

## Integrated Risk Prioritization: A Path to Efficient Human Rights Risk Management

### **The Evolution of Corporate Human Rights Strategy**

Companies face an ever-increasing array of risks related to their human rights impacts. These risks are no longer just reputational. Human rights-related legal and financial risks are proliferating in the form of transnational tort suits; regulatory reporting requirements such as the EU Non-Financial Reporting Directive, the UK Modern Slavery Act, the US Conflict Minerals Rule, and the California Transparency in Supply Chains Act; public-sector procurement expectations, such as the US Federal Acquisition Regulation; and growing demands by investors and lenders for human rights compliance frameworks as a condition of providing capital.<sup>1</sup>

Responding to these new risks demands a systematic human rights strategy built on a governance program with three baseline elements: a policy commitment to respect human rights; human rights due diligence processes; and remediation processes for adverse impacts.<sup>2</sup> One of the key business-related objectives of such a program is to set corporate human rights priorities in a way that is both practical and principled.

Structured prioritization is the key to telling a compelling human rights story to government regulators, courts, investors, and stakeholders. It is also the key to efficient risk management.

In pursuit of efficiency, companies need not create human rights governance programs from scratch. Rather, they can leverage existing anti-corruption compliance mechanisms to conduct targeted due diligence and prioritize human rights risk in a way that manages legal, financial, and reputational risk comprehensively.<sup>3</sup>

### **The Importance of Prioritization**

Structured prioritization is critical to human rights risk management because of the vast array of adverse human rights impacts with which any multinational company—and likely any company with a global supply chain—is involved. Few, if any, companies can reasonably address all actual and potential adverse human rights impacts, and certainly not simultaneously.<sup>4</sup> How such companies choose their priorities reveals much about the underlying rigor of their commitment to respect human rights.<sup>5</sup>

<sup>1</sup> *Choc v. HudBay Minerals Inc.*, 2013 ONSC 1411, 116 O.R. (3d) 674 (transnational tort suit); Directive 204/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330) 1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>; Modern Slavery Act 2015, c. 30, available at <http://www.legislation.gov.uk/ukpga/2015/30/enacted>; 17 CFR § 240.13p-1 (2015), available at <https://www.law.cornell.edu/cfr/text/17/240.13p-1>; SB No. 657, 2009-2010 Reg. Sess. (Cal. 2010), available at [https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb\\_657\\_bill\\_ch556.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf); 48 C.F.R. 1, available at <https://www.acquisition.gov/?q=browsefar>.

<sup>2</sup> Guiding Principle 15.

<sup>3</sup> In fact, the Guiding Principles explicitly direct companies to leverage existing risk management systems for human rights due diligence purposes, “provided that [due diligence] goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.” (Commentary to Guiding Principle 1.)

<sup>4</sup> Commentary to Guiding Principle 24.

<sup>5</sup> For a detailed discussion of efficient human rights risk prioritization in the supply chain context, see Yousuf Aftab and Audrey Mocle, A STRUCTURED PROCESS TO PRIORITIZE SUPPLY CHAIN HUMAN RIGHTS RISKS: A GOOD PRACTICE NOTE ENDORSED BY THE UNITED NATIONS GLOBAL COMPACT HUMAN RIGHTS AND LABOUR WORKING GROUP ON 9 JULY 2015, <https://www.unglobalcompact.org/library/2851>.

At a fundamental level, prioritization is about salience, or the most severe actual or potential human rights risks facing stakeholders affected by the company's operations.<sup>6</sup> But that only speaks to the end rather than the process. Salience explains *why* particular risks are priorities over others; it does not explain *how* those risks were determined in the first place. The latter issue is the core of a compelling human rights story for stakeholders and neutral observers alike. Calibrated governance enables companies to explain how human rights priorities are determined in a way that demonstrates the sincerity of their commitment to respect human rights.

### Think Like a Regulator: Learning from Anti-corruption Compliance

Fulfilling the responsibility to respect human rights under the Guiding Principles turns on three governance elements:

- **A policy commitment** to respect human rights;
- **A due diligence process** to identify, prevent, mitigate, and account for how businesses address their impacts on human rights;
- **Processes to enable remediation** of any adverse human rights impacts businesses cause or to which they contribute.<sup>7</sup>

Risk prioritization applies to the second and third elements, shaping how businesses conduct due diligence and how they develop remediation processes.

The opportunities and costs of this process-focused definition are significant. *First*, it renders business respect for human rights reasonable: businesses are well versed in governance

and in tailoring processes practically to minimize risk. *Second*, and critically from a risk perspective, the definition renders business respect for human rights measurable. That enables stakeholders, courts, investors, and business partners to hold companies accountable with reference to shared parameters.

The human rights governance model bears striking similarities to the governance expectations of national regulators seeking to curb corruption by their businesses operating abroad. In both cases, the focus is on developing and promoting rigorous, ongoing, and context-sensitive corporate processes as the best guarantor of minimizing the risk of harm. In both cases, the reach extends to operations and business relationships across the globe. And, in both cases, the measure of a company's effectiveness in meeting expectations is judged by the strength of policies and processes rather than impact alone.

The chart below details the Guiding Principles' specific governance expectations to illustrate their equivalents in the corruption context. (We have drawn primarily on the US Department of Justice's (DOJ) anti-corruption guidance; we also reference the equivalents from the UK Bribery Act for comparison purposes.<sup>8</sup>) The aim of the chart is to illustrate that, while respect for human rights has a unique substantive scope, it is most practically operationalized in the same way that companies have implemented anti-corruption compliance programs over the last two decades. In other words, ensuring corporate respect for human rights is not an amorphous, vague, and insoluble task. To the contrary, human rights can and should be approached with the same systematic logic companies have applied to battle corruption—with context-sensitive and risk-tailored policies, due diligence processes, and remediation/grievance initiatives.<sup>9</sup>

<sup>6</sup> UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 8, 13 (2012), [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) ("The most salient human rights for a business enterprise are those that stand out as being most at risk . . . For example, the human rights risks that are most salient for enterprises in the apparel sector with products made by workers in factories across several countries, will differ from those of enterprises in the extractive sector that have to relocate an indigenous community.")

<sup>7</sup> Guiding Principle 15.

<sup>8</sup> UK MINISTRY OF JUSTICE, BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING 20-31, (Mar. 2011), <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

<sup>9</sup> See UNGP REPORTING FRAMEWORK at 6-7, [http://www.ungpreporting.org/wp-content/uploads/2015/03/UNGPreReportingFramework\\_Feb2015.pdf](http://www.ungpreporting.org/wp-content/uploads/2015/03/UNGPreReportingFramework_Feb2015.pdf) (outlining reporting framework in terms of measuring policy commitment; processes that embed respect for human rights; specific human rights policies; level of stakeholder engagement; impact assessments; integrating findings; tracking performance; and remediation).

Guiding Principles	US Guidance (FCPA)	UK Guidance (Bribery Act)
<b>Overarching Context</b>		
<ul style="list-style-type: none"> <li>Scale and complexity of means used to respect human rights may vary according to <b>business's size, sector, operational context, ownership, structure, and severity</b> of business's adverse human rights impacts (GP 14)</li> </ul>	<ul style="list-style-type: none"> <li>The compliance program is <b>tailored to company size and company-specific risks</b><sup>10</sup></li> </ul>	<ul style="list-style-type: none"> <li>Proportionate procedures</li> </ul>
<b>Policy</b>		
<ul style="list-style-type: none"> <li>Businesses should have a <b>policy commitment</b> to respect human rights (GP 15(a))</li> <li>Policy commitment should state human rights expectations of personnel and third parties directly linked to business's operations, products, or services (GP 16(c))</li> <li>Policy commitment should be reflected in <b>operational policies and procedures</b> (GP 16(e))</li> <li>Policy commitment should be publicly available and communicated to all personnel and third parties (GP 16(d))</li> </ul>	<ul style="list-style-type: none"> <li>The company has a code of <b>conduct and related policies</b> that are clear, concise, and accessible to all individuals working on the company's behalf<sup>11</sup></li> </ul>	<p style="text-align: center;">n/a</p>
<ul style="list-style-type: none"> <li>Corporate human rights policy should be <b>approved at the highest corporate level</b> (GP 16(a))</li> </ul>	<ul style="list-style-type: none"> <li><b>Senior leadership articulates</b>, adheres to, and clearly communicates company policy to employees<sup>12</sup></li> </ul>	<ul style="list-style-type: none"> <li>Top-level commitment</li> </ul>
<ul style="list-style-type: none"> <li><b>Senior management attention to and accountability for human rights risk</b> helps embed corporate respect for human rights (GP 16)<sup>13</sup></li> </ul>	<ul style="list-style-type: none"> <li><b>Senior executives implement policy autonomously</b>, and they have the resources needed to fulfill their compliance responsibilities<sup>14</sup></li> </ul>	<p style="text-align: center;">n/a</p>
<ul style="list-style-type: none"> <li>Businesses should have policies and procedures that <b>set relevant financial and other performance incentives</b> for personnel to advance coherence between corporate human rights policy and business activities (GP 16 Commentary)</li> </ul>	<ul style="list-style-type: none"> <li>The policy should specify <b>appropriate disciplinary procedures</b> that are uniformly enforced. The policy can include incentives for ethical behavior, such as weighing adherence to company values in performance evaluations<sup>15</sup></li> </ul>	<p style="text-align: center;">n/a</p>

<sup>10</sup> US DEPARTMENT OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 56 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>. See also U.S. Sentencing Guidelines § 8B2.1 Commentary, available at <http://www.uscc.gov/guidelines/2015-guidelines-manual/2015-chapter-8>.

<sup>11</sup> FCPA GUIDE, *supra* note 10, at 57-58. See also U.S. Sentencing Guidelines § 8B2.1(b)(1).

<sup>12</sup> FCPA GUIDE, *supra* note 10, at 57. See also U.S. Sentencing Guidelines § 8B2.1(b).

<sup>13</sup> INTERPRETIVE GUIDE, *supra* note 6, at 30.

<sup>14</sup> FCPA GUIDE, *supra* note 10, at 58. See also U.S. Sentencing Guidelines § 8B2.1(b)(2).

<sup>15</sup> FCPA GUIDE, *supra* note 10, at 59-60. See also U.S. Sentencing Guidelines § 8B2.1(b)(6).

Guiding Principles	US Guidance (FCPA)	UK Guidance (Bribery Act)
<b>Due Diligence</b>		
<ul style="list-style-type: none"> <li>Businesses should have in place a human rights <b>due diligence process</b> to identify, prevent, mitigate, and account for how they address human rights impacts (GP 15(b))</li> <li>Businesses should <b>identify and assess actual or potential adverse human rights impacts</b> arising either in their own activities or from business relationships (GP 18)</li> </ul>	<ul style="list-style-type: none"> <li><b>Risk assessments include due diligence of third party contractors and internal audits.</b> Due diligence is shaped by risk factors such as the country and industry context, nature of the company’s business partners, and transaction size<sup>16</sup></li> </ul>	<ul style="list-style-type: none"> <li>Risk assessment</li> </ul>
<ul style="list-style-type: none"> <li>Businesses should carry out human rights due diligence, including due diligence of operations, products, or services <b>linked to third-party business relationships</b> (GPs 15(b), 17)</li> </ul>	<ul style="list-style-type: none"> <li><b>Third-party due diligence</b> should be based on industry, country, size, nature of the transaction, and historical relationship with the third party<sup>17</sup></li> </ul>	<ul style="list-style-type: none"> <li>Due diligence</li> </ul>
<ul style="list-style-type: none"> <li>Policies and procedures should be <b>supported by training</b> for personnel in relevant business functions (GP 16 Commentary)</li> </ul>	<ul style="list-style-type: none"> <li>The company should have an <b>ongoing training program</b> that explains the policy to all employees and agents<sup>18</sup></li> </ul>	<ul style="list-style-type: none"> <li>Communication (including training)</li> </ul>
<ul style="list-style-type: none"> <li>Businesses should <b>track the effectiveness of their responses</b> to human rights impacts, based on qualitative and quantitative indicators and stakeholder feedback (GP 20)</li> <li>Tracking should review responses to impacts and, in cases of significant rights impacts, <b>undertake root cause analysis</b> to identify why and how the impact occurred (GP 20)<sup>19</sup></li> </ul>	<ul style="list-style-type: none"> <li>Compliance programs should be <b>reviewed and updated to ensure that they remain tailored</b> to the risks faced by the company and incorporate lessons learned<sup>20</sup></li> </ul>	<ul style="list-style-type: none"> <li>Monitoring and review</li> </ul>
<b>Remediation/Grievance</b>		
<ul style="list-style-type: none"> <li>Businesses should have <b>processes to enable remediation</b> of adverse human rights impacts that they cause or contribute to (GP 22)</li> <li>Companies should establish <b>effective operational-level grievance mechanisms</b> to identify and address human rights risks and impacts (GPs 29, 31)</li> </ul>	<ul style="list-style-type: none"> <li>There should be a <b>confidential reporting and investigation mechanism</b>, and whistleblowers should be protected<sup>21</sup></li> </ul>	<ul style="list-style-type: none"> <li>Monitoring and review</li> </ul>

<sup>16</sup> FCPA GUIDE, *supra* note 10, at 58-59. *See also* U.S. Sentencing Guidelines § 8B2.1(a)(1).

<sup>17</sup> FCPA GUIDE, *supra* note 10, at 60. *See also* U.S. Sentencing Guidelines § 8B2.1(a)(1).

<sup>18</sup> FCPA GUIDE, *supra* note 10, at 59. *See also* U.S. Sentencing Guidelines § 8B2.1(b)(4).

<sup>19</sup> INTERPRETIVE GUIDE, *supra* note 6, at 54.

<sup>20</sup> FCPA GUIDE, *supra* note 10, at 61-62. *See also* U.S. Sentencing Guidelines § 8B2.1(c).

<sup>21</sup> FCPA GUIDE, *supra* note 10, at 61. *See also* U.S. Sentencing Guidelines § 8B2.1(b)(5)(C).

## Integrated Risk Prioritization: Practical, Principled, and Efficient

It would be overly simplistic to suggest that anti-corruption compliance is equivalent to human rights governance. The scope of the latter, for instance, is significantly broader than that of the former. Corruption is a discrete wrong, albeit with diffuse effects; human rights governance applies to a wide array of risks to a wide array of stakeholders. Human rights due diligence and remediation are thus far more complex and nuanced processes than their anti-corruption equivalents.

At the same time, the similarities in form between anti-corruption compliance and human rights governance offer valuable synergies for companies to leverage in pursuit of efficiency. The platform for ongoing corruption training, for instance, can be harnessed to include human rights learning modules.

The potential for synergies is most evident in the context of risk-screened due diligence. Risk screening enables companies to determine which regions, segments of their value chain, or specific third parties warrant most scrutiny—for instance through onsite assessment or periodic monitoring—so as to make best use of available resources. Such screens are essential to both corruption compliance and human rights governance, whose global scope would otherwise make undifferentiated due diligence overwhelming or arbitrary. The DOJ, for example, expects companies to tailor corruption due diligence to areas of greatest anti-corruption risk.<sup>22</sup> The Guiding Principles similarly counsel prioritized due diligence, where necessary, based on the severity of the human rights risk facing stakeholders.<sup>23</sup>

Practical and principled risk screens, for corruption as much as for human rights, consider two broad categories of risk: context and system. The elements are related. Context-risk screening considers factors endemic to the specific operating environment, such as the country of operation and industry in question.<sup>24</sup> Context-risk screening may be further tailored to the particular transaction type.<sup>25</sup> System-risk screening is related to the due diligence target's ability to identify and manage relevant context risks on an ongoing basis. The focus is thus on governance. The stronger the target's policies, due diligence processes, and remediation/grievance processes, the lower the system risk.

The screening of both context and system risks favors integration. *First*, the strong correlation between high corruption risk and high human rights risk is well established.<sup>26</sup> Companies can thus leverage data from the corruption screen to establish and reinforce an initial human rights screen. *Second*, because the focus is on governance, the method to conduct system-risk screening is the same in the corruption and human rights contexts. That is, the due diligence target—whether it be the company itself, an affiliate, or a third party—must share sufficient information on its policies, due diligence processes, and remediation/grievance processes to assess its ability to address context risks. The type of information sought, and the parties from whom it is sought, enables the efficient integration of human rights risk screening in corruption risk screening approaches.

<sup>22</sup> FCPA GUIDE, *supra* note 10, at 59.

<sup>23</sup> See Commentary to Guiding Principle 17; SHIFT, RESPECTING HUMAN RIGHTS THROUGH GLOBAL SUPPLY CHAINS 4 (Oct. 2012), [http://www.shiftproject.org/media/resources/docs/Shift\\_UNGPssupplychain2012.pdf](http://www.shiftproject.org/media/resources/docs/Shift_UNGPssupplychain2012.pdf) (“However, in most cases, it is simply not feasible for a company to conduct due diligence for the entirety of its supply chain—where supply chain relationships may number into the thousands, tens of thousands, or more. Companies therefore often need to prioritize those business relationships for which it is most critical to conduct human rights due diligence. However, as a first step, they need to know who is in their supply chains.”).

<sup>24</sup> See FCPA GUIDE, *supra* note 10, at 59. See also Commentary to Guiding Principle 17.

<sup>25</sup> See FCPA GUIDE, *supra* note 10, at 59.

<sup>26</sup> Indeed, corruption and human rights abuses tend to go hand in hand; countries with high levels of corruption also tend to have high levels of human rights abuse. See TRANSPARENCY INTERNATIONAL, HUMAN RIGHTS AND CORRUPTION (2008), [https://www.transparency.org/whatwedo/publication/working\\_paper\\_no.\\_5\\_2008\\_human\\_rights\\_and\\_corruption](https://www.transparency.org/whatwedo/publication/working_paper_no._5_2008_human_rights_and_corruption).

The potential efficiency and effectiveness gains of integrating anti-corruption compliance and human rights governance extend far beyond risk prioritization itself. But, given the central role of risk-tailored due diligence in both types of governance, the synergies in structuring due diligence are worth serious exploration. Beyond efficiency, such integration promises a more comprehensive and nuanced portrait of hidden risks and can significantly lessen the burden on business partners who might otherwise face audit fatigue.

## **Conclusion**

Anti-corruption compliance and human rights governance programs both focus on assessing responsibility through the strength of prevention and detection efforts. This common approach means that the blueprint to ensure corporate respect for human rights already exists in corporate processes. While human rights governance poses uniquely complex issues, anti-corruption compliance architecture is a promising framework from which to draw lessons and on which to build the constituents of effective human rights governance, particularly when it comes to due diligence.

Efficient and comprehensive human rights risk management will turn on the governance system's ability to explain how limited resources are deployed to address priority human rights risks. Leveraging anti-corruption compliance to address that issue precisely may provide the key to efficient and durable human rights risk management.