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OHCHR response to request from Danwatch for advice regarding the application of the UN Guiding Principles on Business and Human Rights

Introduction

On 12 October 2021, the Office of the UN High Commissioner for Human Rights (OHCHR) received a request from the media outlet *Danwatch* to provide interpretive advice on the application of the UN Guiding Principles on Business and Human Rights (UNGPs) in the context of export of military software. Specifically, OHCHR was asked to provide clarification on the following questions:

1. Does the responsibility to respect human rights as set out in the UNGPs imply a responsibility for a tech company to conduct human rights due diligence on how its software is used and by who?
2. What is expected of the state and municipalities under the UNGPs Pillar I when contracting with a technology company which may be involved with human rights abuses?

The purpose of the present note is to provide interpretive advice regarding the application of the UNGPs in response to these questions¹. **The note does not express an opinion or make determination about any specific cases or the acts or activities of any specific country, company or institution.**

Question 1: Does the responsibility to respect human rights as set out in the UNGPs imply a responsibility for a tech company to conduct human rights due diligence on how its software is used and by who?

The corporate responsibility to respect human rights, as set out in Pillar II of the UNGPs, **applies to all business enterprises, including technology companies**, regardless of “size, sector, operational context, ownership and structure” (UNGP 14).

UNGP 13 states that the corporate responsibility to respect human rights requires all business enterprises to:

¹ As the principal United Nations office mandated to promote and protect human rights for all, OHCHR provides substantive expertise, technical assistance and other advice to relevant stakeholder on international human rights standards and principles and the protection of human rights worldwide. See also report by the United Nations Secretary-General: “Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights”, A/HRC/21/21, paras. 32-33 and 96. See previous examples of interpretive guidance of this kind [OHCHR | OHCHR publications and resources on business and human rights](#)

- 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.”

A business enterprise’s “activities” are understood to include both actions and omissions; its “business relationships” are understood to **include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services** (UNGP 13 Commentary).

To meet its responsibility to respect human rights, technology companies should have in place a **“human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights”** (UNGP 15). Where business enterprises have large numbers of entities in their value chains, they should identify general areas **where the risk of adverse human rights impacts is most significant** - whether due to certain clients’ operating context or the particular operations, products or services involved – and **prioritize these for human rights due diligence** (UNGP 17 Commentary).

Following such prioritization, human rights due diligence should be implemented in ways that enable the identification of precise actual and potential impacts on people in specific contexts in the value chain, and (where relevant) in relation to specific business relationships.

Companies selling software and IT systems for military purposes to conflict-affected areas are expected to engage in heightened due diligence. A 2020 report ² of the UN Working Group on Business and Human Rights on Business, human rights and conflict-affected regions noted that,

...[t]he complexity of any human rights due diligence process depends upon the operating context, the size and nature of the business activities under scrutiny, the relationships associated with those activities and the severity of the potential adverse human rights impacts. In conflict-affected situations, the complexity will be increased by the operating context, where State structures are weak or non-existent; business relationships, as some actors may be active participants to the conflict, former combatants, or abusers; and the severity of potential human rights abuses.

It follows that the responsibility to respect human rights extends to software and IT services companies. This implies a responsibility to conduct human rights due diligence to identify, prevent and mitigate human rights risks and impacts in the value chain related to how their products are used and by who.

Failure to conduct human rights due diligence to identify any involvement with human rights risks and impacts through its business relationship does not exempt a company from its responsibility to respect human rights as set out in the UNGPs.

For more information about how to implement human rights due diligence in end-use contexts including what actions a technology company should take to prevent, mitigate, and remedy harms please see the B-Tech foundational paper series.³

² [A/75/212 - E - A/75/212 -Desktop \(undocs.org\)](#)

³ See [key-characteristics-business-respect.pdf \(ohchr.org\)](#); [identifying-human-rights-risks.pdf \(ohchr.org\)](#); [taking-action-address-human-rights-risks.pdf \(ohchr.org\)](#)

Question 2: What is expected of the state and municipalities under the UNGPs Pillar I when contracting with a technology company which may be involved with human rights abuses?

a. The state duty to protect⁴

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication (UNGP 1).

In addition, States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. **UN human rights mechanisms have recommended that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.** There are also strong policy reasons for home States to set out clearly the expectation that business respect human rights abroad, including to preserve the State's own reputation (UNGP 2).

The State's duty to protect human rights is consistent with States' existing human rights obligations under international law, as reaffirmed in the UNGPs. It extends to protecting against human rights abuses involving technology companies.

A cornerstone of the State's duty to protect is that States should apply a **“smart-mix” of the regulatory and policy measures** available to them to protect against business-related human rights harms, including those related to the design, development, sale and use of products and services by technology companies. This means having in place **appropriate and effective regulatory measures and accompanying guidance, incentives, and transparency requirements.**⁵

Additionally, the UNGPs reinforce the importance of policy coherence noting that “States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support” (UNGP 8).

b. Contracting with a technology company

The UNGPs note that where States contract with or procure from companies, **they have unique opportunities to promote awareness of and respect for human rights by those enterprises** (UNGP 6) in relation to the contract in question and beyond. This equally applies to situations where the company is a technology company.⁶

The UNGPs emphasize that as a necessary step, **the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights.** States should ensure that they can effectively oversee the enterprises' activities, including through the provision of **adequate independent monitoring and accountability mechanisms**” (Commentary UNGP 5).

States should also **exercise adequate oversight in order to meet their international human rights obligations** when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights (UNGP 5). It is also likely that where a State cooperates

⁴ In the context of this response, it is considered that UNGPs 1, 2, 5, 6 and 7 are the most relevant. This does not preclude consideration of other parts of UNGP Pillar I and Pillar III.

⁵ <https://www.ohchr.org/Documents/Issues/Business/B-Tech/b-tech-foundational-paper-state-duty-to-protect.pdf>

⁶ As above, Headline 4.

with a technology company to deliver a public good, **there will be a stronger case for that State to put in place strong transparency requirements.**⁷

c. State duties and conflict

The UNGPs state that “Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- c) Denying 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;
- d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

A 2020 report⁸ from the UN Working Group on Business and Human Rights further elaborates on what is expected of States when companies domiciled in their jurisdiction are, or may become, involved in conflict-affected contexts.

Finally, it should be noted that nothing in the UNGPs should be understood as limiting or undermining any legal obligations a State may be subject to under international humanitarian law. (General Principles).

⁷ See headline 5: <https://www.ohchr.org/Documents/Issues/Business/B-Tech/b-tech-foundational-paper-state-duty-to-protect.pdf>

⁸ [A/75/212 - E - A/75/212 -Desktop \(undocs.org\)](#)