

From Global Toolbox to Local Implementation: The IBA Practical Guide on Business and Human Rights for Business Lawyers

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Keywords: Bar associations, Guiding Principles on Business and Human Rights, International Bar Association, Law Societies, Practical Guide

I. INTRODUCTION

In-house counsel and lawyers who advise businesses are increasingly required to integrate human rights into their practice of law. This integration is the result of enhanced international standards, domestic laws, evolving best practices, and increasing clients' requests. The Practical Guide on Business and Human Rights for Business Lawyers (Practical Guide),¹ adopted by the International Bar Association (IBA) Council on 28 May 2016, is the latest testament to this integration and to the new role of lawyers in the twenty-first century.²

Human rights are everywhere, both inside and outside companies: from the rights of workers along supply chains, the rights of communities impacted by a project, to the rights of consumers using goods or services offered by a company. As a result, the legal practices connected to human rights are as diverse as taxation, mergers and acquisitions, capital markets, regulatory, project finance, retail, and real estate. However, only a few lawyers advising businesses know what human rights mean in practice for them, their law firms, and their clients.

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¹ The International Bar Association (IBA) comprises 80,000 individual lawyers and more than 190 bar associations and law societies. IBA, 'About the IBA', http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx (accessed 23 January 2017).

² IBA, 'Practical Guide on Business and Human Rights for Business Lawyers' (2016) (Practical Guide), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=d6306c84-e2f8-4c82-a86f-93940d6736c4> (accessed 21 February 2017).

The Practical Guide is to date the most advanced initiative to help bridge the gap between the fact that lawyers feel disconnected from human rights when advising businesses, and the contribution these lawyers could actually make to enhance human rights compliance in business operations. This piece first explains, with selected examples taken from the Practical Guide, what it means in practice for lawyers and law firms to advise businesses on human rights and what the related risks and opportunities are. The piece then goes on to address the challenges associated with ensuring that the Practical Guide reaches the legal profession through implementation at the domestic level.

II. MAKING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS ACTIONABLE FOR LAWYERS

A. The IBA Practical Guide in Context

The IBA has been a supporter of, and contributor to, the development of the United Nations Guiding Principles on Business and Human Rights (UNGPs)³ that were endorsed by the Human Rights Council in June 2011.⁴ The UNGPs state that businesses have a responsibility to respect human rights within their own activities and along their value chain and prescribe a number of processes to reach this objective. In line with the UNGPs and with its mission to foster cooperation between bar associations and law societies,⁵ the IBA explored the role of these organizations and of the legal profession in advancing human rights compliance in business operations.⁶

The UNGPs – combined with recent scandals involving businesses violating human rights⁷ – have initiated a strong impetus for businesses to respect human rights and for lawyers to advise them accordingly. The Practical Guide explains that the UNGPs, although regarded as soft law, do not exist in a ‘law free zone’.⁸ Hard law requiring businesses to respect human rights existed before the UNGPs, including in the areas of public health and safety, discrimination, workers’ rights and privacy.⁹ The domestic legal landscapes continued to evolve towards more hard law after the adoption of the UNGPs. It now includes European and national legislation in relation to forced labour, non-financial reporting and supply chains.¹⁰

³ Practical Guide, *ibid.*, 7.

⁴ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011) (UNGPs).

⁵ International Bar Association Constitution (as updated on 28 May 2016), art 1.

⁶ Practical Guide, note 2, 7. See also IBA, ‘Business and Human Rights Guidance for Bar Associations’ (2015) (IBA Guidance) 1, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=70D3F1B6-33F8-41AD-866E-4928DAD6E696> (accessed 2 March 2017).

⁷ For examples, see Justine Nolan, ‘Business and Human Rights in Context’ in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights, From Principles to Practice* (London: Routledge 2016) 2–11.

⁸ Practical Guide, note 2, 22.

⁹ *Ibid.*

¹⁰ See, e.g., Modern Slavery Act 2015 (UK), c. 30, § 54, Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information (L330/1), loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre 2017 (France).

This trend towards hard law is likely to be reinforced should states, in light of their duty to protect human rights, continue to prepare national action plans detailing how the UNGPs could be implemented. As the Practical Guide puts it, ‘what is considered unethical and a reputation risk today may well be unlawful tomorrow’.¹¹ In addition, the UNGPs are surrounded by other soft law standards such as the Organization for Economic and Cooperative Development (OECD) Guidelines for Multinational Enterprises and by industry specific standards such as the Equator Principles or the Voluntary Principles on Security and Human Rights.¹² Such standards are multiplying and getting increased visibility.

Against the backdrop of this evolving legal context combining soft law and hard law, the Practical Guide aims to help bar associations, law societies and lawyers better understand why human rights should be integrated into their practice of law.¹³ Turning to lawyers, the Practical Guide is addressed to both ‘in-house [and] external counsel acting in their individual capacity or as members of a law firm’ advising businesses as well as law firms.¹⁴

B. The Reasons for Lawyers and Law Firms to Advise Businesses on Human Rights

Advice on human rights could help business enterprises better anticipate their human rights-related risks. Such risks can be legal, operational or financial and could result in year-long conflicts involving litigation and/or arbitration, social unrest, banks and international financial institutions denying or suspending the funding of infrastructure projects, suspensions of work, decrease in share prices, etc.¹⁵ Conversely, compliance with human rights may lead to new opportunities and competitive advantages for business enterprises (including law firms and their business clients) such as attracting and retaining talented employees, customers and investors.

These risks and opportunities combined with the evolving legal context mean that the need for lawyers to advise businesses on human rights is getting more palpable. Lawyers can become ‘wise professional counselor[s] or trusted advisor[s]’¹⁶ as well as ‘go-to counselors’¹⁷ to advise businesses on soft law and hard law requiring businesses to respect human rights and anticipate not only risks but also legal changes.

Lawyers advising business enterprises are in a privileged position to advise such clients on human rights. They already have a deep understanding of how businesses operate, the legal frameworks applicable to businesses’ activities and the means to ensure

¹¹ Practical Guide, note 2, 23.

¹² For more information on this framework, see, e.g., Justine Nolan, ‘Mapping the Movement: The Business and Human Rights Regulatory Framework’ in Baumann-Pauly and Nolan (eds.), note 7, 32–51.

¹³ Practical Guide, note 2, 7.

¹⁴ Ibid.

¹⁵ See, e.g., *Copper Mesa Mining Corporation v The Republic of Ecuador*, PCA case No. 2012-2 (2016) (finding the expropriation of Mesa Mining Corporation from two mining concessions in Ecuador unlawful but reducing by 30% the indemnity awarded to the claimant for one of the concessions due to its contribution to its own prejudice since the acts of its agents in Ecuador, using premeditative violence against the local population, had reduced its chances of turning this concession into a commercial success).

¹⁶ Practical Guide, note 2, 36.

¹⁷ Ibid, 30.

compliance with such frameworks. They also have an expertise in structuring deals, contractual drafting, transactional work, due diligence, crisis management, judicial and non-judicial proceedings. These operations can be closely connected to human rights concerns.¹⁸ For instance, corporate lawyers may realize through due diligence that existing projects have human rights-related liabilities. A finance lawyer may come across projects that have to comply with International Finance Corporation Performance Standards on Environmental and Social Sustainability and the Equator Principles, both of which include human rights requirements. A labour lawyer can help companies set up processes to ensure that human rights are respected across supply chains.

The responsibility of businesses to respect human rights not only applies to lawyers when advising businesses, but also to law firms as they are considered as businesses under the UNGPs.¹⁹ The incentive for law firms to respect human rights is all the more important as law firms are part of their client's value chain, and clients may scrutinize them to make sure they respect human rights. The Practical Guide provides a summary of items law firms should consider when implementing or advising on the UNGPs.²⁰

C. Two Main Implications Related to Advising Businesses on Human Rights

The Practical Guide focuses on two implications for lawyers and their firms when integrating human rights into their clients' advice. First, the IBA explains that 'neither the UNGPs nor this Practical Guide are intended to alter the legal obligations or liability of companies or of the lawyers who advise them'.²¹ However, failure to provide correct legal advice, including on human rights, can result in clients being particularly exposed to the risks mentioned above and to 'new judges' such as non-governmental organizations (NGOs), social media, and various stakeholders. Such failure may also result in legal claims by clients against their lawyers.²² The Practical Guide thus recommends that lawyers verify that their firms' professional liability insurance covers the provision of advice on soft law such as the UNGPs.²³

Second, an essential focus of the Practical Guide is on clients' right of access to, and representation by, independent legal counsel, especially in the event of claims that a client is violating human rights. Indeed, lawyers and law firms have to respect human rights and also advise their clients on how to do so, but clients who may not have respected human rights still have the right to effective access to a robust legal defence.²⁴

¹⁸ Ibid, 23–26 (lawyers' advice can help clients to respect human rights in relation to corporate governance and enterprise risk management, reporting, disputes, contracts and agreements, development and implementation of human rights standards). See also John G. Ruggie and John F. Sherman III, 'Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice' (2015) 6 *Journal of International Dispute Settlement* 445.

¹⁹ Practical Guide, note 2, 32–33.

²⁰ Ibid, 34–37 (including human rights policy commitments and enforcements of such commitments, internal human rights impact assessments).

²¹ Ibid, 38.

²² Ibid, 38 ('providing incorrect legal advice or services to clients may result in claims by clients against their lawyers. This could encompass claims arising from advice or services regarding UNGPs or their implementation.').

²³ Ibid.

²⁴ Ibid, 28.

Similarly, lawyers should still be able to provide independent advice without the risk of being assimilated with their clients' actions or deemed complicit.²⁵

The Practical Guide aims to raise awareness amongst lawyers and law firms in fostering human rights compliance in business operations by law firms and their clients. However, the issue of how to actually make the Practical Guide implemented by the legal profession in each jurisdiction remains to be addressed.

III. MAKING THE PRACTICAL GUIDE FIT THE DOMESTIC LEVEL: THE CHALLENGE OF RECONCILING THE GLOBAL AND THE LOCAL

A. The Absence of a One-Size-Fits-All Model

A number of businesses operate on a global scale with customers, suppliers and supply chains in multiple jurisdictions. These businesses are also subject to multiple domestic policies, regulations and legislation related to human rights. As a result, they need the advice of lawyers from several jurisdictions. Echoing this need for a multi-jurisdictional perspective, the Practical Guide drafting process was conducted by the IBA Legal Policy and Research Unit and the IBA Business and Human Rights Working Group composed of lawyers from diverse jurisdictions and chaired by John F. Sherman. It also included consultations with some local bar associations and civil society.²⁶

Nevertheless, the direct implementation of the Practical Guide at the domestic level is likely to be limited for two major reasons. First, the IBA has no authoritative power over bar associations and law societies to impose rules or to control the integration and the interpretation of its guidelines.²⁷ Second, given the specificities of the legal profession (and law more generally) across jurisdictions, the Practical Guide cannot be a one-size-fits-all model.

For the Practical Guide to be implemented domestically, this piece suggests that bar associations, law societies and the legal profession need to *appropriate* the substance of the Practical Guide. In this context, 'appropriate' means that associations and societies across jurisdictions could progressively take ownership of the Practical Guide domestically (including at the regional, national and sub-national levels), and develop their own interpretation of such guidelines, adjusted to a number of domestic specificities further detailed below. To assist in the process of appropriation of the Practical Guide, the Business and Human Rights Guidance for Bar Associations adopted by the IBA Council on 8 October 2015 provides helpful suggestions (such as awareness raising strategies and training programmes) for bar associations, law societies, and lawyers.²⁸

B. Domestic Appropriation of the Practical Guide

The domestic appropriation would analyse how the scope of the Practical Guide could be applied domestically to reflect the structural specificities of the legal profession in

²⁵ Ibid, 29.

²⁶ Consultations were conducted with local lawyers, bar associations and law societies, including the Spanish National Bar, the Law Society of Namibia, and the Costa Rican Bar Association. Ibid, 10–11.

²⁷ Ibid, 9.

²⁸ IBA Guidance, note 6.

each jurisdiction. For instance, the Practical Guide considers that whether ‘they work in law firms, corporate law departments or elsewhere, lawyers have specific and legally binding professional responsibilities and obligations, including the duty of independence’.²⁹ In some jurisdictions, such as France, however, the status of independent in-house counsel does not exist. Does this mean that the Practical Guide would not apply to these in-house counsels? Similarly, the title of the Practical Guide seems to indicate that it is addressed to ‘business lawyers’. Who exactly are business lawyers? Could the Practical Guide be expanded to non-business lawyers and to other members of the legal profession not mentioned in the Practical Guide such as notaries?

Domestic appropriation could take into account the domestic legal landscape, traditions and vocabulary in a given jurisdiction. It could detail the domestic hard law in relation to business and human rights where such law exists. It could also interpret key concepts from the Practical Guide, the interpretation of which could differ in civil law and common law jurisdictions, such as the concepts of business enterprises ‘causing’, ‘contributing’, and being ‘directly linked’ to adverse human rights impacts.³⁰ Finally, to resonate with the domestic legal profession, appropriation could explain the challenges and opportunities human rights present for the domestic legal community and provide examples of domestic companies’ adverse impacts on human rights and best practices.

More generally, domestic bar associations and law societies could take ownership of the Practical Guide in exploring areas left relatively untouched by the Practical Guide. They could expand on what being a ‘wise professional counsellor or trusted advisor’ means to a given legal community or elaborate what ‘internationally recognised human rights’ exactly means for business. Domestic bar associations and law societies could draw from the Reference Annex as it provides helpful details to complement the Practical Guide.³¹

A number of bar associations and law societies had already started examining their role in locally implementing the UNGPs prior to the adoption of the Practical Guide.³² Instead of a multiplication of local policies based on the UNGPs, why not have the Practical Guide as a common ground with interpretative guidelines at the domestic level? For instance, the recent practical guide by the Law Society of England and Wales builds on the IBA Practical Guide and is adjusted to the domestic context including by taking into account relevant case law and domestic legislation.³³

²⁹ Practical Guide, note 2, 27.

³⁰ UNGPs, note 3, Principle 13.

³¹ IBA Business and Human Rights Working Group and IBA Legal Policy and Research Unit, ‘Reference Annex to the IBA Practical Guide on Business and Human Rights for Business lawyers’, 3, <http://www.ibanet.org/Document/Default.aspx?DocumentUId=82b3381d-a27c-4ef8-b869-39d0aa2fcb18> (accessed 21 February 2017) (the Annex is, however, not considered as IBA policy).

³² Conseil de l’Ordre du Barreau de Paris, ‘Résolution portant sur la Business and Human Rights’ (8 September 2015), <http://www.avocatparis.org/mon-metier-davocat/publications-du-conseil/seance-du-conseil-de-lordre-du-mardi-8-septembre-2015> (accessed 21 February 2017); American Bar Association, ‘Resolution 109’ (February 2012), http://www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.authcheckdam.pdf (accessed 21 February 2017). Some bar associations and law societies mention the UNGPs in more general guidance documents on CSR, e.g., Council of Bars and Law Societies of Europe, ‘Corporate Social Responsibility and the Legal profession: Guidance II’ (2014), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CSR_Guidelinespd1_1395048991.pdf (accessed 21 February 2017).

³³ The Law Society of England and Wales, ‘Business and Human Rights: A Practical Guide’ (2016), 3, <http://www.lawsociety.org.uk/support-services/documents/business-and-human-rights-a-practical-guide/> (accessed 21 February 2017).

C. Domestic Appropriation: an Enriching or Telescoping Effect?

Interpretative guides could allow domestic bar associations and law societies to reach out to the domestic legal profession. A legal profession that is more engaged with the business and human rights discourse could facilitate the implementation of soft law and hard law on the topic.³⁴ In turn, lawyers could also rely on the UNGPs and UNGPs-inspired domestic law when advising businesses. Furthermore, courts might decide in some specific circumstances to refer to these developments in their decisions.

However, these interpretative efforts of the Practical Guide could lead to a multiplicity of local interpretations and possibly to the emergence of domestic standards related to the integration of human rights across law firms and the legal profession. Would this multiplication of domestic interpretations and related standards ultimately lead to a set of common legal interpretations and practices among jurisdictions? Or would it lead to divergent interpretations of the Practical Guide and the UNGPs, and what would be the effect of such divergence on businesses, their lawyers and law firms and on the UNGPs as a global standard?

A frequent observation at discussions held at the United Nations Annual Forum on Business and Human Rights is that the various stakeholders do not have the same interpretation of the key UNGP concepts. This divergence makes it difficult at times to move forward in discussions to make the different provisions of the UNGPs effective and actionable.

Similarly, domestic appropriation of the Practical Guide means that there could be several co-existing interpretations of the text across diverse jurisdictions and also within the legal profession (and even practice areas) within these jurisdictions. This situation could create a telescoping effect between the Practical Guide whose scope is global and multiple (and possibly divergent) domestic interpretations of it. This situation needs to be addressed by the developers of domestic interpretations and by the IBA to decide if a telescoping effect should be avoided, and if so, by which means. Such means could include a centralized repository of domestic bar associations and law societies' interpretive guides, regular updates to the Practical Guide to reflect how it is interpreted domestically, and enhanced dialogue and peer-learning between domestic bar associations, law societies, lawyers, and law firms.

IV. CONCLUSION

In a changing legal environment, where businesses are increasingly required to respect human rights across their activities and value chains globally, the Practical Guide aims to raise the awareness and guide lawyers as well as law firms on how to advise businesses regarding their human rights responsibilities. Human rights-related advice is essential to minimize risks and open the way for new opportunities for businesses, lawyers, and law firms. Besides these risks and opportunities, the Practical Guide also touches upon lawyers' professional liability and independence.

Although the Practical Guide is aimed at law societies, bar associations, lawyers and law firms globally, this piece shows that the Practical Guide cannot be a one-size-fits-all

³⁴ IBA Guidance, note 6, art 9.

model due to domestic legal specificities and because of the IBA's status *vis-à-vis* domestic bar associations and law societies. As a result, a domestic appropriation of the Practical Guide, as described in this piece, is essential to ensure that lawyers and law firms take ownership of the Guide, are familiar with its provisions, and effectively implement its guidelines. However, such appropriation could lead to a possible telescoping effect between the Practical Guide whose scope is global and a plurality of its domestic interpretations across jurisdictions.

This situation where the global meets the local, similarly to domestic legislation appropriating the UNGPs, means that the local level can be a driving force towards implementing the UNGPs. At the same time, it also prompts a reflection on how to articulate these various local initiatives and their implementation with consistency in a globalized context where a number of businesses operate across several jurisdictions.