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December 2012

## **Developing Corporate Human Rights Policies and the Role of Legal Counsel<sup>1</sup>**

A *Good Practice Note* prepared for the United Nations Global Compact Human Rights Working Group (HRWG)

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The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption. In June 2006, the Global Compact Board established a Human Rights Working Group. The goal of the working group is to provide strategic input to the Global Compact's human rights work. The following is one of an ongoing series of notes on good business practices on human rights endorsed by the working group. Rather than highlighting specific practices of individual companies, Good Practice Notes seek to identify general approaches that have been recognized by a number of companies and stakeholders as being good for business and good for human rights.

### **1. PURPOSE**

This Good Practice Note aims: (1) to illustrate how transnational corporations' (TNCs) in-house corporate counsel are perfectly situated to propel their corporations to adopt practices that ensure respect for human rights; and (2) to encourage this positive role by concisely highlighting key lessons learned and good practices in this area.

Lawyers are increasingly expected to raise ethical and moral—as well as legal—considerations faced by their client TNCs as a matter of professional responsibility.<sup>2</sup> In

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<sup>1</sup>Grateful acknowledgment is given to all those who were interviewed and/or commented on this Good Practice Note, as well as UN Global Compact Advisor and Good Practice Project Leader Professor Chip Pitts and those associated with Stanford Law School's Pro Bono Colloquium on International Business Practices run by Professor Chip Pitts.

<sup>2</sup>The American Bar Association recently endorsed the Protect, Respect and Remedy Framework on Business and Human Rights as well as the Guiding Principles on Business and Human Rights. American Bar Association Resolution 109 (2012). In addition, the ABA has recognized that ABA Model Rule of Professional Conduct 2.1 may create a professional ethical obligation for attorneys to advise their corporate clients on the human rights impacts of their actions. See John F. Sherman, UN Guiding Principles: ABA Steps up to the Bar (February 9, 2012), available at <http://bit.ly/zQxraC>. See also Joe W. (Chip) Pitts III, Business, Human Rights & the Environment: The Role of the Lawyer in CSR & Ethical Globalization, 26 Berkeley J. Int'l Law (2008), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1361&context=bjil>

turn, they often serve a “moral leadership” role. Leadership involves perceiving challenges and opportunities just over the horizon. Lawyers in particular are skilled at looking over the horizon to (1) avoid risks and (2) align internal codes of conduct with the external laws of society.<sup>3</sup> In addition, lawyers are well situated to help clients embrace positive opportunities to mitigate future challenges, thereby encouraging corporations to take novel steps to move forward on meeting human rights responsibilities.

Although lawyers could play a larger role in spearheading such transformations, the research for this note showed that traditionally they have become involved late in the process or even inhibited change due to risk aversion. In some cases involving human rights-related risks and issues, however, lawyers are beginning to help lead the charge in meaningful ways, capitalizing on their unique perspectives and their respected roles within their corporations. These case studies provide a model for future transformations led in whole or part by in-house corporate counsel.

## **2. METHODOLOGY**

This note is based on conversations with individuals, mostly attorneys, who spearheaded the adoption and implementation of human rights-based business practices for various transnational corporations (TNCs). Some drove change from the inside, others served as advisors, and some assisted from the outside. From these conversations, elements helpful in a successful transition to a more socially responsible method of doing business were derived, specifically with regard to the role of lawyers in leading such a transition. In addition, obstacles that need to be addressed both by in-house corporate counsel and other agents of change were uncovered. Based on the note’s underlying methodology, its recommendations are most relevant to TNCs and intended to address the complex ethical, legal, and moral issues faced by TNCs.<sup>4</sup>

## **3. BACKGROUND**

Especially over the past decade and a half, a number of highly publicized human rights breaches have spurred many TNCs to start taking human rights-related risks into account when doing business.<sup>5</sup> In particular, the public’s attention has been focused on TNCs’ business practices in countries where national laws may be at particular risk of not providing the rights and protections established by international human rights standards, or where such standards are poorly enforced. In order to accommodate shareholder and broader stakeholder concerns and to maintain or enhance their position

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<sup>3</sup>See generally, Deborah L. Rhode, *Lawyers and Leadership*, 20 THE PROFESSIONAL LAWYER no. 3, 2010 at 1 (discussing how lawyers play a unique role as leaders due to their training and professional responsibilities).

<sup>4</sup>The note does, however, contain generally applicable suggestions for all business enterprises, given the responsibility all enterprises have to respect human rights, regardless of their size or geographic scope.

<sup>5</sup>See, e.g., The Business and Human Rights Resource Centre Special Resource, available at <http://www.business-humanrights.org/Documents/Policies> (citing 292 companies of the 5100 companies tracked by the organization with a specific human rights policy statement, not counting all the thousands committed via the UN Global Compact); Special Representative of the U.N. Secretary-General, *Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/4/35/Add.4 (February 8, 2007) (finding that 87% of the 300 companies sampled in this study recognized labor rights such as anti-discrimination, the right to a safe and healthy work environment, freedom of association and the right to collective bargaining, the prohibition on forced labor, and the prohibition on child labor).

in the marketplace, many TNCs have proactively examined their own business practices and expressly taken steps to incorporate human rights considerations into their policies and processes. These decisions complement the momentum and, in fact, often implement the norms generated by various hard and soft law mechanisms and ethical norms arising at the global, regional, national, state/provincial, and local levels.

In many instances, in-house corporate counsel has played a pivotal role in developing these practices by which corporate human rights responsibilities are taken into account, often coordinating across the key functional areas and departments to ensure that the practices are adopted and enforced.

#### **4. DEVELOPING CORPORATE HUMAN RIGHTS POLICIES**

##### **A. Foundation**

The main foundation for the corporate responsibility to respect human rights is provided by the UN Guiding Principles on Business and Human Rights for implementing the “Protect, Respect and Remedy” Framework. This responsibility was solidly reaffirmed as the global standard for all business enterprises by the UN Human Rights Council’s unanimous endorsement of the Guiding Principles. It states that businesses should avoid infringing the human rights of others and should address adverse human rights issues with which they are involved. In order to meet this responsibility, the Principles stipulate that enterprises need to institute certain policies and processes to know and show that they are respecting human rights. These include a policy commitment to respect human rights; a human rights due diligence process; and processes to enable the remediation of adverse human rights impacts. These are also the key elements underlying all human rights-related good business practice.

In-house corporate counsel is uniquely positioned to understand these foundational principles and to educate management more broadly that respecting human rights is no longer a voluntary undertaking by companies but, instead, a requirement to meet corporate responsibility. The risk of causing or contributing to gross human rights abuses should certainly be addressed as a serious legal compliance matter, as noted by Guiding Principle 23. But more broadly, when signing on to the Global Compact, member companies also commit to supporting human rights, and corporate counsel should play a key role in helping the company achieve this goal as well.

##### **B. Other drivers**

In addition, there have been a number of external and internal incentives for TNCs to adopt a human rights-based approach to business. Externally, large-scale human rights abuse allegations have led many TNCs to re-evaluate their operations, especially but not only in countries with records of systematic and widespread human rights violations. This includes TNCs that have been directly subjected to such allegations and those who wish to prevent media, campaigner, or legal scrutiny in the future. For example, the allegations against Shell’s practices in Nigeria in the late 1990s led the company to revise its Statement of General Business Principles in 1997. Similarly, after the 1997 allegations against BP’s operations in Colombia—that it was complicit in human rights

abuses related to contracts with the Colombian Ministry of Defense—the company revised its practices and incorporated the Universal Declaration of Human Rights (UDHR) into its Statement of Principles, as so many other companies have now done as well.

Even outside the context of such urgent crises, *external* actors can also play a role in driving TNCs to shift their attention towards human rights. For example, public and private financial institutions helping TNCs with project finance increasingly mandate standards as illustrated by the recent incorporation of the Guiding Principles by the International Finance Corporation (IFC) and the regional development and other banks looking to the IFC for performance standards. The Equator Principles, in turn, similarly look to the IFC to provide a risk-management framework for project finance transactions which now incorporates human rights as a basis for sustainable business practices supported by transparency, accountability, and prudent measure risk management. Similarly, socially responsible and even mainstream investors increasingly focus their investments in TNCs that have adopted proactive human rights practices, thereby creating market pressures for latecomers to change. Finally, external inquiries by NGOs and the media help highlight TNCs' deficient operations and provide guidance in adopting more evolved standards and practices.

*Internally*, there are many motivations that drive TNCs to re-evaluate their business practices on their own without external pressure, and in-house corporate counsel is uniquely situated to make this business case. Sometimes, in growth periods, TNCs seize the opportunity to align themselves with universally accepted human rights norms to comport with global values and to assure themselves a strategic advantage over their competitors. These efforts can enhance brand value and secure a company's reputation as a socially responsible entity. All enterprises in all industries may face human rights risks, depending on their particular operational contexts and circumstances. In industries where such risks have been the subject of much attention for a long time, including the extractive and apparel sectors, many companies have proactively set up policies and practices to prevent large scale problems down the road. By taking a more expansive view of the traditional legal compliance approach, legal counsel are also well situated to highlight the risks the company may face if it doesn't address human rights adequately: perceived complicity, lawsuits, investor concerns, and operational disruptions due to conflicts with stakeholders and shareholders.

### C. Key internal stakeholders in developing the policy

Once TNCs decide to develop and promote human rights policies, various internal players may help drive this process. The research and interviews for this note indicated that almost universally TNCs' in-house counsel helps to craft such policies—often based on the policies of rival companies and perceived best practices in the industry. In addition, in-house counsel coordinates across business units and departments to ensure there is adequate understanding of substantive norms. Beyond understanding, in-house

counsel ensures that there are adequate assurance mechanisms to translate policies into practice, so companies can live up to their commitments.

Crucially, in-house counsel helps to ensure that the policies adopted are feasible, and that TNCs are not promising more than they will be able to execute. To do so, in-house counsel often contracts the services of external consultants (NGOs, for-profit companies engaged in risk-management, academics) to help assess the risks associated with work in particular areas and in particular industries, and to develop strategies for managing these risks in the future. Some in-house counsel also help to convene stakeholder dialogues and manage stakeholder relationships.

Beyond in-house counsel, CEOs and Boards of Directors must help to drive human rights policy development. Internal advocates committed to such issues help to initiate the process, but engagement from top level management is universally recognized as a prerequisite to ensure successful policy development and implementation. Not having top management involved can actually enhance risk by creating commitments not sufficiently resourced or acted upon. Engaging high-level management is also a key recommendation in the UN Guiding Principles for embedding the corporate responsibility to respect human rights. One expert interviewed suggests that in-house counsel can help engage top level management through briefing notes and by aiding management in crafting public statements.

In addition to human rights issues frequently confronting TNCs' supply chain and subsidiaries, almost all departments/functions face human rights issues. These functions include, but are not limited to, Human Resources, Public Affairs/Communications, Risk Management, Production, Logistics, Marketing and Sales, and Security. Best practice is to view these affected players as welcome additions to the policy development/implementation team. The Supply Chain and Procurement personnel, often like the Human Resources groups, usually have knowledge of conditions on the ground, for example, in developing countries where materials are sourced, and their buy-in ensures (or precludes) the successful implementation of the firm's human rights efforts.

#### D. Key sources used in developing policies

TNCs use a variety of resources in developing their human rights policies, especially (as a general reference) the Universal Declaration of Human Rights and core ILO Conventions. When it comes to more detailed development of policies, a 2006 survey conducted by the Special Representative of the UN Secretary General on the human rights commitments of 314 TNCs<sup>6</sup> found that the main sources used at that time included the following: 67% of companies cited the UN Global Compact—specifically the Communication on Progress (COP) database—as the main source; 38% cited to other

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<sup>6</sup>Special Representative of the U.N. Secretary-General, *Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 100-12, U.N. Doc. A/HRC/4/35/Add.4 (February 8, 2007).

voluntary initiatives as their main source;<sup>7</sup> 35% cited to the standards set forth in the Universal Declaration of Human Rights as their main source; 28% cited to the standards put forward by the ILO; 11% cited the OECD guidelines as their main source; and 3% cited the International Covenant on Civil and Political Rights / International Covenant on Economic, Social, and Cultural Rights and other UN Documents as their main source.<sup>8</sup> These efforts have assisted with continued refinement of TNCs' approaches to the issues, and as human rights policies have become increasingly *de rigueur* for major TNCs the policies of industry leaders are increasingly considered.

#### E. Process used

Each TNC consulted shared a slightly different process, but the frequent leadership role of lawyers is notable, as seen in the following sampling:

- **Transnational Energy Corporation A:** After embarking on a large global expansion (Zambia, Tasmania, New Zealand, Poland, Argentina, etc), the corporation's leadership decided to formulate a framework for responsible business, to develop a competitive advantage. The company coordinated with NGOs, employees, and communities to develop an overall framework for responsible business. The framework defined basic human rights values for the company. The CEO and Board of Directors drove this process, with the assistance of the General Counsel and legal staff to ensure that promises about conduct could be kept. The company then adopted the framework across its various business units and implemented internal controls and procedures to ensure compliance.
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- **Transnational Extractive Corporation B:** After facing an internationally recognized human rights breach, the corporation initiated an internal audit where the breach occurred, led by in-house corporate counsel. Initially, lead counsel sent the company's financial integrity team to the site of the breach for two weeks to review documents and speak to people on the ground. In addition, lead counsel sent one of her key in-house lawyers to the site as part of a security review. Ultimately, both efforts showed that breaches had taken place. Lead counsel then helped the corporation produce a Code of Conduct for contracts that extended to developing countries, working with Amnesty International and other NGOs which had criticized the corporation in the past.
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<sup>7</sup>Such voluntary initiatives included, for example: SA8000, Transparency International, the Ethical Trading Initiative, the Business Social Compliance Initiative, the Sullivan Principles, Fair Labor Association (FLA), the Extractive Industries Transparency Initiative (EITI), the Electronics Industry Code of Conduct (EICC), the International Council on Mining and Metals (ICMM), the Kimberley Process, the Voluntary Principles on Security and Human Rights (VPs), and the Equator Principles.

<sup>8</sup>The other UN Documents included the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, and the Rio Declaration on Environment and Development.

- **Transnational Energy Corporation C:** This corporation brought in a legal expert and created an in-house position for her to design a human rights policy framework. The framework aimed to create a consistent approach to risk management across operations, focusing on legal and ethical business practices and community engagement. The framework cut across three different areas: (1) risk management; (2) community relations; and (3) human rights. The legal expert worked with the corporation's larger legal team to evaluate reports on the benefits and challenges of adopting various policies, and she continues to work with the broader legal team to keep the corporation's leadership updated on developments in international and national law norms relating to human rights-based business practices.
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- **Transnational Apparel Corporation D:** This corporation developed its own Code of Vendor Conduct in 1993, based on Levi Strauss's 1991 Code. This move was spearheaded and overseen by the corporation's General Counsel. The fundamental provisions focused on ethical sourcing. In 1998, the corporation took a more comprehensive look at the decentralized social responsibility efforts occurring within the organization, spending six months benchmarking best practices (environmental, client related, employee engagement, etc). This benchmarking helped the company build a global responsibility strategy to coordinate different functions under the same social responsibility umbrella. To execute this process, the General Counsel developed a questionnaire and sent it to 30 - 40 different functions within the company. In 1999, the firm distributed its first Social Responsibility Report. The Report aggregated all social responsibility activities the company was engaged in for distribution to employees, external stakeholders, and shareholders. Over time, this Report has served as an internal and external check on the corporation, to ensure adherence to its human rights policies.
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- **Transnational Energy Corporation E:** As part of a growth plan in emerging markets, the corporation took a proactive and preemptive approach to human rights policies. Consulting an array of sources, including the Business Leaders Initiative on Human Rights (BLIHR) Human Rights Matrix, the firm drafted a statement of principles referencing the UN Declaration of Human Rights. The statement made commitments based on what the corporation could do in different contexts—with its employees, direct business partners, product lines, and community (including foreign governments). The corporation consulted General Counsel in each of its business units to ensure it was making reasonable, attainable commitments. The corporation's business units span an array of services, triggering unique human rights issues in each context. The business used existing cultural compliance rules and tools, including prohibitions on bribery and money laundering, and added a human rights perspective. Moreover, recognizing the complexity of decision-making, the company focused on creating principles, as opposed to

policies, to guide it in areas in which there may have been no law or may have been a conflict between international and national law, to avoid dogmatic responses.

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- **Transnational Technology Corporation F:** This corporation developed a policy based on demands from the corporation's responsible Vice President (VP) and from the company's supply chain group. The supply chain group worried about the inhumane conditions in suppliers' facilities, and internally it led a ground-up movement to encourage the business to manage suppliers more proactively on human rights issues. The VP designated a corporate-level employee to lead the effort, whose first task was to evaluate the company's current human rights policies. From there, that same individual worked with in-house counsel and Business for Social Responsibility's (BSR's) guidance to develop its policy.<sup>9</sup> The corporation also found that socially responsible investment funds provided useful guidelines for policy development. In terms of addressing differing national policies, the corporation viewed its statement as universal, with the fundamental ideas and principles remaining constant across countries.
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- **Transnational Energy Corporation G:** During an overseas expansion, the corporation aimed to distinguish itself by being socially responsible. It enlisted a lawyer to lead this effort. By consulting with NGOs, employees, and communities, the lawyer came up with an overarching framework for responsible business by defining the company's values. Using this framework and the BLIHR matrix, the lawyer created a detailed statement. The company then developed policies to ensure effective implementation of the statement. The human rights policy hinged on responsibilities under the UDHR.
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#### E. Ensuring compliance with international laws

In developing human rights policies, TNCs have discovered a number of mechanisms to ensure their policies comply with established international standards, including international human rights law. The legal function naturally has much to say about TNCs' compliance with international (as well as national, regional, and local) laws, the interrelationships between multilevel and multijurisdictional compliance, and the practical implications for the business of different modes of compliance with different laws.

Companies often consult with attorneys and external advisors, especially when they enter a new country. These experts provide information on changes in the international community's approach to issues as well as updates on situations in specific countries

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<sup>9</sup> BSR works with its over 300 member companies to develop sustainable business strategies and solutions through a variety of initiatives, including consulting, research, and collaboration. For more information, see <http://www.bsr.org/>.

that may impact ground operations. This consultation involves informal and formal communications, internally within the corporation and beyond.

Furthermore, according to our interviews, specific highly regarded and influential resources such as the UN Global Compact's Guide on Responsible Business in Conflict-Affected and High-Risk Areas,<sup>10</sup> BLIHR's Management Guide (authored in collaboration with the UNGC and the Office of the UN High Commissioner for Human Rights),<sup>11</sup> and BLIHR's Matrix,<sup>12</sup> have proven especially useful as there has been such a major trend towards adoption of explicit human rights policies at many of the world's major TNCs (around 300 leading companies currently in addition to the commitments involved via the thousands of companies which are UN Global Compact members).

In addition, companies have found it useful and necessary to stay well-informed about the US Foreign Corrupt Practices Act (FCPA) which, along with national and international laws such as the OECD Convention and UN Convention on the subject, addresses the UNGC's tenth principle in ways that are relevant to the other GC principles, such as those pertaining to human and labor rights.

Although not every country has adopted every international human rights treaty or ILO Convention, the UN Guiding Principles affirm that the corporate responsibility to respect human rights refers, at a minimum, to those rights expressed in the International Bill of Rights<sup>13</sup> and the ILO core conventions,<sup>14</sup> confirming the attractiveness of these instruments as core references for policies.

#### F. Key barriers in implementing human rights policies

Despite these processes, companies and their counsel naturally face an array of predictable barriers in implementing a human rights policy even after it has been developed and adopted. For one, such a policy may conflict with national laws or cultural norms. This is the focus of another Good Practice Note.<sup>15</sup> The corporations in the sample for this note found it useful to employ influence and persuasion to ensure compliance with international norms. They often did so by engaging with third-parties

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<sup>10</sup> U.N. Global Compact, *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors*, available at: [http://www.unglobalcompact.org/docs/issues\\_doc/Peace\\_and\\_Business/Guidance\\_RB.pdf](http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf).

<sup>11</sup> Business Leaders Initiative on Human Rights, *A Guide for Integrating Human Rights into Business Management*, available at: <http://www.integrating-humanrights.org>.

<sup>12</sup> Business Leaders Initiative on Human Rights, *The Human Rights Matrix*, available at: <http://www.humanrights-matrix.net>.

<sup>13</sup> The International Bill of Rights is an informal name given to the following documents: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and International Covenant on Economic, Social and Cultural Rights.

<sup>14</sup> See *Guiding Principles on Business and Human Rights*, available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>.

<sup>15</sup> For more information, please see [Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements](#), a Good Practice Note prepared by Annie Golden Bersagel.

and playing the broker role. A variety of other approaches are elaborated in more detail in the Good Practice Note dealing directly with this subject.

Sometimes, the legal team itself can pose a barrier to development and implementation of human rights policies, especially when it fears the corporation is over-committing itself or worries that a written human rights policy will create a danger of future prosecution. Because lawyers must be attuned to risk, the legal team often slows the process of adopting change while evaluating the potential dangers inherent in such changes. Moreover, lawyers sometimes fail to think proactively, and instead focus their efforts on retroactive damage control. The inclination of many corporate lawyers may still be to fend off human rights grievances against the company through the court system, rather than preventing adverse human rights impacts or addressing them proactively before they escalate into greater problems and potentially lawsuits. In order to combat these challenges, one corporation recommends engaging in detailed discussions with and among the legal team early on in the process to modify the policy and create buy-in.

Finally, creating proper leadership roles and monitoring mechanisms to hold people accountable for ensuring that new projects respect human rights is a constant challenge. Many companies suggest that leadership must ensure human rights principles are addressed concurrently with other elements of the project—such as the architecture of the new site—as opposed to seeing the principles as a late or last step. Under this approach, the project must follow human rights guidelines from the beginning. One lawyer who is a leader in the field emphasized taking time to build buy-in while developing human rights principles to make sure all members of an organization are consulted and educated on the topic. Building such buy-in helps to combat potential logistical difficulties in implementing the principles across a broad array of functions within a corporation. By creating strong values and buy-in, one can reduce the need for control processes.

## **5. KEY CONSIDERATIONS FOR LEGAL COUNSEL ADVISING ON CORPORATE HUMAN RIGHTS POLICIES**

Complete and rigorous due diligence—including impact assessments, integration of findings, and adequate tracking and communication of responses—is the *key* element lawyers must consider when developing and implementing an effective human rights approach to business. This effort minimizes the potential for failure on the ground and addresses identified adverse human rights impacts, as set forth by the UN Guiding Principles.<sup>16</sup>

The interviews for this note revealed a number of other considerations that may be useful to lawyers when designing and supporting implementation of a company's

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<sup>16</sup> See *Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework*, available at [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf); see also reports of the UN Special Representative on Business and Human Rights to the Human Rights Council (2008-2011), available at [www.businesshumanrights.org/SpecialRepPortal/Home](http://www.businesshumanrights.org/SpecialRepPortal/Home).

commitment to respect human rights, some of which are integral parts of the due diligence process:

- *Assess the current internal landscape.* Often, lawyers can complete a helpful self-assessment analysis by looking at a company's existing policies through a "human rights lens" to assess what the company is already addressing with regard to human rights. Lawyers, in particular, have the analytical skills to complete such an exercise, and they are often positioned in a role that allows for visibility into all of a TNC's functional areas. For example, a company's existing Human Resources policies may already address a number of fundamental labor rights issues but use different terms in doing so. Retaining the existing vocabulary but complementing it with explicit human rights vocabulary strikes a nice balance between fostering familiar compliance while achieving the business goals in the human rights area. Additionally, diversity, data privacy, whistle-blowing, health, safety, and environmental policies may do the same and benefit from the same approach. By identifying where existing policies already address human rights and where gaps exist, lawyers can isolate and focus in on the key issues to be addressed by the new policy. In addition, by showing that the company is already addressing basic human rights, the lawyer can open the door to further efforts to promote human rights within the company.
- *Emphasize the business case for change.*<sup>17</sup> The lawyer's role is to take proactive steps to minimize the significant legal risks that can arise from a lack of preparation and a lack of governance around issues like human rights. To accomplish this role, especially when management is not yet on-board, it is essential to emphasize the business case for adopting policies that take human rights issues into account.
  - Committing to and implementing rights-sensitive, responsible practices can be beneficial in all markets, enhancing the legitimacy of the corporation's market presence, entry, and the expansion of its activities.
  - Socially responsible investment funds, institutional investors, international financial and lending institutions, and increasingly mainstream investors have now created many reasons for investor-relations groups and other core constituencies within companies to support human rights initiatives.
  - Disrespect for human rights can cost corporations in terms of financing, construction, boycotts, labor, and brand. Problem-solving lawyers are well-suited to assist in avoiding and managing such risks. If a corporation can achieve cost savings by minimizing risk on the ground, it's beneficial for business in the long-run.
  - The extent of the potential positive impact from enhanced human rights compliance factors into the strength of the business case for change. Developing human rights policies and principles doesn't necessarily require spending millions of dollars without a reasonable return on investment—and yet, it can save corporations substantial money and bring positive financial and other benefits.
  - Extractive companies are but one illustration of TNCs which have experienced great costs for failing to effectively incorporate human rights-based business practices. Recent research suggests that business

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<sup>17</sup> For more information on the business case for change beyond the highlights above, see e.g. Lucy Amis, Peter Brew, & Caroline Ersmarker, *Human Rights: It's Your Business* (2005); Chip Pitts, ed., Kerr, Janda, and Pitts, *Corporate Social Responsibility: A Legal Analysis* (2009) (Chapter 2).

enterprises overlook significant costs that are related to conflicts with communities and workers, where human rights concerns are very often at the root of the tensions.<sup>18</sup> Companies need to be more involved in supporting and promoting local, rights-based development to enhance social license to operate and reduce the risk of nationalization. In addition, companies should work to mitigate risks of conflicts with communities and workers.

- However, the business case alone can be hostile to doing what is right, so its limits must also be appreciated. For example, polluting and the related human rights harm may appear cheaper than not polluting if the business stands little chance of getting caught or being held accountable (factors which can change overnight). Therefore, counsel and others involved must argue for effective human rights policies based on principle as well as pragmatism, emphasizing that corporations should do the right thing.
- The lawyers we interviewed mentioned that case studies appeal to the real-world emotions and empathy of change agents within companies who must understand the pain other people experience if corporate policies fail to take human rights considerations into account.
- *Ensure leadership behind the policy.* Lawyers charged with leadership in this area must get others committed—especially those in other leadership roles—so that rights-sensitive values are understood, protected, and sustained. Then, lawyers must help make sure through various implementation and compliance mechanisms that people on the ground operationalize these values. Sometimes this requires triangulation across various business units to achieve collective buy-in from overall corporate and business units, geographically distributed leadership, and people on the ground. This can be effectuated by various means, including by encouraging management to speak directly with people on the ground to show them how social responsibility affects their business. Moreover, consistency with rhetorical statements and official communications is key.
- *Communicate Human Rights Policies and Principles.* Lawyers, as a result of their profession, spend a great deal of time using simple language to communicate complex concerns to management. As such, many of them grow to be skilled communicators. Moreover, their frequent visibility into all areas of a company mean that they can and often have assisted with communications and training regarding human rights policies and principles. Moreover, they should do so by initiating discussion of the human rights policy and principles throughout the extended enterprise not just at the corporate staff level—to foster buy-in and ensure that far-flung subsidiaries, business units, and operational personnel are aware of, can comply with, and are complying with the developed policies and principles. When educating people and seeking their input, lawyers should look at specific implementation, i.e. what each function could do and what each person's role will be. Taking time to build buy-in and make sure everyone is consulted helps make the principles' development and implementation fully integrated across the enterprise as opposed to merely a top-down exercise.
- *Foster support and insight at the ground level.* Embed the principles deeply into the institutional framework so that they become second-nature and a routine part of the operational policies, procedures, processes, compliance mechanisms, etc.

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<sup>18</sup> See Rachel Davis & Daniel M. Franks, *The costs of conflicts with local communities in the extractive industry*, available at <http://www.csrandthelaw.com/uploads/file/Costs%20of%20Conflict.pdf>

- *Be aware of* and keep up with changes and developments regarding international and national legal norms, voluntary principles, and initiatives regarding corporate social responsibility in general and business and human rights in particular. Lawyers are well-positioned to be attuned to such developments in this dynamic field, and it is their role to educate management as norms progress.
- *Foster a proactive regime* and develop reporting mechanisms to ensure responsibility in implementation. Because lawyers are so acutely aware of the risks of failing to act proactively, they must lead the charge with implementing specific tactical steps to prevent abuses:
  - Leverage the increasingly convergent and uniform standards that already exist in the human rights context at every level of society, by promoting wide and appropriate awareness of them at every level of the corporation.
  - Use employee surveys to gain insight into employees' perceptions of the policies and to enforce the foundational role of the values. In particular, one corporation found these surveys encouraged individuals to bring up questions and ensured a commitment to the system.
  - Use auditing checklists to help ensure that policies are implemented—although relying exclusively on checklists should be avoided as it promotes an inadequate “check the box” compliance mentality that could easily overlook important issues pertaining to values and root causes.
  - Build in from the outset an expectation that good risk management *requires* and not merely *allows* raising concerns and spotting issues (as some codes require expressly as a duty of all employees).
- *Ensure that human rights are defined accurately.* i.e. comprehensively, to cover all internationally recognized human rights (as stipulated by the UN Guiding Principles), and include and/or connect strongly to other responsibilities of companies, including environmental and anti-corruption duties and responsibilities that relate to cultural, social, and economic rights. Again, because lawyers have specific facility with domestic and international human rights protocols and treaties, they can best ensure that a company's definition of human rights is accurately comprehensive.
- *Create compliance mechanisms.* Ensure that human rights compliance mechanisms are framed as rights-based, so the principles are not mistakenly seen as merely discretionary. Lawyers are well situated to frame them as such. The corporate responsibility to respect human rights is not a voluntary undertaking.
- *Empower business units* within the organization to figure out how to incorporate social responsibility into their work consistent with the enterprise's human rights policies and procedures and the universal standards expected by global society. For example, the supply chain purchasers can choose to source their materials from businesses that themselves have effective human rights policies and comport with ILO labor practices. Again, because lawyers have unique visibility into all areas of a company, they can ensure that such actions take place across the business units.
- *Create metrics.* Participate in emerging efforts to push for measurement and incentivization of corporate performance in ways other than financial performance by developing non-financial standards of corporate performance which the enterprise and its stakeholders can use and against which they can judge performance.<sup>19</sup> Lawyers can uniquely ensure that these metrics are aligned with the overall goals of the human rights policy.

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<sup>19</sup> One example increasingly used by companies is linking compensation to sustainability and social indexes such as the Dow Jones Sustainability Index.

- *Establish relationships with the community.* In order to be more effective, lawyers should ensure that the company establishes meaningful relationships with the community and stakeholders affected. Make sure community-relationship and stakeholder-relationship development are built into overall human rights policies and procedures as well as specific investment and project timelines and have an equal status with other elements of the project. Ensure adequate time in such timelines to set up the community and other stakeholder relationships from the beginning. Depending on the size of the project and the community as well as other stakeholders affected, this may take several months or longer.

## **6. CONCLUSION**

In summary, the research, case studies, and insights uncovered through the interviews for this note provide pointers for future transformations led by in-house corporate counsel. The explanation of common obstacles provides forewarning for overcoming barriers to change, and the above good practices can aid in a successful transition to a more socially responsible, rights-aware method of doing business.