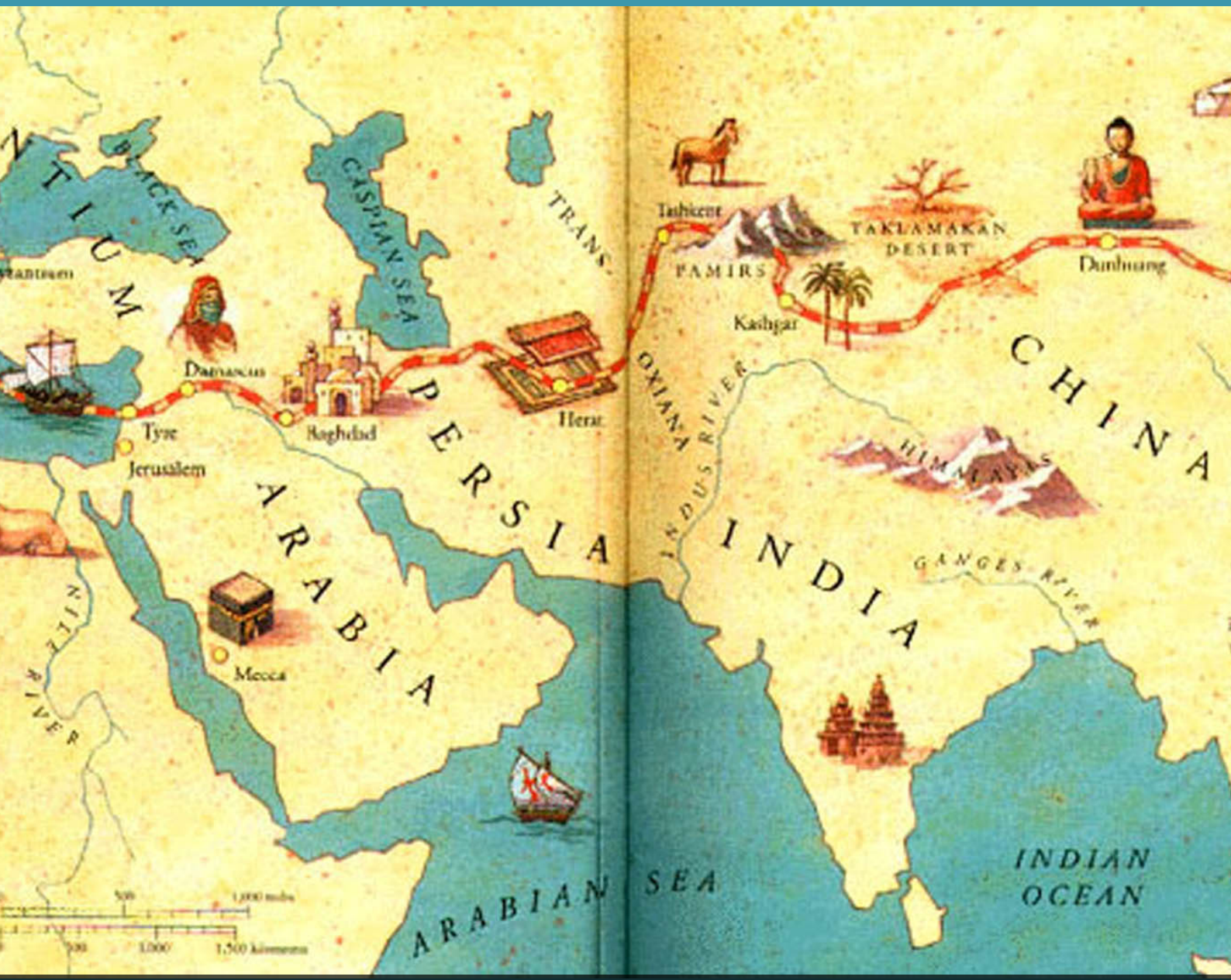

Silk Road Report

United Nations and Business & Human Rights

October 2016

Justice For Iran
عدالت برای ایران

Silk Road Report

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Table of Contents

ABOUT THE SILK ROAD PROJECT **3**

ABOUT THE REPORT **4**

PART ONE- INSTRUMENTS AND MECHANISMS OF THE UN **5**

I. UN GUIDING PRINCIPLES **5**

A) RESPONSIBILITY OF BUSINESS ENTERPRISES 6

B) RESPONDING TO HUMAN RIGHTS IMPACTS 8

II. UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS **8**

PART TWO- CONCEPTUAL ANALYSIS **10**

I. COMPLICITY **10**

II. DUE DILIGENCE **15**

About The Silk Road Project

The Silk Road was an ancient network of trade routes that for centuries were central to cultural interaction through regions of the Asian continent connecting the East and West, from China to the Mediterranean Sea. Trade on the Silk Road played a significant role in the development of the civilizations of China, the Subcontinent, Persia, Europe, the Horn of Africa and Arabia, opening long-distance political and economic relations between the different civilizations.

The Silk Road project aims to promote accountability and protect human rights in the context of Iran's rapid return to the world markets after the 2015 Nuclear Deal.[1] Through publishing reports on business and human rights in Iran, this project intends to increase awareness among advocates of human rights, particularly lawyers and civil society activists, and accountability in business and corporate relations. It also aims to hold accountable corporates which are involved or complicit in human right violations, using legal and other available mechanisms.

[1] The Joint Comprehensive Plan of Action (JCPOA) known commonly as the Iran deal or Iran nuclear deal, is an international agreement on the nuclear program of Iran reached in Vienna on 14 July 2015 between Iran, the P5+1 (the five permanent members of the United Nations Security Council—China, France, Russia, United Kingdom, United States—plus Germany), and the European Union. Under the agreement, Iran will receive relief from U.S., European Union, and United Nations Security Council nuclear-related economic sanctions.

About the Report

This is our first report from the Silk Road Report series which aim to shed light on the underlying concepts and instruments as well as mechanisms that can be applied to specific cases of recent contracts and agreements between multinational corporations and Iranian companies, some of which are closely linked to or partially owned by human rights violators. In this report, we will briefly explore the instruments and mechanisms of the United Nations in the field of business and human rights. In particular, we will focus on the UN Guiding Principles on Business and Human Rights and explain the principles reflected therein such as the duty to protect and corporate responsibility, placing greater emphasis on complicity and due diligence.

PART ONE- Instruments and Mechanisms of the UN

I. UN Guiding Principles

The UN Guiding Principles adopted in 2011 set out the general regulatory and policy measures a state may take in order to fulfil their duty to protect against human rights violations by third parties, including business enterprises. The Guiding Principles can be considered a legal instrument of soft law that provide guidance to States on measures to be taken with respect to the three pillars of the United Nations Framework "Protect, Respect, Remedy":

1. The duty of the state to **protect** human rights
2. The responsibility of businesses to **respect** human rights
3. The need for rights and obligations to be matched to appropriate and effective **remedies** when breached.

The UNGPs, although not legally binding, are an authoritative global standard on business and human rights. They do not constitute an international instrument that can be ratified by States, nor do they create new legal obligations. Instead, they clarify and elaborate on the implications of relevant provisions of existing international human rights standards and provide guidance on how to put them into practice. The Guiding Principles refer to and derive from States' existing obligations under international law. National legislation will often exist or may be required to ensure that these obligations are effectively implemented and enforced. This, in turn, means that elements of the Guiding Principles may be reflected in domestic law regulating business activities.

It must also be noted that the UNGPs are often referred to as soft law. There are however those who believe that they are 'hard' soft laws. That is, despite the fact that the UNGPs are voluntary, there are mechanisms available and measures taken

that give them a quasi-regulatory status.

Many also believe that it is desirable and even inevitable to move away from voluntary initiatives and into the domain of regulation, including mandatory due diligence, in order to better protect people on the ground and to ensure enforceability. The international treaty process is part of the emerging regulatory dynamic. However, this process is yet to become more concrete and narrow in its scope if it is to effectively take shape.

a) Responsibility of Business Enterprises

According to Principle 13 of the UNGPs,

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

Therefore, a business may cause, contribute, or be directly linked to a human rights impact: [2]

Causation	Contribution	Linkage
Business actions lead directly to an impact; e.g., • A factory exposes	A business incentivises, facilitates, or enables third party impact; e.g.,	A business' operations, products or services are directly linked to an impact

[2] For a detailed discussion on adverse impacts of businesses on human rights see: INEF, 'Assessing Business-Related Impacts on Human Rights. Indicators and Benchmarks in Standards and Practice, INEF-Report 110', 2016; available at: http://inef.uni-due.de/cms/index.php?article_id=4&clang=1&pub=1735

workers to hazardous chemicals without adequate personal protective equipment • A company manufactures and sells inherently dangerous products that are likely to cause death or serious personal injury, without providing adequate warning to users about the risks or appropriate instructions on how to use them • A restaurant practices routine discrimination in its treatment of customers • A factory's wastewater discharge is the sole or main source of pollution of a community's drinking water	• An internet company provides data about users of its services to a repressive government that enables the government to track and harass political dissidents, contrary to international human rights standards • An electronics retail brand changes product requirements for suppliers repeatedly and at the last minute, without adjusting production deadlines or prices, pushes suppliers to breach labour standards to ensure that the order is delivered • A food company deliberately targeting high- sugar food and drink at children, with an impact on levels of child obesity • One factory's wastewater discharges, in combination with the discharges of other companies, cumulatively pollute the drinking water in a community	even though the business did not cause or contribute to that impact; e.g., • Human rights impacts occur deep in a company's supply chain, notwithstanding the business' robust efforts to prevent them • The use of portable ultrasound machines by doctors to screen for female foetuses, facilitating their abortion in favour of male children, notwithstanding prohibitions by the manufacturer on such use • A bank providing financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities • A business enters into a joint venture with another company that uses labour for the joint venture that is tainted with human trafficking, despite its agreement and commitment not to do so

b) Responding to Human Rights Impacts

How should a business respond to an impact? The proper response depends on the mode of involvement; i.e. whether the business caused, contributed to, or is merely linked to the adverse human rights impact, as set forth below:

If the business...	Then the business should...
Caused the harm	• Cease the action causing harm • Remediate the harm
Contributed to the harm	• Cease the action contributing to the harm • Use or build leverage to mitigate the risk of future harm • Contribute to remediation of the harm
Is merely linked to the harm	• The UNGPs do NOT expect businesses to contribute to the remedy when they are merely linked to the harm (although they may do so for other reasons). • Use or build leverage to seek to mitigate the risk of future harm

II. UN Working Group on business and human rights

In June 2011 (in resolution A/HRC/17/4), the Human Rights Council decided to establish a Working Group on the issue of human rights and transnational

corporations and other business enterprises, consisting of five independent experts of balanced geographical representation, for a period of three years.[3]

Within the framework of its mandate, the Working Group receives information on alleged human rights abuses from all relevant sources and, where deemed appropriate, intervenes directly with States, business enterprises and others on such allegations.

Such intervention can relate to a human rights abuse which has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned States and business enterprises to draw their attention to the facts of the allegations made and the applicable international human rights norms and standards, in particular the core concepts, obligations, responsibilities and expectations set out in the Guiding Principles.

Communications sent and replies received remain confidential until they are published in joint communication reports submitted at each regular session of the Human Rights Council (in March, June and September). In certain situations, including those of grave concern, the Working Group may issue a public statement earlier.

In its mode of inquiry, the Working Group encourages States to request from companies information on human rights due diligence and stresses the need to ensure access to effective remedy. Depending on the facts of the allegations made, the Working Group may address itself both to home and host States of the company allegedly involved in a human rights abuse. Where relevant, the Working Group will carry out such communications jointly along with other special procedure mandates of the Human Rights Council.

[3] http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx

The Human Rights Council, in its resolution 26/22, encouraged States and private businesses to cooperate fully with the Working Group including responding to communications transmitted.

PART TWO- CONCEPTUAL ANALYSIS

Two important concepts embedded in the UN instruments that are important to examine separately here are 'complicity' and 'due diligence'. These two concepts may arise when the business' responsibility to avoid causing harm and contributing to harms caused by third parties are considered.

I. Complicity

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. It must be noted that complicity has been used in different contexts which has given it different meanings. In its broader meaning, business enterprises may be perceived as being 'complicit' in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party. In the narrower meaning, as used in criminal law, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases.[4]

In fact, just as the concept of impunity in the sphere of human rights is not confined to the strict historical definition, in the context of business and human rights, the concept of complicity is now used in a much more complex fashion. As such, the

[4] Some sources, therefore, refer to 'involvement' in human rights violations in order to avoid confusion with the highly restrictive concept of 'complicity' in criminal law, i.e. 'aiding and abetting'.

phrase "business complicity in human rights abuses" is used to describe what is viewed as undesirable business involvement in such abuses.[5]

The 2005 Report of the UNHCHR states that a company is complicit in human rights abuses if "it authorizes, tolerates or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuses."[6]

Various NCP[7] decisions have confirmed that companies can, through their own actions or omissions, be complicit in or profit from violations of human rights by states and other actors in human rights abuses.[8] However, there continues to be considerable theoretical confusion and uncertainty about the boundaries of this concept. In particular, it is unclear when legal liability, both civil (domestic jurisdictions) and criminal (both international and domestic), could arise for such complicity.

While the exact required link between effective business actors and direct actors of human rights infringements is mainly subject to the applicable legal scheme, an ICJ Expert Legal Panel has adopted a three-prong approach to identify the "zone of legal risk":

1. **Causation/Contribution**: Did the company's conduct enable, exacerbate or facilitate the gross human rights abuses?

[5] International Commission of Jurists Expert Legal Panel, "*Corporate Complicity and Legal Accountability*" (September 2008), vol. 1, p. 3: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/200/07/Corporate-complicity-legal-accountability-vol1-publication-2009-eng.pdf
[6] *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/2005/91 (2005), para. 33.
[7] National Contact Points.
[8] http://www.oecdwatch.org/cases/Case_81; Statement by the Norwegian National Contact Point (29 November 2005): http://www.oecd.org/daf/inv/mne/37439881.pdf, pp. 68-69.

Enabling entails that without the company's conduct the abuses would have not taken place (ex: providing security services to state or private security personnel used to identify and arrest community protestors). *Exacerbating* means that the company's conduct makes the abuses and harm-causing exacerbated or aggravated (ex: by providing earth moving equipment used to demolish houses). *Facilitating* occurs when the company's conduct changed the way in which abuses were carried out and/or the nature and extent of the harm suffered by the victims, depending on the jurisdiction (ex: selling sophisticated surveillance software to government authorities used to target dissidents or minority groups). In either of these cases there is a sufficiently close link in law between the company's conduct and human rights abuses.

Examples: providing advice or support that encourages the principal perpetrator to commit the act; purchasing, hiring or providing goods or services such as weapons, tools, financing, fuel, computer systems, vehicles or transportation, security or infrastructure; entering into any form of business agreement through which the company makes a deal in which it is foreseen that in fulfilling its side of the agreement, the business partner will commit acts that amount to gross human rights abuses; or yet an omission – failure to act – such as deciding not to refuse government imposed forced labour.

More complex situations arise where the contribution made by the company is not necessarily used directly by the perpetrator, but nevertheless it builds up the general capacity of the perpetrator – in the form of much-needed revenue (payment of taxes or other dues), products, and infrastructure such as roads, railways, communication systems or power stations.

Under existing criminal or civil legal principles, mere silent presence in the country or areas where gross human rights abuses are being committed, would usually not amount to involvement in the human rights abuses committed in the country or

region. However, in some situations, presence and silence are not neutral in law. Although as yet untested in court, an argument could be made that under some special circumstances, a company or its individual officials exercise such influence, weight and authority over the principal perpetrators that their silent presence would be taken by the principal to communicate approval and moral encouragement to commit the gross human rights abuses. This should be considered in light of the common fact that the company benefits commercially from a business relationship with those who commit gross human rights abuses. In such a situation, the greater the political and economic influence wielded by the company, the more likely complicity could be established.

2. **Knowledge & Foreseeability**: Did the company have the necessary "state of mind"? Did the company know, or should it have known, that its conduct would be likely to contribute to the gross human rights abuses, or was it wilfully blind to that risk?

The fact that a company neither wished nor desired to contribute to gross human rights abuses is irrelevant to the question of whether, in adopting a particular course of conduct, it became complicit in those abuses and subsequently entered a zone of legal risk. In both criminal and civil law, legal responsibility can arise where a company actively sought to contribute to gross human rights abuses, or simply where it knew that its course of conduct was likely to contribute to such abuses and, even though it may not have wanted the abuses to occur, undertook the course of conduct anyway. Under the law of civil remedies, liability can arise even where a company has no knowledge as to the risk of harm, because the law may hold that it should have known as the risk was reasonably foreseeable.

Where evidence of knowledge and foreseeability is concerned, the internal deliberations and knowledge of company officials (inquiries undertaken by the company or required, or information brought to its attention), as well as the

surrounding objective circumstances (publicly available information, unusual or suspicious circumstances, duration of the company's presence in the region, etc.) are both relevant in determining whether a company knew or should have known that gross human rights abuses would result from its actions.

Obligations of due diligence fact-finding and assessments are of particular importance in this sense. Under the law of civil remedies, a reasonable and prudent company's level of knowledge would be based on due diligence, including risk assessment, and will include the information such steps would have brought to light in its assessment of what a company should have known.

3. **Proximity**: Was the company close or proximate (geographically, or in terms of the duration, frequency and/or intensity of interactions or business transactions) to the principal perpetrator of the human rights abuses or the victims?[9]

The closer – or more proximate – a company is, in time and space and relationship, to those who carry out the human rights abuses or those who suffer the abuses, the more likely it is that the company could be held legally responsible when it is complicit.

Evidence of proximity of a company to the principal perpetrators and/or victims of the harm caused is established based on various factors including geographical proximity; economic dominance in the marketplace and political/business relationships; the legal nature of the business relationships with third parties (joint venture, long-term strategic partnership, partner-subsidiary, in so far as the relationship entails "shared decision-making and close coordination"); and intensity,

[9] International Commission of Jurists Expert Legal Panel, "Corporate Complicity and Legal Accountability" (September 2008), vol. 1, pp. 8-26

duration and texture of the relationship between the company and perpetrators or victims of human rights abuses.

A prudent company should be aware that the closer it is to the principal perpetrator of gross human rights abuses or the victims of abuses, the more likely it is to face allegations of complicity, and the closer it will be to a zone of legal risk wherein its conduct may have enabled, exacerbated or facilitated the abuses. Furthermore, it will be more likely that the law will consider that the company knew of the abuses, or that it should have known.

Prof. John Ruggie has summarized these principles in the following terms: "What constitutes complicity in both legal and non-legal terms is not uniform, nor is it static. Despite this messy reality, the evidence to date lends itself to several conclusions. Firstly, knowingly providing a substantial contribution to human rights abuses could result in a company being held accountable in both legal and non-legal settings. Secondly, being seen to benefit from abuse may attract the attention of social actors even if it does not lead to legal liability. Thirdly, and similarly, mere presence in contexts where abuses are taking place may attract attention from other social actors but is unlikely, by itself, to lead to legal liability. In short, both operating in contexts where abuses occur and the appearance of benefiting from such abuses should serve as red flags for companies to ensure that they exercise due diligence, adapted for the specific context of their operations."[10]

II. Due Diligence

Due diligence is a process through which enterprises actively identify, prevent,

[10] UN Human Rights Council, Clarifying the concepts of "sphere of influence" and "complicity" : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 15 May 2008, A/HRC/8/16, available at: http://www.refworld.org/docid/484d1fe12.html.

mitigate (diminish) and account for how they address and manage their actual and potential harm and adverse impacts. Companies should have ongoing processes in place that will bring existing or potential corporate misconduct to light, address and change irresponsible behaviour and remedy the situation when things go wrong.

Companies must not only respond to ongoing harmful practices, but they must also take preventative steps to avoid potential future adverse impacts. Additionally, enterprises should also avoid contributing to negative impacts and address real and potential violations of internationally recognised standards in their supply chain and throughout their business relationships. Due diligence should be an integral part of the decision-making and risk management systems of the enterprise. In other words, it should go beyond simply managing risks to the enterprise itself to identify and address impacts on individuals, workers, communities and the environment.

According to Principle 17 of the UNGPs:

> *'In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:*
>
> > *(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;*
> >
> > *(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;*

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

The UNGPs aim to establish the responsibility of all businesses to undertake human rights due diligence in their entire supply chain, including subsidiaries, sub-contractors and suppliers. Under the UNGPs, it is not sufficient for a business simply to declare that it respects human rights, either by promulgating a commitment to do so or agreeing to do so in a contractual undertaking. The business is instead expected to take active steps to follow through on this commitment. Human rights due diligence is therefore an ongoing process to enable businesses to 'know and show' that they are addressing their human rights impacts through assessing impacts, taking integrated action in response to identified impacts, tracking and monitoring, and communicating the company's efforts to address its human rights impacts. As a result, the process enables businesses to avoid being 'named and shamed' for not knowing their human rights impacts and not taking steps to avoid or mitigate them.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement in an alleged human rights abuse. It is, in fact, common practice in national and international instruments to include due diligence as a defence (for example, the EC Food Law Regulation and the UK Bribery Act). Thus, if a business enterprise proves that they had carried out proper due diligence, then they have a defence and may be exempt from legal sanctions. Such laws and regulations may also make it mandatory for corporations to report on their due diligence policies and practices along supply chains (for example, the EU Non-Financial Reporting Directive and the UK Modern Slavery Act). However, business enterprises conducting such due diligence should not assume that, this by itself, will

automatically and fully absolve them from liability for causing or contributing to human rights abuses.[11]

[11] UNHCR, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", 2011; available at: www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

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