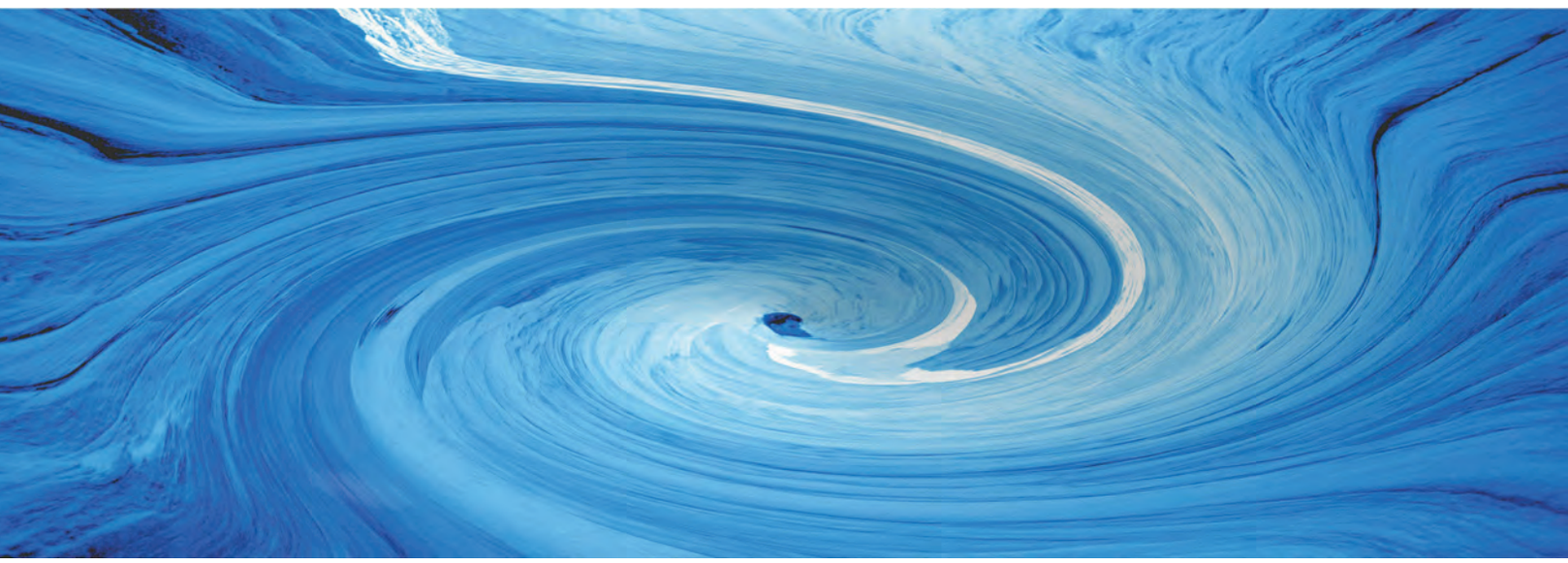

Assessing Business-Related Impacts on Human Rights

Indicators and Benchmarks in Standards and Practice

Dylan Tromp

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ABSTRACT

With a view to informing the policies and practices of states, business enterprises, and other stakeholders towards universal corporate respect for human rights, this study proposes principled and practical indicators to support the assessment of human rights impacts with which business enterprises may be involved. The study identifies a wide array of contexts in which application of the proposed indicators would help to strengthen state approaches to protecting rights-holders against business-related harm in terms of law, policy, regulation, adjudication and participation in multilateral, international and regional organizations. The study also presents a practical methodology for how the proposed indicators can strengthen current private sector approaches to implementing the corporate responsibility to respect human rights, particularly in terms of assessing the human rights risks and impacts that may be associated with core business operations and business relationships.

ZUSAMMENFASSUNG

Die vorliegende Studie möchte einen Beitrag dazu leisten, dass Staaten, Unternehmen und andere Akteure ihre Politik und Praxis der Achtung von Menschenrechten durch Unternehmen gestalten können. Hierzu schlägt die vorliegende Studie konkrete, auf grundlegenden Prinzipien basierende Indikatoren vor, mit denen die menschenrechtlichen Auswirkungen von Handlungen abgeschätzt werden können, an denen Unternehmen beteiligt sind. Darüber hinaus identifiziert die Studie zahlreiche verschiedene Kontexte, in denen die Anwendung der Indikatoren dazu beitragen kann, staatliche Maßnahmen zum Schutz von Rechteinhabern zu stärken, sowohl was Recht, Rechtsprechung, Politik, Regulierung oder auch die Mitwirkung in multilateralen, internationalen und regionalen Organisationen anlangt. Zudem zeigt die Studie auch auf, wie die Indikatoren angewandt werden können, um existierende privatwirtschaftliche Ansätze der Umsetzung von Unternehmensverantwortung zum Schutz von Menschenrechten zu stärken, vor allem im Hinblick darauf, wie menschenrechtliche Risiken und Auswirkungen eingeschätzt werden können, die aus unternehmerischem Handeln und wirtschaftlicher Verflechtung entstehen können.

Table of Contents

1. Executive Summary

With a view to informing the policies and practices of states, business enterprises, and other stakeholders towards universal corporate respect for human rights, this study seeks to achieve three things: First, the study explains why the application of clearly defined, comprehensive and meaningful indicators and benchmarks to the assessment of the human rights impacts with which business enterprises may be involved is a matter of priority importance. To this end, the study examines the notion of the 'severity' of human rights impacts, which is foundational to the United Nations Guiding Principles on Business and Human Rights (UNGPs).[1] In particular, the study identifies key normative challenges inimical to the assessment of impact severity that are left unanswered by the UNGPs, namely: Definition of the terms 'scale', 'scope', and 'irremediable character', by which the UNGPs advise that severity is to be judged; weighting of these three factors against one another in the assessment of impact severity; clarity on how the vulnerability and marginalization of rights-holders should inform and affect assessment of the severity of impacts on their human rights; and clarification on whether and how the probability of impact occurrence is relevant to the priority that companies should accord to addressing the various impacts in which they may be involved. Drawing on authoritative official interpretive guidance on the corporate responsibility to respect human rights that the Office of the United Nations High Commissioner for Human Rights (OHCHR 2012a: 63), issued subsequently to the adoption of the UNGPs, supplemented by other key international standards, this study proposes principled and practicable solutions to each of these normative challenges.

Secondly, drawing on guidance issued by the European Investment Bank (EIB 2013: 63), and other authoritative sources, the study looks beyond the minimum parameters applicable to the assessment of business-related human rights impacts that are set out in the UNGPs to identify five additional dimensions of business-related human rights impacts that may support better identification, assessment, understanding, prioritization, and response to impacts on human rights that companies may cause, contribute to or otherwise be linked to through their business relationships. These five additional dimensions are: Indirect impacts, secondary impacts, cumulative impacts, impact complexity and impact timing, duration and speed of onset.

Finally, in the annexes appended to the study, a wide array of contexts in which the practical and principled indicators and benchmarks for the assessment of the severity of human rights impacts presented in the study would help to address gaps in current approaches are identified. The first annex surveys the landscape of state practice in terms of policies, legislation, regulation, adjudication and participation in multilateral, international and regional organizations, relevant to the assessment of adverse business-related impacts on human rights. The second annex appraises the landscape of human rights assessments commissioned by companies, highlighting emerging trends and

[1] The Human Rights Council unanimously endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011 (UNHRC 2011b).

comparisons between industry sectors. In the third annex, key third-party tools, standards and guidance that have been developed by various stakeholders to support the assessment of human rights impacts in the private sector context are evaluated against the indicators and benchmarks that the study identifies as being central to the effective assessment of business-related impacts on human rights that would be in conformity with the requirements of the UNGPs.

Three broad recommendations for states, business enterprises and concerned stakeholders arise from the analysis in the study:

1. States should incorporate and apply the indicators and benchmarks for the assessment of business-related human rights impacts that are specified by the UNGPs and OHCHR into relevant aspects of policies, legislation, regulations and adjudication, including relevant international and multilateral policy instruments, organizations, initiatives and treaties to which states may be a party. States should appraise opportunities for similarly applying in their policies, legislation, regulations, adjudication and international activities those additional dimensions identified by the EIB as being of central importance to the assessment of business-related human rights impacts.
2. Business enterprises should review and update the indicators and benchmarks by which they assess impacts on human rights in which they may be involved, in order to ensure alignment with the requirements set out by the UNGPs and OHCHR. Business enterprises should also identify opportunities to incorporate the additional dimensions of human rights impact significance identified by the EIB into their risk and impact assessment policies, procedures, and practices.
3. Concerned stakeholders should develop and disseminate practical and publicly available guidance and tools that support the assessment of business-related human rights impacts by states, companies and third parties utilizing the core set of indicators and benchmarks specified by the UNGPs and OHCHR. Such guidance and tools should also support application of the additional dimensions of business-related human rights impacts that have been identified as important by the EIB.

2. Introduction

The issue of business and human rights became "permanently implanted on the global policy agenda" (UNHRC 2011b: 3, para. 1) in the 1990s, in the wake of a series of high-profile controversies involving household name companies such as Nike, Yahoo and Shell (Ruggie 2013). In 2008, by unanimously 'welcoming' the United Nations 'Protect, Respect and Remedy' Framework (UNHRC 2008b), developed by former United Nations Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG), Professor John Ruggie, the United Nations Human Rights Council (UNHRC) inaugurated the international community's official "authoritative focal point" on the issue of business and human rights: A three pillar framework setting out the distinct, complementary, and inter-related

obligations of states and business enterprises vis-à-vis the human rights abuses that companies may cause, contribute to, or to which they may otherwise be directly linked by virtue of their business relationships (UNHRC 2011b: 3, para. 5). In 2011, the 47 member states of the United Nations Human Rights Council unanimously endorsed the UNGPs, intended to "operationalize" the United Nations Framework, thereby establishing "a common global platform for action […] on the effective prevention of, and remedy for, business-related human rights harm" (UNHRC 2011b: 4-5, para. 9, 13, 16).

A keystone of the UNGPs is human rights due diligence by business enterprises, being the principal means by which companies may meet and discharge their corporate responsibility to respect human rights (UNHRC 2011b: 4, para. 6). The assessment of actual or potential adverse human rights impacts with which business enterprises may be involved either through their own operations or as a result of their business relationships is specified by the UNGPs as the "initial step" of human rights due diligence (UNHRC 2011b: 17, Principle 18), one that informs all of the subsequent aspects of the corporate responsibility to respect human rights.[2] In other words, the assessment by business enterprises of the adverse human rights impacts in which they may be involved is foundational to the UNGPs, and therefore also to the United Nations Framework on business and human rights as a whole.

While the UNGPs set out several criteria regarding when business enterprises should assess their human rights impacts (UNHRC 2011b: 17, Principle 18), with whom they should consult in so doing (UNHRC 2011b: 17, Principle 18), and the situations in which formal reporting of assessment findings by companies may be appropriate (UNHRC 2011b: 20, Principle 21), the indicators and benchmarks specified in the UNGPs by which business enterprises are expected to actually assess the severity of the human rights impacts in which they may be involved leave a number of basic issues unsettled. In particular, the UNGPs specify that the severity of business-related human rights impacts ought to be assessed in terms of the 'scale', 'scope', and 'irremediable character' of the impacts, but provide no definitions of these key component terms. Nor do the UNGPs offer guidance on how these three core parameters should appropriately be weighed against one another to arrive at an overall assessment of impact severity.

The UNGPs highlight the overarching need for business enterprises to pay "particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men" (UNHRC 2011b: 6, General Principles (c)). However, the UNGPs neither offer a definition of the terms 'vulnerability' or 'marginalization', nor do they specify in concrete terms how these considerations should appropriately affect assessment of the severity of human

[2] The OHCHR has further clarified that: "Principle [18] does not aim at a single such assessment, but at an ongoing process of assessing impact that will draw on various sources" (2012a: 40). And further that: "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" (OHCHR 2012a: 37).

rights impacts. Moreover, the UNGPs are silent on whether or how the likelihood that a given impact will occur is relevant to the priority that companies should accord to addressing that impact.

These unsettled normative issues matter because the assessment by business enterprises of the human rights impacts in which they may be involved is foundational to the corporate responsibility to respect human rights, and therefore to the UNGPs and United Nations Framework on business and human rights as a whole. Meanwhile, the UNGPs and the United Nations Framework are being referenced and incorporated in whole or in part into an expanding range of state practices, including policies, legislation and regulations spanning an impressive range of policy domains, as well as through the participation of states in international, regional and multilateral organizations, not to mention by business enterprises themselves. The unsettled normative challenges and lacunae pertaining to the indicators and benchmarks that the UNGPs specify for the assessment of business-related human rights impacts therefore compel clarification.

As a starting point, OHCHR has recommended that human rights indicators should be simple; few in number; reliable; based on a transparent and verifiable methodology; in conformity with human rights and international standards; and amenable to contextualization and disaggregation (OHCHR 2012b: 50-51). The present study seeks to propose indicators for the assessment of business-related human rights impacts that meet these six authoritative criteria. In particular, this study proposes principled and practical indicators, doctrinally grounded in and aligned to the UNGPs, and selected and defined in accordance with specific official guidance on the corporate responsibility to respect human rights issued by the OHCHR.[3] The study then looks beyond the horizon of the core parameters set out in the UNGPs and OHCHR to identify additional dimensions, such as those that are applied by the EIB, that may add value and inform best practice in the assessment of business-related human rights impacts.

The annexes that are appended to the study survey the current state of play in state practice in terms of policies, legislation, regulation and participation in

[3] In so doing, this study focuses on indicators and benchmarks by which the UNGPs and other authoritative standards indicate that adverse business-related impacts on human rights should be measured. The study does not focus on other pivotal methodological issues in the assessment of business-related human rights impacts, such as the need for direct consultation with affected rights-holders, or ensuring the independence of assessment processes where companies themselves commission assessments. Moreover, the study focuses exclusively on adverse impacts on human rights, and does not address the measurement of positive effects on the enjoyment of human rights might arise from business operations or business relationships. The UNGPs are clear that, while business enterprises "may undertake … commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights… this does not offset a failure to respect human rights throughout their operations", (UNHRC 2011b: 13, Principle 11). In this connection, NomoGaia, a non-profit research and policy organization dedicated to clarifying the corporate role in human rights protection and facilitating corporate responsibility for the communities impacted by capital projects, has noted that: "It is occasionally argued that a project's positive impacts on the majority of rights-holders should outweigh negative impacts on the minority. This is not how human rights are assessed. Because rights are held by every individual, a negative impact on one rights-holder cannot be neutralized by a positive impact on another" (Salcito 2010: 64). For these reasons, the present study focuses on the assessment by business enterprises of the adverse impacts on human rights in which they may be involved.

multilateral, international and regional organizations, relevant to the assessment of adverse business-related impacts on human rights, as well as examples of actual assessments undertaken by companies, plus selected third-party tools, standards and guidance that have been developed to support the assessment of human rights impacts in a private sector context. The annexes identify a wide array of contexts in which the indicators and benchmarks for the assessment of the severity of human rights impacts that are specified by the UNGPs and OHCHR would address gaps in the current policies and practices of states, business enterprises, and concerned stakeholders.

3. Standards, Indicators and Benchmarks

3.1 Normative foundations

Impact 'severity' and human rights due diligence

The key criterion specified by the UNGPs for determining the priority that business enterprises should accord to addressing the actual and potential human rights impacts in which they may be involved is the 'severity' of those impacts (UNHRC 2011b). Within the UNGPs framework, impact 'severity' is pivotal to four subsequent aspects of the human rights due diligence process that span across the corporate responsibility to respect human rights. Specifically, in the UNGPs, the 'severity' of the human rights impacts in which a business enterprise may be involved is:

- A determinant of the overall complexity and scale of human rights due diligence that is expected of a business enterprise in order to meet and discharge its corporate responsibility to respect human rights (UNHRC 2011b: 14, 16, Principles 14, 17(b)).
- One of the two grounds, in the absence of specific legal guidance, on which business enterprises should prioritize actions to address the actual and potential adverse human rights impacts in which they are involved, in cases where it is necessary to do so because it is not possible to simultaneously address all such impacts (UNHRC 2011b: 21, Principle 21).
- Among the factors that will enter into the determination of the appropriate action for a business enterprise to take where it has neither caused nor contributed to an adverse human rights impact, but is nevertheless directly linked to that impact by virtue of its operations, products or services, or through a business relationship with another entity (UNHRC 2011b: 18, Principle 19).
- A determinant of when business enterprises are expected to publicly and formally report on how they are addressing the human rights impacts in which they are involved (UNHRC 2011b: 20, Principle 21).

The following explication of these implications of impact severity within the UNGPs serves to reinforce the central importance of the concept of impact 'severity' to the United Nations Framework on business and human rights as a whole.

Severity as a determinant of complexity and scale of human rights due diligence

As noted above, the UNGPs highlight severity as a determinant of the overall complexity and scale of human rights due diligence that is expected of a business enterprise in order to meet and discharge its corporate responsibility to respect human rights. On this point, OHCHR in its authoritative *Interpretive Guide* on the corporate responsibility to respect human rights, elaborates further that:

> "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" (OHCHR 2012a: 19).

OHCHR further restates the principle that:

> "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[s] will be the more significant factor" (OHCHR 2012a: 20).

OHCHR also states that, in assessing whether human rights due diligence policies and processes are "appropriate" in the sense meant by the UNGPs, "the most attention [ought to be placed on] […] the severity of the enterprise's adverse human rights impact" (OHCHR 2012a: 23).

Severity as grounds for prioritizing actions to address actual and potential impacts

As we have seen, the UNGPs provide for prioritization of actions by business enterprises to address the impacts in which they are involved, in cases where it is necessary for a company to do so because it is not possible for the company to simultaneously address all such impacts (UNHRC 2011b: 21-22, Principle 24). Indeed, in many cases, business enterprises do need to prioritize their actions on human rights since, as OHCHR recognizes:

> "Many enterprises operate in different contexts and have complex supply chains and a multitude of [business] 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" (OHCHR 2012a: 82).

By implication, the UNGPs require a business enterprise to immediately and simultaneously address the human rights impacts in which it is involved, whenever this is possible.

In relation to the specific role of impact severity as one of the two grounds, in the absence of specific legal guidance, on which business enterprises should prioritize actions to address the impacts in which they are involved, OHCHR further elaborates that:

> "Human rights due diligence and remediation processes aim to help enterprises minimize human rights impact[s] 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" (OHCHR 2012a: 82).

In this connection, it is notable that the only other ground specified in the UNGPs for prioritizing action is "where delayed response would make [the impacts] irremediable […] recognizing that a delayed response may affect remediability"

(UNHRC 2011b: 21-22, Principle 24). Since the UNGPs specify elsewhere that the 'irremediable character' of an impact is one of the three criteria by which the overall severity of an impact will be judged (see discussion, below) (UNHRC 2011b: 14, Principle 14), we may conclude that the relative[4] severity of impacts, with a particular focus on the irremediable character of those impacts, to be the one and only ground legitimately provided for by the UNGPs, in the absence of specific legal guidance, upon which companies may prioritize actions to address the human rights impacts in which they may be involved.

It is notable that this principle established by the UNGPs marks a clear conceptual break with the once dominant but now outdated rubric of the 'sphere of influence'. Introduced to prominence via the United Nations Global Compact (UNGC) (UNHRC 2008c: 19, para. 66), the sphere of influence approach sought to attribute to corporations a responsibility for addressing human rights harm on the basis of the 'influence' that the enterprise had over that harm (UNHRC 2008c: 19, para. 66), rather than on the basis of the actual severity of the harm itself, which is the key criterion specified by the UNGPs. In fact, we can trace this shift from influence to severity as the basis for attributing corporate responsibility for human rights harm to normative evolution during the course of the SRSG's mandate. By 2008, the SRSG had come to the opinion that "influence by itself is an inappropriate basis for assigning corporate responsibility" (UNHRC 2008a: 4, para. 5), since "the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities" (UNHRC 2008a: 8, para. 25; UNHRC 2008c: 20, para. 72). In short, the UNGPs supplanted the sphere of influence notion with an impact-based approach to responsible corporate conduct vis-à-vis human rights.

Synthesizing the role of severity in the prioritization of company action vis-à-vis human rights impacts, and in determining appropriate action where companies are directly linked to human rights impacts by virtue of business relationships, European Commission (EC) guidelines on the corporate responsibility to respect human rights illustrate how the impact-based logic of the UNGPs and the notion of sphere of influence would lead to quite different approaches to prioritizing action. In particular, the EC advises that, "while it may seem simplest to prioritize action on those impacts where the company has greatest leverage, in the context of human rights, it is the severity of impacts that should set priorities; leverage becomes relevant only in then considering what can be done to address them" (EC 2013a: 48). In line with this impact-based approach, the EC specifies that, once companies have assessed the severity of the human rights impacts in which they may be involved, they "may still need to know which risks to address first within each level of severity, starting with those in the most severe category" (EC 2013a: 48). Only at this point may companies "also wish to take account of where they are most able to achieve change" (EC 2013a: 48).

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[4] The UNGPs advise that: "Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified" (UNHRC 2011b: 21, Principle 24).

An involved discussion of how companies should appropriately act in addressing impacts that they may identify through their assessment processes lies beyond the scope of the present study. In connection with the present discussion however, it should be noted that, within the UNGPs framework, a company's connection to, and leverage over, an impact in which it may be involved becomes relevant in terms of how the company should appropriately respond, and not in the assessment of the severity of those impacts *imprimis*. As the UNGPs articulate clearly, the appropriate action that a company should take in response to assessment findings will depend on whether the company causes or contributes to the impact, or whether the company is involved solely because the impact is directly linked to its operations, products or services by virtue of a business relationship (UNHRC 2011b: 18, Principle 19). The UNGPs are clear that the extent of the company's leverage vis-à-vis the human rights impacts in which it may be involved also then becomes relevant only once an assessment of those impacts has been made. Specifically, under the UNGPs, the existence and extent of a company's leverage over an impact is an important determinant of how the company should address the impact and what appropriate actions the company should take (UNHRC 2011b: 18, Principle 19), but not of the overall priority the company should accord to the impact. The key point is that, under the UNGPs framework, action by a business enterprise to address human rights impacts in which it may be involved should be prioritized first and foremost on the basis of impact severity. Only after impacts have been prioritized on the basis of their severity does leverage then become a relevant secondary and supplementary consideration in informing how the company should most effectively go about addressing the identified impacts.

Severity where a business enterprise is linked to an impact by its business relationship(s)

In cases where a business enterprise has neither caused nor contributed to an adverse impact but rather is involved in that impact solely because a business relationship directly links the company's operations, products or services to the impact, the UNGPs highlight that the severity of the impact in question should be among the factors that will enter into the determination of the appropriate action that the company should take (UNHRC 2011b: 18, Principle 19). Within this overall principle, the UNGPs provide that, in situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage, but where the relationship is nevertheless ostensibly deemed by the business enterprise to be "crucial":

> "the severity of the adverse human rights impact must […] be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship" (UNHRC 2011b: 20, Principle 21 and Commentary).

Severity as a determinant of when business enterprises are expected to formally report

Lastly, the UNGPs specify severity as a determinant of when business enterprises are expected to publicly and formally report on how they are addressing the actual impacts in which they are involved (UNHRC 2011b: 20, Principle 21 and Commentary). Providing one rationale for this principle, OHCHR explains that:

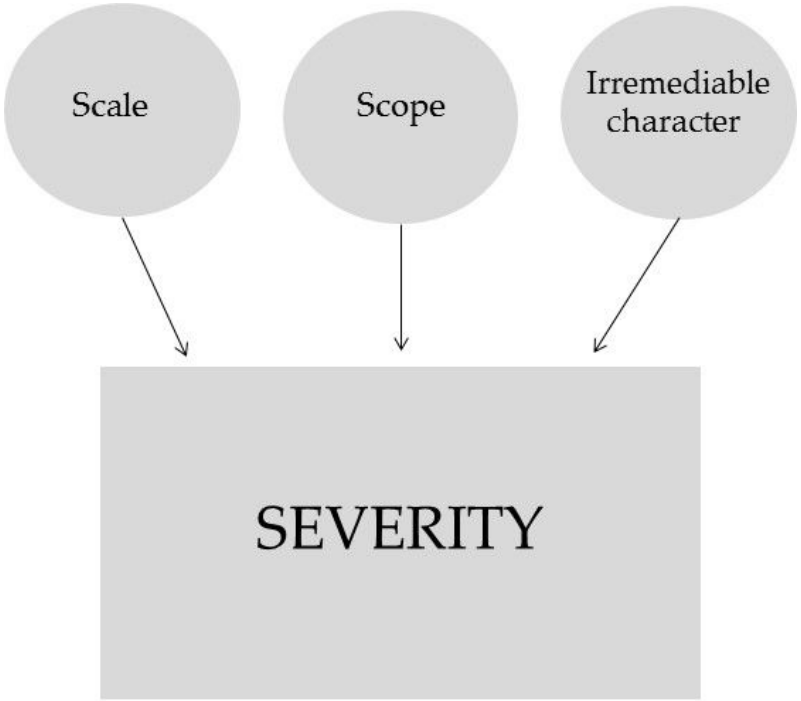
> "A wider public interest is engaged wherever the enterprise is at risk of involvement in [a] human rights impact that is extensive or irremediable […] Public reporting is therefore appropriate" (OHCHR 2012a: 59).

In summary, the severity of the human rights impacts in which a business enterprise may be involved has pivotal implications for the appropriate actions and response that the UNGPs expect of that enterprise. The UNGPs specify four particular implications for the appropriate action that a company should take in light of the severity of the human rights impacts in which it may be involved: Prioritizing actions to address those impacts; the scale and complexity of the means by which the company is expected to address the impacts; the appropriate course of action that the company should take where it is linked to human rights impacts that it did not itself either cause or contribute to; and when formal and public reporting of the impacts and the action that the company is taking to address those impacts may be expected. But how exactly is the 'severity' of an adverse human rights impact to be assessed in the first place? It is to that question that we now turn.

3.2 Severity

The UNGPs offer the following formulation for assessing the severity of the actual and potential human rights impacts in which a business enterprise may be involved: "Severity of impacts will be judged by their scale, scope and irremediable character" (UNHRC 2011b: 14, Principle 14 and Commentary) (see Figure 1).

Figure 1: Scale, scope and irremediable character as criteria to measure business-related human rights impact.



Source: Author's own graphics

Nowhere in the UNGPs are the terms 'scale', 'scope', or 'irremediable character' defined. Reference to supplementary authoritative guidance on the corporate responsibility to respect human rights published by OHCHR (2012a) is therefore necessary in order to understand what these three key terms mean in the context of the UNGPs.

'Scale'

In the context of the assessment by business enterprises of the severity of the impacts in which they may be involved, OHCHR explains that scale means "the gravity of the impact" (OHCHR 2012a: 8, 19). OHCHR does not elaborate further on this definition. Dictionary definitions commonly relate the word 'gravity' to such terms as 'importance', 'significance', and 'seriousness'[5], and provide adjectival definitions of 'gravity' in terms of the 'quality of being grave' in the unfavorable sense of faults, evils or difficulties that are 'highly serious', 'formidable' or that threaten a fatal result. In the absence of specific official clarification on the meaning of the word 'scale' as it applies to the assessment of human rights impacts[6], these supplementary definitions suffice to provide a sense of the ordinary meaning given to the word 'gravity' that may indicate the general way in which we are to interpret the term as it appears in the UNGPs.

While the UNGPs do not offer a definition for the term 'scale' in the context of the assessment of human right impacts, they do however reserve special treatment for a particularly grave class of human rights violations, namely that of 'gross human rights abuses'. Hence, as part of the corporate responsibility to respect human rights, the UNGPs stipulate that:

> "In all contexts, business enterprises should […] [t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate" (UNHRC 2011b: 14, Principle 23).[7]

Authoritative commentary issued by OHCHR elaborates on this point that:

> "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

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5 See, for example, the Oxford English Dictionary and the Merriam-Webster Dictionary.

6 Summarizing leading expert opinion on the genealogy and relevance of the term 'gravity' in the context of human rights violations, Takhmina Karimova has recently written that: "References to the 'gravity' of human rights violations have evolved over time. States often referred to the gravity of violations when they framed ethical foreign policies, or imposed conditions on financial, technical, or technological assistance, for example. The distinction between human rights violations with reference to their gravity has been developed by international human rights supervisory mechanisms. The UN started to take positions on human rights problems around the world, overcoming the domestic jurisdiction limitation in the UN Charter, when it began to distinguish 'gross and systematic' violations of human rights. Over time, egregious and systematic violations of human rights have come to be identified with violations of rights the international community considers fundamental. This is reflected in recognition of *erga omnes* obligations" (Geneva Academy of International Humanitarian Law and Human Rights 2014). See also references cited therein, in particular: G. Abi-Saab (1989) and M. Ragazzi (2000).

7 The UNGPs elaborate further that: In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives" (UNHRC 2011b: 14, Commentary to Principle 23).

> 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" (OHCHR 2012a: 79).

In this connection, the OHCHR further specifies that "heightened human rights due diligence" is the appropriate company response to the risk of involvement in gross human rights abuse (OHCHR 2012a: 80), advising that:

> "The risks of involvement in gross human rights abuse […] should automatically raise red flags within the enterprise and trigger [heightened] human rights due diligence processes that are finely tuned and sensitive to this higher level of risk" (OHCHR 2012a: 80).

As for the state duty to protect human rights against business-related harm, the UNGPs denote that:

> "States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights [...]. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business" (UNHRC 2011b: 11, Commentary to Principle 7).[8]

But when does the scale ('gravity') of a human rights impact reach such a threshold that the impact amounts to gross human rights abuse? Upon involvement in what types of human rights impacts do the UNGPs expect companies to undertake heightened human rights due diligence, while handling their involvement in such impacts as a matter of legal compliance? On this point, OHCHR advises that, while:

> "There is no uniform definition of gross human rights violations in international law […] 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" (OHCHR 2012a: 6).[9]

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[8] Also in relation to the state duty to protect human rights, the UNGPs set out that, "[b]ecause the risk of gross human rights abuses is heightened in conflict affected areas, states for their part should help ensure that business enterprises operating in those contexts are not involved with such abuses". In this connection, the UNGPs set out a number of specific measures states should take to this end, including "[d]enying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation", and "[e]ngaging at the earliest stage possible with business enterprises to identify, prevent and mitigate the human rights-related risks of their activities and business relationships" including by "[p]roviding adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence". The UNGPs also specify that states "should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, states should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses" (UNHRC 2011b: 10-11, Principle 7 and Commentary).

[9] If gross human rights violations represent the very worst 'scale' (gravity) of human rights impacts contemplated by the UNGPs, is there also some minimum threshold below which the effects of a company's operations or business relationships on human rights are so negligible that they do not amount to an impact on human rights in the sense meant by the UNGPs? To answer this question, we may remind ourselves that the nature of the obligation on business enterprises articulated in the UNGPs is to "respect human rights". The SRSG has explained that: "To respect

This juncture presents a good opportunity to squarely address the question: Why not simply assess the severity of a given human rights impact solely on the basis of the 'importance' or 'status' of the human rights norms at stake? The short answer is that it will not in most cases be appropriate to assess the severity of human rights impacts on the basis of the nature of the right alone. Of course, certain human rights norms are considered to enjoy special status under international law. For example, the prohibitions on torture, crimes against humanity, war crimes, genocide, and slavery, are widely considered to have *jus cogens* ('preemptory') status as principles that are "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted". These categories of violation overlap with the indicative open list of 'gross human rights abuses' set out above by OHCHR in its authoritative guidance on the corporate responsibility to respect human rights. Certain international human rights conventions also prohibit derogation from certain of their articles, even during an official state of emergency that may constitute lawful grounds for a state party to derogate from other provisions of the treaty. The International Covenant on Civil and Political Rights (ICCPR), for example, prohibits derogation from its articles setting out the rights to life, equality before the law, freedom of thought, conscience and religion, and prohibitions on slavery and torture, *inter alia*, even during an officially declared state of emergency (OHCHR 1976).

But attempting to assess the severity of business-related impacts on human rights on the basis simply of the nature of the international norms at stake would be an overly narrow approach for many reasons, and it is easy to understand why the UNGPs steer clear of such a one-dimensional approach. Firstly, the very notion of the establishment of an international hierarchy of human rights norms remains controversial. Indeed, core to international human rights law is the principle, set out in the 1993 *Vienna Declaration* that:

> "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" (UN General Assembly 1993).

OHCHR has brought this principle home squarely in the human rights and business context, stating clearly that: "There is no hierarchy in international human rights law. Rather, human rights are treated as indivisible, interdependent and interrelated" (OHCHR 2012a: 82), including when it comes to the corporate responsibility to respect human rights.

Secondly, and relatedly, there is no single authoritative source of law able to provide a definitive list of norms attaining an elevated status. This is an international legal challenge of a 'constitutional' kind. As a statement in point, it

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[human] rights essentially means not to infringe on the rights of others, put simply, to do no harm". As such, we may conclude that all actual and potential negative effects on the enjoyment of human rights in which a company may be involved fall within the definition of 'impact' in the sense meant by the UNGPs. The applicable minimum ambit for impact 'scale' (gravity) in the context of the UNGPs is therefore any adverse impact whatsoever. In other words, a company may legitimately accord a relatively low priority to an impact in which it may be involved due to the relatively greater severity of other impacts in which it may be involved, but the company cannot legitimately discount any of its adverse impacts on human rights altogether. See further UNHRC (UNHRC 2008a: 3, para. 3; 2011b: 13, Principle 11).

has been observed that: "In practice, jurists' attempts to classify certain rules, rights and duties as *jus cogens* or peremptory norms have not met with success: while there is near-universal agreement for the existence of the category of *jus cogens* norms, there is far less agreement regarding the actual *content* of this category" (Legal Information Institute 2016). In light of this, prioritization of actions by a company to address the human rights impacts in which it may be involved based only on the type of international norms breached would likely yield a result of little quality, clarity, utility, legitimacy, or credibility. Clearly, other aspects of human rights impacts beyond merely the legal status of the right(s) at stake must necessarily have a bearing on any sensible assessment of the severity of those impacts. Not least of these factors must be a consideration of the 'scope' of the impact in terms of the number of rights-holders affected. It is to this indicator of impact severity to which we now turn.

'Scope'

The second term in the triptych formula for assessing the severity of human rights impacts provided by the UNGPs is the 'scope' of impacts, i.e. the number of rights-holders affected. The UNGPs themselves offer no definition of the term 'scope'. OHCHR has authoritatively defined the term in the context of the corporate responsibility to respect human rights as "the number of individuals that are or will be affected" by a business-related impact (OHCHR 2012a: 19). Methodically then, we may suggest that the 'scope' of a human rights impact should be enumerated quantitatively as: The total number of individuals that have actually been affected by an actual impact and the estimated number of individuals that may be affected by a potential impact. Importantly, this enumeration should be separately undertaken in respect of each and every impact since, as the UNGPs make clear, "the purpose [of assessing human rights impacts] is to understand the specific impacts on specific people" (UNHRC 2011b: 17-18, Commentary to Principle 18). NomoGaia's Human Rights Impact Assessment of Green Resources Uchindile Forest tree plantation project in Tanzania usefully illustrates how the scope of a human rights impact can be assessed in practice, in terms of the number of rights-holders affected by the impact (Salcito/Wielga/Wise 2009).

Case study: Green Resources Human Rights Impact Assessment: Proposed CHP plant and Transition into Harvesting at Uchindile Forest (Salcito/Wielga/Wise 2009) NomoGaia, 29 October 2009

NomoGaia's Human Rights Impact Assessment (HRIA) of the Uchindile Forest tree plantation project in Tanzania usefully illustrates how the scope of a human rights impact can be assessed in practice, in terms of the number of rights-holders affected by the impact. For example, the assessment found that both of the official trade unions represented on site excluded contract workers from their membership. The assessment found that the plantation engaged 237 contract workers, or some 80 per cent of the plantation's workforce. This number of rights-holders would fall into the '100 – 999' range in the methodology presented in Table 1, below. Hypothetically, if the adverse impact on the right to freedom of association and collective bargaining was judged by the assessor to be 'moderately grave', then the impact would be rated as 'severe', applying the methodology proposed below.

The 'scope' of human rights impacts in the sense meant by the UNGPs is distinct from, but may be related to whatever geographic (i.e. spatial) extent to which those impacts may extend. When it comes to human rights impacts, the 'scope' of the impact should be defined solely in terms of the number of people that are, or that may be affected. The spatial extent of a human rights impact may then be defined derivatively as the complete geographic area within and/or all places at which the affected rights-holders are located. Hence, the spatial extent of a human rights impact could well extend to many separate discontiguous locations. By way of hypothetical example: A multinational oil and gas company is planning to introduce a new contractually-binding requirement into its agreements with its first-tier suppliers and contractors that they must respect the right to freedom of association and collective bargaining of their employees. In order to make implementation of this measure more manageable, the company plans to roll out the requirement in phases over three years, starting with where the new requirement will have the most effect in mitigating the company's involvement in breaches of this right. The company therefore decides to undertake a global assessment of its involvement in impacts relating to this right, disaggregated by country, product/service category (industry sector) as well as type/category of business partner (for example, Small and Medium-sized Enterprises ('SMEs'), privately-owned companies, State-Owned Enterprises ('SOEs'), and so forth), in order to identify its impact 'hot spots'. The spatial extent of the impacts identified in such an assessment would likely span many different locations in many different countries, as defined in terms of the locations of the rights-holders concerned. A real-world example of how the spatial scope of an assessment can be defined based on the spatial extent of impacts on rights-holders is provided in the case study of the 2010 human rights assessment by On Common Ground of Goldcorp's Marlin Mine (On Common Ground Consultants 2010).

Case study: Human Rights Assessment of Goldcorp's Marlin Mine (On Common Ground Consultants 2010)
On Common Ground, May 2010

The 2010 human rights assessment of Goldcorp's Marlin Mine by On Common Ground provides a good example of how the spatial scope of an assessment can be defined based on the spatial extent of impacts on rights-holders. In this assessment, the "primary stakeholders deemed critical to the assessment were defined by two characteristics: Physical proximity to the mining operations and associated facilities (including roads), which includes all land-sellers in and around the mine; and (i)nteraction with the company in ways that directly affected people's human rights, including employees, contractors, and project beneficiaries" (On Common Ground Consultants 2010: 10). Application of these criteria by the assessors resulted in a geographic scope of assessment that extended to four communities immediately adjacent to the mine that had sold land to the operation, as well as adjacent and downstream communities plus two surrounding municipalities.

A key implication of this principle is that rather than first defining either the overall 'area of influence' of a project, operation or business activity, or the 'scope' of a given human rights impact in spatial terms by demarking a physical area and then seeking to assess impacts only on people located within that area, a human rights-based approach to assessing impacts implies that the assessment

should first identify all of the specific rights-holders that might be impacted and then define the spatial scope of actual and potential impacts, and therefore the overall 'area of influence' of a project and spatial scope of impact assessment in terms of where those people are actually located. The distinction between defining the spatial scope of an assessment in terms of a pre-determined geographic boundary as opposed to the actual locations of the rights holders who stand to be affected is well illustrated in the case study below of NomoGaia's Human Rights Impact Assessment (HRIA) of Dole's El Muelle plantation in Costa Rica (Salcito 2010).

Case study: Dole Human Rights Impact Assessment: El Muelle Pineapple Project of Cutris District", Draft for Comment (Salcito 2010)
NomoGaia, 3 December 2010

NomoGaia's Human Rights Impact Assessment (HRIA) of the El Muelle plantation in Costa Rica, which is owned and operated by Dole, highlights the distinction between defining the spatial scope of an assessment in terms of a geographic boundary, in this case, the area of a plantation, versus defining spatial scope in terms of the actual locations of the rights holders who stand to be affected. NomoGaia identified a number of adverse impacts on the human rights of rights-holders located beyond the geographic confines of the plantation area itself, including a decline in the quality of housing for non-employees living along major project routes, resulting from project-related dust and noise. NomoGaia noted that: "The company has struggled to see that rights-holders relevant to its operations are not just employees but also the people external to the project, who are impacted by operations both directly and indirectly. This perspective has resulted in declining human rights protections for residents […] and may, if unchanged, result in human rights campaigns and lawsuits against the company" (Salcito 2010: 6). NomoGaia concluded that the right to housing and the right to an adequate environment of these individuals was likely to be severely negatively impacted by the project to the extent that it posed a risk to the success of the project itself. Had the spatial scope of NomoGaia's assessment been defined narrowly in terms of the area of land owned and operated by the company, it seems likely that the assessment would not have been able to so successfully identify and assess these critical impacts.

'Irremediable character'

The third and final factor by which the UNGPs specify that business enterprises are to judge the severity of the impacts in which they may be involved is the 'irremediable character' of those impacts. The UNGPs do not furnish a definition of 'irremediable character'. OHCHR clarifies that, in the context of business-related human rights impacts, 'irremediability' means:

> "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" (OHCHR 2012a: 83).

OHCHR advises that since "a delay in addressing a certain impact may itself make it less remediable […] this should be taken into account in the prioritization" (OHCHR 2012a: 83), and further clarifies that for the purposes of judging the irremediable character of an impact, "financial compensation is relevant only to the extent that it can provide for such restoration" (OHCHR 2012a: 83). In other words: "Wherever possible, remediation should involve repairing the damage done" (Schutter et al. 2012: 57), as per the principle of *restitutio in integrum* (Schutter et al. 2012: 57).

The 'irremediable character' of an impact will of course often correlate with its 'scale' (gravity), for the logical reason that it is difficult to remediate harm that is grave. For example, impacts involving permanent injury due to workplace accidents, incurable illness due to occupational disease, or loss of life due to industrial disasters are not only of extreme 'scale' (gravity), they are also irremediable. Impacts that are extensive in scope, affecting a large number of people, may also be challenging to remediate, due to their logistical complexity. Hence, as OHCHR notes, "it is often the case that the greater the scale or the scope of an impact, the less it can be remedied" (OHCHR 2012a: 83). The irremediable character of an impact is nevertheless a distinct consideration from either its scale (gravity) or scope (extent), and the UNGPs specify that it should be assessed in and of itself. It is to a proposal for a principled and practical approach by which the scale, scope and irremediable character of business-related impacts on human rights can be assessed to derive an overall rating of the severity of those impacts that we now turn.

Assessing 'severity' on the basis of 'scale', 'scope' and 'irremediable character'

We have seen that the UNGPs specify that the scope, the scale, and irremediable character are the three factors by which a business enterprise should assess the severity of human rights impacts in which it may be involved (UNHRC 2011b: 14, Principle 14 and Commentary). But what is the appropriate relationship between these three factors? How ought these factors to be weighed against one another to arrive at an overall assessment of impact severity? The UNGPs are silent on this point. OHCHR does not address this question directly in its authoritative guidance (OHCHR 2012a), but does establish the general principle that: "It is not necessary for an impact to have more than one of [the] characteristics [of scale, scope, or irremediable character] to be reasonably considered 'severe' […]" (OHCHR 2012a: 19). It follows that whatever methodology is used to relate the three factors together, it must be such that an impact that is grave in scale, but neither extensive in scope nor irremediable in character will be appropriately judged to be severe, as will impacts that are extensive in scope but that are quite readily remediable and not especially grave, as will impacts that are deemed to be irremediable even though they are neither especially extensive in scope nor grave in scale.

Based on this principle, the below table proposes a methodology by which business enterprises may assess the severity of the impacts on human rights in which they may be involved on the basis of the 'scale' (gravity) and 'irremediable character' of those impacts as well as the number of individuals that are already, or that may in future be affected by those impacts. Note that 'scale' and 'irremediable character' are here represented on the same axis of assessment. This is because of the close interrelatedness of these two variables, as discussed above, as well as practicality of application. Nevertheless, the methodology allows for a high rating on either of these two factors to inform assessment of the severity of a human rights impact, which is in line with the principle established by OHCHR.

TABLE 1: Methodology for assessing 'severity' on the basis of 'scale', 'scope' and 'irremediable character'

Scale and Irremediable character The gravity of the impact and 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 (OHCHR 2012a: 8, 19, 83).	Scope. The number of individuals that are or will be affected by the impact (OHCHR 2012a: 19).				
	1 person	*2 – 9 people*	*10 – 99 people*	*100 – 999 people*	*> 1,000 people*
Not grave and/or easily remediable	Not severe	Not severe	Not particularly severe	Moderately severe	Moderately severe
Moderately grave and/or some limitations on remediability	Moderately Severe	Moderately Severe	Moderately Severe	Severe	Very severe
Grave and/or significant limitations on remediability	Severe	Severe	Very severe	Very severe	Extremely severe
Gross human rights violation and/or irremediable	Very severe	Extremely severe	Extremely severe	Extremely severe	Catastrophic severity

As we shall see, the output of this step in the proposed methodology provides the input for the next step: Analysis of the implications of differential vulnerability to impacts of specific rights-holders for the assessment of the overall severity of impacts vis-à-vis particular groups.

It is worthwhile here to note also that measuring human rights impacts implies assessing or anticipating a change in the status of the enjoyment of particular human rights by particular rights-holders. It follows that this change in status should be ascertained *ex post* (in the case of actual impacts) or anticipated *ex ante* (in the case of potential impacts) by reference to a baseline condition. Indeed, experience shows that in the absence of baseline data, assessing impacts on the enjoyment of human rights attributable to particular business activities is a challenging task. For example, the 2010 assessment cited in the case study above of the human rights situation around, and related to, the presence and operations of the Marlin Mine in Guatemala, a gold and silver mine owned and operated by a fully owned subsidiary of Goldcorp, concluded that: "Absence of prior baseline studies about human rights or relevant social issues

[…] made accurate measurement of the existence and extent of human rights impacts […] difficult" (On Common Ground Consultants 2010: 9).

To summarize, we have seen that impact 'severity' is a concept that is pivotal to human rights due diligence. In fact, the determination of impact 'severity' has implications for how business enterprises are expected to discharge their responsibility to respect human rights in ways that span across the corporate responsibility to respect human rights: From prioritizing impacts, to determining whether or not formal public reporting is required. We have also seen how the component factors by which business enterprises are to judge the severity of human rights impacts (scale, scope and irremediable character) can be operationally defined. Furthermore, we have seen how these aspects can be weighted and interrelated to yield an overall assessment of the severity of business-related human rights harm. It remains to consider how the vulnerability or marginalization of those that may be affected by a human rights impact should affect a company's assessment of the overall severity of that impact. This is the issue that we will now address.

3.3 Vulnerability

We have seen that the severity of the impacts in which companies may be involved is a key determinant of the appropriate action that they should take across many aspects of human rights due diligence and the corporate responsibility to respect human rights as set out in the UNGPs. At the same time, the UNGPs specify that, in the process of assessing their human rights impacts,

> "business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men" (UNHRC 2011b: 17-18, Commentary to Principle 18).

OHCHR further specifies that:

> "If the enterprise decides it needs to prioritize its responses to human rights impacts, it should take into account the vulnerability of […] groups [that are exposed to those impacts] and the risk that a delayed response to certain impacts could affect [those groups] disproportionately" (OHCHR 2012a: 84).

The UNGPs do not define the terms 'vulnerability' or 'marginalization'. Nor do the UNGPs specify concretely how the vulnerability or 'marginalization` of rights-holders should affect assessment of the severity of impacts on their human rights. This leaves it unclear how, in practical terms, assessment by a company of its human rights impacts should appropriately take into account the vulnerability or marginalization of the rights-holders whose human rights the company may be involved in infringing.

Vulnerability depends on context

When extending the SRSG's mandate in 2008, the United Nations Human Rights Commission requested the SRSG to "integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children" (UNHRC 2008b: 3, para. 4(d)). In terms of specific groups or populations that are called out for such 'special attention' in the UNGPs prepared by the SRSG in response to this mandate we find: Women, national, ethnic, religious and linguistic minorities, children, persons with disabilities, and

migrant workers and their families (UNHRC 2011b: 8, 13, Principle 3, 12). To this short but open list, we might wish to add many other categories of rights-holders such as: Human Rights Defenders, child laborers, plantation workers, young workers, members of trade unions and trade union officials, victims of human trafficking, seafarers, victims of forced or bonded labour, older persons, fishers, persons living in extreme poverty, dock workers, unemployed persons, people of African Descent, night workers, persons with albinism, internally displaced persons, persons living with HIV/AIDS, refugees and persons identified on the basis of their sexual orientation and/or gender identity (e.g. LGBTI persons). Each of these groups are the subject of specific international human rights treaties (OHCHR 2016b), dedicated thematic mandates of the Special Procedures of the United Nations Human Rights Council (OHCHR 2016d), international labour standards (ILO 2016), or other international instruments.10 Organizations such as the International Finance Corporation (IFC) have incorporated certain of these principles into their guidance to business enterprises regarding human rights impact assessment (Abrahams/Wyss 2010: 42). In its *Guide to Human Rights Impact Assessment and Management*, the IFC advises companies to identify: "Key individuals and groups that may be differentially or disproportionately affected by […] business activity because of their disadvantaged or vulnerable status" (Abrahams/Wyss 2010: 42). The iFC further advises companies further that "this status may stem from an individual's or group's race, color, gender, language, religion, political or other opinion, property titleship or birth place" (Abrahams/Wyss 2010: 42).

OHCHR cautions against a simplistic labeling of certain demographic categories as so-called 'vulnerable groups', promoting instead a contextualized assessment of vulnerability that is grounded in the realities of local situation:

> "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" (OHCHR 2012a: 11).

UNICEF, in its recent guidance to companies on respecting and supporting the human rights of children, has utilized the example of young migrant workers to illustrate the decisive importance of considering contextual factors when assessing the vulnerability of specific groups of rights-holders (UNICEF 2014). UNICEF advises companies that:

> "Young migrant workers are particularly vulnerable to abusive labour arrangements and trafficking because they are outside the protective environment of their community and, in some cases, outside their home country. Furthermore, when unaccompanied, they are separated from the protective environment of their family" (UNICEF 2014: 25).

In other words, it is not simply that they fall within a given demographic category that determines the vulnerability of young migrant workers. Rather, in appraising the vulnerability of particular rights-holders, companies should also consider the specific features of the context.

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10 Human trafficking, for example is the subject of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (OHCHR 2000).

When it comes to assessing the context of vulnerability in practical terms, the EIB advises that relevant factors to consider will include: "Poverty, isolation, insecurity, entrenched social attitudes, gender roles, systemic discrimination and language barriers" (EIB 2013: 64). The IFC advises companies to "consider factors such as culture, health status, physical or mental disability, poverty or economic disadvantage, and dependence on natural resources" (Abrahams/Wyss 2010: 42) when appraising the vulnerability of specific rights-holders to business-related human rights impacts.

Clearly, context is important when assessing the vulnerability of specific rights holders to specific business-related impacts on their human rights. Since, as the UNGPs clearly articulate, the very purpose of assessment by business enterprises of their human rights impacts "is to understand the specific impacts on specific people" (UNHRC 2011b: 17-18, Commentary to Principle 18), it follows that companies should undertake a contextualized assessment of the differentiated vulnerability of specific rights-holders to those impacts which the company causes, contributes to, or to which it is otherwise directly linked.

In many ways, it is axiomatic that a company's activities, operations and business relationships will affect different rights-holders in different ways. For example, where a company is involved in the acquisition of land, those landowners in possession of formal title deeds may stand to benefit, while other occupiers and users of the land who lack formal title may well find themselves adversely affected. Indeed, OHCHR has clearly indicated that vulnerability and marginalization are directly relevant to impact assessment. OHCHR has specified in particular that:

> "the most severe human rights impact[s] may be faced by persons belonging to groups that are at higher risk of vulnerability or marginalization (OHCHR 2012a: 84) […]. People who are disadvantaged, marginalized or excluded from society are often particularly vulnerable (OHCHR 2012a: 11) […]. 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 [companies do] not contribute to, or exacerbate, such discrimination" (OHCHR 2012a: 40-41).

Guidance issued by other multilateral and international organizations has also drawn attention to the relevance of vulnerability for the determination of impact severity. In particular, all three industry-specific guides to the corporate responsibility to respect human rights published to date by the EC explicitly make the link between impact severity and the vulnerability or marginalization of the rights-holders affected, stating in particular that: "Impacts can be more severe where individuals are vulnerable or marginalised" (EC 2013a: 13), and that: "Vulnerable or marginalized individuals typically experience negative impacts more severely than others" (EC 2013a: 30). The EC advises companies that, therefore: "Vulnerable or marginalised […] individuals, or groups they are part of, may require specific, and if necessary separate, consultation and mitigation measures to ensure that negative impacts do not fall disproportionately on them, and are appropriately avoided, mitigated or compensated" (EC 2013a: 96).

Vulnerability makes a critical difference to the impact that business activities can have on specific groups. UNICEF brings this home squarely in relation to impact on children. For example, UNICEF advises companies that:

> "Childhood is a unique period of rapid development when physical, mental and emotional well-being can be permanently influenced for better or worse […] Because children are experiencing crucial stages in the life cycle of human development, the impacts of human rights violations on children are often irreversible (UNICEF 2014: 5, 8). Common occurrences impact children differently and more severely than adults […] disruptions that adults may readily cope with can be defining events in a child's life, for example, if children are exposed to pollutants they absorb a higher percentage of toxins and are less able to expel harmful substances from their bodies […]" (UNICEF 2014: 5).

In even more specific and concrete detail, UNICEF further advises companies that:

> "Children are at greater risk from environmental hazards than adults due to their physical size, developing bodies, metabolic rate, natural curiosity and lack of knowledge about the threats in their environment […] The size of children's bodies, the developmental stage of their internal organs and systems, and their characteristic habits make them far more vulnerable to health risks from pollution and toxins than the same exposure by adults […] When children play on the ground, their potential intake of polluted soil and dust increases. They are more exposed to dietary sources of pollution because, compared to adults, they drink more water and eat more food in proportion to their body weight. If water contains residues of pesticides or other chemicals, for example, infants will receive more than double the dose taken in by an adult drinking the same water […] As children breathe, they take in more air per unit of body weight than adults, resulting in greater exposure to pathogens and pollutants" (UNICEF 2014: 40).

Not only children, but also young workers are more vulnerable to business-related harm than adults:

> "Young workers are particularly vulnerable to many forms of violence, exploitation and abuse – including sexual exploitation, unfair wages and conditions that take advantage of their age, inexperience and powerlessness. Due to their size and stage of development compared to adults, young workers are at greater risk of physical and psychological problems related to work" (UNICEF 2014: 24).

Similar analyses have been produced by other international organizations on the specific and differentiated vulnerability to business-related harm of many other groups of rights-holders.

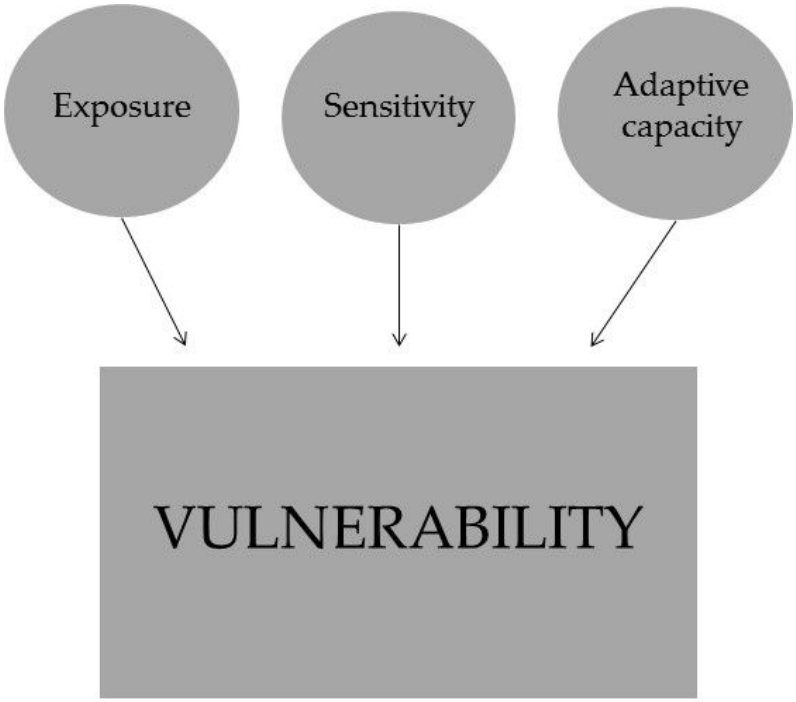
In terms of actually assessing vulnerability to business-related harm in practice, OHCHR authoritatively defines vulnerable individuals, groups, and communities in terms of differential exposure to impacts:

> "Vulnerable individuals, groups and communities are those that face a particular risk of being exposed to […] adverse human rights impact[s]" (OHCHR 2012a: 11).

The key parameter highlighted by OHCHR is differential exposure to impacts. Reference to additional international standards and guidance indicates that, as well as differential exposure, two other aspects of vulnerability may add conceptual rigor to the assessment of vulnerability in the context of business-related impacts on human rights, namely 'sensitivity' and 'adaptive capacity'. Hence, the EIB considers that: "Vulnerability is […] to be understood through the interplay of three factors: (1) exposure to risk and adverse impacts; (2) sensitivity to those risks and impacts; and (3) adaptive capacity" (EIB 2013: 63). The first of these three elements of vulnerability as defined by the EIB coincides with the OHCHR definition. The remaining two aspects complement and augment the OHCHR definition. Diagrammatically, the relationship between the three

component factors used to assess the vulnerability of specific rights-holders to specific business-related impacts can be represented as follows:

Figure 2: Exposure, sensitivity and adaptive capacity as criteria for vulnerability I the context of business-related human rights impacts.



Source: Author's own graphics

In practice, each of these three elements of vulnerability should be appraised for each of the specific groups that are or that may be affected by a specific impact. By way of hypothetical example, let us suppose that an Information Communications Technology (ICT) company is assessing the risk of child labour in its supply chain in a particular country where the best available data indicate that five times as many boys as girls are involved in child labour in the type of mines that produce the metals and the ores that the company sources (e.g. tin, tantalum, tungsten or gold). In the absence of any better information gained through direct consultation with the children in the relevant communities (or if the situation is such that direct consultation is not possible then through recourse to credible, independent expert resources, including human rights defenders and others from civil society) (UNHRC 2011b: 19, Principle 18), the company could reasonably estimate that boys are five times more likely than girls to be exposed to child labour in this specific scenario.

However, if the company's research, consultations and fact-finding indicate that the girls that are involved in child labour in mining operations in the country are vulnerable to sexual violence and sexual exploitation in the workplace to a much greater extent than boys are, and that girls are frequently unable to access appropriate redress or remedy channels when such violations do occur, due to the pervasive institutional and cultural discrimination against women and girls

in the local context, then the company could also legitimately conclude that the effect of involvement in child labour for girls is disproportionately much more serious than it is for boys, and that the ability of girls to respond to those effects is disproportionately lower than that of either boys, or indeed the local population as a whole. This hypothetical example serves to illustrate the importance of appraising each of the three elements of vulnerability separately: Failure to do so may result in assessment findings that obscure serious, perhaps even egregious, human rights risks to those most vulnerable.

A real-world case study of NomoGaia's 2015 Human Rights Risk Assessment of the Disi Water Conveyance Project in Jordan provides an illustration of how assessments can assess differential sensitivity as well as differential exposure of specific groups of rights-holders human rights impacts (Fry et al. 2015).

Case Study: Human Rights Risk Assessment: Disi Water Conveyance Project (Fry et al. 2015)

NomoGaia, 2015

NomoGaia's 2015 human rights risk assessment of the Disi Water Conveyance Project highlights both differential sensitivity to health risks as well as differential exposure of specific groups of rights-holders to such risks. In terms of differential sensitivity, for example, the assessment noted that: "Radiological elements – naturally occurring uranium and thorium in the sandstone aquifer have leached into Disi water, elevating Ra-226 and Ra-228 levels above WHO and Jordan safe drinking water standards […]. These right to health concerns are particularly pertinent for children, who are more susceptible to radiation risks and water quality impacts than adults […] Because children are more susceptible to health risks associated with radiation, they are particularly affected" (Fry et al. 2015: 3). In terms of differential exposure, the assessment found, amongst other things, that "the poor are drinking low-quality Disi-blended water because it is the only option they can afford. The wealthier households access alternative water sources of higher quality" (Fry et al. 2015: 22). By robustly separating considerations of exposure to impacts from those relating to sensitivity to impacts, NomoGaia's report gives good effect to the imperative in the UNGPS to 'understand specific impacts on specific people'.

Marginalization

The degree to which potentially affected rights-holders are marginalized may, in turn, have important implications for the assessment of their vulnerability, and therefore of the severity of impacts upon their human rights. As we have seen, vulnerability refers to the exposure, sensitivity and adaptive capacity of rights-holders vis-à-vis specific impacts. Marginalization, by contrast, refers to societal processes by which certain rights-holders may be relegated to peripheral or disempowered societal positions. Marginalization may increase exposure to impacts, exacerbate sensitivity to impacts, and/or diminish the adaptive capacity of rights-holders to respond to impacts. In other words, marginalization is an underlying root cause of vulnerability.

As OHCHR has noted, when it comes to business-related human rights impacts, "(p)eople who are disadvantaged, marginalized or excluded from society are often particularly vulnerable" (OHCHR 2012a: 11). For example, marginalized groups may be less able to access support and resources, impairing their ability to adapt to or recover from, an impact which in turn will have implications for how the 'irremediable character' of a given impact ought to be

assessed vis-à-vis a marginalized group. UNICEF provides the following illustratie example:

> "Young workers […] often know little about their rights and are unable to speak up against abuse they encounter at the hands of supervisors or adult workers" (UNICEF 2014: 25).

This is a good example of how the marginalization of the rights-holders can exacerbate their vulnerability to adverse business-related human rights impacts.

Marginalization is a particularly pivotal consideration in context of business-related human rights assessment, since it may render certain rights-holders less visible to human rights assessment processes, including by undermining the ability of rights-holders to effectively participate in assessment processes. The very fact that certain groups are marginalized may mean that their vulnerabilities are less well documented and less well understood, in turn impairing accurate estimation by a company of the severity of impacts in which it may be involved vis-à-vis those specific groups. In this regard, an initial finding that there is no differential vulnerability of a certain group to a given impact (see the central column of Table 2, below) should be treated with caution. The initial absence of sufficiently granular, disaggregated information may lead to a false conclusion that a given group is no more vulnerable to an impact than the local population as a whole. A real-world case study (below) of the 2010 Human Rights Assessment of Goldcorp's Marlin Mine by On Common Ground (On Common Ground Consultants 2010) illustrates well the challenges that may be involved in ensuring the direct and meaningful participation of marginalized rights-holders in human rights assessment processes.

Case study: Human Rights Assessment of Goldcorp's Marlin Mine
(On Common Ground Consultants, May 2010)

During an assessment of the human rights situation around, and related to, the presence and operations of the Marlin Mine, a gold and silver mine employing a combination of open pit and underground mine technology, owned and operated by Montana Exploradora de Guatemala S.A., a fully owned subsidiary of Goldcorp Inc. in Guatemala, the assessors and the steering committee for the assessment decided that, without the inclusion of key stakeholder groups, identification of impacts would not be complete and that carrying out the impact assessment as initially designed was not feasible. In this connection, the published assessment report explicitly acknowledges that findings about impacts and human rights were "partial, due to the limited participation of some stakeholder groups" (On Common Ground Consultants 2010: 9). For example, the assessors were not able to meet with and interview those organizations most opposed to the mine and the assessment, since invitations extended to these groups were rejected. The assessors determined that they "could not be confident that they [had] interviewed a representative range of perspectives and groups" (On Common Ground Consultants 2010: 14). On this basis, the assessors therefore decided to redefine the work done as a 'Human Rights Assessment', rather than a 'Human Rights Impact Assessment' (HRIA), in recognition that "further work would be required to complete a fully inclusive and comprehensive impact assessment" (On Common Ground Consultants 2010: 14).

In this connection, the UNGPs advise that when assessing human rights impacts, business enterprises should draw on internal and/or independent external human rights expertise as well as meaningful consultation with potentially affected groups and other relevant stakeholders (UNHRC 2011b: 18, Principle 18). In fact, the UNGPs specify that:

> "To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement" (UNHRC 2011b: 18, Principle 18).

OHCHR reiterates that:

> "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" (OHCHR 2012a: 84).

Because of marginalization, differential vulnerability may often be hidden from view, buried under imprecise data that lumps dissimilar features of the local context together and thus obscures critical information in a way that may materially impair the effective detection of human rights risks and harm. This is one reason, amongst many others, why meaningful and direct consultation with rights-holders is an essential part of any credible and effective process that seeks to assess human rights impacts.

TABLE 2: Assessing the severity of impacts taking into account the differentiated vulnerability of specific rights-holders

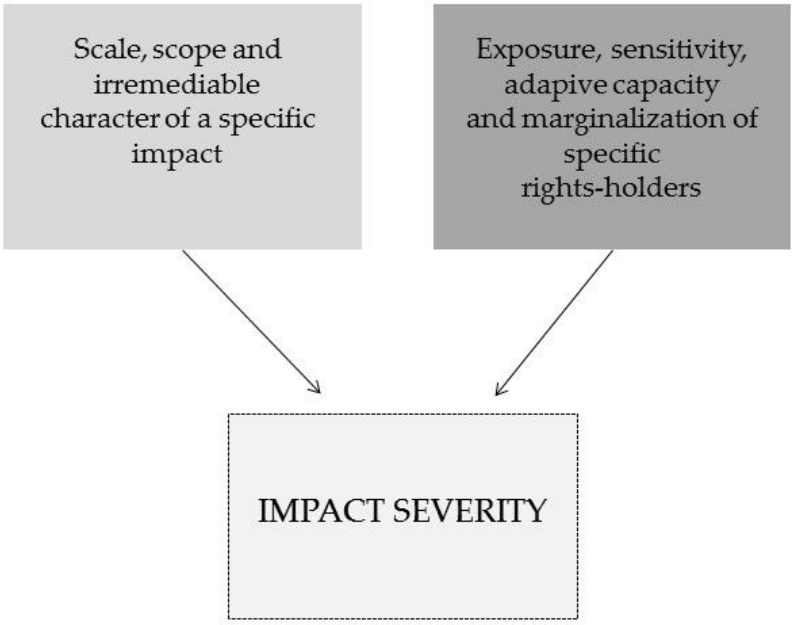
Severity of impact in terms of scale, scope and irremediable character.	Vulnerability of specific group or population in terms of differentiated exposure, sensitivity, adaptive capacity, and marginalization.				
	Not at all vulnerable	*Less vulnerable*	*No differential vulnerability ('average vulnerability')*	*More vulnerable*	*Much more vulnerable*
Not severe	Low severity	Low severity	Low severity	Relatively low severity	Moderate severity
Not particularly severe	Low severity	Low severity	Relatively low severity	Moderate severity	High severity
Moderately severe	Low severity	Relatively low severity	Moderate severity	High severity	Very high severity
Severe	Low severity	Moderate severity	High severity	Very high severity	Extremely high severity
Very severe	Low severity	High severity	Very high severity	Extremely high severity	Catastrohic severity
Extremely severe	Low severity	Very high severity	Extremely high severity	Catastrohic severity	Catastrohic severity
Catastrophic severity	Low severity	Extremely high severity	Catastrohic severity	Catastrohic severity	Catastrohic severity

We are left then with the task of integrating two critical considerations such that both the severity of the impacts in which a company may be involved, in terms of their scope, scale, and irremediable character as well as the differential vulnerability and marginalization of specific groups of rights-holders who may be affected by those impacts, can appropriately inform an overall assessment of the severity of specific impacts on specific groups. The table above proposes such a methodology.

Note that the input factor in the vertical axis of the above Table 2 is the output of Table 1 (p. 21), through which the scale, scope, and irremediable character of an impact can be assessed.

We have seen that it is the 'scale' (gravity), 'scope' (extent), and 'irremediable character' of an impact assessed in light of the exposure, sensitivity, adaptive capacity and marginalization of the rights-holders that may be affected that determine the overall severity of a business-related impact on human rights. This relationship between these six variables can be represented diagrammatically as follows:

Figure 3: Impact Severity as interaction of severity and vulnerability



Source: Author's own graphics

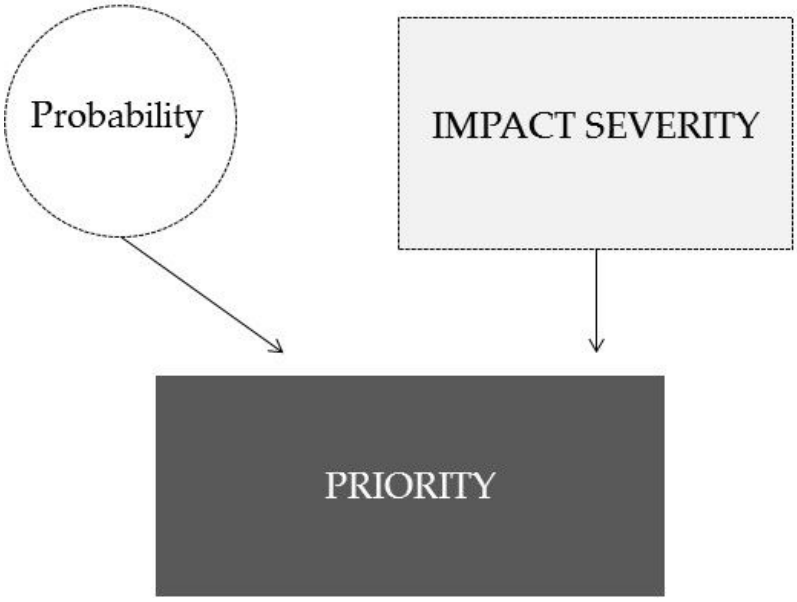
3.4 Probability

We have seen how the severity of an adverse business-related human rights impact can be assessed through appraising the scale (gravity), scope (extent) and irremediable character of the impact, in light of the exposure, sensitivity, adaptive capacity and marginalization of the rights-holders who stand to be affected by that impact. But these cannot be the only considerations that count when a business enterprise seeks to prioritize those impacts in which it may be

involved. Logically, the likelihood (probability) that a given impact will occur will also be a relevant consideration (EIB 2013: 18, 107).

Advising companies on the role of probability of impact occurance in the assessment of business-related human rights impacts, sector-specific guidance issued by the EC on implementing the UNGPs in specific industry sectors recognizes that, once it has assessed the severity of the human rights impacts in which it may be involved, a business enterprise "may still need to know which risks to address first within each level of severity, starting with those in the most severe category" (EC 2013a: 48). On this point, the EC advises that the "logical starting point will be with those impacts that are most likely" to occur (EC 2013a: 44). This relationship between the probability that an impact will occur, the severity of that impact should it occur and the priority that a business enterprise should accord to the impact can be depicted diagrammatically as follows:

Figure 4: Impact severity and likelihood of occurrence as basis for prioritizing impacts



Source: Author's own graphics

The question is: Which is more important, the likelihood that an impact will occur, or the consequences of that impact if it does occur? Proper reflection will confirm that this is not a moot point. It is therefore to clarification of the relationship between impact severity and impact probability in determining the priority that a business enterprise should accord to addressing a given impact to which we now turn.

Severity takes precedence over probability

The UNGPs are silent on how and to what extent the probability that an impact will occur should appropriately inform the priority that a business enterprise should accord in addressing that impact. OHCHR has supplied authoritative clarity on this matter. The key principle established by OHCHR is that when

companies prioritize action to address human rights impacts in which they may be involved, the severity of the impacts takes precedence over the probability that they will occur (OHCHR 2012a: 6, 39-40, 83). Hence, OHCHR advises that:

> "(S)tandard approaches to risk assessment may suggest that the probability of an adverse human rights impact is as important as its severity [...] Probability may be relevant in helping prioritize the order in which potential impacts are addressed in some circumstances […]. However […] (i)n the context of human rights […] severity is the predominant factor (OHCHR 2012a: 37, 39) […] 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 (OHCHR 2012a: 39-40) […] 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" (OHCHR 2012a: 83).

The EC succinctly recapitulates this principle in its sector-specific guidance on the UNGPs, advising companies that, whereas in "traditional risk prioritisation, a risk that is low severity but high likelihood would have a similar priority to a risk that is high severity but low likelihood" (EC 2013a: 48), when it comes to human rights impacts, "a "high severity-low likelihood impact" takes clear priority" (EC 2013a: 48).

The rationale behind this principle is easy to understand. When it comes to human rights, which protect the fundamental worth and dignity of the human being, impacts may have irreversible or even inter-generational consequences. For example, if a member of a community in the vicinity of an oil and gas facility is subjected by public or private security forces to torture or cruel, inhuman or degrading treatment or punishment as a reprisal for her part in a protest against the company that operates the facility then not only is the immediate harm she endures grave and egregious, amounting to a gross abuse of her human rights, but the ramifications for her may be lifelong, and the implications for her dependent children and other family members may likewise also be grave and long-lasting. Such severe impacts, by virtue of their scale (gravity) or irremediable character (irreparability) clearly demand priority attention even where the probability of their occurrence is low.

Logically, the anticipated probability of a given impact can robustly be estimated only after the key parameters that define the impact have been clearly specified. The more precisely that an anticipated impact scenario can be articulated, the more readily the probability of its occurrence can be estimated. For this reason, the probability of occurrence of an impact is best appraised after the severity of a given scenario has been clearly articulated in the process of impact assessment. A real-world case study published in 2013 of Nestlé's experience assessing human rights impacts in its business activities provides an example of an indicator used by business to estimate the probability of a potential impact, based on whether or not the impact in question had materialized in the three years prior to the assessment (DIHR/Nestlé 2013).

Case study: Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities (DIHR/Nestlé 2013)

Danish Institute for Human Rights and Nestlé, 2013

The 'Human Rights Impact Scenario Tool', which consists of a set of potential human rights scenarios that involve business-related impacts on human rights, applied by the Danish Institute for Human Rights (DIHR) in the course of human rights impact assessments (HRIAs) conducted with Nestlé in seven countries (Colombia, Nigeria, Angola, Sri Lanka, Russia, Kazakhstan and Uzbekistan), includes the question "Has this risk materialized in the last 3 years?", supporting a reasoned extrapolation of likely future occurrence of the impact scenario under consideration.

A similar but more elaborate approach was taken by Tullow in its 2012 Human Rights Risk Assessment of the Lake Albert Exploration Project, in Houma and Buliisa Districts of Bunyoro in Uganda, the relevant aspects of which are summarized below (Salcito/Wielga/Kanis 2012).

Case study: Tullow Oil PLC - Human Rights Risk Assessment: Lake Albert Exploration Project, Houma and Buliisa Districts, Bunyoro, Uganda (Salcito/Wielga/Kanis 2012)

NomoGaia, March 2012

In its human rights risk assessment of Tullow's Lake Albert oil and gas exploration project in Uganda, NomoGaia applied the following index to rate the probability of identified human rights impacts:

1 – Slight:	A similar impact has occurred at 10 or [fewer] sites worldwide
2 – Unlikely:	A similar impact has occurred in the country 4 or more times
3 – Likely:	A similar impact has occurred among the project partners
4 – Near Certain:	Conditions, design & context make impacts likely and ongoing

In this example, NomoGaia applied a four-point scale for assessing the probability of impact occurrence that is based on a mix of indicators of the rate of past occurrence of similar impacts (globally across the business, nationally within the country of operation, and locally at the actual project location) combined with salient factors pertaining to the specific project at hand (conditions, design and context).

Estimating probability in practice

Estimation of the probability that a given potential impact will occur can only sensibly be done in reference to a specified timeframe. This temporal scope of analysis can be defined as a standardized unit of time, such as one calendar year. Alternatively, the temporal scope of assessment can be set in terms of the anticipated lifespan of an investment project as a whole, or of particular business activities or relationships, such as, the duration of a contract with a junior mining company tasked with exploring and surveying an ore deposit, for example. The timeframe for assessment could also be aligned to the length of particular phases of a project's lifecycle, such as bidding; contracting; construction; installation and commissioning; production and operation; or decommissioning and closure. Relevantly, the UNGPs advise that:

> "Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship" (UNHRC 2011b: 17-18, Commentary to Principle 18).

Once the temporal scope of analysis has been defined, the likelihood of occurrence of a particular impact within that timeframe may be estimated and articulated as a probability factor ranging from zero to one. Estimation of the probability that a potential impact will occur should be based on the best-available data on the frequency with which that type of impact, or related events, have occurred in the past within the relevant geographic or operational area of the assessment, combined with a reasoned appraisal of how planned activities and business relationships are likely to affect the probability of occurrence. In the absence of specific data, estimation of the probability of impact occurrence should be derived from reasoned extrapolation from information on relevant related issues, such as patterns and trends in the frequency of occurrence of similar impacts in comparable contexts elsewhere. For example, in order to estimate the probability of community members dying in motor vehicle accidents involving company assets in a new operating environment with which the company is neither familiar, nor able to obtain reliable road safety data, the company could reasonably extrapolate from its own internal records on the frequency of such incidents at other operations, scaling for the relative size of the different vehicle fleets.

Establishing priority on the basis of impact severity and probability

Table 3 proposes a methodology by which the probability of occurrence of an impact, together with an assessment of the anticipated severity of that impact if it were to occur, may appropriately inform a determination of its overall priority for response by a company. The methodology is based on the UNGPs and their authoritative interpretation provided by OHCHR (OHCHR 2012a: 6, 39-40, 83).

TABLE 3: Establishing priority on the basis of impact severity and probability of occurrence

Impact severity	Probability of occurrence				
	0.0 *Will certainly not occur*	*0.0 – 0.1* *Less than a one-in-ten chance of occurrence*	*0.5* *50% chance of occurrence*	*0.9 – 0.99* *90 – 99% chance of occurrence*	*1.0* *Absolutely certain to occur; will occur; 100% chance of occurrence*
Low severity	Not a priority	Very low priority	Low priority	Low priority	Low priority
Moderate severity	Not a priority	Low priority	Medium priority	Medium priority	Medium priority
High severity	Not a priority	High priority	High priority	High priority	High priority
Very high severity	Not a priority	Very high priority	Very high priority	Very high priority	Very high priority
Extremely high severity	Not a priority	Extremely high priority	Extremely high priority	Extremely high priority	Extremely high priority
Catastrophic severity	Not a priority	Critical	Critical	Critical	Critical

Note that the input for the 'Impact severity' parameter represented in the vertical axis of the above Table 3 is provided by the output of the analysis shown in Table 2 (p. 29). As the table above indicates, only where it can be conclusively determined that a high-impact scenario will certainly not occur can a company legitimately conclude that the impact is not a priority for countervailing mitigation measures. The onus should fall on the assessment process itself to demonstrate that there is absolutely no likelihood that a particularly significant impact scenario will eventuate. Where it is not possible to make such a determination with the requisite degree of certainty, the precautionary principle should be applied (UNEP 2016). After all, the consequences of such impacts, were they in fact to occur, would literally be catastrophic.

3.5 Indirect impacts

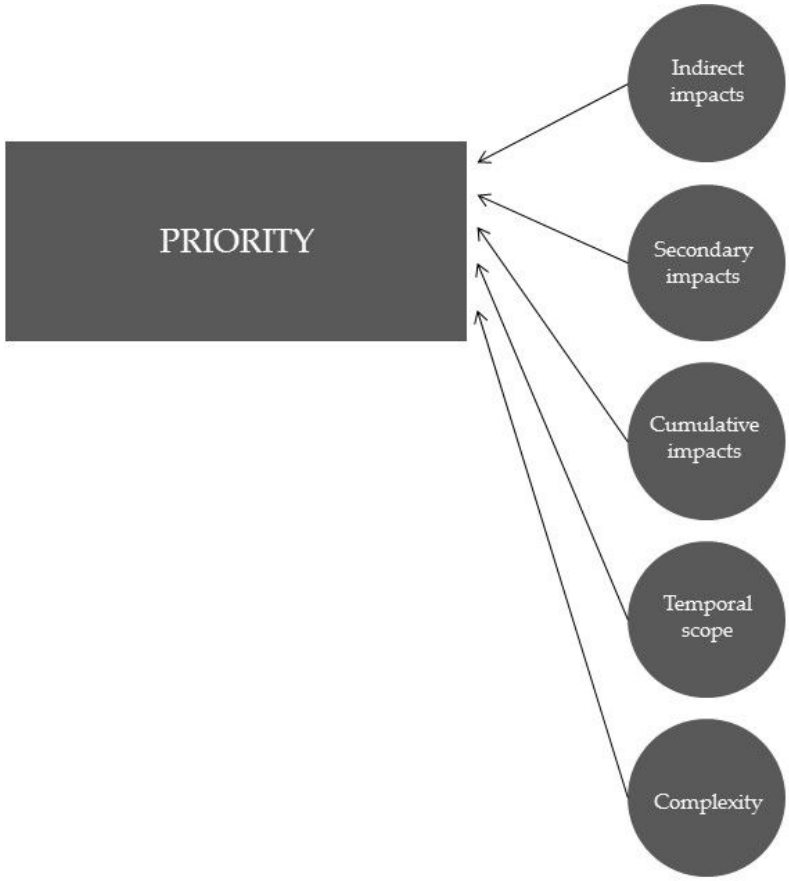
We have seen that the severity of business-related human rights impacts can be assessed in a principled and practical way based on a set of core indicators specified by the UNGPs and defined by OHCHR, namely: The severity (scale, scope and irremediable character of impacts) in light of the vulnerability (exposure, sensitivity, adaptive capacity) and marginalization of the rights-holders that stand to be affected by those impacts. We have seen further how the probability of impact occurrence may then appropriately inform the priority that a business enterprise should accord to addressing impacts of a given severity.

Available standards and guidance highlight the relevance and value addition of several additional indicators that can be used to assess business-related human rights impacts. Application of these indicators may add value to the understanding of and effective response to the human rights impacts in which business enterprises may be involved. Amongst these, current standards and guidance highlight in particular the following five aspects:

- Indirect impacts
- Secondary impacts
- Cumulative impacts
- Temporal scope
- Complexity

The relevance of these factors to the determination of the priority that should be accorded to specific impacts can be depicted as shown in Figure 5.

Figure 5: Additional aspects to consider for prioritizing impacts



Source: Author's own graphics

Let us now consider each of these factors in more detail, in order to understand their relevance and added value for companies, and how their integration into impact assessment frameworks can inform and support companies to understand and address the human rights impacts in which they may be involved.

Indirect human rights impacts are infringements on the human rights of a third-party that result as a consequence of an initial direct impact (EIB 2013: 15, 86, 107-108). Assessment of indirect impacts by business enterprises is already required in some contexts. For example, the EIB specifies assessment of indirect impacts by company proponents of projects seeking EIB support (EIB 2013: 15, 86, 107-108). An example of an indirect human rights impact would be the impact on a young child resulting from their parent being severely injured in a workplace accident, such as the collapse of a garment factory building. Depending on the circumstances, including the injury insurance availed by the employer and the government, the standard of living in the child's household may decline dramatically. The child's parents may no longer be able to afford the child's school fees or to make ends meet in the household budget, all of which may compel the parents to encourage or force their child into child labour. Indeed, because of their strong dependence on their parents or other adult caregivers for the enjoyment of many of their human rights, children in particular

may frequently be impacted indirectly by business-related impacts on their parents. On this point, in its advice to companies on respecting and supporting children's rights, UNICEF elaborates that:

> "The indispensable role of parents and other adult caregivers in raising and protecting children and enabling their development is widely accepted. The family is a child's primary source of both material and emotional support […] the fundamental unit of society and the ideal environment for the growth and well-being of children. Businesses can support families by providing an adequate living wage […] and by ensuring fair employment terms and decent working conditions. They can also make a significant contribution to support[ing] children's rights by establishing family-friendly workplaces that support employees in meeting both their work commitments and family responsibilities [….] Parental leave, breastfeeding policies and flexible workplace policies can enable parents and caregivers to support children during the crucial phase of early childhood, when interactions with family have a profound influence on children's development and growth. Providing protection for mothers, including their right to paid maternity leave and to medical care, is a vital component of protecting children's health and well-being" (UNICEF 2014: 28).

From the above example, it should be clear how failure to consider indirect impacts on children could readily result in the under-estimation of the overall scale, scope and irremediable character of an impact on parents or guardians. Where significant indirect impacts are identified therefore, this finding should be reflected either in a separate stand-alone description and analysis of these impacts, or in their incorporation and integration into the analysis of the relevant direct impacts that give rise to them.

3.6 Secondary impacts

Secondary human rights impacts include any consequential, ensuing, derivative, or 'knock-on' consequences for a rights-holder that result from an initial breach of her or his human rights (EIB 2013: 18, 109). The UNGC provides the following hypothetical example of a secondary human rights impact: As a result of disclosure by a mobile telecommunications operator of the private user data (such as the content of SMS messages or emails or meta-data such as call logs) of one of its subscribers to a government authority, the subscriber is arbitrarily detained and then subjected to torture or cruel, inhuman or degrading treatment or punishment while they are interrogated with questions based on their mobile phone use (UNGC/Human Rights and Business Dilemmas Forum 2016b). Secondary human rights impacts thus illustrate the well-established principle in international law that all human rights are interdependent and interrelated (UN General Assembly 1993, para. 5). In short, a primary impact on any one of a rights-holder's human rights is likely to give rise to secondary impacts on one or more of their other human rights as well. The SRSG drew particular attention to the importance of secondary human rights impacts when, on the basis of his broad survey of public allegations of company involvement in human rights abuse, he reported that: "An alleged abuse often generate[s] impact on multiple human rights. For example, in some cases, alleged use of child labour impacted the right to education […] and, in other cases, where children were performing tasks well beyond their physical capacity, the right to health and right to life" (UNHRC 2008d: 3).

In practice, secondary impacts may readily be assessed in the same way as primary impacts, with secondary impacts informing the overall assessment of the severity of the primary impact. Indeed, assessment of secondary impacts by

business enterprises is already required in some contexts. For example, the EIB specifies assessment of secondary impacts by company proponents of projects proposed to it for support (EIB 2013: 18, 109). The IFC likewise advises that, when assessing human rights impacts in which they may be involved, companies "should look beyond the immediate rights to identify the long-term consequences of loss of rights" (Abrahams/Wyss 2010: 45). Some human rights impact assessment tools have taken the causal inter-linkage of human rights impacts into account in their design. For example, the 'Human Rights Impact Ratings Scoring System' utilized by NomoGaia in its Human Rights Impact Assessment (HRIA) toolkit allows for a given human right to be analyzed "in conjunction with other rights" (NomoGaia 2016).

Secondary impacts need not be a guaranteed consequence of primary impacts to nevertheless be relevant. Even in cases where the probability of potentially severe secondary impacts is low, or there is uncertainty about the probability of their occurrence, their consideration may materially affect assessment of the priority to be accorded to the primary impact that gives rise to them. Indeed, there may be instances where relatively minor primary breaches of human rights may escalate "into more serious [secondary] abuses […] if [they are] not addressed properly" (OHCHR 2012a: 84). For example: In an operating context in which public security forces assigned to protect a company's facilities have a track record of using excessive force, and the company is late in paying wages to its workers, the risk that worker strikes or protests will provoke a disproportionately violent response from the security forces, resulting in the company being linked to egregious violations of fundamental human rights such as the right to life, is liable to increase with every passing day that the company fails to remediate its initial, comparatively minor, breach.

3.7 Cumulative impacts

Cumulative impacts are those impacts "that result from the successive, incremental, and/or combined effects of an action, project, or activity [...] when added to other existing, planned, and/or reasonably anticipated future ones" (IFC 2013: 19). Cumulative human rights impacts may have synergistic, multiplier, aggravating, compounding, or other 'snow-balling' effects that may amplify a company's own impacts on human rights, rendering them more severe than they would have been otherwise.[11] Moreover, cumulative impacts may aggregate on an exponential, rather than linear, basis and may rapidly reach thresholds above which the cumulation hits a 'tipping point' beyond which rapidly occurring and potentially irremediable harm might occur (UNGC/Human Rights and Business Dilemmas Forum 2016a). At least one extractive company, Rio Tinto, has explicitly acknowledged in its human rights policy the challenge and importance of considering cumulative human rights impacts (Rio Tinto 2013: 37).

The UNGC, through its Human Rights and Business Dilemmas Forum, provides an illustrative hypothetical example of a cumulative impact on human

[11] See generally IFC (2013), see further UNGC/Human Rights and Business Dilemmas Forum (2016a).

rights, in which the overall level of industrial contamination of a source of drinking water exceeds international standards and constitutes an infringement on the right to water. A company conducting an assessment of its own human rights impacts in such a situation may well find that, while it is only contributing in part to the overall contamination of the water source, it is the cumulative effect of the pollution discharged by several different companies that explains why the level of contamination renders the water unfit for human consumption (UNGC/Human Rights and Business Dilemmas Forum 2016a).

A second hypothetical example, also supplied by the UNGC, serves to further illustrate the notion of cumulative impacts. In this scenario, the current suite of private sector activities at and around a company's project location, combined with new highly publicized projects planned by investors in the immediate future, precipitate an influx of people to the operating area. This inflow of internal as well as international migrants gives rise to a range of complex adverse local socio-economic consequences including inflation of housing prices, food prices and utility prices, higher incidence of communicable diseases, and increased strain on public infrastructure and essential services, including childcare centers, schools, and health services. The influx is also a key driver of the rapidly expanding urban slums, where living conditions are characterized by increasing rates of violent crime and declining security of land tenure (UNGC/Human Rights and Business Dilemmas Forum 2016a). A company in such a scenario that is assessing its human rights impacts may well determine that its own operations and activities are making some contribution to this worsening situation, but that this contribution is most sensibly understood in the context of the overall cumulative effect of private sector investment and activities in the area. Nevertheless, the cumulative characteristics of the baseline context strongly indicate that any additional contribution that the company may make to this situation will have more severe implications that it would in the absence of cumulative factors.

Logically, only through comprehensive consideration of the total contribution of all relevant duty-bearers to the overall significance of a human rights impact will a company's own human rights assessment accurately reflect the magnitude of its impact as it is actually experienced by rights-holders (UNGC/Human Rights and Business Dilemmas Forum 2016a). In this regard, some experts have gone so far as to assert that cumulative impacts are "the only real effect[s] worth assessing" (Duinker/Greig 2006: 157), because they reflect the conditions that individuals and communities actually experience. Clearly, without an aggregated picture of the cumulative significance of impacts, any assessment may underestimate the magnitude of the human rights issues at stake (UNGC/Human Rights and Business Dilemmas Forum 2016a). If an assessment fails to consider the exacerbating and amplifying effects that cumulation may have on the company's own impacts, then the company may apply inadequate priority, attention or resources in taking action to address the situation, (UNGC/Human Rights and Business Dilemmas Forum 2016a) and find that its planned mitigations fall short of what is needed.

Assessment of the extent to which a human rights impact may have cumulative effects therefore requires an analysis of the ways in which the impact may be contributing its part to a greater overall impact on human rights that is

also caused or contributed to by other actors (IFC 2013).[12] Assessment of cumulative human rights impacts also implies consideration of pre-existing 'legacy' issues present as part of the baseline context, at least to the extent to which a company may 'inherit' these issues, for example through acquisition or mergers, or by virtue of becoming involved in, or taking operational control over, so-called 'brown-field' operations (UNGC/Human Rights and Business Dilemmas Forum 2016a).

Sector-Wide Impact Assessment (SWIA) and strategic impact assessment are two methodologies that companies may draw upon in order to identify, assess and understand how the impacts of their own activities and business relationships may be rendered more significant by cumulative effects. For example, the Myanmar Centre for Responsible Business (MCRB), in partnership with its founders the Institute for Human Rights and Business (IHRB) and the Danish Institute for Human Rights (DIHR), is undertaking a series of SWIAs on selected industries in Myanmar, specifically: Oil and gas, tourism, ICT, and agriculture (MCRB 2016). The MCRB elaborates that:

> "A [Sector-Wide Impact Assessment] consists of detailed examinations of a specific business sector in a particular geographic context through several different levels of analysis in order to build a more complete picture of the potential impacts of the sector on society and its enjoyment of human rights. A sectoral view will help stakeholders see the "bigger picture" of potential negative impacts of a sector's activities […] and to make choices based on a broader perspective" (MCRB 2016).

In this way, the MCRB explains that "a SWIA helps inform project level assessments by providing an indication of the kinds of human rights impacts that have arisen in the past in the sector" (MCRB 2016). Thus:

> "SWIA processes also draw out recommendations on opportunities to improve human rights outcomes at the sectoral level. [At the] (c)umulative-level (n)umerous companies operating in the same area may create cumulative impacts on surrounding society and the environment that are different and distinct from the impacts of any single company or project. Managing those impacts typically requires company-government cooperation or at least company-company cooperation. A SWIA identifies potential areas or activities that may lead to cumulative impacts and identif[ies] options for collective action to address these […]" (MCRB 2016).

The SWIA reports already published by the MCRB, DIHR and IHRB on the oil and gas (MCRB/IHRB/DIHR 2014) and tourism (MCRB/DIHR/IHRB 2015) sectors in Myanmar provide a concrete illustration of the type of information and analysis that a SWIA can offer a company seeking to understand how its operations, activities and business relationships may contribute to, or may be exacerbated by, cumulative impacts. The Human Rights and Business Dilemmas Forum has recently issued expert guidance on how companies can incorporate analysis of cumulation into assessments of human rights impacts (UNGC/Human Rights and Business Dilemmas Forum 2016a).

3.8 Temporal scope

Understanding the temporal scope of an impact, in terms of its timing, duration and speed of onset of an impact is important amongst other reasons, for planning accordingly as to when and for how long measures to avoid, prevent, mitigate or

[12] See further UNGC/Human Rights and Business Dilemmas Forum (2016a).

otherwise address the impact will need to be put in place (EIB 2013: 18, 27, 107). In particular, where it is not possible to avoid or prevent the occurrence of an impact altogether, attempts to shorten its duration may be one appropriate way to mitigate its overall severity (EIB 2013: 181). The expected timing and duration of impacts may be specified in reference to the planned starting date or phase of a given activity, operation or business relationship, or in reference to specific calendar dates or periods, such as the seasons.

The duration of an impact may also have important implications for understanding its severity. For example, where a company is negligent in the provision of security measures to its staff in a high-threat environment, and a female member of staff experiences sexual violence as a result, the victim may suffer long-term physical and psychological harm – a long-duration impact the full severity of which would be underestimated were its very longevity omitted from analysis. Some human rights impacts have ongoing ramifications that last a lifetime. Understanding the duration of impacts may therefore usefully inform an appreciation of their full severity and/or their irremediable character.

The speed of onset of an impact is the rapidity with which it reaches its full magnitude. Some impacts will be more-or-less instantaneous, such as a workplace injury resulting from a fall from a height due to failure by a contractor engaged by a company to provide adequate personal safety equipment. Other impacts may intensify more slowly towards the full severity of their result, as in the example cited above where an incremental influx of migrants into unplanned informal settlements, over time, increases demand on essential government-provided services and places strain on the social fabric of the host community. Speed of onset thus has ramifications for how quickly mitigation actions may need to be in place, as well as how rapidly they will need to be scaled-up over time.

3.9 Complexity

As the SRSG observed: "The societal impacts of business activity are complex. Such impacts can be positive and negative, direct and indirect, singular and cumulative, highly specific to local circumstances, and have multiple interrelated factors" (UNHRC 2007: 3, para. 1). As NomoGaia advises companies in its human rights impact assessment toolkit: "Often the research conducted for cataloging [impacts] will reveal complex challenges associated with myriad topics and rights. Though [impact] catalogs will reveal the extent of the challenges posed, addressing these issues requires thoughtful analysis beyond what catalogs and charts can accomplish" (NomoGaia 2012: 15). Particularly complex impacts on human rights may arise in contexts such as "conflict zones, the presence of artisanal miners, extreme HIV/AIDS prevalence, destructive historical pollution, indigenous communities, communities that will require resettlement and ubiquitous exploitive labor practices" (NomoGaia 2012: 15), amongst a wide array of other possible contexts.

The complexity of a company's human rights impacts may vary, *inter alia*, with: The complexity of the company's operations and business relationships that cause, contribute to, or are otherwise directly linked to, the impact; the number and diversity of different duty-bearers involved in causing, contributing

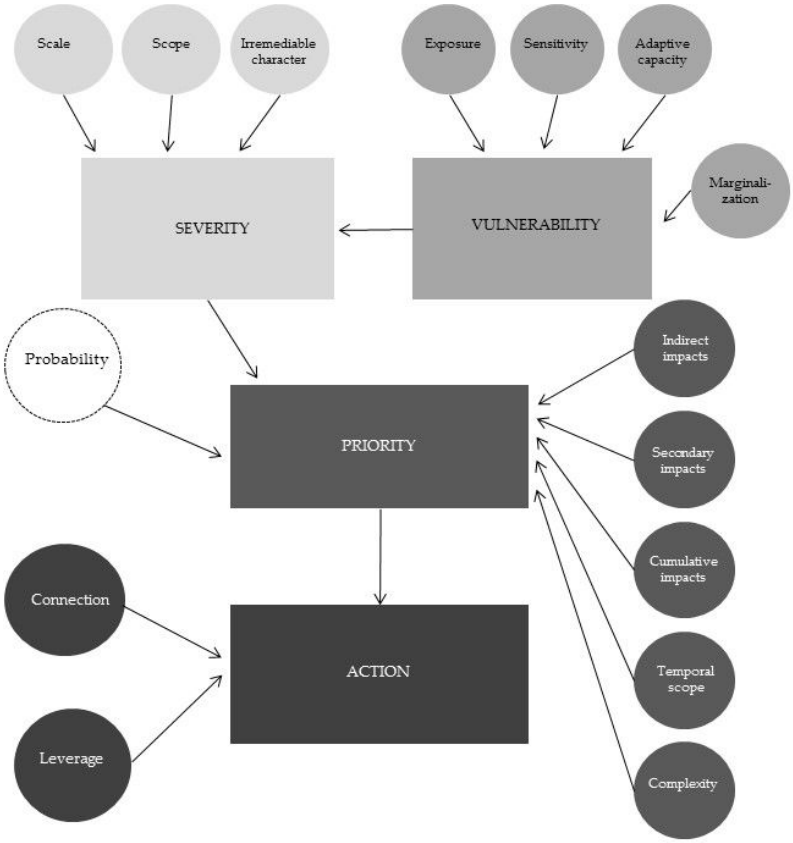
to, or failing to protect against the impact; and the number and importance of inter-linkages between the impact and other impacts, including in terms of indirect, secondary, or cumulative impacts.

The complexity of the human rights impacts in which a company may be involved can have significant implications for the level of attention and resources that the company will need to apply in order to address those impacts. As the EIB advises proponents of projects seeking its support, a company should understand the complexity of the impacts in which it may be involved so that it can plan its response accordingly, including in terms of the extent and nature of collaborative stakeholder engagement or leverage that may be required (EIB 2013: 18, 20, 79, 86, 98, 107-108, 111,128-129, 150-153). Further, as the UNGPs advise: "The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond" (UNHRC 2011b: 18, Principle 19).

4. Conclusion

We have seen that the UNGPs, when read in conjunction with authoritative interpretive guidance issued by OHCHR, provide a robust and conceptually coherent framework for the assessment by business enterprises of the human rights impacts in which they may be involved. In particular, we have seen how the 'severity' of impacts is defined in the UNGPs in terms of their scale (gravity), scope (number of rights-holders) and irremediable character (irreparability), in light of the exposure, sensitivity, adaptive capacity and marginalization of the rights-holders affected. We have seen that the probability that an impact of a given severity will occur is a secondary consideration in determining the overall priority that a company should accord to addressing an impact. Moving beyond the minimum standards set out by the UNGPs, we have also looked at other relevant considerations that may be important when companies seek to understand and prioritize their impacts. These include any indirect, secondary and cumulative impacts that may be associated with the immediate impact at hand, as well as the temporal scope, and complexity of the impact. The methodology by which these dimensions and indictors of human rights impacts can be assessed is summarized in Figure 6.

Figure 6: Overview of the Dimensions for the Severity of Business-Related Human Rights Impacts



Source: Author's own graphics

The three annexes to this report appraise the potential for practical application of the proposed approaches across a wide range of current real world settings:

- Annex 1 shows that, while states, both individually and through their participation in international, multilateral and regional organizations, are increasingly advancing frameworks that encourage or require companies to undertake human rights due diligence, these frameworks all too frequently fail to provide concrete information on how and against which specific indicators and benchmarks companies should assess the severity of the specific human rights impacts in which they may be involved.
- Annex 2 shows that, while business enterprises across a wide range of industry sectors are increasingly undertaking assessments of their human rights risks and impacts, it is far from clear that companies are applying the criteria specified by the UNGPs and defined by the OHCHR in assessing the severity of the impacts in which they may be involved.
- Annex 3 shows that, while a range of tools already exist to support the assessment of business-related impacts on human rights, there is presently no publicly available tool to support the assessment of business-related human rights impacts by states, companies and third parties that utilizes as its basis

the core set of indicators and benchmarks specified by the UNGPs and OHCHR.

Based on the foregoing analysis, and the annexed landscape surveys of state practice, business practice, and available tools and guidance, three broad recommendations for states, business enterprises and concerned stakeholders arise:

1. States should incorporate and apply the indicators and benchmarks for the assessment of business-related human rights impacts that are specified by the UNGPs and OHCHR into relevant aspects of policies, legislation, regulation and adjudication, including relevant international and multilateral policy instruments, organizations, initiatives and treaties to which states may be a party. States should appraise opportunities for similarly applying in their policies, legislation, regulation, adjudication and international activities those additional dimensions identified by the EIB as being of central importance to the assessment of business-related human rights impacts.
2. Business enterprises should review and update the indicators and benchmarks by which they assess impacts on human rights in which they may be involved, in order to ensure alignment with the requirements set out by the UNGPs and OHCHR. Business enterprises should also identify opportunities to incorporate the additional dimensions of human rights impact significance identified by the EIB into their risk and impact assessment policies, procedures, and practices.
3. Concerned stakeholders should develop and disseminate practical and publicly available guidance and tools that support the assessment of business-related human rights impacts by states, companies and third parties utilizing the core set of indicators and benchmarks specified by the UNGPs and OHCHR. Such guidance and tools should also support application of the additional dimensions of business-related human rights impacts that have been identified as important by the EIB.

5. Annexes: State practice, business practice, tools and guidance

5.1 Annex 1. State practice

As a United Nations Human Rights Council resolution, the UNGPs address themselves directly to States "individually [as] the primary duty-bearers under international human rights law, and collectively [as] the trustees of the international human rights regime" (UNHRC 2011b: 9-10, Commentary to Principle 4) as a whole. The state duty to protect human rights against abuses by business enterprises through appropriate policies, regulation, and adjudication, as set out in the United Nations 'Protect, Respect and Remedy' Framework and the UNGPs incorporates many provisions that are of direct relevance to the assessment of human rights impacts by companies. This duty is borne by each of the 193 Member States of the United Nations (UN 2016). To what extent then, and

how are states presently encouraging and requiring the assessment of the severity of the human rights impacts in which business enterprises may be involved? More specifically, to what extent do current policies, regulation, adjudication and international engagements by states incorporate the indicators and benchmarks for human rights impact severity assessment specified by the UNGPs and defined by OHCHR?

The following review of current state practice when it comes to encouraging or requiring companies to assess the adverse actual and potential human rights impacts in which they may be involved highlights significant opportunities for enhanced incorporation of the principled and practical benchmarks and indicators specified by the UNGPs as defined by OHCHR. In particular, the review finds that eight specific policy domains present especially important opportunities for such integration:

- National Action Plans (NAPs) on business and human rights
- Licensing and permitting requirements for private sector projects
- Public investment in business enterprises
- Public procurement of goods and services from private sector suppliers
- Export credit, guarantees, and insurance
- Mandatory human rights due diligence
- Corporate reporting and disclosure requirements
- International, regional and multilateral cooperation, including international development assistance

Let us now briefly examine the current state of play, and key carrier processes, entry points, and latent opportunities for the integration of principled and practical indicators and benchmarks for the assessment of business-related human rights impacts with respect to each of these policy domains.

National Action Plans (NAPs) on Business and Human Rights

In its 2011-2014 Corporate Social Responsibility strategy, the EC invited the European Union (EU) Member States, of which there were 28 at the time of writing, to "develop […] national plans for the implementation of the United Nations Guiding Principles" (EC 2011). Such National Action Plans (NAPs) on business and human rights have since emerged as an important vehicle by which policy, regulatory, legislative, administrative, and adjudicatory measures relevant to the assessment of human rights impacts by companies are increasingly being implemented by states, both within and beyond the EU. Since the EC strategy refers to implementation of the United Nations Guiding Principles as a whole, it can be taken that this should not exclude the operative provisions specifying how the severity of business-related human rights impacts should be assessed.

Meanwhile, the United Nations Working Group (UNWG) on the issue of human rights and transnational corporations and other business enterprises has recently published official guidance on the development of NAPs on business and human rights (UNWG 2014). Amongst other things, the guidance sets out that:

> "all commitments in the NAP as well as the overall plan need to be directed towards preventing, mitigating and remedying current and potential adverse impacts. If Governments need to prioritize, they should select impacts which are most severe in terms of their scale, scope, and irremediable character as well as those where they have most leverage to change the situations on the ground" (UNWG 2014: iii).[13]

In guiding states on the meaning of 'severity' in this context, the language employed by the UNWG clearly echoes and refers to the relevant provisions of the UNGPs and authoritative commentary provided by OHCHR's *Interpretive Guide* discussed earlier (see above) (UNWG 2014: iii). The UNWG further sets out that it considers four "essential criteria" to be "indispensable" for the effectiveness of NAPs (UNWG 2014: ii), the first of which is that NAPs be founded on the UNGPs (UNWG 2014: ii). In particular, the UNWG specifies that: "A NAP […] needs to promote business respect for human rights including through due diligence processes" (UNWG 2014: ii). As we have seen, the assessment of human rights impacts is identified in the UNGPs as the initial step in human rights due diligence (UNHRC 2011b: 17, Principle 18). It follows that NAPs on business and human rights should reflect the criteria for ascertaining the severity of business-related human rights impacts that are set out in the UNGPs.

To date, OHCHR considers that seven states have produced NAPs on business and human rights, *viz.,* in chronological order of adoption: The United Kingdom, the Netherlands, Italy, Denmark, Spain, Finland, and Lithuania (OHCHR 2016c). A further 21 states were considered by OHCHR to be in the process of developing a NAP or to have formally committed to developing a NAP, at the time of writing (OHCHR 2016c). Let us now briefly review six of these publications deemed by OHCHR to constitute published NAPs from the specific perspective of the assessment of business-related human rights impacts.[14]

The United Kingdom was the first state to publish a NAP on business and human rights, doing so in September 2013. The UK NAP specifies that adoption of "appropriate due diligence policies to identify, prevent and mitigate human rights risks" is one of the "key principles" of the UNGPs that "guide the approach UK companies should take to respect human rights wherever they operate" (Government of United Kingdom 2013: 13). Amongst the actions committed to by the UK in its NAP is therefore an undertaking to "encourage trade associations/sector groupings of companies to develop guidance relevant to their members' sector of activity on developing human rights policies and processes, including due diligence" (Government of United Kingdom 2013: 15). Since, as we have seen, the assessment of the scope, scale, and irremediable character of the human rights impacts in which a company may be involved is central to human rights due diligence, it might be expected that the encouragement by the UK of trade associations/sector groupings of companies to develop such guidance

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13 The UNWG goes on to elaborate that: "The UNWG recommends selecting the priority areas based on two criteria: First is the severity of adverse human rights impacts judged by their scale, scope, and irremediable character […] The second criterion to consider is the leverage of the Government in bringing about actual change on the ground" (UNWG 2014: 7).

14 At the time of writing, Spain's NAP was only available in Spanish, with no official translation yet available, rendering it difficult to assess of the extent to which it refers to the assessment of human rights impacts.

would also include a stipulation that these indicators should be applied and incorporated into impact assessment frameworks included in that guidance. Indeed, the UK NAP has been critiqued for its lack of other more specific new positive or negative incentives to influence corporations to conduct human rights due diligence (ICAR/ECCJ 2014), as well as for its lack of specific reference to requiring companies to publicly disclose their human rights due diligence activities that may include the assessment of human rights impacts (ICAR/ECCJ 2014: 23). When adopting its NAP, the UK committed to updating the plan by the end of 2015. The review process for the update was launched in March 2015, and at the time of writing it remained to be seen whether the UK's revised NAP will incorporate more robust provisions on the assessment of human rights impacts by companies domiciled or operating in the UK, including – in particular – concrete reference to the human rights impact assessment criteria set out in the UNGPs and defined further by OHCHR.

The Netherlands was the second country to adopt a NAP, doing so in December 2013. The Netherlands NAP considers human rights due diligence to be "the most important new element in the CSR policies of companies operating internationally and/or within international supply chains" (Kingdom of the Netherlands n.d.: 6). The NAP notes that the government of the Netherlands already requires companies to apply human rights due diligence whenever the government provides those companies with support in the form of grants or other types of finance for activities abroad, including export credit insurance and trade missions, but does not make specific reference to the assessment of human rights impacts in this context, let alone to the specific assessment criteria set out in the UNGPs (Kingdom of the Netherlands n.d.: 8). As with the UK NAP, the Dutch NAP has been critiqued for absence of positive or negative incentives for companies to conduct human rights due diligence (ICAR/ECCJ 2014: 36), and for failing to mention requirements for public disclosure by companies of their human rights due diligence activities (ICAR/ECCJ 2014: 37). The Dutch NAP has been further critiqued on the grounds that: "There are no action points that would require [human rights] due diligence as part of compliance with a legal rule" (ICAR/ECCJ 2014: 38). There are clearly further opportunities for the Netherlands to clarify expectations of business that such human rights due diligence should employ the impact assessment criteria set out in the UNGPS (i.e. scale, scope, and severity) as defined by OHCHR.

In March 2013, Denmark became the third country to issue an NAP on business and human rights. Denmark's NAP makes multiple references to current and planned efforts to integrate and promote human rights due diligence amongst Danish companies (Danish Government 2014). For example, the NAP states that companies involved in Danida Business Partnerships (a government instrument that facilitates and provides economic support to develop commercial partnerships between Danish companies and partners in developing countries) are now required to "demonstrate due diligence, including human rights" (Danish Government 2014: 12). However, the NAP does not set out any expectation that the indicators and benchmarks defined in the UNGPs for assessment of business-related impacts on human rights be an integral aspect of such due diligence. The Danish NAP states that Denmark has planned to establish an inter-ministerial working group that will discuss the need for and

feasibility of business and human rights legislation that will have extraterritorial effect "in areas of particular relevance", including the need for judicial prosecution of any Danish company involved in "severe" human rights impacts (Danish Government 2014: 16). No indication is provided in the NAP, however, that determination of the severity of human rights impacts in this context would be done against the criteria set out in the UNGPs. In fact, the Danish NAP does not mention the assessment of human rights impacts *per se*. Denmark's NAP has been critiqued for failing to mention mandatory human rights due diligence legislation as such amongst its planned actions (ICAR/ECCJ 2014: 50-51).

Finland's NAP on business and human rights, which was released in October 2014, describes human rights due diligence as a "central concept" in managing human rights risks related to business activities, including in their international (i.e. extra-territorial) context (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014), but does not make specific reference to the assessment of business-related human rights impacts, or the criteria that should be applied in such assessments. The NAP states that Finland is preparing a report examining whether its current national legislation corresponds with the aims of the UNGPs "particularly where due diligence" is concerned, but does not refer to impact assessment, or severity criteria in this connection (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 5). According to the NAP, this report will "propose concrete recommendations" for legislative change "wherever necessary" (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 5). Finland's NAP has been critiqued for failing to specifically mention any measures that would require human rights due diligence as the basis for compliance with any legal rule (ICAR/ECCJ 2014: 69). Finland did evince consideration of the possibility of mandatory human rights due diligence in its NAP, but concluded, on the basis that it believed these matters to be insufficiently settled, that transforming human rights due diligence into a legally binding obligation at the domestic level in Finland at this juncture was "difficult to envisage" (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 25). In support of this position, Finland argued that: "According to international guidelines, the sufficiency of … due diligence … [is] always weighed on a case-by-case basis" (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 25). In this connection, Finland considered that "careful actions may be important for assessing company responsibilities" (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 25) in the face of allegations of involvement in impacts of a given severity, and Finland was therefore evidently reluctant to set down a hard legal rule on the matter. Finland nevertheless conceded the general principle that the seriousness of the adverse impacts caused would be an "important" consideration in such an "assessment on sufficiency" in all cases (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 25), but did not specify any specific criteria by which the 'seriousness' of impacts should be appraised, or that those criteria should be those that are set out in the UNGPs.

Neither the NAP of Lithuania nor Italy's NAP contain any specific concrete commitments on, or references to the assessment of human rights impacts.

Licensing and permitting of projects

Assessment of potential social, health and environmental impacts has long formed the basis of acceptance or rejection by states of project licensing and permitting applications made by companies (Schutter et al. 2012: 24). Indeed it has been estimated that more than 130 states require companies to prepare Environmental Impact Assessments (EIAs) as a prerequisite for consideration of approval of a proposed project (Schutter et al. 2012: 20 (footnote 62), 25). While assessment of human rights impacts may not be explicitly required by the letter of the laws that require such environmental, health or social impact assessments, this does not preclude project proponents from including human rights within the scope and methodology of their assessments. In this connection, recent guidance published by the DIHR and the International Petroleum Industry Environmental Conservation Association (IPIECA) on integrating human rights into environmental, social and health impact assessments provides concrete direction (DIHR/IPIECA 2013). Several entry points for human rights are identified by this guidance at critical steps in the impact assessment process, such as project screening, scoping, development of Terms of Reference (TOR), baseline studies, the actual identification and assessment of impacts, impact mitigation and management, monitoring, evaluation, and communicating and reporting as well as in terms of cross-cutting strategic themes like stakeholder engagement and participation, and the imperative to enhance focus on vulnerability and marginalization that a human rights-compatible approach to assessing impacts implies (DIHR/IPIECA 2013). Laws explicitly requiring the incorporation of human rights within the scope and methodology of EIAs, social impact assessments (SIAs), or Environmental, Social and Health Impact Assessment (ESHIAs) are a possible future development on the horizon.

Public investment in business enterprises

The UNGPs are clear that "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State" (UNHRC 2011b: 9, Principle 4). In this connection, some states have already established a legal or regulatory requirement of non-involvement by business enterprises in human rights impacts as a precondition for public investment (Schutter et al. 2012: 29). In Norway, for example, an Ethical Council screens companies in which the country's State Pension Fund Global is invested for involvement in "serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labor, the worst forms of child labour and other child exploitation" (Schutter et al. 2012: 32 and footnote 141 therein). The relevant regulation provides that: "In assessing whether a company shall be excluded […] the Ministry may among other things consider the probability of future norm violations; the severity and extent of the violations; [and] the connection between the norm violations and the company in which the Fund is invested" (Council on Ethics for the Government Pension Fund Global 2012: 68, para.4). Here we can see that two of the central benchmarks for the assessment of human rights impacts, that are set out in the UNGPs are referenced, namely: 'Severity' and 'extent' (which in the absence of any specific definition forwarded by the Fund, we may take to be equivalent to the 'scope' of an impact in terms of the number of rights-holders that stand to be affected, in the sense meant by the UNGPs). Moreover, we see how the UNGPs and official

interpretive commentary published by OHCHR may support interpretation and application of such regulations, for example, through clarification on the meaning of terms such as 'severity', 'extent' and 'probability' that are central to this Norwegian approach to state investment in companies.

Public procurement of goods and services

Noting that "States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities", the UNGPs set out that "States should promote respect for human rights by business enterprises with which they conduct commercial transactions" (UNHRC 2011b: 10, Principle 6 and Commentary). The UNGPs further contemplate that public procurement of goods and services provides "States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by [business] enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law" (UNHRC 2011b: 10, Commentary to Principle 6). In terms of state practice, we find that due diligence has already been established in some countries as a precondition of public procurement (Schutter et al. 2012: 29). As documented by De Schutter and others (Schutter et al. 2012: 29), in certain countries, laws and regulations establish that evidence of due diligence by a company can be taken as legitimate grounds for preferential treatment in its competition for government contracts against other bidders. Assessment by business enterprises of the human rights impacts in which they may be involved would, *prima facie*, constitute such evidence, and presumably even more so were such assessment to apply the authoritative criteria specified by the UNGPs and elaborated by OHCHR.

Export credit, guarantees, and insurance

States provide official export credit to companies domiciled in their territory to support their competition in export markets abroad (OECD 2016a). Export Credit Agencies (ECAs) that render such support can either be *bona fide* state institutions or private companies operating as agents of the state (OECD 2016a). Most official export credit support also involves some form of insurance or guarantee cover for the soft loans provided (OECD 2016a). In relation to such forms of state support to business, the UNGPs set out that:

> "States should take additional steps to protect against human rights abuses by business enterprises […] that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence. […] States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights" (UNHRC 2011b: 9-10, Principle 4 and Commentary).

In 2012, the Council of the Organisation for Economic Co-operation and Development (OECD) adopted a revised version of its Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (Schutter et al. 2012: 33 and footnote 144 therein), applicable to all 34 OECD member states. The Recommendation defines 'Social Due Diligence' so as to "encompass relevant adverse project-related human rights impacts" (Schutter et al. 2012: 33 and footnote 145 therein). At the

time of writing, the OECD Export Credit Group (ECG), in which all but two of the OECD member states are represented[15], was working on a strategy for assessing such project-related human rights impacts (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 27-28). It is unclear at the time of writing to what extent this strategy will align to the severity criteria set out in the UNGPs as defined by OHCHR. In the meantime, under the Common Approaches, the states represented in the OECD ECG have agreed that projects with potential adverse environmental and social impacts will always be screened for compliance with the IFC Performance Standards (Ministry of Employment and the Economy of Finland/Riivari/Piirto 2014: 27-28) which stipulate that, at least "in limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business" (IFC 2012: 8, footnote 12 therein). The assessment of human rights impacts linked to the applicant project against the severity criteria established by the UNGPs would presumably be the first expected step of such due diligence. These developments suggest that the implementation of concrete operational policies, procedures, systems and processes for screening export credit, guarantee, and insurance applications with respect to human rights impacts will continue to be an active area of work for the OECD member states, not least of all for the 32 states represented in the OECD ECG.

The official export development agency of Canada has similarly incorporated the IFC Performance Standards into its own due diligence regime (Schutter et al. 2012: 29, footnote 112 therein). Presumably, the agency therefore applies the formulation in the Performance Standards introduced above that, at least "in limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business" (IFC 2012: 8, footnote 12 therein). In this context also, then, the assessment of human rights impacts linked to the applicant project in terms of scale, scope, and irremediable character (as defined by OHCHR) would presumably be the first expected step of such due diligence.

In its report to the United Nations General Assembly (UNGA) on its official country mission to the United States, the UNWG welcomed the adoption by the Export-Import Bank (EXIM) (EXIM 2016), the official export credit agency of the United States, of policies relating to human rights in the operations that it finances. As reported by the UNWG, these policies included: Adoption of the IFC Performance Standards, the Equator Principles (discussed below), and a statement that EXIM's policies align with the OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, which in turn references the UNGPs (UNHRC 2014b: 7, para. 32). By virtue of this policy architecture, EXIM presumably requires assessment of

[15] The members of the OECD Export Credit Group (ECG) are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States (OECD 2016a). Chile and Iceland are members of the OECD but are not members of the OECD-ECG. See further, OECD (2016d).

human rights impacts in relation to projects proposed for its support. It is unclear, however, whether EXIM requires application of the impact assessment criteria set out in the UNGPs (scale, scope, and irremediable character) in the context of such assessments.

Other national export insurance and guarantee agencies, such as Switzerland's Swiss Export Risk Insurance and the Exports Credits Guarantee Department of the United Kingdom, assess projects proposed for their support in terms of their coherence with their respective state's other international policies, including policies on the promotion of human rights (Schutter et al. 2012: 34-35). However, it appears that these criteria are not assessed by these agencies via specific questionnaires administered to exporters or to investors applying for insurance (Schutter et al. 2012: 34-35). In the absence of further publicly available information, this makes it difficult to come to a definitive conclusion on how in concrete terms, these agencies render their determination of the compatibility of proposed export support applications with their country's international policy positions on human rights, including with respect to assessment of human rights impact attached to project that seek the support of these bodies, let alone whether these authorities expect that assessments will apply UNGP-aligned indicators and benchmarks.

Indeed, in referring to human rights at all, the above examples may represent leading exceptions rather than the rule. A recent expert review of 25 publicly-held agencies offering overseas investment insurance concluded that the integration of human rights considerations into the policies and practices of export credit and investment guarantee agencies remains "in its infancy" (Schutter et al. 2012: 34). The review found that only four of the 25 agencies reviewed required minimum labor or employment-related standards of their clients (Schutter et al. 2012: 34, footnote 151 therein).[16] There would appear to be a significant need for the establishment by export credit agencies of a clear and mandatory expectation the severity of the adverse human rights impacts that may be associated with their support will be assessed against the criteria specified by the UNGPs and defined by OHCHR.

Mandatory human rights due diligence

A recent expert review concluded that human rights due diligence requirements have already been incorporated into the domestic legislation of a number of states, including both civil law and common law jurisdictions.[17] That review concluded that: "There is, in effect, an emerging regulatory framework for human rights due diligence, based on international standards and national state practice" (Schutter et al. 2012: 8). The review identified that, in some States, human rights due diligence is set out as a direct legal obligation, formulated in a rule, such as those used as the basis upon which a competent authority may decide whether or not to grant an approval or a license (see above), whereas in

[16] The study did not identify which four agencies required minimum labor or employment-related standards of their clients.

[17] The study does not identify which states have already incorporated due diligence requirements into their domestic legislation.

other states, the obligation to undertake human rights due diligence is indirect, as when the law offers companies the opportunity to use due diligence as a defense against charges of criminal, civil or administrative breaches of law (see further, below).[18] In this modality, whether or not a company had sought to assess the human rights impacts in which it may be involved would certainly be a relevant consideration. So too, presumably, would be the rigor of the assessment undertaken, including in terms of the indicators and benchmarks that the company had applied, and their compatibility with prevailing expectations, such as those set out in the UNGPs.

The SRSG noted that a traditional definition of due diligence is "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation" (UNHRC 2008c: 9, footnote 22 therein). This begs the question: What level of human rights due diligence, including specifically the criteria applied in assessing impacts, can be "reasonably expected"? In other words: How much diligence is actually due? The SRSG himself was quick to acknowledge that the process of human rights due diligence "inevitably will be inductive and fact-based" (UNHRC 2008c), suggesting that it may not always be apparent from the outset what the appropriate scope and depth of the exercise should be. A recent expert review has reflected that "(t)he diversity of legal traditions, the complexity of business activities, and the variety of human rights contexts at the national level, suggest that there will not be a single form of [human rights] due diligence regulation that will be appropriate for every jurisdiction" (Schutter et al. 2012: 59). This finding does not preclude of course, the possibility of states mandating human rights due diligence in particular contexts, such as with regards to extra-territorial activity in specific high-risk countries abroad, or company involvement in lines of business that are inherently risky from a human rights point of views, such as supply chain sourcing of metals frequently known to be produced from conflict minerals. Indeed, the UNGPs advise that:

> "Human rights due diligence […] [w]ill 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" (UNHRC 2011b: 16, Principle 17) . "[T]he scale and complexity of the means through which enterprises meet [their] responsibility [to respect human rights] may vary according to […] their size, sector, operational context, ownership and structure and with the severity of the enterprise's adverse human rights impacts" (UNHRC 2011b: 14, Principle 14).

The response of the OECD to this issue, as set out in its Guidelines for Multinational Enterprises (see further below) essentially echoes the approach of the UNGPs:

> "The nature and extent of due diligence, such as the specific steps to be taken, appropriate to a particular situation will be affected by factors such as the size of the enterprise, [the] context of its operations, the specific recommendations in the Guidelines, and the severity of its adverse impacts […] [while] factors relevant to determining the appropriate response to the identified risks include the severity and probability of adverse impacts" (OECD 2011: 24-25, para. 15 and 21).

The question of how much diligence is due, including with respect to the assessment of human rights impacts, is of not insignificant bearing when it comes to consideration of the criminal, civil or administrative liability of business

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[18] The study did not identify which particular states had adopted each of these approaches.

enterprises or their staff for involvement in human rights harm. A judicial finding that a company undertook adequate due diligence may absolve a company of criminal, civil or administrative liability completely, or it may lessen the applicable penalty in cases where liability is found (Schutter et al. 2012: 11-24). It follows that this could presumably include application of adequate assessment indicators and benchmarks, such as those set out in the UNGPs. Criminal, civil or administrative liability or a combination of these may exist where a company fails to act with the level of diligence that the court judged to be due. Specifically in terms of criminal liability:

> "A company may, in some instances, avoid being charged with crimes committed by [its] agents by demonstrating that [the company] had in place effective programs of due diligence, sometimes called "compliance" programs. In other situations, a company may face a smaller penalty or sanction as a result of its "compliance" efforts" (Schutter et al. 2012: 12).

And, in the context of civil liability:

> "Negligence is normally defined as behavior that is unreasonable and results in harm. In most legal systems, this may include a failure to act with due diligence, i.e., to take all the precautionary measures that could reasonably have been taken in order to reduce the risk" (Schutter et al. 2012: 17).

In this context, it is noteworthy that due diligence is also increasingly a consideration in terms of consumer protection law (Schutter et al. 2012: 38). This is an arena in which companies may cause harm through their marketing or sale of unsafe goods impacts that could – and should – readily be identified and appraised by a company through an assessment of human rights impacts, including by application of appropriate and credible assessment indicators and benchmarks. There would appear then to be significant scope for states, when adopting and revising legislative and policy provisions that encourage or require human rights due diligence, to specify clearly that business enterprises ought to apply the indicators and benchmarks specific in the UNGPs and defined by OHCHR in assessing the severity of the human rights impacts in which they may be involved.

Corporate reporting and disclosure requirements

Many jurisdictions require incorporated or publicly listed companies to disclose information that may include information related to impacts on human rights. A 2011 United Nations report authored by the SRSG on the findings of the Human Rights and Corporate Law project, which surveyed aspects of corporate law that may be relevant from a human rights perspective for 39 states, concluded that, in most of the jurisdictions surveyed, companies were required by law to disclose all information "material" or "significant" to their operations and financial condition.[19] In cases where human rights impacts to which a company was linked reached such a threshold, the survey suggested a company would be required to report the impacts (Shift Project 2013b: 1). On the other hand, the survey concluded that there was limited regulatory guidance for companies on when a human rights impact could be deemed to meet that threshold (see further: Shift

[19] Question 16 of the survey was: "Are companies required or permitted to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime?" (Shift Project 2013a).

Project 2013b: 1). This is one area in which the severity criteria set out in the UNGPs, and defined by OHCHR, could provide needed clarity.

Governments that set mandatory corporate reporting and disclosure requirements on human rights may thereby directly incentivize the conduct of human rights due diligence, for example by requiring companies to report on their human rights due diligence processes and procedures. A key example of this approach would be the U.S. Reporting Requirements on Responsible Investment in Burma (United States Department of State – Bureau of Democracy Human Rights and Labor 2016). On 1 July 2013, as part of the Obama Administration's easing of sanctions on Myanmar, the U.S. Office of Foreign Assets Control (OFAC) authorized new investment in Myanmar by U.S. individuals and firms by issuing General License No. 17 (GL17) (Embassy of the United States in Burma 2015), pursuant to which, *inter alia*, any U.S. persons whose aggregate investment in Myanmar exceeds USD 500,000 is required to submit to the U.S. Department of State, as set forth in that Department's Reporting Requirements on Responsible Investment in Burma (United States Department of State – Bureau of Democracy Human Rights and Labor 2016), a public report that includes a concise summary or copies of policies and procedures, as they relate to the company's operations and supply chain in Myanmar, including: "Due diligence policies and procedures (including those related to risk and impact assessments) that address operational impacts on human rights, worker rights and/or the environment […]" (United States Department of State – Bureau of Democracy Human Rights and Labor 2016: 3, para. 5(a)). When launching this regulation, the U.S. government explained that: "The Department of State will use the information collected as a basis to conduct informed consultations with U.S. businesses to encourage and assist them to develop robust policies and procedures to address a range of impacts resulting from their investments and operations in Burma" (Embassy of the United States in Burma 2015). The U.S. government further explained that it intended "the public report to empower civil society to take an active role in monitoring investment in Burma and to work with companies to promote investments that will enhance broad-based development and reinforce political and economic reform" (Embassy of the United States in Burma 2015). The U.S. government further elaborated that the Reporting Requirements were intended to "encourage companies to uphold high standards of human rights in new and challenging investment climates", and expressed the hope that "companies will apply human rights due diligence efforts beyond their investment in Burma as they realize the risk mitigation value in this approach" (United States Department of State – Bureau of Democracy 2013: 14). To date at the time of research, 29 company reports had been published pursuant to GL17, including reports by Gap, the Coca-Cola Company, and Colgate Palmolive (Embassy of the United States in Burma 2015). It is unclear to what extent the application of appropriate impact assessment criteria and benchmarks are featuring in the implementation of the Reporting Requirements.

States may also create indirect incentives for companies to undertake due diligence, for example by requiring companies to report on their most salient human rights impacts and/or the measures that they are taking to address these. An important example of this approach is the UK *Companies Act 2006 (Strategic*

Report and Directors Report Regulations 2013) (United Kingdom House of Parliament 2013: 3), which require, at § 414C(7), company directors to prepare a strategic report as part of their annual report to shareholders that must include information about "to the extent necessary for an understanding of the development, performance or position of the company's business" (United Kingdom House of Parliament 2013: 3). While such information would presumably include factors such as the scale, scope and irremediable character of the impacts at hand, the *Companies Act* itself is silent on this point.

In April 2013, the EC adopted a proposal to amend directives on corporate reporting under which circa 18,000 large European companies (defined as those that have more than 500 employees, and a balance sheet total of € 20 million or greater, or a turnover of € 20 million or more) would be required to disclose a statement in their annual reports with information relating to matters including "human rights" and in particular "the risks related to these matters" (EC 2013d: 11). The proposal notes that companies may rely on international frameworks including the UNGPs when preparing the required statement (EC 2013d: 11). The EC proposal does not recommend specifically, however, that the assessment criteria specified by the UNGPs should be used in disclosing "risks related to" human rights (EC 2013d: 11).

Official Development Assistance

International development assistance, including Official Development Assistance (ODA), and related practices, refers to flows of official financing between States that are concessionary in character and that have the promotion of the economic development or welfare of developing countries as their stated primary objective (OECD 2003). By convention, ODA comprises contributions of donor government agencies, at all levels, to developing countries including via multilateral institutions (OECD 2003). According to the OECD, net global ODA flows in 2013 totaled some USD 134 billion (OECD 2016b). Since a portion of ODA is implemented by business enterprises contracted to execute development projects, it is of relevance to our present inquiry that some states are implementing human rights due diligence and/or human rights impact assessment as conditionalities at various points along which capital transfers in the name of development assistance flow through the private sector. The practices of Canada and Germany are illustrative of the types of measures being implemented in this regard.

Section 4.1 of the Government of Canada's Official Development Assistance Accountability Act (ODAAA) 2008, stipulates that: "Official development assistance may be provided only if the competent minister is of the opinion that it […] is consistent with international human rights standards" (Government of Canada 2008: 3). In this connection, the ODAAA – Consistency with International Human Rights Standards that were issued by the Government of Canada in February 2014 stipulate that:

> "For its programming to be consistent with international human rights standards, the applicant should be able to demonstrate, at a minimum, that it can reasonably expect to "do no harm", meaning that due diligence is exercised to avoid undermining human rights in the country or community. [...] [In order to demonstrate that this condition is met] (t)he initiative documentation (application form, proposal or bid) should contain the following: An outline of key human rights issues, including human rights concerns, relevant to the initiative; and

> (p)roposed mitigation measures to address any human rights concerns identified" (Government of Canada 2014).

The Canadian Standards further specify that:

> "When human rights issues are identified […] it is important to propose appropriate and sufficient measures to address the potential human rights concerns [...]. Appropriate means that the measures are tailored to the identified human rights issue. Sufficient means that the measures are proportionate to the likelihood and magnitude of impact of a possible human rights violation" (Government of Canada 2014).

Applicants for Canadian development assistance are required to make such demonstrations presumably also where any portion of the development assistance at hand is to be utilized by private sector entities. It is unclear whether, in such cases, the Canadian authorities would require application of the severity criteria specified in the UNGPs in appraising the "magnitude" of possible assistance-related human rights impacts.

The German Federal Ministry for Economic Cooperation and Development (BMZ) published in 2011 the Human Rights in German Development Policy Strategy. It states that: "During the preparation of all bilateral development programmes […] an assessment of human rights risks and impacts must be carried out", and that: "The human rights impacts must be monitored and reported by the relevant executing agencies during implementation" (BMZ 2011: 15). In this connection, the BMZ's Guidelines on incorporating human rights standards and principles, including gender, in programme proposals for bilateral German Technical and Financial Cooperation, which were issued in February 2013, state that: "When agencies tasked with implementing official development assistance (ODA) prepare programme proposals it is mandatory that they appraise the relevant human rights risks and impacts before any project, programme or module of bilateral German development cooperation can be commissioned" (BMZ 2013: 1). The Guidelines elaborate that:

> "The significant human rights risks that the development measure might entail and how these risks can be avoided [and] (w)hether and how the measure can make a sustainable contribution to the implementation of human rights standards and principles [...] shall be analyzed at an early stage, if applicable, already in the preliminary appraisal [and only] (i)f the appraisal rules out risk of human rights violations, the programme proposal can be deemed to be unproblematic" (BMZ 2013: 1-2).

These provisions presumably apply also in cases where implementation by private sector entities on behalf of the recipient state forms a component of a German development assistance programme. However, neither the current version of the BMZ Strategy nor its subsidiary Guidelines specify *per se* that such assessments should be based on the severity criteria set out in the UNGPs and in authoritiative guidance issued by OHCHR.

International and multilateral cooperation

States cooperate in international, regional and multilateral organizations in pursuit of their common objectives. In regard to state participation in such bodies, the UNGPs stipulate that:

> "States, when acting as members of multilateral institutions that deal with business-related issues, should […] (s)eek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights […] (e)ncourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States

> meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising […] [and] (d)raw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges" (UNHRC 2011b: 12, Principle 10).

The UNGPs ground these principles in the need for greater policy coherence at the international level, reminding states that they retain their international human rights law obligations when they participate in international trade and financial institutions, amongst other forums (UNHRC 2011b: 12, Principle 10).

Since, as we have seen, the assessment of business-related human rights impacts is a foundation for the corporate responsibility to respect human rights as a whole, its promotion is an important measure that states can pursue through international cooperation. Normative developments on the part of the United Nations Committee on the Rights of the Child, UNICEF, the International Organization of Standardization (ISO), the United Nations Conference on Trade and Development (UNCTAD), the Committee on World Food Security (CFS), UNGC, IFC, EIB, the World Bank, EC, the OECD, and the United Nations Human Rights Council (particularly in its adoption of the United Nations Principles for Responsible Contracts and in establishing an intergovernmental working group mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises) are amongst the most prominent examples of recent development in international cooperation that promote the assessment by business enterprises of the human rights impacts in which they may be involved. Let us now take the opportunity to examine each of these key recent developments in turn, from the specific perspective of how they encourage, in some cases require, business enterprises to undertake assessments of the adverse human rights impacts that they may cause, contribute to, or to which they may otherwise be directly linked.

The United Nations Committee on the Rights of the Child, in its General Comment No. 16, which it adopted 2013, on state obligations regarding the impact of the business sector on children's rights, advises states that:

> "To meet their obligation to adopt measures to ensure that business enterprises respect children's rights, States should require businesses to undertake child-rights due diligence. This will ensure that business enterprises identify, prevent and mitigate their impact on children's rights including across their business relationships and within global operations" (UNCRC 2013: 17).

General Comment No. 16 itself does not set out the specific criteria by which the severity of impacts on children's rights identified through such child-rights due diligence should be assessed. However, the Committee has raised the issue of business and human rights indicators in other contexts. For example, in its 2012 Concluding Observations regarding Thailand's implementation of the Convention on the Rights of the Child, the Committee recommended that Thailand "(p)romote the inclusion of child rights indicators and parameters for reporting and provide specific assessments of impacts of business and industry on child rights" (UNCRC 2012). However, the Committee does not specify that these "indicators and parameters" should include those set out in the UNGPs for the assessment of the severity of business-related human rights impacts.

UNICEF and the International Commission of Jurists (ICJ) have recently published guidance for states on how to implement General Comment No. 16 (UNICEF/ICJ 2015), in which it is recommended that "governments should develop a set of children's rights and business indicators to track progress in meeting their international obligations" (UNICEF/ICJ 2015: 32). This guidance does not specifically recommend that such indicators should include the severity criteria set out in the UNGPs and defined by OHCHR.

In 2012, UNICEF, together with the UNGC and Save the Children, launched the Children's Rights and Business Principles (CRBPs) (UNICEF/UNGC/Save the Children 2012), which – *inter alia* – specify that:

> "To carry out human rights due diligence, all business should: Identify and assess any actual or potential adverse impact on children's rights. This […] should take into account that girls and boys may face different risks" (UNICEF/UNGC/Save the Children 2012: 7).

Building on the normative foundation of the CRBPs, UNICEF has since released a set of tools that provide practical guidance to companies on how to integrate child rights considerations into impact assessment processes, in particular the Children Are Everyone's Business workbook (UNICEF 2014), and guidance on Children's Rights in Impact Assessments (UNICEF/DIHR 2013). More recently, UNICEF has published findings of scoping studies and pilot application of the CRBPs and these supporting tools in the oil and gas (UNICEF 2015b) and mining (UNICEF 2015a) sectors that include impact assessment and due diligence within their scope. These documents and guides could be further strengthened through integration of the indicators for the assessment of business-related impacts on human rights specified by the UNGPs, as defined by OHCHR.

The United Nations Principles for Responsible Contracts (UNPRC) (UNHRC 2011a), adopted by the United Nations Human Rights Council (UNHRC) as an addendum to the UNGPs, applicable in the context of investor-state contracting note that: "specific studies on potential adverse human rights impacts should occur throughout the life-cycle" of a state-investor project, and that the "parties need to be aware of any potential adverse impacts that are foreseeable from feasibility studies, early impact assessments, due diligence assessments or other initial project preparation" (UNHRC 2011a: 9, Principle 2). The UNPRC further contemplate that: "To be able to prevent and mitigate potential adverse human rights impacts, States should ensure these are assessed from the project's earliest stages through its life-cycle, including the final stages such as decommissioning, abandonment or rehabilitation of the sites. For the business investor, it is important to complete a first assessment as early as possible in the context of a new activity, even before contract negotiation, to aid its understanding of the potential risks […] to people posed by the project from the outset" (UNHRC 2011a: 9-10, para. 21). However, the UNPRC do not explicitly specify that the severity criteria specified by the UNGPs ought to be applied in such studies and assessments.

The International Organization of Standardization (ISO) 26000 guidelines for the social responsibility of organizations were released in 2010, i.e. prior to the adoption of the UNGPs (see gernerally ISO 2016). Nevertheless, as the SRSG noted, the ISO had "drawn upon" the 2008 United Nations "Protect, Respect and Remedy" Framework in its development of ISO 26000 (UNHRC 2011b: 4, para. 7). Specifically, "Human rights" is a "core subject" of ISO 26000, comprising eight

sub-issues, *viz.* 'Due diligence', 'Human rights risk situations', 'Avoidance of complicity', 'Resolving grievances', 'Discrimination and vulnerable groups', 'Civil and political rights', 'Economic, social and cultural rights', and 'Fundamental principles and rights at work' (ISO 2010). One of specific 'actions and expectations' within the area of human rights due diligence that is stipulated by ISO 26000 (at section 6.3.3.2) is that: "Specific to human rights, a due diligence process should, in a manner that is appropriate to the organization's size and circumstances, include […] means of assessing how existing and proposed activities may affect human rights" (ISO 2010, para. 6.3). In light of the fact that it was released in 2010, prior to the adoption of the UNGPs in 2011, it is perhaps unsurprising that ISO 26000 does not specify that indicators of scale, scope and irremediable character be applied in such assessments.

The United Nations Conference on Trade and Development (UNCTAD) has issued guidance to states on opportunities for integrating human rights considerations into national investment policies and regulations, and into international investment agreements (UNHRC 2015: 7-8, para. 24). As noted by the UNWG, the UNCTAD framework has been used by states to guide their efforts in reforming investment rules, as well as by civil society as a benchmark to evaluate the impact of investment policies on human rights (UNHRC 2015: 7-8, para. 24). While the UNCTAD guidance includes several general references to human rights as well as to impact assessment, it does not recommend assessment of the human rights impacts associated with international investment agreements *per se*. Nor does it contain a specific recommendation that the assessment criteria provided by the UNGPs be integrated into such policies, regulations and investment agreements.

The Principles for Responsible Investment in Agriculture and Food Systems, adopted by the CFS in October 2014 (CFS 2014) reaffirm that "Business enterprises have a responsibility to […] act with due diligence to avoid infringing on human rights" (CFS 2014: 25, para. 50). More specifically, the Principles specify that: "Business enterprises involved in agriculture and food systems are encouraged to […] conduct due diligence before engaging in new arrangements" (CFS 2014: 25, para. 51). However, the Principles do not specifically encourage business enterprises to integrate the impact assessment criteria set out in the UNGPs in such due diligence processes.

Established in July 2000, the current General Assembly mandate of the UNGC is, *inter alia*, to "promote responsible business practices and UN values among the global business community" (UNGC 2016a). The UNGC currently enjoys the participation of some 8,000 business enterprises domiciled and/or operating in 145 countries (UNGC 2016b). As such, the UNGC is considered to be "the leading global voluntary initiative for corporate social responsibility that also addresses the issue of business and human rights" (OHCHR 2016a). The Principles upon which the UNGC is based state, *inter alia*, that: "Businesses should […] respect the protection of internationally proclaimed human rights; and […] make sure that they are not complicit in human rights abuses" (UNGC 2016c). In 2011, immediately following the adoption of the UNGPs by the United Nations Human Rights Council, the UNGC and OHCHR jointly stated that the UNGPs "are of direct relevance to the commitment undertaken by Global Compact participants […] the UN Guiding Principles provide further conceptual and

operational clarity for the […] human rights principles championed by the Global Compact. They reinforce the Global Compact and provide an authoritative framework for participants on the policies and processes they should implement in order to ensure that they meet their responsibility to respect human rights" (UNGC/OHCHR 2014: 2). While neither of the two human rights principles of the UNGC specifically mention the assessment of human rights impacts as such, the UNGC issued guidance materials in 2010 that specify the relevance of assessing human rights impacts to the human rights principles enshrined in the UNGC initiative.[20] Since this guidance predates the UNGPs, it does not specifically support or encourage companies to apply the criteria for the assessment of the severity of human rights impacts in which they may be involved that are set out in the UNGPs.

International Financial Institutions (IFIs)

Commitments to refrain from financing projects implemented by business enterprises that may cause or contribute to human rights impacts are increasingly being incorporated into the policies and procedures of international financial institutions (IFIs), including multilateral development banks (MDBs) such as the EIB (EIB 2013), and the Council of Europe Development Bank (CEB).[21] A recent study published jointly by the World Bank and OECD concluded that: "The trend is clear and sustained […] [that] the majority of [international finance] agencies surveyed have either adopted human rights policies or are in the process of developing or updating them" (World Bank/OECD 2013: 3-4). Implementation of such commitments by IFIs in practice would seem to invite, if not entail, routine *ex ante* assessment of the potential adverse human rights impacts connected to projects proposed for their support, as well as ongoing monitoring and oversight of projects during implementation. A growing number of IFIs are incorporating the assessment of human rights impacts into their policy frameworks and guidelines, in some cases setting out the assessment of human rights impacts or human rights due diligence as preconditions for project finance.

As already noted above, the International Finance Corporation (IFC) has incorporated the concept of human rights due diligence directly into its Performance Standards[22], application of which is required by clients of all of the IFC's direct investments, including project and corporate finance provided through financial intermediaries (IFC 2012: 2). Multiple references to human rights across the Performance Standards set respect for human rights by clients

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20 See, for example Abrahams/Wyss (2010).

21 The Council of Europe Development Bank (CEB)'s Environmental Policy mandates that "the CEB will not knowingly finance projects which are identified as […] undermining human rights" (CEB n.d.: 5).

22 Hence, IFC Performance Standard (PS) 1 provides that: "Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project… In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business" (IFC 2012: 6, 8).

as operational policy objectives.[23] In particular, the Performance Standards stipulate that:

> "In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business" (IFC 2012: 3, footnote 12).

Failure by business enterprises to comply with the Performance Standards is regularly found by the Complaints Advisor Ombudsman (CAO), the independent recourse mechanism for the IFC (CAO 2016b), mandated through its Terms of Reference (TOR) to undertake compliance appraisals, investigations, and audits of IFC-supported projects (CAO n.d.). The CAO typically employs an independent panel of experts to conduct such investigations (CAO 2016a). As per its Operational Guidelines (CAO 2013), the CAO makes public the current status of all compliance cases (CAO 2013: 25). In the 2014 Financial Year, the CAO addressed a total of 54 cases (CAO 2014: 26). However, the IFC Performance Standards do not reflect the criteria for the assessment of project-related human rights impacts that are set out in the UNGPs (i.e. scale, scope, and irremediable character).

The EIB Statement of Environmental and Social Principles and Standards states that: "EIB restricts its financing to projects that respect human rights" and further that "the approach of the EIB to social matters is based on the rights-based approach mainstreaming the principles of human rights law into practices" (EIB 2009a: 18, para. 49). In December 2013, the EIB released its Environmental and Social Handbook, which provides an operational translation of the policies and principles contained in the EIB Standards. The Handbook states that the "EIB is committed to […] ensuring that […] human rights […] are considered accordingly as part of comprehensive assessment and decision-making processes" (EIB 2013: 12), and sets out specific criteria for the assessment of human rights impacts in the context of projects proposed for EIB support that align to the criteria set out in the UNGPs as defined by OHCHR. In terms of enforcement of these criteria, amongst other measures, a Memorandum of Understanding (MOU) (EIB 2009b) signed between the EIB and the European Ombudsman in 2008 establishes a two-stage complaints process for the EIB, under which, failing satisfaction of internal resolution by EIB itself, a complaint can be referred to the European Ombudsman (European Ombudsman 2016) , an independent EU body. In other words, when complainants are not satisfied with the outcome of an internal EIB complaints investigation, they can complain to the European Ombudsman directly about alleged maladministration. This possibility of upward recourse is unique among IFIs (European Ombudsman 2016), and is even more notable in the context of the present analysis by virtue of the comprehensive coverage in EIB's guidance materials of the criteria for assessing human rights impacts that are specified by the UNGPs, and the alignment of the EIB's guidance with the definition of those criteria by OHCHR.

In August 2016, the World Bank's Board of Executive Directors approved a new Environmental and Social Framework (ESF) that will apply to all new World

[23] See especially PS4 and PS7 (IFC 2012: 27-30, 47-52).

Bank investment projects for which a concept note is issued, with anticipated operational effect from early 2018 (World Bank 2016b).

> "the World Bank's activities support the realization of human rights expressed in the Universal Declaration of Human Rights. Through the projects it finances, and in a manner consistent with its Articles of Agreement […] the World Bank seeks to avoid adverse impacts and will continue to support its member countries as they strive to progressively achieve their human rights commitments" (World Bank 2016a: 1, para. 3).

The ESF also introduce labor standards and working condition protections (which were notable by their absence from the Bank's earlier investment lending safeguards) and establishises a cross-cutting principle of non-discrimination.[24]

As already mentioned above, each of the three EC sector-specific guidelines on the corporate responsibility to respect human rights, namely those addressing companies in the oil and gas, employment and recruitment and ICT sectors, elaborate on modalities of human rights due diligence, including impact assessment, as a "core element" for operationalizing the corporate responsibility to respect human rights in practice in particular industry sectors (EC 2013a, b, c), and align to the criteria set out in the UNGPs and the definition of those criteria provided by OHCHR.

The OECD has incorporated a specific recommendation that enterprises carry out human rights due diligence into its revised Guidelines for Multinational Enterprises[25], which are addressed to multinational companies operating in or from the 46 states adhering to the OECD Declaration and Decisions on International Investment and Multinational Enterprises.[26] Relevantly, the Guidelines (OECD 2011) provide that:

> "Enterprises should […] (c)arry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts […] The nature and extent of due diligence, such as the specific steps to be taken, appropriate to a particular situation will be affected by factors such as the size of the enterprise, context of its operations, the specific recommendations in the Guidelines, and the severity of its adverse impacts" (OECD 2011: 31, 24).

The OECD Guidelines do not specify that the "severity" of such impacts be assessed in terms of their scale, scope, and irremediable character as specified by the UNGPs. In terms of oversight and enforcement, noncompliance of business enterprises with the Guidelines is determined by the various OECD National Contact Points (NCPs) upon receipt of lodged cases. At the time of writing, approximately 330 'specific instances' of alleged non-observance of the guidelines had been treated by the various NCPs around the world (OECD 2016c), although it should be noted that not all of these instances referred specifically to human rights.

We have seen that states, both individually and through their participation in international, multilateral and regional organizations are increasingly advancing frameworks that encourage or require companies to undertake human rights due diligence and therefore, by implication, to assess the actual and potential impacts with which they may be involved. We have seen that there have been numerous recent developments in law, regulation, administration, and international

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24 See further (World Bank 2016b).

25 See especially OECD (2011: 31, para. 5).

26 See further OECD (2016e).

cooperation that promote the assessment of adverse business-related human rights impacts, spanning an impressive range of policy arenas. However, the internationally recognized criteria for the assessment of business-related impacts on human rights set out in the UNGPs remain very weakly represented in official instruments and initiatives. On the other hand, it seems unlikely that the present momentum in the field of business and human rights will wane in the short-term, and we may expect more and deeper actions relevant to the assessment of business-related impacts on human rights on the part of a greater number of states going forward, that may include more robust inclusion of human rights assessment indicators that align with the international standard represented by the UNGPs.

Two areas of future international cooperation amongst states deserve special mention. Firstly, as recently identified by the UNWG, one platform with potential for contributing to further convergence between international and multilateral organizations around the UNGPs is the Inter-agency roundtable on Corporate Social Responsibility, jointly organized by UNCTAD, ILO and OECD. The roundtable provides an opportunity for international organizations to better collaborate and align their activities and may as such be a good venue through which to provide states with a "one stop shop" for discussing issues relating to the UNGPs with relevant experts within international organizations (UNHRC 2015: para. 26). Indicators and benchmarks for assessment by business enterprises of the human rights impacts in which they may be involved could be one pertinent matter for the roundtable to take up.

Secondly, in June 2014, the Human Rights Council adopted resolution 26/9 by which it decided to establish an intergovernmental working group mandated to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (UNHRC 2014a: 2). Given the centrality of the concept of human rights due diligence to the UNGPs, it would perhaps be surprising and unfortunate if the proposed binding international instrument on business and human rights which the Open-Ended Intergovernmental Working Group on Transnational Corporations and Human Rights (OEIGWG) is charged with drafting did not reference or incorporate the impact assessment criteria established in the UNGPs. The OEIGWG held its inaugural session in July 2015. Whether and how the forthcoming international legally binding instrument to be drafted by the OEIGWG will require states to implement frameworks for the assessment of business-related human rights impacts remains to be seen.

5.2 Annex 2. Business practice

The UNGPs directly address themselves "to all … business enterprises, both transnational and others, regardless of their size, sector, location, ownership [or] structure" (UNHRC 2011b: 6). The SRSG estimated the numerical population of business enterprises to which the UNGPs apply to include "80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms" (UNHRC 2011b: 5, para. 15). This is, by any measure, a truly enormous scope of application. The strong rationale for this comprehensive scope of application is that the corporate responsibility to respect human rights is defined

as "the basic expectation society has of business in relation to human rights" (UNHRC 2011b: 4, para. 6), an expectation that is not reserved for any specific class of company. This begs the question: To what extent and how are companies presently assessing the severity of the human rights impacts in which they may be involved? More specifically, to what extent do the relevant policies, procedures, and practices applied by business incorporate the indicators and benchmarks for human rights impact severity assessment specified by the UNGPs and defined by OHCHR?

As a starting point, we may observe that there are many good business reasons why companies may wish to know and be able to show that they respect human rights utilizing the authoritative assessment criteria that the UNGPs provide. Indeed, there is strong emerging evidence that human rights performance has a measurable positive impact on long-term corporate value. The findings of a recent analysis by researchers at Shift and the CSR Initiative at the Harvard Kennedy School of the costs of company-community conflict in the extractive sector are a highly illustrative case in point. The study, which was based on an analysis of 50 publicly available case studies of investment projects in the extractive sector (Davis/Franks 2014: 8), found that the most frequently occurring costs for companies in that sector were those arising from lost productivity due to temporary shutdowns or delay (Davis/Franks 2014). In particular, nearly half of the cases analyzed in the study involved a blockade by community members, while one-third involved one or more fatalities or injuries, damage to property, or the suspension of a project, or the outright abandonment of a project (Davis/Franks 2014: 8). The financial costs associated with these adverse social impacts were found to be significant. For example, it was found that mining projects with capital expenditure of between USD 3-5 billion would suffer costs of roughly USD 20 million every week of delayed production (Davis/Franks 2014: 8). One international company in the extractive sector estimated that it may have experienced a USD 6.5 billion value erosion over a two-year period due to stakeholder-related risks (Davis/Franks 2014: 6). The greatest overall costs associated with project-related community conflict identified through the research were found to be the opportunity costs in terms of the lost value of foregone future projects and expansion plans (Davis/Franks 2014: 8). The latter was found to be a particular risk in the feasibility and construction stages (Davis/Franks 2014: 8). Of particular relevance to the present analysis, impact assessment was found to be important in identifying and preventing the causes of conflicts between extractive sector companies and their host communities (Davis/Franks 2014: 9). Presumably, application of the rigorous and authoritative impact assessment criteria provided by the UNGPs (as defined by OHCHR) can therefore be of central importance to companies in safeguarding business value in the face of human rights risks.

Indeed, one indication that business enterprises are increasingly recognizing the business benefits of assessing human rights impacts in which they may be involved is that companies across a range of industry sectors are increasingly issuing public endorsements on the business value of doing so. Shell, for example, has recently stated publicly that a partnership to implement respect for human rights across four areas of the company's global operations (*viz.*, community impacts, employee relations, procurement and security) is helping

the company "to further shape our approach on human rights" (BHRRC 2016d).[27] Shell has publicly stated specifically that: "The collaboration has helped us integrate human rights thinking into our existing business processes, aiming to identify and address potential impacts; particularly when we consider entering or operating in politically sensitive countries and regions" (BHRRC 2016d).

Another indication that companies are increasingly seeing the business value of assessing human rights impacts is that companies regularly commission such assessments without ever promoting that fact externally. The Danish Institute for Human Rights (DIHR) has recently issued an estimate that approximately 50 companies have conducted one or more human rights impact assessments (DIHR/Nestlé 2013: 5). Of these, a desktop survey was only able to identify approximately ten published human rights impact assessment reports commissioned by companies (see table, below), implying that the vast majority of human rights assessments that have been commissioned by companies have never been published, nor in many instances have companies even publicly communicated the fact that such assessments have been undertaken. The fact that companies commission or undertake assessments of the human rights impacts in which they may be involved without ever publicizing that the assessment has taken place suggests that the data, information, knowledge, awareness, and understanding generated by such assessments is of inherent business value.

A related explanation for why companies are increasingly assessing the human rights impacts in which they are involved, even where they are neither disclosing nor promoting the fact that those assessments are taking place, could be that, as the World Bank's Nordic Trust Fund for Human Rights has noted: "Human rights discourse is now so well-entrenched in communities that human rights impact assessments are a logical tool for risk management in a range of contexts" (Nordic Trust Fund/World Bank 2013: 10).

Table 4 shows ten publicly available reports from human rights impact assessments commissioned by companies, in chronological sequence of publication. As the table shows, companies in a range of sectors from oil and gas, mining, travel and tourism, food, beverage and agriculture to energy, infrastructure and utilities have published human rights impact assessment reports. In particular, we can see that BP pioneered the practice of company-based human rights impact assessment by publishing the Executive Summary of the human rights impact assessment of its Tangguh Liquefied Natural Gas (LNG) Project in West Papua, Indonesia, in 2002 (Smith/Freeman 2002).[28] The cohort of published company-based HRIA reports that followed were likewise all commissioned by companies in the extractive sector (Goldcorp, Tullow, and Paladin). In the past few years since 2012, there has been a diversification as well as a relative numerical proliferation of published assessments, with travel and tourism company Kuoni and food, beverage and agriculture companies Dole and Nestlé joining the small but growing group of companies publishing human rights impact assessment reports. Notably, those company-commissioned human rights impact assessment reports that have been published to date have

[27] See also DIHR (2016c).

[28] For many years, this document was publicly available on the BP website, but this is no longer the case. See generally BP Indonesia (2015).

been undertaken by a small number of specialist service providers, namely: The Danish Institute for Human Rights (DIHR), NomoGaia, Foley Hoag, twentyfifty, and On Common Ground.

TABLE 4: Publicly available reports of 10 human rights impact assessments commissioned by companies, listed in chronological order by date of publication[29].

Company	Project / Operation	Location & Country	Industry sector	Service provider	Publication title	Date
BP	Tangguh LNG Project	West Papua, Indonesia	Oil & Gas	Foley Hoag	Human Rights Assessment of the Proposed Tangguh LNG Project: Summary of Recommendations and Conclusion (Smith/Freeman 2002) (full report not publicly available; executive summary publicly available)	April 2002
Paladin Energy	Kayelekera Uranium Project	Karonga District, Malawi	Mining	NomoGaia	Human Rights Impact Assessment: Kayelekera Uranium Project of Karonga District, North Malawi (Salcito 2015)	June 2009
Goldcorp	Marlin Mine	San Miguel, Ixtahuacán & Sipacapa Municipalities, Guatemala	Mining	On Common Ground	Human Rights Assessment of Goldcorp's Marlin Mine (On Common Ground Consultants 2010)	May 2010
Tullow Oil PLC	Lake Albert Exploration Project	Hoima and Buliisa Districts, Bunyoro, Uganda	Oil & Gas	NomoGaia	Human Rights Risk Assessment: Lake Albert Exploration Project - Hoima and Buliisa Districts, Bunyoro, Uganda (Salcito/Wielga/Kanis 2012)	March 2012
Kuoni	Kenya Pilot Project	Kenya	Travel & Tourism	twentyfifty	Assessing Human Rights Impacts: Kenya Pilot Project (Kuoni 2012)	November 2012

[29] Note that inclusion of a publication in this table does not indicate any endorsement by the author. The table is based on the publicly available list of documents published by the Business & Human Rights Resource Centre (http://business-humanrights.org/en/impact-assessment), and is not intended to be comprehensive.

'Aimec Minerals' [30]	'Nuiguyo Project'[31] open pit gold and silver mine	Indonesia	Mining	NomoGaia	Human Rights Impact Assessment on the proposed Nuiguyo gold mine in Indonesia owned by Aimec Minerals (Wielga et al. 2009)	September 2013
Dole Fresh Fruit	El Muelle Pineapple Project	Cutris District, Costa Rica	Food, Beverage & Agriculture	NomoGaia	Dole Human Rights Impact Assessment: El Muelle Pineapple Project of Cutris District (Salcito 2010)	October 2013
Green Resources	Proposed CHP plant and Transition into Harvesting	Uchindile Forest, Southern Highlands, Tanzania	Food, Beverage and Agriculture	NomoGaia	Green Resources Human Rights Impact Assessment: Proposed CHP plant and Transition into Harvesting at Uchindile Forest (Salcito/Wielga/Wise 2009)	October 2013
Nestlé	7 country operations	7 countries	Food, Beverage & Agriculture	Danish Institute for Human Rights	Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities (DIHR/Nestlé 2013)	December 2013
Kuoni	India Project	India	Travel & Tourism	Kuoni, drawing upon earlier twentyfifty support	Assessing Human Rights Impacts: India Project Report (Kuoni 2014)	February 2014

If the trends represented in the table above continue, we can expect publication of human rights impact assessment reports, and similar documents, to become more frequent over time, and to involve companies in an increasingly broad range of industry sectors. For example, while it is axiomatic the business value of assessing the human rights impacts in which a company may be involved will have particular salience when it comes to "large footprint sectors" such as mining, oil and gas, forestry, agriculture, or infrastructure (Götzmann 2014: 4), the process of assessing human rights impacts is doubtless relevant to a wider range of other industry contexts as well, including the ICT sector for example, where the human rights to privacy and freedom of expression of a very large number of 'users' within the 'subscriber base' of a company may be in jeopardy. The increasing frequency with which human rights impact assessment is being undertaken by companies and the increasing diversity of industry sectors and geographic contexts in which such assessments are being conducted underscores the need for principled yet practical indicators and benchmarks for the

30 The actual name of the commissioning company has been changed in this document.

31 The actual name of the project under study has been changed in this document.

assessment by companies of the human rights impacts in which they may be involved, such as those proposed in this study.

For indications on the extent to which the company-commissioned human rights assessments published to date apply indicators of severity aligned to the UNGPs, the reader is referred to the case study excerpts included in the foregoing.

5.3 Annex 3. Tools and guidance

We have seen that the assessment of human rights impacts by companies is an increasingly common practice. This, in turn, has created demand for tools, guidance and standards to support companies in their assessment of the human rights impacts in which they might be involved. Various such tools have been produced and are in active use. The question at hand in the present study is: To what extent do these tools integrate the criteria for assessing the severity of human rights impacts in which companies may be involved that are specified by the UNGPs and authoritatively defined by OHCHR?

With this question in mind, let us review some of the key available tools that have been developed by concerned stakeholders to support companies to undertake human rights assessments. In particular, we will look at the Human Rights Impact Assessment toolkit developed by NomoGaia, the Human Rights Compliance Assessment (HRCA) tool developed by DIHR, and guides to human rights impact assessment published by Rights & Democracy and the IFC. Certain tools, guidance and standards that support sustainability reporting by companies invite reporting on matters directly relevant to the assessment by companies of their human rights impacts. Amongst these, we will look at the key examples of the Global Reporting Initiative (GRI) G4 Sustainability Reporting Guidelines, the United Nations Guiding Principles Reporting Framework, and the proposed forthcoming Corporate Human Rights Benchmark. The Equator Principles provide an illustrative example of the wide range of other tools, standards, and guidance that industry sectors are increasingly utilizing that promote assessment by companies of human rights impacts.

Of the ten examples of assessments of human rights impacts commissioned by companies for which reports of the findings are publicly available and which are summarized above, no less than five were delivered by NomoGaia (see Table 4, above). It is therefore very welcome that NomoGaia has published its Human Rights Impact Assessment toolkit (NomoGaia 2016) enabling public review. Of particular interest for our present purposes is that the toolkit includes a 'Human Rights Impact Ratings Scoring System', which invites an assessment of project-related impacts on human rights on a right-by-right basis, according to eight defined categories (see Table 5).

TABLE 5: NomoGaia's Categories of Human Rights Impact Scoring Systems

Right is likely to be severly negatively impacted. Poses risks to the Project itself.
Project has the potential to impact a right in negative ways.
Project impacts are variable but are likely to be significantly positive or negative.
Project is likely to impact a right in positive ways.
Right is expected to improve significantly as a direct result of Project activities
Data associated with rating is flawed, insufficient, or absent. Monitoring needed.
Extreme uncertainty. Lack of data associated with right represents a significant risk.
Right is more effectively analyzed in conjunction with other rights, not rated alone.

Source: NomoGaia 2012: 4 (adapted version)

NomoGaia explains that:

> "Each […] (t)opic is scored for the intensity, direction (positive or negative) and extent of impact likely to result from project activities. The scoring system is numerical […] Intensity is defined as the severity with which an impact will alter life for even a single person, and the degree to which the Company is responsible. Extent is defined as the breadth of the impact […] the scoring system is on a -25 to +25 scale" (NomoGaia 2012: 12).

The NomoGaia HRIA toolkit evinces great rigor, and a great number of conceptual strengths. Nevertheless, three conceptual issues with the toolkit detract from its otherwise very sound methodological integrity:

Firstly, the toolkit at times appears to conflate assessment of a company's impacts on rights holders with implications of those impacts for the company itself. For example, one particular rating indicates that "a right is likely to be severely negatively impacted by the Project to the extent that it poses risk to the success of the Project itself" (NomoGaia 2012: 12). Another rating indicates that enjoyment of a given right is "expected to improve significantly as a direct result of Project activities" (NomoGaia 2012: 12). Such a rating is intended to "indicate impacts that can positively affect a Corporate Partner's reputation and can be examples of outstanding positive influence in a community" (NomoGaia 2012: 12), again appearing to conflate impacts on rights-holders with impacts to business. Authoritative guidance on the UNGPs issued by the EC is clear on this point that:

> "Traditional prioritisation or "heat mapping" of risks rates the severity (or "consequence") of impacts in terms of the risk they pose to the company. For human rights due diligence, severity is about the risk posed to human rights" (EC 2013a: 47).

Secondly, the NomoGaia HRIA toolkit at times appears to conflate assessment of the severity of an impact with an assessment of the connection between the company and the impact. In particular, the intensity of an impact is defined in the toolkit as "the severity with which an impact will alter life for even a single person, and the degree to which the Company is responsible" (NomoGaia 2012: 12). The EC has advised clearly in this connection that consideration of a company's connection to the impacts in which it may be involved "becomes relevant only in then considering what can be done to address" (EC 2013a: 48) those impacts, and not in the assessment of the basic severity of those impacts.

Finally, it is unclear how the two components of the 'Extent of Impact' factor in the NomoGaia HRIA toolkit, *viz*. "number of Rightsholders impacted" and "breadth of impact", differ from one another. On the face of it, it would appear that the 'breadth' of a human rights impact, being an impact on people, will be defined in terms of the number of rightsholders impacted. In the authoritative guidance on the UNGPs issued by OHCHR, this factor is referred to as the 'scope' of an impact (OHCHR 2012a: 19). Notwithstanding these technical points, the NomoGaia toolkit rightly remains a leading, publicly available guide as to how, in concrete practice, businesses can assess the severity of their impacts on human rights.

The Danish Institute for Human Rights (DIHR)'s Human Rights Compliance Assessment (HRCA) tool (2016b) "measure[s] the implementation of human rights in company policies and procedures" (DIHR 2016b), but does not assess actual or potential company-related impacts on human rights *per se*. As the SRSG noted: "As the name suggests, [the HRCA] identifies a company's compliance with human rights instruments […] But the tool does not actually relate the impact of the company's existing or proposed activities to the human rights situation on the ground, or vice versa" (UNCHR 2006: 19, para. 77). The HRCA uses three types of indicators: policy, procedure and performance:

> "The policy indicators seek to determine whether [a] company has policies or guidelines in place to address human rights issue[s] of concern. […] The procedur[e] indicators inquire whether [a] company has appropriate and sufficient procedures in place to effectuate the policies, and the performance indicators request verification of [a] company's performance" (DIHR 2016a).

Case study: Human Rights Assessment of Goldcorp's Marlin Mine (On Common Ground Consultants 2010)

On Common Ground Consultants, May 2010, applying the Human Rights Compliance Assessment Tool (HRCA) developed by the Danish Institute for Human Rights (DIHR)

In their assessment of the human rights situation around, and related to, the presence and operations of the Marlin Mine, a gold and silver mine employing a combination of open pit and underground mine technology, owned and operated by Montana Exploradora de Guatemala S.A., a fully owned subsidiary of Goldcorp Inc. in Guatemala, the assessors were mandated to use DIHR's HRCA tool. In this connection, the assessment report observes that, whereas the objective of the Goldcorp assessment was to measure "changes to the status of human rights due to the mine's presence" (On Common Ground Consultants 2010: 7), the HRCA tool is designed to appraise the extent to which company policy, procedures and practices comply with international human rights standards, rather than an assessment the impacts of such non-compliance on rights holders. Hence, the assessors observed that, while the "DIHR Compliance Assessment Tool … was useful for the assessment" it was not "structured specifically to determine whether impacts had occurred" (On Common Ground Consultants 2010: 15, footnote 7).

A prioritization feature of the HRCA allows the user to prioritize each question. DIHR recommends that, in prioritizing questions, "the company consider the country and industry risks it faces in the operation" for which the assessment is being conducted (DIHR 2016a) (for example, DIHR advises that: "The company should assign [a] (h)igh priority to questions which are of high risk/concern in its particular industry or country of operation") (DIHR 2016a). However, the HRCA provides no specific framework to practically support such prioritization. The

only consequence of the prioritization feature of the tool is that the 'Follow-Up Report' generated by the tool presents those questions that were deemed by the user to relate to 'high risk' issues appear earlier on the list of follow-up actions to be taken (DIHR 2016a). The SRSG accurately described the HRCA as "a comprehensive diagnostic tool that assesses to what degree a company's policies, procedures, and practices comply with international human rights standards" (UNHRC 2007: 9, para. 34). Nevertheless, the HRCA is not an impact assessment tool as such.

The full set of the HRCA's circa 1,000 indicators, hitherto available only to paying subscribers, have recently been made available as an open source database via a 'Platform for Human Rights Indicators for Business' (HRIB), hosted by the Business and Human Rights Resource Centre (BHRRC 2016c). The HRIB platform also hosts examples of how HRCA indicators have been applied by companies including Barrick Gold, BHP Billiton Petroleum, and Total, National Human Rights Institutions (NHRIs), specifically, the Human Rights Commission of Sierra Leone (HRCSL) as well as other users, such as the consulting firm TwentyFifty (BHRRC 2016c).

Case study: Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities (DIHR/Nestlé 2013)

Danish Institute for Human Rights and Nestlé (2013)

During the course of human rights impact assessments (HRIAs) conducted by DIHR with Nestlé in seven countries (Colombia, Nigeria, Angola, Sri Lanka, Russia, Kazakhstan and Uzbekistan), DIHR merged the HRCA with another tool developed by DIHR, the 'Human Rights Impact Scenario Tool', which consists of a set of potential human rights scenarios that involve business-related impacts on human rights. An example of what the 'Workplace Health and Safety' section of the updated DIHR assessment tool looks like can be found in Annex 2.19 of the resulting synthesis report. As far as can be ascertained from that extract, the tool does not require the assessor to appraise actual or potential impacts on rights-holders.

The IFC's 'Guide to Human Rights Impact Assessment and Management (HRIAM) (Abrahams/Wyss 2010) has been described by the Business and Human Rights Resource Centre as "a practical tool that enables companies to identify, understand, and evaluate actual or potential human rights impacts of a project at each stage of development and operations" (BHRRC 2016b). Rather than offering a single methodology however, the HRIAM suggests that "there is no set procedure on how to assess … human rights risks and impacts" (Abrahams/Wyss 2010: 45). The HRIAM does however recommend, relevantly, that: "As human rights are indivisible […] any prioriti[z]ation of key human rights risks and impacts is guided by evidence indicating the level of the risks and impacts. Where credible evidence is available, a company should make enquiries to clarify […] [the] (p)recise nature of the risks and impacts in relation to the business activity […] [and] (t)he number of stakeholders affected by the impacts" (Abrahams/Wyss 2010: 46), amongst other factors.

The "Getting it Right Human Rights Impact Assessment Guide" (2016a), issued by Rights & Democracy, is designed "primarily" for use by "communities and civil society organizations", rather than by companies (Rights & Democracy 2011: 2). The user is invited to select the human rights that "seem to apply to" the situation at hand by selecting "those rights … which are relevant to and affected

by the investment project" being assessed (Rights & Democracy 2016b). In the "Tips" provided by the Guide, it is suggested that the user "focus on the rights for which [they] have sufficient information" (Rights & Democracy 2016c)[32], rather than to apply the criteria specified by the UNGPs for prioritizing company-related human rights impacts on the basis of impact severity.

Sustainability Reporting tools, guidance and standards

Certain tools, guidance and standards that support sustainability reporting by companies invite reporting on matters directly relevant to the assessment by companies of their human rights impacts. Amongst these, we will look at the key examples of the Global Reporting Initiative (GRI) G4 Sustainability Reporting Guidelines, the United Nations Guiding Principles Reporting Framework, and the proposed forthcoming Corporate Human Rights Benchmark.

The Global Reporting Initiative (GRI) G4 Sustainability Reporting Guidelines – Reporting Principles and Standard Disclosures, released in 2013 (GRI 2013b), and their accompanying Implementation Manual, released in the same year (GRI 2013a), offer "(r)eporting (p)rinciples [and] (s)tandard (d)isclosures […] for the preparation of sustainability reports by organizations". They provide "an international reference for all those interested in the disclosure of governance approach and of the environmental, social and economic performance and impacts of organizations" (GRI 2013b: 5). A number of indicators in the GRI G4 Guidelines specifically address assessment of human rights impacts and disclosure of "significant" human rights impacts. In particular, Indicator G4-HR9 requires disclosure of the: "Total number and percentage of operations that have been subject to human rights reviews or impact assessments" (GRI 2013b: 74). G4-HR11 requires disclosure, *inter alia*, of: "Significant actual and potential negative human rights impacts in the supply chain" (GRI 2013b: 74). Sub-indicators G4-HR11(a) and G4-HR11(c) elaborate on this indicator, respectively requiring adhering organizations to: "Report the number of suppliers identified as having significant actual and potential negative human rights impacts" and "the significant actual and potential negative human rights impacts identified in the supply chain" (GRI 2013b: 74).[33]

One of the "Principles for Defining Report Content" in the G4 Guidelines, entitled "Materiality"[34], is that: "The report should cover Aspects that: Reflect the organization's significant […] social impacts" (GRI 2013b: 17). To this end, the Implementation Manual for the G4 Guidelines provides that:

> "A range of established methodologies may be used to assess the significance of impacts. In general, 'significant impacts' refer to those that are a subject of established concern for expert communities, or that have been identified using established tools such as impact assessment methodologies or life cycle assessments. Impacts that are considered important enough to

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32 Note to the reader: To access this 'tip', it is necessary to enter the Guide, advance to the section entitled "Step 21: Analyze your findings", and then click the tab entitled "Tips".

33 Indicators G4-LA15(b) G4-LA15(c) set out analogous requirements in terms of labour practices, respectively requiring adhering organizations to: "Report the number of suppliers identified as having significant actual and potential negative impacts for labor practices" and "the significant actual and potential negative impacts for labor practices identified in the supply chain" (GRI 2013b: 69).

34 The Guidelines consider that: "Materiality is the threshold at which Aspects become sufficiently important that they should be reported" (GRI 2013b: 17).

> require active management or engagement by the organization are likely to be considered to be significant" (GRI 2013a: 11).

The GRI G4 Guidelines also set out criteria and guidance that provide an objective framework for the *ex ante* assessment of potential impacts. In particular, the GRI G4 Sustainability Reporting Guidelines Implementation Manual advises that "estimates of future impacts […] should be based on well-reasoned estimates that reflect the likely size and nature of impacts. Although such estimates are by nature subject to uncertainty, they provide useful information for decision-making as long as the basis for estimates is clearly disclosed and the limitations of the estimates are clearly acknowledged. Disclosing the nature and likelihood of such impacts, even if they may only materialize in the future, is consistent with the goal of providing a balanced and reasonable representation of the organization's economic, environmental and social performance" (GRI 2013a: 13).

The United Nations Guiding Principles Reporting Framework (RAFI 2015) seeks to focus reporting by companies on "salient" human rights impacts, defined as "the human rights at risk of the most severe negative impact through the company's activities and business relationships" (RAFI 2015: 12). For example, one indicator in the Framework requires adhering companies to: "State the salient human rights issues associated with the company's activities and business relationships during the reporting period" (RAFI 2015: 9). To recall, OHCHR introduced the concept of 'salient human rights' by explaining that:

> "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" (OHCHR 2012a: 8).

The UNGPs Reporting Framework adds a further valuable new perspective on whether the assessment of human rights impacts is best undertaken on a right-by-right basis or on the basis of human rights 'issues' or 'scenarios' that may involve impacts on multiple rights. On this point, the Framework contemplates that: "Salient human rights issues may consist of individual human rights (such as freedom of expression, freedom of association, the right to non-discrimination or the right to water and sanitation), or they may be more general categories that relate to a business activity, a group of potentially affected individuals, or operating contexts that have implications for more than one human right (such as security and human rights, indigenous people's rights, [or] land-related human rights)" (RAFI 2015: 48).

At the time of writing five large companies from five different industry sectors had adopted the United Nations Guiding Principles Reporting Framework, namely Unilever, Ericsson, H&M, Nestlé and Newmont (Shift Project 2012). The Reporting Framework also claims the formal support of 67 investors representing USD 3.91 trillion assets under management worldwide (Shift Project 2012). An accompanying Assurance Framework is due to be issued in early 2016 (Shift Project 2012).

The latest Draft List of Indicators for the Corporate Human Rights Benchmark, an initiative which intends to "rank the top 500 globally listed companies on their human rights policy, process and performance", and thereby

to "harness… the competitive nature of the markets to drive better human rights performance" (BHRRC 2016a), includes, *inter alia*, indicators on "Existence and triggers for identifying human rights risks and impacts", "Assessment of risks and impacts identified", and "Disclosure of human rights risk/impact assessments" (Aviva Investors et al. 2015).

Beyond dedicated tools, standards and guidance designed to directly support assessment of business-related human rights impacts, and frameworks to support corporate reporting on matters material to the assessment of human rights impacts, there are a range of other tools, standards and guidance that may promote human rights due diligence, or otherwise be of relevance. The Equator Principles are one of many such examples.

The Equator Principles are a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects (The Equator Principles Association 2016b). Currently, 80 financial institutions in 34 countries have adopted the Equator Principles, collectively representing coverage of more than 70 percent of international project finance debt in emerging markets (The Equator Principles Association 2016a). The Equator Principles commit their signatory financial institutions to fulfilling their corporate responsibility to respect human rights by "undertaking human rights due diligence … As referenced in the [United Nations] Guiding Principles" (The Equator Principles Association 2013: 2, footnote 1). Principle 2 of the Equator Principles, entitled "Environmental and Social Assessment", clearly borrowing language from the IFC Performance Standards, provides *inter alia*, that "in limited high risk circumstances, it may be appropriate for the client to complement its Assessment Documentation with specific human rights due diligence" (The Equator Principles Association 2013: 5). In this connection, an "Illustrative List of Potential Environmental and Social Issues to be Addressed in the Environmental and Social Assessment Documentation" includes, relevantly, "respect of human rights by acting with due diligence to prevent, mitigate and manage adverse human rights impacts" (The Equator Principles Association 2013: 20). Yet the Equator Principles themselves provide no definition of the term 'severity', and no indication of the applicable criteria for a determination of severity. As with other examples of state and business frameworks providing for human rights due diligence reviewed above, such as the Nordic State Pension Fund-Global, for example, this normative gap indicates the utility for financial institutions that are signatory to the Equator Principles of interpreting the term 'severity' in accordance with the indicators specified by the UNGPs and authoritative interpretive commentary issued by OHCHR, in the way proposed in this study.

6. List of abbreviations

BHRRC	Business & Human Rights Resource Centre
BMZ	Federal Ministry for Economic Cooperation and Development of Germany
CAO	Compliance Advisor Ombudsman
CEB	Council of Europe Development Bank
CFS	Committee on World Food Security
CNCA	Canadian Network on Corporate Accountability
CRBPs	Children's Rights and Business Principles
CSR	Corporate Social Responsibility
DIHR	Danish Institute for Human Rights
EC	European Commission
ECAs	Export Credit Agencies
ECCJ	European Coalition for Corporate Justice
ECG	Export Credit Group
EIAs	Environmental Impact Assessments
EIB	European Investment Bank
ESF	Environmental and Social Framework
ESHIAs	Environmental, Social and Health Impact Assessment
EU	European Union
EXIM	Export-Import Bank of the United States
GRI	Global Reporting Initiative
HRCA	Human Rights Compliance Assessment
HRDs	Human Rights Defenders
HRIAM	Human Rights Impact Assessment and Management
HRIB	Human Rights Indicators for Business
IBLF	International Business Leaders Forum
ICAR	International Corporate Accountability Roundtable
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICT	Information Communications Technology
IDPs	Internally displaced persons
IFC	International Finance Corporation
IFIs	International Financial Institutions

IHRB	Institute for Human Rights and Business
IPIECA	International Petroleum Industry Environmental Conservation Association
ILO	International Labour Organization
ISO	International Organization for Standardization
LGBTI	Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed
LNG	Liquefied Natural Gas
HRIA	Human Rights Impact Assessment
MCRB	Myanmar Centre for Responsible Business
MDBs	Multilateral Development Banks
MOU	Memorandum of Understanding
NAPs	National Action Plans
NCPs	National Contact Points
NHRIs	National Human Rights Institutions
ODA	Official Development Assistance
ODAAA	Official Development Assistance Accountability Act
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-Ended Intergovernmental Working Group on Transnational Corporations and Human Rights
OFAC	Office of Foreign Assets Control
OHCHR	Office of the High Commissioner for Human Rights
PS	Performance Standard
RAFI	Human Rights Reporting and Assurance Frameworks Initiative
SIAs	Social Impact Assessments
SMEs	Small and Medium-sized Enterprises
SOEs	State-Owned Enterprises
SRSG	Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises
SWIA	Sector-Wide Impact Assessment
TOR	Terms of Reference
UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCRC	United Nations Committee on the Rights of the Child
UNCTAD	United Nations Conference on Trade and Development

UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNPRC	United Nations Principles for Responsible Contracts
UNWG	United Nations Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises

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