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Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights

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By
Milton C Regan, Jr[*] and Kath Hall[**]

INTRODUCTION

The modern transnational business organization has grown far beyond the conditions of its birth. It is created under the law of a jurisdiction where sovereignty is generally limited to a particular geographical location, but its operations extend well beyond these boundaries. Furthermore, each jurisdiction in which it does business usually is able to regulate only the conduct that occurs within its borders. Since there is no single authoritative global sovereign, transnational firms are not regulated on a global basis. Instead, each component entity is subject to regulation by the jurisdiction in which it operates or is incorporated. "Yet even where national laws impose [obligations] … states in many cases fail to implement them—because they lack the capacity, fear the competitive consequences of doing so, or because their leaders subordinate the public good for private gain."[1]

In contrast to this fragmented and incomplete system of regulation, the transnational company utilizes a centralized governance structure to synchronize its activities around the globe. More than half of world trade is now comprised of "internal" transactions within networks of related corporate entities, not traditional arms-length exchange among separate companies in different countries. [2] Thus, in contrast to nation-states and international organizations that often struggle to achieve regional and global coordination, transnational companies increasingly represent the most advanced integrated global actors in the modern world.

One response to this situation has been the rise of a system of transnational "governance." The term "governance" incorporates the network of actors, instruments and mechanisms that to varying degrees regulate transnational corporations apart from formally authoritative state laws. The actors within this system include international organizations, non-governmental organizations (NGOs), industry and professional organizations and private sector service providers. The regulatory instruments include both "hard" law that is legally binding and "soft law" that is designed to influence behavior through more informal mechanisms.

It is reasonable to expect that lawyers play an important role within this system of governance. In particular, lawyers are often involved in assisting transnational business clients

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[1] Ruggie intro
[2] Ruggie; see also Picciotto

to operate more effectively across national borders. While many instruments of transnational governance are intended to further this goal, other forms of regulation purport to impose requirements on companies that go beyond what is necessary to enhance cross-border commerce. This is especially true with respect to standards that relate to the human rights impacts of business operations.

Scrutiny of these impacts focuses only not only those for which a company is directly responsible, but also those produced by business partners and subcontractors involved in producing a company's goods and services. Imposing responsibility for such impacts, however, has been hampered by the absence of legally binding obligations to which companies are subject. Countries vary in the effectiveness of their legal systems; the result is often that victims of human rights abuses are unable to gain any redress for their injuries from the business entities that inflicted them.

In this article we discuss the transnational governance regime that has arisen to address the adverse human rights impacts of business activities. We focus in particular on the United Nations (UN) Guiding Principles on Business and Human Rights, which were adopted by the UN Human Rights Council in 2011. These Principles appear to be fostering some agreement on the idea that businesses have an internationally-recognized duty to respect human rights in the course of their operations. The status of this duty, however, is still ambiguous in legal terms. On the one hand, the UN Special Representative primarily responsible for drafting the Guidelines explicitly rejected an approach that imposed international obligations on business enterprises. On the other hand, the Principles describe the duty to respect human rights as "not binding, but not voluntary." This suggests that companies will be held accountable for not fulfilling their duty mainly through mechanisms other than traditional legal enforcement.

In light of the distinctive ways in which the business duty to respect human rights is a soft law obligation that does not raise conventional concerns about legal compliance, what if any role is there for lawyers in fostering acknowledgment and fulfillment of this duty among clients? Is the duty to respect human rights a "legal" obligation in any sense? Should the answer to that question determine whether a company looks to lawyers for advice on human rights questions, as opposed to seeking advice from management consultants or other professionals who advise on corporate social responsibility or sustainability? If a lawyer regards it as appropriate to advise on the duty to respect, should she do so only if asked by the client, or should she initiate the conversation? If she does provide advice, should it encompass only legal risks to the company that fall within the lawyer's traditionally defined specialized expertise? Or should it go beyond that to include other concerns?

In this paper, we begin to explore such questions by drawing on interviews with 28 lawyers involved in various ways in the business and human rights field. While some of these lawyers work in corporate legal departments, most work in advising business clients. All have considerable expertise in and familiarity with the subject of business and human rights. Their observations thus provide the basis for a useful preliminary understanding of the dynamics that are shaping the extent to which business lawyers are involved in advising on the duty to respect human rights, and the forms that this involvement takes.

Part 1 of the article provides an overview of the emergence of a transnational governance regime. Part 2 examines the increasing attention to business and human rights in recent years, and describes some of the governance instruments that attempt to prevent and rectify adverse human rights impact from business activities. Part 3 discusses the extent to which lawyers are advising their business clients on human rights issues, the factors that may inhibit or encourage the provision of such advice, and how lawyers those lawyers who raise these issues tend to frame discussions with clients about them. The Conclusion suggests further areas of inquiry that may enrich our understanding of the role that lawyers may play in helping construct a transnational governance regime on business and human rights.

PART 1: THE GROWTH OF TRANSNATIONAL BUSINESS AND GOVERNANCE

Transnational governance efforts have occurred against the backdrop of public policies that, over the last few decades, have focused on removing formal trade barriers and capital market restrictions among countries and reducing other forms of national regulation that create obstacles to the free movement of goods, services, and investment. These policies reflect the belief in many developing countries that the best way to achieve economic progress is by focusing on an export strategy that capitalizes on the lower costs of labor and other resources within these jurisdictions. [3]

By the end of the Tokyo Round in 1979, for instance, negotiations under the General Agreement on Trade and Tariffs (GATT) had lowered tariffs on manufactured good from an average of 40% to less than 10%.. Further negotiations under GATT resulted in the creation of the World Trade Organization in 1995, which established a regime under which countries could lodge complaints about unfair trade practices by other nations. In 1994, the North American Free Trade Agreement liberalized trade among the United States, Canada, and Mexico. During the last decades of the twentieth century, declining communication and transportation costs, along with improved logistics technology, significantly increased the potential for globally integrated markets.[4] As a result, more companies began to look for business opportunities in multiple locations around the world. Manufacturing companies in particular began to capitalize on differences in the costs of labor and other resources, by moving some of their operations to jurisdictions with low costs and less demanding business regulation.

Around the same time, the structure of business operations in many major companies began to move from mass production and consumption toward a focus on more differentiated markets and flexible production. In what has been called the "Fordist" economy, production was organized around the willingness of consumers to buy the relatively inexpensive and homogenous outputs of a mass production system. The greater emphasis on flexible production led many companies to reduce their investment in fixed assets and to move toward reliance on outside suppliers that were able to configure their products in response to changes in market conditions. As a result, many companies adopted operating models that involved networks of multiple entities in supply chains that stretch across several countries. These networks reflected a move away from vertical integration to a production process that focuses on subsidiaries and

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independently owned contractors that each contribute specific inputs at various stages along the supply chain. Such contractors may also construct their own supply chain by subcontracting out portions of the process for which they are responsible. In some cases, companies completely abandoned any involvement in the production of the goods to which their brands were affixed, instead focusing on the marketing of products and the maintenance of a corporate image with which their consumers could easily identify.[5]

Such developments did not, however, automatically enable companies to operate seamlessly across jurisdictions. Instead, the reduction of trade and technological barriers revealed a world of multiple legal systems that imposed differing, and at times conflicting, demands upon companies seeking to do business. As Sol Picciotto put it, "Th[e] shift towards more 'open' national economies did not create a unified and free world market but, like an outgoing tide, it revealed a craggy landscape of diverse national and local regulations." Similarly, Robert Baldwin has described this process as "draining the swamp." Tim Butte and Walter Matli observe that national differences in product standards became more visible and more economically important "because they now impeded trade in goods that few had even thought of exporting or importing previously, when transport costs and tariffs had made trade prohibitively costly." As a result, companies often faced a world of regulatory divergence: differing regulations on environmental impacts, labor conditions, securities disclosures, insolvency, sales practices, data privacy, intellectual property protection, investment conditions, and a myriad of other issues within each jurisdiction in which they operated.

Regulatory Divergence and Convergence

The operation of transnational companies under multiple legal systems opened up opportunities to benefit from regulatory divergence even as it simultaneously created pressure for convergence. Transnational companies can use regulatory arbitrage to benefit from divergence by locating activities in jurisdictions with the fewest constraints on the pursuit of profitability. The "financial conception" of corporate control described by Neil Fligstein regards the global company as a system for internally allocating investment to achieve the highest relative return. Subsidiaries operating in specific jurisdictions are often vehicles for pursuing this goal. They allow a company to derive the maximum benefits from the mix of opportunities and burdens in each jurisdiction. Countries in turn often compete vigorously for foreign investment by tailoring their regulatory regimes to the needs of such companies. The result can be the proverbial "race to the bottom," in which jurisdictions with the least onerous regulatory demands capture the most investment. Companies benefit from this race by locating their operations in different countries so as to enhance overall returns.

While the transnational company can benefit in this way from regulatory divergence, their global operations also require a certain amount of regulatory convergence. A company subject to multiple conflicting legal demands as it moves goods, services, and capital across jurisdictions can incur substantial administrative costs in attempting to meet these demands. Furthermore, officials in different countries may possess varying amounts of discretion in interpreting and enforcing national laws, based on political and cultural considerations that are

[5] These include companies such as Apple, Nike, Calvin Klein, Gap, and Tommy Hilfiger.

opaque to transnational corporations. This can introduce considerable unpredictability for a company that is attempting to allocate capital among competing internal operations, and to assess the performance of multiple profit centers based on common metrics. Regulatory divergence thus can threaten the ability of a company to coordinate and integrate operations on a transnational basis. At least some degree of regulatory convergence across jurisdictions is necessary to reduce this threat.

Large law firms have benefitted from the need of companies to attend to both divergence and convergence. With respect to divergence, firms' familiarity with the law enables them to determine how a particular jurisdiction's legal regime can affect a company's operations, and to structure business activities so as to comply with the relevant legal requirements. It also enables them to advise management on the legal risks that the company is likely to face by organizing its operations in certain ways, and the remedies that should be available if its investment is threatened. This enables companies to calculate the expected costs and benefits of locating operations in different jurisdictions, and assists managers in maximizing financial returns across a system of divergent regulatory demands.

Lawyers also can be involved in activities that aim to achieve regulatory convergence. This occurs through the creation of rules, standards and guidelines that are applicable across national borders, and which ideally are not subject to different application based on distinctive local culture and politics. While these instruments are sometimes generated by law firms themselves, more often lawyers advise and assist international organizations, NGOs, industry bodies and private service providers to develop standards aimed at convergence. These efforts enhance the ability of companies to operate across multiple boundaries in at least two ways.

First, they can make the environment in which a company operates more predictable, even though a certain amount of variation in national regulation may remain. Such uniformity enables companies to assess with greater precision the profitability of various activities across the globe, thereby improving their ability to efficiently allocate capital.

Second, harmonizing rules and standards across borders enhances a company's "social license" to operate in various countries.[6] This increasingly important license reflects community support for a company's activities based on the perception that those activities are legitimate and in accordance with basic notions of justice. Failing to obtain such support can be costly for a company due to delays or interruptions in operations, reluctance by a host country to approve or ease the ability of a company to do business, consumer boycotts, drops in share price, increases in the cost of capital, and damage to reputation. [7] Achieving greater convergence on standards that reflect minimally shared notions of fairness thus can increase a company's social license to operate. At the same time, the cost of such convergence to a company will be less ability to arbitrage national regulatory regimes in order to minimize its legal obligations.

The results of efforts by lawyers and others to achieve regulatory convergence across multiple borders form part of the emerging system of transnational governance that we discuss in

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the next section. This system has various features that distinguish it from conventional government regulation. In particular, in the absence of a single transnational regulatory body, both public and private entities are now involved in creating binding and non-binding instruments that seek to establish common rules and standards to govern transnational commercial activities.

The Development of Transnational Governance and Regulation

Without an international sovereign that possesses regulatory authority over multi-jurisdictional business activities, transnational actors have increasingly looked to other forms of "law making" that might create what Niklas Luhmann calls "a social system which depends upon the congruent generalization of normative behavioral expectations."[8] The result is generally characterized as a system of transnational "governance," to distinguish it from traditional government regulation.

This system of transnational governance has several distinctive features. First, its processes are less structured and more fluid than the ones through which traditional governmental regulation occurs. Martin Haajer suggests that new forms of governance arise in an "institutional void," where there are no clear rules and norms regarding the policy-making process and the politics that attends it. The result, as Luc Fransen argues, is that new forms of governance emerge in so-called "backstage sites of politics" where actors agree on new rules for conducting politics and develop new policies, as opposed to 'frontstage politics' which are characterized by the formal institutionalized types of governmental and intergovernmental rule.[9] Thus, gatherings convened by international organizations, non-governmental organization (NGO) publicity campaigns, industry conferences, meetings of professional associations meetings, and informal communications among actors in various network area all possible sites where ideas are proposed, tested, developed, refined, and put forward.

Second, transnational governance involves a range of both public and private actors. These include international organizations, NGOs, industry groups, professional organizations, private sector service providers (including lawyers) and major corporations. This means that, as Jennifer Green puts it, "[T]he right to make rules is not restricted to states."[10] Authority in this setting arises not from formal legal delegation, but from the willingness of others to be bound by a party's guidance. As Green argues, "when actors consent to be bound by rules, they create authority."[11] Such consent rests on the perception of the legitimacy of an actor, which in turn is based on qualities such as technical expertise, an inclusive deliberative process, or a dominant position in a relevant market. Thus, "authority need not be legally binding to gain adherents. If private actors are able to legitimate their claims to authority, others will voluntarily adopt the rules. Potential governors then acquire authority and become governors in fact."[12]

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9 Fransen, quoting Van Totenhove 2003

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Some transnational actors also acquire authority and legitimacy through invocation of universal principles such as justice or human rights. NGOs in particular often gain influence by publicizing the harms imposed by transnational business operations, or by criticizing the actions of suppliers or joint venture partners. This publicity in turn may lead to actions such as calls for boycotts of particular companies' products. In recent years, these actions have resulted in concern for corporate reputation become a much more salient consideration for management, and have prompted changes in policies and practices despite the fact that NGOs lack any formal enforcement power.

Third, transnational governance regimes include both "hard" and "soft" law instruments such as national and international laws, industry and commercial standards, corporate codes of conduct and guidelines issued by international organizations and professional bodies. The nature and effect of these forms of regulation is not as sharp as the distinction between "hard" and "soft" law might suggest. For instance, companies may agree to submit to audits by third parties to certify their compliance with particular voluntary standards, NGOs or consumer groups may then monitor such compliance and levy public criticism of the company based on these findings. This can serve as a form of "enforcement" that has serious financial and reputational consequences. Companies may also incorporate voluntary standards into their contracts with retailers and manufacturers in their supply chains, so that failure to comply with these standards can be a basis for termination. In addition, voluntary standards and the principles may become sufficiently accepted that they are incorporated into formal national legislation. Thus, as Sigrid Quack has observed, transnational law-making "represents global institution building that involves continuous transformations between 'soft' and 'hard' regulation."[13]

As this discussion therefore suggests, transnational norms and rules can circulate throughout networks, with various actors in different domains incorporating them into their practices in ways that can reinforce their influence. The result is a decentralized and emergent form of "regulation." Thus, for instance, the International Chamber of Commerce (ICC) issues rules regarding letters of credit, which banks in turn incorporate into their contracts. Courts can then enforce these contract terms, which means that more parties adopt them in their credit facility agreements. As a critical mass of parties incorporate the terms, they can attain the status of customary practice that informs the interpretation of national statues dealing with this subject, which in turn has the effect of embedding these rules in the formal public legal order.

Fourth, transnational governance operates through a network of loosely connected public and private actors rather than in top-down command-and-control fashion. Sol Picciotto suggests that the network metaphor expresses "[t]he destabilization of normative hierarchy" and reflects the absence of a unified sovereign with undisputed regulatory authority over transnational activities. Saskia Sassen argues that transnational governance is creating "new assemblages of authority, rights and power and … diverse jurisdictional geographies" that unsettle national and international authority. As Picciotto notes:

> this central feature of governance . . . distinguishes the post-liberal from the classical liberal system. In the latter, legal rules fell into relatively clear categories and hierarchies, with international law binding states, and national or local law governing legal persons. . .

[13] Sigrid Quack, at 64.

This made it possible, at least in principle, to determine the validity of rules and to decide which should apply to a particular transaction or activity. In networked governance, normative systems overlap and inter-penetrate each other, and the determination of the legitimacy of an activity under any one system of norms is rarely definitive, since powerful actors are usually able to challenge it by reference to another system.

Gregory Shaffer suggests that transnational networks reflect resource dependencies among public and private actors. He maintains that "[t]he diffusion of resources among various actors explains the need for networked forms of governance in an increasingly complex world, since neither central governments nor any other single actor possesses the resources necessary to govern without the cooperation of others." Picciotto echoes this point. Many business enterprises, he notes, have moved from large scale vertically integrated operations to decentralized networks of relationships among suppliers, joint venture partners, and subsidiaries in which there is considerable operational discretion subject to general profitability goals. Furthermore:

> the public sphere has become much more fragmented, as many activities have been divested from direct state management through privatization and subcontracting, and operational responsibility for an increasing range of public functions has been delegated to bodies which are substantially autonomous from central government. In this 'network society' the public and the private, which were never truly separate social spheres, have become harder to distinguish, and their interactions and permutations have become more complex.[14]

Terrence Halliday and Shaffer describe how this system of decentralized networked governance can result in the creation of more formalized "transnational legal orders" (TLO). They define a TLO as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions." The "legal" feature of a TLO means that its form is produced in connection with a transnational body or network, and is designed to influence national legal bodies. Thus, a set of norms will not constitute a TLO "until some evidence can be adduced that the transnational norms are reflected in national legal norms and that national legal norms place their imprint on local legal norms, and there is some degree of normative concordance among these several levels." This emphasis on formalization thus excludes what is commonly regarded as soft law, although soft law norms may generate common expectations that eventually are codified in legally binding rules.

An important feature of the processes through which a TLO is created is what Halliday and Shaffer describe as "recursivity." The recursive process involves ongoing exchange, contestation, negotiation, and revision of norms among the international, national, and local level. Various actors may compete to have their respective descriptions and diagnoses become the accepted way to identify a "problem." This has ramifications for which measures are seen as appropriate responses, as well as which actors are best situated to take the lead in addressing the problem. The concept of recursivity thus "replaces a global-centric, top-down concept of norms

[14] Picciotto

traveling from the center to the periphery with a dynamic, recursive process of exchange and negotiation between transnational, national, and even local norms."[15]

One key area in which transnational governance and regulation has developed over the last three decades is in the context of business and human rights. This development reflects a shift from the traditional assumption that the responsibility to protect and to avoid infringing human rights rests solely with states as signatories to various international human rights conventions. Instead, as we discuss below, it is now relatively common for business harms to be viewed as violations of human rights. The result, as one scholar observes, is that "[b]usinesses formerly insulated by the cover of private law are receiving greater attention for their role in human rights abuses, a field generally defined and defended by public law."[16] One indication of this trend is the substantial growth in literature and scholarship on this subject.[17]

PART 2: BUSINESS AND HUMAN RIGHTS

Background

The original document setting forth general human rights principles is the 1948 UN Universal Declaration of Human Rights. The thirty articles in the Declaration set forth rights that are aspirational, rather than binding, and express belief in "the dignity and worth of the human person and in the equal rights of men and women[.]" Subseqently, in 1966, two further United Nations Covenants were adopted, namely the International Covenant on Civil and Political Rights and the UN Universal Declaration of Human Rights Convention on Economic, Social, and Cultural Rights. The later focuses on rights including the right to work and to just and favorable conditions of work; to form and to join trade unions; to social security, adequate standards of living, health, education, rest, and leisure; and to take part in cultural life and creative activity. Acknowledgment that differing conditions in signatory states may affect their progress in realization of these rights means that variations among countries still exist regarding which international human rights standards are applicable.

The Declaration and the two Covenants together constitute what has come to be known as the "International Bill of Human Rights." States fulfill their responsibilities under these and other treaties through the adoption of domestic law or through direct incorporation of the treaty in their domestic legal systems. While the obligations set forth in the Declaration are directed not only to government but to "every organ of society," the traditional perspective on human rights responsibilities distinguishes between public and private actors. "The state is seen as the main entity responsible for implementing programmes to reduce poverty, to promote human development and generally to protect and promote human rights."[18]

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[15] Halliday and Shaffer.
[16] Kasey L McCall-Smith, *Tides of Change: Expanding the Term "Duty-Bearer" in International Human Rights*, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637318.
[17] *See, e.g.,*
[18] Voilescu

The International Bill of Rights has been supplemented by seven additional UN treaties that elaborate upon prohibitions against racial discrimination, discrimination against women, and torture; that affirm the rights of the child, migrant workers, and persons with disabilities; and that prescribe national prosecution or extradition for the crime of forced disappearance. Expert committees exist under each treaty to receive and evaluate reports that states are required periodically to submit describing their adherence to treaty obligations. Committees also offer recommendations and commentaries on treaty provisions in light of changing conditions.

In addition, the International Labor Organization (ILO), an agency of the UN, has adopted conventions dealing with workplace rights. The ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration) lists freedom of association and recognition of collective bargaining; elimination of all forms of forced or compulsory labor; abolition of child labor; and elimination of discrimination with regard to employment and occupation.

As we discussed above, since the reduction of trade barriers, transnational companies have increasing made use of networks and supply chains to organize their production and supply processes. While this method of organizing their business activities has realized considerable efficiencies for companies, it has also posed challenges for companies in managing all the elements of a global supply chain. In manufacturing, for instance, transnational companies must often place pressure on suppliers in a developing country to deliver products or services on a tight schedule and to respond rapidly to changes to orders, or be subject to penalties that compensate for financial losses resulting from delayed delivery.[19] Because transnational companies typically have a variety of suppliers they deal with, the ability to apply pressure to ensure quick results can give them significant leverage in their relationships with their contractors. Contractors may have comparable influence with their subcontractors. Thus, "there is a crucial relationship of power between transnational corporations and the outsourced . . . companies, and a parallel one between outsourced companies and the subcontractors that provide materials and services upon which those outsourced manufacturers often depend."[20]

At the same time, many transnational companies have argued that they do not bear responsibility for the harms their contractors or partners might inflict. Such harms can include environmental degradation, hazardous working conditions, extremely low wages, unsanitary housing, abuse by security services, and trafficking in forced labor.[21] In the extractive industry, companies have to operate wherever natural resources were located and are "pushing into ever-more-remote areas, often inhabited by indigenous peoples who resisted their incursion, or … in host countries engulfed by the civil wars and other serious forms of social strife … , particularly in Africa and parts of Latin America."[22] In some cases, these operations have triggered allegations of forced displacement of local communities, the use of slave labor, environmental contamination, and torture, rape, and murder by forces providing security services for the projects. There have also been claims that some companies have provided facilities and

[19] Such practices are common, for instance, in the apparel industry because of its sensitivity to seasons and to fashion trends.
[20] (Smith & Pangsapa, in The Business of Human Rights)
[21] Ruggie Report
[22] (Ruggie?)

equipment that have assisted host states in inflicting massive violence, and even genocide, on civilian populations, especially in areas torn by civil conflict.

In a 2007 Report, Special Representative to the Secretary General John Ruggie analyzed 320 allegations of human rights abuse by companies, posted on the website of the Business and Human Rights Resource Center. The report found that the extractive industry accounted for the largest percentage of allegations, with claims relating mainly to forcible displacement of populations, threats to the security of the person, and adverse impacts on livelihood. The retail and consumer product sector was next, followed by pharmaceutical companies, infrastructure and utility companies, and food and beverage companies. Alleged violations by the apparel and sporting goods sector tended to have the most impact on workers, while the extractive community had the most effect on communities. Allegations of violations of the rights of end-users of products mainly involved lack of access to essential medicines because of price or intellectual property protections.

The report distinguished between impacts caused directly by a company, and indirect impacts in which companies contributed to or benefited from abuses by third parties such as suppliers, individuals, states, representatives of states, and other businesses. About 60% of abuses involved direct impacts, while 40% involved indirect impacts. Of the direct impacts, 34% involved workers, nearly 50% involved communities, and about 16% involved end users such as consumers. Of the cases involving indirect impacts, about 60% affected workers and 40% affected communities. The report concluded that:

> In sum, the presence of all sectors and regions in the allegations supports the need for all corporate actors to consider the human rights implications of their activities. Moreover, the study indicates that the subject of this consideration should not be a shortlist of rights but actually the full range of human rights. And given the number of allegations of indirect abuse, firms should also consider the human rights records and activities of those with whom they have relationships - the allegations show that a firm may be held accountable by stakeholders where it contributes to or benefits from third-party abuses.

To understand the development of transnational governance on business and human rights, the following section discusses key events leading to the emergence and evolution of the attention to business and human rights, as well as important transnational regulatory and governance initiatives that now exist to address the human rights impacts of business operations.[23]

[23] Our aim is not to provide a comprehensive history of these developments or to catalogue all of the transnational governance mechanisms that have arisen in this field. Instead we describe those events that have been especially significant in generating momentum for the greater scrutiny of transnational business activities, as well as the key regulatory mechanisms and initiatives that have resulted.

The Growing Attention to Business and Human Rights

A number of events have led to the increased focus on the human rights impacts of transnational business operations. One of the earliest events was the deadliest industrial disaster in history, which was the December 1984 gas leak at Union Carbide's pesticide plant in Bhopal, India. The company that owned the plant, Union Carbide India Limited (UCIL), was 50.9% owned by the U.S. parent Union Carbide Corporation and 49.1% by banks controlled by the Indian government and private shareholders. UCIL traded its stock on the Calcutta Stock Exchange. The leak resulted in the chemical gas methyl isocyanate circulating through the shanty towns that surrounded the plant, causing almost 3,800 confirmed deaths and another 3,900 permanent severely disabling injuries. Some estimates place the death toll much higher, with some as high as 20,000. One study found that the spontaneous abortion rate in the area following the gas leak was 24.2 per cent, about three times the national average, and the stillbirth rate was 26.1 per 1,000 deliveries, compared with a national figure of 7.9 per 1,000. A year after the disaster the infant mortality rate in Bhopal was 110 per 1,000 births, compared with a national average of 65.2 per thousand.[24]

While the immediate cause of the gas leak appeared to be the introduction of water into a tank containing methyl isocyanate, the Indian government and local community groups claimed that poor safety practices at the plant and deferred maintenance resulted in a situation where a backflow of water spilled into the tank. Union Carbide contended that water was introduced into the tank by an act of sabotage. There was no definitive conclusion on this issue, although an investigation of the disaster by the Arthur D. Little firm supported the sabotage theory.

The effects of the disaster on the US parent company were significant. Six months after it occurred the *New York Times* reported that Union Carbide had "seen its stock plummet, its financial health challenged by multibillion-dollar lawsuits and the pace of its strategic acquisitions slow due to problems in raising cash."[25] Numerous lawsuits alleging common law tort violations were filed by victims in the United States and India at both the state and federal levels.

All the U.S. cases were consolidated in the federal district court in Manhattan, which eventually dismissed them on the ground that India was a more convenient forum. A payment of $470 million by Union Carbide was approved by the Indian government in 1989, but was severely criticized as inadequate. In June 2010, seven ex-employees, including the former UCIL chairman, were convicted in Bhopal of causing death by negligence and sentenced to two years imprisonment and a fine of about $2,000 each, the maximum punishment allowed under the law in India. The United States, however, refused to extradite the former UCIL chairman to India.

Due to the catastrophic consequences of the leak, the disaster prompted some of the first global efforts to frame business responsibility in terms of international human rights. Several national and international NGOs were established, some of which are still focused on providing

[24] (Eckerman)
[25] Stuart Diamond, *Warren Anderson: A Public Crisis, A Personal Ordeal*, N.Y. TIMES, May 19, 1985.

assistance to the victims today.[26] Attempts were also made to respond to the regulatory gap that was revealed in terms of corporate liability for harms caused overseas. For example, in 1992, the Permanent People's Tribunal, the successor to the Bertrand Russell International War Crimes Tribunal,[27] conducted hearings in Bhopal in connection with the creation of a Charter on Industrial Hazards, designed to be a "charter of rights to reflect the views and concerns of persons injured and distressed by industrial hazards."[28] The Charter was finalized in 1996 and invoked the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Convention on Economic, Social, and Cultural Rights; and several other relevant international human rights instruments. It provided, among other things, that "[a]ll communities have the right to refuse the introduction, expansion or continuation of hazardous activities in their living environment" and that "[a]ll workers have the right to refuse to work in a hazardous working environment without fear of retaliatory action by the employer."

The Bhopal disaster and its aftermath thus heightened attention to the operations of transnational corporations in general and to health and safety impacts in particular. It also revealed the governence gap in terms of legal remedies for victims. The events underscored the difficulties of bringing successful legal actions against companies with complex organizational structures, involving subsidiaries whose liability could be legally insulated from parent corporations. The attention created significant legal, financial and reputational difficulties for Union Carbide for several years after the incident. When the company eventually sold its shares in its Indian subsidiary for $90 million in 1989, Union Carbide and the Indian Government agreed to spend the proceeds from the sale on research and health care in Bhopal.[29]

Other early cases focused attention on the impacts of business activities in the extractive industry. One of the most high profile involved Royal Dutch Shell's operations in the 1980s and early 1990s in the Ogoniland area of Nigeria. Ogoniland is a tribal area of 400 square miles that housed 500,000 inhabitants in Rivers State, Nigeria. Shell began extracting oil there in the 1950s. When Nigeria nationalized the oil industry in the 1970s, Shell transferred its license to operate to the Shell Petroleum Development Company (SPDC), an unincorporated joint venture between Royal Dutch Shell and the Nigerian National Petroleum Corporation.

In the 1970s tribal chiefs of the Ogoni began complaining that land and water pollution from the project was undermining their ability to engage in farming and fishing. Gas flares in the area burned twenty-four hours a day, and emissions produced acid rain that caused respiratory problems. In addition, some pipelines cut through villages and former farmland. There also was resentment that local residents bore many of the costs of the project without

[26] Ingrid Eckerman, THE BHOPAL SAGA: CAUSES AND CONSEQUENCES OF THE WORLD'S LARGEST INDUSTRIAL DISASTER

[27] The Tribunal "attempts to fill gaps in international law, which it seeks to influence by elaborating on such documents as the Universal Declaration of Human Rights (United Nations), the Nuremberg principles, United Nations General Assembly resolutions on de-colonization and the new international economic order."

[28] https://www.globalpolicy.org/component/content/article/212/45285.html

[29] Editorial, *Bhopal's Second Tragedy*, NY. TIMES, Jan. 15, 1997.

receiving many benefits from it since the operation was capital-intensive and thus generated little local employment. [30]

Residents regarded the company and the government as unresponsive to their complaints and as unconcerned about the adverse impacts of the project. As a result, civil unrest mounted, and in 1992 the Movement for the Survival of the Ogoni People was established. The movement proclaimed an Ogoni Bill of Rights, which called for restoration of environmental conditions, more favorable revenue sharing, and greater political autonomy for the state and community. Neither the company nor the government responded. Instances of sabotage against pipelines and other company property increased, and in 1993 approximately 300,000 Ogoni took to the streets to protest against Shell. As unrest escalated to vandalism and violence, government troops were deployed to protect Shell installations. Eventually, in response to the beating of an SPDC worker, Shell withdrew its staff from Ogoniland and halted its pumping operations there.

After Shell suspended its operation in 1993, the government began a massive campaign against the Ogoni. Over the next three years, the military burned villages, raped women, and killed over 2,000 people between 1993 and 1995. Shell denied any collaboration with the government in this campaign. However, as the *New York Times* later reported, "Internal military documents show the Government hoped that by crushing the Ogoni protests it would persuade Shell to resume operations in the region."[31] In another article it wrote:

> Royal Dutch/Shell is on trial in the court of public opinion. Critics here and abroad accuse the company of colluding in the brutal oppression of local people, of polluting Ogoniland and of failing to speak out against the execution of Mr. Saro-Wiwa. Several countries, including the United States, are contemplating sanctions against Nigeria. A coalition of human rights and environmental groups is planning a worldwide boycott of Shell's gasoline and other products. Even London's Royal Geographic Society, not usually the most militant of groups, has dropped the company as a patron and returned a $60,000 donation.[32]

Ogoni plaintiffs then filed a civil lawsuit against Shell alleging that Shell had contributed to the campaign of violence in the Ogoni region, as well as the sham trial and execution of Saro-Wiwa by Nigeria's military dictatorship. Shell denied the charges, and claimed that it had limited influence over the Nigerian government. However, in 1998 the company issued a report Profits and Principles – Does There Have to Be a Choice? Among other things, the report declared that "we had looked in the mirror and we neither recognized nor liked what we saw." (p. 4) It said that "part of our plans for improvement involves the integration and development

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[30] Furthermore, Nigerian states in which oil exploration is conducted receive only a small fraction of the revenues from the projects, and only a small portion of this amount reaches residents because of widespread corruption. Such dynamics contribute to the fact that more than half of all Nigerians live on two dollars a day.

[31] Paul Lewis, *Blood and Oil: A Special Report:After Nigeria Represses, Shell Defends Its Record,* NEW YORK TIMES, Feb. 13, 1996.

[32] Lewis, *supra.*

of new processes and thinking to help us better manage our social and ethical responsibilities, measure performance, and report regularly." (p. 5)

Shortly before the trial by Ogoni plaintiffs was set to begin in New York in 2009, Shell agreed to a $15.5 million settlement. The company denied any involvement in the deaths, stating that the settlement was part of a reconciliation process and to assist the relatives of Saro-Wiwa and the eight other victims to cover the legal costs of the case. Importantly, a lawyer for the plaintiffs declared, "This was one of the first cases to charge a multinational corporation with human rights violations, and this settlement confirms that multinational corporations can no longer act with the impunity they once enjoyed."[33]

During the same period as the Shell case was appearing in the news, public attention was also being drawn to allegations of poor working conditions within Nike's extensive global supply chains. Nike was one of the first manufacturing companies to completely outsource production. By 1990, Nike's overseas sourcing factories in Asia employed more than 24,000 workers and produced more than six million pairs of shoes, as well as other products.

In the early 1990's American labor rights activists, in partnership with local institutions began to interview workers, issue newsletters, and plan campaigns to challenge low wages and abusive conditions in Nike's supplier facilities. These investigations found that Indonesian workers earned approximately nineteen U.S. cents an hour, and could not leave factory premises except on Sundays, and then only with the permission of management. They also showed that child labor was used in some facilities, leading to *Life* magazine featuring a photograph of a twelve-year-old Pakistani boy stitching Nike soccer balls. Evidence later established that Nike suppliers in Vietnam were using an adhesive containing a toxic chemical in doses that exceeded the relatively lenient Vietnamese regulations.

These findings led to a "storm of bad publicity" for Nike. There were violent strikes at several Indonesian factories, a coalition was created in the US to focus attention on college stores selling and athletic teams wearing Nike products, and an "International Nike Day of Protest" was held in twenty-eight U.S. states and twelve countries. In a 1998 speech at the National Press Club in Washington, D.C., Nike founder and CEO Phil Knight acknowledged that "The Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse. I truly believe that the American consumer does not want to buy products made in abusive conditions." Knight indicated that the company would agree to demands "to allow outsiders from labor and human rights groups to join the independent auditors who inspect the factories in Asia, interviewing workers and assessing working conditions."[34] Later, Nike also became a founding member of the UN Global Compact, an initiative aimed at encouraging good corporate practices.

The campaign against Nike was significant in raising awareness of conditions in transnational companies' supply chains, and in bringing together labor and consumer advocates to challenge the company's activities. It also marked the emergence of a significant

[33] Ed Pilkington, *Shell Pays Out $15.5 Million over Saro-Wiwa Killing*, THE GUARDIAN, June 8, 2009.
[34] John H. Cushman, Jr., *Nike Pledges to End Child Labor and Apply U.S. Rules Abroad,* NEW YORK TIMES, May 13, 1998.

transnational NGO network that continues to monitor and publicize the human rights impacts of business operations.[35] Mobilization of these groups demonstrated the major impact that widespread publicity could have on a company's reputation with consumers and investors. Several consumer boycotts and "naming and shaming" campaigns against major companies have followed the template established during the activities directed at Nike.

Yet problems within supply chains still remain. In 2010 Apple's operations in China, where 90% of Apple products are assembled, became the subject of extensive criticism. The Taiwanese company Foxconn Technology is the world's largest contract electronics supplier and, among other products, manufactures iPhones and iPads for Apple. In 2010, the *New York Times* reported several suicides by workers at Foxconn's industrial park in Shenzhen in China. The article included allegations of abusive workplace conditions and practices, the use of underage workers on assembly lines, severe health and safety risks, deadly accidents, falsification of overtime records, and the improper disposal of toxic wastes.

Apple expressed concern about the conditions in its supply chain, and eventually asked the Fair Labor Association (FLA), an NGO involving collaboration among companies and multiple other stakeholders, to conduct inspections of Foxconn facilities. The FLA reviewed conditions in three factories with 35,500 workers and issued a report in early 2012. The report found that employees typically worked more than 60 hours a week during peak periods, and that they were not fairly compensated for overtime. Two-thirds of the workers said that their take-home pay was insufficient to meet basic needs. In addition, 43% said that they had witnessed an accident in the workplace, and that there was a "widespread sense of unsafe working conditions" at the factories. The FLA conducted onsite inspections of three additional facilities through July 2013, and follow up visits in late October and early November 2013. The organization said conditions had improved and that progress was occurring. Between March and October 2013, however, more than half of the workforce had on worked beyond the Chinese legal limit of 36 overtime hours per month in all three facilities.

A recent report indicates that challenges continue for Apple. In July 2015 the NGO China Labor Watch issued a report on conditions at three factories with 70,000 employees operated by Pegatron, which manufactures equipment for Apple computers and iphones. Apple increased its orders to these factories in 2013. The report found violations of labor and other standards including "hiring discrimination, women's rights violations, underage labor, contract violations, insufficient worker training, excessive working hours, insufficient wages, poor working conditions, poor living conditions, difficulty in taking leave, labor health and safety concerns, ineffective grievance channels, abuse by management, and environmental pollution." The report noted that Apple's 60-hour work week rule violates China's 49-hour weekly limit, and that average weekly hours in the three factories were 66, 67, and 69 hours, respectively. In one factory, the report says, workers are forced to sign forms that understate their working hours.

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[35] George H. Sage, *Justice Do It! The Nike Transnational Advocacy Network: Organization, Collective Actions, and Outcomes,* 16 SOCIOL. OF SPORT 205 (1999).

Apple responded to the report by issuing a statement that the report "contains claims that are new to us and we will investigate them immediately. Our audit teams will return to Pegatron, RiTeng and AVY for special inspections this week. If our audits find that workers have been underpaid or denied compensation for any time they've worked, we will require that Pegatron reimburse them in full." The response also stated:

> "As a part of our extensive Supplier Responsibility program, Apple has conducted 15 comprehensive audits at Pegatron facilities since 2007… we have closely tracked working hours at all of these facilities. Our most recent survey in June found that Pegatron employees making Apple products worked 46 hours per week on average. Excessive overtime is not in anyone's best interest, and we work closely with our suppliers to prevent it."[36]

It is unclear at this point how these allegations will be resolved, or what the impact will be on public attitudes toward Apple. The controversy, however, illustrates the challenges that global manufacturers continue to face with respect to managing conditions throughout their supply chains, and the scrutiny to which many are now subject. Apple's willingness to allow the FLA to conduct an inspection of conditions at Foxconn in 2012 also reflects the extent to which NGOs are now firmly established as significant actors in monitoring the impacts of business operations.

While all of the cases discussed above have been significant in focusing attention on business and human rights, few concrete regulatory initiatives have emerged from them. This is true even in the wake of the worst factory accident in history, the 2013 collapse of the eight-story Rana Plaza building in Dhaka, Bangladesh. Bangladesh is the world's second-largest apparel exporting nation behind China. Europe buys about 60 percent of its exports from that country, and the United States around 25 percent. The Rana Plaza building contained several factories that manufactured clothing for companies that included Bennetton, Bonmarché, Monsoon, Mango, Matalan, Primark and Walmart.[37]When the factory caught fire on 24 April2013, 1,129 people died, with another 2,515 injured. More than half of the victims were women, along with a number of their children who were in nurseries within the building.

The day before the collapse, a television news program had shown cracks in the building, and government authorities had requested an evacuation until an inspection could be conducted. Later that day, however, the owner of the factory declared that the building was safe and that workers should return the next day. Some have argued that the decision by managers to send workers back into the factories was due to pressure from overseas companies to complete orders.

The head of the Bangladesh Fire Service & Civil Defense said that the upper four floors had been built without a permit. The building's architect noted that the building was planned for

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[36] (http://blogs.wsj.com/digits/2013/07/29/apples-response-to-latest-supplier-labor-abuse-allegations/)

[37] . Benetton,https://en.wikipedia.org/wiki/2013_Savar_building_collapse - cite_note-autogenerated1-14 Bonmarché, the Children's Place, El Corte Inglés, Joe Fresh,https://en.wikipedia.org/wiki/2013_Savar_building_collapse - cite_note-autogenerated1-14 Monsoon Accessorize, Mango, Matalan, Primark, and Walmart

shops and offices, not for factories. One garment manufacturer's website indicated that the building had been built on a pond without authorization, and that substandard material was used during construction, which led to an overload of the structure that was aggravated by vibrations from generators in the building. The disaster triggered large demonstrations and some rioting in Bangladesh. In November, a ten-story garment factory that supplied Western brands was allegedly burned down by workers angered over rumors that a demonstrating worker had died from police fire.

About a week after the collapse, the government announced that new measures to ensure safety would be leading to the closure of several garment plants. Seven inspectors were suspended and accused of negligence for renewing the licenses of garment factories in the building. In June 2015, murder charges in connection with the collapse were filed by Bangladeshi police against 42 people, including the owners of the building.

The ILO, in consultation with government, industry, and labor representatives, investigated the collapse and issued a set of recommendations after the event. In addition to calling for strengthening building and safety codes and practices, it emphasized the importance of Bangladesh passing legislation to "improve protection, in law and practice, for the fundamental rights to freedom of association and the right to collective bargaining, as well as occupational safety and health."[38]

Of the 29 brands identified as having sourced products from the Rana Plaza factories, nine attended meetings in November 2013 to agree on a proposal for compensation to the victims.[39] By March 2014, seven of these brands had contributed to the Rana Plaza Donor's Trust Fund compensation fund, which is backed by the International Labor Organization. In July 2013, a group of 17 major North American retailers that included Wal-Mart, Gap, Target and Macy's announced the Alliance for Bangladesh Worker Safety. The five-year initiative provides for participating companies to inspect within twelve months the estimated 500 Bangladeshi factories that the companies use, and to assess conditions based on a common safety standard. The companies then work with factory owners, the government, and civil society groups to explore how to finance necessary improvements. Members of the Alliance pledged funding of at least $42 million for the inspection project, with some others promising loans totaling $100 million to help finance necessary safety improvements. The New York Times reported that under the plan "the onus is on factory owners to improve their workplaces. . . Essentially, if a factory is not up to par and does not fix the problems itself, the American retailers say they will no longer do business there."

Around the same time, 70 European companies announced an accord under which they agreed to inspect all of the factories they use in Bangladesh within nine months, to develop plans to remedy problems that are identified, and "to ensure that sufficient funds are available to pay for renovations and other safety improvements." Some labor organizations and NGOs praised

[38] http://www.ilo.org/global/about-the-ilo/activities/statements-speeches/WCMS_212463/lang--en/index.htm.
[39] Several companies refused to sign including Walmart, Carrefour, Mango, Auchan and Kik. The agreement was signed by Primark, Loblaw, Bonmarche and El Corte Ingles

the European program in contrast to the U.S. one, on the ground that the former committed the companies to paying for whatever improvements in the factories were necessary.

Finally, a controversy involving Yahoo in China in 2004 highlights that human rights issues involving business are not confined to companies involved in manufacturing or the extraction of natural resources. Yahoo complied with a request from the Chinese government for the Internet protocol (IP) address from which Chinese dissident Shi Tao sent an email to a U.S. NGO. This enabled authorities to connect his Shi Tao's personal e-mail account to a computer located in the office of his employer. Having obtained this information, the Chinese authorities then requested and obtained the content of Shi Tao's communications with the Democracy Forum. Shi was arrested shortly afterward and in March 2005 was sentenced to ten years in prison for revealing state secrets.

Yahoo came under severe criticism for providing information about Shi Tao's account to the Chinese government. It later settled a lawsuit by his family claiming that Yahoo had "knowingly and willfully aided and abetted in the commission of torture and other major abuses violating international law that caused Plaintiffs severe physical and mental suffering."[40] Yahoo went on to form the Global Network Initiative, along with Google and Microsoft. The aim of the initiative is to develop common approaches regarding how to respond to government policies and practices that violate freedom of expression and privacy. The incident heightened awareness of the extent to which there may be tension between laws in which countries do business and international expectations about business conduct and its impact on human rights.

As these incidents indicate, pressure is now increasing for more stringent regulatory responses to fill the governance gap that exists around transnational companies' liability for human rights violations caused by themselves, their producers, and their suppliers. The human rights impacts of business operations are no longer seen as solely the responsibility of countries in which companies do business, but as an issue of international concern that requires collaboration among a variety of parties. As we discuss below, initiatives to deal with this gap are developing. To date, however, none have imposed binding obligations or liability on companies with respect to the human rights impacts of their activities.

Key Governance Instruments and Initiatives on Human Rights

A range of approaches has been adopted with respect to business and human rights. Each approach involves its own distinct combination of actors, procedures, and incentives. Some measures encourage companies voluntarily to identify and disclose the impacts of their operations. Others involve mandatory reporting requirements that do not prescribe specific substantive conduct. Still others consist of private regulatory schemes to which companies can voluntarily adhere. These approaches all tend to take the form of "soft" law that is not legally

[40] Wang Xiaoning v. Yahoo!, Complaint for Tort Damage, U.S. District Court for the Northern District of California, No. C-07-2151, April 18, 2007, ¶1. The complaint on behalf of Wang was filed in April, and Shi Tao joined the suit in May. Colleen Costello, *Jailed Chinese Journo Shi Tao Joins Lawsuit Against Yahoo*, May 30, 2007, http://boingboing.net/2007/05/30/jailed-chinese-journ.html.

enforceable, but that has the potential to influence business conduct in a variety of other ways. Furthermore, as standards are more widely adhered to, there is more chance that they will be incorporated into "hard law" in the form of common law standards of care or government regulation.

Voluntary Programs

The UN Guiding Principles on Business and Human Rights

After decades of pressure to create a system of governance dealing with business and human rights, the UN *Guiding Principles on Business and Human Rights* were adopted in 2011 by the UN Human Rights Council. The Principles are the product of a project coordinated by Professor John Ruggie, acting as Special Representative of the Secretary General of the UN. Since their adoption by the UN Human Rights Council in 2011 they have gained acceptance as a useful framework for structuring both governmental and business approaches to meeting human rights obligations.

The Principles were preceded by the 2003 publication of the draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, which were prepared by the UN Sub-Commission on the Promotion and Protection of Human Rights. The Norms provided that business enterprises "as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights" in addition to states. The draft elaborated that "[w]ithin their respective spheres of activity and influence," companies "have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law[.]" The Norms thus imposed on companies the duty not only to respect human rights, but the same duties as states to promote and fulfill these rights.

The draft Norms generated considerable controversy, and the UN Commission on Human Rights, the predecessor to the current UN Human Rights Council, ultimately declined to endorse them. Professor Ruggie also explicitly rejected their approach at the outset of his project. He concluded instead that there was a need "to establish a clear differentiation between the respective obligations of states and businesses, one that recognized the different social roles they play, not intermingling the two as the Norms had done." As a result, the Principles are organized around three pillars: (a) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) the need for rights and obligations to be matched to appropriate and effective remedies when breached. The Principles thus rest on the notion of three core obligations: states are to protect human rights, businesses are to respect them, and both are to provide appropriate remedies for their violation.

This responsibility to respect human rights requires that business avoid infringing human rights, and that they address any adverse impacts "with which they are involved." The source of these rights is primarily the International Bill of Human Rights and the ILO Declaration. The Commentary states: "The responsibility of business enterprises to respect human rights is distinct

from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions." Furthermore, the responsibility of business "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights." When national law conflicts with international human rights principles, companies should "[s]eek ways to honor" the latter to the greatest extent possible.

The Principles elaborate on the ways in which businesses must avoid human rights violations. These are to avoid causing or contributing to adverse human rights impacts through their own activities, and to seek to prevent or mitigate adverse impacts that are "directly linked to their operations, products, or services, by their business relationships, even if they have not contributed to those impacts." The Commentary states that "activities" include both actions and omissions, and that business relationships include those with "business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products, or services."

To meet their responsibilities, it is recommended that businesses have in place a formal commitment to respect human rights, approved at the most senior level of the company; a due diligence process to identify, prevent, mitigate, and account for the company's impact on human rights; and a process to provide remedies for any adverse impacts that they cause or to which they contribute. In engaging in due diligence, it is recommended that companies evaluate actual and potential violations, a process that should include both reliance on experts and meaningful consultation with potentially affected groups. They also should publicly communicate these efforts to all stakeholders, including those on whom their business operations may have an impact.

With respect to remedies, the Principles suggest that businesses establish "operational-level grievance mechanisms" for those adversely affected by the companies' operations. Such processes should be "[b]ased on engagement and dialogue" with stakeholder groups for whose use they are intended. In addition to furnishing redress for victims, these grievance mechanisms can help companies analyze trends and patterns that may indicate systematic problems that need to be addressed. Grievance procedures should be seen as legitimate, accessible, predictable, equitable, transparent, consistent with internationally recognized human rights, and a source of continuous learning.

The European Union endorsed the Principles in its 2011 Corporate Social Responsibility Strategy and is committed to support their implementation. The American Bar Association and the U.S. government also endorsed the Principles, and the provisions have been incorporated into the OECD Guidelines on Multinational Enterprises and the International Finance Corporation's sustainability framework. To support the adoption of the Principles, the UN Human Rights Council established a Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to promote dissemination and implementation of the Principles. The Working Group has encouraged states to meet their responsibility to protect human rights by developing National Action Plans on Business and Human Rights, and has published Guidance on how states should engage in this process. As of August 2015, seven

countries had completed plans, twenty-two were in the process of doing so, including the US, and civil society organizations had taken initial steps to develop plans in six other countries.

The effect of the Principles has been to strengthen respect for human rights "in commitments undertaken by industry bodies, multi-stakeholder and other collaborative initiatives, through codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations, and similar undertakings." While the Global Principles are the most significant step to date in placing responsibility on businesses with respect to their human rights impacts, as discussed below, other initiatives operate alongside the Principles to create a broad framework of obligations and standards.

OECD Guidelines for Multinational Enterprises

The OECD Guidelines were established in 1976. They set forth principles of good business practice consistent with applicable laws and internationally recognized standards. The Guidelines are supported by representatives of business, worker organizations and non-governmental organizations through various OECD committees. The OECD states that "[t]he Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. In countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honor such principles and standards to the fullest extent which does not place them in violation of domestic law." OECD Explanation

While the original Guidelines focused on companies' compliance with the law of the host countries in which they do business, the current version places more emphasis on international standards. It contains a separate chapter on human rights, and follows the framework of the UN Guiding Principles. The Guidelines provide that companies should respect human rights and, that at a minimum, they should be guided by the International Bill of Human Rights and the principles concerning fundamental rights set out in the 1998 International Labor Organization Declaration on Fundamental Principles and Rights at Work. (Guidelines p. 32)

Similar to the Guiding Principles, the Guidelines state that enterprises should: (1) have a policy commitment to respect human rights; (2) avoid causing or contributing to adverse human rights impacts; (3) seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts; (4) conduct due diligence to identify risks of adverse human rights impacts that they might cause, or to which they might contribute or be directly linked; and (5) provide redress for human rights violations for which they are responsible.

The Guidelines are voluntary and cannot be enforced against multinational companies. They do, however, require participating states to establish and fund National Contact Points (NCPs) where complaints may be filed by members of the public, NGOs, unions, and governments about failure to comply with the Guidelines. Participation in the complaint process is voluntary, which means that any party to a dispute can refuse to participate or withdraw from the process. In general, the NCPs are expected to provide consultation and assistance to companies accused of non-compliance to help them conform their conduct to the Guidelines,

although they are not able to monitor implementation of any agreement that is reached through this process.

The UK NCP has been especially active, moving toward a quasi-judicial process that in some cases culminates in a determination on whether a company has failed to comply with the Guidelines. One such determination, for instance, involved a complaint about the UK company Afrimex in connection with its operations in the Democratic Republic of the Congo (DRC). The NCP found that Afrimex had violated the Guidelines by failing to apply sufficient pressure on its business partners to induce them to cease trading in minerals where those sales provided revenues that funded the continuation of the war in that country. It also found that Afrimex had failed to conduct adequate due diligence by relying on oral assertions from its suppliers that they did not use forced or child labor, or require workers to operate in life-threatening conditions. Although it had no authority to impose any changes on the company, the NCP recommended that Afrimex adopt a corporate code of conduct that included attention to human rights, and that it utilize the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. Not all NCPs have assumed as active a role as in the UK, however, nor do many have the resources to do so.

UN Global Compact

The UN Global Compact was established in 2000 to provide a framework for companies to report on their efforts to meet social responsibilities with respect to human rights, labor, the environment, and anti-corruption. Over 8,000 businesses and 4,000 non-business organizations have joined the Compact. Participants agree to abide by ten basic principles, which are derived from the Universal Declaration of Human Rights, the ILO Declaration, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. The two principles that relate to human rights are that businesses should: (1) support and respect the protection of internationally proclaimed human rights and (2) make sure that they are not complicit in human rights abuses.

Companies that are members of the Compact agree to submit an annual Communication on Progress (COP) that is posted on the UN website. The format can be flexible, but at a minimum must contain (1) a statement by the chief executive expressing continued support for the Compact and ongoing commitment to it; (2) a description of practical actions the company has taken or plans to take to implement the Principles; and (3) an indication of any outcomes that the company has achieved. A company also must provide an explanation if it is not reporting on any aspect of the Principles.

If a participant does not submit a COP that meets the minimum requirements, it is given a one-time twelve-month grace period to resubmit a conforming COP. If it does not submit a conforming COP within that grace period, or fails to submit a conforming COP more than once, it is designated as "non-communicating" on the Compact website. If the company then fails to submit a conforming COP within twelve months of being designated "non-communicating" it is expelled from the Compact and has to reapply. As of August 2015, there were 1543 "non-communicating" participants and 5553 that had been expelled.

Companies that meet the minimum requirements are designated as "GC Active," while those that go beyond the minimum requirements by reporting on the company's implementation of advanced criteria and best practices qualify as "GC Advanced." With respect to human rights, for instance, a business that earns a designation as Advanced will have submit a COP with "Robust Human Rights Management Policies & Procedures" that meet three criteria: (1) robust commitments, strategies or policies in the area of human rights; (2) effective management systems to integrate the human rights principles; and (3) effective monitoring and evaluation mechanisms of human rights integration.

While the UN determines if a company's COP has met the minimum guidelines within the prescribed deadlines, it does not verify any of the statements in the company's report. In this respect, as it declares, it acts "more like a guide dog than a watch dog." (GC Advanced COP Self-Assessment) The Compact is "meant to serve as a framework of reference and dialogue to stimulate best practices and to bring about convergence in corporate practices around universally shared values." The idea is that stakeholders will use the information to assess and engage with companies on the issues discussed in the COPs. Some observers have criticized the Compact, however, for failing to prescribe specific requirements for participating companies and leaving it to them to determine how to implement broadly defined standards. The concern is that companies "reap reputational benefits for the mere act of signing up to the initiative." It is also unclear the extent to which the Compact has prompted changes in behavior. As one scholar has concluded, "Since the goal of the [Compact] is to serve as a 'learning platform,' it is difficult to devise a metric for measuring its impact, if any, on corporate behavior." (Governance Gap)

Extractive Industries Disclosure

As discussed above, companies engaged in mining and oil and gas exploration can face risks that their activities may contribute to human rights abuses by the government in the countries in which they operate. One effort to reduce the likelihood of such abuses through corruption is the Extractive Industry Transparency Initiative (EITI).[41] The EITI is a set of reporting standards published by a coalition of companies, governments and non-governmental organizations (NGOs). It requires companies to disclose payments to governments and governments to disclose the amounts that they receive from these sources. Recent revisions require disclosure of payment information by individual project.

Adoption of the EITI standard is discretionary, and implementation is the responsibility of individual countries that subscribe to it. As a result, the EITI requirements must be adopted into national law so that the extractive companies that operate within the country are subject to it.

[41] While corruption involves a number of distinct issues beyond the scope of this article, The UN Office of the High Commissioner for Human Rights suggests that it can be connected in several ways to human rights abuses. It can lead to violation of the state's responsibility "to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [International] Covenant [on Economic, Social and Cultural Rights]." Corruption in the management of public resources can impair the state's ability to deliver services in areas such as health, education, and welfare that are essential to realize economic, social, and cultural rights. Corruption can also result in discrimination in the provision of such services in favor of those who can furnish bribes and other benefits to government officials. As the UN notes, "The economically and politically disadvantaged suffer disproportionately from the consequences of corruption, because they are particularly dependent on public goods."

National laws or regulations and the process for certifying them are independently validated by the EITI before the country is deemed to be EITI compliant, and countries must maintain adherence to all the EITI rules in order to retain their compliant status. The EITI currently has designated 31 countries as compliant, which includes Kazakhstan, Peru, and a significant number of African countries. Another 17 countries are "candidates" that are engaged in the process of implementing the EITI rules. Compliant countries must seek revalidation every three years.

Mandatory Disclosure

There are only a few examples of mandatory initiatives dealing with business and human rights, most of which focus on disclosure. These are discussed briefly below.

Extractive Industries

EU Accounting and Transparency directives adopted in 2013 apply to all "listed and large non-listed companies with activities in the extractive industry and the logging of primary forests" that are either registered in the European Economic Area or listed on EU regulated markets even if they are incorporated in a non-European country. They require these companies to report all material payments to governments by country and project, including those for infrastructure improvements. The EU disclosure requirements apply directly to companies rather than, as with the EITI, to individual countries. The European Commission states that its directives are intended to promote the adoption of the EITI in countries in which reporting companies operate. "The ultimate objective," says the Commission, "is to contribute to the strengthening of the EITI and to extend its scope to all resource-rich countries."[42]

Human Trafficking

The California Transparency in Supply Chains Act requires retailers and manufacturers with $100 million or more total worldwide revenues that do business in the state to report on their efforts to identify and prevent human trafficking in their supply chains. The remedy for a violation of the Act is injunctive relief by the State Attorney General, although the Act says that nothing in the legislation is intended to limit the availability of remedies for violation of other state or federal law. The Act requires only that a company disclosure its efforts with regard to trafficking and slavery, and does not require the adoption of any specific policies regarding these practices. Nonetheless, as one law firm has suggested:

> "fair trade activists are likely to be aggressive in using the statute to shame corporations that have deficient anti-human trafficking programs. Such activists may push the envelope in litigation to try to find ways to use the statute without Attorney General involvement, or they may use extra-judicial methods to

[42] A major impetus for the EU initiative was the reporting requirement in Section 1504 of the 2010 Dodd-Frank legislation in the United States. That section requires resource extraction companies listed on U.S. stock exchanges to disclose all payments to governments by government entity, business segment making the payment, and individual project. Securities and Exchange Commission regulations implementing the Act have been embroiled in litigation, however, which has delayed the effective date of the Act's requirements.

> publicize violations. For this further reason, companies would be well advised both to have reasonable fair trade practices in place and to report those practices accurately."[43]

In July 2015, the UK Modern Slavery Act went into effect. Unlike the California Act, it imposes disclosure obligations on any company that does business in the UK, regardless of the amount of its revenues. The Act provides not only for disclosures similar to those under the California Act, but also extends from fourteen years to life imprisonment the penalty for persons convicted of holding anyone in slavery or servitude, or engaging in human trafficking.

In addition, the United States government prohibits contractors from engaging in any human trafficking. The government issued a final rule in 2015 that requires federal contractors performing work on contracts that exceed $500,000 outside the United States to conduct diligence and to certify that neither they nor any of their suppliers are engaged in any trafficking activities. Contractors must have a compliance plan that is designed to prevent any prohibited activities, and to terminate any subcontractor who engages in them.

UK Companies Act

The 2006 UK Companies Act requires companies to issue a Strategic Report "to inform members of the company and help them assess how the directors have performed their duty . . . to promote the success of the company." It provides that a company listed on a stock exchange "must, to the extent necessary for an understanding of the development, performance or position of the company's business," include in its Report information about, among other things, social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies." The Guidance Report on the Act issued by the Financial Reporting Council (FRC), has clarified that the Act mandates disclosures that relate to information that is material. The FRC also has said that in making disclosures on human rights issues, companies

> "may refer to a source of guidance (e.g. the UN *Guiding Principles on Human Rights*) or a voluntary framework that provides advice on how the entity should conduct its business, suggests ways of monitoring or tracking performance, or provides examples of disclosures that might be helpful in communicating information to the entity's stakeholders. In preparing the strategic report, the directors may choose to comply fully or partially with that guidance or voluntary framework, or take a more general regard of its content."

In addition, the agency has opined that it "does not believe that it would be best practice for an unquoted company to prepare a strategic report which omitted, for example, information on a material human rights issue, simply because there was no explicit legal or regulatory requirement to address such matters." The FRC guidance reflects the way in which

[43] http://business.transworld.net/features/human-trafficking-supply-chain-for-california-businesses/#UqpV1r1pk7ceKlMH.97.

"soft" standards such as the UN *Guiding Principles*, may be incorporated into company compliance with "hard" law requirements such as disclosure regulation.

Private Voluntary Standards

A number of initiatives involve voluntary standards designed to assist companies in meeting their general human rights obligations. Commitments by companies to adhere voluntarily to the standards may influence behavior despite the fact that such commitments are not legally enforceable. A company's failure to adhere to standards may damage its reputation if most other comparable companies have agreed to follow the standards. In addition, some companies are incorporating various standards into contracts with suppliers and joint venture partners, including host states, which can provide a means of enforcement in the form of contract termination in the event of non-compliance. In general terms, these and other governance initiatives attempt to generate a conversation about business conduct, both inside and outside of companies, in which human rights considerations are salient.

Labor Standards

As we have described above, greater reliance on supply chains by manufacturing companies and retail brands have raised concerns in recent years about labor conditions in factories that are part of these chains. In response, private organizations have arisen in various sectors that encourage companies voluntarily to adhere to certain standards. The variety among these organizations is significant, and reflects distinctive features of the products that are manufactured, the nature of the production processes, the structure of the different markets, and a number of other factors.

Focusing on private regulatory initiatives in the apparel sector illuminates some features of this form of regulation. As Luc Fransen, a scholar who has studied this industry, observes, "Firms involved in the clothing production chain have been among the long-time targets for societal pressure and critique, and the initiatives for this industry belong to the group of most advanced private regulatory organizations in the global arena of voluntary business efforts."

Between 1996 and 2004, eight private organizations emerged in the United States and Europe with their own set of voluntary standards for apparel companies. These organizations then competed with one another in attempting to persuade major companies to agree to adhere to their programs, which differed with respect to the labor standards that adopted, the procedures for implementing commitment to those standards, and the process of monitoring implementation.

Fransen identifies two main trends with regard to private regulatory schemes in the apparel industry. The first is increasing stringency in labor standards, as a growing number of companies are adopting codes based on ILO provisions. The second is decreasing stringency in implementation and monitoring, as a larger number of firms are adopting external monitoring of their systems. Thus, Fransen notes, many companies involved in supplier certification schemes "are not required to monitor suppliers. Instead they are asked to let audit firms monitor suppliers. These buying companies then leave the selection of and cost for external professional audits and compliance programs with the suppliers themselves."

Private labor standards in the apparel industry thus are "soft" measures that have the potential to operate as "hard" constraints in some instances. The verification process can serve as a means to monitor compliance with the standards, with the loss of certification a potential "hard" penalty. This process can become more onerous for those companies that face close scrutiny from their customers. These companies may involve non-business groups in the certification process, which in turn subjects them to even more stringent accountability that begins to resemble formal regulation.

The Voluntary Principles on Security and Human Rights

Abuses by security forces providing services for business operations in zones of conflict and weak governance prompted the creation of the Voluntary Principles on Security and Human Rights for the extractive industry. Companies signing on to the Principles commit to obey the laws of the host state, "to be mindful of the highest applicable international standards, and to promote the observance of applicable international law enforcement principles … particularly with regard to the use of force." The Principles provide guidance for them with respect to risk assessments of doing business in weak governance or conflict zones, as well as contractual relationships with public and private security forces.

The Principles also state that private security providers should provide only preventive and defensive services, and should not engage in activities that are the exclusive responsibilities of state military or law enforcement authorities. Companies are encouraged to incorporate the Principles into their contracts with private security forces, and to provide for contractual authority to terminate services upon credible evidence of unlawful or abusive behavior by private security personnel. Finally, both public and private security providers are expected not to interfere with the right to peaceful assembly, collective bargaining, and other fundamental labor rights protected under the UDHR and the ILO Declaration.

Government, extractive companies, and NGOs may become members of the Voluntary Principles Initiative. The participation criteria explicitly state that the Principles do not create legally binding standards and specifically rule out the possibility of legal enforcement. While a complaint mechanism exists, it is internal and is not available to parties claiming to be victims of corporate-related human rights abuses. The mechanism permits a participant or an observer organization to raise concern that another participant has failed to meet the participation criteria or demonstrates "a sustained lack of effort to implement the [Principles]."

International Finance Standards

International Finance Corporation

The International Finance Corporation (IFC) is a member of the World Bank Group that makes financing available for private investment in developing countries. Its Performance Standards on Environmental and Social Sustainability are measures that companies must adopt in order to qualify for funding. The Eight Standards "provide[e] guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way

of doing business in a sustainable way." They deal with Environmental and Social Risks and Impacts; Labor and Working Conditions; Resource Efficiency and Pollution; Community Health, Safety, and Security Performance; Land Acquisition and Involuntary Resettlement; Biodiversity Conservation and Sustainable Management of Living Natural Resources; Indigenous Peoples; and Cultural Heritage.

The Standards do not include a standard devoted specifically to human rights, but the IFC states that "[e]ach of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project." The Standards do indicate that "[i]n limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business." (n. 12) In collaboration with the International Business Leaders Forum, the IFC has produced a guide to conducting Human Rights Impact Assessments. This guide is not part of the Standards, and hence does not affect eligibility for funding. It is intended rather to serve as an analytical tool for identifying human rights issues and responding to adverse impacts. The IFC indicates that its approach to assessing and managing environmental and social risks is "broadly convergent" with the UN Guiding Principles.[44]

While the Performance Standards do not take the form of government regulation, their adoption by the IFC effectively imposes requirements on companies that wish to obtain financing for investment in developing countries. In this respect, they reflect a "hard" law constraint that is enforceable through the mechanism of funding denial or withdrawal.

The Equator Principles

The Equator Principles provide a risk management framework for private financial institutions to identify and manage environmental and social risk in proposed projects. The preamble of the Principles states that the aim of the principles is to ensure that projects financed by financial institutions that adopt them "are developed in a manner that is socially responsible and reflects sound environmental management practices." As with the IFC Performance Standards, the Principles do not explicitly address human rights except insofar as environmental or social impacts that are the focus of the Principles may have a bearing on them.

The Principles apply to all industry sectors and to four financial products: (1) Project Finance Advisory Services (2) Project Finance (3) Project-Related Corporate Loans and (4) Bridge Loans. Currently 80 financial institutions in 35 countries have officially adopted the Principles, which represents more than 70% of international project finance debt in emerging markets. Multilateral development banks, including the European Bank for Reconstruction & Development, and export credit agencies through the OECD Common Approaches, also

[44] UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND IFC SUSTAINABILITY FRAMEWORK, at 1: http://www.ifc.org/wps/wcm/connect/c3dedb0049c51e71886d99da80c2ddf3/UNGPsandIFC-SF-DRAFT.pdf?MOD=AJPERES

increasingly are referring to the Principles in their own standards. Institutions committed to the Principles agree not to provide services to projects that do not comply with them.

The Principles require institutions to place a project in one of three categories based on its environmental and social impacts according to the IFC social and environmental criteria. Category A includes projects with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented. Category B includes projects with potential limited adverse environmental and social risks and/or impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures. Finally, projects in Category C are those with minimal or no adverse environmental and social risks and/or impacts. Projects in Category A are subject to the most demanding requirements, while those in Categories B and C are respectively subject to decreasing demands.

The Equator Principles are privately developed standards to which financial institutions voluntarily agree to adhere. This "soft" feature of the Principles, however, takes on a "hard" edge for borrowers that must comply with the requirements of the Principles in order to obtain funding for projects. This constraint becomes even more stringent as other public and private financial institutions incorporate the Principles into their own lending standards.

As the discussion above indicates, the breadth and diversity of initiatives aimed at enhancing business accountability for human rights impacts have now reached a point where it is hard for transnational companies to ignore their obligations, especially when operating in developing countries. However, as we discuss in the next section, it is also clear from our interviews with lawyers that companies vary in their awareness of this human rights framework and their obligations under it. This in turn raises questions about what role lawyers might play in increasing such awareness.

PART 3: ADVISING BUSINESSES ON HUMAN RIGHTS

While there are a few examples of enforceable "hard law" that provide specific guidance for companies on how to satisfy their responsibilities regarding specific human rights, most initiatives consist mainly of "soft law" standards that companies are not obliged to follow. The violation of these standards may have few if any legal consequences. Furthermore, companies have several standards from which to choose with respect to certain issues, each of which claims to offer a model to ensure compliance with the standards. In addition, the sources of the rights that the duty of respect is intended to protect are instruments that either are unenforceable, such as the Universal Declaration of Human Rights and the ILO Labor Standards, or are treaties that impose obligations only upon nation-states, such as the Covenants on Political and Civil Rights and on Economic, Social, and Cultural Rights. The rights in such documents are expressed in very broad terms whose meaning may vary considerably in different situations.

The responsibility of business to respect human rights thus differs from many other obligations on which lawyers counsel their clients. Legal advice as traditionally conceived involves clarifying for clients the legal provisions to which they are subject, and how those provisions are likely to apply to a client's contemplated course of action. Many lawyers also advise business clients more broadly on how to organize their operations so as to ensure

compliance with the regulations to which they are subject. There has been a surge in such work, for example, dealing with compliance with the U.S. Foreign Corrupt Practices Act and comparable provisions in other countries. Inside counsel identify regulatory compliance as a major focus of the legal department, and enlist law firms in identifying compliance risks and designing systems to minimize them, as well in representing the company in enforcement actions. All of this falls under the rubric of work on legal compliance, which is predicated on the existence of enforceable hard law.

Given the distinctive ways in which the business duty to respect to human rights differs from concern about legal compliance, what if any role is there for lawyers in advising on this duty? The International Bar Association has attempted to provide address this question in its draft *Business and Human Rights Guidance for Bar Associations and Business Lawyers*.[45] The *Guidance* says that "[b]usiness lawyers can help make their clients aware that respecting human rights is not solely a matter of legal compliance. By being prepared to advise clients on gaps between national law and international human rights standards, they can assist clients in assessing the risks of operating in a particular context – both to human rights and to the client's business – and take appropriate steps to address them."[46] In addition, "Lawyers may be expected to advise companies on human rights where companies have adopted specific policy commitments, or where they have directly or indirectly (*e.g*, through their membership in an industry association) endorsed a code or charter that contains human rights commitments."[47] The *Guidance* says that "advising business clients on how to manage their legal risks by preventing and mitigating their involvement in negative human rights impacts falls within a lawyer's ethical obligations under the IBA International Principles [on Conduct for the Legal Profession]."[48]

This section examines the way in which the business duty to respect human rights is distinguishable from the duty of legal compliance, and explores what roles lawyers may play in fostering acknowledgment and fulfillment of this duty. We look for answers to this question in interviews with 28 lawyers involved in the business and human rights field. While some of the lawyers work in corporate legal departments, most work outside of that setting in advising business clients. Eight interviews were conducted in person, while the remainder were conducted via telephone or Skype video. Most interviews ranged from an hour to an hour and a quarter. All interviewees were assured of anonymity with respect to both their identity and their organizational affiliation. While the group does not represent a random sample, it does represent a set of people with considerable expertise in and familiarity with the subject of business and human rights. Their observations thus provide the basis for a strong preliminary understanding of the dynamics that are shaping the development of a business duty to respect human rights and ways in which lawyers are involved in advising on this duty.

[45] International Bar Association, *Business and Human Rights Guidance for Bar Associations and Business Lawyers*, Oct. 23, 2014.
[46] *Id.* at 27-28.
[47] *Id.* at 26.
[48] *Id.* at 33.

Business Awareness of Human Rights Responsibilities

Much of the IBA *Guidance* is predicated on the assumption that business clients increasingly are turning to lawyers for advice on human rights issues. Before considering the role of lawyers in advising clients on human rights, it is therefore useful to assess the extent to which there is greater business awareness of these issues. Our interviews with lawyers suggest that companies differ in their awareness of their human rights responsibilities and the need for advice on them. Some understand well the adverse impacts that their operations can have, and seek advice on how to mitigate these risks. Others are generally aware of the emerging discussion of human rights and of the risks of their activities, but don't conceptualize such risks in terms of human rights violations. Finally, there are still companies that have limited awareness of the human rights framework or the ways in which their operations may have adverse impacts.

Not surprisingly, large multinational companies and those involved in the extractive and manufacturing industries are the most aware of the human rights risks their operations can have. As one lawyer noted ' I think you are more likely to have a body of expertise and interest in implementation amongst the big listed international corporates . . . they've already got business ethics codes … (and) sophisticated legal teams … but everybody is at different stages of evolution, development and understanding … it's patchy'. TG2 Another lawyer commented:

> I've noticed it more in the big companies that have a reputation to lose … (s)o far I've seen little traction in small to medium size enterprises that haven't got a very big name and that continue to perhaps engage in business in the way they've always engaged in business … (B)ecause they don't tend to hit the radar there are all kinds of inappropriate … exchanges that are going on that really aren't brought to anybody's attention … but in my experience most of the big companies that have a reputation to lose are working very, very hard to make sure they are doing the right thing and tend to be very proactive when issues come up.

As this quote indicates, corporate awareness of the possible economic and reputational consequences of being involved in human rights abuses has been a significant factor in motivating compliance. One lawyer noted that:

> I talked to a lot of in-house lawyers who say that they get pushback from the C Suite … because they have to make the business case for implementing programs when this is really a voluntary activity and so what you're seeing now is that there are a number of organizations and entities that are trying to … to show that the cost of not having considered the human rights impact whether it is because of law suits or because of work stoppages or all kinds of things … is higher than if you do that at the front end. And so you are starting to see that kind of data because let's face it for a lot of companies are moved by two prime motivators economics and reputation.[49]

[49] Interview TG-21

In contrast, the companies that appear to be the least aware of their human rights obligations are the national companies that focus on domestic markets. These companies tend to have simpler business structures, and do not attract the same kind of attention from NGOs and consumer groups as large companies do. However, as one interviewee noted, 'just about any … business these days has some kind of supply chain that extends extraterritorially to some country where there is a potential of child labor'. TG13 see also TG5 Small companies' actions can also present concern for large multinational companies where they form part of their supply chain. As one lawyer noted 'the big companies are the first ones who have been involved in these issues and this agenda, but as they get more and more involved and they get more and more serious about managing adequately their human rights responsibilities including through their supply chain that means everyone along the line needs to understand what is happening'.

Lawyer Reluctance

Some of the interview subjects noted that there is reluctance by some members of the bar to accept the idea that it is the place of the lawyer to provide advice on anything beyond enforceable legal provisions. One interviewee who works with lawyers from various countries observed that there are some law firms that say that their lawyers are not supposed to have a discussion about the UN Guiding Principles "because they are not law and therefore my only job is to counsel you on what is the law, the law says you can do X, I'm telling you that you must do X."[50] Another noted that even for inside counsel there is a lot of discomfort with human rights to the extent that it's soft law; "when it gets to the general counsel's office it [can] get complicated because they're lawyers and they feel much more comfortable advising on hard law."[51]

Thus, as one lawyer put it, "It is still difficult for lawyers to see their role when they don't see the law, I mean they are always asking for the law; '[S]o where is the law, if there is no law why do I have to be there?' So it is taking a bit of time also for lawyers to realize that this is a blend of issues. Things are hardening into regulation but markets and other pressures are acting in terms of risks for clients and so in advising clients they need to understand that."[52] One potential obstacle to lawyer's advising on human rights therefore is that these issues "started with international standards and norms and things that lawyers don't usually deal with."[53]

One expression of skepticism that the business duty to respect human rights constitutes "law" comes from Jonathan Goldsmith, Secretary General of the Council of Bars and Law Societies of Europe (CCBE). In commenting on the IBA *Guidance*, Goldsmith questions "whether it is useful for the IBA to publish something where so many of the difficult questions remain unresolved."[54] Among these questions are:

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[50] Interview TG-21.
[51] Interview TG-13
Interview TG-14
[53] Interview TG-25.
[54] Jonathan Goldsmith, *Business, Human Rights – and Meaning*, Law Gazette, March 3, 2015, http://www.lawgazette.co.uk/analysis/comment-and-opinion/business-human-rights-and-meaning/5047211.article.

> What does it mean to respect human rights when the role of lawyers is to advise on respecting laws (which may not always cover the human rights in question)?
>
> What is the impact on the responsibility of lawyers – whether legal or ethical – to their clients if they advise on human rights rather than on the law?
>
> Is there a distinction between advising clients about the existence of human rights standards which go beyond the legal requirement, and advising clients that they must comply with those standards which go further than the law?[55]

A second source of reluctance is that some lawyers see their role as advising only on the legal risk that a company may face with respect to its operations. One lawyer described the terms in which this concern often is expressed: "[T]he lawyer is assuming more and more the position of being the gatekeeper for ethics . . . and we've got no background in that, we've had no training in that, but we suddenly seem to be assuming the mantle for being the person [who is] the expert on that.[56]

Another lawyer observed, "When [lawyers] advise on commercial issues they also provide some commercial advice. On human rights, they still have the perception that they don't want to get into morality or ethics -- you know, they are not judging the clients. It's like if I start doing that where do I stop."[57] Still another lawyer noted that:

> by advising on human rights issues which the client doesn't ask me to advise on, I am somehow passing a moral judgment on the client's activities. . . [H]istorically lawyers have always been very comfortable in putting a distance between us and the client's commercial objectives: 'We just advise on the law, it's not my role to question the client's objectives. Clearly if they are illegal I can't be complicit and I may withdraw my services, but if they want to sell tobacco products or mine uranium or move a community [off its land] on that's entirely for the client to decide.[58]

Lawyers' tendency to think in terms of compliance also can create discomfort and uncertainty about their role with respect to soft law. One lawyer observes that "part of the deficit of the [UNGP] framework is that there is not that much hard stuff in order to say, 'Around this we can build a product and this product is going to define that we need X, Y and Z processes in order to be clear of that particular liability.' That is very different from, let's say, anti-money laundering, anti-corruption, those kind of compliance programs which lend themselves to almost a tick box approach."[59] Another interview subject echoes this point by asking:

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[55] *Id.*
[56] Interview TG-10.

> What tick do you have to put in what box to do the right thing?' It's extremely difficult, it's extremely difficult. So for example, … if you find that you have a supplier and may have child labor in the supply chain, the old business approach to human rights before the UNGPs would say, 'Okay, stop using the supplier so you can say you don't have child labor in your supply chain.' But everyone knows now that child labor is actually a very complex issue and cutting those factories out of your supply chain may actually bring harm to the people you're trying to protect. So the new idea with the UNGPs is even when you pull out you have to think about what the human rights implications are. So it may be that your first step is to work with suppliers to try and put the children in school, change the rules about suppliers, it's a whole process now that we need to go through … (H)ow could you express that in compliance terms?[60]

One lawyer who has worked with companies from a number of countries suggested that U.S. lawyers' advice tends to be driven more by considerations of legal liability than advice from lawyers in other countries. She recalls one company turning to both French and U.S. counsel for advice on a matter. French counsel "basically advised [the company] to follow human rights principles." By contrast, "the American legal advice was very strongly [based on] legal liability: 'Don't do X, Y, or Z even though people are asking you to do it; just follow your legal liability."[61] She suggested that in the U.S. "[t]here is not a whole lot of understanding or even respect for the UN Guidelines; I think that's in the legal culture."[62] Another lawyer observed:

> I think European companies and countries and just citizens themselves are more accustomed to international institutions and paying attention to them. They've got the whole EU and regulations binds all of these countries, so the average citizen is much more aware that they are part of a union and have to abide by those kinds of principles. So when it comes to the U.N. that doesn't scare them or bother them whereas the U.S. is pretty independent and thinks we don't need the UN. I don't mean that to be probably as derisive as it is coming across but I do think there is a notion within the U.S. that 'We go it alone and so we don't have to pay attention to the U.N.'[63]

On the other hand, some interview subjects suggested that lawyers from civil law jurisdictions might be less receptive than those from common law jurisdictions to the notion that a lawyer would be expected to advise on open-ended standards in addition to formal legal provisions. One interviewee put it this way: "[T]he common law allows a little bit more for the soft law side of things and to provide more of an advisory role as opposed to providing [strictly] legal advice. . . Whereas in civil law it is very much a rules-based form of legal jurisdiction and . . . if you are going beyond that you don't really know exactly how to incorporate more of the soft law approach into [your] work."[64]

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[60] Interview TG-25.
[61] Interview TG-25.
[62] *Id.*
[63] Interview TG-21
[64] Interview TG2-2

Another lawyer suggested that in a common law system "you don't itemize every action or rule that you need to follow, which means I've got a level of discretion about how I apply something."[65] By contrast, the instinct in a civil law system is to say, "'[H]ow do I think about what salient human rights impacts are, which human rights are we talking about? [W]e need to elaborate exactly which ones [we're] talking about, exactly what sorts of actions and impacts and then I can deal with this.'"[66] Thus, the civil law lawyer will say that "we need to write our own code, and elaborate every potential human rights adverse impact scenario one through 510."[67] Yet another lawyer commented, "A continental lawyer is really holding strong to what they know, to their traditions, to the strict law that is written and the hard law is what counts."[68] Thus, for instance, while the United Kingdom features a variety of sources of standards, ranging from decisions by its OECD National Contact Point to the government's National Action Plan for the UN Guiding Principles, French authorities want to codify business obligations. As one sponsor of legislation expressed it, "You have to start with a law, then you might have regulations."[69]

Another lawyer from a common law jurisdiction, however, questioned whether the division is quite as sharp as the common perception. He suggested that it depends on the area of law involved. "If you are an administrative lawyer dealing with environmental law, you tend to look at what the regulations provide, end of story. But when you are dealing in a commercial context and you're looking at negligence law suits judges are permitted to look at standards . . . even for a civil law this is an area that I think is very interesting it requires a lot of research, I think that even in the civil law it's not quite as black and white as you might think. . . A German judge in a commercial dispute is entitled to look at standards outside the law."

While there is resistance in some quarters to lawyers advising on soft law dealing with human rights, many interviewees expressed the view that the main obstacle to providing such advice may be that many lawyers simply are not very familiar with the UN Guiding Principles and are unsure of how they would incorporate this and other soft law standards into their conversations with clients. As one lawyer said of many inside counsel, "They don't really understand what it is that they can do to help the company not get involved in violations of international rights human rights norms that are not hard law. They honestly don't know what it is that they can do. They don't know they can help to structure a contract or a joint venture or do due diligence in an M&A so it's a question of capacity and understanding."[70]

Talking About Human Rights

This section discusses how our interview subjects describe ways that lawyers find opportunities to engage with business clients about human rights issues and how they frame

[65] Interview TG2-3.
[66] *Id.*
[67] *Id.*
[68] TG-14.
[69] *Id.*
[70] Interview TG-13.

those discussions. In general, the approach most likely to resonate with clients is to focus on the potential risks to the company of human rights violations. Clients vary, however, in how sensitive they are to different types of risks, which can range from the prospect of legal liability to criticism from consumers, investors, or local communities. Furthermore, the UN General Principles state that human rights risk analysis should focus on the risk to rights-holders, not simply the risk to the company. The section will discuss the extent to which lawyers may contribute to that shift in perspective. Finally, we discuss some of the factors that are likely to shape the ability, willingness, and effectiveness of lawyers in advising on soft law human rights issues with their clients.

The Risk Management Lexicon

Modern corporations spend a considerable amount of resources engaged in "enterprise risk management," which is defined as "the process of planning, organizing, leading, and controlling the activities of an organization in order to minimize the effects of risk on an organization's capital and earnings. Enterprise risk management expands the process to include not just risks associated with accidental losses, but also financial, strategic, operational, and other risks."[71] Human rights violations can create such risks, which makes advising on how to prevent them seem like a natural topic to include in such analysis. As the UN Guiding Principles suggest, "Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders."[72]

Risk of Legal Liability

One risk on which lawyers traditionally advise is the risk of legal liability. If we think of the type of issues on which lawyers may advise as a set of concentric circles, the issue of liability would constitute the core inner circle. While there is some national regulation prohibiting egregious conduct such as human trafficking, liability of companies in developed countries often depends on complex determinations of liability for the actions of subsidiaries or contractual partners in developing countries. In light of this, in many cases the most immediate concerns about direct liability of major corporations tend to be based on compliance with reporting and disclosure requirements. These include, for instance, the California and U.K. requirements to describe efforts to identify and prevent forced labor and human trafficking in supply chains, the U.K. Companies Act requirement to report on human rights issues that may be materially important in understanding a company's condition and the E.U. directive that requires extractive companies to report material payments to governments.

Reporting and disclosure requirements generally do not restrict the company's operations, but simply require information about them. Discussions about potential liability therefore focus primarily on whether the information is accurate. These discussions, however, have the potential to also direct corporate attention to human rights issues in a couple of ways.

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[71] Tech Target, "Enterprise Risk Management (ERM) Definition," http://searchcio.techtarget.com/definition/enterprise-risk-management.
[72] United Nations Guiding Principles on Business and Human Rights 19 (2011).

First, as one lawyer put it, "In order to get to the reporting outcome you have to implement processes which will allow you to come up with the information you need to report."[73] Assembling and analyzing the information necessary to make disclosure can lead to more far-ranging conversations about corporate activities and the extent to which they risk violating human rights. The need to report on efforts to prevent human trafficking, for instance, can lead to discussions on the creation of systems to prevent such conduct, and to closer scrutiny of supplier operations.

Second, disclosure can be a way of holding a company accountable to stakeholder and the public at large, regardless of any potential legal liability. Reporting provisions typically require that a company disclose its efforts to avoid adverse human rights impacts. In theory, a company can comply with these requirements by reporting that it is making no such efforts. As a practical matter, however, this is unlikely to be a realistic option, particularly for large companies or where other companies are taking steps to avoid adverse impacts. A company that discloses its failure to make any efforts on human rights issues is likely to attract criticism that could affect its standing with customers, investors, or officials that may be in a position to grant or deny regulatory approvals. Furthermore, where convergence around appropriate practices is starting to emerge, companies that fail to adopt these practices are likely to be subject to similar criticism and potential adverse business consequences. Discussions of compliance with reporting and disclosure requirements therefore can create opportunities for lawyers to advise companies on the broader risks of human rights violations and the importance of minimizing them.

Finally, the potential for convergence around appropriate compliance and reporting practices could have implications for corporate liability under the common law or customary international law. Acceptance of certain standards by a majority of companies in a given industry, for instance, or those facing a common human rights risk, could lead to a judicial finding that acting in accordance with these standards is required to meet the appropriate standard of care under tort law. As one lawyer put it, "The standard of care is something that has evolved," and there is "an expectation for [companies within an industry] that if the industry comes up with it a code of conduct and you are not subscribing to that code of conduct something is wrong with you." [74]

One source of such standards is voluntary codes of conduct, such as those relating to, for instance, labor conditions, security forces, and indigenous community displacement. Failure to adopt or to follow these standards therefore would breach a company's duty of care. In the case of *Choc v. HudBay Minerals*, for instance, a Canadian trial court denied a company's motion to dismiss a lawsuit alleging that company security forces had engaged in violent abuses, including murder and rape, of members of a community residing near a company mining facility.[75] The court held that it was possible that the plaintiffs might be able to establish a cause of action against the company, and that it would not be unfair or unjust to impose a duty of care on it by virtue of the company's professed adherence to the Voluntary Principles on Security and Human

[73] Interview TG-19
[74] Interview TG-17.
2013 ONSC 1414 (2013).

Rights.[76] It is also conceivable that at some point compliance with such principles could come to constitute customary international law.

The doctrines linking voluntary standards to legal liability are still in their infancy, and will require further elaboration. Lawyers performing the core function of advising on potential legal liability nonetheless will need to be attentive not only to statutory regulations, but evolving levels of commitment to soft law.

Legal Risks from Soft Law Standards

Lawyers also may advise on soft law standards when they are incorporated into legal documents such as contracts with suppliers, joint venture partners, and creditors. Compliance with these standards therefore becomes a legal obligation that is a condition of entry into and performance under these various agreements. In the former case, failure to credibly demonstrate conformity with the standards may result in inability to obtain financing for a project or foreclose the opportunity to enter into a potentially profitable business arrangement. In the latter case, violation of the standards may require indemnification of a contractual partner or authorize termination of the contract.

If the contractual partner is a host state, acceptance of standards may be a condition of bidding for a project, or violation of them may result in denial of approval or termination of the project. Countries in developing countries are now being encouraged to insist on protection of human rights and other assurances in investor agreements, with an increasing roster of lawyers and consultants providing assistance to them in negotiating and implementing agreements with such terms. Instruments such as the OECD Policy Framework on Investment, for instance, reflect the view that "we need to stop thinking of investment as an end in itself because large flows of investment do not necessarily translate into growth and more jobs. And without the proper safeguards, these flows might even cause negative impacts on people and the environment."[77]

Lawyers that act for companies that are parties to agreements which contain such standards therefore need to advise their clients about the extent to which they may be in compliance or breach with them. As with discussions about potential legal liability, such conversations can be the impetus for evaluating and strengthening a company's processes for avoiding various types of adverse human rights impacts. As one lawyer put it, this can impress upon clients "the need to be proactive and not simply react as issues or controversies arise."[78] Another lawyer recounts how his discussion with a client on compliance with certain standards began with the assumption that the client faced a particular risk, but ended with the realization that "they had overlooked a risk that neither of us had thought of until we actually sat down and

[76] *Id.* at 14-16.

[77] Andrea Saldarriaga, The Need to Construct a European Investment Policy Reflective of Europe's Values, June 19, 2015, http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/the-need-to-construct-a-european-investment-policy-reflective-of-european-values/.

[78] Interview TG-9.

talked and thought about it."[79] The result was that they concluded that the risk "is not over there where we thought it was, it's over here."[80]

In addition, some government entities that are not contractual partners with a company may use information about the company's failure to comply with soft law expectations as the basis for adverse action. Canada, for instance, provides that its Export Credit Agency is authorized to deny or terminate funding for a Canadian mining company that refuses to participate in an OECD National Contact Point process initiated in response to a complaint against the company.[81] More generally, it is not hard to imagine that a government agency that is deciding whether to issue a regulatory approval of some sort may well take into account a company's record on human rights issues. Any set of standards that includes some type of complaint process provides an especially visible means for publicizing alleged violations, even if the process does not result in legally binding consequences. As one lawyer noted, for instance, the European Bank for Reconstruction and Development (EBRD) requires that applicants for funding incorporate human rights impact assessments into the projects for which they are seeking financing. Any interested party can then bring a complaint alleging that the project is having some kind of negative impact. "So the moment you open a project, a complaint mechanism makes you accountable."[82]

Advising on the potential legal risks of failure to comply with human rights standards thus involves the lawyer in traditional legal counseling that can create the opportunity to expand awareness of the impacts of a company's activities. One lawyer expressed impatience with the notion that advising on the soft law is any different from what lawyers regularly do in other contexts:

> A client sends me their code of conduct or their business ethics policy and says, 'Well, do you think we've got a problem here?' And the oil and gas mining sector or the telecommunications or electricity sector have got a bunch of codes and . . . template agreements dictated or agreed between the sector. And lawyers quite happily interpret those documents, even though they've got no more standing from a national law perspective than any other documents.
>
> I found that reaction is quite surprising that all of a sudden lawyers retreat behind saying, 'No, we only advise on legislation.' Oh that's rubbish, you are drafting policies, templates, codes, guidance you're looking at electoral commission guidelines. Anybody who is a planner has read more planning codes, guidelines, protocols -- they advise clients on that just the same way they advise on bits of legislation.[83]

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[79] Interview TG-1.
[80] *Id.*
[81] Interview TG-25.
[82] Interview TG-14.
[83] Interview TG2-3

Soft Law as Hard Law in Waiting

Transnational businesses operate in a world of considerable uncertainty. One significant source of uncertainty involves what regulatory provisions are likely to be imposed in the future or what contract terms counterparties may request. Lawyers who advise on soft law are in a position to offer some insight into these questions, thereby enabling clients to anticipate and plan for what legal requirements may emerge down the road. As one lawyer succinctly put it, "Soft law can be hard law in waiting. The law is a lagging indicator of what's considered ethical, so that what may be considered unethical today may be illegal tomorrow."[84] Another captured this idea by saying that soft law also includes the "unspoken expectations of the public."[85]

One lawyer was among many who drew an analogy to the early days of concern about environmental issues. There was very little hard law, and when "naming and shaming" proved ineffective, the government "pick[ed] the practices of the most . . . progressive companies and use[d] that as the basis for what [it] impose[d] on everybody else."[86] These voluntary practices were an important foundation for the numerous environmental statutes that eventually followed.

Another lawyer noted that failure of companies to voluntarily police themselves can lead to government regulation that is more onerous than what otherwise might have been imposed" "(S)oft law principles may not become law but (companies) really ought to pay attention to them and lawyers ought to pay attention to them in seeing what they can do to avoid problems because if they don't then you will get some really nasty hard law that you would otherwise not get.[87]

This overall analytical framework suggests that a lawyer who discusses soft law with a client from this perspective is advising on the "law" in an expansive sense that is sensitive to the fluid relationship among ethics, norms, and formal law. She is attempting to provide a client not simply with a snapshot but a moving picture.

Business Risk: The Social License

The preceding types of risks to a business arising from the human rights impacts of its operations can all be conceptualized in terms of gradually expanding concentric circles of legal risk. It may be, however, that in some cases there is no plausible basis for conceptualizing the human rights risk to the company as falling within one of these circles. At the same time, however, there may be other types of risks that are relevant to the client's business. Is there any role for the lawyer in advising on such risks? Lawyers may not be able to claim any particular professional expertise with respect to these risks. At the same time, many of them will reflect stakeholder and public perception that the company has violated common ethical norms. This is a matter with respect to which a lawyer may have insight because of the broad relationship between such norms and the law. In addition, as the lawyer is that responsible for furthering the

[84] Interview TG-13.
[85] Interview TG-17.
[86] *Id.*
[87] Interview TG-13.

best interest of the client, does this require an expansive assessment of risks to the client's welfare? Many lawyers traditionally have fulfilled this role by acting as a client's trusted advisor. To the extent that they act in this role, a lawyer will bring to the client's attention the various types of risks to the business that may result from imposing adverse human rights impacts. Indeed, doing so is consistent with modern business emphasis on enterprise risk management.

Advising on these risks requires an appreciation of the kinds of resources and support that the client needs in order to be successful, and the extent to which violating human rights may jeopardize them. Such risks may exist even when a company is in compliance with national law. One lawyer provided an example involving a project that required moving an indigenous community:

> There is under the national legislation an ability to move the community . . . but the compensation is very nominal and de minimis, and there is no right to have the decision reviewed. We would say, 'Well look, there is clearly a national law that deals with this, but from the United Nations Guiding Principles perspective you would also want to raise with the client perhaps the difference between the national law standard and international human rights standards.' [Under the latter] you would expect a reasonable level of compensation and a review process or a grievance mechanism for those who were unhappy with the decision.[88]

The lawyer continued:

> And you might try and explain why you are raising these issues with the client because they are not legal issues. In other words, the client will ask the question, 'What can I do?' They are not interested in what else can I not do or should I be doing. To that you can say, 'Well, have you thought about from a business perspective the potential disruption, will there be protests, what's this going to cost in terms of project delay, the impact to your reputation when you are on the front page of all the local newsletters, when perhaps you've got to go before a government commission and you want an approval for another project in two or three years' time?'[89]

Another lawyer commented on how companies in the extractive industry were among the first to learn the need to take account of these risks:

> The extractive industries were the first ones to really get onboard and think about this because they are at the front lines of doing some things and involved in places that either have weak rule of law or that have security issues. Sometimes the assets are on the land of people who are not in the best position to fight and protect their land and they look like bullies going in and throwing people off their land. . . So they've learned the hard way that that's not the best way to operate. Yeah, you can do it legally but the pushback from doing it by the time you spend

[88] Interview TG-2-3
[89] *Id.*

> the money both in the law suits and your reputation [isn't worth it]. Wouldn't it have been better to go in with a comprehensive plan and say, 'Look, the silver is in this mine, you live on this land, we can't have both, so what can we do to compensate the people?'[90]

Lawyers provided many other examples of business risk in our discussions. A telecommunications company, for instance, may operate in country in which an authoritarian government is facing pressure from dissidents who are mobilizing the population. The government might respond with violence, and request all transnational companies operating in the country to disable access to social media in order to reduce the prospect that further demonstrations will endanger its grip on power. What should a company do? A lawyer can inform the company of what the national law says about the authority of the government to issue such demands, but are there other considerations that go beyond the legality of the order that the company should consider? Will there be an outcry by the international community that the company is complicit in abuses by the regime? On the one hand, failure to comply with the demand may well jeopardize the ability of the company to operate in that country – at least if the current regime remains in power.

Less dramatically, a transnational company may be in a position to negotiate an investment agreement with a developing country that gives the company a lion's share of the profits from a project. The contract also could severely constrain the government from enacting any legislation that could impair the value of the project, which could include changes in tax law or worker health and safety regulation. Should the company capitalize on its bargaining position to obtain the best possible terms under the contract? Or should it accept a more equitable allocation of rights and obligations that enhances the government's commitment to the project and provides a more sustainable social and economic environment for the company over the thirty-year life of the project?

In both of these instances, compliance with national or local law will not necessarily insulate a company from criticism. Depending upon the issue, there may be emerging international expectations on ethical behavior to which the public may hold a company. These expectations are the basis of what some observers have called a company's "social license." This license reflects the public's sense of the legitimacy of a company's operations. More broadly, "The presence of the social license might be described as an equitable balance, or harmony, between different societal interests that allows a specific activity to continue and to thrive. However, as the social license is dynamic, it can always be withdrawn by society."[91] As one lawyer put it with respect to human rights impacts, "you certainly look at the risk of legal violations but you also look at the risk of what happens when you violate soft law global norms because that can cause all kinds of problems that can ultimately lead to the loss of a company's social . . . license to operate."[92]

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[90] Interview TG-21.
[91] JOHN MORRISON, THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE (2014). *See also* ROBERT KAGAN & NEIL GUNNINGHAM, SHADES OF GREEN.
[92] Interview TG-13.

The likelihood that a company will be held accountable for breaching accepted public norms has increased substantially in recent years with advances in telecommunications technology and the rise of international NGOs and other significant actors in the transnational sphere. The International Bar Association, for instance, has helped to develop "eyeWitness to Atrocities, a mobile app with the unique capability to authenticate and securely store footage of gross human rights abuses, while maintaining the anonymity of the user."[93] With use of the app, "[m]inimal extra analysis is necessary – no UN panel, no media probe. In the meantime, those caught in the spotlight, used to swatting away irritatingly observant social media saplings with a cursory cry of 'fake!, are advised to be on guard."[94] This and other examples are why one interview subject said that lawyers need to advise clients, "People are in touch with each other and NGOs are out there; a lot of forces at work that did not exist ten or twenty years ago. The impacts on people can lead to serious consequences."[95]

Discussion of business risks can also assist companies in gaining greater certainty about their operations. In the face of what can seem amorphous and open-ended obligations with respect to human rights, companies may find that reliance on global standards provides them with greater predictability in their activities. A business may, for instance, agree in an investment agreement with a host country that the country has the discretion to adopt regulations that conform to E.U. standards on social and environmental matters. A company may agree to adopt international standards on community consultation with respect to extractive projects, or may agree to abide by the Voluntary Principles on Security and Human Rights with respect to the use of security services. Once this has occurred, dynamics that we have described above can begin to hold a company accountable in a variety of ways for its commitment to such standards. In this way, conversations with clients about business risks may set in motion a process that can protect human rights apart from a company's concerns about its legal risks.

A lawyer who advises a client on risks to its social license is not acting as a decision-maker with respect to such risks. Rather, her role is to ensure that the client is aware of these considerations in deciding how to proceed. As one lawyer described it, the lawyer's role is to say, to the client, "'I'm not supplanting your role in [making a] decision, that is absolutely your responsibility and you will need to take whatever decision commercially you feel is appropriate, but I feel that in terms of positioning this within the broader spectrum of issues you need to take account of these things that are relevant and material.'"[96] This may require that management further consult with experts in areas such as finance, political risk, operations, public affairs, or community or investor relations. It may even require conferral with other companies in the same industry to consider if an industry-wide approach would be desirable

Furthermore, corporate management is increasingly looking to both outside and inside counsel for advice on the full range of risks that a company faces. As a scholar and corporate general counsel observed, "legally astute top management teams take a proactive approach to

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[93] Rebecca Lowe, eyeWitness Witnessing Atrocity, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=11e76b66-d949-4738-9347-e67fbfbb9441.
[94] *Id.*
[95] Interview TG-17.
[96] Interview TG-2-3.

legal matters. They bring counsel in early to assist not only in assessing legal risk but also in creating a strategy and a plan of execution that maximizes realizable value while eliminating any unnecessary legal or business risks."[97] As one study of the role of general counsel concludes, "According to directors, the highest performing General Counsel add value by contributing strategic advice. With strategic input increasing in prominence and necessity, future general counsel would be wise to develop strategic-thinking skills. To do this, however, they need to be comfortable with risk and helping their business colleagues decide which risks are reasonable and which are not."[98] Serving as the company's lawyer requires contacts with business throughout the organization, which can put inside counsel in a position to identify and analyze risks and opportunities across the full range of a company's operations. This feature of the job, along with lawyers' traditional training in identifying and assessing risk, is resulting in more companies turning to lawyers for wide-ranging advice.

Conclusion

Focusing on expanding concentric circles of risk thus is a way to including human rights concerns within the enterprise risk assessments that an increasing number of companies already are performing. This attention to risks to the company, however, is analytically distinct from an emphasis on risks to rights-holders. As the UN Guiding Principles say, "Human rights due diligence can be within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders."[99] In keeping with this, the Principles also say, "Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable."[100] The next section discusses how business lawyers may be most effective in encouraging their clients to adopt this perspective.

Risks to Rights-Holders

It is understandable that lawyers attempting to minimize the adverse impact on human rights of business activities would tend to stress the risks to the company of imposing such impacts. Businesses generally operate in highly competitive environments, in which market pressures make financial performance a top priority and cost-benefit analysis a standard approach to decision making. Impacts on human rights may be most likely to enter into deliberations when they can be framed as potential costs to the company. From a pragmatic focus, therefore, the best way to minimize risks to right-holders is to persuade management to minimize risks to the company because this aligns the interest of the latter with the former.

Such an approach reflects the view that outcomes are more important than motives in assessing behavior. Philosopher Robert Goodin suggests that this is an application of David

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99 UN Guiding Principles, at 18.

100 *Id.* at 26.

Hume's axiom that "only motivations motivate."[101] He elaborates: "Suppose someone has acted so as to further a collectively desirable outcome. [Hume says,] "His so acting cannot be explained merely by the fact that it furthers that outcome, or merely by his knowing that it does," this axiom would hold; instead "his so doing must be explained by some disposition or desire that he has."

From this same basic axiom it follows, that "if one wants people to pursue such outcomes, one will have to see that appropriate motivations do actually exist to produce that result." Merely moralizing about the matter will not, in and of itself, necessarily suffice to move people.[102] Goodin goes on to argue that most actions "probably proceed from a multiplicity of motives, some good and some bad. . . So in a way it does not really even make very much sense to expect a conclusive answer to the question, 'What motive lay behind that act.'"[103]

Consistent with this pragmatic approach, several lawyers who professed strong commitment to advancing business respect for human rights emphasized that their focus is on finding a way to reduce risks to rights-holders rather than ensuring the purity of clients' motives. As one lawyer put it, "If I can show them a way where they can make money and at the same time not either not harm or violate someone's human right or craft a remedy because they have done it, that will allow them to continue to operate and at the same time give relief to these victims then I've done my job."[104] Another lawyer who described herself as "passionate" about human rights issues commented, "I don't think as a business community we've reached [a] tipping point" such that companies consider human rights impacts from a purely altruistic perspective.[105] As a result, "I think any conversation has to involve a reference to what value that client would see in this kind of proposition. It might be as a shareholder or it might be at governance level, so it might be more of a management kind of issue than a profit issue. But there has to be some kind of a sale."[106]

At the same time, focusing on risk to the company will not necessarily always align the interests of the company and those affected by the company's actions. Alignment may not be complete, for instance, if affected rights-holders are not in a position to exert pressure on a company that will affect its financial condition or its reputation with stakeholders such as customers, investors, or government regulators. The UN Guiding Principles, for instance, declare that companies should set priorities among human rights risks based on the severity of the potential adverse impacts. As one lawyer commented, however, "I don't know one company that actually prioritizes in that way. Because they prioritize based on where the squeaky wheels are and where the company is going to get bit, and then as soon as that's done maybe then they can go to another thought but they are always going to be watching out for what's the next campaign."[107]

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[101] ROBERT GOODIN, MOTIVATING POLITICAL MORALITY 4 (1992).
[102] *Id.*
[103] *Id.* at 7.
[104] Interview TG-21.
[105] Interview TG-10.
[106] *Id.*
[107] Interview TG-25.

A company that acts based on cost-benefit calculations thus may leave rights-holders vulnerable to the possibility that in any given instance the calculation will not favor taking their interests into account. As Goodin puts it, "We want to get people to do the right thing *regularly* and *systematically,* and the surest way to do that simply has to be to get them to do the right thing for the right reason."[108] The best way to get a company to minimize risks therefore is for managers to be genuinely concerned about the persons who will affected if those risks materialize. More fundamentally, it means that people treat the rights it as a hard constraint, not as one that is contingent on cost-benefit calculations. This requires adoption of a deontological instead of consequentialist framework.

The challenge for business lawyers thus is how to help inculcate a deontological perspective in clients who operate in a domain dominated by consequentialist thinking. The lawyers we interviewed acknowledged the difficulty of this task, but some held out hope that it could succeed. For instance, while enterprise risk management is a natural vehicle for discussions about the risks of adverse human rights impacts, those discussions do not necessarily sharply distinguish between the risks to the company and to rights-holders. If a company undertakes to conduct human rights due diligence, rather than simply responding to criticism of adverse impacts as they arise, the focus will be on the potential for violations to occur. Even simply considering whether these represent risks to the company requires imagining the reactions of average persons who are guided by the standards of ordinary morality. This process of taking the perspective of persons outside the company requires imaginative evaluation of the company's operations according to moral considerations rather than simply self-interest.

That evaluation may initially be for the purpose of determining whether public moral reactions will result in criticism of the company. It seems plausible to imagine, however, that the habit of consulting ordinary morality will lead to moral standards being a direct, rather than derivative, influence on behavior. As one lawyer said:

> I tend to work with clients who are trying to take on board the Guiding Principles and if they do that, and they've adopted a policy consistent with that, they are going to be thinking about the risks to right holders because what they are trying to do is implement their processes and conduct their operations and their business in a way that is consistent with that. It would be a different conversation potentially with a client who has not thought about that and who simply wants to make an investment and is concerned about political and financial risk.[109]

A second point is that it can be perilous for a company to try to differentiate between those adverse human rights impacts that will and will not generate public criticism. Social media has the potential to direct worldwide attention to an incident that occurs in a remote part of the world, and international NGOs can have the capacity to generate ongoing campaigns that exert pressure on companies by alerting a variety of stakeholders. This makes it prudent for a company to assume that every risk to rights-holders is a risk to the company, which means that

[108] GOODIN, at 9 (emphasis in original).
[109] Interview TG-19.

the best approach is to focus directly on potential victims.

We can gain some insight into the possibilities for changes in business client perspectives from what has been called a "constructivist" approach to international relations. That approach challenges the realist view that that actors in the international realm operate on the basis of interests that are exogenous to norms and law, and that it is these interests, rather than normative or legal considerations, that determine their behavior.[110] Constructivists argue for the importance of conceptualizing actors as members of social and discursive communities whose conceptions of their own interest may be reshaped by participation in such communities. Interests, in other words, are endogenous to norms and law. Thus, as Janina Dill puts it:

> [T]here is no reason to consider interests to be prior to, or as confronting an actor more immediately than, norms. Interests are constructed in the same way as normative beliefs – in a process that is subject to perceptions. Interests arise from and inform actors' interaction and the formation of their identities. From the constructivist standpoint . . . motivational forces or reasons for action are hence socially constructed and changeable. Norms can be endogenous to interests; interests can be endogenous to norms. There is neither a pre-ordained canon of interests (material or otherwise) on behalf of which a strategic legal argument could be made, nor a separate universe of normative beliefs that could be brought forward disguised as an aspirational interpretation of law.[111]

This suggests the possibility that increasing attention to and discussion of the human rights impacts of business activities could gradually change companies' understandings of their identities and interests. Some companies already, for instance, purport to distinguish themselves as socially responsible. Even if this self-presentation initially is meant to serve instrumental financial interests, it creates an account of identity to which persons both inside and outside the company can hold it accountable. Constructivism posits that this interaction among actors has the potential to solidify this corporate identity so that it serves as a motivation for acting in socially responsible ways. To the extent this occurs, what is in the interest of rights-holders is in the interest of the company – not because of cost-benefit analysis but because a particular conception of identity has been internalized in the company culture.

These dynamics can create client receptivity to a lawyer asking about a course of action, "Is it right?" rather than simply, "What are the risks to the company?"[112] As David Wilkins, William Lee, and Benjamin Heineman suggest, under a broad conception of the lawyer as counselor, the ultimate question is not what should be the "right" legal course of action under current law and circumstances, but rather what is "right" in the sense of what a law or policy or private norm ought to be in the future."[113] Not all lawyers subscribe to this view, but some

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[110] *See* REALIST CONSTRUCTIVISM

[111] JANINA DILL, LEGITIMATE TARGETS? SOCIAL CONSTRUCTION, INTERNATIONAL LAW AND U.S. BOMBING 46-47 (2015).

[112] *See* Wilkins, Lee & Heineman, *Lawyers as Professionals and as Citizens: Key Role s and Responsibilities in the 21st Century*

[113] *Id.* at 4.

general counsel have described their role as including attention to this issue. As one inside counsel stated in hearings conducted by the New York State Judicial Institute on Professionalism in the Law, "We tell our clients what the rules of law are, how they apply them to their business, how to do so in an expert way, help them be profitable, but at the same time, there's that question, 'Is it legal versus is it right?' That question of, 'Is it right?' benefits clients, and I think, a greater good."[114] Another said, "I think the lawyer's special role is to have a little more of a lens on what's right and wrong, other than purely legal or illegal or profitable or not profitable."[115]

Ultimately, it may be unrealistic to imagine that companies will focus on the risks of adverse human rights impacts without ever considering the impact on their own economic viability. As one lawyer put it, counsel needs to emphasize that establishing priorities is about focusing on "the risk to humans not to the company," but "[i]t's probably always going to be some sort of balance, because at the end of the day the people who make the decisions are looking at income. So what you can hope for is some sort of balance." [116]

The Role of Inside Counsel

Another dynamic that shapes the likelihood and nature of lawyers' advice on human rights issues is the relationship between inside and outside counsel. Inside counsel have gained significant influence over the past few decades, and several interviewees saw them as crucial in sensitizing companies to the need to consider the human rights impacts of their operations. One law firm lawyer commented, "The in-house counsel [role] has changed. They are starting to see . . . that they have a broader remit [that] may mean interacting with human rights issues."[117] Another said, "I think the general counsel is a critical piece; I don't think it can be underestimated."[118] Still another observed, "It's the in-house counsel who are the market leaders; they are the ones in whose laps business and human rights issues land."[119]

Their crucial role within the company thus means that "internal counsel are really the key to unlocking this for external counsel, giving them a level of comfort and confidence about raising [human rights] issues with clients."[120] Those internal counsel who seek to raise awareness of these issues within companies can enlist outside counsel to play certain roles in support of such an effort. Outside counsel can be in a position, for instance, to describe what other companies in an industry are doing with respect to human rights impacts, including commitments to adhere to certain voluntary standards. They also can provide in-depth analysis of potential human rights issues based on familiarity with how standards are being interpreted and applied, and may be especially well-positioned to advise on what standards are likely to be incorporated in hard law. These roles reflect the fact that general counsel typically must be

[114] Milton C. Regan, Jr., Zachary Hutchinson, & Juliet Aiken, *Lawyer Independence in Context: Lessons from Four Practice Settings*, __ GEO. J. LEGAL ETHICS __ (2016).
[115] *Id.*
[116] Interview TG-25.
[117] Interview TG-2-3.
[118] Interview TG-1.
[119] Interview TG-13.
[120] Interview TG-2-3.

generalists who attend to a wide range of issues, while outside counsel often develop more focused expertise. This can enable outside counsel to provide valuable support by reinforcing inside counsel initiatives. As one law firm lawyer put it, "Our job is to help that person within the company who is trying to drive change and give them as many arrows in their quiver as we can."[121]

To what extent are outside counsel likely to be the ones to initiate discussions of human rights, rather than responding to inside counsel requests for advice? There is a divergence of opinion on how likely this is, and on the extent to which it is the lawyer's role to do so. As one lawyer stated, "Normally the relationship between the lawyer and the client is such that the lawyer reacts to what the client wants and that's kind of it. . . . A lawyer has to be very, very careful when he starts he or she starts trying to persuade a client to do something that the client isn't already inclined to do. . . He can easily become labeled a troublemaker, an idealist someone who is off the program if you are not careful"[122]

At the same time, there may be some factors that create opportunities for outside counsel to direct attention to human rights concerns. First, as one lawyer put it, "to perform a risk analysis for a project is something that lawyers sometimes are asked to do and in which case you have kind of a license."[123] Drawing on the earlier discussion of concentric circles of risk, a lawyer may be able not only to suggest consideration of the risk of legal liability, but to expand discussions to include the wider range of risks that a course of action might create. Second, "if you are doing the first draft of something you also have a kind of license. I call it running room. You could have subtle influences without being overt and appearing to be missionizing. [You can] say, 'Look we should have a covenant in here that says the person who is building the airport really will observe international standards for dealing with the people in the area that he's taking over. That means relocation expenses and so forth and there are international standards that cover that."[124] The result is that "nine times out of ten because the lawyer is the lawyer you get it."[125]

Outside counsel also may take the initiative because she wants to be seen as a trusted advisor rather than simply a purveyor of technical services. As one lawyer noted, "It's much more valuable when a firm becomes . . . a wise counselor than if it's just a commodity provider of specialized services. . . I think outside counsel want to be able to understand how they can provide that wise counsel."[126] Another lawyer echoed this point:

> [T]he climate for lawyers outside counsel is so competitive you need to have an advantage. . . What differentiates you is what extra value you [are] bringing. If you are a lawyer who knows about these principles, who understands them, who can translate that into language that your client can (a) appreciate and (b) profit

[121] Interview TG-15.
[122] Interview TG-17.
[123] Interview TG-17.
[124] Interview TG-17.
[125] *Id.*
[126] Interview TG-13.

> from you are going to be at an advantage. . . You can convey the information and they can take that information and use it to build their business. You provide a service . . . a valuable service.[127]

Fourth, outside counsel may come to see herself as having a professional responsibility to raise concerns about human rights impacts. Rule 1.1 of the European Bar's Code of Conduct for Lawyers in the European Community, for instance, says that a lawyer's ethical obligations include those that she owes to "the public for whom a free and independent profession… is an essential means of safeguarding human rights in the face of the power of the state and other interests in society." The American Bar Association's Report accompanying its resolution endorsing the UN Guiding Principles, for instance, stated, "It bears noting here that ABA Model Rule of Professional Conduct 2.1 may well apply in this context. It requires lawyers to exercise "independent professional judgment and render candid advice" and permits them to "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.' This imperative logically would include applicable international standards in the conduct of a client's affairs, including the Framework and Guiding Principles where corporate clients are concerned."[128]

The reference in Rule 2.1 to discussing considerations beyond law is of course framed in discretionary, rather than mandatory, terms. This means that the issue discussed above of what constitutes "law" will have an important bearing on the scope of the lawyer's duty under Rule 2.1 and similar professional standards. One lawyer did suggest, however, that the day may come when a lawyer's failure to advise a client of the potential risks to the company arising from, say, local opposition to a project could lead the client to allege that the lawyer had failed to provide adequate advice.[129] The fluid relationship among international norms, standards, and hard law thus may have the potential to reshape understandings of the lawyer's role. The organization A4ID report *The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession*, reviewed the professional codes of nine jurisdictions and identified points of both alignment and potential tension between the codes and the Guiding Principles. Ultimately, as the IBA Guidance says, "Whether and the extent to which such potential tensions restrict the ability of lawyers to help their clients respect human rights as a practical matter is a subject for review by individual country bar associations."[130]

Finally, the conduct of human rights due diligence by law firms may result in occasions for lawyers to initiate discussions of the impacts of client activities. The IBA Guidance states that, as businesses:

> law firms can be expected to meet the responsibility to respect human rights in all of their activities (including in their employment of lawyers) and in their business relationships, both with other law firms and business enterprises such as suppliers, and in the services they provide to their clients. Law firms that fail to respect

[127] Interview TG-21
[128] American Bar Association Resolution 109, at 4, n.16
[129] Interview TG-8.
[130] IBA Guidance at 34.

> human rights can therefore expect to be increasingly exposed to similar legal and non-legal risks as other businesses that also fail to do so.[131]

In order to meet its obligation, a law firm "needs to assess whether there are any actual or potential human rights impacts that may be directly linked to the firm's services for a client."[132] The Guidance suggests that a firm may be seen as contributing to an client's adverse human rights impact "when it provides services to enable the client to take actions that are legal (or at least not clearly illegal), but which the firm knows, or ought to know in the exercise of reasonable due diligence, will result in adverse impacts on human rights."[133]

A firm that has such a due diligence process in place to avoid contributing to human rights violations could make it easier for its lawyers to initiate discussions of human rights issues with clients by enabling the lawyers to say that they are simply following standard firm policy. The extent to which firms are willing to put such a process in place may vary, however. First, firms may contest the assumption that they should be regarded as contributing to a client's human rights violations in any instance in which they are simply providing advice on what conduct is in compliance with the law. The traditional view of the lawyer's role as a neutral partisan is that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities."[134] The lawyer is not morally accountable for how the client chooses to use her advice as long as the lawyer does not counsel or assist the client in conduct that the lawyer knows is "criminal or fraudulent."[135] A firm may conclude that this conception of the lawyer's role provides a strong response to any claim that it is complicit in any human rights violations by its clients, and that it therefore does not need to put in place a robust human rights due diligence process. Indeed, putting in place such a process might be taken as an implicit admission that in some cases the firm could be complicit in its clients' abuses.

Some lawyers we interviewed, however, suggested that the standard conception of the lawyer's role may not be as persuasive when a lawyer is acting in an advisory capacity, as opposed to when she is engaged in litigation. Indeed, some lawyers stated that they themselves do not accept it in that context.[136] The advisor can be a vital partner in helping a client imagine and pursue a specific course of action, as opposed to a litigator who encounters the client's conduct after the fact and attempts to fashion the best explanation for it.[137] Thus, as one lawyer put it,

> If for example you have advised a client that what they are doing might well affect adversely human rights of people and the client says, 'Fine I've heard what you say I'm going ahead with this contract,' are you complicit? I mean at the moment there may be no professional problem as long if there is no requirement

[131] IBA Guiding Principles.
[132] *Id.*
[133] *Id.*
[134] Model Rule 1.2(b).
[135] Model Rule 1.2(d).
[136] Interview TG-4, Interview TG-5, Interview TG-8.
[137] Richard Painter

> for you to do more than advise, but in the court of public opinion you could well be found to be complicit even though it's not a matter of a liability.[138]

Second, a firm may prefer not to establish a due diligence process because it fears that doing so may strain relationships with current and prospective clients, who regard the firm as passing moral judgment on their activities. A due diligence process therefore will need to be widely adopted among law firms in order to avoid this potential competitive disadvantage. Otherwise, "people are just cutting themselves out of the market in order to have somebody else pick up that work."[139] This suggests that there may be a collective action problem among firms; none may want to risk being disadvantaged by being the first to inaugurate human rights due diligence, even though firms would be better off if all agreed to do so. The market dynamics by which firms may overcome this obstacle would require analysis beyond the scope of this paper, but it is important to recognize the challenge.

Conclusion

Lawyers' willingness and opportunity to advise business clients on the soft law dealing with the duty to respect human rights is likely to vary. Advising on soft law that may have hard law consequences is the role with which lawyers are most likely to be comfortable, and is an activity that is arguably is required by their professional responsibilities. Moving outward from that core begins to encompass broader concerns that some lawyers may not regard as within their province. At the same time, many major corporations now expect general counsel to provide an assessment of the full range of risks that the company may face. The pervasiveness of social media and the activities of NGOs can make potential adverse human impacts a significant risk for some companies. This suggests that inside counsel in at least major companies may increasingly attend to this risk. It remains to be seen whether an established role for outside counsel will emerge in this process. As many interview subjects commented, we are in the early phase of attention to the human rights impacts of business activities. This means that lawyers as well are in the early phase of determining what these developments will means for their sense of themselves as professionals.

CONCLUSION: LAWYERS, BUSINESS, AND HUMAN RIGHTS

The emergence of a transnational governance regime in general, and efforts to minimize adverse human rights impacts from business activities in particular, challenge conventional understandings of what constitutes law and regulation. They reflect a dynamic process that involves complex interaction among informal norms, public expectations, voluntary standards, economic incentives, and codified rules of behavior. The various spheres of activity that constitute this regime each have the potential to establish a set of expectations based on cosmopolitan values that may trump compliance with national or local legal requirements. They also have the potential to impose sanctions that are distinct from legal liability. This state of affairs can create uncertainty for transnational companies with respect to the standards of behavior to which they will be held accountable.

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[138] Interview TG-9.
[139] Interview TG-10.

Lawyers may be in a position to help business clients reduce this uncertainty by advising on how companies can minimize the risks of human rights violations. We have suggested that many lawyers' conceptions of law and regulation may create reluctance to assume this role. We have also, however, explored the ways in which some lawyers are finding occasions to embrace it, and how they frame their advice to clients when they do. All the subjects we interviewed expressed the view that attention to business and human rights is gaining significant momentum that is unlikely to abate. It remains to be seen whether and how business lawyers will accept what could be an opportunity to integrate their roles as representatives of clients and as professionals with some responsibility for the public good.