

Updated IBA Guidance Note on Business and Human Rights: The role of lawyers in the changing landscape

Introduction

1. In 2016, the IBA issued a Practical Guide for Business Lawyers on Business and Human Rights to assess the implications of the authoritative 2011 UN Guiding Principles on Business and Human Rights (UNGP) and related standards for the legal profession. It noted the widespread uptake of the UNGP, their growing importance to States, businesses, and civil society, and their reflection and incorporation into law. It discussed the opportunities and challenges that business and rights poses for internal and external legal counsel.
2. Since then, relevance of the UNGP to the legal profession has rapidly increased, as evidenced by many factors—the creation of dedicated business and human rights and Environment, Social and Governance (ESG) legal practice groups in law firms, the enactment of mandatory human rights due diligence legislation in several countries, the assertion of duty of care, corporate liability and responsibility claims based on the UNGP and related standards, and the recognition of the human right to a clean, healthy, and sustainable environment in a resolution adopted by an overwhelming majority of the UN General Assembly in July 2022.
3. This Guidance note builds upon the 2016 Practical Guide by briefly reprising its key points and providing a snapshot of emerging trends and legislation that are relevant for business lawyers globally.

The UN Guiding Principles on Business and Human Rights (UNGP)

4. In 2011, following six years of multistakeholder consultations, research, and pilot projects, the United Nations Human Rights Council unanimously endorsed the UNGP, which operationalize the Protect, Respect and Remedy Framework developed by the late Professor John Ruggie, the Special Representative of the Secretary General on Business and Human Rights. Under this Framework, the UNGP articulate the duty of States to protect human rights (Pillar One), the responsibility of businesses to respect human rights in their operations and value chains (Pillar Two) and the need for greater access to remedy by stakeholders (Pillar Three). Respecting human rights means that a company should publicly commit to respect human rights in its operations and its value chain, conduct human rights due diligence, and play a role in facilitating remedy where it has caused or contributed to adverse human rights impacts. Human rights due diligence is an ongoing, stakeholder-centered process through which a business identifies its potential and actual human rights impacts, responds to them in an integrated fashion, and monitors and reports on its performance.
5. The UNGP have become the authoritative global standard for the roles of businesses and states vis-à-vis human rights. The corporate responsibility to respect business and human rights is a soft law standard but does not exist in a law-free zone. The UNGP are based on international human rights, which “are often expressed and guaranteed by law, in the form of treaties, customary

international law, general principles and other sources of international law.” [OHCHR Interpretive Guide, p.3]. The laws of many States apply these international standards to protect against infringement of human rights by third parties, including businesses. The UNGP are a living document, whose interpretation and application should reflect the evolution and articulation of international human rights standards over time, such as the UN General Assembly’s overwhelming vote in July 2022 in favor of a resolution recognizing the human right to a clean, healthy, and sustainable environment, the infringement of which prevents the enjoyment of many other human rights.

6. Since their endorsement, the UNGP, and particularly Pillar Two—the business responsibility to respect human rights—have become increasingly reflected or incorporated in statutes, regulations, judicial and quasi-judicial articulations of legal duties of care, corporate responsibility, multistakeholder norms, the decision-making of investors and banks, the practices and policies of leading companies, and the advocacy of civil society. The responsibility to respect human rights applies to all business organizations. Therefore, the UNGP generate opportunities and challenges for the advice and services that lawyers render to their business clients, and for external law firms.
7. Countries around the world are at various stages of implementing the three pillars of the UNGP into domestic law. For the first five years after 2011, States encouraged voluntary business action by promulgating National Action Plans (NAPs) that outline their plans to implement the UNGP. At the time of writing, approximately forty countries around the globe have issued NAPs – the most recent being Uganda, Kenya and Japan.
8. As the understanding of UNGP matured, some States have moved beyond NAPs towards requiring corporations to engage in mandatory due diligence in reference to the UNGP and to report on their human rights performance. In Europe, France introduced laws in 2017, followed by Germany and Norway in 2021, and Switzerland effective in 2023. The French Vigilance Law explicitly includes measures to identify all risks to people, including environmental risks, and to prevent those which are the most serious, including environmental damage. Similar mandatory due diligence legislative proposals are pending in Austria, Denmark, Finland, the UK, and most significantly, in the EU. At the time of writing this update, the EU draft directive on corporate sustainability due diligence proposes mandatory human rights and environmental due diligence, which would apply to EU and non-EU companies whose annual sales in the EU single market exceed certain thresholds.
9. Separately (though relatedly) there has been an emergence of domestic laws concerning human rights abuses such as Magnitsky laws and the seizure or prohibition of imported goods manufactured in a manner involving forced labour (including in the US, where the Customs Office has increased its scrutiny of imported goods at the border). Also, stock exchange listing requirements in many countries require reporting of human rights risks.
10. Investors are increasingly using ESG factors to assess a company’s impact on stakeholders and resulting harm to the company’s shareholders. Professionally managed asset funds that require consideration of ESG factors are on track to represent half of all professionally managed assets globally by 2024. The “S” or Social pillar is heavily populated with human rights. The “E” pillar includes

environmental issues that trigger human rights such as the right to life, as well as the progressive realization of the human right to a clean, healthy, and sustainable environment. The “G” factor includes verifying whether Board oversight is sufficient to meet human rights and environmental commitments.

11. Positively, these developments have enabled regional and national capacity building and pollination of similar guidance and laws in other countries. For example, Japan issued a non-binding guidance on human rights due diligence in late 2022, with the explanatory document citing the emergence of domestic due diligence laws in Europe and forced labour laws globally, highlighting the significance of respecting human rights and its potential to reduce management risks and increase corporate value as a result.
- ### Judicial and quasi-judicial trends on corporate accountability, human rights and climate change litigation
12. Litigation involving human rights and related environmental claims has been brought against multinational companies for alleged harm that occurred outside their home countries, including by way of class actions and via transnational litigation. For example:
 - a. In 2019 and 2021 the UK Supreme Court issued two landmark decisions, ruling that a parent company may owe a duty of care to the claimants concerning environmental damages and human rights abuses caused by its foreign subsidiary, where the parent undertakes to supervise the company’s actions in question, takes active steps to ensure that the subsidiary implements the parent’s policies, and fails to take active steps to prevent harm.
 - b. In 2020, the Canadian Supreme Court recognized that customary international laws, including prohibition of crimes against humanity, forced labor, and torture, are part of Canadian law, and that Canadian companies may be liable for the breach of these standards as a result of their overseas operations (in that case, arising from a Canadian company’s joint venture mining operations in Eritrea).
 - c. In 2021, the Court of Appeal of The Hague found a Dutch company liable for oil spills caused by its African subsidiary.
 - d. In 2022, the District Court of The Hague ordered an oil company to reduce its CO2 emissions, applying a rule of unwritten law relating to social conduct under the Dutch Civil Code, and using the UNGP and other soft and hard law instruments to define the company’s duty of care.
 - e. In 2023, residents of an Indonesian island threatened by rising sea levels caused by climate change sued a Swiss company in Switzerland, following a similar lawsuit filed in Germany against a German electricity provider for damages linked to the rise in greenhouse gases that allegedly increase the likelihood of major flooding from a glacial lake.
 - f. In France, several cases are pending for alleged violations of human rights, including environmental damages, by multinationals under the French Vigilance Law in the extractive, agribusiness, energy, and banking sectors, including for harm that occurred outside France.

- g. In several European jurisdictions (including the UK and Germany) there are ongoing court cases regarding dam collapses that occurred on Brazilian soil, including the collapse of the Fundão tailings dam in southeast Brazil on 5 November 2015 (commonly referred to as the 'Mariana dam collapse').
 - h. Multinationals in the apparel sector are facing criminal investigations for alleged complicity in forced labour in several countries.
13. Additionally, and contrary to the UNGPs, strategic lawsuits against public participation (**SLAPPs**) have been utilized in domestic jurisdictions around the world to delegitimize human rights concerns in the context of business operations, particularly in the mining, agriculture and livestock, logging and lumber, and palm oil sector. As a result, some jurisdictions have introduced Anti-SLAPP legislation to prevent and protect against SLAPPs in the future.
 14. In international arbitrations, the UNGPs are gaining increased traction in bilateral treaty disputes between foreign investors and host states, especially in the mining and infrastructure sectors. Recent arbitral tribunals have accepted amicus curiae briefs and found that they had jurisdiction over human rights-based arguments presented by States as defenses (on the basis of clean hands, legality or contributory fault) or even counterclaims (for example, environment matters), including claims based on the UNGPs. Striking a balance between protection of investors and protection of human rights is increasingly being recognized as a new requirement under necessity and proportionality principles, including the invocation in some jurisdictions of international public policy as a ground to deny recognition and enforcement of arbitral awards. For example, in International Investment Agreements (IIA) there is a growing shift toward a (re)conciliation of business and human rights with a recognition of Pillar One and Pillar Two of the UNGPs. Some decisions even referred to the UNGPs and soft law and asserted that companies cannot be immune from obligations under international law.

How does this fast-changing landscape impact the role of lawyers?

15. The law is dynamic; what is considered merely unethical today may well be unlawful tomorrow. This is particularly true in the business and human rights context. Lawyers have the unique task of tracking these legal developments and advising clients on new laws and best practice norms across the supply chains and value chains of their clients, not only to act lawfully but also to meet consumer and community expectations which are shifting more towards transparency and sustainability.
16. In addition to the hard law imposed over time (such as due diligence laws), lawyers should consider how the three pillars of the UNGPs interact with other frameworks such as the OECD Guidelines for Multinational Enterprises (and its update in 2023), the International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the EU Taxonomy and minimum safeguards, EU Sustainable Finance Disclosures Regulations, Central Securities Depositories Regulation, the Paris Agreement and other relevant instruments.
17. As seen by the growing relevance of ESG factors to investors and other key stakeholders, businesses are increasingly engaging with the management of human rights risks as critical to their long-term sustainability. They expect their lawyers – both internal and external counsel – to advise not only on black letter

law, but also to act as wise counselors in identifying and managing human rights risks, and broader business risks and opportunities.

18. This fast-changing landscape requires context-sensitive analysis that integrates aspects of hard law, soft law, evolving jurisprudence, and emerging trends across the three pillars of the UNGPs, and the three pillars of ESG.
19. Advice that is grounded solely on domestic, hard law compliance will likely obscure the larger picture of business risks. These business risks include lost opportunities, reduced access to capital markets, delay costs, top management distraction, reduced ability to hire and retain the best new employees, and reputational risks. In addition, more businesses now expect that those who participate in their supply chain, including law firms, can show that they respect human rights.
20. Finally, business and human rights is a growing legal practice area. Clients are increasingly seeking advice on multiple binding and non-binding human rights standards that may apply to their industry, projects, or business models. Law firms without credible business and human rights expertise will likely miss opportunities to serve their clients in a highly competitive international market for legal services.
21. As a result, lawyers who advise mostly on transactions would be well advised to consult with lawyers with an expertise in business and human rights, to favour mixing perspectives and enable stronger stakeholder engagement. Given the uptick and global application of the UNGPs, all lawyers (especially those engaging in business) would benefit from understanding and integrating the UNGPs into legal practice as a failure to do so could lead to misapprehension of risk to clients.

Legal practice areas impacted by the UNGPs

22. Section 3 of the 2016 'IBA Practical Guide on Business and Human Rights for Business Lawyers' helps lawyers identify areas that are particularly relevant in the context of business and human rights. This Guidance Note briefly reprises and expands how the UNGPs may impact various practice areas, including:
 23. **Environmental Law.** Recent international recognition of the human right to a clean, healthy, and sustainable environment will likely change the practice of environmental law. Responsible companies have long conducted environmental 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 issues may pose a threat to the company's bottom line, plans, and operations. 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 protecting and respecting human rights for all, safeguarding the most vulnerable people in society and respecting the special connection to land and free, prior and informed consent of indigenous peoples.
 24. **Corporate Governance and enterprise risk management.** Lawyers can support clients in creating the proper internal governance structure and policies to embed respect for human rights. This may include advice on structuring effective human rights governance and compliance programs; drafting policies to respect human

rights; setting up the appropriate process to implement that commitment; conducting impact assessment and stakeholder engagement; and establishing grievance mechanisms to enable the resolution of complaints.

25. **Reporting and disclosure.** Societal expectations for transparency regarding human rights and environmental performance of businesses are increasing. To meet these expectations, laws and regulations are evolving rapidly, requiring enhanced sustainability reporting more generally, disclosure on human rights performance specifically, and consideration of how this applies extraterritorially. To meet these objectives, actions and reporting must be genuine and not mere "greenwashing".
26. **Mergers and acquisitions (M&A).** The 2012 UN OHCHR's Interpretative Guide to the Corporate Responsibility to Respect Human Rights notes that "if an enterprise is involved in a merger or acquisition that brings new projects, activities, and relationships into its portfolio, its due diligence processes should include human rights due diligence, beginning with an assessment of any human rights risks it is taking on". Given the significant legal developments and investment trends since this guidance, particularly with respect to ESG, M&A lawyers play an important role in identifying business-related human rights risks (including environmental risks that impact on human rights) early on in the course of a transaction, rather than only raising them post-acquisition (or not at all).
27. **Finance.** Public and private sector finance, and financial institutions, are key players in the global economy. They have their own responsibility as business organizations to respect human rights, including in the loans and investments they make. There has been a shift in global market conditions towards sustainable finance and finance with 'strings attached' relating to human rights and environmental performance. Although financial issues are also covered by contracts, there are additional considerations and finance lawyers might fail to appreciate this without specific mention of human rights and environmental issues that can significantly affect the financial viability or 'bankability' of a project.
28. **Contracts.** Lawyers can help their clients address human rights impacts arising from their commercial relationships, including in supply chain and procurement contracts, by incorporating shared human rights due diligence provisions into relevant instruments.
29. **Dispute resolution.** The UNGPs have influenced the development of judicial and non-judicial dispute resolution processes, such as the OECD National Contact Points (**NCPs**), as well as collaborative and multi-stakeholder grievance mechanisms, of both general and context-specific application, including operational-level grievance mechanisms (**OLGMs**). Arbitration as a means of resolving business-related human rights disputes is still limited but has the potential to grow since the publication of the 2019 Hague Rules on Business and Human Rights Arbitration. As noted above, international arbitration tribunals are increasingly paying attention to the UNGPs.
30. **Antitrust.** In addressing their human rights goals, companies should be aware that certain collaborations among competitors, even if intended to respect human rights, may trigger competition concerns. Competition authorities around the world including in the EU, are looking into this matter to provide more clarity and legal certainty about the application of competition law to such

collaborations.

31. The areas listed above are merely illustrative. Business and human rights concerns and implications emerge in the context of labor and employment matters, governmental relations, foreign investment, home state bilateral treaty arbitration, tax law, intellectual property, mining law, insurance, bankruptcy law, among other legal practice areas.

What challenges do the UNGPs pose concerning the right of access to legal services, or to the professional duties of lawyers?

32. As recognized by the rules that govern the legal profession in several jurisdictions, and by the United Nations, lawyers are 'essential agents of the administration of justice' and play a fundamental role in establishing the rule of law and promoting the cause of justice. This is stated in the UN Basic Principles on the Role of Lawyers (**UN Basic Principles**), Principle 12.
33. Compliance with the law is a bedrock requirement of the responsibility to respect human rights under the UNGPs. Access to a lawyer and legal services is a fundamental right and is an essential component of the rule of law and due process. This right cannot be undermined even if the client or its business sector is highly unpopular. Every company is entitled to seek legal advice and representation to evaluate and respond to claims that it has been involved with human rights issues. The UNGPs do not impair the right to legal representation.
34. Lawyers owe clients the highest duties of care and loyalty. Whether they work in law firms, corporate law departments, or elsewhere, lawyers have specific and legally binding professional responsibilities. This includes advising clients as to their legal rights and obligations; assisting clients in every appropriate way; taking legal action to protect their interests; and representing clients before courts, tribunals, or administrative authorities, where appropriate (UN Basic Principles, Principle 13).
35. Therefore, states should ensure that lawyers (a) can perform all of their professional functions without intimidation, hindrance, harassment, or improper interference; (b) can travel and consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics (UN Basic Principles, Principle 16).
36. A lawyer's freedom to act with independence is also confirmed by the UN Basic Principles, which state that lawyers should not be identified with their clients or their clients' causes (UN Basic Principles, Principle 18). Independence also includes the need to provide the client with unbiased advice, including risks that the client might prefer not to know.
37. The UNGPs do not abridge the professional responsibilities of lawyers, which include the duty to act, within the limits of the law and professional standards, in their business client's best interests. This also includes advising businesses on identifying and addressing risks to themselves and society from the client's involvement in human rights and environmental impacts. This duty should be met independently of expectations and pressures that are external to the lawyer-client relationship, subject to compliance with their professional and legal

responsibilities.

What do the UNGPs mean for law firms?

38. Law firms, as business enterprises, have their own responsibility to respect human rights. This responsibility applies to businesses 'regardless of their size, sector, operational context, ownership, and structure' (UNGP 14). This includes professional service providers, such as law firms, architects, accountants, and the like. However, law firms are subject to unique professional duties, as noted above, such as the duty to preserve the confidentiality of client communications and the duty to provide unbiased and independent advice and services in the client's best interest.
39. Law firms are part of a client's supply chain. As clients implement their own business and human rights governance, policies, and processes, clients will increasingly expect law firms to show that they also respect human rights and can identify and address the human rights risks that may be linked to their legal services. Larger law firms are already reporting on their supply chains under mandatory modern slavery regimes (such as in Australia and the UK) and detailing actions taken and the effectiveness of such actions. With the introduction of domestic and regional human rights due diligence laws, larger law firms may be required to provide human rights impact assessments or other additional due diligence depending on the scope of the definition of a reporting entity.
40. Section 6 of the IBA Guide suggests further practical steps that a law firm might consider in order to embed respect for human rights in its legal practice.

Conclusion

41. Since 2011, the three pillars of the UNGPs have been incorporated into various domestic legislation in varying ways and included in other hard law developments in jurisdictions worldwide—a trend that seems likely to continue globally and strengthen over time. The UNGPs are an authoritative global standard on business and human rights that is increasingly relevant to legal practice and the profession as a whole.
42. There is a growing case for lawyers – including corporate lawyers, law firms, internal and external counsel – to take human rights into account in their professional activities and understand how human rights and the environment interrelate, as due diligence laws are being proposed that would seek to incorporate these historically separate areas of law together. Engagement with affected stakeholders can be one particularly critical way to understand the nuances of human rights and environmental due diligence and an appropriate way to respond to growing consumer and stakeholder expectations.
43. With the progressive implementation of elements of the UNGPs into business practices by way of guidance and codification into domestic legislation, and the rise of business-related, ESG and human rights litigation globally, there is an increasing demand for legal advice and services on this topic and how it impacts other legal practice areas. This presents significant opportunities for lawyers to engage with the UNGPs – and poses significant risks in not doing so.
44. This fast-changing landscape presents challenges, including for lawyers and law firms in their capacity as businesses with their independent responsibility to

respect human rights and the environment both in the management of the firm and in the legal services provided to clients. Lawyers play a unique role in advising their clients on how to conceptualise these risks and meet the various reporting requirements relevant to a company under human rights and environmental due diligence (in whichever way it is presented in domestic law), as well as international and domestic law, and work cohesively as a profession to facilitate the growing implementation of the UNGPs across the world.

Key references

1. [The United Nations Guiding Principles on Business and Human Rights \(2011\) \(UNGPs\)](#)
2. [The United Nations OHCHR Interpretive Guide to the Corporate Responsibility to Respect Human Rights \(2012\)](#)
3. [The OECD Guidelines for Multinational Enterprises \(2011\)](#)
4. [The United Nations Basic Principles on the Role of Lawyers | OHCHR \(1990\)](#)
5. [The 2016 IBA Practical Guide on Business and Human Rights for Business Lawyers \(2016\)](#)
6. [Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers \(2016\)](#)
7. [ISO 26000 – Social Responsibility \(first introduced in 2010\)](#)
8. [The United Nations Global Compact](#)
9. [The China Network of the United Nations Global Compact](#)
10. [The United Nations Working Group on Business and Human Rights](#)
11. [The United Nations Guiding Principles on Business and Human Rights at 10: The Impact of the UNGPs on Courts and Judicial Mechanisms \(2021\)](#)
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13. [OECD Due Diligence Guidance for Responsible Business Conduct \(2018\)](#)
14. [Principles for Responsible Investment \(2020\)](#)
15. [International Labour Organization "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" \(2017\)](#)
16. [United Nations General Assembly. A/70/L.1. "Transforming our world: the 2030 Agenda for Sustainable Development" \(2015\)](#)
17. [UN General Assembly Resolution A/76/300, adopted on 28 July 2022](#)

9 March 2023

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