

Understanding Human Rights and Climate Change¹

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¹ Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change

Key Messages on Human Rights and Climate Change

Climate change impacts, directly and indirectly, an array of internationally guaranteed human rights. States (duty-bearers) have an affirmative obligation to take effective measures to prevent and redress these climate impacts, and therefore, to mitigate climate change, and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis.

Climate justice requires that climate action is consistent with existing human rights agreements, obligations, standards and principles. Those who have contributed the least to climate change unjustly and disproportionately suffer its harms. They must be meaningful participants in and primary beneficiaries of climate action, and they must have access to effective remedies.

OHCHR's Key Messages on Human Rights and Climate Change highlight the essential obligations and responsibilities of States and other duty-bearers (including businesses) and their implications for climate change-related agreements, policies, and actions. In order to foster policy coherence and help ensure that climate change mitigation and adaptation efforts are adequate, sufficiently ambitious, non-discriminatory and otherwise compliant with human rights obligations, the following considerations should be reflected in all climate action, including agreements to be negotiated at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change.

- 1. To mitigate climate change and to prevent its negative human rights impacts:** States have an obligation to respect, protect, fulfil and promote all human rights for all persons without discrimination. Failure to take affirmative measures to prevent human rights harms caused by climate change, including foreseeable long-term harms, breaches this obligation. The Fifth Report of the Intergovernmental Panel on Climate Change confirms that climate change is caused by anthropogenic emissions of greenhouse gases. Among other impacts, climate change negatively affects people's rights to health, housing, water and food. These negative impacts will increase exponentially according to the degree of climate change that ultimately takes place and will disproportionately affect individuals, groups and peoples in vulnerable situations including, women, children, older persons, indigenous peoples, minorities, migrants, rural workers, persons with disabilities and the poor. Therefore, States must act to limit anthropogenic emissions of greenhouse gases (e.g. mitigate climate change), including through regulatory measures, in order to prevent to the greatest extent possible the current and future negative human rights impacts of climate change.
- 2. To ensure that all persons have the necessary capacity to adapt to climate change:** States must ensure that appropriate adaptation measures are taken to protect and fulfil the rights of all persons, particularly those most endangered by the negative impacts of climate change such as those living in vulnerable areas (e.g. small islands, riparian and low-lying coastal zones, arid regions, and the poles). States must build adaptive capacities in vulnerable communities, including by recognizing the manner in which factors such as discrimination, and disparities in education and health affect climate vulnerability, and by devoting adequate resources to the realization of the economic, social and cultural rights of all persons, particularly those facing the greatest risks.

3. **To ensure accountability and effective remedy for human rights harms caused by climate change:** The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other human rights instruments require States to guarantee effective remedies for human rights violations. Climate change and its impacts, including sea-level rise, extreme weather events, and droughts have already inflicted human rights harms on millions of people. For States and communities on the frontline, survival itself is at stake. Those affected, now and in the future, must have access to meaningful remedies including judicial and other redress mechanisms. The obligations of States in the context of climate change and other environmental harms extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur.
4. **To mobilize maximum available resources for sustainable, human rights-based development:** Under core human rights treaties, States acting individually and collectively are obligated to mobilize and allocate the maximum available resources for the progressive realization of economic, social and cultural rights, as well as for the advancement of civil and political rights and the right to development. The failure to adopt reasonable measures to mobilize available resources to prevent foreseeable human rights harms caused by climate change breaches this obligation. The mobilization of resources to address climate change should complement and not compromise other efforts of governments to pursue the full realization of all human rights for all including the right to development. Innovative measures such as carbon taxes, with appropriate safeguards to minimize negative impacts on the poor, can be designed to internalize environmental externalities and mobilize additional resources to finance mitigation and adaptation efforts that benefit the poorest and most marginalised.
5. **International cooperation:** The UN Charter, the International Covenant on Economic, Social and Cultural Rights, and other human rights instruments impose upon States the duty to cooperate to ensure the realization of all human rights. Climate change is a human rights threat with causes and consequences that cross borders; thus, it requires a global response, underpinned by international solidarity. States should share resources, knowledge and technology in order to address climate change. International assistance for climate change mitigation and adaptation should be additional to existing ODA commitments. Pursuant to relevant human rights principles, climate assistance should be adequate, effective and transparent, it should be administered through participatory, accountable and non-discriminatory processes, and it should be targeted toward persons, groups, and peoples most in need. States should engage in cooperative efforts to respond to climate-related displacement and migration and to address climate-related conflicts and security risks.
6. **To ensure equity in climate action:** The Rio Declaration on Environment and Development, the Vienna Declaration and Programme of Action, and ‘The Future We Want’ all call for the right to development, which is articulated in the UN Declaration on the Right to Development, to be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The UN Framework Convention on Climate Change calls for States to protect future generations and to take action on climate change "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". While climate change affects people everywhere, those who have contributed the least to greenhouse gas emissions (i.e. the poor, children, and future generations) are those most affected. Equity in climate action requires that efforts to mitigate

and adapt to the impacts of climate change should benefit people in developing countries, indigenous peoples, people in vulnerable situations, and future generations.

7. **To guarantee that everyone enjoys the benefits of science and its applications:** The International Covenant on Economic, Social and Cultural Rights states that everyone has the right to enjoy the benefits of science and its applications. All States should actively support the development and dissemination of new climate mitigation and adaptation technologies including technologies for sustainable production and consumption. Environmentally clean and sound technologies should be accessibly priced, the cost of their development should be equitably shared, and their benefits should be fairly distributed between and within countries. Technology transfers between States should take place as needed and appropriate to ensure a just, comprehensive and effective international response to climate change. States should also take steps to ensure that global intellectual property regimes do not obstruct the dissemination of mitigation and adaptation technologies while at the same time ensuring that these regimes create appropriate incentives to help meet sustainable development objectives. The right of indigenous peoples to participate in decision making related to and benefit from the use of their knowledge, innovations and practices should be protected.
8. **To protect human rights from business harms:** The United Nations Guiding Principles on Business and Human Rights affirm that States have an obligation to protect human rights from harm by businesses, while businesses have a responsibility to respect human rights and to do no harm. States must take adequate measures to protect all persons from human rights harms caused by businesses; to ensure that their own activities, including activities conducted in partnership with the private sector, respect and protect human rights; and where such harms do occur to ensure effective remedies. Businesses are also duty-bearers. They must be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights. Where States incorporate private financing or market-based approaches to climate change within the international climate change framework, the compliance of businesses with these responsibilities is especially critical.
9. **To guarantee equality and non-discrimination:** States have committed to guarantee equality and non-discrimination. Efforts to address climate change should not exacerbate inequalities within or between States. For example, indigenous peoples' rights should be fully reflected in line with the United Nations Declaration on the Rights of Indigenous Peoples and actions likely to impact their rights should not be taken without their free, prior and informed consent. Care should also be taken to ensure that a gender perspective, including efforts to ensure gender equality, is included in all planning for climate change mitigation and adaptation. The rights of children, older persons, minorities, migrants and others in vulnerable situations must be effectively protected.
10. **To ensure meaningful and informed participation:** The International Covenant on Civil and Political Rights and other human rights instruments guarantee all persons the right to free, active, meaningful and informed participation in public affairs. This is critical for effective rights-based climate action and requires open and participatory institutions and processes, as well as accurate and transparent measurements of greenhouse gas emissions, climate change and its impacts. States should make early-warning information regarding climate effects and natural disasters available to all sectors of society. Adaptation and mitigation plans should be publicly available, transparently financed and developed in consultation with affected groups. Particular care should be taken to comply with relevant

human rights obligations related to participation of persons, groups and peoples in vulnerable situations in decision-making processes and to ensure that adaptation and mitigation efforts do not have adverse effects on those that they should be protecting. Human rights impact assessments of climate actions should be employed to ensure that they respect human rights. Further, States should develop and monitor relevant human rights indicators in the context of climate change, keeping disaggregated data to track the varied impacts of climate change across demographic groups and enabling effective, targeted and human rights compliant climate action.

Part I. Human Rights and Climate Change

“Climate change threatens our ability to achieve sustainable development, and in some cases, our very survival.”

Ban Ki-moon, Secretary General of the United Nations

As emphasized by the United Nations Human Rights Council in its Resolution 26/27, “climate change is an urgent global problem requiring a global solution.” The Council called for international cooperation to implement the United Nations Framework Convention on Climate Change (UNFCCC) “in order to support national efforts for the realization of human rights affected by climate change-related impact.” The Council affirmed that “human rights obligations, standards and principles have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.”

In recognition of these facts, the Human Rights Council held a full-day panel discussion on human rights and climate change on 6 March 2015.² The discussion addressed challenges posed by climate change towards the realization of all human rights for everyone, particularly those in vulnerable situations, and the adverse impacts of climate change on States’ efforts to progressively realize the right to food. Panellists, who included eminent speakers representing United Nations Member States, intergovernmental organisations, civil society and academia, recommended forward-looking rights-based solutions to address climate change.³

This submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change is an outcome of the above-mentioned panel discussion that is complemented by human rights commentary and analysis. It is intended to inform climate action and policy at all levels including the work of the Conference of the Parties to the UNFCCC (COP) and to further elucidate the critical links between human rights and climate change identified by panellists. Panellists highlighted a number of human rights challenges resulting from or exacerbated by climate change as well as efforts to mitigate and adapt to it. They stressed the importance of ensuring transparency and participation, especially of those most affected, in all climate-change

² The summary report of this discussion is contained in A/HRC/29/19

³ For more information about this discussion including the concept note and statements of panellists please see <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Discussion6March2015.aspx> (last accessed 6 October 2015).

related action. They made an unequivocal call for integration of human rights in COP 21 (2015 Paris) and highlighted the impacts of climate change on the enjoyment of human rights.

Panellists' comments inform the structure of this document which begins with a background discussion of the human rights implications of climate change and the global discourse so far. It then proceeds to elaborate upon the legal basis of specific human rights affected by climate change, the factual basis for alleged human rights violations caused by climate change, and recommendations for a rights-based approach to climate change.

Why integrate human rights in climate change-related actions?

Human rights are universal legal guarantees that protect individuals, groups and peoples against actions and omissions that interfere with their fundamental freedoms and entitlements. Human rights law obliges governments (principally) and other duty-bearers to respect, promote, protect and fulfil all human rights. Human rights are universal and are based on the inherent dignity and equal worth of all human beings. They are equal, indivisible, interrelated and interdependent, and cannot be waived or taken away. Furthermore, human rights are legally protected, and impose obligations in relation to actions and omissions, particularly of States and State actors.

It is now beyond dispute that climate change caused by human activity has negative impacts on the full enjoyment of human rights. Climate change has profound impacts on a wide variety of human rights, including the rights to life, self-determination, development, food, health, water and sanitation and housing. The human rights framework also requires that global efforts to mitigate and adapt to climate change should be guided by relevant human rights norms and principles including the rights to participation and information, transparency, accountability, equity, and non-discrimination. Simply put, climate change is a human rights problem and the human rights framework must be part of the solution.

The Fifth Assessment Report (AR5) by the Intergovernmental Panel on Climate Change (IPCC) unequivocally states that “human influence on the climate system is clear, and recent anthropogenic emissions of green-house gases are the highest in history.”⁴ It notes that “recent climate changes have had widespread impacts on human and natural systems.”⁵ AR5 found that “people who are socially, economically, culturally, politically, institutionally or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses.”⁶ During the Human Rights Council panel discussion, the United Nations Deputy High Commissioner for Human Rights Flavia Pansieri affirmed that “those who have contributed the least to greenhouse gas emissions will be the ones who bear the greatest burden; the poorest people, in the poorest countries, their children, and all our children”. Former High Commissioner for Human Rights, Mary Robinson, now President of the Mary Robinson Foundation – Climate Justice, described climate change as “probably the greatest human rights challenge of the 21st century”. Other panellists

⁴ Intergovernmental Panel on Climate Change, *Fifth Assessment Report: Climate Change 2014 Synthesis Report Summary for Policymakers* (Bonn: United Nations Framework Convention on Climate Change), p. 2 (hereinafter IPCC, AR 5).

⁵ IPCC, AR5, p. 2.

⁶ IPCC Working Group II, *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Summary for Policymakers*, (WMO and UNEP) p. 6.

described climate change as an ethical and moral challenge of a global scale that demands a human rights solution. Recognizing the importance of human rights in this context, parties to the UNFCCC have agreed to “fully respect human rights in all climate change-related actions”.⁷

Despite the clear human rights implications of failure to act to prevent climate change, the international community has not taken adequate preventive action. In fact, some of the climate change mitigation and adaptation efforts that have been employed to date have had counterproductive human rights impacts, particularly on the most marginalized. Taken as a whole, existing climate change mitigation and adaptation efforts have fallen far short of the level of ambition necessary to prevent and/or remedy the negative human rights impacts of climate change in fulfilment of the obligations of States and other duty-bearers.

Integrating human rights in climate actions will necessitate higher levels of ambition and improve mitigation and adaptation strategies by making them more effective and inclusive. During the panel discussion, several delegations underlined the importance of integrating human rights in climate policy, including participation, access to information and access to justice. A human rights based approach addresses cross cutting social, cultural, political and economic problems, while empowering persons, groups and peoples, especially those in vulnerable situations. This can make considerable contributions to climate change policies, making them less myopic and more responsive, sensitive, and collaborative.

What human rights principles apply in the context of climate change?

“These are basic issues of justice.”

Olav Fykse Tveit, General Secretary, World Council of Churches

States are obligated to respect, protect, promote, and fulfil all human rights for all people. This includes an affirmative obligation to prevent foreseeable harms including those caused by climate change. The UN Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Declaration on the Right to Development all make clear that State human rights obligations require both individual action and international cooperation. According to the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms therein can be fully realized and everyone has duties to the community. Similarly, the ICESCR declares that States should “take steps, **individually and through international assistance and co-operation**, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of rights recognized in the present Covenant”.

The Declaration on the Right to Development further calls on States to establish through their individual and collective actions, national and international conditions favourable to the realization of the right to development and all human rights including through international cooperation to provide developing countries “with appropriate means and facilities to foster their

⁷ United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its sixteenth session* (Cancun: United Nations, 2010), FCCC/CP/2010/7/Add.1.

comprehensive development”. It also emphasizes that “**all human beings have a responsibility for development**, individually and collectively... and they should therefore promote and protect an appropriate political, social and economic order for development”. The UN *Guiding Principles on Business and Human Rights* confirm that businesses also have human rights responsibilities. They reaffirm that **all responsible actors should be held accountable for the negative impacts of their activities** and that all actors share responsibility for remedying these impacts.⁸

The basic human rights principles of **equality and non-discrimination** require action to address and remedy the disproportionate impacts of climate change on the most marginalized and to ensure that climate actions benefit persons, groups and peoples in vulnerable situations and reduce inequalities. The disproportionate impacts of climate change on persons in vulnerable situations raise concerns of **climate justice, fairness, equity and access to remedy**. The Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights (ICCPR) and other human rights instruments make it clear that **all persons who suffer human rights harms are entitled to access to effective remedy**. The Human Rights Council panel repeatedly called for climate justice and immediate action to mitigate and adapt to climate change. Prime Minister Enele Sopoaga of Tuvalu described the human rights impacts of climate change as an issue of justice that requires immediate international action and adequate compensation of victims. According to Olav Fykse Tveit, General Secretary of the World Council of Churches, the disproportionate impact of climate change on persons least responsible for climate change and most vulnerable to it is an issue of fundamental injustice.

The Declaration on the Right to Development by calling for the **fair distribution of the benefits of development** and for developed countries to assist developing countries, embraces the need for equitable development. International cooperation, equality and non-discrimination, accountability and equity reflect human rights commitments and are critical to address climate change. The principle of equity, including **intergenerational equity**, is also specifically recognized in the UNFCCC which calls for all parties to “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their **common but differentiated responsibilities and respective capabilities**”. In spite of the above, State commitments under the UNFCCC have so far failed to provide for and ensure the implementation of adequate mitigation and adaptation measures to limit climate change and its adverse effects on human rights, the economy, public health and the environment.

The UNFCCC is a framework convention and it is open to evolution and continuing negotiations. There is a high degree of hope that the agreement negotiated at COP21 in Paris and any subsequent agreements will raise the level of ambition of climate action in order to protect human rights from the adverse effects of climate change. In these negotiations and throughout related processes, the human rights principles of **transparency, participation and accountability** have an important role to play.⁹ “Participation is a basic human right in itself, [and] a precondition or catalyst for the realization and enjoyment of other human rights.”¹⁰ In order to ensure sustainable

⁸ The legal obligations of States and enterprises to address climate change are the subject of growing consensus and analysis. See e.g. the Oslo Principles on Global Obligations to Reduce Climate Change (1 March 2015) available at: <http://www.osloprinciples.org/principles/> (last accessed 7 October 2015).

⁹ The Aarhus Convention of the United Nations Economic Commission for Europe on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters highlights the importance of these principles in the context of environmental issues.

¹⁰ United Nations General Assembly, A/HRC/23/36: *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona* (New York: United Nations, 2013), Summary.

development and appropriate mechanisms for mitigating and adapting to climate change, the COP21 outcome should reflect human rights principles and a rights-based framework should shape both the substantive commitments of parties and the processes by which they are agreed and carried out.

How can human rights be integrated in climate-change related actions?

Human rights can be integrated in climate-change related actions by applying a rights-based approach to policy and development as called for by the Declaration on the Right to Development and agreed to in the UN Common Understanding of a Human Rights-Based approach to Development Cooperation.¹¹ The UN Common Understanding emphasizes key human rights principles like universality and inalienability, indivisibility, interdependence and interrelatedness, non-discrimination and equality, participation and inclusion, accountability and the rule of law. It outlines a conceptual framework for development based on international human rights standards in order to promote and protect human rights in all development activities. A rights-based approach analyses obligations, inequalities and vulnerabilities, and seeks to redress discriminatory practices and unjust distributions of power. It anchors plans, policies and programmes in a system of rights, and corresponding obligations established by international law.

The essential attributes of a human rights-based approach are the following:

- As policies and programmes are formulated, the main objective should be to fulfil human rights.
- The *rights-holders* and their entitlements must be identified as well as the corresponding *duty-bearers* and their obligations in order to find ways for strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.
- Principles and standards derived from international human rights law – especially the Universal Declaration of Human Rights and the core universal human rights treaties, should guide all policies and programming in all phases of the process.

A human rights-based approach should be integrated in any climate change adaptation or mitigation measures, such as the promotion of alternative energy sources, forest conservation or tree-planting projects, resettlement schemes and others. Affected individuals and communities must participate, without discrimination, in the design and implementation of these projects. They must have access to due process and to remedy if their rights are violated.

During the panel discussions, the importance of a rights-based approach to climate change was raised frequently. Martin Khor, Executive Director of the South Centre, observed that such an approach demands the inclusion of climate justice, equity, respect for human rights as well as international cooperation and solidarity. These factors are essential in supporting developing countries, including through finance and technology. According to Mary Robinson, a human rights-based approach to development should focus on fulfilling for all persons the minimum conditions necessary for a life of human dignity. Faced with climate change, persons in vulnerable situations must have their rights protected, obtain access to measures of adaptation and resilience, and receive the support of the international community. A rights-based response should also maximize inclusion, participation and equality.

¹¹ See <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> last accessed on 7 September 2015.

Critically, it is not enough to simply focus on ensuring that climate actions respect human rights. A rights-based approach requires States to take affirmative actions to respect, protect, promote and fulfil all human rights for all persons. Failure to prevent foreseeable human rights harms caused by climate change, or at the very least to mobilize maximum available resources in an effort to do so, constitutes a breach of this obligation. Human rights obligations apply to the goals and commitments of States in the area of climate change and require that climate actions should focus on protecting the rights of all those vulnerable to climate change starting with those most affected. Human rights principles articulated in the Declaration on the Right to Development and other instruments call for such climate action to be both individual and collective and for it to benefit all persons, particularly the most marginalized. The UNFCCC further elaborates upon the need for equitable climate action calling for States to address climate change in accordance with their common but differentiated responsibilities and respective capabilities in order to benefit present and future generations.

State commitments therefore require international cooperation, including financial, technological and capacity-building support, to realise low-carbon, climate-resilient, and sustainable development, while also rapidly reducing greenhouse gas emissions. Only by integrating human rights in climate actions and policies, and empowering people to participate in policy formulation, can States promote sustainability and ensure the accountability of all duty-bearers for their actions. This, in turn, will promote consistency, policy coherence and the enjoyment of all human rights.

What actions have been taken by international human rights mechanisms so far?

Since 2008, the Human Rights Council and its Special Procedures Mechanisms have been actively involved in addressing the human rights impacts of climate change. The Council has held two panel discussions on human rights and climate change, which was also the theme of the 2010 Social Forum¹². The following resolutions on human rights and climate change have been issued to date:

- **Resolution 7/23** (March 2008): The Council expressed concern that climate change “poses an immediate and far-reaching threat to people and communities around the world” and requested OHCHR to prepare a study on the relationship between climate change and human rights (A/HRC/10/61).
- **Resolution 10/4** (March 2009): The Council noted that “climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights ...” and that such effects “will be felt most acutely by those segments of the population who are already in a vulnerable situation ...”
- **Resolution 18/22** (September 2011): The Council affirmed that human rights obligations, standards, and principles have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes. They called for a seminar to address the adverse impacts of climate change on the full enjoyment of human rights and a summary report of the seminar (A/HRC/20/7).
- **Resolution 26/27** (July 2014): The Council emphasized the need for all States to enhance international dialogue and cooperation to address the adverse impacts of climate change on the enjoyment of human rights including the right to development. It called for dialogue, capacity-building, mobilization of financial resources, technology transfer, and other forms of cooperation to

¹² The report of the 2010 Social Forum is contained in A/HRC/16/62.

facilitate climate change adaptation and mitigation, in order to meet the special needs and circumstances of developing countries.

- **Resolution 29/15** (July 2015): The Council emphasized the importance of continuing to address the adverse consequences of climate change for all and called for a panel discussion and analytical study on the impacts of climate change on the enjoyment of the right to health.

The Council has also addressed the issue of the impact of climate change in the framework of its work on human rights and the environment, particularly resolutions **16/11**, **19/10**, **25/21** and **28/11**. In these resolutions, the Human Rights Council has recognized that the impact of climate change on the full enjoyment of human rights is a global problem that requires a global solution. It has highlighted the importance of addressing human rights in the context of discussions related to the UNFCCC and the post-2015 development agenda and made available the results of its debates, studies and activities to the sessions of the Conference of Parties to the UNFCCC. The Council has clearly articulated that “human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change”.

The outcome document of the 2012 United Nations Conference on Sustainable Development “The Future We Want” reaffirmed the importance of human rights for achieving sustainable development. Prior to this Conference, the UN High Commissioner for Human Rights had emphasized the responsibilities of all States to ensure full coherence between efforts to advance the green economy, on the one hand, and their human rights obligations on the other, in an open letter to all Permanent Missions in New York and in Geneva.¹³ In addition to this advocacy, OHCHR has produced a number of reports on the effect of climate change on the enjoyment of human rights.¹⁴

Mandate holders of the special procedures mechanisms of the Human Rights Council have also regularly addressed the human rights impacts of climate change in the course of implementing their mandates. The Special Rapporteur on human rights and the environment has been particularly engaged, and issued a Climate Change mapping report in 2014 that describes statements made by human rights bodies regarding human rights that are threatened by climate change and human rights obligations related to climate change.¹⁵ In addition to this report which highlights work of the special procedures mechanisms, the human rights treaty-bodies and other relevant bodies related to climate change, there have been several joint advocacy efforts on human rights and climate change, by special procedures mandate holders. These include:

¹³ See Open Letter of the High Commissioner for Human Rights on Sustainable Development (30 March 2012) available at <http://www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf> (last accessed 7 September 2015).

¹⁴ See e.g. A/HRC/10/61, Analytical study on the relationship between climate change and human rights; Summary Report of the Panel discussion on the relationship between climate change and human rights held at the eleventh session of the HRC (June 2009) following resolution 10/4, available at: <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Panel.aspx> last accessed 7 September 2015; A/HRC/16/62, Report of the 2010 Social Forum on the adverse effects of climate change on the full enjoyment of human rights; A/HRC/20/7, Report of the United Nations High Commissioner for Human Rights on the outcome of the seminar addressing the adverse impacts of climate change on the full enjoyment of human rights; A/HRC/29/19, Summary report of the Office of the United Nations High Commissioner for Human Rights on the outcome of the full-day discussion on specific themes relating to human rights and climate change.

¹⁵ Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus report on human rights and climate change (June 2014) available at <http://www.ohchr.org/Documents/Issues/Environment/MappingReport/ClimateChangemapping15-August.docx> (last accessed 7 September 2015).

- An Open Letter dated 17 October 2014 to State Parties to the UNFCCC from 28 Special Procedures mandates that urges the UNFCCC "to adopt urgent and ambitious mitigation and adaptation measures to prevent further harm" and to include in the 2015 climate agreement a commitment that "the Parties shall, in all climate change related actions, respect, protect, promote and fulfil human rights for all."¹⁶ At the panel discussion, John Knox, the Special Rapporteur on human rights and the environment, emphasized critical elements of this letter which describes climate change as one of the greatest challenges of our generation, highlights its disproportionate effects on disadvantaged, marginalized, and excluded person, groups and peoples, and urges the incorporation of human rights obligations into climate change negotiations

- A joint statement drawing attention to the grave harm even a two degree Celsius increase in average global temperature would cause to the enjoyment of human rights issued on the occasion of World Environment Day 2015.¹⁷ The Special Rapporteurs urged climate negotiators to reach an agreement that reflects the obligations human rights law places on States to protect and promote human rights.

- A report prepared by several Special Rapporteurs for the Climate Vulnerable Forum, a group of twenty countries that are especially vulnerable to the effects of climate change. On behalf of the Forum, the Philippines, the current chair, submitted the report, entitled "The Effects of Climate Change on the Full Enjoyment of Human Rights", on 1 May 2015 to the Conference of the Parties (COP) to the UNFCCC.¹⁸ This report warns that a temperature increase of just 1.5 degrees Celsius will threaten human rights, challenging the level of ambition of the current temperature goal of two degrees Celsius.

What steps should be taken going forward?

In the Geneva Pledge for Human Rights in Climate Action, announced on 13 February 2015, eighteen States committed to facilitate the sharing of best practices and knowledge between human rights and climate experts at the national level, in order to build collective capacity to deliver responses to climate change that are good for people and the planet. The Geneva Pledge remains open to States and is one of many important initiatives aimed at improving understanding of the linkages between human rights and climate change. During the panel discussions, panellists repeatedly emphasized the importance of this initiative noting that improved communication between these distinct constituencies is an important prerequisite for a greater integration of human rights in the climate change discussion.

The ultimate objective of these and other initiatives must be to take this discussion from a theoretical level to a practical one which inspires urgent, immediate, rights-based action to mitigate and adapt to the negative impacts of climate change. By building upon previous work in the area of human rights and climate change and the panel discussion of 6 March 2015, the remainder of this report seeks to inform and inspire the action needed to integrate human rights in climate action at COP 21 and beyond. The next section examines particular rights affected by climate change. Part III,

¹⁶ Available at: http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf (last accessed 7 September 2015).

¹⁷ Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E> (last accessed 7 September 2015).

¹⁸ Available at: <http://www.thecvf.org/wp-content/uploads/2015/05/humanrightsSRHRE.pdf> (last accessed 7 September 2015).

composed of recommendations from the panel discussion offers several ideas for integrating human rights in climate action that respects, protects, promotes and fulfils all human rights.

Part II: Which human rights are most affected by climate change?

“Climate change, human-induced climate change, is obviously an assault on the ecosystem that we all share, but it also has the added feature of undercutting rights, important rights like the right to health, the right to food, to water and sanitation, to adequate housing, and, in a number of small island States and coastal communities, the very right to self-determination and existence.”

Flavia Pansieri, United Nations Deputy High Commissioner for Human Rights,

The relationship between climate change and the enjoyment of human rights is both too complex and too vast to fully describe here. Instead, this Part focusses on specific examples referred to by panellists during the March 2015 discussion at the Human Rights Council. In this context, it is critical to remember that although specific rights may be discussed separately, all human rights are universal, inalienable, indivisible, interdependent and interconnected. A preventable violation of one right can have far-reaching consequences for other, and in some instances, all human rights.

The panel discussion, the IPCC, and the overwhelming consensus among experts make it abundantly clear that climate change negatively impacts human rights. In this regard, it is useful to consider what States and other duty-bearers are obligated to do in the circumstances. This question is addressed briefly here and more thoroughly in OHCHR’s Key Messages on Human Rights and Climate Change and in Part III. As a starting point, States are legally bound to respect, protect, promote, and fulfil all human rights. In doing so, they have committed to work individually and collectively, to eliminate discrimination and promote equality, and to expend maximum available resources for the progressive realization of economic, social and cultural rights as well as the advancement of civil and political rights and the right to development. The following discussion of specific issues demonstrates the grave consequences of failure to comply with these obligations.

The right to life

“...in dealing with sustainable development issues, unless you deal with the issues of climate change, life, particularly of the most vulnerable, will continue to be threatened and compromised, and life is already compromised and threatened on most island countries...”

Enele Sosene Sopoaga, Prime Minister, Tuvalu

According to the Universal Declaration of Human Rights “everyone has the right to life, liberty and security of person.” The International Covenant on Civil and Political Rights (ICCPR) reiterates that “every human being has the inherent right to life.” All States have committed to respect, protect, promote, and fulfil the right to life. This entails, at the very least, that States should take effective measures against foreseeable and preventable loss of life.

Climate change clearly poses a threat to human life. Abul Hassan Mahmood Ali, Foreign Minister of Bangladesh, described this threat as “existential”. As highlighted by Renan Dalisay,

Administrator of the National Food Authority of the Philippines, in his remarks about Typhoon Yolanda which “left a path of death and destruction, claiming no less than 7500 precious Filipino lives, mostly in economically vulnerable communities,” this threat extends to both present and future generations. Yolanda, or Typhoon Haiyan as it is more commonly known internationally, was an extreme weather event.

According to the IPCC, the risk of having further extreme weather events and the resulting endangerment of human lives is “moderate to high at temperatures of 1°C to 2°C above pre-industrial levels.”¹⁹ A recent report by the World Bank affirms this risk, finding that “further health impacts of climate change could include injuries and deaths due to extreme weather events.”²⁰

In the context of climate change, extreme weather events may be the most visible and most dramatic threat to the enjoyment of the right to life but they are by no means the only one. Climate change kills through drought, increased heat, expanding disease vectors and a myriad of other ways. According to a report by the Climate Vulnerable Forum and DARA International, climate change is already responsible for approximately 400,000 deaths per year and that number is expected to rise to 700,00 by 2030.²¹ In order to uphold the right to life, States must take effective measures to mitigate and adapt to climate change and prevent foreseeable loss of life.

The right to self-determination

“There are realities where extreme events surpass the ability to adapt...and displacement and migration are the only avenues for survival.”

Mary Robinson, President, Mary Robinson Foundation – Climate Justice

Article 1 of the UN Charter calls for respect of the “self-determination of peoples”. Further, Common Article 1 of the ICCPR and the ICESCR states that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” States must respect the right to self-determination of all peoples and ensure that they have the necessary resources to provide for themselves. Climate change not only poses a threat to the lives of individuals; but also to their ways of life and livelihoods, and to the survival of entire peoples.

During the panel discussion, Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous peoples, highlighted that “the realisation of the rights to self-determination and development” are “being seriously challenged” by climate change. Small Island Developing States and Least Developed Countries have identified even warming of 1.5°C as a “serious threat” to their continued existence.²² These views are supported by the IPCC in its review of the effects of rising

¹⁹ IPCC, *AR5*, p. 19.

²⁰ The World Bank, *Turn down the heat: why a 4°C warmer world must be avoided* (2012), p. xvii (hereinafter *Turn down the heat 2012*).

²¹ See DARA and the Climate Vulnerable Forum, *Second edition: A guide to the cold calculus of a hot planet* (DARA and Climate Vulnerability Monitor, 2012), p. 17.

²² World Bank, *Turn down the heat 2012*, p. xiii.

sea-levels on “coastal systems and low-lying areas.”²³ According to a recent report by a group of United Nations Special Rapporteurs, climate change challenges the ability of peoples in small island states to “continue to live on their traditional territory, and... to enjoy and exercise their right to self-determination”.²⁴ States are obliged to take adequate measures to guarantee the rights of all peoples to self-determination in the face of the looming threat posed by climate change but they have so far failed to do so.

The right to development

Pursuant to Article 55 of the UN Charter, States should promote “conditions of economic and social progress and development”. The ICESCR and ICCPR emphasize that all peoples should “freely determine their political status and freely pursue their economic, social and cultural development”. The Declaration on the Right to Development presents an integrated framework for the pursuit of all three pillars of the UN Charter – peace and security, human rights and development. It articulates a holistic vision of development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” The Declaration underscores that people must be the central subjects, active participants, and beneficiaries of development. It articulates that all States and all persons have responsibilities for development and States should work individually and collectively to create an internationally enabling environment for development in which the benefits of development are equitably shared by all.

In particular, States should take steps individually and collectively to guarantee all persons the ability to enjoy economic, social, cultural and political development. Climate change poses an existential threat to people’s enjoyment of their right to development. According to World Bank President, Jim Yong Kim “unless the world takes bold action now, a disastrously warming planet threatens to put prosperity out of reach of millions and roll back decades of development”.²⁵ The IPCC found that “limiting the effects of climate change is necessary to achieve sustainable development and equity, including poverty eradication.”²⁶ Importantly, while AR5 stressed the “threat” that is posed to sustainable development by climate change, the report also noted with “high confidence” that “there are many opportunities to link mitigation, adaptation and the pursuit of other societal objectives through integrated responses.”²⁷ Moreover, in the recently adopted Sustainable Development Goals, combating climate change (see Goal 13) has been recognized as instrumental to sustainable development, highlighting the importance of addressing climate change and its adverse effects to secure sustainable, inclusive development that benefits all persons.

²³ IPCC, AR5, p. 13.

²⁴ Devandas Aguilar et al., *The effects of climate change on the full enjoyment of human rights* (OHCHR, 2015), p. 16.

²⁵ The World Bank, *Turn down the heat: Climate extremes, regional impacts, and the case for resilience*, p. xii (hereinafter *Turn down the heat 2013*).

²⁶ IPCC, AR5, p. 17.

²⁷ IPCC, AR5, p. 13.

For these reasons, the right to development was the subject of marked emphasis during the panel discussions. Panellists agreed that the right to development should inform humanity's collective response to climate change. Renan Dalisay cautioned that "climate change dilutes the right of vulnerable communities to socio-economic development." Elizabeth Mpofu, General Coordinator of La Via Campesina, described how many developing countries were forced to divert financial and human resources away from development priorities like health, education and agrarian support to confront climate change and its impacts. Mary Robinson affirmed that all individuals and peoples had a right to development and that climate action should be directed toward fulfilling that right. She emphasized that the international community must work together to address challenges that climate change poses to the realization of human rights, especially the right to development.

Mithika Mwenda, Secretary General of the Pan-African Climate Justice Alliance, stated that climate change is a problem that requires a broad understanding of human rights and an emphasis on realizing the right to development, in particular, equitable or even equal development between States. He emphasized that in addition to having the obligation to protect human rights within their borders, States and the international community had broader responsibilities to promote the realization of all human rights for all and should act collectively to address climate change, including through the Secretariat of the UNFCCC. The discussions made it clear that States must take urgent action in order to mitigate and adapt to climate change and promote the realization of the right to development for everyone.

The right to food

"In extreme cases, food insecurity caused by droughts or floods as a result of climate change has literally paralysed some developing States, such that human rights gains have been reversed to deplorable levels."

Elizabeth Mpofu, General Coordinator, La Via Campesina

The right to food is enshrined in the Universal Declaration of Human Rights and the ICESCR. Article 11 of the ICESCR upholds the "fundamental right of everyone to be free from hunger" and calls upon States acting individually and through international co-operation, "to ensure an equitable distribution of world food supplies in relation to need." As with all human rights, States must respect, protect, promote, and fulfil the human right to food. Further, States have committed to mobilize maximum available resources for the progressive realization of the right to food and all other rights contained in the ICESCR.

According to the IPCC, climate change undermines food security;²⁸ therefore, it threatens realization of the right to food. The World Bank has estimated that a 2°C increase in average global temperature (the proposed target for international climate mitigation efforts) would put "between 100 million and 400 million more people at risk of hunger and could result in over 3 million additional deaths from malnutrition each year."²⁹ Moreover, persons, groups and peoples in vulnerable situations are at a greater risk. For instance, with about two-thirds of the female labour

²⁸ IPCC, AR5, p. 13.

²⁹ The World Bank, *World Development Report 2010: Development and Climate Change* (2010), pp. 4 – 5.

force in developing countries, and more than 90 percent in African countries, engaged in agricultural work, the threats to loss of harvests, often the sole source of food and income, have severe implications for many women in rural areas.³⁰

During the panel discussion, several panellists described the many ways in which climate change affects the enjoyment of the right to food. According to Renan Dalisay, “damage to agriculture and food production caused by climate change negatively impacts livelihoods, food security and the human right to food.” Ana Maria Suarez Franco, Permanent Representative in Geneva for Food First Information and Action Network (FIAN), described how climate change-induced “extreme events, including droughts and floods, the salinization of water used for irrigation, desertification, [and] water shortages...are affecting the availability of food in the country and cities.”

In her remarks during the discussion, Xiangjun Yao, Director of the Geneva Office of the Food and Agriculture Organization, highlighted that the adverse effects of climate change on the realization of the human right to food had to be addressed so that the “more than 800 million people suffering from hunger and two billion people affected by the diverse forms of malnutrition” could see this right fulfilled. In spite of these well-known threats, the international community has not taken adequate climate action and has left climate change, perhaps the single greatest threat to fulfilment of the right to food largely unchecked.

The right to water and sanitation

Although the right to water is not explicitly recognized in the ICESCR, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights articulates this right stating: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”³¹ In its resolution 64/292, the General Assembly recognised “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”³² The right to water and sanitation is also found in legal instruments such as the Convention on the Elimination of Discrimination against Women (CEDAW), among others. Pursuant to General Comment 15, “States [sic] parties have to adopt effective measures to realize, without discrimination, the right to water.”³³

According to the IPCC, “climate change is projected to reduce renewable surface water and groundwater resources in most dry subtropical regions...intensifying competition for water”.³⁴ The IPCC further found that climate change will likely increase the risk of water scarcity in urban areas and “rural areas are expected to experience major impacts on water availability and supply.”³⁵ According to a recent World Bank report, a 2 degree Celsius average global increase in temperature

³⁰ See UN Women Watch, *Fact Sheet: Women Gender Equality and Climate Change* (2009).

³¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 15* (New York: United Nations, 2002), Art. 2.

³² United Nations General Assembly, *64/292: The human right to water and sanitation* (2010), Art. 1.

³³ UNCESCR, *General Comment No. 15*, Art. 1.

³⁴ IPCC, *AR5*, p. 13.

³⁵ IPCC, *AR5*, pp. 15 – 16.

may result in 1 to 2 billion no longer having enough water to meet their needs.³⁶ Reduced access to water will disproportionately impact persons, groups and peoples in vulnerable situations. For example, reduced access to water introduces added burdens for women and girls in developing countries, who are often responsible for fetching water for their families from distant sources and have distinct needs for water and sanitation.³⁷

During the panel discussions, several speakers stressed the importance of water and sanitation, and the impacts that climate change could have on this right. According to Minister Abul Hassan Mahmood Ali, “millions at the bottom of the development pyramid...are exposed to various climatic shocks. Slow-onset disasters like river erosion, desertification, ground water contamination, or inland salinity intrusion do not make headlines, yet impact people’s living.” There can be no doubt that the right to water and sanitation which is derived from the rights to health and an adequate standard of living found within the ICESCR is threatened by inadequate climate action.

The right to health

“Adverse effects of climate change” means changes in the physical environment or biota resulting from climate change which have significant deleterious effects... on human health and welfare.... The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.

United Nations Framework Convention on Climate Change Articles 1 and 3

The human right to health is articulated in the Universal Declaration of Human Rights and in Article 12 of the ICESCR which provides that all persons have the right “to the enjoyment of the highest attainable standard of physical and mental health.” The Human Rights Council has specifically recognized the impacts of climate change on the right to health on multiple occasions, most recently in its resolution 29/15 which calls for a panel discussion and a detailed study on the relationship between climate change and the enjoyment of the right to health.

According to World Bank reports, climate change will cause “health impacts [that] are likely to increase and be exacerbated by high rates of malnutrition,”³⁸ including potential increases in vector-borne diseases and “heat-amplified levels of smog [that] could exacerbate respiratory disorders.”³⁹ In its most recent report, the IPCC found that “climate change is expected to lead to increases in ill-health in many regions and especially in developing countries with low income, as compared to a baseline without climate change”.⁴⁰

During the panel discussion, Dan Bondi Ogolla, Coordinator and Principal Legal Adviser at the UNFCCC, stressed that the right to health is safeguarded in the UNFCCC, as “the definition of ‘adverse effects’ of climate change under the Convention includes impacts...on ‘human health and welfare’.” However, the level of ambition in climate action to date has fallen short of that necessary

³⁶ World Bank, *World Development Report*, 5.

³⁷ See UN Women Watch, *Fact Sheet: Women Gender Equality and Climate Change* (2009).

³⁸ The World Bank, *Turn down the heat 2013*, p. 24.

³⁹ World Bank, *Turn down the heat 2012*, p. xvii.

⁴⁰ IPCC, *AR5*, p. 15.

to prevent adverse impacts on the enjoyment of the human right to health as evidenced by the current and projected impacts of climate change on the enjoyment of this right.

The right to housing

“We have to reconcile ourselves with the reality that our islands will be under water, unless we do something very significant and substantial.”

Anote Tong, President, Republic of Kiribati

According to Article 11 of the ICESCR all persons are entitled to an adequate standard of living for themselves and their families including adequate housing. The scope and application of the right to housing is elaborated upon in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights, which states that “the human right to adequate housing...is of central importance for the enjoyment of all economic, social and cultural rights.”⁴¹ Like with all other economic, social and cultural rights, States are obliged to expend maximum available resources for the progressive realization of the right to housing for all persons.

Climate change threatens the right to housing in a number of ways. Extreme weather events can destroy homes displacing multitudes of people. Drought, erosion and flooding can gradually render territories inhabitable resulting in displacement and migration. Sea level rise threatens the very land upon which houses in low-lying areas are situated and is expected to “continue for centuries even if the global mean temperature is stabilized.”⁴²

During the panel discussions, several speakers raised the issue of the right to housing in the context of destructive extreme weather events and rising sea-levels. Stressing the interconnected and cross-cutting nature of the impacts of climate change, Dan Bondi Ogolla noted that “loss of land through sea level rise [also] impacts the right to self-determination [and] to property.” President Anote Tong emphasized that climate change may literally erase Kiribati and other low-lying island States from the map and stressed the importance of guaranteeing the displaced inhabitants of low-lying areas “migration with dignity.” Migration with dignity would entail migration with the assurance of all human rights to all, including an adequate standard of living and the right to housing.

The right to education

According to the Universal Declaration of Human Rights, “everyone has the right to education.” Article 13 of the ICESCR elaborates upon this right, guaranteeing to all persons, free, compulsory primary education and calling on States to progressively realize free secondary education for all. However, the impacts of climate change and the exigencies which it creates threaten the ability of States to expend maximum available resources for the progressive realization of the right to education and can press children into the labour pool prematurely.

⁴¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 4* (New York: United Nations, 1991), Art. 1.

⁴² IPCC, *AR5*, p. 13.

In his 2011 report to the General Assembly, the United Nations Special Rapporteur on the right to food stated that the impacts of successive droughts had caused some children to be “removed from schools because education became unaffordable and because their work was needed by the family as a source of revenue”.⁴³ According to the World Bank, climate impacts can “exacerbate the existing development challenge of ensuring that the educational needs of all children are met.”⁴⁴

During the panel discussion, concerns were expressed that the right to education would be hampered by the transfer of funds earmarked for education to disaster relief budgets, or other adaptation measures. According to Mithika Mwenda, this is already transpiring as “funds earmarked for... providing quality education to children [are] diverted to address climate-inspired disasters”. Failure to ensure fulfilment of the right to education and the diversion of funds from education not only violates this right but also has long term developmental consequences with substantial implications for the enjoyment of all rights by all.

The right to meaningful and informed participation

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 10, 1992 Rio Declaration on Environment and Development

The ICCPR guarantees to all persons the right to participate in public affairs and to vote. The Declaration on the Right to Development guarantees the rights of all persons to participate in, contribute to and enjoy economic, social, cultural and political development and to share in the benefits therefrom. According to the Declaration, “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development”. CEDAW provides for women’s equal right to participate in political and public life at the national and international levels and the Convention on the Rights of Persons with Disabilities (CRPD) calls on State parties to ensure that persons with disabilities have access to political participation rights on an equal basis with others.

In order for participation to be meaningful, it should be adequately informed. Freedom of information is enshrined in Article 19 of the ICCPR, which guarantees “the right to freedom of

⁴³ United Nations General Assembly, *A/HRC/16/49/Add.2: Report of the Special Rapporteur on the right to food, Olivier De Schutter* (2011), para. 13.

⁴⁴ The World Bank, *Turn down the heat 2013*, p. xix.

expression, including the right to seek, receive and impart information and ideas of all kinds.”⁴⁵ As the Human Rights Committee has stated “States parties should proactively put in the public domain Government information of public interest.”⁴⁶ In the context of climate change, this includes making available early warning information about the effects of climate change, and transparency regarding adaptation and mitigation measures, their potential impacts and their financing.

Given that persons, groups and peoples in vulnerable situations face greater risk and threats from climate change, it is particularly important that the right to meaningful and informed participation in decisions likely to affect their rights and survival is honoured. In addition to being a human rights obligation, ensuring meaningful and informed participation of all persons in climate policy should also improve outcomes. According to the IPCC, “recognition of diverse interests, circumstances, social-cultural contexts and expectations can benefit decision-making processes” and consequently, enables an effective and rights-based approach to tackling the threat of climate change.⁴⁷

During the panel discussions, panellists emphasized the importance of ensuring the participation of people in vulnerable situations. Noting that women constituted 43 per cent of the agricultural labour force and were critical food producers, Xiangjun Yao stated that engaging women in relevant policymaking was critical to food security. She called for climate policy that addresses the situation and conditions of those most vulnerable to climate change, includes all relevant stakeholders in decision-making processes, enables communities to share knowledge and good practices, and strengthens accountability processes.

Elizabeth Mpofu called upon States to give voice to the voiceless in the discussion of climate change. La Via Campesina represents over 200 million marginalized people, including peasants and fishermen whose voices are not being adequately heard in the climate debate. As a practicing woman farmer from Zimbabwe, she had witnessed first-hand, the impacts of climate change on human rights, particularly the rights to life, food, health, housing, education, self-determination, development and water and sanitation. According to Ms. Mpofu, the inadequate representation of poor and marginalized people in decision-making processes had contributed to these violations and facilitated the subordination of State responsibilities to protect human rights to powerful corporate interests. Companies had engaged in unsustainable and indefensible practices, including land-grabbing, excessive exploitation of mineral resources, over-reliance on fossil fuels and destruction of nature and livelihoods. Persons, groups and peoples in vulnerable situations, including indigenous peoples, peasants and women, had suffered the greatest impacts of these actions and many had been displaced from their lands.

Ms. Mpofu stated that developed countries, through their trade and investment negotiations and even their efforts to mitigate climate change through the mechanism to reduce emissions from deforestation and forest degradation, had further perpetuated human rights abuses and land-grabs and prioritized the interests of the few over those of the many. For example, biofuels and export

⁴⁵ See also United Nations Human Rights Committee, CCPR/C/GC/34, *General comment No. 34: Article 19: Freedoms of opinion and expression* (12 September 2011).

⁴⁶ *Ibid*, para 19.

⁴⁷ IPCC, AR5, p. 19

crops had been favoured over locally grown and consumed food. Forests were being taken away from indigenous peoples who relied on them for their livelihoods, shelter, balanced diets and way of life. People were losing their right to self-determination. Participation was critical to address these problems and indigenous peoples must have a voice and vote in climate-related decisions. In the context of indigenous peoples, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) further clarifies that States should obtain the free, prior and informed consent of indigenous peoples before taking any actions that affect their rights including actions related to climate change mitigation and adaptation measures.

Dan Bondi Ogolla agreed that response measures to climate change, such as activities under the auspices of the clean development mechanism, could sometimes violate human rights. He called for human rights principles, such as participation and freedom of information to guide the implementation and development of relevant policies. The importance of participation had been emphasized in a variety of COP decisions, which had held, inter alia, that responses to climate change should be integrated with social and economic development plans; all stakeholders should be engaged in the development and implementation of climate change policies; and adaptation actions should follow a participatory approach, taking into account the views of and likely impacts on those in vulnerable situations. During the interactive dialogues, delegations also highlighted the importance of integrating human rights in climate policy, including participation, access to information and access to justice.

The rights of those most affected by climate change

“We cannot continue to avoid the injustice faced by the poorest, the most vulnerable, and those on the front line”

Anote Tong, President, Republic of Kiribati

Article 1 of the Universal Declaration of Human Rights declares that “all human beings are born equal in dignity and rights”. The Declaration, the ICCPR and the ICESCR all contain explicit provisions related to equality and non-discrimination. States have further committed to the principles of equality and non-discrimination in a number of international treaties and other legal instruments including the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and instruments that address the rights of particular persons, groups and peoples such as the CEDAW, the Convention on the Rights of the Child (CRC), the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, CRPD, the United Nations Declaration on the Right to Development and the UNDRIP. These instruments require States to respect, protect, promote, and fulfil the rights of all persons, particularly those who face added social, economic or political vulnerabilities.

As previously discussed, climate change has disproportionate impacts on the rights of persons, groups and peoples in vulnerable situations. According to the IPCC, “people who are socially, economically, politically, institutionally or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses”.⁴⁸ This fact has been

⁴⁸ IPCC, AR5, p. 54.

repeatedly emphasized by Human Rights Council resolutions on the subject of human rights and climate change including resolution 10/4 which states that the impacts of climate change “will be felt most acutely by those segments of the population who are already in a vulnerable situation.”

John Knox and other panellists in the March 2015 discussions also highlighted that climate change posed the greatest threat to the rights of people in vulnerable situations. Elizabeth Mpofu emphasized that in addition to its direct impacts on the enjoyment of human rights, climate change also brought about indirect impacts by diverting resources from crucial public services such as health, education and agrarian support to climate change response and mitigation efforts at the expense of persons who rely upon public services to meet their needs. Discussing food security, Ana Maria Suarez Franco noted that climate change disproportionately affects peasants, indigenous peoples, pastoralists, small farmers and fishermen, who, paradoxically, have contributed to it the least.

Minister Abul Hassan Mahmood Ali called for States to take a human rights perspective and focus on the impacts of climate change on the poorest communities and countries. Mithika Mwenda compared the plight of humanity in the face of climate change to that of passengers struggling for survival during the sinking of the Titanic: the weak might suffer and die first but, in the end, everyone would sink. Given this reality, he called for a paradigm shift to address climate change and transition to low-carbon economies in an equitable, fair and ecologically sound manner that permitted continued growth in developing countries. Renan Dalisay also emphasized that climate change takes lives and had a disproportionate impact on the poorest and most marginalized. During the interactive discussion that followed the panel presentations, delegations called for mitigation and adaptation efforts to place people at the centre, be gender sensitive and ensure the rights of persons, groups and people in vulnerable situations, including women, children, indigenous peoples and the poor.

To better understand how climate change impacts the rights of particular groups, it is useful to consider the particular nature of the threat posed to the rights of indigenous peoples, one that was emphasized throughout the panel discussion. The UNDRIP and International Labour Organization Convention 169 articulate specific rights of indigenous peoples. UNDRIP affirms that “indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.” It calls for States to “provide effective mechanisms for prevention of, and redress for” actions which would undermine indigenous peoples’ rights including their rights to culture, land and resources, and self-determination.

“Indigenous people[s] are among the most culturally endangered communities.”

Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous peoples

During the panel discussion, many speakers warned of the impact of climate change on indigenous peoples’ rights. Victoria Tauli-Corpuz stressed that, “indigenous peoples, like many developing countries, are among those who have least contributed to the problem of climate change, but are the ones suffering from the worst impacts.” She went on to state that indigenous peoples often lived in and relied on fragile ecosystems, damage to which threatened their homes,

livelihoods and cultural survival. Climate change threatens their rights to self-determination, development, food, water, land and culture, among others. Efforts to prevent, mitigate and adapt to climate change could also threaten their rights. The production of biofuels can lead to land-grabbing, and displacement; and the construction of hydroelectric dams and other renewable energy projects can cause displacement and ecological damage. These activities should not be permitted without the consent of potentially affected indigenous peoples.

Prime Minister Enele Sosene Sopoaga further emphasized the importance of ensuring that people are able to “continue to enjoy and practice their own cultural and traditional practices, and their own traditional ways of life.” Panellists also stressed the potential applications of indigenous practices for climate mitigation and adaptation. According to Ms. Tauli-Corpuz, “indigenous peoples’ knowledge increases the effectiveness of adaptation measures.” Similarly, the IPCC has found that “indigenous, local and traditional knowledge systems and practices, including indigenous peoples’ holistic view of community and environment, are a major resource for adapting to climate change.”⁴⁹ By empowering indigenous peoples and guaranteeing them control over their traditional knowledge, lands, territories and resources, as called for in UNDRIP, States can simultaneously improve climate mitigation and adaptation efforts and the situation of indigenous peoples. According to Hilal Elver, the Special Rapporteur on the right to food, women’s and indigenous peoples’ knowledge of biodiversity and agro-ecology should inform climate mitigation and adaptation strategies. This will empower and benefit affected persons, guarantee their participation in relevant decision-making processes, and make them part of the climate solution.

The rights of future generations

“Climate justice requires that States look beyond their responsibility to their own people, to accept their responsibility to those living beyond their shores, who are particularly vulnerable to climate change. And also, to the generations to come.”

Mary Robinson, President, Mary Robinson Foundation – Climate Justice

The rights of children are protected by the CRC but the rights of future generations (in the sense of generations yet unborn) are not formally recognised in this or other major human rights instruments. Nevertheless, a strong argument in favour of the rights of future generations can be made on the basis of the human rights principle of equity and a number of multi-lateral environmental agreements. The Stockholm Declaration of the United Nations Conference on the Human Environment stated that “defend[ing] and improve[ing] the human environment for present and future generations has become an imperative goal for mankind” and that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.⁵⁰

⁴⁹ IPCC, AR5, p. 19.

⁵⁰ United Nations Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment* (Stockholm: United Nations, 1972).

General Assembly resolutions 43/53, 44/207, 45/212 and 46/169 call for the protection of the global climate for present and future generations of mankind. The 1992 Rio Declaration on Environment and Development explicitly advanced the rights of future generations when it linked the right to development to the environment and sustainable development. In paragraph 3, the Rio Declaration affirmed that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”⁵¹ The following year, the Vienna Declaration and Programme of Action included the same language in its paragraph 11.⁵² The 2002 Johannesburg Declaration, and the Future We Want, the outcome document of Rio + 20, further affirm the links between the environment, sustainable development and human rights. The principle of equity, including intergenerational equity, is also specifically recognized in the UNFCCC which calls for all parties to “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”.

During the panel discussions, the concept of intergenerational equity was highlighted by several discussants. President Anote Tong questioned whether or not we could “guarantee” the futures of our grandchildren. He observed that the people in Tuvalu and other SIDS “have to reconcile [themselves] with the reality that [their] islands will be under water, unless we do something very significant and substantial.” This possible loss of the land mass of an entire country poses a grave threat to the cultural identity and survival of its people including generations yet unborn who may never know their traditional lands and territories. Flavia Pansieri concurred that those who had contributed the least to greenhouse gas emissions, including the poorest people in the poorest countries and future generations worldwide, would be affected the most and this was a matter of fundamental injustice. Victoria Tauli-Corpuz called for the implementation of the “polluter pays” principle, an environmental law principle from environmental law that requires that those responsible for environmental harms should pay for the damages they cause. She stressed the need for current actions to take into account likely impacts on future generations.

Renan Dalisay urged States and people to come together to agree on a lasting solution to save our children and our children’s children from the devastation wrought by the terrible consequences of climate change. Olav Fyske Tveit asserted that we must act now to address climate change, the impacts of which are already a reality and will affect even more, our future generations. Actions taken now will determine whether or not generations to come have access to the most basic elements of life, including food and water. During the interactive dialogues that followed, participants reiterated that the poorest countries and persons, groups and peoples in vulnerable situations that had contributed the least to climate change were likely to suffer its worst impacts. This was particularly true of children and future generations. Discussants agreed that addressing the impacts of climate change on those in vulnerable situations was a matter of justice and fairness that required immediate action.

⁵¹ United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (Rio de Janeiro: United Nations, 1992).

⁵² World Conference on Human Rights, *Vienna Declaration and Programme of Action* (Vienna: United Nations, 1993).

Part III: Realizing human rights in a warming world

“Time is running out to avoid dangerous climate change. This year, 2015, presents a unique opportunity to set the global community on a new path; away from fossil fuel based development and towards a sustainable alternative that will ensure the protection of the rights of generations to come.”

Mary Robinson, President, Mary Robinson Foundation – Climate Justice

In order for States to realise their commitments to safeguard and uphold all human rights for all in the face of challenges posed by climate change and its impacts, they must act collectively and **immediately**. Principle 15 of the Rio Declaration on Environment and Development calls for States to adopt a precautionary approach to environmental harms and act “when there are threats of serious or irreversible damage” even in the absence of full scientific certainty. In the case of climate change there is no uncertainty. Climate change has already done serious damage. The only uncertainty remaining is how much more damage it will cause. Under these circumstances, urgent preventative action is needed. Discussants agreed that immediate, coordinated climate action that effectively mobilizes resources to mitigate and adapt to climate change while protecting the rights of people affected by it is the only viable solution. The need for such action is supported by sound science, including the most recent report of the IPCC, which overwhelmingly confirms that humanity is headed down a dangerous path towards a warmer, more climate volatile, and less secure world.

The panel discussions, the IPCC, and the growing political consensus in favour of urgent climate action, all demonstrate that the time for concrete, effective climate action is now. Since climate change directly contributes to the violation of human rights, States have an affirmative obligation to take measures to mitigate climate change, to prevent negative human rights impacts, and to ensure that all persons, particularly those in vulnerable situations, have adequate capacity to adapt to the growing climate crisis. Integrating human rights obligations in climate actions will improve outcomes by providing concrete measures to protect people from the harms of climate change. There is a growing body of evidence that a human rights-based approach will lead to more sustainable and effective results in climate action.⁵³ A human rights perspective offers guidance for addressing climate through a broader lens that encompasses the economic, social, cultural and political dimensions of climate change. It can also reduce arbitrariness in climate change programs and objectives, and ensure that climate action benefits those who are most in need. The integration of human rights in climate action will promote significant involvement from UN bodies and mechanisms mandated to promote and protect human rights, and from civil society actors bringing additional resources to confront the challenge of climate change.

In spite of this, concrete efforts at effective climate change mitigation and adaptation measures have been limited. In the course of the panel discussion, President Aote Tong posed the question “how much global effort are we putting into providing concrete, tangible action to help the vulnerable whose security and survival is very much on the line?” The answer so far has been not

⁵³ See for example Caleb Stevens et. al., *Securing Rights Combatting Climate Change: How Strengthening Community Forest Rights Mitigates Climate Change*, Executive Summary (World Resources Institute 2014) available at http://www.wri.org/sites/default/files/securingrights_executive_summary.pdf (last accessed 25 November 2015) (discussing the importance of indigenous and local communities’ forest rights for climate mitigation).

enough. In order to address this failure, panellists and participants made several recommendations to help effectively integrate human rights considerations in climate adaptation and mitigation efforts and to spur the urgent action that is so critically needed to prevent climate change from becoming a human rights catastrophe.

Recommendations from the full-day panel discussion on climate change

- Appointment of a Special Rapporteur on human rights and climate change to identify good practices, strengthen accountability mechanisms, engage with the Secretariat of the United Nations Framework Convention on Climate Change and further explore the links between climate change and human rights;
- Thorough integration of human rights obligations, standards and principles in international and national climate policy and action, including COP 21;
- Participation of all relevant stakeholders in the development and implementation of climate change policies and action;
- Mitigation and adaptation efforts that place people at the centre, are gender sensitive, and ensure the rights of persons, groups and peoples in vulnerable situations, including women, children, indigenous peoples and the poor. These could be informed by the use of impact assessments to ensure that climate actions benefit those facing the greatest risks;
- Improved regulation of the private sector in order to mitigate their contributions to climate change and ensure their respect for human rights in all their actions;
- Enhanced cooperation based on principles of equity and fairness to ensure adequate funding and research into adaptation measures to help the poorest countries and those persons, groups and peoples most at risk;
- Intensified research and development into renewable sources of energy and energy conservation to reduce the emissions intensity of growth;
- Equitable access to technology, including, if necessary, the lowering of intellectual property standards and facilitation of technology transfer;
- The creation of a climate justice fund;
- Protecting and utilizing traditional knowledge of local communities and indigenous peoples to support the effective use of resources for agriculture and forestry;
- Titling the lands and territories of indigenous peoples and other communities in order to support preservation of forests and improved carbon storage;
- Utilizing community-based climate monitoring to reduce monitoring costs and enhance early warning systems;
- Improved capacity-building, development assistance, innovative finance and clean development mechanisms;
- Improved communication between climate change negotiators and human rights experts including through increased participation in the Geneva Pledge;
- Consideration by States of the linkages between human rights and climate change during the universal periodic review;
- Increased scrutiny of the impacts of climate change on human rights by Human Rights Council special procedures mandate holders;
- A special session of the Human Rights Council on human rights and climate change; and

- The creation of a legal instrument to protect the rights of climate displaced people

Recommendations from the panel discussion share a common objective of better integrating human rights in climate action with a view to respect, protect, promote, and fulfil all human rights for all. With negotiations of the outcome document of COP21 currently under way, this objective is critical and States have the opportunity to make considerable progress. From a human rights perspective, the new agreement and other efforts to mitigate climate change and adapt to its impacts should specifically address the human rights impacts of climate change and be consistent with existing human rights agreements, obligations, standards and principles.



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Foreword



Climate change is one of the greatest threats to human rights of our generation, posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world. This report aims to support government and private decision makers by assessing the relationship between climate change and human rights law.

While the United Nations and national governments acknowledge that climate change and the responses to it can impact on human rights, there is less agreement on the corresponding obligations of governments and private actors to address this problem. The relationship between human rights and the environment has been much debated over the past few decades, supported by UNEP, OHCHR and the Human Rights Council-appointed Special Rapporteur, specifically the identification of positive, mutually reinforcing links between the fields of law and policy.

This UNEP report sheds light on the human rights obligations of both governments and private actors in responding to climate change, including those relating to rights to information, public participation in decision-making and access to justice, as well as obligations relating to adaption and mitigation.

The report makes a number of recommendations on how governments and other actors may address climate change. These include the need to recognize the link between climate change and human rights in climate-related processes and activities. The report also highlights the need for greater ambition with regard to mitigation, human rights safeguards for international climate finance mechanisms, financial assistance for developing countries faced with adaptation, and the development of an international mechanism on climate-induced displacement and migration. In addition, the report proposes a number of new human rights-related mechanisms for international coordination and accountability in delivering these outcomes.

The Paris agreement is a stepping stone rather than the end objective for climate change action. So I hope that, whatever the outcome, this report will become a central reference for anybody involved in making climate or environmental related decisions in the crucial years ahead.

A handwritten signature in blue ink that reads "Achim Steiner". The signature is fluid and cursive, with the first name "Achim" and last name "Steiner" clearly distinguishable.

Achim Steiner
UNEP Executive Director

Foreword



Ten years ago, the Inuit people asked the Inter-American Human Rights Commission to hear their claim that the unchecked effects of climate change were violating their human rights. At the time, the request seemed quixotic, especially after the Commission declined to hear the case. In retrospect, however, the Inuit petition was the first harbinger of a sea-change in how the international community thinks about climate change.

In 2007, a group of small island states came together to adopt the Male' Declaration, the first intergovernmental statement that "climate change has clear and immediate implications for the full enjoyment of human rights." The next year, they convinced the United Nations Human Rights Council to adopt the first of what became a series of resolutions linking climate change to a host of impacts on human rights. The Office of the High Commissioner for Human Rights then issued a seminal report describing those effects. And in 2010, the State Parties to the UN Framework Convention on Climate Change agreed in Cancun that the "Parties should, in all climate change related actions, fully

respect human rights." The relevance of human rights to climate change is now universally recognized. On Human Rights Day last year, December 10, 2014, all 78 UN human rights mandate-holders came together to issue a joint statement underscoring the threat climate change poses to human rights, and unanimously calling on States "to make sure that human rights are at the core of climate change governance."

At the same time, the human rights norms relating to the enjoyment of a safe, clean, healthy and sustainable environment have been clarified. As the first UN Independent Expert (and as of March 2015, the first Special Rapporteur) on human rights and the environment, I have had the honor of hearing from practitioners and scholars all over the world how human rights are being applied to environmental problems generally and to climate change in particular. The question is no longer whether human rights law has anything to say about climate change, but rather what it says and how it can best be brought to bear.

This report is the most detailed and comprehensive study yet undertaken of those questions. It arrives at a critical moment, as the Parties to the UNFCCC meet in Paris to begin a new chapter in our generational effort to defeat climate change. The report provides an indispensable basis for climate policy going forward, helping us see in detail how climate change threatens our ability to enjoy our human rights, and also how the exercise of human rights can inform and guide our climate policies. As the report makes clear, a human rights perspective on climate change not only provides a stark warning of what is at stake - it also gives us a beacon of hope that we can solve this problem together.

A handwritten signature in dark ink, appearing to read 'John H. Knox'.

John H. Knox,
UN Special Rapporteur on human rights and the environment

Executive Summary

It has long been recognized that a clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living. Anthropogenic climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced. The latest assessment report from the Intergovernmental Panel on Climate Change (IPCC) describes how observed and predicted changes in climate will adversely affect billions of people and the ecosystems, natural resources, and physical infrastructure upon which they depend. These harmful impacts include sudden-onset events that pose a direct threat to human lives and safety, as well as more gradual forms of environmental degradation that will undermine access to clean water, food, and other key resources that support human life.

As a consequence, climate change will have a profound effect on the enjoyment of human rights for individuals and communities across the planet. This is not merely an abstract, future possibility. Climate change is already affecting temperatures, hydrologic conditions, ecosystem functioning, and agricultural productivity in many regions. Displacement is also an imminent prospect for some communities, such as those situated in the rapidly melting Arctic and low-lying coastal areas.

Further complicating the picture, measures undertaken to mitigate greenhouse gas (GHG) emissions and adapt to climate change can themselves adversely affect the enjoyment of human rights. The international community has pledged to allocate or direct \$100 billion (US) per year to funding mitigation and adaptation projects in developing nations. It is critical that as the world endeavors to address climate change, it do so with full respect for human rights.

This report describes how governments and other actors may address climate change in a manner consistent with their obligations to respect, protect, promote and fulfill human rights. One key goal is to inform the decisions undertaken by the Conference of the Parties to the United Nations Framework Conference on Climate Change (UNFCCC). However, the analysis and recommendations set forth in this report are not limited to the current round of international climate negotiations. Another key goal is to inform decisions and actions undertaken by nations, sub-national governments, international organizations and private actors pursuing climate action both within and beyond the context of the UNFCCC in the coming years.

Part I describes the latest projections and observations of how climate change impacts and responses can affect the environment, individuals and communities. Some of the key findings include:

- The impacts of climate change on freshwater resources, ecosystems, and human settlements are already undermining access to clean water, food, shelter, and other basic human needs; interfering with livelihoods; and displacing people from their homes. Even if we remain within the international goal of 2° C of global warming, these impacts will expand dramatically in the coming decades.
- These impacts constitute a serious interference with the exercise of fundamental human rights, such as the rights to life, health, water, food, housing, and an adequate standard of living.
- Mitigation, adaptation, and geoengineering measures can also adversely affect the exercise of human rights. For example, there are documented instances of hydroelectric and biofuel projects that have resulted in human rights violations. There is also a high risk of human rights violations resulting from the implementation of resettlement programs for those who are displaced or at risk of displacement due to climate change, and a corresponding need to ensure that such programs are undertaken with adequate input and consent from those who are relocated.

Part II summarizes the obligations of governments and private actors to respond to these impacts. This section begins by reviewing how UN agencies and national governments have come to understand the relationship

between climate change and human rights. It then provides a more detailed discussion of specific obligations in this context. These include:

- Procedural obligations for all governments to ensure that the affected public is: (i) adequately informed about the impacts of climate change and the measures undertaken to both mitigate and adapt to climate change; (ii) adequately involved in public decisions about climate change; and (iii) given access to administrative, judicial, and other remedies when rights are violated as a result of climate change and responses to it.
- Substantive obligations for all governments to: (i) protect human rights from climate-related harms; (ii) respond to the core drivers of climate change by regulating GHG emissions within their jurisdiction; (iii) cooperate internationally to protect human rights against climate-related harms; (iv) address the transboundary impacts of climate change; and (v) safeguard human rights in all mitigation and adaptation activities.
- States also have unique obligations with respect to certain groups, including women, children, and indigenous peoples. Notably, states must obtain free, prior and informed consent (FPIC) before undertaking any measures that would adversely affect the traditional lands and resources of indigenous peoples.
- Private actors also have obligations to address the human rights implications of climate change, and should refer to the UN Guiding Principles on Business and Human Rights to ensure that they fully respect human rights in all activities.

Part III discusses the implementation of these obligations, focusing primarily on activities undertaken by national governments either within or outside of the UNFCCC context. It documents several recent developments in this area:

- Some states are beginning to recognize the linkages between human rights and climate change in reports submitted to the UNFCCC secretariat, but this is not the case for the majority of developed nations.
- There is a significant “emissions gap” between the mitigation commitments set forth in the Intended Nationally Determined Contributions (INDCs) and the emission reductions required to keep warming at or below 2°C.
- There is also a significant “adaptation finance gap” in terms of what will be needed to adapt to climate change and the finance, technology and capacity available.
- Finally, there is a significant “finance gap” between the financial and technical assistance that has been given or pledged to developing countries and the resources that will be required to ensure that climate change does not interfere with the exercise of human rights in those countries. This is true even if we do meet the 2°C target.
- Most international climate finance mechanisms are accompanied by safeguards to protect human rights, but there is room for improvement, especially with respect to the monitoring and assessment of these programs and any human rights violations.

Part IV provides recommendations on how national governments and other actors can better integrate human rights considerations into their mitigation and adaptation activities. Our key recommendations for the parties to the UNFCCC include:

- National parties should commit to **more ambitious mitigation targets** to ensure that the global average temperature increase remains at or below 2°C.
- The COP should **recognize the link between climate change and human rights** in the Paris Agreement.
- The **safeguards for the various climate finance mechanisms should be made uniform and revised** to ensure full respect for human rights.
- National parties should **increase financial and technical assistance** to developing countries that are most vulnerable to the impacts of climate change, to protect human rights in those areas.
- National parties should continue to discuss the issue of **loss and damage** in a transparent way that will address the concerns of all affected countries.

The report also contains other recommendations to national governments on measures they can adopt unilaterally to protect human rights in the context of climate change, as well as recommendations to local governments and private actors.

Glacial melt in the Hindu Kush-Himalayas.



Introduction

The natural environment provides human beings and the communities in which we live with the resources we need to achieve lives of dignity and well-being – clean air to breathe; clean water to drink; food to eat; fuels for energy; protection from storms, floods, fires and drought; climate regulation and disease control; and places to congregate for aesthetic, recreational and spiritual enjoyment. These environmental endowments—often referred to as ecosystem services—are at once essential to core survival and vital to human flourishing. As the nations of the world declared in *The Future We Want*, the outcome document of the 2012 Rio+20 conference, sustainable development requires that we angle toward “harmony with nature.”¹ To achieve this idea, we must balance economic, social and human development with “ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.”²

The nature of the linkages between the environment and human rights has been debated for years. However, it has long been recognized that a clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living. This recognition offers one reason the international community has banded together through multilateral environmental agreements (MEAs) to prohibit illegal trade in wildlife, to preserve biodiversity and marine and terrestrial habitats, to reduce transboundary pollution, and to prevent other behaviors that harm the planet and its residents. In short: Environmental protection protects human rights. At the same time, adherence to human rights—such as those that ensure public access to information and participation in decision making—contributes to more just decisions about the utilization and protection of environmental resources, and protects against the potential for abuse under the auspices of environmental action. Thus, domestic environmental laws and MEAs can both be strengthened through the incorporation of human rights principles, even as they contribute to the ongoing realization of human rights.

Anthropogenic climate change is the largest, most pervasive threat to the natural environment and human rights of our time. Climate change has already begun to have far-reaching environmental impacts, including many adverse effects on wildlife, natural resources and the ecological processes that support access to clean water, food, and other basic human needs. These impacts, combined with direct harms to people, property, and physical infrastructure, pose a serious threat to the enjoyment and exercise of human rights across the world.³ The mandate to take immediate action to both reduce the greenhouse gas emissions that contribute to global climate change and enact measures that reduce vulnerability and increase resilience to climate change impacts is clear. Yet, certain responses to climate change—including both mitigation and adaptation activities—can also interfere with human rights, as has been the case for a number of hydroelectric and biofuel projects undertaken, in part, to reduce global greenhouse gas emissions. It is critical that as the world endeavors to address the “super wicked” problem of climate change it do so with full respect for human rights.

Over the course of the last decade the international community has arrived at a clear consensus on all of these issues. Yet, while United Nations agencies and national governments have explicitly acknowledged that climate change and responses to climate change can impair human rights, there has been less agreement on the corresponding obligations of governments and private actors to address this problem. The purpose of this report is to inform the decisions undertaken by the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) at COP-21, as well as other activities undertaken by governments and private actors, by providing an up-to-date assessment of the relationship between climate change and human rights law and by making recommendations for incorporating a human rights lens into international and domestic climate action. Part I describes the latest projections and observations of how climate change impacts and responses can affect the environment, individuals and communities and the exercise of human rights. Part II summarizes the obligations of governments and private actors to respond to these impacts. Part III discusses the implementation of these obligations, focusing primarily on activities undertaken by national governments either within or outside of the UNFCCC context. Part IV provides recommendations on how the COP, national governments, and other actors can better integrate human rights considerations into their mitigation and adaptation activities.

¹ UN GA Res. 66/288, *The Future We Want*, p. 40, UN Doc. A/RES/66/288 (July 7, 2012).

² *Id.* p. 4.

³ See, e.g., UNHRC Resolutions 10/4 (March 25, 2009), 18/22 (Oct. 17, 2011), and 26/27 (June 27, 2014).



Rising sea levels and changing salinity pose a serious threat to mangrove ecosystems, like those found along the coast of Los Haitises National Park, Dominican Republic.

The Human Rights Implications of Climate Change

1.1 Effects of Climate Change on Human Rights

Climate change poses an enormous threat to the lives and well-being of individuals and communities across the world. The Intergovernmental Panel on Climate Change (IPCC)'s Fifth Assessment Report (AR5) provides a detailed picture of how the observed and predicted climatic changes will adversely affect millions of people and the ecosystems, natural resources, and physical infrastructure upon which they depend.⁴ These harmful impacts include sudden-onset events that pose a direct threat to human lives and safety, as well as more gradual forms of environmental degradation that will undermine access to clean water, food, and other key resources that support human life.

Thus, climate change will have a profound effect on the enjoyment of human rights for billions of people. This is not merely an abstract, future possibility. Climate change is already contributing to drought, ecosystem degradation, and food shortages across the world.⁵ Some regions are hit harder than others, with more clearly attributable linkages to climate change—for example, sea level rise has adversely affected the safety and livelihoods of many coastal inhabitants,⁶ and rising temperatures are causing significant changes in the Arctic ecosystems that support many indigenous communities.⁷

⁴ IPCC, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, CONTRIBUTION OF THE WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Cambridge University Press 2014).

⁵ *Id.* See also OXFAM, ENTERING UNCHARTED WATERS: EL NIÑO AND THE THREAT TO FOOD SECURITY (2015).

⁶ Anthony Oliver-Smith, *Sea Level Rise and the Vulnerability of Coastal Peoples: Responding to the Local Challenges of Global Climate Change in the 21st Century*, UNU-EHS Publication No.7/2009 (July 2009).

⁷ Sheila Watt-Cloutier, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (Dec. 7, 2005) [hereinafter Inuit Petition].

This section briefly summarizes the findings of the IPCC AR5, specifically the contribution of Working Group II on Impacts, Adaptation, and Vulnerability. For each impact area, the effect on specific human rights is also noted.⁸ A more detailed summary of what these rights entail is provided in Appendix A. The discussion focuses on impacts that are projected to occur under the intermediate emissions scenarios (RCP4.5 and RCP6.0), corresponding with a global mean temperature increase between 1.1 and 3.1°C. The severity of these impacts will be significantly worse in a high emissions scenario (RCP8.5), which would correspond with a temperature increase between 2.6 and 4.8°C.

(a) Impacts on Ecosystems and Natural Resources

(i) Freshwater Resources

According to IPCC projections, climate change will significantly reduce surface water and groundwater resources in most dry subtropical regions, thus intensifying competition for water among agriculture, ecosystems, settlements, industry, and energy production, and affecting regional water, energy, and food security.⁹ Climate change will also increase the frequency of droughts in presently dry areas. The primary drivers of these projected water shortages and droughts include: (i) reduced rainfall, (ii) reduced snowpack, resulting in less snowmelt supplying rivers and streams; (iii) higher temperatures, which increase evaporation from surface water and soils; and (iv) sea level rise, which contributes to saltwater inundation of freshwater resources. In addition, variations in the timing, magnitude, and type of precipitation, as well as temperature increases and sea level rise, can harm freshwater ecosystems by changing stream flow and water quality. This can also lead to the degradation of water supplies for human consumption, agriculture, and other uses.

Affected rights: right to water and sanitation, right to health, right to life, right to food, right to an adequate standard of living.



Climate change will reduce freshwater availability in arid regions that are already suffering from severe water shortages and drought, such as the remote Turkana region of Northern Kenya, where residents had to collect water from dry riverbeds during a period of prolonged drought.

⁸ The rights identified in this report are based on the core international human rights treaties. For the full text of these treaties and protocols, see UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), *THE CORE INTERNATIONAL HUMAN RIGHTS TREATIES* (2014), available at http://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf. For an explanation of treaty implementation, see OHCHR, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30, Rev. 1 (2012), available at <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>. For a more detailed overview of specific rights, such as the rights to water, food, health, and housing, see OHCHR, *Publications and Resources: Fact Sheets*, <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx> (last visited Nov. 12, 2015).

⁹ IPCC (2014), *supra* note 4, at 232.

(ii) Terrestrial Ecosystems

Even under the intermediate emissions scenarios there is a “high risk” that climate change will cause “abrupt and irreversible regional-scale change in the composition, structure, and function of terrestrial and freshwater ecosystems” in this century.¹⁰ Many plant and animal species have already moved their ranges and changed their behavior in response to observed climate change over recent decades, but many others will be unable to move quickly enough or otherwise adapt to changing climactic conditions.¹¹ Thus, the IPCC predicts that climate change will “reduce the populations, vigor, and viability” of many species, especially those with spatially restricted populations, and will increase the extinction risk for many species.¹²

In addition, increased tree death has been observed in many places worldwide, and there is high confidence that this can be attributed to climate change in some regions.¹³ “Forest dieback” is a major environmental risk, which has potentially significant impacts on climate, biodiversity, water quality, wood production, and livelihoods. The drivers of tree death include high temperatures and drought, and changes in the abundance of insect pests and pathogens (related, in part, to warming).¹⁴

Affected rights: right to food, right to an adequate standard of living, right to health.

(iii) Coastal Systems and Low-lying Areas

The IPCC projects that coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, flooding, erosion, and saltwater intrusion, primarily due to sea level rise (although increased precipitation and storm surges will also contribute to these impacts). For the two intermediate emissions scenarios, the projected mean sea level rise ranges from .36-.73 meters by 2100, with large regional and local variations.¹⁵ There will also likely be an increase in the occurrence of the most severe tropical cyclones.¹⁶ Finally, the physical composition of coastal and estuarine ecosystems will be altered by changes in precipitation and river flow, increased water temperatures, and ocean acidification, and this will contribute to a decline in biodiversity and ecosystem productivity along coastlines.¹⁷

The projected increase in the intensity of tropical cyclones, exacerbated by sea level rise and the degradation of ecosystems that provide protection from storms and flooding, will pose a direct threat to human lives and coastal settlements. Without adaptation, IPCC AR5 projects with high confidence that “hundreds of millions of people will be affected by coastal flooding and will be displaced due to land loss by year 2100.”¹⁸ Coastal communities will also be adversely affected by the more gradual degradation of land, soils, freshwater resources, and coastal and estuarine ecosystems.

Affected rights: right to life, right to health, right to housing, right to an adequate standard of living, right to food, right to water, right to property, right to self-determination.

(iv) Ocean Systems

Climate change is altering the physical, chemical, and biological properties of the ocean; scientists have already observed large-scale distribution shifts of species and altered ecosystem composition as a result of ocean warming (e.g., the distribution of many fish and invertebrates have shifted poleward and/or to deeper, cooler waters).¹⁹ The IPCC thus predicts that, in response to further warming by 1°C or more, there will be large, irreversible shifts in the spatial distribution of species and seasonal timing of their activities (feeding, growth, development, behaviors, and productivities), which will have implications for ecosystem goods and services.²⁰ It is likely that the spatial shifts of

¹⁰ *Id.* at 276.

¹¹ *Id.* at 274-275.

¹² *Id.* at 275.

¹³ *Id.* at 276.

¹⁴ *Id.*

¹⁵ *Id.* at 369.

¹⁶ There is not yet consensus on whether climate change will affect the severity of extratropical cyclones. *Id.* at 368.

¹⁷ *Id.* at 368.

¹⁸ *Id.* at 364.

¹⁹ *Id.* at 414.

²⁰ *Id.*

marine species will cause species richness to increase at mid- and high latitudes, and decrease at tropical latitudes. This has serious implications for marine productivity and food security in tropical areas.²¹

Affected rights: right to food, right to an adequate standard of living, right to health.

(v) Food Security and Production Systems

The effects of climate change on crop and terrestrial food production are already evident in several regions of the world. Some high-latitude regions, such as northeast China and the U.K., have experienced a modest increase in productivity as a result of recent warming trends.²² However, changes in temperature and rainfall precipitation have also negatively affected wheat and maize production in many regions.²³ There is also evidence that extreme weather events (storms and flooding) have impacted food production, but it is not possible to say that these specific events were caused by climate change (although climate change will increase the likelihood of such events).²⁴ As noted above, climate change is also adversely impacting the productivity of fisheries.

Going forward, it is very likely that climate change will adversely impact the production of major crops (wheat, rice, and maize) in both tropical and temperate regions.²⁵ The food security risk will be greatest in low-latitude countries, where there is high confidence that crop production will be “consistently and negatively” affected by climate change in a 2°C warming scenario (and fishery production will also decline).²⁶ Even in the near term, the impacts on global food security could be devastating—for example, 10% of the projected impacts on food security under a 2°C warming scenario showed yield losses of more than 25% for the period 2030-2049.²⁷ Greater losses are expected after 2050.²⁸

Affected rights: right to food, right to health, right to life, right to an adequate standard of living.

(b) Impacts on Physical Infrastructure and Human Settlements

(i) Urban Areas

Climate-related phenomena such as rising sea levels, coastal storms, heat stress, extreme precipitation, inland and coastal flooding, landslides, drought, increased aridity, water scarcity, and air pollution “will have profound impacts on a broad spectrum of city functions, infrastructures, and services and will interact with and may exacerbate many existing stresses.”²⁹ Urban climate change-related risks are increasing, with widespread negative impacts on people and their health, livelihoods, and assets, as well as local and national economies and ecosystems.³⁰ These risks are amplified for those who live in informal settlements and hazardous areas, which often lack essential infrastructure and adaptive capacity, as well as individuals that are more vulnerable as a result of age, income, disability, or other factors.³¹

Affected rights: right to life, right to housing, right to health, right to water and sanitation, right to an adequate standard of living, right to property.

(ii) Rural Areas

Climate change will affect water supply, food security, and agricultural incomes in rural areas.³² This will have implications for human health, livelihoods, incomes, and migration patterns. Some of the key impacts that create risk for rural communities include: rising temperatures and heat waves, changing precipitation patterns, and

21 *Id.* at 414-415.

22 *Id.* at 491.

23 *Id.*

24 *Id.*

25 *Id.* at 488.

26 *Id.*

27 *Id.* at 504.

28 *Id.* at 488, 504.

29 *Id.* at 556.

30 *Id.* at 538.

31 *Id.*

32 *Id.* at 616.



Changing precipitation patterns and higher temperatures can adversely affect food production in many parts of the world, such as Vietnam, where adaptation measures will be needed to protect food security and agricultural livelihoods.

extreme weather events, and the corresponding impacts on human health, water supply, ecosystems, natural resources, crops, and physical structures. Rural areas are also uniquely vulnerable to the effects of climate change due to: (i) a greater dependence on agriculture and natural resources, such as fisheries and forests; and (ii) existing vulnerabilities caused by poverty, lower levels of education, physical isolation, and neglect by policymakers.³³ Rural areas in developing countries face the most significant risks due to their geographical location (where climate change impacts are projected to be most severe), lack of adaptive capacity, and heavy reliance on agriculture and natural resources.³⁴

Affected rights: right to life, right to health, right to housing, right to food, right to water and sanitation, right to an adequate standard of living, right to property.

(iii) Key Economic Sectors and Services

Climate change will affect a variety of economic sectors and services, including energy, water services, transport, agriculture and livestock, forestry, fisheries, tourism, and insurance. Food production systems, water supply systems, and other sectors and services that rely on natural resources in their supply chain are particularly vulnerable to the impacts of climate change.³⁵ Electricity systems will also be affected, both through direct climactic impacts (e.g., higher temperatures, lower water supply) and through increased demand for electricity, both of which can compromise electric grid reliability.³⁶

³³ *Id.* at 618.

³⁴ *Id.* at 631.

³⁵ *Id.* at 674, 676.

³⁶ *Id.* at 664-672.

Current estimates of global annual economic losses due to additional temperature increases of approximately 2°C are between 0.2 and 2.0% of income, but actual losses are more likely than not to be greater than these estimates, and there will be large differences in economic losses both between and within countries.³⁷ Many of the direct and indirect economic losses will occur due to the decreased productivity of agricultural systems, fisheries, forests, and other natural resources. Other drivers of economic loss include direct impacts on human health, water shortages, and extreme weather events.

Affected rights: right to health, right to an adequate standard of living, right to food, right to water.

(c) Impacts on Livelihoods, Health, and Security

(i) Livelihoods and Poverty

Climate-related hazards, including gradual changes and extreme weather events, will affect peoples' livelihoods directly through impacts such as losses in crop yields; the destruction of natural resources, homes, and properties; and displacement. They will also have indirect effects on livelihoods by exacerbating other stressors—for example, climate change can contribute to: (i) increases in the prices of food, energy, and other critical commodities; (ii) political instability and large-scale conflict; and (iii) individual and household-level disturbances.³⁸

Poverty, political instability, and conflict also undermine the ability of individuals and communities to adapt to climate change (e.g., by fortifying their physical assets or by moving to less vulnerable locations). Thus, climate change is one of many factors that can perpetuate a vicious cycle of poverty, deprivation, and inequality.³⁹

Affected rights: right to an adequate standard of living, right to health, right to life, right to food, right to water, right to property.



Aerial view of Kotzebue, Alaska, USA - an Inuit village facing the imminent prospect of displacement due to rising sea levels, melting permafrost, and erosion.

³⁷ *Id.* at 663.

³⁸ For example, studies have found an increase in gender-based violence within households following climate-related disasters as well as slow-onset climate events, owing to greater stress and tension, loss and grief, and disrupted safety nets. *Id.* at 809.

³⁹ *Id.* at 817.

(ii) Human Health

There is evidence that climate change has already contributed to health problems in some regions, and if climate change continues as projected under various scenarios, the major health impacts will include: (i) greater risk of injury, disease, and death due to more intense heat waves and fires; (ii) increased risk of under-nutrition resulting from diminished food production in poor regions; (iii) health consequences stemming from lost work capacity and reduced labor productivity in vulnerable populations; and (iv) increased risk of food-, water- and vector-borne diseases.⁴⁰ In some regions, the combined effects of higher average temperatures and higher humidity will also create significant health risks (especially those regions that already exceed the international standard for safe work activity during the hottest months of the year). Although there may be some positive health impacts, these will be increasingly outweighed by the magnitude and severity of negative health effects.⁴¹

Affected rights: right to health, right to life.

(iii) Human Security

Climate change will threaten human security⁴² by increasing the scarcity of key resources (e.g., water, food, land, and other natural resources), undermining livelihoods, compromising culture and identity, increasing displacement and migration, and challenging the ability of states to provide the conditions necessary for human security. Each of these impacts can directly affect human security, and can also contribute to political instability and violent conflict.⁴³

Affected rights: right to life, right to an adequate standard of living, right to a nationality, right to self-determination, right to mobility, right to property.

1.2 Effects of Mitigation and Adaptation on Human Rights

The manner in which governments and other actors respond to the challenges of climate change can also affect the enjoyment of human rights. This is true for actions undertaken to mitigate the greenhouse gas (GHG) emissions that contribute to climate change, as well as projects undertaken to adapt to the impacts of climate change.

(a) Mitigation

There are numerous examples of how certain kinds of mitigation projects undertaken to reduce or sequester GHG emissions can adversely affect the rights of certain groups. The most egregious violations have occurred in the context of:

1. **Hydroelectric projects**, which often lead to displacement of local people and the destruction of ecosystems upon which they depend, and can also harm the health and livelihoods of people living downstream from the project by reducing river flows.⁴⁴
2. **Biofuels policies and projects**, which can contribute to food shortages and price shocks, additional water stress and scarcity, widespread deforestation, and displacement of indigenous peoples and

⁴⁰ *Id.* at 713.

⁴¹ Positive health impacts include modest reductions in cold-related mortality and morbidity in some areas due to fewer cold extremes, and reduced capacity of disease-carrying vectors due to extreme heat. *Id.*

⁴² In the IPCC report, “human security” is defined as “a condition that exists when the vital core of human lives is protected, and when people have the freedom and capacity to live with dignity.” *Id.* at 759.

⁴³ For example, in a report on Syria, the former Special Rapporteur on the Right to Food described how severe droughts, exacerbated by climactic changes in the region, led to crop failures and food shortages, thus undermining the right to food. Olivier De Schutter, Special Rapporteur on the Right to Food, *Addendum, Mission to the Syrian Arab Republic*, U.N. Doc. A/HRC/16/49/Add.2 (Jan. 27, 2011). Since then, the drought and food shortages have contributed to political instability and violent conflict, resulting in deaths, injuries and displacement of millions of people. See also U.N. Secretary-General, *Climate change and its possible security implications: Report of the Secretary-General*, U.N. Doc. A/64/350 (Sept. 11, 2009).

⁴⁴ IFC Compliance Advisor Ombudsman, Complaint, Guatemala / Real LRIF-01/Coban (Oct. 29, 2014) (complaint submitted to IFC alleging social and environmental harms from Santa Rita dam); ECONOMIC, SOCIAL & CULTURAL RIGHTS AND CLIMATE CHANGE: A LEGAL REFERENCE GUIDE 68-69 (Sébastien Jodoin & Katherine Loftis eds., CISDL, GEM & ASAP 2013); Naomi Roht-Arriaza, “First, Do No Harm”: Human Rights and Efforts to Combat Climate Change, 38 GA. J. INT’L & COMP. L. 593, 597-98 (2010); Victoria Tauli-Corpuz & Aqpaluk Lyngbe, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on their Territories and Lands*, study presented at the UN Economic and Social Council, Permanent Forum on Indigenous Issues, 7th session, E/C.19/2008/10 (2008); Tania Boderó et al., *Request to meet about the Barro Blanco project during July 2013 visit to Panama* (Centro de Incidencia Ambiental 2013).



Mario Robert Duran Ortiz (2008)

Costa Pinto Biomass Cogeneration Plant in Piracicaba, São Paulo, Brazil.

small-scale farmers through land acquisitions.⁴⁵ According to a 2008 Oxfam Report, the “scramble to supply” biofuels like palm oil, which was partly driven by EU biofuel targets, exacerbated the food price crises, brought “30 million people into poverty,” and put 60 million indigenous people at risk.⁴⁶ Numerous adverse impacts on local stakeholders and human rights violations have also been documented in the context of specific biofuel projects.⁴⁷

Many of these projects have been funded through the UNFCCC Clean Development Mechanism (CDM) and other climate finance mechanisms.⁴⁸ Concerns have also been raised about the potential effect of the Reducing Emissions from Deforestation and Forest Degradation (REDD/REDD+) program on indigenous groups and local stakeholders—specifically, that: (i) there may not be sufficient opportunities for input and consent from the people whose lives and livelihoods are affected by REDD/REDD+ projects; (ii) the commodification of forest carbon sequestration services will lead to land grabs that will displace people who lack adequate legal protections and land tenure; and (iii) the payments for those sequestration services will not be equitably distributed among local stakeholders.⁴⁹

On a more general level, there are concerns about the distributional consequences of mitigation policies. Carbon pricing schemes, for example, can have a disproportionate effect on indigenous peoples, the poor, and other

45 FAO, *CLIMATE CHANGE ADAPTATION AND MITIGATION: CHALLENGES AND OPPORTUNITIES IN THE FOOD SECTOR* 7 (2012); Nicola Colbran, *Indigenous Peoples in Indonesia: At Risk of Disappearing as Distinct Peoples in the Rush for Biofuel?* 18 INT'L J. ON MINORITY & GROUP RIGHTS 63 (2011); UNDP, *HUMAN DEVELOPMENT REPORT 2007/2008, FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD* 143 (2007); INTERNATIONAL COUNCIL ON HUMAN RIGHTS, *CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE* 33-36 (2008), at 33-36; Olivier De Schutter, Special Rapporteur on the Right to Food, *Building Resilience: A Human Rights Framework for World Food and Nutrition Security*, ¶ 31, UN Doc A/HRC/9/23 (2008).

46 OXFAM, *CLIMATE WRONGS AND HUMAN RIGHTS: PUTTING PEOPLE AT THE HEART OF CLIMATE-CHANGE POLICY* 15-16 (2008).

47 ACCOUNTABILITY COUNSEL, *FUELING HUMAN RIGHTS DISASTERS: AN EXAMINATION OF THE U.S. OVERSEAS PRIVATE INVESTMENT CORPORATION'S INVESTMENT IN BUCHANAN RENEWABLES* (2014); ACTIONAID, *FEELING THE BIOFUELS PRESSURE: HUMAN RIGHTS ABUSES IN GUATEMALA* (2013); CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *FOREIGN LAND DEALS AND HUMAN RIGHTS: CASE STUDIES ON AGRICULTURAL AND BIOFUEL INVESTMENT* (NYU School of Law 2010).

48 Jeanette Schade and Wolfgang Obergassel, *Human Rights and the Clean Development Mechanism*, 27 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 717 (2014); Roht-Arriaza (2010), *supra* note 44, at 597-598. See also Jake Abrahamson, *An Indian Coal Plant's Human Rights Crisis*, SIERRA, July 4, 2015 (discussing human rights abuses associated with the construction of the Sasan coal-fired power plant, which received CDM support because it employed more efficient coal technology); Anuradha Munshi, Bank Information Center Trust, *Sasan Ultra Mega Power Project – A Brief Report* (Sept. 2013) (further detailing adverse consequences on local communities associated with the Sasan project).

49 Arturo Balderas Torres & Margaret Skutsch, *Challenges for Pro-Poor Benefit Sharing Schemes in the Implementation of REDD+ in Mexico*, TECHNICAL SERIES: FOREST GOVERNANCE AND ECONOMICS, No. 2 (IUCN 2014); Cristiane Faustino and Fabrina Furtado, *The Green Economy, Forest Peoples and Territories: Rights Violations in the State of Acre* (Plataforma de Direitos Humanos, Econômicos, Sociais, Culturais e Ambientais 2014); ALED DILWYN FISHER, *A HUMAN RIGHTS-BASED APPROACH TO THE ENVIRONMENT AND CLIMATE CHANGE: GI-ESCR PRACTITIONER'S GUIDE* 11 (2014); David Takacs, *Environmental Democracy and Forest Carbon (REDD+)*, UC Hastings Legal Studies Research Paper No. 103 (2014); JOYEETA GUPTA ET AL., *CLIMATE CHANGE, FORESTS, AND REDD: LESSONS FOR INSTITUTIONAL DESIGN* (Routledge 2013); Annalisa Savaresi, *REDD+ and Human Rights: Addressing Synergies between International Regimes*, 18 ECOLOGY AND SOC'Y J. 5 (2013); Margaret Skutsch, *Slicing the REDD+ Pie: Controversies Around the Distribution of Benefits* (2012).

vulnerable groups, who may suffer greater hardship due to the increased price of energy, fuel, and goods.⁵⁰ Some commentators have also suggested that the commoditization of carbon emissions rights will contribute to, rather than alleviate, existing economic disparities between and within countries.⁵¹ These concerns may be alleviated through proper regulatory design, such as by including relief from increased costs or encouraging distributional equity in project siting decisions.

(b) Adaptation

Both the failure to adapt and the implementation of adaptation measures can interfere with human rights, particularly for the most vulnerable. One concern is that some adaptation programs, may benefit one group to the detriment of another—as might be the case for coastal fortifications that protect one community while exposing another to greater risk of erosion and/or flooding. There is also the risk that adaptation measures will be undertaken without the necessary public consultation and may result in outcomes that adversely affect the very persons they aim to protect. There is a risk of human rights violations in the context of relocation and resettlement programs, and a corresponding need to ensure that such programs are undertaken with adequate input and consent from those who are relocated. It should be noted that both the Adaptation Fund and the Green Climate Fund have put in place environmental and social safeguards.

(c) Geoengineering

Geoengineering refers to the deliberate and large-scale manipulation of natural systems through measures aimed at preventing or mitigating the effects of climate change, such as solar radiation management and ocean iron fertilization. Although there have not yet been any significant field tests of geoengineering technology, far less any large-scale geoengineering projects, it is important to note that such projects could seriously interfere with the enjoyment of human rights for millions and perhaps billions of people. For example, one recent study of five potential geoengineering methods deployed in high GHG emissions scenarios concluded that these methods could severely disrupt ocean and terrestrial ecosystems.⁵² These disruptive effects could undermine the provision of ecosystem goods and services, thus interfering with access to food, clean water, and other key resources. Another study found that proposals for solar radiation management would cause widespread regional-scale changes in precipitation.⁵³ Such shifts could lead to increases in storms and flooding in some areas and drought in others, with adverse impacts on natural ecosystems and human settlements. In addition, there is at this time no mechanism in place to ensure that governments or private parties carrying out geoengineering projects coordinate with the international community, or even disclose information to allow for public participation.

50 See, e.g., Jodoin & Lofts (2013), *supra* note 44, at 31-32; Karen Bubna-Litic, *Climate Change Impacts on the Poor – A Case Study of Australia’s Indigenous Population and the Impact of Australia’s Response on this Population*, in POVERTY ALLEVIATION AND ENVIRONMENTAL LAW (Yves Le Bouthillier et al. eds., Edward Elgar 2012).

51 See, e.g., Torres & Skutsch (2014), *supra* note 49; Gupta et al. (2013), *supra* note 49; Mark Wilson, *The Green Economy: The Dangerous Path of Nature Commoditization*, 10 CONSCIENCE: THE JOURNAL OF SUSTAINABLE DEVELOPMENT 85 (2013).

52 David Keller et al., *Potential Climate Engineering Effectiveness and Side Effects During a High Carbon Dioxide-Emission Scenario*, 5 NATURE COMMUNICATIONS 3304 (2014).

53 J.A. Crook et al., *A Comparison of Temperature and Precipitation Responses to Different Earth Radiation Management Geoengineering Schemes*, 120 JOURNAL OF GEOPHYSICAL RESEARCH: ATMOSPHERES DOI 10.1002/2015JD023269 (2015).



PART II

World Leaders in attendance at Rio+20

The Obligations of Governments and Private Actors to Respond to the Human Rights Implications of Climate Change

While the linkages between climate change and human rights are clear, it is only in the past decade that UN human rights bodies and national governments have begun to develop consensus on this issue. Thus far, the consensus has extended to the understanding that climate change will interfere with the full enjoyment of human rights, as detailed in Part 1. There is less agreement on the nature of corresponding obligations of governments and private actors to address the human rights implications of climate change. However, there are several well-established and emerging principles that are applicable in this context.

This section provides a brief history of how UN agencies and national governments have come to understand the relationship between climate change and human rights, before turning to a more detailed discussion of specific obligations for international agencies, national governments and private actors.⁵⁴ The obligations discussed here are primarily based on the rights enumerated in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as these comprise the core of international human rights law. State commitments under the UNFCCC and other agreements are also discussed in relation to these core treaty obligations. It is worth noting that a country's legal obligations may differ depending on which treaties it has ratified. It is beyond the scope of this paper to highlight all of these differences; however, there is growing consensus that most or all of the rights enumerated in the UDHR constitute customary international law, and as such, they are binding on all states regardless of treaty ratification status.⁵⁵

⁵⁴ For detailed discussion of this political process, and the various positions of specific national governments, see John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, 33 HARVARD ENVIRONMENTAL LAW REVIEW 477 (2009).

⁵⁵ See, e.g., Olivier De Schutter, *INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY* 63-66 (Cambridge University Press 2014); THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (Clarendon Press 1989); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GEORGIA JOURNAL OF INTERNATIONAL LAW 37 (1995-1996).

2.1 The Progressive Recognition of Human Rights Obligations Relating to the Environment and Climate Change

(a) Recognition of Human Rights Obligations Relating to the Environment

The core international human rights treaties do not recognize a freestanding right to a clean environment. However, it is generally understood that inadequate environmental conditions can undermine the effective enjoyment of other enumerated rights, such as the rights to life, health, water, and food. Some of the UN human rights treaties explicitly recognize this link. The ICESCR, for example, directs states to adopt measures as may be necessary for the “improvement of all aspects of environmental and industrial hygiene” in order to fully realize the right to health.⁵⁶ The Convention on the Rights of the Child (CRC) directs states to account for the “dangers and risks of environmental pollution” to ensure full implementation of the right to health for children.⁵⁷

In addition, the 1972 Stockholm Declaration recognized that there is “a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”⁵⁸ While this declaration apparently recognizes a right to an adequate environment, it lacks the force of a binding treaty. Nonetheless, as noted by the Office of the UN High Commissioner for Human Rights (OHCHR), this declaration reflects a “general recognition of the interdependence and interrelatedness of human rights and environment.”⁵⁹ OHCHR’s conclusion is supported by the UN Independent Expert on Human Rights and the Environment’s 2013 mapping report, which concluded that “[h]uman rights law includes obligations relating to the environment” that include both procedural obligations and substantive obligations.⁶⁰

Finally, the right to a clean environment has either been expressly included in or interpreted as a fundamental component of many regional human rights agreements and national constitutions.⁶¹

(b) Recognition of Human Rights Obligations Relating to Climate Change

Two key events sparked a searching international dialogue on human rights and climate change. First, in December 2005, the Chair of the Inuit Circumpolar Conference (ICC) submitted a petition to the Inter-American Commission on Human Rights (IACHR) requesting relief for human rights violations resulting from the impacts of global warming and climate change. The petition specifically alleged that the United States—the largest cumulative emitter of greenhouse gas (GHG) emissions to date—had violated the Inuit’s human rights by failing to adopt adequate GHG controls.⁶² Although the IACHR never issued a decision, the petition did succeed in drawing public attention to the severe effects of global warming on the Inuit and sparking further dialogue about the human rights implications of climate change.⁶³

Second, in November 2007, the Small Island Developing States (SIDS) adopted the Male’ Declaration on the Human Dimension of Global Climate Change. The Male’ Declaration was the first international agreement to explicitly recognize that “climate change has clear and immediate implications for the full enjoyment of human rights.” It also called upon the Conference of the Parties (COP) to the UNFCCC and the UN human rights bodies to launch a collaborative process for assessing the human rights implications of climate change.⁶⁴ That same month, OHCHR issued a public statement for the Bali Climate Change Conference (COP-13) acknowledging that “climate change can adversely affect the fundamental human rights of present and future generations” and reminding the

⁵⁶ ICESCR Art. 12(2)(b).

⁵⁷ CRC Art. 24(2)(c).

⁵⁸ Declaration of the UN Conference on the Human Environment (“Stockholm Declaration”), June 16, 1972, Principle 1.

⁵⁹ OHCHR further explains: “the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights....” *Report of the OHCHR on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, Jan. 15, 2009 at paras 17-18.

⁶⁰ HRC, *Report of the Independent Expert on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, John H. Knox, pp. 79-81, A/HRC/25/53 (Dec. 30, 2013) [hereinafter “Mapping Report”].

⁶¹ African Charter on Human and People’s Rights (June 27, 1981), Art. 24; Protocol of San Salvador Protocol (Nov. 17, 1988), Art. 11; Arab Charter on Human Rights (May 22, 2004), Art. 38; ASEAN Human Rights Declaration (Nov. 19, 2012), Art. 28; DAVID BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2012); Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?* 35 DENV. J. INT’L L. & POL’Y 130 (2008); Luis E. Rodríguez-Rivera, *Is the Human Right to Environment Recognized under International Law? It Depends on the Source*, 12 COLO. J. INT’L ENVTL L. & POL’Y 1 (2001).

⁶² Inuit Petition (2005), *supra* note 7.

⁶³ Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights*, 31 AM. INDIAN L. REV. 675 (2007).

⁶⁴ Male’ Declaration on the Human Dimension of Global Climate Change (Nov. 14, 2007).

COP that governments have both moral and legal obligations to protect and promote basic human rights when tackling climate change.⁶⁵

Responding to the Male' Declaration, the UN Human Rights Council (UNHRC) issued a 2008 resolution, expressing concern that climate change “poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights,” and directing OHCHR to conduct a “detailed analytical study of the relationship between climate change and human rights” in consultation with states and other relevant international organizations and intergovernmental bodies.⁶⁶

OHCHR released a report in 2009 describing how the observed and projected impacts of climate change have implications for the enjoyment of human rights and for the obligations of states under international human rights law.⁶⁷ The report found that “[a]n increase in global average temperatures of approximately 2° C will have major, and predominantly negative, effects on ecosystems across the globe, on the goods and services they provide,” that it will “exacerbate the harmful effects of environmental pollution,” and that these effects “have implications for a wide range of human rights.”⁶⁸ The report discussed specific examples of those rights which relate most directly to climate change-related impacts, including the rights to life, food, water, health, housing, and self-determination. It also highlighted effects on specific groups, including women, children, and indigenous peoples.

Despite concluding that there is “broad agreement that climate change has generally negative effects on the realization of human rights,” OHCHR noted that “it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.” This statement reflected the position of many developed countries that were willing to accept that climate change could interfere with the enjoyment of human rights, but would not concede that this interference constituted a violation of international human rights law.⁶⁹ OHCHR justified this conclusion by citing challenges of causation, attribution, and future harm associated with climate change.⁷⁰

Nonetheless, OHCHR concluded that states have a duty to address the effects of climate change on human rights regardless of whether the state has contributed to climate change in a manner which gives rise to specific human rights violations.⁷¹ This is because “human rights law requires each State to do more than merely refrain from interfering with human rights itself; it also requires the State to undertake due diligence to protect against such harm from other sources.”⁷² Accordingly, OHCHR identified a number of national level obligations that are applicable in this context, such as the obligation to protect individuals against foreseeable threats of weather-related hazards,⁷³ and to provide access to information and participation in decision-making.⁷⁴ OHCHR also described various “obligations of international cooperation,” thus asserting that countries have an obligation to address the extraterritorial effects of climate change.⁷⁵

65 OHCHR, *The Human Rights Impact of Climate Change*, UN Joint Press Kit for Bali Climate Change Conference, 3-14 December 2007 (Nov. 2007).

66 UNHRC Res. 7/23, *Human rights and climate change*, UN Doc. A/HRC/Res/7/23 (March 28, 2008).

67 OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, A/HRC/10/61 (2009) [hereinafter “OHCHR Report”].

68 *Id.* at p. 16.

69 Knox (2009), *supra* note 58, at 489-90; Mark Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 GA. J. INT'L & COMP. L. 543, 571-73 (2010).

70 OHCHR Report (2009), *supra* note 71, at p. 70. It bears noting that these issues are becoming less problematic over time. For one thing, recent research on current and historical GHG emissions has made it easier to allocate responsibility for emissions among different states. See, e.g., World Resources Institute, *CAIT Climate Data Explorer* (2015), <http://cait.wri.org>; TOMMI EKHOLOM & TOMI J. LINDROOS, *ASSESSING COUNTRIES' HISTORICAL CONTRIBUTIONS TO GHG EMISSIONS*, Research Report VVT-R-00139-15 (2015); H. Damon Matthews, *Quantifying Historical Carbon and Climate Debts Among Nations*, NATURE CLIMATE CHANGE LETTERS, DOI: 10.1038 (Sept. 7, 2015). In addition, as the effects of climate change become increasingly apparent, it is possible to identify, with greater certainty, those effects which can be causally traced to climate change (e.g., sea level rise and increased average temperatures). IPCC (2014), *supra* note 4.

71 OHCHR Report (2009), *supra* note 71, at p. 71. See also Knox (2009), *supra* note 58, at 491 (“whether a state causes climate change is a separate question from whether it has a duty to address the effects of climate change on human rights”).

72 John H. Knox, *Human Rights Principles and Climate Change*, Wake Forest Univ. Legal Studies Paper No. 2523599, 8 (2014).

73 OHCHR Report (2009), *supra* note 71, at p. 74.

74 *Id.* at pp. 78-79.

75 *Id.* at pp. 84-91.

Since the issuance of this report, UNHRC has issued five resolutions recognizing the linkages between climate change and human rights.⁷⁶ These include:

- Resolution 10/4 (2009), which recognized that international cooperation would be “necessary” to enable implementation of the UNFCCC.⁷⁷
- Resolution 18/22 (2011), which affirmed that “human rights obligations, standards and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes” and that “in no case may a people be deprived of its own means of subsistence” as a result of climate change.” Resolution 18/22 also called for additional dialogue on how to address the adverse impacts of climate change on the full enjoyment of human rights.⁷⁸
- Resolution 26/27 (2014), which explicitly noted the “urgent importance of continuing to address, as they relate to States’ human rights obligations, the adverse consequences of climate change for all, particularly in developing countries and its people whose situation is most vulnerable to climate change, especially those in a situation of extreme poverty, and deteriorating livelihood conditions.”⁷⁹
- Resolution 29/15 (2015), which contained effectively the same language on “States’ human rights obligations” as Resolution 26/27, and called for new study on the relationship between climate change and the human right to the highest attainable standard of physical and mental health.⁸⁰

Although UNHRC has not yet issued a clear declaration on the obligations of governments or other actors to respond to the human rights implications of climate change, there is ample evidence that certain obligations do exist. Specifically, the Independent Expert’s 2013 mapping report on *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* outlines numerous statements from the UN human rights treaties and treaty bodies charged with overseeing them, other UN bodies and mechanisms, regional human rights systems, and international environmental instruments, all recognizing various human rights obligations related to climate change.⁸¹ The results of that report are incorporated into the analysis in Section 2.2, below.

The UNFCCC COP also formally recognized the linkages between climate change and human rights in the 2010 Cancun Agreements, where the Parties agreed to emphasize that countries “should, in all climate change-related actions, fully respect human rights.”⁸² But the COP has done very little in the past five years to elaborate on *how* countries should fulfill that goal. In the interim, numerous declarations and submissions have been made calling for the COP to incorporate human rights considerations into its decisions and agreements, and most notably, the 2015 Paris Agreement.⁸³

⁷⁶ In addition, many regional bodies have issued decisions on the linkages between climate change and human rights. See African Commission on Human and Peoples’ Rights (ACHPR), *Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa*, ACHPR/Res.153(XLVI)09 (2009); Organization of American States, *General Assembly, Resolution 2429: “Human Rights and Climate Change in the Americas”*, AG/Res. 2429 (XXXVIII-O/08) (OAS June 3, 2008).

⁷⁷ UNHRC Res. 10/4, *Human Rights and Climate Change*, A/HRC/Res/10/4 (March 25, 2009). Some developing countries sought the stronger language, but were unable to convince developed countries to accept it. Limon (2010), *supra* note 73, at 455.

⁷⁸ UNHRC Res. 18/22, *Human Rights and Climate Change*, A/HRC/Res/18/22 (Oct. 17, 2011).

⁷⁹ UNHRC Res. 26/27, *Human Rights and Climate Change*, A/HRC/Res/26/27 (July 15, 2014) (emphasis added).

⁸⁰ UNHRC Res. 29/15, *Human Rights and Climate Change*, A/HRC/Res/29/15 (July 2, 2015).

⁸¹ Mapping Report (2013), *supra* note 64; UN Independent Expert on Human Rights and the Environment, *Focus Report on Human Rights and Climate Change* (June 2014).

⁸² UNFCCC Decision 1/CP.16, *The Cancun Agreements*, p. 8, UN Doc. FCCC/CP/2010/7/Add.1 (March 15, 2011).

⁸³ See, e.g., Special Procedures Mandate-Holders of the HRC, *A New Climate Change Agreement Must Include Human Rights Protections for All* (October 17, 2014).



Greg Thompson / USFWS (2012)

Aerial photo of Mantoloking, New Jersey after Hurricane Sandy

2.2 Governmental Obligations to Address the Human Rights Implications of Climate Change

The obligations of governments with respect to international human rights are frequently characterized as entailing three types of duties:⁸⁴

- The duty to **respect** human rights, a negative obligation, which requires states to refrain from taking actions that would interfere with or curtail the enjoyment of human rights.
- The duty to **protect** human rights against violations by third parties.
- The duty to **fulfill** human rights, a positive obligation, which requires states to undertake measures to ensure the realization of rights for all members of society.

Some documents also refer to a duty to “promote” human rights, which can be understood as a related but distinct obligation to “promote universal respect for, and observance and protection of, all human rights.”⁸⁵

Another way to conceptualize government duties in this context is to divide them into 1) procedural obligations, 2) substantive obligations, and 3) obligations in relation to individuals who are members of specific groups. This approach is particularly helpful for understanding the linkages between different obligations, and so we use it here.

⁸⁴ OHCHR, *International Human Rights Law*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Oct. 6, 2015).

⁸⁵ Vienna Declaration and Programme of Action, Art. 1 (June 25, 1993) (endorsed by G.A. Res. 48/121). See also G.A. Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Art. 1 (Dec. 9, 1998) (noting states’ responsibility to “promote” human rights); M. MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 157-167 (Intersentia 2003) (explaining typologies for human rights obligations).

For each set of obligations, we describe the “hard law” (treaty provisions, case law) underpinning the obligations, as well as soft law (UN declarations, comments from UN treaty bodies) and interpretations from UN special rapporteurs and other experts. As noted above, the actual scope of legal obligations for any specific country may depend on treaty ratification status, except to the extent that some of these obligations may now constitute customary international law that is binding all countries.⁸⁶

(a) Procedural Obligations

Human rights law imposes various procedural obligations on governments with respect to the environmental impacts of their activities. These include obligations to gather and disseminate information about environmental impacts, to facilitate public participation in environmental decision-making, and to provide access to remedies for environmental harm. These obligations are based in civil and political rights, but “they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm.”⁸⁷

As discussed below, governments also have unique obligations with respect to decisions that affect indigenous peoples and their lands, such as a duty to obtain the free, prior and informed consent (FPIC) of indigenous peoples before undertaking decisions that would adversely affect any lands or resources that they have traditionally owned or occupied.

(i) Ensuring Access to Information and Conducting Environmental Assessments

ICCPR Art. 19 and UDHR Art. 19 recognize the right of all persons “to seek, receive and impart information.” At a minimum, the ICCPR and UDHR require states to provide public access to any government information of public interest.⁸⁸ The Human Rights Committee (HR Committee), the treaty body for the ICCPR, has not explicitly discussed whether the right of access to information entails a corresponding obligation for states to conduct environmental impact assessments (EIA). However, the International Court of Justice (ICJ) has held that, as a matter of customary international law, states have an obligation vis-à-vis other states to conduct environmental assessments where there is a risk that a proposed activity “may have a significant adverse impact in a transboundary context, in particular, on a shared resource” and disclose the results of that EIA to countries that may be adversely affected.⁸⁹ Accordingly, states should assess how activities within their jurisdiction will adversely affect the climate (a shared resource) and provide adequate notice to the international community. For example, states should conduct GHG assessments for activities that are likely to have significant GHG impacts—such as programmatic decisions about fossil fuel development, large fossil fuel-fired power plants, and fuel economy standards—and make the results publicly available.

The right of access to information is generally viewed as a prerequisite to the exercise of other procedural rights relating to public participation and access to remedies, and these procedural rights have been interpreted as critical to the exercise of substantive human rights, such as the rights to life, health, and privacy.⁹⁰ As such, many regional human rights courts have held that states have an obligation to assess and disclose foreseeable environmental risks as part of their positive duties to protect, respect, and fulfill various human rights.⁹¹ This includes any environmental risks caused by government activity, as well as other environmental risks that threaten the exercise of human rights (since states have an obligation to protect rights against harms caused by third parties).

⁸⁶ See *supra*, note 59.

⁸⁷ Mapping Report (2013), *supra* note 64, at p. 29.

⁸⁸ HR Committee, General Comment No. 34, pp. 18-19, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011)

⁸⁹ Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J. 14, 83, p. 204 (April 20).

⁹⁰ See, e.g., CESCR, General Comment No. 14, p.3, UN Doc. E/C.12/2000/4 (Aug. 11, 2000) (recognizing that the right to health “is closely related to and dependent upon the realization of other human rights” including access to information); Okechukwu Ibeanu, Special Rapporteur on the Adverse Effects of Illicit Movement and Dumping of Toxic Wastes on Human Rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 2, UN Doc. A/HRC/7/21 (Feb. 18, 2008) (noting that the rights to information and participation are “both rights in themselves and essential tools for the exercise of other rights, such as the right to life, the right to the highest attainable standard of health, the right to adequate housing and others”).

⁹¹ See *Öneryildiz v. Turkey*, 2004-XII European Court of Human Rights 1, p. 90 (deriving right to information from right to life); *Ta kin v. Turkey*, 2004-X Eur. Ct. H.R. 179, pp. 118, 119, 126 (deriving right to information from right to privacy and home life); *Ogoniland Case* (Social and Economic Rights Action Center v. Nigeria), Decision Regarding Communication 155/96 (African Commission on Human & Peoples’ Rights, Oct. 2011), 96 AJIL 937, para 53 (2002) (deriving right to information from the rights to health and a healthy environment); *Claude-Reyes et al. v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 151 (2006) (deriving right to information from right to freedom of expression).

The UNFCCC outlines similar obligations with respect to assessing and disclosing information related to climate change. Specifically, Art. 4(1)(h) requires states to “[p]romote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies.” Art. 6 also directs the Parties to promote and facilitate at the national and, as appropriate, subregional and regional levels, “public access to information on climate change and its effects.” Several other provisions direct the Parties to provide information on national GHG emissions and measures taken to address climate change and its effects.⁹²

The right to information and corresponding obligation to acquire information through environmental impact assessments (EIA) and other mechanisms, and to communicate that information to the public, are also included in the Rio Declaration,⁹³ the Aarhus Convention,⁹⁴ the Espoo Convention on EIA in a Transboundary Context, the Kyiv (SEA) Protocol, and a variety of other MEAs.⁹⁵ The domestic laws of numerous states also contain such requirements.⁹⁶

Several expert bodies have explicitly directed states to account for climate change when fulfilling their obligations to evaluate environmental risks and disclose environmental information to the public.⁹⁷ For example, in Resolution 65/178 (2011), the UN General Assembly called for urgent international, regional and national efforts to address the impacts of climate change on food security.⁹⁸ And regarding the right to water, the Committee on Economic, Social and Cultural Rights (CESCR) has determined that State parties should establish mechanisms for assessing the impacts of climate change, desertification and other environmental harms on watersheds.⁹⁹

(ii) Public Participation in Environmental Decision-making

The UDHR (Art. 21) and ICCPR (Art. 25) both recognize the fundamental right of everyone to take part in the government of their country and in the conduct of public affairs. In addition, a variety of human rights treaty bodies have determined that governments have an obligation to facilitate public participation in environmental decision-making in order to protect human rights against environmental harm.¹⁰⁰ The UNFCCC also directs states to promote and facilitate “public participation in addressing climate change and its effects and developing adequate responses.”¹⁰¹ Other multilateral environmental instruments similarly provide for public participation.¹⁰²

92 UNFCCC Arts. 4(2)(b), 7(2)(b), 12.

93 Rio Declaration on Environment and Development (1992), Principles 10 and 17.

94 The Aarhus Convention outlines a comprehensive set of obligations relating to access to information, public participation in decision-making, and access to justice in environmental matters, and provides a useful gauge for a country's compliance with obligations under other treaties (notably, the ICCPR). For example, the Convention defines “environmental information” for assessment and disclosure purposes; directs parties to take specific, affirmative steps to promote access to information. The Convention also restricts the circumstances under which governments may refuse a request for environmental information. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”), June 25, 1998, Arts. 3(2), 3(3), 4, 5.

95 Convention on Biological Diversity (CBD), Art. 13; UN Convention on Law of the Sea (UNCLOS), Art. 244; Protocol on Environmental Protection to the Antarctic Treaty, Annex I; Convention to Combat Desertification (CCD), Arts. 5(d), 10(f); Montreal Protocol on Substances that Deplete the Ozone Layer, Art. 9.

96 According to a 2011 survey, 191 of the 193 member nations of the UN either have national legislation or have signed some form of international legal instrument that refers to the use of EIA. Richard K. Morgan, *Environmental Impact Assessment: The State of the Art*, 30 IMPACT ASSESSMENT AND PROJECT APPRAISAL 5 (2012).

97 In addition to the statements of the UN General Assembly and the CESCR, see Special Rapporteur Raquel Rolnik, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, p. 50, UN Doc. A/62/25 (Aug. 6, 2009).¶ 50, UN Doc. A/62/214 (Aug. 8, 2007) (“Informed and effective participation, in turn, requires that information about the mitigation targets and decisions related to those goals are managed transparently.”); *Report of the Special Rapporteur on the human rights of internally displaced persons*, Chaloka Beyani, p. 66, UN Doc. A/HRC/16/43 (Dec. 20, 2010) (“Urban dimensions of climate-change-induced displacement should be a key consideration in medium and long-term national development strategies, as well as adaptation measures. These should include strengthened systems to monitor influxes of IDPs, and to address the assistance and durable solutions needs of IDPs outside camps living in urban areas. IDPs, who are more likely to be unlisted and undocumented, are also likely to have less access to services and livelihoods, and to live in slum areas which are often situated in hazard-prone locations such as low-lying areas and landfill sites—thereby making them vulnerable to further risks, including to their physical safety, the loss of housing, and secondary displacement.”).

98 G.A. Res. 65/178, pp. 15, 26, UN Doc. A/Res/65/178 (March 24, 2011).

99 CESCR Comment No. 15, p. 28, UN Doc. E/C.12/2002/11 (Jan. 20, 2003).

100 See, e.g., CESCR General Comment No. 15, p. 56, UN Doc. E/C.12/2002/11 (Jan. 20, 2003) (public participation required before any government or third party action that interferes with right to water); Mapping Report (2013), *supra* note 64, pp. 36-40. See also UN Doc. A/HRC/7/21 (Feb. 18, 2008), *supra* note 94, at ¶ 51 (Special Rapporteur Ibeanu calling for “public participation in the preparation of environmental plans, programmes, policies, laws and regulations, as well as the permitting of industrial, agricultural, and construction activities”).

101 UNFCCC Art. 6. See also *Cancun Agreements* (2011), *supra* note 86, p. 7; UNFCCC Decision 9/CP.13 Amended New Delhi work programme on Article, annex, p. 17(k), UN Doc. FCCC/CP/2007/6/Add.1 (2007).

102 See, e.g., Stockholm Convention on Persistent Organic Pollutants. Art. 10; CBD, *supra* note 99, Art. 14(1); CCD Arts. 3, 5, 19; Aarhus Convention, Arts. 6, 7, 8.

General Assembly Resolution 67/210 (2013) recognizes the “need to engage a broad range of stakeholders at the global, regional, national and local levels, including national, subnational and local governments, private businesses and civil society, and including youth and persons with disabilities, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change.”

The precise standard of what constitutes “adequate” or “effective” public participation is not always clear. Terms such as “full and informed participation” and “meaningful consultation” are often used to describe this requirement. At a minimum, this requires: (1) assessment and disclosure of environmental impacts, as discussed above; (2) effective communication of those impacts—e.g., in a language and venue that is accessible to the persons who will be affected; and (3) an opportunity for affected persons to “voice their concerns.”¹⁰³

It is particularly important to invite and facilitate public participation in decisions that affect vulnerable groups,¹⁰⁴ and for decisions concerning the displacement or resettlement of certain groups. OHCHR emphasizes that “adequate and meaningful consultation with affected persons should precede decisions to relocate people away from hazardous zones.”¹⁰⁵ The Special Rapporteur on the human rights of migrants, François Crépeau, has also contributed to this discussion by recommending certain obligations and good practices for States to address the impacts of climate change on migrants.¹⁰⁶

(iii) Access to Administrative, Judicial, and Other Remedies

The UDHR, ICCPR, and ICESCR all recognize that states should provide an “effective remedy” for human rights violations. The respective human rights bodies for these treaties have clarified that such remedies extend to human rights violations caused by environmental harms. The obligation to provide access to justice and/or an effective remedy is also enshrined in the Rio Declaration, the Aarhus Convention, and a variety of other multilateral environmental and human rights agreements.¹⁰⁷

There is both a procedural and a substantive dimension to this obligation. First, states must provide access to administrative and judicial proceedings to adjudicate claims of human rights violation (the procedural element). But various expert bodies have asserted that states must also ensure that compensation or other forms of redress are available when violations do occur (the substantive dimension). The CESCR, for example, has noted that states should ensure that adequate compensation, alternative accommodation, and resettlement opportunities are provided to indigenous communities and other groups who are displaced by large infrastructure projects and deforestation.¹⁰⁸ More generally, the former Special Rapporteur on Adequate Housing, Raquel Rolnik, has stated that human rights standards “require the existence of institutional forms of redress for grievances, compensation in response to inevitable damages and an evaluation of the distributional impacts of projects and effects.”¹⁰⁹

The UNFCCC does not explicitly recognize a right of access to justice or remedies for individuals. Article 14 outlines a procedure for the settlement of disputes between countries concerning the interpretation or application of the Convention.¹¹⁰ More notably, Paragraph 92 of the Cancun Agreements describes the need to consider “information from those affected, and evidence of actual impacts” of response measures (adaptation and mitigation).¹¹¹ But the

¹⁰³ Report of the United Nations Conference on Sustainable Development, p. 13, UN Doc. A/CONF.216/6 (2012).

¹⁰⁴ See discussion, *infra*, section 2.2.3.

¹⁰⁵ OHCHR (2009), *supra* note 71, at p. 79.

¹⁰⁶ François Crépeau, Report of the Special Rapporteur on the human rights of migrants to the General Assembly, pp. 39, 73-76, 79, 93, UN Doc. A/67/299 (Aug. 13, 2012).

¹⁰⁷ See, e.g., Rio Declaration, Principle 10; Aarhus Convention Art. 9; CBD, *supra* note 99, Art. 10(b).

¹⁰⁸ See CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, p. 28, UN Doc. E/C.12/MEX/CO/4 (June 9, 2006); CESCR General Comment No. 15, p. 55, UN Doc. E/C.12/2002/11 (Jan. 20, 2003). For a more detailed discussion of CESCR's views on this, see Mapping Report (2013), *supra* note 64, Individual Report on the International Covenant on Economic, Social and Cultural Rights, pp. 55-56 (Dec. 2013).

¹⁰⁹ Rolnik (2009), *supra* note 101, p. 50.

¹¹⁰ Specifically, Art. 14 directs the country parties to settle such disputes “through negotiation or any other peaceful means” when possible, and allows parties to request that a “conciliation commission” be convened to issue a “recommendatory award” when such disputes have not been settled after twelve months. UNFCCC Art. 14(1), (5)-(6). Alternatively, the parties may issue a declaration consenting to the compulsory jurisdiction of the ICJ and/or an independent arbitrator to settle such disputes. UNFCCC Art. 14(2). Notably, no countries have accepted the jurisdiction of the ICJ over such disputes, and only three countries (Netherlands, Solomon Islands, and Tuvalu) have recognized arbitration as compulsory for the settlement of UNFCCC disputes, but the COP has yet to develop any procedures for the arbitration of disputes. UNFCCC, *Declarations by Parties*, http://unfccc.int/essential_background/convention/items/5410.php (last viewed Oct. 19, 2015).

¹¹¹ Cancun Agreements (2011), *supra* note 86.

COP has yet to establish any clear mandate for countries, climate finance mechanisms, or other entities to ensure access to a grievance mechanism for those who are harmed by the impacts of or responses to climate change.

(b) Substantive Obligations

Both the ICESCR and ICCPR contain substantive rights, such as the rights to life, health, and an adequate standard of living, accompanied by a combination of: (i) negative obligations for states to refrain from taking action that would interfere with rights, (i.e., a duty to respect rights); and (ii) positive obligations for states to protect and fulfill rights.¹¹² As noted by the UN General Assembly:

“Each state has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political, and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.”¹¹³

Based on these obligations, the CESCR, regional courts, and UN special rapporteurs have concluded that states have a general duty to “adopt legal and institutional frameworks that protect against, and respond to, environmental harm that may or does interfere with the enjoyment of human rights.”¹¹⁴ The framework must ensure that the state will respect human rights in all of its activities and decisions, and include protections to prevent third parties from creating environmental harms that interfere with the exercise of human rights.¹¹⁵ In addition, the European Court of Human Rights (ECtHR) has held that states must also take reasonable measures to protect citizens against the reasonably foreseeable effects of natural disasters.¹¹⁶

The adverse impacts of climate change clearly qualify as “environmental harms” that can interfere with the exercise of human rights. Thus, states must enact legal and institutional frameworks to protect against and respond to those impacts. More specifically, there are at least five types of obligations that may arise in this context: (1) adaptation obligations, requiring states to enact frameworks for protecting people against the effects of climate change; (2) domestic mitigation obligations, requiring states to regulate the sources of GHG emissions; (3) international cooperation obligations, requiring states to participate in international negotiations for an effective global climate agreement; (4) transboundary mitigation obligations, requiring states to mitigate the effect of their activities on the human rights of persons outside of their jurisdiction; and (5) an obligation to ensure that mitigation and adaptation activities do not themselves contribute to human rights violations.

There are at least three overarching principles which apply to all of these obligations. First, states are “obliged to take measures towards the full realization of economic, social, and cultural rights *to the maximum extent of their available resources*.”¹¹⁷ This means that states “must take deliberate, concrete and targeted measures, making the most efficient use of available resources, to move as expeditiously and effectively as possible towards the full realization of rights.”¹¹⁸

112 Regarding implementation, the ICESCR specifies that each party shall “take steps, individually and through international assistance and cooperation... to the maximum of its available resources, with a view to progressively achieving the full realization of” the rights contained therein. ICESCR Art. 2. The ICCPR contains slightly different language, requiring each party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights recognized therein, and to “take the necessary steps...to adopt such laws or other measures as may be necessary to give effect” to those rights. ICCPR Art. 2, pp. (1)-(2). Based on this language, the treaty bodies have concluded that both agreements contain a combination of positive and negative obligations. HR Committee General Comment No. 31, pp. 5-7, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004); HRC General Comment No. 6, pp. 1, 5, UN Doc. HRI/GEN/1/Rev.1 (1994); CESCR General Comment No. 3, pp. 1-2 UN Doc. E/1991/23 (Dec. 14, 1990).

113 G.A. Res. 53/144, Art. 2, p. 1, UN Doc. A/RES/53/144 (March 8, 1999).

114 Mapping Report, *supra* note 64, at pp. 47 (citing statements from these entities to support this proposition). See, e.g., CESCR, General Comment No. 14, pp. 4, 15, 36, UN Doc. E/C.12/2000/4 (Aug. 11, 2000) (to achieve full realization of right to health, states must adopt measures to protect citizens from environmental hazards, and implement policies “aimed at reducing and eliminating pollution of air, water and soil”); Fadeyeva v. Russia, 45 Eur. Ct. H.R. 10 (2005); Öneriyildiz v. Turkey, 2004-XII European Court of Human Rights 1, ¶p. 89 (“The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2... entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”); López Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1994); T tar v. Romania, App. No. 67021/01, Eur. Ct. H.R. (Jan. 27, 2009); Ogoniland Case (2011), *supra* note 95; Hatton and Others v. United Kingdom, 37 Eur. Ct. H.R. 28, ¶ 98 (2003). See also Gabčíkovo-Nagymaros (Hungary v. Slovakia), 1997 I.C.J. 7 (Sept. 25) (separate opinion of Judge Weeramantry) (describing the protection of the environment as a “sine qua non for numerous human rights such as the right to health and the right to life itself”).

115 Mapping Report, *supra* note 64, at pp. 47-6.

116 See, e.g., Budayeva and Others v. Russia, App. Nos. 15339/02, 21155/02, 20058/02, 11673/02 and 1543/02, Eur. Ct. H.R. (March 20, 2008).

117 OHCHR Report (2009), *supra* note 71, at p. 75 (citing CESCR General Comment No. 3, pp. 1-2).

118 *Id.* at p. 76 (citing CESCR General comments No. 3 and No. 14).

Second, although international human rights law generally requires the “progressive realization” of economic, social, and cultural rights, there are some obligations which require immediate implementation. For example, states must guarantee non-discrimination in access to economic, social and cultural rights, irrespective of resource constraints.¹¹⁹ States also have an immediate obligation to ensure, at the very least, “minimum essential levels” of each right that is enshrined in the ICESCR.¹²⁰ In addition, states have an immediate obligation to refrain from undertaking actions that cause a violation of *any* human rights.

Third, states have an obligation to protect *all rights* against third party abuses. As interpreted by the HR Committee, this means that states must “take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress” any human rights violations caused by third parties.¹²¹

(i) Adaptation Obligations: Protecting Human Rights From Climate-Related Harms

Article 6 of the ICCPR recognizes that “[e]very human being has the inherent right to life” and that no person “shall be arbitrarily deprived of life.” The HR Committee has noted that the right to life “should not be interpreted narrowly” and that “the protection of this right requires that States adopt positive measures” to protect life.¹²² The ICESCR contains a number of additional rights—such as the rights to health and an adequate standard of living—which also require positive action from the state for their implementation.¹²³

As discussed in Part 1, the effects of climate change will threaten the lives, health, well-being, and livelihoods of hundreds of millions if not billions of people in the coming decades. States have an obligation to enact legal and institutional frameworks to protect human rights against these effects. This is true regardless of whether the state is responsible for those effects because, as noted above, the ICCPR and ICESCR both include obligations to protect human rights from harms caused by third parties. Presumably, this would encompass a more pressing obligation to protect citizens from imminent, life-threatening harms (such as more severe storms and flooding), as well as an ongoing obligation to implement adaptation measures to alleviate the projected impacts of climate change on people and their livelihoods.¹²⁴

The ECtHR has issued several decisions which, although not binding under the ICCPR or ICESCR, do provide insight on the nature of a state’s positive obligation to protect the human right to life in this context.¹²⁵ For example, in *Budayeva and Others v. Russia*, the ECtHR determined that Russian authorities had violated the right to life when: (i) the authorities knew that there was a risk of a mud-slide, (ii) they did not implement land planning and emergency relief policies, (iii) they did not adequately inform the public about the risk; and (iv) eight citizens died as a result of the mud-slide.¹²⁶ The Lahore High Court in Pakistan also recently issued a decision in which it held that the national government had violated the fundamental rights of its citizens, including the right to life, by failing to implement adaptation measures recommended in the 2012 National Climate Policy and Framework.¹²⁷

The UNFCCC does not recognize a right to adaptation, but it does call upon all parties to “[c]ooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas,

119 CESCR General Comment No. 3, pp. 1-2, UN Doc. E/1991/23 (Dec. 14, 1990).

120 OHCHR Report (2009), *supra* note 71, at p. 76 (citing CESCR general comment No. 3).

121 HRC General Comment No. 31, p.8, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004). See also CESCR, General Comment No. 12, p. 15, UN Doc. E/C.12/1999/5 (May 12, 1999); Knox (2014), *supra* note 76, at 7; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006); John H. Knox, *Horizontal Human Rights Law* (2008); Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988); Z and Others v. United Kingdom, 34 Eur. Ct. H.R. 3 (2002).

122 HR Committee General Comment No. 6, ¶¶ 1, 5, UN Doc. HRI/GEN/1/Rev.1 (1994).

123 ICESCR Arts. 11, 12.

124 OHCHR acknowledges that, “in some cases, states may have an obligation to protect individuals against foreseeable threats to human rights related to climate change, such as an increased risk of flooding or storms in certain areas.” OHCHR (2009), *supra* note 71, at p. 74. In another statement on disaster risk reduction and human rights obligations, OHCHR has also asserted that a failure “to take reasonable preventive action to reduce exposure and vulnerability and to enhance resilience, as well as to provide effective mitigation [to disasters]” is a “human rights issue.” OHCHR, Organization Profile: Policies and Programmes in DRR, <http://www.preventionweb.net/organizations/1370/view> (last visited Oct. 6, 2015). In addition, HRC Resolutions 10/4 and 18/22 more assert that: “in no case may a people be deprived of its own means of subsistence” as a result of climate change impacts.”

125 Öneriyildiz v. Turkey, *supra* note 95; Budayeva and Others v. Russia, *supra* note 120; T tar v. Romania, *supra* note 118.

126 Budayeva and Others v. Russia, *supra* note 120.

127 Ashgar Leghari v. Federation of Pakistan, Lahore High Court Green Bench (W.P. No. 25501/2015) (Sept. 15, 2015). Similarly, a district court in The Hague recently referred to the ECtHR’s jurisprudence on the right to life and corresponding obligation of governments to protect citizens from environmental harm in order to determine the “standard of care” that the Dutch national government must exercise to protect its citizens from climate-related harms. District Court of the Hague, *Judgment: Urgenda Foundation v. Kingdom of the Netherlands Regarding the failure of the Dutch State to take sufficient actions to prevent dangerous climate change*, p. 4.74 (Urgenda Foundation 2015).



Damage to villages and infrastructure following Cyclone Sidr, which hit southern Bangladesh in November 2007

particularly in Africa, affected by drought and desertification, as well as floods.”¹²⁸ In addition, it calls upon developed countries to provide assistance to developing countries to address the adverse effects of climate change in those countries.¹²⁹ These directives complement the human rights obligations noted above.

The Hyogo Framework for Action (2005-2015) and the Sendai Framework for Disaster Risk Reduction (2015-2030), endorsed by the United Nations General Assembly,¹³⁰ also outline a set of obligations for countries to build resilience of their citizens to disasters. The Sendai Framework explicitly recognizes that “[m]anaging the risks of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development.”¹³¹ It also recognizes that each state has the “primary responsibility” to take “effective measures to reduce disaster risk” within its jurisdiction.¹³² States can refer to the principles and directives outlined in the Sendai Framework in order to implement their human rights obligations with respect to climate-related disaster planning and risk reduction.

Finally, OHCHR notes that states are “legally bound to address [climate-related] vulnerabilities in accordance with the principle of equality and non-discrimination.”¹³³ Specifically, the non-discrimination principle requires that states “identify marginalized or vulnerable individuals and groups; address specific needs through ‘targeted and differentiated interventions;’ and tackle underlying power imbalances and structural cases of ‘differential vulnerability’ within and between households while building the ecological resilience necessary to reduce vulnerability and achieve threshold needs.”¹³⁴

128 UNFCCC Art. 4(1)(e).

129 UNFCCC Arr. 4(4).

130 A/RES/69/283, June 23, 2015.

131 Sendai Framework for Disaster Risk Reduction (2015-2030), Part III, p. 19(c).

132 *Id.* at Part III, p. 13(b).

133 OHCHR, *supra* note 71, at p. 42.

134 FISHER (2014), *supra* note 49, at 11 (citing ELAN, *Integrating Community and Ecosystem-Based Approaches in climate Change Adaption Responses* (2012)).

Although states have discretion to decide how to protect human rights against climate-related effects, taking into account their resource constraints and national contexts, there may be some minimum measures that would be required as a matter of international, regional, or domestic human rights law. These might include measures that are necessary to protect lives from imminent threats, such as early-warning systems and risk notification,¹³⁵ which tie into the obligation to disclose information, discussed above; improvements to physical infrastructure to reduce the risk of floods or other hazards; emergency response plans; and the provision of disaster relief and humanitarian assistance in times of emergency.¹³⁶

Some of the UN Special Rapporteurs have further expanded upon the measures that states should take to protect human rights in the context of climate-related disasters and slow-onset degradation. Some of the proposed measures include:

- **Urban Planning and Warning Systems:** (1) Risk assessments in urban planning, rural development projects, and housing design (with a particular focus on vulnerable areas).¹³⁷ (2) Establishing necessary infrastructure and services to prevent extreme weather events from becoming disasters.¹³⁸ (3) Providing warning information to all neighborhoods to allow dwellers to seek protection and take risk reduction actions.¹³⁹ (4) Providing access to “affordable and well-located land for the urban poor” in order to “avoid further unplanned settlement expansions” that contribute to climate change vulnerability.¹⁴⁰
- **Displacement and Resettlement:** (1) Conducting risk assessments, providing public participation risk assessments, providing public participation opportunities, and ensuring that there are human rights safeguards for all programs to manage migration and displacement.¹⁴¹ (2) Ensuring adequate resettlement opportunities for those who are temporarily displaced by climate change-related disasters, and ensuring that “temporary relocation must last only as long as absolutely necessary and all displaced persons should have the right to return to their homes without discrimination.”¹⁴² (3) Ensuring that the UNFCCC and related climate change frameworks address “the nexus between the effects of climate change and displacement” and that the least developed countries are provided with technical assistance, financial resources and/or other enhancements to domestic capacity to cope with climate-related displacement.¹⁴³ (4) Adhering to the Guiding Principles on Internal Displacement, which describe how human rights considerations should be incorporated into government actions to prevent and manage internal displacement.¹⁴⁴
- **Access to Food:** (1) Addressing food shortages and price shocks that are caused or aggravated by climate related phenomena.¹⁴⁵ (2) Developing social safety nets to ensure that those who are adversely affected by climate change (e.g., through displacement or loss of livelihoods) will have access to food.¹⁴⁶

(ii) Domestic Mitigation Obligations

States may also have an obligation to respond to the core causes of climate change – anthropogenic emissions of GHGs and the accumulation of GHGs in the atmosphere. The CESCR, for example, has stated that State Parties to the ICESCR should mitigate the effects of climate change in order to safeguard the economic, social and cultural

¹³⁵ OHCHR (2009), *supra* note 71, at p. 78.

¹³⁶ The CESCR has asserted that, to protect the right to health, parties to the ICESCR have a “joint and individual responsibility . . . to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.” CESCR, General Comment No. 14, p. 40, UN Doc. E/C.12/2000/4 (Aug. 11, 2000).

¹³⁷ Rolnik (2009), *supra* note 101, at ¶ 51.

¹³⁸ *Id.*

¹³⁹ *Id.* at p. 53.

¹⁴⁰ *Id.* at p. 74.

¹⁴¹ Crépeau (2012), *supra* note 110, at 39, 73-76, 93.

¹⁴² Rolnik (2009), *supra* note 101, at 55.

¹⁴³ *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin*, p. 84, U.N. Doc. A/HRC/13/21 (Jan. 5, 2010).

¹⁴⁴ *Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani*, ¶ 65, U.N. Doc. A/HRC/16/43 (Dec. 20, 2010).

¹⁴⁵ *Id.* See also, De Schutter (2008), *supra* note 45.

¹⁴⁶ *Id.*

rights of their citizens (although it has not expressly characterized this as an obligation).¹⁴⁷ The former Special Rapporteur on Adequate Housing has also asserted that “Human rights standards require all countries to seek to reduce their harmful emissions to the global atmosphere, with a view to reducing their negative effect on the enjoyment of human rights.”¹⁴⁸ The international human rights courts have not yet addressed the nature of a state’s obligations to mitigate GHG emissions, but there is at least one domestic case requiring a national government to accelerate its emission reduction efforts in order to fulfill a duty of care to its citizens,¹⁴⁹ and another requiring the government to implement its national climate change policy (which included mitigation objectives) in order to protect the fundamental rights of its citizens.¹⁵⁰ In addition, cases alleging a violation of fundamental rights as a result of governmental inaction on climate change have been filed in the United States¹⁵¹ and Belgium.¹⁵²

In this context, questions of causation are relevant. Many countries have made and are making relatively small contributions to climate change; their GHG emissions reductions will not significantly impact their peoples’ enjoyment of human rights. By contrast, emissions reductions by the U.S., China, the E.U. and other major emitters matter a great deal.¹⁵³

The principles and goals set forth in the UNFCCC provide a useful frame for these mitigation obligations. For one thing, the treaty recognizes that all states share a duty to “prevent dangerous anthropogenic interference with the atmosphere” as necessary to “allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”¹⁵⁴ In the 2010 Cancun Agreements, the COP agreed that, to achieve this goal, they must “hold the increase in global average temperature below 2°C and above pre-industrial levels,” and that they should consider strengthening this long-term goal so as to hold the global average temperature increase to 1.5°C.¹⁵⁵ Many UN independent experts and other stakeholders feel that to protect fundamental human rights, it will be necessary to keep global warming well below the 2°C goal.¹⁵⁶ Such an approach would accord with some of the core principles of many international environmental instruments (including the UNFCCC), such as the precautionary principle¹⁵⁷ and intergenerational equity.¹⁵⁸

The UNFCCC also provides insight on how to allocate the responsibility for achieving this target. Under the principle of common-but-differentiated responsibilities, developed countries must take the lead in ensuring that we remain within the 2°C global warming goal established under the UNFCCC.¹⁵⁹ However, developing countries also have an

147 E.g., in Statement on the World Food Crisis, CESCR pressed State parties to adopt “strategies to combat global climate change that do not negatively affect the right to adequate food and freedom from hunger, but rather promote sustainable agriculture, as required by article 2 of the UN Framework Convention on Climate Change.” In Concluding Observations to Australia, it encouraged Australia “to reduce its greenhouse gas emissions and to take all the necessary and adequate measures to mitigate the adverse consequences of climate change, impacting the right to food and the right to water for indigenous peoples.”

148 Rolnik (2009), *supra* note 101, at 45.

149 Urgenda decision, *supra* note 131.

150 Ashgar Leghari, *supra* note 131.

151 Complaint for Declaratory and Injunctive Relief at 85, *Kelsey Cascadia Rose Juliana, Xiuhtezcatl Tonatiuh M. Et Al. v. United States, Barack Obama et al.*, No. 6:15-cv-01517-TC (D. Or. Aug. 12, 2015). This complaint and other recent cases in the U.S. also allege that federal and state governments have violated their public trust obligation by failing to adequately mitigate the GHG emissions that contribute to climate change. See, e.g., *Foster v. Washington Department of Ecology*, No. 14-2-25295-1 (Wash Super. Ct., filed Sept. 2014); *Juliana v. United States*, No. 6:15-cv-01517 (D.Or., filed Aug. 2015). Although these cases have not yet been successful at compelling government action, they have resulted in at least one decision holding that the state government (New Mexico) had a public trust responsibility to protect the atmosphere (but the court also found that this responsibility had been met through compliance with the state air quality act). *Sanders-Reed v. Martinez*, 2015-NMCA-063, 350 P.3d 1221 (March 12, 2015). Although these cases did not involve human rights claims, there is a clear relationship between governments’ public trust obligations—which require the maintenance and preservation of common environmental resources for the benefit of current and future generations—and governments’ human rights obligations. See BURNS H. WESTON & DAVID BOLLIER, *GREEN GOVERNANCE – ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS* (Cambridge University Press 2013); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 NYU ENVTL. L.J. 711 (2008).

152 Summons to the Ministers of Flanders, Wallonia, Brussels, and the Federal State of Belgium (April 27, 2015), available at <http://klimaatzaak.eu/wp-content/uploads/2015/04/Dagvaarding.pdf>.

153 Knox (2009), *supra* note 58, at 10-11.

154 UNFCCC Art. 2.

155 Cancun Agreements (2011), *supra* note 86, at ¶ 5.

156 See, e.g., *A New Climate Change Agreement Must Include Human Rights Protections for All: An Open Letter from Special Procedures Mandate-holders of the Human Rights Council to the State Parties to the UNFCCC on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for enhanced Action in Bonn*, 20-25 October 2014 (Oct. 17, 2014); Press Release, Climate Vulnerable Forum, 20 Nations Call to Strengthen 2 Degrees Climate Goal (May 1, 2015), <http://www.thecvf.org/wp-content/uploads/2015/05/cvfpressrelease010515.pdf>.

157 Hartmut Grassl & Bert Metz, *Climate Change: Science and the Precautionary Principle*, Ch. 14 in PRECAUTIONARY PRINCIPLE: LATE LESSONS FROM EARLY WARNINGS: SCIENCE, PRECAUTION, INNOVATION, EEA Report No 1/2013.

158 Edward Cameron et al., *Climate Justice: Equity and Justice Informing a New Climate Agreement*, World Resources Institute and Mary Robinson Foundation Working Paper (Sept. 2013).

159 UNFCCC Art. 3(1).



Wind turbines in rural India.

obligation to incorporate GHG mitigation goals into their development plans, laws, and policies.¹⁶⁰ This approach accords with fundamental principles of equity, responsibility, and burden sharing.¹⁶¹

Finally, the Oslo Principles, although not endorsed by the UN or binding on any states, contain a useful framework for conceptualizing state obligations in this context. The principles explicitly reference the need to protect human rights and clarify the obligations that states have to reduce GHG emissions, taking into account cost and other factors.¹⁶²

(iii) International Cooperation Obligations

The ICESCR requires parties to “take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”¹⁶³ The UDHR and ICCPR also recognize an obligation of states to “promote universal respect for, and observance of” human rights and freedoms.¹⁶⁴ Finally, in the UN Charter, all UN member states “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [inter alia] universal respect for, and observance of, human rights and fundamental freedoms for all.”¹⁶⁵

Based on this language, both the CESCR and the OHCHR have concluded that states have an obligation to address the extraterritorial impacts of environmental harm caused by activities within their jurisdiction.¹⁶⁶ These have been framed as “obligations of international cooperation,” and they require that states:

- Refrain from interfering with the enjoyment of human rights in other countries

¹⁶⁰ UNFCCC Art. 4(2).

¹⁶¹ IPCC, *Sustainable Development and Equity*, Ch. 4 in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE, WORKING GROUP III CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 317-319 (2014).

¹⁶² Oslo Principles on Global Climate Change Obligations (2015).

¹⁶³ ICESCR Art. 2.

¹⁶⁴ UDHR Preamble; ICCPR Preamble. See also Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, June 25, 1993, Art. 1.

¹⁶⁵ UN Charter p. 85.

¹⁶⁶ OHCHR (2009), *supra* note 71, at ¶ 84-88; CESCR General Comment No. 3, ¶ 14, UN Doc. E/1991/23 (Dec. 14, 1990).

- Take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries
- Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfillment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons
- Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.¹⁶⁷

The OHCHR has noted that these standards and principles are “consistent with and further emphasize” the principle of “common but differentiated responsibilities” contained in the UNFCCC,¹⁶⁸ and the various provisions of the UNFCCC which call for international cooperation and financial and technical assistance between countries.¹⁶⁹

According to one author, the obligation of international cooperation would likely require the following actions from countries with respect to climate change: (i) setting mitigation targets that are consistent with the full enjoyment of human rights (and implementing those targets); (ii) funding adaptation measures in vulnerable countries; and (iii) crafting international agreements that do not adversely affect human rights.¹⁷⁰ Other components of this obligation may include the provision of financial assistance and/or technology transfer for climate change *mitigation* measures in countries that lack resources to implement those measures, and compensating people for harm incurred as a result of climate change.

(iv) *Obligations to Address Transboundary Harm*

States also have a duty to address transboundary environmental harms, which is closely related to, and partially premised on, their duties of international cooperation. This obligation also derives in part from customary international law, which primarily deals with a state’s obligations vis-à-vis other states, as opposed to a state’s obligations to individuals.

The ICJ has clarified that, as a matter of customary international law, it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹⁷¹ Specifically, there is a “principle of prevention” that requires a state to “use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”¹⁷² The ICJ’s holding is consistent with the principle of *sic utere* (also known as the “no harm” rule).¹⁷³

It is less clear whether states have an independent obligation, as a matter of international human rights law, to prevent transboundary harms where the harms originate from activities that occur within their own jurisdiction but have adverse effects on the enjoyment of human rights in other jurisdictions. As noted above, the CESCR has interpreted the ICESCR as encompassing extraterritorial obligations of this nature. The language of the convention strongly supports this interpretation—states are directed to cooperate internationally, and to use the maximum available resources, to protect the enumerated human rights for all persons.¹⁷⁴ There is no jurisdictional limitation. However, many developed countries have disagreed with this interpretation, and thus there is not a clear consensus on the extraterritorial application of the convention.¹⁷⁵

167 OHCHR (2009), *supra* note 71, at ¶ 86 (citing CESCR General Comments No. 12, No. 13, No. 14, No. 15).

168 *Id.* at ¶ 87 (citing UNFCCC Art. 4, pp. 4 and 9).

169 These include: Article 3(5), which recognizes that Parties “should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them to better address the problems of climate change;” Article 4(1)(c), which specifies that Parties should “[p]romote and cooperate in the development, application, and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions” of GHGs; and Article 4(1)(e), which directs parties to “[c]ooperate in preparing for adaptation to the impacts of climate change,” by developing integrated resource management and protection plans, among other things.

170 Mark Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439, 455 (2009).

171 *Pulp Mills Case* (2010), *supra* note 93, at p. 101 (citing *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment (1949)). See also *Trail Smelter (United States v. Canada)*, 3 R.I.A.A. 1938, 1963 (Mar. 11, 1941) (“no state has the right to use or permit the use of its territory in such a manner as to cause injury... in or to the territory of another or of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”).

172 *Id.* at 56, citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, p. 29 (1996).

173 Marte Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule*, PluriCourts Research Paper No. 14-17 (2014).

174 ICESCR Art. 2.

175 Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and the Economic, Social, and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION* (M.A. Baderin & R. McCorquodale eds. 2007).

Unlike the ICESCR, the ICCPR does include a jurisdictional limit. Specifically, it directs each party “to respect and to ensure to all individuals *within its territory and subject to its jurisdiction*” the rights recognized therein.¹⁷⁶ The HR Committee has interpreted this as requiring states to respect and ensure civil and political rights for all persons within their “effective control.”¹⁷⁷ For example, the Committee has noted that a state may not actively violate the right to life of persons detained abroad, noting that:

“It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”¹⁷⁸

However, the Committee has not held that a state has an obligation to protect the right to life of persons outside of its jurisdiction against harms caused by activities within its jurisdiction, and it would be a stretch to say that the “effective control” standard encompasses such situations. That said, there are several HR Committee resolutions that recognize the importance of international cooperation in this context, without explicitly recognizing an obligation of international cooperation.¹⁷⁹

The idea that states have extraterritorial obligations to prevent transboundary environmental harm is supported by other international declarations and statements from authoritative bodies. For example, Principle 21 of the Stockholm Declaration provides that states have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁸⁰ More generally, the UNFCCC and other MEAs all recognize that states have obligations to address the effect of their activities on global resources, such as the climate, oceans, and biodiversity.¹⁸¹ Indeed, the UNFCCC’s principle of common but differentiated responsibilities is premised on the idea that the states most responsible for climate change must take the lead in order to address the adverse effects of climate change on ecosystems and people across the world, not just their own citizens.

(v) *Safeguarding Human Rights in Mitigation and Adaptation Activities*

Finally, international law requires states and other governmental actors to ensure that the actions they undertake to mitigate or adapt to climate change do not violate human rights, as part of their duty to *respect* human rights.

This obligation applies to both specific projects and broader policy decisions. For example, in the CESCR Statement on the World Food Crisis, the Committee “urge[d] State parties to address the structural causes at the national and international levels, including by . . . [i]mplementing strategies to combat global climate change that do not negatively affect the right to adequate food and freedom from hunger, but rather promote sustainable agriculture, as required by Article 2 of the United Nations Framework Convention on Climate Change.”¹⁸² CESCR’s recommendation in this context was no doubt informed by concerns about biofuel projects and their impact on food security.

¹⁷⁶ ICCPR Art. 2, p. (1).

¹⁷⁷ HR Committee, General Comment No. 31, *Nature of the General Legal obligation on State parties to the Covenant*, p. 10, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

¹⁷⁸ 101 (1981) ICCPR Comm. No. 52/1979, p. 12.3, UN Doc. CCPR/C/OP/1 (1981). See also Lilian Celiberti de Casariego v. Uruguay, ICCPR Comm. No. 56/1979 (1981).

¹⁷⁹ See, e.g., UNHRC Res. 18/22, *supra* note 82, stated that “climate change is a global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change in accordance with the provisions and principles of the Convention is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts.” Resolution 26/27, *supra* note 83, provided that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.” / “the need of giving due consideration in the elaboration of the Post 2015 development agenda to the role of international cooperation in relation to the special needs and particular circumstances of developing countries and to addressing the adverse impact of climate change on the full and effective realization of human rights.” / climate change is an urgent global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change in accordance with the provisions and principles of the Convention is important in order to support national efforts for the realization of human rights affected by climate change-related impact.

¹⁸⁰ In addition, the Maastricht Principles, although not legally binding, provide a comprehensive framework for understanding the extraterritorial obligations of states in the area of economic, social, and cultural rights. They do not, however, provide detailed information on extraterritorial obligations related to environmental harms or climate change. Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013).

¹⁸¹ See, e.g., CBD, *supra* note 99, Arts. 5, 10; 1979 Geneva Convention on Long-range Transboundary Air Pollution, Art. 2 UNCLOS, *supra* note 99, Art. 145.

¹⁸² CESCR Statement on the World Food Crisis, pp. 12-13, UN Doc. E/C.12/2008/1 (May 18, 2008).

The UNFCCC COP also explicitly recognized this issue in Art. 8 of the Cancun Agreements, which recognize that the Parties “should, in all climate change-related actions, fully respect human rights as enunciated in the outcome of the sixteenth session of the Conference of the Parties to the Convention.”¹⁸³ UNHRC Resolutions 18/22 and 26/27 include similar language.¹⁸⁴

The Cancun Agreements also include several paragraphs outlining principles for how Parties should address and mitigate the “economic and social consequences of response measures” on vulnerable groups and developing countries. For example, paragraph 89 urges developed country Parties to:

“strive to implement policies and measures to respond to climate change in such a way as to avoid negative social and economic consequences for developing country Parties, taking into account Article 3 of the Convention, and to assist these Parties to address such consequences by providing support, including financial resources, transfer of technology and capacity-building, in accordance with Article 4 of the Convention, to build up the resilience of societies and economies negatively affected by response measures.”¹⁸⁵

Appendix I of the Cancun Agreements also outlines a set of safeguards for protecting vulnerable groups in the context of mitigation actions in the forest sector. These safeguards are evaluated in Part 3.

(c) Obligations to Specific Groups

The principle of non-discrimination is included in the UDHR, the ICCPR, and the ICESCR.¹⁸⁶ In accordance with this principle, countries must ensure that the measures they take to address climate change (and the measures they take to respect, protect, and fulfill human rights) are implemented in a non-discriminatory fashion. These and other agreements also recognize that individuals who are part of certain groups—notably, women, indigenous groups, and children—are entitled to special protections.

The UNFCCC does not speak of specific individuals or groups, but does recognize that some countries and ecosystems may be particularly vulnerable to the effects of climate change, and as such, they warrant special consideration and adaptation assistance.¹⁸⁷ In addition, the Cancun Agreements provide more detailed instructions on how the parties should address the impacts of climate change on people who are vulnerable to climate change as a result of geography, gender, age, indigenous or minority status, and disability.¹⁸⁸

(i) Women

The Cancun Agreements recognize that gender equality and the effective participation of women are important for effective action on all aspects of climate change.¹⁸⁹ They also discuss the need to address gender considerations in the implementation of REDD projects.¹⁹⁰ However, they do not outline any specific requirements for countries to ensure that women are adequately involved in the various phases of government decision-making related to climate change mitigation and adaptation, or to address the potentially discriminatory effect of certain actions on women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides a more detailed framework for protecting the rights of women and ensuring that they have a voice in public decisions.¹⁹¹ However, the Convention is more geared towards preventing acts of overt discrimination, as opposed to addressing the discriminatory effects of actions on women. As such, the Convention does not provide much guidance on government obligations relating to the disproportionate burden that women will likely experience as a result of climate change.

¹⁸³ Cancun Agreements (2011), *supra* note 86, at p. 8.

¹⁸⁴ UNHRC Res. 18/22, *supra* note 82; UNHRC Res. 26/27, *supra* note 83.

¹⁸⁵ Cancun Agreements (2011), *supra* note 86, at p. 89.

¹⁸⁶ ICESCR Art. 2(2); ICCPR Art. 26; UDHR Art. 7.

¹⁸⁷ UNFCCC Arts. 3(2), 4(4), 4(10).

¹⁸⁸ Cancun Agreements (2011), *supra* note 86, at pp. 7, 12, 18,

¹⁸⁹ *Id.* at p. 7.

¹⁹⁰ *Id.* at p. 72.

¹⁹¹ For example, Art. 14(2) of the Convention mandates “all appropriate measures to eliminate discrimination against women in rural areas in order... that they participate in and benefit from rural development,” and requires participation “at all levels” as well as access to adequate living conditions.

(ii) Children

The Cancun Agreements recognize the need to “fully account” for the adverse effects of climate change on children,¹⁹² but do not contain additional instructions on how countries should do this. The Convention on the Rights of the Child outlines a variety of additional requirements that are relevant to the protection of children in the context of climate change. Article 24 is most relevant—it recognizes the “right of the child to the enjoyment of the highest attainable standard of health” and outlines how states should ensure full implementation of the right. For example, states “shall take appropriate measures” to “combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”¹⁹³

In addition, the CESCR has directed states to “adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.”¹⁹⁴ The UNFCCC also has an intergenerational focus, with the Parties agreeing that they “should protect the climate system for the benefit of present and future generations of humankind.”¹⁹⁵

(iii) Indigenous Peoples

OHCHR has recognized that climate change “poses a serious threat to indigenous peoples, who often live in marginal lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment.”¹⁹⁶ This threat could potentially undermine the right to self-determination for indigenous peoples, which is recognized in both the ICCPR and the ICESCR,¹⁹⁷ as well as the rights outlined in the UN Declaration on the Rights of Indigenous Peoples. The Cancun Agreements explicitly refer to indigenous rights, and call for public participation of indigenous peoples in decisions about forestry and land use projects.¹⁹⁸

The UN Declaration on the Rights of Indigenous Peoples contains particularly robust requirements for states to engage and obtain consent from indigenous peoples before undertaking actions that will adversely affect those peoples. For example, it specifies that indigenous peoples shall not be relocated from their lands or territories without “free, prior and informed consent... and after agreement on just and fair compensation and, where possible, with the option of return.”¹⁹⁹ It also requires states to provide redress measures in the event that land or property is taken from these people without their consent.²⁰⁰ These provisions are particularly relevant when governments are implementing or authorizing mitigation and adaptation projects that will affect lands or resources owned or used by indigenous peoples. Indeed, the Inter-American Court of Human Rights has decided several cases involving the obligation to protect indigenous rights in the context of projects that affect indigenous lands and resources that would appear applicable in these circumstances.²⁰¹

In addition, the Declaration recognizes that “Indigenous peoples have the collective right to live in freedom, peace and security” and a corresponding right “not to be subjected to forced assimilation or destruction of their culture.”²⁰² Climate change will likely have a devastating effect on many of the ecosystems that indigenous people rely on for their livelihoods and cultural identity, and as such, the effects of climate change could be construed as a violation of this principle.²⁰³ Although it may be difficult to establish causation for the purposes of bringing a successful claim before an international or regional human rights court, it is nonetheless reasonable that major emitters do have an obligation to curtail their emissions so as to avoid the destruction of indigenous cultures.

192 Cancun Agreements (2011), *supra* note 86, at Section E (preamble).

193 CRC Art. 25(2)(c).

194 CESCR General Comment No. 15, UN Doc. E/C.12/2002/11 (Jan. 20, 2003).

195 UNFCCC Art. 3(1).

196 OHCHR (2009), *supra* note 71, at p. 68.

197 ICCPR Art. 1, ICESCR Art. 1.

198 See, e.g., Cancun Agreements (2011), *supra* note 86, at Section E (preamble), p. 72.

199 UN Declaration on the Rights of Indigenous Peoples Art. 10.

200 *Id.* Arts. 8, 11.

201 See, e.g., *Saramaka People v. Surin*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, para. 95 (Nov. 28, 2007); *Indigenous Cmty. Yakyé Axa v. Para.*, Inter-Am. Ct. H.R. (ser. C), No. 146, para. 143 (June 17, 2005); *Maya Indigenous Cmty. Of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Ct. H.R., Response No. 40/04, OEA/Ser.LV/II.122 doc. 5 rev., para. 113 (2004); *Indigenous Community of Awás Tingni v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79, para. 148 (Aug. 31, 2001).

202 *Id.* Arts. 7 and 8.

203 See *Inuit Petition* (2005), *supra* note 7.

2.3 Private Sector Obligations to Address the Human Rights Implications of Climate Change

As discussed above, states have an obligation to protect human rights against abuses by third parties, as well as an obligation to provide access to an adequate remedy, judicial or non-judicial, when human rights are violated by non-state actors.

The core international human rights treaties do not directly address the obligations of private parties to respect human rights, but there are some standards for non-state actors that countries are beginning to incorporate into domestic law. These standards are enshrined in the UN Guiding Principles on Business and Human Rights (the “Ruggie Principles”), proposed by UN Special Representative John Ruggie and endorsed by the UN Human Rights Council in June 2011.²⁰⁴ The Ruggie Principles provide additional guidance to countries on how to fulfill their obligations in this context, as well as principles that are directly applicable to private actors. The foundational principles for private actors include, inter alia:

1. Businesses should respect human rights by avoiding infringing on the human rights of others and addressing any adverse human rights impacts with which they are involved.
2. The rights that must be respected by businesses include, at minimum, the rights recognized in the International Bill of Rights (UDHR, ICCPR, ICESCR) and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.
3. To meet their human rights responsibilities, businesses should implement policies and processes appropriate for their size and circumstances, so as to safeguard human rights in all aspects of their operation.
4. Businesses should also carry out human rights due diligence, which includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.
5. Where businesses identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.²⁰⁵

A complete assessment of non-state actors’ obligations is beyond the scope of this report, but it is worth noting that non-state obligations with respect to human rights are also outlined in the Oslo Principles (which deal specifically with climate change).²⁰⁶ In addition, the International Bar Association (IBA) published a recent report on advancing climate justice which contains recommendations on how corporations can implement the Ruggie Principles through the implementation of corporate responsibility policies and other actions.²⁰⁷

²⁰⁴ UNHRC Res. 17/4, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/Res/17/4 (July 6, 2011).

²⁰⁵ Guiding Principles on Business and Human Rights, Part II: The Corporate Responsibility to Respect Human Rights (2011).

²⁰⁶ Oslo Principles, pp. 27-30.

²⁰⁷ IBA PRESIDENTIAL TASK FORCE ON CLIMATE CHANGE JUSTICE AND HUMAN RIGHTS, *ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION* (2014).



AusAID (2012)

Additional investment in flood protection will be needed to address the impacts of rising sea levels and increased precipitation in Manila, the capital city of the Philippines.

Implementation Assessment

The parties to the UNFCCC have taken many important steps, both individually and jointly, to address the causes and impacts of climate change. However, it appears that there is still a need to mainstream human rights considerations into the decisions of individual countries, the COP and the UNFCCC's various arms and mechanisms, and to undertake additional measures to address the effect of climate change on human rights.

This section will briefly evaluate the adequacy of national and international responses in six contexts: (1) formal recognition of the human rights-climate change nexus in national communications; (2) mitigation actions and commitments; (3) adaptation actions and commitments; (4) financial assistance to developing countries; (5) respect for procedural rights in climate policy and planning; and (6) safeguards in international climate finance mechanisms.

3.1 Human Rights and Climate Change in National Communications

As of Oct. 5, 2015, 119 INDCs had been submitted, covering 146 countries.²⁰⁸ Among these,

- 14 discussed the linkages between climate change and human rights.²⁰⁹
- 48 discussed gender equality, mainstreaming, and empowerment.²¹⁰

208 Center for International Environmental Law, *Briefing Note: Human Rights and the 2015 Climate Commitments* (November 2015), available at www.ciel.org.

209 These countries include: Brazil, Chad, Chile, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Malawi, Marshall Islands, Mexico, Morocco, Philippines, Zimbabwe. *Id.*

210 These countries include: Barbados, Brazil, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Rep, Chad, Comoros, Costa Rica, Cote d'Ivoire, Djibouti, Dominica, Dominican Rep., DR Congo, Ethiopia, Gambia, Georgia, Guatemala, Guinea, Haiti, Honduras, India, Jordan, Kenya, Kiribati, Lesotho, Liberia, Malawi, Mali, Mauritius, Mexico, Morocco, Myanmar, Niger, Papua New Guinea, Paraguay, Peru, Philippines, Sierra Leone, Solomon Islands, South Africa, Swaziland, Tajikistan, Vanuatu, Vietnam, Zambia, Zimbabwe. *Id.*

- 14 discussed the impact of climate change and mitigation and/or adaptation responses on indigenous peoples.²¹¹

Notably, *all* of the INDCs that discuss any of these three topics were submitted by developing countries and least developed countries. These countries often noted the need to implement their mitigation and adaptation targets with full respect for human rights or related issues (e.g., gender equality, indigenous rights), without providing much detail on how this would occur.²¹² The INDCs submitted by developed countries do not mention human rights, gender, indigenous peoples, or other relevant considerations (e.g., equity, poverty alleviation, and ensuring access to basic goods and services).²¹³

A report published by the Mary Robinson Foundation in 2014 also concluded that the majority of country reports to the UNFCCC and the UNHRC do not address the link between human rights and climate change.²¹⁴ Some of the key findings from that report included:

- 49 countries explicitly mentioned human rights in National Communications and National Adaptation Plans of Action (NAPAs) submitted to the UNFCCC between 2010 and 2014. This included 39% of the National Communications and 4% of the NAPAs that were submitted during that period.²¹⁵
- Procedural rights were more frequently discussed than substantive rights in the National Communications submitted to the UNFCCC. 20% of these communications discussed procedural rights (10% developed/10% developing), and 13% discussed substantive rights (1% developed/12% developing).²¹⁶
- 45 countries explicitly mentioned the human rights impact of climate change in their national reports to the Universal Periodic Review of the HRC between 2010 and 2014. These included 12% of the submissions from developed countries, 29% of the submissions from developing countries, 32% of submissions from least developed countries (LDCs), and 45% of the submissions from small island development states (SIDS).²¹⁷
- Only 12 countries made the link between human rights and climate change in reports to both the UNFCCC and the HRC.²¹⁸

The report concluded that further steps are needed to ensure that countries will integrate human rights considerations into their climate policies, and also account for climate change when reporting on human rights performance.

While the failure to report on the linkages between human rights and climate change is not itself a violation of human rights obligations, it does suggest that many countries are not thinking about these obligations when formulating climate change plans and policies. It also makes it more difficult for the international community to assess what countries are doing to address the human rights implications of climate change.

3.2 Mitigation Measures and Commitments

The “emissions gap”—the gap between the aggregate effect of actions and commitments by parties to the UNFCCC and the emissions reductions required to keep warming at or below 2°C²¹⁹—is a major concern from a human rights perspective. The parties have significantly increased their mitigation ambition in the lead-up to the Paris Agreement. But there is more to be done. Moreover, many countries dispute whether the 2°C is really adequate to prevent “dangerous anthropogenic interference” with the atmosphere and the natural systems that

211 These countries include: Brazil, Cameroon, Central African Rep, Costa Rica, Guatemala, Honduras, Lao, Mexico, Paraguay, Peru, Philippines, South Africa, Vietnam, Zimbabwe. *Id.*

212 See, e.g., Federative Republic of Brazil, *Intended Nationally Determined Contribution 1* (2015); Government of Costa Rica, Ministry of Environment and Energy, *Costa Rica’s Intended Nationally Determined Contribution 11* (2015).

213 See, e.g., INDCs submitted by Australia, Canada, the European Union, Japan, New Zealand, Norway, and the United States.

214 Mary Robinson Foundation, *Incorporating Human Rights into Climate Action* (Oct. 2014).

215 *Id.* at 4.

216 *Id.* The report also noted that parties to the Aarhus Convention (predominantly developed countries) were 4 times more likely to refer to the right to access to information, which implies that the Aarhus Convention is “successful at promoting the inclusion of human rights in policy making.”

217 *Id.* at 5.

218 *Id.* at 6.

219 UNEP, *THE EMISSIONS GAP REPORT* (2015).

support human life²²⁰—indeed, based on the IPCC’s analysis (summarized in Part 1), an increase of this magnitude will have environmental impacts that seriously interfere with human rights for millions and perhaps even billions of people across the world.

In November 2015 UNEP published its sixth Emissions Gap Report which provides a scientific assessment of the mitigation contributions from submitted INDCs, and compares this with the mitigation levels required to meet the target of a global average temperature increase below 2°C by 2100.²²¹ The assessment covers 119 submitted INDCs, representing 146 countries and 85-88 per cent of global emissions.

The assessment determined that full implementation of both unconditional and conditional INDCs will result in emission level estimates in 2030 that are most consistent with scenarios that limit global average temperature increase to below 3-3.5°C with a greater than 66 per cent chance.²²² Therefore although the INDCs do present a real increase in the ambition level compared to a projection of current policies, there is still a large emissions gap in 2030 of 12GtCO₂e (with a range of 10-15).²²³

In light of these findings, there is a clear need to continue increasing ambition with respect to global GHG mitigation. Thus, many countries have called for inclusion of a mechanism for gradually “ratcheting down” emissions (or “ramping up ambition”) in the upcoming Paris agreement.²²⁴ Such a mechanism could contribute to mitigation ambition, although it may not go far enough to protect human rights from climate-related harms. If emissions are not significantly lowered beneath the current commitments, there will almost certainly be environmental impacts that result in widespread interference with human rights. Indeed, the IPCC’s Fifth Assessment Report confirmed that, to have a “likely” chance of limiting warming to 2°C, we must see “substantial emissions reductions over the next few decades, and near zero emissions... by the end of the century.”²²⁵ Thus, national governments and other actors must seek pathways to a zero-carbon economy.

3.3 Adaptation Measures and Commitments

Considerable investments will be required in both developed and developing countries to adapt to climate change. Even the richest countries have yet to enact adequate legal and institutional frameworks for climate change adaptation, and will face serious challenges in terms of mobilizing resources and building adaptive capacity among their citizens, economic sectors, and infrastructure.²²⁶ But there is no question that developing countries—and in particular, least developed countries (LDCs) and geographically vulnerable countries (e.g., small island states)—face the greatest adaptation challenges.

In 2014, UNEP published the Global Adaptation Gap Report which found that there is likely to be a significant gap between the resources that would be needed to adapt to 2°C of warming and the funding that will be made available through international climate funds and other finance mechanisms.²²⁷ The report cited evidence that financial commitments to adaptation have increased in recent years, and that a significant amount of adaptation funding flows to developing countries.²²⁸ However, it also noted a serious need to scale up adaptation funding, and that the existing estimates of global adaptation costs (ranging from US\$70 billion-\$100 billion per year) are likely to be a significant underestimate, particularly in the period after 2030.²²⁹ The bulk of international climate finance to developing countries in the past few years has been channeled towards mitigation, rather than adaptation (see discussion below). In this context, the decision of the Green Climate Fund to allocate funds 50/50 between mitigation and adaptation is welcome.

220 Petra Tschakert, *1.5°C or 2°C: A Conduit’s View from the Science-Policy Interface at COP20 in Lima, Peru*, 2 CLIMATE CHANGE RESPONSES 1 (2015).

221 UNEP, THE EMISSIONS GAP REPORT (2015).

222 *Id.* at XVIII.

223 *Id.* (Based on full implementation of conditional and unconditional INDCs).

224 Both the U.S. and China have supported language to this effect. For more on this issue, see *Commitment Cycles and the Ratchet Mechanism*, The Road to Paris, Climate Nexus (Sept. 28, 2015), <http://www.theroadthroughparis.org/negotiation-issues/commitment-cycles-and-ratchet-mechanism>.

225 IPCC, CLIMATE CHANGE 2014, SYNTHESIS REPORT, SUMMARY OF POLICYMAKERS 20 (2014).

226 IPCC (2014), *supra* note 4, highlights numerous examples of where adaptive capacity is lacking in both developed and developing countries, although it ultimately concludes that developed countries will fare better than developing countries. See also CHRISTIAN KROLL, SUSTAINABLE GOVERNANCE INDICATORS (SGI), SUSTAINABLE DEVELOPMENT GOALS: ARE THE RICH COUNTRIES READY? (2015) (concluding that 34 OECD countries are not ready to meet the sustainable development goals, including goals related to climate change adaptation); NICHOLAS STERN, STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE 413 (Cambridge University Press 2007) (“Even with an appropriate policy framework, adaptation will be constrained by both uncertainty and technical limits to adaptation.”)

227 UNEP, THE ADAPTATION GAP: A PRELIMINARY ASSESSMENT (2014).

228 *Id.* at XIII.

229 *Id.*

The UNEP Global Adaptation Report also highlighted other key barriers to adaptation in developing countries, including lack of access to technologies and limitations in existing technologies, lack of knowledge about the impacts of climate change and the effectiveness of various adaptation measures, and problems with institutional capacity and governance in some countries. Even if countries increase their mitigation ambition and can limit warming to 2°C, it will be challenging for many countries to fulfill human rights obligations related to climate change adaptation.

3.4 Financial and Technical Assistance to Developing Countries

In the 2009 Copenhagen Accord, developed countries committed to a goal of mobilizing US\$100 billion per year by 2020 to “address the needs of developing countries” in the context of “meaningful mitigation actions and transparency on implementation.”²³⁰ The expectation was that this funding would come from a variety of public and private sources (not just foreign aid).²³¹ This commitment was reaffirmed in the 2010 Cancun Agreements.²³² The Cancun Agreements also called for the creation of a Green Climate Fund (GCF),²³³ with the stated objective of “achieving a balanced allocation between adaptation and mitigation.”²³⁴ The draft negotiating text for the Paris Agreement contains proposed text for scaling up finance after 2020, but does not specify a numeric target for this goal.²³⁵

As of October 2, 2015, a total of 37 governments had made pledges to the GCF, amounting to US\$10.2 billion (including \$5.8 billion in signed pledges, and \$4.4 billion in announced but not signed pledges).²³⁶ Thus, the aggregate amount of the pledges (which are not annual pledges), is far below the \$100 billion annual target. Moreover, the countries have not yet made financial commitments or mobilized any resources for loss and damage caused by the effects of climate change.

However, a recent OECD report determined that many more funds have been mobilized outside of the context of the GCF.²³⁷ Specifically, the report concluded that developed countries had mobilized an average of US\$57 billion per year in 2013-2014 for public and private climate finance in developing countries.²³⁸ This figure excludes the pledges that developed countries have made to the GCF. Notably, 77% of the mobilized climate finance addressed climate change mitigation only, 16% addressed adaptation only, and 7% consisted of activities designed to address both mitigation and adaptation.²³⁹ This data reinforces one key concern of developing countries—that international climate finance will prioritize mitigation over adaptation—and lends support to the idea that climate finance should be channeled through a global facility, like the GCF, to ensure that funds are more equally distributed between adaptation and mitigation.

Even if the COP does meet its goal of mobilizing \$100 billion in climate finance annually, this will not be adequate to address the effect of climate change on human rights. As noted by the World Resources Institute, \$100 billion is “only a fraction of the finance needed to keep the average temperature increase to 2°C,”²⁴⁰ and clearly insufficient to meet both adaptation and mitigation needs in developing countries.

On a more positive note, there are some promising examples of state action aimed at providing technical assistance to developing countries and addressing the transboundary impacts of climate change. For example, in October 2014, 110 countries endorsed the Nansen Initiative Protection Agenda, which calls for additional research on international displacement caused by natural disasters, including climate-related disasters, and which directs countries to make better use of humanitarian measures to help those displaced across borders.²⁴¹

230 UNFCCC Decision 2/CP.15, *Copenhagen Accord*, ¶ 8, UN Doc. FCCC/CP/2009/11/Add.1 (March 30, 2010).

231 *Id.*

232 Cancun Agreements (2011), *supra* note 86, at ¶ 98.

233 *Id.* at ¶ 100-112. The Agreements did not, however, announce a separate target for adaptation funding—as a result, it is unclear whether the COP intended to raise \$100 billion to finance both mitigation and adaptation in developing countries, or if additional funds will be mobilized for adaptation.

234 *Id.*, Appendix III, ¶ 11(c).

235 Draft Agreement, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Article 6: Finance, ¶ 5, UN Doc ADP.2015.8.Informal Note, Section F, Finance.

236 Green Climate Fund Pledge Tracker, *Status of Pledges and Contributions made to the Green Climate Fund* (Oct. 1, 2015).

237 OECD, CLIMATE FINANCE IN 2013-14 AND THE USD 100 BILLION GOAL (2015).

238 *Id.* at 10.

239 *Id.* at 28.

240 MICHAEL I. WESTPHAL ET AL., WRI, GETTING TO \$100 BILLION: CLIMATE FINANCE SCENARIOS AND PROJECTIONS TO 2020 5 (May 2015).

241 Nansen Initiative, Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (2015).

Nonetheless, to fulfill their human rights obligations relating to international cooperation and transboundary harm, developed countries should increase the amount of financial assistance that is provided to developing countries. They should also seek to achieve a more equitable balance between adaptation and mitigation funding, especially in light of current emissions trajectories.

3.5 Respect for Procedural Rights in Climate Policies and Planning

A complete overview of procedural safeguards for national adaptation and mitigation measures is beyond the scope of this report. But there are a few trends worth highlighting.

One of the most important developments occurred in 1992, when the UN General Assembly adopted the Rio Declaration on Environment and Development. Principle 10 stated that:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.²⁴²

The outcome document for Rio+20, *The Future We Want*, reaffirmed that “broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development.”²⁴³ Countries across the world have taken important steps towards implementing these principles in environmental decision-making,²⁴⁴ and this seems to be the case for climate-related decisions as well.

For example, it appears that many countries are making reasonable efforts to assess the impacts of climate change, as well as the contribution of their activities to climate change, and make this information available to the public. This includes efforts to: (1) monitor and disclose domestic sources of GHG emissions, in accordance with Annex I of the UNFCCC; (2) inform the public about the potential impacts and risks associated with climate change;²⁴⁵ (3) describe and evaluate efforts to respond to climate change;²⁴⁶ and (4) use existing EIA procedures to inform decision-makers and the public about the contribution of a proposed action to global GHG emissions, as well as the potential impacts of climate change on those proposals.²⁴⁷

It is difficult to gauge the extent to which governments are promoting public participation in decisions that involve climate change, for instance major projects that generate GHG emissions or the development of local, regional and national adaptation plans. National progress in this context relates to the broader issue of public participation in local, regional and national governance, and accordingly with general implementation of the rule of law in nations around the world. There is evidence that, as a general matter, many states have taken important steps towards promoting public participation in environmental decision-making.²⁴⁸ This appears to be the case for climate-related decisions as well. For example, one study found that many European countries have mechanisms in place to ensure that affected stakeholders are informed about climate-related decisions and that they can provide input on those decisions.²⁴⁹ However, the same study found that government decision-makers should be more proactive about

242 UN GA, *Rio Declaration on Environment and Development*, A/CONF.151/26 (Aug. 12, 1992).

243 UN GA Res. 66/288, *The Future We Want*, p. 43, UN Doc. A/RES/66/288 (July 7, 2012).

244 STAKEHOLDER FORUM FOR A SUSTAINABLE FUTURE, REVIEW OF IMPLEMENTATION OF AGENDA 21 AND THE RIO PRINCIPLES 43 (Jan. 2012) (finding that the implementation of Principle 10 has been “very successful in some regions, and looks set to secure successful implementation in others”).

245 See, e.g., U.S. GLOBAL CHANGE RESEARCH PROGRAM, NATIONAL CLIMATE ASSESSMENT (2014); UK CLIMATE CHANGE RISK ASSESSMENT: GOVERNMENT REPORT (2012); AUSTRALIAN DEPARTMENT OF ENVIRONMENT, CLIMATE ADAPTATION OUTLOOK: A PROPOSED NATIONAL ADAPTATION ASSESSMENT FRAMEWORK (2013).

246 See, e.g., the National Adaptation Plans (NAPs), National Adaptation Programmes of Actions (NAPAs), and Nationally Appropriate Mitigation Actions (NAMAs) submitted to the UNFCCC Secretariat.

247 See Morgan (2012) *supra* note 100. Promisingly, many jurisdictions have developed policies or guidance for integrating climate change considerations into strategic and project-level EIA, to address both the contribution of proposed actions on climate change and the potential impact of climate change on those projects. However, in some jurisdictions, EIA documents do not thoroughly assess the GHG emissions from activities and/or the impacts of climate change on the project. See Sabin Center for Climate Change Law, *Climate Change and Environmental Impact Assessment*, <http://web.law.columbia.edu/climate-change/resources/nepa-and-state-nepa-eis-resource-center> (last visited Oct. 13, 2015) (website includes list of guidance documents from the U.S. and other jurisdictions, as well as assessments of climate change considerations in U.S. EIA).

248 See John Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment – Compilation of Good Practices*, Parts A-C, UN Doc. A/HRC/28/61 (Feb. 3, 2015).

249 Mara Silina, European Environmental Bureau & European ECO Forum, *Is Everything Right with Public Participation in Climate Related Decisions?* Presentation for the Fifth Meeting of the Task Force on Public Participation in Decision-making, Geneva, February 23-24, 2015.



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soliciting input from affected stakeholders, and actually incorporating the information and perspectives gathered through public consultation processes into final decisions.²⁵⁰

Finally, perhaps the largest procedural gap in this context is the lack of access to justice and remedies for climate-related harms. In both domestic courts and international tribunals, many cases alleging serious injury to human rights caused by the effects of climate change have been dismissed or have failed due to: (i) the challenge of establishing a causal link between specific emitters and climate change; (ii) the challenge of establishing a causal link between climate change and the on-the-ground impacts that gave rise to the harm; and/or (iii) the absence of legal requirements or liability for GHG emissions.²⁵¹ Jurisdiction (or lack thereof) also poses a major barrier to judicial remedies, especially in the context of transboundary harms. Moreover, there is no international grievance mechanism that would provide an alternative forum for justice and remedies in this context—although many developing countries would like to see a Loss and Damage Framework developed under the auspices of the UNFCCC that could fill this role.²⁵²

One way for countries to implement and further elaborate upon their procedural human rights obligations is through participation in MEAs. As of 2015, there are 47 parties to the Aarhus Convention, which include virtually all of the countries in Europe as well as several countries in Central Asia.²⁵³ In addition, nineteen countries in Latin America and the Caribbean are currently negotiating a new regional agreement to implement the access rights set forth in Principle 10 of the Rio Declaration.²⁵⁴ Other actors are also using international mechanisms to give effect to procedural rights—for example, in 2010, the UNEP Governing Council adopted the Bali Guidelines for

²⁵⁰ *Id.*

²⁵¹ See, e.g., Inuit Petition (2005), *supra* note 7; Sabin Center for Climate Change Law, *Litigation Charts*, <http://web.law.columbia.edu/climate-change/resources/litigation-charts> (last visited Oct. 13, 2015).

²⁵² For a detailed discussion of barriers to justice in this context, see IBA (2014), *supra* note 211.

²⁵³ UNECE, *Status of Ratification*, <http://www.unece.org/env/pp/ratification.html> (last visited Oct. 19, 2015).

²⁵⁴ Press Release, ECLAC, *LAC Countries Hold First Negotiating Committee Meeting on Principle 10 of Rio Declaration*, May 7, 2015.

the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, which are intended to be used as a guidance tool for states in the implementation of Rio Principle 10.²⁵⁵

3.6 Human Rights Safeguards in International Climate Finance Mechanisms

(a) Clean Development Mechanism

The CDM modalities and procedures include rules that require stakeholder consultation (LSC) and global stakeholder consultation (GSC) prior to the validation of a CDM project.²⁵⁶ These include rules directing the project participants and coordinating/managing entities to inform the public about the proposed CDM project, invite comments from local and global stakeholders, and explain how these comments were considered in the decision-making process.²⁵⁷

These rules are expressed in relatively general terms, lacking definite criteria for what constitutes adequate stakeholder consultation. Moreover, the rules do not require the consent of local stakeholders, nor do they outline any substantive requirements to promote the well-being of local people or the protection of rights (e.g., requirements for equitable distribution of project benefits). Nor is there any framework for prioritizing projects that will have beneficial impacts on the poor and other vulnerable groups, and their local environments.²⁵⁸ And although the project participants may include commitments to address stakeholder comments in the CDM project (e.g., commitments for job creation, mitigation of environmental harms, or compensation for land), there are no rules for monitoring the status or completion of those commitments. Finally, there are no provisions for stakeholders wishing to raise concerns about a project after it has been validated and registered, nor is there a grievance mechanism for individuals and communities who have been harmed by CDM projects.

As a result of these procedural deficiencies, Carbon Market Watch concluded that many CDM projects have been registered “despite insufficient local stakeholder consultation, strong local opposition and clear evidence that projects cause harm to the local populations and/or ecosystems.”²⁵⁹

The Executive Board of the CDM has taken steps to improve stakeholder consultation for CDM projects. For example, at its seventieth meeting in 2012, the Board issued a decision directing Designated Operational Entities (DOEs) to assess whether LSC is still adequate when significant changes occur in the project design after the initial LSC.²⁶⁰ However, as noted in a recent concept note on improving stakeholder consultation in CDM projects, there are additional changes that could be made to the CDM rule and regulations “to increase the participation of stakeholders in, and the transparency, clarity, and effectiveness of,” the local and global stakeholder consultation processes.²⁶¹ Recommendations for the CDM and other climate finance mechanisms are presented in Part 4.

The lack of adequate provisions for stakeholder consultation in this context reflects a failure on the part of governments to protect and promote both substantive and procedural human rights. As noted in section 1.2, there are some egregious examples of CDM projects that have resulted in the violation of human rights through displacement and the destruction of livelihoods. Better safeguards are needed to ensure that such violations do not occur in the context of future CDM projects.

(b) REDD+

The Cancun Agreements included a set of safeguards that serve as guidance for forest activities aimed at mitigating climate change.²⁶² These included some provisions that are relevant to the protection of human rights—e.g., that projects should demonstrate “respect for the knowledge and rights of indigenous peoples and members of local communities” and that they should include the “full and effective participation of relevant stakeholders, in particular

255 UNEP, Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters, Decision SS.XI15, Part A, Feb. 26, 2010.

256 UNFCCC Decision 3/CMP.1, *Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol*, UN Doc. FCCC/KP/CMP/2005/8/Add.1 (March 30, 2006); UNFCCC, *CDM Standards*, <http://cdm.unfccc.int/Reference/Standards/index.html> (last visited Oct. 13, 2015).

257 *Id.*

258 PHILIPPE CULLET, *THE KYOTO PROTOCOL AND VULNERABILITY: HUMAN RIGHTS AND EQUITY DIMENSION* (International Environmental Law Research Centre 2010).

259 Carbon Market Watch, *Social and Environmental Accountability of Climate Finance Instruments*, 3 (Sept. 2015).

260 EB 70 report, para 91. The Board also adopted a decision to improve the global stakeholder consultation through further action. See EB 70 Report, para 90(a)(b)(d), and (e).

261 Concept Note: Improving Stakeholder Consultation Processes, Version 01.0, CDM-EB86-AA-A15, at Para. 6 (2015?).

262 Cancun Agreements, 92011), *supra* note 86, at Appendix I.

indigenous peoples and local communities.”²⁶³ But these guidelines are expressed in very general, non-binding terms, and they do not explicitly require consent from those who live in the forests or utilize the forest resources that will be affected by REDD+ projects. They also do not contain language about the equitable distribution of benefits from forestry projects, which may not be a human right in of itself, but which has implications for the effective enjoyment of human rights for those who live in forests and depend on forest resources.²⁶⁴

A variety of proposed standards and guidance documents have been introduced in this context. Two notable examples include the REDD+ Social & Environmental Standards,²⁶⁵ and the Joint Guidelines from UN-REDD Programme and the Forest Carbon Partnership Facility.²⁶⁶ These standards provide a more comprehensive framework for protecting the rights of indigenous peoples and other local stakeholders, and ensuring an equitable distribution of benefits from REDD+ projects, but they are not binding on member states or other project stakeholders.²⁶⁷ That said, projects that are funded through the World Bank’s Forest Carbon Partnership Facility (FCPF) are required to comply with World Bank safeguard policies.²⁶⁸ These include ten social and environmental safeguards addressing the following issues: (i) environmental assessment, (ii) natural habitats, (iii) pest management, (iv) physical and cultural resources, (v) involuntary settlement, (vi), indigenous peoples, (vii) forests; (viii) dam safety; (ix) projects on international waterways; and (x) projects in disputed areas.²⁶⁹ However, compliance with the World Bank safeguards may not ensure that rights will be respected, because the existing safeguards arguably do not fully reflect existing human rights obligations, such as the obligation to obtain free, prior and informed consent (FPIC) for projects that adversely affect indigenous peoples.²⁷⁰ The World Bank is currently working on revisions to the safeguard policies, which may result in positive human rights outcomes—for example, the current draft requires FPIC for projects that affect indigenous lands and resources or result in the displacement of indigenous communities.²⁷¹ However, some stakeholders are concerned that the revisions will ultimately weaken protections for affected communities and the environment, as a result of roll backs in due diligence and other procedural requirements.²⁷²

Ultimately, to fulfill obligations to protect and promote human rights, countries should ensure that any REDD+ projects financed within their jurisdiction include adequate public participation mechanisms and that they do not result in the dispossession of people from forest lands and resources. Special attention should be paid to the rights of indigenous people in this context, and in particular, the right to FPIC. The COP should also consider adopting a more concrete safeguard policy that applies to all REDD+ projects.

(c) Green Climate Fund

In 2014, the GCF Board decided to adopt, on an interim basis, the International Finance Corporation’s (IFC’s) environmental and social performance standards for GCF-funded projects.²⁷³ The IFC safeguards include eight performance standards addressing the following issues: (i) Assessment and management of social and environmental risks and impacts; (ii) Labor and working conditions; (iii) Resource efficiency and pollution prevention; (iv) Community health; (v) Safety and security; (vi) Land acquisition and involuntary resettlement; (vii) Biodiversity conservation and sustainable management of living natural resources; (viii) Full respect of rights of indigenous people and protection of cultural heritage. The Board also adopted terms of reference for an “Independent Redress Mechanism” to receive complaints related to the operation of the Fund and make operation.²⁷⁴ Once operational, peoples and communities who are directly affected by adverse impacts of projects resulting from a failure to implement the IFC safeguards can submit a complaint to the mechanism. The mechanism can make recommendations on a specific project or on operational policies and procedures.

263 *Id.* at p. 2(c),(d).

264 See Thomas Sikor et al., *REDD-plus, forest people’s rights, and nested climate governance*, 20 GLOBAL ENVIRONMENTAL CHANGE 423 (2010).

265 REDD+ SOCIAL & ENVIRONMENTAL STANDARDS, Version 2, Sept. 10, 2012.

266 FOREST CARBON PARTNERSHIP AND UN-REDD PROGRAMME, GUIDELINES ON STAKEHOLDER ENGAGEMENT IN REDD+ READINESS (2012).

267 For a more detailed assessment of REDD+ finance safeguards, see Stephanie Roe, et al., *SAFEGUARDS IN BILATERAL REDD+ FINANCE* (Climate Focus 2014).

268 Alternatively, for projects undertaken in accordance with the FCPF’s “Common Approach”, projects must achieve “substantial equivalence” with the World Bank safeguard policies. For a more detailed discussion of this issue, see ALYSSA JOHL & YVES LADOR, *A HUMAN RIGHTS-BASED APPROACH TO CLIMATE FINANCE* (Friedrich Ebert Stiftung 2012).

269 The World Bank’s standards are derived from the IFC’s standards, and thus there are significant overlaps. World Bank, *World Bank Performance Standards*, <http://go.worldbank.org/BZ9RCBSRB0> (last visited Oct. 15, 2015).

270 JOHL & LADOR (2012), *supra* note 273, at 10.

271 World Bank, *Environmental and Social Framework, Second Draft for Consultation*, Section B, p. 18 (July 1, 2015).

272 Human Rights Watch, *World Bank: Dangerous Rollback in Environmental, Social Protections* (Aug. 4, 2015), <https://www.hrw.org/news/2015/08/04/world-bank-dangerous-rollback-environmental-social-protections>; Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UN Doc. A/70/274 (Aug. 4, 2015).

273 See Decisions of the Board – Green Climate Fund, GCF/B.07/11, Annex III, June 19, 2014.

274 Decisions of the Board – Green Climate Fund, Terms of Reference for the Independent Redress Mechanism, GCF/B.06/06, Feb. 13, 2014.



Bwindi Forest National Park, Uganda

The IFC standards appear to provide adequate protection for human rights—for example, they specify that, in the context of land acquisition projects, project proponents should “avoid/minimize displacement,” “avoid forced eviction,” and “improve or restore livelihoods and standards of living.”²⁷⁵ They also require FPIC for indigenous peoples under specified circumstances.²⁷⁶ These substantive provisions are complemented by the procedural mechanisms noted above.

Thus, the safeguards provided for the GCF appear to be sufficient for the protection and promotion of both procedural and substantive human rights, and should be adopted as permanent guidelines, ideally with additional provisions on internal monitoring and assessment.

(d) Adaptation Fund

The Adaptation Fund Board approved an Environmental and Social Policy in November 2013.²⁷⁷ The policy outlines a process for screening projects and programs based on their environmental and social impacts, and adopting measures to mitigate any adverse impacts. Specifically, the policy requires implementing entities to adopt measures to avoid or, where avoidance is impossible, minimize environmental and social risks, and monitor and report on the status of those measures during and at the end of implementation. It also outlines a set of social principles to guide the impact assessment process, which are more comprehensive than some of the other safeguard policies. Some notable aspects of these principles include:

- They explicitly require that all projects supported by the Fund “respect and where applicable promote human rights,”²⁷⁸ and furthermore, that all projects adhere to “core labour standards as identified

²⁷⁵ IFC PS5: Land Acquisition and Involuntary Resettlement.

²⁷⁶ IFC PS7: Indigenous Peoples.

²⁷⁷ ADAPTATION FUND BOARD, ENVIRONMENTAL AND SOCIAL POLICY (2013).

²⁷⁸ *Id.* at p. 15.

by the International Labour Organization”²⁷⁹ and the “rights and responsibilities set forth in the UN Declaration on the Rights of Indigenous Peoples and other applicable international instruments relating to indigenous peoples.”²⁸⁰

- They require that projects be designed and implemented in a way that “avoids or minimizes the need for involuntary resettlement” and specify requirements for when “limited involuntary settlement is unavoidable” which include “socially feasible resettlement alternatives or fair and adequate compensation.”
- They require that all supported projects “provide fair and equitable access to benefits in a manner that is inclusive and does not impede access to basic health services, clean water and sanitation, energy, education, housing, safe and decent working conditions, and land rights,” and that projects “should not exacerbate existing inequities, particularly with respect to marginalized or vulnerable groups.”²⁸¹ They also include specific provisions to ensure that project proponents respect the rights of marginalized and vulnerable groups and women.²⁸²
- They include provisions for habitat protection, conservation of biological diversity, pollution prevention, resource efficiency, public health, physical and cultural heritage, and land and soil conservation.²⁸³

The policy also includes relatively robust requirements for public disclosure and consultation, and for monitoring, reporting, and evaluating the implementation of projects and risk mitigation measures.²⁸⁴ Finally the policy requires that the implementing entities identify a grievance mechanism that will provide affected persons with an “accessible, transparent, fair and effective process for receiving and addressing their complaints about environmental or social harms” caused by the project, and also allows for complaints to be submitted to the Adaptation Fund Board secretariat.²⁸⁵

Thus, like the Green Climate Fund, these safeguards appear to be sufficient for the protection and promotion of both substantive and procedural human rights.

(e) Global Environment Facility

The GEF is the oldest UNFCCC financial mechanism, and it manages two additional funds established by the COP: the Special Climate Change Fund (SCCF) and the Least Developed Country Fund (LDCF). In 2011, the GEF Council has also approved its own set of Policies on Environmental and Social Safeguards and Gender Mainstreaming.²⁸⁶ The environmental and social safeguards are similar to the World Bank safeguards.²⁸⁷ They require an initial screening for environmental and social impacts, and outline various substantive requirements for the protection of natural habitats, avoiding and minimizing involuntary resettlement, protecting the rights of indigenous peoples (but unlike the World Bank, they require FPIC), pest management, the protection of physical cultural resources, and dam safety. Apart from the requirements for consulting with and respecting the rights of indigenous peoples, the public participation provisions are very weak. The social and environmental policy also lacks provisions to address adverse or disproportionate impacts on vulnerable or marginalized groups.

The policy on gender mainstreaming outlines additional criteria for soliciting input from women and avoiding discriminatory outcomes. The policy calls for the preparation of a “gender mainstreaming strategy or plan” to “cover gender sensitive activities” but does not contain very robust requirements for ensuring that women are fully involved in the decision-making process and that benefits are equally distributed to women.²⁸⁸

The GEF safeguards provide some protection for human rights, but additional provisions on public notice and consultation would help to ensure that procedural rights are fully respected in the context of GEF-funded projects.

279 *Id.* at p. 17.

280 *Id.* at p. 18.

281 *Id.* at p. 13.

282 *Id.* at pp. 14, 16.

283 *Id.* at pp. 20-26.

284 *Id.* at pp. 32, 33.

285 *Id.* at p. 34.

286 *GEF Policies on Environmental and Social Safeguards and Gender Mainstreaming*, GEF/C.40/10/REV.1, May 26, 2011.

287 JOHL & LADOR (2012), *supra* note 273, at 8.

288 *GEF Policies* (2011), *supra* note 291, at Annex II, p. 18.



Peter Prokosch
http://www.grfia.no/photoalbum/biogas-project-in-badreni-nepal-for-climate-forests-and-health_e36f#

Biogas-project in the rural community of Badreni, Nepal.

Recommendations

Based on the following summary of human rights obligations and implementation, this report makes the following recommendations on how the UNFCCC Parties and other actors can better integrate human rights considerations into their mitigation and adaptation activities.

4.1 International Cooperation

More Ambitious Mitigation Targets – Even if all of the INDCs are fully implemented, the anticipated level of global warming will result in extreme climatic and environmental impacts and widespread adverse effects on human rights. The Parties should continue to increase their mitigation ambition so as to ensure that the global average temperature increase remains at or below 2.0°C, and preferably 1.5°C. To this end, the Paris agreement should include a schedule for assessing and revisiting country commitments with the aim of increasing, over time, the ambition of the climate targets set by countries. Another way to encourage more ambition would be to establish scientifically-based targets for all countries and then assess the performance of countries with respect to these targets. The targets could account for countries’ historical and current GHG emissions (on a country-wide, per capita, and per unit of GDP basis) as well as the financial and technical capacity of the country to make emissions reductions. Nations should also undertake efforts to reduce emissions above and beyond their international commitments.

Recognize the Link Between Climate Change and Human Rights in the Paris Agreement: The COP should expressly refer to both the effects of climate change on the exercise of human rights and the need for Parties to respect, protect, promote, and fulfill human rights in all climate-related activities. This could include: (i) recognizing the human rights-climate change nexus in the preamble to the agreement; (ii) noting that one purpose of the agreement is to protect, respect, and fulfill the human rights of all persons; (iii) calling for mitigation commitments that are sufficient to fully protect human rights; (iv) calling upon the parties to ensure that all mitigation and adaptation activities do not violate human rights; and (v) incorporating more robust human rights safeguards into climate finance mechanisms.

Human Rights Safeguards for International Climate Finance Mechanisms – The safeguards for the various climate funds and other mechanisms used to finance mitigation and adaptation projects should be made uniform and revised to fully account for human rights considerations. The Adaptation Fund policy provides a good model, although it would be useful to flesh out many of the provisions in that policy with more detailed guidance. In particular, these safeguards should specify procedural requirements as well as substantive requirements—e.g., “no harm” rules to ensure that projects do not adversely affect local communities. One way to achieve this would be to establish a social and environmental safeguard policy that applies to *all* UNFCCC mechanisms and funds, accompanied by a more detailed implementation guide.

Financial Assistance to Developing Countries – It is imperative that developed countries increase financial assistance to developing countries, and in particular, the LDCs and countries that are most vulnerable to the impacts of climate change. In particular, the amount of funding available for adaptation measures in these countries should be significantly increased in order to account for the disproportionate adverse effects of climate change on people, settlements, and ecosystems. The \$100 billion goal should not be viewed as an overarching goal for *all* climate finance in developed countries, as it is inadequate even to cover the cost of mitigation measures (let alone adaptation measures). Rather, separate funding targets should be established for adaptation measures.

Climate Displacement and Migration – Climate change could contribute to the temporary displacement and permanent migration of millions of people in the coming decades. Countries should cooperate in the development of an international mechanism for addressing climate-induced displacement and migration, both within and across domestic borders. Proposals have already been made for the creation of “Climate Change Displacement Coordination Facility” within the UNFCCC, and countries should consider supporting the development of such a facility.²⁸⁹

Loss and Damage – Countries should also continue to discuss the broader issue of loss and damage in a transparent way that will address the concerns of all affected countries. This could occur within the framework of the existing Warsaw Mechanism, or a new platform could be developed (most likely within the UNFCCC). Additional stakeholders—such as the UN human rights agencies and expert bodies—could be included in this dialogue.

New Mechanisms for International Coordination and Accountability – To facilitate the activities noted above and other rights-related goals, it may be desirable to introduce new mechanisms for sharing information, coordinating responses, and promoting accountability. Some examples might include:

- **Work Programme on Human Rights** – The COP could establish a work program on human rights, pursuant to the recommendation of the Special Procedures mandate-holders of the Human Rights Council.²⁹⁰ This work programme could compile data, conduct research, evaluate progress, and develop recommendations on how human rights can be better integrated into climate change responses.
- **Information Sharing Platform** – Alternatively, or as a complement to a UNFCCC work program, the COP and/or another UN body could introduce a platform for compiling and sharing information and best practices—e.g., examples of successful mitigation and adaptation measures with human rights co-benefits, national and sub-national policies that are particularly mindful of human rights, and cost-effective strategies for improving public participation in climate-related decision-making.
- **Human Rights Accountability** – The COP or another UN body could establish an independent accountability mechanism to evaluate human rights performance in the context of climate-related actions taken by countries and private actors. The UNHCR could also issue a declaration or guidance document calling upon countries to incorporate climate-related considerations into their UPR reports.

²⁸⁹ For a discussion of possible functions that this facility could serve, see Jessica Wentz and Michael Burger, *Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21* (Sabin Center for Climate Change Law 2015).

²⁹⁰ *An Open Letter from Special Procedures Mandate-holders of the Human Rights Council to the State Parties to the UNFCCC* (Oct. 17, 2014), *supra* note 160.

Continued Focus on Environmental Protection and Conservation – A continued focus on environmental protection and conservation will be necessary to address the potential effects of climate change on ecosystems, biodiversity, and natural resources. As such, governmental and private actors should remain dedicated to these goals—for example, through the ongoing and enhanced implementation of MEAs, such as the Convention on Biological Diversity.

4.2 National Measures

National Mitigation – Regardless of what happens within the UNFCCC, countries should continue to pursue domestic GHG reductions to the greatest extent practicable and with a target of achieving a net zero carbon economy, as this will be necessary to safeguard the human rights of persons both within and outside of their territory.

National Adaptation Planning – Countries should consider how to align human rights and climate change adaptation objectives. One approach would be to pursue an integrated response to climate change adaptation and disaster risk reduction, in order to better safeguard human rights in the face of climate-related disasters. National planners should also pursue adaptation measures with environmental and social co-benefits, such as ecosystem-based adaptation, which refers to the conservation, sustainable management and restoration of natural ecosystems to help people adapt to climate change. Decision-makers can refer to UNEP's Ecosystem-Based Adaptation Guidance for additional information on this approach.²⁹¹ Finally, countries must ensure that they do not discriminate against marginalized groups in all adaptation planning activities and in responses to climate-related hazards and disasters.

National Adoption of Human Rights Protections – Countries should incorporate human rights norms into their domestic legal frameworks, including (but not limited to) laws that specifically address climate change. This could include, for example, specific provisions to ensure that the affected public has knowledge of and an adequate opportunity to comment on proposals for domestic mitigation and adaptation policies. In developing domestic policies, countries can consult with existing MEAs, the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, and a Compilation of Good Practices published earlier this year by the Special Rapporteur on Human Rights and Environment,²⁹² among other resources.

4.3 Local Governments and Private Actors

Local Governments – Local governments should undertake measures to reduce GHG emissions within their jurisdiction and pursue adaptation objectives in a manner that is mindful of human rights. As with national governments, local governments should ensure that adaptation responses are non-discriminatory, consider integrating climate change adaptation and disaster risk reduction programs, and pursue adaptation measures with environmental and social co-benefits, such as ecosystem-based adaptation.

Private Sector – Private actors also have important roles to play in addressing climate change and protecting human rights. They can place pressure on national governments to adopt more ambitious policies and cooperate in international negotiations, and can also undertake their own initiatives to reduce their carbon foot print and ensure that they respect human rights in all of their activities. In particular, large businesses should adopt policies that correspond with the recommendations set forth in the UN Guiding Principles on Business and Human Rights.

291 UNEP, *Ecosystem-Based Adaptation Decision Support Framework*, <http://www.unep.org/climatechange/adaptation/EbA/EBADecisionSupportFramework/tabid/102163/Default.aspx> (last visited Oct. 20, 2015).

292 Knox, *Compilation of Good Practices* (2015), *supra* note 253.

Conclusion

Climate change and responses to climate change will have a profound effect on the exercise of human rights for millions and perhaps billions of people across the world. This will occur through both direct impacts on humans and settlements, as well as through the degradation of the ecosystems and environmental resources upon which many lives and livelihoods depend. States have obligations to respect, protect, and fulfill human rights, and this includes obligations to mitigate domestic GHG emissions, protect citizens against the harmful effects of climate change, and ensure that responses to climate change do not result in human rights violations. Although states have taken important steps towards fulfilling these obligations, there is more to be done. In particular, states need to increase their ambition with respect to both climate change mitigation and adaptation, and work cooperatively to ensure the protection of human rights for all citizens across the world.

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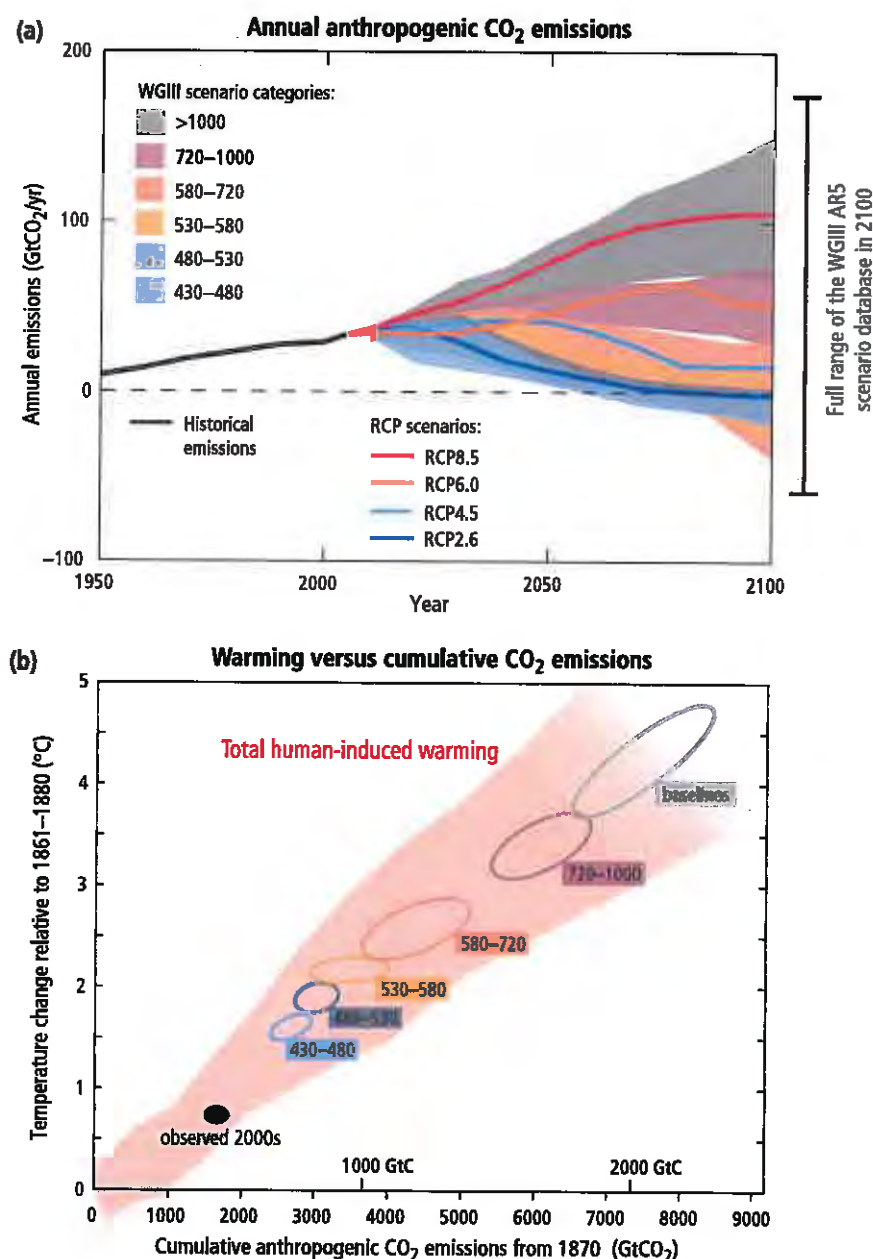


Figure SPM.5 | (a) Emissions of carbon dioxide (CO₂) alone in the Representative Concentration Pathways (RCPs) (lines) and the associated scenario categories used in WGIII (coloured areas show 5 to 95% range). The WGIII scenario categories summarize the wide range of emission scenarios published in the scientific literature and are defined on the basis of CO₂-eq concentration levels (in ppm) in 2100. The time series of other greenhouse gas emissions are shown in Box 2.2, Figure 1. (b) Global mean surface temperature increase at the time global CO₂ emissions reach a given net cumulative total, plotted as a function of that total, from various lines of evidence. Coloured plume shows the spread of past and future projections from a hierarchy of climate-carbon cycle models driven by historical emissions and the four RCPs over all times out to 2100, and fades with the decreasing number of available models. Ellipses show total anthropogenic warming in 2100 versus cumulative CO₂ emissions from 1870 to 2100 from a simple climate model (median climate response) under the scenario categories used in WGIII. The width of the ellipses in terms of temperature is caused by the impact of different scenarios for non-CO₂ climate drivers. The filled black ellipse shows observed emissions to 2005 and observed temperatures in the decade 2000–2009 with associated uncertainties. (Box 2.2, Figure 1; Figure 2.3)



THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS



An Interpretive Guide



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It is impossible to distil six years of research, consultation and reflection into a document the length of the Guiding Principles. This Interpretive Guide is a means to provide some further explanation of those Principles that relate to the corporate responsibility to respect human rights. As work continues to elaborate the implications of this responsibility for different sectors, issues and situations, I hope that this Guide will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves.

Professor John Ruggie



INTRODUCTION

In June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights presented to it by the Special Representative of the United Nations Secretary-General, Professor John Ruggie.

This move established the Guiding Principles as the global standard of practice that is now expected of all States and businesses with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law.

THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK

The Guiding Principles are based on six years of work by the former Special Representative, including in-depth research; extensive consultations with businesses, Governments, civil society, affected individuals and communities, lawyers, investors and other stakeholders; and the practical road-testing of proposals. They were developed to put into operation the “Protect, Respect and Remedy” Framework presented by the Special Representative to the United Nations in 2008. This three-pillar Framework consists of:

- The State duty to protect human rights
- The corporate responsibility to respect human rights
- The need for greater access to remedy for victims of business-related abuse.

The United Nations High Commissioner for Human Rights welcomed the “Protect, Respect and Remedy” Framework, which set:

“both a new and clear benchmark and represents an important milestone in the evolving understanding of human rights in our societies... Clarity about the baseline expectations of business with regard to human rights is a first important step towards developing appropriate and effective responses to such problems”.¹

¹ Navanethem Pillay, “The corporate responsibility to respect: a human rights milestone”, *International Labour and Social Policy Review* (2009).

THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The Guiding Principles reflect and build on the three-pillar structure of the “Protect, Respect and Remedy” Framework. They comprise 31 principles, each followed by a brief commentary. Together, the Guiding Principles outline steps for States to foster business respect for human rights; provide a blueprint for companies to manage the risk of having an adverse impact on human rights; and offer a set of benchmarks for stakeholders to assess business respect for human rights.

The Guiding Principles have gained extensive support from businesses and civil society as well as States. A number of other international and regional organizations have reflected them in their own standards, and more are expected to do so in the months and years to come. Many businesses around the world are already looking at how they can implement the Guiding Principles in their operations.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has supported the six-year long process that led to the Principles under the stewardship of the Special Representative. Before their endorsement by the Human Rights Council, the High Commissioner stated that:

“These Guiding Principles clarify the human rights responsibilities of business. They seek to provide the first global standard for preventing and addressing the risk of adverse human rights impact linked to business activities. If endorsed, the Guiding Principles will constitute an authoritative normative platform which will also provide guidance regarding legal and policy measures that, in compliance with their existing human rights obligations, States can put in place to ensure corporate respect for human rights.”²

As Professor Ruggie has stated, the Guiding Principles will not bring all human rights challenges to an end, but their endorsement marks the end of the beginning. They provide a solid and practical foundation on which more learning and good practice can be built.

² Statement to the Employers’ Group at the International Labour Conference, 7 June 2011.



The first task now is to ensure their effective implementation. This Interpretive Guide, which was developed in full collaboration with the former Special Representative, is designed to support this process.³

THE PURPOSE OF THIS INTERPRETIVE GUIDE

This Guide does not change or add to the provisions of the Guiding Principles or to the expectations that they set for businesses. Its purpose is to provide additional background explanation to the Guiding Principles to support a full understanding of their meaning and intent. The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together.

The Guide is not an operational manual that will explain exactly how to put the Guiding Principles into practice. Further work will be needed to develop such operational guidance, which will vary depending on the sector, operating context and other factors. The United Nations Working Group on Business and Human Rights will play a central role in this regard. In addition, other organizations with particular sectoral or issue-based focuses are already preparing their own thinking on implementation. As they do so, it is hoped that this Guide will assist them by explaining further the intent behind the Guiding Principles that address the corporate responsibility to respect human rights. As such it is a resource not just for businesses, but also for Governments, civil society, investors, lawyers and others who engage with business on these issues.

While this Guide focuses on the corporate responsibility to respect human rights, it in no way reduces the equally important duty of States to protect human rights against abuse by third parties, including business.

THE STRUCTURE OF THIS INTERPRETIVE GUIDE

Chapter I briefly defines some key concepts used in the Guiding Principles.

Chapters II and III focus on the substance of those Guiding Principles that address the corporate responsibility to respect human rights, with a series of basic questions and answers to help interpret each principle, its intent and

³ Special thanks go to Caroline Rees of the Harvard Kennedy School of Government, who served as a senior adviser to the Special Representative's team.

the implications of its implementation. Chapter II covers the five “foundational principles” of the corporate responsibility to respect human rights, which are the basis for all the “operational principles” of chapter III. These operational principles elaborate on the policies and processes businesses need to have in place to ensure that they respect human rights. They follow the same structure as the Guiding Principles:

- A. Policy commitment
- B. Human rights due diligence
- C. Remediation
- D. Issues of context

The Guiding Principles address the issue of remediation both under the second pillar (the corporate responsibility to respect) and under the third (access to remedy). Those Guiding Principles on access to remedy that are relevant to businesses are included here under “Remediation”, for the sake of completeness. Section D focuses on dilemmas where the operating context of a business seems to preclude or limit its ability to respect all human rights in practice.

The annexes contain useful reference material.

THE STATUS OF THIS INTERPRETIVE GUIDE

The formal commentary provided in the Guiding Principles is not reproduced in this Guide, although it is at times quoted. The questions and answers provided here go beyond that commentary to provide additional detail and assistance in understanding the Guiding Principles. As such, they complement the commentary but do not replace or supersede it.

I. KEY CONCEPTS

Actual human rights impact

An “actual human rights impact” is an adverse impact that has already occurred or is occurring.

Adverse human rights impact

An “adverse human rights impact” occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

Business relationships

Business relationships refer to those relationships a business 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. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.

Complicity

Complicity has both legal and non-legal meanings. As a legal matter, most national legislations prohibit complicity in the commission of a crime, and a number allow for the criminal liability of business enterprises in such cases. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is “knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime”.

Examples of non-legal “complicity” could be situations where a business enterprise is seen to benefit from abuses committed by others, such as when it reduces costs because of slave-like practices in its supply chain or fails to speak out in the face of abuse related to its own operations, products or services, despite there being principled reasons for it to do so. Even though enterprises have not yet been found complicit by a court of law for this kind of involvement in abuses, public opinion sets the bar lower and can inflict significant costs on them.

The human rights due diligence process should uncover risks of non-legal (or perceived) as well as legal complicity and generate appropriate responses.

Due diligence

Due diligence has been defined as “such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case”.⁴ In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.

Gross human rights abuses

There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.

Human rights and international crimes

Some of the most serious human rights violations may constitute international crimes. International crimes have been defined by States under the Rome Statute of the International Criminal Court. They are genocide (“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”), crimes against humanity (widespread and systematic attacks against civilians that include murder, enslavement, torture, rape, discriminatory persecution, etc.), war crimes (as defined by international humanitarian law) and the crime of aggression.

Human rights risks

A business enterprise’s human rights risks are any risks that its operations may lead to one or more adverse human rights impacts. They therefore relate to its

⁴ *Black’s Law Dictionary*, 6th ed. (St. Paul, Minnesota, West, 1990).

potential human rights impact. In traditional risk assessment, risk factors in both the consequences of an event (its severity) and its probability. In the context of human rights risk, severity is the predominant factor. Probability may be relevant in helping prioritize the order in which potential impacts are addressed in some circumstances (see “severe human rights impact” below). Importantly, 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.

Leverage

Leverage is an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.

Mitigation

The mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.

Potential human rights impact

A “potential human rights impact” is an adverse impact that may occur but has not yet done so.

Prevention

The prevention of adverse human rights impact refers to actions taken to ensure such impact does not occur.

Remediation/remedy

Remediation and remedy refer to both the *processes* of providing remedy for an adverse human rights impact and the substantive *outcomes* that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Salient human rights

The most salient human rights for a business enterprise are those that stand out as being most at risk. This will typically vary according to its sector and operating context. The Guiding Principles make clear that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise. But the most salient rights will logically be the ones on which it concentrates its primary efforts.

Severe human rights impact

The commentary to the Guiding Principles defines severe human rights impact with reference to its scale, scope and irremediable character. This means that its gravity and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will both be relevant considerations. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

Stakeholder/affected stakeholder


A stakeholder refers to any individual who may affect or be affected by an organization’s activities. An affected stakeholder refers here specifically to an individual whose human rights has been affected by an enterprise’s operations, products or services.

Stakeholder engagement/consultation

Stakeholder engagement or consultation refers here to an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.

Value chain

A business enterprise’s value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise’s own products or services, or (b) receive products or services from the enterprise.



II. FOUNDATIONAL PRINCIPLES

GUIDING PRINCIPLE 11

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

GUIDING PRINCIPLE 12

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

Question 1. What are human rights?

The idea of human rights is as simple as it is powerful: that people have a right to be treated with dignity. Human rights are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Every individual is entitled to enjoy human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations on States to act in certain ways or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.

The 1948 Universal Declaration of Human Rights was drawn up by representatives from many nations to prevent a recurrence of the atrocities of the Second World War and is the cornerstone of modern human rights law. At the World Conference on Human Rights in Vienna in 1993, all 171 participating countries reaffirmed their commitment to the aspirations expressed in that Declaration.

The Universal Declaration is codified in international law through the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966. Each of the Covenants has been ratified by over 150 States. Collectively all three documents are known as the International Bill of Human Rights.

In the sphere of human rights for workers, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work commits all its member States to four categories of principles and rights: freedom of association and the right to collective bargaining; the elimination of compulsory labour; the abolition of child labour; and the elimination of discrimination in respect of employment and occupation. These are covered by the eight core conventions of the International Labour Organization (ILO).

Together these documents constitute the minimum reference point for what the Guiding Principles describe as internationally recognized human rights.

Q 2. How are human rights relevant to States?

States have the legal obligation to respect, protect and fulfil the human rights set out in the international human rights conventions they ratify. Similar responsibilities, though usually not legally binding, result from the human rights declarations and other such political commitments that States make.

The obligation of States to respect human rights means that they must refrain from interfering with or curtailing the enjoyment of human rights. Their obligation to protect human rights requires them to protect individuals and groups against human rights abuses, including by business enterprises. Their obligation to fulfil human rights means that States must take positive action to facilitate the enjoyment of basic human rights.

Q 3. How are human rights relevant to businesses?

International human rights treaties generally do not impose direct legal obligations on business enterprises. Legal liability and enforcement for the infringement by businesses of international human rights standards are therefore defined largely by national law.⁵ However, the actions of business enterprises, just like the actions of other non-State actors, can affect the enjoyment of human rights by others, either positively or negatively. Enterprises can affect the human rights of their employees, their customers, workers in their supply

⁵ It is important to note that national law provisions, and some human rights requirements in contracts, may result from or be heavily influenced by international human rights treaties.

chains or communities around their operations. Indeed, experience shows that enterprises can and do infringe human rights where they are not paying sufficient attention to this risk and how to reduce it.

The International Bill of Human Rights and the core ILO conventions provide basic reference points for businesses in starting to understand what human rights are; how their own activities may affect them; and how to ensure that they prevent or mitigate the risk of adverse impact. *Human Rights Translated: A Business Reference Guide* provides a range of examples under each human right.⁶ (See also box 2 for examples of different ways in which enterprises may be involved in adverse human rights impact.)

Q 4. What additional human right standards may be relevant?

Depending on the circumstances of their operations, enterprises may need to consider additional standards beyond the International Bill of Human Rights and core ILO conventions, in order to ensure that they act with respect for human rights: for instance, if their activities could pose a risk to the human rights of individuals belonging to specific groups or populations that require special attention. Certain United Nations human rights instruments have elaborated the human rights of persons belonging to such groups or populations, recognizing that they may need particular accommodation or protection in order to fully enjoy human rights without discrimination (see box 1).

Vulnerable individuals, groups and communities are those that face a particular risk of being exposed to discrimination and other adverse human rights impact. People who are disadvantaged, marginalized or excluded from society are often particularly vulnerable. Examples may be children, women, indigenous peoples, people belonging to ethnic or other minorities, or persons with disabilities. Vulnerability can depend on context. For example, while women are more vulnerable to abuse than men in some contexts, they are not necessarily vulnerable in all contexts. Conversely, in some situations women from marginalized groups may be doubly vulnerable: because they are marginalized and because they are women.

In armed conflict, the standards of international humanitarian law apply to business enterprises as well as to others. On the one hand, international humanitarian law grants protection to business personnel—provided they

⁶ *Human Rights Translated: A Business Reference Guide* (Monash University, the International Business Leaders Forum, OHCHR and the United Nations Global Compact, 2008). Available from www.ohchr.org.

BOX 1

United Nations human rights instruments elaborating the rights of persons belonging to particular groups or populations

The International Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Rights of the Child

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The Convention on the Rights of Persons with Disabilities

The United Nations Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

In most instances, the rights in these instruments relate to the *individuals* in the groups they address. The United Nations Declaration on the Rights of Indigenous Peoples addresses both the human rights of indigenous individuals and the collective rights of indigenous peoples.

do not take part directly in armed hostilities—as well as to the assets and capital investments of enterprises. On the other, it imposes obligations on managers and staff not to breach international humanitarian law and exposes them—and the enterprises themselves—to the risk of criminal or civil liability in the event that they do so. The International Committee of the Red Cross has developed guidance on the rights and obligations of business enterprises under international humanitarian law.⁷

Q 5. How can all internationally recognized human rights be relevant to business?

The corporate responsibility to respect human rights applies to all internationally recognized human rights, because business enterprises can have an impact—

⁷ *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law* (International Committee of the Red Cross, 2006).

directly or indirectly—on virtually the entire spectrum of these rights. Even rights such as the right to a fair trial, which is clearly directed at States, can be adversely affected if, for example, an enterprise obstructs evidence or interferes with witnesses. In practice, some rights will be more relevant or salient than others in particular industries and circumstances, and companies will pay more attention to them. For example, the human rights risks that are most salient for enterprises in the apparel sector with products made by workers in factories across several countries, will differ from those of enterprises in the extractive sector that have to relocate an indigenous community. But there is nothing *in principle* that precludes any enterprise from causing or contributing to adverse impact on any internationally recognized human right. It is therefore not possible to limit the application of the responsibility to respect human rights to a particular subset of rights for particular sectors.

Q 6. What does “avoid infringing” human rights mean?

This means that enterprises can go about their activities, within the law, so long as they do not cause harm to individuals’ human rights in the process. For example, if a factory or a mine pollutes the water source of the surrounding communities so that people do not have the same access to safe drinking water as before, it has infringed on the enjoyment of the right to safe drinking water. Or, if an enterprise evicts a community without due process, consultation and compensation, it will infringe the right to adequate housing.

Q 7. Is the responsibility to respect human rights optional for business enterprises?

No. In many cases the responsibility of enterprises to respect human rights is reflected at least in part in domestic law or regulations corresponding to international human rights standards. For instance, laws that protect people against contaminated food or polluted water, or that mandate workplace standards in line with the ILO conventions and safeguards against discrimination, or that require individuals’ informed consent before they take part in drug trials, are all different ways in which domestic laws can regulate the behaviour of enterprises to help ensure that they respect human rights.

The responsibility to respect human rights is not, however, limited to compliance with such domestic law provisions. It exists over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses

in all situations. It therefore also exists independently of an enterprise's own commitment to human rights. It is reflected in soft law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). There can be legal, financial and reputational consequences if enterprises fail to meet the responsibility to respect. Such failure may also hamper an enterprise's ability to recruit and retain staff, to gain permits, investment, new project opportunities or similar benefits essential to a successful, sustainable business. As a result, where business poses a risk to human rights, it increasingly also poses a risk to its own long-term interests.

Q 8. Do enterprises have any additional human rights responsibilities?

The Guiding Principles set the baseline responsibility of all enterprises as *respect* for human rights wherever they operate. Beyond that, enterprises may voluntarily undertake additional human rights commitments—such as the *promotion* of certain human rights—for philanthropic reasons, to protect and enhance their reputation, or to develop new business opportunities. National laws and regulations may require additional activities by enterprises regarding human rights in some situations, as may contracts with public authorities for particular projects. For example, a contract with a State for the provision of water services may require a business enterprise to help fulfil the human right to water. Operational conditions may also lead enterprises to take on additional responsibilities in specific circumstances. For example, enterprises may identify a need to make social investments, such as in local health care or education, in order to achieve or maintain support for its operations from surrounding communities (a so-called social licence to operate). Supporting human rights also forms part of the commitment undertaken by signatories to the United National Global Compact.

Debate continues over whether there may be a *responsibility* for some enterprises in some situations to go beyond respect for human rights and also to seek to promote them. This falls beyond the scope of the Guiding Principles, which constitute a global standard of responsibility for *all* businesses in *all* situations and therefore focus on the responsibility to respect human rights. Respect for human rights is about an enterprise's core operations—how it goes about its daily business. It is not about voluntary activities outside its core operations, however welcome these may be.

It is also important to note in this context that there is no equivalent of a carbon off-set for harm caused to human rights: a failure to respect human rights in one area cannot be cancelled out by a benefit provided in another.

GUIDING PRINCIPLE 13

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Q 9. *How can enterprises be involved in adverse human rights impact?*

There are three basic ways in which an enterprise can be involved in an adverse impact on human rights:

- (a) It may cause the impact through its own activities;
- (b) It may contribute to the impact through its own activities—either directly or through some outside entity (Government, business or other);
- (c) It may neither cause nor contribute to the impact, but be involved because the impact is caused by an entity with which it has a business relationship *and* is linked to its own operations, products or services.

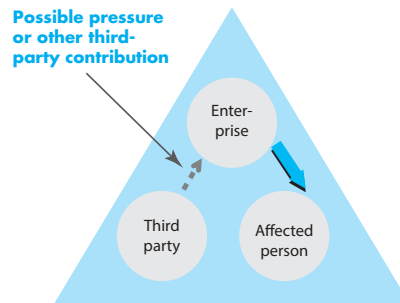
Each scenario has different implications for the nature of an enterprise's responsibilities, as discussed in question 11 below and further elaborated under Guiding Principle 19.

Q 10. *What is meant by "adverse human rights impact"?*

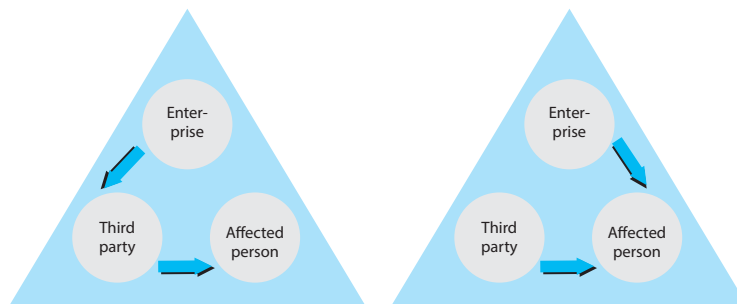
An "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

The Guiding Principles distinguish between "actual" and "potential" human rights impact. Actual impact is one that has occurred or is occurring. Potential impact is one that may occur but has not yet done so.

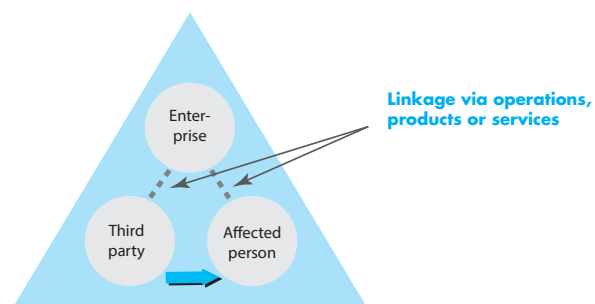
I. Cause



II. Contribution



III. No contribution, but linkage



BOX 2

Examples of business impact on human rights

Examples of situations where business enterprises may be deemed to have caused adverse human rights impact:

- Routine racial discrimination by a restaurant in its treatment of customers;
- Exposure of factory workers to hazardous working conditions without adequate safety equipment;
- Being the sole or main source of pollution in a community's drinking water supply due to chemical effluents from production processes.

Examples of enterprises being accused of contributing to adverse human rights impact:

- Providing data about Internet service users to a Government that uses the data to trace and prosecute political dissidents contrary to human rights;
- Performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment;
- Targeting high-sugar foods and drinks at children, with an impact on child obesity;
- Changing product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver.

Examples of adverse impact that is directly linked to an enterprise's operations, products or services by its business relationships, but where the enterprise itself may not have contributed to it:

- Providing financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities;
- Embroidery on a retail company's clothing products being subcontracted by the supplier to child labourers in homes, counter to contractual obligations;
- Use of scans by medical institutions to screen for female fetuses, facilitating their abortion in favour of boys.

Human Rights Translated contains further examples of how business enterprises can be involved in adverse impact on human rights.

Actual impact requires remediation (see Guiding Principle 22). Potential impact—or human rights risk—requires action to prevent it from materializing, or at least to mitigate (reduce) as far as possible the extent to which it may do so (see Guiding Principles 17–21 on human rights due diligence). Where some residual impact on human rights is unavoidable, this in turn requires remediation.

Q 11. *What should enterprises do if they are at risk of involvement in adverse human rights impact?*

The appropriate responses in these different situations are explored in some detail under Guiding Principle 19. In summary:

- (a) If an enterprise is at risk of causing or contributing to an adverse human rights impact through its own activities, it should cease or change the activity that is responsible, in order to prevent or mitigate the chance of the impact occurring or recurring. If an impact nevertheless takes place, the enterprise should engage actively in its remediation either directly or in cooperation with others (be it the courts, the Government, other enterprises involved or other third parties);
- (b) If an enterprise is at risk of involvement in an adverse impact solely because the impact is linked to its operations, products or services by a business relationship, it does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.

GUIDING PRINCIPLE 14

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

Q 12. What is the relevance of the “severity” of an enterprise’s human rights impact to other factors listed here?

The severity of a potential adverse human rights impact is the most important factor in determining the scale and complexity of the processes the enterprise needs to have in place in order to know and show that it is respecting human rights. The processes must therefore first and foremost be proportionate to the human rights risks of its operations.

Q 13. What is meant by a “severe” human rights impact?

The commentary to this Principle states that “severity of impacts will be judged by their scale, scope and irremediable character”. This means that the gravity of the impact (its scale) and the number of individuals that are or will be affected (its scope) will both be relevant. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact.

It is not necessary for an impact to have more than one of these characteristics to be reasonably considered “severe”, although it is often the case that the greater the scale or the scope of an impact, the less it is “remediable”.

The concept of “severity” is discussed further under Guiding Principle 24, including in the context of risk assessment.

Q 14. How is the size of an enterprise relevant to its responsibility to respect human rights?

All enterprises have the same responsibility to respect human rights as they go about their business. However, size will often influence the kinds of approaches they take to meet that responsibility.

A large enterprise will have more employees, typically undertake more activities and be engaged in more relationships than a small one. This may increase its human rights risks. Large enterprises are also likely to have more complex systems and procedures in place for decision-making, communications, control and oversight. They are more likely than small enterprises to have operations, value chain relationships, clients or customers that span multiple countries, making the implementation and monitoring of standards more challenging.

They may have longer and more complex value chains with multiple forms of relationships, some of them entailing more human rights risks than others.

The policies and processes that a large enterprise needs to ensure respect for human rights by the enterprise as a whole will need to reflect all these factors. They will need to extend to all those in the enterprise who deal with the activities and relationships with which its human rights risks are associated. The significance of embedding respect for human rights across all relevant functions and units of the enterprise is discussed further under Guiding Principle 16.

Small and medium-sized enterprises may have less capacity and more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. With fewer employees, communications across functions may be easier and less formal. Internal systems and oversight functions will typically be less complex.

In many instances, the approaches needed to embed respect for human rights in a smaller enterprise's operations can mirror the lesser complexity of its operations. However, size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity of its actual and potential human rights impact will be the more significant factor. For instance, a small company of fewer than 10 staff that trades minerals or metals from an area characterized by conflict and human rights abuses linked to mining has a very high human rights risk profile. Its policies and processes for ensuring that it is not involved in such abuses will need to be proportionate to that risk.

The commentary to Guiding Principle 17 discusses further how external expertise and pooled resources can assist all enterprises, and particularly small and medium-sized ones, in conducting human rights due diligence that is both effective and proportionate to their human rights risks and their resources.

Q 15. *How is an enterprise's sector and operational context relevant to its responsibility to respect human rights?*

All enterprises have the same responsibility to respect all internationally recognized human rights (see Guiding Principle 12). That said, an enterprise's sector and its operational context will typically determine which human rights it is at greatest risk of having an impact on in the normal course of its operations.

Engagement with local stakeholders will often enable a business enterprise to better understand the context in which it operates.

An enterprise's sector determines many of the activities it engages in, some of which may carry particular human rights risks. For example, agribusiness enterprises often invest in land for new agricultural activities. This land may be inhabited or used by communities for their livelihoods, whether or not they are recognized as having legal title. This creates a particular risk for the right of the individuals concerned to an adequate standard of living. An information and communications technology company may be at particular risk of impacting the rights to privacy and/or information of its users as a result of data sharing or censorship. Enterprises in sectors that routinely work with toxic products, such as chemical companies, many manufacturing companies, as well as mining companies, may pose a particular risk to the right to safe water. (These are mere illustrations. Other rights may also be at risk in these sectors.)

An enterprise's operational context can also make a significant difference. If labour laws are poorly implemented and enforced by the State authorities, then working with suppliers from that region will carry a higher risk of becoming involved in labour rights abuses. If the area is affected by, or prone to, conflict, there may be particular risks with regard to security, the right to life and ethnic discrimination. If the region suffers from water scarcity, then the risk of adverse impact on the right to safe water will be high. If the affected communities include indigenous peoples, then their rights, including their cultural rights, may be at particular risk.

These factors of sector and operational context are therefore especially relevant, or salient, in determining which human rights are at greatest risk from a particular enterprise's operations. As stressed above, this does not mean they should become its exclusive focus. But they will likely need to be the subject of the most systematized and regular attention.

Q 16. *How is an enterprise's ownership relevant to its responsibility to respect human rights?*

All enterprises have the same responsibility to respect human rights regardless of ownership. It applies whether they are publicly listed, privately owned, State-owned, joint ventures or have some other, or hybrid, form of ownership.

Abuse by State-owned enterprises, that is to say, where the State controls the enterprise or where the enterprise's acts can otherwise be attributed to the State, may constitute a violation of the State's own international law obligations.⁸ If States own or control business enterprises, they have the greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. The legal obligations of the State to respect and protect human rights are additional to the enterprise's own responsibility to respect human rights and do not diminish it in any regard.

For joint ventures with significant human rights risks, it is particularly important to ensure that the legal and other agreements underpinning the ventures provide the necessary basis to ensure that human rights are respected in their operations.

Q 17. *How is an enterprise's structure relevant to its responsibility to respect human rights?*

Business enterprises can have various structures. For instance, some are wholly separate—legally and functionally—from any other enterprise; others follow a franchise model with greater or lesser degrees of contractual constraint on franchisees; others are part of cooperatives or create a holding company to link a group of enterprises. Some others operate as a parent company and subsidiaries, with varying degrees of control exercised by the parent company and correspondingly varied levels of devolved authority to the subsidiaries.

The corporate group structure does not make any difference to *whether* entities within the group have to respect human rights. It simply affects *how* they go about ensuring that rights are respected in practice, for instance through their contractual arrangements, internal management systems, governance or accountability structures. If human rights abuses occur, it will be the national law in the relevant jurisdiction that determines where liability rests.

⁸ See the State duty to protect human rights, in particular Guiding Principle 4, not covered in this publication.

GUIDING PRINCIPLE 15

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Q 18. Why are policies and processes required if this is just a question of avoiding harm?

Respecting human rights is not a passive responsibility: it requires *action* on the part of businesses. It is relatively easy for an enterprise to say that it respects human rights and it may genuinely believe that this is the case. But to make that claim with legitimacy, an enterprise needs to know and be able to show that it is indeed respecting human rights in practice. That, in turn, requires it to have certain policies and processes in place. The Guiding Principles define these as: a statement of policy commitment, a human rights due diligence process and processes to enable remediation.

Chapter II elaborates on the factors an enterprise should take into consideration in developing these policies and processes and ensuring that they collectively meet the objective of enabling it to manage its human rights risks effectively. Specifically, section A elaborates on the policy commitment, section B elaborates on human rights due diligence and section C elaborates on remediation. Finally, section D elaborates on issues and challenges arising in particular contexts.

Q 19. What makes policies and processes “appropriate to size and circumstances”?

There is no single answer to this question. It will depend on all the factors discussed under Guiding Principle 14, with the most attention due to the severity of the enterprise’s adverse human rights impact.

Good policies and processes are not necessarily resource-intensive. If a business's human rights risk profile is low, its processes for addressing such risk may be correspondingly simple. Moreover, any business may benefit from drawing on external resources to keep the costs manageable (see box 3 and annex II).

Q 20. *How fast can an enterprise be expected to achieve all this?*

It is relatively easy for an enterprise to assert that it respects human rights or that it is committed to doing so. Meeting that commitment can be notably more complex, particularly in large companies that have vast numbers of personnel, multiple and complex business relationships, and operate in different locations. It is also challenging for enterprises for which these issues are relatively new. Moreover, maintaining respect for human rights will often require constant work to keep up with new challenges.

So even if an enterprise is quick to recognize that it has a responsibility to respect human rights, the reality is that it may take time to know and show that it is actually meeting that responsibility. An enterprise should not try to overcome this hurdle by suggesting that its policy commitment is merely aspirational. This almost inevitably suggests that the commitment is fluid or negotiable, and

BOX 3


Many business enterprises—not just small and medium-sized ones—will benefit from external expert resources that can support and assist their efforts to meet their responsibility to respect human rights. The primary focus should be on the credibility of such resources—written, audio-visual or human. There may be various ways of assessing this. For instance:

- Is there evidence of their successful use by other business enterprises?
- Were they developed by an individual or organization that is trusted by stakeholders and respected in this field?
- Are they referred to, used or trusted by other respected individuals or organizations (in the industry, academia, civil society, including human rights experts, etc.)?

lowers expectations and incentives for its achievement among personnel and business partners. Moreover, the responsibility to respect human rights exists regardless of the enterprise's own commitment: it is not the commitment to meet it that creates the responsibility.

An enterprise is well advised to be transparent about the efforts it makes to manage the transition as it develops or adjusts the policies and processes it needs. It could, for example, provide public information on the timelines it has set for various stages of implementation. It could engage a group of independent experts—respected individuals from civil society, national human rights institutions, academia or other fields—to advise it on the development of these new processes or oversee its own efforts to do so. If it uses a stakeholder or expert panel of this kind, some independent reporting from the panel can provide important transparency and credibility to the ongoing efforts.

In short, if an enterprise is able to demonstrate that it has serious processes under way to put its policy commitment into practice, this can help create the space it needs to develop the internal policies, procedures and practices to deliver on that commitment. Indeed, if an enterprise's human rights challenges are changing over time and require adjustments to the systems that address them, approaches of this kind may be of ongoing benefit.



III. OPERATIONAL PRINCIPLES

A. POLICY COMMITMENT

GUIDING PRINCIPLE 16

As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

- (a) Is approved at the most senior level of the business enterprise;
- (b) Is informed by relevant internal and/or external expertise;
- (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
- (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
- (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Q 21. *Why does this matter?*

The term "policy commitment" is used here to mean a high-level and public statement by an enterprise to set out its commitment to meet its responsibility to respect human rights. It makes this commitment a clear, overarching policy that will determine its actions. The policy commitment is distinct from the operational policies and procedures referred to in subparagraph (e) of this Guiding Principle, which are typically not public, are more detailed in nature and help translate the high-level commitment into operational terms.

A policy commitment to meet the enterprise's responsibility to respect human rights:

- (a) Demonstrates both inside and outside the enterprise that management understands this is a minimum standard for conducting business with legitimacy;

- (b) Clearly communicates the expectation of top management as to how all personnel, as well as business partners and others the enterprise works with, should act;
- (c) Triggers the development of internal procedures and systems necessary to meet the commitment in practice;
- (d) Is the first essential step for embedding respect for human rights into the values of the enterprise.

This Principle states that the policy commitment should stipulate the enterprise's human rights expectations also of business partners and other parties directly linked to its operations, products or services. Doing so provides a starting point from which the enterprise can better leverage respect for human rights in these relationships, should this be necessary. For example, it can facilitate the inclusion of provisions for the respect of human rights in contracts with suppliers and partners; and it can provide the basis for auditing or monitoring performance and for factoring the results into decisions on future business relationships. Conversely, if it is not clear that these expectations with regard to human rights are a firm policy of the enterprise, they can easily become "negotiable" and be sidelined in particular relationships or circumstances. This weakens the ability of the enterprise to ensure it is not involved in human rights abuses by others, which in turn increases its own risks.

Q 22. How detailed should a policy commitment be?

An enterprise's policy commitment will typically remain static for an extended period of time, although it may be updated as lessons are learned. It is a constant reference point for employees, parties with which the enterprise works and its wider stakeholders. It sets the foundational expectation from which the operational policies and processes for its implementation follow. It is therefore not the place for details of policy and process that are likely to shift frequently as circumstances change.

So the degree of detail in a policy commitment may vary. It may simply be expressed as a general commitment to respect all internationally recognized human rights and an expectation that those with whom the enterprise works do the same. It could also include a summary of those human rights that the business recognizes as likely to be the most salient for its operations and information

on how it will account for its actions to meet its responsibility to respect human rights. Nevertheless, the policy should reflect a commitment to respect *all* internationally recognized human rights, even if some are highlighted as being particularly salient.

Q 23. Which human rights issues are most salient to your business?


Those responsible for developing the human rights policy commitment and processes will need to know which human rights the enterprise is most likely to have an impact on—that is, which rights are the most salient to its operations—while also ensuring that these do not become its exclusive focus. Question 15 explores the frequent linkage between salient human rights and an enterprise’s sector or operational context.

For instance, one of the most typical risks for a toy or footwear company will be involvement in labour rights abuses through its supply chain. For a beverage or food company, typical risks are both labour rights and impact on water and/or land use and consumer health. For a pharmaceutical company, the right to health will be particularly salient, as will freedom of expression and the right to privacy for an information and communications technology enterprise.

If an enterprise is typically or regularly operating in contexts that increase the risks to human rights, these may add to the list of salient human rights that its policy commitment could highlight. For instance, a logging or construction company that often operates in areas inhabited by indigenous peoples will particularly need to understand the impact these peoples may suffer; an electronic goods company sourcing largely from a State or region where labour laws are weak or weakly enforced will need to take that into account; an oil company developing new fields in conflict-affected areas may highlight security-related risks in its policy commitment.

Q 24. What relevant expertise can an enterprise draw upon?

There are various sources an enterprise can turn to in order to help it work out which human rights issues it should highlight in its overarching policy commitment and how. In the first instance, the enterprise’s own experience will be an important indicator of the most salient issues, albeit not the only one. The enterprise may have internal human rights expertise to draw on as well.



Looking beyond the enterprise itself, various resources are available, many of them at no cost (see examples in annex II).

In many situations, large enterprises or those with significant human rights risks, in particular, will find it invaluable to consult individuals who are representative of those stakeholder groups most likely to be affected by their operations. These representatives can bring important perspectives on how the enterprises could have an impact on human rights and the potential significance of that impact. They will also be able to advise how the wording of the draft policy commitment is likely to be viewed by these important stakeholder groups.

Q 25. How does the public policy commitment relate to internal policies and procedures?

The implications of the overarching policy commitment need to be understood internally and reflected in relevant internal policies and procedures. It is through them that the commitment is put into practice and can be embedded in the values of the enterprise.

In a small enterprise with very limited human rights risks, it may be sufficient to provide a policy note to staff, highlighting the responsibility to respect human rights and key issues for their attention (for example, non-discrimination), what this means for staff practices and what accountability there will be (including the consequences for breaches).

In a large enterprise, it will often be necessary to have additional internal human rights policies that elaborate the implications of the policy commitment. These might be particular to different departments, such as procurement, human resources, production, sales, etc. It will also be necessary to make sure that other policy areas and procedures are aligned with those related to human rights. If such alignment does not take place, it can be much more difficult for the enterprise to meet its responsibility to respect human rights when problems arise.

For instance, if the buying division of a toy company makes decisions without regard to how they may impact the ability of suppliers to comply with labour rights standards, the enterprise risks contributing to adverse human rights impact. If a construction company rewards operational staff purely on their speed in building new infrastructure and without regard to whether they harm

communities in doing so, it is likely to incentivize behaviours that lead to adverse human rights impact. If an Internet company's staff automatically defer to every Government request for information about users, regardless of the human rights implications, it runs the risk of being involved in any human rights abuses that result.

Several factors are likely to influence the extent to which internal policies and procedures are effective in embedding respect for human rights across an enterprise. Existing systems may provide relevant and effective models, for example systems related to health and safety or non-discrimination that can be built on. Senior management attention and accountability for human rights risk management can also help, as can staff training. Including indicators related to human rights policies and procedures in the performance assessments of staff across *all* relevant functions—not just those that lead on human rights—can be particularly important.

QUESTIONS TO ASK

What elements does our statement of policy commitment to respect human rights need to include in order to:

- (a) Set clear expectations for the behaviour of personnel, business partners and other relevant parties linked to our activities?
- (b) Trigger the necessary internal attention, resources and action for its delivery?
- (c) Be credible in the eyes of our key stakeholder groups?

What sources can we use to help us identify our key human rights risks?

With whom can we test our ideas about which human rights risks are most salient in our sector and in the areas where we operate?

How can we make sure that in focusing on the most salient human rights we do not forget that we might have an impact on others?

Which credible experts could we ask to comment on our draft policy commitment, perhaps as part of a group of external stakeholders?

What additional internal policies and procedures are we going to need to put this policy commitment into practice?

Which departments need to have understanding and ownership of these policies and procedures, and how can we involve them in their development?

Who should sign off on the final policy commitment at the top of the enterprise, to send the signal to all personnel that this is a priority?

How will we communicate our policy commitment publicly, bearing in mind the different ways our stakeholders are able to access information?

B. 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”. See Guiding Principle 13 for more on these three possible forms of involvement in adverse human rights impact.

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. The commentary to Guiding Principle 14 sets out these distinctions more fully, while 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

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

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?

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

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

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?

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?

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?

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. (See question 4 for more on vulnerable populations and groups.)

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.

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 (see Guiding Principle 14). 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. As set out in Guiding Principle 13, 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 (see Guiding Principles 22 and 29).



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

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?

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?

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

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?

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?

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?

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, which is addressed under Guiding Principle 22.

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.

To maximize their effectiveness, such mechanisms should meet the minimum criteria set out in Guiding Principle 31 and discussed in section C below.

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 (see Guiding Principle 14). 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

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?

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

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?

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

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

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?

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?

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

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

C. REMEDIATION

GUIDING PRINCIPLE 22

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Q 62. *Why does this matter?*

An enterprise cannot, by definition, meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation.

Having systems in place to enable the remediation of such impact in no way implies that the enterprise does not intend to respect human rights. On the contrary, it demonstrates a recognition that impact may occur despite its best efforts, and intent to ensure that respect for human rights is restored as swiftly and effectively as possible should this happen.

Q 63. *Does this apply even if the allegations are unfounded?*

No. This Guiding Principle is limited to situations where the enterprise *itself* recognizes that it has caused or contributed to an adverse human rights impact. It is in these situations that the enterprise is necessarily expected to enable the remediation of that impact. It may find that it has caused or contributed to adverse impact through its own impact assessments, grievance mechanism or other internal processes, or the impact may be brought to its attention by other sources and confirmed by its own investigations.

Q 64. When should an enterprise provide directly for remediation?

If an enterprise recognizes it has caused or contributed to adverse human rights impact, it will in many cases be well positioned to play a direct role in providing timely and effective remedy. Remedies can take a variety of forms and it is important to understand what those affected would view as effective remedy, in addition to the enterprise's own view. This may be an apology, provisions to ensure the harm cannot recur, compensation (financial or other) for the harm, cessation of a particular activity or relationship, or some other form of remedy agreed by the parties.

In some circumstances, it may be most appropriate for remediation to be provided by an entity other than the enterprise. For instance, if a court process or some other State-based proceeding is under way, it may be necessary or appropriate for the enterprise to defer to that process rather than pursuing direct remediation. As the commentary to Guiding Principle 22 makes clear, such deferral is likely to be necessary if crimes are alleged. Wherever possible, those affected should have the opportunity to make an informed decision about how they wish to proceed, based on an understanding of the alternatives.

If the enterprise has contributed to the impact but another entity (for instance, a contractor, supplier or the armed forces) is the primary cause and is either providing remediation or being held to account through a legitimate State-based mechanism, it will typically be appropriate to defer to that process whenever a parallel remediation process would undermine it. Such State-based mechanisms could be an ombudsman's office, a labour office, a National Contact Point or national human rights institution. In these and similar cases, the enterprise should cooperate in the remediation process.

Q 65. What kind of remediation processes should an enterprise provide for?

The focus of Guiding Principle 22 is on achieving remediation. That said, the means of providing for remediation can influence the effectiveness of that outcome. For instance, if an enterprise relies entirely on ad hoc processes to remedy any impact it has caused or contributed to, there is unlikely to be a shared understanding within the enterprise as to what kind of response is

appropriate. This creates a risk of internal dispute over how to proceed and of delays in remediation.

Some enterprises may have formalized processes for specific adverse impact that is a particular risk for their operations—for instance, if a pollutant escapes into a waterway or if an employee is injured. The risk of such an issue-specific approach is that there is no clear process available when a less foreseeable impact occurs.

It is therefore generally preferable to have in place agreed processes for the remediation of adverse human rights impact arising in any area of operations, even if this requires more than one type of process (for instance, for direct employees and for external stakeholders).

In many instances, the most effective and efficient way to provide for remediation processes is through an operational-level grievance mechanism. A grievance *mechanism* is not just an internal administrative procedure for handling impact or grievances. Whereas an internal procedure is typically passive, i.e., waiting for problems to arise and then responding, a grievance mechanism is active: it aims to facilitate the identification of grievances and address them as early as possible. It does so by ensuring it is known to, and trusted by, those stakeholders for whom it is intended. The key processes provided by the mechanism are public, as are the general timelines it provides for handling grievances and the ways in which individuals can register their concerns. There is transparency of communication with complainants and accountability to them for the provision of a fair process. A grievance mechanism of course also requires some internal procedures, but these are just part of the larger process it provides.

Grievance mechanisms and criteria for their effectiveness are discussed further under Guiding Principles 29 and 31.

Q 66. What kinds of “legitimate processes” could provide remediation other than those of the enterprise itself?

There may be one or more kinds of State-based mechanisms that are appropriate for providing remediation if the enterprise cannot or should not do so itself. These obviously include the courts and may also include State ombudsman or complaints offices (sometimes specific to an industry), a labour standards office, a National Contact Point (in States that have signed up to

the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development), a national human rights institution, or any other State-administered or statutory body empowered to take on this kind of role. They may also include local, traditional mechanisms used by indigenous or other communities. In some instances, a mechanism administered by a multi-stakeholder initiative might have a role, for example, if complaints involve a supplier or contractor to more than one of its corporate members.

Not all these mechanisms are present or effective in all States. An enterprise will need to seek expert advice on the extent to which such mechanisms in their local operating environment are likely to be able to perform this role in practice, free of corruption or manipulation, and with sufficient credibility in the eyes of complainants for outcomes to be sustainable.

Q 67. What if an enterprise agrees that it has caused or contributed to an impact but does not agree with those affected on the appropriate remedy?

If the enterprise and those affected cannot reach agreement on the appropriate remedy, it may prove necessary either to involve a neutral third party as a mediator or to turn to adjudication.

Any third-party mediator should be freely accepted by all involved. The mediator's role is to assist the parties in the search for an agreed solution and no party to mediation can be forced to accept a particular outcome. If they do agree on an outcome, the parties are free to agree also that it will be binding on them.

Adjudication does not require the parties' agreement to the outcome and is often binding. It could take place through the courts, a governmental or statutory body such as an ombudsman or a national human rights institution, or another mechanism that has jurisdiction or is agreed upon by the enterprise and those affected.

Q 68. What if an enterprise does not accept that it has caused or contributed to a human rights impact?

If an enterprise contests an allegation that it has caused or contributed to an adverse impact, it cannot be expected to provide for remediation itself unless

and until it is obliged to do so (for instance, by a court). Nevertheless, if credible opportunities are available for seeking an agreed resolution to the dispute, whether through negotiation or mediation, an enterprise is often well advised to cooperate in these efforts.

QUESTIONS TO ASK

What processes do we already have in place for remedying any adverse impact we cause or to which we contribute?

How effective have those processes proven to be in the past? Do they involve all relevant parts of the enterprise? Can they be strengthened to make them more effective?

Do they cover all the areas where adverse impact may arise? If not, what gaps do we need to cover with existing or additional processes?

Can we systematize these processes within one or more operational-level grievance mechanisms?

What judicial and non-judicial remedial processes exist in the State(s) where we operate? How effective are they and to what extent can or should we typically defer to them? Who can provide us with expert advice in this regard?

Have there been situations where we could have benefited from a neutral third party to help us agree with those affected on solutions and remedies? Can we envisage such situations in the future? If so, where would we find expert mediators who could assist us in this way and who would be acceptable to all involved?

GUIDING PRINCIPLE 29

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

Q 69. Why does this matter?

As noted under Guiding Principle 22, an enterprise cannot meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation. One of the most systematic ways for an enterprise to provide for the remediation of such impact is through an operational-level grievance mechanism.


Unlike many State-based mechanisms (courts, ombudsman's offices and so forth), an operational-level grievance mechanism does not have to wait until an issue amounts to an alleged human rights abuse or a breach of other standards before it can address it. It can receive and address concerns well before they reach that level and before an individual's or a community's sense of grievance has escalated.

Effective grievance mechanisms also help reinforce aspects of the human rights due diligence process. They can help in identifying adverse human rights impact in a timely manner and in tracking the effectiveness of responses to impact raised through the mechanism. They can also help build positive relationships with stakeholders by demonstrating that the enterprise takes their concerns and the impact on their human rights seriously.

Q 70. What is an operational-level grievance mechanism?

An operational-level grievance mechanism is a formalized means through which individuals or groups can raise concerns about the impact an enterprise has on them—including, but not exclusively, on their human rights—and can seek remedy. As explained in the commentary to Guiding Principle 29, operational-level grievance mechanisms are:

"... accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm."



In sum, their primary purpose is to provide an early point of recourse to identify and address the concerns of directly affected stakeholders before they escalate or lead to otherwise preventable harm.

These mechanisms are distinct from whistle-blower systems, which enable employees to raise concerns about breaches of company codes and ethics, which may or may not harm those individuals, but are of concern to the enterprise as a whole. Operational-level grievance mechanisms are specifically a channel for individuals – inside or outside the enterprise—to raise concern about impact on themselves and they do not require the individual to show a breach of a company code.

Q 71. Does it have to be called a “grievance mechanism”?

“Grievance mechanism” is used in the Guiding Principles and their commentary as a term of art to cover a whole range of mechanisms that address complaints and disputes involving enterprises and their stakeholders. It is possible that the term may have unhelpful connotations in some cultures or contexts, and it is certainly not necessary to label every grievance mechanism with this name. However, it is risky to call a grievance mechanism by a name that its potential users may find inappropriate, for instance one that diminishes or glosses over its real purpose. Doing so may make it more palatable for the enterprise but leave those with grievances feeling belittled and disrespected.

Q 72. To whom should an operational-level grievance mechanism be available?

Most operational-level grievance mechanisms are accessible only to individuals or groups that are directly affected by an enterprise’s operations, or to their legitimate representatives, rather than being open to a wider array of groups that may have concerns or criticisms about its operations. This should not exclude other means of engaging with the wider array of voices and it may be in the interest of the enterprise to do so in at least some instances.

As discussed in the context of Guiding Principle 22, it is fairly usual to have separate grievance mechanisms for direct employees and for external affected stakeholders, though it is not always necessary to separate the two. It may also be important to have tailored grievance mechanisms for particular situations, such as community resettlement, or for particular groups, such as indigenous

peoples. However, the more streamlined the mechanisms, the more easily their effectiveness can be monitored, and the more successful they can be at identifying generalized patterns and trends in how the enterprise is addressing its human rights impact.

Q 73. *What issues should an operational-level grievance mechanism be able to address?*

To be fully effective, a grievance mechanism should not be limited to addressing complaints that amount to alleged breaches of human rights or other specific standards. Such limitations will exclude a host of concerns that may, if neglected, harm human rights or lead to protests or violent action, which in turn may increase the risk of human rights abuses. For instance, communities that find that an enterprise persistently ignores their concerns about noise, dust or work opportunities may feel driven to take action to disrupt its operations as the only way to get its attention, perhaps leading to physical confrontation and even risk to life. One of the comparative advantages of an operational-level grievance mechanism over formal third-party mechanisms is precisely its ability to identify and address problems early, before they escalate.

It is reasonable for a mechanism to exclude clearly vexatious complaints, but great care should be taken before concluding that a complaint falls into this relatively rare category. A complaint that appears vexatious may mask other, genuine concerns with potential human rights implications or wider risks to the enterprise. The default should be to take every complaint seriously in the first instance.

Q 74. *Who should oversee the mechanism?*

A grievance mechanism will rarely be effective without adequate senior-level oversight and accountability within the enterprise. In a small enterprise, this may mean a simple reporting line to the head of the enterprise from whoever handles incoming complaints. In a larger enterprise, it will typically entail more formal internal control and oversight systems. The allocation of oversight roles should avoid any conflicts of interest, for instance, between ensuring the effectiveness of the mechanism and defending the actions or decisions of certain parts of the business.

If trust between the enterprise and affected stakeholders is low or human rights risks significant, it can be highly beneficial to provide for joint oversight of the mechanism by representatives of both the enterprise and the affected stakeholder groups. This can help ensure that the mechanism is trusted by its intended user groups, and that its accessibility and processes are best tailored to their needs. If joint oversight is not deemed necessary or appropriate, there should at a minimum be input to its design or evaluation from the affected stakeholders, as provided under Guiding Principle 31.

Q 75. How does an operational-level grievance mechanism relate to an enterprise's wider operations?

The staff or departments in an enterprise that are responsible for human rights and social issues will need to play a key, coordinating role in any grievance mechanism. But the mechanism will fail if it is seen as solely their responsibility. Resolving and remedying impact will often necessitate the participation of others across the enterprise. The role of senior management becomes particularly significant in ensuring that this kind of cross-functional response to grievances is feasible and prioritized throughout the enterprise, for example through appropriate incentives to relevant staff.

It may be necessary and appropriate for those personnel or departments within the enterprise whose decisions or actions are relevant to an alleged human rights impact to take a role in initial internal investigations. Where that would be inappropriate—for instance, owing to a potential conflict of interest or risk to individuals—they will still have a role in providing information to those conducting the investigation. They may help to craft possible solutions for remediation—again, where this is appropriate. And they will be essential in ensuring the enterprise learns lessons so it can prevent or mitigate any repetition.

Q 76. How does the mechanism relate to wider stakeholder engagement?

The Guiding Principles and this Interpretative Guide repeatedly highlight the role of stakeholder engagement in human rights due diligence for any enterprise with significant human rights risks. An effective grievance mechanism is not a substitute for this broad stakeholder engagement. Rather, it is an important

complement. Having a grievance mechanism, however good, without wider stakeholder engagement processes, risks signalling to affected stakeholders that the enterprise wants to hear from them only when they have real problems.

That said, the Guiding Principles also recognize that small or medium-sized enterprises may not need to engage directly with affected stakeholders if they have limited human rights risks and engagement is a genuine challenge for geographical, financial or other reasons. Such enterprises will look to other means of gathering information and perspectives about their potential human rights impact, as discussed under Guiding Principle 18. For these enterprises, having a simple but effective grievance mechanism can be one way of ensuring that they are still able to identify problems raised directly by those who may be affected.

Q 77. When might an enterprise “participate in” a grievance mechanism rather than establish one itself?

It will typically be appropriate for a large enterprise or one with significant human rights risks to have its own grievance mechanism. Small and medium-sized enterprises with limited human rights risks can also develop grievance mechanisms that are simple in form, yet able to meet the effectiveness criteria set out in Guiding Principle 31. However, enterprises may also consider participating in a grievance mechanism provided by an external organization, if it provides similar opportunities for the early identification and remedy of adverse impact. Examples include a hotline and remediation provided by an external organization—Government, business, NGO or multi-stakeholder—or a traditional mechanism run by the local communities or administration as part of their local practices. Such mechanisms should be reviewed to see whether they meet the effectiveness criteria and how any gaps could be addressed.

Alternatively, an enterprise may establish its own mechanism but use external and shared resources to help reduce its costs and/or increase its capacity and effectiveness. Examples include enabling an NGO trusted by stakeholders to act as an access point and to engage with the enterprise in finding solutions to legitimate complaints. Such an NGO might take on this role for more than one enterprise, whether with independent funding or with pooled funding from the enterprises, provided this does not damage its credibility. Legitimate trade unions should play this kind of role with regard, at a minimum, to the workers

they represent. A number of enterprises might also pool small financial contributions to support a local institution in providing expert advice to complainants or to enable the use of mediation should it be needed.

QUESTIONS TO ASK

Do we already have a mechanism that deals, at least in part, with grievances?

If so, is it available to all potentially affected stakeholders or does its reach need to be broadened? Is it able to address any kind of impact or does it need to be extended to do so?

Is there senior-level oversight of the grievance mechanism and accountability for its performance within the enterprise?

Is there an opportunity for or advantage in having joint oversight of the mechanism with representatives of stakeholder groups? If not, how can we at least solicit feedback from affected stakeholder groups on its performance and possible improvements?

Does the mechanism provide for all relevant business units or functions in the enterprise to be involved in investigating and resolving grievances, while avoiding conflicts of interest or risk to individuals?

If resource constraints make it difficult to run a self-standing grievance mechanism, can we benefit from shared resources to make it feasible or, alternatively, participate in an effective external mechanism?

GUIDING PRINCIPLE 31

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

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Operational-level mechanisms should also be:

- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Q 78. Why does this matter?

Both State-based and operational-level grievance mechanisms need to be effective in order to provide remedy to those affected by corporate-related human rights abuse. A truly effective operational-level grievance mechanism can generate the kinds of benefits discussed under Guiding Principle 29, including the early identification of problems, early and agreed solutions, increased trust, and the avoidance of public protest, litigation or other forms of opposition.

A poorly designed or administered grievance mechanism may distort assessments of how well human rights risks are being managed. It may raise expectations that concerns will be addressed, without providing the processes to deliver on that expectation. In the worst instances, an ineffective grievance mechanism may compound stakeholders' sense of grievance.

It is therefore important that operational-level grievance mechanisms should meet certain criteria that help ensure their effectiveness.

Q 79. Why these criteria?

The criteria in this Guiding Principle were developed through a process of research, consultation and road-testing. There are other ways in which some of them could be articulated or in which the issues they cover could be labelled or clustered. But the core elements they reflect provide a set of benchmarks for ensuring that a mechanism can achieve the benefits and avoid the pitfalls identified in response to question 78. These criteria should be taken as a whole as they are inter-related—excluding one will weaken the ability to meet others and make the mechanism as a whole less effective. The individual criteria are explained further in the commentary to the Guiding Principles.

As noted above, a grievance mechanism's effectiveness requires all relevant departments or functions, as well as senior management, to support it in principle and in practice. It will also be beneficial to include relevant personnel or departments in the development of a grievance mechanism so that they understand its aims and the standards it needs to meet, and support the model developed. It is particularly important for personnel to feel that hearing about problems is not a threat, but constructive and necessary to enable the enterprise to learn and succeed over time.

Q 80. How should a grievance mechanism's effectiveness be assessed?

It will be important for the enterprise to develop appropriate measurements that can help it assess the mechanism's effectiveness in practice. There can be advantages to getting stakeholders' input on what these measurements should include, so as to ensure that their perspective on what "success" looks like is adequately reflected.

An enterprise should be wary of easy assumptions about what certain numerical indicators might mean. A decrease in the number of complaints over time may indicate that the enterprise is learning from past complaints and preventing their recurrence; it may equally indicate that stakeholders are losing trust in the grievance mechanism and perhaps looking at other ways to vent their grievances. Conversely, an increase in complaints—at least initially or after a major new development—may indicate either that the mechanism is trusted and working, or that problems are on the rise. Qualitative indicators—

including feedback from those for whom the mechanism is intended (and not just those who have actually used it)—are important in helping to interpret these kinds of data accurately.

QUESTIONS TO ASK

How does any grievance mechanism we have in place measure up against these criteria?

How can we solicit the views of the intended users of the mechanism on how well it measures up?

Can any gaps we identify be addressed through adjustments to what we have in place or is there merit in redesigning a new process? If the latter, can we involve representatives of the intended user groups (affected stakeholders) in the design?


What long-term measures should we have in place to assess the mechanism's ongoing effectiveness?

How confident are we of how to interpret quantitative data on its performance and how might this be complemented by qualitative measures?

D. ISSUES OF CONTEXT

GUIDING PRINCIPLE 23

In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
 - (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
 - (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.
- 

Q 81. Why does this matter?

The responsibility to respect human rights applies in all contexts. It is a uniform standard, reflecting its roots in the universal expectation that enterprises should not harm the dignity of people as they go about their business. This provides predictability for both enterprises and their stakeholders. However, the human rights risks related to an enterprise's activities and business relationships will often vary depending on the specific contexts in which it operates. Those contexts may pose particular challenges or dilemmas for enterprises in their efforts to meet the responsibility to respect human rights, for example when local requirements appear to compel a business to act in a manner that is contrary to internationally recognized human rights. Enterprises need to be prepared with a basic "compass" for when they find themselves in such situations, since, by definition, there will be no easy or standard answers.

Q 82. How does legal compliance relate to respect for human rights?

Enterprises recognize that their social responsibilities begin with legal compliance. The responsibility to respect human rights is itself often reflected—at least in part—in laws and regulations. The concept of legal compliance requires enterprises to comply with national laws and regulations protecting human rights even if the capacity of the State to enforce such laws effectively is weak.

However, the responsibility to respect human rights extends beyond compliance with national laws and regulations protecting human rights and entails respect for all internationally recognized human rights. It therefore also applies where there are no national laws and regulations to protect these rights. For the same reason, where national laws and regulations offer a level of human rights protection that falls short of internationally recognized human rights standards, enterprises should operate to the higher standard.

In sum, the responsibility to respect human rights, as a global standard expected of all enterprises in all situations, provides clarity and predictability for enterprises facing differing expectations and demands. It also means that enterprises should not take advantage of operating environments that provide insufficient protection for human rights to lower their own standard of conduct.

Q 83. *How should an enterprise deal with conflicting requirements?*

In some operating contexts, domestic laws, regulations or customs may require (as against merely allowing for) enterprises to act in ways that are in conflict with their responsibility to respect internationally recognized human rights. Such requirements could for example be in relation to women's rights, labour rights or the right to privacy. This type of situation presents enterprises with a dilemma when having both to comply with all applicable laws and also to meet the responsibility to respect human rights in all contexts.

An enterprise's human rights due diligence process should reveal where it may be faced with this kind of dilemma and what measures could prevent or mitigate the risk. If there is a direct conflict of requirements, the challenge is to find ways of honouring the principles of internationally recognized rights. As with other issues, there is no blueprint for how to respond. However, the more an enterprise has embedded respect for human rights into its values and the more it has prepared its personnel for ethical dilemmas, through training, scenarios, lessons learned, decision trees and similar processes, the more likely it will be able to identify appropriate and timely responses.

Understanding the exact nature, scope and implications of the conflicting requirements is an important first step in identifying ways of addressing the dilemma. It may be that local requirements are more ambiguous than first thought or that the conflict is in some other way overstated. Recognizing this may provide opportunities for mitigating the conflict. It may be possible to seek clarification from the Government or local authorities about the scope of the conflicting requirement and even to challenge it. This may both help reduce risks to people and to the company, as well as signal to stakeholders the commitment of the enterprise to respect human rights. It may also be possible that others within the industry or country have approaches that mitigate the harm to human rights which can be replicated. For example, some enterprises operating in countries where freedom of association is restricted have established parallel processes to engage with workers.

If an enterprise cannot find immediate or obvious solutions, it will be well advised to engage with relevant expert stakeholders—including, where possible, any groups or individuals whose rights may be affected by the

conflicting requirements. At all times, enterprises need to be aware of any risks that a particular course of action may pose to affected stakeholders and take these into account in their decisions.

It is particularly likely that where enterprises face challenges of this type, their conduct will be under closer scrutiny from stakeholders. Enterprises should be able to account for their efforts to maintain respect for human rights in these situations and it will often be advisable to report on them, provided that doing so does not increase risks to human rights.

In the rare situations where local law or other requirements put an enterprise at risk of being involved in gross abuses of human rights such as international crimes, it should carefully consider whether and how it can continue to operate with integrity in such circumstances, while also being aware of the human rights impact that could result from terminating its activities.

Q 84. *Why should the risk of being involved in gross human rights abuses be considered a matter of legal compliance?*

If enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable. This is so both because of the severity of the human rights abuses at stake and also because of the growing legal risks to companies as a result of involvement in such abuses.

Enterprises can cause gross human rights abuses through their own activities, for example if they use slave labour or treat workers in a manner that amounts to cruel, inhuman or degrading treatment. They may also contribute to gross human rights abuses that are committed by other parties, for example security forces. Such indirect contribution to gross human rights abuse can give rise to allegations of either legal or non-legal complicity.

The commentary to Guiding Principle 17 states that “as a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of enterprises in such cases. Typically, civil actions can also be based on an enterprise’s alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard

for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.” For example, enterprises have faced charges of legal complicity based on allegations that they provided chemicals to another party that then uses them to commit acts of genocide or that they provided logistical support to Government forces engaged in war crimes.

The recent history of legal action—mostly in the form of civil liability lawsuits—against multinational corporations for involvement in gross human rights abuse reveals an uneven, yet expanding web of potential corporate legal liability. Because of the nature of the human rights risks involved, but also because of the expanding legal boundaries, including territorial boundaries in some instances, enterprises should treat all cases of risk of involvement in gross human rights abuses as a matter of legal compliance, irrespective of the status of the law where the business activity is taking place.⁹

Q 85. What situations pose a particular risk of business involvement in gross human rights abuses?

The risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection or where there are entrenched patterns of severe discrimination. Perhaps the greatest risks arise in conflict-affected areas, though they are not limited to such regions. Such contexts should automatically raise red flags within the enterprise and trigger human rights due diligence processes that are finely tuned and sensitive to this higher level of risk. Such heightened human rights due diligence should also be seen as essential if the enterprise has, or is considering entering into, business activities in countries that are under sanctions by the United Nations or regional intergovernmental organizations.

Q 86. Where can an enterprise seek help in assessing and addressing challenges that arise in difficult contexts?

When planning or doing business in contexts that pose particular challenges to the ability of an enterprise to respect human rights, such as conflict-affected areas, many enterprises will find it difficult to assess the risks adequately. If that

⁹ The Business and Human Rights Resource Centre maintains a portal with information on lawsuits regarding alleged business involvement in human rights abuses: www.business-humanrights.org.

is the case, they should seek advice from credible external sources, including civil society organizations working in or reporting from the area. Where appropriate, they can also seek advice from Governments, including that of their home State. National human rights institutions can be another valuable source of advice. Working with business partners, industry bodies or multi-stakeholder initiatives can also help enterprises in devising approaches that are more finely tuned to the human rights risks posed by complex circumstances. (See annex II for more examples of external resources.)

QUESTIONS TO ASK

Are we operating in a context where domestic law related to human rights is weak, unenforced or inexistent? Does our due diligence assess these factors and their implications for human rights risks?

Is it clear to all personnel and to those with whom we have business relationships in those contexts that we work to the standard of respect for all internationally recognized human rights? Do they understand what that entails?

Are we operating in a context where there are conflicting requirements between domestic law and internationally recognized human rights?

If so, how certain are we that the law and international standards cannot be reconciled? Is there scope to approach the authorities in the search for a solution, without increasing risks to human rights?

Are there any well-established ways of dealing with this conflict of requirements or any successful examples from other enterprises?

Faced with real dilemmas, who would we turn to for help in identifying the best possible response? Is it possible to include representatives of affected stakeholders in this process?

What processes do we have in place to account for our decisions and actions in such scenarios?

Where local requirements place us at risk of involvement in gross abuses of human rights such as international crimes, through what processes, and with what senior-level participation, will we determine whether we can remain and, if so, on what terms?

Is the potential of involvement in gross human rights abuses handled within our enterprise as would be a legal compliance issue? Who needs to be involved at what stage to ensure that this is the case?

If we or those with whom we have business relationships are active in conflict-affected areas, do these situations automatically lead to a more rigorous due diligence process within the enterprise?

How will we assess the human rights situation and its implications for us in such conflict-affected areas? On what resources will we draw?

GUIDING PRINCIPLE 24

Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Q 87. Why does this matter?

There is no hierarchy in international human rights law. Rather, human rights are treated as indivisible, interdependent and interrelated. However, it may not always be possible for an enterprise to address all adverse human rights impact immediately. Many enterprises operate in different contexts and have complex supply chains and a multitude of partners. They may be at risk of involvement in a range of adverse human rights impacts, and there may be legitimate resource and logistical constraints on the ability of the enterprise to address them all immediately.

Human rights due diligence and remediation processes aim to help enterprises minimize human rights impact linked to their operations, products and services. If these impacts cannot reasonably be addressed all at once, the focus must be on those that would cause the greatest harm to people. That means prioritizing those impacts that are, or would be, most severe in their scope or scale or where a delayed response would render them irremediable. As soon as the most severe impacts are addressed, the enterprise should turn to those with the next greatest severity and so on until it has addressed all its actual and potential impacts on human rights (bearing in mind that this is likely to be an ongoing exercise that adjusts to changing circumstances).

Q 88. What would count as “severe” impact?

The commentary to Guiding Principle 14 states that the severity of human rights impacts “will be judged by their scale, scope and irremediable character”. This means that both the gravity of the impact and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will be relevant considerations. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

It is not necessary for an impact to have more than one of these three characteristics to be reasonably considered “severe”. That said, it is often the case that the greater the scale or the scope of an impact, the less it can be remedied. In addition, Guiding Principle 24 highlights the fact that a delay in addressing a certain impact may itself make it less remediable and that this should be taken into account in the prioritization. For example, if workers are unfairly dismissed, an extended delay in remediation may oblige them to move in search of other work, making their reinstatement more difficult.

If an adverse impact is potential rather than actual, standard approaches to risk management suggest that the *probability* of it occurring becomes a primary factor, alongside its severity. However, a low probability of a severe human rights impact alone cannot justify reducing the priority of efforts to mitigate the risk. Instead, the remediability of the potential impact must be a key factor in determining the legitimacy of delaying such efforts. In sum, in the context of risks to human rights, the severity of actual or potential risks must be the dominant factor.

In many cases it may be self-evident what kind of impact is “severe” or “irremediable”, for example impact on the right to life and health of individuals or which fundamentally affects the welfare of entire groups or communities. And in cases where an enterprise has identified that it risks being involved in gross human rights abuse addressing this risk should always be given priority.


In other situations it may be less clear what human rights impact should be considered most severe or what factors might affect its remediability. Moreover,

as the commentary to Guiding Principle 24 states, “severity” should not be seen as an absolute concept, but as relative to the other human rights impact the enterprise has identified. Where possible, enterprises are advised to engage with those whose rights are at risk in order to ensure they have understood what impact they may have.

Depending on the operational context, the most severe human rights impact may be faced by persons belonging to groups that are at higher risk of vulnerability or marginalization, such as children, women, indigenous peoples, or people belonging to ethnic or other minorities. If the enterprise decides it needs to prioritize its responses to human rights impacts, it should take into account the vulnerability of such groups and the risk that a delayed response to certain impacts could affect them disproportionately.

Q 89. What does this mean for impact that is not deemed severe?

Addressing the issues deemed as most severe in no way implies that other human rights impact identified through the enterprise’s due diligence process do not need to be addressed. Rather, this principle is about sequencing responses in the event that not all impact can be addressed at once. An enterprise is still accountable for addressing *all* its actual and potential human rights impact. It is also worth keeping in mind that even impact that initially is not considered severe may evolve into more serious abuses (or be perceived to do so) if not addressed properly.



QUESTIONS TO ASK

Do we need to sequence our responses to any adverse human rights impacts we have identified or are they such that we can address them all in parallel?

If we need to prioritize them in order to sequence our responses, do we have a means of assessing the severity of our impacts?

Do our systems for assessing the severity of impacts take account of scope, scale and remediability?

Do they reflect that if a potential impact is severe, it should be a priority for action, regardless of its probability?

Do they pay particular attention to individuals belonging to vulnerable groups who may suffer the most severe human rights impact?

Do they identify situations where a delay in responding to an actual impact may make it harder to remedy?

Once the most severe human rights impacts have been addressed, do our systems automatically move on to the next most severe impacts until all have been addressed?

1

ANNEX I

The rights contained in the International Bill of Human Rights and the International Labour Organization's core conventions

A. The International Bill of Human Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Similar provisions in the two Covenants stipulate non-discrimination and gender equality as overarching principles to be applied in conjunction with specific rights. Both Covenants recognize and define in more detail the rights in the Universal Declaration in the following manner:

International Covenant on Civil and Political Rights

- Article 1: Right of self-determination
- Articles 2 to 5: Overarching principles
- Article 6: Right to life
- Article 7: Right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment
- Article 8: Right not to be subjected to slavery, servitude or forced labour
- Article 9: Rights to liberty and security of the person
- Article 10: Right of detained persons to humane treatment
- Article 11: Right not to be subjected to imprisonment for inability to fulfil a contract
- Article 12: Right to freedom of movement
- Article 13: Right of aliens to due process when facing expulsion
- Article 14: Right to a fair trial
- Article 15: Right to be free from retroactive criminal law

Article 16:	Right to recognition as a person before the law
Article 17:	Right to privacy
Article 18:	Rights to freedom of thought, conscience and religion
Article 19:	Rights to freedom of opinion and expression
Article 20:	Rights to freedom from war propaganda, and freedom from incitement to racial, religious or national hatred
Article 21:	Right to freedom of assembly
Article 22:	Right to freedom of association
Article 23:	Rights of protection of the family and the right to marry
Article 24:	Rights of protection for the child
Article 25:	Right to participate in public life
Article 26:	Right to equality before the law, equal protection of the law, and rights of non-discrimination
Article 27:	Rights of minorities

International Covenant on Economic, Social and Cultural Rights

Article 1:	Right of self-determination
Articles 2–5:	Overarching principles
Article 6:	Right to work
Article 7:	Right to enjoy just and favourable conditions of work
Article 8:	Right to form and join trade unions, and the right to strike
Article 9:	Right to social security, including social insurance
Article 10:	Right to a family life
Article 11:	Right to an adequate standard of living. (This includes the right to adequate food, the right to adequate housing, and the prohibition of forced evictions. This right has also been interpreted to comprise the right to safe drinking water and sanitation.)

- Article 12: Right to health
- Articles 13 and 14: Right to education
- Article 15: Rights to take part in cultural life, to benefit from scientific progress, and of the material and moral rights of authors and inventors

B. ILO core conventions

In 1998, ILO adopted the Declaration on Fundamental Principles and Rights at Work. The Declaration committed members to respect four fundamental principles and rights at work: freedom of association and collective bargaining; elimination of forced and compulsory labour; elimination of discrimination in employment and occupation; and abolition of child labour. Each of these is supported by two ILO conventions, which together make up the eight ILO core labour standards.

1. Freedom of Association and Protection of the Right to Organise Convention, 1949 (N° 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (N° 98)
3. Forced Labour Convention, 1930 (N° 29)
4. Abolition of Forced Labour Convention, 1957 (N° 105)
5. Equal Remuneration Convention, 1951 (N° 100)
6. Discrimination (Employment and Occupation) Convention, 1958 (N° 111)
7. Minimum Age Convention, 1973 (N° 138)
8. Worst Forms of Child Labour Convention, 1999 (N° 182)

ANNEX II

Examples of external expert resources

- Information and advice on human rights risks is increasingly available from some government offices or agencies, whether in general terms, for particular industries, in particular geographical contexts, or for particular issues such as labour rights or indigenous peoples' rights.
- Authoritative online information resources can assist, such as the websites of the Office of the United Nations High Commissioner for Human Rights (www.ohchr.org) and the International Labour Organization (www.ilo.org).
- Other credible sources of advice may be available, such as many national human rights institutions, the ILO Helpdesk for Business on International Labour Standards, as well as respected NGOs and academic institutions focusing on business-related human rights issues.
- The Global Compact is the United Nations global corporate responsibility initiative. The relationship between the Guiding Principles on business and human rights and the Global Compact is outlined here: www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf (accessed 8 March 2012). A range of tools and guidance materials, many of which are also relevant to small and medium-sized enterprises, can be downloaded directly from the website of the United Nations Global Compact (UNGC) (www.unglobalcompact.org/Issues/human_rights_Guidance_Material), for example:
 - **Business and Human Rights Learning Tool** (UNGC/OHCHR, 2011): Web-based modules integrate exercises and case studies on current trends and expectations from business on the implementation of human rights principles, as reflected in the United Nations "Protect, Respect and Remedy" Framework. Upon successful completion of a test, users can obtain a certificate.
 - **The Human Rights Matrix** (Business Leaders Initiative on Human Rights/Global Business Initiative on Human Rights/Credit 360, updated 2010): The Human Rights Matrix is an initial self-assessment and learning tool that enables a company to begin

to understand and address its human rights performance, by identifying its policies on human rights and the approaches it has taken towards human rights. It will help companies visualize, assess and manage their human rights programmes and performance.

- **How to do Business with Respect for Human Rights** (Global Compact Network Netherlands, 2010): This publication builds on the “Protect, Respect and Remedy” Framework of the United Nations Special Representative for Business and Human Rights. Its descriptions, learnings and guidance points are based on the experiences of ten multinational companies of the Global Compact Network Netherlands and are intended to help companies implement a commitment to respect human rights in line with the Framework.
- **Human Rights Translated: A Business Reference Guide** (UNGC/OHCHR/Castan Centre for Human Rights Law/International Business Leaders Forum, 2008): The purpose of this publication is to explain universally recognized human rights in a way that makes sense to business. The publication illustrates, through the use of examples and suggested practical actions, how human rights are relevant in a corporate context.
- **Guide to Human Rights Impact Assessment and Management** (UNGC/International Finance Corporation/International Business Leaders Forum, updated 2010): This interactive online tool is designed to provide companies with guidance on how to assess and manage human rights risks and impacts of their business activities. While the Guide may benefit different types of organizations, companies are its main and intended audience. The Guide can be accessed free of charge, following registration.
- **Guide on How to Develop a Human Rights Policy** (UNGC/OHCHR, 2011): Provides instruction on how companies can develop and implement a human rights policy.

- OECD also provides some widely used tools and guidance, including its Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (2006). Available from www.oecd.org/dataoecd/26/21/36885821.pdf (accessed 8 March 2012).
- Information on human rights impacts for which others in the same industry have been criticized or even taken to court provides a very good indicator of some issues an enterprise should focus on. News coverage can point to the hot human rights issues faced by a particular industry. One widely respected source of such information is the Business and Human Rights Resource Centre (www.business-humanrights.org).
- The web pages of various NGOs that critically assess the activities of enterprises can provide an indication of relevant issues.
- There is often relevant experience and advice available within the enterprise's own industry. Examples of industry initiatives can be found on the website of the Business and Human Rights Resource Centre. Some business associations may also be able to provide guidance to members. Some Global Compact Local Networks have also included human rights in their areas of work and may have relevant information for enterprises seeking guidance with respect to a particular geographic area. See www.unglobalcompact.org/networksaroundtheworld/index.html (accessed 8 March 2012).
- Respected multi-stakeholder or industry initiatives can be a particularly valuable source of advice and experience in addressing business and human rights challenges.
- Collaborative opportunities for addressing shared human rights challenges may exist. For instance, brands and their suppliers may have a common interest in reducing human rights risks in the value chain, enabling the pooling of resources to achieve common objectives.
- For guidance related to business enterprises operating in conflict-affected areas, see "Red Flags: Liability risks for companies operating in high-risk zones", produced by International Alert and Fafo. Available from www.redflags.info/index.php?page_id=14&style_id=0 (accessed 8 March 2012).



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