BUSINESS AND HUMAN RIGHTS GUIDANCE FOR BAR ASSOCIATIONS

WITH COMMENTARIES

2014

Table of Contents

INTRODUCTION

This Business and Human Rights Guidance for Bar Associations is intended to encourage bar associations around the world to improve the understanding of the relevance of business and human rights, and particularly of the UN Guiding Principles on Business and Human Rights (the 'Guiding Principles'), for lawyers who advise business.

The IBA was founded in 1947, inspired by the vision of the United Nations (UN), with the aim of supporting the establishment of law and administration of justice worldwide. In 2011, following six years of research and multistakeholder consultations, the UN Human Rights Council unanimously endorsed the Guiding Principles, authored by Harvard Kennedy School Professor John Ruggie, the former Special Representative of the UN Secretary-General on Business and Human Rights (SRSG). The IBA significantly contributed to, and strongly supported, the SRSG's UN mandate.

The UN Guiding Principles on Business and Human Rights

The Guiding Principles are based on the three pillar UN 'Protect, Respect and Remedy' Framework, under which (1) states have a duty to protect against human rights[1] abuses by third parties, including business, through appropriate policies, laws, regulation and adjudication, (2) all business enterprises have a responsibility to respect human rights, which means to avoid infringing on the rights of others and to address negative impacts with which they may be involved, and (3) there is a need for access to effective remedy for victims of business-related human rights abuses.

The Guiding Principles have enjoyed wide global uptake, and are regarded as an authoritative international reference point on respective roles of states and business when it comes to business-related human rights harms. They are increasingly reflected in public policy, law and regulation, in commercial agreements, in international standards that influence business behavior, in the advocacy of civil society organizations, and in the policies and processes of companies worldwide.

There is also growing recognition that a strong business case exists for respecting human rights and that the management of legal risks increasingly means that business lawyers need to take human rights into account in their advice and services. There are few areas of business legal practice for which the Guiding Principles are not relevant.

Guidance for Business Lawyers – Annex A

To help lawyers understand developments in this space, the IBA Business and Human Rights Working Group, which includes representatives or members of eight national bar associations and law societies, has prepared Guidance for Business Lawyers on the UN

1 The Guiding Principles refer to 'internationally recognized human rights', an authoritative list of which is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), together with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work (Commentary to Guiding Principle 12).

Guiding Principles on Business and Human Rights (the 'Lawyers Guide'), which sets out in detail the core content of the Guiding Principles, how they may be relevant to the advice provided to their clients by business lawyers (whether they are in-house or external counsel), and what their potential implications for law firms may be, as business enterprises with a responsibility to respect human rights themselves. The Lawyer's Guide is an Annex to this Bar Association Guidance.

Purpose of the Bar Association Guidance

As a business enterprise with its own responsibility respect human rights, the IBA wishes to use its leadership role with the global legal profession to encourage bar associations and law societies around the world to take affirmative steps to develop an overall strategy for integrating the Guiding Principles into their work for the legal profession.[2] The activities of bar associations are an important means for lawyers to increase their ability to help their clients respect human rights. As a result, this Guidance suggests how to educate bar associations and lawyers on the topic of business and human rights, how to integrate the Guiding Principles into the mainstream of legal practice, and how to enable individual bar associations to create tailored programmes for their member lawyers.

The IBA welcomes the measures already taken by bar associations, law firms and individual legal practitioners to recognise the importance of the Guiding Principles to the legal profession and to integrate this topic into their practice at a domestic and international level. Given the global reach of the Guiding Principles and the increasingly global nature of legal practice, it is imperative that bar associations and lawyers collaborate on sharing experiences and best practices in this rapidly evolving area.

General commentary on the Bar Association Guidance

1. This Guidance aims to inspire bar associations to promote, launch and develop business and human rights initiatives that are relevant to practitioners in their jurisdictions. The IBA acknowledges that bar associations are better positioned to assess the specific needs of their own jurisdictions and to balance those needs with their capacity and available resources.
2. This Guidance groups its recommendations under three different objectives:
    a. to help lawyers understand the relevance of the Guiding Principles to the advice that they provide to clients in all type of commercial and business transactions;
    b. to incentivise the use of the Guiding Principles by members of the legal profession and provide technical assistance to practitioners and other interested stakeholders; and
    c. to positively represent the legal profession and bar associations as champions of business and human rights in local and international fora.

[2] This Bar Association Guidance draws upon the precedent of the *IBA Anti-Corruption Guidance for Bar Associations: Creating, Developing and Promoting Anti-Corruption Initiatives for the Legal Profession*, drafted by the IBA Legal Projects team in 2013, available at http://anticorruptionstrategy.org/AC_strategy_legal_profession_bar_guidance_and_forum.aspx .

3. This Guidance does not attempt to define every means by which a bar association may wish to design a business and human rights strategy for its own jurisdiction. Rather, the measures are suggestive but not exhaustive.
4. The IBA understands that different national bar associations will be at different stages in their implementation of business and human rights initiatives. Some bar associations will have already implemented a number of the recommendations set out in this document, while other bar associations may be willing but do not yet have the capacity to do so.
5. Although this Guidance is addressed to bar associations, its recommendations may also be relevant to other professional legal organisations, associations of law firms, regulators of the legal profession or any other institutions with the ability to influence on the profession.
6. This Guidance is aspirational rather than binding. It has neither the intention nor the authority to impose a business and human rights compliance obligation on the legal profession or on individual bar associations.

CHAPTER I: DEVISING A SUSTAINABLE STRATEGY

Article 1. Organisational structure

Bar associations are encouraged to establish and support an appropriate structure for the management and development of the topic of business and human rights within the association.

Commentary

2. In order to promote, launch, and develop an efficient and sustainable business and human rights strategy, bar associations are encouraged to support it with a strong organisational structure. Doing so will enhance the effectiveness and legacy of any initiatives through appropriate policies, procedures and mechanisms approved at the most senior level.
3. A bar association may choose to establish an independent committee on the subject of business and human rights or to establish a sub-committee or working group. Regardless, bar associations should ensure that the responsible body welcomes members from:
    a. all legal practice backgrounds, including human rights, commercial law, dispute resolution, environmental law, employment law and others;
    b. all different legal communities, including but not limited to those coming from private practice, in-house counsel, government, and not-for-profit, the judiciary, and academia.
4. Depending on its means and capacity, a bar association should support the strategy with the assignment of appropriate staff and budget.
5. A bar association may wish delegate its responsibility to an appointed or a selected group of individuals with special interest in the topic. Nevertheless, a successful programme requires the public commitment of the bar association, with full support

and oversight of the bar association's top management and leadership, supported by appropriate policies and procedures to embed the commitment in the activities of the association and its member lawyers.

Article 2. Ensuring effective implementation

Bar associations are encouraged to consider the following implementing milestones, which can help to ensure an effective initiative regardless of its scale and dimension:

a) setting specific objectives;

b) devising a realistic timescale;

c) considering the sustainability and legacy of the project;

d) identifying indicators of success;

e) the allocation of responsibility for implementation.

Commentary

1. Article 2 indicates some practical issues that bar associations may want to consider when implementing a strategy on business and human rights.
2. *Setting specific objectives*: Once the bar association has considered its own means, plans, priorities and political possibilities, it should set specific objectives in order to create a clear path that allows the organisation to address the more pressing needs of its membership. For example, some bar associations may focus on establishing a vibrant committee or convening a widely attended annual gathering on the subject. Others may choose to produce guidance for law firms or to help law schools in their jurisdictions to include business and human rights in their curricula. Some bar associations may feel prepared to work on several objectives in parallel. It is advisable that all objectives and plans be discussed and consulted on among those responsible for steering the project (see Commentary 4 of Article 1) or, preferably, more broadly among members and other stakeholders.
3. *Devising a realistic timescale*: Each objective should be accompanied by a timescale for completion. The bar association should prepare those time frames realistically, considering the existing resources and the level of interest and knowledge of the subject among members at any given time.
4. *Considering the sustainability and legacy of the project*: Bar associations should understand that the topic of business and human rights is an evolving one that will continue to grow and gain relevance for legal professionals. Initiatives introduced should be enduring, but able to adjust and improve over time.
5. *Identifying indicators of success:* In addition to identifying objectives, bar associations should identify metrics that show that their business and human rights programmes are achieving the desired results; eg, assessing whether training on the Guiding Principles is effectives, whether answers to requests for information about the Guiding Principles from lawyers were helpful in practice. Approaches could include surveys of lawyer, client, and public perceptions.
6. *Allocation of responsibility for implementation:* Initiatives should be led by an appointed individual or select group of individuals. Delegating responsibility will

ensure that the project is accountable and clearly focused. Rotation in the projects' leadership will ensure the involvement of a wider group of interested members and can help incentivise new ideas and plans.

CHAPTER II: AWARENESS RAISING, TRAINING AND EDUCATION

Article 3. Awareness raising

Bar associations are encouraged to use all available resources to raise awareness of the existence and relevance of business and human rights instruments and principles among all members.

Commentary

1. Bar associations are encouraged to take advantage of all possible opportunities to raise awareness of the existence of the Guiding Principles. These efforts should target all audiences within the legal profession, regardless of the level of prior knowledge in the subject matter, or whether they work directly with businesses.
2. Although the primary focus of the awareness-raising efforts by bar associations will be on the legal profession, these campaigns may also extend to the general public.
3. Awareness-raising campaigns can use different avenues, methods and formats, including:
    a. special sessions on business and human rights in conferences, seminars and other similar events;
    b. specific sections of the Association's website dedicated to the theme of business and human rights;
    c. specific business and human rights sections in existing publications or new publications on the topic, including newsletters, bulletins, books and journals;
    d. videotaped business and human rights material available in social media, or online.

Article 4. Comprehensive education

Bar associations should actively promote, participate and/or establish educational programmes on the relevance of business and human rights principles for the practice of law. This effort should be extended comprehensively to all different stages of legal education, including:

a) law schools and/or universities;

b) programmes for newly qualified lawyers;

c) continuing professional development; and

d) programmes for senior-level practitioners.

Commentary

1. Article 4 highlights the role of education in raising awareness within the legal profession at every stage of a professional legal career. Lawyers who work in law

firms, companies, governments, and civil society organisations may have very different approaches to the same matter. The aim of educational programs should be to reduce those differences by helping to provide a common understanding of evolving developments and expectations in this field.

2. Article 4(a) encourages bar associations to urge law schools and/or universities to incorporate business and human rights programmes into their curricula. Some bar associations may also choose to develop their own seminars for law students or to promote these courses jointly with educational institutions. In addition to law schools, other faculties – such as humanities, business, accountancy, and engineering – can play an important role in the promotion of business and human rights in the legal profession.
3. Articles 4(b), (c) and (d) recognise the importance of developing educational programmes and tools on business and human rights for qualified legal practitioners who may not have been exposed to the topic at law school.
4. It is critical to develop practical advice for lawyers and provide case-based examples of how lawyers can apply the Guiding Principles in specific practice areas.
5. Bar associations should consider addressing the following items in their educational programmes:
    a. information about the international human rights framework, including all applicable laws, principles and standards at the international, regional and/or domestic levels;
    b. the role that the legal profession plays in promoting business and human rights principles and the importance of advising client on these matters;
    c. the incentives, opportunities and the business case for lawyers to integrate business and human rights principles into the practice of law – and the disincentives and risks if they do not do so; and
    d. practical advice for lawyers that addresses the needs of both in-house and external counsel.

CHAPTER III: CODES OF PROFESSIONAL CONDUCT

Article 5. Reviewing ethical codes of conduct

Bar associations may wish to consider reviewing their ethical codes of conduct and disciplinary rules and policies to strengthen their alignment with business and human rights principles, particularly the UN Guiding Principles.

Commentary

1. Codes of professional conduct are key instruments for the promotion of best practices in a range of areas, including business ethics and human rights. The codes of a number of bar associations are already strongly aligned with the Guiding Principles, although it is possible that there will be tensions and dilemmas arising from their application in practice (as discussed in the Lawyers Guide). Therefore, individual bar associations may wish to consider whether, and the extent to which,

their own professional codes of conduct prevent, permit, encourage or require lawyers to take the risks of human rights impacts into account in their advice to business clients.

CHAPTER IV: CAPACITY BUILDING AND TECHNICAL ASSISTANCE

Article 6. Guidance and technical assistance

Bar associations should consider assisting their profession through technical assistance and guidance to help them strengthen their institutional and human capacity to adopt more effective practices in the area of business and human rights.

Commentary

1. Article 6 stresses the role bar associations may adopt in providing support and guidance to the legal profession together with education in order to enhance integration between education and implementation.
2. The convening authority of bar associations as a focal point of the legal profession in each country should be utilised to provide expertise, create forums for discussion, and the identification of best practices.
3. Technical assistance can consist of non-financial support such as sharing information and expertise, transferring skills or know-how, and supporting the administration, management, policy development and capacity building for those lawyers that wish to include bring a business and human rights lens to the advice they provide to their clients.
4. Through a strong supporting structure, bar associations can help, guide and lead lawyers to reach better outcomes in integrating the Guiding Principles into the practice of law by focusing on the particular needs and priorities identified by the legal profession.
5. It is essential that lawyers have access to international and domestic business and human rights instruments, preferably in their own language.

Article 7. Sharing examples of best practice

Bar associations are encouraged to provide ways through which legal professionals can share examples of best practice and experiences of dealing with the topic of business and human rights. The sharing of knowledge and experience is crucial to creating a coherent strategy for the legal profession.

Commentary

1. Article 8 stresses the importance of sharing examples of best practice. An important role that bar associations can play is bringing the legal profession together and enabling lawyers and law firms who have had particular success in embedding business and human rights principles in the advice they provide to clients to share those experiences.
2. As well as encouraging their members to share examples of best practice, bar associations should share experiences, ideas, and best practices with one another

when implementing their business and human rights strategies. Learning from the best practices and challenges faced by other bar associations around the world can improve and strengthen a bar association's own human rights programme.

CHAPTER V: RECOGNITION AND INCENTIVES

Article 8. Acknowledgement

Bar associations could consider publicly acknowledging successful business and human rights measures or programmes adopted by legal practitioners in their jurisdiction.

Commentary

Article 8 suggests that bar associations publicly acknowledge successful business and human rights initiatives in the legal sector. Legal professionals may be incentivised by recognition from their bar association. This acknowledgement could be manifested in a number of forms, for example:

a) providing awards for outstanding performance or improvement in advising on these issues;

b) promoting the work of successful business and human rights programmes by individual lawyers in bar association publications;

c) keeping a record or publishing a list of, or potentially providing certification to, lawyers and law firms who have consistently adopted a business and human rights lens in the advice they provide to clients; and

d) giving an ambassadorial role to lawyers with great interests and achievements in the area of business and human rights so that they can promote and raise awareness of the bar association's programme in different local and international forums.

Promoting the work of successful business and human rights initiatives is closely related to the sharing of best practice as considered above in Article 7.

CHAPTER VI: BUSINESS AND HUMAN RIGHTS ACTION

Article 9. An active legal profession

Bar associations should ensure that the legal profession is active in all discussions to implement business and human rights principles in domestic legislation, as well as in the work of international organisations, particularly the establishment or review of existing principles and standards.

Commentary

1. Governments are increasingly translating global business and human rights principles into domestic policy or legislation. Likewise, international and multistakeholder organisations create or revise standards that are of general interest and application to business and are therefore of concern for the legal profession. In most of these

processes there are public consultations phases where all interested parties are invited to participate.

2. The bar association should ensure that the views of the legal profession are represented in these processes. This would also assist other academic disciplines and professions in aligning with the Guiding Principles.
3. The bar association may explore the establishment of working partnerships or alliances with other stakeholders for the promotion of best practices in the area of business and human rights.

GUIDANCE FOR BUSINESS LAWYERS ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

ANNEX TO THE IBA BUSINESS AND HUMAN RIGHTS GUIDANCE FOR BAR ASSOCIATIONS

2014

Table of Contents

EXECUTIVE SUMMARY

It is now widely accepted that business enterprises have a responsibility to respect human rights throughout their operations. As a result, their legal advisors are increasingly being called on to help them understand what this responsibility entails.

This Guidance is intended for lawyers globally who are involved in advising businesses, including those in law firms as well as in-house counsel. It aims to assist lawyers in:

- understanding the core content of the UN Guiding Principles on Business and Human Rights (the 'Guiding Principles') (Part 1);
- starting to explore the ways in which the UN Guiding Principles may be relevant to the advice and other services they provide to business clients (Part 2); and
- recognising the relevance of the UN Guiding Principles for law firms as business enterprises themselves (Part 3).

The Guidance acknowledges that discussion of these issues is still at an early stage and that much more work is needed to understand how the Guiding Principles interact with legal practice, while seeking to make a constructive contribution to evolving understandings. It does not claim to reflect the perspectives and concerns of all lawyers globally on these issues.

This Guidance forms an Annex to the International Bar Association's Business and Human Rights Guidance for Bar Associations and will be open for consultation and piloting by national bar associations through late 2015, during which time all comments to help nuance and further improve the contents will be welcomed. The Guidance will then be revised and finalised by the IBA Business and Human Rights Working Group.

PART 1: THE UN GUIDING PRINCIPLES

Background and convergence (sections I and II): The Guiding Principles were unanimously endorsed by the UN Human Rights Council in 2011, and were authored by the former Special Representative of the UN Secretary-General for Business and Human Rights, Harvard Kennedy School Professor John Ruggie (SRSG). They provide guidance for states on the policy implications of their existing duties under international human rights law, and they also provide guidance to companies on the policies and processes they are expected to put in place to 'know and show' that they respect human rights throughout their operations.

The Guiding Principles are increasingly reflected in public policy and regulation, in commercial agreements, in the terms of global multistakeholder and business-led initiatives, and in the advocacy of civil society organisations.

The Guiding Principles are based on the three pillars of the UN 'Protect, Respect and Remedy' Framework, also developed by the SRSG, as follows.

Pillar 1 – state duty to protect (section III): States have a duty to protect against human rights abuses by businesses within their territory and/or jurisdiction through appropriate laws, policy, regulations, and adjudication. This arises from existing legal obligations states have under international law.

Pillar 2 – corporate responsibility to respect (section IV): This means that businesses should avoid infringing on the rights of others and should address negative impacts with which they are involved. This includes impacts that the business's own activities may cause or contribute to, or which may be directly linked to its operations, products or services by a business relationship.

Meeting the responsibility to respect means that a business is expected to: (1) adopt and embed a high-level policy commitment to respect human rights throughout the organisation; (2) develop and implement human rights due diligence processes; and (3) have processes in place to remediate human rights harms that the business causes or contributes to.

Human rights due diligence is an ongoing process that enables businesses to identify and address actual and potential human rights impacts. The process consists of assessing impacts, taking action in response to identified impacts based on the company's mode of involvement, and tracking and monitoring the company's efforts to address its human rights impacts.

Where a company contributes or is directly linked to an impact through a business relationship, it is expected to use its leverage, or influence, to encourage the third party to refrain from engaging in conduct that results in human rights harms. Leverage extends to the expectation that even non-dominant parties in a relationship will do what they reasonably can under the circumstances to influence the other party.

Pillar 3 – access to effective remedy (section V): This Pillar has implications for both states and businesses. States should take appropriate steps to provide access to effective remedy, both judicial and non-judicial, for those affected by business-related human rights abuses. Businesses are expected to establish or participate in effective operational-level grievance mechanisms in order to identify and address grievances early, before they escalate into human rights harms.

PART 2: HOW LAWYERS CAN HELP BUSINESSES RESPECT HUMAN RIGHTS

This Part of the Guidance discusses how both in-house and external lawyers can help their business clients respect human rights, consistent with their professional obligations to act in their client's best interests, properly advise their clients and preserve client confidences.

There are few areas of legal practice for which the Guiding Principles – and the international human right standards they reference – are not potentially relevant. Lawyers may be expected to advise companies on human rights where companies have adopted specific policy commitments, or where they have directly or indirectly (eg, through their membership in an industry association) endorsed a code or charter that contains human rights commitments. And companies themselves are increasingly requesting that their legal counsel provide advice that takes potential human rights risks into account as part of their broader management of legal risks. This Part explores some of the key areas that lawyers will want to be aware of in responding to this growing demand.

Relationship of the Guiding Principles to national law (section I): The Guiding Principles do not and cannot impose legal obligations on companies directly, but neither are they voluntary. Aspects of the responsibility to respect human rights may be, and often are, compelled by national law. However, the responsibility exists over and above compliance with national laws and regulations and it exists independently of the state's ability to meet its own duty to protect human rights. That is, national law does not limit the responsibility to respect human rights. Business lawyers can help make their clients aware that respecting human rights is not solely a matter of legal compliance and advise them on practical strategies to adopt where national law is absent, weak, unenforced, or in tension with international human rights standards, or where they may be at risk of causing or contributing to gross human rights abuses. Such strategies are increasingly seen as important for the sustainability of a business in the medium to long term.

Legal risk management (section II): A company's failure to manage its human rights risks can have serious adverse consequences for the company itself, including legal risks. This section provides leading examples of changes in law and the legal landscape that can affect company's legal risk exposure, specifically in relation to human rights reporting and disclosure, financial regulation, and litigation in response to emerging business and human rights concerns.

Legal professional codes of conduct (section III): Lawyers must adhere to professional codes of conduct. The Guiding Principles were not intended to trump such codes, given the critical role that lawyers play in upholding the rule of law. Indeed, the Guiding Principles explicitly recognise the importance of preserving client confidences. The legal profession codes of a number of jurisdictions have strong points of alignment with the Guiding Principles, and some of them mention human rights as a component of ethical lawyering. Where tensions arise, this should be a subject of review by individual national bar associations and law societies, in line with the IBA Guidance for Bar Associations on this topic.

Specific legal practice areas (section IV): There are few areas of business legal practice where lawyers do not have at least the potential to influence a company's respect for human rights. Part 3 discusses the circumstances in which law firms may have a responsibility to provide such advice or otherwise seek to influence a client's actions in line with the firm's responsibility to respect human rights as a business enterprise itself. This section aims to provide a non-exhaustive list of some key practice areas in which lawyers are increasingly being asked to provide or are proactively providing, advice to enable their clients to respect human rights, specifically:

Reporting and disclosure (section IV.A). Lawyers who advise companies on reporting and disclosure will want to be aware of evolving stakeholder expectations when it comes to how companies should communicate about their management of human rights risks, the trend towards greater human rights reporting requirements, and a corresponding business case for increased transparency.

Contracts and agreements (Section IV.B). Through their central role in contract negotiation and drafting, lawyers can play a critical role in helping a company increase its leverage in order to encourage or incentivise another party to respect human rights. Examples discussed in this subsection include host state investment agreements, joint venture agreements, merger and acquisition agreements, and supplier contracts.

Dispute resolution and non-judicial grievance mechanisms (section IV.C). The Guiding Principles are influencing the development of non-judicial dispute resolution processes and a leading example of this is the growth in the use of National Contact Points (NCPs) under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. The exponential increase in complaints and the outcomes in a number of high-profile cases mean that law firms are increasingly being asked to advise their clients on what the NCPs are and what their processes entail.

PART 3: IMPLICATIONS OF THE GUIDING PRINCIPLES FOR LAW FIRMS

Law firms as business enterprises (section I): This Part of the Guidance discusses the potential implications of the Guiding Principles for the independent responsibility of law firms, as business enterprises, to respect human rights. While this responsibility extends to their activities as employers, purchasers of goods and services, and as providers of legal services and advice to business clients, this part focuses on the latter. The legal services that law firms provide to their business clients are the core business relationship of a firm.

Of course, a law firm must serve its clients' best interests, and act on client instructions. A law firm cannot force a business client to do anything that the client does not wish to do. Accordingly the primary emphasis of this section is on exploring when firms might be expected to exercise leverage in order to influence their clients to respect human rights and how they can appropriately do so, recognising the special relationship that exists between lawyers and their clients.

Developing and embedding a human rights policy commitment in a law firm (section II): A policy commitment is likely to look very different for a large global law firm and for a sole practitioner, and the Guiding Principles are not prescriptive when it comes to the form such commitments should take. Whatever language is adopted, it will be important to take the necessary time to test it internally in order to ensure adequate buy-in and try to minimise unforeseen tensions in actual cases once the policy is published.

Human rights due diligence in a law firm (section III): Although the responsibility to conduct human rights due diligence with respect to client engagements applies to all firms, the formality, scale and complexity of the processes will vary according to the firm's size and, importantly, the severity of the impacts with which its clients may be involved.

A law firm needs to assess whether there are any actual or potential human rights impacts that may be directly linked to the firm's services for a client. A large firm, with multiple clients and multiple matters of representation, will typically need to prioritise by focusing on those matters that raise the greatest potential concern for human rights. However, a lawyer's limited knowledge of the underlying facts, and constraints on his or her ability to learn more, may prevent a full assessment of an impact in some cases (or effective tracking of the firm's efforts to address identified risks in others).

Client-engagement processes may be the moment when a firm has the greatest leverage to encourage the client to address them; after this, it may be difficult to assess whether a firm has contributed or is directly linked to a client's negative impact due to the confidentiality of lawyer–client communications. The special nature of the lawyer–client relationship means that the appropriate use of leverage and the difficult (and sometimes impermissible) option of withdrawing from client relationships are discussed with particular care.

The Guiding Principles recognise that certain information is legally protected against disclosure to third parties. In most cases, the firm will want to focus on whether the client itself is prepared to communicate about its approach to addressing its human rights risks, and that it does so where appropriate and necessary. Even though a law firm may not disclose the specifics of its services, it should be able to explain in general terms how it is implementing its policy commitment to respect human rights in the provision of its services.

Remediation for a law firm (section VII.H): Where a firm has contributed to an impact by a client, its contribution to any remedy will likely 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. In such circumstances, the firm may need to invest the time in making the business case to the client for providing or cooperating in legitimate processes to remedy any human rights impacts that the client has caused or contributed to. This is a complex issue that merits significant further exploration.

INTRODUCTION

I. Aims and audience

This Guidance for Business Lawyers on the United Nations Guiding Principles on Business and Human Rights (the 'Guiding Principles') is an Annex to the International Bar Association's Business and Human Rights Guidance for Bar Associations. Its intended audience consists of lawyers globally who are involved in advising businesses, including those in law firms as well as in-house counsel.[3]

The aims of this guidance are to assist business lawyers in:

- understanding the core content of the UN Guiding Principles;
- starting to explore the ways in which the UN Guiding Principles may be relevant to the advice and other services they provide to business clients; and
- recognising the relevance of the UN Guiding Principles for law firms as business enterprises themselves.

The three parts of this Guidance address these three aims in turn.

It is important to note that this Guidance is *not* intended as a 'toolkit' on how to provide legal services in alignment with the Guiding Principles. The Guidance recognises that the discussion in this area is still at an early stage and that much more work is needed to understand how the UN Guiding Principles interact with legal practice. It does not claim to reflect the perspectives and concerns of all lawyers globally on these issues.

At the same time, it is hoped that the Guidance will make a constructive contribution to this discussion – one which can be further refined and built on over time as learning and experience evolves.

As discussed in section IV below, it will be open for consultation and piloting by national bar associations through late 2015, during which time comments will be welcomed.

II. Setting the scene

There are differences between how lawyers practise their profession around the world. Professional conduct rules for lawyers vary, as well as the laws that apply to business. At the same time, there is now an authoritative global reference point on the topic of business and human rights that applies to all companies, regardless of their size, sector, location, ownership and structure.

The UN Guiding Principles were unanimously endorsed by the UN Human Rights Council in 2011. They provide guidance for states on the policy implications of their existing duties under international human rights law, and they also provide guidance to companies on the policies and processes they are expected to put in place to 'know and show' that they respect human rights throughout their operations – meaning both in their own activities and through their business relationships. The Guiding Principles are increasingly reflected in public policy and regulation, in commercial agreements, in the

[3] The term 'lawyer' is intended broadly to encompass legal professionals of every description.

terms of global multistakeholder and business-led initiatives, and in the advocacy of civil society organisations.

Professor John Ruggie, the former Special Representative of the UN Secretary-General and author of the Guiding Principles, has observed that corporate counsel were among the most consequential new players that he brought into the business and human rights debate, due to their access to and influence with corporate executives,[4] and their input helped inform the content of the Guiding Principles. Perhaps not surprisingly then, the Guiding Principles are relevant to a range of the areas that business lawyers advise companies on, such as drafting of contracts, corporate governance, legal risk management, reporting and disclosure, and dispute resolution.

The Guiding Principles are also highly relevant to lawyers who provide legal services to states – including to state-owned business enterprises as well as advice intended to enable states to foster business respect for human rights through policy, regulation, and adjudication. Finally, the Guiding Principles are relevant to lawyers representing individuals or communities whose human rights have or may have been affected by business conduct or advising civil society organisations that advocate for such stakeholders. The implications of the Guiding Principles for this last group of lawyers are, however, beyond the scope of the current Guidance.

III. Structure of the guidance

This Guidance is organised into three parts, as follows:

- **Part 1: The UN Guiding Principles**. Section I briefly describes the background to the Guiding Principles. Section II describes the global convergence on the Guiding Principles. Sections III through V describe the three independent but interrelated pillars of the UN 'Protect, Respect, and Remedy Framework' that the Guiding Principles are based on, namely: the state duty to protect human rights, the corporate responsibility to respect human rights, and the need for access to effective remedy.
- **Part 2: How lawyers can help businesses respect human rights**. This part explores how lawyers, wherever they are employed, can help companies respect human rights, consistent with their professional obligations to act in their client's best interests, properly advise their clients and preserve client confidences. It discusses the relationship of the Guiding Principles to national law (section I), the increasing relevance of human rights to the management of legal risks by business enterprises (section II), the role of professional codes of conduct (section III), and implications of the Guiding Principles for particular legal practice areas (section IV).
- **Part 3: Implications of the Guiding Principles for Law Firms**. This part discusses the potential implications of the Guiding Principles for the independent responsibility of law firms, as business organisations, to respect human rights throughout their operations – whether as employers, purchasers of goods and services, or in the legal services and advice that they provide to

[4] John Ruggie, *Just Business, Multinational Corporations and Human Rights* (Norton, 2013).

clients. It follows the elements of the corporate responsibility to respect – Policy Commitment and Embedding, Human Rights Due Diligence and Remediation Processes – in unpacking some of their implications for law firms.

A glossary of terms used in this Guidance is included as Annex A. Annexes B through D contain additional reference and support materials.

IV. Methodology

This Guidance is the product of over eight months of consultation and drafting by the IBA Business and Human Rights Working Group, whose members and the bar associations they represent are:

- Horacio Bernardes-Neto – *Motta, Fernandes Rocha; Brazilian Bar Association; Chair, IBA Bar Issues Committee*;
- Stéphane Brabant – *Herbert Smith Freehills; Co-Chair, IBA Corporate Social Responsibility Committee;*
- Umit Herguner – *Herguner Bilgen Ozeke; American Bar Association and Turkish Bar Association;*
- 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;*
- Isabel Jimenez Mancha – *Head of the International Section, Spanish Bar Association;*
- Tatsu Katayama – *Anderson Mori & Tomotsune; Japanese Federation of Bar Associations;*
- Deidre Sauls – *Former President, Law Society of Namibia*;
- John F Sherman, III – *General Counsel, Shift; former Co-Chair, IBA CSR Committee.*

The Guidance is not intended to represent the personal views of each Working Group member but rather summarise the collective view of at least a majority of the Group.

The Working Group also wishes to give special thanks to the following people for their comments and input on earlier drafts of the Guidance:

- Antony Crockett – Senior Associate, Herbert Smith Freehills;
- Rachel Davis – Managing Director, Shift;
- Gonzalo Guzman – Head of Legal Projects, IBA;
- Amol Mehra – American Bar Association Business and Human Rights Advisory Board Member; Director of the International Corporate Accountability Roundtable (ICAR);
- Rocio Paniagua – Projects Advisor, IBA;
- Carmen Pombo Morales – President, Fundacion Fernando Pombo;
- Robert C Thompson – American Bar Association Business and Human Rights Advisory Board Member;
- Anna Triponel – Advisor, Shift.

The Guidance is being released as a working draft for consultation and piloting by national bar associations over a period of about 12 months, during which time all comments to help improve and further nuance the contents of the Guidance will be welcomed. It will then be refined and finalised in late 2015 by the IBA Business and Human Rights Working Group.

PART 1: THE UN GUIDING PRINCIPLES

I. What are the UN Guiding Principles on Business and Human Rights?

In June 2011 the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (the 'Guiding Principles'),[5] authored by the former Special Representative of the UN Secretary-General for Business and Human Rights, Harvard Kennedy School Professor John Ruggie (SRSG).

The SRSG had been appointed in 2005 to break a deadlock at the United Nations (UN) over the respective roles and responsibilities of states and businesses with respect to business impacts on human rights. The endorsement of the Guiding Principles followed six years of multistakeholder consultations and research by Professor Ruggie, documented online.[6]

This section briefly explains the problem that the UN Guiding Principles are intended to address and how they build on the UN 'Protect, Respect and Remedy Framework'.

A. Negative human rights impacts by business on people and communities

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.'[7]

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 impacts on human rights. When it comes to business, a range of high-profile cases in recent decades have shown that their negative impacts can extend far beyond labour rights and non-discrimination to encompass for example abuses of local communities by security contractors at mining sites, persecution of political dissidents by

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[5] The UN Guiding Principles can be downloaded in all official UN languages at www.ohchr.org/EN/PublicationsResources/Pages/ReferenceMaterial.aspx. There are 31 Guiding Principles, each of which is followed by an official commentary, which clarifies its meaning and implications.

[6] See http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights.

[7] See *The Corporate Responsibility to Respect: An Interpretive Guide* (2011), prepared by the UN Office of the High Commissioner of Human Rights, with the full approval of the SRSG ('Interpretive Guide'), available at www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.*The Corporate Responsibility to Respect: An Interpretive Guide*, p 9.

governments using information supplied by ICT companies, and the sometimes severe mistreatment of migrant workers in global supply chains spanning multiple sectors.

In his initial reports to the UN Human Rights Council, the SRSG began by stressing 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 appears in Annex B, which 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 Declaration on Fundamental Principles and Rights at Work.[8] Some examples of how businesses can impact certain of those rights are included in Appendix C.

B. The UN 'Protect, Respect and Remedy' Framework

The Guiding Principles implement the SRSG's 'Protect, Respect, and Remedy' Framework on business and human rights, which the UN Human Rights Council unanimously welcomed in 2008, part-way through his mandate. The Framework rests on three independent but mutually supporting pillars:

1. The **state duty to protect** against human rights abuses by third parties, including business, through effective policies, regulation and adjudication (Guiding Principles 1 through 10);
2. The **corporate responsibility to respect 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); and
3. The need for greater access by victims to **effective remedy**, both judicial and non-judicial (Guiding Principles 25 through 31).

II. Convergence on the UN Guiding Principles

There has been significant global convergence on the Guiding Principles following their unanimous endorsement by the UN Human Rights Council in 2011, as seen in:

- **International standard-setting bodies**, including: 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 UN Guiding Principles;[9] the International Finance Corporation's revised Performance

[8] The core international human rights instruments can be downloaded at www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.
[9] Available at www.oecd.org/investment/mne/oecdguidelinesformultinationalenterprises.htm.

Standards on Environmental and Social Sustainability;[10] the International Organization for Standardization's corporate social responsibility standard (ISO 26000);[11] and the European Commission's 2011 Communication on Corporate Social Responsibility.[12] This convergence is also reflected in the growing understanding of the UN Global Compact's human rights and labour principles[13] and the content of various industry-specific standards.

- **Government-level developments**, including the development of 'National Action Plans' on business and human rights by many European governments and by the US Government;[14] 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**, including the European Parliament's Directive on Disclosure of Nonfinancial and Diversity Information;[15] national-level reporting requirements, including in Denmark, France, Sweden and the UK; US 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.[16]
- **Public commitments by companies** to respect human rights and implement the UN Guiding Principles, including by a range of companies that have adopted standalone

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[10] Available at www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework.

[11] Available at www.iso.org/iso/discovering_iso_26000.pdf.

[12] Available at http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm.

[13] Available at www.unglobalcompact.org/abouttheGc/TheTenprinciples/index.html

[14] Current National Action Plans are available at http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans. See also International Corporate Accountability Roundtable, *Launch of the National Action Plans (NAPs) Project* (2014), available at http://accountabilityroundtable.org/analysis/launch-of-the-national-action-plans-nap-project/.

[15] Available at http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm.

[16] See Shift, *Update to John Ruggie's Corporate Law Project: Human Rights Reporting Initiatives* (2013), available at http://shiftproject.org/publication/update-john-ruggie's-corporate-law-project-human-rights-reporting-initiatives, and Triponel and Rees, *The Rising Tide of Human Rights Reporting Requirements* (2014), available at www.shiftproject.org/article/rising-tide-human-rights-reporting-requirements.

human rights policies or updated their existing policy commitments, or that are updating their processes to better align with the Guiding Principles.[17]

In addition, lawsuits asserting that businesses have negatively impacted human rights, either by themselves or through their involvement with others, are being filed with increasing frequency around the world, against companies in many different business sectors. This is driven by rising awareness by victims of their human rights, enhanced cooperation by human rights lawyers in numerous countries to find innovative ways to secure remedy for their clients, and the increasing recognition of such claims by courts and tribunals. This is discussed further in Part 2 Section II.C below.

In Sections III through V below, the Guidance briefly summarises the three pillars of the UN 'Protect, Respect and Remedy' Framework. Given the focus of this Guidance, it spends more time on Pillar 2 which outlines the corporate responsibility to respect human rights.

III. Pillar 1 – The state duty to protect human rights

The Guiding Principles do not create new legal obligations for states – rather, they recognise existing obligations that states have under international human rights law, in particular to take appropriate steps to protect against human rights harms committed by third parties, including business, within their territory and/or jurisdiction. The Guiding Principles instead focus on the policy implications of these legal duties for states: in other words, how can states more effectively put these obligations into practice?

Clearly, states should 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 should clearly set out the expectation that all business enterprises domiciled in their territory and/or jurisdiction should respect human rights throughout their operations – including at home and abroad (Guiding Principle 2). States should also consider a 'smart mix' of measures to foster business respect for human rights, which include enforcing laws that regulate business respect for human rights, ensuring that business laws and policies enable business respect for human rights, providing effective guidance to business on how to respect human rights, and encouraging businesses to communicate about how they address human rights impacts (Guiding Principle 3).

States should take special steps to ensure respect for human rights by state-owned or controlled enterprises, businesses that receive substantial support and services from state agencies, and businesses with whom the state contracts for services or enters into commercial transactions (Guiding Principles 4–6). In addition, states should also take particular steps to ensure that business enterprises operating in conflict-affected and other high-risk areas are not involved in serious human rights abuses (Guiding Principle 7).

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[17] According to the Business and Human Rights Resource Centre, over 370 companies have adopted a formal company policy statement explicitly referring to human rights, as of 28 August 2014. *Company policy statements on human rights,* available at http://business-humanrights.org/en/company-policy-statements-on-human-rights.

The Guiding Principles focus on the issue of 'policy coherence' by states, which has both a vertical and horizontal dimension to it. Vertical policy coherence means that states need to ensure that their international obligations are implemented domestically through appropriate law and policy. Horizontal policy coherence means that states should seek to ensure that state departments and agencies that shape business practices act consistently with the state's human rights obligations (Guiding Principle 8). In addition, ensuring policy coherence means that states should not restrict their legitimate domestic policy space to appropriately protect human rights when they enter into agreements or contracts, such as investment agreements (Guiding Principle 9).

In addition, when acting as members of multilateral institutions that deal with business issues, states should seek to ensure that their participation aligns with and does not detract from their duty to protect human rights (Guiding Principle 10).

States also have existing obligations when it comes to providing access to effective remedy; this is discussed further below.

IV. Pillar 2 – The corporate responsibility to respect human rights

A. Overview

The responsibility to respect human rights is the baseline expectation of all business enterprises. The Guiding Principles do not, and cannot, impose legal obligations on companies directly but neither are they voluntary; businesses (and others) do not have to 'sign-up' to them for them to apply. Aspects of the responsibility to respect human rights may be, and often are, 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 and – importantly – it exists independently of the state's ability to meet its own duty to protect human rights. That is, national law does not limit the responsibility to respect human rights.

The responsibility to respect means that businesses should avoid infringing on the human rights of others, and 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 service by their business relationships, even if the company itself did not cause or contribute to the impact (Guiding Principle 13). '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 in an enterprise's value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.

The way in which a business is involved in a negative human rights impact will determine the action that it should take in response. This is discussed in subsection E below.

The responsibility to respect applies to all 'internationally-recognised' human rights (Guiding Principle 12). 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;
- International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

Where a company's activities may impact on a potentially marginalised or vulnerable group (eg, children, women, migrant workers, indigenous peoples), it will also need to pay attention to the international human rights standards that apply to members of that group.

The responsibility applies to all businesses, regardless of their size, sector, operational context, ownership and 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).

To meet the responsibility to respect, a business needs to 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: (i) assesses the actual and potential impacts on human rights arising from its own activities and through its business relationships, (ii) integrates the findings from these assessments and takes action to prevent or mitigate adverse impacts, (iii) tracks the effectiveness of its efforts to address human rights impacts, and (iv) is prepared to communicate these efforts to affected stakeholders and others. (Guiding Principles 17–21).
- 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).

There are two principles addressed to 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). Secondly, where it is necessary for a business to prioritise human rights impacts for attention, severity of impact should drive that assessment (Guiding Principle 24).

This section now turns to a detailed discussion of each Guiding Principle relevant to the corporate responsibility to respect human rights.

B. Adopting and embedding human rights policy commitments – Guiding Principle 16

A policy commitment is a high-level, public statement that the business will respect human rights. The commitment should serve as a critical source of the business's leverage – that is, its ability to influence others to respect human rights – because it sets a clear expectation for its business relationships, including entities in its supply chain, contractors, and customers.

In order to be effective, a policy statement should be embedded throughout the business. Embedding is the process of translating the policy statement into a company-wide commitment that becomes part of how the company operates and makes decisions through a range of approaches, including:

- effective and authentic leadership by the company's 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, for example, its procurement or sales practices; and
- deciding how to organise the human rights function within the company in order to drive cross-functional engagement and collaboration.[18]

C. Conducting human rights due diligence – Guiding Principle 17

Human rights due diligence is an ongoing process that is intended to enable businesses 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 that have occurred should be the subject for remediation, as discussed below in connection with Guiding Principle 22 (see Commentary to Guiding Principle 17).

The expectation that businesses will conduct human rights due diligence raises several questions about the nature and scope of the process.

1. Scale, complexity, and severity of impact

Companies vary greatly in size, scope, and complexity and 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).[19] Therefore, while the human rights due diligence processes of small businesses will typically be less complex than those of a large, multinational corporation, even a small business with few employees – such as a trading company that arranges for the import of minerals that may be mined by child or forced labour from conflict affected areas – can be involved with significant impacts on human rights.

2. Due diligence on business relationships

Guiding Principle 17 recognises that it may be unreasonably difficult for businesses with large numbers of entities in their value chains to conduct human rights due diligence on them all. In such cases, the business 'should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain… clients' operating contexts, the particular operations, products or services involved, or other relevant considerations, and prioritise these for human rights due diligence'.

The focus of due diligence with respect to a business relationship is 'not on the risks the related party poses to human rights *in general*, but the risks that it may harm human

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[18] For a detailed discussion, see Shift, *Embedding Respect for Human Rights Within a Company's Operations*, Workshop Report No 1 (June 2012), available at www.shiftproject.org/publication/embedding-respect-human-rights-shift-workshop-report-no-1.

[19] Guiding Principle 24, discussed in Section D, discusses the concept of severity in detail, in the context of prioritising human rights risks and impacts for responsive action.

rights *when acting in connection with the enterprise's own operations, products or services'*. (Interpretive Guide, section 6.2).

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 moments where human rights due diligence should be conducted or repeated, for example, 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 Guiding Principles do not prescribe whether such processes should be standalone or integrated into other systems.

D. Assessing impacts – Guiding Principle 18

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, but could experience negative impacts in a more severe manner (see previous subsection A). A business should map its own activities and business relationships, as well as potentially affected stakeholder groups, in order to assess how it may be involved with negative impacts on those stakeholders' human rights.[20]

Assessing human rights impacts means taking full account of the perspective of potentially affected stakeholders – where possible, through meaningful engagement with them. Understanding their perspective is essential in order to accurately assess the severity of impacts. Severity, as defined in Guiding Principle 24, has three characteristics:

- scale, which refers to the gravity of the impact; ie, how serious is the potential impact on the enjoyment of the right? 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, which refers to the number of people who may be impacted; the more people, generally speaking, the more severe the impact; and
- irremediability, which refers to 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 in which they combine, can render an impact severe.

[20] The European Commission's Guides on implementing the Guiding Principles in three sectors (Employment & Recruitment, ICT and Oil & Gas) provide examples of how to map impacts on stakeholder groups. The guides were written by Shift and the Institute for Business and Human Rights and are available at http://ec.europa.eu/enterprise/policies/sustainable-business/documents/corporate-social-responsibility/index_en.htm.

In addition to its severity, a company needs to assess the *likelihood* of a particular human rights impact occurring, or continuing or recurring (in the case of an actual impact). 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 (if the risk arises 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?).

Guiding Principle 24 identifies severity as the key factor in determining which impacts a business should address first, where prioritisation due to limited resources is necessary.

E. Integrating and Acting – Guiding Principle 19

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.

Effective integration, as described in Guiding Principle 19(a), requires that the business has the internal decision-making and oversight processes in place to enable effective responses to such impacts. 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.

1. Modes of Involvement in Negative Impacts – Guiding Principle 19(b)

The way in which a business is involved in negative human rights impacts, actual and potential, determines the nature and scope of its required response. In responding to identified impacts, businesses should consider three potential modes of involvement in a human rights impact – cause, contribute, and linkage.[21]

a) Cause

A business can *cause* an impact when its own actions lead solely and directly to an impact. For example, a business may be deemed to have caused adverse impacts if it exposes workers in its factories to hazardous conditions without providing them with adequate safety equipment. Where a business has caused or may cause an impact, it should prevent the harm or stop the relevant action in order to prevent further impacts, and remediate any harm that has occurred.[22]

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[21] Examples from the Interpretive Guide.

[22] The responsibility to remediate is found in Guiding Principle 22, discussed in section G, which states that where businesses enterprises identify that they have caused or contributed to adverse human rights impacts, they should provide for or cooperate in their remediation through legitimate processes.

b) Contribute

A business may *contribute* to an impact either by incentivising, facilitating or enabling a third party – such as a supplier, a contractor, or a client – to harm human rights, whether intentionally or not. A business may also contribute in parallel with one or more entities to a negative impact (as in the example of cumulative pollution of a water source by several different factories). Other examples of contribution include the following:

- an internet company providing data about users of its services to a repressive government that uses the data to trace and prosecute political dissidents in a manner that is contrary to international human rights standards;
- a construction and maintenance company working on strengthening fences and other facilities in a detention camp where inmates are allegedly subject to inhumane treatment;
- a food company deliberately targeting high-sugar foods and drinks at children, with an impact on levels of child obesity;
- an electronics retail brand changing product requirements for suppliers at the last minute, without adjusting production deadlines or prices, pushing suppliers to breach labour standards to ensure that the order is delivered.

Where a business has contributed or may contribute to an impact, it should prevent or stop its contribution, seek to use its leverage with the relevant third party to mitigate the risk that any further impact continues or recurs, and remediate its contribution to the impact.

Leverage means the ability of a business to change the wrongful practices of another party that causes or contributes to an adverse human rights impact and is discussed further below.

c) Linkage

Even where a business does not cause or contribute to an impact, the impact may nevertheless be directly *linked* to its operations, services or products through a business relationship. Examples of direct linkage include the following:

- 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 purchasing embroidery on clothing products that were subcontracted by the supplier to child labourers in homes, counter to the supplier's contractual obligations to the buyer;
- the use of portable ultrasound machines by doctors to screen for female foetuses, facilitating their abortion in favour of male children, notwithstanding prohibitions by the manufacturer on such use.

Where a business's operations, products or services are or risk being directly linked to an impact, it should seek to use or build leverage with the third party in order to mitigate the risk of the impact occurring or continuing to the greatest extent possible.

2. Possible responses to negative impacts

As discussed above, the appropriate response to a negative impact varies according to whether the business caused, contributed, or is directly linked to the impact. This subsection addresses the relevance of leverage in more detail, as well as what the Guiding Principles provide for regarding termination of the relationship.

a) The appropriate use of leverage

Leverage is distinct from a business's responsibility to address an impact; rather, exercising leverage is a means of meeting that responsibility. As used in the Guiding Principles, leverage includes, but is much broader than, the ability of the dominant party in a business relationship to influence the human rights behaviour of the other party. It is relevant to non-dominant parties as well, which have limited ability to influence others. And even companies with a dominant position in a relationship may not always be able to identify and exercise leverage effectively to address human rights issues.

When thinking about leverage, companies should ask three key questions:[23]

1. **Who am I trying to apply leverage to?** Common examples of the actors over which leverage can be exercised include: up-stream suppliers; joint venture partners; down-stream business customers; clients; end-users of products and services; and state actors.
2. **Through what means?** The means through which leverage can be asserted can include: traditional commercial leverage (eg, commercial contracts); broader business leverage (eg, offers of capacity-building); leverage with business partners (eg, collective action with other companies); leverage through bilateral engagement (eg, a government entity, a business peer, an international organisation, a leading NGO); and multistakeholder collaboration with a variety of entities involved.
3. **For what purpose?** The purpose of leverage is to create the opportunity to change how others think and behave. The purpose may range along a spectrum from obliging another to address an issue, to obliging them to engage in discussions about the issue, or to engaging them in order to try to persuade them to address an issue. Examples of practical opportunities in a business relationship to apply leverage 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.

b) Considering Termination of the Relationship

Where a business has tried unsuccessfully for some time to use or increase its leverage over a third party to prevent or mitigate human rights harm, 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 it is constrained by

[23] See generally, Shift, *Using Leverage in Business Relationships to Reduce Human Rights Risks* (November 2013), available at http://shiftproject.org/publication/using-leverage-business-relationships-reduce-human-rights-risk-shift-workshop-report-no-.

contract or law from terminating the relationship except in very specific circumstances. Moreover, any consideration of termination should factor in the potential adverse human rights impacts of doing so; eg, child labourers being put in an even more precarious position if a supplier is terminated and it stops being able to pay them any wages. 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.

F. Tracking (Guiding Principle 20) and communicating (Guiding Principle 21)

1. 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 involve an appropriate mix of quantitative and qualitative indicators.

2. Communicating about efforts to address impacts

Guiding Principle 21 provides that 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 through to formal public disclosure. Formal disclosure is expected where a company's operations or operating contexts pose a risk of severe negative impacts.

A business need not 'reveal publicly all the issues identified in its on-going assessments of human rights impacts or the steps it takes to mitigate every risk identified' (Interpretive Guide, section 10.2). Nor need it disclose confidential information. Guiding Principle 21 states that, 'In all instances, communications should... not pose risks to affected to stakeholders, personnel or to the legitimate requirements of commercial confidentiality'. This would include 'information legally protected against third parties' (Interpretive Guide, section 10.7). Rather, the business should explain its general approach towards addressing its human rights risks (Interpretive Guide, *s*ection 10.3).

In situations where a business has identified actual or potential impacts that people need to know about in order to adequately protect themselves from harm, the Guiding Principles urge the company to inform potentially affected stakeholders about the risk and how the company is seeking to address it, without waiting for a request for such information (Interpretive Guide, section 10.5).

G. Remediation – Guiding Principle 22

Under Guiding Principle 22, a business has a responsibility to provide or cooperate in legitimate processes to provide remedy for impacts that it identifies it caused or contributed to. If it does not consider that it caused or contributed to the impact, it can insist on the need to have an authoritative, impartial body adjudicate the issue (Interpretive Guide, section 11.7).

V. Pillar 3 – Access to effective remedy

This part of the Guiding Principles is addressed both 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 existing obligations 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 (Guiding Principle 25). 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).[24]

Remedy can take many 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' (Guiding Principle 25, Commentary).

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 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, serving as a source of continuous learning, and (for operational-level grievance mechanisms), being based on engagement and dialogue (Guiding Principle 31).

[24] For more on remediation see Shift, *Remediation, Grievance Mechanisms, and the Corporate Responsibility to Respect Human Rights,* Workshop Report No 5 (May 2014), available at http://shiftproject.org/publication/remediation-grievance-mechanisms-and-corporate-responsibility-respect-human-rights.

PART 2: HOW LAWYERS CAN HELP BUSINESSES RESPECT HUMAN RIGHTS

This Part of the Guidance discusses how lawyers, wherever they are employed, can help their business clients respect human rights, consistent with their professional obligations to act in their client's best interests, properly advise their clients and preserve client confidences. In some contexts, this may primarily involve advice about how to comply with existing national laws that protect human rights. However, experience shows that compliance with domestic law alone has not been sufficient for companies to ensure that they are respecting human rights particularly in more challenging context, such as where national law is at odds with international human rights standards. Thus, business lawyers increasingly need to be able to provide advice on these international standards and their interaction with national law, or know where to turn for such expertise.

Lawyers may be expected to advise companies on human rights where companies have adopted specific policy commitments, or where they have directly or indirectly (eg, through their membership in an industry association) endorsed a code or charter that contains human rights commitments. And companies themselves are increasingly requesting that their legal counsel provide advice that takes potential human rights risks into account as part of their broader management of legal risks. In addition, management of human rights risks is increasingly seen as important to the sustainability of business in the medium to long term.

The company general counsel 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.'[25] Some companies have also chosen the legal department to drive their human rights commitments. It is now the case that even where it does not lead on human rights, 'the legal department often plays a critical role in shaping implementation of human rights responsibilities. Legal 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.'[26]

In turn, leading companies are starting to demand that their external counsel consider human rights in the business law advice that they provide. As Professor Ruggie stated in a meeting with International Bar Association leaders and corporate counsel in 2013, '[w]here previously corporate counsel expressed deep scepticism about the implications of the UN Guiding Principles, corporate in-house legal leaders are now challenging their outside

[25] Heineman, *The Rise of the General Counsel*, Harvard Business Review Blog Network (2012), available at http://blogs.hbr.org/2012/09/the-rise-of-the-general-counsel.

[26] Davis and Kovick, *Organizing the Human Rights Function within a Company,* UN Global Compact Good Practice Note (2014), available at www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/GoodPracticeNote_HumanRightsFunction.pdf

counsel to proactively advise them on human rights risks.'[27] 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 impacts 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 advice on business and human rights issues fits within the scope of the lawyer's engagement with the client, whether the lawyer is in a law firm or in an in-house legal department, in order to give their members clear guidance on these issues.

Thus, business lawyers will increasingly need to be prepared for their clients to ask them to provide such assistance and advice. This section aims to equip them with a grounding in some of the key issues involved, including the relationship between the Guiding Principles and the international human rights standards they reference and national law, evolving aspects of legal risk management relevant to human rights, the relationship between the Guiding Principles and national professional codes of conduct, and some specific areas of legal practice where advice on the Guiding Principles is being sought.

I. Relationship of the Guiding Principles to National Law – Guiding Principle 23

As discussed above in Part 1, the Guiding Principles do not and cannot impose legal obligations on companies directly, but neither are they voluntary. Aspects of the responsibility to respect human rights may be, and often are, 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 and – importantly – it exists independently of the state's ability to meet its own duty to protect human rights. That is, national law does not limit the responsibility to respect human rights.

Guiding Principle 23 addresses the relationship between the responsibility to respect and the law.

A. Legal compliance – Guiding Principle 23(a)

Guiding Principle 23(a) recognises the importance of legal compliance. It states that businesses enterprises should '[c]omply with all applicable laws and respect internationally recognised human rights, wherever they operate'.

At the same time, the responsibility to respect is not limited by the laws of a particular country and applies even where national law is absent, weak, unenforced, or even in tension with internationally recognised human rights. 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). Moreover, even in countries with robust legal

[27] Ruggie, *Corporate Lawyers and the UN Guiding Principles,* (2013), available at www.shiftproject.org/article/corporate-lawyers-and-un-guiding-principles.

frameworks, there may be many areas where the law does not adequately protect human rights from business-related harms.

Business lawyers can help make their clients aware that respecting human rights is not solely a matter of legal compliance. By being prepared to advise clients on gaps between national law and international human rights standards, they can assist clients in assessing the risks of operating in a particular context – both to human rights and to the client's business – and take appropriate steps to address them.

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 has minimal requirements for consultation with, or compensation for, affected households or communities. In such cases, the defective government acquisition process may sow the seeds of conflict between the community and the company, which could threaten the project's long-term viability.

B. Conflicting requirements – Guiding Principle 23(b)

National law may not only be inadequate to protect human rights, it may be in direct conflict 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 in the workplace. 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.

This is again an area where lawyers can provide critical advice to clients in order to help them understand the nature, scope, and implications of the conflict and explore appropriate responses without violating national law. For example:

- the national law may be ambiguous;
- the means used by the government to restrict human rights may be procedurally defective;
- there may be opportunities for seeking clarification from the government or even to challenge the law, together with peer companies or through an industry association;
- there may be ways for the client to seek to honour the spirit of human rights without violating national law; eg, by establishing parallel processes 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.

C. Involvement in gross human rights abuses – Guiding Principle 23(c)

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).

As the commentary to Guiding Principle 23(c) states:

> 'Business enterprises should treat this risk as a legal compliance issue, 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 of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.'[28]

Lawyers typically play a critical role in designing, enforcing, and monitoring a company's compliance with external and internal standards. In order to ensure that their business clients respect human rights, they should be prepared to assume a similar role in preventing the involvement of their clients in gross human rights abuses.

II. Legal risk management

A company's failure to manage its human rights risks can have serious adverse consequences for the company itself, including legal risks. These legal risks may arise from many sources, such as: a company board's failure to discharge its oversight and monitoring responsibilities for human rights risks,[29] resulting in damage to the company's reputation;[30] a company not honouring human rights commitments in a policy, code of conduct or in its contractual obligations; changing judicial interpretations of the appropriate standard of care for managing human rights risks; or the enactment of more stringent legislation following severe human rights violations in a sector or country.

Lawyers typically advise business clients not only on legal risks that arise under existing law, but on risks that may likely arise under future law as well. National law in this area is not static; it is dynamic and evolving. The global convergence on the Guiding Principles is

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[28] This statement reflects, among other sources, independent research into the laws of 16 countries regarding the criminal liability of companies for grave breaches of international criminal and humanitarian law (genocide, crimes against humanity, forced labour, and war crimes): Ramasastry and Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries,* (2006), available at www.fafo.no/liabilities.

[29] Business lawyers play a crucial role in advising boards of directors on oversight of the management of risks by the company, which now includes human rights risks. According to Marty Lipton of Wachtel, Lipton and Katz in the US, such oversight is a 'straightforward extension of the board's existing duty to monitor corporate compliance with criminal, financial, environmental, employee, and health and safety legal obligations.' He concludes that the 'eminently reasonable [UN] guiding principles can be endorsed, and practically implemented, by corporations'. See his letters to clients dated 27 May 2010 and 24 November 2010.

[30] The importance to shareholders of board oversight of the company's management of human rights risks is underscored by recent research, which suggests that 38 per cent of the stock market value of FTSE 100 companies, which is approximately £911bn in cash terms, can be attributed to the reputation of the business. See Reputation Dividend, *The 2013-2014 UK Reputation Dividend Study* (2014), available at http://reputationdividend.com/files/2413/9029/4988/2013-14_UK_Reputation_Dividend_Report.pdf.

increasingly reflected in national laws, as discussed in Part 1, section II, whether or not those laws are an explicit response to the Guiding Principles, and it is likely that this trend will continue. The following provide some examples of changes in law and the legal landscape in relation to reporting and disclosure, financial regulation, and litigation in response to emerging business and human rights concerns.

A. Reporting and disclosure

Public disclosure laws and regulations are increasingly and specifically requiring disclosure of a company's human rights policies, processes and performance, as a result of growing demands from regulators, investors, shareholders, labour, consumers and civil society organisations for accurate information on companies' social and environmental impacts.[31] 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 the European Union, the United Kingdom, France, Denmark and India.[32]

For example, 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'.[33] The UK Financial Reporting Council in June 2014 published guidance on corporate reporting pursuant to the Act, which explicitly refers to the UN Guiding Principles as a source of guidance for directors.[34]

Further, in a new directive adopted by the European Parliament in 2014 which must be implemented by EU Member States by 2016, 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 UN Guiding Principles is referenced in the directive as an international framework that companies can rely upon in providing this information.

B. Financial losses and regulation

In the mid- to long- term, harm to people and harm to business often converges, which increases the likelihood of governmental regulation intended to prevent such harm to people in their jurisdiction, to other businesses, and to their economies as a whole.

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[31] Triponel and Rees, *The Rising Tide of Human Rights Reporting Requirements* (2014), available at www.shiftproject.org/article/rising-tide-human-rights-reporting-requirements.

[32] See Shift, *Update to John Ruggie's Corporate Law Project: Human Rights Reporting Initiatives,* (November 2013), available at http://shiftproject.org/sites/default/files/Update%20to%20Corporate%20Law%20Project%20November%202013.pdf.

[33] *The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013*, available at www.legislation.gov.uk/ukdsi/2013/9780111540169/contents.

[34] Financial Reporting Council, *Guidance on the Strategic Report* (June 2014), available at https://www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/Guidance-on-the-Strategic-Report.pdf.

Lawyers can help clients make the connections between negative impacts on people and legal risks.

For example, in the extractive sector, conflicts between communities and companies can lead to violence and project shutdowns. Research 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 NPV terms, mostly due to lost sales.[35] However, because the costs of conflict are often rolled into local operating costs and not identified and aggregated, they do 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.

The SBS, the Peruvian independent financial regulator, has identified company-community conflict in the mining industry 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 SBS is in the process of promulgating regulations requiring banks, insurers and pension funds to evaluate the effectiveness of the policies and processes that extractive companies have in place to prevent and address community conflict when engaging in transactions with them.[36]

C. Legal liability and litigation

Claims against companies for alleged involvement in human rights abuses are increasingly occurring under different theories and in different jurisdictions, as seen from the database of cases maintained by the Business & Human Rights Resource Centre.[37] A key driver of such litigation is the increasing cooperation and rapid communication among 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.[38] This section outlines some recent developments, but is only intended as a starting point for lawyers, whether they are involved in bringing or defending such claims.

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[35] Davis and Franks, *Costs of Company-Community Conflict in the Extractive Sector*, CSRI at Harvard Kennedy School (2014), available at http://shiftproject.org/sites/default/files/Costs%20of%20Conflict_Davis%20&%20Franks.pdf.

[36] Schydlowsky and Thompson, *Reducing the Financial Risk of Social Conflict*, Americas Quarterly (Spring 2014), pp 83 et seq, available at www.americasquarterly.org/content/reducing-financial-risk-social-conflict.

[37] See http://business-humanrights.org/en/corporate-legal-accountability.

[38] Compare Earthrights International, *Missing the Point: A response to the U.S. Chamber of Commerce report,* (2010) *'Think Globally, Sue Locally,* available at www.earthrights.org/publications with Drimmer and Lamoree, 'Think Globally, Sue Locally; Trends and Out of Court Tactics in Transitional Tort Actions', 29 *Berkeley Journal of International Law*, Issue 2 (2011), available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1407&context=bjil.

Since the mid-1990s, the US courts have been a centre of international human rights litigation against companies under the US Alien Tort statute (ATS), which gives foreign plaintiffs 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.[39] In 2013 the US Supreme Court in *Kiobel v Shell Oil Co* narrowed the extraterritorial reach of the ATS to cases that 'touch and concern' the interests of the United States.[40] The decision was complex and tied closely to the facts of the case, and its future application awaits further litigation in other cases.[41]

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 Nigeria, South Africa, Peru and Côte D'Ivoire.[42] In 2012 the English Court of Appeals 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.[43]

This theory 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's Guatemalan subsidiary. The court concluded that the complaint had properly pleaded a novel duty of care owed by the parent to the villagers for the alleged abuses.[44]

Supply chain contracts can also serve as the vehicle for the assertion of human rights claims. For example, in 2013, the shoe company Adidas AG agreed to pay severance to Indonesian workers of an independent supplier whose factory had shut down, after the University of Wisconsin sued Adidas, alleging that it had breached labour provisions in its contract to supply garments with the university logo.[45]

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[39] Goldhaber, *Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard*, 3 UC Irvine Law Review 127 (2013).
[40] *Kiobel v Royal Dutch Petroleum Co*, 569 US (2013).
[41] See Earthrights International, *Out of Bounds—Accountability for Corporate Human Rights Abuse After Kiobel*, (2013), available at www.earthrights.org/publications. Lower court decisions following *Kiobel* have dismissed some ATS claims and allowed others to go forward: Altshuller, *Alien Tort Case Developments: Three Recent Decisions* (September 19, 2014), available at www.csrandthelaw.com/2014/09/19/alien-tort-case-developments-three-recent-decisions/. Also, complaints in ATS lawsuits typically plead state common law claims as well – eg, assault and battery, wrongful death – which the *Kiobel* case does not address.
[42] See Goldhaber, *Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard*, 3 UC Irvine Law Review 127 (2013); Meeran, *Tort litigation against multinationals (MNCs) for violation of human rights: an overview of the position outside the US,* available at www.leighday.co.uk/LeighDay/media/LeighDay/documents/Anglo%20-%20silicosis/Tort-litigation-against-multinational-corporations-by-Richard-Meeran.pdf.
[43] *Chandler v Cape plc*, [2012] EWCA Civ 525.
[44] See http://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0.
[45] See http://business-humanrights.org/en/adidas-lawsuit-re-university-of-wisconsin.

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, including:

- the filing in 2013 of a complaint with the state prosecutors office in Germany alleging that a senior manager of Danzer Group, a German timber company, provided logistical and financial help to Congolese police during an attack on a village in the Democratic Republic of the Congo that resulted in serious harms;
- the filing in 2012 of a criminal complaint in a Paris court, urging it to investigate the alleged complicity of Qosmos in government torture by supplying surveillance equipment to the Syrian government; and
- a decision by the Paris Court of Appeals allowing a judicial investigation into Amesys (part of Groupe Bull) to proceed, regarding alleged complicity with surveillance and torture by the Gaddafi government.[46]

The aforementioned is not intended to suggest that the successful assertion of business-related human rights claims is easy. To the contrary, such claims face considerable challenges.[47] 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, the UN Human Rights Council, in a recent and sharply divided vote, has created an intergovernmental working group to consider such a treaty.[48] Whatever the fate of this process will be, it will likely put pressure on states to increase opportunities for access to remedy for victims of business-related human rights abuse.

Finally, it should be noted that the question of a company's litigation strategy and tactics has recently been raised as a topic to explore under the responsibility to respect human rights. As Professor Ruggie has said, business lawyers may wish to consider 'laying out for their client the entire range of risks entailed by the litigation strategy and tactics, including concern for their client's commitments, reputation, and the collateral damage to a wide range of third parties' as part of helping their client understand the full implications of any proposed approach to responding to claims of human rights harms.[49]

[46] Business & Human Rights Resource Centre, Corporate Legal Accountability Annual Briefing (2013), available at http://business-humanrights.org/en/corporate-legal-accountability/publications/corporate-legal-accountability-annual-briefings.
[47] See, eg, Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies,* A report prepared for the Office of the UN High Commissioner for Human Rights (2014), available at www.ohchr.org.
[48] Ruggie, *The Past as Prologue? A Moment of Truth for a UN Business and Human Rights Treaty* (July 2014), available at www.ihrb.org/commentary/board/past-as-prologue.html.
[49] Ruggie, *Kiobel and Corporate Responsibility: An Issues Brief* (September 2012), available at www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf.

III. Legal professional codes of conduct

Lawyers must adhere to professional codes of conduct.[50] The Guiding Principles were not intended to trump such codes of conduct, given the critical role that lawyers play in upholding the rule of law, which is a foundation for the corporate responsibility to respect human rights. Indeed, the Guiding Principles recognise the need for businesses to preserve the confidentiality of lawyer–client communications and client confidences, as discussed in Part 1, section F.2.

In addition, the professional legal codes of a number of jurisdictions can be seen to align with the Guiding Principles in several key respects. A useful starting point is the IBA's 2011 International Principles on Conduct for the Legal Profession, which consists of ten principles common to the legal profession worldwide and which 'express the common ground which underlies all the national and international rules which govern the conduct of lawyers, principally in relation to their clients'.[51] The IBA has recognised that advising business clients on how to manage their legal risks by preventing and mitigating their involvement in negative human rights impacts falls within a lawyer's ethical obligations under the IBA International Principles, which explicitly take into account the 1948 UN Declaration of Human Rights – a key source of the internationally recognised human rights standards that the corporate responsibility to respect relies on.

Principle 5 (Clients' Interest) in the IBA International Principles provides that '[a] lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, *and to maintain ethical standards*' (emphasis added). Principle 1 (Independence) states that lawyers must maintain their independence 'in order to give clients unbiased advice and representation', and the commentary states, 'Clients are entitled to expect independent, unbiased and candid advice, irrespective of whether or not the advice is to the client's liking' (Commentary 1.2).

The American Bar Association used this reasoning when it endorsed the Guiding Principles in 2012, and focused on the impact that the Guiding Principles would likely have on the future development of the law. In so doing, the ABA explicitly linked its own rule requiring that lawyers provide independent and candid advice – Model Rule of Professional Conduct 2.1 – to the need for lawyers to provide advice on the Guiding Principles to business clients, where relevant. It found that the Guiding Principles 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'.[52]

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[50] Moreover, lawyers who advise on international transactions must pay attention to more than one code of conduct – eg, the jurisdiction where they are admitted to practice and the jurisdictions where the transaction takes effect.

[51] The Principles are available at www.ibanet.org/Article/Detail.aspx?ArticleUid=bc99fd2c-d253-4bfe-a3b9-c13f196d9e60.

[52] See American Bar Association Resolution No. 109, February 6, 2012 and Report, available at www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_109.authcheckdam.pdf.

Other jurisdictions explicitly refer to human rights as a component of ethical lawyering, including Rule 1.1 of the European Bar's Code of Conduct for Lawyers in the European Community (stating that lawyers' moral and ethical obligations include those that they owe to 'the public for whom a free and independent profession… is an essential means of safeguarding human rights in the face of the power of the state and other interests in society'); Article 1 of Japan's Basic Rules on the Duties of Practicing Attorneys; and the non-discrimination provisions of the Canadian Bar Association Code of Professional Conduct.[53] South African lawyers are subject to similar rules.[54]

There may of course be potential tensions between a lawyer's responsibilities under applicable codes of conduct and the Guiding Principles. Dilemmas will inevitably arise, as discussed in in Part 3, section II below. In its 2013 report, *The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession*, A4ID surveyed the professional codes of nine jurisdictions and identified points of alignment between the codes and the Guiding Principles, as well as some potential tensions, such as those relating to a firm's human rights policy as a form of attorney advertising, limitations by clients on the lawyer's scope of work, and withdrawal from representation of a client.[55]

Whether and the extent to which such potential tensions restrict the ability of lawyers to help their clients respect human rights as a practical matter is a subject for review by individual country bar associations, as contemplated by Article 5 of the IBA's Business and Human Rights Guidance for Bar Associations, and as discussed in Part 3, section III.B.2.

IV. Specific legal practice areas

There are few areas of business legal practice in which lawyers do not have the potential to influence a company's ability to respect human rights. Part 3 of this Guidance discusses the circumstances in which law firms may have a responsibility to provide such advice or otherwise seek to influence a client's actions in line with the firm's responsibility to respect human rights as a business enterprise itself.

For now, the aim of this section is to provide a non-exhaustive list of some key practice areas in which lawyers are increasingly being asked to provide services to enable their clients to respect human rights. Yet relatively few business lawyers currently have the expertise to identify potential human rights issues that may be associated with a client's request for services because many lack familiarity with international human rights

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[53] See Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 Colum L Rev 157, 182 (2010), quoting from Code of Conduct For European Lawyers (19 May 2006), www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf ; Japan Federation of Bar Associations, Basic Rules (preliminary provision, adopted 10 November 2004) Art 1 available at www.nichibenren.or.jp/en/about/regulations.html.

[54] See A4ID, *The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession* (2013) p 46, available at http://a4id.org/sites/default/files/user/A4ID%20Business%20and%20Human%20Rights%20Guide%202013%20(web).pdf.

[55] *Ibidd.*

standards. As a result, a growing number of law firms and corporate legal departments are starting to develop the internal capacity (through training and education) to identify and address potential human rights issues that may arise in their practice, as well as identifying appropriate specialists to consult where the matter is unclear.

A. Reporting and disclosure

Lawyers who advise companies on reporting and disclosure will want to be aware of the changed stakeholder expectations when it comes to 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 in section II.A, and a corresponding business case for increased transparency. The Guiding Principles provide the accepted framework for companies to report on their approach to human rights,[56] and there are growing examples of companies reporting information in line with their provisions.[57] In this way, companies can meet stakeholder expectations without posing undue risks to the business itself.

Lawyers who advise companies on these issues are often concerned that disclosure of certain information that is critical of the company may then be used against the company in litigation or public campaigns. 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 is a significant business case to be made that the benefits of increased transparency on human rights 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 to get out ahead of the trend in this direction;
- growing pressures on companies from business partners (customers, joint venture partners) and investors to demonstrate that human rights risks are being managed;
- experience showing that the risk of sharing information 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;
- 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.

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[56] See the research and consultation reports from the Reporting and Assurance Frameworks Initiative: www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi.

[57] See Shift, *Evidence of Corporate Disclosure relevant to the UN Guiding Principles on Business and Human Rights*, (June 2014) available at www.shiftproject.org/publication/evidence-corporate-disclosure-relevant-un-guiding-principles-business-and-human-rights-0.

In situations where a business has identified actual or potential impacts that people need to know about in order to adequately protect themselves from harm (see Part 1, section F.2), lawyers may find themselves in very uncomfortable positions if they do not advise the company to disclose such information in a timely manner.[58]

B. Contracts and agreements

A business has a responsibility to respect human rights not only in its own activities, but also in it business relationships with others. Through their central role in contract negotiation and drafting, lawyers can play a critical role in helping a company increase its leverage in order to encourage or incentivise another party to respect human rights.

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 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), or in enforcing contractual terms. These activities can also have a significant impact on a business's leverage with third parties.

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.[59] Again, the aim here is not to set down a lawyer's responsibility to provide such advice but to explore the means by which a lawyer can assist their client in this area.

1. Host state investment agreements

Early in his UN mandate, the former 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 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 – positively through improved public services, increased employment, and increased tax revenues, but also negatively 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, that are attached as an Annex to the

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[58] Eg, *Lawyers Hid Fatal Flaw, From Critics and One Another*, New York Time (6 June 2014), available at www.nytimes.com/2014/06/07/business/gm-lawyers-hid-fatal-flaw-from-critics-and-one-another.html?hpw&rref=business&module=Search&mabReward=relbias%3Aw&_r=0.

[59] More generally on this topic, see Global Business Initiative on Human Rights and Institute for Human Rights and Business, *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships* (2012), available at www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf.

Guiding Principles themselves. They are entitled *Principles for responsible contracts: Integrating the management of human rights risks into State-investor contract negotiations* (the 'Contract Principles'), and the ten principles that form the core are included in Annex C of this Guidance.[60]

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 some of the Contract Principles are unique to agreements between states and foreign investors, 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 – offer useful guidance for lawyers in negotiating other contracts that have a potential to impact human rights.

2. 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, and major infrastructure projects, because they enable companies to spread the risk of investing in capital-intensive projects that are too big for an individual company.[61] There are a growing number of examples of lawyers – both in-house and external – playing 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-venturers adequately assesses their human rights track record, and their capacity to address the human rights risks that are likely to arise if the co-venturer has any operating responsibility, by using the lens of the Guiding Principles to evaluate their policies and processes.

Secondly, the JV agreement should provide for processes and systems that enable the JV to identify and address human rights risks, including budgeting and assignment of responsibilities, and through reference to third party standards. Requiring project financing from the International Finance Corporation or from an Equator Principle Bank – which follow the Performance Standards and require human rights due diligence as part of the loan application process – is an increasingly common approach.

Thirdly, some leading companies in JV situations have negotiated corporate governance provisions to enable them to influence the joint venture's human rights performance, such as the right to monitor or audit the human rights performance of the JV, the right to second employees to 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).

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[60] Available at www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf.

[61] As a further means of allocating risk, majority owners usually operate the project, and minority owners typically do not operate the venture. Instead, they reserve the right to audit and monitor the project's performance.

3. Merger and acquisition agreements

The Guiding Principles pay particular attention to mergers and acquisitions in the context of human rights due diligence, observing that acquiring companies can inherit responsibility for human rights impacts through their mergers and acquisitions (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 understanding the risk of specific impacts on specific stakeholder groups, which could amount to a human rights impact. Such an assessment should include the past activities of the target, the ongoing activities of the target, and the future planned activities of the combined entity (to the extent that such changes have new or additional impacts on human rights).

There will be practical and legal constraints on the ability of an acquirer to engage directly with potentially affected stakeholders or their representatives prior to the closing of the deal to understand the nature and extent of any human rights risks. Lawyers may need to be prepared to conduct human rights-related background research on the relevant operating/country context, and to advise acquirers on the availability of other resources that the acquirer could use to gain insight into stakeholder perspectives, such as views of independent experts or credible proxies who could be consulted confidentially.

4. **Supply chain** agreements

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, which lawyers often play a key role in drafting, can provide an important source of leverage. However, supply chain contract terms are only part of the solution, and experience demonstrates that lawyers should be prepared to advise buyers not to rely on them exclusively.

A common response to address 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 the buyer the right to audit compliance by the supplier using the buyer's standards.

There are two practical concerns with this approach. 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'.[62] Rather than a

[62] Shift, *Respecting Human Rights Through Global Supply Chains*, Workshop Report No 2, (October 2012), available at www.shiftproject.org/publication/respecting-human-rights-through-global-supply-chains-shift-workshop-report-no-2.

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.

Secondly, 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 for workers' human rights.[63] At best, they serve as snapshots in time, and do not address the supplier's 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 purely or largely on social compliance audits towards more collaborative and capacity-building approaches.[64]

C. Dispute resolution and non-judicial grievance mechanisms

As seen in Section II.C above, the scope and reach of international human rights litigation is expanding. In addition, the Guiding Principles are influencing the development of non-judicial dispute resolution processes as well. A leading example of this is the growth in the use of National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises. The exponential increase in complaints and the outcomes in a number of high-profile cases mean that law firms are increasingly being asked to advise their clients on what the NCPs are and what their processes entail.

Each OECD member and adhering state is expected to have an NCP – a non-judicial grievance mechanism for resolving complaints that a company from that state has not acted in accordance with the Guidelines. Some NCPs are highly active, such as those in the UK, the Netherlands, and Norway. Other NCPs are less active, but are increasingly becoming so (such as France, Germany, and Brazil).

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. As a result, NCP decisions are leading to the development of a human rights 'lex mercatoria' – ie, a set of non-judicial precedents and rules that can be highly consequential for companies in individual cases and predictive for future cases. For example, the UK NCP's decision that a UK mining company's failure to consult properly with an indigenous tribe in India when seeking to build a project on a sacred mountain 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.[65]

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[63] See Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy*, 2013.

[64] See Shift, *From Audit to Innovation: Advancing Human Rights in Global Supply Chains* (2013), available at www.shiftproject.org/publication/audit-innovation-advancing-human-rights-global-supply-chains.

[65] *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International Against Vedanta Resources,*

Beyond the NCP process, there may be sound reasons in appropriate cases for a lawyer to be prepared to counsel a client to consider non-judicial processes for resolving disputes over human rights impacts, if credible opportunities present themselves. Such processes can be seen as a key tool of proper corporate governance, because submitting disputes to judges and juries takes control of the company's assets and liabilities away from the company itself.[66] Taking advantage of opportunities to resolve a human rights dispute through non-judicial processes may serve the company better than litigation – which is expensive, adversarial, unpredictable, highly time-consuming, distracts senior management attention and can destroy relationships with stakeholders. 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. There may be similar lessons that lawyers can help highlight in the broader human rights field when it comes to other affected stakeholder groups beyond workers.

plc, available at www.oecd.org/investment/mne/43884129.pdf; see also, Bennet, *Lessons from the Vedanta case—what next?* (January 21, 2014), available at http://bit.ly/VuORZy.

[66] Eijsbouts, *Mediation as management tool in corporate governance*, in *ADR in Business, practice and issues across countries and cultures'*, Ingen-Housz (ed), (2nd edn, 2010), p 67–80.

PART 3: IMPLICATIONS OF THE GUIDING PRINCIPLES FOR LAW FIRMS

Having discussed how lawyers generally – wherever employed – can help business clients to respect human rights, this part of the Guidance shifts to discuss the potential implications of the Guiding Principles for the independent responsibility of law firms, as business enterprises, to respect human rights, whether in their operations as employers, purchasers of goods and services, or in the legal services and advice that they provide to business clients. The relationship of the Guiding Principles to national laws, the management of legal risks, legal ethics and particular practice areas, as discussed in Part 2, remains highly relevant.

Readers may want to refer back to the relevant components of the Guiding Principles that were outlined in Part 1 as they work through this part of the Guidance.

I. Law firms as business enterprises

Under Guiding Principle 14, the responsibility to respect human rights applies to all business enterprises, regardless of their size, sector, ownership, structure or location. It does not provide an exception for business enterprises that provide professional services such as those providing accountancy, medical, engineering, architectural, or legal services.

Law firms are professional organisations that function as business enterprises. In 2013, for example, the 100 largest law firms in the world were reported to have revenues of US$85bn.[67] As a matter of principle then, law firms can be expected to meet the responsibility to respect human rights in all of their activities (including in their employment of lawyers) and in their business relationships, both with other law firms and business enterprises such as suppliers, and in the services they provide to their clients. Law firms that fail to respect human rights can therefore expect to be increasingly exposed to similar legal and non-legal risks as other businesses that also fail to do so.

This part of the Guidance focuses on the practical application of the responsibility to respect to legal services that law firms provide to their business clients – the core business relationship of a firm. Law firms may also be involved with adverse human rights impacts on their employees, on workers in their supply chain, or other stakeholders. These are also important subjects, since a business cannot readily embed respect for human rights in its culture if it only respects human rights in part of its business. However, this Guidance focuses on the potential for a law firm to contribute to, or be directly linked to, negative human rights impacts by its business clients' and what steps it may be able to take to prevent against such situations.

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[67] *The 2013 Global 100: A Wild Ride* (20 September 2013), available at www.americanlawyer.com/id=1202471809600/The-2013-Global-100-A-Wild-Ride?slreturn=20140710125406.

Of course, a law firm must serve its clients' best interests, and act at their instruction. A law firm cannot force a business client to do anything that the client does not want to do. Accordingly the primary emphasis of this section is on exploring when firms might be expected to exercise leverage in order to influence their clients to respect human rights and how they can appropriately do so, recognising the special relationship that exists between lawyers and their clients.

II. Developing and embedding a human rights policy commitment in a law firm – Guiding Principle 16

As with any business enterprise, in order to respect human rights, a law firm should develop and adopt a public commitment to respect human rights that extends to all aspects of its operations.

A policy commitment is likely to look very different for a large global law firm and for a sole practitioner, and the Guiding Principles are not prescriptive when it comes to the form such commitments should take.

There may also be good business reasons for a law firm to adopt a clear commitment in this area, since firms are increasingly asked to sign different supply chain codes of conduct by different clients that require them to adhere to the client's standards of conduct, which more and more contain human rights standards. A human rights policy commitment, backed by evidence that it is embedded in the firm's systems, may help enable the firm to demonstrate that it is functionally in compliance with such client codes.

A firm may wish to consider clear language that explains how the commitment aligns with the responsibility of its lawyers to act in the best interests of their clients. This could emphasise the desirability of advising the business client on the 'bigger picture' – including identifying and addressing human rights issues connected with the representation, managing risk in difficult business environments, navigating the complex social, cultural and political contexts in which legal advice is being given – and not just on technical legal compliance. 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 as discussed earlier, are increasingly linked to its legal risks.

Whatever language is proposed needs to be tested 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 about the issues discussed in Parts 1 and 2 of this Guidance.

In order to embed the policy commitment in a relatively flat organisation like a law firm, the firm's leadership should consider providing the resources and incentives to enable lawyers to regularly talk to each other, within and across practice groups, to share 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 lawyers back up their advice with a 'business case' for respecting human rights that is specific to the client's sector.

Such opportunities are also important for addressing the potential conflicts and dilemmas that can arise from the firm's commitment to respect human rights while serving its clients, and the practical realities and demands of managing client relationships. These dilemmas can include:

- the desire of some clients to take advantage of the lower cost opportunities of operating in countries whose legal systems offer insufficient protection of human rights from abuse by business without wanting to take steps to address the gap between national law and international human rights standards;
- a client's preference to aggressively defend against any allegations of involvement in human rights harm rather than search for whether there is a 'grain of truth' in what stakeholders are claiming;
- the belief that a firm's commitment to respect human rights is necessarily inconsistent with:
  - its robust defence of a business client against a legal claim that the client has caused or contributed to human rights harm, or
  - its representation of a client that may be involved with negative human rights impacts in areas that are not directly related to the firm's services.
- a lack of appreciation by business clients of the Guiding Principles generally, or more specifically, of the reasons to respect human rights;
- an unwillingness of the client to pay for advice from the firm on human rights issues;
- difficulties in acquiring information regarding potential human rights issues relevant to the services that a firm provides to a client;
- a lack of expertise, experience, and/or confidence among firm lawyers regarding their ability to spot human rights issues and address them in their advice, and the possible unwillingness of lawyers to acknowledge the need for the client to consult an expert on international human rights law;
- how to assess the likelihood that the firm's corresponding counsel and other agents in particular countries – particularly those with poor human rights protections – might not provide advice that is consistent with respect for international human rights standards.

All of these dilemmas are worthy of early attention and open discussion in order to try to minimise the number of unforeseen issues arising once the commitment has been adopted. Firms that have established dedicated business and human rights practice groups may find that they are able use the expertise of individuals in those groups to provide practical advice and support to other lawyers on how to address human rights issues in different practice group areas. For firms that have not created such groups, it may be advisable to build internal capacity 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 in order to promote welfare, reduce poverty, and increase access to justice by the most vulnerable in society, including victims of human rights

abuse by business.[68] Pro bono legal work for a firm is similar to a charitable contribution by a company, in that it does not offset a failure to respect human rights elsewhere in its operations (Guiding Principle 11, Commentary). That being said, it can be an excellent source of learning regarding business and human rights issues.

III. Human rights due diligence in a law firm – Guiding Principles 17–21

Although the responsibility to conduct human rights due diligence with respect to client engagements applies to large and small law firms, the formality, scale and complexity of the processes will vary according to the firm's size and the severity of the impacts that its clients may be involved in. The key driver is severity of impact, which may occur, for example, when a law firm represents businesses in countries that are afflicted by conflict, or businesses in sectors with a history of chronic child or forced labour in the supply chain.

Businesses with the potential to have a severe impact on human rights are not always represented by large, multinational law firms. 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, would be expected to have more robust human rights due diligence processes compared to a domestic real estate practice.

For those law firms whose practice does not involve advising clients in matters that have a likelihood of severe human rights risks, the firm's leading human rights risks may reside in its employment practices and in its supply chain. However, this should not be assumed without actual analysis.

A. Assessing impacts – Guiding Principle 18

A law firm needs to assess whether there are any actual or potential human rights impacts that may be directly linked to the firm's services for a client. This does not involve assessing the risks that the client poses to human rights in general. A large firm, with multiple clients and multiple matters of representation, will typically need to prioritise by focusing on those matters that raise the greatest potential concern for human rights for further attention.

In assessing impacts, a firm will want to consider: (1) 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; local communities around a mining project); (2) the severity of potential impacts (eg, a major factory accident; excessive violence by security forces protecting the mine); and (3) the likelihood of potential

[68] See, eg, the mission statement of Advocates for International Development (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. www.a4id.org. 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.

impacts, based on the client's operating context, business relationship context, and management system context.

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 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.

However, a lawyer's limited knowledge of the underlying facts, and constraints on his or her ability to learn more, may prevent a full assessment of the likelihood of an impact. Compared to in-house counsel, a law firm may not understand the full scope of the client's plans but may only be called in to address a narrow legal issue, and the client may not be willing to pay to let the firm dig more deeply. Absent client permission, the law firm will be precluded from engaging with potentially affected stakeholders, and may not have the capacity or expertise to do so in any event. 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.

Finally, during the engagement, 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 joint venture partner of a client has an unanticipated and significant child labour issue in its supply chain which is now linked to the JV's operations. Since due diligence is ongoing rather than static, the firm may consider putting processes in place that can identify changing circumstances and enable it to revise its risk assessment accordingly.

B. Integrating and acting – Guiding Principle 19

After a firm assesses the human rights risks associated with its services, it should integrate the findings from the assessments and take appropriate action to respond to them.

Effective integration requires that the business has the internal decision-making and oversight processes in place to enable effective responses to such impacts. Typically, a large law firm does not accept a client engagement absent review by an independent and centralised group or compliance officer within the firm assigned to conduct due diligence with respect to such risks as conflicts of interest, money laundering, and corruption, as appropriate to the jurisdiction. The larger the firm, the more complex these processes.

Aspects of these existing processes may already touch on human rights issues, particularly in light of the close connection between negative human rights impacts and the presence of corruption. Larger firms could consider explicitly integrating appropriate human rights due diligence on prospective clients into existing pre-engagement screening processes, based on consideration of the severity and likelihood of potential impacts, as discussed above. 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.

1. Modes of involvement in negative impacts – Guiding Principle 19(b)

As with any other business, a firm can cause, contribute, or be directly linked to a negative human rights impact (See Part 1, section IV.E).

a) Cause

In the context of a client relationship, the circumstances in which a lawyer can cause an adverse impact are likely to be very rare. For example, a law firm could take unilateral action, unknown to the client, in order to achieve a favourable result in a matter. Two examples could be:

1. Bribing a judge or witness to obtain a favourable ruling in a lawsuit. This would infringe upon various human rights including the right to a fair trial, the right to non-discrimination, and the right to equal protection of the law.
2. Bribing a local environmental official to allow a client to dump toxic waste illegally. This could infringe upon various rights of local community members, including their right to life, right to health, and the right to adequate housing.

These are acts of corruption, which are presumptively illegal and prohibited by codes of professional conduct for lawyers.[69]

b) Contribute

A law firm could however potentially *contribute* to negative human rights impacts by a client, for example, if it enables or adds to the conditions under which the client's action is possible – for example, if it takes an active and knowing role in supporting a client's efforts to engage in conduct that is highly likely to have a severe adverse impact on human rights, without taking any steps to mitigate that risk.

In cases 1 and 2 above, if the client was aware that the law firm was using improper means to help the client to achieve its goals and did not object, both the client and the law firm would contribute to the impact. However, it is not necessary that the firm engage in improper or illegal means in order to contribute to a human rights impact.

Contribution to an adverse impact by a client may be seen to occur when the firm provides services to enable the client to take actions that are legal (or at least not clearly illegal), but which the firm knows, or ought to know in the exercise of reasonable due diligence,[70] will result in adverse impacts on human rights. For example:

3. During an investigation on behalf of a manufacturing sector client, a law firm learns that one of its products has a safety defect that will likely cause serious injury or death to end-users. The law firm discourages the client from disclosing the defect to end-users in countries where such disclosure is not legally required, in order to lower the likelihood of legal claims and the client agrees not to disclose the information. The law firm could be seen to contribute, along with the client, to any infringements of the end-users' rights to life or safety if they suffer serious harm as a result.
4. A mining company enters into an agreement with a host government in a country with a developing economy that allows exploration and production of minerals.

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[69] See, *Corruption and Human Rights: Making the Connection* (2009), by the International Council on Human Rights Policy and Transparency International, available at www.ichrp.org/files/reports/40/131_web.pdf.

[70] Section III.A above recognises that a law firm's ability to conduct due diligence on the human rights implications of its legal services may be practically constrained by a variety of factors.

The company instructs its law firm to limit the company's responsibility for negative social and environmental impacts that may occur in relation to its site as much as possible, and the lawyer does nothing to raise the client's awareness of the implications of this approach for human rights. In this case, the lawyer's efforts could be seen to contribute to actual infringements upon various human rights of local community members (including in relation to health, safety and livelihoods), which the government says it has no responsibility, or capacity, to remediate.

5. An agribusiness company wishes to acquire large tracts of land in a rural area of a conflict-afflicted region in order to build a tree plantation. To do so, it needs to avoid a weakly enforced national law prohibiting single entities from acquiring large land holdings, the purpose of which is to reduce the likelihood of conflict with local communities. It therefore retains a local law firm to create numerous dummy corporations to enable the company to acquire the land. The resulting plantation has adverse impacts on community members' right to food (because it displaces and reduces access to farmland used for subsistence without offering reasonable alternatives), right to water (because the plantation's fertilizers pollute the local drinking water source), and rights to life, liberty, and security of the person (because security forces protecting the plantation overreact with violence to community protests resulting from the impacts on their food and water sources). In this case, the law firm could be seen to contribute to infringements by the company of all of these rights.

c) Linkage

The third category of involvement – *linkage* – would involve cases where the lawyer does not contribute to the client's human rights impacts, but the firm's services are still directly linked to negative impacts by the client. For example, instead of ignoring, avoiding or not doing the reasonable due diligence needed to uncover human rights risks, a lawyer instead tries to advise a client about the potential human rights impacts related to a specific matter, and attempts to persuade the client to take a different course of action, but the client either ignores the lawyer or a serious negative human rights impact nevertheless occurs. This could be an alternative scenario in situations 3–5 discussed above.

However, as a practical matter, it may be quite difficult to assess the nature of a firm's involvement in an impact, due to the confidentiality of lawyer–client communications, in order to know whether it is a contribution or linkage situation. As a result, a law firm will want to do its best assess the human rights risks involved at the inception of a client relationship, the willingness and capacity of the client to address them, and (where feasible) to attempt to persuade the client to take action to prevent or mitigate existing risks. Otherwise, if a human rights impact occurs, the law firm may be publicly seen as directly linked to the impact even if it did not cause or contribute to it, and yet it will not be able to explain the steps that it took to try to prevent it – which is one of the main options open to other business enterprises that find themselves in linkage situations.

2. Possible responses to negative impacts

To recap the discussion in Part 1, section IV.E above, the appropriate response by a company to an adverse impact depends on its mode of involvement. Where a business is at risk of causing or contributing to an impact, it should change its conduct in order to

try to prevent the impact from occurring or recurring. And if the business recognises that it has caused or contributed to an actual impact, it should engage actively in its remediation to the extent of its contribution, either directly or in cooperation with others.

In addition, a business enterprise that contributes or is directly linked to a human rights impact by a business relationship should seek to exercise or increase its leverage to change the behaviour of the party that is causing the harm. Where the business is unable to exercise or increase its leverage, it should consider ending the relationship, taking into account such factors as the severity of the harm and any potential adverse human rights impacts of ending the relationship, and be prepared to accept the consequences of remaining in the relationship.

Applying these expectations to a law firm's dealings with its business clients requires taking into account the unique aspects of that relationship. Several key issues that inform the appropriate response by a law firm are *leverage*, *considering ending the relationship*, and *remedy*. The first two points are discussed in subsections a) and b) immediately below. The third is discussed in Section IV below.

a) Appropriate use of leverage

As noted in Part 1, section IV.E.2, the concept of leverage under the Guiding Principles is not limited to dominant parties in a business relationship. It also applies to parties with limited ability to influence the human rights behaviour of another, which will include law firms in many cases.

The key source of a law firm's leverage, within the meaning of the Guiding Principles, is its duty to serve its clients' best interests, and its obligation to maintain the confidentiality of client communications and confidences. This helps to create an atmosphere of trust, in which clients are free to discuss potential problems with their lawyers, and lawyers are free to offer advice, without fear that the communication will become public. However, creating and maintaining such trust is a sensitive process. Firm lawyers as a general rule cannot condition their continued representation of a client on the client's willingness to accept the firm's advice. If they tried to do so, they would quickly run out of clients.

The Guiding Principles recognise that a business may not, by itself, have sufficient leverage to influence the behaviour of another. In such cases, there may be ways to increase its leverage, including offering capacity-building support or collaborating with others (Commentary to Guiding Principle 19).

A law firm will need to evaluate which matters present the most severe risks of negative impacts in determining where to focus its efforts to use or build leverage. There are a number of ways in which a law firm may be able to increase its leverage either alone or with others, for example:

- It could emphasise to all its clients up-front that it intends to advise on the 'big picture', which includes human rights risks, in order to provide greatest value to clients, particularly those operating in risky environments.
- It could 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, and offer to advise on how to avoid those problems.

- It could offer to provide capacity-building to clients and their legal departments on human rights issues, either by itself or with outside experts as appropriate.
- It could provide advice and services on business and human rights on a pro bono basis to clients.
- It could issue client briefings and alert bulletins on specific human rights issues related to its individual practice groups that highlight the kinds of legal and regulatory developments outlined in Part 2 of this Guidance.
- It could participate in multistakeholder dialogues or fora where the firm can champion business and human rights issues.
- It could support the efforts of law societies and bar associations to provide training and guidance for member lawyers on business and human rights issues.

The last two points, about championing business and human rights and supporting the efforts of law societies and bar associations, deserves special mention in light of the IBA Bar Association Guidance to which the this Business Lawyer's Guidance is an Appendix. Law firms and lawyers, when acting collectively, are likely to be able to assert much greater leverage than they can alone. The Bar Association Guidance describes the way in which 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 and others have already taken significant steps in this direction. Interested readers should review the Bar Association Guidance for further examples.

b) Considering withdrawal from the client relationship as a last resort

If a severe negative impact occurs, or the firm becomes aware of it after a client relationship commences and the client persists in engaging in conduct that infringes on human rights in matters relating to the representation, despite the efforts of the firm to exercise or increase its leverage to influence the client not to do so, applying Guiding Principle 19(b) to a law firm context suggests that a firm should *consider* withdrawing from the relationship.

It is extremely rare, though not unprecedented, for law firms to withdraw their representation of clients where continuing the relationship will conflict with the firms' stated ethical policies. But withdrawal is a last resort. It is a serious and problematic matter that requires careful consideration, since the firm has a professional obligation not to prejudice the client, and in some cases, may not withdraw from the representation without judicial approval.

Staying in the relationship and continuing to try to persuade the client to prevent and mitigate human rights impacts may serve the purposes of the Guiding Principles better than leaving (if that is possible) and being replaced by another firm whose lawyers say nothing about the client's activities.

C. Tracking efforts to address impacts – Guiding Principle 20

The tracking processes used by a law firm to understand its human rights performance should make sense for its practice areas 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 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 routinized review process. Alternatively, there may be key moments where a review seems useful or necessary. For example, if 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 then 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 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.

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

- At the inception of the client relationship, did we 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)?
- Did we try to discuss these risks with the client and evaluate the client's response?
- Did we monitor the engagement to determine whether our 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?
- What was the nature and severity of any human rights impacts that occurred during the representation, why did they occur, and what was the firm's involvement in the impact?
- What did we do/try to do in response?
- What lessons did we learn from the experience? Were those lessons disseminated throughout the firm, with appropriate regard to client confidentiality?

D. Communicating about Efforts to Address Impacts – Guiding Principle 21

Guiding Principle 21 provides that a business should be prepared to communicate about how it is addressing its human rights impacts, but it also recognises that certain information is legally protected against disclosure to third parties. 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.

This is because a law firm cannot, as a matter of professional ethics, and the need to protect client confidentiality, disclose to third parties how it seeks to encourage clients to address their particular human rights risks. This does not, however, prevent a law firm from making the business case to the client to improve its communication about how it is addressing its human rights impacts, even where current law may not require doing so explicitly.

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 (See Part 1, section IV.F.2). Law firms, which often learn about such risks during their engagements with clients, can play a unique role in urging the company to address the risk.

Even though a law firm may not disclose the specifics of its services, it should be able provide information in an anonymised and aggregated fashion to explain in general terms how it is implementing its policy commitment to respect human rights in the provision of its services. It may be able to outline, for example, the systems that it has put in place to embed its policy commitment, such as the internal assignment of responsibilities, and how it generally determines whether there are human rights risks associated with the provision of legal services.

IV. Remediation for a law firm – Guiding Principle 22

In some jurisdictions, a lawyer's misconduct can result in a legal liability to provide remedy to a non-client.[71] The Guiding Principles add nothing new to these situations. Other than in such cases, a firm's contribution to any remedy (where it has contributed to a negative impact on people) will likely 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 the time in making the business case to the client 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.

[71] Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers be 'Privileged' to Assist Their Clients' Wrongdoing?,* 29 Pace L Rev 75 (2008).

ANNEX A – GLOSSARY

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	*Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations,* authored by the SRSG as an Annex to the Guiding Principles.
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 Guiding Principles, 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	The process of translating a company's public human rights policy that becomes part of how the company operates and makes decisions.
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.' Section II.
Guiding Principles	UN Guiding Principles on Business and Human Rights, unanimously endorsed by the UN Human Rights Council in 2011, and authored by the SRSG.

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 (see 'severe human rights impacts' below). 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, *The Corporate Responsibility To Respect Human Rights – An Interpretive Guide* (2011).
Leverage	'Leverage is a form of advantage that gives power to act effectively. In the context of the Guiding Principles it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact. 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 OECD Guidelines for Multinational Enterprises
OECD	Organisation for Economic Cooperation and Development.
OECD Guidelines	OECD Guidelines for Multinational Enterprises.
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 *processes* of providing remedy for an adverse human rights impact and to the substantive *outcomes* 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 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.
SRSG	The former Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie, author of the Guiding Principles.
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.'

ANNEX 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

ANNEX C – EXAMPLES OF HOW BUSINESSES CAN IMPACT CERTAIN HUMAN RIGHTS

These examples are drawn from the publication 'Human Rights Translated: A Business Reference Guide', UN Office of the High Commissioner for Human Rights, IBLF and Castan Centre for Human Rights Law (2008), which is an excellent source of additional information and guidance.[72]

[72] It is available at http://human-rights.unglobalcompact.org/doc/human_rights_translated.pdf.

Relevant Human Right	The Right Explained	How Business Might Impact that Right
Right to Life	• *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*	• 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	• *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*	• 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	• *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*	• 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

Relevant Human Right	The Right Explained	How Business Might Impact that Right
		not follow required national procedures and/or that are not in line with international human rights law
Right to Health	• *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*	• 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	• *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*	• 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	• *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*	• Any activity that might have impacts on indigenous peoples or their lands whether through acquisition, construction or operation

Relevant Human Right	The Right Explained	How Business Might Impact that Right
	has been specifically recognised by the international community	

ANNEX D – PRINCIPLES FOR RESPONSIBLE CONTRACTS

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.