



# The UN Guiding Principles on Business and Human Rights

*A guide for the legal profession*



Advocates for International Development  
Lawyers Eradicating Poverty





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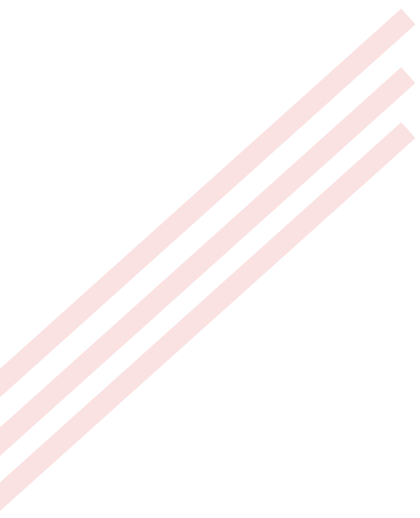
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# Introduction

**U**nanimously endorsed by the UN Human Rights Council in June 2011, the UN Guiding Principles on Business and Human Rights were the result of extensive consultations and debate about businesses' status as human rights actors. Individual lawyers and legal experts were central to this process. The Guiding Principles establish that all businesses – not just states – have an explicit role in the realisation of human rights through a worldwide responsibility to respect them and provide guidance on how businesses can actually implement such respect. Since then, hundreds of multinational businesses have publicly committed to respecting human rights consistent with the Guiding Principles, not only for ethical reasons, but also to protect themselves from potential liability, negative public relations and the damaging reputational impact of civil society campaigns.

This guide focuses on three areas that were identified at the meeting we convened, in late 2011, to start a discussion about the unique challenges law firms face as they adopt business practices consistent with the Guiding Principles. Part 1 examines the import of the Guiding Principles for lawyers. Part 2 introduces how firms can put their human rights responsibilities into practice when working for clients. Part 3 examines the relationship between professional codes of conduct for lawyers and the Guiding Principles and explores how the codes could further support the Guiding Principles.

As a charity working to empower lawyers to fight global poverty, Advocates for International Development comes to this area with a particular agenda. Our purpose in this guide is to advance respect for the human rights of people living in poverty in developing countries. We believe that they remain the people most vulnerable to the worst human rights abuses in the world today. At the same time, we hope that the guide will contribute to respect of human rights in general by businesses, in particular, law firms.

As a result, the focus of this document is not principally on the human rights of lawyers or people working for law firms in developed countries, but on the global impact that lawyers can make through their relationships with their clients. Nor is the purpose of this short guide to attempt to overwrite the experiences of those firms that have already started to grapple with the Guiding Principles, but to provide a further interpretation of how firms should begin to consider their human rights responsibilities. Thus, it is an opinion in a young and developing field and not a definitive 'how-to' instruction booklet.

Consequently, in Part 2, on law firms' implementation of the human rights due diligence process, questions of exactly how and to what extent firms' processes will need to be developed or changed are deliberately left unanswered. Some may find the absence of a more prescriptive set of instructions frustrating, but it is our belief that individual firms and businesses need to learn by internally developing and

extending their processes and approaches in a way that works for them, within a broad framework. The provision of a series of model approaches or forms risks reducing respect for human rights to a forced, inflexible and imposed tick-box exercise.

Moreover, in the analysis of the relationship between professional codes of conduct for lawyers and the Guiding Principles, suggestions are posed for bar associations and law societies on how their codes of conduct could be amended to better support a cross-sector standard on respect for rights, but these should not be seen as definitive decrees or requirements.

We have therefore produced the following report with the modest ambition

of advancing the discussion on law firms' implementation of their responsibility to respect human rights. Our intention with this report is that it will contribute to the understanding of both Guiding Principles sceptics and enthusiasts within the legal field. Specifically, we hope that it will help to overcome the practical concerns of law firms that do not currently see how their business can commit to the Guiding Principles and to enable all firms to better consider what the Guiding Principles mean for their day-to-day work.

*Yasmin Batliwala*  
*Chief Executive*

## Part 1:

# The Import of the UN Guiding Principles on Business and Human Rights For Law Firms

## Why the Guiding Principles matter for law firms

Law firms may question why they should adopt and implement the Guiding Principles on Business and Human Rights ['Guiding Principles'], with its key principle of respect for human rights, into their business practices. After all, the Guiding Principles are not legally binding and the risk that law firms may cause human rights infringements and be subject to civil society campaigns is lower than for businesses in many sectors, such as those in manufacturing, extractives and defence. Furthermore, changing internal processes to ensure respect for human rights will have associated costs at a time when firms may be pursuing cost reduction measures.

However, there are sound business reasons for law firms to ensure that they act consistently with the Guiding Principles; namely:

- The changing legal standards

- New client expectations
- Staff recruitment, retention and productivity

Private international law instruments and institutions are increasingly incorporating the principle that businesses are to respect human rights as outlined in the Guiding Principles. In the finance sector, for example, the International Finance Corporation (IFC) has modified its performance standards to support this principle<sup>1</sup> and the updated Equator Principles also incorporate the responsibility of businesses to respect human rights.<sup>2</sup> International transactions are being subjected to regulations with human rights implications, such as Section 1502 of the Dodd-Frank Act in the United States that requires companies utilising certain minerals to conduct due diligence on their supply chains to determine whether the minerals originated in the Democratic

1. Policy on Environmental and Social Sustainability, International Finance Corporation, para. 12 (2012), available at: <[http://www1.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/ifc+sustainability/sustainability+framework/Sustainability+Framework++2012/#SustainabilityPolicy](http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/ifc+sustainability/sustainability+framework/Sustainability+Framework++2012/#SustainabilityPolicy)>.

2. Equator Principles, available at <<http://www.equator-principles.com/index.php/about>>.



Republic of Congo or adjoining countries.<sup>3</sup>

In addition, companies are having to account for their effects on human rights as a growing number of governments require corporate social responsibility reports. In the United Kingdom, proposed amendments to the Companies Act will require listed companies to report on any social, community and human rights issues related to the company's business performance.<sup>4</sup> More targeted reporting requirements are also emerging, such as the US Reporting Requirements on Responsible Investment in Burma.<sup>5</sup> Governments' support for the principle of businesses' respect for human rights, including the Organisation for Economic Co-operation and Development's incorporation of the principle into its 2011 updated Guidelines for Multinational Enterprises<sup>6</sup> and the European Commission's inclusion of the principle in its corporate social responsibility policy of October 2011,<sup>7</sup> will likely give impetus to further governmental efforts to ensure respect for the principle. Firms that are not up-to-speed with these developments will not be fully equipped to provide their clients the comprehensive advice that they expect and for which they pay.

Although the influence of human rights on businesses is in its infancy, international human rights law is poised, much as environmental law was thirty years ago, to become a formidable force in shaping the way businesses carry out their operations across the globe.

As an increasing number of businesses translate the Guiding Principles into their practices and policies, they will not only need advice on emerging regulatory requirements and evolving national laws, which reflect human rights principles, but also guidance on how to incorporate human rights concerns into their practices in order to maintain the ability to provide authoritative and comprehensive advice to businesses. As a result, firms that do not adopt the principle of respect for human rights could potentially risk failing to attract new clients. In addition, just as with other aspects of corporate responsibility, law firms that are able to demonstrate their respect for human rights may find they have a competitive advantage in recruitment and that it is easier to retain and motivate their employees.

3. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173, 2010 [pdf] available at <<http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>>.
4. Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, s414C(4)(d)(iii) <http://www.bis.gov.uk/assets/biscore/business-law/docs/f/12-979-future-of-narrative-reporting-new-structure.pdf>
5. See for example Act amending the Danish Financial Statements Act (Accounting for CSR in large businesses) (2008), available at <<http://www.csr.gov.dk/legislation>>; U.S. Department of State, Office of Policy Planning and Public Diplomacy in the Bureau of Democracy, Human Rights and Labor, Reporting Requirements on Responsible Investment in Burma, 2012b, available at: <<http://www.humanrights.gov/2012/07/11/burmaresponsibleinvestment>>.
6. Guidelines for Multinational Enterprises, Organisation for Economic Co-operation and Development (OECD Publishing: 2011), available at: <<http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/1922428.pdf>>.
7. A Renewed EU strategy 2011-2014 for Corporate Social Responsibility, European Commission (2011), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>>.



## What introducing respect for human rights implies

### Extending existing practices

Law firms already have established processes to check anti-money laundering, other illegal activities and client ownership issues related to clients and some have sophisticated approaches to corporate responsibility issues. Adopting business approaches consistent with the Guiding Principles should extend and develop existing good practice, not replace it. Law firms are expected to learn and develop their approach to respecting human rights over time, since there will never be a single standard that will work perfectly across the whole legal sector and in all situations.

publicity. Reputational and human rights risk management practices and policies may be aligned, but are not identical. In general, the Guiding Principles imply working with clients to reduce human rights risks.

### Adopting risk-based, prioritised and proportional processes

Whilst they place an emphasis on changes in practices rather than rhetoric, the Guiding Principles ask businesses to adopt processes that are practical, risk-based and proportional to address human rights risks. In doing so, law firms are working toward reducing the risk that they contribute or are linked to the adverse human rights risks of their clients.

### Instituting training and education related to the Guiding Principles

Training and education will likely be key means to develop law firms' understanding and ability to conform to the Guiding Principles. Without a broader understanding of what it means to respect rights and where human rights risks lie, processes risk being reduced to a paper exercise. Lawyers need to be equipped to identify and make decisions about human rights risks associated with their clients and client matters. They also need to be able to properly advise their clients on such risks in connection with the services they provide to their clients.

### Assisting not avoiding clients

The Guiding Principles do not automatically imply that firms are expected to avoid clients who have been subject to bad

### Using a firm's influence

The Guiding Principles do state that the ultimate action a business should take, where it cannot otherwise avoid contributing to an adverse rights impact is to end a business relationship. However, this is an ultimate action, which would follow attempts to mitigate the human rights risk or the adverse human rights impact, according to the Guiding Principles. Only

in extremely exceptional circumstances will law firms conclude that genuine respect for human rights will imply ending a business relationship. As a practical matter, law firms will use their influence, termed ‘leverage’ in the Guiding Principles, to convince businesses to respect human rights. In other words, leverage with a client or potential client will generally mean a proactive approach of engagement, with advice on human rights issues, which looks toward the long-term interests of a well-run business.

## Looking Forward

The Guiding Principles, with their underlying concept of respect for human rights, may pose some challenges for law firms, but they also offer significant benefits. Not only will firms be acting in an ethical manner, but they also will more ably carry out their role of trusted advisors and representatives of businesses. In coming to understand the content of the Guiding Principles, how they apply to law firms and what steps firms should take to implement them, law firms will be instituting a process that will continue to develop and evolve over time with increasing experience and expertise as they strive to fulfil the responsibility to respect human rights.

## Part 2:

# Law Firms' Implementation of their Human Rights Responsibilities In their Client Relationships:

## the Human Rights Due Diligence Process of the UN Guiding Principles on Business and Human Rights

### Introduction

The United Nations Guiding Principles on Business and Human Rights ['Guiding Principles'], unanimously endorsed by the UN Human Rights Council in June 2011, are poised to become an increasingly important facet of law firm practice. The Guiding Principles articulate the responsibility of businesses, and thus law firms, to respect human rights and in doing so, set forth a global standard of expected conduct regardless of where a business carries out its activities. In acknowledging the explicit role and responsibility of businesses in the realisation of human rights, they draw upon international law for their content. Guiding Principle 11 serves as the key foundational principle for businesses; it provides that businesses' respect for human rights means they should:

- i) avoid infringing on the human rights of others and

- ii) address adverse human rights impacts with which they are involved.

Law firms will want to consider the application of the Guiding Principles throughout their practices, including with respect to their employees, suppliers, and in their relationships with their clients. In particular, given the important advisory and representational services that law firms provide to their clients, they will want to carefully reflect upon ways to avoid involvement and means to address adverse human rights impacts in their client relationships. To do so, firms will need to understand how they can be involved in adverse human rights impacts and also what their responsibilities are when they are involved.

The Guiding Principles articulate three types of involvement for businesses,

including law firms, each of which entails a different responsibility:

- They can cause adverse human rights impacts.

*Responsibility:* They are responsible for the impact and should take steps to cease or prevent the impact.

- They can contribute to adverse human rights impacts.

*Responsibility:* They are responsible for taking steps to cease or prevent their contribution and should also use their leverage to mitigate any remaining impact by other parties involved to the greatest extent possible.

- Their operations, products or services can be directly linked to adverse human rights impacts through their business relationships

*Responsibility:* They are not responsible for the adverse impact nor for taking remedial measures although they may opt to take a role in such measures if they wish. They are responsible for using leverage over the client to mitigate the risk that the abuse continues or recurs. The focus is not on the risks that the client poses to human rights in general, but on the risks that the client may harm human rights in connection with the firm's services. [Q.27]

The two types of involvement of most concern to law firms relating to their clients are those of contribution and direct linkage. Law firms should be aware, however, that the distinction between these two situations is not always clear, although the Guiding Principles seem to suggest an element of knowledge or complicity associated with 'contribution'<sup>1</sup>. Given the current discussion of these concepts within businesses, academia, and among lawyers, further development and clarification of these concepts is likely to occur in the future. Examples of each of the three types of involvement are contained in 'The Guiding Principles and The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', published by the United Nations Office of the High Commissioner for Human Rights.

The Guiding Principles suggest a process, termed 'human rights due diligence', as the key means for businesses to identify, prevent, mitigate and account for how they address their adverse human rights impacts. The human rights due diligence process includes:

- assessing actual and potential human rights impacts
- integrating the findings
- acting upon the findings
- tracking responses, and
- communicating how impacts are addressed.

While all aspects of due diligence are important and merit consideration by law firms, this part of the Guide limits its scope to two topics within the due diligence process that are most closely tied to law firms' relationships with clients operating in developing countries. Yet, the information provided applies to firms' relationships worldwide. These topics are:

- 1) Assessing actual and potential human rights impacts
- 2) Taking appropriate action in response to adverse human rights impacts of clients

Implementing human rights due diligence in order to avoid involvement in the adverse human rights impacts of clients and specifically, assessing and taking appropriate action with respect to actual and potential human rights impacts of clients, can initially appear to be a mammoth logistical task and therefore entirely daunting to law firms. This may particularly be the case where the firm has numerous clients in a range of different business areas and for small and medium-sized law firms.

However, this part of the Guide is intended, in a general manner, to show firms that support for human rights is an extension of many of their current practices and policies and consistent with their professional responsibility obligations and

respect for the rule of law. Adherence should be a progressive, evolving and developing process that is not an overly burdensome addition to their current handling of clients, but rather, a new opportunity to further the best interests of clients while respecting human rights.

No single approach exists for law firms to implement respect for human rights into their client relationships, but there are some general considerations based on the Guiding Principles that law firms could utilise to effectively ensure that they are aware of human rights risks of actual and potential clients and to facilitate appropriate action. Therefore, the specific purpose of this part is to provide a descriptive outline of those considerations. Examples are included to illustrate the general considerations but are in no way prescriptive for actual situations given the unique context, relationship, and work for a potential or actual client.

As a final introductory note, this part should be read in parallel with a copy of the Guiding Principles and The Corporate Responsibility to Respect Human Rights: An Interpretive Guide ['UN Interpretive Guide']. In order to facilitate referral to the Guiding Principles, citations to particular principles and commentary are noted in brackets. In addition, the relevant sections of the Interpretive Guide are designated in brackets by Question number [Q].

1. The commentary to Guiding Principle 17 suggests that contributing to adverse human rights impacts may raise issues of 'complicity', both in a non-legal sense, where the business is perceived as being 'complicit' and a legal sense. In the latter case, the commentary refers to the international criminal law standard for aiding and abetting of 'knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime'.

## Definitions

### Human rights

Human rights are rights inherent to all human beings. These rights include, at a minimum, those contained in the International Bill of Human Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), and the four categories of fundamental principles and rights listed in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, which are covered in the eight core International Labour Organization conventions. A list of these rights is contained in the 'Table of International Human Rights of Instruments' at the end of this Guide.

### Human rights risks

Human rights risks, as stated in the commentary to Guiding Principle 17, are the business' potential adverse human rights impacts. The UN Interpretive Guide provides that '[a] business enterprise's human rights risks are any risks that its operations may lead to one or more adverse human rights impacts.'

### Leverage

The UN Interpretive Guide defines leverage as 'an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.'

### Mitigation

The mitigation of an adverse human rights impact, according to the UN Interpretive Guide, concerns actions taken to reduce its extent, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.

### Remediation/remedy

Remediation and remedy refer to both the processes of providing a remedy for an adverse human rights impact and the substantive outcomes that can counteract or 'make good' the adverse impact, as stated in the UN Interpretive Guide. Remediation aims to put right any actual human rights impact that an enterprise causes or to which it contributes.

# 1. Assessment of actual and potential human rights impacts

## 1.1. General Considerations

### 1.1.a. Purposes

According to Guiding Principle 17, 'in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, businesses should carry out human rights due diligence.' The assessment of actual and potential adverse human rights impacts serves as an essential first step of a due diligence process [Q. 34].

The human rights assessment permits law firms to identify and evaluate any actual or potential adverse human rights impacts of prospective or current clients with which the firm may be involved. Involvement may be a result of the law firm's own activities, that is, the firm causes or contributes to the adverse human rights impact. It also can arise from the business relationship the law firm has with the client where the services provided by the firm to the business are directly linked to adverse human rights impacts of the business [Principle 18]. When the firm identifies how it may potentially or actually cause, contribute, or be linked to an adverse

human rights impact of a particular client, it can then evaluate the type and severity of the impact and consider appropriate actions to prevent, mitigate and/or remediate it, as appropriate.

While a human rights assessment may bear some similarities to a determination of whether there may be adverse reputational implications to working with a client, they are not the same. The human rights assessment assists the firm in identifying specific human rights risks, that is risks of having an adverse human rights impact on specific people, as contrasted with risks to the business itself.

### 1.1.b. Timing

A human rights assessment clarifies the specific human rights risks at a particular point in time related to a specific operating context as well as the actions the firm needs to take to prevent and mitigate those risks [Q.26]. In practice, when working for a client, the firm may find that it did not foresee certain adverse human rights impacts of the



client [Commentary to Guiding Principle 22], new information may come to light or the client may modify the specifics of the instruction. In addition, the human rights risks may change.

In other words, as human rights risks for the firm are dynamic and are tied to the businesses to which the firm provides services, an initial human rights assessment of prospective clients and a base-line assessment for current client matters of the firm serve as a starting point for a process of on-going due diligence related to a firm's human rights risks. According to the commentary to Guiding Principle 18, assessments of human rights impacts should be undertaken at regular intervals, including:

- Prior to a new activity or relationship;
- Prior to major decisions or changes in the operation;
- In response to or in anticipation of changes in the operating environment (e.g. rising social tensions); and
- Periodically throughout the life of an activity or relationship.

Therefore, the firm will need to remain sensitive to changes in the operating environment and the client matter in order to discern any potential or actual adverse human rights impacts.

## Example 1

**Example 1:** The firm has concluded negotiations on behalf of a client in a North African country that is licensing information technology from a US-based company and is finalising the terms of the agreement. The new government, elected following the pro-democracy revolution, is becoming increasingly frustrated with the anti-governmental demonstrations and is enacting measures to censor and restrict free speech and association.

The firm will want to discuss with its client the evolving situation, the impact the political changes might have on the licensing arrangement, and the eventual ability of the client to operate without infringing on the rights of citizens.

A firm will want to conduct a human rights assessment before any matter is embarked upon, even where the firm has already

handled another matter for the company, due to the contextualised nature of human rights risks.

## Example 2

**Example 2:** A European-based toy company had previously retained a law firm in connection with the negotiation and drafting of agreements with distributors of its toys in China. The company now wishes to establish a manufacturing facility in China and the firm has been requested to represent it in connection with the matter.

To meet its responsibilities under the Guiding Principles, the firm would need to reassess the human rights risks and potential adverse impacts of completing the matter. The human rights risks associated with toy distributors in a country will differ significantly from those related to a manufacturing facility.

### 1.1.c. Nature and Content

A human rights assessment will vary in scale and complexity with, according to Guiding Principle 17(b), ‘the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations’. Therefore, the size of the law firm, its practice areas, the size, sector and location of its clients, and the matter(s) on which the firm does work for the client are factors that influence the extent and content of its human rights assessment process. While risk factors in traditional risk assessment include both the consequences of an event (its severity) and its probability, in the context of human rights risk assessment, severity is the predominant factor.

The severity of a client’s potential or actual human rights impact will be judged by three key criteria: i) gravity of the impact

(its scale), ii) number of individuals affected (scope) and iii) irremediable character of the impact, which effectively means the ability to restore persons whose rights have been affected to a situation that is at least equivalent to their situation before the impact [Q.13 and Commentary Guiding Principle 14]. For the human rights impact to be considered ‘severe’, it only needs to meet one of the three criteria; it is not necessary that it meet all three, although where the scale and the scope are significant then it will likely be less remediable [Q.13].

Thus, whether the business client is small, medium or large and regardless of the size of the firm, it is important to determine the severity of the adverse human rights impacts so that the processes are proportionate to the human rights risks [Q. 12].

### Example 3

**Example 3:** A sole proprietor of an electrical supply company wishes to engage the firm to draft a consultancy agreement for accounting services from the local office of an internationally-known accounting firm. The law firm also is approached by the head office of a major multinational oil company that seeks representation in connection with the purchase of a local oil producer in south Sudan.

The contextualised and scalable nature of human rights due diligence means that the firm should not assess the human rights risks of conducting every piece of work in the same manner. The risks where the client is a sole proprietor engaging an accounting firm are clearly less than for a multinational oil company in a conflict zone.

Firms will approach the implementation of due diligence, in general, and human rights assessments, in particular, in different ways [Q.26]. Although there is definitely an opportunity for learning and the sharing of ‘best practices’ among law firms in and across practice areas, there is no single approach that will be best for all law firms. Organisational, systems, learning and experience are likely to develop over time. The essential outcome to an effective human rights assessment is that it identifies the nature of potential and actual adverse human rights impacts with which the law firm may be involved. Where the risks are severe and the context particularly complex the advice of experts may be required and instructive [commentary to Guiding Principle 19].

A human rights impact assessment typically includes:

- Assessing the human rights context;
- Identifying who may be affected;
- Cataloguing the relevant human rights standards and issues; and

- Projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. [Commentary to Guiding Principle 18]

The assessment should also accord particular attention to any adverse human rights impacts on vulnerable persons and groups, including women, children, the elderly, persons with disabilities, minorities and indigenous peoples. These persons may be excluded from society and exposed to discrimination and other adverse human rights impacts [Q.4, Q.37]

The human rights assessment should include all internationally recognised human rights as a reference point, although the actual adverse human rights impacts will differ based on the type and nature of work that the firm is to perform or is performing for the client, and the sector and operational context of the client, among other factors. Specifically, the firm will want to consider whether its service is likely to have an impact on:

- A civil and political right (see Universal Declaration of Human Rights and International Covenant on Civil and Political Rights as starting points)
- An economic, social or cultural right (see Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights as starting points)

- A labour right (see the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the eight core conventions of the International Labour Organization as starting points)

It should be noted that there is no hierarchy of rights in international human rights law and that human rights are treated as indivisible, interdependent and interrelated [Q. 87].

### 1.1.d. Risks Associated with Businesses in Particular Industries or Locations

Working for clients that operate in particular industries or geographic locations will not automatically result in contribution to or linkage with adverse impacts. However, awareness of particular human rights risks in particular industrial sectors is important. In addition, knowledge of the relevant political context of the country or region, including where there is a weak rule of law, non-democratic government or on-going conflict will be of assistance. This information can assist a law firm with the identification of potential human rights risks associated with a particular client or matter, for example, where a client wishes to:

- establish a manufacturing facility in a country where the use of child labour is known to be commonplace;
- contract with a security company in a country where the rule of law is weak;
- enter into a manufacturing agreement with a company in a country that does not enforce national laws protecting indigenous communities;
- create a web-based information system provider in a country with non-democratic institutions; or
- develop an extractive facility where there is an on-going conflict.

## Example 4

**Example 4:** A client with clothing manufacturing facilities in a number of Asian countries engages the firm to represent it in connection with its purchase of a manufacturing company in Myanmar.

The human rights risks of working with clients that operate in Myanmar – where democratic

institutions are not yet fully developed– are inherently higher than working in more developed economies.

Each client and related matter will need to be assessed, for such adverse human rights impacts, in an independent manner. In addition, when assessing risks, a firm may

need to look at the risks directly associated with the matter as well as the context for the risk.

## Example 5

**Example 5:** A client with a refinery in Algeria requests the firm to review an employment contract for additional security personnel following a recent attack on its personnel and premises.

The firm will not only want to review the contract in light of labour standards contained in key International Labour Organisation conventions, but also should consider whether the responsibilities assigned under the contract do not encourage excessive use of force by the security personnel that would result in infringements on the right to life of persons.

## 1.2. Assessment of human rights impacts when taking on new clients or matters

The commentary to Guiding Principle 17 provides that '[h]uman rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements'. Thus, the ideal time for a law firm to conduct a human rights assessment is before the firm accepts work for a new client. However, while the firm should attempt to identify actual and potential human rights risks at this stage, it will likely obtain additional information about such risks during the performance of services for the client.

In addition, as stated in section 1.1.b. above, an assessment also should be carried out when the firm agrees to perform work on a new matter for an existing client of the firm, as the nature, content and operating context for the matter may pose different human rights risks than previous work. In general, it is most effective to begin to assess human rights risks as early as possible in the life of a particular activity or relationship [Q.36].

The human rights assessment will provide advance notice of potential and on-going adverse human rights impacts. This information will allow the firm to incorporate human rights compliance into the scope of work for the client. In addition, the exercise of conducting a human rights risk assessment can set the right tone for the client-firm relationship [Q36]. Where the

firm has created a human rights policy, as suggested by Guiding Principle 16, the firm will likely find it useful to provide the policy to a prospective client to clearly convey the firm's commitment to respect human rights. The provision of the policy also furthers the firm's management of the client's expectations of the firm related to human rights.

While the human rights assessment will certainly entail additional procedures prior to agreeing to work for a client, the firm may be able to incorporate its human rights risk assessment for prospective clients into the 'know your client' phase, which includes a conflict check and in some cases, a financial verification. However, there is nothing in the Guiding Principles that suggests that the firm's awareness of adverse human rights impacts by a prospective client, as a result of a human rights assessment, would activate any responsibility by the firm with respect to the adverse impact. The firm will not yet have entered into a relationship with the client and will not yet have committed any action that could have contributed towards an adverse impact.

Moreover, accepting work for a client that has on-going adverse human rights impacts does not mean that the firm's services will necessarily be contributing or linked to those impacts. This will not, however, necessarily protect the firm from any reputational risks associated with working with particular businesses.

## Example 6

**Example 6:** A UK-based subsidiary of a US multinational logistics business approaches a law firm for advice about renewing a lease on a London office. The office is principally used as an administrative centre that carries out human resources and payroll services for its UK employees. The US multinational has recently received media attention for involvement in the transport and dumping of chemicals in Mexico that have negatively impacted the health of local people.

Where the firm's services relate to the UK office, then the firm would not likely be involved in any of the business' adverse human rights impacts in Mexico. The firm will nevertheless want to consider reputational implications of its relationship to the UK based subsidiary of the US multinational.

It is impractical and unrealistic to suggest that where there is any risk of an adverse human rights impact as a result of taking on an assignment for a new client then the law firm's responsibility is to decline the work. In reality, there will be a risk associated with nearly every assignment and each client of a law firm, but where some will be negligible others will be significant. As such, the response of law firms to human rights risks should not be considered as black

and white. The contexts and risks will be dynamic and law firms will be required to use their judgement to manage risks.

In practice, law firms will be faced with the option of: i) taking on a matter and monitoring risks commensurate with the context, ii) accepting a matter and taking action to avoid a contribution or linkage to the adverse human rights impacts or iii) declining to take on a piece of work.

## Example 7

**Example 7:** A small company that manufactures children's clothing in Bangladesh contacts the firm. The president of the company has agreed to manufacture brand clothing for a UK retailer. The Bangladeshi company requests the law firm to represent it in negotiations and the finalisation of an agreement with the UK retailer.

- A. The law firm's human rights assessment of the Bangladeshi company may not indicate any on-going or potential adverse human rights impacts. In this case, the firm should nevertheless continue to monitor the matter, due to the nature of the risks associated with a clothing manufacturer in a developing country, in order to avoid involvement with any such impacts of which it becomes aware later.
- B. However, if the assessment reveals that the Bangladeshi manufacturer is operating at full



capacity, then the firm's representation will facilitate the increase in manufacturing orders and there is a serious risk that the law firm would contribute to labour violations by the Bangladeshi business. In this instance the firm's responsibilities are fairly clear in accordance with the Guiding Principles. The Bangladeshi business would be responsible for causing the adverse human rights impacts and has the responsibility to prevent these adverse impacts. The law firm should take steps to avoid contributing to the adverse impacts. Thus, where the firm decides to represent the Bangladeshi company, it should use its leverage to influence it to increase its manufacturing capacity prior to beginning work for the UK retailer.

This example demonstrates the challenges firms may face when their provision of services to a client may contribute to the client's adverse human rights impacts.

Their responses to such situations and in particular the firm's use of its 'leverage' are considered below in 2.1.

### 1.3. Assessment of human rights impacts in active client matters

Guiding Principle 18 suggests that law firms identify and assess adverse human rights impacts in which they may be involved. Therefore, when firms initially commit to respect human rights and to act in accordance with the Guiding Principles, they will want to consider conducting a base-line human rights assessment of on-going work for clients. This assessment permits the firm to identify both actual adverse human rights impacts of clients in which it may be involved on the basis of its services and potential impacts of clients in which it could become involved. Once the impacts are identified, then the firm can evaluate whether the firm contributes to

such adverse impacts or whether, through its services to the clients, the firm is linked to the client's impacts.

Law firms are expected, as stated in Guiding Principle 24, to address all their adverse human rights impacts, but it may be difficult for them to carry out due diligence and in particular, human rights assessments immediately and simultaneously, particularly where the firm has a large number of clients [Commentary Guiding Principle 17]. In such case, law firms should prioritise those client matters where the human rights impacts are likely to be the most severe relative to other client matters [Guiding Principle 24].

## Example 8

**Example 8:** The firm has a number of clients that are in the extractive industry sector with headquarters primarily in Europe. Several of these clients are in the process of establishing new mining sites and the firm is providing representation to the clients on the contracts for the construction and operation of the sites. Several clients are confronted with protests by local inhabitants who claim illegal occupation of their lands by the relevant company. The clients have either employed security services or asked the government to enhance security at the site in countries where security forces have a reputation for overly harsh tactics.

The firm might reasonably prioritise the client companies with problems with local persons in its baseline assessment and follow-up actions given that the operation affects the welfare of an entire community and that the security forces may be impacting on the right to life and security of the individuals who are conducting protests.

Following the law firm's determination that it is actually contributing or linked to adverse human rights impacts of a client or could be in the future, the firm will be faced with a need to determine what action to take to cease contributing or being linked to the impact. The response will range from continuing its services and

taking appropriate action to withdrawing from representation, but will be unique to each firm and each client-relationship. The following section provides more detailed consideration related to how a law firm might respond when it is involved in the adverse human rights impacts of clients.

## 2. Appropriate action in response to adverse human rights impacts of clients

### 2.1. General Considerations

Once the firm determines, based on the human rights assessment, that it is involved in actual adverse human rights impacts of the client or that there is a human rights risk, that is, a potential impact in which the firm may be involved, it should take concrete action [Guiding Principle 19]. In the case of on-going services to a client, the firm is required to take action, regardless of whether the firm contributes or is linked to

the client's adverse human rights impacts through its services. However, where the prospective client has adverse human rights impacts, the firm does not have any responsibility to take action unless it enters into a relationship with the client thereby creating the concrete risk of contributing or being linked to the adverse impacts of the client.

#### Example 9

**Example 9:** A coffee growing enterprise in Brazil seeks to expand its distribution efforts to the Scandinavian countries. During the human rights assessment process, the firm discovers that the labour practices of the company infringe a number of rights of its employees.

At the due diligence stage, having not yet committed any act that could have contributed toward an adverse impact of the company, the firm does not have a responsibility to influence the company and is unlikely to have any leverage, in any case. If the firm determines to act for the client, its responsibilities will change.

A key distinction in determining what action the firm should take is whether the firm contributes to the adverse impact or whether it is involved solely because the impact is directly linked to its services to the client by its business relationship [Guiding Principle 19(b)]. Where the firm's involvement in the adverse human rights impact would arise because of its contribution to the impact then the firm should take steps to cease or prevent its contribution and then use its leverage or influence with the client to mitigate the client's impact [Commentary to Guiding Principle 19]. In the case of the firm being directly linked to the adverse human rights impact as a result of its services to the client, the firm is not responsible for the impact, nor for taking remedial measures, but instead, is responsible for using its leverage with the client to mitigate the client's adverse human rights impacts [Commentary to Guiding Principle 19].

As noted above, in the Key Concept section, the distinction between the types of involvement of the firm in the adverse human rights impacts of the client is not always clear. However, where the firm knows that its advice and services assist or encourage the client to infringe upon human rights, then the firm would be prudent, in deciding upon the relevant action, to consider its involvement more of a contribution than linked to the client's adverse human rights impacts.

As with human rights assessments, the impacts to be addressed first by the firm are those where the actual or potential human rights impacts are most severe [Guiding Principle 24]. After the firm has addressed the most severe impacts then it should address the impacts that are next most severe and continue to do the

same until it has addressed all actual and potential human rights impacts [Q.87]. This means that the firm should prioritise the human rights impacts that are or would be the most severe in terms of their scope or scale or where a delay in responding to an impact would make it irremediable [Q87].

In both cases, where the firm is contributing or is linked to the adverse human rights impact, the firm is to use its leverage with the client. Leverage is the ability of a law firm to effect change in the wrongful practices of its client, where the client may contribute or has already contributed to an adverse human rights impact. Firms' leverage – as with human rights risks – will be contextual and will vary from client to client. The leverage also will be affected by factors relating to the firm-client relationship: the quality of the relationship and whether the firm represents the client in other matters, as well as the degree of the business' commitment to respect human rights, which may be manifested as a Global Compact participant or in a written publicly available policy.

However, leverage should not be interpreted as simply meaning threat of withdrawal of service. Convincing and influencing clients of the need for a change in policy or practice, for an alternative course of action or for further advice, either from the firm or another service, will be the more usual form of leverage used by firms. Examples of leverage for firms include:

- Raising an issue of adverse human rights impacts with a client
- Suggesting the firm can provide advice to client on said issue

- Advising the client of the consequent impacts on the individuals
- Advising the client of the potential reputational impacts on the client
- Advising the client on measures to avoid/mitigate/remedy adverse impacts
- Persuading the client to take such measures
- Considering whether to decline or withdraw services

In practice, the firm is only likely to decline clients in exceptional circumstances and will more regularly try to use its leverage to mitigate the risk of human rights impacts once in an active client relationship.

The Guiding Principles do not suggest that firms have any special responsibility to use their leverage to influence their clients to respect human rights as a general rule or blanket policy. Firms are only responsible for avoiding and preventing their own involvement in adverse impacts when they are contributing or their services are directly linked to the client's adverse human rights impact.

## Example 10

**Example 10:** While acting for a multinational chemicals manufacturer, in relation to a warehouse in India, the firm becomes aware of allegations of chemical dumping by the same manufacturer in Indian rivers.

The firm will want to satisfy itself that there is no linkage between its services and the potential adverse impact in order to ensure that it does not have to take steps to mitigate the risk that the abuse by the client continues or recurs. Although the firm may want to raise the issue with the client for other reasons (for example, reputational reasons or because it believes that doing so is in the long-term best interests of the client), under the Guiding Principles the firm only has a responsibility to use its leverage if its services are directly linked to the adverse human rights impact.

## 2.2. Response in case of potential or actual contribution to adverse human rights impacts

Where a firm is at risk of making a potential contribution to a negative human rights impact or in a case where it has made an actual contribution, Guiding Principle 19 states that the firm has a two-fold responsibility. First, the firm has a responsibility to act to cease or avoid contributing to the adverse human rights impact. Second, the firm should use its

‘leverage’ over the business that is at risk of or actually causing the impact to mitigate any remaining impact by the business to the greatest extent possible. The purpose of the firm’s two-fold responsibility is to ensure that where the firm is contributing to the adverse human right impact, then it is providing for or cooperating in its remediation, as stated in Guiding Principle 22.

### Example 11

**Example 11:** A firm is instructed by a mining conglomerate with world-wide operations to draft and negotiate an agreement with a company based in Asia for extraction of coal. The country is known for its use of children in the mining sector. The firm includes a provision in the agreement that provides that the mining company will respect national labour laws. However, the law provides for a minimum working age of 13 whereas Convention No. 138 on the Minimum Age for Admission to Employment, which has not been ratified by the country, provides for a minimum age of 18 for hazardous work.

The firm is at risk of making a potential contribution to adverse impacts. Therefore, it has the responsibility to avoid making the contribution and to use its leverage with the client to have the client take steps to ensure that the mining company does not use child labour.

The firm’s primary responsibility is to avoid making a contribution; its responsibility to mitigate the potential impact by the client remains commensurate with its level of leverage over the company causing it. Where a firm has used its reasonable

endeavours, and its leverage is weak, it may decide that the company’s reluctance to take steps to remedy the impacts means the firm will be unable to provide services without contributing to the adverse impact and cannot, therefore, act on the matter.

## 2.3. Response in case of involvement in adverse human rights impact due to linkage to its services by its business relationship with the client

Where the firm's services link the firm to the adverse human rights impacts of a business client, then the situation is more complex than in the case of the firm making a contribution to the negative impact [Commentary Guiding Principle 19]. According to the UN Interpretive Guide [Q.46], often it is the occurrence of an actual abuse that results in awareness of its continuation or its recurrence.

In situations where the firm becomes aware that its services will be or are linked to adverse impacts, the UN

Interpretive Guide suggests approaching the future of the client-law firm relationship through a decision matrix [Q.46]. The matrix outlines how the firm is responsible to act to use its leverage, increase its leverage or end the relationship, depending on the nature of the relationship, that is whether it is a crucial or non-crucial business relationship, and the extent of leverage. In addition, while the abuse continues, the law firm should continue to use its efforts to mitigate the client's adverse human rights impact.

### Example 12

**Example 12:** A UK-based retail developer has a long-standing relationship with the firm and regularly seeks advice on leases for shops in its shopping centres. It comes to light that the developer regularly refuses to lease shops to sole proprietorships owned by women and thus, acts in a discriminatory manner.

The firm's services are linked to an adverse human rights impact. The firm will want to avoid a future contribution to the client's adverse human rights impact and therefore will want to ensure that the client acts differently in the future. The firm's longstanding relationship with the client is likely to mean that it has leverage over the developer to mitigate the actual negative impact. Its responsibility is therefore to aim to use that leverage by, for example, offering advice on human rights as a service, inserting a relevant provision in the retainer agreement, and raising the reputational risks to the client.

With respect to prospective clients, where the firm has identified through its human rights assessment a human rights risk,

then the firm will want to determine whether it will be able to use its services to mitigate the risk and try to ensure,



through its agreement with the client on the parameters of its services, that it has the leverage to mitigate the client's impact [Q.46]. Where the firm determines that it will have the leverage to mitigate the prospective client's adverse impacts, then the firm may feel comfortable providing services on the matter, but where it will not have the necessary leverage the high risk of adverse human rights impacts may deter the firm from agreeing to work for the business. [Q.46]

However, in practice, the nature of law firms services to clients means that the advice is provided by a firm and is then followed by action by the client. Thus, the firm will have frequently completed its services on the matter when the client's actions, which cause or contribute to adverse human rights impacts, occur. Where this is the case, the firm will have little leverage over the business to mitigate the impact.

## Conclusion – The Future

The Guiding Principles are still relatively new and therefore, many law firms are in the early stages of understanding their content and determining what modifications in their policies and practices are needed to implement them. With respect for human rights as the ultimate objective, the Guiding Principles provide a blueprint for law firms to manage the risk of having adverse human rights impacts. Managing human rights risks will be a matter of organisational learning for firms as they adapt their policies and practices according to their experiences.

Lawyers will need to be equipped with the necessary skills to identify and manage human rights risks with which the firm may be involved. Training and education would likely be useful to provide lawyers with the relevant skills. Law firms also may wish to draw upon independent external human rights expertise to assist them with identifying and assessing actual and potential adverse human rights impacts

with which they may be involved.

In implementing the Guiding Principles within their on-going services to clients, law firms will undoubtedly uncover areas of difficulties. For example, a client's request to a firm to limit the scope of its work and not to provide advice on human rights may challenge a firm's commitment to respect human rights.

However, as more and more businesses commit to respect human rights consistent with the Guiding Principles, they will seek advice and representation from law firms that incorporate human rights risks. Where business clients are not yet aware of the Guiding Principles, law firms will be able to enhance their services by incorporating human rights into their services. In sum, as the Guiding Principles gain wider acceptance and more extensive implementation, lawyers can and should play a pivotal role in furthering respect for human rights by businesses.

## Part 3:

# An Analysis of the Relationship between the United Nations Guiding Principles on Business and Human Rights and Codes of Professional Conduct for the Legal Profession

Law firms, as a unique type of business with a distinctive role in society, and the lawyers in those firms, will want to implement processes and take actions, suggested by the United Nations Guiding Principles on Business and Human Rights [‘Guiding Principles’], to meet their responsibility to respect human rights. At the same time, they will need to ensure that they comply with applicable codes of professional conduct for the legal profession.

Codes of professional conduct vary from country to country based on their historical development and the nature of a country’s legal system. Provisions in these codes may serve as binding obligations, ethical guidance, or aspirational goals. Regardless of their differences, such codes serve similar purposes: they uniformly provide standards of conduct that lawyers are expected to know and respect as

legal professionals. A lawyer’s breach of an applicable code can have serious consequences for the lawyer and may constitute professional misconduct that results in disciplinary action, including censure, fines, and disbarment by the bar association or law society as well as court action.

Therefore, in order to ensure the compatibility between the Guiding Principles and codes of professional conduct for lawyers, this document conducts a comparative analysis to identify areas where the codes of conduct support law firms’ respect for human rights and those areas of tension between the Guiding Principles and such codes.

The first section focuses on provisions in the codes that either expressly or implicitly support implementation of the Guiding Principles. Generally, acting in a

manner that respects human rights will also constitute acting consistently with code of professional conduct and will therefore be unproblematic. Thus, the purpose of this section is to identify how these code provisions could be further strengthened to bolster law firms' respect for human rights. Advocates for International Development believes that where this potential exists, action by bar associations and law societies should be undertaken as this will not only empower firms that are embracing their duty to respect human rights but will also clarify, for both lawyers and clients that law firms incorporate into their practices a respect for human rights.

The second section focuses on 'issue areas', areas of tension between implementation of the Guiding Principles and conduct consistent with codes of professional conduct. Advocates for International Development believes that many of these tensions could be removed through modification of the wording of the codes. Therefore, suggestions are made as to how the codes could be amended or clarified so that law firms and their lawyers can meet their responsibility to respect human rights.

Recommendations for bar associations and law societies are colour-coded red, amber or green. Red indicates a change that should be made in relevant jurisdictions to urgently address an avoidable tension, amber a change that an association could make to progressively promote the responsibility to respect and green an unproblematic area.

Throughout the analysis the term 'bar association' also refers to law societies and denotes professional organisations that establish rules for legal practitioners within their jurisdictions. The term 'human rights'

refers to internationally recognised human rights, which include at a minimum, the rights in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and the principles concerning fundamental rights in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work<sup>1</sup>, which rights are summarised in the Table of International Human Rights Instruments at the end of this Guide.

The term 'lawyer' is used throughout this analysis in a generic manner to refer to a legal professional and encompasses the various terms utilised by the different jurisdictions, such as 'attorney-at-law', 'legal practitioner', and 'solicitor'.

The codes covered in this analysis are those of: Antigua and Barbuda, Australia (including South Australia, Victoria, Queensland, New South Wales, Western Australia, Tasmania, Australian Capital Territory and Northern Territory), Dubai, England and Wales, Europe, Germany, Nigeria, South Africa, and the United States (American Bar Association Model Rules of Professional Conduct). Given the extensive nature of the relevant provisions of the codes, the specific provisions are contained in Appendix A to this document and the key points of the provisions are summarised in the text.

Comprehensive information about code provisions was provided pro bono by law firms in response to questions posed by Advocates for International Development. Where law firms provided relevant information based on cases, texts or other documentation, such information also has been incorporated into the analysis.

## Support for Law Firms' Implementation of the Guiding Principles

Principle 11 of the Guiding Principles states that businesses, and thus law firms, should respect human rights.<sup>2</sup> If codes of professional conduct support this responsibility, lawyers who practise in law firms will find it easier to commit to the principle, to express this commitment internally and externally and to implement the principle. Where the code of conduct explicitly requires lawyers to respect human rights then all firms within the jurisdiction will operate on the basis of the same principle, thereby creating an even greater

impetus for lawyers' compliance with the principle. In addition, respect for human rights will become a key component of the lawyer's advisory and representational role and be more clearly understood by clients as integral to the lawyer's role.

Three areas in the codes of conduct were identified as potential opportunities to explicitly express lawyers' responsibility to respect human rights: 1) direct references to human rights, 2) lawyers' professional qualities, and 3) lawyers' duties.

### References to Human Rights in Codes of Professional Conduct

An explicit reference to international human rights in the codes of professional conduct would provide direct support for lawyers to act consistently with the Guiding Principles.

Only the codes of one country, reviewed in connection with this study (South Africa), specifically mention human rights in their provisions. However, the International Bar Association code and the European Code, which recognise the Universal Declaration of Human Rights as a basis for their principles, take an initial step in weaving human rights into principles relating to lawyers'

conduct. The commentary in the Charter of Core Principles of the European Code acknowledges that the principles take into account the Universal Declaration of Human Rights, the European Convention on Human Rights and the European Union Charter of Fundamental Rights<sup>3</sup>. In a similar manner, the International Bar Association, in the introduction to its International Principles on Conduct for the Legal Profession, adopted in May 2011, notes that the principles take into consideration the Universal Declaration of Human Rights<sup>4</sup>.

In the United States, the

1. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, principle 12, U.N. Human Rights Office of the High Commissioner, U.N. Doc HR/PUB/11/04 (2011), available at: <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> ['Guiding Principles'].
2. Guiding Principles, principle 11.
3. Charter of Core Principles of the European Legal Profession, Council of Bars and Law Societies of Europe, p.5 (2010 Edition), available at: <[http://www.ccbbeu/fileadmin/user\\_upload/NTCdocument/EN\\_Code\\_of\\_conductp1\\_1306748215.pdf](http://www.ccbbeu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf)>.
4. International Principles on Conduct for the Legal Profession, International Bar Association, p. 10-11 (2011), available at [www.ibanet.org](http://www.ibanet.org) ['International Principles'].

American Bar Association has evidenced a commitment of engagement with the Guiding Principles. The Association, in 2012 adopted a resolution that endorses the Guiding Principles and urges the legal community, along with governments and the private sector, to integrate the Guiding Principles into their operations and practices<sup>5</sup>. Significantly, in the report prepared by the Chair of the ABA Center for Human Rights in connection with the resolution, reference is made to a rule in the ABA Model Rules that permits the lawyer 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'<sup>6</sup>. The footnote then notes that '[t]his 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'<sup>7</sup>. A number of codes of professional conduct refer to the role or the obligation of lawyers

to uphold the rule of law. As the concept of 'rule of law', as defined by the United Nations, refers to laws that are consistent with international human rights norms and standards<sup>8</sup>, a link could be made between references to the rule of law in professional codes of conduct and the responsibility of law firms to respect human rights. However, this link is somewhat tenuous given that the 'rule of law' has different meanings in different jurisdictions and that the provisions in codes of conduct concerning the rule of law would not have been adopted with the intention of committing lawyers to respect international human rights principles.

Thus, while the term 'rule of law' provides a potential connection between international human rights and the legal profession, the present use and meaning of this term in codes of conduct is insufficient to ground the responsibility of lawyers to respect human rights.

### *Recommendation*

**Bar associations could consider to what extent it would be appropriate to include a general reference to human rights or the Guiding Principles in their codes of professional conduct.**

## Professional Qualities of Lawyers

Lawyers serve as trusted advisors and representatives of their clients, as professionals respected by third parties and as key participants in the fair administration of justice<sup>9</sup>. In order to fulfil such roles, certain characteristics and attributes are often enumerated in codes of conduct as quintessential to a lawyer's professional responsibilities.

The codes provide both specific traits of lawyers and prohibit certain types of conduct. The traits, which lawyers are to embody, include honesty, integrity, dignity, honour and independence. The codes establish that lawyers must avoid conduct

that negatively affects the reputation of the lawyer and the legal profession and that would diminish the public confidence in lawyers and the administration of justice.

Arguably, the existing codes' provisions concerning lawyers' characteristics support the role of lawyers and law firms in furthering respect for human rights as conduct that is consistent with the Guiding Principles should enhance the reputation of the legal profession. However, explicit reference to law firms' responsibility to respect would provide further support.

### Recommendation

**In order to evidence the key role that lawyers play in furthering respect for human rights, the prohibition of certain types of conduct could include a provision that states that lawyers should endeavour to avoid causing or contributing to adverse human rights impacts.**

## Duties of Lawyers

Lawyers are ascribed, under nearly all of the codes of professional conduct included in this study, specific duties to persons, institutions or concepts. Further discussion of certain of these duties – such as those

concerning lawyers' relationships with clients and confidentiality obligations – can be found in the next section, Issue Areas.

In some jurisdictions, lawyers have multiple duties, which reflect their role and

5. ABA Center for Human Rights, Res. 109 (Feb. 2012). The resolution also endorses the 'Human Rights' provisions (Part I, Subpart IV) of the Organisation for Economic Cooperation and Development's 2011 Guidelines for Multinational Enterprises.
6. American Bar Association Model Rules, Rule 2.1, American Bar Association (2010), available at <[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)>
7. ABA Center for Human Rights, Res. 109, Report, submitted by Michael Greco, p. 3, fn 16 (Feb. 2012).
8. Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, para. 6, U.N. Doc. S/2004/616 (3 Aug. 2004), available at <<http://www.unrol.org/files/2004%20report.pdf>>.
9. International Principles, at p. 10.

responsibilities in the society's system for the administration of justice. These duties frequently include those to the client, the courts, the administration of justice, and the public. In some cases the jurisdiction may specify an ultimate duty to the client or the administration of justice.

A number of jurisdictions include within the lawyers' duties a duty to the public, which furthers and maintains the public's trust and confidence in the integrity of the legal profession, legal system and the rule of law. The lawyer's duty to the public distinguishes law firms from most other businesses that are involved in selling goods or supplying services.

The duties of lawyers, articulated in codes of professional conduct, do not conflict in principle with the concept of a lawyers' responsibility to respect human rights. However, in practice, a lawyer's duty to a client, particularly where the code provides for an ultimate duty to the client, may occasionally be considered by a lawyer to be in conflict with the lawyer's

responsibility to respect human rights.

Only three codes, examined in connection with this study, deal with conflicting duties of lawyers. Two of them essentially acknowledge the possibility of conflict between duties while the third provides that the one that best serves the public interest in the particular circumstances should take precedence.

Codes of professional conduct frequently require lawyers to refrain from engaging in conduct that diminishes public confidence in the legal profession. In addition, a number of codes of professional conduct reviewed in connection with this study contain provisions that express the lawyer's duty to the public in some manner. However, lawyers' obligations with respect to the public are not generally framed as about the protection of rights, but rather the reputation of the legal profession. As such, the codes do not provide clear support for lawyers' responsibility to respect human rights.

### *Recommendation*

**The enumeration of duties in codes of professional conduct could include an express provision that lawyers respect human rights. Additionally, codes could acknowledge potential conflicts between duties. Utilising the language of Principle 23, a provision could specify that lawyers should seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements. Alternatively, bar associations could indicate that the duty to the client includes consideration of the client's responsibility to respect human rights.**

### Limitation regarding Unlawful Conduct

Codes of professional conduct provide that lawyers must act within the boundaries of the law and therefore, may refuse to assist or participate in conduct that is unlawful. Some codes express that the lawyer shall not encourage, counsel, or assist the client with conduct the lawyer knows is illegal. In one code (Nigeria), the lawyer is to use his/her best endeavours to restrain and prevent his/her client from committing misconduct or a breach of the law. However, in another code (US), the lawyer may discuss the legal consequences of any proposed course of conduct with the client.

While in some cases, a human rights infringement would also constitute fraudulent or illegal conduct, there may be other situations where the human rights infringement is not a violation of the national law of a jurisdiction. In the latter case, lawyers' actions that infringe international human rights and lawyers' encouragement or assistance to a client to infringe such principles would not be prohibited under the code of professional conduct.

### *Recommendation*

**Provisions in codes of professional conduct that prohibit lawyers from acting unlawfully or assisting the client in conduct that the lawyer knows is criminal or fraudulent or a violation of the law could be modified to include that the lawyer shall not act, counsel a client to engage in nor assist the client with conduct the lawyer knows constitutes a violation of internationally recognised human rights.**



## Issue Areas

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### Introduction: Applicable Codes of Conduct

In implementing the Guiding Principles, lawyers may be faced with a conflict between a particular principle and the requirements of applicable codes of professional conduct. Generally, the lawyer is subject to the professional code of conduct of the jurisdiction in which the lawyer is admitted to practise law, whether or not the lawyer is residing within that jurisdiction. Where the lawyer is practising in a foreign jurisdiction, then the code of professional conduct of that jurisdiction will be applicable as well. As noted by the International Bar Association in its International Principles on Conduct for the Legal Profession, lawyers are 'called upon to observe applicable rules of professional conduct in both home and host jurisdictions (Double Deontology) when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted

to practice.'<sup>10</sup> Thus, the implementation of the Guiding Principles will sometimes be subject to two applicable bar codes with different requirements.

A lawyer's breach of the code(s) regulating his/her conduct may constitute professional misconduct that results in disciplinary action, including censure, fines, and disbarment by the bar association as well as court action. Therefore, lawyers must ensure, in implementing the Guiding Principles that their compliance with them does not result in their breach of applicable codes of professional conduct. Likewise, where a conflict currently exists between firms' responsibilities as set out in the Guiding Principles and lawyers' responsibilities in a professional code of conduct, action should be taken by the bar association to remove the conflict.

### A Law Firm's Communication of its Human Rights Policy

Businesses are responsible under the Guiding Principles to express their commitment to respect human rights in a statement of policy<sup>11</sup>. The policy

is to be publicly available and is to be communicated internally and externally to all personnel, business partners and other relevant parties<sup>12</sup>.

#### *Issue:*

**Are there restrictions that prohibit law firms from publicly communicating their human rights policy?**

In some jurisdictions the code of professional conduct contains restrictions on advertising that may affect a firm's ability to issue a human rights policy publicly. In one jurisdiction, law firms cannot advertise facts that are true for all lawyers and any advertisement must relate to the lawyer's profession.

In a number of codes that explicitly allow advertising by a law firm, the codes specify that the content of such advertising must not be false, misleading or deceptive. As a result, a firm that publicises its human rights policy would need to ensure that the content of the policy is accurate and that it actually can fulfil and respect the claims that it makes in the policy. The firm might

therefore wish to ensure that the human rights policy reflects the firm's intention to respect human rights and its expectations of entities with which it has business relationships.

In countries where the code of professional conduct does not permit advertising or publicity, law firms may not be able to make a human rights policy publicly available. In such jurisdictions, law firms may want to seek clarification from the bar association and draft an internal policy to evidence their commitment to respect human rights, if a public document policy commitment would be interpreted as advertising.

### *Recommendation*

**In jurisdictions where the code of professional conduct does not allow advertising or publicity by law firms, and where public policies are considered publicity, bar associations should consider an explicit exception to allow lawyers to provide their human rights policies publicly.**

10. International Principles, at p. 14.  
11. Guiding Principles, principle 16.  
12. Guiding Principles, principle 16(d).

## Lawyers' Engagement by Clients

As part of law firms' responsibility to respect human rights under the Guiding Principles, they are responsible for conducting due diligence, commensurate to the risks and context, to avoid or prevent contribution to adverse human rights impacts or direct linkage to those impacts through their service.

Where a law firm conducts due

diligence before taking on a client, it will have a better understanding of human rights risks. The firm will then be in a position to decide whether it is able to represent the client and what actions it should take to prevent or avoid adverse human rights impacts to which it might contribute or be linked on the basis of its relationship with the client.

### *Issue:*

**Are there provisions in codes of professional conduct that hinder law firms from conducting a human rights assessment of a client and refusing to represent a client with actual or potential human rights impacts?**

A law firm's human rights assessment of a prospective client, as part of the due diligence process, could be viewed as consistent with a lawyer's professional duties to the public and the qualities of honesty and integrity associated with maintaining respect and confidence in the legal profession and system.

The codes of professional responsibility of a number of jurisdictions explicitly provide that lawyers do not have an obligation to accept a client. In these jurisdictions lawyers are free to accept or reject any prospective client and lawyers could assess and consider the client's actual or potential adverse human rights impacts before deciding whether to agree to be retained.

However in one jurisdiction (Nigeria), firms are obliged to accept the brief of a client in the Court in which the lawyer

practises provided the proper professional fee is offered unless there are special circumstances that justify a refusal to act. This provision within the code clearly restricts firms' ability to refuse clients where they are concerned that acting for them would be inconsistent with respect for human rights.

In addition, in one other jurisdiction (Germany), a court may, although this hardly ever occurs in practice, appoint a lawyer to represent a corporation in court proceedings, such as in legal aid proceedings, insolvency proceedings, and labour proceedings. In most cases, the court must appoint a lawyer who is willing to accept such representation, but there are limited exceptions where the court imposes the representation. In each case, the lawyer has the right to apply to the court for termination of appointment for good cause.

**Where the code of professional conduct provides for the court appointment of a lawyer for a business client, the bar association of the jurisdiction could consider the inclusion of a provision allowing law firms to refuse the appointment where representation of the client would conflict with the firm’s responsibility to respect human rights**

### **Confidentiality of Information about a Prospective Client**

In order for a lawyer to carry out a human rights assessment as part of the firm’s due diligence, consistent with Guiding Principles 17 and 18, the prospective client may need to provide the necessary information

about actual and potential adverse human rights impacts to the lawyer. However, the prospective client may be unwilling to do so without assurances that the confidentiality of the information will be maintained.

#### *Issue:*

**When a lawyer conducts due diligence on a prospective client to discover whether such client has actual or potential adverse human rights impacts, is the lawyer required to maintain the confidentiality of such information?**

The codes of a few jurisdictions protect the confidentiality of information provided by a prospective client to a lawyer. However, in the absence of such protection, a law firm may wish to provide a written commitment to the prospective client that it will maintain the confidentiality of such information. This

commitment should not only facilitate the prospective client’s willingness to provide information about its potential or actual human rights impacts, but also signal to the prospective client that the law firm takes adverse human rights impacts seriously. The firm also may wish to provide a copy of its human rights policy to the prospective client.

### *Recommendation*

**If the code of professional conduct of a particular jurisdiction does not include a provision that protects information provided by a prospective client to a law firm, then the jurisdiction might consider adopting such a provision.**

### **Representational and Advisory Role of Lawyers**

Lawyers serve as representatives of their clients and in this capacity have certain duties and obligations to those clients. In addition, lawyers' advisory role pervades nearly all aspects of their work for a client.

In carrying out their representative and advisory roles, lawyers may be faced with a conflict between their responsibility to respect human rights and the demands of their clients.

### *Issue:*

**Do the codes of professional conduct support a lawyer's provision of advice on the Guiding Principles and international human rights to clients?**

Codes of professional conduct express that lawyers are to provide objective and unbiased advice to their clients. Some codes even articulate that lawyers do not necessarily endorse the views of their clients and thus, can serve in an advisory role even with respect to unpopular clients.

Under the codes of professional conduct evaluated, there is no express obligation for lawyers to advise their clients about the Guiding Principles or potential adverse human rights impacts by the client and how to remedy them. Yet, the codes recognise that the advisory role of lawyers involves the provision of candid and full

information to their clients about not only the law but also other relevant information and considerations, which would include voluntary guidelines and principles relevant to the client's situation. As mentioned above in the section 'References to Human Rights in Codes of Professional Conduct', the report of the US ABA Center for Human Rights, which supported the ABA's endorsement of the Guiding Principles, expressly links rule 2.1 of the ABA Model Rules – that in providing candid advice lawyers 'may refer not only to law but to other considerations such as moral, economic, social and political factors' – to the Guiding Principles<sup>13</sup>.

Some codes specifically mention that lawyers must follow the instructions of the client. Thus, where a client provides clear instructions to the lawyer that the work requested is of a limited nature, such as where the client requests the lawyer to provide purely technical advice, the lawyer may be obligated under such codes to abide by such instructions. If the lawyer fails to follow the client's instructions, by providing advice on international human rights impacts associated with the matter, then the lawyer may be in breach of the relevant professional code of conduct. If the lawyer perceives adverse human rights impacts could result from following such instructions and the lawyer is unable to convince the client otherwise, then the lawyer may need to consider not accepting the requested work. Further discussion of lawyers' ability to refuse to accept clients with adverse human rights impacts can be found below.

Lawyers are frequently called upon, under codes of professional conduct, to act in the best interest of their clients. This obligation might be construed as imposing an implied obligation on lawyers to ensure that their corporate clients are aware of any international human rights issues related to the matter for which the lawyer is providing representation and advice. In particular, this implied obligation could be derived from the fact that a corporate client should know about and understand any applicable and relevant international human rights standards, how its actions have or might create adverse human rights impacts, and how to ensure that such impacts are avoided and/or remedied.

However, the crucial issue is how

the 'best interest' of the corporate client is determined. This issue is not expressly addressed in any of the codes reviewed in connection with this study. Where the corporate client has expressed its commitment to respect human rights, such as in a policy or annual report, then the lawyer could reasonably conclude that the client's 'best interest' includes advice with respect to international human rights standards. If, however, a representative of the client company informs the lawyer that the client's best interest is linked to the commercial results and does not include international human rights considerations, then law firms will have greater difficulty determining whether advice concerning international human rights should be provided.

Where a business client is controlled by the State or its acts can be attributed to the State, then the State's international law obligations, including those under international human rights agreements, may apply. In this case, the best interest of the client clearly includes advice from the lawyer about relevant human rights standards and the potential ramifications of various proposed avenues of conduct on such rights.

13. ABA Center for Human Rights, Res. 109, Report, submitted by Michael Greco, p. 4, fn 16 (Feb. 2012).

### *Recommendation*

**Bar associations may wish to consider how to address situations where the client limits the scope of work of the lawyer and thus, effectively excludes advice related to international human rights and whether the concept of ‘best interest’ of the client would include human rights considerations.**

In addition, as lawyers’ competent provision of advice helps ensure the protection of clients’ interests, bar associations may wish to consider how they can encourage professional competence by lawyers in the area of international human rights. International human rights permeate clients’ matters and problems. Therefore, regardless of their area of specialisation, lawyers need to have an awareness and understanding of international human rights standards and their implications for clients.

### **Withdrawal from Representation of a Client**

In the case of a client that refuses to prevent potential adverse human rights impacts or to remedy actual impacts, a law firm may opt, consistent with Principle 19, to

withdraw from representation of the client. The issue of withdrawal from representation of a client can occur at any time in the firm’s relationship with the client.

#### *Issue:*

**Are there provisions within the codes that prohibit or restrict withdrawal from representation of a client?**

Many of the codes reviewed for this analysis specify situations in which a lawyer may withdraw from representation of a client. A number of codes specify a ‘compelling reason,’ ‘just cause’ or ‘good cause’ as a

justification for withdrawal. Some codes list such reasons and causes as action that is illegal or fraudulent. Under one code reviewed, the client’s pursuit of conduct that is illegal necessitates that the lawyer withdraw.

One jurisdiction defines ‘good cause’ as including situations where the client insists on taking an unjust or immoral course; another includes within ‘good cause’ where the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. Thus, these provisions also might serve as a basis for withdrawal in the case of the client’s human rights infringement, although this would likely depend on the interpretation given to these types of ‘good cause’.

Some codes enumerate particular situations in which the lawyer may not withdraw, such as where the court orders the lawyer to continue to represent the client or where the case is reserved or mature for decision and the court does not consent. Moreover, under certain codes, when lawyers intend to withdraw from representing a client, they must fulfil certain prerequisite steps. These include reasonable notice, so as to allow the client time to employ another lawyer and, in some cases, the client’s ability to obtain alternative legal assistance.

### *Recommendation*

**Bar associations for jurisdictions where the code of professional conduct allows a law firm to withdraw from representation of a client for ‘good cause’, ‘just cause’ or a ‘compelling reason’, might consider defining the relevant standard so as to include the client’s failure to respect human rights.**

**Bar associations of jurisdictions that do not allow withdrawal might wish to consider adoption of a provision that would permit law firms to withdraw for ‘good cause’ or a ‘compelling reason’ that includes the client’s failure to respect human rights.**

### **Defending against an accusation of involvement or complicity in a client’s adverse human rights impact**

An allegation of involvement in a client’s adverse human rights impact or complicity against a law firm in connection with a client’s actions can arise in one of two principal ways. First, the public, civil society groups or others may perceive the law firm as being involved in the acts of a client, given that the law firm serves as the trusted

advisor to the client, and either privately or publicly accuse the law firm of such involvement. Second, the law firm may be charged in either a criminal or a civil law suit or in disciplinary or other proceedings with involvement or complicity.

Where the law firm is accused, whether in the press or by civil society



organisations or others, of being involved or complicit in an adverse human rights impact, the law firm may feel that it has a responsibility under the Guiding Principles to ‘know and show’ how it respected human rights. Principle 21 states that business enterprises ‘should be prepared to communicate [how they address human rights impacts] externally, particularly when concerns are raised by or on behalf of affected stakeholders’ and that this communication should ‘[p]rovide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved’.

However, lawyers have certain confidentiality obligations that may

inhibit or prohibit them from providing information obtained from communications with the client to defend themselves against such legal and non-legal accusations. Confidentiality rules, including attorney-client privilege, professional secrecy, and legal professional privilege rules, relate to the communications between lawyer and client. Such confidentiality obligations further the relationship of trust between the lawyer and client by fostering the client’s full disclosure of information needed in order for the lawyer to effectively advise the client, including concerning how to refrain from illegal conduct.

### *Issue:*

## **Do provisions on confidentiality, in codes of professional conduct, prevent a lawyer from defending him or herself against charges of involvement or complicity in a client’s adverse human rights impact?**

Nearly all codes of professional conduct for lawyers provide for the confidentiality of information related to the provision of lawyers’ services to clients and, in some cases, to former clients. Some codes also specify that all staff members of the law firm, not just the lawyers, are bound by the confidentiality obligations.

Confidentiality provisions do not provide absolute standards; various exceptions to such rules exist. In some jurisdictions the lawyer may disclose such information in response to a complaint or proceeding against the lawyer by the client

or to a claim against the lawyer based on the client’s conduct.

Exceptions to the rules of confidentiality also exist where the disclosure of information concerns an illegal purpose or a crime by the client, but in some jurisdictions this exception applies only where the disclosure is intended to prevent such crime. Yet, in utilising the criminal exception, for a given human rights violation, the lawyer would want to know to whom the information can be disclosed.

Given that only a few codes contain an explicit exception to the lawyer’s

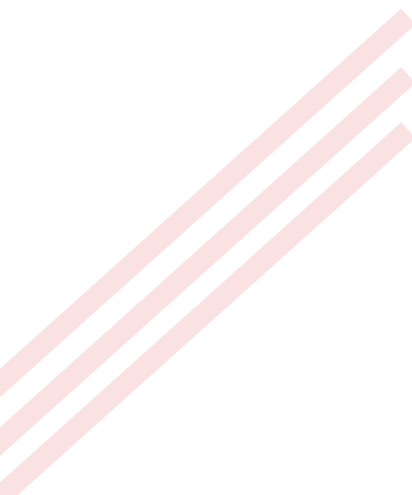
confidentiality obligation that permits a lawyer to defend him/herself, lawyers in most jurisdictions remain unable to defend themselves without concern about being in breach of these obligations. In addition, under codes of professional conduct, lawyers are generally prohibited from disclosing information to counter a non-legal allegation of involvement or complicity in a client's conduct that leads to a human rights adverse impact.

However, a law firm might be able to publicise information about its general approach to human rights without disclosing confidential information of

the client. In doing so, the firm would be communicating how it addresses human rights impacts, consistent with Guiding Principle 21, while respecting the confidentiality obligation of the professional code of conduct. Guiding Principle 21(c) specifically recognises that businesses will need to exercise discretion when communicating how they address their human rights impacts, as it states that information released under the 'know and show' responsibility should '[i]n turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality'.

### *Recommendation*

**Further to the recommendation under 'Duties of Lawyers', consideration could be given by bar associations to the inclusion of a provision that permits disclosure of information when necessary to respond to a serious complaint or proceeding against the lawyer of involvement or complicity in a client's adverse human rights impact.**



# Appendix A

## Specific Provisions of Codes of Professional Conduct Relevant to the Analysis<sup>1</sup>

Support for Law Firms' Implementation of the Guiding Principles

1. The formal titles and websites for all codes of professional conduct referenced in the footnotes can be found in Appendix B

## References to Human Rights in Codes of Professional Conduct

- In **South Africa**, the Legal Services Sector Charter and the Natal Law Society Rules provide that attorneys are to ‘honour, respect and promote the values enshrined in the Bill of Rights’<sup>2</sup> and note that a ‘strong, independent and representative profession is essential for the protection of the rights contained in the Bill of Rights.’<sup>3</sup>

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- In **Germany**, the code of professional conduct provides that the lawyer’s practice serves the ‘realization of a society governed by the rule of law.’<sup>4</sup> In **England and Wales** the code of professional conduct refers to solicitors’ obligations to uphold the rule of law.<sup>5</sup> In **Nigeria**, the lawyer ‘shall uphold and observe the rule of law.’<sup>6</sup>

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- In **Dubai**, the Advocate ‘complements the judiciary in ... reinforcing the rule of law.’<sup>7</sup> In **Europe**, the Code of Conduct for European Lawyers provides that ‘[r]espect for the lawyer’s professional function is an essential condition for the rule of law and democracy in society.’<sup>8</sup> The International Bar Association’s principles note that ‘[l]awyers throughout the world... strive to obtain respect for the Rule of Law.’<sup>9</sup>

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## Professional Qualities of Lawyers

- In **Australia**, the codes of certain States provide that ‘[a] solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice or bring the profession into disrepute.’<sup>10</sup> Also, the rules of a number of States and Territories note that ‘[p]ractitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.’<sup>11</sup> The general principle stated in a number of the codes in **Australia** links the solicitor’s privileges with the lawyer’s conduct:

*A practitioner is endowed by law with considerable privileges, including exclusive entitlement to appear in some courts and tribunals, exclusive entitlement to conduct some transactions and draw some documents, and special protection against disclosure of client confidences. These privileges require that the community has confidence that a practitioner must at all times be fit to enjoy those privileges. A practitioner ought also to act in ways which uphold the system of administration of justice in relation to which those privileges are conferred.*<sup>12</sup>

- In **Nigeria** the lawyer is to ‘uphold and observe the rule of law, promote and foster the cause of justice, maintain a high standard of professional conduct, and shall not engage in any conduct which is unbecoming of a legal practitioner.’<sup>13</sup>

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- In **Dubai**, the ‘Advocate must observe honesty, professional integrity and ethics’ and ‘may not be involved in any activity that may cause disrespect to the Advocacy Profession or that may conflict with its practice.’<sup>14</sup>

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- The **Antigua and Barbuda** code of professional conduct provides that ‘[a]n attorney-at-law shall ... maintain his integrity and the honour and dignity of the legal profession and encourage other attorneys-at-law to act similarly and ... shall refrain from conduct which is detrimental to the profession or which may tend to discredit it.’<sup>15</sup> Also, ‘[a]n attorney-at-law shall endeavour to uphold standards of integrity, capability, dedication to work, fidelity, and trust.’<sup>16</sup>

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- In **Germany** a lawyer must demonstrate that s/he is ‘worthy of the respect and the trust that his/her status as Rechtsanwalt [attorney] demands.’<sup>17</sup>

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- In **South Africa**, under the rules of the Law Society of South Africa and the Natal Law Society Rules, attorneys are to ‘maintain the highest standards of honesty, integrity and independence at all times; act with care and skill, honour undertakings and maintain the reputation and high standards required in the performance of their duties, [and] comply with all ethical and professional rules of practice.’<sup>18</sup> The Cape Law Society Rules provide that an attorney shall at all times: ‘maintain the highest standards of honesty and integrity’, ‘retain the independence necessary to enable them to give their clients unbiased advice’,

2. South Africa, Law Society Code of Ethics, provision 1. Also see Natal Law Society Rules, Thirteenth Schedule.
3. South Africa, Legal Services Sector Charter, preamble.
4. Germany, Professional Code, Section 1(2).
5. England and Wales, SRA, Principle 1.
6. Nigeria, RPC, Rule 1.
7. Dubai, UAE Federal Law, Article 1.
8. Europe, European Code of Conduct, Section 1.1.
9. International Principles on Conduct for the Legal Profession, International Bar Association, p. 5 (2011), [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)
10. Australia, South Australia Rules, Rule 5.1. Similar provisions are contained in VCPR, Rule 30.1.2; QSR, Rule 30.2; WALPA, Rule 5.2.
11. Australia, VCPR, p. 35; NSWPCR, Statement of Principles for Rules 32-36; ACTPCR, p. 44; NTPCR, p. 29.
12. Australia, VCPR, p. 38.
13. Nigeria, RPC, Rule 1.
14. Dubai, UAE Federal Law, Article 35.
15. Antigua and Barbuda, LPA, Schedule 4, Part A, Section 1.
16. Antigua and Barbuda, LPA, Schedule 4, Part A, Section 7(1).
17. Germany, Federal Act, Section 43.
18. South Africa, Law Society Code of Ethics, provisions 2,3, 6. Also see Natal Law Society Rules, Thirteenth Schedule.

and ‘refrain from doing anything which could or might bring the attorneys’ profession into disrepute.’<sup>19</sup>

- In **Europe**, the European Charter’s core principles include ‘the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer’.<sup>20</sup> A ‘lawyer’s personal honour, honesty and integrity’ are professional obligations.<sup>21</sup> A lawyer must ‘avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties.’<sup>22</sup> Furthermore, ‘the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession.’<sup>23</sup>
- In the **United States**, under the ABA Model Rules, the lawyer’s conduct ‘should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.’<sup>24</sup> In **England and Wales**, solicitors are to act with integrity.<sup>25</sup>

## Duties of lawyers

### In General

- In the **United States**, the preamble to the ABA Model rules provides that the lawyer is a ‘representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.’<sup>26</sup>
- In **Europe**, the European Code recognises that lawyers have a variety of legal and moral obligations including to the client, the courts and other authorities, the legal profession, and the public.<sup>27</sup>
- The code for **England and Wales** includes the mandatory principles that the solicitor should ‘uphold the rule of law and the proper administration of justice’, and ‘act in the best interests of each client.’<sup>28</sup>
- In **Antigua and Barbuda**, ‘[t]he first concern of an attorney-at-law should always be the interest of his client and the exigencies of the administration of justice.’<sup>29</sup>
- In **South Africa**, an attorney maintains a duty not only to the client but also to the legal profession and other practitioners, the courts, the State, the community (the public interest) and the South African Law Society.<sup>30</sup>
- Some jurisdictions specify one particular duty that serves as the ultimate duty of the lawyer. In **Australia**, the rules for South Australia provide that the ‘solicitor’s duty to the court and

the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.<sup>31</sup> Similarly, in **Nigeria** a lawyer has an ultimate duty to the Court, to assist the courts to uphold and foster the cause of justice.<sup>32</sup> In **South Africa**, under the Cape Law Society Rules, the lawyer shall ‘treat the interests of their clients as paramount, provided that their conduct shall be subject always to- their duty to the court; the interests of justice; the observation of the law; [and] the maintenance of the ethical standards prescribed by this rule and generally recognised by the profession.’<sup>33</sup>

## Duties to the Public

- In **England and Wales** the solicitor is to ‘behave in a way that maintains the trust the public places’ in the solicitor.<sup>34</sup> In **Australia**, the ‘solicitor must not engage in conduct, in the course of practice or otherwise, which ... is likely to a material degree to ... diminish the public confidence in, the administration of justice.’<sup>35</sup> In **Antigua and Barbuda**, in the case of the lack of explicit ethical guidance, the attorney-at-law shall act in a ‘manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.’<sup>36</sup>
- In the **United States**, the ABA Model Rules provide that the lawyer should ‘further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.’<sup>37</sup>
- In **Europe**, the European Code provides that the lawyer has legal and moral obligations towards various groups, including ‘the public for whom the existence of a free and independent legal profession ... is an essential means of safeguarding human rights in face of

19. South Africa, Cape Law Society Rules, Sections 14.3.1, 14.3.8, 14.3.14.

20. Europe, European Charter of Core Principles, para. d.

21. Europe, European Code of Conduct, Section 2.2.

22. Europe, European Code of Conduct, Section 2.1.1.

23. Europe, European Charter of Core Principles, para. d, comment.

24. US, ABA Model Rules, preamble, para. 5.

25. England and Wales, SRA, Principle 2.

26. US, ABA Model Rules, preamble, para. 1.

27. Europe, European Code of Conduct, Section 1.1.

28. England and Wales, SRA Principles 1, 4.

29. Antigua and Barbuda, LPA, Schedule 4, Part A Section 20(2).

30. South Africa, Law Society Code of Ethics, L.E.A.D. Practice Notes Professional Conduct (2011), p. 31.

31. Australia, South Australia Rules, Rule 3.1.

32. Nigeria, RPC, Rule 1.

33. South Africa, Cape Law Society Rules, Section 14.3.2.

34. England and Wales, SRA, Principle 6.

35. Australia, South Australia Rules, Rule 5.1. Similar provisions are also contained in VCPR, Rule 30.1; QSR, Rule 5.1; WALPA Rule 5.

36. Antigua and Barbuda, LPA, Schedule 4, Part A, Section 50.

37. US, ABA Model Rules, preamble, para. 6.



the power of the state and other interests in society.<sup>38</sup>

## Conflicting Duties

- In **Europe**, the European Code acknowledges that law practice involves conflicting responsibilities and specifically mentions the conflict between loyalty to the client and respect for the rule of law.<sup>39</sup>
- The preamble of the ABA Model Rules, in the **United States**, provides that ‘[i]n the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.’<sup>40</sup>
- In **England and Wales**, where ‘two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice. Compliance with the Principles is also subject to any overriding legal obligations.’<sup>41</sup>

## Limitation regarding unlawful conduct

- In **Australia**, the lawyer must act within the boundaries of the law.<sup>42</sup>
- In **England and Wales**, the solicitor must ‘uphold the rule of law.’<sup>43</sup> In **Antigua and Barbuda** ‘An attorney-at-law shall always act in the best interest of his client . . . always bearing in mind that his duties and responsibilities should be carried out within and not without the boundary of the law.’<sup>44</sup>
- In the **United States**, under the ABA Model Rules, the lawyer ‘shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client.’<sup>45</sup>
- In **South Africa**, the lawyer ‘is not bound to do whatever his client wishes him to do . . . if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it.’<sup>46</sup>
- In **Nigeria**, the ‘lawyer may refuse to aid or participate in conduct that [s/]he believes to be unlawful even though there is some support for an argument that the conduct is legal.’<sup>47</sup>

Also, the lawyer is to ‘use his[/her] best endeavors to restrain and prevent his[/her] client from committing misconduct or breach of the law’<sup>48</sup> and is not to provide services or advice to the client that s/he ‘knows or ought reasonably to know is capable of causing ... breach of, the law’.<sup>49</sup>

## Issue Areas

### Introduction: Applicable Codes of Conduct

- In **Germany**, the German Federal Lawyer’s Act and the Lawyers’ Professional Code apply to European and other foreign lawyers practicing in **Germany**.
- In **England and Wales**, the code of professional conduct applies to all English and Welsh solicitors wherever they practise as well as ‘Registered European Lawyers’ and ‘Registered Foreign Lawyers’ practising in **England and Wales**.
- In **Europe**, the European Code is intended to apply to the ‘cross-border activities of the lawyer within the European Union and the European Economic Area.’<sup>50</sup>
- In **Nigeria**, neither the 2004 Legal Practitioners Act, nor the code of professional conduct, entitled the ‘Rules of Professional Conduct for Legal Practitioners of 2007’, contains provisions about their applicability to lawyers admitted to practise in Nigeria who are practising law outside the country as a barrister or solicitor of Nigerian law. However, if the lawyer were practising as a barrister or solicitor of Nigerian law in a foreign jurisdiction, then such rules would likely apply. If such a lawyer were not practising Nigerian law, then the rules would likely not be applicable. However, in the latter scenario, most Nigerian lawyers who are nationals of Nigeria subject themselves to the Rules of Professional Conduct by paying their practice fees. A foreign lawyer entitled to practise as a legal practitioner in Nigeria and who maintains a law office in Nigeria is subject to the provisions of the Nigerian

38. Europe, European Code of Conduct, Section 1.1.

39. Europe, European Charter of Core Principles, principle (e), comment.

40. US, ABA Model Rules, preamble, para. 9.

41. England and Wales, SRA, Introduction to the SRA Code of Conduct, The Principles, para 2.

42. Australia, VCPR, p. 10; QSR, Section 4.1.5; NSWPCR, Statement of Principle for Rules 1-16; ACTPCR, p. 6; NTPCR, p. 7.

43. England and Wales, SRA Principle 1.

44. Antigua and Barbuda, Schedule 4 Part A, Section 20(1).

45. US, ABA Model Rules, Rule 1.2(d).

46. South African case, *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos and another* 1985 (4) SA 341 (T) citing a passage from C H Van Zyl, *The Theory of the Judicial Practice of South Africa*, vol. 1, at passage 42 (1921).

47. Nigeria, RPC, Rule 15(1).

48. Nigeria, RPC, Rule 15(2)(b).

49. Nigeria, RPC, Rule 15(3)(a).

50. Europe, European Code of Conduct, Section 1.5.

code of professional conduct.<sup>51</sup>

- In **Antigua and Barbuda**, the code of professional conduct applies to attorneys-at-law who 'have been entered on the Roll of Attorneys-at-Law'. If the attorney-at-law has been admitted to practise in Antigua and Barbuda but is practising outside of Antigua and Barbuda, then s/he would be subject to the rules/Codes of that jurisdiction in which s/he is practising.

- In **Dubai**, the Dubai Federal Law does not apply to 'Legal Consultants', who are generally lawyers qualified from foreign jurisdictions; it applies to Advocates practising before the Dubai Courts and only Emiratis (i.e. UAE nationals) can practise as Advocates before the Dubai Courts.<sup>52</sup> Therefore, if the Advocate is residing and working in a law firm outside the UAE, s/he is unlikely to be an Advocate for the intents and purposes of the Federal Law and unlikely to be practising before the Dubai Courts.

- In **South Africa**, once a lawyer from a foreign country qualifies to practise in South Africa, then the rules of the law society of the province in which the non-South African lawyer practises will apply to such lawyer.

- In **Australia**, a solicitor who has been admitted to practise in one Australian State or Territory and who holds a practising certificate in that State or Territory is entitled to practise law in another Australian State or Territory. Thus, interstate solicitors must comply with the solicitors' rules, the Legal Profession Act and Regulations and any applicable laws of the host jurisdiction. The rules of a particular law society will apply to a solicitor who is admitted to practise in Australia but who resides and practises overseas. Foreign lawyers who are admitted to practise in Australia must comply with the rules of the particular law society of the State or Territory in which they are registered to practise foreign law as a foreign lawyer.

## A Law Firm's Communication of its Human Rights Policy

- In the **United States**, under the ABA Model Rules, 'a lawyer may advertise services through written, recorded or electronic communication, including public media' but such communications may not contain a material misrepresentation of fact or law.<sup>53</sup>
- In some jurisdictions, such as **Australia** and **England and Wales**, advertising is allowed but may not be false, misleading or deceptive.<sup>54</sup> In **Europe**, under the European Code, '[a] lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.'<sup>55</sup> In **South Africa**, the code of the Cape Law Society permits advertising by a lawyer but such advertising cannot be offensive or 'bring the attorney's profession into disrepute'.<sup>56</sup>

- In **Nigeria**, lawyers may engage in any advertising or promotion in connection with their practice of the law, provided it is ‘fair and proper’ and complies with the provisions of the rules of professional conduct; lawyers must ensure that such advertising or promotion is not inaccurate, does not mislead and would not likely ‘diminish public confidence in the legal profession, or the administration of justice, or otherwise bring the legal profession into disrepute.’<sup>57</sup>

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- In **Antigua and Barbuda**, an attorney-at-law is not permitted to disseminate information publicly if it is seen as advertising the firm; specifically, ‘[a]n attorney-at-law shall not in any way make use of any form of public advertisement calculated to attract clients to ... any firm with which he is associated.’<sup>58</sup>

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- In **Dubai**, ‘[t]he Advocate may promote himself only in ways that agree with legal practice’<sup>59</sup> and ‘may advertise about himself on his office, headed paper and readable means by writing his full name, educational decree, specialisation and instances of courts before which he practices his profession, all this should be according to the traditions of the advocacy profession.’<sup>60</sup>

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- In **Germany**, a lawyer is ‘only permitted to advertise his/her services in as far as the advertising in question provides matter-of-fact information concerning the form and the nature of the professional services and as long as it is not aimed at soliciting specific instructions or a specific brief.’<sup>61</sup> In particular, it is prohibited to advertise facts that are true for all lawyers.

## Lawyers’ Engagement by Clients

- In **Antigua and Barbuda**, the professional code of conduct specifies that ‘[a]n attorney-at-law has a right to decline employment and is not obliged to act either as adviser or advocate for every person who may wish to become his client.’<sup>62</sup> In addition, the code guides an attorney-at-law to ‘at the time of agreeing on a retainer disclose ... his interest in or connection with the dispute which may influence the client in his selection of an attorney-at-

51. Nigeria, RPC, Rule 13(1).

52. Dubai, UAE Federal Law, Article 10.

53. US, ABA Model Rules, Rule 7.2(a), 7.1.

54. See Australia, South Australia Rules, Rule 36.1; QSR, Rule 36.2; ACTPCR, Rule 38.2(a); WALPA, Rule 45(1). England and Wales, SRA, Code of Conduct, Outcome 8.1.

55. Europe, European Code of Conduct, Section 2.6.1.

56. South Africa, Cape Law Society Rules, Section 14.4.1.1-14.4.1.2.

57. Nigeria, RPC, Rule 39(1)-(2).

58. Antigua and Barbuda, LPA, Schedule 4, Part B, Section 6, also see Section 5.

59. Dubai, UAE Federal Law, Article 37.

60. Dubai, Ministerial Decree No. 591 (1997) referred to in Article 37 of the UAE Federal Law.

61. Germany, Federal Act, Section 43b. Also see Professional Code, Section 6.

62. Antigua and Barbuda, Part A, Section 9.

law.<sup>63</sup>

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- In **England and Wales** a solicitor is ‘generally free to decide whether or not to accept instructions in any matter, provided [s/he does] not discriminate unlawfully.’<sup>64</sup> The same is true of attorneys in **South Africa** as well as solicitors in **Australia**.
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- In **Nigeria**, however, the lawyer has a duty ‘to accept any brief in the court in which he professes to practice provided the proper professional fee is offered unless there are special circumstances which justify his refusal.’<sup>65</sup> Special circumstances may include but not be limited to a conflict of interest between the lawyer and the client or where the client insists on an unjust or immoral course in the conduct of his/her case. In **Dubai**, a Practitioner ‘shall not act for a client in proceedings before the Court if ... the Practitioner’s duty to act in the best interest of the client conflicts or there is a risk that it may conflict with the Practitioner’s own interests in the same or related ... matter.’<sup>66</sup>
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- In the **United States**, a lawyer shall not represent a client where the ‘representation will result in violation of the rules of professional conduct or other law.’<sup>67</sup> The ABA Model Rules provide for the possibility of the lawyer to ‘limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent’; thus, according to the commentary, the lawyer may exclude actions considered to be repugnant or imprudent.<sup>68</sup>
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- In **Germany**, according to the lawyers’ professional freedom, there is no general obligation to accept a certain client or matter, with certain exceptions described below.<sup>69</sup> While the Federal Lawyer’s Act provides that ‘everyone has the right to be given legal advice and to be represented by a Rechtsanwalt [lawyer] of his or her choice in the courts, before arbitral tribunals or before the authorities,’<sup>70</sup> this is a right of every citizen, but not an obligation of the lawyer. However, a lawyer must declare his/her refusal without undue delay after receipt of the offer.<sup>71</sup> If the lawyer does not, then this may constitute a violation of the lawyer’s professional duties and the lawyer could be liable for the rejected client’s damages resulting therefrom.
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- In addition, in **Germany**, a court may appoint a lawyer to represent a party in court proceedings, such as in legal aid proceedings, insolvency proceedings, and labour proceedings.<sup>72</sup> In most cases, the court must appoint a lawyer who is willing to accept such representation, but there are limited exceptions where the court imposes the representation. In each case, the lawyer has the right to apply to the court for termination of their appointment for good cause.<sup>73</sup>
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## Confidentiality of Information about a Prospective Client

- In the **United States**, under the ABA Model Rules, the lawyer is generally prohibited from using or revealing information obtained about a potential client.<sup>74</sup> In **Germany**, information obtained from a due diligence process in determining whether to select a client would need to be maintained in confidence.<sup>75</sup>

## Representational and Advisory Role of Lawyers

### In General

- In **Europe**, under the European code, the lawyer is recognised as having the 'duty not only to plead the client's cause but to be the client's adviser.'<sup>76</sup> 'The lawyer shall undertake personal responsibility for the discharge of the client's instructions.'<sup>77</sup>
- In the **United States**, as an adviser, a lawyer is to render candid advice and 'may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.'<sup>78</sup> The American Bar Association has recently expressed the view that this provision would include the UN Guiding Principles on Business and Human Rights in the case of corporate clients.<sup>79</sup>
- In addition, the **United States** ABA Model Rules provide that a lawyer furnishes a 'client with an informed understanding of the client's legal rights and obligations and explains their practical implications,'<sup>80</sup> but abides 'by a client's decision concerning the objectives of representation' and 'shall consult with the client as to the means by which they are to be

63. Antigua and Barbuda, Part A, Section 22(1).

64. England and Wales, SRA, Code of Conduct, Chapter 1, para. 3.

65. Nigeria, RPC, Rule 24(1).

66. Dubai, DIFC Code, Article 7(ii).

67. US, ABA Model Rules, Rule 1.16 (a)(1).

68. US, ABA Model Rules, Rule 1.2(c), also see Comment 6.

69. Germany, Law for the Federal Republic of Germany, Article 12 and, Federal Act, Section 1.

70. Germany, Federal Act, Section 3(3).

71. Germany, Federal Act, Section 44.

72. Germany, Federal Act, Sections 48, 49.

73. Germany, Federal Act, Section 48(2).

74. US, ABA Model Rules, Rule 1.18(b).

75. Germany, Federal Act, Section 43(a)(2), Professional Code, Section 2.

76. Europe, European Code of Conduct, Section 1.1.

77. Europe, European Code of Conduct, Section 3.1.2.

78. US, ABA Model Rules, Rule 2.1.

79. US, ABA, Center For Human Rights, Res. 109, Report, submitted by Michael Greco, p. 4, fn 16 (Feb. 2012).

80. US, ABA Model Rules, preamble para. 2.

pursued.<sup>81</sup> The commentary to the ABA Model Rules states that the ‘lawyer should fulfil reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.’<sup>82</sup> The commentary to the ABA Model Rules also provides that when a client experienced in legal matters expressly or impliedly asks the lawyer for purely technical advice, the lawyer may accept it at face value. On the other hand, when ‘such a request is made by a client inexperienced in legal matters, . . . the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.’<sup>83</sup>

- In the **United States**, under the ABA Model Rules, ‘a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client . . . may require that the lawyer offer advice if the client’s course of action is related to the representation.’<sup>84</sup> The commentary indicates that ‘[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant’ and notes that ‘[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.’<sup>85</sup>
- As advisers, solicitors are, under various codes of conduct in **Australia**, to ‘give their clients the benefit of all information relevant to their clients’ affairs of which they have knowledge.’<sup>86</sup> In several jurisdictions in **Australia**, the solicitor ‘must follow a client’s lawful, proper and competent instructions.’<sup>87</sup>
- Under the Cape Law Society Rules in **South Africa**, attorneys have an ethical duty to ‘retain the independence necessary to enable them to give their clients unbiased advice.’<sup>88</sup> Also, under the 2006 Law Society of **South Africa** Code of Ethics for Legal Practitioners, attorneys are to ‘promote the values enshrined in the Bill of Rights.’<sup>89</sup>
- In **England and Wales**, solicitors are required to ‘provide services to [their] clients in a manner which protects their interests in their matter’ and ‘takes account of [their] clients’ needs and circumstances.’<sup>90</sup> In **Nigeria**, a lawyer is to: ‘consult with his [/her] client in all questions of doubt which do not fall within [the lawyer’s] discretion; [k]eep the client informed of the progress and any important development in cause or matter as may be reasonably necessary; warn [the] client against any particular risk that is likely to occur in the course of the matter; [and] respond as promptly as reasonably possible to requests for information by the client.’<sup>91</sup>
- In **Antigua and Barbuda** the attorney-at-law ‘should, before advising on the cause of a client, obtain a sound knowledge of the matter and give a candid opinion of its merits or demerits’ but the ‘client is not entitled to receive nor is an attorney at law entitled to render

any service or advice ... concerning the deception or betrayal of the public.<sup>92</sup>

- Similarly, in **Dubai**, subject to certain duties '[p]ractitioners shall fearlessly advance, defend and protect the interests of their client before the Court without regard to any consequences to themselves or any other person.'<sup>93</sup> Under the ABA Model Rules in the **United States**, '[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.'<sup>94</sup>

### ■ Best Interest of Client

Lawyers are frequently called upon, in professional codes of conduct, to act in the 'best interest' of their clients, as is the case in **Antigua and Barbuda, England and Wales**, and many of the jurisdictions in **Australia**.<sup>95</sup> In **Europe**, the European code refers to the lawyer's 'loyalty to the client'.<sup>96</sup>

- In **Antigua and Barbuda**, the professional code of conduct provides that the 'attorney-at-law shall defend the interest of his client without fear of judicial disfavour or public unpopularity and without regard to any unpleasant consequences to himself or to any other person'<sup>97</sup> and thus, an 'attorney-at-law shall not be deterred from accepting proffered employment owing to the fear or dislike of incurring the disapproval of officials, other attorneys-at-law or members of the public.'<sup>98</sup>

- In **Nigeria**, the legal practitioner is to 'devote his[/her] attention, energy and expertise to

81. US, ABA Model Rules, Rule 1.2(a). Also, see Rule 1.4(a)(2).

82. US, ABA Model Rules, Rule 1.4, Comment 5.

83. US ABA Model Rules, Rule 2.1, Comment 3.

84. US, ABA Model Rules, Rule 2.1, Comment 5.

85. US, ABA Model Rules, Rule 2.1, Comment 2.

86. Australia, VCPR, p.10; QSR, p. 9; NSWPCR, Statement of Principle for Rules 1-16; ACTPCR, p. 6; NTPCR, p. 76.

87. Australia, South Australia Rules, Rule 8.1, WALPA, Rule 7(a).

88. South Africa, Cape Law Society Rules, Section 14.3.8.

89. South Africa, Law Society Code of Ethics, provision 1.

90. England and Wales, SRA, Code of Conduct, Outcome 1.2, 1.5.

91. Nigeria, RPC, Rule 14(2)(a)-(d).

92. Antigua and Barbuda, Schedule 4 Part A, Section 21(1), Section 10(c).

93. Dubai, DIFC Code, Article 6.

94. US, ABA Model Rules, 1.2(b).

95. Antigua and Barbuda, LPA, Schedule 4, Part A, Section 20(1). England and Wales, SRA Principle 4. Australia, South Australia Rules, Rule 4.1.1; VCPR, Rule 1.1; WALPA, Rules 6(1)(a), 7(d).

96. Europe, European Charter of Core Principles, para. e.

97. Antigua and Barbuda, LPA, Schedule 4, Part A, Section 8.

98. Antigua and Barbuda, LPA, Schedule 4, Part A, Section 17.



the service of his client and, subject to any rule of law, to act in a manner consistent with the best interest of the client.<sup>99</sup>

- In **Europe**, under the European Code, 'a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests' subject to 'due observance of all rules of law and professional conduct'.<sup>100</sup>

### Withdrawal from Representation of a Client

- In **Antigua and Barbuda** an attorney-at-law shall withdraw where, among other reasons: 'the client seeks to pursue a course of conduct which is illegal'; where 'a client has in the course of the proceedings perpetrated a fraud upon a person or tribunal and on request by the attorney-at-law has refused or is unable to rectify the same'; 'where his continued employment will involve him in the violation of the law'; 'where the client by any other conduct renders it unreasonably difficult for the attorney-at-law to carry out his employment effectively, or in accordance with his judgment and advice, or the rules of law or professional ethics'; or 'where for any good and compelling reason it is difficult for him to carry out his employment effectively'.<sup>101</sup>

- Also, in **Antigua and Barbuda**, an attorney-at-law may withdraw where the client agrees to the termination of the employment, where the attorney-at-law's 'inability to work with colleagues indicates that the best interest of the client is likely to be served by his withdrawal'; or where there is a 'good and compelling reason' why it is difficult for the attorney-at-law 'to carry out his employment effectively'.<sup>102</sup> In such cases, the attorney-at-law shall not withdraw 'until he has taken reasonable steps to avoid foreseeable prejudice or injury to the position and rights of his client including: giving adequate notice; allowing time for employing another attorney-at-law; delivering to the client all documents and property to which he is entitled'; and 'where appropriate, obtaining the permission of the Court where the hearing of the matter has commenced'.<sup>103</sup> Thus, this provision in **Antigua and Barbuda** can be quite onerous, particularly where an attorney-at-law has made an appearance at the High Court of Justice.

- In addition, in **Antigua and Barbuda** the attorney-at-law shall not exercise the right to withdraw 'where the client may be unable to find other timely assistance to prevent irreparable damage being done to his case'.<sup>104</sup>

- In the **United States**, under the ABA Model Rules, a lawyer shall withdraw where the representation will result in 'violation of the rules of professional conduct or other law'.<sup>105</sup> A lawyer may withdraw if the withdrawal will not have a material adverse effect on the interests of the client or for good cause, which includes where the client:

- ❑ ‘persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent’;
  - ❑ ‘used the lawyer’s services to perpetrate a fraud’; or
  - ❑ ‘insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.’<sup>106</sup>

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- If the lawyer is required to withdraw from representation or opts to withdraw, the lawyer is required to ‘take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, [and] allowing time for employment of other counsel’.<sup>107</sup>

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- However, in the **United States**, under the ABA Model Rules, ‘[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.’<sup>108</sup>

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- In **Dubai**, ‘[a]n Advocate may withdraw from representing a client before courts, in which case he must notify the client or his representative by registered mail. The Advocate shall continue the proceedings for [a] maximum [of] one (1) month from the date of such notification if this is deemed necessary to defend the interests of the client unless the client or the Court notifies the Advocate of their acceptance of the withdrawal and appointment of another Advocate prior to the expiry of this time limit’... In all events, if the case is reserved/mature for decision, an Advocate may withdraw from representing the client only if the consent of the court before which the case is heard is granted.’<sup>109</sup>

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- In **Australia**, several jurisdictions allow termination of the relationship with the client by the solicitor where the lawyer agrees with the client or for just cause and on reasonable notice.<sup>110</sup> In **Western Australia** the solicitor may terminate the engagement where ‘the client materially misrepresents any material fact relating to the subject matter of the

99. Nigeria, RPC, Rule 14(1).

100. Europe, European Code of Conduct, Section 2.7.

101. Antigua and Barbuda, LPA, Schedule 4, Part B, Section 13(b)-(f).

102. Antigua and Barbuda, LPA, Schedule 4, Part A, Section 32 (c), (b), (d).

103. Antigua and Barbuda, LPA, Schedule 4, Part B, Section 12(1)(a)-(d), (e)

104. Antigua and Barbuda, LPA, Schedule 4 Part A, Section 30.

105. US, ABA Model Rules, Rule 1.16(a)(1).

106. US, ABA Model Rules, Rule 1.16(b)(2)-(4).

107. US, ABA Model Rules, Rule 1.16(d).

108. US, ABA Model Rules, Rule 1.16(c).

109. Dubai, UAE Federal Law, Article 27.

110. Australia, South Australia Rules, Rule 13.1; VCP, Rule 6.1; QSR, Rule 13.1; NSWPCR, Rule 5.1; ACTPCR, Rule 5.1; NTPCR, Rule 5.1.

engagement.<sup>111</sup>

- In **Nigeria**, '[a] lawyer shall not abandon or withdraw from an employment, once assumed, except for good cause'; 'good cause' includes 'a conflict of interest between the lawyer and the client' or 'where the client insists on an unjust or immoral course in the conduct of his case'.<sup>112</sup> Thus, where the 'client insists on a breach of the law, the lawyer shall withdraw his/[her] service'.<sup>113</sup> 'Where the lawyer is justified in withdrawing from the employment, [s/] he shall give reasonable notice to the client allowing [the client] time to employ another lawyer'.<sup>114</sup>
- In **England and Wales**, where a solicitor ceases 'to act for a client without good reason and without providing reasonable notice', this may show that the solicitor has not complied with the principles of the code of professional conduct.<sup>115</sup> Also, where the solicitor must cease acting for a client, then the solicitor should 'explain[] to the client their possible options for pursuing their matter' in order to comply with the principles of the code.<sup>116</sup>
- In **Germany**, the termination at will of an engagement is not explicitly regulated by German rules on professional and ethical conduct. Therefore, the general provisions of the German Civil Code apply. Accordingly, lawyers may generally terminate their engagement without cause or notice period, but shall not terminate at an inappropriate moment, that is, the client must be able to find appropriate counsel before the termination becomes effective except where the lawyer has good cause for termination.<sup>117</sup> Only in extreme cases, the way in which the termination is carried out or the timing of such termination may be prohibited by German rules on professional and ethical conduct.
- In **Europe**, under the European Code of Conduct for European Lawyers, the lawyer shall not 'exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client'.<sup>118</sup>
- In **South Africa**, the legal practitioner must withdraw in a timely manner and inform the client so that the client can make other arrangements.<sup>119</sup>

### Defending against an accusation of involvement or complicity in a client's adverse human rights impact

- In **South Africa**, under the Law Society of **South Africa** Code of Ethics for Legal Practitioners, attorneys are to 'respect the legal privilege and confidentiality that exists with clients and former clients' and under the Cape Law Society Rules, attorneys are to 'maintain confidentiality regarding the affairs of present or former clients, unless otherwise required by law'.<sup>120</sup> However, the legal professional privilege does not apply if the legal advice is

obtained by the client ‘to further a criminal end’.<sup>121</sup>

- In **Antigua and Barbuda**, the ‘attorney-at-law shall scrupulously guard and never divulge the secrets and confidence of his client except with his client’s consent.’<sup>122</sup> In **Europe**, under the European Code ‘confidentiality is ... a primary and fundamental right and duty of the lawyer’ and ‘[a] lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.’<sup>123</sup>
- In **Germany**, the lawyer ‘has a duty to observe professional secrecy. This duty relates to everything that has become known to the Rechtsanwalt [lawyer] in professional practice.’<sup>124</sup> The lawyer must explicitly obligate and require all employees and other personnel supporting him to maintain professional secrecy.<sup>125</sup> The duty of secrecy does not apply to the extent that the professional code or other legal provisions allow for exceptions or that enforcement of or defence against claims resulting from the engagement or the lawyer’s own defence require disclosure.<sup>126</sup> However, the latter exception does not apply if the public makes such accusations. Also, disclosure is required where the lawyer gains knowledge that the client intends to commit a serious crime as listed in sec. 138 of the German Criminal Code or facts indicate that the client is involved in money laundering.<sup>127</sup>
- In **Nigeria** ‘all oral or written communications made by a client to his[/her] lawyer in the normal course of professional employment are privileged’ except with the consent of the client after full disclosure to the client, when required by law or a court order, or where the client has an intention to ‘commit a crime and the information is necessary to prevent the crime.’<sup>128</sup> Also, a lawyer shall ‘exercise reasonable care to prevent his employees, associates and others whose services are utilized by him[/her] from disclosing or using confidences or secrets of a client.’<sup>129</sup>

111. Australia, WALPA, Rule 27(1)(d).

112. Nigeria, RPC, Rule 21(1), (2)(a)-(b).

113. Nigeria RPC, Rule 15(2)(a)

114. Nigeria, RPC, Rule 21(3).

115. England and Wales, SRA Code of Conduct, Indicative Behaviours 1.26.

116. England and Wales, SRA, Code of Conduct, Indicative Behaviours 1.10.

117. Germany, Civil Code, Section 627.

118. Europe, European Code of Conduct, Section 3.1.4.

119. South Africa case, MacDonald t/a Happy Café v Neethling, 1990 (4) SA30 (N).

120. South Africa, Law Society Code of Ethics, provision 7; Cape Law Society Rules, Section 14.3.5.

121. South Africa, see IM Hoffman Lewis & Kyrou’s Handy Hints on Legal Practice, at 50 (2nd ed., Lexis Nexis, 2011).

122. Antigua and Barbuda, Part A, Section 22(2).

123. Europe, European Code of Conduct, Sections 2.3.1, 2.3.4.

124. Germany, Federal Act, Section 43(a)(2), also see Professional Code, Section 2.

125. Germany, Professional Code, Section 2(4).

126. Germany, Professional Code, Section 2(3).

127. Germany, German Criminal Code, Section 138 and the German Anti Money Laundering Act, Section 11.

128. Nigeria RPC, Rule 19(1), (3)(a)-(c), also see 2011 Evidence Act, sec 192(1).

129. Nigeria RPC, Rule 19(4).

- In certain jurisdictions in **Australia**, an exception to the rules of confidentiality applies where 'disclosure of the information is necessary to respond to a complaint or a proceeding brought against ... the practitioner'<sup>130</sup> or when the client seeks advice in furtherance of, or to facilitate, an illegal purpose.<sup>131</sup>
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- In **Dubai**, a Practitioner has a duty to 'keep information communicated to them by their client confidential unless such disclosure is authorised by the client, ordered by the Court or required by law.'<sup>132</sup> Moreover, this obligation applies to former clients.<sup>133</sup> 'The Advocate may not disclose any secret information entrusted to him or that has come to his knowledge through practice of the Advocacy Profession, unless such disclosure is conducive to preventing committal of a crime.'<sup>134</sup> In addition, '[t]he Advocate shall not testify on events or information that has come to his knowledge through practice of the Advocacy Profession without the consent of the revealer of such information, provided that such revelation is not intended to commit a misdemeanor or a felony.'<sup>135</sup>
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- In the **United States**, the confidentiality provisions of the ABA Model Rules apply to lawyers, associates and staff and with respect to current and former clients of a lawyer.<sup>136</sup> A 'lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent' or in certain exceptional circumstances.<sup>137</sup> Such exceptions include, to the extent the lawyer reasonably believes necessary:
    - - 'to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
    - - to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;... [or]
    - - 'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.'<sup>138</sup>
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- Thus, the commentary to the ABA Model Rules provides the example of a lawyer advising authorities where the client has discharged toxic waste into a town's water supply.<sup>139</sup>
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- In addition, in the **United States**, under the ABA Model Rules, where the 'lawyer for an organization knows that an officer, employee or other person associated with the organisation is engaged in action, intends to act or refuses to act in a matter related to

the representation that is a violation of ... law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organisation, then the lawyer shall proceed as is reasonably necessary in the best interest of the organisation.<sup>140</sup> Notably, the lawyer is to refer the matter to a higher authority in the organisation. Where such efforts do not result in timely and appropriate action and ‘the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation, ...but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organisation’, except that this rule shall ‘not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.’<sup>141</sup>

130. Australia, WALPA, Rule 9(3)(g). Also see ACTPCR, Rule 2.1(d).

131. Australia, South Australia Rules, Rules 9.2.4, 9.2.5; VCPR, Rule 3.1.3; NSWPCR, Rule 2.1.3; ACTPCR, Rule 2.1(c); NTPCR, Rule 2.1.3.

132. Dubai, DIFC Code, Article 12.

133. Dubai, DIFC Code, Article 12.

134. Dubai, UAE Federal Law, Article 42.

135. Dubai, UAE, Federal Law, Article 41.

136. US, ABA Model Rules, Rules 5.1, 5.3, 1.9(c)(2).

137. US, ABA Model Rules, Rule 1.6(a).

138. US, ABA Model Rules, Rule 1.6(b)(2),(3),(5).

139. US, ABA Model Rules, Rule 1.6 Comment 6.[6].

140. US, ABA Model Rules, Rule 1.13 (b).

141. US, ABA Model Rules, Rule 1.13(c-d).



# Appendix B

## List of Codes of Professional Conduct



## Antigua and Barbuda

Legal Profession Act (2008), Schedule 4  
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### **[ABA Model Rules]**

# Table of International Human Rights Instruments:

## the International Bill of Human Rights and the International Labour Organization's Core Conventions

### I. Human Rights Conventions

The International Bill of Human Rights is comprised of three instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

#### Universal Declaration of Human Rights

Article 1: Right to Equality

Article 2: Right to Non-Discrimination

Article 3: Right to Life, Liberty and Security of Person

Article 4: Right Not to be Subjected to Slavery or Servitude

Article 5: Right Not to be Subjected to Torture or Cruel, Inhuman or Degrading Treatment

Article 6: Right to Recognition as a Person Before the Law

Article 7: Right to Equality before the Law

Article 8: Right to Effective Remedy by Competent Tribunal

Article 9: Right Not to be Subjected to Arbitrary Arrest, Detention or Exile

Article 10: Right to a Fair Public Hearing

Article 11: Right to be Presumed Innocent Until Proven Guilty

Article 12: Right Not to be Subjected to Interference with Privacy, Family, Home or

Correspondence

Article 13: Right to Freedom of Movement Within and to Leave and Return to the Country

Article 14: Right to Seek and Enjoy Asylum

Article 15: Right to a Nationality

Article 16: Right to Marriage and Family

Article 17: Right to Own and Not to be Arbitrarily Denied of Property

Article 18: Right to Freedom of Thought, Conscience and Religion

Article 19: Right to Freedom of Opinion and Expression

Article 20: Right to Freedom of Peaceful Assembly and Association

Article 21: Right to Participate in Government

Article 22: Right to Social Security

Article 23: Right to Favourable Work and to Form and Join Trade Unions

Article 24: Right to Rest and Leisure

Article 25: Right to an Adequate Standard of Living

Article 26: Right to Education

Article 27: Right to Participate in the Cultural Life of the Community

Article 28: Right to a Social and International Order in which Human Rights Can be Fully Realised

Articles 29- 30: Overarching Principle

### **International Covenant on Civil and Political Rights**

Article 1: Right of self-determination

Articles 2-5: Overarching principles

Article 6: Right to life

Article 7: Right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment

Article 8: Right not to be subjected to slavery, servitude or forced labour

Article 9: Rights to liberty and security of the person

Article 10: Right of detained persons to humane treatment

Article 11: Right not to be subjected to imprisonment for inability to fulfil a contract

Article 12: Right to freedom of movement

Article 13: Right of aliens to due process when facing expulsion

Article 14: Right to a fair trial

Article 15: Right to be free from retroactive criminal law

Article 16: Right to recognition as a person before the law

Article 17: Right to privacy

Article 18: Rights to freedom of thought, conscience and religion

Article 19: Rights to freedom of opinion and expression

Article 20: Rights to freedom from war propaganda and freedom from incitement to racial, religious or national hatred

Article 21: Right to freedom of assembly

Article 22: Right to freedom of association

Article 23: Rights of protection of the family and to marry

Article 24: Rights for protection for the child

Article 25: Right to participate in public life

Article 26: Rights to equality before the law, equal protection of the law, and of non-discrimination

Article 27: Rights of minorities

### **International Covenant on Economic, Social and Cultural Rights**

Article 1: Right of self-determination

Articles 2-5: Overarching principles

Article 6: Right to work

Article 7: Right to enjoy just and favourable conditions of work

Article 8: Rights to form and join trade unions and to strike

Article 9: Right to social security, including social insurance

Article 10: Right to a family life

Article 11: Right to an adequate standard of living. (This right includes the right to

adequate food, the right to adequate housing, and the prohibition of forced evictions. This right also has been interpreted to comprise the right to safe drinking water and sanitation.)

Article 12: Right to health

Articles 13 and 14: Right to education

Article 15: Rights to take part in cultural life, to benefit from scientific progress, and of the material and moral rights of authors and inventors

## II. International Labour Organization Conventions

The International Labour Organization Declaration on Fundamental Principles and Rights at Work (1998) covers four fundamental principles and rights at work. Each of these principles is supported by two ILO conventions:

- 1) . Freedom of association and the effective recognition of the right to collective bargaining
  - Freedom of Association and Protection of the Right to Organise Convention, 1949 (No. 87)
  - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- 2) Elimination of all forms of forced or compulsory labour
  - Forced Labour Convention, 1930 (No. 29)
  - Abolition of Forced Labour Convention, 1957 (No. 105)
- 3) Effective abolition of child labour
  - Equal Remuneration Convention, 1951 (No. 100)
  - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- 4) Elimination of discrimination in respect of employment and occupation
  - Minimum Age Convention, 1973 (No. 138)
  - Worst Forms of Child Labour Convention, 1999 (No. 182)

**A4ID**

24th Floor, The Broadgate Tower  
20 Primrose Street  
London  
EC2A 2RS

[www.a4id.org](http://www.a4id.org)

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