

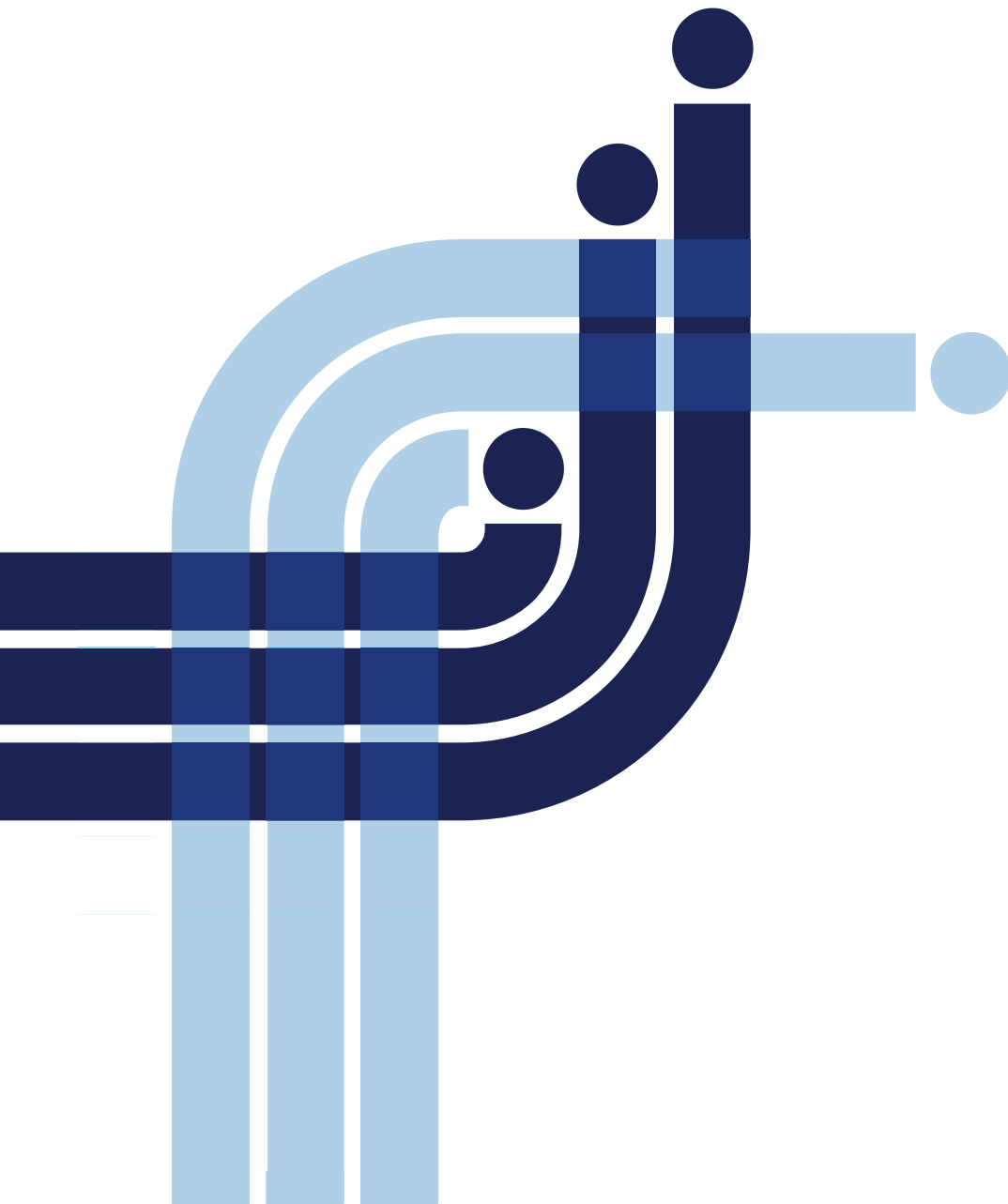


United Nations
Global Compact

Addressing Adverse Human Rights Impacts Connected to Product Misuse

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The United Nations Global Compact is a call to companies everywhere to voluntarily align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of UN goals and issues. In June 2006, the Global Compact Board established a Human Rights Working Group. In light of the growing recognition that labour rights are human rights and in order to ensure a coherent approach, the Chairs and members of the Human Rights Working Group and Labour Working Group merged to create the Human Rights and Labour Working Group (HRLWG) in 2013. The goal of the Working Group is to provide strategic input to the Global Compact's human rights and labour work. The following is one of an ongoing series of notes on good business practices on human rights endorsed by the Working Group. Rather than highlighting specific practices of individual companies, Good Practice Notes seek to identify general approaches that have been recognized by a number of companies and stakeholders as being good for business and good for human rights. The inclusion of company names does not constitute an endorsement of the individual companies by the UN Global Compact Office or the Human Rights and Labour Working Group.

Addressing Adverse Human Rights Impacts Connected to Product Misuse

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1. Introduction

While much attention has been given to business's responsibility to respect human rights within its supply chain operations, much less attention has been given to this responsibility on the customer side of the value chain, in particular how business can or should address adverse human rights impacts linked to their relationships with customers, clients, or other third party purchasers and end users.

Product misuse— defined as the use of a product or service, in whole or in part, for a purpose other than its intended application— is one way a business relationship on the customer side of the value chain could be directly linked to adverse human rights impacts. For example, a construction company sells a tool to a customer, who then misuses that tool to intimidate and injure citizens engaging in a peaceful demonstration, or a finance services company sells financial data to a client, who then misuses that data to target and harm vulnerable persons. Through these examples, one can infer how product misuse may lead to human rights harm, infringing individuals' rights to freedom of expression, health and privacy, among others.

The responsibility of business to respect human rights is increasingly understood as a result of long-standing work by the UN Global Compact and other global initiatives, reaffirmed by the *United Nations Protect, Respect and Remedy: a Framework for Business and Human Rights* ("UN Framework" 2008), and elaborated in the *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* ("Guiding Principles" 2011). However, practical guidance for business on how they can address adverse human rights impacts connected to product misuse remains limited.¹ For instance, what human rights implications are incurred upon selling a product or service that has the potential for customers or others to misuse it and inflict human rights harm? What practical strategies can companies employ to identify, prevent, or mitigate adverse human rights impacts connected to product misuse?

This Good Practice Note ("Note") seeks to explore the human rights responsibilities, the practical implications, as well as the common challenges and pitfalls faced by business when addressing adverse human rights impacts connected to product misuse. The Note also highlights how some companies are currently engaging in good practice to address adverse human rights impacts connected to product misuse. The good and emerging practices highlighted herein may be read as recommendations for companies to consider when faced with a situation of product misuse leading to human rights harm. Finally, this Note finds that business *must* increasingly recognize product misuse as a human rights issue if it seeks to adequately address and combat this challenge on a global scale.

¹ The UN Global Compact is a strategic policy initiative for businesses committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment, and anti-corruption. For more information see <https://www.unglobalcompact.org>. See also, Ruggie, J. (2008) 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights, A/HRC/8/57 (herein referred to as *UN Framework*), OHCHR (2011) *United Nations Guiding Principles on business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework'*, HR/PUB/11/04, annex at A/HRC/17/31 (herein referred to as *Guiding Principles*).

2. Research methodology

The research presented in this Note is based on the following:

- A review of existing literature and case studies on product misuse;
- Publically available company information and a review of company human rights and related policies addressing product misuse (both directly and indirectly);
- Interviews with individuals at companies; and
- Interviews with individuals at NGOs and civil society organizations with experience and expertise addressing product misuse.

Since existing literature on this topic is limited, interviews with individuals at companies, NGOs and civil society organizations serve as the primary source of information in this Note. The author reached out to twenty companies, and conducted interviews with representatives from eight multinationals across different sectors, as well as interviews with five representatives from relevant civil society and human rights organizations. A structured questionnaire was used to guide the interview process. All of the information collected from interviews has been generalized, and the confidentiality of company names and sensitive material has been respected.

3. Scope

Research for this Note revealed that some companies do not define product misuse as a human rights issue. With this premise, this Note intends to provide general guidance to business on how to understand and address product misuse in a human rights context. The guidance and recommendations herein are not meant to highlight specific company or industry examples, but should be considered and adapted as they apply to a specific industry, sector, product or service. While recognizing the importance of remediation and remedy under the UN Framework and Guiding Principles, these topics remain outside the scope of this Note for purposes of length.

4. Product misuse in a human rights context

Product misuse: the use of a product or service, in whole or in part, for a purpose other than its intended application, which could lead to human rights harm.

Product misuse is not a new phenomenon. When a product or service gets into the hands of wrongdoers, or even ignorant parties, human rights violations can and do occur. While not all situations of product misuse lead to adverse human rights impacts, some do.² Consider the following examples:

- A chemical fertilizer, with an intended use for agricultural farming, instead being used as an ingredient for a bomb that kills civilians (infringing, *e.g.*, rights to life, safety).
- A pharmaceutical drug, with an intended use for treating a specific illness, instead being used by the appropriate authorities to facilitate the death penalty (widely considered a human rights violation infringing, *e.g.*, rights to life, health).
- An online (classified) advertisement service, with an intended use for customers to advertise and sell consumer goods, instead being used to facilitate the sexual exploitation of children online (infringing, *e.g.*, rights to safety, freedom from torture).

These examples suggest how internationally proclaimed human rights— as enumerated in the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), as well as other governing international conventions and treaties— may be violated when a product or service is misused.³ Regional conventions and treaties as well as domestic human rights law may also apply depending on jurisprudence and how and where the situation of product misuse occurred.⁴

In interviews, business and civil society representatives underscored that one of the biggest challenges in conceptualizing product misuse as a human rights issue is the vast array of ways, including non obvious ways, a product or service can be misused and inflict human rights harm. In the above examples, product misuse leads to adverse human rights impacts on third parties and victims, but it can also directly harm those misusing the product or service. Consider, for example, customer misuse of processed foods, sugary drinks, and alcohol leading to obesity, diabetes and other illness, or in extreme circumstances, death. Per the definition, product misuse can also be executed with any part or

² There are situations of product misuse that do not lead to human rights harm. Consider the example of a newspaper, intended to be used for reading, instead being used to create a papier-mâché piñata. This Note acknowledges that other forms of product misuse exist, but does not include them in this discussion. This Note focuses on addressing those situations of product misuse that can or do lead to human rights harm.

³ In addition to the International Bill of Human Rights, the corpus of human rights is further defined by other international declarations, treaties and conventions. Of particular relevance to business are the ILO Declaration on Fundamental Principles and Rights at Work (1998), Convention on the Elimination of all Forms of Racial Discrimination (1966), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), ILO Convention (107) Indigenous and Tribal Populations Convention (1957), ILO Convention (169) Concerning Indigenous and Tribal Peoples in Independent Countries (1991), and the United Nations Declaration on the Rights of Indigenous People (2007).

⁴ Human rights are further defined at the regional and sub-regional levels. Those particularly relevant to business include, for example, the African Charter on Human and People's Rights, the American Convention on Human Rights, and the European Convention on Human Rights. Domestic human rights law may also apply.

component of a product or service. It is considered misuse when, for example, a specific chemical is extracted from a household cleaner to make chemical weapons, or when integrated circuits or sensors are removed from products to make mines or cluster weapons.

Product misuse not only emerges or manifests in different ways across products, services, and industries, it can also vary on a more micro-level. For example, two telecommunications companies enabled similar tracking capabilities on cell phones for the same intended use, but each company faced a different form of misuse, which required two different responses. Even in similar product or services, specific variables in design, components or materials used, and markets and customers targeted can contribute to the potential for misuse.

This Note does not intend to list every form of misuse nor does it advocate that companies have a responsibility to stop every wrongdoer from misusing their products or services. In fact, attempts to do so could raise additional human rights issues discussed later in this Note. Instead, these examples are included to demonstrate that product misuse does raise human rights concerns for business.

‘Dual-use’ and other high-risk goods and services for product misuse

‘Dual use’ is a legal term applied to products, services or technology that can be used for both military and civilian purposes. For example, the European Commission defines dual-use items as “goods, software, and technology normally used for civilian purposes but which may have military application, or may contribute to the proliferation of Weapons of Mass Destruction (WMD).”¹ These items, such as some electronics, computers, policing and security equipment, construction tools and equipment, sensors and lasers, among others, are often subject to export controls or other legal regulations – at not only local or national but also regional and global levels – given their potential for military-related application or misuse. Companies involved in the manufacturing, production, sale, and servicing of ‘dual-use’ items should be aware of their high risk for product misuse.

In addition, emerging technologies, medical discoveries and other breakthrough innovations that are well positioned to advance and promote human rights worldwide can also fall subject to misuse. For example, nanotechnology, artificial intelligence, and information and communications technology (ITC) services, such as predictive data or data mining, offer enhanced benefits to society for public health, safety, and security purposes. However, as these emerging technologies and innovations become more widely used and incorporated into consumer goods, there is also greater risk of misuse by customers as well as by third party hackers, criminals, terrorists, or agents of repressive states.² For example, surveillance technologies, which offer states more instruments and means for policing and maintaining public safety, can also be misused to infringe on civil liberties. Brain-computer interfaces, which offer the possibility to interact with computers through thought benefiting, for example, patients suffering from neurodegenerative diseases, can also be misused by hackers to access sensitive data, hijack systems and manipulate devices. New innovations can sometimes lead to negative results, especially in the absence of clear regulations, laws or ethical guidelines concerning their use in the relevant industries.³

¹ European Commission (2017), ‘Dual-use export controls’, available at: <http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/>.

² Al-Rodhan, Nayef (2014) ‘Security, ethics and emerging technologies,’ World Economic Forum, available at: <https://www.weforum.org/agenda/2014/03/security-ethics-emerging-technologies/>.

³ Hope, Dunstan A. (2011) ‘Protecting Human Rights in the Digital Age,’ BSR, available at: https://www.bsr.org/reports/BSR_Protecting_Human_Rights_in_the_Digital_Age.pdf.

Global Priorities Project et al. (2014) ‘Unprecedented Technological Risks,’ available at: <https://www.fhi.ox.ac.uk/wp-content/uploads/Unprecedented-Technological-Risks.pdf>.

5. What responsibilities do companies have to address adverse human rights impacts connected to product misuse?

International instruments regarding ‘business and human rights’ have evolved rapidly in recent years, offering guidance to business on how to address adverse human rights impacts. For one, the UN Global Compact’s ‘Ten Principles’ for corporate sustainability highlight the importance of addressing human rights in all aspects of business operations. Principle 1 calls on businesses to “support and respect the protection of internationally proclaimed human rights,” and Principle 2 underscores that businesses should “make sure they are not complicit in human rights abuses.”⁵ Moreover, the Guiding Principles make clear that business’s responsibility to respect human rights extends to operations, products and services. Guiding Principle 13(b) states that businesses should:

“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 [emphasis added].”⁶

According to this Principle, a company **does** have a responsibility to seek to prevent or mitigate those adverse human rights impacts ‘directly linked’ by business relationships, which includes customers, clients and other third party purchasers and end users.⁷ The responsibility exists even when the company itself did not cause or contribute to the human rights harm. The chart below, adapted from the Guiding Principles, suggests the ‘appropriate action’ a business may take given its ‘level of involvement’ in the adverse human rights impact.⁸

⁵ Ten Principles of the UN Global Compact, available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

⁶ See *Guiding Principles*, at Guiding Principle 13(b).

⁷ “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. For purposes of this Good Practice Note, “customer” includes not just the end user, but also any party receiving a good or service, such as in business-to-business transactions.

⁸ This chart is an adaptation from guidance in the *Guiding Principles*. See also, Global Business Initiative on Human Rights and Institute for Human Rights and Business (2012) ‘State of Play: The corporate responsibility to respect human rights in business relationships,’ available at: <https://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf> and Debevoise Business Integrity Group and Enodo Rights (2017) ‘Practical definitions of cause, contribute, and directly linked to inform business respect for human rights’ discussion draft, available at: <http://www.enodorights.com/assets/pdf/debevoise-enodo-practical-meaning-of-involvement.pdf>

| <i>Level of Involvement</i> | <i>Definition</i> | <i>Appropriate action</i> |
|-----------------------------|--|------------------------------------|
| (1) Cause | A business enterprise causes or may cause adverse human rights impacts through its own activities ⁹ | Cease or prevent impact |
| (2) Contribute | A business enterprise contributes or may contribute to adverse human rights impacts by its own activities ¹⁰ | Cease or prevent contribution |
| (3) Directly linked | Adverse impacts are directly linked to a business enterprise's operations, products or services through its business relationships ¹¹ | Seek to prevent or mitigate impact |

Applying the guidance to situations of product misuse, business should, at the very least, seek to prevent or mitigate adverse human rights impacts with which they are 'directly linked' as per the third category in this chart. However, the categories are somewhat fluid, and a company could also be found to 'cause' or 'contribute' to product misuse. The most obvious scenario involves a company directly executing product misuse and directly inflicting human rights harm. For example, consider a parent company establishes a shell company to specifically and intentionally try to hide the fact it is selling surveillance technology to repressive governments, knowing that the technology is being misused to inflict human rights harm. In other circumstances, a company's omission to act or failure to address known adverse human rights impacts may also constitute cause or contribution. In accordance with international guidance on corporate complicity, a company could be found to cause or contribute to human rights harm if they 'should have known' or could have foreseen the human rights harm.¹²

In recognizing that it could be near impossible for some companies to prevent or mitigate every adverse human rights impact stemming from business relationships—for example, it would be highly difficult for a knife company or drug company to prevent the misuse of every single knife or pill sold respectively—international guidance further clarifies:

“Business enterprises are not required to assess the human rights record of every entity with which they have a relationship...instead, the company would be expected to **assess the risk of**

⁹ See *Guiding Principles on Business and Human Rights*, at Principle 13(a).

¹⁰ See *Guiding Principles on Business and Human Rights*, at Principle 13(a).

¹¹ See *Guiding Principles on Business and Human Rights*, at Principle 13(b).

¹² The “should have known” standard is what a company could reasonably be expected, or foresee to know under the circumstances. See *UN Framework* and Ruggie J. (2008) ‘Clarifying the concepts of ‘sphere of influence’ and ‘complicity’’, A/HRC/8/16, available at: <http://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-companion-report-15-May-2008.pdf>. For additional legal guidance see, International Commission of Jurists (2008) *Corporate Complicity & Legal Accountability, Criminal Law and International Crimes*, vol 2., Geneva, Thompson; Ramasastry and Taylor (2009) “Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes”, *Transnational Corporate Responsibility for the 21st Century*, Vol. 40 No. 4, *George Washington International Law Review*; Sherman, J.F. (2013) ‘Practical implications for business lawyers,’ *Global Policy, Human Rights Issues, Shift Project*; and Nystuen, G. et al. (2011) *Human Rights, Corporate Complicity and Disinvestment* (Cambridge: Cambridge University Press).

those entities that may harm human rights when acting in connection with its operations, products or services [emphasis added].”¹³

In 2012, the Office of the High Commissioner for Human Rights published an *Interpretive Guide to the Corporate Responsibility to Respect Human Rights* (“Interpretive Guide”), which suggests that business take a risk-based approach—where risk is understood as risk to human rights and rights-holders, and not merely risk to the company (the focus of traditional risk management). This approach allows companies to consider and focus on addressing human rights risks that are reasonably foreseeable. According to the Interpretive Guide, companies should identify areas where human rights risks are most significant through human rights policies, due diligence and other related processes. For example, a knife or drug company using this approach could assess the risks of certain entities prior to sale in order to mitigate sales to entities that are knowingly misusing their products to inflict human rights harm. While companies are not required to assess every individual business relationship, the Interpretive Guide makes clear that “not knowing about human rights abuses linked to its operations, products or services is unlikely by itself to satisfy key stakeholders, and may be challenged in a legal context, if the enterprise should reasonably have known of, and acted on, the risk through due diligence.”¹⁴

Since the adoption of the Guiding Principles, states, human rights institutions, NGOs, multi-stakeholder initiatives, multilateral organizations, UN special procedures, academics, legal organizations, business associations, companies and investors have supported and complemented their implementation, embedding the principles into the global regulatory ecosystem. This has developed a “culture of expected adherence” that all companies everywhere have a responsibility to respect human rights throughout their entire value chain, which includes avoiding negative impacts, where possible, and addressing such impacts where they occur.¹⁵

¹³ Office of the High Commissioner for Human Rights (OHCHR, 2012), ‘Interpretive Guide to the Corporate Responsibility to Respect Human Rights,’ available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

¹⁴ *ibid.*

¹⁵ See ‘Applications of the U.N. “Protect, Respect and Remedy” Framework,’ available at: <https://business-humanrights.org/sites/default/files/media/documents/applications-of-framework-jun-2011.pdf>.

6. What are the practical implications for addressing (or not addressing) adverse human rights impacts connected to product misuse?

There is no ‘one-size-fits-all’ response for addressing adverse human rights impacts connected to product misuse. In fact, situations of product misuse tend to present complex, sometimes nuanced challenges to business without a clear or straightforward response. This complexity may explain, at least in part, why the term ‘product misuse’ remains infrequently cited by business as a human rights issue. In a review of company reports to the UN Global Compact on their human rights policies, product misuse was referenced only by a handful of companies.¹⁶ Of those companies that reported it, some dismissed their responsibility to address it finding that product misuse practices are “exceptional” or “beyond their control.” In interviews, business representatives shared that sometimes there is internal resistance or fear to acknowledge that products or services are not being used as intended. Different departments within a company (*e.g.*, legal, management, marketing) can also disagree on how to categorize and address misuse, leading to internal debate and inaction.

However, these same interviews also revealed that a dismissive stance towards product misuse may no longer be in the best interest of business. Companies, especially multinational corporations, are producing, selling, and marketing products and services to more people in more remote places in the world, which has increased the risk and visibility of product misuse worldwide.¹⁷ For business, this means that stakeholders, including consumers, investors, and business partners, among others, are increasingly considering a company’s human rights record before engaging in business interactions, which includes citing to allegations of product misuse as part of their review. These stakeholders are now linking a company’s human rights record to how their products and services are used by customers, clients and other third parties. They are voicing these allegations regardless of whether 1) the allegations are true and 2) the company was complicit in or knowledgeable of the product misuse.¹⁸ In an interview, one business representative stressed how this linkage is placing the topic of product misuse on his radar whether he wants it there or not.

Media attention on product misuse, such as the use of surveillance devices to monitor individuals’ communications or the use of encryption technologies to facilitate crimes, has also raised public awareness and fear of product misuse.¹⁹ In interviews, the majority of business representatives shared

¹⁶ This review included a key word search for ‘product misuse’ in the UN Global Compact’s database of 37,694 Communications on Progress (COPs) as of 20 May 2015. In addition, 1,859 (advanced) COPs, as well as any and attached annual, CSR or other reports, were reviewed more closely for reference to ‘product misuse’.

¹⁷ Global Business Initiative on Human Rights and Institute for Human Rights and Business (2012) ‘State of Play: The corporate responsibility to respect human rights in business relationships.’ the Business and Human Rights Dilemmas Forum at <http://hrbdf.org/dilemmas/product-misuse/#.Vum3EsdAdU> and Ruggie, J. (2014) ‘Global Governance and ‘New Governance Theory.’ *Global Governance*, vol. 20.

¹⁸ *Ibid.*

¹⁹ See, for example, Perlroth, N. (2015) ‘Security Experts Oppose Government Access to Encrypted Communication,’ 7 July, available at: <http://www.nytimes.com/2015/07/08/technology/code-specialists-oppose-us-and-british-government-access-to->

how they first learned or became aware of product misuse allegations against their company from the media, stressing how difficult it is to address or control the issue after a story breaks. With the 24/7 media cycle, risks become even more serious because 1) damage control may require the attention of senior level management, diverting attention from day-to-day priorities, and 2) activist attention can escalate very quickly through the use of social media, threatening a company's reputation, brand, or value more significantly than in the past.²⁰ If the company failed to consider product misuse in its policies and protocols prior to media attention, it also may face a higher risk of being perceived as complicit in the human rights harm.

The business case for addressing product misuse

As referenced above, companies highlight key business reasons for addressing adverse human rights impacts connected to product misuse. In interviews, business representatives cited how failure to address even just allegations of product misuse can result in a myriad of negative risks, which can slow production, operation and/or sales and hurt a company's bottom line. These risks include:

- **Reputational risks** (e.g., brand loss, increased government scrutiny, negative media coverage, anti-company campaigns by NGOs and civil society).
- **Financial risks** (e.g., investor divestment, customer boycotts, contract suspension/withdrawal, work stoppages, fines).
- **Legal risks** (civil and criminal) A company could face civil allegations for complicity in inflicting damage resulting from a wrongful act, or criminal allegations in countries that recognize the criminal liability of companies, for complicity in the commission of a human rights offence. Taking "no action" (i.e., an omission), such as failing to employ human rights due diligence, could also lead to criminal or civil allegations because the company "should have known" its actions or omissions would contribute to human rights harm (refer to above section on responsibilities, pg. 7).

There is also a case to be made that addressing adverse human rights impact connected to product misuse can contribute to business gains. In more recent years, business partners, investors, customers, and clients are increasingly requesting information about a company's human rights record prior to engaging in business activities. While stains on a record, such as allegations of product misuse, can halt a business deal or render it void, a clean human rights record can help facilitate a deal. Interviews with business representatives reveal that addressing product misuse can provide a competitive edge for:

- **Branding and marketing opportunities.**
- **New business development** (in particular if bidding on government contracts that contain human rights clauses).

[encrypted-communication.html?_r=05](#) and Sanger, D and N. Perloth (2015) 'Encrypted Messaging Apps Face New Scrutiny Over Possible Role in Paris Attacks, 16 Nov., available at: <http://www.nytimes.com/2015/11/17/world/europe/encrypted-messaging-apps-face-new-scrutiny-over-possible-role-in-paris-attacks.html>

²⁰ Deloitte (2014) '2014 Global Survey on Reputational Risk,' available at: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report.pdf.

7. What challenges or pitfalls do businesses face when addressing adverse human rights connected to product misuse?

The human rights responsibilities and practical business implications, as expressed in the two sections above, reinforce that companies should, at the very least, consider product misuse when identifying and addressing adverse human rights impacts directly linked to their products or services through their business relationships. However, how business should address product misuse in practice is another issue altogether.

This section outlines some of the key challenges and common pitfalls faced by business—as identified by business—when addressing adverse human rights impacts connected to product misuse. While these challenges and pitfalls are generalized for the purposes of this Note, they should be considered as they apply to a specific industry, sector, product or service:

A. Lack of control and oversight of products or services post-sale or re-sale

Once a product or service is sold, especially in an open market, a company's ability to control or oversee that product or service may be diminished. Even with safeguards in place to oversee the initial sale, if a company is not dealing with a controlled substance, they may have little control over 1) how a customer or client decides to use a product or service, and 2) the resale, reuse, or repurpose of any product or service, especially if that product or service is distributed to a secondary purchaser. This challenge is particularly highlighted by the commercial reality of some products and services, such as knives, hammers, and other household goods or tools, that are sold in high production or have a wide range of legitimate uses. It is also difficult to control or oversee products or services if they are informally re-sold on a black market or by using the dark web, which allows users to remain anonymous to business and law enforcement.

B. Lack of complete autonomy to decide where and to whom products or services are sold

Some companies lack complete autonomy to decide where and to whom their products or services get used or sold, limiting their ability to identify and address product misuse. This is often the case for companies whose products or services are subject to export controls or trade regulations, such as 'dual-use' items. In such cases, an authorizing state or government rather than the company maintains final oversight and control over the sale, distribution and/or marketing of the good or service. States often look at export controls in terms of political, geopolitical or national security contexts, which do not necessarily include considerations of human rights.²¹ In addition, export controls and trade regulations are becoming increasingly complex worldwide. They not only differ between countries and regions but they are frequently amended, making it particularly challenging for companies operating in multiple

²¹ For example, see European Commission (2015) 'Dual-use export controls,' website, available at: <http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/> and Regulation (EC) No 428/2009.

countries to comply. Repressive governments, terrorist groups, and others have also become more skilled and sophisticated at finding legal loopholes to procure and use trade-regulated goods and services, such as ‘dual use’ technologies for surveillance or networking, to inflict human rights harm.²²

C. Decentralization and fragmentation of business operations

It is increasingly rare that a company will conduct all business operations in one centralized location. As the value chain becomes more fragmented, oversight is more difficult and managers become increasingly distant from their business relationships, in particular their customers, clients and other end users. This makes it more challenging for companies to follow the sale of products and services, including knowing to whom they are selling, for what purposes, and whether products or parts of products will be re-purposed or re-sold. Even if a company’s senior level management is committed to respecting human rights, local offices, subsidiaries, contractors, or other agents can fail to implement human rights policies and protocols as proscribed by management and cause adverse human rights harm.

D. Increased use of ‘intermediaries’ in sales

Some industries are increasingly using intermediaries, such as brokers and middlemen, to deliver, distribute and sell goods and services, which may hinder companies’ abilities to manage, track, or assess the risks of misuse. Intermediaries increase the distance between the company and the final end user and, in some instances, a company may sell its product or service to an intermediary without knowing exactly where or with whom it will end up. While less common, it was also indicated in an interview that intermediaries are not always truthful about their intent for sale by citing examples of intermediaries that procured products for customers, knowing that those customers planned to misuse them to inflict human rights harm.

E. Facing human rights dilemmas

Any company seeking to address product misuse may face human rights dilemmas— when a potential action to prevent or mitigate adverse human rights impacts may also infringe the rights of other individuals.²³ To illustrate, consider an Internet service provider seeking to address customer misuse of its services to commit crimes online. On the one hand, the service provider could provide all customer email correspondence and other putatively incriminating data to law enforcement to help combat the misuse. On the other hand, turning over such data, especially when a customer is not charged with any crimes, may infringe rights to privacy and freedom of expression, among others. For another example, consider a medical company discovers that its ultrasound machines, a medical device with intended use for checking the health and sex of unborn babies, is instead being used to facilitate the practice of

²² Hope, Dunstan A. (2011) ‘Protecting Human Rights in the Digital Age,’ BSR, available at: https://www.bsr.org/reports/BSR_Protecting_Human_Rights_in_the_Digital_Age.pdf and Global Priorities Project et al. (2014) ‘Unprecedented Technological Risks,’ available at: <https://www.fhi.ox.ac.uk/wp-content/uploads/Unprecedented-Technological-Risks.pdf>

²³ Business and Human Rights Dilemmas Forum at <http://hrbdf.org/dilemmas/product-misuse/#.Vum3EsdiAdU>

female sex-selective abortion, infringing rights to life, health and freedom from discrimination, among others. The company could halt production or restrict sale of those machines to where the misuse occurred. However, failure to produce or sell into certain markets could also cause harm more broadly if the machines offer human and social benefits to people when used in the way in which they are intended. Removing the product could be seen as removing those human rights benefits. Since healthcare providers could easily be involved in both the intended and unintended uses of these machines, a human rights dilemma arises. When faced with a human rights dilemma, companies are forced to balance a trade-off (benefit and utility versus human rights risks due to product misuse).

F. Facing a challenging country context

In some circumstances, product misuse may be a result of national, provincial, or local laws, policies or social practices. In countries lacking basic human rights protections, such as freedom of expression or freedom from discrimination, individuals may engage in product misuse without violating, and in some circumstances, even upholding the national law. Issues of government corruption or weak law enforcement may also contribute to product misuse in practice. For example, social media and other network providers could face scrutiny for providing equipment and services to countries where it was alleged that governments were misusing these services to place specific groups (opposition parties, human rights defenders, ethnic, religious or sexual minorities) under arbitrary surveillance. For another example, construction companies could face scrutiny for providing equipment and services to countries where it was alleged that governments as well as non-state actors were using the equipment to intimidate and torture individuals. When product misuse occurs due to a government's position, law, or policy, it can be very difficult for a company to respond. When faced with this challenge, some companies choose to remove or recall their products or services from the country, while others indicate that a continued presence in a challenging country can help influence societal and policy changes in the long-term, even if that means product misuse and human rights violations occur in the short-term. The Guiding Principles make clear that the responsibility to respect human rights "exists independently of States' abilities and/or willingness to fulfill their own human rights obligations [...] and above compliance with national laws and regulations protecting human rights."²⁴

²⁴ See *Guiding Principles on Business and Human Rights*, at Principle 11.

8. What practical strategies can companies employ to identify, mitigate and/or prevent adverse human rights impacts connected to product misuse?

Despite the challenges and pitfalls faced by business, some companies do demonstrate good practice. The good practices highlighted below should be considered and applied as they relate to a specific industry, company, product, or service.

Good Practice

A. Taking a proactive approach to risk assessment and management

It was discovered that companies effectively addressing adverse human rights impacts connected to product misuse not only react to allegations of misuse when they arise, but they also proactively assess human rights risks, seeking to prevent or mitigate product misuse before it occurs. This approach aligns with the risk-based approach adopted by the Guiding Principles, and can be integrated into a business's existing human rights policies and due diligence processes.²⁵

For example, some companies conduct Human Rights Impact Assessments (HRIAs) in accordance with the Guiding Principles as part of their human rights due diligence. The aim of an HRIA is to assess actual and potential human rights impacts, as well as to act upon the findings, track performance, and communicate how the company will address the impacts.²⁶ Some companies have found that integrating considerations of product misuse into their HRIA framework is an effective tool for mapping potential human rights impacts of their products or services and identifying existing processes and gaps that may contribute to product misuse, especially with respect to sales and marketing.

²⁵ For additional guidance on human rights risk assessment, see Global Compact Network Germany and German Institute for Human Rights (2016) 'Assessing Human Rights Risks and Impacts, Perspective from corporate partners,' available at: <https://www.globalcompact.de/wAssets/docs/Menschenrechte/Publikationen/Assessing-Human-Rights-Risks-and-Impacts.pdf> and Global Compact Network Germany and TwentyFifty (2015) '5 Steps towards managing the human rights impacts of your business, Getting started with human rights due diligence', available at: http://www.gc15europe.org/wp-content/uploads/2015/10/DGCN_2015_5-Steps-Towards-Managing-Human-Rights-Impacts.pdf.

²⁶ See *Guiding Principles*, at Guiding Principle 17. When designing a Human Rights Impact Assessment (HRIA), a company may wish to consult existing guidance. See, for example, IFC, UNGC and IBLF (2010) 'Guide to Human Rights Impact Assessment and Management,' available at: <https://www.unglobalcompact.org/library/25>; BSR (2013) 'Conducting an Effective Human rights Impact Assessment,' available at: http://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf; European Commission (2015) 'Guidelines on the analysis of human rights impacts' and The Danish Institute for Human Rights 'Human rights impact assessment guidance and toolkit,' available at: <https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox>. For product specific assessment, see, Global Compact Self Assessment Tool, Product Stewardship, available at: <http://www.globalcompactselfassessment.org/humanrights/productstewardship>.

When addressing product misuse, companies have considered the following set of factors:

| | |
|---|---|
| Country risk The impact of the external environment on the likelihood of product misuse, including a history of product misuse in the country, the relevant laws, regulations, and policies of a country including whether they could facilitate product misuse, review of credible human rights reports on the country, and mass media reports that indicate incidents of misuse in the country. | Product purpose The impact of the product itself on the likelihood of product misuse, addressing the context in which the product is being sold by the company, i.e. for what purpose, and the potential that the product could harm human rights if not used as intended. |
| Customer/Client risk The impact of the customers/clients on the likelihood of product misuse, including a review of business partners, business entities in the distribution chain, and end users who will come in contact with the product or service. A company can also review for evidence that business actors have management systems in place to mitigate or prevent against the risk of product misuse. | Sale portfolio The impact of the total sale portfolio, including all of the products or services being sold by the company, on the likelihood of product misuse. This can include evidence of an end user being eligible to purchase a product (e.g., a certificate of registration with certain authorities that would prove that the end user can legitimately use the product), or ineligible to buy a product due to evidence of harmful intent, or records of past experience of sales to a particular country or an end user. |

HRIAs support a deep dive into understanding design processes, user communities, and the legal and human rights context in countries and regions where the products are used, which can help companies to proactively set up protocols and policies where products and services present risks and opportunities to users or other rights holders. For example, a telecommunications equipment company conducts HRIAs before entering a new country or market to help them assess the human rights impacts of selling, distributing or marketing its products and services in the new location, especially if that country or market presents a challenging human rights context. A HRIA may also help a company identify and address potential human rights dilemmas. For example, when human rights activists raised allegations that healthcare equipment was being misused to inflict human rights harm, the company conducted an HRIA of their sale portfolio in the affected region to guide their response. A company that does not conduct HRIAs but engages in other forms of human rights due diligence could look to integrate and adapt considerations of product misuse into their existing processes as well.

The outcomes or findings of proactive risk assessment can also be used to help strengthen other internal policies and protocols. For examples, some companies enhanced their product or service management systems and/or updated training requirements to address product misuse. Training can help ensure the correct use of a product or service and promote effective implementation of technical and security strategies by customers, clients and other third parties in order to mitigate identified risks of product misuse. In interviews, business representatives highlighted that risk assessment is most successful when it is ongoing and continuous, and when it encourages input from all relevant departments (e.g., sale compliance, trade compliance, communications, legal) and stakeholders.

B. Establishing oversight and accountability by leadership and senior management

Guiding Principle 16(a) highlights how important it is for business to express its commitment to respect human rights through a statement of policy that “is approved at the most senior level of the business enterprise.”²⁷ Most companies agree that their human rights policies and protocols are most effective when they are supported at the top. Leadership and senior management buy-in helps to embed human rights practices into the culture and ethos of the company. This support becomes particularly important when a company is faced with salient high-risk circumstances— those situations in which the likelihood of severe human rights impacts is greatest or widespread.²⁸

To help elevate product misuse as a priority human rights issue, some companies find it useful to establish oversight and accountability mechanisms that directly engage leadership and senior management in addressing product misuse. For example, a company that markets and manufactures cell phones and other mobile devices established a senior-level internal review process requiring high level managers to review sales in countries presenting a high human rights risk. Another company established a ‘Sales Compliance Body’ that is comprised of senior cross-functional leaders representing key departments within the business. After weighing the competing corporate interests of maximizing sales and preventing product misuse, the body may approve the sale, negotiate further safeguards, restrict the use of certain products or services or rule a different outcome. These mechanisms not only promote oversight but they also can help reduce potential reputational, financial and legal risks associated with product misuse by engaging and educating leadership and senior management on how to address and mitigate risks before they arise.

C. Using leverage to reduce risks of product misuse

Companies seeking to address adverse human rights impacts connected to product misuse find that leverage can be an effective tool, as contemplated by the Guiding Principle 19, especially if the company is faced with challenges, such as lack of oversight or control of its products and services post-sale or a challenging country context. Leverage exists where a company has the ability to effect change in the wrongful practices of an entity or third-party that causes or contributes to human rights harm.²⁹ In other words, leverage is the ability of a company to influence the behavior of its business relationships or business counter-party. This can also be particularly useful when a company faces a human rights dilemma.

Using leverage, a company could help prevent a situation of product misuse or mitigate the risk of reoccurrence. For example, companies have offered commercial incentives or used negotiations to

²⁷ See *Guiding Principles on Business and Human Rights*, at Principle 16(a).

²⁸ For more information on human rights due diligence in high-risk circumstances, see, Shift Project (2015) ‘Human Rights Due Diligence in High Risk Circumstances: Practical Strategies for Businesses,’ available at: https://www.shiftproject.org/media/resources/docs/Shift_HRDDinhighriskcircumstances_Mar2015.pdf.

²⁹ OHCHR, 2011, the Commentary to Guiding Principle 19 and Shift (2013) ‘Using Leverage in Business Relationships to Reduce Human Rights Risks,’ Available at: <http://www.shiftproject.org/resources/publications/leverage-business-relationships-reduce-human-rights-risk/>.

influence the behavior of their business relationships. Leverage can also be applied at the onset of a new relationship by, for example, defining and integrating clear human rights expectations as well as enabling recourse if “things go wrong.”³⁰ Moreover, through leverage and advocacy, companies have helped to influence national or other policies and laws in support of mitigating the risks of product misuse and other adverse human rights impacts.³¹ For example, an Internet service provider operating in a foreign country was able to exercise leverage and help amend local regulations infringing free speech.

D. Implementing safeguards and controls within contracts and ‘terms of sale’

In some circumstances, companies can address adverse human rights impacts connected to product misuse by implementing safeguards and controls within their contracts and ‘terms of sale’ to maintain a degree of control over the sale, use and distribution of their products and services. This is particularly useful if a company engages with intermediaries in sales. For example, companies have included special contractual provisions or clauses in license agreements, warranty agreements, sales contracts, service contracts, and other related legal documents to govern the sale of their products and services. Sometimes these legal safeguards and controls are specifically linked to a human rights clause, but often they are included in more general business terms of sale. For examples, the language of safeguards and controls could:

- Specify the intended use of a product or service, and prohibit its use or sale for any reason other than that intended use
- Commit a customer not to re-sell the product unless approval is granted by the company
- Commit that similar conditions of sale be imposed on secondary buyers during re-sale
- Cease, halt, or refuse continued service or sale of a product or service if there are reasonable grounds to believe that product misuse has occurred

This approach can be particularly useful when managing the sale of an emerging technology or new innovation that is being marketed, distributed or sold before regulations, laws, and industry standards governing legitimate uses are clearly defined. By implementing safeguards and controls in the terms of sale, companies can seek to define legitimate uses and help to prevent or mitigate misuse. In interviews, business representatives also stated the importance of enforcement mechanisms. Once the ‘terms of sale’ are signed, companies should ensure they remain effective by conducting regular audits to verify that customers remain fully compliant with the terms. Where companies discover noncompliance, they should be prepared to impose contractual penalties, or take legal action should this be warranted by the severity of the breach.

³⁰ Shift (2013) ‘Using Leverage in Business Relationships to Reduce Human Rights Risks.’

³¹ For more guidance on addressing human rights challenges due to local or national laws or norms, see, UN Global Compact (2011) ‘Good Practice Note: Meeting the responsibility to respect in situations of conflicting legal requirements,’ available at: <https://www.unglobalcompact.org/library/1001>.

E. Assessing human rights and ‘product misuse’ in internal procedures for managing business relationships

Internal corporate procedures for managing business relationships — sometimes referred to as ‘Know Your Customer’ (KYC) policies—have helped some companies reveal and mitigate risks of product misuse by assess the human rights records of their business partners. Through KYC policies, companies conduct thorough background checks and screenings of their business partners to determine if a partner can be linked to any potential or actual human rights risks or harm.³² If publically available information or data is lacking, KYC policies can request information from the partner directly. Additionally, a partner can be checked against commercial and regulatory watch lists, sanction lists, and politically exposed persons (PEP) databases.³³ The use of specialized screening software can help facilitate this good practice.³⁴

These internal procedures can help mitigate risks prior to engaging in a new business relationship as well as throughout the entire lifecycle of a business relationship to ensure that partner remains in good human rights standing. For example, some financial service providers conduct thorough background checks of clients to mitigate risks of money laundering and other financial-based crimes. In addition, . KYC policies are helping network vendors and other ICT service providers to publically distance themselves from companies that market themselves as lawful, but their capabilities actually fall outside the law. It is important to note that—in keeping with the Guiding Principles’ expectation for ongoing versus one-time due diligence— internal procedures are most effective when they are periodically reviewed to ensure compliance with all export, trade and sale regulations, which are subject to change in much the same way as the conditions affecting ongoing service agreements.³⁵

F. Removing the product or service from situations of misuse

Sometimes product misuse will occur even when a company proactively implemented policies and protocols to help prevent or mitigate it. In these scenarios, good practice may include the removal of that product or service from the situation of misuse. This can be accomplished by:

- Removing or recalling the product or service in a country or market
- Banning the sale of products or services to a particular country or market
- Discontinuing the production and sale of a product or service

For example, some agricultural companies halted the production of fertilizers containing ammonium nitrate once it was tied to the production of chemical bombs. Additionally, a telecommunication

³² ‘Know Your Customer’ policies are highly developed in the banking sector, and have been applied to human rights issues. See, for example, PwC (2013) ‘Know Your Customer: Quick Reference Guide,’ available at:

<https://www.pwc.com/gx/en/financial-services/assets/pwc-kyc-anti-money-laundering-guide-2013.pdf>. In the U.S.

³³ For example, the U.S. State Department maintains a screening list on exports, re-exports, and transfer items, see:

http://export.gov/ecr/eg_main_023148.asp.

³⁴ For example, LexisNexis offers identify verification services, see <http://www.lexisnexis.com/risk/intl/en/identity-verification.aspx>.

³⁵ See *Guiding Principles on Business and Human Rights*, Principle 17(c).

company halted the production of a computer component that could be used in the production of land mines. When prevention and mitigation practices do not work, removal or recall may be the best and only option. During the removal process, a company may find it useful to issue public communications and engage in remediation efforts to reduce further fall out. The company may also wish to reflect on and conduct a review of its current human rights policies and protocols and enact amendments and changes that could reduce future risks of product misuse.

Emerging Good Practice

A. Designing safeguards into products or services to mitigate the risk of misuse

Some innovative and supply companies have begun to change the design of a product or service, making it more difficult to misuse. They do this by implementing safeguards or alterations to help better protect human rights and manage their business relations. Design features have also allowed for the tracking and monitoring of products or services post-sale. For example, telecommunications manufacturers have integrated encryption technology into their devices making it more difficult for states to monitor users. Other companies have incorporated radio frequency identification (RFID) technology into their products, enabling product tracking (though at the risk of tracking individuals inappropriately, which underlines the need for proactive consideration of all human rights risks). While this approach can be difficult, resource intensive, and requires buy-in from leadership, it has also been found to be effective at mitigating product misuse.

B. Engaging in industry-wide collaboration to addressing product misuse

Some companies are starting to host forums, discussions and network events allowing for industry leaders and representatives to come together and openly discuss human rights issues and risks. These industry-wide efforts have resulted in an enhanced awareness of product misuse and, in some circumstances, collective action. For example, fertilizer companies, through industry associations, have devised industry standards for product stewardship to minimize the inherent risks on their products.³⁶ In addition, technology companies are engaging in industry-level dialogue on issues related to the balance between rights to privacy, freedom of expression, and personal security. For example, the Global Network Initiative, a multi-stakeholder group of companies, civil society organizations, investors and academics dedicated to protecting and advancing freedom of expression and privacy in the ICT sector, has published collective industry-led statements on these topics.³⁷ In interviews, business representatives highlighted how addressing human rights issues in partnership can feel more legitimate, safer and sometimes more effective. They also found industry-wide collaboration as a useful way to increase leverage, identify challenges and share best practices.

³⁶ See, for example, International Fertilizer Industry Association's (IFA) Product Stewardship initiative, available at: <http://www.protectandsustain.org/principles/text/46-about-the-ifa-approach>.

³⁷ For more information about the Global Network Initiative, see www.globalnetworkinitiative.org.

C. Increasing direct engagement with civil society and human rights organizations

Some companies find that directly engaging with civil society and human rights organizations is a highly effective way to increase their understanding and awareness of product misuse. In an interview, a business representative explained how she works with a local human rights organization. When that organization became aware of product misuse allegations against her company, they advised her before sharing those allegations with mainstream media. This allowed her company to investigate and devise a response, helping them to contain and address the issue. These organizations can help them learn about situations of product misuse before they reach the mainstream media as often such organizations are the ones sharing or leaking the stories. By working with civil society, companies can help build a culture of information sharing, trust, and openness.

Civil society can also help companies devise ways to effectively address product misuse. For example, a human rights organization worked with pharmaceutical companies to devise a medicine distribution model to help protect medicines from being sold to prisons for use in lethal injection executions. This model is so effective that it is now considered an industry standard³⁸

³⁸ Bart Stapert vs. Mylan, Statement by the National Contact Point Netherlands for the OECD Guidelines: http://www.oecdwatch.org/cases/Case_355 See also, Reprieve's 'lethal injection' website at <http://www.reprieve.org.uk/topic/lethal-injection/>.

9. Conclusion and Ways Forward

Calling for widespread recognition of product misuse as a human rights issue, paving the way for business to adequately address and combat product misuse on a global scale.

Product misuse does raise human rights concerns for business. In accordance with international guidance on ‘business and human rights,’ business should consider product misuse as part of its responsibility to respect human rights. This includes engaging in good practice as well as seeking new and emerging ways to address adverse human rights harm. Research for this note shows that some companies are, in fact, addressing product misuse in some capacity within their existing policies, protocols, and mechanisms even if they do not specifically cite it. Companies should review their existing processes to identify where and how they can better address, mitigate and/or prevent adverse human rights impacts connected to product misuse.

While the business and human rights community has distinctly moved away from ‘naming and shaming’ companies directly linked to adverse human rights harm, there remains some fear in the private sector that acknowledging human rights risks, especially risks linked to customers, clients and other business relations, could result in reputational, financial, legal risks for the company. For this reason, this Note calls on all stakeholders—companies, industry associations, governments, and civil society— to step out together and recognize product misuse in a human rights context—similar to how we recognize human rights risks in supply chain operations and through labor standards. Through collaborative and collective action, companies will be encouraged and compelled to address challenges, identify risks, and devise good practice. Widespread recognition will also allow for additional research, practical examples and sector-specific guidance, which are required to adequately address and combat product misuse on a global scale.

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