

IBA Practical Guide on Business and Human Rights for Business Lawyers

Adopted by a resolution of the IBA Council
28 May 2016
International Bar Association



the global voice of
the legal profession®

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International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD
United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

ISBN: 978-0-948711-41-1

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Foreword

At its Annual Conference in Vienna in October 2015, the IBA Council adopted its Business and Human Rights Guidance for Bar Associations ('Bar Association Guide').¹ The IBA noted that its founding in 1947 had been inspired by the vision of the United Nations, with the aim of supporting the establishment of the rule of law and the administration of justice worldwide. It described the unanimous endorsement by the UN Human Rights Council of the UN Guiding Principles (UNGPs),² drafted by the Special Representative of the UN Secretary General on Business and Human Rights (SRSG), Professor John Ruggie. It recalled the IBA's significant contributions to and support of the SRSG's UN mandate, and noted that governments have evidenced strong support for the UNGPs as an authoritative policy framework, including through the development of national action plans to implement them. It described the reflection of the UNGPs in international and industry specific standards. And it noted the growing recognition of a strong business case for respecting human rights and the management of risks, including legal risks, resulting in the need for lawyers to take human rights into account in their practice of law.

In order to help bar associations and lawyers better understand these issues, the IBA committed to prepare a Practical Guide for Business Lawyers on the Guiding Principles (the 'Practical Guide') that would 'set out in detail the core content of the UNGPs, how they can be relevant to the advice provided to clients by individual lawyers subject to their unique professional standards and rules (whether they are in-house or external counsel acting in their individual capacity or as members of a law firm) and their potential implications for law firms as business enterprises with a responsibility to respect human rights themselves.'

At the conference, the IBA Council also adopted a resolution approving the Bar Association Guide, looking forward to the Practical Guide's presentation for approval in May 2016, and stating that 'in line with

the provisions of the UN Basic Principles on the Role of Lawyers as resolved by the UN General Assembly in its ‘Human rights in the administration of justice’ resolution of 18 December 1990 (Basic Principles), nothing in the Guidance for Bar Associations or in the IBA Practical Guide for Business Lawyers (once approved) shall be interpreted as reducing respect for the fundamental human right of effective access to legal services provided by an independent legal profession to all in need of such services, including that all lawyers should always be able to fulfill their duties and responsibilities and enjoy the guarantees provided for by the Basic Principles, consistent with their legal and professional responsibilities.’

This Practical Guide has been prepared to fulfill these purposes.

International Bar Association Council Resolution on the IBA Practical Guide on Business And Human Rights for Business Lawyers

The Council of the International Bar Association (IBA),

Recalling that the IBA is the ‘global voice of the legal profession’, and that providing guidance for Bar Associations (Associations), Law Societies (Societies) and individual members of the legal profession (Members) on United Nations instruments that may impact on the legal profession, among others, is critical to the IBA’s objectives, as stipulated in Articles 1.2, 1.3, 1.5 and 1.7 of the IBA Constitution.

Respecting the IBA’s collaborative relationship with Associations, Societies and Members, and that those Associations have primary responsibility as rule-making and regulatory bodies for the profession in their respective jurisdictions.

Noting that the UN’s Human Rights Council in 2011 unanimously endorsed the United Nations Guiding Principles (UNGPs) after almost six years of research and review of internationally accepted standards on human rights, and global consultation.

Noting further that states, civil society organisations and the private sector increasingly support the UNGPs as the authoritative global standard for preventing and addressing the risk of adverse impacts on human rights by businesses.

Recognising that it is important for lawyers to understand how the UNGPs may affect their clients' activities and those of lawyers.

Recognising that the protection of human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession.

Recognising that according to Principle 18 of UN's 1990 Basic Principles on the Role of Lawyers, 'lawyers shall not be identified with their clients' or their clients' causes as a result of discharging their functions', thereby stressing the need for lawyers to adhere to their principal duty of providing independent legal advice and supporting a robust legal defence even for clients allegedly engaged in conduct that violates human rights.

Recognising that professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from improper restrictions, and providing legal services to all in need of them.

Recognising that neither the UNGPs nor the Practical Guide are intended to override the professional standards of any jurisdiction or to prescribe any of the factors that lawyers may or may not consider as independent professionals.

Recognising that all persons are entitled to call upon the assistance of a lawyer of their choice to protect their rights and to defend them.

In this context the IBA, after consultation with various representatives of Associations, Societies and Members at the 2013 Annual Conference in Boston, formed the IBA Business and Human Rights Working Group (Working Group), and that the Working Group, with the assistance of the then IBA Legal Projects Team (LPT), presented draft versions of the IBA Business and Human Rights Guidance for Bar Associations (Guidance for Bar Associations) and the IBA Business and Human Rights Practical Guide for Business Lawyers (Practical Guide) (at that stage as one document), at the IBA Annual Conference in Tokyo in October 2014.

Appreciating further that during 2015 the Working Group and the IBA Legal Policy and Research Unit (IBA LPRU) (the former LPT) sought and received comments from various IBA committees, as well as from Associations, Societies and Members among others, including three in-country consultations with the collaboration of the Associations of Spain, Costa Rica and Namibia, and that based the consultations and comments received have revised the document, and finalised the Guidance for Bar Associations.

Noting the IBA Council approved the Guidance for Bar Associations at the IBA's Annual Conference in Vienna on 8 October 2015 and *reflecting* on the existing IBA guidance documents, such as the IBA International Principles on Conduct for the Legal Profession approved on 28 May 2011.

Noting further that in approving the Guidance for Bar Associations, the IBA Council agreed to undertake further work on the Practical Guide with a view to it being presented to the Council for approval at its mid-year meeting in Barcelona in May 2016.

Noting that since the IBA Council approved the Guidance for Bar Associations, final rounds of consultations were undertaken, and the IBA LPRU held meetings and discussions with the BIC's Closed Policy Committee and the Working Group, the parties then agreed the final language for the Practical Guide for Business Lawyers.

Noting that the Working Group, in collaboration with the IBA LPRU, is preparing a Reference Annex, which, consistent with the principles of the Practical Guide, will provide further detail and information on the various provisions of the Practical Guide and which will remain as a living document for future reference and assistance for legal professionals. The Reference Annex is not intended to become an IBA Policy; as such, it was neither reviewed nor commented by the Policy Committee and is therefore not submitted to the Council for approval,

Now therefore resolves that:

1. The Council approves the Practical Guide for Business Lawyers; and
2. The Council thanks the Working Group and the IBA LPRU for their excellent collaboration with the Closed Policy Committee on the production of the Practical Guide for Business Lawyers.
3. The Council confirms that, in line with the provisions of the UN Basic Principles on the Role of Lawyers as resolved by the UN General Assembly in its 'Human rights in the administration of justice' resolution of 18 December 1990 (Basic Principles), nothing in the IBA Business and Human Rights Guidance for Bar Associations or in the IBA Practical Guide for Business Lawyers shall be interpreted as reducing respect for the fundamental human right of effective access to legal services provided by an independent legal profession to all in need of such services, including that all lawyers should always be able to fulfil their duties and responsibilities and enjoy the guarantees provided for by the Basic Principles, consistent with their legal and professional responsibilities.
4. The Council understands that the Reference Annex and any amendment thereof will be published as a commentary to the Practical Guide issued by the Working Group in collaboration with the IBA LPRU (as its own position) and shall be consistent with the general principles contained in the Practical Guide, as approved on 28 May 2016 by the Council.

Introduction

In 2011, following six years of multi-stakeholder consultations, research and pilot projects, the UN Human Rights Council unanimously endorsed the UNGPs. As discussed in further detail in Section 2.4 below, the UNGPs do not have the force of law and are not legally binding. But they have enjoyed wide global uptake, and are regarded as the global authoritative standard on business and human rights. They are increasingly reflected in public policy, in law and regulation, in commercial agreements, in international standards that influence business behaviour, in the advocacy of civil society organisations, and in the policies and processes of companies worldwide. There exist around the world, at national and/or regional level, various other human rights instruments, many of which have the force of legally binding statutory or even constitutional law. Compared to these the UNGPs do not enjoy comparable binding force. There are also other non-legally binding human rights instruments that have a global reach. However, because the UN Human Rights Council has unanimously endorsed the UNGPs, it is therefore important and appropriate for the IBA, as the global voice of the legal profession, to draw attention to them and explore their implications for lawyers.

The UNGPs are based on the three pillar ‘Protect, Respect and Remedy’ Framework under which: (1) States have a duty to protect against human rights³ 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.

There is growing recognition that a strong business case exists for respecting human rights and that the management of risks, including

legal risks, increasingly means that lawyers, and particularly business lawyers, need to take human rights into account in their advice and services. The UNGPs are relevant to many areas of business legal practice, including but not limited to corporate governance, reporting and disclosure, litigation and dispute resolution, contracts and agreements, land acquisition, development and use, resource exploration and extraction, labour and employment, tax, intellectual property, lobbying, bilateral treaty negotiation, and arbitration. Indeed, the relevance of the UNGPs to such broad areas of legal practice has led a number of prominent law firms to establish business and human rights practice groups.

As a result, lawyers, both as in-house counsel and as members of law firms, are increasingly asked to help businesses understand what the responsibility to respect human rights implies. In addition, the UNGPs also have implications for the management of law firms as business enterprises and which operate within a business environment, with their own supply chains and employment practices, which will vary according to the size, complexity and organisation of the firm.

1 Purpose of this Practical Guide

The Practical Guide is intended to provide an accessible summary of a complex and nuanced subject by assisting internal and external lawyers who are involved in advising businesses globally through:

- Explaining the background and core content of the UNGPs, which are also incorporated into other relevant human rights and responsible business practice standards and approaches, such as the OECD Guidelines for Multinational Enterprises, the IFC Performance Standards, ISO 26000 and supports the UN Global Compact responsible business principles (Section 2, *infra*);
- Exploring how the UNGPs may be relevant to the advice and other services they – both in-house and external lawyers – provide to business clients (Section 3, *infra*);
- Explaining the implications of the UNGPs for the clients’ right of access to, and representation by, independent legal counsel (Section 4, *infra*);
- Exploring the opportunities and challenges that the UNGPs present for lawyers who advise businesses, including both internal and external legal counsel (Sections 5 and 6, *infra*).

2 The UN Guiding Principles on Business and Human Rights

This section explains the background of the UNGPs, some of their key concepts, and their legal status.

2.1 What is the background of the UNGPs?

When human rights were first formally articulated in international declarations and conventions, they were primarily addressed to States. Business, however, also has an important role in ensuring human rights are respected. For example, a range of high-profile cases in recent decades show that the negative impacts of business can extend far beyond labour rights and non-discrimination to encompass for example abuses of local communities by security contractors at mining sites, performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment, and the sometimes severe mistreatment of migrant workers in global supply chains spanning multiple sectors.

In 2005, Harvard Kennedy School Professor John Ruggie was appointed as Special Representative to the Secretary General on Business and Human Rights (SRSG) to break a deadlock at the UN over the respective roles and responsibilities of States and businesses with respect to business impacts on human rights. The UN Human Rights Council unanimously endorsed his Guiding Principles in 2011, which marked the first time that the Council or its predecessor had addressed the subject of business and human rights and the first time that a UN body had adopted normative language that States themselves did not negotiate.

The UNGPs resulted from a highly inclusive, incremental consultative process, which included six years of nearly 50 multi-stakeholder consultations,

research and pilot projects, culminating in a remarkable consensus of States, businesses and civil society. As a result of this consensus, the uptake of the UNGPs has been swift and widespread, compared to other complex and contested areas, such as climate change. Examples of this uptake include: the 2013 revisions to the UK Companies Act requiring listed companies to report on human rights issues where necessary to understand the company's business, the 2015 UK Modern Slavery Act, and the European Parliament's 2014 directive requiring 6,000 large public enterprises to report on their human rights performance); government policy developments (including the Recommendations of the Committee of Ministers of the Council of Europe on human rights and business in 2016, the issuance of National Action Plans on business and human rights, and endorsement of the UNGPs by the G7 Leaders in 2015), international standard setting bodies (such as the OECD Guidelines for Multinational Enterprises and the International Organization for Standardization's corporate social responsibility standard (ISO 26000)); public commitments by businesses to abide by the UNGPs and their increasing appearance as a standard in commercial and financial transactions; and increasing judicial and public advocacy by civil society.

2.1 What are the United Nations Guiding Principles on Business and Human Rights (UNGPs)?

The UNGPs rest on three interdependent pillars and consist of 31 principles and commentary. They have been translated into all official UN languages.

I. State Duty to Protect Human Rights	II. Corporate Responsibility to Respect Human Rights	III. Need for Greater Access to Remedy
<ul style="list-style-type: none"> • State duty to protect against business related human rights abuse • Through laws, policy, regulation, and adjudication • Based on existing legal obligations under international law 	<ul style="list-style-type: none"> • Business should avoid negative human rights impacts and address those with which they are involved • Recognises that that a business may be involved with impacts where: <ul style="list-style-type: none"> – It causes or contribute to them, or – Its operations, products, or services are directly linked to them through a business relationship • Expects that business will: <ul style="list-style-type: none"> – Adopt a high level human rights policy commitment – Develop and implement human rights due diligence – Have processes in place to remediate harm that business causes or contributes to 	<ul style="list-style-type: none"> • States should take appropriate steps to provide access to effective remedy for human rights abuse • Businesses should use effective operational-level grievance mechanisms <ul style="list-style-type: none"> – To identify and address grievances early – To act as a feedback loop • Businesses should provide for and/or cooperate in legitimate processes to remedy adverse impacts that they identify that they have caused or contributed to

2.3 Understanding some key concepts used in the UNGPs

2.3.1 What is a human rights policy commitment?

A human rights 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 based on engagement with key stakeholders and embedded throughout the business through appropriate governance, internal controls, processes, incentives and training.

2.3.2 What is human rights due diligence?

Under the UNGPs, it is not sufficient for a business simply to declare that it respects human rights, either by promulgating a commitment to do so or agreeing to do so in a contractual undertaking. The business is instead expected to take active steps to follow through on this commitment. Human rights due diligence is therefore an ongoing process to enable businesses to 'know and show' that they are addressing their human rights impacts through assessing impacts, taking integrated action in response to identified impacts, and tracking and monitoring, and communicating the company's efforts to address its human rights impacts. As a result, the process enables business to avoid being 'named and shamed' for not knowing their human rights impacts and not taking steps to avoid or mitigate them.

Human rights due diligence should take full account of the perspective of the affected stakeholder in assessing risks. However, there is increasing evidence that in the mid- to long-term, the risks to the company and to the stakeholder will tend to converge.

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

A business may cause, contribute, or be linked to a human rights impact, as seen below:

Cause	Contribute	Linkage
<p>Business actions lead directly to an impact; eg,</p> <ul style="list-style-type: none"> • A factory exposes workers to hazardous chemicals without adequate personal protective equipment • A company manufactures and sells inherently dangerous products that are likely to cause death or serious personal injury, without providing adequate warning to users about the risks or appropriate instructions on how to use them • A restaurant practices routine discrimination in its treatment of customers 	<p>Business incentivises, facilitates, or enables third party impact; eg,</p> <ul style="list-style-type: none"> • An internet company provides data about users of its services to a repressive government that enables the government to track and harass political dissidents, contrary to international human rights standards • An electronics retail brand changes product requirements for suppliers repeatedly and at the last minute, without adjusting production deadlines or prices, pushing suppliers to breach labour standards to ensure that the order is delivered 	<p>A business's operations, products or services are directly linked to an impact even though the business did not cause or contribute to that impact; eg,</p> <ul style="list-style-type: none"> • Human rights impacts occur deep in a company's supply chain, notwithstanding the business's robust efforts to prevent them • The use of portable ultrasound machines by doctors to screen for female fetuses, facilitating their abortion in favour of male children, notwithstanding prohibitions by the manufacturer on such use

Cause	Contribute	Linkage
<ul style="list-style-type: none"> • A factory's wastewater discharge is the sole or main source of pollution of a community's drinking water 	<ul style="list-style-type: none"> • A food company deliberately targeting high-sugar foods and drinks at children, with an impact on levels of child obesity • One factory's wastewater discharges, in combination with the discharges of other companies, cumulatively pollute the drinking water in a community 	<ul style="list-style-type: none"> • A bank providing financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities • A business enters into a joint venture with another company that uses labor for the joint venture that is tainted with human trafficking, despite its agreement and commitment not to do so

2.3.4 How should a business respond to an impact?

The proper response depends on the mode of involvement; ie, whether the business caused, contributed to, or is merely linked to the adverse human rights impact, as set forth below:

If the business...	Then the business should...
Caused the harm	<ul style="list-style-type: none"> • Cease the action causing harm • Remediate the harm
Contributed to the harm	<ul style="list-style-type: none"> • Cease the action contributing to the harm • Use or build leverage to mitigate the risk of future harm • Contribute to remediation of the harm
Is merely linked to the harm	<ul style="list-style-type: none"> • Use or build leverage to seek to mitigate the risk of future harm

Note that the UNGPs do not expect businesses to contribute to remedy when they are merely linked to the harm (although they may do so for other reasons).

2.4 What is the legal status of the UNGPs?

The responsibility to respect human rights has its roots in the universal expectation that business enterprises should not harm the dignity of people. However, they are not legally binding. ‘The Guiding Principles do not constitute an international instrument that can be ratified by States, nor do they create new legal obligations. Instead, they clarify and elaborate on the implications of relevant provisions of existing international human rights standards, some of which are legally binding on States, and provide guidance on how to put them into operation. The Guiding Principles refer to and derive from States’ existing obligations under international law. National legislation will often exist or may be required to ensure that these obligations are effectively implemented and enforced. This, in turn, means that elements of the Guiding Principles may be reflected in domestic law regulating business activities.’⁴

Compliance by business with national law is a bedrock requirement of the UNGPs. The UNGPs do not override national law. However, where national law does not adequately protect internationally recognised human rights (for whatever reason), the UNGPs stress that business should respect internationally recognised human rights. Where national law is in tension with internationally recognised human rights, the UNGPs expect that a business should strive to honour the principles of internationally recognised human rights ‘to the greatest extent possible’ without violating applicable laws. UNGP 23(b).

Although UNGPs were not intended to, and do not, impose legal responsibilities on or create liabilities for business by themselves, the responsibility to respect does not exist in a law free zone. Much of its content was already legally required before the UNGPs were endorsed; that is, the domestic law of many States had already required business to respect human rights in numerous areas, such as antidiscrimination, workers’ rights, workplace and public health and safety, and privacy. And as noted above, the content of the UNGPs have in fact become increasingly reflected in legislation and regulation, in commercial and financial transactions and agreements, and in the advocacy of civil society.

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

Lawyers have an important role to play in this context. They are frequently asked to advise their business clients to the extent that the UNGPs are incorporated or reflected in public, commercial, and financial legal requirements, or the client's own internal policy and governance framework. Where the UNGPs are not so reflected or incorporated, lawyers can nevertheless act as wise professional counsellors and enhance the value of their services by providing appropriate human rights context for their legal advice and services. The law is not static, but is dynamic and evolving; what is considered unethical and a reputation risk today may well be unlawful tomorrow. Lawyers are uniquely positioned to advise clients on this potential.

As noted earlier, there are numerous legal practice areas in which legal advice and services can shape a business client's ability to respect human rights. Some of them are as follows:

Practice Area	Where legal advice and services are relevant
1. Corporate Governance and Enterprise Risk Management	<p>Lawyers are typically asked to advise companies on proper corporate governance and risk management, which increasingly includes human rights issues.</p> <p>Such lawyers should understand the implications of the UNGPs, and be prepared to advise companies on the design and implementation of internal compliance related controls and compliance and risk management systems to manage their human rights risks.</p>

Practice Area	Where legal advice and services are relevant
2. Reporting and disclosure	<p>Public disclosure laws and regulations are increasingly and specifically requiring disclosure of a company's human rights policies, processes and performance, as a result consumers and civil society organisations for accurate information on companies' social and environmental impacts.</p> <p>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 UK, France, Denmark, India, and the US).</p> <p>Beyond the specific legal obligations, the expectations of stakeholders for increased company transparency concerning their approach to and management of human rights related issues are increasing.</p> <p>Therefore, lawyers who advise companies on reporting and disclosure should be aware of and understand the evolving law requiring greater transparency on human rights performance, and the trends on human rights reporting that are developing worldwide.</p>

Practice Area	Where legal advice and services are relevant
3. Disputes	<p>Lawyers who advise and represent companies in the management and resolution of disputes should be aware of the likelihood of increased litigation worldwide arising from business involvement in human rights issues, and the availability of non-judicial grievance mechanisms to assist with remedying them.</p> <p>For example, Government enforcement action and victim claims against companies for alleged involvement in human rights abuses are increasingly occurring in different jurisdictions. And the Committee of Ministers of the Council of Europe, in its 2016 recommendations on business and human rights, has elaborated on the need for member countries to address gaps in providing access to remedy for human rights violations by business enterprises.</p> <p>The UNGPs are also influencing the development of non-judicial dispute resolution processes. For example, National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises are used increasingly to resolve human rights complaints against multinational companies.</p> <p>Finally, lawyers can play a key role in developing and shaping, and counseling clients on the use of, operational level grievance mechanisms, and other non-judicial dispute resolution processes, in order to resolve human rights disputes without the expense, uncertainty, and polarising characteristics of judicial litigation.</p>

Practice Area	Where legal advice and services are relevant
4. Contracts and agreements	<p>Lawyers who advise companies on a wide variety of corporate and commercial contracts – such as, host state investment agreements, joint venture agreements, merger and acquisition agreements, supply chain agreements – should be aware of and understand how those contracts can be structured to help prevent and mitigate human rights harm.</p> <p>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.</p> <p>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.</p> <p>However, the insertion of boilerplate human rights provisions into contracts, which the parties do not understand and regard as formality, will likely not lead by themselves to improved human rights performance.</p>
5. Development of and participation in human rights standards	<p>Lawyers who advise companies on the development, participation, and implementation of global, industry and issue specific standards should be aware of how such standards may be relevant to and can enhance a company’s human rights due diligence and should encourage clients to participate in their development.</p> <p>Such standards have been and will continue to be a critical way to drive forwards meaningful implementation of the responsibility to respect human rights, particularly for a company’s most pressing human rights risks.</p>

4 What are the implications of the UNGPs for law firms and for the independent responsibilities of lawyers?

Under Guiding Principle 14, the responsibility to respect human rights applies to all business enterprises, ‘regardless of their size, sector, operational context, ownership, and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.’ However, since law firms are unique professional organisations whose lawyers render legal services, care must be taken not to inhibit the exercise of their professional responsibilities. Whether they work in law firms, corporate law departments, or elsewhere, lawyers have specific and legally binding professional responsibilities and obligations, including the duty of independence. The UNGPs do not abridge this duty, which includes the duty to decide, within the limits of the law, how to act in their client’s best interests, independently of expectations and pressures that are external to the lawyer–client relationship, subject of course to adherence by the lawyers with their professional and legal responsibilities.

Compliance with the law, including the right of access to such independent legal counsel, are critical to ensure the attainment of broader public interest objectives of the rule of law and the administration of justice, and to enable companies to respect human rights. The UNGPs were not intended to override or

supplement legal professional codes of conduct, given the critical role that lawyers play in upholding the rule of law and supporting the administration of justice. Nor were they intended to create extrinsic expectations for a lawyer's conduct, which are grounded in the scope of services for which the lawyer has retained the client, the relevant laws, and professional standards that govern a lawyer's conduct.

A universal dimension of independence is, in particular, freedom from interference by the State. This is reflected in Principle 18 of UN's 1990 Basic Principles on the Role of Lawyers ('Basic Principles'), which provides that 'Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their function.' The UN adopted the Basic Principles in its Eighth Congress on the Prevention of Crime and Treatment of Offenders, whose enumerated purposes included ensuring that all persons have effective access to legal services provided by an independent legal profession in order to protect to their human rights, and that lawyers be protected from persecution and improper restrictions in providing such services. UN Basic Principle 18 helps to fulfil this purpose by providing that lawyers should not be identified with their clients or their clients' causes. This is echoed in the IBA's 2011 International Principles on Conduct for the legal profession ('IBA International Principles'), in the Commentary at section 1.2.

Accordingly, the UNGPs do not impinge upon a client's right to assert a robust legal defence to claims that it has engaged in conduct that violates human rights, to seek judicial determination of human rights issues, and to seek legal advice on them. This right cannot be abridged even if the client is highly unpopular.

The IBA International Principles also note that while 'the principles of independence of the lawyer and of the legal profession are undisputed in all jurisdictions adhering to, and striving for, the improvement of the Rule of Law, the respective regulatory and organisational frameworks vary significantly from jurisdiction to jurisdiction' (Commentary, Section 1.3). This variation applies to the factors that lawyers may be permitted or encouraged to consider in

providing independent advice, including non-legal contextual factors such as the human rights impacts of the client's activities as relevant to the legal services. In any event, neither the UNGPs nor the Practical Guide are intended to override or add to the professional standards of any jurisdiction or to prescribe any of the factors that they may or may not consider as independent professionals. However, the UNGPs may nevertheless be highly relevant to the advice or services to be rendered the client: ie, where they are within the agreed scope of services (or mandate) to be provided (which may include a range of services, from very specific to highly general); where they are reflected or incorporated in relevant laws, or where they are permitted or encouraged to be considered by lawyers in their independent judgement under applicable professional standards of conduct.

Therefore, subject to a lawyer's professional and legal responsibilities, nothing in the UNGPs or in this Practical Guide should be read: (1) to restrict the right of effective access by clients to legal services provided by independent lawyers; (2) to restrict the obligation of lawyers to provide independent services to their clients (without being identified with their client or client's causes, or deemed complicit in their clients' activities, as contemplated by UN Basic Principle 18); (3) to restrict the representation of clients who may be highly unpopular (including those who have been accused of engaging in human rights harm), (4) to restrict the rights of clients to secure a robust defence to such claims or to seek judicial determination of human rights related issues; (5) to restrict the rights of clients to seek, and lawyers to provide, independent legal advice with respect to human rights issues or matters that have potential impacts on human rights; or (6) to define the factors that lawyers must, should, or are expected to, consider in their independent judgement, when providing advice or services to a client.

5 What opportunities do the UNGPs present for business lawyers?

Familiarity with the UNGPs presents significant opportunities for all lawyers who advise business, both for internal and external counsel.

5.1 Internal counsel

Internal General Counsels have become the go-to counselors for the CEO and the board on responsible business practices and principles, including global soft law standards such as the UNGPs, and the laws, regulations, transactions and contracts that incorporate or reflect them. Questions about human rights land on the desks of company counsel with increasing frequency in conjunction with other colleagues in other functions. In a number of companies, the General Counsel's office leads on human rights. And even where they do not lead, they play a critical role in helping to manage the client's strategic and reputation risks, which include human rights risks. In order to serve their clients' interests, General Counsel and other internal counsel should become familiar with the UNGPs and their implications for their client's business and the legal advice and services that their client's business receives from its lawyers.

5.2 External law firms

As noted above, businesses are increasingly expecting their preferred external counsel to act as partners in the identification or management of human rights risks, and broader reputation-based risks. Moreover, many businesses are increasingly expecting that those who participate in their supply chain, including law firms, are able to show that they respect human rights. Therefore, awareness of the implications of UNGPs for legal practice will enable external law firms to respond more effectively to the demands of their business and government clients and in a way that is aligned with and supports their obligations and interests concerning respecting human rights.

6 What particular issues do the UNGPs present for law firms?

The corporate responsibility to respect human rights ‘applies to all enterprises, regardless of their size, sector, operational context, ownership and context’ (UNGP 14). However, ‘when it comes to means for implementation’ of this responsibility, ‘one size does not fit all’ (UNGP Introduction, para 15). Application of the responsibility to respect to law firms is straightforward with respect to aspects of its business other than the provision of legal services; eg, a firm’s employment practices and its supply chain. However, its application to the firm’s provision of legal services by licensed legal professionals must respect their obligation to provide independent services for all of the reasons discussed in Section 4 above. Those professional obligations do not change by virtue of who employs them.

Nevertheless, firms may be increasingly asked by business clients to demonstrate that they respect human rights and provide advice or be aware of human rights issues that may be implicated by their legal services. A law firm can demonstrate its respect for human rights in the provision of legal services by providing legal services in accordance with its professional and legal obligations. However, if it does not know, or has not considered, the human rights implications of those services, this may be problematic for the client, and may not serve its best interests. As a result, law firms should be prepared to advise their clients in a way that does not restrict the professional obligations of their lawyers, or the unique requirements of the jurisdictions in which they practise.

In addition to the challenges described above that all business lawyers face, both inside and outside, law firms face unique challenges, including the following:

- Law firms may be generally more insulated from the human rights concerns of their clients compared to their in-house colleagues, and therefore may be less familiar with human rights issues.
- The flat organisational structure of most law firms, where lawyers practice as independent professionals, may make it more difficult for the firm to embed human rights policies and processes, and share learning across different practice areas (or the firm more generally) and client experience.

These challenges are capable of being progressively addressed, and can be addressed through appropriate policies, training, education, incentives, policies, and management processes and governance, as discussed below.

6.1 What should law firms and lawyers think about when implementing or advising on the UNGPs?

Here is a summary of some of the things to think about in implementing the UNGPs for law firms and lawyers, bearing in mind Section 4 above:

UNGP Expectation	Things to think about
1. Human Rights Policy Commitment	<ul style="list-style-type: none"> • If backed by evidence, such a policy commitment should help the firm to demonstrate that it is functionally in alignment with client supplier codes on human rights. • Consider explaining how this commitment aligns with the responsibility of the lawyer to act as wise professional counsellor, and advise on the bigger picture. • Engage in a consultative process with key stakeholders, both internal and external, to determine the firm's potential human rights impacts. • Test the commitment's language internally in order to ensure adequate understanding and buy in, before making it public. • Provide sufficient resources and incentives to enable lawyers to share experiences across practice groups, in order to identify best practices and address potential conflicts and dilemmas. • Consider using pro bono opportunities to build business and human rights capacity.

UNGP Expectation	Things to think about
2. Assessing human rights impacts	<ul style="list-style-type: none"> • Focus on all potential human rights impacts, including the firm's employment practices, supply chain, and the legal advice and services it renders. • Focus on the risks that the subject of the specific legal advice or service poses to human rights, not on the company's overall human rights track record. • Consider the stakeholders who may be affected, the severity of the impact, and the likelihood of the impact. • Where the client is unable or unwilling to provide sufficient information, make reasonable assumptions based on what the firm knows, what it can learn from trusted and knowledgeable third parties and experts, and what is publicly available. • Monitor potential risk throughout the life of the retention, in order to address changing circumstances. • For larger firms, consider integrating impact assessment into existing pre-engagement screening processes. • Smaller firms will likely require much less elaborate risk assessment processes than larger ones.
3. Integrating and acting upon involvement in human rights impacts, actual and potential	<ul style="list-style-type: none"> • The UNGPs themselves impose no legal liability on business enterprises for their involvement in human rights impacts. Whether a law firm has legal or professional liability for any of its activities is a matter for the courts, legislatures and bar regulatory agencies to decide. • Businesses enterprises, including law firms, have no responsibility to address human rights impacts that they did not cause, contribute to, or are directly linked to by their services.

UNGP Expectation	Things to think about
<p>4. Increasing a firm's ability to influence the client to avoid or mitigate human rights impacts.</p>	<p>A law firm's main ability to influence a client to avoid or mitigate human rights impacts not explicitly addressed by hard law may depend largely on whether the client sees the lawyer as a wise professional counselor or trusted advisor, a status which is not automatically granted. Listed below are a number of steps that can be considered to increase the firm's ability to be seen as such a counselor on business and human rights issues:</p> <ul style="list-style-type: none"> • Develop internal firm capacity on business and human rights. • Identify problems that other companies have faced when they ignored human rights issues in similar situations. • Offer to provide capacity building to clients. • Provide advice on business and human rights to clients on a pro bono basis, • Issue client briefings and alerts. • Participate in multi-stakeholder dialogues or forums, including the development of issue and industry specific standards. • Support the efforts of bar associations to provide training and guidance.
<p>5. Withdrawing from the client relationship if the client persists in infringing upon human rights, notwithstanding the firm's advice</p>	<ul style="list-style-type: none"> • Withdrawal is a last resort, and may not be legally permitted in any event • 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 UNGPs better than withdrawal.

UNGP Expectation	Things to think about
6. Tracking	<ul style="list-style-type: none"> • Review how the firm has identified and responded to human rights issues related to its core business, as part of a broader review process. • Consider key moments in a client relationship where additional review would be necessary.
6. Communicating	<ul style="list-style-type: none"> • Due to attorney client confidentiality concerns, the purposes of the UNGPs are better served if the firm focuses on whether the client is prepared to communicate its approach on human rights where appropriate and necessary. • Although a firm may not disclose the specifics of its legal services, it should be able to provide anonymised and aggregated information in order to explain generally how it is implementing its commitment to respect human rights.
7. Remediation	<ul style="list-style-type: none"> • With respect to the legal services and advice it renders, the provision of remedy by a law firm for an adverse human rights impact by a client that the firm contributed to is highly problematic. • Other than in cases of illegal or unprofessional conduct by the firm resulting in a human rights violation arising from its legal services and advice, the purposes of the UNGPs are better served by making the business case to the client to provide or cooperate in legitimate processes to remedy human rights impacts that the client caused or contributed to. • In any event, a business enterprise has no responsibility to provide remedy with respect to a human rights impact that it neither caused nor contributed to.

6.2 Liability insurance

Lawyers may find themselves providing advice or being asked to advise on UNGPs as they may be relevant to legal services, including the interrelationships with other legal instruments. As noted above, neither the UNGPs nor this Practical Guide are intended to alter the legal obligations or liabilities of companies or of the lawyers who advise them. However, providing incorrect legal advice or services to clients may result in claims by clients against their lawyers. This could encompass claims arising from advice or services regarding UNGPs or their implementation. In certain insurance markets, claims arising from advice on such matters may not be covered. Therefore, before advising on the UNGPs, the lawyer should ascertain whether such legal advice – because of their nature as soft law – is covered by the firm’s professional liability insurance. In some countries, or under some policies, third party liability insurance coverage may be restricted to legal work relating to hard law.

7 Conclusion

The UNGPs although not legally binding, are an authoritative global standard on business and human rights that is increasingly relevant to legal practice. There is a growing case for law firms and lawyers to take human rights into account in their activities.

Compliance with the law is a bedrock requirement of the corporate responsibility to respect human rights under the UNGPs, but it applies even where the law is absent, unenforced, or in tension with internationally recognised human rights. Even though the UNGPs themselves do not and cannot impose legal responsibilities on business, the UNGPs are relevant to many legal practice areas. The UNGPs stress that business should respect internationally recognised human rights even when national laws do not adequately protect them.

The UNGPs have implications for the management of law firms as business organisations. As regards to the legal services rendered by the lawyers in their firms, the UNGPs were not intended to override legal professional codes of conduct, given the critical role that lawyers play in upholding the rule of law and supporting the administration of justice, which serves as a foundation for the corporate responsibility to respect human rights. Access to the law and the provision of legal services by independent counsel are of paramount importance to promote the rule of law and the administration of justice, which are central to the UNGPs.

Thus, the UNGPs require neither lawyers nor law firms to implement them in a manner that restricts the right of access to legal counsel for independent advice and services. They do not infringe upon the right of businesses to undertake, and the obligation of legal counsel to provide, a robust defence to allegations that the business engaged in conduct that violates human rights, to seek judicial determination of human rights issues, and to provide legal advice, even where the issue is highly controversial.

Nevertheless, the UNGPs do have a role to play in supporting the role of lawyers to provide their independent legal advice and services in a manner that takes account of specific human rights impacts and the client's best interests.

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

The Practical Guide has analysed these opportunities and challenges, and suggested ways to move forward, consistent with the independence of the legal profession as well as the professional responsibilities of lawyers to uphold the rule of law; this includes human rights in general and specifically, the human right of access to legal services provided by an independent legal profession.

Notes

- 1 *IBA Business and Human Rights Guidance for Bar Associations*, www.ibanet.org/Legal_Projects_Team/Business_and_Human_Rights_for_the_Legal_Profession.aspx.
- 2 The UNGPs 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.
- 3 The UNGPs 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.
- 4 *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, (2014), UN Office of the High Commissioner of on Human Rights, p 8.



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