

## The Two Dimensions of Human Rights: Government and Business

The Guiding Principles are the source of business risk and opportunity because of their precision. They create a new language for businesses and stakeholders to understand the scope of private-sector responsibility for social impacts. Using this language requires definition. There is no point talking about adverse impacts on “human rights”, “cause or contribute to”, or “directly linked to” a business without a shared understanding of what those terms mean.

**The focus of this piece is on the importance of defining rights before conducting due diligence, stakeholder engagement, or remediation (and, ideally, before drafting a human rights policy).** The definitions of human rights themselves are shifting because of the Guiding Principles, and understanding that shift in the context of the traditional state responsibility for rights is essential for businesses to appreciate stakeholder concerns—and for stakeholders to understand the relevant scope of business responsibility.

To illustrate the importance of definition, we use the example of freedom of expression, particularly as it applies to the information and communications technology (ICT) sector. The logic, however, applies across sectors to all rights.

### **BUSINESS RESPONSIBILITY FOR HUMAN RIGHTS**

*Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. (Guiding Principles, Principle II.A.11)*

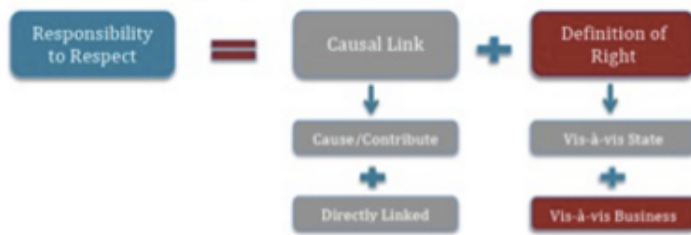
This principle captures the nature and scope of business responsibility for human rights. But there are layers to peel. Most importantly: how can a business directly infringe on human rights? The answer is not obvious. Human rights are fundamentally distinct from people’s feelings or grievances. **Rather, they are defined concepts that establish a scope of protected individual freedom or justifiable claims vis-à-vis a particular institution.** This freedom or claim is independent of perception: rights can be infringed without anyone being aggrieved; conversely, they can remain untouched no matter how injured people feel by a given action.

The institution against which a right may be claimed is integral to the scope of the right. Traditionally, the relevant institution has been the state. *The International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) therefore focus on state obligations and limits on state action. National and

international jurisprudence and commentary by the UN's Human Rights Committee are also focused on the state.

Implicit in the principle that businesses should respect human rights is an additional dimension to rights themselves: the idea that individuals have a defined scope of freedom or justifiable claims against businesses. Figure 1 represents the structure of this responsibility.

Figure 1: Representation of Responsibility to Respect



This framing of business responsibility raises questions of practical definition, particularly concerning how the nature of an individual's (or group's) protected scope of freedom or legitimate claims evolves vis-à-vis an institution that is itself a rights holder (i.e., business).

## RIGHTS ARE DEFINED BY THEIR LIMITS

While rights are framed as individual or group freedoms and claims, they are defined by limits on government action or imperatives to act. No right is absolute and unfettered. Freedom of expression, for instance, includes the freedom to hold an opinion, the freedom to receive and impart information, and limits imposed on these freedoms legitimately imposed by government. It does not mean that a person can express herself in any way and any time over any medium. Rather, as the UN Human Rights Committee explains in General Comment 34, it means that the government cannot use coercive powers of the state to harass, detain, arrest, try, or imprison an individual for expressing an opinion or belief.<sup>1</sup> With respect to freedom of information, states should encourage free and independent media and ensure access to it. But even that is not absolute. States do not infringe on the

right to freedom of expression if they restrict expression or access to information by law in order to protect (i) rights and reputations of others or (ii) in the interests of public order, morals, or national security.

## IMPLICATIONS OF TRADITIONAL DEFINITIONS FOR THE RESPONSIBILITY TO RESPECT

The traditional definitions of rights offer insight for businesses considering their duty to respect when the state is involved. When business is conducting due diligence on relevant adverse impacts, at one level the scope of the due diligence is certainly focused on state violations of the freedom of expression that the right is designed to protect. The due diligence should cover the ways in which the business may cause, contribute to, or be directly linked to infringements on the right by the government itself; the scope of that right can be understood using national and international jurisprudence. For instance, a business that provides the technology for a government to violate individuals' freedom of expression is directly linked to—if not causing or contributing to—an adverse human rights impact.

Traditional definitions, however, are limited when the government is not involved. If a right may be impacted directly by business without any government involvement, what is the nature of the right itself? Transposing state-centric concepts to the business context raises two related issues.

- *First*, just as the right to freedom of expression vis-à-vis the state is distinct from the ability to express oneself, in that the ability can be curtailed without infringing on the right, there are presumably ways in which business can limit the ability to express oneself without impacting the right to freedom of expression.
- *Second*, and tied to the first, business and the state are fundamentally different in how they impact individual freedom. While a government violates freedom of expression by passing a law or using coercive force to

<sup>1</sup> UN Human Rights Committee, General Comment 34: Freedoms of Opinion and Expression (Art. 19), Sept. 12, 2011, CCPR/C/GC/34.

prevent expression, in most instances (aside from the use of security forces) a business does not have that coercive authority, and is itself subject to the state's coercive authority.

**To the extent an ICT company, for instance, affects individuals' ability to express themselves or receive information, it is generally through contract or market forces: employment agreements, confidentiality agreements, terms of service, fees or other restrictions on access to services. It would be strange if such restrictions on expression or information constituted adverse impacts on the right to freedom of expression. Indeed, they are arguably an exercise of the business's right to freedom of expression and individuals' basic liberty.** Moreover, it is clear that even states may restrict expression for certain purposes—the right vis-à-vis business should not be more expansive. The question a business faces when analyzing potential adverse impacts on rights independent of government action then is: at what point do business limits on individuals' ability to express themselves become adverse impacts on individuals' right to freedom of expression?

The answer to this question lies in the definition of the right. But traditional sources of rights definitions—namely courts and international institutions—have focused on human rights in the state context. To understand the scope of direct business responsibility for rights, it is necessary to translate those rights to the business context. This is the joint responsibility of business and stakeholders.

### **EXAMPLE: TRANSLATING FREEDOM OF EXPRESSION INTO A BUSINESS-FOCUSED RIGHT**

Translating a right from one institutional context to another requires capturing the purpose of the right while recognizing the reality of the changed institutional attributes. The translation should be practical while being general enough that its principles can apply to different sectors and operating contexts. We provide below an example using freedom of expression, as defined in Article 19 of the ICCPR and the UN Human Rights Committee's commentary in General Comment 34.

#### *Freedom of expression (ICCPR Art. 19)*

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

#### ***Translation of freedom of expression into a business-focused right***

1. Business may not use coercion or abuse of power to limit individuals' freedom to hold opinions or to seek, receive, and impart information and ideas of all kinds through any medium.
2. Nothing in this right precludes a business from limiting individuals' ability to express themselves or receive information through agreements entered into freely and with informed consent or through fair, market-based limitations on access to goods or services. Any such agreements or market-based limitations must be in accordance with law.

The purpose of this definition is not to create a freestanding legal right equivalent to the right in the ICCPR. Nor is it to provide a definitive guide to the scope of business's direct responsibility for rights. **Rather, it is to provide a principled basis for a reasonable discussion, both within the business and with stakeholders, regarding the nature of business's responsibility to respect rights.** As with any definition of rights, there will remain room for interpretation and debate regarding the meaning of terms like "coercion", "abuse of power" and "market-based limitations". By providing a

reasonable foundation for this debate, however, the definition can advance the iterative process of language formation for more productive engagement and more consistent corporate communication. The definition is designed to capture the spirit of limitations on state action while recognizing the distinct function of business as a social institution. The translation thus provides guidance for businesses seeking to be better corporate citizens regarding the kinds of impacts they should protect individuals against when the state is not involved.

## IMPLICATIONS FOR BUSINESS RESPECT FOR RIGHTS

Returning to the framework for respect mentioned at the outset of this note, we would then have two elements of potential adverse rights impacts that businesses would need to consider: (i) *vis-à-vis* the state, by causing or contributing to, or being directly linked to, an infringement of a legitimate individual freedom or claim against the state; and (ii) *vis-à-vis* the business, by adversely impacting a legitimate individual freedom or claim against the business. To be clear, this second element is already assumed to exist. The scope of it, however, is not defined, which means businesses and stakeholders are often speaking different languages.

## BENEFITS OF DEFINING RIGHTS

Because rights are legal concepts with specific meanings, definitions are the centerpiece of a corporate responsibility strategy. A commitment to corporate responsibility without definitions of those rights is no commitment at all. It is simply repackaging of traditional corporate social responsibility. More fundamentally, it reflects a failure to seize the opportunities—for business and stakeholders alike—that the Guiding Principles offer.

By contrast, starting with appropriate definitions offers significant benefits:

1. **Structured stakeholder engagement:** With defined terms as the touchstone of a shared language, businesses will be better able to understand the meaning of stakeholder concerns, and stakeholders will be better able to communicate the implications of particular grievances.

2. **Anticipating human rights risks:** Because rights have specific definitions independent of stakeholder perception, definitions will allow businesses to accurately and precisely understand the scope of their responsibility without waiting for grievances to arise.
3. **Targeted remedial efforts:** With a basis to understand why a given action is wrong, i.e., the specific adverse impact on the specific right, business can efficiently tailor the remedial measure it adopts to mitigate or avoid the adverse impact. Definitions will also enable businesses to distinguish between rights impacts and more general social grievances, so that they can respond accordingly.
4. **Rights-focused grievance mechanisms:** Grievance mechanisms are essential to a Guiding Principles-consistent program. Without definitions of those rights, and particularly how they apply to the business context, it is impossible to implement a fair, transparent, and consistent grievance-resolution system.

Businesses looking to build a corporate responsibility strategy in line with the Guiding Principles, and stakeholders looking to engage them, should turn their attention first to definitions of rights. Only with these in hand is it possible to for rights to be respected.