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- The Corporate General Counsel Who Respects Human Rights; John F. Sherman III, Legal Ethics Journal (2021)

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GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Implementing
the United Nations
“Protect, Respect and
Remedy” Framework

UNITED NATIONS

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UNITED NATIONS

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This publication contains the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", which were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development.

The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

GENERAL PRINCIPLES

These Guiding Principles are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

I. THE STATE DUTY TO PROTECT HUMAN RIGHTS

A. FOUNDATIONAL PRINCIPLES

1. **States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.**

Commentary

States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.

The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.

This chapter focuses on preventative measures while chapter III outlines remedial measures.

2. **States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.**

Commentary

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their

territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

B. OPERATIONAL PRINCIPLES

GENERAL STATE REGULATORY AND POLICY FUNCTIONS

3. In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;**
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;**
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;**
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.**

Commentary

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic

minorities, children, persons with disabilities, and migrant workers and their families.

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies' size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.

THE STATE-BUSINESS NEXUS

- 4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.**

Commentary

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.

5. **States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.**

Commentary

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

6. **States should promote respect for human rights by business enterprises with which they conduct commercial transactions.**

Commentary

States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law.

SUPPORTING BUSINESS RESPECT FOR HUMAN RIGHTS IN CONFLICT-AFFECTED AREAS

7. **Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:**
 - (a) **Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;**

- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;**
- (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;**
- (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.**

Commentary

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself – where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.

It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

ENSURING POLICY COHERENCE

- 8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.**

Commentary

There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law

and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments’ human rights obligations.

- 9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.**

Commentary

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

- 10. States, when acting as members of multilateral institutions that deal with business-related issues, should:**
- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;**
 - (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;**
 - (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.**

Commentary

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

II. THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

A. FOUNDATIONAL PRINCIPLES

- 11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.**

Commentary

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.

Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.

Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.

- 12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.**

Commentary

Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to

respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.

An authoritative list of the core internationally recognized human rights 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), coupled 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. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises. The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.

Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

13. The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;**
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.**

Commentary

Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. Guiding Principle 19 elaborates further on the implications for how business enterprises should address these situations. For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

- 14. The responsibility of business enterprises to respect human rights applies to all 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.**

Commentary

The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character. The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually. However, the responsibility to respect human rights applies fully and equally to all business enterprises.

- 15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:**

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Commentary

Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place. Principles 16 to 24 elaborate further on these.

B. OPERATIONAL PRINCIPLES

POLICY COMMITMENT

- 16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:**
- (a) Is approved at the most senior level of the business enterprise;
 - (b) Is informed by relevant internal and/or external expertise;
 - (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
 - (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
 - (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Commentary

The term "statement" is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations.

The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's

operations. Expertise can be drawn from various sources, ranging from credible online or written resources to consultation with recognized experts. The statement of commitment should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces; investors; and, in the case of operations with significant human rights risks, to the potentially affected stakeholders.

Internal communication of the statement and of related policies and procedures should make clear what the lines and systems of accountability will be, and should be supported by any necessary training for personnel in relevant business functions.

Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.

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

HUMAN RIGHTS DUE DILIGENCE

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;**

- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;**
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.**

Commentary

This Principle defines the parameters for human rights due diligence, while Principles 18 through 21 elaborate its essential components.

Human rights risks are understood to be the business enterprise's potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22).

Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.

Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.

As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- (a) Draw on internal and/or independent external human rights expertise;**
- (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.**

Commentary

The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.

In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.

While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.

Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.

The assessment of human rights impacts informs subsequent steps in the human rights due diligence process.

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the adverse impact.

Commentary

The horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions. This is required to ensure that the assessment findings are properly understood, given due weight, and acted upon.

In assessing human rights impacts, business enterprises will have looked for both actual and potential adverse impacts. Potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts—those that have already occurred – should be a subject for remediation (Principle 22).

Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.

Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the

enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond.

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.

Where the relationship is "crucial" to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

- (a) Be based on appropriate qualitative and quantitative indicators;**
- (b) Draw on feedback from both internal and external sources, including affected stakeholders.**

Commentary

Tracking is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement.

Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.

Tracking should be integrated into relevant internal reporting processes. Business enterprises might employ tools they already use in relation to other issues. This could include performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant. Operational-level grievance mechanisms can also provide important feedback on the effectiveness of the business enterprise's human rights due diligence from those directly affected (see Principle 29).

21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

- (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;**
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;**
- (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.**

Commentary

The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know

and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.

Communication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include online updates and integrated financial and non-financial reports.

Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.

REMEDIATION

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Commentary

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.

Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31.

Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations,

products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.

Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.

Further guidance on mechanisms through which remediation may be sought, including where allegations of adverse human rights impacts are contested, is included in chapter III on access to remedy.

ISSUES OF CONTEXT

23. In all contexts, business enterprises should:

- (a) **Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;**
- (b) **Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;**
- (c) **Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.**

Commentary

Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.

Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate

criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Commentary

While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect remediability. Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.

III. ACCESS TO REMEDY

A. FOUNDATIONAL PRINCIPLE

- 25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.**

Commentary

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some

mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.

B. OPERATIONAL PRINCIPLES

STATE-BASED JUDICIAL MECHANISMS

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Commentary

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision

of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, "market-based" mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended

consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Commentary

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants.

Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.

National human rights institutions have a particularly important role to play in this regard.

As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.

NON-STATE-BASED GRIEVANCE MECHANISMS

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

Commentary

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

Commentary

Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.

Operational-level grievance mechanisms perform two key functions regarding the responsibility of business enterprises to respect human rights.

- First, they support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly;
- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.

Such mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted. If those concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses.

Operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (Principle 31). These criteria can be met through many different forms of grievance mechanism according to the demands of scale, resource, sector, culture and other parameters.

Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

Commentary

Human rights-related standards are increasingly reflected in commitments undertaken by industry bodies, multi-stakeholder and other collaborative initiatives, through codes of conduct, performance standards, global

framework agreements between trade unions and transnational corporations, and similar undertakings.

Such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. The legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms. The mechanisms could be at the level of individual members, of the collaborative initiative, or both. These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts.

EFFECTIVENESS CRITERIA FOR NON-JUDICIAL GRIEVANCE MECHANISMS

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

- (f) **Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;**
- (g) **A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;**

Operational-level mechanisms should also be:

- (h) **Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.**

Commentary

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term “grievance mechanism” is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

- (a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;
- (b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;
- (c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Time frames for

each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;

- (d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;
- (e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism's performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary;
- (f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;
- (g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;
- (h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.



The Corporate General Counsel Who Respects Human Rights

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This paper reflects my personal views only, and not necessarily those of any organization or person with whom I am or have been affiliated, which are listed below only for identification. Since 2008, I have acted as senior legal counsel to Harvard Kennedy School Professor John Ruggie, author of the UN Guiding Principles on Business and Human Rights (UNGPs) during his UN mandate; general counsel and senior advisor to Shift (the leading center of expertise on the UNGPs); Senior Program Fellow of the Corporate Responsibility Initiative at the Harvard Kennedy School of Government; and former chair of the IBA's Business and Human Rights Working Group. I am grateful for the thoughtful insights of Malcolm Rogge at Harvard Law School regarding the devolution of the business responsibility to respect human rights to corporate counsel.

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The Corporate General Counsel Who Respects Human Rights

Abstract: Global soft law (notably the 2011 UN Guiding Principles on Business and Human Rights ('UNGPs'), multistakeholder norms, the business practices and policies of leading companies, the expectations of investors and stakeholders, and hard law in a growing number of jurisdictions, all expect that businesses should respect human rights in their operations and in their value chains. The COVID 19 pandemic has made it urgent for corporate legal departments, led by the general counsel, to support the company's commitment to respect human rights. This means using human rights due diligence to improve human rights performance, rather than as a paper exercise intended primarily to avoid legal liability. This paper provides practical guidance on how corporate general counsel can help their companies conduct authentic and robust human rights due diligence by acting as technical legal experts, wise counselors, and leaders.

Keywords: business and human rights; UNGPs; hard and soft law; legal liability; human rights due diligence; corporate general counsel; corporate culture; corporate governance; ESG; supply chains; roles of lawyers

Introduction

The 2011 UN Guiding Principles on Business and Human Rights ('UNGPs')¹ have become the authoritative global standard on business and human rights. Their central purpose is to prevent businesses from undermining the basic dignity and equality of all people. They are increasingly incorporated into hard law, multistakeholder norms, investor and lender expectations, the practices and policies of leading companies, and the advocacy of civil society. This means that prudent and responsible businesses, supported by their general counsel, should manage their human rights risks in alignment with the UNGPs.

Corporate lawyers, particularly company general counsel, play a key role in partnering with executive management and the board to manage their strategic risks, which should include human rights risks. Knowing this, Harvard Kennedy School Professor John Ruggie, author of the UNGPs, deemed corporate lawyers to be the most consequential new players that he brought into the business and human rights debate².

This paper tries to provide practical answers to the question, what can a general counsel do to help manage the company's human rights risks? Suggested answers include: working with senior management and the board to embed such respect in the business culture through the appropriate governance and leadership; assisting the business in its exercise of human rights due diligence (as defined in the UNGPs) whether or not is compelled by law; and meeting the increasing demands of investors to demonstrate improved human rights performance (as

¹ *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy Framework'* (2011), available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, accessed May 29, 2020.

² John Gerard Ruggie, *Just Business—Multinational Corporations and Human Rights* (Norton, 2013), p. 157 ('*Just Business*').

exemplified by the sharp growth of ESG (Environmental, Social, and Governance) factors used by investors.

These proposals will require the general counsel to act in three sometimes overlapping roles: as the company's legal expert on today's hard law, as its wise counselor on what the hard law will likely be in the future, and as a leader within the company with the ability to coordinate and influence the actions of different corporate functions to achieve organizational coherence

A general counsel should champion respect for human rights, and not undermine it by focusing solely on protecting the company from legal liability. Doing so would lose sight of the forest for the trees, thereby increasing the risk of involvement in severe human rights harm.

They can apply these norms to all areas of the company where legal services are needed. Some examples include: looking at environmental and social due diligence thorough a human rights lens; appreciating the difference between human rights due diligence and business or legal due diligence; encouraging frank discussion of human rights problems; hiring outside counsel and other representatives who respect human rights; and drafting supply chain contracts that respect human rights.

As discussed throughout, the COVID 19 pandemic has made it urgent for corporate legal departments, led by the general counsel, to support the company's commitment to respect human rights in line with the UNGPs.

A. The background, content, and the uptake of the UNGPs

The 2011 UNGPs constitute the authoritative global standard on business and human rights. They reflect a strong consensus by states, businesses, and civil society on how to address business involvement in human rights abuse. The rapid increase in global trade since the 1990s cut off millions of people were cut off from the benefits of development, and suffered significant human rights harms.³ The precipitous free fall of the global economy due to the COVID-19 pandemic exacerbated this suffering by causing the unemployment of millions of supply chain workers worldwide and increasing the level of global poverty.

The UNGPs were drafted by Professor John Ruggie, the former Special Representative to the UN Secretary General on Business and Human Rights, following a six-year period of multistakeholder consultations, research, and pilot projects. The resulting consensus among States, business, and civil society led to their unanimous endorsement of the UNGPs in 2011 by the UN Human Rights Council, and their subsequent wide global uptake.

1. Content of the UNGPs

The UNGPs consist of 31 principles and integrated commentary that operationalise Ruggie's 'Protect, Respect, and Remedy' framework, which is based on three mutually supporting pillars: (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) the need for greater access to remedies.

³ Shift, 'Business, Human Rights and the Sustainable Development Goals: Forging a Coherent Vision and Strategy' (commissioned by the Business and Sustainable Development Commission) (*Shift Project*, 2016) 8-9 <<https://shiftproject.org/resource/business-human-rights-and-the-sustainable-development-goals-forging-a-coherent-vision-and-strategy/>> accessed 31 August 2020.

Pillar One: The state duty to respect human rights from abuse by third parties, including businesses. (UNGPs 1-10)

International human rights laws impose this duty on States. They discharge it through effective policies, regulation, and adjudication. The UNGPs do not create new legal obligations for states. Rather, they recognise existing obligations that international human rights laws impose on states to protect people from human rights harms committed by third parties, including businesses.

Pillar Two: The corporate responsibility to respect human rights (UNGPs 11-24)

The responsibility to respect human rights applies to all business enterprises, regardless of their size, sector, location, or organisational structure. It means not infringing on internationally recognised human rights, both in a business's own operations and in its business relationships, including in its entire value chain. This responsibility is not by itself a legal duty and is not limited by local law. However, it does not exist in a law free zone and is not a voluntary sign-up standard.

To meet this responsibility, businesses are expected to:

- publicise a high-level commitment to respect human rights and embed this commitment in its culture, as the way things are done;
- conduct human rights due diligence; and
- remedy harm that they caused or contributed to.

In order to determine the human rights risks of a company's operations and business relationships, companies are expected to conduct human rights due diligence from the perspective of affected stakeholders..

Human rights due diligence is an ongoing, four stage process, in which businesses should:

- identify their risks of harm to vulnerable people (from their perspective);
- integrate their findings into their operations, and into their responses to the risks;
- track their human rights performance; and
- be prepared to communicate their performance as appropriate (for example, to persons who are at risk).

Pillar Three: The need for greater access to remedy by victims (UNGPs 25-31)

States have the primary obligation under international human rights law in order to ensure that those who are affected by human rights abuses in their territory and/or jurisdiction have access to effective remedies, both judicial and non-judicial.

As part of their responsibility to respect human rights, businesses are expected to remedy human rights impacts that they caused or that they contributed to, in proportion to their contribution. Businesses should also establish or participate in operational level grievance mechanisms in order to resolve grievances quickly and serve as a feedback loop.

2. Uptake of the UNGPs

The uptake of the UNGPs has been rapid and broad and has spread far beyond their UN origins. The UNGPs are embedded in global multistakeholder norms, global, national and regional governmental policies, mandatory human rights due diligence laws, reporting and disclosure laws and regulations, bilateral treaty arbitration decisions, the private law of contracts, the

practices and policies of leading companies and business organisations, nonjudicial dispute resolution mechanisms, the skyrocketing growth in the use of ESG factors by investors, and the advocacy of civil society.⁴

a. Mandatory Due Diligence

In particular, human rights due diligence under the UNGPs is rapidly concretising into a legal duty of care. On April 29, 2020, the European Commissioner for Justice announced its plan to legislate mandatory corporate environmental and human rights due diligence in the EU in line with the UNGPs.⁵ The EU is the world's largest trading bloc. The prospect of an EU-wide legislation mandating similar human rights due diligence has significant implications for companies that do business with and in the EU. France and the Netherlands have already enacted their own mandatory human rights due diligence statutes. Similar laws are also under consideration by other EU countries.

In addition, in a 2020 common law case in Canada, *Nevsun Resources Ltd v Araya*, the Supreme Court of Canada held that customary international law was a part of Canadian common law. Therefore, it could be applied to allegations that a Canadian mining company committed crimes against humanity, forced labour, and torture at its mine in Eritrea.⁶

In the US, a plaintiff class of child cobalt miners in the Democratic Republic of the Congo, who were allegedly forced to work in highly dangerous conditions at less than subsistence wages, have imported human rights due diligence into a statutory claim under the US Trafficking Victims Protection Reauthorization Act, 18 USC § 1595 et seq, against major multinational electronics and automobile companies.⁷

Notre Dame Law School Professor Emeritus Doug Cassel argues that the time for judicial recognition of a common law duty of care to exercise human rights due diligence is ripe, since the basic elements of such a duty—foreseeability, proximity, fairness, and public policy—are in place.⁸ This also has implications for claims against home state parent companies by local residents claiming that the parent had a duty of care to exercise human rights due diligence to

⁴ John F Sherman, III, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' in Rae Lindsay and Roger Martella (eds) *Corporate Social Responsibility - Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century* (Wolters Kluwer 2020) ch 20, s 20.04.

⁵ 'EU Commissioner for Justice commits to legislation on mandatory due diligence for companies' (*Business & Human Rights Resource Center*, April 2020) <<https://www.business-humanrights.org/en/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies>> accessed 31 August 2020.

⁶ *Nevsun Resources Ltd v Araya*, 2016 BCSC 1856, aff'd 2017 BCCA 401, aff'd 2020 SCC 5.

⁷ Class Action Complaint, *Jane Doe 1, etc v Apple Inc 1, etc*, (DDC 2019) (No 19-03737) <https://www.classaction.org/media/doe-et-al-v-apple-inc-et-al_1.pdf> 11 accessed 31 August 2020 (The statute subjects defendants to civil liability if they participated in a venture, knowingly received anything of value from the venture, and 'knew, or should have known' that the venture had engaged in forced labour. Plaintiffs allege that the failure of the defendants to exercise human rights due diligence was a deliberate strategy designed to undermine the claim that the defendants knew or should have known that their products had been manufactured with child slave labour.)

⁸ Doug Cassel, 'Outlining the Case for a Common Law Duty of Care to Exercise Human Rights Due Diligence' (2016) 1 *Business and Human Rights J* 179, 179–202 <http://journals.cambridge.org/abstract_S2057019816000158> accessed 31 August 2020.

protect them from human rights violations by their host state subsidiaries. No common law courts have so ruled explicitly, but they have come close in the UK and Canada.⁹

As a result, the general counsel should prepare the company to comply with existing legal requirements to conduct human rights due diligence and, as a matter of future-proofing and resilience, to comply with human rights standards that are likely to crystallise into law.

b. Investor interest in predicting human rights performance

In addition to the growth of mandatory due diligence laws, general counsel should pay close attention to growing investor interest in a company's human rights performance, which is ultimately grounded in the company's culture.

As noted earlier, ESG factors have become increasingly important to investors and have accounted for an exponential growth of investment funds that use ESG criteria.¹⁰ The COVID-19 pandemic has accelerated the growth of ESG investment.¹¹

The 'S', or social impact factor in ESG measures 'how well a company manages its risks to people connected with its core business' and is therefore, 'heavily populated with labour and human rights elements'.¹² As a result, company alignment with the UNGPs helps investors to predict a company's future human rights performance.

Moreover, the 'E' or environmental factor profoundly implicates human rights impacts. In 2018, John Knox, the former Special Rapporteur on Human Rights and the Environment presented his Framework Principles for Human Rights and the Environment, which states that without a 'safe, clean, healthy and sustainable environment' it is impossible to fully enjoy a vast range of human rights, including rights to life, health, food, water, and development; yet in order to protect the environment, it is vital to exercise human rights including rights to information, freedom of expression and association, participation and remedy.¹³

⁹ *Garcia v Tahoe Resources Inc*, 20017 BCCA 39; *Caal Caal v Hudbay Mineral Inc*, 2020 ONSC 415; Sherman, 'Beyond CSR' (n 4) 28-29 (regarding the case of *Vedanta Resources PLC v Lungowe*, [2019] UKSC 20, [2019] 2 WLR 1051; 'Hudbay Minerals Lawsuits (re Guatemala)' (*Business & Human Rights Resource Centre*, 2010-2020) <<http://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>> accessed 31 August 2020; 'Tahoe Resources Lawsuit (re Guatemala)' (*Business & Human Rights Resource Centre*, 2014-2019) <<https://business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala>> accessed 31 August 2020.)

¹⁰ See John G Ruggie and Emily K Middleton, 'Money, Millennials and Human Rights: Sustaining "Sustainable Investing"' (2019) 10 *Global Policy* 144 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/1758-5899.12645>> accessed 31 August 2020.

¹¹ Georg Kell, 'Covid-19 is Accelerating ES investing and Corporate Sustainability Practices' (*Forbes*, 19 May 2020) <<https://www.forbes.com/sites/georgkell/2020/05/19/covid-19-is-accelerating-esg-investing-and-corporate-sustainability-practices/#1cd8d16426bb>> accessed 31 August 2020; 'Why Covid-19 Could Prove to be a Major Turning Point for ESG Investing' (*JP Morgan*, 1 July 2020) <<https://www.jpmorgan.com/global/research/covid-19-esg-investing>> accessed 31 August 2020.

¹² Ruggie and Middleton (n 10) 144.

¹³ United Nations General Assembly, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles' UN Doc A/HRC/37/59 (24 January 2018) para 2; see generally, Sara L Seck, 'Teaching Note: Human Rights and the Environment' in Anthony Ewing (ed) 'Teaching Business and Human Rights Handbook' (*Teaching Business and Human Rights Forum*, 2020), <<https://teachbhr.org/resources/teaching-bhr-handbook/teaching-notes/human-rights-and-the-environment/>> accessed 31 August 2020.

As to the ‘G’ or governance factor, the culture necessary for a company to respect human rights requires a robust governance system that specifically and effectively drives the company’s public commitment to respect human rights throughout the organisation.¹⁴

The interest by investors in ESG factors has intensified efforts to identify accurate predictors of a company’s future human rights performance.¹⁵ Assessments of past human rights harm are largely accurate; such as buyer involvement in the tragic 2014 Rana Plaza building collapse that killed over 1,000 garment supply chain workers. But this is a lagging indicator of human rights harm, not a leading indicator.¹⁶

Unfortunately, most leading indicators of human rights performance currently in use are poorly predictive and focused on labour issues, such as the number of hours of human rights training given to staff, the number of human rights clauses in contracts, or the number of social audits at operational sites and supplier factories.¹⁷ Moreover, the majority of buyers do not audit below their first tier, even though human rights problems may originate at more remote tiers.¹⁸

Other leading indicators in use consist of internal governance mechanisms to ensure respect for human rights—such as codes of conduct, organisational structures, roles, responsibilities and incentives. These are very important, but by themselves, they are formal and aspirational. To be effective, they must be real and engrained in the company’s culture.

B. Corporate culture

Culture predicts future human rights performance.¹⁹ This is why the UNGPs require embedding the organisation’s public commitment to respect human rights into the organisation’s culture as the ‘way things are done’.²⁰ Culture consists of the company’s authentic norms and values. It is what the organisation truly believes and how it truly acts. It not aspirational, but actual. Since ‘culture eats strategy for breakfast’, culture is a top priority of corporate leadership.²¹ Culture has both organisational and individual dimensions: the organisation’s actual goals and strategies for achieving them and how individual members of the organisation (including general counsel and their staff) actually behave. Culture cannot be engineered, but it can be shaped with the right leadership and governance.

¹⁴ Shift, ‘Leadership & Governance Indicators of a Rights-Respecting Culture (Beta)’ (*Shift Project*, June 2020) <<https://shiftproject.org/resource/leadership-governance-indicators-of-a-rights-respecting-culture-beta/>> accessed 31 August 2020.

¹⁵ Caroline Rees, ‘The Way Businesses’ Social Performance Gets Measured Isn’t Working’ (*Shift Project*, February 2018) <<https://shiftproject.org/business-social-performance-measurement-not-working/>> accessed 31 August 2020; John Sherman, ‘Viewing the Valuing Respect Project through the Lagging v. Leading Indicator Lens’ (2018) *Valuing Respect by Shift* <<https://valuingrespect.org/wp-content/uploads/2019/09/Lagging-Leading-Indicators-Sherman.pdf>> accessed 31 August 2020 (‘Leading Indicators’) (both issued as part of Shift’s Valuing Respect Project).

¹⁶ *ibid.*

¹⁷ Rees (n 15) 3.

¹⁸ *ibid.*

¹⁹ John F Sherman III, ‘Rights-respecting corporate culture: Identifying the cultural norms and values that underpin business respect for human rights’ (2019) *Valuing Respect by Shift* <https://valuingrespect.org/wp-content/uploads/2019/09/VRP_Culture_Respect%20for%20Human%20Rights_Sherman.pdf> accessed 31 August 2020.

²⁰ *ibid.*

²¹ *ibid.*

Culture has particular relevance to respecting human rights. In workplace safety, for example, a culture of safety is the canary in the coal mine. If it is not authentic, people will be injured at work notwithstanding the company's stated goals and formal governance systems.²²

The norms and values of a rights-respecting culture can be posited as: (1) respect for the dignity of all individuals and empathy with them; (2) openness and learning; (3) individual empowerment and learning; and (4) coherence, which are elaborated as follows.²³

1. Respect for the dignity of all individuals and empathy with them

The COVID-19 pandemic, with its dramatic devastation of the well-being and economic status of millions around the world, has highlighted the need for empathy-driven models of company leadership.²⁴ In such a model, company leaders embrace empathy—the cognitive ability to stand in another's shoes and understand how they feel.²⁵ Also key is respect, which means 'treating individuals with dignity and appreciating that they all have inherent human rights, whatever their "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"'.²⁶

An organisation with a rights-respecting culture knows and cares about its involvement in human rights harms, including to remote individuals and communities. Respect and empathy are particularly critical values for respecting human rights in a company with globalised operations and interests, where remoteness from the person being harmed may desensitise senior corporate management even to gross human rights abuses in their supply chain. The UNGPs expect that companies will assess and address human rights risks from the perspective of all stakeholders. That cannot be done if respect and empathy are not authentic values.²⁷

The general counsel should support this value by refraining from an exclusively winner-takes-all, liability-avoiding approach to legal practice, without regard to stakeholder impact.

2. Openness and learning

An organisation that respects human rights seeks to identify and address human rights issues and learn from its mistakes. This is not unique to human rights, but it permeates each element of the corporate responsibility to respect human rights. It expects that the company will: (a) actively search for human rights problems of which it is not already aware (for example, abuse in the remote tiers of its supply chain); (b) accepting responsibility when things go wrong (for example, by providing remedy when it causes or contributes to abuse); and (c) being transparent about problems, even when they are not fixed.

²² Sherman III, 'Leading Indicators' (n 15).

²³ Sherman III, 'Rights-respecting corporate culture' (n 19) 3ff (These four norms and values are based on literature review in the field of business and human rights and other related fields with more mature evaluation methodologies (such as safety and business ethics), plus interviews that were conducted with over a dozen experts and executives in these fields.)

²⁴ Alison Buckholtz, Interview with Jane Nelson, founding director of the Corporate Responsibility Initiative at the Harvard Kennedy School of Government in 'IFC Insights: Lessons for COVID-19-era CEOs' (*International Finance Corporation*, May 2020)

<https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/insights/covid-19-era-ceo> accessed 31 August 2020 (see discussion of environmental issues below).

²⁵ Sherman III, 'Rights-respecting corporate culture' (n 19) 11.

²⁶ *ibid*, citing UNGA 'Universal Declaration of Human Rights' (adopted 10 December 1948) Res 217A(III) art 2.

²⁷ Sherman III, 'Rights-respecting corporate culture' (n 19) 11.

The general counsel should support this value by not overusing legal privilege to chills discussion of human rights issues in order to solve them and build trust.

3. Individual empowerment and responsibility

Those who work in an organisation that respects human rights are motivated to raise and address human rights issues responsibly. This includes lawyers. Even if they do not have explicit human rights functions, they have the ability to tell right from wrong, and should speak up (for example, when the company's products and services pose a risk of severe harm to people).

The general counsel should support this value by reviewing, challenging, and improving the governance processes that encourage feedback on the company's human rights performance, and learning from mistakes.

4. Coherence

A rights-respecting organisation respects human rights notwithstanding tensions with other business goals. Doing so avoids cognitive dissonance and reinforces the authenticity of the company's public commitment to respect human rights. It expects that the company will harmonise financial, performance, and human rights goals and that the company will behave consistently from the top down and across organisational silos. Otherwise, internal and external stakeholders will not believe that the company truly respects human rights.

The general counsel can support this value by ensuring that in-house and external lawyers act consistently with the company's commitment to respect human rights.

C. The three roles of general counsel: technical legal expert, wise counsellor and leader

Drawing from the 2014 report of the Harvard Law School Center for the Legal Profession, 'Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century',²⁸ the International Bar Association ('IBA') recognised that the general counsel acts in three capacities when it comes to human rights: as a technical legal expert; a wise counsellor, and a leader.²⁹ Awareness of these three roles helps to identify the areas where general counsel can support the company's commitment to respect human rights.

1. Technical legal expert

A technical legal expert advises the company on what it can and cannot do legally. In light of the increasing incorporation of human rights due diligence norms into hard law, understanding respect for human rights is becoming a matter of basic legal competence.³⁰ This includes not

²⁸ Ben W Heineman, William F Lee, and David B Wilkins, 'Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century', (Center on the Legal Profession, Harvard Law School 2014) <https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf> accessed 31 August 2020.

²⁹ IBA Business and Human Rights Working Group in collaboration with the IBA Legal Policy and Research Unit, 'Reference Annex to the IBA Practical Guide on Business and Human Rights for Lawyers' (2016) s 4.2 <<https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx>> accessed 31 August 2020 ('Reference Annex').

³⁰ eg American Bar Association (ABA), 'Model Rule of Professional Conduct' r 1.1 (Competence) <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/> accessed 31 August 2020; IBA 'International Principles on Conduct for the Legal Profession' (25 May 2019) 31, principle 9 (Competence)

only compliance with existing law, but also with likely future law. Given the arc of the uptake of the UNGPs since their endorsement, there will likely be more law requiring alignment with the UNGPs, including human right due diligence.

Moreover, beyond their reflection in mandatory due diligence laws, the UNGPs are also reflected in legal reporting and disclosure obligations, business to business transactions (via incorporation of the UNGPs into contracts), project finance documents, bilateral treaty obligations, and the like.³¹ All of these matters require the close attention of general counsel.

2. Wise counsellor

As a wise counsellor, the general counsel works with executive management to decide what is right or fair in the business's sustainable interest, including whether to follow soft law norms, such as the UNGPs, even where they are not reflected in hard law. This is because soft law can have a hard bite.

In his well-known law review article on legal independence, Stanford Law School Professor Robert Gordon writes that even when business lawyers advise clients on hard law compliance, it is almost impossible for them to avoid making judgements about how client actions will affect the public interest; for example, whether a technically legal course of action that causes harm to stakeholders will nevertheless engender public condemnation.³² This type of lawyering is not new. Gordon refers to former US Supreme Court Justice Louis Brandeis, who as a private business lawyer a century ago tried to identify sustainable solutions to resolve management-labour strife, which addressed the needs of all parties to the conflict, including stakeholders.³³

Due to the complexity and interconnectivity of today's business environment, it is rare for companies to make business decisions without considering stakeholder impacts. As Doug Sundheim writes in a recent piece in *Forbes*, 'Who, for example, seeing the potential devastation of a community they are leaving, would not spend considerable time, energy, and effort trying to find a cost-effective and innovative solution to stay put. Good CEOs are always weighing social costs that don't immediately show up on the bottom line. They will always have profit in mind, but they will also be considering the needs of a variety of stakeholders.'³⁴

The American Bar Association's Model Rule of Professional Conduct 2.1 recognises the value of a stakeholder-aware approach to corporate legal practice. Rule 2.1 provides that in order to discharge their role as independent counsel, lawyers should advise their clients on relevant context, including the impact of a client's proposed action's impact on stakeholders. In the

<<https://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C>> accessed 31 August 2020.

³¹ Sherman, III, 'Beyond CSR' (n 4).

³² Robert W Gordon, 'The Independence of Lawyers' (1988) 65 BU L Rev 1, 25-29

<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2368&context=fss_papers> accessed on 31 August 2020; see also, Malcolm Rogge, *Vesting Transnational Corporate Responsibility in Natural Persons v. Legal Persons – What Matters Today?*, in *Corporate Citizen: New Perspectives on the Globalized Rule of Law* (Oonagh Fitzgerald, ed.) (CIGI-McGill-Queen's University Press 2020)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3570105> accessed on 31 August 2020 (for an excellent discussion of the implications of the devolution of respect for human rights to corporate counsel as natural persons).

³³ Gordon (n 32).

³⁴ Doug Sundheim, 'CEOs Have a Responsibility to Help Lead Society' (*Forbes*, 9 August 2020)

<<https://www.forbes.com/sites/dougsundheim/2020/08/04/ceos-have-a-responsibility-to-help-lead-society/#7c4c3bc570d5>> accessed 31 August 2020.

comment, it observes, ‘Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or *effects on other people*, are predominant.’³⁵

As a result, international, regional, and national bar associations recognise that the UNGPs and related soft law human rights norms are relevant to corporate law and have urged their members to implement the UNGPs into legal practice.³⁶ For example, in 2018, the European Bars Federation/Fédération des Barreaux d’Europe (FBE) recommended that its 250 European bar association members representing 800,000 lawyers make far-reaching and proactive efforts to embed the UNGPs into all areas of legal practice, including considering amending professional codes of conduct for lawyers.³⁷ One of FBE’s associations, the Geneva Bar Association, ‘amended its professional code of conduct to provide that lawyers should do their best to mitigate the risks of human rights abuses by corporate clients by promoting their inclusion up front in the early stages of their advice or when helping to prepare agreements or contracts’.³⁸

3. *Leader*

When it comes to human rights, the general counsel should act not only as technical expert and wise counsellor, but also as a leader within the company, both with respect to the legal services and executive functions directed by the legal department. This involves exercising significant decision-making authority for the organisation, including how legal services are provided. This plays out in several ways for the general counsel.

First, they should ensure that the legal department plays the lead role helping the company to avoid involvement in gross human rights abuses, such as genocide, slavery, torture, and rape,

³⁵ ABA, ‘Model Rule of Professional Conduct’ r 2.1 (comment)

<http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor.html> 2 (emphasis added); see also IBA, ‘Reference Annex’ (n 29) s 4.

³⁶ ABA, ‘House of Delegates Resolution 109’ (2012).

<https://www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.authcheckdam.pdf> accessed 31 August 2020; IBA, *Business and Human Rights Guidance for Bar Associations* (adopted 8 October 2015) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=B9719C7C-212B-4717-8C66-FD028ABD6C6A>> accessed 31 August 2020; IBA, *Practical Guide on Business and Human Rights for Business Lawyers* (adopted 28 May 2016) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=D6306C84-E2F8-4C82-A86F-93940D6736C4>> accessed 31 August 2020; The Law Society of England & Wales, ‘Business and Human Rights, A Practical Guide’ (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/pdf-business-and-human-rights-a-practical-guide>> accessed 31 August 2020; Japan Federation of Bar Associations, ‘Guidance on Human Rights Due Diligence’ (January 2015) (English translation by the Asia-Pacific Human Rights Center and Sustainability Japan Forum) <https://www.nichibenren.or.jp/library/en/document/data/150107_guidance.pdf> accessed 31 August 2020.

³⁷ Ilustre Colegio de Abogados de Madrid and Sustentia, ‘Guidance in Business and Human Rights for European Law Societies’ (1 June 2017) (approved by the Human Rights and Freedom European Bars Federation Commission) <<http://www.sustentia.com/wp-content/uploads/2018/02/GUIDE-ON-BUSINESS-HUMAN-RIGHTS-ICAM-FBE-January-2018-Sustentia-English.pdf>> accessed 31 August 2020.

³⁸ John F Sherman, III, ‘When Counseling Clients on Risk, Lawyers Need to Take a Proactive Approach on Human Rights: New Initiatives by European Bar Associations Recommend that Lawyers Advise Clients on Human Rights Risks with a Focus on Prevention of Impacts’ (*Shift Project*, 2018)

<<https://www.shiftproject.org/resources/viewpoints/lawyers-proactive-risk-human-rights/>> accessed 31 August 2019; see also L’Ordre des avocats de Genève, ‘US & Coutumes’ (2018), art 2 (Responsabilité sociale) <https://www.odage.ch/medias/documents/regles-profession/Us_Coutumes_2018.pdf> accessed 31 August 2019.

whether or not the local jurisdiction prosecutes them per UNGP 23(c). This should be deemed a matter of legal compliance within the company, even if national law does not mandate it.

Second, even they do not take the lead on human rights, general counsel should partner with senior management in evaluating and managing the company's human rights risks, legal and non-legal. They should be involved in: (a) reviewing and challenging the company's business model for red flags of human rights risks; (b) designing and implementing appropriate governance systems designed to address human rights risks and drive respect for human rights into the organisation's culture; (c) ensuring the public disclosure of salient human rights risks; (d) establishing and measuring human rights performance targets and outcomes; and (e) providing for assurance of human rights disclosures.³⁹

Third, as a member of the executive management team, they should ensure that legal services are provided with respect for human rights.⁴⁰ Malcolm Rogge notes that the exercise of the responsibility to respect human rights ultimately devolves to natural persons, including prominently the corporate counsel, who is charged both with protecting the company from legal liability and shaping its ethical culture, 'including its disposition toward the vexing question of human rights responsibility.'⁴¹

Finally, the general counsel often plays a key role in advising their companies on their support for the State's protection of human rights. The January 6, 2021 invasion of the U.S. Congress and attempted coup of the U.S. Presidency constituted a brazen assault on the rule of law and democracy, which are fundamental to the enjoyment of all human rights. In response, many companies cut off their funding of Congresspersons who voted to reverse the Presidential election.⁴² Typically, the general counsel's office carefully scrutinizes political contribution laws to ensure that the company is in compliance. But as noted earlier, technical legal compliance is not enough. As the chief legal officer of the company, the general counsel should take the lead in ensuring that the company does not fund politicians who sanction and encourage an assault on democracy and the rule of law.

D. Not undermining a corporation's respect for human rights

Championing rights-respecting behaviour means ensuring that the organisation's legal advice and services should support the company's commitment to respect human rights. This is not always the case, however. In its report to the UN General Assembly in 2018, the UN Office of the High Commissioner on Human Rights in 2018, observed a tension between the business lawyer's role as wise counsellor and a taking narrowly technical approach to avoiding legal liability:

Business lawyers — both in-house counsel and external firms — have a unique position for shaping the path an enterprise may take. Often, they are seen as one of the main obstacles to adopting effective human rights due diligence, with a traditional narrow focus on legal risk.

³⁹ Shift, 'Submission on Human Rights Opportunities in the EU Non-Financial Reporting Directive Review Process' (*Shift Project*, May 2020) <http://shiftproject.org/wp-content/uploads/2020/05/Shift_Submission_HumanRights_EUNFRD_v05082020_withAnnexes.pdf> accessed 31 August 2020 ('Shift Submission').

⁴⁰ Ben W Heineman, Jr, *Inside Counsel Revolution* (ABA 2016), ch 4.

⁴¹ Rogge (n 32) 5f.

⁴² Douglas McMillan and Jenna McGregor, 'Lawmakers who objected to election results have been cut off from 20 of their 30 biggest corporate PAC donors', *Washington Post* (January 19, 2021), accessed <https://www.washingtonpost.com/business/2021/01/19/gop-corporate-pac-funding/>.

However, some bar associations, large law firms and in-house counsel endorse the Guiding Principles and acknowledge that human rights due diligence should be a core part of the advice provided by a wise counsellor.⁴³

A cribbed approach to corporate legal practice that prioritises avoiding legal liability over respecting human rights undermines the norms and values of a rights respecting culture. In Malcolm Rogge's words, 'when it comes to human rights, focusing narrowly on avoiding liability misses the forest for the trees.'⁴⁴

The pandemic has underscored the inherent weakness of a business model that treats stakeholder impacts as an afterthought. To quote a recent blog by Helle Bank Jorgeson and Tom Cummings:

The COVID-19 virus has been a wake-up call that reveals the consequences of our constant pursuit of ever-cheaper products and services, global just-in-time supply chains, share buybacks and cutting CAPEX to reward short-term shareholder dividends that are deemed to be added-value.

Suddenly we see the blind spots. Our very lean global supply chains fail when all the supply comes from one region under lockdown. We witness how changing the configuration and software of an airplane for short-term profit sacrifices redundancy and safety. Then we notice when that same company is first in line for corporate bailouts. Trust is a bank account that is filled up by long-term trustworthiness. Our limited focus on shareholder value has drained our loyalty account with other stakeholders, just at the moment we most need their trust.⁴⁵

When it comes to human rights, general counsel practically must take impacts on the dignity and equality of people into account in their decision-making. Doing so is necessary not only to meet increased legal requirements arising from the uptake of the UNGPs, but also the expectations of investors and other external stakeholders as demonstrated by the rise in ESG investing. Therefore, treating adverse impacts on vulnerable people as collateral damage in a winner-takes-all legal fight is bound to have unpleasant consequences for the shareholders. Severe harm to stakeholders and severe harm to people tend to converge in the mid to long term.

E. Practical steps that a general counsel can take to support a rights-respecting culture

What practical steps can a general counsel take to engrain respect for human rights into the organization's culture? The key is to identify and use internal leverage points to exercise their influence within the company. Leverage in the UNGPs is normally thought of in terms of influencing external parties (suppliers, governments, etc.), but leverage can be internal too.

Here are five practical steps that the general counsel might take: (1) integrating human rights due diligence into environmental and social due diligence processes; (2) seeing human rights risks through the eyes of the stakeholder; (3) fostering an open and learning culture; (4) ensuring that external representatives act consistently with the company's commitment to respect human rights; and (5) structuring supply chain contracts to respect human rights.

⁴³ UNGA 'The Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (16 June 2018) UN Doc A/73/163 para 41 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement>> accessed 31 August 2020.

⁴⁴ Rogge (n 32) 5.

⁴⁵ Helle Bank Jorgeson and Tom Cummings, 'People in need have long memories – the case for stakeholder primacy' (*The Center for Global Enterprise*) <<https://www.thecge.net/ceo-hub/new-enlightenment-initiative/people-in-need-have-long-memories-the-case-for-stakeholder-primacy/>> accessed 31 August 2020.

1. Integrating Human Rights Due Diligence into Environmental and Social Due Diligence Processes

Environmental impacts by business have a strong human rights dimension, as noted earlier. The IBA's 2014 report, 'Achieving Justice and Human Rights in an Era of Climate Disruption' drew a strong connection between climate change and human rights, noting that 'Climate change poses an effective obstacle to the continued progress of human rights, which translates directly into a worsening of the existing inequities that afflict a world already riven with inequality, poverty and conflict.'⁴⁶

In addition, a horrific and recent example of the connection between environmental and human rights harm is the COVID-19 Pandemic, which has killed a million people to date, sickened millions more, and has thrown further millions more back into poverty. COVID-19 is a zoonotic virus; that is, one that leaps from wildlife to people. Experts note that 'These leaps often happen at the edges of the world's tropical forests, where deforestation is increasingly bringing people into contact with animals' natural habitat.'⁴⁷ Deforestation in turn results from commercial activity by businesses in providing commodities destined for global supply chains.

More than half of the world's tropical deforestation is driven by four commodities: beef, soy, palm oil and wood products. They replace mature, biodiverse tropical forests with monocrop fields and pastures. As the forest is degraded piecemeal, animals still living in isolated fragments of natural vegetation struggle to exist. When human settlements encroach on these forests, human-wildlife contact can increase, and new opportunistic animals may also migrate in.⁴⁸

In such circumstances,

Changes in the environment are usually the result of human activities, ranging from land use change to changing climate. Encroachment on natural ecosystems through resource exploitation, agricultural activity, and human settlements provides opportunities for pathogens to spillover from wild animals to people, especially when the natural disease resistance that may result from rich biological diversity is lost.⁴⁹

In his July 2020 Report to the UN, David R. Boyd, the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clear, healthy and sustainable environment, identified business

... as a major contributor to the destruction of ecosystems and the loss of biodiversity, through deforestation, land-grabbing, extracting, transporting and burning fossil fuels, industrial agriculture, intensive livestock operations, industrial fisheries, large-scale mining and the commodification of water and nature. Businesses have outsourced many activities that damage

⁴⁶ IBA Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014) 2

<<https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>> accessed 31 August 2020.

⁴⁷ Amy Y Vittor, Gabriel Zorello Laporta and Maria Anice Mureb Sallum, 'How deforestation helps deadly viruses jump from animals to humans' *The Conversation* (25 June 2020) <<https://theconversation.com/how-deforestation-helps-deadly-viruses-jump-from-animals-to-humans-139645>> accessed 31 August 2020 .

⁴⁸ *ibid.*

⁴⁹ United Nations Environment Programme, *UNEP Frontiers 2016 Report: Emerging Issues of Environmental Concern* (2016) 22

<https://environmentlive.unep.org/media/docs/assessments/UNEP_Frontiers_2016_report_emerging_issues_of_environmental_concern.pdf> accessed 31 August 2020.

ecosystems and biodiversity from high income nations to low-income nations, exploiting environmental standards that are lower and not enforced.⁵⁰

He therefore called upon businesses to meet their responsibilities under the UNGPs.

Responsible companies already conduct environmental and social due diligence in connection with their ongoing operations or special projects to determine whether there are risks of noncompliance with applicable laws and regulation and whether environmental and social issues may pose a threat to the company's bottom line, plans, and operations. These due diligence processes will identify human rights impacts. However, human rights due diligence under the UNGPs is broader than traditional environmental and social due diligence because it is not limited by local law and because it focuses on harm to the most vulnerable persons in society.⁵¹

Since the general counsel can see across functional silos in a company, they are uniquely positioned to ensure that human rights due diligence is incorporated into the company's environmental and social due diligence processes. Thus, where a company incentivises and encourages the destruction of biodiversity without violating domestic law, it may nevertheless be deemed to have contributed to, or be linked with, resulting harm to people under the UNGPs.

2. Seeing human rights risks through the eyes of vulnerable people

Human rights due diligence looks at risks through the eyes of vulnerable impacted persons. As a technical legal expert and as a wise counsellor, the general counsel should not conflate it with business due diligence. The processes have similarities, but they are significantly different. Professor Ruggie explained that businesses typically view due diligence 'in strictly transactional terms—what an investor or buyer does to assess a target asset or venture.'⁵²

Instead, he used the term more broadly, as a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.⁵³ In his view, without conducting human rights due diligence from the perspective of the stakeholder, 'companies can neither know nor show that they respect human rights, and therefore cannot credibly claim that they do.'⁵⁴

Business lawyers typically look at risks through a materiality lens, defined in terms of commercial, legal, and financial risks to business that rise above a risk-adjusted quantified dollar threshold. However, this narrow focus can lead the company to overlook or tolerate its involvement in severe human rights risks and underreport its real human rights risk profile.

⁵⁰ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, health and sustainable environment, *Human rights depend on a healthy biosphere* David R. Boyd (July 15, 2020), A/75/161, available at <https://undocs.org/A/75/161>, paragraphs 76-77..

⁵¹ Jonathan Drimmer and Michael Torrance, 'CSR Risk Management and Due Diligence' in Rae Lindsay and Roger Martella (eds) *Corporate Social Responsibility—Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century* (Wolters Kluwer 2020) Ch. 25, 613-617.

⁵² UNGA 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' UN Doc A/HRC/11/13 (22 April 2009), para 71 <<https://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>> accessed 28 May 2020.

⁵³ UNGA 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5 paras 25, 56ff.

⁵⁴ John Gerard Ruggie and John F Sherman, III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 EJIL 921, 924 <<https://academic.oup.com/ejil/article/28/3/921/4616676>> accessed 31 August 2020.

Examples would be the categorisation of wrongful death claims as non-material because they are covered by liability insurance or arise in countries where victims do not have adequate access to remedies. However, in the end, company involvement in human rights harms, particularly severe harms, is not sustainable to the preservation and growth of shareholder value.

3. *Fostering an open and learning culture*

The increasing absorption of the UNGPs into hard law means that corporate involvement in human rights harm may also give rise to legal liability. This speaks to the role of the general counsel as technical legal expert. Companies should be encouraged to communicate in confidence with their legal counsel to evaluate their compliance with new human rights legal requirements, when structuring transactions or analysing and defending claims asserted against the company.⁵⁵ Companies have an interest in protecting the ‘legitimate requirements of commercial confidentiality’, per UNGP 17. This includes confidential attorney client communications. Such communications need not be disclosed to affected stakeholders.

However, maintaining the confidentiality of attorney client communications is hardly a certain thing, as shown by the hacking of privileged documents from thousands of business clients from an international law firm in the Panama Papers case.⁵⁶ In the human rights context, it is also likely that human rights impacts assessments conducted by legal counsel for a company will ultimately become public. For example, in the *Nevsun* case discussed above in Section 2, Lloyd Lipsett, a lawyer and human rights expert who was retained by the company, used the UNGPs as a procedural framework in his human rights impact assessment of the company’s mine in Eritrea. The Canadian House of Commons requested Lipsett’s testimony, and the Supreme Court of British Columbia considered that testimony over the company’s objections.⁵⁷

Moreover, the wise counsellor should ensure that legal privilege is not used to chill internal discussions that would resolve human rights problems and build trust with external stakeholders.⁵⁸ A notorious example of this problem is the General Motors ignition key scandal, where the GM product safety and legal teams used legal privilege to slow-walk the investigation, discovery, and public disclosure of a design defect for 10 years. The defect had caused airbags not to deploy in accidents when the ignition key became loose and moved. This resulted in the deaths of 124 people, the recall of 300 million cars worldwide, and the payment of \$900 million in a Deferred Prosecution Agreement to the US. government. An independent report to GM’s Board strongly criticised the role of the legal department in fostering a closed culture, which

⁵⁵ Yousuf Aftab and Jonathan Drimmer, ‘Expert ESG Attorneys: How Corporate Sustainability Creates Legal Risk’ (*Corp Gov*, 11 February 2020) <<https://corpgov.com/lessons-from-cobalt-in-the-congo-how-corporate-sustainability-creates-legal-risk/>> accessed 31 August 2020 (for a discussion on the risks such communication may prevent).

⁵⁶ ‘The Panama Papers: Exposing the Rogue Offshore Finance Industry’ (*International Consortium of Investigative Journalists*) <<https://www.icij.org/investigations/panama-papers/>> accessed 31 August 2020.

⁵⁷ *Araya v Nevsun Resources, Ltd* (BCSC) (n 6).

⁵⁸ John F Sherman, III and Amy Lehr, ‘Human Rights Due Diligence: Is it Too Risky?’ (2010) HKS Corporate Social Responsibility Initiative Working Paper No 55, 15ff <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/workingpaper_55_shermanlehr.pdf> accessed 31 August 2020.

chilled candid internal discussion and investigation of safety issues out of fear that discovery of problems could result in increased product liability awards in court.⁵⁹

4. Ensuring that the company's external representatives act consistently with the company's commitment to respect human rights

As leader of the legal function, the general counsel is ultimately responsible for hiring external lawyers and lobbyists who speak for the company. As a result, the general counsel should ensure that external representatives of the company behave consistently with the company's own commitment to respect human rights.

Examples of areas where this might not occur include: (a) hiring local outside counsel to set up dummy companies in order to acquire small parcels of land for a plantation allegedly in order to avoid national law intended to preserve small land holdings in a former conflict zone;⁶⁰ (b) hiring law firms to engage in Strategic Litigation against Public Participation (SLAPP) allegedly for the purpose of chilling the expression of public concerns regarding a proposed pipeline's adverse impacts on the rights of Indigenous people;⁶¹ and (c) allegedly participating in and funding business associations that lobby states to condition COVID-19 pandemic relief aid legislation on indemnifying employers from liability in order to coerce vulnerable workers laid off by the pandemic to return to work in unsafe conditions.⁶²

5. Structuring supply chain contracts to respect human rights

The general counsel is ultimately responsible for structuring a wide variety of contracts and agreements, including procurement contracts, M&A agreements, licensing agreements, foreign investment-host government agreements (for example, mining concessions and profit-sharing agreements), and tax agreements with states, among many others. Each has implications for human rights and can be crafted in ways that mitigate the risk of company involvement in human rights abuses.⁶³

Contracts for the purchase of goods were the first contracts to receive attention in the business and human rights context.⁶⁴ Preventing supply chain human rights abuses is increasingly the focus of current legislation and regulation.⁶⁵ The general counsel should take steps to mitigate

⁵⁹ Anton R Valukas (Jenner & Block), 'Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls' (*Attorney's Information Exchange Group*, 29 May 2014), <<https://www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf>> (redacted copy) accessed 31 August 2020.

⁶⁰ John Otis, 'In Colombia, An Alleged American Land Grab Sets Off a Political Storm' *Time Magazine* (10 July 2013) <<https://world.time.com/2013/07/10/in-colombia-an-alleged-american-land-grab-sets-off-a-political-storm/>> accessed 31 August 2020.

⁶¹ Elodie Aba, 'Lawsuits by companies seek to silence accountability advocates' (*Business & Human Rights Resource Center*, 2017) <<https://www.business-humanrights.org/en/lawsuits-by-companies-seek-to-silence-accountability-advocates>> accessed 31 August 2020.

⁶² Will Wilkinson, 'The Brutal Clarity of the Trump-McConnell Plan to Protect Businesses: The liability-protection ruse is an excuse to coerce Americans back to work by refusing desperately needed help (Opinion)' *New York Times* (26 May 2020) <<https://www.nytimes.com/2020/05/25/opinion/trump-mcconnell-reopening.html?action=click&module=Opinion&pgtype=Homepage>> accessed 31 August 2020.

⁶³ IBA, 'Reference Annex' (n 29) s 3.3.3.

⁶⁴ Global Business Initiative on Human Rights and the Institute for Human Rights and Business, *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships* (2012) ch 8 <<https://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf>> accessed 31 August 2020.

⁶⁵ eg, Anna Triponel, 'Demystifying the Modern Slavery Act 2015 for corporate lawyers' (*Practical Law*, 21 May 2020) <<https://uk.practicallaw.thomsonreuters.com/w-025->

the human rights impacts associated with procurement contracts, such as: (a) challenging the procurement business model; (b) setting human rights performance standards in the contract; (c) mapping the entire supply chain to identify involvement in human rights risks; (d) supporting the supplier's performance of its human rights responsibilities; (e) providing for remedy of harm where appropriate; and (f) mitigating the human rights impact of terminating a supplier.

a. Challenging the procurement business model

First, as member of the senior executive team, the general counsel should help to review and challenge the business model for the procurement process, in order to determine whether it is a red flag for involvement in human rights abuse.⁶⁶ For example, among the contributing root causes that have been identified for the tragic Rana Plaza factory collapse in 2014 in the Ready-Made Garment sector in Bangladesh were:

- the reliance by buyers and suppliers on the 'indirect sourcing model' in which buyers use independent purchasing agents that subcontract out to a shifting and opaque network of unregulated and unauthorised smaller suppliers, in order to secure the cheapest cost of labour; and
- the so-called 'fast fashion' business model in the garment industry, in which buyers place a premium on speed by suppliers in adjusting their production to respond to rapidly changing fashion demands.⁶⁷

As discussed in subsection e below, where buyers contribute to human rights harm by suppliers, they are expected to contribute to remedy, to stop their actions that contribute to harm, and to use or build their leverage to influence suppliers to do so. The general counsel should understand the inherent human rights risks of the procurement business model and ensure that the buyer takes effective steps to mitigate them.

b. Setting human rights performance standards and assessing supplier capacity to perform

Avoiding and mitigating human rights risks in the procurement function requires a buyer to assess whether the supplier has the financial and managerial capacity to honour its human rights responsibilities under the contract (including the capacity to provide remedies). The supplier's squeezed profit margin, last minute changes by the buyer in design, quantity and delivery, and the systemic challenges presented by the sector and country (for example, corruption, lax factory building and fire safety code enforcement, unavailability of independent trade union membership for workers), can all impair this capacity. If these and similar factors are not assessed, the result

6078?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 31 August 2020 (see thoughtful discussion of the challenges for traditional corporate lawyers presented by the need to comply with the UK Modern Slavery Act).

⁶⁶ Shift, 'Business Model Red Flags: Is Your Business Wired In Ways That Put People at Risk? (Beta)' (*Shift Project*, May 2020) in 'Shift Submission' (n 39) Annex A.

⁶⁷ Sarah Labowitz and Dorothee Baumann-Pauly, 'Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza' (New York University Stern School of Business, 2014) <https://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf> accessed 31 August 2020.

is will likely be, in Human Rights Watch's words, 'paying for a bus ticket and expecting to fly'.⁶⁸

In addition, the buyer and supplier should understand what is expected of them through a process of dialogue, rather than by merely adding to the contract a boilerplate reference to the buyer's supplier code of conduct that is rarely discussed except in cases of breach. This dialogue, and the contract, should clearly cover the specific 'salient' human risks⁶⁹ that the parties should prioritise (for example, forced labour, child labour, workplace injury and death).

c. Mapping the entire supply chain to identify involvement in human right risks

The general counsel should ensure that as part of the contracting process, the company identifies all of the most salient human rights risks in its supply chain. Unfortunately, however, most multinational companies fail to map human rights impacts beyond the first tier or two of their supply chains.⁷⁰ Many lawyers are reluctant to advise their clients to look for unknown problems out of a concern that known risks generate a responsibility to do something about them. But if companies do not map the risks of their entire supply chain, they may likely report an understated human rights risk profile until they are exposed on social media.⁷¹ As Warren Buffet has reputedly said, 'when the tide goes out, you can tell who is swimming naked'.

Therefore, human rights due diligence expects that businesses will identify risks for the entire supply chain, including down to the raw materials that are used for the goods that the buyer eventually purchases. A business should map its entire value chain in order to understand the full scope of its impacts, to prioritise the most severe impacts, and to identify other actors that can have a role to play in exercising leverage.⁷² The most severe harm can occur in remote tiers of the chain; for example, child miners forced to work in hazardous conditions at less than subsistence wages to dig minerals ultimately used in electronics products.⁷³ Furthermore, mapping of the entire supply chain will identify the company's reliance on activities (such as deforestation) that contribute significantly to an increased risk of zoonotic disease and climate change.

d. Supporting supplier's efforts to meet its human rights performance responsibilities

⁶⁸ "Paying for a Bus Ticket and Expecting to Fly": How Apparel Brand Purchasing Practices Drive Labor Abuses' (Human Rights Watch, 23 April 2019) <<https://www.hrw.org/report/2019/04/23/paying-bus-ticket-and-expecting-fly/how-apparel-brand-purchasing-practices-drive>> accessed 31 August 2020.

⁶⁹ OHCHR, 'The Corporate Responsibility to Respect: An Interpretive Guide' (2012) UN Doc HR/PUB/12/02, 8 <https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf> accessed 31 August 2020 (A 'salient' human rights risk is one that poses a likely risk of severe human rights harm [with emphasis on severity]. Severity is assessed through the eyes of the stakeholder. A severe human rights risk is characterised by its scale [gravity of impact], scope [number of people affected], and irremediable character [whether harmed persons can be made whole]. Businesses should prioritise their attention to salient risks).

⁷⁰ Achilles, 'Unethical supply chains: What's the problem and how to deal with it' (Achilles, February 2017) <<https://www.achilles.com/industry-insights/unethical-supply-chains-whats-problem-deal/>> accessed 31 August 2020.

⁷¹ CORE, 'Risk Averse? Company reporting on raw material and sector-specific risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015' (September 2017) <https://corporate-responsibility.org/wp-content/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf> accessed 31 August 2020.

⁷² David Vermijs, 'How Value Chain Mapping is Helping Companies Respect Human Rights' (Shift Project, March 2019) <<https://www.shiftproject.org/resources/viewpoints/value-chain-mapping-business-respect-human-rights/>> accessed 31 August 2020.

⁷³ *Doe v Apple* (n 7).

To repeat an old legal saying, ‘the contract is king.’ If a contract does not reflect a buyer’s human rights responsibilities, buyers and suppliers will give them low priority. The contract is not a one-way street, since the actions of both parties in combination can result in human rights harm.

As noted earlier, buyer purchasing and sourcing practices in the apparel industry can force suppliers to cut safety corners, contributing to the Rana Plaza tragedy in 2014. Better Buying, an independent, supplier-centric rating agency, identifies and ranks buyers based on seven purchasing and sourcing practices in the apparel industry that could contribute to human rights harm by suppliers: planning and forecasting, design and development, cost and cost negotiation, sourcing and order placement, payment and terms, management of the purchasing process, and alignment with the company’s own CSR policies.⁷⁴

Thus, general counsel should take steps to ensure that the procurement contract reflects the buyer’s undertaking to support and not undermine a supplier’s efforts to meet its human rights responsibilities.⁷⁵ By doing so, the buyer stands a much better chance of not being deemed to have contributed to impacts caused by the supplier. This is discussed in the next section immediately below.

e. Providing for remedy of involvement of harm where appropriate

Avoiding and resolving legal disputes between the company and the stakeholder are subjects that sit squarely in the zone of the general counsel’s responsibility. In order to support the company’s commitment to respect human rights, the general counsel should avoid taking an approach of fighting stakeholder claims, ‘until Hell freezes over and then fighting on the ice’.

As noted earlier, in exercising human rights due diligence, businesses are expected to provide or contribute to the remedy of human rights harm that they caused or contributed to. There are many different forms of remedy, including ‘apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition’, per UNGP 25, Commentary.

The business responsibility to provide remedy has two parts.

- First, a company should actively participate in the remediation of human rights harm that it identifies (that is, recognises) it has caused or to which it contributed per UNGP 22.⁷⁶

⁷⁴ eg Marsha A Dickson, ‘Better Buying Index Report 2019, Purchasing Practices Performance in Apparel, Footwear, and Household Textile Supply Chains’ (9 September 2019) <https://betterbuying.org/wp-content/uploads/2019/09/4523_better_buying_report_summer2019_final.pdf> accessed 31 August 2020 (see the recommended better buying practices).

⁷⁵ For a general discussion of the contribution that that poor buyer purchasing practices can make to adverse human rights impacts in the supply chain, see John F Sherman, III, ‘The Contractual Balance Between “Can I?” and “Should I?” Mapping the ABA’s Model Supply Chain Contract Clauses to the UN Guiding Principles on Business and Human Rights’ (2020) HKS Corporate Social Responsibility Initiative Working Paper No 55 <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=3265940> accessed 31 August 2020; Sarah Dadush, ‘Contracting for Human Rights: Looking for Version 2.0 of the ABA Model Contract Clauses’ (2019) 68 Am ULREV <<http://www.aulawreview.org/contracting-for-human-rights-looking-to-version-2-0-of-the-aba-model-contract-clauses/>> accessed 31 August 2020.

⁷⁶ As a practical matter, buyers do not cause harm directly to supply chain workers, although it is theoretically possible for them to do so. As a result, contribution and linkage are the modes of buyer involvement that usually apply to supply chain harm.

This means providing for, or cooperating in, legitimate remedial processes, such as a court or a non-judicial grievance mechanism, that are appropriate to the nature of the harm. If the company disagrees that it caused or contributed to harm, it can contest the allegation in court or in a nonjudicial dispute resolution process, such as mediation or arbitration.⁷⁷

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

Non-judicial grievance mechanisms should meet specific effectiveness criteria: legitimacy, accessibility, predictability, equitability, transparency, rights compatibility, be a source of continuous learning. The operational-level grievance mechanisms that companies support or provide, should, in addition, be based on engagement and dialogue per UNGP 31.

The company's responsibility to provide or contribute to remedy applies only where the organisation itself recognises that it has caused or contributed to an adverse human rights impact.⁷⁸ The company can contest that in good faith in a judicial or non-judicial process, as appropriate.⁷⁹ Remedial processes could include state-based mechanisms that can order remediation, such as courts and other processes, as well as nonjudicial dispute resolution processes (for example, arbitration, mediation, ombudsperson, OECD National Contact Point, etc).

The circumstances under which a company should directly provide for remedy vary. For example, where crimes have been committed and a state-based judicial proceeding is underway, a company may defer to that proceeding rather than pursue direct remediation. Where a buyer has contributed to harm by a supplier, but the supplier is the primary cause 'and is either providing remediation or being held to account through a legitimate state-based mechanism, it will typically be appropriate [for the buyer] to defer to that process whenever a parallel remediation process would undermine it.'⁸⁰

However, multinational buyers commonly draft procurement contracts with language to avoid any inference that they owe a legal duty of care to supply chain workers in order to deny such workers direct access to judicial remedy against the buyer. Common clauses required by buyers to achieve this end include: disclaimers of obligations to third parties (such as workers for suppliers and contractors); disclaimers of obligations to monitor, inspect, and control the manner of work of suppliers; and requirements that the supplier indemnify the buyer for any harm caused by the suppliers.⁸¹

These disclaimers are problematic under the UNGPs, and under the laws that may reflect or incorporate them, for at least three reasons.

⁷⁷ OHCHR, 'The Corporate Responsibility to Respect' (n 68) 66f.

⁷⁸ *ibid* 63.

⁷⁹ *ibid* 66f.

⁸⁰ *ibid* 64.

⁸¹ Sherman, III 'The Contractual Balance Between "Can I?" and "Should I?"' (n 74); Dadush (n 74).

First, the disclaimer of legal liability to third parties, including workers, is designed to deny access to judicial remedy arising out of the contract by workers for harm that the buyer has caused or contributed to. As noted earlier, UNGP 22 provides that where buyers “identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” Where the buyer has disclaimed contractual responsibility for judicial remedy to third parties, an authentic and fully implemented public commitment by the buyer to participate in nonjudicial remedy processes that meet the effectiveness criteria of UNGP 31, would be critical to avoid denying remedy where the buyer has caused or contributed to harm.

Second, enshrining a hands-off approach in the contract to assessing and addressing the adverse impact on vulnerable persons is in tension at minimum with the buyer’s human rights due diligence responsibility to proactively identify, mitigate, avoid, and where appropriate, remedy its involvement of harm throughout its supply chain. Here, an explicit commitment in the contract by the buyer to engage in human rights due diligence would be critical to mitigate this conflict.

Third, requiring the supplier to indemnify the buyer from human rights harm can incentivize the supplier to meet appropriate human rights standards, provided that the supplier has the capacity to do so and is not prevented from doing so by systemic issues that are beyond the supplier’s ability to control. However, such indemnification is not consistent with the UNGPs where the buyer caused or contributed to the harm.

For these reasons, a rights-respecting general counsel for a buyer should carefully re-examine these standard procurement contract protections for their consistency with the UNGPs.

f. Mitigating the human rights impacts of termination on vulnerable workers

Premature termination of suppliers represents a particular risk of harm to vulnerable workers, as seen by the practice of buyers in response to the COVID-19 pandemic to use force majeure clauses to terminate suppliers.⁸² These clauses enable buyers to terminate a contract for unforeseeable and uncontrollable events that make buyers unable to perform. In light of the government curtailment of business (through travel bans, border restrictions, limits to gatherings of people, the closure of non-essential businesses, and the cancellation of public events, etc.) multinational buyers have invoked force majeure to cancel supplier contracts.⁸³

Such terminations have devastated suppliers and thrown their vulnerable workers onto the street. In many industries, such as the Ready-Made Garment sector, suppliers have very tight margins due to a long history of being squeezed by buyers.⁸⁴ Millions of supply chain workers have been

⁸² John F. Sherman, III ‘Irresponsible Exit: Exercising Force Majeure Provisions in Procurement Contracts’, (December 14, 2020), Business and Human Rights Journal, First View, pp. 1 – 8, available at DOI: <https://doi.org/10.1017/bhj.2020.27>, accessed 28 December 2020.

⁸³ Lisa M Richman and others, ‘Force Majeure and COVID-19: Frequently Asked Questions’ (*McDermott Will & Emery*, 20 March 2020), <<https://www.mwe.com/insights/force-majeure-and-covid-19-frequently-asked-questions/>> accessed 31 August 2020.

⁸⁴ Mark Anner, ‘Squeezing workers’ rights in global supply chains: purchasing practices in the Bangladesh garment export sector in comparative perspective’ (2020) 27 RIPE <<https://doi.org/10.1080/09692290.2019.1625426>> accessed 31 August 2020.

thrown out as factories closed. Global poverty rates are forecast to rise the first time since 1988, and half a billion people will become destitute as a result of the COVID-19 pandemic.⁸⁵

Some prominent companies have acted responsibly to try to mitigate the impacts on supply chain workers, but many have not.⁸⁶ This has engendered public condemnation, including by civil society⁸⁷ and has resulted in a plea by 195 long-term investors representing over USD \$4.7 trillion in assets under management to maintain supplier relationships by maintaining timely and prompt payments.⁸⁸ Guidance is available regarding the concrete steps that buyers can take to mitigate these impacts.⁸⁹

Therefore, when corporate lawyers are asked whether a buyer *can* legally terminate a supply chain contract for force majeure, they must also address the question of whether a buyer *should* do so where vulnerable people will be harmed.

Conclusion

Winston Churchill famously said, “never let a good crisis go to waste” when he was working to help establish the United Nations following the end of World War II. The COVID-19 pandemic is such a historic crisis. To date, over one million persons globally have died from the virus. Its impact has been the hardest on the most vulnerable in society—people of colour, the low income, the elderly, and the disabled. It has shone a spotlight on how dependent businesses have become on highly vulnerable workers in their factories and supply chains, particularly those temporary workers in the gig economy who have no health benefits or protection against layoffs.

⁸⁵ Andy Sumner, Chris Hoy, and Eduardo Ortiz-Juarez, ‘Estimates of the impact of COVID-19 on global poverty’ (April 2020) United Nations University WIDER Working Paper 2020/43

<<https://www.wider.unu.edu/publication/estimates-impact-covid-19-global-poverty>> accessed 31 August 2020.

⁸⁶ Anna Triponel and John Sherman, ‘Moral bankruptcy during times of crisis: H&M just thought twice before triggering force majeure clauses with suppliers, and here’s why you should too’ (*Business & Human Rights Resource Centre* [co-published with the HKS Corporate Responsibility Initiative], 1 April 2020)

<<https://www.business-humanrights.org/en/moral-bankruptcy-during-times-of-crisis-hm-just-thought-twice-before-triggering-force-majeure-clauses-with-suppliers-and-here’s-why-you-should-too>> accessed 31 May 2020; Buckholtz (n 24).

⁸⁷ Scott Nova and Ineke Zeldenrust, ‘Worker Rights Consortium White Paper: Who will bail out the workers that make our clothes?’ (Worker Rights Consortium March 2020) <<https://www.business-humanrights.org/sites/default/files/documents/Who-Will-Bail-Out-the-Workers-March-2020.pdf>> accessed 31 August 2020.

⁸⁸ ‘Investment Statement on Coronavirus Response’ (*Interfaith Center on Corporate Responsibility*) <https://www.iccr.org/sites/default/files/page_attachments/investor_statement_on_coronavirus_response_03.26.20a.pdf> accessed 31 August 2020.

⁸⁹ Better Buying Institute, ‘Better Buying: Special Report Guidelines for “Better” Purchasing Practices Amidst the Coronavirus Crisis and Recovery’ (2 April 2020) <<https://betterbuying.org/wp-content/uploads/2020/04/Better-Buying-Special-Report-COVID-19-Guidance-for-Brands-and-Retailers.pdf>> accessed 31 August 2020 (The Guidelines include: (a) collaborating in true partnership with suppliers; (b) securing the cash needed to cover contractual obligations, including accounts payable with suppliers; (c) discussing with suppliers their financial health and whether they have the cash/liquidity necessary to retain workforce for at least three months; (d) accepting and paying all existing purchaser orders for goods that have been shipped, are ready or in progress, or are cut, and not resorting to outright cancellations; (e) rationalizing current assortment plans and reconfigure orders to continue producing viable products; (f) engaging suppliers to manufacture masks and other needed personal protective equipment for workers on the front lines; (g) extending delivery dates/accepting shipping delays as necessary; (h) paying a portion of orders that have not been cut and future orders that are affected by changes in volume, have delayed shipping deadlines, or are on hold.)

Many of these workers have nevertheless been deemed ‘essential’ to the business and must choose between going to work in unsafe conditions and not working at all.

The pandemic has further highlighted the fragility of the ‘just in time delivery’ business model which relies upon rapidly shifting and opaque global supply chains, many of whose workers have abruptly been thrown into poverty as supply chain contracts have been cancelled. And as noted earlier, businesses themselves have contributed significantly to the pandemic through the destruction of eco-systems and the consequent loss of biodiversity.

As a result, many businesses have responded to the crisis of the pandemic by committing to ‘build back better’. Corporate legal departments should also ‘build back better’. The pandemic is a wake-up call for corporate counsel who have focused primarily on avoiding the company’s legal liability, without regard to harm by the business to vulnerable people.

This myopic legalistic view will do a disservice the business in the mid to long term. Respecting business human rights is core to business sustainability, even where it is not compelled by law. Businesses must comply with thousands of laws each day, and lawyers are essential to show a business how to do so. But despite these multiple legal requirements, the general counsel should emphasize the need for the legal department to be guided by the overarching need to act reasonably in order to avoid undermining people’s basic dignity and equality.