

# *The UN Guiding Principles and the Legal Profession: Quo Vadis?*

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## I. INTRODUCTION

This piece explores the critical role played by lawyers in promoting the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>1</sup> Although many key stakeholders such as the European Union and the Organisation for Economic Co-operation and Development (OECD) have committed to the UNGPs, significant work remains to be done in embedding the UNGPs at the national level. In this context, lawyers can play an important role in addressing corporate responsibility to respect human rights. Law firms face a growing global legal practice that involves human rights risks. They counsel companies on legal practice areas such as corporate governance and risk management, and deal with clients who are involved in multinational transactions. This may include rendering advice on buying new businesses, selling to other companies and helping clients to expand into new markets where the rule of law may be weak and regimes may not comply with international human rights standards.<sup>2</sup> A law firm's advice can, therefore, have a critical impact on a client's appropriate business operations, which, in turn, might also mean that a (corporate) client's human rights abuse could be directly linked to the law firm's services through its relationship with the client.<sup>3</sup> Given that the UNGPs apply to all businesses, including law firms, it should be no surprise that law

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<sup>1</sup> 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).

<sup>2</sup> Jolyon Ford, 'Business and Human Rights: Bridging the Governance Gap', Chatham House International Law Programme, Research Paper (22 September 2015), [https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20150922BusinessHumanRightsFordV2.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150922BusinessHumanRightsFordV2.pdf) (accessed 4 March 2017) 10; International Bar Association (IBA), *Practical Guide on Business and Human Rights for Business Lawyers* (London: IBA, 2016) 23–6, 39.

<sup>3</sup> See also American Bar Association Resolution 109 (6 February 2012), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2012\\_hod\\_midyear\\_meeting\\_109.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_109.doc) (accessed 4 March 2017).

firms too have a responsibility to respect human rights, as providers of legal services to corporate clients and business enterprises themselves.<sup>4</sup>

In practice, however, there is a considerable divergence in how law firms respond to the UNGPs because national laws may not adequately protect or enforce all human rights, meaning that more guidance on the UNGPs is urgently needed. Legal representative bodies around the world – such as the American Bar Association (ABA), the Law Society of England and Wales, the Law Council of Australia and the International Bar Association (IBA) – have therefore set up working groups and other initiatives to underline the importance of the UNGPs for the legal profession. They have reviewed their codes of legal ethics and reminded members, particularly those who advise corporate clients, of their professional responsibility to respect human rights.

The ABA, the first national bar association that endorsed the UNGPs, recognized in 2012 the impact that the private sector can have on human rights and called upon the legal community, along with governments and the private sector, to incorporate the UNGPs into legal practice.<sup>5</sup> In this context, the ABA referred to rule 2.1 of the ABA Model Rule of Professional Conduct, which underlines that lawyers are to exercise ‘independent professional judgment and render candid advice’ and shall ‘refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation’.<sup>6</sup> The ABA concluded that lawyers shall ‘include applicable international standards in the conduct of a client’s affairs’, including the UNGPs where corporate clients are concerned.<sup>7</sup> In Europe, the Business and Human Rights Advisory Group (BHRAG) set up by the Law Society of England and Wales led the way with regard to the UNGPs. In its report published in 2014, the BHRAG pointed out that lawyers have a professional responsibility to comply with human rights standards and that regulations for solicitors do not conflict with the principles set out in the UNGPs.<sup>8</sup> In 2015, the Law Society, following the recommendation of the BHRAG, established the ‘Law Society’s Business and Human Rights Programme’ that actively promotes the UNGPs to its members (e.g., offering one-to-one consultations and seminars to support lawyers to understand the practical implications of the UNGPs).<sup>9</sup>

The Law Society of England and Wales and other bar associations have also encouraged members to take active steps to address the UNGPs within their law firms and in their role as advisers to clients, such as assessing (potential) human rights impacts and disclose whether and how the UNGPs are implemented within

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<sup>4</sup> Anita Ramasastry and Doug Cassel, ‘White Paper: Options for a Treaty on Business and Human Rights’ (May 2015), 46, [http://www.americanbar.org/content/dam/aba/administrative/human\\_rights/aba-chr-bhrproject-treatywhitepaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/human_rights/aba-chr-bhrproject-treatywhitepaper.authcheckdam.pdf) (accessed 4 March 2017); Jonathan Smithers, ‘As Businesses, Law Firms Need to Implement Processes and Practices to Ensure Respect for Human Rights’, *Business and Human Rights Resource Centre* (2015), <https://business-humanrights.org/en/as-businesses-law-firms-need-to-implement-processes-and-practices-to-ensure-respect-for-human-rights-0> (accessed 4 March 2017).

<sup>5</sup> ABA Resolution, note 3.

<sup>6</sup> ABA Model Rule of Professional Conduct, rule 2.1.

<sup>7</sup> Ibid; ABA Resolution, note 3, 5.

<sup>8</sup> BHRAG, ‘Recommendations’ (March 2014), <http://communities.lawsociety.org.uk/download?ac=9376> (accessed 4 March), 7–12.

<sup>9</sup> Law Society of England and Wales, ‘Business and Human Rights Workshops’, <http://communities.lawsociety.org.uk/human-rights/what-we-do/business-and-human-rights/business-and-human-rights-workshops/> (accessed 4 March 2017).

law firms.<sup>10</sup> In case a client persists in violating human rights, notwithstanding the lawyer's advice, it remains, however, unclear how a lawyer shall respond to the client. While some professional organizations recommend ending the client relationship, others note that withdrawing from the client relationship should be only a 'last resort'.<sup>11</sup> Against this background, this piece looks at the possible conflicts lawyers may face when applying the UNGPs, discusses latest debates and trends in this area, and explores how lawyers can discharge their dual responsibility.

## II. THE UNGPs AND THE LEGAL PROFESSION

### A. The Legal Profession's Hesitation with the UNGPs

Lawyers are increasingly expected to respond to the growing demands of diverse stakeholders to internalize the UNGPs in their practice. Nevertheless, many lawyers and law firms are still struggling to follow the recommendations and other initiatives of their bar associations. The UNGPs are regarded as soft law, but lawyers do not generally deal with issues outside the boundaries of hard law.<sup>12</sup> The UN Global Compact – which uses the UNGPs as an admission criteria for potential members to avoid complicity in human rights abuse – conducted interviews with 40 general counsels about the practical implications of the UNGPs for the legal profession. Its study found that lawyers feel challenged in addressing human rights matters because 'human rights issues can be hard, complex, messy, and carry significant reputational risk for an organization – many times without clear guidance on how to manage or navigate through them'.<sup>13</sup> Besides, applying the UNGPs may raise the prospect of losing clients if they disregard the legal advice on risk exposure to human rights. There are legal representative bodies, such as the German Bar Association (Deutscher Anwaltverein, DAV), who reject incorporation of the UNGPs into legal practice. The DAV argues that lawyers act as independent legal advisers to their clients who must not necessarily share the client's (inappropriate) viewpoints and that the UNGPs violate a lawyer's professional responsibilities of loyalty and confidentiality with regard to the relationship with their clients, such as disclosing confidential information of clients.<sup>14</sup> The DAV also underlined that lawyers have the professional duty to ensure every individual's right to access to legal assistance, which includes clients who are at risk of breaching international human rights law.<sup>15</sup>

Following on from that, it seems that lawyers may have to balance their professional duties carefully in case they consider applying the UNGPs: the conflict between a

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<sup>10</sup> See, e.g., Law Council of Australia, 'Business and Human Rights: Some Questions and Answers for Business Lawyers' (2016), 17, 22, <https://business-humanrights.org/en/law-council-of-australia-publishes-new-guidance-on-business-human-rights-for-business-lawyers> (accessed 4 March 2017).

<sup>11</sup> See, e.g., Advocates for International Development (A4ID), *The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession* (London: A4ID, 2013) 40.

<sup>12</sup> IBA, note 2, 35.

<sup>13</sup> UN Global Compact, 'UN Global Compact Guide for General Counsel on Corporate Sustainability' (June 2015), <https://www.unglobalcompact.org/library/1351> (accessed 4 March 2017).

<sup>14</sup> DAV, Stellungnahme Nr. 17/2016 (April 2016) 7–8.

<sup>15</sup> *Ibid.*

lawyers' duties as set out in their professional codes of conduct and ethics, and their responsibility under international law to respect human rights.<sup>16</sup>

## B. Why Lawyers should Support the UNGPs

Acting in the best interests of a client also means offering the most competent, best and right advice to a client including raising human rights issues.<sup>17</sup> This position is also increasingly reflected in steps taken by the legal profession itself: several international law firms have come forward to publicly acknowledge their business and human rights (BHR) practices,<sup>18</sup> UK-based corporate lawyers gathered in 2016 to discuss the role of long-term risks of corporate environmental operations for their clients,<sup>19</sup> a commercial law firm started to edit a BHR journal,<sup>20</sup> a major law firm may opt for terminating a client relationship where the client disregards advice on human rights law,<sup>21</sup> and a group of lawyers called for an 'International Arbitration Tribunal on Business and Human Rights', which would hear claims of human rights abuses against corporations.<sup>22</sup> In addition, various law firms have set up stand-alone human rights policies and practice groups, which include human rights training programmes for lawyers and specialized teams that support clients to identify and reduce human rights risks within their businesses.<sup>23</sup>

Moreover, a growing number of multinational corporations (MNCs) are being subjected not only to greater due diligence and disclosure requirements by governments and international organizations, but also to strategic litigation by human rights groups. For instance, civil society organizations have increasingly used non-judicial grievance mechanisms – such as the OECD's National Contact Points – and local courts (e.g., in Canada) to resolve human rights complaints against MNCs.<sup>24</sup> Such 'human rights risks' can cause companies 'to lose substantial value through delay' and their lawyers are likely to be among the first people with whom they want to consult about

<sup>16</sup> See, e.g., IBA, note 2, 39–40.

<sup>17</sup> BHRAG, note 8, 10.

<sup>18</sup> See, e.g., Linklaters, 'Human Rights: Statement of Intent', <http://www.linklaters.com/Responsibility/Pages/Human-RightsStatement-Intent.aspx> (accessed 4 March 2017).

<sup>19</sup> King's College London and A4ID, 'What Lawyers Can Do about Climate Change', Workshop Briefing Paper, <http://www.a4id.org/wp-content/uploads/2017/01/A4ID-KCL-What-Lawyers-can-do-about-Climate-Change-Briefing-Paper.pdf> (accessed 4 March 2017).

<sup>20</sup> Such as Allen & Overy.

<sup>21</sup> In an interview, a partner of Norton Rose Fulbright stated: 'If a client doesn't take your advice in relation to a gross human rights abuse, my personal perspective is that I withdraw'. Marialuisa Taddia, 'Business and Human Rights – Moral Support', *The Law Society Gazette* (21 March 2016), <http://www.lawgazette.co.uk/practice/business-and-human-rights-moral-support/5054307.article> (accessed 4 March 2017).

<sup>22</sup> Claes Cronstedt and Robert C Thompson, 'A Proposal for an International Arbitration Tribunal on Business and Human Rights', *Harvard International Law Journal* (7 July 2016), <http://www.harvardilj.org/2016/07/a-proposal-for-an-international-arbitration-tribunal-on-business-and-human-right> (accessed 4 March 2017). In an updated proposal, the authors call for a 'Business and Human Rights Arbitration Panel' instead of a tribunal. Claes Cronstedt, Jan Eijbsbouts and Robert C Thompson, 'International Business and Human Rights Arbitration', Lawyers for Better Business (13 February 2017), <http://www.l4bb.org/pages/Resources.php> (accessed 4 March 2017).

<sup>23</sup> Sam Chadderton, 'Top City Firms Aim to Develop Human Rights Principles to Guide Work', *Legal Futures* (7 August 2013), <http://www.legalfutures.co.uk/latest-news/top-city-firms-aim-develop-human-rights-principles-guide-work> (accessed 4 March 2017).

<sup>24</sup> Véronique Lebus, 'Human Rights and Transnational Business: Are Canada's Courts Up to the Task?' (2011) 15:4 *Aportes DPLf* 22; Claudia Müller-Hoff, 'Strategic Human Rights Litigation: Can It Be Used Effectively against Transnational Corporations?' (2011) 15:4 *Aportes DPLf* 24, 25.

these matters,<sup>25</sup> meaning that there is an urgent need for the legal profession to understand the relevance of human rights for its practice.

Another factor why lawyers should consider overcoming their lack of appreciation of human rights may be that many corporations are already ahead of their legal advisers in the context of the UNGPs. This is illustrated, for example, by the rise of public advocacy in the private sector and business-sponsored grievance mechanisms.<sup>26</sup>

Education and training can help lawyers (and students, in their role as future lawyers) to demystify their concern regarding the UNGPs.<sup>27</sup> In fact, human rights matters arise across a wide array of legal areas with which lawyers may already be familiar: the UNGPs will be relevant to various areas of legal practice including corporate governance, reporting and disclosure, litigation, dispute resolution, contracts and agreements, and mergers and acquisitions.<sup>28</sup> In its study on corporate lawyers, the UN Global Compact concluded that the legal profession ‘will see that human rights issues are just one additional aspect of the familiar issues they are already responsible for managing’.<sup>29</sup> It also appears that there is a growing demand from legal professionals about BHR education. A study carried out by the Law Society of England and Wales shows that there is an increasing demand for lawyers to acquire knowledge of the UNGPs.<sup>30</sup> Half of the respondents confirmed that they or their law firm have clients who seek advice on how to develop a human rights policy for a company or what to include in a contract to ensure that business partners respect human rights in supply chains.<sup>31</sup>

Should lawyers, however, not overcome their gaps in knowledge of the UNGPs, they, or the law firm through which they work, may risk potential reputational damage. In the worst case, a law firm could be perceived as complicit in the human rights abuse of its client and risk being named in the court.<sup>32</sup> While some members of the legal profession are aware of the ‘costs’ of socially unacceptable corporate behaviour and regard the UNGPs as an opportunity to represent the profession as ‘champions of business and human rights’ domestically and internationally,<sup>33</sup> others do not. This is reflected, for example, by US attorneys who were recorded by Global Witness, an anti-corruption non-governmental organization (NGO), and accused of deliberately advising clients on how to move suspect funds to the US.<sup>34</sup> The case was later covered in the

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<sup>25</sup> John F Sherman, ‘Professional Responsibility of Lawyers under the Guiding Principles’, *Shift* (April 2012), <http://www.shiftproject.org/resources/viewpoints/professional-responsibility-lawyers-guiding-principles/> (accessed 4 March 2017).

<sup>26</sup> See, e.g., Martin Wright, ‘The rise of public advocacy in business’, *The Guardian* (11 August 2015), <https://business-humanrights.org/en/the-rise-of-public-advocacy-in-business-examples-of-companies-speaking-out-on-human-rights-sustainability-issues> (accessed 4 March 2017).

<sup>27</sup> John G Ruggie and John F Sherman, ‘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’, SSRN, 3, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2657885](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657885) (accessed 4 March 2017).

<sup>28</sup> IBA, note 2, 31; Taddia, note 21.

<sup>29</sup> UN Global Compact, note 13.

<sup>30</sup> Smithers, note 4.

<sup>31</sup> *Ibid.*

<sup>32</sup> BHRAG, note 8, 8; Law Council of Australia, note 10, 3–5.

<sup>33</sup> Law Council of Australia, note 10, 19.

<sup>34</sup> Global Witness, ‘Undercover in New York’, <https://www.globalwitness.org/shadyinc/> (accessed 4 March 2017).

*New York Times*.<sup>35</sup> In another case, a major US law firm specializing in investment arbitration made headlines by representing the oil extraction company Chevron. Human rights groups publicly accused this law firm of using delay tactics to prevent its client from paying damages worth US\$ 9.5 billion, as ordered by local courts, and block claims of about 30,000 residents who suffer from serious diseases because of Chevron's contamination.<sup>36</sup>

### C. Outlook

There may still be a long way to go to bring the UNGPs into the mainstream practice of corporate lawyers. However, as noted earlier, raising a client's human rights responsibilities and providing uncompromising advice does not necessarily conflict with a lawyer's duties to act in the client's best interests and ensure the right to legal assistance. In particular, withdrawing from representation, where a client does not take a lawyer's advice, is generally seen only as a 'last resort' as it might not be legally permitted in any event.<sup>37</sup> Lawyers, however, do have some flexibility to respond to the UNGPs. The UNGPs leave wide leeway to update professional frameworks and practices, and policy initiatives developed by law societies, bar associations and other relevant stakeholders have shown that there are various approaches to balance a lawyer's 'dual responsibilities'. This may include putting an internal (and credible) human rights risk assessment in place, which might involve a 'quick-check', a desktop-based risk assessment of clients, suppliers and their operations,<sup>38</sup> and issuing a human rights commitment.<sup>39</sup> Nevertheless, a successful human rights due diligence process does not mean that every detail of the client's business operations must be disclosed. While respecting a lawyer's confidentiality responsibilities as set out in professional codes of conduct, lawyers might only be required, in line with Principle 21(c) of the UNGPs, to communicate information about their general approach to human rights, without disclosing confidential information of the client (e.g., providing information on how the law firm addresses human rights impacts).<sup>40</sup>

Furthermore, it might be worth considering that a human rights-friendly advice is likely to be more effective for clients in the long run. Jeopardizing a company's reputation through expensive and lengthy legal measures (such as in the case of Chevron) could also result in losing the client to another law firm. Instead, lawyers could lead the way to rights-sensitive, responsible business practices and use their leverage to sensitize companies for greater engagement and manage how the client is perceived

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<sup>35</sup> Louise Story, 'Report Describes Lawyers' Advice on Moving Suspect Funds Into U.S.', *New York Times* (31 January 2016), [http://www.nytimes.com/2016/02/01/us/report-describes-lawyers-advice-on-moving-suspect-funds-into-us.html?\\_r=1](http://www.nytimes.com/2016/02/01/us/report-describes-lawyers-advice-on-moving-suspect-funds-into-us.html?_r=1) (accessed 4 March 2017).

<sup>36</sup> See, e.g., Amazon Defense Coalition, 'Chevron's Arbitrator Suffers from Acute Ethical Problems, Ecuadorians Assert', *ChevronToxico* (23 February 2012), <http://chevrontoxico.com/news-and-multimedia/2012/0223-chevrons-arbitrator-suffers-from-acute-ethical-problems> (accessed 4 March 2017).

<sup>37</sup> IBA, note 2, 36, 39.

<sup>38</sup> See, e.g., Danish Institute for Human Rights, 'Human Rights Impact Assessment Guidance and Toolbox', <https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox> (accessed 4 March 2017).

<sup>39</sup> See, e.g., Law Council of Australia, note 10, 22.

<sup>40</sup> A4ID, note 11, 43.

by society.<sup>41</sup> Advising clients in a way that respects human rights may therefore bring law firms the long-term success that they want for their clients, as well as for themselves.

### III. CONCLUSION

This piece has shown that the legal profession has a promising potential to strengthen the implementation of the UNGPs. The increasing importance of human rights due diligence within the legal profession provides lawyers with both challenges and opportunities. Although the UNGPs are not legally binding, they have become an authoritative global standard on BHR. Considering the wide support for the UNGPs on the part of governments, inter-governmental organizations, NGOs and the private sector, it is likely that knowledge of the UNGPs will become a global competitive advantage for lawyers and a law firm that incorporates the UNGPs into practice is more attractive to (corporate) clients.<sup>42</sup> The legal profession's commitment to the UNGPs is vital to manage human rights risks of their business clients and encourage them to better understand the practical implications of the UNGPs. The legal profession, as the 'guardian of the rule of law', should take further steps to embed the UNGPs. Otherwise, lawyers may face 'new judges' in the form of civil society activists and social media.<sup>43</sup>

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<sup>41</sup> Chip Pitts, 'Authentic Leadership: The Lawyer's Role in Corporate Social Responsibility, Business and Human Rights', *Lawyers for Better Business* (5 October 2011), <http://www.l4bb.org/pages/home.php> (accessed 4 March 2017).

<sup>42</sup> See also BHRAG, note 8, 3, 8.

<sup>43</sup> See, e.g., Law Council of Australia, note 10, 3; Taddia, note 21.