

Business and Human Rights: Concepts and Terms

SEVERAL CONCEPTS AND TERMS being used in this training manual are briefly explained below using definitions drawn from a variety of existing materials of international institutions and organizations. The United Nations materials are preferred sources of definition, but those from other organizations are also included whenever deemed necessary.

Other concepts and terms that have not been mentioned in the modules of this training manual are also included as additional information that may be discussed in training workshops.

The sources of definition are provided at the end of each batch of concepts and terms. Facilitators (and/or their resource persons) are encouraged to review the source materials for better understanding of the definitions.

The definitions of concepts and terms are meant to guide the use of this training manual. On the whole, these definitions remain general concepts that have to defer to more specific definitions that might have been developed at the national level by local institutions and organizations. It is necessary for facilitators and/or their resource persons to search for specific and appropriate local definitions of concepts and terms that can be used alongside the definitions listed below.

The concepts and terms are grouped according to themes.

1. General concepts and terms

Access to justice

The process of ensuring that all individuals have access to the legal services and to legal processes in order to defend and enforce their rights as well as to seek or obtain a legal remedy.

Accession

The act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.

Amicus curiae

The amicus curiae is someone who, although they are not a party to the lawsuit, petitions the court or is requested by the court to file a brief due to their strong interest in the subject matter of the lawsuit (also referred to as “friend of the court” or “amicus”).

(Source: UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions, December 2010, New York-Geneva, page xi)

Business relationships

Business relationships refer to those relationships a business enterprise has 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. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.

Civil society

Civil society refers to all groups outside government such as community groups, non-governmental organizations, labour unions, indigenous peoples’ organizations, charitable organizations, faith-based organizations, professional associations and foundations. Civil society expresses the interests of social groups and raises awareness of key issues in order to influence policy and decision-making. In recent decades, such organizations have been successful in shaping global policy through advocacy campaigns and mobilization of people and resources.

(Source: UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions, December 2010, New York-Geneva, pages xii-xiii)

Complicity

Complicity has both legal and non-legal meanings. As a legal matter, most national legislations prohibit complicity in the commission of a crime, and a number allow for the criminal liability of business enterprises in such cases. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is “knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime”. Examples of non-legal “complicity” could be situations where a business enterprise is seen to benefit from abuses committed by others, such as when it reduces costs because of slave-like practices in its supply chain or fails to speak out in the face of abuse related to its own operations, products or services, despite there being principled reasons for it to do so. Even though enterprises have not yet been found complicit by a court of law for this kind of involvement in abuses, public opinion sets the bar lower and can inflict significant costs on them. The human rights due diligence process should uncover risks of non-legal (or perceived) as well as legal complicity and generate appropriate responses.

Due diligence

Due diligence has been defined as “such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case”. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.

Duty bearers

Duty bearers are those actors who have a particular obligation or responsibility to respect, promote and realize human rights and to abstain from human rights violations. The term is most commonly used to refer to State actors, but non-State actors can also be considered duty bearers. An obvious example is private armed forces or rebel groups, which under international law have a negative obligation to refrain from human rights violations. Depending on the context, individuals (e.g. parents), local organizations, private companies, aid donors and international institutions can also be duty-bearers.

(Source: Gender Equality, UN Coherence and You, Glossary: Definitions A-Z, page 1, www.unicef.org/gender/training/content/resources/Glossary.pdf)

Gross human rights abuses

There is no uniform definition of gross human rights violations in international law, but 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.

Human rights

Human rights are the fundamental rights and freedoms which, it is generally agreed, everybody has from the moment of birth, simply because they are human beings. They are not privileges which need to be won and they apply equally to everybody, regardless of age, sex, race, ethnicity, wealth or social standing. Because they are rights, they cannot be taken away from anyone by the government (although they can be limited and sometimes suspended during states of emergency). These rights are based on a number of human rights principles. Human rights become enforceable as they become codified as conventions, covenants or treaties, or as they become recognized as customary international law.

Human rights-based approach (HRBA)

Access to justice is a fundamental right, and a human rights-based approach to access to justice provides a necessary framework for action on human development. The HRBA is useful in analysing immediate as well as underlying causes of justice problems by framing the issues in terms of 'rights' as guaranteed by law and international human rights standards and identifying the multiple factors impeding access to justice. The HRBA also identifies and gives due attention to the most vulnerable 'claim-holders' and the 'duty-bearers' who are accountable for preventing and stopping the rights violations, as well as for fulfilling the rights.

(Source: Access to Justice Assessments in the Asia Pacific: A review of experiences and tools from the region, Asia-Pacific Regional Centre United Nations Development Programme, February 2012, Bangkok, page 3)

Human rights and international crimes

Some of the most serious human rights violations may constitute international crimes. International crimes have been defined by States under the Rome Statute of the International Criminal Court. They are genocide ("acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"), crimes against humanity (widespread and systematic attacks against civilians that include murder, enslavement, torture, rape,

discriminatory persecution, etc.), war crimes (as defined by international humanitarian law) and the crime of aggression.

Human rights impact

a. Actual human rights impact

An “actual human rights impact” is an adverse impact that has already occurred or is occurring.

b. Adverse human rights impact

An “adverse human rights impact” occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

c. Potential human rights impact

A “potential human rights impact” is an adverse impact that may occur but has not yet done so.

d. Severe human rights impact

The commentary to the Guiding Principles defines severe human rights impact with reference to its scale, scope and irremediable character. This means that its gravity and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will both be relevant considerations.

Human rights risks

A business enterprise’s human rights risks are any risks that its operations may lead to one or more adverse human rights impacts. They therefore relate to its potential human rights impact. In traditional risk assessment, risk factors in both the consequences of an event (its severity) and its probability. In the context of human rights risk, severity is the predominant factor. Probability may be relevant in helping prioritize the order in which potential impacts are addressed in some circumstances (see “severe human rights impact” above). Importantly, an enterprise’s human rights risks are the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

“Irremediability”

This refers to 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. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

Justiciability

A justiciable case is one that can be brought before the courts and in which a remedy can be sought and obtained. Justiciability is a key feature of a right. It also refers to the ability to use a human rights standard before the courts or to enforce such rights more generally. The justiciability of economic, social and cultural rights has been a contentious issue for years.

(Source: UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions, December 2010, New York-Geneva, page xvi)

Leverage

Leverage is an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.

Mitigation

The mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.

Prevention

The prevention of adverse human rights impact refers to actions taken to ensure such impact does not occur.

Remediation/remedy

Remediation and remedy refer to both the processes of providing remedy for an adverse human rights impact and the substantive outcomes that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Rights holders

Rights-holders are individuals or social groups that have particular entitlements in relation to specific duty-bearers. In general terms, all human beings are rights-holders under the Universal Declaration of Human Rights. In particular contexts, there are often specific social groups whose human rights are not fully realized, respected or protected. More often than not, these groups tend to include women/girls, ethnic minorities, indigenous peoples, migrants and youth, for example.

(Source: Gender Equality, UN Coherence and You, Glossary: Definitions A-Z, page 5, www.unicef.org/gender/training/content/resources/Glossary.pdf)

Rule of law

One of the fundamental, overarching ideas in legal systems. The rule of law is a safeguard against arbitrary governance and requires legal decisions to be made according to known principles or laws of general and equal application. The rule of law ensures that no one is above the law and that individuals are entitled to due process of law. It is a state responsibility. It informs and structures the effectiveness and integrity of the entire justice system, including the work of NHRIs.

(Source: UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions, December 2010, New York-Geneva, page xx)

Salient human rights

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.

Stakeholder/affected stakeholder

A stakeholder refers to any individual who may affect or be affected by an organization's activities. An affected stakeholder refers here specifically to an individual whose human rights have been affected by an enterprise's operations, products or services.

Stakeholder engagement/consultation

Stakeholder engagement or consultation refers here to an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.

Value chain

A business enterprise's value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise.

(Source: The Corporate Responsibility to Respect Human Rights – an Interpretative Guide, United Nations (New York/Geneva 2012), HR/PUB/12/02, pages 5 – 8.)

2. Child/children and business

Best interests of the child

This is one of the four core principles in the Convention on the Rights of the Child, [and] applies to all actions and decisions concerning children and calls for active measures to respect their rights and promote their survival, growth and well-being as children, as well as measures to support and assist parents and others who have day-to-day responsibility for realizing children's rights.

Child labour

This refers to work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development. This includes work that is mentally, physically, socially or morally dangerous and harmful to children; work that interferes with their schooling; and engaging in work children who are under the minimum working age(s) set by national legislation or international standards. No child under 18 years old should be engaged in hazardous work (i.e. work that is likely to harm their health, safety or morals) or other worst forms of child labour such as trafficking, sexual exploitation, debt bondage, forced labour and the recruitment or use of underage children for security or military purposes. This also involves focus on the gender dimensions of child labour in light of the more likely engagement of girls in activities such as domestic work and sexual exploitation. For further elaboration, see the International Labour Organization (ILO) Conventions No. 182 on the Worst Forms of Child Labour and No. 138 on the Minimum Age, in addition to the optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

Child participation

This is one of the four core principles of the Convention on the Rights of the Child, [and] includes processes that encourage and enable children to articulate and convey their views on issues that affect them. It also involves information sharing and dialogue between children and adults based on mutual respect in an environment that facilitates freedom of expression. Such processes must be authentic, inclusive and meaningful and should take into account the evolving capacities of children and enable them to learn constructive ways

to influence the world around them. There should be a commitment to consider children's opinions including girls and boys, the most marginalized, the vulnerable, and those of different ages and abilities, their views should be respected, heard and taken into account in all decisions and actions affecting them. Participation should not be tokenistic and should not exploit children.

Child protection code of conduct

This is a document that sets out the business's detailed expectations of conduct for individuals within its operations who come into contact with children. The code of conduct implements the business's zero-tolerance policy on violence, exploitation and abuse. It uses the Convention on the Rights of the Child and its optional Protocols as its framework and is designed to help protect children from violence, exploitation and abuse.

Child or children

Article 1 of the Convention on the Rights of the Child defines children as every human being under 18 years old unless, under the law applicable to the child, majority is attained earlier.

Decent work

This involves opportunities for work that are productive and deliver a fair income. Decent work should provide security in the workplace and social protection for families, rights at work, social dialogue, and better prospects for personal development and social integration. People, including young people of working age, should be free to express their concerns, to organize and to participate in the decisions that affect their lives, and have the right to equality of opportunity and treatment.

Emergencies

The situations where lives, physical and mental well-being, or development opportunities for children are threatened as a result of armed conflict, widespread violence, epidemics, famine, natural disaster or the breakdown of social or legal order.

(Source: Children's Rights and Business Principles, <http://childrenandbusiness.org/>)

3. Corporate Social Responsibility (CSR)

ILO defines CSR as "a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law."

(Source: International Labour Office, Combating Forced Labour - A Handbook for Employers & Business, 2nd ed. (Geneva: ILO, 2015), pages 6-7. Full text available at www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101171.pdf.)

4. Grievance Mechanisms

Grievance

An issue, concern, problem, or claim (perceived or actual) that an individual or community group wants a company or contractor to address and resolve.

Company-Community Grievance Mechanism

A locally based, formalized way to accept, assess, and resolve community complaints concerning the performance or behavior of a company, its contractors, or employees.

(Source: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects, Compliance Advisor/Ombudsman (Washington, DC, 2008), page iv.)

Adjudication

The formation of a judgment on the rights and wrongs of parties in a situation of dispute and on any remedies needed, which may be binding on the parties or lead to some form of sanction. Usually, the culmination of an investigation, adjudication is distinct from arbitration in that it does not require agreement by the parties on who will adjudicate, nor does it involve a formal process of hearings.

a. **Specialised labour adjudication** is a procedure whereby ordinary courts or special labour courts settle finally any disputes over rights and obligations.

(Source: Labour dispute prevention and resolution, International Labour Organization, www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm.)

Arbitration

a. Arbitration

A procedure whereby a third party (whether an individual arbitrator, a board of arbitrators or an arbitration court), not acting as a court of law, is empowered to take a decision which disposes of the dispute.

(Source: Labour dispute prevention and resolution, International Labour Organization, www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm.)

b. Arbitration process

A process by which neutral arbitrators selected by the parties to a dispute hear the positions of the parties, conduct some form of questioning or wider investigation and arrive at a judgment on the course of action to be taken in settling the grievance of dispute, often, though not always, with binding effect on the parties.

Information Facilitation

The gathering and dissemination of information on grievances, with any further action or that information largely left to its end-users.

Investigation

A process of gathering information and views about a grievance or disputed situation in order to produce an assessment of the facts.

Negotiation

Direct dialogue between the parties to the grievance with the aim of resolving the grievance or dispute through mutual agreement.

Mediation and/or Conciliation

a. Mediation/Conciliation

Direct or indirect dialogue between the parties assisted by an external, neutral/objective facilitator with the aim of resolving the grievance through mutual agreement. The facilitator may take a more or less active and intrusive role in the dialogue process.

b. Conciliation and mediation

They are procedures whereby a third party provides assistance to the parties in the course of negotiations, or when negotiations have reached an impasse, with a view to helping them to reach an agreement. While in many countries these terms are interchangeable, in some countries a distinction is made between them according to the degree of initiative taken by the third party.

(Source: Labour dispute prevention and resolution, International Labour Organization, <http://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang--en/index.htm>.)

(Note: Unless otherwise indicated, the definitions under Grievance Mechanisms are from Caroline Rees and David Vermijs, *Mapping Grievance Mechanisms in the Business and Human Rights Arena* (Cambridge: Harvard University, January 2008), page 3.)

4. National Contact Points (NCP)

Filed

It means a case has been submitted, but the NCP has not published an initial assessment determining whether the case is admissible.

Pending

It means the NCP has issued an initial assessment and determined that the case merits further examination.

Rejected

It means an NCP has determined the issues do not merit further examination.

Blocked

It means the NCP either provides no response to the complainants at all or it allows the case to proceed endlessly without finalising it.

Concluded

It means the case was resolved with a joint agreement by the parties or the case was not resolved and the NCP issued a final statement.

Closed

It means the NCP has accepted the case, attempted to handle it, but then stops handling it (usually because the company refuses to cooperate) without issuing a final statement.

Withdrawn

It means the complainants withdrew their case, usually because the NCP has mishandled the process.

(Source: OECD Watch, Assessment of NCP Performance in the 2013-2014 Implementation Cycle, June 2014, page 9, www.oecdwatch.org.)

5. Foreign Investment/International Financing

Stabilization Clauses

For the purposes of this study, “stabilization clauses” are those clauses in private contracts between investors and host states that address changes in law in the host state during the life of the project. Use of stabilization clauses is widespread across industries and regions of the world. From an investor’s perspective, stabilization clauses constitute a risk-mitigation tool to protect foreign investments from such sovereign risks as nationalization, expropriation, or the obsolescence bargain, in which the host state can use changes in circumstances to impose new requirements on investors. These clauses also may be designed to insulate investors from environmental and social legislation, a matter of growing economic significance to investors.

Categories of stabilization clauses: Freezing clauses; Economic equilibrium clauses; and Hybrid clauses.

Freezing clauses

Freezing clauses “freeze” the law of the host state with respect to the investment project over the life of the project.

Economic equilibrium clauses

Economic equilibrium clauses require that the investor comply with new laws but also require that the investor be compensated for the cost of complying with them (compensation taking such forms as adjusted tariffs, extension of the concession, tax reductions, monetary compensation, or other), but exemptions are not specifically mentioned in the contract.

Hybrid clauses

Hybrid clauses (so named because they share some aspects of both of the other categories) require the state to restore the investor to the same position it had prior to changes in law, including, as stated in the contract, by exemptions from new laws.

(Source: Andrea Shemberg, *Stabilization Clauses and Human Rights*, March 11, 2008. Full report available at www.reports-and-materials.org/sites/default/files/reports-and-materials/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf.)

6. International Labour Organization (ILO)

International Labour Standards

International labour standards are legal instruments drawn up by the ILO constituents (governments, employers and, workers) and setting out basic principles and rights at work. They are either Conventions, which are legally binding international treaties that may be ratified by member States, or recommendations, which serve as non-binding guidelines.

In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the Convention by providing more detailed guidelines on how it can be applied.*

* Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. A/HRC/17/31, 21 March 2011.)

There is a difference between labour “principles and rights” on the one hand, and ILO standards (Conventions and Recommendations) on the other. The existence of this difference is for instance also suggested by the ILO 1998 Declaration (although the 1998 Declaration concerns only the fundamental principles and rights at work and ILO’s fundamental Conventions):

THE INTERNATIONAL LABOUR CONFERENCE

1. Recalls: ...

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization ...”

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights

In other words, “*principles and rights*” are universal values that should (somehow) be respected, promoted and realized everywhere. As they are necessarily imprecise, it is not possible to control their implementation.

International labour standards (e. g. Conventions), on the other hand, spell out these principles in concrete and specific rules. Countries that have ratified a Convention are under a legal obligation to implement these rules. Implementation can and is supervised.

(Source: ACT/EMP, Labour and Social Policy Components in Current Trade Agreements in Asia and the Pacific, March 2015, pages 4-5. Full text available at www.ilo.org/public/english/dialogue/actemp/downloads/publications/research_note_2015march.pdf.)

Committee of Experts on the Application of Conventions and Recommendations (CEACR)

The body established by the ILO to examine the application of international labour standards. It makes two kinds of comments: observations and direct requests. Observations contain comments on fundamental questions raised by the application of a particular convention by a state. These observations are published in the Committee’s annual report. Direct requests relate to more technical questions or requests for further information. They are not published in the report but are communicated directly to the governments concerned.

(Source: Committee of Experts on the Application of Conventions and Recommendations, www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.)

Conference Committee on the Application of Standards

A standing committee of the Conference, the Conference Committee is made up of government, employer, and worker delegates. It examines the report in a tripartite setting and selects from it a number of observations for discussion. The governments referred to in these comments are invited to respond before the Conference Committee and to provide information on the situation in question. In many cases the Conference Committee draws up conclusions recommending that governments take specific steps to remedy a problem or to invite ILO missions or technical assistance. The discussions and conclusions of the

situations examined by the Conference Committee are published in its report. Situations of special concern are highlighted in special paragraphs of its General Report.

(Source: Conference Committee on the Application of Standards, www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm.)