is also relatively clear, though it can occur in two distinct ways. In the first, the contribution is via a third party – for example, a supplier or a government. This can occur where a decision or action by a company creates strong incentives for the third party to abuse human rights – for example, where a private security company operating in a conflict-affected area sets such short deadlines for the supply of personnel that the recruitment company it is using is unable to perform adequate background checks on new hires, and one of those personnel then commits a human rights abuse. Contribution can also occur where a company facilitates or enables such abuse – for example, by providing personal information about users of an online social networking service to a repressive regime, enabling it to target those individuals not for legitimate criminal law enforcement purposes but for harassment and persecution in contravention of international human rights law.

The second way in which a company may contribute to an impact is in parallel with a third party, leading to cumulative impacts. For example, an apparel factory located in an area that is dangerous for women at night because of the presence of insurgent groups might change its shifts, requiring women workers to leave or arrive outside daylight hours. As a result, those women may then be attacked as they go to and from work. The impact on their security results from the company's failure to consider the consequences of its decision to change shift times when combined with existing risk factors.

Finally, in the third scenario, an adverse impact on human rights may be directly linked to a company's products, operations, or services through a business

relationship, even though the company has neither caused nor contributed to the impact. For instance, an extractive company has a code of conduct that prohibits the use of force except in clearly circumscribed instances; it requires compliance with that code in all its security contracts; it screens out contractors known for improper use of force, and monitors its business partners for compliance. Yet it nonetheless finds that a security provider has breached those standards. Clearly the company is unlikely to be ‘responsible for’ the impact in a legal sense, since it has done all that could reasonably be expected to prevent the breach. The Guiding Principles make clear that it does not have an obligation to remediate in such cases. However, it does have a forward-looking responsibility to take steps to prevent the continuation or recurrence of the impact, given that the impact is directly linked to its own operations.

Another example of ‘linkage’ is where a company is sourcing components for electronic equipment from suppliers that, in turn, use minerals sourced from conflict-affected areas. As the range of current efforts to address the challenge of ‘conflict minerals’ show, this is far from a straightforward issue for a company to address.²² Under the Guiding Principles, however, the company has a responsibility to consider what steps it can reasonably take to address the fact that the adverse impacts resulting from the production of conflict minerals are directly linked, via a business relationship, to its own products – including through collaborative efforts, as a number of initiatives in this space are now doing.²³

Each of these three scenarios implies very different responses on the part of the company. Where a company has directly caused an impact, ceasing that impact is likely to be in a company’s full control. That may also be possible where a company has contributed to an impact, but there may be complexities in addressing the company’s own contribution, either in terms of its internal decision-making and other processes, or in its external relationships with third parties (like government authorities). This does not reduce the responsibility of the company to act appropriately, but it may make it difficult to address such impacts in the short term.

In the third scenario, a company often has the least control over impacts that are linked to its products, operations, or services, without it having caused or contributed to them. This is where the concept of ‘leverage’ – meaning the company’s ability to effect change in the wrongful behaviour of another party – becomes particularly significant. The Guiding Principles point to the need for a company to consider how it can use its leverage to mitigate the impact and, where leverage is lacking, how it can find ways to increase it (for example, through incentives, collaborating with peer companies, or engaging with government or civil

22 For example, the work being conducted by the OECD on responsible supply chains of minerals from conflict-affected areas. See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 25 May 2011, available at: www.oecd.org/fr/daf/investissementsinternational/principesdirecteurspourlesentreprisesmultinationales/mining.htm. This work is now referenced in the new implementation guidelines developed by the US Securities and Exchange Commission for the implementation of Dodd-Frank Section 1502.

23 See, for example, Public-Private Alliance for Responsible Minerals Trade (www.resolv.org/site-ppa/, last visited February 2013) and Solutions for Hope (<http://solutions-network.org/site-solutionsforhope/>).

	Have leverage	Lack leverage
Crucial Source/partner	<ul style="list-style-type: none"> Mitigate the risk that the abuse continues/recurs If unsuccessful 	<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 be able to demonstrate efforts made to mitigate abuse, recognizing possible consequences of remaining.
Non-crucial Source/partner	<ul style="list-style-type: none"> Try to mitigate the risk that the abuse continues/recurs If unsuccessful, take steps to end the relationship* 	<ul style="list-style-type: none"> Consider ending the relationship*

* take account of credible assessments of potential harm to human rights from ending relationship

** take account of severity of impact; the more severe, the more quickly change should be seen before decisions are reached on whether to end the relationship

Figure 1. Decision-making matrix in linkage situations.²⁴

society actors). In addition to leverage, critical considerations in determining an appropriate response in such cases include how crucial the business relationship is to the company, how severe the impact on human rights is, and what the implications for human rights are of terminating the relevant business relationship. Importantly, this approach does not presume that the solution is simply to terminate a relationship; indeed, in many cases such a move can produce additional adverse human rights consequences of its own.

The Corporate Responsibility to Respect Human Rights: an Interpretive Guide, issued by the Office of the UN High Commissioner for Human Rights with the support and involvement of Ruggie shortly after the end of his mandate, illustrates the decision processes required in a matrix, reproduced in Figure 1.

As the matrix shows, there are rarely simple answers in such situations, but the Guiding Principles provide companies with a structured approach for working through them.

Treating gross human rights abuses as a legal compliance issue

Guiding Principle 23 provides guidance for businesses in three different situations: where national law is weak or silent, where national standards directly conflict with

24 Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, November 2011, para. 8.5, available at: www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

international standards, and where businesses face the risk of being complicit in gross human rights abuses. All three may be relevant when operating in conflict-affected areas.

Principle 23 clarifies that companies should respect international human rights standards wherever they operate, including seeking ways to do so when faced with conflicting requirements. Clearly, companies should not take advantage of operating contexts that provide little protection for human rights by lowering their own standards, but should instead continue to use international standards as the relevant benchmark.²⁵ Where national standards appear to be in conflict with international standards, businesses need to understand the true extent of any potential conflict through, for example, careful examination of the relevant rules, seeking clarification from government and/or challenging the provisions, learning from what peer companies have done, and testing their proposed approaches with experts and local stakeholders. Again, the Guiding Principles do not assume that ‘exit’ is the solution, but businesses that decide to enter or continue to operate in such contexts need to be able to know and show that they can operate in a way that meets their responsibility to respect human rights – or face the potential legal and reputational consequences.

Principle 23(c) provides that businesses should ‘treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate’. It has already been the subject of concrete action by individual companies – and of debate. It is therefore worth discussing in some detail. The Commentary to Principle 23 states:

Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

Principle 23 focuses on the first two scenarios described above – that is, where a company causes or contributes to an adverse impact. It is about making sure that a company has taken appropriate steps to avoid causing or contributing to gross human rights abuses – for example, when it provides weapons to public or private

²⁵ *Ibid.*, para. 14.2.

contracted security forces, that it does so in line with the Voluntary Principles on Security and Human Rights.²⁶ It is not about imposing a ‘strict liability’ approach on companies.

The Commentary to Principle 23(c) points out that particular attention should be paid to the risk of being involved with gross human rights abuses in part because it is prudent from the company’s perspective to do so, given the ‘expanding web’ referred to above.²⁷ However, the Guiding Principles are intended to be read as a coherent whole,²⁸ and Principle 23 therefore should be understood in light of the importance of the concept of severity in the Guiding Principles, and the explicit direction in Guiding Principle 24 that, where it is necessary to prioritise actions to prevent and address adverse impacts, businesses should prioritise those actions that deal with the most severe impacts (as discussed above). This emphasis on severity – taking into account the perspective of the affected individual – thus informs the guidance in Principle 23.

Principle 23 was not intended as a recommendation as to which function should necessarily take the lead in internal coordination on human rights issues; there are pros and cons to locating responsibility in any particular corporate function. As John Sherman (General Counsel of Shift and another member of Ruggie’s core team) explains:

[Guiding Principle 23(c)] does not mean that a company’s responsibility to respect all human rights should be vested in a company’s legal department and made a matter solely of legal compliance and legal risk. The challenge for a company is also about improving relationships and changing ways of doing business. [It] simply recognizes that regardless of the uncertainty of the law in particular jurisdictions, a company’s involvement in gross human rights abuses would be such an egregious calamity for the company and society that its lawyers should proactively monitor the company’s efforts to prevent its involvement in such abuse, as they would do to prevent its involvement in any serious corporate crime.²⁹

Principle 23 directs companies’ attention to ensuring that they have the appropriate processes in place to address particular operating contexts. There are some existing tools that companies cite as useful when it comes to conflict-affected areas.³⁰ In discussions occurring as part of a collaboration between Shift and the IFC

26 See Voluntary Principles on Security and Human Rights, available at: http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf.

27 The Interpretive Guide makes this clear: see Office of the High Commissioner for Human Rights, above note 24, para. 14.4.

28 See above note 1, General Principles.

29 John Sherman, ‘The UN Guiding Principles: practical implications for business lawyers’, in *In-House Defense Quarterly*, Winter 2013, p. 55, available at: <http://shiftproject.org/sites/default/files/Practical%20Implications%20for%20Business%20Lawyers.pdf>.

30 See International Alert, *Conflict-Sensitive Business Practice: Guidance for Extractives Industries*, London, March 2005, available at: www.international-alert.org/sites/default/files/publications/conflict_sensitive_business_practice_all.pdf; and UN Global Compact and Principles for Responsible Investment, *Guidance on Responsible Business in Conflict-Affected and High Risk Areas: A Resource for Companies and Investors*, 2010, available at: www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.

to develop guidance for IFC clients on human rights due diligence in high-risk contexts,³¹ leading company practice suggested a number of aspects of human rights due diligence that are likely to require particular attention, including:

- the greater need for meaningful stakeholder engagement, evidenced through more extensive and inclusive consultation, supported by strategic stakeholder mapping;
- the increased use of collaborative approaches with independent third parties not only in crafting appropriate mitigation and remediation efforts but also in the assessment phase of due diligence;
- the importance of conducting dynamic rather than event-driven due diligence through processes that are capable of capturing unpredictable as well as rapid changes in risks; and
- the critical role that senior leadership needs to play in decision-making in such settings (for example, some companies with country offices deliberately require hard decisions in such contexts to be made at regional or corporate headquarters level in order to protect local staff on the ground from retaliation).

Conclusion

With the Guiding Principles providing an authoritative blueprint for how companies should prevent and address adverse human rights impacts, and outlining the policy implications for states of their existing obligations under international human rights law, attention can now turn to implementation – including in the most challenging contexts, such as conflict-affected areas.

On the state side, it is clear that much more could – and needs – to be done by states to engage with cooperative companies, and deal with uncooperative ones, operating in conflict-affected contexts to help protect against human rights harms, particularly gross abuses. There is a range of tools at states' disposal, as identified by states themselves through the conflict workshops – with one leading example being the UK government's toolkit for its overseas missions to promote good conduct by UK companies in relation to human rights.³² The process driven by the new EU Communication on CSR, encouraging EU Member States to develop National Action Plans on implementation of the Guiding Principles, should hopefully generate some useful ideas, as should calls within the EU itself for its trade delegations and the revamped External Action Service to be better equipped to support companies on these issues – or at least be able to point them to resources when questions arise.

31 See Shift and IFC, 'Collaborating with the IFC on guidance for high-risk contexts', available at: www.shiftproject.org/project/collaborating-ifc-guidance-high-risk-contexts.

32 See The Foreign and Commonwealth Office, *Business and Human Rights Toolkit: How UK Overseas Missions can Promote Good Conduct by UK Companies*, 2009, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/35451/business-toolkit.pdf.

For responsible companies, the challenge remains ensuring that their policies and processes are robust enough to enable them to know and show that they are proactively addressing the risks of human rights abuses in some of the most challenging contexts in which they operate – conflict-affected areas. While the Guiding Principles are not intended to be a bar on operating in such situations, they do set out a baseline expectation that companies need to be able to meet if they are to continue to operate with integrity.

Responsible companies have been seeking to meet this challenge for some time, and initiatives like the IFC's work on due diligence in high-risk contexts should build on those efforts in seeking to provide greater clarity for other companies – including those who lack capacity – about the most effective approaches.