

Practical Implications for Business Lawyers

This article discusses the practical implications, for business lawyers, of the United Nations Guiding Principles on Business

and Human Rights. I was a member of the United Nations mandate team of Harvard Kennedy School Professor John G. Ruggie, UN Special Representative of the Secretary-General for Business and Human Rights from 2005 through 2011. Along with my former teammates—including my colleagues at Shift, the nonprofit business and human rights practice that Prof. Ruggie now chairs—I helped him draft and shape the *Guiding Principles* that the UN Human Rights Council unanimously endorsed in June 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (June 2011), http://shiftproject.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf. (UN Guiding Principles). As a former in-house corporate counsel, I want to share my insights on what the UN Guiding Principles mean for corporate lawyers.

The core responsibility of business under the UN Guiding Principles is to respect human rights. It means that companies must not infringe upon human rights and must address adverse human rights impacts with which they are involved, both through their own activities and through their business relationships. It means adopting policies, processes, and systems that enable them to know and to show that they are doing so. It has become an authoritative normative standard, based on a global consensus, on the steps that business should take to

respect internationally recognized human rights.

However, this business responsibility does not exist in a law-free zone. Many countries have long mandated compliance with human rights standards in such areas as labor, the environment, and antidiscrimination, among others. Moreover, managing a company’s risks of adverse human rights impacts is required for prudent corporate governance and risk management. In particular, lawyers have a critical role to play in helping business avoid involvement in gross human rights abuses. Finally, the UN Guiding Principles also have potentially significant implications for maintaining legal privilege and for the professional ethical responsibilities of attorneys who represent business.

History of the UN Guiding Principles

The UN Human Rights Council’s unanimous endorsement of the UN Guiding Principles in June 2011 originated in an acrimonious debate in the UN over corporate social responsibility. Early efforts extending from the 1970s to the early 1990s to devise a UN “code of conduct” for transnational corporations had failed for political reasons. Then in 2003, a UN subcommission of experts drafted a set of “Norms on the Responsibilities of Transnational Companies” (the Norms). Even though the subcommission had no mandate to promulgate legally binding standards, it cast the Norms in the language of a human rights treaty and purported to restate existing international law. The Norms said that such law imposed legal duties directly on companies for violations of human rights. They argued that businesses had essentially the same obligations as governments; not merely to respect human rights, but also to promote and

to fulfill them. The Norms generated a bitter and divisive debate; a number of nongovernmental organizations (NGOs) liked them, business groups did not like them, and governments did not support them. Ultimately, the UN Commission on Human Rights (the predecessor to today’s UN Human Rights Council), did not accept them. To break the logjam, then UN Secretary-General Kofi Annan asked Prof. Ruggie, his former strategic advisor at the UN (by then back in academia at the Harvard Kennedy School), to become the Special Representative to the Secretary General on Business and Human Rights, and to clarify standards and responsibilities regarding business and human rights.

After initial study, Prof. Ruggie rejected the Norms as a basis for going forward. He did not agree that they constituted an accurate statement of international human rights law, since the Universal Declaration of Human Rights and other international conventions did not generally impose direct legal duties on companies.

The “Protect, Respect, and Remedy” Framework and the UN Guiding Principles

Prof. Ruggie and his team then engaged in extensive research and consultation, guiding the process with a philosophy of “principled pragmatism,” which recognized that an authoritative framework on how to identify, to prevent, and to address adverse human rights impacts by businesses could not await the decades that it typically takes for UN treaties on human rights to be negotiated, drafted, signed, ratified, and become legally binding.

The work was grounded in evidence-based research, legal and otherwise, on numerous subjects and in feedback from nearly 50 multi-stakeholder consultations



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held around the world. Consensus was achieved in increments. There were no surprises, which created a sense of inevitability. To the greatest practical extent, the work built on known and accepted concepts and legal standards.

The UN Special Representative's first major product was the "protect, respect, and remedy" framework that the UN Human Rights Council welcomed in 2008. (U.N. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (the Framework). The Framework's three independent yet mutually supporting pillars explained *what* government and business must do to meet their respective obligations and responsibilities. His second major product was the UN Guiding Principles, which the Council unanimously endorsed in 2011, constituting the first time that a UN body had ever adopted, as its own, the normative language of an outside expert. The UN Guiding Principles explained *how* businesses and governments should implement the Framework, and provided a benchmark against which stakeholders could hold them to account.

State Duty to Protect Human Rights

Under the first pillar of the framework—the state duty to protect human rights, described in Guiding Principles 1–10—states are the primary duty-bearers. They have the legal obligation under existing international instruments—such as the UN Universal Declaration of Human Rights, the 1966 UN human rights covenants, and subsequent UN human rights treaties—to protect human rights from infringements by third-party actors, including businesses. States are to discharge this duty through policy, regulation, and adjudication.

Corporate Responsibility to Respect Human Rights

Under the second pillar—the corporate responsibility to respect human rights, described in UN Guiding Principles 11–24—businesses have the responsibility not to infringe on human rights (either through their direct operations or through their business relationships), and to address the negative impacts with which they are involved. Although generally this is not a

responsibility that international human rights conventions impose on companies directly, it draws upon the UN conventions for its content and does not replace them. Rather, the responsibility to respect provides process guidance on how companies can achieve the goals of these instruments.

Prof. Ruggie's research revealed that

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there are no human rights that business cannot infringe upon. Therefore, the scope of the responsibility to respect covers all internationally recognized human rights, not just a preselected few. The responsibility requires businesses to know and to show that they are respecting human rights through a process of due diligence. Human rights due diligence is not a one-shot transactional assessment. Rather, it is a dynamic, iterative, and ongoing management process that draws upon established concepts of corporate governance and risk management. It requires a high level policy commitment to respect human rights, supported by operational level policies, training, and incentive structures that embed a company's commitment from the top of the organization to the bottom. It requires the assessment of company impacts on human rights, including assessing them from the perspective of external stakeholders as well as from the perspective of a company. It requires integrated and coordinated actions in response to the findings from assessments to ensure that a company is addressing them coherently, across corporate silos. It requires monitoring of the effectiveness of a company's efforts to address how it affects human rights. And it requires a company to communicate these efforts to affected stakeholders, and when appropriate, to report on them publicly, particularly when the impacts are severe.

Finally, the responsibility to respect requires businesses to cooperate in legitimate processes, including nonjudicial grievance mechanisms, to remedy human rights harms that they caused or contributed to.

Access to Effective Remedy

The third pillar—the need for greater access to effective remedy, described in UN Guiding Principles 25–31—has both state and business components. The obligation of states to provide a remedy follows naturally from their duty to protect human rights; states must take appropriate steps to ensure that victims of business-related human rights violations have access to adequate remedy, through appropriate judicial, administrative, and legislative processes. In addition, states should provide for, or support the use of, nonjudicial grievance mechanisms in order to provide a comprehensive, state-based system to remedy business-related human rights abuse. To be effective, these mechanisms must be legitimate, accessible, equitable, predictable, transparent, rights-compatible, and a source of continuous learning under Guiding Principle 31.

Businesses also have a role to play in providing access to remedy as part of their responsibility to respect; under Guiding Principle 29, a company should provide for, or participate in, operational-level grievance mechanisms in order to identify and to resolve issues promptly, and to act as a feedback mechanism on the effectiveness of the management of its human rights impacts. Operational level grievance mechanisms should meet the same effectiveness criteria as state-based, nonjudicial grievance mechanisms, but under Guiding Principle 21, they should also be based on dialogue and engagement.

Acceptance of the UN Guiding Principles

The UN Guiding Principles have enjoyed wide acceptance, and are being used by companies, investors, and international standard-setting organizations. NGOs use them in their advocacy. They are reflected in the updated Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the new International Standards Orga-

nization (ISO) 26000 Guidance on Social Responsibility for companies, and the revised International Finance Committee (IFC) Sustainability Framework and Performance Standards. They have received significant support from the international legal community, including the American Bar Association, which formally endorsed them in February 2012. (ABA House of Delegates Res. 109 (Feb. 6, 2012), <http://www.abanow.org/2012/01/2012mm109/> (last visited Nov. 26, 2012)).

In addition, governments are promulgating regulations and policies that incentivize and require companies to adopt systems and processes to enable them to respect human rights, as recent developments in the United States demonstrate. The U.S. Department of State has published a draft regulation requiring companies that make new investments in Burma—which has recently emerged from decades of military dictatorship—to report on their policies and procedures respecting human rights, using the UN Guiding Principles and concepts of human rights due diligence as a reference point. 31 C.F.R. §537.321. In addition, Section 1502 of the Dodd-Frank Act requires companies to conduct due diligence on their supply chain for products containing certain minerals from the Democratic Republic of the Congo, where mining has fueled armed conflict resulting in the deaths of millions. Frank-Dodd Act, Pub. L. No. 11-203, §1502, 124 Stat. 1376 (July 21, 2010) (codified at 15 U.S.C.A. §78m(p) (West 2012)). Section 1502 in turn has spawned California legislation regulating state procurement of products containing conflict minerals from companies in violation of section 1502. (California Conflict Minerals Procurement Act, S.B. 861 (Cal. 2011), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_861_bill_20110218_introduced.html (last visited Nov. 26, 2012)). The California Transparency in Supply Chains Act of 2010 requires large retail and manufacturing companies doing business in California to disclose the efforts that they have taken to eliminate slavery and human trafficking from their supply chains. Cal. Civ. Code §1714.43 (West 2012).

Outside of the United States, the European Commission (EC) has asked Shift and the Institute for Business and Human

Rights to develop guidance on how three industries—employment and recruitment agencies, information and communication technologies, and oil and gas—can align their businesses with the UN Guiding Principles. Finally, one of the first tasks of the Inter-governmental Commission on Human Rights of the Association of South-

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east Asian Nations (ASEAN), formed in 2009, is to conduct a baseline thematic study on business and human rights in the ASEAN region.

The Responsibility to Respect as a Basic Tool of Corporate Governance and Risk Management

The overall contours of the processes that enable a company to respect human rights should be familiar to lawyers who advise companies and their boards on corporate governance. The basic corporate governance responsibilities of corporate boards are to ensure that stakeholder rights and interests are protected, risks are managed, and long-term business value is created. Meeting these goals requires that a company develop effective internal processes to identify and to address the risks of infringing directly or indirectly on human rights.

Since the risks of adversely affecting human rights can prevent businesses from achieving these goals, businesses must manage the risks properly as a matter of corporate governance. Martin Lipton, of the U.S. law firm Wachtel, Lipton, Rosen, & Katz, has applauded the UN Guiding Principles as “sensible guidance” that “marries aspirations with practicability,” which “mobilizes the U.N.’s unique position to assure a level playing field, calling

on every corporation in the world—regardless of size, location, or line of business, and whether public or private—to declare its business interest in preventing violations of human rights by the corporation.” Lipton, *Guiding Corporate Social Responsibility: A United Nations Blueprint to Promote Human Rights* (Wachtel, Lipton, Rosen, & Katz, Nov. 23, 2010), <http://www.business-humanrights.org/media/documents/ruggie/wachtel-lipton-rosen-katz-guiding-corporate-social-responsibility-24-nov-2010.pdf>.

The responsibility to respect has antecedents in company internal controls and risk management systems, which have emerged as best company practices or which have been imposed externally, often by national law. Enterprise risk management is a core feature of corporate governance standards that have found their way into a variety of hard and soft law principles in different countries.

- The Committee of Sponsoring Organizations of the Treadway Commission (COSO), a private sector initiative of the accounting and auditor industry in the United States, developed in 1992 what became a widely used system of internal controls to prevent financial fraud. The internal controls require an appropriate “tone at the top” of the organization, risk assessment, policies and procedures, information and communication, measurement, and monitoring. In 2004, COSO developed an enterprise risk management system to enable companies to better assess and manage their risks.
- Section 404 of the U.S. Sarbanes-Oxley Act of 2002, 15 U.S.C. §7262, requires companies to use a recognized framework to provide assurance that they have an effective internal control system over financial reporting, and U.S. regulators have recognized that the COSO enterprise risk management system provides such a framework. (Inst. of Internal Auditors, *Sarbanes-Oxley Section 404: A Guide for Management by Internal Controls Practitioners* (2008)).
- The French Autorité Des Marchés Financiers, or the “AMF,” the French counterpart to the U.S. Securities and Exchange Commission, requires publicly listed companies to include in their annual reports descriptions of their inter-

nal control and risk management systems. (Autorité des Marchés Financiers, *Recommendations of the Autorité des Marchés Financiers on the "Internal control: Reference Framework,"* (Jan. 22, 2007), http://www.amf-france.org/documents/general/7620_1.pdf (English version)).

- The Dutch Corporate Governance Code of 2009 identifies the maintenance of a suitable internal risk management and control system as a core responsibility of a company's management board. (Corporate Governance Code Monitoring Comm., *Dutch Corporate Governance Code: Principles of Good Corporate Governance and Best Practice Provisions* (2009)).
- The United Kingdom 1992 Cadbury Report, *Financial Aspects of Corporate Governance*, and in particular, the 1999 Turnbull Report on Internal Governance, require companies to state in their annual reports that they have an ongoing process to identify, to evaluate, and to manage risk, to summarize the effectiveness of their internal controls, and to confirm that they have taken necessary actions to remedy any significant failings or weaknesses. If a company cannot make such disclosures, it must state that and explain why. (Financial Reporting Council, *Internal Control-Revised Guidance for Directors on the Combined Code* (2005)).
- The Japanese Financial Instrument and Exchange Law of 2008, also known as "J-SOX," which is that country's legislation on internal control and financial reporting, draws upon COSO principles of corporate governance. (*J-SOX Readiness: Potential Impact and U.S. SOX Lessons Learned*, The Japan Society (Feb. 22, 2007), http://www.japansociety.org/page/multimedia/articles/imported_corporate_notes/j-sox_readiness_potential_impact_and_us_sox_lessons_learned (last visited Nov. 26, 2012)).
- The U.S. Sentencing Guidelines for Organizational Defendants, created in 1993 and amended in 2004 (U.S. Sentencing Guidelines), require companies to exercise due diligence to prevent corporate crime and to ensure the existence of ethical and legally compliant cultures to become eligible for more le-

nient sentences following criminal convictions. (U.S. Sentencing Commission, 2010 Federal Sentencing Manual, §8B2.1, http://www.uscc.gov/Education_and_Training/Guidelines_Educational_Materials/Organizational_Guidelines.cfm, (then follow "Effective Compliance and Ethics Program: 8B2.1" hyperlink) (last visited Nov. 26, 2012)).

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- The Chancery Court of Delaware (the home incorporation State of most major U.S. corporations) ruled in 1996 that the U.S. Sentencing Guidelines serves as the benchmark for determining whether a board of directors had met its fiduciary duty to its shareholders to have an effective compliance program to detect and to prevent crime. *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

The history of these corporate governance standards for risk management may predict the future arc of the UN Guiding Principles since many of the earlier standards subsequently transcended their original contexts to reach more widely. For example, the due diligence process in the U.S. Sentencing Guidelines, originally enacted as a guide for judges sentencing corporate defendants, evolved by judicial decision making into a fiduciary duty standard for corporate directors. Similarly, the U.S. SEC acknowledged the COSO recommendations regarding enterprise risk management, originally developed by private industry groups, as a standard for industries to follow under section 404 of the Sarbanes-Oxley Act. And in updating its Guidelines for Multinational Enterprises in 2011, the OECD not only mirrored the UN Guiding Principles' concept of

human rights due diligence in the OECD Guidelines' new human rights chapter, but it also applied it more broadly to other risk management areas ranging from taxation to environment, to anticorruption, and to consumer protection. Given the extensive consultation and research that led to the UN Guiding Principles, their unanimous endorsement by the UN Human Rights Council, and their wide global adoption, it is not unreasonable to assume that policies, laws of governments, and judicial decision making around the world will increasingly reflect them.

Risk Management and External Stakeholder Impact

Modern enterprise risk management stresses the need for companies to manage the impact of the business on external stakeholders. For example, in 2009, the International Standards Organization (ISO), developed through an international consultative process, promulgated a global risk management standard called ISO 31000 Risk Management—Principles and Guidelines, *available at* http://www.iso.org/iso/catalogue_detail?csnumber=43170 (last visited Nov. 26, 2012). It provides that

- A company should understand both the internal and external context in which it must manage risk, including the company's "relationships with, and perceptions and values of, external stakeholders."
- In making risk decisions, a company should appreciate the "tolerance of the risks borne by parties other than the organization that benefits from the risk."
- In assessing its risks, a company should take into account "social responsibility and the protection of the natural environment" as well as legal and regulatory requirements."

Assessing the Costs of Adverse Human Rights Impacts

Yet despite the requirement that companies manage the risks of adverse human rights impacts on their external stakeholders, companies do not always appreciate the full scope of the risks. In his 2010 report to the UN Human Rights Council, Prof. Ruggie identified a risk that companies in the extractive sector had not fully taken into account and, therefore, had not adequately

managed or disclosed to investors: the costs of conflict with local communities arising from exploration and production activities. These activities potentially can affect local environments, communities, and economies hugely, with severe human rights impacts. He identified a 2008 study of 190 oil and gas projects showing that the time to bring such projects on line had doubled in 10 years, causing significant delay-related costs. He highlighted a confidential follow-up study showing that nontechnical risks accounted for more than half of the delay, of which external stakeholder risks constituted the largest category.

Recently, Newmont Mining Company, the majority owner of the \$4.8 billion Conga gold mine project in the Cajamarca region of northern Peru, calculated a US\$2.1 million per day initial cost resulting from the project's suspension due to protests about water pollution by local residents in November of 2011. (Alex Amery, *Newmont Cutting Jobs at Suspended Peruvian Gold Project*, Bloomberg (Mar. 14, 2012), <http://www.bloomberg.com/news/2012-03-14/newmont-cut-jobs-at-suspended-conga-project-santa-cruz-says.html> (last visited Nov. 26, 2012)).

A 2011 study of the costs to extractive companies arising from community conflict, based on 40 in-depth, confidential interviews with mining executives and others involved in the industry, found further evidence that the companies incurred but did not fully appreciate the costs. The study found lost productivity due to delay were the most frequent costs, lost opportunity costs were the greatest costs (e.g., inability to pursue future projects), and the need for additional staff time to respond to community conflict, were the most overlooked costs. It found that a major, world-class mining project with capital expenditure of between US\$3–5 billion would suffer roughly US\$20 million per week of delayed production in net present value (NPV) terms. Even during the exploration stage, costs can accrue. In the case of a serious exploration project for a new mine, a company will lose around US\$10,000 every day of delay due to wages, idle machinery, and other factors. Davis and Franks, *The Costs of Conflict with Local Communities in the Extractive Industry* 3 (First Int'l Seminar on Social Responsibility in Mining, Oct. 19–21, 2011), <http://>

www.shiftproject.org/publication/costs-conflict-local-communities-extractive-industry (then follow report hyperlink) (last visited Nov. 26, 2012)).

Risk Perspective and Risk Prioritization

Significant as these costs to a company may

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be, assessing human rights impacts requires looking beyond the impact to the company's bottom line. It also requires looking at costs from the perspective of affected stakeholders. This is why UN Guiding Principle 18 specifies that assessing a company's human rights impacts—the first step in human rights due diligence—must “[i]nvolve meaningful consultation with potentially affected groups and stakeholders.” Looking at the negative impact on human rights solely from the company's perspective assumes, incorrectly, that potential victims have the same tolerance for negative human rights consequences as a company. This is the so-called Ford Pinto fallacy: a company's shareholders may be able to “tolerate” the economic consequences of a wrongful death lawsuit from a poorly designed gas tank that explodes in a collision, but from the perspective of the driver and the children in the car, the consequences are intolerable. Lynn Paine, *Value Shift*, 220–222 (McGraw Hill, 2003). And this is the perspective from which a company must assess how it may affect human rights.

In addition, UN Guiding Principle 24 specifies that without specific legal guid-

ance, the company action in response to human rights risks must be prioritized on the basis of severity of harm to the stakeholders. Doing so avoids the temptation to place on the back-burner highly severe but seemingly low-likelihood risks to human rights. A trio of recent corporate disasters—the global liquidity crisis of 2008, the Deepwater Horizon pipeline leak in the Gulf of Mexico in 2010, and the Fukushima nuclear power plant accident in 2011—highlights the dangers of that approach. Each had severely affected human rights adversely, and each was thought virtually impossible the year before it happened.

The Lawyer's Role in Managing the Risk of Involvement in Gross Human Rights Abuses

UN Guiding Principle 23(c) provides specific guidance on how companies should manage the risks of the most severe impacts; it says that companies should treat the risk of causing or contributing to gross human rights abuses—e.g., torture, death, slavery—as a legal compliance issue wherever they operate, even if the applicable legal standards may be unclear. In other words, a company should act on the prudent assumption that it may be held legally liable if it causes or contributes to these abuses, and take robust measures to prevent them from occurring.

For example, in *Kiobel v. Shell*, a lawsuit filed in the U.S. District Court for the Southern District of New York, the plaintiffs alleged that in the early 1990s, the defendant oil companies had enlisted the support of the Nigerian government to suppress environmental protests by residents against the defendants' oil and gas exploration and production activities in the Ogoni region of Nigeria and that members of the Nigerian military “shot and killed Ogoni residents and attacked Ogoni villages—beating, raping, and arresting residents and destroying or looting property—all with the assistance of defendants.” *Kiobel v. Shell*, 621 F.3d 111, 2010 U.S. App. Lexis 19382, at *28–29 (2d Cir. 2010). On February 28, 2012, the U.S. Supreme Court considered whether plaintiffs could sue corporations—as distinct from their directors, officers, and employees—in the U.S. courts under the Alien Tort Statute, cod-

ified at 28 U.S.C. §1350, for their involvement in gross human rights abuses outside the United States. Afterwards, the Court requested additional briefing and argument on the statute's extraterritorial reach and heard a second round of argument on October 1, 2012. *Kiobel v. Shell*, ___ S. Ct. ___, 2012 U.S. Lexis 1998 (2012).

Victims around the world have relied on the Alien Tort Statute as a significant legal tool to hold international companies legally accountable for gross human rights abuses. The future viability of the Alien Tort Statute is beyond my scope, but it is not the only game in town. For example, in 2007, Prof. Ruggie identified an "expanding web of potential corporate liability for international crimes—imposed through national courts." U.N. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* para. 22, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007), <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2007> (then follow report hyperlink) (last visited Nov. 26, 2012). Countries forming part of this "emerging web" include the United Kingdom and The Netherlands, where the interaction between domestic law and those countries' ratification of the Statute of the International Criminal Court leads to the potential imposition of criminal liability for genocide, crimes against humanity, and war crimes on corporate actors. "In this fluid setting," Prof. Ruggie wrote, "simple laws of probability alone suggest that corporations will be subject to increased liability for international crimes in the future." *Id.* at para. 27.

This does not mean that a company's responsibility to respect all human rights should be vested in a company's legal department and made a matter solely of legal compliance and legal risk. The challenge for a company is also about improving relationships and changing ways of doing business. UN Guiding Principle 23(c) simply recognizes that regardless of the uncertainty of the law in particular jurisdictions, a company's involvement in gross human rights abuses would be such an egregious calamity for the company and society, that its lawyers should proactively monitor the company's efforts to prevent its

involvement in such abuse, as they would do to prevent its involvement in any serious corporate crime; *e.g.*, under such due diligence processes as the U.S. Sentencing Guidelines.

Legal Protections

Some lawyers may be concerned with the "knowing and showing" part of the human rights due diligence process, which is at the heart of the corporate responsibility to respect human rights. The perceived risk is that this requires businesses to gather and disclose information for the benefit of their adversaries—in court and in public campaigns.

Guiding Principles 18 (Risk Assessment) and 21 (Communication) are relevant to the answer to this concern. Guiding Principle 18 requires a company to assess the actual and potential adverse human rights impacts with which it may be involved—through its own operations, and also, through its business relationships, such as its supply chain. Assessing risks is nothing new for businesses; it is a fundamental requirement of proper corporate governance, because a company cannot properly manage risks that it does not know exist. And getting involved in human rights problems is a risk for companies, even when measured by the company's bottom line. Guiding Principle 18 does require businesses to assess their human rights impacts through "meaningful consultation with potentially affected groups and other relevant stakeholders." However, it does not mandate making the entire risk assessment public. Nor does it require the company "to assess the human rights record of every entity with which they have a relationship." Rather, it requires them to assess, "the risk that those entities may harm human rights, when acting in connection with the enterprise's own operations, products or services." UN Office of the High Commissioner on Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (November 2011), s. 7.8. <http://shiftproject.org/publication/corporate-responsibility-respect-human-rights-interpretive-guide>. (Interpretive Guide).

Guiding Principle 21 provides that businesses should communicate how they are addressing their human rights impacts,

particularly when stakeholders raise concerns. It requires companies to report formally and publicly, but only on the risks of severe human rights impacts—*i.e.*, those that are large scale, large scope, or are irremediable. The communication should be in a form and frequency that reflects the severity of the impacts. It should be accessible to its intended audiences. It should provide sufficient information to enable a reader assess the adequacy of the company's response. And most relevant, the communication should "not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality." (Emphasis added).

This language recognizes that businesses have a proper interest in keeping certain matters confidential. "The legitimate requirements of commercial confidentiality would... include information legally protected against disclosure to third parties." Interpretive Guide, s. s. 10.7. It recognizes the business need for a confidential space in which to investigate difficult problems, to evaluate them candidly and realistically, and to communicate them internally, in order to address those problems. Guiding Principle 21 does not close that space.

Under U.S. law, this space is protected by doctrines of legal privilege and the work product rule. *See Upjohn v. United States*, 449 U.S. 383 (1981). Legal privilege protects communications between an attorney and a client from discovery and use at trial, unless the client waives the privilege. The privilege applies only to the confidential communication itself, but not to the underlying facts. The work product rule provides more limited protection to investigative reports conducted by or for lawyers. It can be overcome by a showing of need by adversaries, such as their inability to get the information in any other reasonable way.

These protections are not boundless. They cannot be abused to "allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure." *Radiant Burners, Inc. v. American Gas Association*, 320 F.2d 314, 324 (7th Cir. 1963). But as noted at the outset, although the UN Guiding Principles do not impose

legal duties on companies, they do not exist in a law free zone, either. Existing law requires companies to respect many human rights, such as rights relating to safety, the workplace, and antidiscrimination. In addition, the process requirements of the Guiding Principles are starting to influence the law.

Therefore, it would be highly prudent for a company to call on its lawyers for advice where it suspects that it has been involved, or has a risk of becoming involved, in gross human rights abuses, in order to take appropriate action. Indeed, Guiding Principle 23(c), discussed earlier, compels such an approach. In such a case, appropriate assertion of legal privilege and work product would not be incompatible with human rights due diligence. Those protections do not apply to underlying facts communicated, and even investigations subject to the attorney work product rule may be disclosed upon an appropriate showing of need.

However, even where assertion of legal protection is justified, a reflexive resort to it may be in tension with the need to head off or reduce problems by building relationships with external stakeholders based on mutual trust. Building trust between companies and stakeholders is the purpose of Guiding Principle 21—and indeed underpins the corporate responsibility to respect. This requires being candid and open about problems and taking responsibility when things go wrong. In the end, the decision to assert legal privilege with respect to assessments of a company's human rights performance should not be reduced to a simple on/off button—where the default position is “on.”

Professional Ethical Responsibility

Last, I want to address the emerging recognition that lawyers must advise their corporate clients on human rights risks because they have a professional ethical responsibility to do so. As noted earlier, the UN Guiding Principles apply to all businesses, public or private, which includes law firms. The international legal community substantially supported Prof. Ruggie's mandate, and increasingly, firms provide advice to their corporate clients on the UN Guiding Principles.

However, as a group, law firms have lagged far behind other sectors in their ability to know and to show that they actively respect human rights. This may stem from market pressures, as described by Edward Waitzer, senior partner of the Canadian law firm Stikeman Elliott LLP, as follows:

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Looking at the negative impact on human rights solely from the company's perspective assumes, incorrectly, that potential victims have the same tolerance for negative human rights consequences as a company.

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The advent of substantial in-house law departments (in a real sense, internal law firms) has tended to position inside counsel as the “trusted advisor”, often relegating outside law firms to more of a managed commercial service provider role, competing to deliver increasingly commoditized services. Deregulation of major sectors of our economies (e.g., telecom, finance, transportation, energy) has also tended to promote the view of outside lawyers as “zealous advocates” charged with the aggressive and efficient execution of transactions. Each of these dynamics has shifted the focus of transactional lawyers on duties owed to the client rather than to the “public” (other than refraining from facilitating the violation of law or lying on behalf of clients).

Waitzer, *Ethical Responsibilities of Securities Lawyers*, (Canadian Ctr. for Ethics & Corporate Policy, Jan. 16, 2012), <http://www.ethicscentre.ca/EN/resources/articles.cfm> (then follow article hyperlink) (last visited Nov. 26, 2012).

Despite these pressures, law firms have very significant abilities to influence their clients' impact on human rights. This is critically important to the response that firms should take, as independent businesses, under the UN Guiding Principles to the adverse human rights impacts with which they may become involved through their relationships with clients. Under the commentary to UN Guiding Principle 19(b), when a business finds that it may cause or contribute to an adverse impact, it must take the necessary steps to avoid or mitigate the impact. When it does not cause or contribute to the impact, but is directly linked to an adverse impact solely by its operations or the services it renders, it must exercise its leverage over its business relationship in an attempt to avoid or mitigate the impact. And when it does not have sufficient leverage, it must consider terminating the relationship, taking into account how important the relationship is, the severity of the impact on the stakeholder, and the potential human rights impacts of termination.

These principles apply to a law firm's relationships with its clients. They require firms to take a number of steps, including determining the impact of a corporate client's actions on human rights as a result of the law firm's services, providing appropriate advice to clients on how to avoid or mitigate adverse human rights impacts, and determining whether to withdraw from representation. These steps are not easy, given the potential reluctance of some clients to provide more than the minimum amount of information necessary to enable a firm to render service, the requirement that lawyers represent their clients' interests zealously, and restrictions upon withdrawing from legal representation in a way that would prejudice a client's interests.

Things are changing, however, in light of the American Bar Association's endorsement of the UN Guiding Principles on February 6, 2012, and its acknowledgement that they apply to the professional responsibility of lawyers. ABA House of Delegates Res. 109, *supra*. As the report supporting the resolution noted, the UN Guiding Principles pour content into the independent and candid advice that lawyers must provide corporate clients under ABA Model

Rule 2.1; the rule's commentary notes that "moral and ethical factors impinge on most legal questions and may decisively influence how the law will be applied." Model Rules of Prof'l Conduct R. 2.1, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html. This resonates with professional codes of responsibility in Japan, Europe, and Canada, among others, which acknowledge that lawyers must balance their dual roles as guardians of and advocates for the interests of their clients, and as gatekeepers for the interests of courts and society. UN Guiding Principle 19 and ABA Model Rule 2.1 should be read in harmony. Both require lawyers to offer advice beyond determining the letter

of the law; the advice should encompass potential human rights infringements and the full range of other legal and business consequences that may likely result, and it should suggest how to achieve a client's goals in a way that respects human rights.

Conclusion

Lawyers who advise companies must become familiar with the UN Guiding Principles to help their corporate clients achieve their business goals without adversely infringing on human rights. Without derogating from the primary role of states in protecting individuals against human rights abuse by private actors, the corporate responsibility to respect human rights establishes a globally authorita-

tive process standard on how companies should manage their business with respect for human rights, and the responsibility requires companies to know and to show that they are doing so. If it is a soft law standard, it is one with hard consequences. Given the consultative and evidence-based foundation of the UN Guiding Principles on Business and Human Rights, and their global acceptance, corporate lawyers have a critical and essential role to play in helping their clients to respect human rights to comply with fundamental and legally consequential principles of corporate governance and risk management, as well as with their own professional legal responsibilities. 