

The Distribution of Paraquat: Does Syngenta Respect Human Rights?

LEGAL OPINION

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WHO IS RESPONSIBLE?

The number of global cases of pesticide poisoning is estimated to be over one million each year. Tens of thousands of the cases result in death. A significant portion of these cases can be attributed to the use of Paraquat, which is the substance with the most victims in various countries. The product has been banned in Europe and Switzerland for years.

The Berne Declaration, together with many partner organizations and unions worldwide, has been pointing out this untenable situation for years. It urges countries, users and producers to renounce this herbicide. The European Center for Constitutional and Human Rights is focusing on the question of corporate responsibility for human rights violations and is helping victims of corporate abuse to hold those companies legally accountable.

The question, if, and in what manner, the sale of Paraquat stands in contradiction of fundamental human rights and more specifically, if, with the sale of Paraquat, market leader Syngenta exercises its obligation to respect human rights – or not has gained little attention so far.

With the Guiding Principles on Business and Human Rights, developed by John Ruggie and adopted by the U.N. Human Rights Council in June 2011, there is now a worldwide recognized standard which provides criteria to answer the question of corporations' responsibility for human rights violations. The purpose of this legal opinion is to analyze if Syngenta is fulfilling its responsibility to respect human rights under the UN Guiding Principles when producing and marketing Paraquat in the way it does currently. For the first time, the Guiding Principles are applied in a concrete case of violations of the right to life and health that

have taken place daily and globally for the past half a century.

The verdict of this analyses is clear. With the sale of Paraquat – particularly in developing countries – Syngenta violates its responsibility to respect human rights. The Guiding Principles – also endorsed by corporations and business associations – are not being adhered to. It is no longer sufficient for a company to emphasize that it abides by national laws. If the activities of a corporation violate the right to health, the corporation must act. And this is exactly where Syngenta falls short.

Despite these shortcomings there are no direct legal consequences for the Swiss agribusiness corporation, because the Guiding Principles are not legally binding. They are nonetheless an important milestone in our opinion, demanding concrete measures to prevent, mitigate and remediate human rights violations of corporations. States as well as corporations have obligations and responsibilities under the Guiding Principles: States must see to it that corporations do not violate human rights, and when they do, the victims must be able to access effective remedies like filing lawsuits in the corporation's home country to make a claim for compensation. The corporations must systematically orient themselves according to the Guiding Principles on Business and Human Rights. They must introduce human rights risk assessments in all of their activities and take precautionary measures and provide compensation.

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Summary

The author of this legal opinion was asked by the Berne Declaration to assess whether the Swiss business enterprise Syngenta meets its responsibility to respect human rights. The assessment relates in particular to the highly hazardous herbicide paraquat, which has been distributed by Syngenta and its predecessors worldwide since the 1960s and lead to large numbers of acute poisonings (including deaths), from occupational exposure and from ingestion. The key question is whether the distribution of paraquat constitutes a breach of Syngenta's responsibility to respect human rights.

The framework of this analysis is the United Nations Guiding Principles on business and human rights as a normative basis for assessing Syngenta's compliance with the responsibility to respect human rights. The Guiding Principles were adopted by the UN Human Rights Council in June 2011, after 6 years of extensive research of the Special Representative of the Secretary General on business and human rights. On the factual side, the author drew information largely from peer-reviewed scientific sources.

The legal analysis comes to the following conclusion:

- Regarding countries with no or low enforcement of occupational safety and health regulations, countries where the necessary personal protection equipment is not easily available and affordable for pesticide users, countries with high illiteracy, extreme poverty, and countries where due to the tropical climate adequate personal protection is often not worn, the responsibility to respect requires Syngenta to not distribute paraquat and to take appropriate steps against the distribution of paraquat to those countries by third parties. It is not realistically feasible to obtain an appropriate level of safety by any means in these contexts.
- Regarding other countries, the distribution of paraquat is in breach of the responsibility to respect as long as Syngenta has not begun to continuously assess the human rights impact on a context-specific basis, to develop safety measures that are effective and appropriate both for the size and global structure of Syngenta's business and the risks to the human rights to life and health, and implemented these effective safety measures. Syngenta has not yet demonstrated and substantiated, beyond mere assertions, that it has taken safety measures that have proven appropriate and effective. Effective measures may be, inter alia, schemes of restricting access to trained operators and users, licencing reliable farm owners and employers, the comprehensive distribution of personal protective equipment, trainings, and improvement of warnings aimed at preventing the underestimation of paraquat's extraordinary toxicity, depending on the socio-economic context of paraquat application in each country.
- Syngenta and others classify most deaths by paraquat poisoning as cases of suicide. Its due diligence responsibility requires Syngenta to investigate the contexts and reasons of paraquat poisonings, by means appropriate regarding Syngenta's size, global structure and the importance of the rights to life and health. Several sources indicate that what is labelled as suicide may less often than assumed be cases of fully intentional, self-inflicted death, but rather para-suicides or even accidents. For these para-suicides (which were not *intended* to end deadly) and accidents, Syngenta bears responsibility in as far as it has not taken effective safety measures as outlined above.
- Syngenta has a responsibility to remediate adverse impacts it has caused and contributed to by distributing paraquat.

- Considering previous reports by Syngenta, there is no sign that Syngenta's Code of Conduct might be more than a promotional endeavour and that its due diligence processes are appropriate regarding the circumstances.
- The above findings, based on the UN Guiding Principles, do not imply any legally binding obligations of Syngenta that could be brought forward in a court of law. However, the underlying broad consensus among stakeholders, in particular business enterprises, suffuses the Guiding Principles with normative legitimacy and authority that cannot be ignored.

I. Introduction

Paraquat is one of the world's largest selling weedkiller and is registered and used in about 100 countries. It has been a subject of controversy for several decades, especially regarding the safety of farmers and agricultural workers in developing countries. Both intentional and unintentional poisonings with paraquat, mainly among agricultural workers, farmers and inhabitants of rural areas, have led to serious concern among national health authorities, workers' unions and non-governmental organisations. Acutely toxic pesticides are used in many countries under inadequate conditions and cause ill health and deaths, both among agricultural workers and the general public. The injuries suffered often cause chronic health problems, and are sometimes fatal.

The product was first sold in 1961 and it is the most toxic herbicide used today, about 28 times more acutely toxic than the globally most widely used herbicide glyphosate. From the time when it was first marketed until today, accidental and suicidal ingestion of paraquat has caused an innumerable loss of lives. Paraquat is often mistakenly ingested because containers for drinking water and storage or mixing of paraquat are confused, and paraquat has been found available in stores in re-packed containers without proper labelling.¹ An oral ingestion of a mouthful of a 20% paraquat solution is likely to cause death, and depending on the constitution of a person 10 ml are enough to be fatal.² Fatal poisoning at the workplace occurs mostly when paraquat absorption through skin is increased after prolonged contact with undiluted or diluted paraquat solution. Spray mist deposited in the nose may be swallowed and spray in the air can be ingested when workers breathe through the mouth. The level of exposure to paraquat that workers may experience when handling paraquat is high enough to lead to absorption of an amount that can result in acute poisoning. The symptoms of poisonings are often delayed. Damage to the lungs, for example, may not be evident until several days after absorption. Since there is no antidote against paraquat poisoning, the outcome can be fatal and in these cases death mostly results from respiratory failure.

Syngenta is by far the most important seller of paraquat with an approximate market share of 75%.³ The use of paraquat is banned today in several parts of the world, for instance in Switzerland (the home country of Syngenta), the European Union, Russia, the Ivory Coast, and – most recently – Sri Lanka. However, Syngenta continues to sell and distribute paraquat to other countries, such as South Korea, where paraquat has been used for the past three decades, with an estimated 2,000 toxic ingestions annually and associated 60-70% mortality.⁴ Ingestion of paraquat is still common across the world, from the United States to China and from Costa Rica to Malaysia. Burkina Faso has recently proposed to add 'Gramoxone Super' to Annex III of the Rotterdam Convention, because of numerous occupational poisonings caused by this common paraquat formulation.

In June 2011, the United Nations Human Rights Council (HRC) was unanimous⁵ in welcoming the Guiding Principles⁶ on business and human rights that were proposed by the Special Representative of

the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, Prof. John Ruggie (SRSG Ruggie). The Guiding Principles are the product of a six year research of SRSG Ruggie and are meant to clarify the implications of the “protect, respect and remedy” policy framework, adopted by the HRC in 2008.⁷ The Guiding Principles aim to delineate the implications of all businesses enterprises’ responsibility to respect human rights.

This expertise assesses whether Syngenta, by distributing paraquat, fulfils its responsibility to respect human rights under the Guiding Principles. It does not analyse in depth the duties of states to protect human rights, which in the case of Paraquat distribution certainly exists. The author has not conducted any own first-hand research into facts and does therefore not make any own factual allegations but relies on the quoted material.

II. Paraquat Poisoning and the Human Rights to Life and Health

A. The Foundation of the Human Rights to Life and Health in International Law

The human rights to life and health are firmly rooted in international law, and particularly so in the labour context. Today’s central foundation of most human rights in positive law is the International Bill of Human Rights, comprised by the Universal Declaration of Human Rights of 1949 (UDHR) and two international covenants from 1966, one on cultural, civil and political rights (ICCPR) and the other on economic, social and cultural rights (ICESCR).

Everyone’s right to life is provided for in Art. 3 of the UDHR and in Art. 6(1) of the ICCPR. Art. 25 of the UDHR declares everyone’s right to a standard of living adequate for their health and well-being. Art. 23(1) of the UDHR contains the right to “just and favourable conditions of work”. Art. 7(b) and 12(1) of the ICESCR provide the right to safe and healthy working conditions.⁸

Furthermore, the International Labour Organisation (ILO), a United Nations special agency that brings together representatives of governments, employers and workers, has provided for several conventions that specify the right to just and favourable conditions at work in the context of usage of chemicals.

The ILO’s Occupational Safety and Health Convention C155 of 1981 requires member states to implement “a coherent national policy on occupational safety, occupational health and the working environment” in order to “prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment” (Art. 4(1) and (2)). 57 states have ratified this convention as by October 2011.

The ILO’s Chemicals Convention C170 of 1990 requires member states to implement “a coherent policy on safety in the use of chemicals at work” (Art. 4), “to prohibit or restrict the use of certain hazardous chemicals” (Art. 5), and to ensure labelling, “in a way easily understandable to the workers, so as to provide essential information regarding their classification, the hazards they present and the safety precautions to be observed” (Art. 7(2)). This convention has been ratified by 17 states as by October 2011.

The ILO's Safety and Health in Agriculture Convention C184 of 2001 requires member states to establish "specific criteria for the importation, classification, packaging and labelling of chemicals used in agriculture and for their banning or restriction" (Art. 12(a)). Furthermore, it requires that member states "ensure that there are preventive and protective measures for the use of chemicals and handling of chemical waste at the level of the undertaking", including the preparation, handling, application, storage and transportation of chemicals, agricultural activities leading to the dispersion of chemicals, the maintenance, repair and cleaning of equipment and containers for chemicals, and the disposal of empty containers and the treatment and disposal of chemical waste and obsolete chemicals (Art. 13(1) and (2)). This convention has been ratified by 13 states as by October 2011.

B. The State Duty to Protect

International law firmly establishes that states have a duty to protect against non-state human rights abuses within their jurisdiction. For instance, regarding the right to life, Art. 6(1) of the ICCPR states that "[t]his right shall be protected by law". This most certainly applies to the state in which the person affected by the business activity sustains the injury.⁹

As to the state from where the enterprise has its headquarters (that is, in the case of Syngenta, Switzerland) the extent of the state duty to protect foreign citizens abroad is somewhat less clear. The Guiding Principles' provision on the role of the corporation's home state has been phrased in very vague terms, leaving the scope of the home state duty, or mere "responsibility", open for discussion.¹⁰ Previously, SRSR Ruggie has clearly acknowledged the existence of a home state duty, stating that the duty to protect from injuries sustained abroad is limited only by the amount of control that the state has over the enterprise.¹¹ There is clear and growing support for this view on the so-called "extraterritorial" duty to protect.¹² Consequentially, the Swiss authorities would have a duty, for instance, to enforce at Syngenta's headquarters regulation on Syngenta's business decisions and activities that have potentially a negative impact abroad.

However, considering the uncertainty surrounding the role of the business enterprise's home state and the reluctance or lack of capacity of states of the Global South to adequately protect their citizens, it becomes necessary to also focus on the responsibility of the business enterprise involved.

III. The Distribution of Paraquat as a Failure of Syngenta to Respect Human Rights

A. Human Rights Law Between Non-State Actors: An On-going Debate

In what ways business enterprises such as Syngenta are bound by international human rights law has been the subject of heated discussions for a long time. The Guiding Principles, as will be explained below in section 2, escape all of the uncertainty surrounding this debate by operating outside of spheres of hard, binding law. Yet, in order to understand what the Guiding Principles imply and do not imply, it is important to consider the difficulties of treating corporations as addressees of international human rights law.

At least originally, the idea underlying international human rights law was that states – not businesses – should respect and protect values that are shared universally and in dignity by all humans.

After the birth of international law with the Peace of Westphalia in the 17th century, it had been unquestionable that only states are subjects of international law. For a long time, the protection of the sovereignty of nation states against intrusion by other states had been the centre of attention at the international level. Not much of that view changed at the beginning of the 19th century, when the first international human rights agreements (regarding the abolition of the slave trade) were concluded. Still it was only states who were the duty-bearers under international law and who, in order to protect the human rights as agreed on, enforced the international law by implementing it into domestic laws and prosecuting individual slave traders before domestic criminal courts.¹³

This understanding of international human rights law as a mere blueprint for domestic legislation still dominates today,¹⁴ even though the dogma of international law as a domain of only states started to crack after the end of the German Third Reich. While the formation of the International Bill of Human Rights of 1949 and 1966 was motivated by atrocities committed mainly by state actors during the era of National Socialism, the contribution of individuals and corporations to the atrocities of the Third Reich also reflects in the treaty framework where its preambles highlight the role of “every individual and every organ of society” in the recognition and observance of human rights.¹⁵ It is undisputed today that parts of international criminal law attach to individuals.¹⁶ Outside of the human rights sphere, it has been understood since 1980 that treaties can without further ado contain substantive law that directly binds non-state actors: regarding the international sale of goods, the rights and duties of individuals and corporations from 76 states are codified in a United Nations treaty that is applied directly in domestic courts.¹⁷ There is growing support for the view that human rights treaties, too, can and should be interpreted so as to contain binding duties of corporations, especially because the power of corporations on people’s lives today appears as influential as that of states and therefore is said to deserve some framework of accountability at the international level.¹⁸ However, the flipside of this argument serves for many as an objection to binding horizontal human rights law: States, some authors argue, could play down their role as the primary guardians of human rights once corporations are equally liable duty-bearers.¹⁹

Presently, the view that Syngenta is bound by international human rights law would, particularly regarding the right to life, find support in some rather progressive authors’ writings,²⁰ but other authors refrain from accepting, or even outspokenly reject, the notion of an international right to life binding corporations.²¹ SRSR Ruggie, in his reports, has hence pointed out that the discussion on binding corporate international human rights law is yet unresolved.²²

With the Guiding Principles, SRSR Ruggie and the Human Rights Council did not take a stance on the issue but escaped it. The Guiding Principles themselves and their Commentary²³ remain silent on the issue. They do not assign any legally binding duties to business enterprises but instead take a soft approach by specifying a responsibility to respect human rights. Hence, there is no mention in the Guiding Principles of “violations” of (legally binding) “duties” by corporations. Instead, the Guiding Principles speak of “impacts” on human rights and “responsibilities” that business enterprises “should” observe.²⁴ And yet, as will be explained below, the Guiding Principles serve as a normative, persuasive basis that should not be ignored.

B. The UN Guiding Principles: A Normative Basis beyond Binding Rules

The Guiding Principles are an authoritative normative basis for assessing a business enterprise’s compliance with human rights. For several reasons is it advisable for any business official to take into account their implications during every day’s business.

One must first of all be aware that the Guiding Principles derive their authority and legitimacy not from a formal process of law making; their drafters did not intend to stipulate binding obligations of business enterprises but sought to delineate the implications of existing obligations. Due to the lack of legal status, the responsibilities depicted in the Guiding Principles cannot serve as a basis for claims in a court of law. The so called “responsibilities” under the Guiding Principles have disappointed many for falling far short of much-needed legal duties. Merely to reveal cases of non-compliance with human rights is not regarded as satisfying the need for implementation on the ground, perhaps against the will of certain actors. Similarly, human rights as “natural rights” have historically often been discarded as a mere illusion as long as what is called “rights” has not been cast into formal, legal provisions.²⁵

However, just like the objections against the very notion of natural rights has been forcefully rebutted,²⁶ the responsibilities under the Guiding Principles are more than illusions. Soft law derives a normative force through recognition of social expectations by states and other key actors.²⁷ The Guiding Principles serve as a reference point that draws its legitimacy and authority from a broad consensus among businesses, many non-governmental organisations, as well as the unanimous support by the UN Human Rights Council.²⁸ This is not to conceal the shortcomings which were with much verve pointed out by several non-governmental organisations during the drafting of the Principles. As minimal as the Guiding Principles may be, their provisions regarding business enterprises’ responsibilities do reflect a broad consensus as a “lowest common denominator”.²⁹ SRSR Ruggie pointed out that the workability of the Guiding Principles’ human rights due diligence provisions was tested internally by 10 companies, and was the subject of detailed discussions with corporate law professionals from more than 20 countries with expertise in over 40 jurisdictions.³⁰ Several multi-stakeholder workshops were convened and input requested from all member states of the United Nations. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility.³¹ Eventually, the Guiding Principles reflect a standard commonly agreed on (in the sense of a minimum standard) and were endorsed by the Human Rights Council unanimously in June 2011. This broad consensus among stakeholders suffuses the Guiding Principles with normative legitimacy and authority. No corporate officer, including those of Syngenta, can “just do business as usual” ignoring the Guiding Principles. Any argument of social concerns not being a purpose of businesses has in light of the broad support for the Guiding Principles by business enterprises and governments become pale and unconvincing.

Besides the dimension of authority by consensus, the Guiding Principles are relevant in that they can, as ethical demands, pave roads to legal regulation.³² Furthermore, even though the provisions of the Guiding Principles cannot *directly* support a legal claim, they might in the process of applying hard law serve as a benchmark by helping to specify the meaning of legal terms (such as, in tort law, “duty of care” or “foreseeability”) in the global business context.³³ Lastly, as SRSR Ruggie put it, “human rights are the baseline benchmarks by which other social actors judge companies’ human rights practices”.³⁴

C. Paraquat and the Responsibility to Respect Human Rights

The Guiding Principles have not been designed with a view narrowed specifically to human rights impacts as a result of the production of dangerous chemicals. The scope of the responsibility to respect, as *Mark Taylor* puts it, “reaches the limits of generalization”, and then assigns the concept of due diligence the task of getting to the specifics of what it means for a particular business to respect human rights in its particular context.³⁵ Taking into account the text of the Guiding Principles, SRSR

Ruggie's Commentary, his reports to the Human Rights Council, and secondary literature, an assessment of Syngenta's responsibility to respect can be structured as follows.

Syngenta's distribution of paraquat would, according to the Guiding Principles, constitute a breach of the responsibility to respect human rights if all of the following criteria are met:

1. Applicability of the provisions on the responsibility to respect. This condition relates to personal and geographical scopes, the scope of human rights, as well as the scope in business operations that the Guiding Principles are meant to cover.
2. Negative impact of paraquat on human rights
3. Causation. This condition relates to the attributability of the negative impact to Syngenta, i.e. whether an own responsibility of paraquat users might exclude Syngenta's responsibility.
4. Unavailability of exemptions from responsibility. This condition relates to the role of states, lack of domestic regulation, and to hypothetical alternative responsibilities of other distributors of paraquat.
5. Due diligence requires appropriate steps
6. Failure to take the appropriate steps

The meaning of each condition will now be delineated in the order provided and the facts of reported paraquat injuries will be subsumed under each condition respectively.

1. Applicability of the Provisions on the Responsibility to Respect

Before the implications of the responsibility to respect are delineated and applied, it must first be established whether or not hazardous chemicals, their distribution by a Swiss company and the injuries that they cause in over 100 countries fall within the scope of that responsibility.

a) Material Scope

As to the material scope of the responsibility to respect, SRSG Ruggie has held that "[b]ecause companies can affect virtually the entire spectrum of internationally recognized rights, the corporate responsibility to respect applies to all such rights."³⁶ This extension of the scope of corporate responsibility so as to include every international human right that can be affected found support in the secondary literature.³⁷ The Guiding Principles, however, introduce a somewhat vague reservation. According to Guiding Principle 12, not all rights contained in international agreements are "internationally recognized" in terms of the Guiding Principles, but only "at a minimum" the rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. As has been explained above in section II.1, the human rights to life, health and safe and healthy working conditions are part of that core of internationally recognized human rights to the extent that they are expressed in Art. 3, 23 (1), 25 UDHR, Art. 6 (1) ICCPR, Art. 7 (b) and 12 (1) ICESCR.

The ILO conventions referred to in part II.1, i.e. the conventions on occupational safety and health, on chemicals, and on safety and health in agriculture, are neither part of the International Bill of Human Rights, nor are they part of the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. Whether or not they can still be regarded as containing "internationally recognized rights" in terms of the Guiding Principles appears questionable, considering their ratification status (57, 17 and 13 states respectively). Possibly, one might consider the stipulations of those conventions as mere specifications of the rights to life, health and safe

workplace, and refer to them only regarding the use of paraquat in the countries which have ratified the respective convention. For the purpose of this examination, however, it is sufficient to have established that the rights to life, health and safe and healthy work environment are at least recognized through the International Bill of Human Rights.

b) Scope Ratione Personae and Geographical Scope

Regarding the scope *ratione personae*, Guiding Principle 14 (1) provides that “[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.” The responsibility to respect hence applies to the stock company Syngenta of Switzerland (as well as on subsidiaries of Syngenta and other companies that distribute paraquat, wherever they are based).

Regarding their geographical scope, the Guiding Principles are also clearly applicable. Para. 15 of the Introduction to the Guiding Principles speaks of “universal applicability”, and para. 1 of the Commentary on Guiding Principle 11 refers to a “global standard of expected conduct for all business enterprises”.

c) Scope of the Business Activity Encompassed by the Responsibility to Respect

The scope of business operations covered by the responsibility to respect is established in Guiding Principles 11 and 13, and is all-encompassing, referring in Guiding Principle 13(a) and (b) to all impacts of own activities and through relationships with third parties. SRSG Ruggie has been clear in that it is a company’s impact what defines the scope of its responsibility to respect, and not its size, influence or profit margins.³⁸ The main emphasis of SRSG Ruggie’s mandate has been laid from the start and until the end³⁹ on human rights violations in global supply chains and in the extractive industries. But SRSG Ruggie has always seen his approach as a “grand strategy”, an “overall strategy”⁴⁰ and included the end use of company products into his contemplation from the start. The globalisation of business “has increased the challenges companies face in managing their global value chains – the full range of activities required to bring a product or service from its conception to end use.”⁴¹ He has pointed out that the responsibility to respect “should consider the full business life cycle.”⁴²

As all-encompassing as the responsibility to respect may be, so is it important to follow a distinction that SRSG Ruggie draws in Guiding Principle 13, as in fact already in previous reports,⁴³ a distinction that he has termed “direct” vs. “indirect” forms of company involvement.⁴⁴

- GP 13(a) concerns direct involvement, i.e. cases in which enterprises *cause* or *contribute* to adverse human rights impacts “through their own activities”. Both direct forms of involvement are somewhat more intense than the indirect, and hence a higher standard applies to the business enterprise’s responsibility to remediate the adverse impacts (Guiding Principle 22).
- GP 13(b) concerns indirect involvement, i.e. cases in which human rights impacts are “directly *linked* to their operations, products or services by their business relationships”, even if the respective business enterprise has not itself (directly) contributed to those impacts. This form of involvement relates to the concept of complicity with third persons, for instance labour rights violations in supplier factories in which a chemical substance might be produced.⁴⁵ The indirect form of involvement has a lesser intensity and there are hence low expectations as to a remediation of the adverse impacts by the business enterprise (see Guiding Principle 22 and the respective Commentary para. 3).

Even though lit. (b) and not lit. (a) refers to the term “product”, it is important to note that cases of damages taken in course of *the application* of a product fall within the realm of direct company involvement, i.e. lit. (a). Cases in which human rights impacts are “directly linked to [. . .] products [. . .] by business relationships” in terms of lit. (b) are cases of human rights violations in the supply chain. Human rights violations in supply chains occur particularly often and were therefore be found worthy of being referenced explicitly in lit. (b). SRSG Ruggie himself has in his report of May 2008 allocated two cases, one of being supplied with and one of distributing products to lit. (b) and lit. (a) respectively.⁴⁶ The dominant feature of direct cases under lit. (a) is that the company’s own actions or omissions cause the alleged abuse; few or no intervening circumstances or third-party actors connect the company to impact on the right.⁴⁷ Syngenta itself causes the danger, by producing the hazardous product and distributing it even to regions that are particularly un-fit for the use of paraquat. Without the distribution of paraquat, the negative human rights impacts would cease. This is why SRSG Ruggie explicitly pointed out that alleged impacts on end-users of products are “direct only”.⁴⁸ Persons affected by direct corporate human rights abuse can be both end-users of products and workers at the same time.⁴⁹ A case similar to that of paraquat that SRSG Ruggie subsumes under direct forms of company involvement is that of an electronics firm, alleged to use toxic flame retardants in its products that were suspected to have carcinogenic effects on end-users of the products.⁵⁰

Subsuming the distribution of paraquat under the direct form of involvement is notwithstanding that Syngenta might not deliver paraquat through its own personnel globally. The responsibility under Guiding Principle 13(a) for direct forms of involvement does not presuppose any personal or proximate relationship, or a foreseeability of specific harm of specific people, but it attaches to the impact of one’s own activities. Whether Syngenta distributes paraquat through its own personnel, sells paraquat to traders or even outsources its entire sales department to subsidiary companies – the impact does not change and is in any event caused by Syngenta’s own activity, namely making paraquat available to anyone in the world. Indeed, hardly any product is delivered nowadays directly from producer to end-user. It is a principle of reason that also reflects in laws: One’s responsibility for a hazard that one has created is not decreased by transfer of possession and ownership of the hazardous item to intermediaries.

d) Interim Conclusion

The global distribution of paraquat by Syngenta activates the responsibility to respect human rights. This is not, in itself, surprising as SRSG Ruggie has continuously emphasised that the business and human rights problematic entails multi-faceted challenges and that his framework aims to cover all of them.⁵¹ It must be noted, however, that the distribution of the hazardous product paraquat falls within the direct form of involvement in terms of Guiding Principle 13(a) and is therefore considered as relatively intense.⁵²

2. Negative Impact on Human Rights

Syngenta acknowledges that exposure to toxic doses of paraquat is often fatal, despite aggressive medical intervention.⁵³ Paraquat poisonings have been occurring throughout the last decades, since the introduction of paraquat in 1961.⁵⁴ In South Korea alone, 800 to 1,000 people die annually, most of them from ingesting paraquat, and Chinese authorities have recently discussed concerns over 5,000 of its citizens dying from paraquat each year.⁵⁵ Accidental ingestion is still common across the world. Acute poisonings of Paraquat users are still common all over the world⁵⁶. Typical injuries, including skin problems ranging from mild dermatitis up to severe chemical burns, eye injury, nail damage, and

nosebleed, have been observed in proportions as high as 50% of exposed workers. Long-term and delayed health effects may occur, including Parkinson's Disease, lung effects, and skin cancer.⁵⁷

3. Causation: Attributability of the Negative Impact to Syngenta

For a responsibility to be established, the product must have "caused" a negative human rights impact in terms of Guiding Principle 13(a). Causation is generally known in legal systems as the requirement of attributability of the injury, and it is established, firstly, by a *but for* test in the Anglo-American legal system, comparable to the *conditio sine qua non*-requirement in continental legal systems. Since the injuries would not occur if the extraordinarily toxic herbicide paraquat was not distributed, the *but for*-test or *conditio*-test is passed. There is wide agreement, however, that many of the myriad of circumstances that necessarily accumulate every time an injury occurs must be discarded from the set of causes in terms of establishing responsibility. For instance, every tortfeasor was necessarily once conceived by their mother, and yet the act of giving birth to the tortfeasor will not be considered to have "caused" the respective injury, in terms of establishing responsibility. Hence, just because the distribution of paraquat is a *but for* cause of harm does not necessarily mean that responsibility for the harm will be attributed to Syngenta.

Legal systems have hence developed criteria in order to reasonably limit the number of circumstances that give rise to responsibility. The test of foreseeability⁵⁸ is easily passed here, considering the high toxicity of the substance, its intended distribution to developing countries with often low standards of safety, application within the close realm of human bodies, and the many reports and studies on the severe and deadly effects of paraquat.

Another limitation in legal systems is that people are not held liable for harms that they caused in fact, but that were the result of more immediate intervening causes, like the conduct of the claimant or a third party, which breaks the chain of causation.⁵⁹ The most obvious "more immediate cause" is the intentionally or negligently self-inflicted injury,⁶⁰ in particular suicide.⁶¹ It is therefore questionable, firstly, whether and how cases of paraquat poisoning can be classified as suicidal; secondly, how such suicidal intention would limit the responsibility of Syngenta under the Guiding Principles; and thirdly, how Syngenta's responsibility is limited in other cases, i.e. cases of negligent misapplication of paraquat.

a) *The Doubtful Classification of Poisonings as Acts of Suicide*

It is undisputed that paraquat is in some regions of the world often used for suicides and suicide attempts.⁶² In South Korea, approximately 85% of acute toxic pesticide ingestion is reported to be due to suicide attempts.⁶³ Syngenta claims that "exposure to toxic doses of paraquat (largely with suicidal intention) is often fatal, despite aggressive medical intervention."⁶⁴ It is for several reasons questionable, however, whether the assertion of "largely suicidal intention" is reliable.

Paraquat is often mistakenly ingested because it is stored in wrong containers or in the course of mixing paraquat solutions, and containers for drinking water are confused with those for paraquat. In some stores paraquat is available in re-packed containers without proper labelling.⁶⁵ An oral ingestion of a mouthful of a 20% paraquat solution is likely to cause death, and depending on the constitution of a person 10 ml are enough to be fatal.⁶⁶

Medical professionals point at methodological flaws in statistics on paraquat poisonings. Reports of data tend to overstate the number of cases of suicides, because pesticide poisonings at the workplace in rural areas are often not reported to hospitals, partly because employers are reluctant to bear the costs of health insurance.⁶⁷

There is also considerable uncertainty as to the medical criteria of classifying cases of paraquat ingestion as suicides. Criteria such as the amount of paraquat ingested, time interval from ingestion to presenting at the hospital, and plasma paraquat level in the emergency room show no difference between intentional and non-intentional cases of paraquat ingestion.⁶⁸ Furthermore, as relatively small amounts of ingestion have a severe effect on the stomach, the injuries in the stomach can be regarded as proof of suicide even when the herbicide was swallowed accidentally after containers for drinking water and pesticides were not separated properly. Due to its extreme and unusual toxicity, there are no reliable criteria to distinguish intentional self-poisoning from negligent misjudgement of the substance's toxicity. Attorney Richardson and Instructor in Pathology Breyfogle point out that when medical practitioners find poison in a stomach of a deceased person, they are prone – without further ado – to jump to conclusions about the person's death.⁶⁹ It has in general been doubted by courts whether medical studies are useful for apportioning responsibilities, because they are not prepared for that purpose but for acquiring a better medical and psychological understanding in the public interest of the phenomenon of suicide.⁷⁰

What looks like suicide may also often be the deadly ending of what was meant to be a mere call for recognition, i.e. para-suicide. As reasons for suicide vary greatly in kind and intensity, suspects of suicide may more often be undecided than fully determined about dying.⁷¹ The suspect might wish to only call for attention. He or she will choose a means with a seemingly controllable risk, a small amount of any toxic but ordinary and widely available pesticide. The suspect will then be surprised by the lethal effect, because he or she had not fully grasped the toxicity of paraquat. A study prepared at the Soonchunhyang University Hospital of Korea found that most patients had not considered different kinds of pesticides before attempting suicide: “[A]most two of every three patients ingested paraquat simply because it was available when they attempted suicide. Some of the patients bought an herbicide from a shop without mention of a specific trade name and it simply turned out to be paraquat. [. . .] In conclusion, only 38% of the patients who attempted suicide with paraquat actually intentionally chose paraquat.”⁷² Since the unusually high toxicity of paraquat is often underestimated, attempts of suicide with paraquat are more likely to end deadly than others⁷³.

This is supported by a study conducted in Western Samoa. On this island, the number of suicides (but not suicide attempts) rose significantly as paraquat was introduced, and fell just as significantly as paraquat was later banned.⁷⁴ However, nothing indicates that the distribution of paraquat on the island has induced or increased the population's intention to commit suicide. The only explanation for this phenomenon is that the sharp incline of suicides was due to the ingestion of Paraquat, which is much more fatal than other pesticides used as a suicide agent.

In the light of these circumstances there is serious doubt whether cases of paraquat poisonings are indeed largely fully intentional suicides rather than cases of misestimating the toxicity of small amounts of paraquat or cases of confused usage of drinking versus pesticide containers. Can Syngenta nonetheless resort to the assertion of suicide, possibly resulting in an exclusion of the responsibility to respect? SRSR Ruggie's framework contains no explicit provisions on burdens of proof. One might by extension of the requirement of investigating human rights impacts (GP 17) and of communicating the results thereof (GP 21) conclude that Syngenta may not resort to questionable assertions as long as it has not investigated the reasons for doubt outlined above and communicated its findings. Furthermore, in legal systems the party who claims a fact for its own benefit also bears the persuasive burden.⁷⁵ The burden would hence rest with Syngenta, as it is Syngenta who alleges that its own responsibility is ousted by a suicidal intention of the suspect. Medical surveyors might in cases of severe injury to the stomach tend to jump to the assumption of suicide. However, such *prima facie* assumption cannot be applied in legal systems.⁷⁶ Proceeding from an assumption of suicide, being convinced that particular circumstances of a case are typical indicators of suicide, is problematic, because the constitutive

element of suicide is an *individual* decision of will, the will to die.⁷⁷ Suicides are influenced by the suspects' particular circumstances of life, their personal constitutions and momentary moods, and in particular their subjective view on their situation, which can be subject to more or less irrational elements.⁷⁸ One can therefore not classify cases as suicide without taking into account individual proof of intent, e.g. suicide notes or witness statements on the personal history and attitude towards life of the supposed suicide victim.⁷⁹ The standard of proof varies between jurisdictions, between a "balance of probabilities" in the Anglo-American legal systems and "judicial conviction" (*richterliche Überzeugung*) in the German and French traditions.⁸⁰ Either way, considering the reasons for doubt depicted in the preceding paragraphs, it appears questionable that a large number of paraquat poisonings are suicidal. As a result, both in light of the spirit of the Guiding Principles and considering principles of legal systems, one cannot rely on Syngenta's and others' assertion of most cases being fully intentional attempts of suicides (and not para-suicides or accidental ingestions), as individual evidence for or against individuals' intentions to die are not available in most cases.

In the situations depicted above, the poisoned person had not intended to die. These cases will be treated as negligent misapplication of paraquat. It will now be addressed how Syngenta's responsibility is affected by suicidal intent, and then how it is affected by negligent misapplication.

b) Suicidal Poisonings

Despite all doubt about the exact share of cases, it is safe to assume that a considerable number of paraquat victims are in fact suicide victims, i.e. victims who have in full awareness of all consequences intentionally ingested the herbicide in order to kill themselves. It is generally understood that who intentionally harms himself agrees to assume an own responsibility which generally ousts the responsibility of anyone else who may be involved, even if the self-infliction of harm was foreseeable.⁸¹ If the poisoned person has fully understood the consequences of their actions and wanted these consequences, the legal responsibility of Syngenta is generally excluded.

Suicidal death or injury can in exceptional cases yet be attributed to someone else than the suicide victim if that other person has set the cause of suicidal motivation.⁸² This would be the case for instance if the other person has severely injured the victim, leading to a psychosis that induces suicidal intentions.⁸³ In one controversial⁸⁴ precedent a company was held liable for the suicide of an employee committed years after an accident had occurred at the work place.⁸⁵ However, there is apparently nothing to the qualities of paraquat that induces a will to die. Instead, as a study indicates, the large majority of suicide victims ingested paraquat simply because it was available when they attempted suicide.⁸⁶ Paraquat is simply being used as a tool, selected among many tools commonly used for suicide, like razor blades or rope.

It may be questionable whether the result can be the same in light of the particular importance of the right to life. The human right to life is stipulated by Art. 6 of the ICCPR as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." It is noteworthy that this wording does not refer to a duty to live.⁸⁷ The notion of human rights generally lies in guaranteeing every human being's freedoms, not limiting them. Hence most human rights treaties provide for freedoms of human beings, not duties.⁸⁸ One notable exception is the American Declaration of the Rights and Duties of Men, which provides for ten duties of humans, among them the duties to vote, to work and to pay taxes – but a duty to not commit suicide is alien even to that human rights document.⁸⁹ Consequently, the right to life under Art. 6 of the ICCPR has been interpreted so as to not imply a duty to live.⁹⁰ While there is some argument as to whether the right to life, suffused by the inherent value of human dignity, comprises a *right* to autonomously dispose of one's right to life,⁹¹ it is at least understood that it is *allowed* to commit suicide.⁹² But then,

since it is allowed to commit suicide – by ingesting paraquat or by any other means – it cannot generally be said that the producer of the means of suicide is responsible for the consequential loss of life.

In cases with particular circumstances, precedents in international and domestic law indicate the existence of a responsibility to prevent suicides. In 1990, the United Nations Human Rights Committee decided that Uruguayan authorities were responsible for not taking adequate measures to prevent what appeared to be the suicide of a prison detainee.⁹³ Domestic laws support a responsibility of hospital owners and attending physicians to take care for patients' safety, including the prevention of self-inflicted injuries, in particular suicide.⁹⁴ This can include a responsibility to lock away toxic detergents, in as far as they do not need to be constantly available for cleaning purposes.⁹⁵ Lastly, Universities and Colleges have, to a very limited extent, a responsibility to prevent students from mobbing-induced suicide.⁹⁶ However, the decisive and strikingly common circumstance in all three of these sets of cases – prison, hospital and university – is that the suicide was caused or occurred while the suicide victim was *in the custody* of the responsible person. This cannot be said about paraquat users and Syngenta.

To sum up, the chain of causation is disrupted by intentional self-infliction of harm. In cases of suicide, it can therefore not be sustained that Syngenta causes or contributes to the respective injuries, in a way that gives rise to the responsibility to respect under Guiding Principle 13. Syngenta “causes” suicide in the same way in which producers of razor blades and rope cause suicide, but not in the sense of a responsibility under law or under the Guiding Principles.

One might argue that business enterprises that can prevent a harm have a responsibility to do so, simply because they can, and even if it has not caused or contributed to the harm. SRSG Ruggie's Framework, however, has always rejected this idea of a corporate responsibility to *protect* (as opposed to *respect*). SRSG Ruggie faced considerable criticism because of the exclusion of that responsibility.⁹⁷ This criticism, however, found no resonance in the final version of the Guiding Principles. The Framework remains such that states owe the responsibility to protect and businesses have a responsibility to respect. No business, under the Guiding Principles, is expected to remediate damage that it has not caused or contributed to.

c) Misapplication, negligent application and Accidents

Cases of poisonings and deaths also occur in the course of accidents or negligent misapplications, or are seemingly suicidal poisonings which were in fact not intended by the suspect to end severely (para-suicides). It is questionable how the chain of causation is affected in these cases.

Deviation from the recommended procedure of applying paraquat does not automatically relieve Syngenta from responsibility. Legal systems do provide for an exception from liability where products have not been used as recommended. But a full exclusion of liability requires that the producer is not at fault at all, and that it is only the user who did wrong, to himself.⁹⁸ This would require some form of wilful ignorance, a thinking like “Even if I hurt myself, I don't care.” This may hold true in some cases of paraquat poisoning, namely regarding the intentionally self-inflicted harms like suicide, discussed above. However, as explained, the circumstances suggest that by far more often people act out of negligence, or even not negligently at all. Unless explicitly advised about the danger of paraquat and how to prevent them, workers cannot estimate the adverse effects of paraquat. The WHO lists “low social class and illiteracy” as a cause of non-intentional exposure to toxic chemicals.⁹⁹ The fact that Syngenta applies the product label standards issued by the UN Food and Agriculture Organisation has little relevance. According to the FAO, labelling is not enough in certain contexts but pesticides whose handling requires the use of personal protective equipment that is uncomfortable, expensive or

not readily available should even be avoided, especially in the case of small-scale users in tropical climates.¹⁰⁰ Farm workers do not always have access to personal protection equipment. In some socio-economic contexts (explained further below under (e)), mistakes will be hardly avoidable. Especially in situations of severe circumstances, to act negligently at times lies within human nature, and hence legal systems do not exclude a tortfeasor's liability entirely simply because the injured person contributed some negligence to the causation of harm. Negligence on the side of the injured person would at most result in a *reduction* of liability of the tortfeasor. But it is the tortfeasor who must demonstrate, and has the burden of proving, how negligently exactly the injured person had been acting.

Also, the fact that paraquat has so far not been classified as a "class 1" chemical under the World Health Organisation's toxicity schema does not mean that the cause of injury is rather negligence than toxicity. Medical experts have pointed out that the WHO toxicity schema is inadequate for estimating substance's effect on human health as the WHO assesses toxicity based on the lethality for rats. The human lethality of paraquat is several-fold higher than that of substances within the same chemical and functional class, and paraquat is hence said to be wrongly not categorised as a class 1 chemical.¹⁰¹

Particularly regarding the cases of para-suicide in which the suspect intended to inflict some self-injury but then the substance used caused much more than that envisaged injury, both the suspect and Syngenta share a responsibility. Medical surveys make it clear that paraquat, due to its unexpectedly high toxic qualities, is prone to cause excess damage. In Samoa, for instance, the number of suicides / para-suicides clearly correlated with the arrival of paraquat and later with restrictions on access.¹⁰² Medical experts from the Cheonan University Hospital of Korea ended a study prepared in 2008 with the words: „In conclusion, only 38% of the patients who attempted suicide with paraquat actually intentionally chose paraquat. Thus, it is important to decrease the accessibility of paraquat to improve suicide prevention. In particular, control of the storage of pesticides on farms and control of the purchase of pesticides by farmers would be helpful.“¹⁰³ Experts have repeatedly pointed out that any restriction of public access to paraquat is in all contexts the perhaps most important means for reducing the number of deadly self-poisonings.¹⁰⁴ Means restriction does generally not lead to a significant resort to other means of suicide. Empirical data suggest that there is little reason to fear an increase in suicides by other means once the distribution of paraquat would be restricted. Miller and Bhalla note examples of large-scale reductions in suicide incidence due to decreased availability of highly lethal and commonly used suicide methods.¹⁰⁵ Two of these examples relate to pesticides. In Western Samoa the rise and fall of suicides (but not suicide attempts) closely tracked the introduction and later banning of paraquat on the island.¹⁰⁶ Over the past two decades, a series of targeted legislative initiatives in Sri Lanka culminated in the withdrawal of World Health Organization (WHO) class I pesticides resulting in a fall in the incidence of suicide by 50%. This decline in suicide by pesticides also occurred without a compensatory increase in suicide by other methods.¹⁰⁷

Hence, the misapplication of paraquat may often be induced by particular socio-economic contexts (see also III.C.5.d) to which Syngenta distributes paraquat, or lets paraquat be distributed. The fault on the side of the users of paraquat is small, considering the severity of particular contexts, and hence it would not free Syngenta from responsibility but only, at most, reduce its responsibility.

d) Role of Farm Owners and Employers of Paraquat Users

The attribution is also not disrupted because of a possible responsibility of employers of paraquat users. Some employers might not take serious the issue of work place safety. As a result, a responsibility of the employer would arise. But that responsibility does not oust Syngenta's responsibility. It merely steps beside it, arises in addition to Syngenta's responsibility.¹⁰⁸

e) Interim Conclusion

It is undisputed that every year thousands of deaths and injuries are caused by paraquat poisonings. Under the Guiding Principles, Syngenta does not bear responsibility for suicides committed with paraquat, where suicide means the self-infliction of death in full awareness and intention that the ingested amount of the substance causes death. However, the assertion that paraquat poisonings are “largely” suicides – in the above mentioned meaning – is in light of methodological weaknesses and contextual circumstances not reliable. A significant number of cases involve underestimation of paraquat’s toxicity or simply negligent misapplication of paraquat. Regarding these cases, the responsibility to respect under Guiding Principle 13 of Syngenta (as well as farm owners and employers) is activated. The due diligence standard under the Guiding Principles requires Syngenta to investigate the contexts of poisonings, develop effective measures of safety, implement them, monitor the effects, and communicate this entire process.

4. Exemptions from Responsibility

a) Compliance with Regulation at the National Level

Paraquat has in recent years been prohibited from use in the European Union, Switzerland, and other states, and has been classified as a “restricted use” pesticide in the USA with high Personal Protection Requirements.¹⁰⁹ However, the laws in many countries are still indifferent to the distribution and use of paraquat. The Guiding Principles at this point go beyond the territorial limitations of laws and regulations and “draw a clear line in the ethical sand: it is not an option to allow the absence of effective host state jurisdiction to stand in the way of ensuring respect for human rights.”¹¹⁰

According to para. 1 of the Commentary to Guiding Principle 11, “[t]he responsibility to respect human rights [. . .] exists over and above compliance with national laws and regulations protecting human rights.” This clear position can today be said to be grounded very firm on international consensus. Early in his mandate, the Special Representative asked the world’s largest international business associations to address this problem. Their response was resolute: “All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.”¹¹¹ The International Chamber of Commerce, too, has accepted that business should adhere to international human rights standards in the absence of effective state regulation.¹¹² The Organisation for Economic Co-operation and Development – of which Switzerland is a member – has adopted the same principle in the 2011 revision of their Guidelines for Multinational Enterprises: “A State’s failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.”¹¹³

b) The State Responsibility to Protect

There is a variation of the argument above, and it too turns out to be unconvincing. When confronted with criticism, Syngenta might seek to refer stakeholders and their demands to their home state. Indeed, the home state has a duty to protect its citizens by any means, be it to pass and enforce regulation, to issue warnings, to distribute safety equipment or to provide for trainings.

However, both state duty and business responsibility run parallel. For sound reasons the state duty does not offset the responsibility of the business enterprise. Relying on the role of states alone would be unlikely to prove sufficient.¹¹⁴ The human rights treaties which contain the rights to life and to

health do not specify the regulations and measures that governments owe in order to ensure enjoyment of these human rights. The obligation on governments therefore is merely to exercise “due diligence” to protect human rights from private interference.¹¹⁵ This means that one cannot expect the state to successfully defuse the hazard, and in case of failure claim reparation from the state. One can only demand that the state tries as hard as possible, by applying due diligence. Under the due diligence standard, a state’s obligation to ensure human rights is an obligation of conduct, not of result.¹¹⁶ The level of diligence that is due may vary greatly and depends on factors such as the resources available to the state for taking reasonable steps to try to prevent violations, investigate violations that have happened and pursue punishment and indemnification.¹¹⁷ Those resources, including institutions, trained personnel and impartial decision-making procedures, tend to be poorly available in states of the Global South,¹¹⁸ and this particularly goes for the handling of chemicals.¹¹⁹ In exactly some of these states the use of paraquat has shown to be most problematic, i.e. in states with tropical climate or high rates of illiteracy.

c) Hypothetical Responsibility of Other Distributors of Paraquat

Syngenta might argue that it is not the only producer and distributor of paraquat, that therefore paraquat would still be distributed by other producers if Syngenta withdraws from the market, and damage would still be caused. However, a hypothetical, alternative cause of a damage does not exempt from responsibility if that alternative cause would as well result in a responsibility of the person who would set that alternative cause.¹²⁰ If someone else caused the damage, they would be responsible, and if Syngenta causes damage, Syngenta is responsible.

5. Due Diligence Implications of the Responsibility to Respect

As has been demonstrated, the provisions on the responsibility to respect are applicable to cases of paraquat poisonings, the negative impact on the rights to life and health are attributable to Syngenta (unless intentionally self-inflicted), and possible shortcomings of occupational health and safety regulations in certain states serve as no exemption from responsibility. It will now be discussed what the responsibility to respect entails and whether Syngenta fulfils the requirements.

a) General Implications: Due Diligence and a Test of Appropriateness

According to SRSG Ruggie, the baseline expectation for all companies in all situations is to not infringe on the rights of others – “put simply to do no harm.”¹²¹ Accordingly, Guiding Principle 13(a) provides that the responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.

The responsibility to respect is discharged, in accordance with Guiding Principles 17-20, in a process of due diligence. That the distribution of paraquat has, in fact, a considerable impact on the human rights to life and health has already been established above.

However, the requirement of avoiding to cause or contribute to adverse impacts does not, at least not immediately, imply that Syngenta simply ceases to distribute paraquat. SRSG Ruggie has acknowledged the existence of “many other legitimate policy demands” besides human rights and refused to establish any hierarchical order between the rights to life and health on the one hand and business interests on the other.¹²² Interestingly, this stands quite in contrast to international environmental law, where the widely accepted “precautionary principle” ranks the environment higher than business interests, prohibiting business practices if risks to the environment remain possible

despite all safety measures.¹²³ SRSR Ruggie's concept of the responsibility to respect, however, takes an approach of balancing all interests involved in the specific case, and requires businesses only to take actions that are "necessary" and "appropriate" to the circumstances.¹²⁴ One size, he says furthermore, does not fit all; the tools and processes companies employ to operationalise due diligence vary with circumstances.¹²⁵ The steps required depend on "the country context, the nature of the activity and industry, and the size of investment."¹²⁶ As a result, "doing no harm" does not always mean to cease all dangerous activity, but can, as a minor measure, require that positive steps be adopted to ensure that negative consequences do not result from corporate action.¹²⁷

The balancing approach, or test of appropriateness, is affected by several criteria, and these will be discussed as follows in turn.

b) Raised Scale and Complexity of Expectations Regarding Paraquat

The scale and complexity of the means through which the enterprise should meet its responsibility is influenced by three factors:

Firstly, the scale and complexity of the means may vary according to size, sector, operational context, ownership and structure and with the severity of the enterprise's adverse human rights impacts (Guiding Principle 14). With an annual turnover of 11.6 billion USD (2010) and being the biggest producer of pesticides globally, Syngenta can be considered a relatively large and globally present business enterprise. The adverse human rights impact is severe, because both in scale (regarding the kinds of human rights: life and health) and in scope (large number of people affected) it produces large damage.¹²⁸ The severity of Syngenta's adverse human rights impact is the most important factor in determining the scale and complexity of the expectable measures.¹²⁹ But further factors raise the bar even higher:

Secondly, Guiding Principle 19(b)(i) and the Commentary on Guiding Principle 19 distinguish between the three different forms of involvement: causation, direct contribution, and indirect contribution (through a direct link to operations, products supplied to the business enterprise, or services). It has been established above that Syngenta is directly involved by causing the adverse impacts (see part III.C.1.c). Causation is the most intense form of involvement (para. 3 of the Commentary on Guiding Principle 19).

Thirdly, according to Guiding Principle 19(b)(ii), an even higher standard of appropriate action can be expected if the enterprise has a high leverage in addressing the adverse impact, where leverage means to be able to effect change in the wrongful practices.¹³⁰ As the main producer and seller of paraquat, Syngenta knows best the qualities of paraquat, controls the product's packaging and labelling, knows or can find out where paraquat is being distributed to and used, and as a global enterprise can effect measures to improve the way paraquat is used. Syngenta hence has the ability to effect change and has leverage in terms of Guiding Principle 19(b)(ii). This must not be misunderstood as referring to Syngenta's possible *influence* in avoiding paraquat poisonings. The concept of sphere of influence has been rejected by SRSR Ruggie as being both over- and under-inclusive of what enterprises should really be responsible for, and replaced by criteria of impact and leverage as explained above.¹³¹

As a result, the scale and complexity of the means through which Syngenta would meet the responsibility increases in accordance with Guiding Principles 14 and 19, reaching the highest possible level.

c) Abstract Importance of the Rights to Life and Health

As explained above, the Guiding Principles accept no general hierarchy between human rights and business interests and therefore allow for human rights concerns to sometimes be deferred in favour of business interests.

The special importance of the right to life is obvious from the prominent position that it takes within the texts of human rights treaties and many national constitutions. That importance becomes clear from the texts of human rights treaties. International human rights treaties restrict much more narrowly the ways that the rights to life can be restricted than they restrict the ways that other, including economic, human rights can be restricted.¹³² The rights to life as founded in the ICCPR, the European Convention and the American Convention can be restricted only under particularly narrow circumstances.¹³³ Derogation clauses in the treaties make clear that they do not allow derogation from many rights, including the right to life.¹³⁴

The particular importance of the rights to life and health also reflects in domestic laws of tort and delict. The German Civil Code, for instance, provides for a claim for damages if the right to life or another absolute right has been injured in course of faulty conduct.¹³⁵ The interest in operating a business, for instance, does not reach this level of protection.

d) Specific Degree of Danger to the Rights to Life and Health

The fact that paraquat is extremely toxic is not a matter of dispute. According to medical studies comparing the lethality of 34 common pesticides, paraquat is the pesticide most likely to cause the death of the user poisoned. Paraquat is said to be twice as deadly as the next-poisonous pesticide, endosulfan. About 14 pesticides are only up to about 10% as lethal as paraquat.¹³⁶

Syngenta's responsibility to respect increases or decreases depending on the human rights impact of paraquat within specific contexts (Guiding Principle 14). As virtually every tool (like, for instance, razor blades or vehicles) can in one way or the other be considered dangerous, it must be considered whether the user can reasonably be expected to apply the respective product cautiously in such way that risks are negligible. Syngenta makes recommendations for safe usage, such as the wear of protective boots, gloves, overalls and masks, the immediate rinsing of paraquat spills with water, to refrain from using leaked sprayers. However, there is strong disagreement as to whether the modes of usage considered as safe by Syngenta are feasible at all, and how much risk remains even if paraquat is used in accordance with Syngenta's recommendations.

First of all, the feasibility of proper usage of paraquat is questionable. Syngenta points out that paraquat could be used without adverse effects on health: "When properly used it [paraquat] has no adverse effects on the health of spray operators."¹³⁷ It must be noted that the Guiding Principles require a country-based and context-based approach to risk assessment. Syngenta's assumption of "proper use" being applied by paraquat users is not equally realistic regarding all circumstances. Poisonings can have a variety of socio-economic causes, such as:

- Domestic safety regulations may be weak and/or unenforced.
- Personal protection equipment may be too expensive or for lack of infrastructure not easily available.
- Illiteracy and lack of education. In some countries, there may be a high chance that workers are not able to read instructions. The WHO lists illiteracy as a cause of non-intentional exposure to toxic chemicals.¹³⁸
- Some farms are located in tropical climate with direct sunlight, where the worker's physical condition compels them to neglect the wear of gloves, boots, masks and aprons.

- Due to extreme poverty, farm workers may be exposed to a lack of alternative income opportunities. Farm workers might be employed or compelled to work for long hours every day of a whole season. Increasing one's work performance at some point necessarily means to neglect one's personal safety. The WHO lists "low social class" as a cause of non-intentional exposure to toxic chemicals.¹³⁹ Poverty is also likely to result in not being able to afford personal protective equipment.

Countries of the Global South are particularly prone to these factors, as statistical data confirm: Worldwide, paraquat accounts for 20 deaths per million persons but much lower rates have been reported in developed countries, such as Japan (11.0 per million persons), Ireland (2.7 per million persons), Great Britain (0.66 per million persons), and the United States (0.004 per million persons).¹⁴⁰

The responsibility to respect requires Syngenta to conduct a human rights impact assessment that is adequate to its size, its global structure and outreach, as well as to the severe risk that it imposes (death), and addresses the specific contexts of the situations in which paraquat is used. This means that Syngenta's impact assessment must consider how the critical factors listed above impact on the feasibility of "proper usage" in each country, especially in developing countries. Syngenta has apparently not assessed the feasibility of proper usage subject to any of these contexts. Its claim "safe when properly used" refers to a perfect moment, a second in which all conditions of safety are met and the user pays high attention. It does not, as the Guiding Principles require, relate to likely scenarios and contexts in real life but remains vague and unsubstantiated.

Not only is the assertion "safe when properly used" vague and unsubstantiated – it is also unrealistic. Should Syngenta assess the feasibility of "proper usage", as context-specific and thoroughly as the Guiding Principles require, it would not likely reach a positive outcome regarding any of the countries affected by one or more of these factors. But especially under burdensome conditions, it is probable that even an ordinary, careful person in the position of a farm worker suffers paraquat poisonings sooner or later. Any one of the above country-specific factors by itself can be severe enough to render incorrect usage of paraquat a mere question of time. The likeliness of incorrect usage even increases if more than one factor is involved, which is usually the case.

In 2007, the European Court of First Instance has ruled that paraquat must be prohibited within the European Union, exactly because the dangers of paraquat were considered too high. The reasoning of this judgment cannot fully be adopted under the framework of the Guiding Principles. The Court relied in its decision on the "precautionary principle".¹⁴¹ Under the precautionary principle, even indications of a risk serve as a basis for the prohibition of a business practice. This concept is, as explained above, alien to the Guiding Principles. However, the judgment is remarkable for its *factual* findings. The Court ruled that there is serious doubt as to whether paraquat has no effects on health and life even if all recommended safety measures are applied within the European context. If this doubt persists within the high standards of safety regulations of the European Union, its non-tropical climate, with largely no issues of availability of protective equipment, illiteracy of users and extreme poverty, then paraquat can hardly be considered safe in contexts outside of the Global North. A similar conclusion can be drawn from the highly restrictive regulations on the use of paraquat in the USA, which can hardly be implemented in the global south.

In addition to the country-specific factors, there are product-specific qualities that increase the danger. The dangerousness of many products is obvious and can be recognised *a priori* due to their design or construction: everybody understands the danger in razor blades or cars in traffic at first sight, not needing training, labels, or user instructions; the user is inadvertently alerted by the product itself and intuitively understands how to handle the hazard safely. Moreover, the danger of these products can be recognised *ex posteriori*, by experiencing injuries. In contrast thereto, the extreme toxicity of

paraquat is not easily understood. It may easily be mistaken for a less toxic pesticide. Even where users are advised explicitly on the toxicity of the herbicide, they may take the warnings as exaggerated, bearing in mind that they may have grown accustomed to the much less dangerous qualities of any other pesticide. In severe cases the user may die of his first ever mistake. The toxicity of paraquat is hence highly difficult to recognise.

As a result, when combining any of the particular country-specific contexts listed above with the product-specific qualities of paraquat, it must be regarded inevitable that the distribution of paraquat causes damages to health and life.

Even assuming that in other socio-economic contexts paraquat can be applied as recommended, it is questionable whether the safety measures indeed sufficiently eliminate the risk to life and health. Studies have indicated that exposure to paraquat is problematic even when the recommended work procedures are followed.¹⁴²

As a result, paraquat must be regarded as inevitably causing injuries to health and life in particular country-contexts and as hazardous even when applied in other countries and as recommended.

e) Syngenta's Business Interests

Restricting the distribution of paraquat would have an impact on Syngenta's business interest. The freedom from interference in one's business undoubtedly is, as such, a legitimate demand. A *right to do business* has not been recognised explicitly in the International Bill of Human Rights. However, aspects of it reflect in the right to property, the right to work (Art. 23 of the UDHR and Art. 6(1) ICESCR), and in trade agreements.

As regards the right to property, Art. 17(1) of the UDHR stipulates that “[e]veryone has the right to own property alone as well as in association with others.” Unlike other human rights stipulated by the Universal Declaration, the right to own property has not been cast into binding treaty law in the process of drafting both International Covenants of 1966, due to a lack of consensus regarding the desirable implications of a right to property.¹⁴³ Furthermore, unlike the rights to life and health, the right to own property is subject to a reservation in Art. 17(2), which stipulates that “[n]o one shall be *arbitrarily* deprived of his property.”¹⁴⁴ Most notably, and in contrast to property rights stipulated by regional human rights treaties, the wording of Art. 17(1) UDHR (right to *own* property) does not include a right to transfer ownership or possession of property. Hence, a “right to do business”, in terms of selling a specific product, has no pedigree in the International Bill of Human Rights. The optional Protocol No. 1 to the European Convention on Human Rights is one of few regional human rights documents which provide for property rights.¹⁴⁵ Its Art. 1(1) stipulates that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.” This includes the right to transfer ownership and possession of property.¹⁴⁶ However, considering the strong disagreement between Member States about property rights and their consequential inclusion in an optional protocol only, providing for a relatively wide scope for exceptions from the property right in the “general interest”,¹⁴⁷ it cannot be said that the interest in selling particular products is widely accepted as an international human right to property. This even more so as Switzerland has until today not ratified the optional Protocol No. 1.¹⁴⁸

The right to work as codified in the International Bill of Human Rights (Art. 23 (1) UDHR, Art. 6-10 ICESCR) is an aggregate right that comprises a number of components, such as claims to employment, free choice of work, improvement of working conditions, and trade union rights.¹⁴⁹ The right to work does not include a freedom from restrictions on *how* to pursue one's work.¹⁵⁰

Limitations to the sale of one item of Syngenta's product range do not affect Syngenta's ability to sell other herbicides, fungicides or crop seeds. The right to work is hence not affected.

The interest to sell and distribute paraquat internationally can hence only be seen as finding a normative protection in free trade clauses of the General Agreement on Tariffs and Trade.¹⁵¹

f) Societal Interests

Paraquat has certain positive and undisputed qualities: It is a fast-acting contact herbicide which is rainfast shortly after application and is rapidly deactivated on contact with soil. According to Syngenta its many uses in a wide variety of crops have helped to increase the productivity of agriculture in both the developed and developing world. By reducing the need for cultivation it has helped to prevent erosion of soil and assisted in the conservation of soil moisture. It has facilitated the introduction of no-till farming or direct drilling in which time and energy-consuming soil cultivation have been eliminated.¹⁵² However, there is growing evidence that some pesticides can be eliminated without adverse effects on agricultural output or production costs. A recent study prepared in Sri Lanka over the last 20 years indicates that targeted pesticide restrictions have reduced pesticide deaths by 50% without decreasing agricultural output.¹⁵³ Communities and food producers have other and less harmful weed management practices with comparable agricultural benefits available. Other commonly used herbicides have a significantly lower mortality of between 4% and 8%. A large number of food producers certified under voluntary standards have demonstrated that effective and economic alternatives to paraquat exist.¹⁵⁴

It is also noteworthy that, a large number of people has become dependent on the production of paraquat. Reportedly, China has become the largest paraquat producer in the world with the production capacity of paraquat reaching 152,500 tons in 2010.¹⁵⁵ Restricting the distribution of paraquat either way would undoubtedly mean that the respective businesses and factory workers could not rest assured about their situation but would have to consider other work opportunities.

Whether Syngenta operates any social policies or projects outside of the paraquat problematic is of no relevance. The Guiding Principles are clear in that “[c]ommitments or activities to support and promote human rights, which may contribute to the enjoyment of rights do not offset a failure.”¹⁵⁶

g) Interim Conclusion: Delineating the Appropriate Steps

To summarise the findings, Syngenta has a relatively high responsibility as it is directly involved and possible measures by Syngenta have a high leverage. All this raises the bar for expectable measures.

Both rights to life and health are deeply rooted in international law. The right to life is considered particularly important. Paraquat must be considered as inevitably causing unintentional deaths and injuries in specific country contexts, and as hazardous when applied in other countries. Safety measures such as personal protective equipment, product labels, instructions, and trainings can in the particular contexts not be considered to sufficiently eliminate risk.

Syngenta's business interest in selling particular products has no foundation in international human rights law, but can be seen as reflecting in the General Agreement on Tariffs and Trade. Restrictions on the distribution of paraquat would not inhibit the sale of Syngenta's other products.

As an *ius cogens* right, a right of particular importance under international law, the right to life is widely regarded a “trump” that outweighs other interests, no matter how pressing and important, in particular with regard to business interests.¹⁵⁷ It must also be considered, however, that every person has an own responsibility to take care for their physical integrity (see part III.C.3.b-c), and that it is not in all country contexts equally realistic to expect that paraquat users are able to actually realise

appropriate protective measures (III.C.5.d). Eventually, the Guiding Principles require that a differentiation is drawn relating to the country context:

Firstly, the safety measures laid out by Syngenta cannot be said to reduce the human rights impacts in countries with low or no enforcement of workplace safety regulations, in countries with high illiteracy or extreme poverty to an extent that people may be compelled to work on the field for long hours, and in countries where due to the tropical climate adequate personal protection is often not worn. To these countries, paraquat should not be distributed and Syngenta should develop mechanisms for the prevention of the distribution and use of paraquat in those countries.

On the one hand, the end to the sale of paraquat would undoubtedly lead to a decline of injuries, because the extraordinarily hazardous substance would likely be replaced by other, less hazardous means of weed control (see III.C.5.f). On the other hand, the end to the sale of paraquat has obviously negative impact on Syngenta's turnover; however, there appear to be no minor measures available that would reduce the risks in those specific contexts. Who is compelled due to extreme poverty to work in safety wear for long hours on the field, or in warm and humid climate, is prone to suffer injuries from paraquat, because small mishaps occur inadvertently in those contexts. The same goes for countries in which work place safety regulations are absent or unenforced, where personal safety equipment is generally unavailable or too expensive for workers, and where due to high rates of illiteracy workers are likely to be employed who cannot read safety instructions.

Secondly, regarding other countries, studies raise serious concerns as to the safety of paraquat even when applied appropriately, as the European Court of First Instance has pointed out. That serious doubt was sufficient for the European Court to prohibit paraquat in light of the precautionary principle; however, as explained, doubt is not sufficient under the Guiding Principles to request Syngenta to end the sales of paraquat, as long as it seems possible to reduce risk to an acceptable level by other measures. What measures are appropriate will depend on the particular context of each country. Appropriate measures could be continuous trainings, proper labelling above the minimal standard required by regulations, and written instructions in all official languages of each country. Syngenta should assess where injuries occur particularly often, investigate for reasons and circumstances and take measures to avoid these poisonings. It would be appropriate, for instance, to seek a better understanding of classification of cases as suicides, as it appears that suicides are more often than not in fact caused by accidental misestimation of the substance's extreme toxicity.

6. The Steps Taken by Syngenta

Syngenta provides in various reports that it is undertaking stewardship programs, including the trainings of farmers.¹⁵⁸ Judging from the information provided, teams of Syngenta have from 2002 to 2004 trained communities in China, in 2008 in the Andes, and at an undisclosed time in East Africa, including medical staff in the Laikipia region of Kenya in 2010. 4.3 Million farmers were trained in 2010, according to Syngenta's 2010 Annual Report. However, the term "training program" is loosely used by Syngenta, and the delineation of safety trainings and marketing programs is not evident. Moreover, paraquat is in many countries easily accessible by anyone, no matter if they received safety trainings or not. The impact of trainings that are in fact safety trainings is largely unclear. Only one study has analysed how safety trainings have impacted on the behaviour of farmers, and revealed considerable shortcomings (see next paragraph). Syngenta has in 2008 set up a stewardship program website that enables workers who have internet access to download so-called training materials to teach themselves.¹⁵⁹ Reports of Syngenta provide numbers of people that have allegedly been trained, but it remains unclear what the "training" entails and whether it means more than mere numbers of accesses to online training materials. Syngenta has also produced a guide to diagnosis, first aid and

hospital treatment, and makes it clear therein that there is no antidote to paraquat.¹⁶⁰ All together, the references of Syngenta to the trainings it provides are vague and few, considering the world-wide sale of the substance. The stewardship program outlined does not meet the scale appropriate for a product that is distributed to that extent.

In 2008, Syngenta commissioned a study to be prepared on the risks to which users are exposed in 26 countries. Important shortcomings that the study points out are that most farmers and plantation workers in developing countries use backpack/knapsack sprayers that repeatedly leaked – only 48% of over 8.500 smallholders interviewed reported that their sprayers had never leaked. A further 38% reported they were able to repair any leaks immediately. In Morocco, Cameroon, Senegal and India, 38% of users reported that occasional leaks were not always repaired immediately. The reasons quoted were lack of importance attached to the need to avoid leakage of sprayers plus lack of spare parts, knowledge and cost. The same study also showed that a very high proportion of interviewed farmers in Asia, especially in Bangladesh, India, Philippines and Sri Lanka, do not wear the minimum protective clothing consisting of long-sleeved shirts and long trousers and shoes or boots while spraying. Only 20% of all respondents (in developed as well as in developing countries) wore the recommended five key items, including long trousers, and long sleeved shirts (or overalls), gloves, boots and face shield while mixing and loading pesticides. In most cases, because overalls are an extra expense, some form of normal clothing is used.¹⁶¹ Syngenta referenced the study on its website in no more than 173 words and only pointing out aspects of the case study that were either positive or not contributing to any understanding of needs for improvement. Syngenta points out that the study surveyed 13,000 pesticide users in 30 countries about their attitudes to pesticides from 2004 to 2008 but makes no mention of any need to look into improving safety measures,¹⁶² although this study makes it evident that the current conditions of pesticide use are not acceptable.

Over the past 30 years, several methods have been studied for modifying the toxicity of paraquat, including prevention of absorption from the gastrointestinal tract,¹⁶³ removal from the bloodstream,¹⁶⁴ prevention of accumulation in the lungs,¹⁶⁵ scavenging oxygen free radicals,¹⁶⁶ and the prevention of lung fibrosis.¹⁶⁷ However, these methods have not proven to be effective. Patient outcome is usually determined by the degree of exposure to paraquat. Thus, improved prevention of acute paraquat intoxication appears to be the only method to reduce the number of toxic exposures.¹⁶⁸

The formulation of paraquat was being revised several times and Syngenta initiated a “safe storage” campaign, but satisfactory reductions of the risks to health were not demonstrated.¹⁶⁹

7. Conclusion

The responsibility to respect requires Syngenta to not distribute paraquat to regions where safety measures are ineffective due to the particular country context, and to take appropriate steps against the distribution of paraquat to those countries. Regarding other countries, the distribution of paraquat does not fulfil the responsibility to respect as long as Syngenta does not provide safety measures that are appropriate both for the size of Syngenta’s business (Guiding Principle 14(2)) and the risks to the human rights to life and health. Syngenta has not yet demonstrated and substantiated, beyond mere assertions, that it has taken safety measures that have proven appropriate and effective.

D. Syngenta's Responsibility to Remediate Adverse Impacts of Paraquat Poisoning

Guiding Principle 22 stipulates clearly: "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes." Syngenta is therefore under the Guiding Principles required to remediate the adverse impacts that it has caused.

Grievances should be addressed and remediated directly. The Special Representative has identified a set of principles that all non-judicial human rights-related grievance mechanisms should meet to ensure their credibility and effectiveness: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for company-level mechanisms is that they should operate through dialogue and engagement rather than the company itself acting as adjudicator.¹⁷⁰

In a report of 2010, SRSG Ruggie stated:

Successful companies do not wait for employee or consumer complaints to be lodged with external complaints bodies or the courts. They have established means for dealing with a variety of grievances in order to retain customer loyalty, maintain employee morale and sustain their reputation as responsive and responsible enterprises.¹⁷¹

So far, however, nothing has been heard of any attempts of remediation for paraquat victims. Therefore Syngenta has not fulfilled its responsibilities according to the Guiding Principles on business and human rights.

IV. Do Syngenta's Code of Conduct and Processes Meet the Guiding Principles' Criteria of Due Diligence?

The Guiding Principles require business enterprises to declare a public statement of policy and to have an on-going human rights due diligence process in place, including a human rights impact assessment.

A. Syngenta's Statement of Policy

In 2009, Syngenta has released an updated code of conduct (CoC) covering the areas of law, business integrity, society, science, products and property rights.

Guiding Principle 16 requires business enterprises' statements of policy to fulfil several criteria which will be looked at in turn now.

Statement of policy approved at the most senior level

Syngenta's CoC has been approved by the Chairman and Chief Executive Officer.

Informed by relevant internal and/or external expertise

The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's operations. Expertise can be drawn from various sources, ranging from credible online or written resources to consultation with recognized experts.¹⁷²

No sign indicates any expertise on human rights impacts of Syngenta's business. Had Syngenta relied on expertise, its CoC would perhaps reflect that Syngenta's products can have severe impacts on the rights to life and health of product end-users, for which reasons this is so, and how Syngenta is determined to mitigate the impacts.

Stipulation of the enterprise's human rights expectations

According to Guiding Principle 16(c), the statement must stipulate the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services.

The term "human rights" appears only once in Syngenta's CoC, and that is in a section about Syngenta's own employees (No. 22 of the CoC).

The statement "Wherever we operate, we seek to make a positive contribution, creating economic, health and social benefits for the community" (No. 16 of the CoC) would need to be elaborated in more detail in order to be suffused with meaning.

The phrase "ensuring adequate training for customers" is vague. Training has allegedly been ongoing for years, and yet it is not clear what "training" means to Syngenta – perhaps placing product information on an online website. A good start is the pledge: "We will carefully identify hazards, assess risks associated with the use and alert users of consequences from misuse of a product on the product package, leaflet and label. Products carry clear end user instructions concerning safe storage, use and disposal." However, labelling and instructing are, as was elaborated in part III, certainly not enough with respect to extremely toxic products.

The first section of Syngenta's CoC, titled "Law", provides that Syngenta will comply with international law insofar as it is applicable to its work. As explained in part III.1, there is strong dispute whether international law in general and international human rights law in particular apply to corporations at all. In context of that dispute, saying that one complies with "all applicable laws" amounts to saying nothing at all.

The Guiding Principles take the approach that business enterprises should respect internationally recognised human rights despite their unclear legally binding or non-binding character. This is what Syngenta's CoC should stipulate as well, regarding everyone who experiences an impact of Syngenta products.

Statement is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;

Internal communication of the statement and of related policies and procedures should make clear what the lines and systems of accountability will be, and should be supported by any necessary training for personnel in relevant business functions.¹⁷³ In the case of operations with significant human rights risks, the statement should be communicated actively to the potentially affected stakeholders.¹⁷⁴

Syngenta's CoC is publicly available by online download.

Statement is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.¹⁷⁵ In a large enterprise, it is necessary to have additional internal human rights policies that elaborate in more detail the implications of the policy commitment. These might be particular to different departments, such as the sales department.¹⁷⁶

Through these and any other appropriate means, the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights.¹⁷⁷

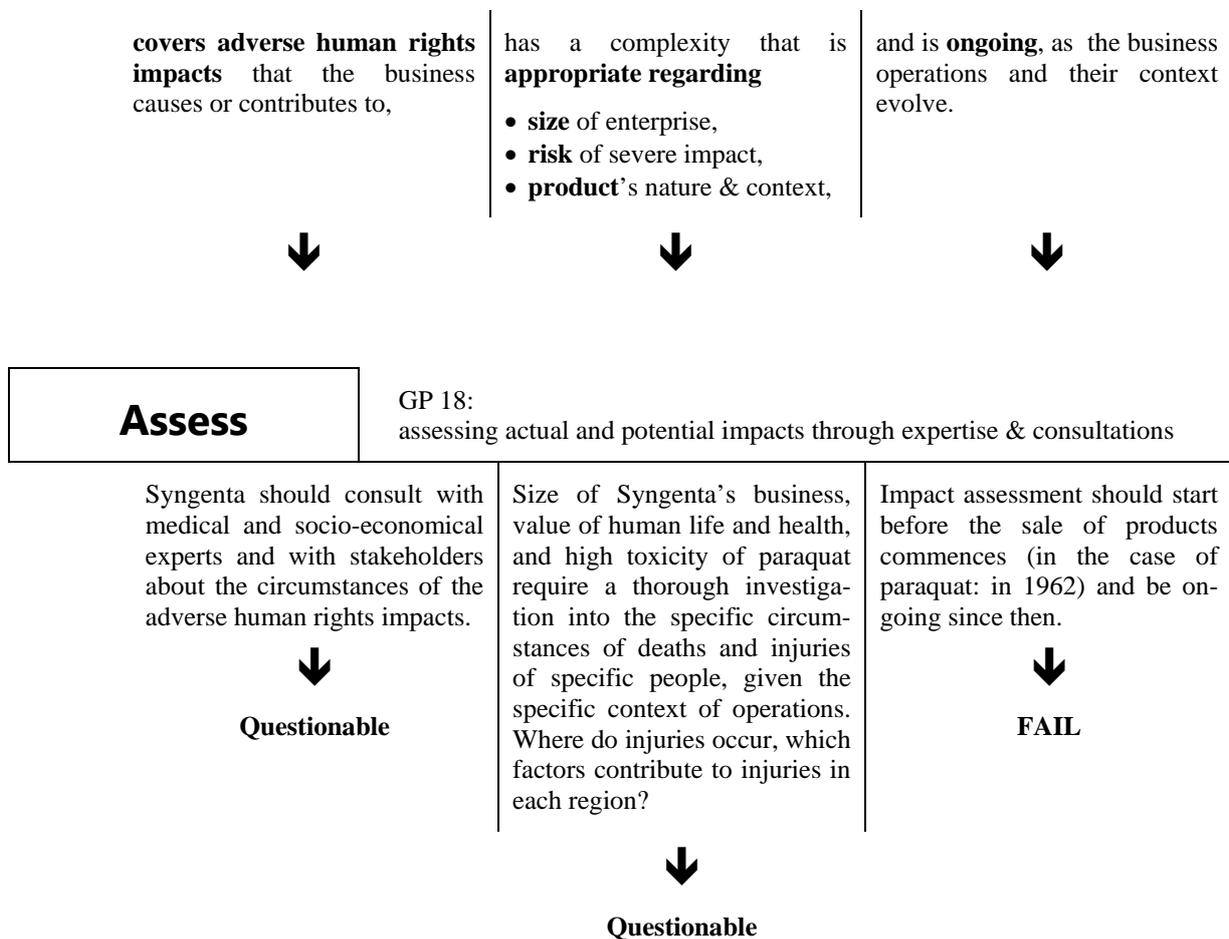
Syngenta's CoC is hardly a policy statement that takes human rights concerns serious (other than those of its employees), and hence it cannot as such reflect in operational policies and procedures.

B. Human Rights Due Diligence

The criteria for the human rights due diligence process is outlined by Guiding Principles 17-21 and their respective commentaries. These Principles form a matrix. At the outset, GP 17 stipulates that all of the due diligence process must be directed at the human rights impacts caused and contributed to, have an appropriate complexity and be on-going. GPs 18-21 then describe the several stages of the process. Detailed delineations of the implications of human rights due diligence can be found in writings by Lambooy¹⁷⁸ and Taylor¹⁷⁹. In the following table, the most essential criteria are displayed:

The due diligence process

according to Guiding Principle 17(a), (b) and (c),



Prevent & mitigate

GP 19:
integrating and acting upon the findings

Syngenta should assign responsibility for addressing human rights risks to the appropriate level and function and should provide for decision-making, budget allocation and oversight processes that enable effective responses.

GP 16(e): Policy statement should reflect in operational policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.

There is no sign that Syngenta assigned responsibility to sections and persons in its enterprise at the level of headquarter and in regional offices. Policy statement does not make it clear that human rights impacts on end-users of paraquat must be addressed by all staff and managers of Syngenta, and in particular by directors, sales managers and salesmen.



FAIL

Raised standard of care due to Syngenta's size, the value of human life and health, and high toxicity of the product.

The standard is raised higher because Syngenta has strong leverage in addressing the impact.

The standard is raised very high due to the highest of three degrees of involvement (causation).

Syngenta apparently does not seek ways to prevent paraquat from being distributed to countries where injuries are inevitable due to particularly difficult contexts.

In other, less severe contexts Syngenta apparently does not seek to develop and integrate meaningful measures on a very high level of standard. Impact of the stewardship program are not assessed and/or not communicated.



FAIL

Prevention and mitigation should be an on-going measure, not a once-off event.

Syngenta has continuously taken some safety measures, e.g. provided warning labels and text instructions, trained medical staff in the Laikipia region of Kenya, trained farmers in China, the Andes and Eastern Africa, set up a stewardship program website that enables workers with internet access to download information.

However, these measures only have a regional effect and are limited in time. They do not meet the high, global and continuous standard expected.



FAIL

Track response

GP 20:
watching over integration and over effectiveness and continuity of response

Appropriate qualitative and quantitative indicators should be chosen.

Draw on feedback from internal and external sources including from affected stakeholders and from operational-level grievance mechanisms.



Questionable

Raised standard of response-tracking due to Syngenta's size, the value of human life and health, and high toxicity of the product.

Follow up with particular effort regarding people at heightened risk of vulnerability.



Questionable

Response-tracking should happen continuously.



Questionable

Disclose account

GP 21:
communicating externally how impacts are addressed

Disclosure should be of a form that is accessible to its intended audiences.

Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved.

No disclosure of numbers, place, time and circumstances of deaths and injuries.

Largely unsubstantiated data on prevention & mitigation and response-tracking. Efficiency of the stewardship program is apparently not evaluated.



FAIL

Raised standard of communication because concerns are raised by and on behalf of affected stakeholders.

Standard is raised even higher because the risks of human rights impacts are severe.

Open dialogue and stakeholder communication (No. 17 of Syngenta's Code of Conduct) should be sought, with a serious intention to achieve improvement.

There is no published short- and long-term evaluation about the effect of the stewardship program. Reports provide numbers of people that have allegedly been trained, but the term "training" is loosely used by Syngenta. Some figures about the output are communicated but not about the program's impact.

Disclosure should occur at a frequency that reflects the enterprise's human rights impacts, i.e. continuously.

Disclosure is largely insufficient.



FAIL



FAIL

C. Interim Conclusion

The standards which Syngenta is expected to apply in establishing its statement of policy and carrying out due diligence is raised by several factors under Guiding Principles 14, 17(b) and 19. Considering the impact to the rights to life and health, the size of Syngenta's business, its leverage, and its direct involvement by causing the risk, the standard rises to the highest possible. Syngenta should communicate information on its due diligence processes in particular detail. Yet, reports of Syngenta feature only rudimentary information. Product safety, how product safety is addressed within the enterprise, and the remediation of damage are issues that Syngenta only mentions, rather than elaborates. Syngenta's Code of Conduct fails most of the criteria stipulated by the Guiding Principles: It fails to clearly declare respect for everybody's human rights (not just those of Syngenta employees) and embody that respect in operational policies and procedures. The Code does, however, meet the criteria of being approved at the most senior level and being communicated widely. As a result, there is no sign that Syngenta's Code of Conduct might go beyond a promotional endeavour and that its due diligence processes are appropriate regarding the circumstances.

V. Conclusion and Feasibility

As a particularly important right, the right to life is regarded to outweigh business interests. The Guiding Principles, however, do not provide for a prohibition of all business activity that implies a risk of advertent human rights impacts. Instead, they seek a solution of appropriateness and necessity. The Guiding Principles raise the bar of expectation for several reasons: The human rights impact is severe, Syngenta is a relatively large and globally active business enterprise, is directly involved by causing the damage and has high leverage. All in all, the context specific delineation of due diligence implications runs as follows:

Regarding countries with no or low enforcement of occupational safety and health regulations, countries where the necessary personal protection equipment is not easily available and affordable for pesticide users, countries with high illiteracy, extreme poverty, and countries where due to the tropical climate adequate personal protection is often not worn, the responsibility to respect requires Syngenta to not distribute paraquat and to take appropriate steps against the distribution of paraquat to those countries by third parties. It is not realistically feasible to obtain an appropriate level of safety by any means in these contexts. Syngenta has a responsibility to remediate the adverse impacts caused by distributing paraquat to these countries.

Regarding other countries, the distribution of paraquat is in breach of the responsibility to respect as long as Syngenta has not begun to continuously assess the human rights impact on a context-specific basis, to develop safety measures that are effective and appropriate both for the size and global structure of Syngenta's business and the risks to the human rights to life and health, and implemented these effective safety measures. It could be an appropriate and effective measure to restrict the distribution of paraquat to licensed, reliable, and trained farmers who are capable of fulfilling the safety recommendations. Syngenta has not yet demonstrated and substantiated, beyond mere assertions, that it has taken safety measures that have proven appropriate and effective. Merely numbers of output but no evaluation of their training programmes' impact on safety are published. Syngenta also has a responsibility to remediate the adverse impacts caused by distributing paraquat to these countries without taking safety measures that have proven appropriate and effective.

Farm and shop owners, employees and other producers of paraquat may have an own responsibility to respect human rights, but their responsibility does not oust Syngenta's responsibility to respect human rights. Lack of domestic safety regulation does not exempt from the responsibility to respect human rights.

It is obvious that making a choice of appropriate measures raises serious questions of practicability for each particular context. For one, there will be doubt regarding country-specific criteria of occupational safety standards, extreme poverty, illiteracy and warm and humid climate unsuitable for the use of paraquat. Although schemes of controlling the origin or distribution of products to or from reliable persons are elsewhere in operation with some success,¹⁸⁰ it will be questionable whether Syngenta can develop a method for monitoring and steering the distribution of paraquat to only reliable persons effectively and feasibly. The difficulties in this differentiated approach, however, do not render it dismissible. Delineating the implications of the responsibility to respect necessarily involves context-specific criteria.¹⁸¹ Particularly with a view on chemicals, to decide by regional context whether and under what conditions products should be distributed is in line with the views of the United Nations Environment Programme (UNEP).¹⁸²

Syngenta has no responsibility, according to the guiding principles, for intentionally self-inflicted injuries such as suicides. The responsibility and own choice of the suicide victim breaks the chain of

causation and thereby ousts Syngenta's responsibility. But Syngenta's due diligence responsibility requires Syngenta to investigate the contexts and reasons of paraquat poisonings, by means appropriate regarding Syngenta's size, global structure and the importance of the rights to life and health. Several sources indicate that what is labelled as suicide may in fact often be cases of accidental ingestion or accidental misestimation of paraquat's toxicity, and in these cases a responsibility of Syngenta does exist.

Considering previous reports by Syngenta, there is no sign that Syngenta's Code of Conduct might be more than a promotional endeavour and that its due diligence processes are appropriate regarding the circumstances.

Finally, it should be noted that Syngenta's responsibility to respect the human rights of paraquat users has not commenced with the endorsement of the Guiding Principles by the Human Rights Council in June 2011. The Guiding Principles' normative contribution hence lies not in the creation of new rules but in elaborating the implications of existing standards and practices for businesses.¹⁸³ In other words, the concerns that were elaborated in the present opinion could have and should have been observed and adequately addressed by Syngenta since paraquat was first sold in 1961.

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- ¹ K. Leverton, V. Cox et al., *Hospital admission for accidental pesticide poisoning among adults of working age in England, 1998-2003*, 45(5) *Clinical Toxicology* 594 (2007); A.V. Waichman, J. Römbke et al., *Review Articles Use and fate of pesticides in the Amazon State, Brazil: Risk to human health and the environment*, 9(6) *Environmental Science and Pollution Research* 423 (2002), doi: 10.1007/BF02987596; C. Wesseling, C. Hogstedt et al., *Unintentional fatal paraquat poisonings among agricultural workers in Costa Rica: a report of fifteen cases*, 32(5) *American Journal of Industrial Medicine* 433 (1997); R. H. Cravey, *Poisoning by Paraquat*, 14(2) *Clinical Toxicology* 195 (1979); R. Fernando, D. G. Harendra de Silva, *An unusual case of fatal accidental paraquat poisoning*, 44(1) *Forensic Science International* 23 (1990).
- ² C. Bismuth, R. Ganier et al., *Prognosis and Treatment of Paraquat Poisoning: A Review of 28 Cases*, 19(5) *Clinical Toxicology* 461 (1982), cited by Berne Declaration, *paraquat - Unacceptable health risks for users*, 3rd edition (2011), 10-11.
- ³ Martin Taylor, Chairman of the board of directors of Syngenta, during the AGM 2007, cited by Berne Declaration, *Goodbye Paraquat* (February 2009), 2.
- ⁴ Hong SY et al., *Effect of vitamin C on plasma total antioxidant status in patients with paraquat intoxication*. *Toxicol Lett* 2002;126:51-59.
- ⁵ Human Rights Council Resolution 17/4, adopted 6 July 2011.
- ⁶ The Guiding Principles as adopted by the UN Human Rights Council as well as SRSR Ruggie's official Commentary are included in his submission "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (21 March 2011), UN doc. A/HRC/17/31, accessible at www.un.org/en/documents/.
- ⁷ Human Rights Council Resolution 8/7, adopted on 18 June 2008.
- ⁸ Art. 12 (1) speaks of "the highest attainable standard of physical and mental health". As the Committee on Economic, Social and Cultural Rights stated, this right "is not confined to the right to healthcare" but extends to "safe and healthy working conditions", CESCR, General Comment 14, para. 4.
- ⁹ SRSR Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (19 February 2007), UN doc. A/HRC/4/35, para. 10.
- ¹⁰ See Guiding Principle 2: "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."
- ¹¹ SRSR Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (19 February 2007), UN doc. A/HRC/4/35, para. 10 fn. 5.
- ¹² Principles 4, 8(b), 9(a), 26 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (28 September 2011), signed by a score of international human rights experts; Jochen von Bernstorff, *Extraterritoriale menschenrechtliche Staatenpflichten und Corporate Social Responsibility*, 49 *Archiv des Völkerrechts* (2011), 34; Antje Weber, *Die rechtliche und politische Dimension von extraterritorialen Staatenpflichten bei Menschenrechtsverstößen durch transnationale Konzerne*, Duisburg (2009).
- ¹³ Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 *Yale Law Journal* 550 (2008), 607; Based on international agreements, US law classified the slave trade as piracy, captured some 103 slave ships and brought criminal proceedings against more than 100 individuals in U.S. courts between 1837 and 1862.
- ¹⁴ Jochen von Bernstorff, *Extraterritoriale menschenrechtliche Staatenpflichten und Corporate Social Responsibility*, 49 *Archiv des Völkerrechts* (2011), 34; id. *Die völkerrechtliche Verantwortung für menschenrechtswidriges Handeln transnationaler Unternehmen*, INEF Forschungsreihe Menschenrechte, Unternehmensverantwortung und Nachhaltige Entwicklung (Mai 2010).
- ¹⁵ Preambles of the Universal Declaration of Human Rights (1949), of the International Covenant on Civil and Political Rights, (16 December 1966) 999 UNTS 171, and of the International Covenant on Economic, Social and Cultural Rights (1966).
- ¹⁶ Francesco Francioni, *Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations*, in: *Economic Globalisation and Human Rights*, ed. by Francesco Francioni, 248 (2007) 251.
- ¹⁷ The United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna (11 April 1980), has been ratified by 76 states so far. On the direct application based on ratification, without

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- implementation, see for instance Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 Ohio State Law Journal 265 (1984).
- ¹⁸ Adefolake Adeyeye, *Corporate Responsibility in International Law: Which Way to Go?*, 11 Singapore Year Book of International Law (2007) 141; Danwood Chirwa, *In search of philosophical justifications and suitable models for the horizontal application of human rights*, 8 African Human Rights Law Journal (2008) 294; Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, Journal of International Criminal Justice (2008) 899; Iris Halpern *Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century*, 14 Buffalo Human Rights Law Review (2008) 129, 207; Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 (2002) Vanderbilt Journal of Transnational Law 801, 802-810; Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 461-465 (2001).
- ¹⁹ John Knox, *Horizontal Human Rights Law*, 102 American Journal of International Law (2008) 1; Kirsten Schmalenbach, *Multinationale Unternehmen und Menschenrechte*, 39 Archiv des Völkerrechts (2001) 57.
- ²⁰ Barbara Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 Minnesota Journal of Global Trade (1997) 153, 163; Geldermann recognises customary international human rights as binding corporations, Heiner Geldermann, *Völkerrechtliche Pflichten multinationaler Unternehmen* (2009), 368; The United Nations Sub-Commission's draft of Norms on Business and Human Rights referred to all international human rights as legally binding for businesses, but were (partly for exactly that reason) rejected by the United Nations Commission on Human Rights in 2004, see CoHR 2004/116 and ECOSOC Decision 2004/279.
- ²¹ Jan Arno Hessbrügge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 Buffalo Human Rights Law Review (2005) 21, 31; John Knox, *Horizontal Human Rights Law*, 102 American Journal of International Law (2008) 1-47.
- ²² SRSR Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (19 February 2007), UN doc. A/HRC/4/35, para. 12-13.
- ²³ SRSR Ruggie's official Commentary is included in his submission "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (21 March 2011), UN doc. A/HRC/17/31, accessible at www.un.org/en/documents/.
- ²⁴ SRSR Ruggie (9 April 2010), para. 55; pointing out the differences in the terminology and their implications: David Bilchitz, *The SRSR Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, 7(12) SUR International Journal on Human Rights 199 (2010), 204.
- ²⁵ Jeremy Bentham was apparently issued the oldest and most explicit criticism of the idea of natural rights as "rhetorical nonsense – nonsense upon stilts", Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792), republished in J Bowring (ed), *The Works of Jeremy Bentham*, vol II (William Tait 1838-43).
- ²⁶ Amartya Sen, *Rights, laws and language*, 31(3) Oxford Journal of Legal Studies 437 (2011), 440; id., *The Idea of Justice* (2009), Chapter 17: Human Rights and Global Imperatives.
- ²⁷ Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (19 February 2007), UN doc. A/HRC/4/35, para. 45.
- ²⁸ On the validation of norms through a consensus-oriented process of discourse between all subjects of society, see Jürgen Habermas, *Moralbewußtsein und kommunikatives Handeln* (1983).
- ²⁹ David Bilchitz, *The SRSR Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, 7(12) SUR International Journal on Human Rights 199 (2010), 216.
- ³⁰ SRSR Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (21 March 2011), UN doc. A/HRC/17/31, para. 11.
- ³¹ See A/HRC/4/35, paragraphs 66–81; John Ruggie, *The Construction of the UN "Protect, Respect and Remedy" Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist*, European Human Rights Law Review (2011), 127, 130.
- ³² SRSR Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (19 February 2007), UN doc. A/HRC/4/35, para. 49.
- ³³ Radu Mares, *Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy*, 1 (2) Transnational Legal Theory 221 (2010), 266-267.
- ³⁴ SRSR Ruggie, *Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework* (9 April 2010), UN doc. A/HRC/14/27, para. 60.

- ³⁵ Mark B. Taylor, *The SRSR Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility*, 5(1) *Nordic Journal of Applied Ethics* 9 (2011), 15.
- ³⁶ SRSR Ruggie, *Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework* (9 April 2010), UN doc. A/HRC/14/27, para. 59.
- ³⁷ Mark B. Taylor, *The SRSR Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility*, *Nordic Journal of Applied Ethics* (2011), 5 (1), p. 9, 14.
- ³⁸ SRSR Ruggie, *Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework* (9 April 2010), UN doc. A/HRC/14/27, para. 58.
- ³⁹ John Ruggie, *The Construction of the UN “Protect, Respect and Remedy” Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist*, *European Human Rights Law Review* (2011), 127,
- ⁴⁰ SRSR Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 *American Journal of International Law* 819 (2007), 838 and 839.
- ⁴¹ SRSR Ruggie, *ibid.*, 823. Beth Kytte & John Gerard SRSR Ruggie, *Corporate Social Responsibility as Risk Management: A Model for Multinationals*, Kennedy School of Government Corporate Social Responsibility Initiative Working Paper No. 10, (2005), available at www.ksg.harvard.edu/mrcbg/CSRI/publications/workingpaper_10_kytte_ruggie.pdf.
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- ⁴³ SRSR Ruggie, *Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework* (09 April 2010) para 58; and see SRSR Ruggie’s Draft Guiding Principles of November 2010, Commentary para. 5 on Draft-GP 12.
- ⁴⁴ SRSR Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (7 April 2008) A/HRC/8/5/Add.2, page 4, and at para. 35; UN Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (November 2011), at 7.7 and 7.8.
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- ⁴⁶ SRSR Ruggie, *ibid.*, para. 21 titled “Assess the company’s own activities” and para. 22 titled “Analyse the company’s relationships”.
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- ⁴⁹ SRSR Ruggie, *ibid.*, para 31.
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- ⁵³ Syngenta, *paraquat Poisoning: a practical guide to diagnosis, first aid and hospital treatment* (2008), 2, available at syngenta.com.
- ⁵⁴ Berne Declaration, *paraquat - Unacceptable health risks for users*, 3rd edition (2011).
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- ⁵⁶ For an overview of peer-reviewed studies: Berne Declaration, *paraquat - Unacceptable health risks for users*, 3rd edition (2011).
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- ⁵⁸ The test of foreseeability has more or less similar implications in anglo-american and continental legal systems, see Janet O’Sullivan, *Employer’s liability for injured employee’s suicide*, 67(2) *Cambridge Law Journal* 241 (2008), 242; Gerald Spindler, *Kausalität im Zivil- und Wirtschaftsrecht*, 208 *Archiv für die civilistische Praxis* 283 (2008). It is not necessary that the extent of the harm or precise manner of occurrence was foreseeable, see O’Sullivan, *ibid.*

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- ⁶⁰ German Federal Supreme Court, judgment of 13 July 1971, docket no. VI ZR 125/70; Dieter Medicus, Jens Petersen, *Bürgerliches Recht*, 23rd ed. (2011), marginal no. 653; Claire McIvor, *Liability for suicide*, 23(4) *Professional Negligence* 263 (2007).
- ⁶¹ Claire McIvor, *Liability for suicide*, 23(4) *Professional Negligence* 263 (2007).
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- ⁷⁰ Paul Matthews, *The coroner and the quantum of proof*, *Civil Justice Quarterly* (July 1993), 279, 280, referring to: Lord Lane C.J., *R. v. South London Coroner*, ex p. Thompson, *The Times* (9 July 1982).
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- ⁷⁴ J.R. Bowles, *Suicide in Western Samoa: an example of a suicide prevention program in a developing country* (1995), in: R. Diekstra et al. (eds.), *Preventive strategies on suicide*, Leiden (Netherlands), referenced by M. Miller, K. Bhalla K, *An Urgent Need to Restrict Access to Pesticides Based on Human Lethality* (2010), *PLoS Med* 7(10): e1000358. doi:10.1371/journal.pmed.1000358.
- ⁷⁵ Moritz Brinkmann, *Das Beweismaß im Zivilprozess aus rechtsvergleichender Sicht* (2005), 19.
- ⁷⁶ The German Federal Supreme Court has ruled: “There is no *prima facie* assumption for suicides.” (“*Es gibt keinen Beweis des ersten Anscheins für einen Freitod.*”), German Federal Supreme Court, judgment of 18 March 1987 – docket no. IVa ZR 205/85, maxim no. 1. Courts of the anglo-american tradition have also refused to ease in any way the usual burden of proof regarding cases involving alleged suicide, see Paul Matthews, *The coroner and the quantum of proof*, *Civil Justice Quarterly* (July 1993), 279, 285-286; on the similar view of the Canadian courts, see Paul Matthews, *ibid.*, 287-288.
- ⁷⁷ German Federal Supreme Court, judgment of 18 March 1987 – docket no. IVa ZR 205/85, marginal no. 6; Richardson & Breyfogle point out: “It is generally presumed that most men love life and fear death. This broad generalization characterizing human motive and action cannot logically be applied to the complex of forces which influence the individual man contemplating suicide. But irrespective of logic, the courts unanimously

- indulge a presumption that a violent death was neither suicide nor murder. Some courts go one step further to raise an affirmative presumption that a violent death was accidental.”, Orville Richardson & Herbert S. Breyfogle, *Problems of Proof in Distinguishing Suicide from Accident*, 56 Yale Law Journal (February 1947) 482.
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- ⁹⁴ German Federal Supreme Court, judgment of 20 June 2000 – docket no. VI ZR 377/99.
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- ⁹⁷ David Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, 7(12) SUR International Journal on Human Rights 199 (2010), 199, 207.
- ⁹⁸ See concepts of “contributory negligence” in Angloamerican legal systems and “Mitverschulden” in German law.
- ⁹⁹ World Health Organisation, *Guidelines on the Prevention of Toxic Exposures* (2004), available at www.who.int/ipcs/features/prevention_guidelines.pdf, at page 63.
- ¹⁰⁰ Art. 3.5 of the FAO Code of Conduct on the Distribution and Use of Pesticides.
- ¹⁰¹ M. Miller, K. Bhalla K, *An Urgent Need to Restrict Access to Pesticides Based on Human Lethality* (2010), PLoS Med 7(10): e1000358. doi:10.1371/journal.pmed.1000358.
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Violence and Health (2002), Geneva, ISBN 92 4 154561 5 Global Burden of Disease and Injury Series, Vol. 1, Cambridge, MA.

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- ¹⁰⁷ Manuweera G. et al., *Do targeted bans of insecticides to prevent deaths from self-poisoning result in reduced agricultural output?* (2008), *Environ Health Perspect* 116: 492–495.
- ¹⁰⁸ Of several people who cause, in the same or different ways, a damage, all are jointly and severally liable according to § 421 of the German Civil Code, see Palandt/Grüneberg *BGB* (2011), § 421, marginal no. 9; Michael A. Jones, *Proving causation - beyond the "but for" test*, 22(4) *Professional Negligence* 251 (2006), 262.
- ¹⁰⁹ Restricted Use: may only be applied by a certified pesticide applicator or under the direct supervision of a certified applicator. Applicators and other handlers using ‘Gramoxone Inteon’ (ca. 30% paraquat dichloride content) in the US must wear long-sleeved shirt, long pants, shoes plus socks, protective eyewear, chemical resistant gloves (Category A), plus adust mist NIOSH 1 -approved respirator with any N, R, P, or HE filter. In addition to that, mixer and loaders must wear a chemical resistant apron and a face shield.
- ¹¹⁰ Mark B. Taylor, *The SRSR Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility*, *Nordic Journal of Applied Ethics* (2011), 5 (1), p. 9, 21.
- ¹¹¹ SRSR Ruggie (9 April 2010), para. 67, quoting from International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, “Business proposals for effective ways of addressing dilemma situations in weak governance zones” (December 2006). SRSR Ruggie has agreed to the view of political philosopher Iris Marion Young, who wrote in a discussion of labor abuses in global supply chains: “because the injustices that call for redress are the product of the mediated actions of many, . . . they can only be rectified through collective action.” And that, she continues, requires a broader construction of “shared responsibility.”, SRSR Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 *American Journal of International Law* 819 (2007), 839, referring to: Iris Marion Young, *Responsibility and Global Labor Justice*, 12 *J. POL. PHIL.* 365, 387 (2004).
- ¹¹² ICC et al. (2008) Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights. Geneva: International Chamber of Commerce.
- ¹¹³ Para. 38 OECD Guidelines for Multinational Enterprises, 2011 Edition.
- ¹¹⁴ SRSR Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (19 February 2007), para. 16
- ¹¹⁵ Hum. Rts. Comm., General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8 (May 26, 2004).
- ¹¹⁶ Knox “Horizontal Human Rights Law”, 102 *American Journal of International Law* (2008) 1, 22.
- ¹¹⁷ Knox “Horizontal Human Rights Law”, 102 *American Journal of International Law* (2008) 1, 23.
- ¹¹⁸ This is not to say that societies of the South are generally unable or unwilling to protect their citizens. It is an empirical observation that the transition from colonialism to sovereignty has not been designed such as to ensure that the newly independent states could effectively protect their own and their citizens’ interests against corruptive or detrimental foreign influences, see Smita Narula, *International Financial Institutions, Transnational Corporations and Duties of States*, in: Malcolm Langford, Wouter Vandenhoe, Martin Scheinin, and Willem van Genugten (eds.), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (forthcoming 2012).
- ¹¹⁹ The United Nations Environment Programme (UNEP) found in 2006: “Many countries lack the capacity to manage chemicals soundly at the national, subregional, regional and global levels.” and also found that attempts on the international level to manage chemicals, including pesticides safely have failed, UNEP, *Strategic Approach to International Chemicals Management. SAICM texts and resolutions of the International Conference on Chemicals Management* (2006), www.saicm.org, p. 12.

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- ¹²⁰ Martin Gebauer, *Hypothetische Kausalität und Haftungsgrund* (2007), 386-389.
- ¹²¹ SRSR Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (7 April 2008), para. 24.
- ¹²² As SRSR Ruggie wrote in a legal journal article, “the Framework and Guiding Principles do not rely upon any presumed hierarchy of international legal norms. They seek to foster more effective connectivity as the surest drivers of better human rights performance – more robust horizontal linkages within states, within business enterprises, between states and businesses, and between businesses and their external stakeholders.”, John Ruggie, *The Construction of the UN "Protect, Respect and Remedy" Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist*, *European Human Rights Law Review* (2011), 127, 130. SRSR Ruggie stated in his report for the Draft Guiding Principles, that there was no internationally-recognized hierarchy of treaty obligations, and explicitly referred to “the need for investment, jobs, as well as access to markets, technology and skills”, SRSR Ruggie, Introduction to the Draft Guiding Principles, para. 5.
- ¹²³ Scott LaFranchi, *Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool*, 32 *Boston College Environmental Affairs Law Review* (2005) 679.
- ¹²⁴ Guiding Principle 19 and Commentary to Guiding Principle 19, para. 4.
- ¹²⁵ SRSR Ruggie, *Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework* (9 April 2010), para. 82.
- ¹²⁶ SRSR Ruggie, *Clarifying the Concepts of “Sphere of influence” and “Complicity”* (15 May 2008), para. 23. Professor Kinley and Barrister Tadaki also believe a balancing test of the TNC’s rights with the individual’s human rights should occur, David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 *Virginia Journal of International Law* 931 (2004), 961, 967-968.
- ¹²⁷ UN Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (November 2011), at 4.1; SRSR Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (7 April 2008), para. 24; For instance, a workplace anti-discrimination policy, SRSR Ruggie claims, might require that a company adopt specific recruitment and training programmes, *ibid.*, para. 55. SRSR Ruggie’s expectation that companies take positive steps does not contradict his and the HRC’s rejection of a corporate duty to protect human rights, see David Bilchitz, *The SRSR Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, 7(12) *SUR International Journal on Human Rights* 199 (2010), 207; see also S. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *Yale Law Journal* 443 (2001), 517, who is also prepared to allow that positive measures may be required to give effect to these negative duties.
- ¹²⁸ On the concept on severity, see: UN Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (November 2011), at 3.2.
- ¹²⁹ *Ibid.*, at 3.1.
- ¹³⁰ Guiding Principle 19 (b) (ii) and Commentary para. 4.
- ¹³¹ See the Commentary on Draft Guiding Principle 12 (November 2010). For instance, enterprises could be expected to improve situations that they are not involved with, or escape responsibility by stating that they have no influence on the work context in factories of suppliers.
- ¹³² John Knox, *Horizontal Human Rights Law*, 102 *American Journal of International Law* (2008) 1, 11.
- ¹³³ For example, the ICCPR provides that no one may be arbitrarily deprived of life and that the “sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime,” pursuant to a final judgment by a competent court; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR], Art. 6. The American Convention is similar, although it adds more restrictions on the death penalty; American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123 [hereinafter American Convention], Art. 4. The European Convention sets out other specific circumstances under which deprivation of life is acceptable; European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 UNTS 221 [hereinafter European Convention], Art. 2.
- ¹³⁴ ICCPR, Art. 4(1); European Convention, Art. 15(2); American Convention, Art. 27(2).
- ¹³⁵ Section 823(1) of the German Civil Code.
- ¹³⁶ Andrew H. Dawson et al., *Acute Human Lethal Toxicity of Agricultural Pesticides: A Prospective Cohort Study* (2010), *PLoS Med* 7(10), doi:10.1371/journal.pmed.1000357, p. 6.

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- ¹³⁷ Syngenta, *paraquat Poisoning: a practical guide to diagnosis, first aid and hospital treatment* (2008), 12, available at syngenta.com.
- ¹³⁸ World Health Organisation, *Guidelines on the Prevention of Toxic Exposures* (2004), available at www.who.int/ipcs/features/prevention_guidelines.pdf, at page 63.
- ¹³⁹ World Health Organisation, *Guidelines on the Prevention of Toxic Exposures* (2004), available at www.who.int/ipcs/features/prevention_guidelines.pdf, at page 63.
- ¹⁴⁰ Onyon LJ, Volans GN. The epidemiology and prevention of paraquat poisoning. *Hum Toxicol* 1987;6:19-29.
- ¹⁴¹ European Court of First Instance, Judgment of 11 July 2011, Case T.229/04, marginal numbers 161 and 170.
- ¹⁴² A study carried out in 1996 in Guatemala on 20 persons who had used protective equipment showed that one of the users had suffered an exposure level equivalent to 118% of the acceptable operator exposure level notwithstanding the fact that he was wearing protective equipment. It is also mentioned therein that another user wearing protective equipment suffered an exposure level equivalent to 92.8% of the limit notwithstanding the fact that, according to the study, the user applied the product carefully. These results were found to be reliable by the European Court of First Instance, Judgment of 11 July 2011, Case T.229/04, marginal number 180.
- ¹⁴³ Kirsten Koopmann-Aleksin, *Der Schutz des Eigentums als Menschenrecht*, in: *Eigentumsrecht und Enteignungsrecht*, Gornig et. al. (ed.), Berlin (2008), 107, 108-109.
- ¹⁴⁴ Emphasis added.
- ¹⁴⁵ Regarding the other two exceptional treaty provisions see Art. 14 of the African Charter on Human and Peoples' Rights: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." as well as Art. 31 of the Arab Charter on Human Rights: "Everyone has a guaranteed right to own private property. No person shall under any circumstances be divested of all or any part of his property in an arbitrary or unlawful manner."
- ¹⁴⁶ Wolfgang Peukert, *Der Schutz des Eigentums nach Art. 1 des Ersten Zusatzprotokolls zur Europäischen Menschenrechtskonvention*, 8(4/5) *Europäische Grundrechtezeitschrift* 97 (1981), 103.
- ¹⁴⁷ Art. 1 (2) of optional Protocol 1.
- ¹⁴⁸ See current treaty status at <http://conventions.coe.int/Treaty/Commun/>.
- ¹⁴⁹ Fons Coomans, "Education and Work", in: "International Human Rights Law" (2010), D. Moeckli et. al. (ed.), 280, at 297-300.
- ¹⁵⁰ *ibid.*
- ¹⁵¹ Thomas Cottier, *Trade and human rights: a relationship to discover*, 5(1) *Journal of International Economic Law* 111 (2002).
- ¹⁵² Syngenta, *paraquat Poisoning: a practical guide to diagnosis, first aid and hospital treatment* (2008), 12, available at syngenta.com.
- ¹⁵³ Andrew Dawson, *Acute Human Lethal Toxicity of Agricultural Pesticides: A Prospective Cohort Study* (2010), *PLoS Med* 7(10), doi:10.1371/journal.pmed.1000357.
- ¹⁵⁴ Berne Declaration, *paraquat - Unacceptable health risks for users*, 3rd edition (2011), p. 47.
- ¹⁵⁵ PRLOG, *Banning Paraquat Raises Dispute in China*, press release (20 October 2011), www.prlog.org/11701572-banning-paraquat-raises-dispute-in-china.html.
- ¹⁵⁶ Guiding Principle 11, Commentary para. 3.
- ¹⁵⁷ Ronald Dworkin, *Rights as Trumps*, in: *Theories of Rights*, 153 ("Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole."); Ian D. Seiderman, *Hierarchy in international law: the human rights dimension* (2001); Thomas Cottier, *Trade and human rights: a relationship to discover*, 5(1) *Journal of International Economic Law* 111 (2002), 114.
- ¹⁵⁸ Annual Review 2010, p. 34, 50; Annual Report 2009, p. 33; Annual Review 2008, p. 18 and 48.
- ¹⁵⁹ www.stewardshipcommunity.com/stewardship-in-practice/safe-and-effective-use.html.
- ¹⁶⁰ Syngenta, *paraquat Poisoning: a practical guide to diagnosis, first aid and hospital treatment* (2008), 2, available at syngenta.com.
- ¹⁶¹ G.A. Matthews, *Attitudes and behaviours regarding use of crop protection products—A survey of more than 8500 smallholders in 26 countries* (2008), *Crop Protection* (27):834–846.
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- ¹⁶⁸ Seok SJ et al., *paraquat Intoxication in Subjects Who Attempt Suicide: Why They Chose paraquat*, *The Korean Journal of Internal Medicine* 24:247-251 (2009).
- ¹⁶⁹ D. N. Bateman, *New Formulation of Paraquat: A Step Forward but in the Wrong Direction?*, 2008, 5(2) *PLoS Med*: e58. doi:10.1371/journal.pmed.0050058; Martin F. Wilks, John A. Tomenson et al., *Formulation changes and time trends in outcome following paraquat ingestion in Sri Lanka*, 49(1) *Clinical Toxicology* 21 (2011), doi:10.3109/15563650.2010.544658.
- ¹⁷⁰ SRSR Ruggie (9 April 2010) para. 93-94; The details of these criteria are laid out in an Addendum to the Guiding Principles: Human Rights Council, A/HRC/17/31/Add.1 (24 May 2011).
- ¹⁷¹ SRSR Ruggie (9 April 2010) para. 91.
- ¹⁷² Guiding Principle 16, Commentary para. 2.
- ¹⁷³ Guiding Principle 16, Commentary para. 4.
- ¹⁷⁴ Guiding Principle 16, Commentary para. 3.
- ¹⁷⁵ Guiding Principle 16, Commentary para. 5.
- ¹⁷⁶ UN Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (November 2011), at 5.5.
- ¹⁷⁷ Guiding Principle 16, Commentary para. 6.
- ¹⁷⁸ Tineke Lambooy, *Corporate Due Diligence as a Tool to Respect Human Rights*, 28(3) *Netherlands Quarterly of Human Rights* 404 (2010).
- ¹⁷⁹ Mark B. Taylor, *The SRSR Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility*, 5(1) *Nordic Journal of Applied Ethics* 9 (2011).
- ¹⁸⁰ See for instance regulation and monitoring of the distribution of armament. Furthermore, the Kimberley Process involves a global certification scheme by means of which record is taken of the chain-of-custody of a product, see SRSR Ruggie (19 February 2007), para. 54.
- ¹⁸¹ See for instance Guiding Principle 7 and the term “conflict-affected area”.
- ¹⁸² In light of a failure of international systems to manage hazardous chemicals, the UNEP’s advice in 2006 was to “[b]ase national decisions on highly toxic pesticides on an evaluation of their intrinsic hazards and anticipated local exposure to them.” UNEP, *Strategic Approach to International Chemicals Management. SAICM texts and resolutions of the International Conference on Chemicals Management* (2006), www.saicm.org, p. 44.
- ¹⁸³ Guiding Principles, Introduction, para. 14.

