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Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers

2016

Prepared by the IBA Business and Human Rights Working Group

in collaboration with the IBA Legal Policy and Research Unit

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Foreword

At its Annual Conference in Vienna in October 2015, the IBA Council adopted its Business and Human Rights Guidance for Bar Associations ('Bar Association Guide'),¹ and committed to consider a Practical Guide for Business Lawyers on Business and Human Rights ('Practical Guide').² The IBA unanimously approved the Practical Guide at its mid-year meeting in Barcelona on 28 May 2016. The IBA Business and Human Rights Working Group ('Working Group'), in collaboration with the IBA Legal Policy and Research Unit (IBALPRU) — which had drafted the Bar Association Guide and the Practical Guide — have now prepared this Reference Annex to supplement the Practical Guide.

The past and current members of the Working Group are listed below:

- John F Sherman, III — *Chairman of the Working Group; General Counsel, Shift; former Co-Chair, IBA Corporate Social Responsibility Committee.*
- Horacio Bernardes-Neto — *Motta, Fernandes Rocha; Brazilian Bar Association; former Chair, IBA Bar Issues Commission.*
- Nicole Bigby — *Partner and Director of Risk, Berwin Leighton Paisner.*
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- Robert Heslett — *Chair, Business and Human Rights Advisory Group of the Law Society of England and Wales; former President, Law Society of England and Wales; co-opted Member of the IBA Bar Issues Commission Policy Subcommittee.*
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- Andrea Saldarriaga — *Project Lead, Investment and Human Rights Project, London School of Economics.*
- Deidre Sauls — *former President, Law Society of Namibia; former Officer of the IBA Bar Issues Commission.*

The past and present members of the IBALPRU are listed below:

- Jane Ellis — *Director, Legal Policy and Research Unit, IBA.*
- Gonzalo Guzman — *former Head of Legal Projects, IBA.*
- Rocio Paniagua — *Senior Legal Advisor, Legal Policy and Research Unit, IBA.*

Country consultations were held in Costa Rica (facilitated by Andrea Saldarriaga), Namibia (facilitated by Nicole Bigby), and in Spain (facilitated by Nicole Bigby).

Purpose

This Reference Annex is intended to be consistent with the general principles of the Practical Guide. However, it amplifies and focuses in more detail on some of the potential implications for the legal profession of the UN Guiding Principles on Business and Human Rights (UNGPs)³ than was possible in the shorter and more focused Practical Guide. The Reference Annex is based on an in-depth review of the UNGPs; the Interpretive Guide on the Responsibility to Respect prepared by the Office of the High Commissioner of Human Rights; and the extensive literature, ongoing practices and policies of governments, multistakeholder institutions, bar associations and companies. Its content was the subject of nearly 18 months of consultation and feedback from many stakeholders inside and outside the IBA.

The Reference Annex has not been submitted to, and therefore has not been approved by, the IBA Policy Committee. It is not intended to be official IBA policy. Nor is it meant to prescribe the steps that law firms or lawyers may take in order to discharge their responsibilities under the UNGPs, or their relevant professional and legal obligations.

The Reference Annex represents the overall consensus of the Working Group as a whole, whose members come from different countries, backgrounds and organisations. As a result, it does not necessarily reflect the views of each of its individual members or their organisations as to every word written. Furthermore, the Reference Annex does not purport to distill all of the wisdom on the implications of the UNGPs for the profession. This is an evolving topic. It is only a start, and there are many issues that remain to be addressed.

We welcome readers' continued input and suggestions on how to revise or supplement this Annex, as the experience of lawyers, business and society with the UNGPs evolves over time. We invite all stakeholders to submit comments to lp ru@int-bar.org in order to have them reviewed and addressed on a periodic and regular basis.

Mapping to the Practical Guide

The structure of the Reference Annex follows that of the Practical Guide:

1. Introduction
2. The UN Guiding Principles on Business and Human Rights
3. How are the UNGPs relevant to specific legal practice areas?
4. What are the implications of the UNGPs for the independent responsibilities of lawyers?
5. What opportunities do the UNGPs present for business lawyers?
6. What issues do the UNGPs present for business lawyers and how can they be addressed?

Glossary

A glossary of key concepts used in the Reference Annex can be found at Appendix A.

1. Introduction

Although there is a global consensus on key professional ethics issues for lawyers, the regulation of and professional rules of conduct for lawyers and the laws that apply to business vary from country to country. At the same time, there is now an authoritative global standard on the topic of business and human rights. It consists of the UN Guiding Principles on Business and Human Rights (UNGPs). They apply to all businesses, regardless of their size, sector, location, ownership or structure.

Professor John Ruggie, the former Special Representative of the UN Secretary-General for Business and Human Rights (SRSG), was the author of the UNGPs. He observed that corporate counsel were among the most consequential new players that he brought into the business and human rights debate. This was due to their access to, and influence with, corporate executives.⁴ Their input helped inform the content of the UNGPs. Perhaps not surprisingly then, the UNGPs are relevant to a wide range of the areas of business law practice, such as drafting contracts, corporate governance, legal risk management, reporting and disclosure and dispute resolution.

The UNGPs are also relevant to other groups of lawyers, including:

- lawyers who provide legal services to States — including to State-owned business enterprises (eg, their own procurement practices) — as well as advice on policy, regulation and adjudication intended to enable States to foster business respect for human rights.
- lawyers who advocate on behalf of individuals or communities whose human rights may be, or have been, affected by business conduct.
- lawyers who work on business and human rights issues in government, civil society, academia and elsewhere.

The potential implications of the UNGPs for the legal profession are far-reaching. Their implementation will require considerable capacity and knowledge-building. At the same time, they present significant positive opportunities for lawyers, for their clients and for society. In particular, the UNGPs now provide, for the first time, an authoritative global framework and methodology for advising business clients on how to mitigate or avoid involvement in adverse human rights impacts. This has the potential to significantly increase the value of legal services and advice. See section 5 below.

2. The UN Guiding Principles on Business and Human Rights

2.1 What is the background of the UNGPs?

In 2005, at the request of the UN Commission on Human Rights (now the Human Rights Council), the former UN Secretary General, Kofi Annan, appointed the SRSG to break a deadlock at the United Nations (UN) on the subject of business and human rights. The SRSG was asked to identify international human rights standards that regulate corporate conduct and to clarify the roles of States and business in safeguarding those rights. The SRSG's mandate expanded and, after six years of multi-stakeholder consultation, pilot projects and research, it culminated in the SRSG's drafting of, and the Council's unanimous endorsement of, the UNGPs in 2011.⁵

2.1.1 Addressing negative human rights impacts by business

Human rights are aimed at securing the basic dignity and equality of all people.

'The idea of human rights is as simple as it is powerful: that people have a right to be treated with dignity. Human rights are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Every individual is entitled to enjoy human rights without discrimination. These rights are all interrelated, interdependent and indivisible.'⁶

When human rights were first formally articulated in international declarations and conventions, they were primarily addressed to governments. However, it has become increasingly apparent that non-State actors, including companies, can also have negative impacts on human rights that can extend far beyond labour rights and non-discrimination. They can encompass, for example, abuses of local communities by security contractors at mining sites; persecution of political dissidents by governments using information supplied by Information Communications Technology (ICT) companies; and the — sometimes severe — mistreatment of migrant workers in global supply chains that span multiple sectors.

In initial reports to the UN Human Rights Council, the SRSG stressed that the expansion of global markets in recent decades has played a major role in reducing poverty in emerging market countries and increasing welfare in industrialised countries. However, his research also found that globalisation has imposed significant costs on people and communities, including business-related negative human rights impacts. This has often occurred where national regulation or enforcement has failed to keep up with the pace of economic change — or indeed, to align with States' own international human rights obligations.

A non-exhaustive list of internationally-recognised human rights can be found at Appendix B. This list is drawn from the International Bill of Human Rights (comprised of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), and the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work.⁷ Some examples of how businesses can impact certain of those rights are included in Appendix C.

2.1.2 Convergence on the UN Guiding Principles

According to the UN High Commissioner for Human Rights, the UNGPs have become ‘the global authoritative standard, providing a blueprint for the steps all States and businesses should take to uphold human rights.’⁸ As seen below, the core content of the UNGPs is increasingly reflected in law and regulation; in public policy; in global, industry-specific or issue-specific standards; and in the practices of leading companies:

| Area of convergence | Examples |
|---|---|
| Government policy and legislative developments | <ul style="list-style-type: none"> • The 2016 recommendation of the Committee of Ministers of the EU States (1) acknowledging the status of the UNGPs as the global authoritative framework on business and human rights and (2) urging member States to review their national legislation and practice to ensure compliance with the UNGPs by identifying and addressing gaps between national legislation and policy and all pillars of the UNGPs;⁹ • The development of ‘National Action Plans’ on business and human rights by many European governments and by Chile, Colombia, Malaysia, Mozambique, the US and a growing number of other countries; • An increasing focus on human rights due diligence by various Export Credit Agencies and National Development Finance Institutions (including in Canada, Germany, the Netherlands and Norway); and • the strengthening of various National Contact Points under the OECD Guidelines for Multinational Enterprises to improve their handling of complaints. |
| Evolving human rights disclosure requirements | <ul style="list-style-type: none"> • The European Parliament’s Directive on Disclosure of Nonfinancial and Diversity Information; • National-level reporting requirements, including in Denmark, France, Sweden and the UK; • US State Department reporting requirements for investments in Myanmar over US\$500,000 as well as the US Securities and Exchange Commission’s disclosure requirements on conflict minerals in supply chains; and • Stock exchange listing requirements, including in India and Thailand. |
| International standard-setting bodies | <ul style="list-style-type: none"> • The OECD’s Guidelines for Multinational Enterprises (revised in 2011 to include a specific chapter on human rights as well as the cross-cutting concept of due diligence, which mirror the UNGPs);¹⁰ • The International Finance Corporation’s revised Performance Standards on Environmental and Social Sustainability¹¹ and the International Organization for Standardization’s Corporate Social Responsibility Standard (ISO 26000);¹² • The European Commission’s 2011 Communication on Corporate Social Responsibility;¹³ and • The growing understanding of the UN Global Compact’s human rights and labour principles¹⁴ and the content of various industry-specific standards. |
| Public commitments by companies to respect human rights and implement the UNGPs | <ul style="list-style-type: none"> • A range of companies have adopted standalone human rights policies; have updated their existing policy commitments; or are updating their processes to better align with the UNGPs.¹⁵ |
| Voluntary human rights reporting and benchmarking initiatives | <ul style="list-style-type: none"> • The UN Guiding Principles Reporting Framework;¹⁶ and • The Corporate Human Rights Benchmark.¹⁷ |
| Laws specifically targeting supply chain human rights issues | <ul style="list-style-type: none"> • The UK Modern Slavery Act; • The California Transparency in Supply Chain Act of 2010; and • The US Federal Acquisition Regulation, ‘Combating Trafficking in Persons’.¹⁸ |

In addition, lawsuits asserting that businesses have harmed human rights, either by themselves or through their involvement with others, are being filed with increasing frequency against companies around the world, as discussed further in section 3.3.1 below. This is driven by such factors as: rising awareness by victims of their human rights; enhanced cooperation among, and innovative efforts by, human rights lawyers in numerous countries to secure remedy for their clients; the increasing recognition of such claims by courts and tribunals; and the increasing use of non-judicial grievance mechanisms to address business-related human rights claims.

Finally, major financial institutions and businesses are increasingly requiring their borrowers, contractual counter parties and suppliers to respect human rights, including by making explicit reference to the UNGPs.

2.2 What are the United Nations Guiding Principles on Business and Human Rights?

The UNGPs are based upon the three interdependent and mutually supporting pillars of the SRSG's 'Protect, Respect and Remedy' Framework, which the UN Human Rights Council unanimously welcomed in 2008:

- The state duty to protect (pillar 1) against human rights abuses by third parties, including business, through effective policies, regulation and adjudication (Guiding Principles 1 through 10).
- The corporate responsibility to respect (pillar 2) human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which a business may be involved (Guiding Principles 11 through 24).
- The need for greater access by victims to effective remedy (pillar 3), both judicial and non-judicial (Guiding Principles 25 through 31).

2.2.1 Pillar 1 — the state duty to protect human rights

The UNGPs do *not* create new legal obligations for States. Rather, they recognise *existing* obligations that international human rights law imposes on States to protect against human rights harms committed by third parties, including businesses. The UNGPs instead focus on how States can take appropriate steps to prevent, investigate, punish and redress business-related human rights harms through effective policies, legislation, regulations and adjudication (Guiding Principle 1). States also have existing obligations when it comes to providing access to effective remedy. See section 2.2.3 below.

2.2.2 Pillar 2 — the corporate responsibility to respect human rights

The global baseline expectation of business

The responsibility to respect human rights is the global baseline expectation of all business enterprises. It expects that all businesses should respect human rights, whether or not the business voluntarily chooses to commit to doing so. Aspects of the responsibility to respect human rights are often compelled by national law (for example, through health and safety, non-discrimination,

environmental or criminal laws). However, the responsibility exists over and above compliance with national laws and regulations. It exists independently of the State's ability to meet its own duty to protect human rights. That is, the absence of national laws on human rights or a failure in their enforcement does not limit the businesses' responsibility to respect human rights.

Avoiding and addressing human rights infringement

The responsibility to respect means that businesses should avoid infringing on the human rights of others, and they should address negative human rights impacts with which they may be involved (Guiding Principle 11). Companies are expected to take appropriate action to avoid causing or contributing to adverse human rights impacts, and to seek to prevent or mitigate impacts that are directly linked to their operations, products or services by their business relationships — even if the company itself did not cause or contribute to the impact (Guiding Principle 13).

Business relationships

'Business relationships' refer to those relationships a company has with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships, such as suppliers beyond the first tier in a supply chain.¹⁹ However, as explained in section 2.3.4 below, how a business discharges its responsibility to respect in particular circumstances depends on the mode of its involvement in a negative human rights impact.

A company's responsibility to respect human rights with regard to its business relationships is not limited to those entities or persons within its 'sphere of influence'; that is, those whose behaviour the company can readily influence.²⁰

'Instead, responsibility is determined by the human rights impact of its activities: whether it causes or contributes to an adverse impact, or its operations, products or services are directly linked to adverse impact through a business relationship. Its influence — here understood as leverage — then becomes relevant in identifying what it can reasonably do to address that impact and will normally vary in these contexts.'²¹

The concept of leverage is discussed below in section 2.3.4 with respect to businesses generally, and in section 6.3.3.2 with respect to law firms.

Sources of human rights

The responsibility to respect applies to all 'internationally-recognised' human rights. This refers, at a minimum, to:

- The 'International Bill of Human Rights', which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; and
- The International Labour Organization's Declaration on Fundamental Principles and Rights at Work (Guiding Principle 12).²²

Universal application of the responsibility to respect

The responsibility applies to all businesses, regardless of their size, sector, operational context, ownership or structure. But the means through which businesses may meet this responsibility may vary according to these factors and the severity of their impacts (Guiding Principle 14). Philanthropic and charitable activities by a business cannot offset its failure to respect human rights (Guiding Principle 11).

Company policy and practice expectations

To meet its responsibility to respect, a business must have policies and processes in place appropriate to its size and circumstances (Guiding Principle 15), including:

- A high-level policy commitment to respect human rights, supported by operational-level policies, training and incentives that embed the commitment throughout the organisation (Guiding Principle 16).
- Human rights due diligence processes through which the business: (1) assesses the actual and potential impacts on human rights arising from its own activities and through its business relationships; (2) integrates the findings from these assessments and takes action to prevent or mitigate adverse impacts; (3) tracks the effectiveness of its efforts to address human rights impacts; and (4) is prepared to communicate these efforts to affected stakeholders and others (Guiding Principles 17 through 21).
- The provision of, or cooperation in, legitimate processes to remediate human rights harms that the business has caused or contributed to, which may include non-judicial, operational-level grievance mechanisms (Guiding Principles 22, 29 and 31).

Contextual issues

Two Guiding Principles also address key contextual issues. First, businesses should comply with all applicable laws; seek ways to honour international human rights principles when faced with conflicting legal requirements; and treat the risk of involvement in gross human rights abuses as a matter of legal compliance wherever they operate (Guiding Principle 23). Second, severity of impact on affected stakeholders should drive prioritisation of a company's response to such impacts (Guiding Principle 24). These issues are discussed in further detail in section 2.3 below.

2.2.3 Pillar 3 — access to effective remedy

The third pillar of the UNGPs — access to remedy — is addressed to States, as part of their duty to protect human rights, and to businesses, as part of their responsibility to respect human rights.

States have the primary obligation under international human rights law to take appropriate steps to ensure that those affected by human rights abuses in their territory and/or jurisdiction have access to effective remedy, both judicial and non-judicial (Guiding Principle 25 and 26). This should include reducing existing barriers to judicial remedy; providing effective non-judicial grievance mechanisms (such as labour tribunals or other administrative channels); and considering access to non-State-based

grievance mechanisms, such as those established by international financial institutions (Guiding Principles 26 through 28).²³

Businesses should establish or participate in operational-level grievance mechanisms in order to prevent and address grievances early, before they amount to human rights impacts. Such mechanisms can also act as an important feedback loop to identify particular issues or trends and prevent future problems (Guiding Principle 29). Collaborative initiatives by industry bodies and others should also ensure the availability of effective grievance mechanisms (Guiding Principle 30).

In order to be effective, all non-judicial grievance mechanisms should meet specific criteria, namely: legitimacy, accessibility, predictability, equitability, transparency, rights compatibility, serve as a source of continuous learning and (for operational-level grievance mechanisms), be based on engagement and dialogue (Guiding Principle 31).

2.3 Understanding the key concepts used in pillar 2 — the corporate responsibility to respect human rights

This section describes in detail the key concepts of pillar 2 — the corporate responsibility to respect human rights. It draws from the UNGPs and their commentary, as well as the *Interpretive Guide to the Corporate Responsibility to Respect Human Rights*, prepared by the Office of the UN High Commissioner for Human Rights in 2012 with the full approval of the former SRSG ('Interpretive Guide').²⁴ It also draws upon the experience and learning of major multinational companies and sectors that are implementing the UNGPs.

2.3.1 What is a human rights policy commitment?

A policy commitment is a high-level, public statement made by the business that it will respect human rights. It serves as a critical source of the business's ability to influence others to respect human rights because it sets a clear expectation for its business relationships, including suppliers, contractors and customers.

In order to be effective, a business should *embed* its policy statement throughout its systems and processes (Guiding Principle 16). Embedding translates the policy statement into a company-wide commitment that informs and integrates into how the company makes decisions and operates. Major companies have done so by using the following methods, among others:

- effective and authentic leadership by top management;
- setting appropriate performance incentives for personnel;
- addressing tensions between the company's human rights commitment and the policies that govern the company's wider business activities and relationships, (eg, its procurement or sales practices); and
- organising the company's human rights function to drive cross-functional engagement, collaboration and continuous learning and improvement.²⁵

2.3.2 What is human rights due diligence?

Human rights due diligence is an ongoing process that businesses should undertake to enable them to identify, prevent, mitigate and account for how they address their adverse human rights impacts. Potential impacts should be prevented or mitigated and actual impacts should be remedied, as discussed below in connection with Guiding Principle 22 (see Commentary to Guiding Principle 17). A diagram of the human rights due diligence process is set forth below:



Figure 1: (c) 2015 Shift Project Ltd. Reproduced with permission

2.3.2.1 SEVERITY OF IMPACT

Companies, their activities and business relationships vary greatly in size, scope and complexity. This will affect the nature of their human rights due diligence processes. However, the single most important factor will be the severity of their actual and potential impacts (see Commentary to Guiding Principle 14).

Severity has three characteristics:

| | |
|-----------------|--|
| Scale | The gravity of the impact; ie, how serious is the potential impact on the enjoyment of the relevant rights? For example, is access to drinking water made more difficult or entirely impossible; would release of a pollutant cause a temporary skin rash or permanent damage to health? |
| Scope | The number of people who may be impacted; generally speaking, the more people, the more severe the impact. |
| Irremediability | The ability to restore those impacted to the same or an equivalent position as they were in before the impact. |

Any one of these factors, or the way(s) in which they combine, can render an impact *severe*.

Even small businesses can have a severe impact on human rights. The human rights due diligence processes of small businesses will typically be less complex than those of a large, multinational corporation. However, even a small or relatively simple business with few employees can be involved with significant impacts on human rights. For example, a small trading company may arrange for the export of minerals mined by child or forced labour from conflict-affected areas.

2.3.2.2 DUE DILIGENCE ON BUSINESS RELATIONSHIPS

It may be unreasonably difficult for businesses with large numbers of entities in their value chains to conduct human rights due diligence on all of them. In such cases, the business should prioritise those where the risk of negative human rights impacts is most significant, for example due to the operating contexts involved (Guiding Principle 17).

The focus of due diligence for a business relationship (eg, a supplier, partner or customer) is not on the general risks that the third party poses to human rights. Rather, it is on the specific human rights risks that a third party poses only when it is acting in connection with the businesses's own operations, products or services (Interpretive Guide, section 6.2).

2.3.2.3 ONGOING NATURE OF DUE DILIGENCE

Human rights due diligence is an ongoing process because circumstances and impacts may change over time. There are often key points where human rights due diligence should be conducted or repeated: eg, upon entry into a new market; a new product launch; or a major corporate transaction, such as a merger or sale. In addition, due diligence is relevant at various stages in business relationships, including formation, monitoring and termination or renewal. The UNGPs do not prescribe whether such processes should be standalone or integrated into other systems.

2.3.2.4 ASSESSING IMPACTS

Human rights due diligence means that a business should map its human rights risks by severity and likelihood. Through its own activities and its business relationships, a business can impact the rights of various different stakeholders, such as its own employees or workers on temporary contracts; workers in its supply chain; customers or end-users of its products and services; and local communities around its operations. Some of those stakeholders may belong to potentially marginalised or vulnerable groups, who may sometimes be the least visible or vocal in a society, and as a result, could experience more severe negative impacts.

Assessing human rights impacts means seeking to take into account the perspective of potentially affected stakeholders wherever possible, through meaningful engagement with them or their representatives. Understanding their perspective is essential in order to accurately assess the severity and probability of impacts on them (Guiding Principle 18).

Severity is the predominant factor. But a company should also assess the probability of a human rights impact, in order to help prioritise the sequence in which potential impacts are addressed (Interpretive Guide, section II). This involves considering:

- the company's operating context — eg, does it operate in a country where the law does not adequately protect the right in question?;
- the specific business relationship in question — eg, does the risk arise through a business relationship?;
- and

- the company’s own management systems — eg, does the company have existing policies, processes and systems in place that are sufficient to identify, mitigate or prevent the risk?

In a small business, ‘where communication between personnel is relatively easy, and day-to-day interaction is frequent, the integration process may occur naturally’ (Interpretive Guide, section 8.3). For large businesses, the processes are more complex and may require more pro-active and systematic intervention and actions in order to be effective.

2.3.2.5 INTEGRATING AND ACTING

After a business assesses the human rights risks associated with its activities and business relationships, it should integrate the findings from the assessments and take appropriate action to respond to them. To do so, it should have internal decision-making and oversight processes in place to enable effective responses (Guiding Principle 19(a)).

How a business is involved in negative human rights impacts — both actual and potential — determines the nature and scope of its required response. This is discussed in detail in sections 2.3.3 and 2.3.4 below.

2.3.2.6 TRACKING AND COMMUNICATING

TRACKING EFFORTS TO ADDRESS IMPACTS

Guiding Principle 20 is based on the concept that ‘what’s measured gets managed’ (Interpretive Guide, section 9.1). Tracking the effectiveness of a company’s efforts to address identified human rights impacts should draw on the perspectives of potentially affected stakeholders, not just the company itself, and should involve an appropriate mix of quantitative and qualitative indicators.

COMMUNICATING ABOUT EFFORTS TO ADDRESS IMPACTS

A business should be prepared to communicate how it addresses its human rights impacts. This can include everything from direct communication with potentially affected stakeholders to formal public disclosure (Guiding Principle 21). Formal disclosure is expected where a company’s operations or operating contexts pose a risk of severe negative impacts.

However, a business need not reveal all the issues identified in its due diligence, or the steps it takes to mitigate them (Interpretive Guide, section 10.2). Nor need it disclose confidential information: ‘In all instances, communications should... not pose risks to affected stakeholders, personnel or to the legitimate requirements of commercial confidentiality’ (Guiding Principle 21). This would include ‘information legally protected [as] against third parties’ (Interpretive Guide, section 10.7). Rather, the business should explain its general approach towards addressing its human rights risks (Interpretive Guide, section 10.3).

2.3.2.7 REMEDIATION

A business has a responsibility to provide for, or cooperate in, legitimate processes to provide remedy for impacts that it identifies as having caused or contributed to (Guiding Principle 22). If it contests the allegation that it did so, ‘it cannot be expected to provide for remediation unless or until it is obliged to so (for instance, by a court)’ (Interpretive Guide, section III.C). In other words, the UNGPs do not impair the right of a company to assert a robust defence to legal allegations that it violated the law with respect to human rights, or to obtain legal advice and assistance in assessing its position and options.

2.3.3 What are the different ways in which business can be involved in an impact?

Under the UNGPs, businesses may become involved in human rights impacts in one of three ways — cause, contribute or linkage.²⁶

| Cause | Contribute | Linkage |
|--|---|--|
| <p>Business actions lead directly to an impact; eg,</p> <ul style="list-style-type: none"> • A factory exposes workers to hazardous chemicals without adequate personal protective equipment. • A company manufactures and sells inherently dangerous products that are likely to cause death or serious personal injury, without providing adequate warning to users about the risks or appropriate instructions on how to use them. • A restaurant practices routine discrimination in its treatment of customers. • A factory's wastewater discharge is the sole or main source of pollution of a community's drinking water. | <p>Business incentivises, facilitates or enables third party impact; eg,</p> <ul style="list-style-type: none"> • An internet company provides data about users of its services to a repressive government that enables the government to track and harass political dissidents, contrary to international human rights standards. • An electronics retail brand changes product requirements for suppliers repeatedly and at the last minute, without adjusting production deadlines or prices, pushing suppliers to breach labour standards to ensure that the order is delivered. • A food company deliberately develops and targets high-sugar foods and drinks at children, with an impact on levels of child obesity. • A factory's wastewater discharges, in combination with the discharges of other companies, cumulatively pollute the drinking water in a community. | <p>A business's operations, products or services are linked to an impact, even though the business did not cause or contribute to that impact; eg,</p> <ul style="list-style-type: none"> • A company manufactures and sells portable ultrasound machines that are used by medical institutions to screen for female fetuses, facilitating their abortion in favour of male children. • A bank providing financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities. • A retail garment company purchases clothing from a supplier that subcontracted to an entity that used child labour at home to embroider the clothing, counter to contractual obligations. |

2.3.4 How should a business respond to an impact?

As set forth in Guiding Principle 19, the appropriate response to a negative impact varies according to whether the business *caused*, *contributed* or is directly *linked* to an impact, as set forth below:

| If the business ... | Then the business should ... |
|---------------------|---|
| Caused the harm | <ul style="list-style-type: none"> • Cease the action causing the harm • Remediate the harm |

| | |
|-------------------------|---|
| Contributed to the harm | <ul style="list-style-type: none"> • Cease the action contributing to the harm • Use or build leverage to mitigate the risk of future harm • Contribute to the remediation of the harm |
| Is linked to the harm | <ul style="list-style-type: none"> • Use or try to build leverage to seek to mitigate the risk of future harm |

Note that the UNGPs do *not* expect businesses to contribute to remedy when they are only linked to the harm (although they may do so for other reasons, such as managing reputational risk).

In practice, the distinction between whether a business ‘contributed’ to an impact and whether it is merely ‘linked’ to the impact for purposes of the UNGPs depends on such factors as:

- whether the business motivated a third party to harm human rights;
- whether the business’s actions or omissions are essential and sufficient to enable another to cause harm; and
- the likelihood that the other will do harm regardless of efforts of the business to prevent it. The OECD has examined the distinction extensively in the context of the financial sector.²⁷

2.3.4.1 THE APPROPRIATE USE OF LEVERAGE

Leverage, as used in the UNGPs, means the ability of a business to influence another party’s human rights performance. Leverage is a highly flexible and broad concept that can be applied in numerous contexts. It is not limited to relationships between bilateral contracting parties. It can include relationships with non-direct tier suppliers; joint venture and other horizontal business partners; clients and end users; business peers; governments; national and international civil society organisations; and multistakeholder collaboration initiatives.

According to the Interpretive Guide,²⁸ the ability to exercise leverage in a business relationship may depend upon a number of factors, including:

- whether there is a degree of direct control by the enterprise over the entity;
- the terms of contract between the enterprise and the entity;
- the proportion of business the enterprise represents for the entity;
- the ability of the enterprise to incentivise the entity to improve human rights performance in terms of future business, reputational advantage, capacity-building assistance, etc;
- the benefits of working with the enterprise to the entity’s reputation and the harm to its reputation if that relationship is withdrawn;
- the ability of the enterprise to incentivise other enterprises or organisations to improve their own human rights performance, including through business associations and multi-stakeholder initiatives; and
- the ability of the enterprise to engage local or central governments in requiring improved human rights performance by the entity through the implementation of regulations, monitoring, sanctions, etc.

Examples of practical opportunities in a business relationship to apply or build leverage might include: contract negotiation; licensing agreements/renewal; setting qualifications for bidding; periodic reports on implementation of a service or plan of action; renewal of service agreements; points when services or products require maintenance; disbursement of funds; monitoring/auditing; provision of technical or advisory assistance; and processes/investigations for addressing complaints.

2.3.4.2 CONSIDERING TERMINATION OF THE RELATIONSHIP

Where a business has tried unsuccessfully for some time to prevent or mitigate human rights harm by a third party, it may need to consider ending the relationship — particularly if the impact is severe. Termination may be highly problematic if the relationship is crucial to the business, or if contract or law constrains the business from terminating the relationship. Moreover, any consideration of termination should factor in the potential adverse human rights impacts of such termination. For example, abruptly terminating a relationship with a supplier that uses child labour would deprive the children of wages. Doing so could put the children and their families in an even more precarious position, unless steps are taken to identify, assess and mitigate such an impact. Ultimately, if the business decides to stay in the relationship, it should be prepared to demonstrate its ongoing efforts to prevent or mitigate the harm, and be prepared to accept any consequences — reputational, financial or legal — of doing so.²⁹

2.4 Relationship of the UN Guiding Principles to national law

The responsibility to respect human rights is rooted in the universal expectation that business enterprises should not harm the dignity of people. However, the UNGPs are not legally binding. They do not impose legal responsibilities or legal standards of care on businesses by themselves.

‘The Guiding Principles do not constitute an international instrument that can be ratified by States, nor do they create new legal obligations. Instead, they clarify and elaborate on the implications of relevant provisions of existing international human rights standards, some of which are legally binding on States, and provide guidance on how to put them into operation. The Guiding Principles refer to and derive from States’ existing obligations under international law. National legislation will often exist or may be required to ensure that these obligations are effectively implemented and enforced domestically. This, in turn, means that elements of the Guiding Principles may be reflected in domestic law regulating business activities.’³⁰

This includes laws relating to antidiscrimination, workers’ rights, workplace and public health and safety, environmental protection and privacy, to name a few. And, as noted above, the content of the UNGPs have become increasingly reflected in legislation and regulation; in commercial and financial transactions and agreements; and in the advocacy of civil society.

2.4.1 Legal compliance

Guiding Principle 23(a) emphasises the importance of legal compliance. It states that business enterprises should ‘comply with all applicable laws and respect internationally recognised human rights, wherever they operate’.

At the same time, the responsibility to respect human rights is not limited by the laws of a particular country. It goes beyond mere legal compliance. Where national law offers a level of human rights protection that falls short of internationally recognised standards, businesses should operate to the higher standard. Consequently, businesses should not engage in a ‘race to the bottom’ by attempting to take advantage of weak legal frameworks in countries that insufficiently protect human rights in order to lower their own standards (Interpretive Guide, section 14.2).

For example, acquiring legal title to land in some countries may provide a false sense of security to a company, where that land was made available for commercial use by a government following a statutory procedure that did not provide for adequate consultation with, or compensation for, affected households or communities. This may sow the seeds of conflict between the community and the company, which could threaten the project’s long-term viability or the company’s operations. If the client expects or asks the lawyer to act as its wise counsellor or trusted advisor, then the lawyer should be prepared to point this out and explore with the client available options, the extent to which they align with the UNGPs and the consequences of choices among them.

2.4.2 Conflicting requirements

National law may sometimes be in conflict or in tension with international human rights law. For example, it may prohibit workers from joining a trade union, or it may discriminate against women being employed on equivalent terms to men. Guiding Principle 23(b) addresses this tension by indicating that businesses should seek ways to honour the principles of internationally recognised human rights; in other words, to respect human rights to the greatest extent possible in the circumstances and to be able to demonstrate that they have done so.

Here, lawyers can provide constructive advice to help clients understand the nature, scope and implications of the conflict, and to explore appropriate responses without violating national law. For example:

- the national law may be ambiguous, allowing for the argument that the restriction on human rights is not required by law;
- the means used by the government to restrict human rights may be procedurally defective, allowing for a procedural challenge to the restriction;
- there may be opportunities to seek clarification from the government or even to challenge the law as relevant, together with peer companies or through an industry association; and/or
- there may be ways for the client to seek to honour the spirit of human rights without violating national law; eg, by finding lawful ways to engage with workers in countries that restrict freedom of association (while continuing to call for the full protection of the right to form and join trade unions under law), or permitting work opportunities for women where there are restrictions on mixed sex work environments, by creatively thinking about work force composition.

2.4.3 Involvement in gross human rights abuses

Guiding Principle 23(c) provides that businesses should treat ‘the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate’. This is particularly important for businesses that operate in areas of conflict, where there is a high risk of gross human rights abuses (such as murder, rape or torture) and corresponding impunity on the part of the relevant actors (often public security forces or armed groups). Treating involvement in gross human rights abuses as a matter of legal compliance is required ‘given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute establishing specific corporate criminal responsibility and the jurisdiction of the International Criminal Court for those offences. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses’ (Commentary to Guiding Principle 23(c)).

Lawyers often play a critical role in designing, enforcing and monitoring a company’s compliance with criminal legal standards.³¹ This experience may provide useful guidance on how to structure a company’s systems and processes to prevent the involvement of their clients in gross human rights abuses.

3. How are the UNGPs relevant to specific legal practice areas?

This section discusses how lawyers can help business clients meet their responsibility to respect human rights. In order to address this point, it is helpful to explore and understand the various roles that lawyers may play when advising business clients.

Human rights risks have hard consequences for companies

A company's failure to manage its human rights risks can have hard consequences for the company, including its evolving legal risks. As technical experts, lawyers advise business clients on legal risks that arise under applicable laws. As wise counsellors or trusted advisors, lawyers identify and advise on potential legal risks that may likely arise in the future. For example, new laws and regulations may be enacted; existing laws may be interpreted or enforced more vigorously; or claimants may be more innovative, assertive, coordinated and resourceful in pressing litigation claims.

Evolving law on human rights for business

The law is not static; it is dynamic and evolving. The global convergence on the UNGPs is increasingly reflected in national laws, as discussed in section 2.1.2 above. It is likely that this trend will continue. For example, the 2016 European Council of Ministers recommendation on human rights and business provides detailed recommendations for EU Member States to consider in identifying and addressing gaps in legislation, in order to enable States and businesses to meet their obligations and responsibilities under the UNGPs.

Human rights on the agenda of global business

Recent studies make it clear that human rights are firmly on the agenda of global business. A recent report by the Economist Intelligence Unit of 853 senior executives worldwide revealed that 83 per cent of them agreed (74 per cent of whom do so 'strongly') that 'human rights are a matter for business as well as governments,' and 71 per cent said that 'their company's responsibility to respect these rights goes beyond simple obedience to local law'.³² As business has become globalised, so too has the legal profession.³³

Where legal advice on respecting human rights can help serve a client's best interests

Businesses increasingly recognise that compliance with national law alone may not be enough to ensure that they are respecting human rights. This may be particularly true in more challenging contexts; eg, where national law protecting human rights does not exist, is not enforced or is even in tension with human rights. Thus, lawyers may wish to be prepared to provide advice on these

international standards and their interaction with national law, or, where domestic law does not provide all of the answers, point clients to appropriate sources of such expertise.

In numerous areas, legal advice and services can help a business avoid or mitigate the hard consequences of involvement in human rights harm. Section 3.1 below lists some examples.³⁴

3.1 Corporate governance and enterprise risk management

Lawyers are typically asked to advise companies on proper corporate governance and risk management, which increasingly includes human rights risks.³⁵ As the UK Equality and Human Rights Commission has observed, managing human rights risks has become a matter for the attention of corporate boards in the discharge of their fiduciary duty.³⁶ This is because harm to companies resulting from involvement in severe human rights harm can include legal liability, reputational harm, delay, contract penalties, lost opportunities, reduced production, management distraction and reduced access to capital markets.

For example, the cost of conflict in the extractive industry has been extensively examined. Mining companies have been involved in instances of severe human rights harm arising from violent conflict between security forces and communities. These conflicts typically arise from a poor relationship between company and community; they can be triggered by pollution, competition over water and access to land, inadequate engagement with communities and health and safety issues.

In addition to harm to people and communities, conflict can generate significant costs for companies. The most frequent of which are delays in their operations and lost opportunities and the most overlooked of which are the indirect costs of diversion of staff time.

Empirical research on the costs of company-community conflict in the extractive sector³⁷ shows that the costs of such disputes to companies can be quite high; eg, a major world-class mining project with capital expenditure of between US\$3bn and US\$5bn will suffer costs of roughly US\$20m per week in delayed production in Net Present Value terms, mostly due to lost sales. Often, the costs of conflict are rolled into local operating costs, and are not identified and aggregated. When this happens, they will not get the same attention from boards and senior management as technical problems, contractual or regulatory disputes, or environmental or safety breakdowns, even though they can have the same disruptive impact on the business.

Conflict costs can threaten not only an individual company's bottom line, but also the financial sustainability of an industry within a national economy. For example, the Peruvian independent financial regulator ('Regulator') has identified company/community conflict as a major threat to the viability of local and regional economies in Peru (because of the negative knock-on effects on small businesses when projects are shut down or delayed), and indeed to the national economy as a whole. The Regulator has therefore promulgated regulations requiring banks, insurers and pension funds to request their potential clients to provide evidence of the policies and processes that they have in place to manage social and environmental risk, and prevent and address community conflict when providing financial support to certain investment projects and project-related activities.³⁸

In addition to the extractive sector, other sectors present their own unique human rights risks which can harm companies as well as their stakeholders; eg, garment and electronic manufacturers, internet technology and communications, chemicals and agriculture. As a result, lawyers who advise companies on corporate governance and enterprise risk management may wish to understand and advise upon the implications of the UNGPs for the design and implementation of internal controls, internal governance approaches and risk management systems that are necessary for clients to manage their human rights risks.

3.2 Reporting and disclosure

3.2.1 Evolving legal requirements

Public disclosure laws and regulations are increasingly and specifically requiring disclosure of a company's human rights policies, processes and performance. This results from growing demands from regulators, investors, shareholders, labourers, consumers and civil society organisations for accurate information on companies' social and environmental impacts.³⁹ This can be seen in regulatory and stock exchange developments requiring enhanced sustainability reporting more generally (eg, in Brazil, Indonesia, Singapore, South Africa and Thailand) and in developments requiring attention to human rights specifically (notably in Denmark, the European Union, France, India, the UK and the US).⁴⁰

For example, the 2013 revisions to the UK Companies Act now require all listed companies to report publicly on environmental matters, the company's employees and social, community and human rights issues, where this information is 'necessary for an understanding of the development, performance or position of the company's business' in achieving its strategic objectives.⁴¹ In June 2014, the UK Financial Reporting Council published guidance on corporate reporting pursuant to the Act, which explicitly refers to the UNGPs as a source of guidance for directors.⁴² In May 2015, the UK adopted the Modern Slavery Act, which seeks to eradicate slavery and human trafficking from company supply chains. It requires certain companies to publicly describe the steps that the company has taken (including due diligence and other processes) to ensure that slavery and human trafficking are not taking place in its supply chain.⁴³

Further, in a new directive to EU Member States adopted by the European Parliament in 2014 (which must be implemented by EU Member States by 2016), about 6,000 large public interest enterprises will be asked to report on environmental, social and employee-related respect for human rights, anti-corruption and bribery matters, including a description of the relevant policies, outcomes and the risks related to those topics. The directive references the UNGPs as an international framework that companies can rely upon in providing this information.⁴⁴

3.2.2 Human rights reporting trends

Lawyers who advise companies on reporting and disclosure will want to be aware of the changed stakeholder expectations for how companies should communicate about their management of human rights risks. This is reflected in the trend towards greater human rights reporting requirements, as discussed immediately above, and a corresponding business case for increased

transparency. The UNGPs provide the accepted framework for companies to report on their approach to human rights,⁴⁵ and there are growing examples of companies reporting information in line with their provisions.⁴⁶ In this way, companies can meet stakeholder expectations without posing undue risks to the business itself.

Lawyers who advise companies on these issues may be concerned that disclosure of certain information that is critical to the company may then be used against the company in litigation or public campaigns. As noted in section 2.3.2.6(b) above, Guiding Principle 21 recognises that companies cannot be expected to disclose commercially sensitive information, including information that is legally protected against disclosure.

At the same time, there may be benefits to the company from increased transparency on human rights that can offset the risks to the company, including:

- the need to be prepared to meet new and emerging regulatory requirements for non-financial reporting or where non-financial issues are relevant to publicly disclosed reports or associated materials, or to get out ahead of the trend in this direction;
- growing pressures on companies from investors and business partners (customers, joint venture partners, etc) to demonstrate that human rights risks are being managed;
- experience showing that the risk of sharing information in general is often far lower in practice than the risk of being non-transparent, which can fuel suspicion, distrust and rumour among stakeholders along with assumptions that the company is doing nothing to address human rights risks;
- the ability of companies to demonstrate that they are using what opportunities and leverage they reasonably can to seek to improve human rights outcomes in relation to their operations; and
- the potential for the discipline and process of reporting (and of internal audit or external assurance) to trigger the internal discussions that can, in turn, support and enable improved human rights risk management processes.

Moreover, leading companies are beginning to report specifically on how their human rights performance aligns with the UNGPs.⁴⁷

Therefore, lawyers who advise companies on reporting and disclosure should be aware of and understand the evolving law requiring greater transparency on human rights performance and the trends on human rights reporting that are developing worldwide.

3.3 Disputes

As noted in section 2.1.2 above, the European Commission of Ministers in 2016 issued detailed recommendations regarding the need for its member states to identify and address gaps between existing legislation and implementation of the UNGPs in their Member States. Prominent among these are recommendations to increase access to remedy for human rights violations that arise from business activity. The recommendations urge increasing access to remedy for civil and criminal violations by businesses, including judicial and non-judicial dispute resolution mechanisms.

3.3.1 Litigation

Even without further specific laws that increase access to remedy, claims against companies for alleged involvement in human rights abuses are increasingly occurring under different theories and in different jurisdictions.⁴⁸ A key driver of such litigation is the increasing cooperation and rapid communication among actual or claimed victims, local human rights activists and international lawyers, including pro bono counsel from major law firms. These disputes are not confined to the courts but are often accompanied by public outreach, education and advocacy campaigns.⁴⁹ Some of the more significant developments are discussed below:

US Alien Tort Statute

Under the US Alien Tort Statute (ATS) 28 USC s. 1350, the US courts have heard numerous international human rights claims against companies since the mid-1990s. The ATS has been construed to provide foreign plaintiffs with access to the US courts for business-related human rights abuses committed abroad. This has resulted in the filing of about 180 lawsuits and settlements estimated to be worth roughly US\$80m.⁵⁰ However, in 2013, the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co*, 133 S.Ct. 1659 (2013) ('Kiobel'), narrowed the extraterritorial reach of the ATS to cases that 'touch and concern' the interests of the US. The decision was complex and tied closely to the facts of the case, and its future application is being defined by further litigation in other cases.⁵¹

Other approaches

Nevertheless, the ATS is not the only basis for legal liability for human rights harm. Other legal theories have been used as a basis to challenge human rights violations in ATS lawsuits, for example, state tort-based claims are typically pleaded as well — assault and battery, wrongful death, etc — which the *Kiobel* case does not address.⁵²

Approaches in other jurisdictions have included a series of tort-based claims filed in the UK courts, including against companies or over activities occurring in Côte D'Ivoire, Nigeria, Peru and South Africa.⁵³ In 2015, for example, an international oil company settled a lawsuit for £55m that had been filed against it in London by 15,000 members of the Bodo community in Nigeria, who had sought compensation for two oil spills in 2008 and 2009, allegedly caused by the company's failure to properly maintain the pipes and respond quickly to the spills.⁵⁴

In *Chandler v Cape plc* [2012] EWCA (Civ) 525 ('Chandler'), the English Court of Appeal upheld the legal theory underlying settlements in a number of these cases — namely, that parent companies that are directly involved in, or otherwise control, their subsidiary's operations can owe a duty of care to victims injured by the subsidiary. In *Chandler*, the Court of Appeal determined that a UK parent company could owe a duty of care to protect employees of a defunct South African subsidiary from asbestos exposure.

This basis also underpins a Canadian trial court's denial of a motion in 2013 to strike a complaint filed by Guatemalan villagers against a Canadian parent company for gross human rights abuses allegedly committed by security forces protecting the mining property of the parent company's

Guatemalan subsidiary. The court concluded that the complaint had properly pleaded a novel duty of care owed by the parent company to the villagers in respect of the alleged abuses.⁵⁵

Based on these and other cases, it has been argued that in light of widely accepted international standards such as the UNGPs, businesses have a common law duty of care to exercise due diligence with regard to the potential impacts of their business activity. This duty of care would include due diligence by all entities in an enterprise, including those of its subsidiaries.⁵⁶

Supply chain contracts can also serve as the vehicle for the assertion of human rights claims. For example, in 2013, an international shoe company agreed to pay severance to Indonesian workers of an independent supplier whose factory had shut down, after a university sued the company in a state court in the US, alleging that it had breached labour provisions in its contract to supply garments with the university logo.⁵⁷

In addition, criminal law is being used to hold companies accountable for human rights abuses, as seen by the filing of cases or commencement of investigations.⁵⁸

Challenges to asserting human rights claims against companies.

Legal claims alleging business-related human rights abuses nevertheless continue to face considerable challenges.⁵⁹ As the UN Human Rights Council has observed, accountability and remedy are often elusive, even though business enterprises can be involved with human rights abuses in many ways, and ensuring accountability of businesses to provide remedy is a vital part of a State's duty to protect human rights.⁶⁰ Indeed, frustration with the need to improve access to remedy for human rights abuses has led some to urge the negotiation of a binding business and human rights treaty. As a result, in 2014 the UN Human Rights Council, in a sharply divided vote, created an intergovernmental working group to consider such a treaty.⁶¹ Whatever the fate of this process, there will likely be continued pressure on States to strengthen laws allowing greater access to remedy for victims of business-related human rights abuses.

3.3.2 Non-judicial dispute resolution

In addition to the expansion of judicial litigation, the UNGPs are also influencing the development of non-judicial dispute resolution processes to resolve business-related human rights disputes. There is a strong business case for companies to use such processes if credible opportunities present themselves. As noted in section 2.2.3 above, Guiding Principle 29 provides that use of operational level grievance mechanisms enables companies to address problems early and directly, when they are capable of being resolved much more easily. Such mechanisms also provide an important feedback loop that gives the company critical feedback on what it needs to do to avoid human rights harm in the future.

There are different types of non-judicial processes to resolve business related human rights disputes, some of which are tailored to specific issues and sectors. See, eg, the Access Facility, run by the Hague Institute for Global Justice, which specialises in access to non-judicial remedy for company/community conflict.⁶² New processes continue to be developed and debated; for example, a proposal has been put forward to broaden the reach of existing international arbitration to include human rights disputes involving multinational enterprises, their business partners and victims of abuse.⁶³

Taking advantage of credible opportunities to resolve a human rights dispute through non-judicial processes may serve a company better than judicial litigation, which can be expensive, adversarial, unpredictable, highly time-consuming, distracting to senior management attention and can destroy relationships with stakeholders. Non-judicial dispute resolution methods can be seen as a key tool of an effective and sustainable approach to corporate governance, because submitting disputes to judges and juries takes control of outcomes that may impact the company's assets and liabilities away from the company itself.⁶⁴

Indeed, lawyers have played a prominent role in urging companies to use non-judicial dispute resolution methods, particularly with respect to the use of integrated programs to manage conflict and resolve disputes with employees, which are designed to learn the cause of problems and fix them. Beyond workers, there may be similar lessons that lawyers can help clients to apply in the broader human rights field for resolving disputes with other affected stakeholders.

OECD National Contact Points

A leading example of the use of non-judicial processes to resolve human rights disputes is the growth in the use of National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises ('OECD Guidelines') to resolve human rights complaints against multinational companies. The OECD Guidelines 'are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.'⁶⁵ An NCP is a non-judicial grievance mechanism for resolving complaints that allege that a company from that State has not acted in accordance with the OECD Guidelines.

In 2011 the OECD added a new dedicated chapter on human rights to its Guidelines. It explicitly adopted the human rights due diligence process of the UNGPs as its standard for what companies should do to avoid and mitigate involvement in human rights impacts, both for a companies' own activities and their business relationships.

Each OECD member and adhering State to the OECD Guidelines is expected to have an NCP. Some NCPs are highly active. Other NCPs are less active, although this is changing.

Civil society organisations are increasingly using the NCP dispute resolution process as a public vehicle to push companies to address human rights issues. An NCP cannot compel a company to participate in mediation but is able to make a public statement if it does not do so. Although the processes of individual country NCPs vary, their decisions on complaints should be consistent in terms of impartiality, predictability, equitability and compatibility with the Guidelines.

They have become 'a potential venue to which human rights complaints regarding any and all internationally recognised rights, including workplace standards, can be brought against multinational enterprises operating in or from the 46 countries that adhere to the Guidelines, including several from emerging market countries'.⁶⁶

Empirical research on the preliminary impact of the new human rights additions to the Guidelines identifies four trends: 1) 'a greater diversity of human rights cases than in the past; 2) a diversification

of industries against which complaints are brought; 3) the growing role of the Guidelines' due diligence provisions; and 4) a higher admissibility rate [ie, acceptance of complaints] for human rights cases than for others'.⁶⁷

As a result, NCP decisions demonstrate that not respecting human rights can have hard consequences, regardless of legal requirements. For example, the UK NCP found that a UK mining company had failed to consult properly with an indigenous tribe in India when the company sought to build a project on a sacred mountain. The NCP decision sparked a major public campaign against the company, resulting in the divestiture of its stock by major institutions and a drop in its market price. Ultimately, the Indian government denied permission for the project to proceed.⁶⁸

3.3.3 Contracts and agreements

In addition to resolving disputes that have already arisen, lawyers, through their contract negotiation and drafting practice, can play a major role in preventing such disputes from occurring. To recap, a business has a responsibility to respect human rights not only in its own activities but also in its business relationships with others (Guiding Principles 13 and 19). As very large multinational business enterprises with complex supply chains begin to demand that all of their business partners and suppliers comply with the UNGPs, contract lawyers may wish to understand the implications of UNGPs for these contracts.⁶⁹ Through their central role in contract negotiation and drafting, lawyers (with their client's instructions) may be able to play a critical role in helping a company increase its leverage — as used in Guiding Principle 19 — in order to encourage or incentivise another party to respect human rights (see section 2.3.4.1 above).

The right contractual terms can create strong incentives for other parties to respect human rights, where the other party has the capacity to do so. Conversely, contract terms that increase human rights risks, or constrain the ability of the other party to address such risks, jeopardise the business's own responsibility to respect human rights (Interpretive Guide, section 8.4). In addition, lawyers may also be able to play key roles before and after the contract is negotiated and signed (eg, in designing a procurement bidding processes, conducting due diligence on other parties, etc); or in enforcing contractual terms; or designing dispute or grievance resolution mechanisms. These activities can also have a significant impact on a business's ability to influence the human rights performance of parties with whom it contracts.

This subsection discusses a few examples of contracts and agreements where lawyers may be able to help increase their client's leverage on human rights. There are other examples not listed below.⁷⁰ Again, the aim here is not to prescribe a lawyer's responsibility to provide such advice; rather, it is to begin to explore the means by which a lawyer can explore approaches and options with their client to assist them in this area.

Host state investment agreements

Early in his UN mandate, the SRSG identified investment agreements between host States and foreign investors as a key focus of concern. Such agreements are common for projects in the extractive sector; large agricultural and forestry projects; major infrastructure projects (eg, highways, railways, ports); and for water and sanitation systems. These projects have the potential to have both significant

positive *and* negative human rights impacts due to their large size, scope and physical footprint. The impacts can be positive; eg, through improved public services, new goods or services, increased employment and associated economic development and increased tax revenues. But the impacts can also be negative; eg, through displacement of people without adequate compensation or consultation, or through environmental damage with negative impacts on people's access to food and water, on their livelihoods and on other human rights.

In order to provide negotiators — including lawyers — with guidance on how such agreements can be drafted with respect for human rights, the SRSG developed a set of principles through a highly consultative process. They are attached as an annex to the UNGPs, and are entitled 'Principles for responsible contracts: Integrating the management of human rights risks into State-investor contract negotiations' (Contract Principles).⁷¹ See Appendix D.

The Contract Principles are designed to ensure that the parties and their legal advisers adequately identify the human rights risks of the project; codify mitigation mechanisms and processes in the contract negotiation process; and implement those mechanisms in the project. While the Contract Principles were intended to apply only to State-investor negotiations, their overall approach to contract negotiation — which involves identifying human rights risks; ensuring that the parties have the mutual capacity to address those risks; budgeting and clearly allocating responsibilities for addressing the risks; and avoiding contractual restraints on the ability to do so — may offer useful guidance for lawyers in negotiating other contracts that have a potential to impact human rights.

Joint venture agreements

In joint ventures (JVs), companies agree to combine their resources and expertise for a limited purpose. Such agreements are common in the oil, gas and mining industries, major infrastructure projects and other commercial investment ventures. A growing number of lawyers — both in-house and external — play critical roles in enabling their clients to address human rights risks in JV agreements.

First, the lawyer may be able to help ensure that the due diligence conducted on co-ventures adequately assesses factors such as: their human rights track record; their policies and procedures; their capacity to address the human rights risks that are likely to arise; the scope of their operational authority in the JV; and the unique skills that they bring to the JV. This may be particularly important where the majority JV party is a State-owned entity in a former conflict-affected area, where tensions between communities, vulnerable groups and the State, and resulting human rights risks, could be high.

Second, the JV agreement should provide for processes and systems that enable the JV to identify and address human rights risks, including through reference to third party standards. Requiring project financing from the International Finance Corporation or from an Equator Principle Bank (which require human rights due diligence as part of the loan application process) is an increasingly common approach. This generates a need to understand and work with the UNGPs as relevant context to negotiating and drafting the transaction documents.

Third, some leading companies in JV situations have negotiated corporate governance provisions to enable them to influence the JV's human rights performance, such as the right to monitor, require reports or audit the human rights performance of the JV; the right to place employees in key positions in the JV that can affect human rights (eg, health and safety or environmental management); or the right to require supermajority votes by the JV on critical issues that may impact human rights (such as the choice of security providers).

Merger and acquisition agreements

The UNGPs pay particular attention to mergers and acquisitions (M&A) in the context of human rights due diligence, observing that acquiring companies can inherit responsibility for human rights impacts through their M&A activities (Guiding Principle 17, Commentary). As a result, an M&A due diligence process — in which lawyers are usually heavily involved — should assess human rights risks that may arise from the proposed merger, acquisition or divestiture. Again, a number of companies in sectors ranging from extractive to ICT are integrating this lens into their existing M&A processes and others are seeking legal advice on how to do so.

Bringing a human rights lens to such processes means being equipped to identify and address potential or actual harm to people that is connected to the target company and its business relationships.⁷² Such an assessment would include the past activities of the target and the ongoing activities of the target. Identifying and addressing risks involved in the future planned activities of the combined entity will fall to those responsible for integrating and running the combined business, rather than exclusively to the M&A lawyers. Assessing human rights risks typically means more than assessing the risks of legal non-compliance.

There is typically a range of practical and legal constraints to addressing human rights in the course of M&A's, including relating to confidentiality, timing and the traditional legal compliance focus.⁷³ For instance, there will likely be practical and legal constraints on the ability of an acquirer to engage directly with potentially affected stakeholders or their representatives to understand the nature and extent of any human rights risks prior to the closing of the deal. Lawyers may need to be prepared to conduct human rights-related background research on the relevant operating/country context and to advise acquirers on available resources to gain insight into stakeholder perspectives, such as independent experts or credible proxies who could be consulted confidentially.

Supply chain agreements

Lawyers draft contracts for clients at both ends of their value chain: for their suppliers and for their distributors, buyers and end users. All of these underlying transactions can have human rights impacts. However, supply contracts for goods and services were among the first contracts to receive attention for human rights purposes, due to revelations of widespread safety and labour violations in global supply chains in the apparel and electronic industries, among others. Again, supply chain contracts can increase a party's incentive to respect human rights. However, supply chain contract terms are only part of the solution. Experience demonstrates that lawyers should be prepared to advise clients not to rely on them exclusively.

A common response to addressing potential human rights issues in supply chain contracts is to negotiate language requiring the supplier to adhere to human rights standards, often by reference to the purchasing company's supplier code of conduct. In addition, contracts often give one party the right to require reports and audit compliance by the supplier using the buyer's standards.

These are important steps, but they may not always be sufficient for at least two reasons.

First, supply chain contract terms specifying human rights standards 'are often extensive pro-forma documents with boilerplate language that suppliers must sign in order to secure the business. Rarely does a dialogue between company and supplier take place around these supplier codes, and some company leaders question whether they are even read by suppliers'.⁷⁴ Rather than a monologue, it is preferable to create a dialogue with the supplier during the negotiation process, in order to ensure that both parties understand the purpose of these standards.

Second, independent research has shown that top-down compliance audits by buyers of their suppliers are not effective on their own in ensuring sustainable improvements in respect to workers' human rights.⁷⁵ At best, they serve as snapshots in time. They do not address the supplier's awareness of potential risk, commitment and capacity to actually address any 'non-compliances' or human rights issues that are found. Moreover, the threat of terminating the relationship for breach — rather than working with the supplier to build capacity — may simply encourage cheating on standards or the use of unauthorised subcontractors. As a result, leading companies are increasingly moving away from models based largely on social compliance audits and towards more collaborative, dialogue and engagement-driven and capacity-building approaches.⁷⁶

3.4 Development of and participation in industry-specific or issue-specific standards

As discussed in section 2.1.2 above, various international standard setting bodies have incorporated or reflected the UNGPs in their norms. This process of convergence is likely to continue, with particular attention to industry-specific and issue-specific standards. Companies often ask their lawyers for advice on whether to adopt new or emerging global standards, to help shape those standards and to design the internal processes necessary to align company performance with them.⁷⁷

Indeed, corporate lawyers and bar associations (including the IBA), played a major role in the shaping of the UNGPs themselves, particularly with the respect to the concept of corporate human rights due diligence and their provisions on remedy.⁷⁸ Lawyers representing extractive companies and governments in Africa were deeply involved in the development of the Principles for Responsible Contracts, referred to in section 3.3.3 above. Bar associations have also taken the lead by developing relevant guidance on emerging global standards: eg, the American Bar Association's (ABA) Model Business and Supplier Policies on Labor Trafficking and Child Labor⁷⁹ and the IBA's Model Mineral Mining Development Agreement Project.⁸⁰

In addition, standards have also been developed for specific industries, sectors and human rights issues. For example, well before the UNGPs were endorsed, governments, companies and civil society actors came together to develop the Voluntary Principles on Security and Human Rights, the leading standard on preventing and addressing security-related human rights impacts involving private

or public security forces.⁸¹ Similarly, the Fair Labor Association (FLA) was established in 1999 as a multi-stakeholder initiative to address abusive working conditions in global supply chains.⁸² Following revisions to the Principles of Fair Labor and Responsible Sourcing, FLA members are now committed to addressing some of the most challenging issues when it comes to respecting the rights of workers, including aligning their purchasing practices with their commitment to workplace standards.

The Global Network Initiative Principles, which address privacy and freedom of expression issues in the ICT sector, were developed in 2007—08, around the same time as the UN ‘Protect, Respect and Remedy’ Framework. Deliberate efforts were made to align with the evolving broader business and human rights standard that the Framework represented.⁸³ The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and its two supplements were also developed through a consultative multi-stakeholder process. The guidance aligns with the elements of the corporate responsibility to respect while focusing specifically on the challenges involved in responsible mineral sourcing.⁸⁴

These are all leading examples of sector and issue-specific standards in the business and human rights space. Such standards have been, and will continue to be, a critical way to drive forward meaningful implementation of the responsibility to respect human rights, particularly for a company’s leading human rights risks. Moreover, the discussion and exchange that occurs among members and stakeholders involved in such initiatives can be an important means of addressing emerging challenges and of seeking to build leverage through collaborative responses to systemic human rights issues. In short, such standards can give companies more precise human rights risk management tools and their legal advisors would do well to be aware of the credible initiatives that exist and point their clients to them where appropriate.

Participation in the development of such standards can provide advantages to clients in creating clarity as to their responsibilities, transparency concerning their management approach and comfort that competitors will be abiding by the same standards. As a result, lawyers may wish to consider encouraging their clients to engage in the development of such industry standards where none exist or are still at a formative stage.

4. What are the implications of the UNGPs for the independent responsibilities of lawyers?

The UNGPs were not intended to override or supplement legal professional codes of conduct, given the critical role that lawyers play in upholding the rule of law and supporting the administration of justice. That role supports a key foundation for the responsibility to respect human rights. Nor were the UNGPs intended to impose extrinsic standards on a lawyer's conduct, other than those that are contained in the scope of services agreed between the client and lawyer, the relevant laws and the professional standards that govern a lawyer's conduct. Rather, the UNGPs provide, for the first time, an authoritative methodology that helps lawyers to advise and serve clients by showing them how to avoid and mitigate involvement in human rights harm.

Two issues are discussed below: legal independence and consideration by legal counsel of human rights issues in providing advice and services to clients. These two issues can be accommodated in a coherent and complementary manner.

4.1 The principle of independence for lawyers and the legal profession

A universal component of a lawyer's professional duty is independence. This is reflected in Principle 18 of the United Nations' 1990 Basic Principles on the Role of Lawyers ('UN Basic Principles'), which provides that 'Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their function.'⁸⁵ The UN adopted the UN Basic Principles in its Eighth Congress on the Prevention of Crime and Treatment of Offenders to ensure that all persons have effective access to legal services provided by an independent legal profession in order to protect their human rights, and that lawyers be protected from persecution and improper restrictions in providing such services. The UN has applied UN Basic Principle 18 as well as other Basic Principles to cases in which States have harassed lawyers representing accused persons in politically sensitive cases.⁸⁶

The principle of legal independence is echoed in the IBA's 2011 International Principles on Conduct for the Legal Profession, which refers to UN Basic Principle 18 and states, 'A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.'⁸⁷

This means, among other things, that access to legal services provided by independent lawyers is a fundamental principle that underlies the rule of law, which is a foundation of the responsibility to respect human rights under the UNGPs. A client has a right to demand, and a lawyer has an obligation to provide, a robust legal defence to allegations or claims that it has engaged in conduct that violates human rights; to seek judicial determination of human rights issues; and to seek legal advice and services regarding them, without being identified with their client or client's causes or being deemed complicit in their activities. This right and obligation cannot be abridged even if the client is highly unpopular and is accused of violating laws relating to human rights. The UNGPs do not disturb this principle.

Of course, lawyers remain responsible for their own conduct, as distinct from the conduct of their clients. In some jurisdictions, a lawyer's misconduct can result in legal liability to provide remedy to a non-client, such as participation with the client in financial fraud on investors.⁸⁸ The UNGPs add nothing new to these situations.

4.2 Consideration of the UNGPs when providing legal advice and services in the exercise of a lawyer's independent judgment

The principle of legal independence does not preclude or discourage lawyers from taking into account the UNGPs in providing advice and services where they are relevant. Given the shifting boundaries between legal standards and global norms, it may be difficult, as a practical matter, for a lawyer to advise on the former and ignore the latter. This is particularly acute where the context for the lawyer's services is in an environment, sector, relationship or setting that poses risks of human rights harm.

Even when advising on legal compliance, lawyers may be unable to avoid considering global norms such as the UNGPs in order to assess and advise on the likelihood of prosecution, the size of penalties or fines, reputational and other business harm and the feasibility of measures that the client can take to mitigate or avoid them; particularly as such actions may also need to be sufficiently flexible to accommodate future change.⁸⁹ As the ABA has observed;

'Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.'⁹⁰

It has been suggested that as business clients must navigate increasingly complex and inter-connected legal and governance regimes, in advising them a lawyer may also act to support the client's best interests in one or more of three roles: as a technical expert; as a wise counsellor or trusted advisor; and/or as an effective leader.⁹¹

- As a technical expert, a lawyer may be asked to exercise his or her expertise, skill and judgment in applying the law to the facts. To do so effectively, a lawyer should understand the UNGPs to see how they shape and influence existing law and regulation and emerging forms of governance.
- As a wise counsellor or trusted advisor, a lawyer may be asked to provide relevant context in order not only to answer the question of what is legal, but also, what is right and fair in the context of the business' medium to long term interests and sustainability, and what should be done.

Answering these questions may require consideration of a broad variety of contextual factors in addition to what is technically legal, including institutional, political, economic, policy, reputational, ethical and geopolitical factors. These factors include the global consensus on business and human rights that is expressed in the UNGPs and their subsequent uptake and practice.⁹²

- Finally, lawyers may be asked to act as leaders in varying capacities — as heads of law firms, inside legal departments, representative bodies for the legal profession and other institutions — and are often expected by their clients to exercise decision-making authority on particular subjects. As a leader, a lawyer may be responsible for the structuring of his or her institution’s systems, processes and visions in a manner that respects human rights.⁹³

Section 3 above describes some of the legal practice areas to which the UNGPs may be highly relevant when lawyers are acting in one or more of these roles.

The professional standards of conduct of a number of bar associations have recognised that attention to human rights is a key component of ethical lawyering.⁹⁴ Bar associations have specifically recognised that the UNGPs and related human rights standards may be increasingly relevant to the advice and services rendered by lawyers, even when they are not reflected or incorporated in the law. For example, when it endorsed the UNGPs in 2012, the ABA found that they are properly included as part of a lawyer’s advice, since the UNGPs are ‘likely to influence legal regulations and processes’ and that ‘corporations may find more clarity in standards and compliance requirements, States may step-up investigation and enforcement, and individuals harmed by corporate activities may benefit from enhanced causes of action and access to justice’.⁹⁵ See also, CCBE’s 2014 Report on Corporate Social Responsibility and the Legal Profession.⁹⁶

5. What opportunities do the UNGPs present for business lawyers?

As noted above, the UNGPs do not expand the obligations of lawyers to their clients under professional codes of conduct, but they do present significant positive opportunities for business lawyers, their clients and societies. This is because the UNGPs present lawyers with an authoritative methodology to advise their clients on how to identify and address human rights risks that did not exist before. Some of the specific reasons why understanding these issues is critical to assisting and supporting business clients are set out below.

5.1 Opportunities for internal counsel

As global business operations have become more complex, the responsibilities of internal company counsel have increased. Internal law departments have become highly sophisticated and powerful. They often displace law firms as the primary counsellors to top executive management and the board. They have been granted significant decision-making authority on many important issues.⁹⁷ Moreover, general counsel offices play a critical role in the embedding of core corporate ethical values into effective company systems, key decisions and processes.⁹⁸ As a result, questions about human rights frequently land on the desk of the company general counsel, who is ‘now often the go-to counsellor for the CEO and the board on law, ethics, public policy, corporate citizenship, and country and geopolitical risk’.⁹⁹ To answer them, the general counsel should be prepared to act not only as a technical legal expert, but also as a wise counsellor or trusted advisor and sometimes as the company’s leader on human rights.

As a result, some companies have chosen the legal department to drive their human rights commitments. And even when it does not lead, the legal department often plays a critical role in shaping implementation of human rights responsibilities. The law will be central to the process of assessing national, regional and global legal and regulatory frameworks and their alignment with the company’s broader human rights responsibilities and in drafting contracts and other agreements that establish the terms of the company’s key business relationships and which directly affect the company’s leverage in those relationships.¹⁰⁰

5.2 Opportunities for external law firms

Law firms have become international in scope; for example, the world’s largest law firms may have dozens of offices in as many countries.¹⁰¹ Not surprisingly, leading global companies are starting to demand that their external counsel consider human rights in the business law advice that they provide. Professor Ruggie stated in a meeting with IBA leaders and corporate counsel in 2013, ‘where previously corporate counsel expressed deep scepticism about the implications of the UNGPs, corporate in-house legal leaders are now challenging their outside counsel to proactively advise them on human rights risks’.¹⁰² This has an undeniable impact on the services provided by outside law firms.

In response to this demand, leading international law firms are starting to train their lawyers to consider how their clients may be involved with human rights impact and some are seeking to develop specialised practices in business and human rights. At the same time, national bar associations and law societies are exploring how legal advice on business and human rights issues fits within the scope of lawyer's engagement with the client.

Thus, business lawyers will increasingly need to be prepared when their clients ask them for such assistance. Developing the capacity to respond enables lawyers to align their services with the client's best interests.

6. What issues do the UNGPs present for business lawyers and how can they be addressed?

6.1 Issues for business lawyers generally

Business lawyers, whether internal or external, face a common set of issues in addressing the potential implications of the UNGPs for legal practice. These include the following:

- First, there is a potential lack of clarity associated with advising on soft law issues compared to hard law. Clear guidance may not yet be available but understanding the UNGPs will enable lawyers to demystify the subject of human rights. It will enable them to better understand the many practical ways in which their services can affect a business's ability to respect human rights.
- Second, the legal team may lack specific competence and experience to advise on the human rights implications of a particular legal service. Of course, not every lawyer can or should be an expert on human rights. And lawyers should not attempt to advise on matters where they lack competence or capacity to do so. However, lawyers who advise businesses should acquire a basic understanding of how to spot potential human rights issues related to their legal services, in order to advise their client of the need to bring in human rights expertise where necessary — either from within the client, the law firm or elsewhere.
- Third, a client may seek advice only on narrow, technical legal issues. In such cases, there may be benefit in educating and exploring with the client the need to be aware of the big picture and the associated risks of not considering the wider human rights context. Analogously, it is not unusual for experienced lawyers to point out to their clients the reputational and ethical risks of engaging in complex financial transactions that may pass muster under a narrow, technical legal analysis. Such alerts can serve the client's best interests and add value to the lawyer's services.¹⁰³ The same should apply to alerting the client on specific human rights concerns.

6.2 Issues for law firms

Under Guiding Principle 14, the responsibility to respect human rights applies to all business enterprises, 'regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.'

Law firms are also accommodated by this very broad definition. The law firm sector is quite large worldwide; eg, the Global 100 law firms are reported to have had 2015 revenues of US\$92.7bn as a group, and the top ten firms were individually reported to have revenues ranging from US\$1.85bn to US\$2.612 bn.¹⁰⁴ Its global profile is also very diverse; there are not only large international firms but a large number of practitioners practicing through small or medium-sized firms, or as sole practitioners.

Application of the responsibility to respect to law firms is straightforward with regard to aspects of its business other than the provision of professional legal advice and services; eg, a firm's employment practices and its general operations and supply chain. However, since law firms are also professional organisations, care must be taken not to inhibit the exercise of their independent professional responsibilities and obligations, discussed in section 4 above.

Law firms, like other business enterprises, are keen to protect and enhance their reputation. Normally, the need for a firm to preserve client confidences and serve a client's best interests would make it highly inappropriate for a firm to defend itself in public by demonstrating its efforts to raise and explore options with a company to act otherwise. Doing so would undermine the role of the lawyer in upholding rule of law and the administration of justice and would not further the purposes of the UNGPs.

Nevertheless, there have been cases in which a law firm has been required to reveal the advice it provided to a client; eg, when the client invokes the firm's advice as a defence to allegations against it, and waives the confidentiality of the advice. In such cases, the firm's advice may well be the subject of public scrutiny.¹⁰⁵ More recently, the role of law firms was highlighted where an unauthorised leak of confidential documents revealed that a law firm had created thousands of off-shore anonymous corporations for clients, some of which were alleged in the press to have been created to shield the identities of the owners of the companies from their involvement in human rights harm, as discussed in section 6.3.2.2 below.

When faced with public criticism, a law firm that has committed to implement human rights due diligence may be in a better position to defend its reputation against claims of involvement in human rights harms than one that does not. Although normally client confidentiality obligations would prevent a law firm from disclosing the specifics of its advice, it should nevertheless be able to provide information in an anonymised and aggregated fashion, in order to explain generally how it is implementing its policy commitment to respect human rights in the provision of its services, as discussed in section 6.3.2.2 below.

With these points in mind, we now turn to discuss the issues that law firms may wish to consider in respecting human rights under the UNGPs.

6.3 What should law firms think about when implementing the UNGPs?

6.3.1 Developing and embedding a human rights commitment

In order to respect human rights, a business is expected to develop and adopt a public commitment to respect human rights that extends to all aspects of its operations (Guiding Principle 16). The UNGPs do not prescribe the form that such commitments should take. However, for a large global law firm a policy commitment is likely to look very different than a policy commitment for a small legal practice.

Business reasons for adopting a human rights commitment

There may be good business reasons for a law firm to adopt a clear commitment to respect human rights. Like other business organisations, firms need to protect and enhance their reputations. Moreover, firms are increasingly asked to adhere to different supply chain standards of conduct by different clients. Such standards increasingly contain human rights standards and commitments. A law firm's human rights policy commitment, backed by evidence that it is embedded in the firm's systems, may enable the firm to demonstrate that it is functionally in compliance with such codes.

A firm may wish to consider putting clear language in its commitment that explains how the commitment aligns with the responsibility of its lawyers to act in the best interests of their clients. The language could emphasise the desirability of exploring and advising, where appropriate, the business client on the 'bigger picture', including: identifying and addressing human rights issues connected with the representation; managing legal and reputational risk in difficult business environments; and navigating the complex social, cultural and political contexts in which legal advice is being given. It could reflect the positive impact that legal advice, informed by an awareness of human rights issues, can have on the client's ability to effectively manage its own human rights risks, which are increasingly linked to its legal risks.

A law firm may wish to test the language of its commitment to respect human rights internally to ensure that there is adequate understanding and buy-in from across the firm before the commitment is made public. This may require an intensive period of building awareness and capacity about these issues.

Embedding the policy

Embedding a human rights commitment in a law firm may be challenging because, compared to some of their inside counsel colleagues (particularly those in industries with high risks of human rights impacts), a firm may be more insulated from the human rights concerns of their business clients. As a result, law firm lawyers may be less familiar with human rights issues or lack understanding of how their services may help their clients avoid human rights impacts.

In addition, law firms are relatively flat organisations compared to many of their business clients, in which lawyers practice as independent professionals. This may make it more difficult for firms to embed human rights policy commitments into their processes and systems, creating a premium on the need for structures that support shared learning of experiences and best practices.

In order to embed the policy commitment, the firm's leadership may wish to consider providing appropriate resources and incentives; eg, to enable lawyers to regularly talk to each other within and across practice groups, in order to share the examples of how they are implementing the policy commitment and serving the best interests of their clients by doing so (recognising the limitations imposed by client confidentiality). This could include helping the client identify the 'business case' for respecting human rights that is specific to the client's sector.

Building capacity

Since business and human rights is a relatively new area for law firms, a firm may wish to develop the capacity to identify and address potential issues for their clients, and to resolve the tensions and dilemmas that will inevitably arise. These are worthy of early attention and open discussion. Doing so will help to minimise the number of unforeseen issues arising once the commitment has been adopted and ensure that appropriate resources and expertise are available when needed. Firms that have established dedicated business and human rights practice groups may be able to use their expertise to provide practical advice and support on how to address human rights issues across different practice groups. Firms that have not created such groups may wish to build internal capacity (or identify external experts) on business and human rights in other ways before adopting a public commitment.

One source of capacity building could be a firm's pro bono activities. Law firms are justifiably proud of their pro bono activities, which promote the rule of law. Pro bono service is often highly rewarding to lawyers personally because it allows them to apply their professional skills to promote welfare, reduce poverty and increase access to justice for the most vulnerable in society, including victims of human rights abuse by business.¹⁰⁶ Pro bono legal work for a firm, however, is similar to a charitable donation by a company; that is, the contribution does not offset a failure to respect human rights elsewhere in its operations (Guiding Principle 11, Commentary). That being said, pro bono work can be an excellent source of learning regarding business and human rights issues. For firms or sole practitioners, external personal roles to act as part-time judges or leaders of professional groups can also be a proportionate and powerful contribution to respect for human rights.

6.3.2 Human rights due diligence in a law firm

As discussed in section 2.3 above, the key elements of due diligence are: assessing human rights risks; integrating and acting in response; and tracking and communicating human rights performance and remediation (where appropriate). However, human rights due diligence 'is not a single prescriptive formula. Different size enterprises in different industries, with different corporate structures and in different operating circumstances, will need to tailor their processes to meet those needs' (Interpretive Guide, section 6.1). This is particularly true for law firms, in light of the unique role of lawyers to uphold the rule of law and the administration of justice. The specific means through which law firms exercise human rights due diligence should align, and not interfere with, that unique role.

6.3.2.1 ASSESSING HUMAN RIGHTS IMPACTS

The starting point for a business's responsibility to respect human rights is gauging its human rights risks. This includes risks from the firm's overall operations and risks from the services it provides to a client. For a law firm, the primary focus of the assessment would be on future potential risks, since — as noted above — the UNGPs do not restrict the right of businesses to robustly defend legal claims that they violated human rights. Moreover, the assessment would not involve assessing human rights risks that the client's business poses generally. It is only on risks that are directly linked to the services provided to the client.

For any business, the key focus of an assessment should be on the severity of the risk. For a law firm, severe impacts might be associated with the services it provides to businesses with operations or business relationships in countries that are afflicted by conflict, or businesses in sectors with a history of chronic child or forced labour in the supply chain. A large law firm with multiple clients and multiple matters of representation may wish to prioritise by focusing on those services that raise the greatest potential risk of severe human rights impacts.

However, large, multinational law firms are not the only firms that represent businesses with potentially severe human rights risks. Small, specialised firms can represent them on contracts or projects that have the potential for severe impacts. For example, a small law firm that represents a security contractor providing services to businesses in a conflict zone, or that negotiates supply chain contracts for buyers in countries with poor labour practices, may wish to pay close attention to the link between its services and their clients' potential involvement in those risks.

For law firms that do not advise clients on matters with a likelihood of severe human rights risks — eg, a domestic real estate conveyancing practice — the firm's leading human rights risks may reside solely in its employment practices and in its supply chain. However, this should not be assumed without actual analysis.

IDENTIFYING THE RISKS

To assess its specific risks, a firm may wish to ask the following questions in connection with the subject of the legal service or advice for a client:

- Who are the stakeholders whose rights may be affected by the activity or project for which legal advice or services are being sought? — eg, factory workers in a major supplier or local communities around a mining project.
- What is the severity of a potential impact? — eg, a major factory accident or excessive violence by security forces protecting the mine.
- What is the likelihood of potential impacts, based on the client's operating context, business relationship context and management system context? — including its capacity to respond appropriately to human rights risks, even if advised of their existence.

Identification of these risks at the outset of the client relationship is important, since the firm will normally not be permitted to disclose the advice it gave its client and it will be difficult for the firm to withdraw from the relationship after it starts, other than in very specific circumstances.

The nature of the legal services being provided by the firm may be an important factor in determining the likelihood of the client's infringing on human rights absent of appropriate advice from the firm. For example, an M&A lawyer could help his or her client identify and address, in relevant due diligence and contractual documents, the likely human rights issues of the target company.

Typically, a large law firm does not accept a client engagement without prior due diligence on risks such as conflicts of interest, money laundering, bribery and corruption, as appropriate to the

jurisdiction. An independent and centralised group within the firm often conducts this work. The larger the firm, the more complex these processes will have to be.

Aspects of these existing due diligence processes may already touch on human rights issues. For example, there is a very close connection between the likelihood of negative human rights impacts and the presence of corruption. Larger firms may wish to consider explicitly integrating appropriate human rights due diligence on prospective engagements and the relevant mandate or retainer into existing pre-engagement screening processes, based on consideration of the severity and likelihood of potential impacts. Where new issues arise during the representation, the same reviewing group or compliance officer could be asked to review the new information from a human rights perspective in conjunction with the relevant lawyers working on the matter.

POTENTIAL CONSTRAINTS ON RISK IDENTIFICATION

In many cases there may be sufficiently obvious red flags — based on the nature of the matter and the services — to enable a law firm to assess the human rights risks of a particular matter prior to formal engagement of the firm by the client. However, this may not always be true. For example, the client may be reluctant to disclose confidential information relevant to such risks in pre-engagement discussions when such communications may likely not be legally protected. In such a case, the interests of assuring the availability of access of clients to the confidential advice of independent legal counsel would make insistence on such pre-engagement disclosure highly problematic.

Moreover, compared to in-house counsel, a law firm may not understand the full scope of the client's plans. It may only be called in to address a narrow legal issue, and the client may not be willing to share relevant information or to pay to let the firm dig more deeply. Absent client permission, the law firm may likely be precluded from engaging with potentially affected stakeholders and, in any event, may not have the capacity or expertise to do so. In such cases, the firm will have to make reasonable assumptions based on what it knows about the matter, what it can learn from third party experts and what is publicly available. This highlights the value of raising the possibility of these contingent issues with the client, and to discuss possible responses at the start of the relationship, in order to minimise problems and surprises arising later on. In some cases the engagement letter may present an opportunity to raise and address these issues at the beginning of the relationship.

NEW FACTS

Finally, during the engagement, the client and the firm may become aware of new facts that indicate that the client may be involved in, or may be at risk of involvement in, human rights impacts. Or the scope of the engagement may expand to or focus on a new area where human rights issues may arise. For example, it may be revealed that a JV partner of a client has an unanticipated child labour issue in its supply chain, which is now linked to the JV's operations. Since due diligence is ongoing, the firm may wish to consider putting processes in place that can identify changing circumstances and enable it to revise its risk assessment accordingly (Guiding Principle 18).

6.3.2.2 INTEGRATING AND ACTING UPON INVOLVEMENT IN HUMAN RIGHTS IMPACTS, BOTH ACTUAL AND POTENTIAL

MODES OF INVOLVEMENT IN NEGATIVE IMPACTS

To recap the discussion in section 2.3.3, after a business assesses the human rights risks associated with its services, it is expected to integrate the findings from the assessments and take appropriate action to respond to them, based on its mode of involvement. A business can cause, contribute or be directly linked to a negative human rights impact, within the meaning of the UNGPs (see section 2.3.3).

Law firms can also be involved in human rights impacts in the advice and services that they render to clients. For example, a firm could bribe a judge to obtain a favourable ruling in a lawsuit. This patently illegal conduct would infringe directly upon the right to a fair trial and the right to equal protection of the law.

Rather than cause a human rights impact directly, it is more likely that a lawyer or law firm could contribute to a client's negative human rights impacts. Here are some possible examples:

- Establishing anonymous shell corporations and using law firm bank accounts for the purpose of enabling a senior government official of a highly impoverished country — whose citizens lack access to adequate health care and high rates of infant mortality — to launder money obtained under suspect circumstances from his business arrangements involving the country's public natural resources.¹⁰⁷ This would exacerbate the poverty of the country's citizens and undermine the already-weak capacity of the government to provide basic health services.
- Establishing anonymous off-shore corporations to enable the client to avoid international embargoes in order to fund the bombing of civilians during that country's civil war.¹⁰⁸
- Proactively designing, developing and implementing unfair and deceptive debt collection practices in order to obtain consent orders for the garnishment of 50 to 100 per cent of the wages of tens of thousands of low wage earners, thereby depriving them of their rights to access to the courts for remedy, to an adequate standard of living and to a family life.¹⁰⁹

Law firms could also be seen as directly linked to the negative human rights impacts of their clients that they did not cause or contribute to. For example, assume that a lawyer for a company acting on behalf of an international manufacturer and seller of portable ultrasound equipment negotiates and drafts contracts for the sale and licensing of such equipment in a country that discourages the birth of female children. The lawyer then learns that the equipment sold under the contract has been used to identify female fetuses for abortion. In this case, the lawyer could be seen as directly linked to the impact, even though it neither caused nor contributed to it.

POSSIBLE RESPONSES TO NEGATIVE IMPACTS

Under the UNGPs, a company's response to involvement in a human rights harm depends on its mode of involvement with the harm. To recap section 2.3.4 above: (1) if it caused the harm, the

business should cease the action causing the harm and remediate the harm; (2) if it contributed to the harm, it should cease the action contributing to the harm, use or build leverage to mitigate the risk of future harm and contribute to remediation of the harm; and (3) if it is merely linked to harm that it did not cause or contribute to, it should use or build leverage to seek to mitigate future harm if that is possible; however it is not expected to provide remedy.

Application of the concept of ‘leverage’ under the UNGPs to the law firm/client relationship is problematic if it means imposing a responsibility on the lawyer to act in a manner that is external to its existing professional responsibility and the client’s best interests. But, as noted in section 2.3.3.5 above, leverage is a very flexible concept. It does not require a lawyer to abrogate his or her professional responsibilities and act contrary to the client’s instructions or the client’s best interests. Instead, advising on human rights and how to address them can add significant value to the exercise of those responsibilities.

Generally, lawyers have a duty to act independently in the client’s best interests, including the duty to preserve the client’s confidences. Lawyers also have the right not to be identified with the client or the client’s causes. Nevertheless, as discussed in section 4, these professional obligations do not restrict a lawyer’s ability to advise a client in confidence of the steps that the client can take in the client’s best interests to avoid or mitigate harming human rights under the UNGPs, to the extent that lawyers are permitted or encouraged to do so by professional regulatory authorities. The UNGPs do not add to these existing professional responsibilities. But they now provide an authoritative framework and a methodology for a lawyer’s advice on these issues.

The ability of a lawyer to provide such advice may vary. Where existing law adequately protects human rights, then the lawyer need do no more than advise on how to comply with the law. However, where laws do not adequately protect human rights, where they are ambiguous or where the future evolution of the law or its enforcement is uncertain, clients may wish for guidance from their lawyers on how to conduct business in order to mitigate or avoid involvement in such harm. The business case for providing such guidance is particularly strong where the risks of human rights impacts are severe (eg, doing business in a conflict zone, where the risk of company involvement in gross human rights abuses caused by security forces is high).

However, a lawyer’s ability to provide such guidance, and a client’s willingness to listen to it, is not guaranteed. Here are a number of ways in which firms could build such capacity and be regarded as wise counsellors on the subject:

| Providing the client with the knowledge and means to respect human rights | |
|--|--|
| Build internal firm capacity | <p>Develop the internal capacity to identify and provide advice on human rights issues related to its services, or identify outside experts to whom it could refer clients;</p> <p>Providing advice and services on business and human rights on a pro bono basis to clients may be a good way for a firm to build its own capacity and expertise.</p> |

| | |
|--|---|
| Tactfully communicate with client about risks | Tactfully raise with a client, in anonymised form, the kinds of problems that other companies have faced when they have not fully addressed human rights issues associated with a similar transaction or sector and offer to advise on how to avoid those problems. |
| Provide capacity to clients | Offer to provide capacity building to clients and their legal departments on human rights issues, either by itself or with outside experts as appropriate. |
| General client issue briefing | Issue client briefings and alert bulletins on specific human rights issues related to its individual practice groups that highlight key business, human rights, legal, regulatory and governance developments. |
| Help to develop industry specific standards | Participate in multi-stakeholder dialogues or forums where the firm can champion business and human rights issues, including the development of issue and industry-specific standards and metrics, discussed in section 4.2.5 above. |
| Participate in bar associations or other specialist professional groups | Support the efforts of law societies, bar associations and other specialist professional groups to provide training and guidance for member lawyers on business and human rights issues. ¹¹⁰ |

CONSIDERING WITHDRAWAL FROM THE CLIENT RELATIONSHIP AS A LAST RESORT

If a severe negative impact occurs through a business relationship, and continues notwithstanding the business's efforts to influence the third party to cease the conduct, the company is expected to *consider* withdrawing from the relationship (Guiding Principle 19, Commentary).

The same applies to law firms and independent lawyers. If, notwithstanding a lawyer's advice, the client continues to engage (or appears likely to continue to engage) in harmful conduct, then the lawyer should consider withdrawal from the relationship, if doing so is legally permissible. Withdrawal is not an automatic conclusion. As discussed in section 2.3.4.2, the decision to terminate a business relationship is a difficult one for any business. It requires analysis of the severity of the harm; how crucial the relationship is to the business; the constraints imposed by law or contract on termination; and the potential adverse impacts on human rights from termination.

Withdrawal from a client relationship is particularly problematic for a law firm or lawyer. It may not be a realistic option in litigation; eg, where the firm has been retained to defend a business client against claims that it is legally liable for human rights impacts, or to challenge the legality of government regulations and legislation relating to the company's human rights performance in court before an independent judiciary. The UNGPs do not compel such a result, as discussed earlier.

Withdrawal might be more appropriately considered outside the litigation context, but even then it is highly difficult and could undermine the role of the lawyer in upholding the rule of law and the administration of justice. Withdrawal may deny the client the opportunity to obtain confidential advice on the desirability of taking the UNGPs into account. It is rare, although not unprecedented, for a firm to withdraw its representation of clients where continuing the relationship will conflict with the firms' stated ethical policies. However, withdrawal ought to be a last resort.

Moreover, staying in the relationship, and continuing to try to advance the business case to the client of preventing and mitigating human rights impacts (within the scope of the attorney client relationship), may serve the purposes of the UNGPs better than leaving (if that is possible) and being replaced by another firm whose lawyers say nothing about the client's potential human rights impacts.

TRACKING

The tracking processes used by a business to understand its human rights performance ought to make sense for its operations and its culture. Law firms tend to be relatively flat organisations; larger firms have multiple clients, multiple practice groups and multiple matters. Typically in a firm, a relatively small number of lawyers are responsible for handling a single matter. A tracking system for a firm (in the context of its legal services as opposed to its general operations), could be no more than a review of how the firm has identified and responded to human rights issues related to its client representation, as part of a broader or routinised review process. Alternatively, there may be key moments where a review seems useful or necessary.

For example, assume that an M&A client acquires a company with a poor track record on human rights and then becomes embroiled in a violent conflict with a community, which leads to severe negative impacts and to lawsuits. It can be important for the firm to understand whether it appropriately advised the client to assess the potential for community conflict arising from inherited human rights risks as part of its acquisition due diligence. As a practical matter, it may be difficult for the firm to understand fully the human rights impacts of its advice and services, because it may only be retained at specific points in a legal transaction and lack the full perspective that in-house counsel possess regarding a transaction. As noted above, a firm has no obligation to determine whether its advice has been followed and a client has no obligation to provide that information to the firm.

Nevertheless, a firm may wish to consider asking a number of questions to evaluate the effectiveness of its effort to mitigate human rights risks, including the following:

| Key tracking questions for a law firm | |
|--|---|
| Identifying | At the inception of the client relationship, did the firm appropriately identify the potential human risks that could be involved in the representation (based on the client's sector, operational context, type of legal services provided and the willingness and capacity of the client to address these risks)? |
| Discussing | Did the firm discuss these risks with the client and evaluate the client's response? |
| Monitoring | Did the firm monitor the engagement to determine whether the identification of human rights risks was correct; whether the client was acting to address these risks; and whether circumstances changed such that a new discussion might be needed? |
| Evaluating | What was the nature and severity of any human rights impacts that occurred during the representation? Why did they occur? What was the firm's involvement in the impact? |
| Responding | What did the firm do/try to do in response? |
| Learning | What lessons did the firm learn from the experience? Were those lessons disseminated throughout the firm, to the client, to others in the same sector or to those engaged in similar transactions, with appropriate regard to client confidentiality? |

COMMUNICATING

Guiding Principle 21 provides that a business should be prepared to communicate about how it is addressing its human rights impacts. But, as noted above in section 2.3.2.6, this principle does not infringe upon the need to safeguard client confidences and information. Applying this to the law firm context is likely to be most meaningful if the firm focuses on whether the client itself is prepared to

communicate about its approach to addressing its human rights risks, and does so where appropriate and necessary. The need to protect client confidences does not prevent a law firm from helping the client to improve what it communicates about its human rights performance, even where current law may not require it to do so.

Guiding Principle 21 also provides that companies should promptly inform people about risks that they need to know about in order to be able to protect themselves. Law firms, which can learn about such risks during their engagements with clients (eg, discovering product design flaws when investigating the cause of accidents), can play a unique role in urging the company to warn consumers promptly about those risks.

REMEDATION FOR A LAW FIRM

Businesses are expected to provide remedy for human rights impacts that they cause or contribute to. As discussed in section 4.1 above, in some jurisdictions a lawyer's own misconduct may result in a legal liability to provide remedy to a non-client. The UNGPs add nothing new to these situations. Other than in such cases, a firm's contribution to any remedy for human rights harm is likely to require a different approach than directly providing remedy to the victim. This is a result of the firm's duty to act in the best interests of the client and the confidential nature of the lawyer/client relationship. Indeed, the firm may be asked to defend the client against claims that it caused or contributed to the human rights impact at issue.

In such circumstances, the firm may need to invest time in helping the client to identify the business case for providing or cooperating in legitimate processes to remedy any human rights impacts that the client has caused or contributed to. Clearly, the question of remediation by law firms is a complex area that merits further exploration and discussion (Guiding Principle 22).

Some firms may be concerned with potential liability for not adhering to an appropriate level of care when taking the UNGPs into account, as they may be potentially relevant to the legal services or advice rendered. As noted earlier, the UNGPs do not and cannot by themselves impose legal liabilities on any business. This applies to law firms and their lawyers as well as other business enterprises. Nor do they alter professional rules of conduct for lawyers. Significant business risks, legal and otherwise, from involvement in human rights harm have preexisted the UNGPs and continue to exist apart from the UNGPs.

What the UNGPs do provide is an authoritative framework for lowering the likelihood of such involvement, as well as how to navigate and mitigate their harm. As the SRSG observed during his mandate, 'proof that the company took every reasonable step to avoid involvement in the alleged violation can only count in its favor' if the company is sued for infringing on human rights.¹¹¹ Thus, advising on the implications of the UNGPs as relevant to specific legal services will likely increase the chances that the company can take appropriate steps to avoid the hard consequences of infringing on human rights.

Of course, a law firm has no obligation to ensure that the client follows the advice it provides on any subject. Moreover, a law firm should not provide advice on any matter, legal or otherwise, which it is not competent to provide. And not all law firms must be experts in human rights, just as they need

not be experts in accounting, engineering, economics or other technical subjects related to legal services, although general familiarity with those subjects may add significant value to contextual aspects of, and their services more generally in, particular cases. In Canada, for example, a lawyer may be asked or expected to give advice on non-legal matters for the benefit of the client, provided that he or she points out, if necessary, any lack of experience or other qualification and clearly distinguish legal from other advice.¹¹²

To the extent that any concerns exist about providing advice on respecting human rights, they can be mitigated through up-front discussions and in the retention agreement regarding the scope and nature of the services to be provided and the qualifications of the lawyers.

Finally, in sophisticated legal insurance markets, malpractice insurance is typically available for all of the advice and services that law firms provide, even if they take into account non-legal contextual and normative issues. Doing so is often unavoidable, as discussed in section 4.2 above. However, law firms may wish to consult their malpractice insurance policies if they are concerned about the availability of such coverage. This may or may not be the case in countries where the only malpractice insurance consists of standard form policies available from local bar associations.

Conclusion

The UNGPs have become the authoritative global standard on business and human rights and are increasingly reflected in the law and in business practice. They expect that business enterprises should comply with all applicable laws and respect internationally-recognised human rights wherever they operate.

The responsibility to respect human rights should be embedded in an organisation; it is not solely a specific task for lawyers. However, lawyers are uniquely positioned by their skills, experience and professional independence to act as wise professional counsellors or trusted advisers by advising their business clients of the need to align themselves with universal soft law standards, such as those expressed in the UNGPs, particularly given their potential to become reflected or incorporated in legal standards.

Compliance with the law is a bedrock requirement of the corporate responsibility to respect human rights under the UNGPs. But the responsibility to respect human rights applies even where the law is absent, unenforced or in tension with internationally recognised human rights. Even though the UNGPs themselves do not and cannot impose legal responsibilities on business, the UNGPs are relevant to many legal practice areas.

The UNGPs were not intended to override legal professional codes of conduct, given the critical role that lawyers play in upholding the rule of law and supporting the administration of justice, which serves as a foundation for the corporate responsibility to respect human rights. Access to the law and the provision of legal services is of paramount importance to ensure the attainment of broader public interest objectives of the rule of law and the administration of justice.

Thus, the UNGPs do not infringe upon the right of businesses to undertake, and the obligation of legal counsel to provide, a robust defence to allegations that the business engaged in conduct that violates human rights. Nor do the UNGPs suggest that business enterprises (such as law firms) have responsibilities for the general human rights performance of their business relationships (such as clients). They are only concerned with identifying and addressing the specific human rights impacts that a business enterprise causes, contributes to or is directly linked to by its goods and services.

The UNGPs present significant opportunities for lawyers who advise business, and both internal and external counsel, based on the increasing demand for such advice by clients. They also present challenges, including for law firms in their capacity as business enterprises with their own responsibility to respect human rights, both in the management of the firm as a business and in the legal services provided to clients.

This Reference Annex hopes to serve as part of a first step in analysing these opportunities and challenges and in suggesting ways to move forward, consistent with the professional responsibilities of lawyers to uphold the rule of law.

Appendix A – Glossary of key concepts

| Term | Definition |
|--|---|
| Business relationship | 'Business relationships refer to those relationships the business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in an enterprise's value chain, beyond the first tier and minority as well as majority shareholding positions in joint ventures.' Interpretive Guide, section II. |
| Causing a human rights impact | A business can cause a human rights impact when its own actions lead directly to an impact. Guiding Principles 13 and 19. |
| Contract principles | <i>Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations</i> , authored by the SRSG as an annex to the UNGPs. |
| Contributing to a human rights impact | A business may contribute to an impact by incentivising, facilitating or enabling a third party to harm human rights or by contributing in parallel. Guiding Principles 13 and 19. |
| Due diligence | 'Due diligence has been defined as "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case". In the context of the UNGPs, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.' Interpretive Guide, section II. |
| Embedding | '"Embedding" is the <i>macro</i> process of ensuring that all personnel are aware of the enterprise's human rights policy commitment, understand its implications for how they conduct their work, are trained, empowered and incentivised to act in ways that support the commitment and regard it as intrinsic to the core values of the workplace. It is one continual process, generally driven from the top of the company.' Interpretive Guide, section III.B. |
| Gross human rights abuses | 'There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic in scope and nature, for example violations taking place at a large scale or targeted at particular population groups.' Interpretive Guide, section II. |
| Human rights impact | Occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights. Interpretive Guide, section II. |
| Human rights risks | 'A business enterprise's human rights risks include any risks that its operations may lead to one or more adverse human rights impacts. They therefore relate to its potential human rights impacts. In traditional risk assessment, risk factors in both the consequences of an event (its severity) and the probability of it occurring. In the context of human rights risk, severity is the predominant factor. Probability may be relevant in helping prioritise the order in which potential impacts are addressed in some circumstances... Importantly, human rights risks are separate from any risks to the enterprise that may flow from its involvement with human rights impacts. However, the two are increasingly related.' Interpretive Guide, section II. |
| Interpretive Guide | Office of the UN High Commissioner for Human Rights, <i>The Corporate Responsibility To Respect Human Rights – An Interpretive Guide</i> (2011). |

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|--|---|
| Leverage | 'Leverage is a form of advantage that gives power to act effectively. In the context of the UNGPs it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.' Interpretive Guide, section II. |
| Linkage to a human rights impact | Even where a business does not cause or contribute to an impact, it may nevertheless be directly linked to its operations, services or products through a business relationship. Guiding Principles 13 and 19. |
| Mitigation | 'The mitigation of adverse human rights impacts refers to actions taken to reduce the extent of an impact, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.' Interpretive Guide, section II. |
| National Contact Point (NCP) | Country-based dispute resolution mechanism created under the <i>OECD Guidelines for Multinational Enterprises</i> . |
| OECD | Organisation for Economic Cooperation and Development. |
| OECD Guidelines | <i>OECD Guidelines for Multinational Enterprises</i> . |
| Prevention | 'The prevention of adverse human rights impacts refers to actions taken to avoid such impacts occurring.' Interpretive Guide, section II. |
| Remediation/remedy | 'Remediation and remedy refer to both the <i>processes</i> of providing remedy for an adverse human rights impact and to the substantive <i>outcomes</i> that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, including apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.' Interpretive Guide, section II. |
| Severe human rights impacts | 'The commentary to the UN Guiding Principles defines severe human rights impacts in reference to their scale, scope and irremediable character. This means that the gravity of the impact and the number of individuals impacted at present or in the future (for instance, from the delayed effects of environmental harm) will both be relevant considerations. "Irremediability" is the third relevant factor, used here to mean any limits on the ability to restore those impacted to a situation at least the same as, or equivalent to, their situation before an adverse impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.' Interpretive Guide, section II. |
| SRS | The former Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie, author of the UNGPs. |
| Stakeholder engagement/consultation | 'Stakeholder engagement or consultation refers here to an on-going process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond, including through collaborative approaches to their interests and concerns.' Interpretive Guide, section II. |
| Stakeholder/affected stakeholder | 'A stakeholder refers to any individual who may affect or be affected by an organisation's activities. An affected stakeholder refers here specifically to individuals whose human rights may be affected by an enterprise's operations, products or services.' Interpretive Guide, section II. |
| Value chain | 'A business enterprise's value chain encompasses the activities that convert inputs into outputs by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services or (b) receive products or services from the enterprise.' Interpretive Guide, Section I. |

Appendix B – Non-exhaustive list of internationally recognised human rights

| | | |
|---|---|---|
| Right to life | Right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment | Right to liberty and security of person |
| Right to be free from slavery, servitude and forced labour | Right to freedom of movement | Right to privacy |
| Right to freedom of thought, conscience and religion | Rights to freedom of opinion and expression | Right to an adequate standard of living |
| Right to work | Right to freedom of association and rights to collective bargaining | Right to enjoy just and favourable conditions of work |
| Right to freedom of assembly | Right to participate in public life | Right to take part in cultural life |
| Right to health | Right to water and sanitation | Right to education |
| Right to a family life | Right to non-discrimination | Rights of minorities |
| Rights of protection for the child | Right of self-determination | Rights to freedom from war propaganda and freedom from incitement to racial, religious or national hatred |
| Right to social security | Right of detained persons to humane treatment | Right to recognition as a person before the law |
| Right to a fair trial (and aliens' rights to due process when facing expulsion) | Right to be free from retroactive criminal law | Right not to be imprisoned for inability to fulfil a (private) contract |

Appendix C – Examples of how business can impact certain human rights

These examples are drawn from the publication ‘Human Rights Translated: A Business Reference Guide’, produced by the UN Office of the High Commissioner for Human Rights, International Business Leaders Forum and Monash University’s Castan Centre for Human Rights Law in 2008, which is an excellent source of additional information and guidance.¹¹³

| Relevant human right | The right explained | How business might impact that right |
|---|---|---|
| Right to life | <ul style="list-style-type: none"> • Right not to be deprived of life arbitrarily or unlawfully; • right to have one’s life protected, for example from physical attacks or health and safety risks. | <ul style="list-style-type: none"> • Lethal use of force by security forces (State or private) to protect company resources, facilities or personnel; • operations that pose life-threatening safety risks to workers or neighbouring communities through accident/exposure to toxic chemicals; • manufacture and sale of products with lethal flaws or dual-use products. |
| Right to be free from slavery, servitude and forced labour | <ul style="list-style-type: none"> • Slavery occurs when one human effectively owns another; • freedom from servitude covers other forms of egregious economic exploitation, like trafficking of workers or debt bondage; • rights to freedom from slavery and servitude are absolute rights; • forced or compulsory labour is defined by the ILO as all work or service that is extracted under menace of any penalty and for which the person has not voluntarily offered themselves; • providing wages does not necessarily mean that work is not forced labour if the other aspects of the definition are met. | <ul style="list-style-type: none"> • Business operations that take place in certain countries or cultural contexts may, knowingly or unknowingly, benefit from forced labour, either directly or through supply chains; • business practices that put workers in a position of debt bondage through company loans, payment of fees or other means; • transportation of people/goods that facilitates the trafficking of forced or bonded labour. |
| Right to privacy | <ul style="list-style-type: none"> • Individuals have a right to be protected from arbitrary, unlawful or unreasonable interference with their privacy, family, home or correspondence and from attacks on their reputation. | <ul style="list-style-type: none"> • Failing to protect the confidentiality of personal data on employees, customers or other stakeholders; • providing information to government authorities without the individual’s permission, in response to government requests that do not follow required national procedures and/or that are not in line with international human rights law. |

| Relevant human right | The right explained | How business might impact that right |
|---|--|--|
| Right to health | <ul style="list-style-type: none"> Individuals have a right to the highest attainable standard of physical and mental health; this includes the right to control over one's health and body and freedom from interference. | <ul style="list-style-type: none"> Pollution from business operations creates negative health impacts on workers and surrounding communities; sale of products that are hazardous to the health of end users/customers; failure to implement effective OH&S standards. |
| Rights of protection for the child | <ul style="list-style-type: none"> Children are in need of special protection because of their potentially vulnerable status as minors; a child has the right to a name, to be registered and to acquire a nationality; children must be protected from sexual and economic exploitation; ILO standards set minimum employment ages for hazardous work (18 years) and regular work (15 years, unless the country exercises the exception for developing States, which is 14 years), though there are some carefully prescribed exceptions. | <ul style="list-style-type: none"> Business activities might be relying on child labour, either directly or through their supply chains; where child labour is discovered, businesses can impact other rights (such as the right to an adequate standard of living) if they fail to take account of the best interests of the child in determining the appropriate response. |
| Right of self-determination | <ul style="list-style-type: none"> Right of peoples, rather than individuals; Peoples are entitled to determine their political status, pursue economic, social and cultural development, dispose of their land's natural resources and not be deprived of their own means of subsistence; The right of indigenous peoples to self-determination has been specifically recognised by the international community. | <ul style="list-style-type: none"> Any activity that might have impacts on indigenous peoples or their lands whether through acquisition, construction or operation. |

Appendix D – Principles for responsible contracts

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| 1 | The parties should be adequately prepared and have the capacity to properly address the human rights implications of projects during negotiations. |
| 2 | Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalised. |
| 3 | The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project. |
| 4 | Contractual stabilisation clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations. |
| 5 | Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities. |
| 6 | Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards. |
| 7 | The project should have an effective community engagement plan through its life cycle, starting at the earliest stages of the project. |
| 8 | The State should be able to monitor the project's compliance with relevant standards to protect human rights, while providing necessary assurances for business investors against arbitrary interference in the project. |
| 9 | Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism. |
| 10 | The contract's terms should be disclosed and the scope and duration of exceptions to such disclosure should be based on compelling justifications. |

Appendix E – Acknowledgements

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Endnotes

Note: All links have been verified as of 7 August 2016.

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- upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf; (2) the Japanese Federation of Bar Association's Basic Rules on the Duties of Practicing Attorneys (adopted 10 November 2004) www.nichibenren.or.jp/library/en/about/data/basic_rules.pdf; (3) the motto of the South Korean Bar Association ('Protecting Fundamental Human Rights and Realizing Social Justice'); and (4) the International Bar Association Principles on Conduct for the Legal Profession' (Adopted 28 May 2011) www.ibanet.org/Article/Detail.aspx?ArticleUid=bc99fd2c-d253-4bfe-a3b9-c13f196d9e60. See more generally, Martha Davis, 'Human Rights and the Model Rules of Professional Conduct: Intersection and Integration', (2010) 42 Colum L Rev 157, 182; and Advocates for International Development (A4ID), 'The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession' (2013) www.a4id.org/resource/un-guiding-principles-business-and-human-rights-guide-legal-profession.
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- 105 See, Rebecca Lowe, 'Code of Misconduct' (2011), discussing the UK Parliament's inquiry into a London law firm's advice to a newspaper in connection with a phone-hacking scandal www.ibanet.org/Article/Detail.aspx?ArticleUid=65b57a74-2359-41b6-aaf3-5d645a7a7c26.
- 106 See eg, the mission statement of A4ID, a UK-based charity that runs a pro bono network of 37,000 lawyers, mostly from large law firms, which is dedicated to achieving the Millennium Development Goals and ensuring all those who need legal advice can access it. A4ID was the first major international organisation to identify the relevance of the application of the Guiding Principles to the practice of law beyond pro bono work www.a4id.org.
- 107 This fact pattern was inspired by a US Congressional investigation of, and later a US government forfeiture action against, a senior government official of oil-rich but extremely poor Equatorial Guinea, who was the son of the country's leader. See, US Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Government Affairs, 'Keeping Foreign Corruption Out of the United States: Four Case Histories', Released in Conjunction with the Permanent Subcommittee on Investigations, February 4 2010 Hearings; *United States of America v One White Crystal-Covered 'Bad Tour' Glove and Other Michael Jackson Memorabilia, et al*, Second Amended Complaint for Forfeiture In Rem, No CV 2: 11-3582-GW-SS (US Dist Ct, Central District of California), June 11 2012; 'Little Theodor's Big Troubles', American Lawyer (13 May 2013). In this case, the official denied that he had obtained the money illegally, and the case was reported to have settled. Scott Cohen, 'African national leader forced to give up assets in DOJ settlement', October 10 2014, CNBC www.cnn.com/2014/10/10/african-nation-leader-forced-to-give-up-assets-in-doj-settlement.html. The fact pattern also appears to have been used as the inspiration for undercover videos taped by Global Witness of a senior official of a foreign government seeking legal advice from 13 New York City law firms to anonymously move millions of dollars of funds that appeared to have been obtained through corrupt activity into the US. The videos became the subject of a segment on a widely watched US television show, 60 Minutes. See, David Rivkin, 'Maintaining lawyers' integrity: Message from the IBA President', 29 February 2016 www.ibanet.org/Article/Detail.aspx?ArticleUid=2e81ebb8-d48c-497e-813c-cd93b41b9397.
- 108 This fact pattern was inspired by a case involving an unauthorised leak of massive amounts of confidential client information from a law firm that specialised in setting up off-shore corporations in order to preserve the privacy of their owners. Will Fitzgibbon and Martha Hamilton, 'Law Firm's files include Dozens of Companies and People Blacklisted by US Authorities', ICIJ, 4 April 2016 <https://panamapapers.icij.org/20160404-sanctioned-blacklisted-offshore-clients.html>. The law firm in question has defended its client's due diligence practices and denies responsibility for the actions of its clients, and knowledge of any unlawful conduct. Kirk Semple, Azam Ahmed and Eric Lipton, 'Panama Papers Leak Casts Light on a Law Firm Founded in Secrecy', *New York Times*, 6 April 2016 www.nytimes.com/2016/04/07/world/americas/panama-papers-leak-casts-light-on-a-law-firm-founded-on-secrecy.html?_r=0.

- 109 This fact pattern comes from a decided appellate case, *In re University of Stellenbosch Legal Aid Clinic, et al*, High Court of South Africa (Western Cape Division, Cape Town), Case No 16703/14 (July 8 2015) <http://tinyurl.com/glqr5hb>.
- 110 Bar Association Guidance (n 2). Law firms and lawyers, when acting collectively, are likely to be able to assert much greater leverage than they can alone. The IBA Bar Guidance describes how bar associations can develop a sustainable business and human rights strategy, including by raising awareness, providing training, offering capacity-building and technical assistance, and ensuring the association actively participates in business and human rights discussions and developments. The IBA, the ABA, the Law Society of England and Wales, the French Conseil National des Barreaux, the Japanese Federation of Bar Associations and others have already taken significant steps in this direction.
- 111 John Ruggie, Report of the Special Representative of the Secretary General, 'Business and Human Rights: Further steps towards the operationalization of the "protect, respect, and remedy" framework', UN Human Rights Council, A/HRC/14/27 (9 April 2010), para 86.
- 112 Federation of Law Societies of Canada, 'Model Code of Professional Conduct' (as amended 10 October 2014) www.flsc.ca/wp-content/uploads/2014/10/ModelCodeENG2014.pdf.
- 113 UN Office of the High Commissioner for Human Rights, International Business Leaders Forum and Monash University Castan Centre for Human Rights Law, 'Human Rights Translated: A Business Reference Guide' (2008) www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf.



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