

THE ABA’S COMMITMENT TO DEVELOP AND PROMOTE BUSINESS AND HUMAN RIGHTS WITHIN THE LEGAL PROFESSION: WHAT THIS MEANS FOR LAWYERS

*Dr. Corinne Lewis**

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* Dr. Corinne Lewis practices business and human rights law in the Brussels-based law firm Lex Justi. She provides legal advice, consultation, and training to a range of clients, including law firms, multi-national companies and international and nongovernmental organizations. She brings to her work both a corporate law background, as in-house counsel with a major multi-national company, and a decade of international human rights law experience with the United Nations High Commissioner for Refugees. She has taught human rights law and public international law courses, including at the University of Houston Law Center, and has lived and worked in the U.S. and various countries in Asia and Europe. Dr. Lewis currently serves as an Expert on Human Rights and Business to the Council of Europe and writes, speaks, and publishes regularly on business and human rights. She has law degrees from the London School of Economics and Political Science (PhD), Georgetown University (LLM) and Indiana University (JD).

I. ABSTRACT

Lawyers increasingly hear the refrain that as advisors and representatives of businesses they should assist their business clients to respect human rights. Yet many lawyers remain unsure about not only what “human rights” are but also how to incorporate human rights into their work. As the American Bar Association and other bar associations around the world reflect upon how to support the legal profession’s implementation of a human rights-based approach, there are a number of challenging issues that they should consider, study and discuss. These include the appropriate business and human rights framework, the elaboration of the sources of human rights, the nature of human rights, and practical difficulties faced by lawyers as they advise their clients on international human rights. This article explores these issues in a manner that should assist bar associations with identifying and addressing these issues and also provides lawyers an enhanced understanding of the human rights field and its relevance to their practices.

II. INTRODUCTION

In June 2015, the American Bar Association (ABA) took a notable step that should foster greater understanding of business and human rights by lawyers and lead to lawyers more actively assisting businesses to respect human rights. The ABA, the Law Society of England and Wales,¹ and other bar associations and legal organizations, adopted the “Joint Declaration of Commitment on the Development and Promotion of the Field of Business and Human Rights within the Legal Profession” (“Joint Declaration”).² The Joint Declaration recognizes the “integral role of lawyers in promoting and

1. The Law Society is an independent professional body for solicitors in England and Wales. THE LAW SOCIETY, <https://www.lawsociety.org.uk> (last visited Sept. 1, 2015).

2. Am. Bar Ass’n et al., Joint Declaration of Commitment on the Development and Promotion of the Field of Business and Human Rights Within the Legal Profession (June 9, 2015), http://www.americanbar.org/content/dam/aba/administrative/human_rights/joint_declaration.authcheckdam.pdf. The Joint Declaration was presented and signed by the American Bar Association at a meeting held at the United Nations’ Palais des Nations in Geneva Switzerland, *id.*, from 8-9 June 2015 and was attended by the Author.

defending human rights and the rule of law in all contexts.”³ Pursuant to the terms of the Declaration, the ABA and other signatories commit to undertake a number of activities individually and jointly: i) “promoting the realization of human rights in the business context”; ii) “educating lawyers about human rights in the business context”; and iii) “developing and implementing further policy initiatives” in the area.⁴

This is not the first time the ABA has undertaken action relating to business and human rights. In a 2012 resolution, the ABA acknowledged the importance of the area⁵ through its endorsement of two key documents that articulate the responsibility of businesses to respect human rights: the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines),⁶ both of which are further discussed in subsequent sections. The 2012 resolution “urges governments, the private sector and the legal community to integrate into their respective operations and practices the United Nations Guiding Principles and the OECD Guidelines”⁷ but does not provide any guidance on how they should do so. Also, in 2015 the ABA sent a letter to businesses encouraging them to put into place policies on labor trafficking and child labor within their own business and with respect to their supply chains that are consistent with the *Model Principles of the ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor*.⁸ The lack of a standard code

3. *Id.*

4. *Id.*

5. Am. Bar Ass’n, Resolution 109, at 1 (Feb. 6, 2012) [hereinafter Resolution 109].

6. *Id.*; U.N. Office of the High Commissioner for Human Rights [OHCHR], Guiding Principles on Business and Human Rights, U.N. Doc HR/PUB/11/04 (2011) [hereinafter Guiding Principles], http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; Org. for Econ. Co-operation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises*, at 31-34 (2011) [hereinafter *OECD Guidelines*], <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

7. Resolution 109, *supra* note 5, at 1.

8. Letter from William C. Hubbard, President, American Bar Association to Chief Executive Officer and General Counsel (Mar. 3, 2015) (on file with author). Am. Bar Ass’n, Revised Resolution 102B, at 1, ll. 1-3 (Feb. 2014) [hereinafter Resolution 102B], http://www.americanbar.org/content/dam/aba/images/abanews/2014mym_hodres/102b.pdf.

of conduct for businesses regarding labor trafficking and child labor and the staggering number of child laborers and persons subject to forced labor⁹ led to the resolution, which provides principles that businesses and their suppliers can adopt.

The ABA's endorsement of the Joint Declaration signals that it is entering a new phase with respect to the business and human rights area. The clear intention of the ABA, one of the largest voluntary professional membership organizations in the world with nearly 400,000 members,¹⁰ is to reinforce and strengthen lawyers' role in supporting and assisting businesses to respect human rights and to further lawyers' contribution to the development and elaboration of the business and human rights field.

Lawyers, no matter what their area of legal practice, need to develop a greater understanding of the principles and processes related to business and human rights. For lawyers with business clients, business and human rights principles will be directly applicable to their client matters. This is not only true with respect to clients that are large multinational companies (MNCs) in high risk sectors, such as extractive companies and those with manufacturing facilities in developing countries, but also pertains to business clients regardless of their sector and size. Small family run businesses, fledgling internet companies, or banks lending money for business projects can all impact human rights through their business activities. Even lawyers with non-business clients will reap benefits from an enhanced understanding of this new area. For example, lawyers representing persons harmed by a manufacturing facility's pollution will find human rights-based arguments relevant to their cases. Also, those working within governmental institutions, in areas ranging from procurement to overseas

9. Resolution 102B, *supra* note 8, at 2. The resolution contains an explanatory report, written by Dixie L. Johnson, which cites the International Labour Organization's estimates that 20.9 million men, women, and children are subject to forced labor in the world and some 168 million children perform child labor. *Id.*; *see also* INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, INT'L LABOUR ORG. [ILO], GLOBAL ESTIMATES AND TRENDS OF CHILD LABOUR 2000-2012 (2013); SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR, ILO, ILO GLOBAL ESTIMATE OF FORCED LABOUR (2012).

10. *Our Origins and Principles*, AM. BAR ASS'N, http://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html (last visited Aug. 27, 2015).

development, may be called upon to assess companies' respect for human rights to determine whether the entity presents any risks to human rights that might render the government complicit in such infringements. Moreover, numerous human rights issues, such as labor standards in supply chains, treatment of migrant workers, and risks to the health of local communities, affect lawyers' business clients in a wide array of sectors.

Although there is still a great deal that needs to be done to enhance the understanding, awareness and implementation of a human rights sensitive approach by businesses, as this occurs, lawyers will increasingly be called upon to counsel them on human rights. However, most business lawyers, trained in the practice of private law, are unsure not only of the framework for this new area of business and human rights but also what human rights are. Lawyers also need to become more aware and receive guidance on the practical difficulties that the provision of advice to clients on business and human rights presents within the lawyer-client relationship.

This article, therefore, aims to introduce lawyers to the business and human rights area and to foreshadow some of the issues that will arise as the ABA, other bar associations and law societies take steps to implement the Joint Declaration. Initially, a brief overview of the development of the business and human rights area is provided, with a particular emphasis on the issue of voluntary versus non-voluntary standards for business conduct related to human rights. This is followed by consideration of three key areas that the ABA and other legal organizations will need to address to allow lawyers to properly understand, incorporate, and implement human rights considerations into their advice and representation of clients. These comprise: i) the framework(s) for business and human rights; ii) the nature of "human rights;" and iii) the practical challenges inherent in advising business clients on human rights. The article does not, however, address the issue of what law firms, as businesses themselves, should do to ensure that

they respect human rights, although this topic merits further clarification.¹¹

The author hopes that this article will lead to greater understanding by lawyers of the business and human rights area and broader commitment within the legal community to assist businesses to respect human rights. In addition, this article is intended to highlight the need for further reflection, research, and discussion on the content of the business and human rights field and to convey the need for bar associations to play a prominent role in providing guidance as well as business and human rights education and training programs for lawyers.

III. DEVELOPMENT OF THE BUSINESS AND HUMAN RIGHTS AREA

In approaching the topic of business and human rights, lawyers will likely wish to know the provenance of this new subject area. In brief, significant concerns about the activities of MNCs in the 1960s and 1970s led to the first efforts by international bodies to produce guidelines for MNCs.¹² These concerns related to MNCs' economic activities, such as internal transfer pricing that drew the attention of the U.S. tax authorities in the 1960s and 1970s,¹³ and their political

11. For initial guidance for law firms in implementing the U.N. Guiding Principles, see generally Advocates for Int'l Dev., *The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession* (2013), [http://www.l4bb.org/reports/A4IDBusinessandHumanRightsGuide2013\(web\).pdf](http://www.l4bb.org/reports/A4IDBusinessandHumanRightsGuide2013(web).pdf) (discussing the importance of the U.N. Guiding Principles to lawyers and law firms and outlining methodology for applying those principles in business-client relations); INT'L. BAR ASS'N, DRAFT GUIDANCE FOR BUSINESS LAWYERS ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, ANNEX TO THE IBA BUSINESS AND HUMAN RIGHTS GUIDANCE FOR BAR ASSOCIATIONS, pt. 3, at 41-51 (2014), http://www.ibanet.org/Legal_Projects_Team/Business_and_Human_Rights_for_the_Legal_Profession.aspx.

12. ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (4th ed., 2006) [hereinafter *Tripartite Declaration*], http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

13. Jed Greer & Kavaljit Singh, *A Brief History of Transnational Corporations*, GLOBAL POL'Y F., <https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html> (last visited Aug. 27, 2015). Transfer pricing refers to the pricing of tangible and intangible products and services within a company. Companies may use internal pricing to shift profit to countries with lower tax rates. For an example of a U.S. case related to the shifting of profit during this period, see *E.I. Du Pont de Nemours & Co. v. United States*, 608 F.2d. 445 (Fed. Cir. 1979) (upholding the

activities, such as International Telephone and Telegraph's efforts in the early 1970s to overthrow Salvador Allende in Chile.¹⁴ among others.

Defense industry scandals in the 1980s and 1990s – such as those resulting from defense contractors grossly overcharging the U.S. Department of Defense,¹⁵ Union Carbide's toxic gas leak in Bhopal, India in 1984 that killed nearly 4,000 people and injured more than three times that number,¹⁶ and the 2013 Rana Plaza garment factory collapse in Bangladesh that killed some 1,100 laborers and injured another 2,000,¹⁷ among others – have kept the issue of the potential harmful impacts of companies in the public eye. As these examples demonstrate, businesses' negative impacts can affect consumers, local communities, employees, and the environment. In addition, the growth in the number of MNCs (from an estimated 7,300 MNCs with 27,300 foreign subsidiaries in the late 1960s and early 1970s to more than 100,000 MNCs today,¹⁸ mostly based in

U.S. International Revenue Service's rejection of Du Pont's transfer pricing position). One of the first comprehensive reports on the issue of transfer pricing concerning MNCs was the OECD report 'Transfer Pricing and Multinational Enterprises' in 1979, with the most recent version being the OECD 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' in 2010. OECD, TRANSFER PRICING AND MULTINATIONAL ENTERPRISES (1979); OECD, OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS (2010).

14. Greer & Singh, *supra* note 13.

15. *E.g.*, Tomomi Kawasaki, *White-Collar Crime and Reactions of the Criminal Justice System in the United States and Japan*, in INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME 552, 556 (Henry N. Pontell & Gilbert L. Geis eds., 2007); Andrea Bonime-Blanc, *The Defense Industry Initiative: From Business Conduct Program Innovator to Industry Standard?*, in GLOBALIZATION AND SELF-REGULATION: THE CRUCIAL ROLE THAT CORPORATE CODES OF CONDUCT PLAY IN GLOBAL BUSINESS 123, 127-129 (S. Prakash Sethi ed., 2011).

16. Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. L. REV. 235, 236 & n.2 (1994).

17. Amnesty Int'l, *The State of the World's Human Rights 2014/2015*, at 73, Index No.: POL 101/001/2015 (Feb. 25, 2015), <https://www.amnesty.org/en/documents/pol10/0001/2015/en/>.

18. U.N. DEP'T OF ECON. AND SOC. AFFAIRS, MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT 138 (1974); Grazia Ietto-Gillies, *The Theory of the Transnational Corporation at 50+*, 3 ECON. THOUGHT, No. 2, 2014 at 38, 39-40 (noting that around 1968-1969 there were approximately 7276 MNCs and that the number now is estimated to be over 103,000); Theodore H. Moran, *The UN and Transnational Corporations*, 18

developed countries, with nearly 800,000 affiliates)¹⁹ coupled with their influence on local and regional economies, has also contributed to the heightened concern about MNCs.

While the legislation of many developed countries, such as the United States, Canada, western European countries, Australia and others, regulates corporate activities that infringe upon human rights in areas such as employment, health and safety of conditions in operating facilities, and non-discrimination, the legislation does not generally extend to the operations of these businesses outside the regulating State's territory.²⁰ These standards generally apply only to the activities of the business within the regulating State. In addition, developing countries, where the operations of MNCs are sited, may lack legislation that regulates human rights infringements within their territories or are unable or unwilling to enforce existing regulations. Therefore governance gaps emerge as a result of the inability of countries to address and manage negative human rights impacts.²¹

With negative impacts of businesses particularly evident, but not exclusively so, in developing countries and states' inability or unwillingness to enact new measures of protection to

TRANSNAT'L CORPS., no. 2, 2009, at 91, 94 (stating that the number of foreign owned affiliates for U.S. MNCs alone grew from around 7,400 in 1950, to 23,000 in 1966).

19. ILO, Multinational Enterprises, <http://www.ilo.org/global/topics/employment-promotion/multinational-enterprises/lang-en/index.htm> (last visited Aug. 27, 2015); U.N. Conference on Trade & Dev. [UNCTAD], *The Universe of the Largest Transnational Corporations*, at 3, UNCTAD/ITE/IIA/2007/2 (2007) (comparing the number of foreign affiliates of transnational corporations in the 1990s with the early 2000s – 170,000 and 770,000, respectively).

20. This approach stands in contrast to the posture of the United States on the topics of anti-trust under the Sherman Antitrust Act, 15 U.S.C §§ 1-7 (2012), and the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (2012).

21. The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, referred to the "governance gap" in his 2008 report to the UN Human Rights Council: "The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences." John Ruggie (U.N. Special Rep. of the Secretary-General), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect and Remedy Framework*].

prevent and address such impacts,²² the issue of how best to regulate the conduct of MNCs has remained on the international agenda from the 1970s up through the present.

The United Nations has undertaken a number of initiatives to create an international code of conduct for businesses over the past 40 years. Initially, a Commission on Transnational Corporations, established by the U.N. Economic and Social Council in 1974,²³ worked on a *Draft Code of Conduct on Transnational Corporations*,²⁴ the last version of which was transmitted to the U.N. Economic and Social Committee in 1990.²⁵ However, this draft Code was never endorsed by States and thus, remains inactive.²⁶ This initial attempt to draft guidelines was followed by that of a U.N. working group, established in 1998 by the U.N. Sub-Commission on Human Rights.²⁷ The group drafted the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises* (Norms), which was adopted by the U.N. Sub-Commission in

22. See European Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, ¶ 4.8.2, COM(2011) 681 final (Oct. 25, 2011), <http://eur-lex.europa.eu/legal-content/en/txt/?uri=celex:52011DC0681> (inviting all member States to draft national action plans for the implementation of the U.N. Guiding Principles on Business and Human Rights). Specifically, this proclivity is evidenced by the National Action Plans on business and human rights drafted by 10 States as of December 2015 (Colombia, Denmark, Finland, Italy, Lithuania, Netherlands, Norway, Spain, Sweden, and the UK), which fail to propose significant measures regulating the extra-territorial conduct of businesses domiciled in their countries. The U.N. Human Rights Council encouraged all U.N. member countries to submit information on their national action plans in 2014. Human Rights Council Res. 26/22, A/HRC/Res/26/22, ¶ 4 (July 15, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/083/82/PDF/G1408382.pdf>.

23. UNCTAD, *International Investment Instruments: A Compendium*, at 161, U.N. Doc UNCTAD/DTCI/30 (Vol. I) (1996), http://unctad.org/en/Docs/dtci30vol1_en.pdf.

24. *Id.*

25. *Id.*

26. Carolin F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 4 GER. L.J. 1065, 1066 (2003).

27. Sub-Comm'n on Human Rights Res. 1998/8, U.N. Doc. E/CN.4/Sub.2/RES/1998/8, ¶ 4 (Aug. 20, 1998). Paragraph 4 charged the working group with responsibility to "examine the working methods and activities of transnational corporations" which included: "To consider the scope of the obligation of States to regulate the activities of transnational corporations, where their activities have or are likely to have a significant impact on the enjoyment of economic, social and cultural rights and the right to development, as well as of civil and political rights of all persons within their jurisdiction." *Id.* at 4(f).

2003²⁸ but remains dormant after the U.N. Commission on Human Rights, the predecessor to the U.N. Human Rights Council,²⁹ failed to endorse them.³⁰ However, the content of these two U.N. efforts, as well as the criticisms of them, served as stepping-stones leading to the drafting of the UNGPs, which received endorsement within the U.N. as well as wide-ranging support from States, businesses, and civil society.

In 2005, the U.N. Secretary-General, at the request of the U.N. Commission on Human Rights, appointed a Special Representative on the issue of human rights and MNCs and other business enterprises.³¹ The Special Representative first prepared and submitted the “*Protect, Respect and Remedy*” Framework to the U.N. Human Rights Council in 2008,³² which the Council formally “welcomed.”³³ The Special Representative was then asked by the Council to “operationalize” the framework. Consequently, he prepared and submitted the UNGPs.³⁴ The UNGPs, which were unanimously “endorsed” by the U.N. Human Rights Council in June 2011,³⁵ provide guidance on the implementation of the “*Protect, Respect and Remedy*” Framework.

Businesses, themselves, in an attempt to address concerns about their contribution to human rights infringements, have undertaken a number of initiatives. One of these is the development of industry codes of conduct, which are generally drafted as principles to which MNCs voluntarily commit themselves. One of the earliest industry codes was the Sullivan

28. Hillemanns, *supra* note 26, at 1065-66.

29. The U.N. Human Rights Council was created by the United Nations General Assembly in 2006 and replaced the United Nations Commission on Human Rights. OHCHR, United Nations Human Rights Council, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Sept. 15, 2015).

30. OHCHR, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, E/CN.4/DEC/2004/116 (Apr. 20, 2004), http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9780.

31. OHCHR Res. 2005/69, E/CN.4/RES/2005/69 (Apr. 20, 2005).

32. *Protect, Respect and Remedy Framework*, *supra* note 21, ¶ 1.

33. Human Rights Council Res. 8/7, U.N. Doc. A/HRC/RES/8/7, ¶ 1 (June 18, 2008).

34. Guiding Principles, *supra* note 6, at iv.

35. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/8/7, ¶ 1 (July 6, 2011).

Principles.³⁶ Initially developed in 1977, the Sullivan Principles were adopted by businesses opposed to the practice of apartheid in South Africa. The principles supported equal and fair employment practices with respect to blacks and other non-whites, who were marginalized, segregated, and exploited under the apartheid regime instituted by the white government.³⁷ Another effort undertaken by businesses to address concerns was the adoption of corporate codes of conduct in the 1980s and 1990s, whereby businesses articulated their responsibilities toward stakeholders, including employees, consumers, and the local community. These codes initially focused on labor rights and later environmental concerns³⁸ but now incorporate human rights.³⁹ Both industry and corporate codes of conduct evidence businesses' preference for voluntary, self-regulatory schemes relative to their operations in developing countries as opposed to being subject to governmental legislation and regulation.

The mandatory versus voluntary question – that is, whether mandatory legal obligations should be imposed on businesses regarding human rights or whether their adoption and commitment to voluntary principles are sufficient⁴⁰ – had been a polarizing issue throughout debates about an international code of conduct, but was temporarily placed in abeyance with the creation of the UNGPs. The responsibility of business

36. The original Sullivan principles, consisting of seven principles, were created in 1977 by the Rev. Leon Sullivan, an African-American minister who was a board member of General Motors. A second version of the Sullivan principles was launched in 1999 by Rev. Sullivan and UN Secretary General Kofi Annan. This was a more expansive version of the original principles. *The Global Sullivan Principles of Corporate Social Responsibility*, GLOBAL SULLIVAN PRINCIPLES (Aug. 27, 2015), <http://www.globalsullivanprinciples.org/principles.htm>.

37. *Id.*

38. Hellen Keller, *Codes of Conduct and Their Implementation: The Question of Legitimacy*, in LEGITIMACY IN INTERNATIONAL LAW 219, 233 & n.49 (Rüdiger Wolfrum & Volker Röben, eds. 2008).

39. *Id.* at 235-36.

40. See John Ruggie, Former UN Secretary-General's Special Representative for Business and Human Rights, Lecture at the University of Connecticut: Just Business: Multinational Corporations and Human Rights (Feb. 28, 2013), <http://mediasite.dl.uconn.edu/Mediasite/Play/76c132b67e3e4aa0ad91295b041cbf381d> (describing the Guiding Principles as reinforcing policy measures capable over time of generating cumulative change and achieving large-scale success).

enterprises to respect human rights, contained in the UNGPs, is not legally binding on businesses but is a “global standard of expected conduct.”⁴¹ Extensive multi-stakeholder consultations, with “[g]overnments, business enterprises and associations, civil society, experts in various areas of law and policy that relate to the Guiding Principles, and individuals and communities directly affected” by activities of businesses, not only informed the eventual content of the UNGPs but also helped assure that they would be acceptable to these very same groups.⁴²

Yet, with continuing violations of human rights, the debate over corporate self-regulation versus legislative and regulatory measures continues apace. The recent discussions within the United Nations by the open-ended intergovernmental working group on a potentially binding treaty relating to business and human rights evidence the marked division that remains on standards in this area.⁴³ The United States, which voted against the resolution establishing the intergovernmental working group, refused to participate in the discussions, and other leading developed countries, including European Union countries, Japan, and Australia, remained silent on a number of the significant issues discussed.⁴⁴ The schism between those seeking binding regulations – namely, civil society, academics,

41. Guiding Principles, *supra* note 6, at 13.

42. John Ruggie (U.N. Special Rep. of the Sec’y-Gen.), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* ¶ 10, at 4, U.N. Doc. A/HRC/17/31 (2011) [hereinafter *Implementing the U.N. Framework*].

43. An intergovernmental working group was created pursuant to a 2014 resolution of the UN Human Rights Council, which provided that the group should “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.” Human Rights Council Res. 26/9 U.N. Doc. A/HRC/RES/26/9, at 1 (June 25, 2014). The resolution was sponsored by Bolivia, Cuba, Ecuador, South Africa and Venezuela. Twenty countries voted in favor of the resolution, 14 against and 13 countries abstained. The 14 countries that voted against the resolution included several OECD member countries, including: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, South Korea, the United Kingdom and the United States. *Id.*

44. See Michael Kourabas, *Is a Binding Treaty the Way Forward for Business and Human Rights?*, TRIPLE PUNDIT (July 14, 2015), <http://www.triplepundit.com/2015/07/binding-treaty-way-forward-business-human-rights> (indicating the United States and many European Union members, including Japan and Australia, were absent or silent on the resolution).

and others – and those favoring self-regulation by companies – primarily the States that are home to the largest MNCs and businesses – is likely to be aggravated without greater respect for human rights by businesses and adequate remedies and access to such remedies by persons harmed by businesses' actions.

IV. CHALLENGES FOR THE LEGAL PROFESSION

The business and human rights area is still in the process of development; its parameters are not yet entirely demarcated and its content not yet fully defined. One of the major difficulties for lawyers is that the legal component of the corporate responsibility to respect has not yet been elaborated in detail. Any discourse on legal standards for businesses in this area has two key components: i) the relevant frameworks for the area and ii) the human rights standards that businesses must respect. These topics and their ambiguities are explored below.

A. *The Frameworks*

For the foreseeable future, and at least until an international treaty specifically addresses the topic of business and human rights, the UNGPs remain the foundation for this area. Yet, as suggested by the Joint Declaration's reference to the "UNGPs and other frameworks on business and human rights" in each of its operative paragraphs,⁴⁵ there are other frameworks that are pertinent. Therefore, it is useful to first examine the UNGPs and then other relevant frameworks before considering how these frameworks might fit together.

1. The United Nations Guiding Principles on Business and Human Rights

The UNGPs are formulated on the basis of the "*Protect, Respect and Remedy*" Framework, which has been frequently cited as the underpinning for the business and human rights area. This framework is referred to as a three-pillared structure comprising: i) the State duty to *protect* against human rights abuses by business; ii) the corporate *responsibility* to respect

45. Am. Bar Ass'n et al., *supra* note 2.

human rights; and iii) access to *remedy* for victims of business-related abuse of human rights. The UNGPs provide principles that serve as “concrete and practical recommendations for [the “*Protect, Respect and Remedy*” Framework’s] implementation.”⁴⁶ The UNGPs has become the key document that provides structure and general content to the business and human rights area and establishes, as noted above, the “global standard” for expected business conduct.⁴⁷

The first pillar, the State duty to protect, is based on international law, according to the Special Representative’s report, and “provides that States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction.”⁴⁸ The second pillar, the corporate responsibility to respect human rights, means that businesses should not infringe on the rights of others; in essence, they should “do no harm.”⁴⁹ This is not an obligation with an international law basis, but rather “the basic expectation society has of business.”⁵⁰ The third pillar, access to remedy, refers to the requirement that States take appropriate steps to ensure that when businesses infringe upon the human rights of individuals or groups⁵¹ within the territory or jurisdiction of the State, those persons can access an effective remedy.⁵² Thus, the UNGPs are constructed on the foundations of the “*Protect, Respect and Remedy*” Framework in the area of

46. *Implementing the U.N. Framework*, *supra* note 42, ¶ 9.

47. *Id.* ¶ 11. Recent support for the UNGPs is evidenced in: 2030 Agenda for Sustainable Development, G.A. Res. 70/1, ¶ 67, U.N. Doc. A/Res/70/1 (Oct. 21, 2015), and G-7 Leaders’ Declaration, Schloss Elmau, Germany, The White House, Office of the Press Secretary (June 8, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>.

48. *Protect, Respect and Remedy Framework*, *supra* note 21.

49. *Id.* ¶ 24.

50. *Id.* ¶ 9.

51. “Group rights” can also be termed “collective rights” and, as stated by the OHCHR, “refers to the rights of such peoples and groups, including ethnic and religious minorities and Indigenous peoples, where the individual is defined by his or her ethnic, cultural or religious community.” OHCHR, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, at 4, U.N. Doc. HR/PUB/06/8 (2006).

52. *Implementing the U.N. Framework*, *supra* note 42, ¶ 25.

business and human rights, and provide guidance on the implementation of the framework.

2. Other Frameworks

The Joint Declaration does not specify what the “other frameworks” are, and there is no general agreement within the international community as to the identity of these frameworks. However, other frameworks referenced by the European Commission, the executive branch of the 28 Member-State European Union, as a “core set of internationally recognized principles and guidelines” that provide “authoritative guidance” to companies in the area of corporate social responsibility,⁵³ include the following: OECD Guidelines for Multinational Enterprises; International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; the U.N. Global Compact; and the ISO 26000 Guidance Standard on Social Responsibility.⁵⁴

However, in order to recognize the instruments, which were mentioned by the European Commission as relevant to the area of corporate social responsibility, as valuable frameworks for the business and human rights area, it is necessary to examine them more closely. This evaluation is essential because, although the areas of “corporate social responsibility” and “business and human rights” are not always distinguishable from one another in corporate discourse, they are not coterminous and may be at most “close cousins.”⁵⁵ “Corporate social responsibility” is defined by the United Nations Industrial Development Organization as “a management concept whereby companies integrate social and environmental concerns in the business operations and interactions with their stakeholders.”⁵⁶ In contrast, “business and human rights” emphasizes rights and

53. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, ¶ 3.2, COM (2011) 681 final (Oct. 25, 2011).

54. *Id.*

55. Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUMAN RIGHTS 237, 237 (2015).

56. *What is CSR?*, U.N. INDUS. DEV. ORG., <http://www.unido.org/en/what-we-do/trade/csr/what-is-csr.html> (last visited Sept. 3, 2015).

remedies for infringements on those rights and, therefore, focuses on the accountability of businesses for their negative impacts on persons and communities.⁵⁷

Given these essentially different orientations – namely, voluntary actions taken by businesses as part of their “corporate social responsibility” and accountability of businesses and remedies for persons harmed for the “business and human rights” area – it is instructive to assess the nature and content of these instruments to evaluate their relevance to the business and human rights area. A determination of the degree to which they are reflected in the UNGPs is also productive. These considerations should assist in the evaluation of whether and to what extent they should be included as “frameworks” in the business and human rights area.

a. U.N. Global Compact

The U.N. Global Compact,⁵⁸ officially launched in 2000, is considered to be the “world’s largest corporate responsibility initiative.”⁵⁹ While work was proceeding on the Norms, U.N. Secretary-General Kofi Annan officially proposed the U.N. Global Compact at the World Economic Forum in Davos in 1999.⁶⁰ The launch occurred, and not coincidentally, in the same year that the Millennium Development Goals were adopted by the 189 countries represented in the U.N. General Assembly to reduce poverty and to ensure the economic and social development of people in these countries.⁶¹

57. See Ramasastry, *supra* note 55, at 238 (explaining that “business and human rights” is more focused on corporate accountability and on limiting the negative consequences of business activity that erode human rights).

58. U.N. GLOBAL COMPACT [UNGC], <https://www.unglobalcompact.org/> (last visited Nov. 1, 2015).

59. *Report on Corporate Sustainability and the United Nations Post-2015 Development Agenda*, UNGP (June 17, 2013), https://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2013_06_18/UNGC_Post2015_Report.pdf

60. Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999).

61. The eight Millennium Development Goals were adopted in 2000 with a 15-year agenda to tackle poverty. See U.N., United Nations Millennium Development Goals, <http://www.un.org/millenniumgoals/bkgd.shtml> (last visited Sept. 3, 2015); World Bank Group [WBG], Millennium Development Goals, <http://data.worldbank.org/about/millennium-development-goals> (last visited Sept. 21, 2015) (“In September 2000, 189

Today more than 8,000⁶² companies in 140 countries have joined⁶³ and committed to respect the 10 principles of the Global Compact. Companies pledge to abide by the 10 principles when they “sign-on” to the U.N. Global Compact.⁶⁴ In doing so, they are obligated to create a publicly available report every year termed a “Communication on Progress” in which they report on their actions and plans to implement the ten principles of the U.N. Global Compact and assess the outcomes.⁶⁵

In brief, the 10 principles cover four general areas. There are two human rights principles, four labor rights principles, three environmental principles, and one anti-corruption principle, which was added in 2004. The first human rights principle articulates that businesses are to “respect human rights,” in a manner coterminous to the second pillar of the “*Protect, Respect and Remedy*” Framework, which as noted above, structures the UNGPs.⁶⁶ However, this first principle also includes an affirmative obligation of businesses to support internationally proclaimed human rights, that is by “making a positive contribution to human rights, to promote or advance human rights” according to the U.N. Global Compact.⁶⁷ The second human rights principle provides that businesses should

member States of the United Nations came together at the Millennium Summit.”). In September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes 17 Sustainable Development Goals. The Sustainable Development Goals are intended to build on the work undertaken to meet the Millennium Development Goals. See U.N. Dev. Programme, Sustainable Development Goals (SDGs), <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html> (last visited Feb. 15, 2016).

62. *Our Participants*, UNGC, <https://www.unglobalcompact.org/what-is-gc/participants> (last visited Nov. 26, 2015).

63. UNGC, Corporate Sustainability in the World Economy, at 2 (Jan. 2014), https://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf.

64. *Id.*

65. *Id.*

66. See *Protect, Respect and Remedy Framework*, *supra* note 21, at 1 (explaining that the second principle of the Protect, Respect, and Remedy Framework is the corporate responsibility to respect human rights).

67. *The Ten Principles of the UN Global Compact: Principle One: Human Rights*, UNGC, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> (last visited Aug. 28, 2015).

ensure that they are not complicit in human rights violations.⁶⁸ This concept is also addressed in the UNGPs;⁶⁹ the commentary to principle 17 suggests that businesses' performance of due diligence will help them avoid complicity in or contribution to adverse human rights impacts perpetrated by others.

The four labor principles articulate the four categories of fundamental principles and rights listed in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and are recognized by the UNGPs as part of the minimum understanding of internationally recognized human rights.⁷⁰ These fundamental principles and rights are: i) freedom of association and the effective recognition of the right to collective bargaining; ii) elimination of all forms of forced and compulsory labor; iii) effective abolition of child labor; and iv) elimination of discrimination in respect of employment and occupation.

The U.N. Global Compact principles have served as a significant catalyst for businesses' corporate social responsibility actions and corporate social reporting.⁷¹ However, there is little

68. *The Ten Principles of the UN Global Compact: Principle Two: Human Rights*, UNGC, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2> (last visited Sept. 4, 2015).

69. *Implementing the U.N. Framework*, *supra* note 42, ¶ 17.

70. *Id.* ¶ 12.

71. For example, under section 225 of the "Grenelle II" Act of the French Commercial Code, France requires companies with more than 500 employees to report on 40 topics that fall under three themes: social, environmental, and commitments to sustainable development. Where companies choose not to provide information on certain subjects, they must explain why they did not do so. *The French Legislation on Extra-Financial Reporting: Built on Consensus*, MINISTÈRE DES AFFAIRES ÉTRANGÈRES - FRANCE [MINISTRY OF FOREIGN AFFAIRS] § II (Dec. 2012), http://www.diplomatie.gouv.fr/en/IMG/pdf/Mandatory_reporting_built_on_consensus_in_France.pdf.

The UK Companies Act 2006 requires the directors' reports of all quoted UK companies (includes those listed on the New York Stock Exchange or the Nasdaq) to include a business review that "to the extent necessary for an understanding of the development, performance or position of the company's business, include . . . information about - (i) environmental matters (including the impact of the company's business on the environment), (ii) the company's employees, and (iii) social and community issues, including information about any policies in relation to these and the effectiveness of those policies." Companies Act 2006, c. 46, § 417 (Eng.), http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf.

The European Commission noted in a 2011 communication that "In order to ensure a level playing field, as announced in the Single Market Act the Commission will present

accountability following a company's publication of its annual report since these reports are not analyzed or commented upon by any entity associated with the UN Global Compact or an independent third party body. Nevertheless, the failure to submit the annual report can result in companies being delisted from the U.N. Global Compact, as has occurred with over five thousand Global Compact business participants.⁷²

The commentary to the U.N. Global Compact human rights principles generally tracks the UNGPs.⁷³ However, the obligation of businesses to “support” internationally proclaimed human rights in Global Compact principle 1 takes companies beyond respect for human rights and imposes upon them a positive obligation of contribution to human rights. The commentary to Principle 1 provides several examples of how companies can support or promote human rights: i) through their core business activities; ii) through strategic social investment and philanthropy; iii) advocacy and public policy engagement; and iv) partnership and collective action.⁷⁴ The

a legislative proposal on the transparency of the social and environmental information provided by companies in all sectors.” *Communication from the Commission to the European Parliament*, *supra* note 53, ¶ 4.5. Thus, in 2014, the European Union adopted a directive concerning corporate social responsibility by companies, which entered into force on Dec. 6, 2014. EU member States have two years in which to adopt national legislation implementing the directive. Companies are to report information on policies, risks and outcomes concerning environmental matters, social and employee aspects, respect for human rights, and anticorruption and bribery issues in their management reports. The rules apply to large companies with more than 500 employees and are estimated to cover approximately 6000 companies and groups in the EU. *See* Council Directive 2014/95, art. 19a, 2014 O.J. (L 330) 4 (EU) (noting amendments to the reporting requirements for public-interest entities averaging 500 employees or more); *Non-Financial Reporting*, EUROPEAN COMMISSION, http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm (last visited Sept. 22, 2015).

72. *See Monthly Bulletin: April 2015*, UNGC (Apr. 2015), <http://bulletin.unglobalcompact.org/t/r-F4701646C86B11242540EF23F30FEDED> (noting in the figures as of 31 March that a total of 5,179 business participants had been expelled); *see also* Jo Confino, *Cleaning Up the Global Compact: Dealing with Corporate Free Riders*, THE GUARDIAN (Mar. 26, 2012), <http://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash> (noting 750 companies likely to be delisted in 2012 and added to the 3100 companies already delisted).

73. *See generally The Ten Principles of the UN Global Compact*, UNGC, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Sept. 22, 2015) (explaining the ten principles of the U.N. Global Compact in detail).

74. *The Ten Principles of the UN Global Compact: Principle One: Human Rights*, *supra* note 67.

UNGPs take a different approach: they not only do not require companies to undertake activities to support or promote human rights but also note that this type of support cannot “offset a failure to respect human rights throughout their operations.”⁷⁵

b. OECD Guidelines

The Organisation for Economic Co-operation and Development,⁷⁶ best known by its acronym “OECD,” developed its first set of Guidelines for Multinational Enterprises⁷⁷ (OECD Guidelines or Guidelines) in 1976 and updated them for the fifth time in 2011.⁷⁸ The OECD Guidelines are non-binding recommendations on responsible conduct for businesses operating in or from the 34 member countries, mostly western ones, and the 12 non-member countries adhering to the Guidelines.⁷⁹ While the 1976 version of the OECD Guidelines referred to some labor rights but did not cover human rights, recent updates have increasingly incorporated human rights.⁸⁰ The 2011 update, issued the same year as the adoption of the UNGPs, inserted a human rights chapter and rendered the content consistent with the principles of the UNGPs.⁸¹ As mentioned earlier, the ABA endorsed the human rights chapter of the OECD Guidelines in its resolution endorsing the

75. *Implementing the U.N. Framework*, *supra* note 42, ¶ 11.

76. *About the OECD*, OECD, <http://www.oecd.org/about> (last visited Sept. 5, 2015).

77. *See generally OECD Guidelines*, *supra* note 6 (addressing how companies should implement the OECD guidelines).

78. *The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions*, OECD, <http://www.oecd.org/daf/inv/mne/2011update.htm> (last visited Nov. 26, 2015).

79. The 12 countries adhering to the OECD Guidelines for Multinational Enterprises are: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia. *See OECD Legal Instruments on International Investment and Trade in Services*, OECD, <http://www.oecd.org/investment/investmentinstruments.htm> (last visited Sept. 5, 2015) (explaining that all OECD member countries adhere to the guidelines).

80. The version of the OECD Guidelines adopted by governments on June 27, 2000 mentioned human rights under the “General Policies” section but did not contain a specific section addressing human rights. *See* OECD, *OECD Guidelines for Multinational Enterprises*, at 14 (2008), <http://www.oecd.org/corporate/mne/1922428.pdf> (mentioning that companies should respect the human rights of those affected by their business).

81. *OECD Guidelines*, *supra* note 6, at 31.

UNGPs.⁸² In addition to human and labor rights, the Guidelines treat a range of other areas of corporate responsibility, including the environment, bribery, consumer interests, transparency, development of local communities, and science and technology.

The Guidelines fulfill two key functions. First, they promote policies that improve the economic well-being of people around the world and their social well-being.⁸³ Specifically, the Guidelines encourage MNCs to make a positive contribution and to minimize negative impacts that affect society.⁸⁴ Second, they create a binding legal obligation on member and adhering governments. These governments are to implement the Guidelines and establish a dispute mechanism. Specifically, they are to create National Contact Points that promote the Guidelines and receive and consider complaints.⁸⁵ In theory, this mechanism provides a forum established by governments for complaints by persons whose human rights, including labor rights, have been infringed by businesses. In practice, however, the National Contact Points have been criticized for not being entirely effective due a lack of consistency and transparency, and the absence of significant consequences where businesses have been found to be in breach of the Guidelines.⁸⁶

The human rights chapter of the OECD Guidelines primarily covers what business *should* do. This includes the general obligation to respect human rights, as well as practical steps such as having a policy commitment and carrying out human rights due diligence. The Guidelines also provide that businesses should “co-operate in the remediation of adverse

82. Resolution 109, *supra* note 5, at lines 6-8.

83. *About the OECD*, OECD, <http://www.oecd.org/about> (last visited Sept. 11, 2015).

84. *OECD Guidelines*, *supra* note 6, at 7.

85. *Id.* at 68.

86. *See Update on the role of OECD National Contact Points with Regard to the Extractive Sectors*, U.K. DEPT FOR BUS. INNOVATION & SKILLS & INST. FOR HUMAN RIGHTS & BUS. 1, (Mar. 22, 2013), http://www.ihrb.org/pdf/IHRB-NNCP-OECD-National-Contact-Points-and-the-Extractive-Sector_2013-Update.pdf (discussing the problems connected with NCPs such as the varying degree of transparency and lack of consequences for breaching businesses); *see also* OECD Watch, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct*, June 2015, http://oecdwatch.org/publications-en/Publication_4201.

human rights impacts.”⁸⁷ Of note is the fact that the human rights section is the only topical one in the document to mention the responsibility of States, in this case “to protect human rights.”⁸⁸ None of the other substantive topical chapters announce obligations for States. Thus, while the human rights chapter of the OECD Guidelines essentially reiterates the UNGPs, it does not contain further substantive elaboration of human rights protections of persons against infringements by businesses. In contrast, the chapter on employment and industrial relations not only mentions the ILO’s Declaration on Fundamental Principles and Rights at Work, referred to in the UNGPs, but also supplies considerable additional information. Specifically, it references the particular principles from the ILO Declaration as well as principles from the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, discussed below.⁸⁹ Thus, the chapter on employment and industrial relations in the OECD Guidelines articulates specific rights contained in the two fundamental ILO instruments. In addition, the commentary references key ILO documents and therefore, provides legal foundations and guidance on the implementation of these rights.

c. ISO 26000

The International Organization for Standardization (ISO),⁹⁰ a well-respected authority on standards worldwide, launched ISO 26000 Guidance on Social Responsibility in 2010.⁹¹ This standard is intended to provide guidance to businesses and other organizations, whether public, profit, or non-profit, on the principles of social responsibility and on ways to implement socially responsible behavior into an organization, including

87. *OECD Guidelines*, *supra* note 6, at 31.

88. *Id.*

89. *See id.* at 35-37 (addressing principles that appear in the ILO Declaration and the ILO Tripartite Declaration of Principles such as the right to join trade unions, collective bargaining, eliminating child labor and forced labor, non-discrimination in employment, employment conditions, and employer relations).

90. *See About ISO*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home.html> (last visited Sept. 4, 2015) (explaining that the ISO develops and publishes international standards for businesses).

91. INT’L ORG. FOR STANDARDIZATION, ISO 26000: GUIDANCE ON SOCIAL RESPONSIBILITY (2010) [hereinafter ISO 26000].

businesses, and to assist organizations in contributing to sustainable development.⁹² The standard covers seven core areas: organizational governance, human rights, labor practices, the environment, fair operating practices, consumer issues, and community involvement and development.⁹³

Representatives from government, civil society, industry, consumer groups, and labor organizations, with significant input from developing countries, drafted ISO 26000.⁹⁴ 72 National Standards Bodies endorsed the standard, although the National Standards Body from the United States voted against it.⁹⁵ However, endorsement is not considered to be formal governmental endorsement. Therefore, ISO 26000 provides only voluntary guidance to organizations and as the ISO states: “it is not intended to provide a basis for legal actions, complaints, defenses or other claims in any international, domestic or other proceeding, nor is it intended to be cited as evidence of the evolution of customary international law.”⁹⁶ Moreover, ISO 26000 does not contain any mechanism for accountability or enforcement for a business’s failure to respect human rights, although it does permit complaints concerning false statements of certification to the standard or misuse of its logo, since ISO 26000 provides non-binding guidance rather than obligatory standards that can be certified.⁹⁷

92. *Id.* introductory cmt.

93. *Id.* introductory cmt., tbl 2; *see also* Int’l Org. for Standardization, *Discovering ISO 26000: Guidance on Social Responsibility*, at 9 (2014), http://www.iso.org/iso/discovering_iso_26000.pdf.

94. MARTJE THEUWS & MARIETTE VAN HUIJSTEE, CENTRE FOR RESEARCH ON MULTINATIONAL CORPORATIONS, CORPORATE RESPONSIBILITY INSTRUMENTS: A COMPARISON OF THE OECD GUIDELINES, ISO 26000 & THE UN GLOBAL COMPACT 4, 38-39 (2013).

95. *Id.* at 10.

96. ISO 26000, cl. 1.

97. *See Certification*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/certification.htm> (last visited Sept. 13, 2015) (noting that companies’ compliance with ISO standards can be certified by external entities but that ISO does not, itself, certify compliance with the standards it promulgates); *Making a Complaint to ISO*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/certification/complaints> (last visited Nov. 1, 2015) (advising that complaints regarding “the misuse of the ISO logo or false certification to ISO standards” may be made to ISO).

d. ILO Tripartite Declaration

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Tripartite Declaration) was adopted by the International Labour Organisation (ILO) in November 1977.⁹⁸ The ILO was created in 1919 as part of the Treaty of Versailles that ended World War I,⁹⁹ thus, well before the U.N. and even prior to the formation of the U.N.'s predecessor, the League of Nations, in 1920. The ILO helps advance decent work for all women and men and has a unique tripartite structure composed of workers, employers, and governments.¹⁰⁰

The Tripartite Declaration was developed, adopted, and supported by workers, employers organizations, and governments,¹⁰¹ and provides recommendations to all of these in order to encourage the positive contribution of MNCs to economic growth and social development¹⁰² and to minimize and resolve the difficulties that arise from their operations.¹⁰³ Amended several times since its adoption in 1977,¹⁰⁴ it contains principles that relate primarily to issues of work relations and covers five main areas: general policies, employment, training, conditions of work and life, and industrial relations.¹⁰⁵ The Tripartite Declaration also takes into account the ILO's Declaration on Fundamental Principles and Rights at Work, an instrument adopted in 1998¹⁰⁶ and mentioned in the UNGPs, and contains detailed references to ILO Conventions and labor

98. *Tripartite Declaration*, *supra* note 12, intro., at v.

99. *Origins and History*, ILO., <http://www.ilo.org/global/about-the-ilo/history/lang-en/index.htm> (last visited Aug. 26, 2015).

100. *Mission and Objectives*, ILO., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> (last visited Aug. 26, 2015).

101. Hans Günter, *The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (History, Contents, Follow-up and Relationship with Relevant Instruments of Other Organisations)* 1, 3-4 (Multinat'l Enters. Programme Working Papers, Working Paper No. 18, 1981).

102. *Tripartite Declaration*, *supra* note 12, intro., at v; *id.* para. 2.

103. *Id.* ¶ 2.

104. *See id.* at 1 (“[The Tripartite Declaration was] adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th (November 2000) and 295th Session (March 2006).”).

105. *Id.* ¶¶ 7-12.

106. *Id.*, intro., at v.

rights. A procedure for examination of disputes concerning application of the Declaration, established by the ILO Governing Body, permits governments and international and national organizations of employers and workers to make requests concerning interpretation of the provisions of the Declaration.¹⁰⁷

3. An Approach to the Multiple Frameworks

The above review of the UNGPs and other frameworks provides a basis for a comparison of their relevance to the business and human rights area. The UNGPs, with the underlying “*Protect, Respect and Remedy*” Framework, provide a foundation for the business and human rights area with a focus on accountability of businesses and remedies for persons harmed. The U.N. Global Compact is almost a pure corporate social responsibility initiative, and ISO 26000 serves as internal guidance on social responsibility. However, the OECD Guidelines and the Tripartite Declaration cross-over from the corporate social responsibility area into that of business and human rights with the former’s recommendations to businesses by States and the latter’s adoption by the ILO.

These various frameworks also have different purposes. The UNGPs set forth an overall framework and guidance for the business and human rights area that includes action by States, respect for human rights by businesses, and access to an effective remedy for persons and communities whose rights are negatively affected by businesses. The U.N. Global Compact is a call to businesses to align their strategies and operations with universal principles while ISO 26000 standards are for internal use by organizations, including businesses. The Tripartite Declaration and OECD Guidelines are geared toward economic growth and social development, which are more in the nature of general development policies rather than respect for rights and ensuring access to remedies.

Despite the differences among these frameworks, they all contain relevant principles and concepts to the business and human rights area, particularly the human rights that businesses should respect. However, in the absence of a single document that summarizes the guidelines and principles from

107. *Id.* add. II.

the UNGPs and the four other frameworks, lawyers are obliged to read through these documents and synthesize their provisions in order to understand the human rights standards businesses are expected to meet and how businesses should implement these standards. This is a process that would be both time-consuming and unreasonably burdensome for lawyers.

An approach to synthesize the UNGPs and the other frameworks could utilize the UNGPs¹⁰⁸ as a base and then incorporate the business-oriented ISO 26000 and U.N. Global Compact as well as the recommendations to both government and businesses of the OECD Guidelines and ILO Declaration. This is particularly workable since ISO 26000 was drafted and the OECD Guidelines were revised in 2011 to reflect the content of the UNGPs.¹⁰⁹ In addition, the general human rights, including labor principles, of the U.N. Global Compact were incorporated into the UNGPs.¹¹⁰

In addition to weaving these documents into a foundation built on the UNGPs, the unique elements that each of the documents contains merit further consideration as the field of business and human rights continues to develop. The OECD Guidelines establish a remedial mechanism, the National Contact Points, while the U.N. Global Compact provides for the obligation of businesses not only to respect but also to “support” human rights.¹¹¹ The ISO standard might also provide a basis for drafting similar guidance to law firms. Many of these documents also contain sections on the environment and corruption, which topics, as will be discussed below, are increasingly linked to human rights standards; therefore, their inclusion in the business and human rights framework merits further discussion.

Consideration should also be given to incorporating human rights standards more explicitly, specifically those related to human rights other than labor rights, which already receive

108. Guiding Principles, *supra* note 6, princ. 11 & cmt.

109. *OECD Guidelines*, *supra* note 6, foreword, 3.

110. UNGC & OHCHR, THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: RELATIONSHIP TO UN GLOBAL COMPACT COMMITMENTS (June 2014), https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf.

111. *Id.*

significant attention in several of the relevant frameworks. Documents, instruments and standards on distinct issues and sectors would serve as valuable resources. Since the endorsement of the UNGPs by the U.N. Human Rights Council in 2011, there have been numerous guides and instruments issued that focus on the human rights impacts of businesses. A few examples highlight the potential contribution that these could make to the development of the business and human rights framework. The Children's Rights and Business Principles, which were developed jointly by UNICEF, the U.N. Global Compact, and Save the Children, provide principles to guide businesses in their actions so as to minimize their negative impacts on children and maximize their positive impacts.¹¹² The OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High Risk Areas, articulates due diligence and reporting recommendations for businesses potentially sourcing minerals or metals from conflict-affected and high-risk areas.¹¹³ The United Nations Principles for Responsible Investing are guidelines for incorporating environmental, social, and governance issues into investment practices.¹¹⁴

Thus, as the ABA and other bar associations and legal organizations promote the realization of and educate lawyers about human rights in the business context, they will want to provide lawyers with a document that synthesizes the principles and concepts of the relevant frameworks in the business and human rights area and will serve as a foundation for further development in this area. This foundation should be a solid one into which various other relevant initiatives can be integrated and upon which further developments can be grafted in order to

112. UNICEF, THE GLOBAL COMPACT, & SAVE THE CHILDREN, CHILDREN'S RIGHTS AND BUSINESS PRINCIPLES (2012) https://www.unglobalcompact.org/docs/issues_doc/human_rights/CRBP/Childrens_Rights_and_Business_Principles.pdf.

113. OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2d ed., 2013), <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>.

114. PRINCIPLES FOR RESPONSIBLE INV. ASS'N, PRINCIPLES FOR RESPONSIBLE INVESTMENT (2015), http://www.unpri.org/viewer/?file=wp-content/uploads/PRI_Brochure_2015.pdf.

facilitate lawyers' ability to advise their clients on business and human rights.

B. Human Rights Standards

The expected standard of conduct for businesses, as stated in the UNGPs and reflected in the four frameworks reviewed above, is that businesses should respect human rights. Moreover, the human rights that businesses can impact include "virtually the entire spectrum of internationally recognized human rights," as provided in the UNGPs.¹¹⁵ Thus, as lawyers attempt to incorporate human rights into their work on behalf of their business clients, one of the initial challenges they will encounter is to determine where to find internationally recognized human rights. The UNGPs provide a valuable starting point, but lawyers need to understand the range of standards as well as the variety of sources of international human rights law. They also will need to comprehend the nature of such rights. Accordingly, the specific human rights instruments cited by the UNGPs are examined below, followed by an overview of the three primary sources of international human rights law and the nature of human rights standards.

1. Instruments Referred to in the UNGPs

The UNGPs provide that "human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights (IBHR) and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."¹¹⁶ The IBHR is composed of three important instruments;¹¹⁷ chief among them is the Universal Declaration of Human Rights. Adopted by the U.N. General Assembly in 1948, it is considered to be the most

115. Guiding Principles, *supra* note 6, princ. 12 cmt.

116. *Id.* princ. 12.

117. OHCHR, FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS, OHCHR (June 1996), <http://www.refworld.org/docid/479477480.html>; *see also* G.A. Res. 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948) (establishing the Universal Declaration of Human Rights in Part A and instructing in part E the immediate commencement of work on two complementary covenants to effectuate the purpose of the Declaration).

important and far-reaching U.N. declaration and the one that established the direction for the UN's work in the human rights area.¹¹⁸ The other two international instruments that comprise the IBHR are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted by the U.N. General Assembly in 1966.¹¹⁹

Even at the time of the drafting of the Universal Declaration, there was general agreement among States that the rights contained in the Declaration should be expressed in the form of hard law for States through a treaty. The only question was whether such rights should be contained in a single or multiple instruments given the different views on the attainment of such rights. The western countries argued that civil and political rights had to be strictly respected, while economic and social rights should be progressively achieved.¹²⁰ This view prevailed and the civil and political rights, such as freedom of thought, conscience, religion, and expression, many of which are found in the first ten amendments to the U.S. Constitution, were placed in one instrument, the ICCPR.¹²¹ The economic, social, and cultural rights that are not reflected in the U.S. Constitution, such as the right to work, health, education, cultural life, and protection of the family, are contained in the ICESCR.¹²²

The other essential set of rights referenced in principle 12 of the UNGPs are those relating to workers, found in the ILO's Declaration on Fundamental Principles and Rights at Work. Adopted in 1998, the declaration contains four labor principles: i) freedom of association and the effective recognition of the right to collective bargaining; ii) elimination of all forms of forced or compulsory labor; iii) effective abolition of child labor; and

118. Universal Declaration of Human Rights, *supra* note 117.

119. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

120. Christian Tomuschat, *International Covenant on Civil and Political Rights*, U.N. AUDIOVISUAL LIBRARY OF INT'L L. 1 (2008), http://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf.

121. ICCPR, *supra* note 119, at 178.

122. ICESCR, *supra* note 119, at 6-9.

iv) elimination of discrimination in respect of employment and occupation.¹²³ These principles are detailed in eight core ILO conventions.¹²⁴

2. Identifying the Sources of International Human Rights Law

The UNGPs' establishment of a minimum understanding of international human rights allows lawyers to focus on many of the key international human rights, but lawyers should be aware in their advice to businesses that the potential scope of human rights standards applicable to businesses is much more extensive. Thus, lawyers will need to look beyond the IBHR and ILO Declaration on Fundamental Principles and Rights at Work to obtain a fuller understanding of human rights.

The Office of the High Commissioner for Human Rights, the U.N. agency that works to promote and protect international human rights,¹²⁵ defines international human rights as "rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status."¹²⁶ Within international law these inherent rights can be found in the three primary international law sources: international conventions, customary

123. ILO, *ILO Declaration on Fundamental Principles and Rights at Work* (1998), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>.

124. See ILO, Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize, July 19, 1948, 68 U.N.T.S. 17; ILO, Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257; ILO, Convention No. 29 Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; ILO, Convention No. 105 Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291; ILO, Convention No. 138, Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297; ILO, Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161; ILO, Convention 100 Concerning Equal Remuneration for Men and Women, June 29, 1951, 165 U.N.T.S. 303; ILO, Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31.

125. *Human Rights Bodies*, OHCHR, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Sept. 1, 2015).

126. *What are Human Rights*, OHCHR, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Sept. 1, 2015).

international law, and general principles of international law,¹²⁷ each of which merits separate consideration to determine how they contribute to the body of internationally recognized human rights.

Regarding international conventions, the UNGPs specifically reference two such instruments: the ICCPR and the ICESCR.¹²⁸ However, other international human rights treaties elaborate on the content of the ICCPR and ICESCR and cover particular categories of persons – such as children, migrant workers, women, minorities, indigenous people, and disabled persons – and specific topics – such as labor, genocide, racial discrimination and torture. Therefore, the human rights standards in treaties on these persons and topics, as well as others, are also part and parcel of the international human rights treaties that businesses are to respect.

For example, the Convention on the Rights of the Child¹²⁹ provides additional detail to the rights of children contained in the ICESCR.¹³⁰ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹³¹ amplifies article 7 of the ICCPR. Moreover, the rights related to labor and the rights to form and join trade unions, found in the two covenants,¹³² are expanded upon in much greater detail in ILO conventions.

While human rights standards can be fairly easily identified from the texts of treaties, it is vastly more difficult to discern the two other sources of international law relevant to human rights, customary international human rights law and general principles of international human rights law. For a customary international human rights law to exist, there must be *state practice*, that is, acts that constitute “settled practice” by States and *opinio juris*, that is, a “belief that this practice is rendered

127. These principles are derived from the Statute of the International Court of Justice, 1945 I.C.J Acts & Docs. 75, art. 38(1).

128. Guiding Principles, *supra* note 6, princ. 11 cmt., at 14.

129. G.A. Res. 44/25 (Nov. 20, 1989).

130. The rights of children can be found in ICESCR, *supra* note 119, arts. 10(1), (3), 13(3).

131. G.A. Res. 39/46 (Dec. 10, 1987).

132. ICCPR, *supra* note 119, arts. 8, 22; ICESCR, *supra* note 119, arts. 6-8.

obligatory by the existence of a rule of law requiring it.”¹³³ U.N. Declarations, such as the U.N. Declaration on Human Rights and the U.N. Declaration on the Rights of Indigenous Peoples,¹³⁴ do not necessarily constitute international customary law in their entirety; therefore, it is necessary to consider which particular provisions of these instruments reflect customary international law standards. Moreover, a standard contained in a U.N. Declaration could be a customary international law standard (*lex lata*), a standard that is emerging as law (*in statu nascendi*), or a statement of what the law should be (*de lege ferenda*).¹³⁵ Unlike the customary international law project of the ICRC, which identifies customary international humanitarian law standards, there is no similar project that has been carried out in the international human rights law area, thereby making it difficult for lawyers to know exactly which standards have the status of customary international law in the absence of a pronouncement by an international court with respect to a particular standard.

General principles of international human rights law are even less easy to identify than customary international law principles and there is significant debate about the characterization of the types and their content. Generally speaking, these legal rules can be extracted from national law or from international legal principles.¹³⁶ In the latter case, the principles are derived from international convention standards and customary international law rules.¹³⁷ General principles of law comprise a much less significant source of international human rights law than international conventions and international custom, the two sources of law created by States. However, they can serve as guidance where there are voids in

133. North Sea Continental Shelf Cases (Fed. Republic of Ger. v. Den.; Fed. Republic of Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20).

134. Universal Declaration of Human Rights, *supra* note 117; G.A. Res. 61/295 (Oct. 2, 2007).

135. See Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L L. 39, 68 (1988) (discussing the influence of General Assembly resolutions on the development of customary international law).

136. MALCOLM SHAW, INTERNATIONAL LAW 99 (6th ed. 2008).

137. ANTONIO CASSESE, INTERNATIONAL LAW 188 (2d ed. 2005).

the rules of international law¹³⁸ including international human rights law.

3. The Nature of Human Rights Standards

As seen above, the sources of international human rights law differ significantly from the legislative, judicial and administrative sources for national laws and regulations in the United States. Similarly, international human rights law develops in a manner and relates to laws and regulations in a country that may be unfamiliar to many private law lawyers. Therefore, the on-going development of human rights standards and their relationship to national laws and regulations and other facets of the business environment are examined below.

a. Development of Standards

Human rights standards are very dynamic. New instruments may be adopted to elaborate existing rights. As an example, at the United Nations level, an instrument on the rights of elderly persons is being developed, which would clarify principles of non-discrimination with respect to such persons but may also result in the development of new standards. Specifically, an open-ended U.N. Working Group on the rights of older persons, established by the U.N. General Assembly, is working to obtain consensus on a new international instrument specifically dedicated to the promotion and protection of the rights and dignity of older persons.¹³⁹

Moreover, the U.N. treaty bodies to the nine core international human rights treaties, which bodies are comprised of independent experts who monitor the implementation of the treaties by States, contribute to the development of the content of human rights standards contained in those treaties.¹⁴⁰ They

138. SHAW, *supra* note 136, at 98.

139. U.N. Human Rights Chief Offers Her Support for a New Convention on the Rights of Older Persons, OHCHR, <http://www.ohchr.org/EN/NewsEvents/Pages/RightsOfOlderPersons.aspx> (last visited Sept. 1, 2015).

140. The nine treaties and their treaty bodies are the following: 1) International Covenant on Civil and Political Rights – Human Rights Committee; 2) International Covenant on Economic, Social and Cultural Rights – Committee on Economic, Social and Cultural Rights; 3) Convention on the Elimination of All Forms of Discrimination against Women – Committee on Elimination of Discrimination against Women; 4) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

can make observations on State party reports, issue general comments, and eight of the nine bodies can receive claims from individuals alleging violations of human rights and issue decisions on such claims.¹⁴¹ The special procedures of the Human Rights Council, comprised of independent human rights experts who advise and report on thematic and country issues, also contribute to the development of international human rights law standards.¹⁴² For example, the U.N. Special Rapporteur on the Right to Food and the U.N. Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation have developed these respective rights in their reports.¹⁴³

Punishment – Committee against Torture; 5) International Convention on the Elimination of All Forms of Racial Discrimination – Committee on the Elimination of Racial Discrimination; 6) International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities – Committee on the Rights of Persons with Disabilities; 7) International Convention for the Protection of All Persons from Enforced Disappearance – Committee on Enforced Disappearances, International Convention for the Protection of All Persons from Enforced Disappearance; 8) Convention on the Rights of the Child – Committee on the Rights of the Child, Convention on the Rights of the Child; 9) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families – Committee on Migrant Workers. *Human Rights Bodies Complaints Procedures*, OHCHR, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (last visited Sept. 21, 2015). Although these treaty bodies cannot hear complaints against persons, only States, they are increasingly addressing infringements of human rights by business in the context of a State's obligation to protect such rights. For example, the Committee on Economic, Social and Cultural Rights has stated in its General Comment No.15 on the Right to Water that “steps should be taken by States Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.” Comm. on Econ., Social and Cultural Rights, *General Comment No. 15: The Right to Water*, ¶ 33, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

141. *Human Rights Bodies Complaints Procedures*, *supra* note 140. The individual complaint mechanism for the Committee on Migrant Workers will enter into force when ten States have made the necessary declaration under Article 77 of the Convention. *Id.*

142. *Human Rights Bodies*, *supra* note 125. These special procedures include special rapporteurs, independent experts and members of the working groups. There are currently 41 thematic and 14 country mandates. *Id.* For more information on the special procedures, see generally OHCHR, Working with the United Nations Human Rights Programme: A Handbook for Civil Society, ch. 6, U.N. Doc. HR/PUB/10Rev.1 (2008), http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf.

143. See Hilal Elver (Special Rapporteur on the Right to Food), Report on Access to Justice and the Right to Food: The Way Forward, U.N. Doc. A/HRC/28/65 (Jan. 12, 2014) (noting, for example, the development of extraterritorial application of the right to food, both to MNCs and to nations where the activities within the nation have an impact

In addition, areas that have been traditionally considered outside of the human rights area but within the corporate social responsibility of businesses are also being drawn into the ambit of human rights. In particular, the topics of the environment and corruption, which are covered in a number of the other frameworks considered above in section III. A., namely the U.N. Global Compact, the OECD Guidelines, and ISO 26000, are now becoming more closely interconnected with human rights standards.

With respect to the environment, while the universal human rights treaties do not contain a specific right to a safe and healthy environment, the ICESCR provides, in connection with the right of everyone to the enjoyment of the highest attainable standard of health, that States take steps including “[t]he improvement of all aspects of environmental and industrial hygiene.”¹⁴⁴ This provision has been interpreted as requiring States to take steps to protect the population from being exposed to harmful chemicals or other contaminants of the environment.¹⁴⁵ In addition, the U.N. human rights treaty bodies “all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.”¹⁴⁶ There also has been some recognition of a right to a healthy environment, although this is not yet as well accepted.¹⁴⁷ However, with the work of the U. N. Environmental Programme and the Special

outside its borders); Report of Léo Heller (Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation) transmitted by the Secretary-General, *Human Right to Safe Drinking Water and Sanitation*, U.N. Doc. A/70/203 (July 27, 2015) (providing detail to the scope of the Human Rights Council’s mandate regarding access to safe drinking water and sanitization (citing Human Rights Council Res. 24/18, U.N. Doc. A/HRC/RES/24/18 (Oct. 8, 2014))).

144. ICESCR, *supra* note 119, art. 12.

145. U.N. ENV’T PROGRAMME & CTR. INT’L ENVTL. LAW, UNEP COMPENDIUM ON HUMAN RIGHTS AND THE ENVIRONMENT: SELECTED INTERNATIONAL LEGAL MATERIALS AND CASES 13, http://www.unep.org/delc/Portals/119/publications/UNEP_Compndium_HRE.pdf (last visited Sept. 3, 2015).

146. OHCHR, Report on the Relationship Between Climate Change and Human Rights, ¶ 18, U.N. Doc. A/HRC/10/61 (Jan. 15 2009).

147. For example, the African Commission on Human and People’s Rights has recognized the right to a “general satisfactory environment favorable to [all peoples’] development.” Organization of African Unity, African (Banjul) Charter on Human and Peoples’ Rights, art. 24, 21 I.L.M. 58 (June 27, 1981).

Rapporteur on human rights and the environment, the interrelationship between the environment and human rights is likely to be further strengthened in the future.

Corruption also has been increasingly articulated as a violation of human rights. Businesses, both private and state-owned, may engage in corruption of governmental officials or other businesses or receive bribes themselves. While there is no internationally recognized definition of corruption, and even the U.N. Convention that is intended to address corruption – the U.N. Convention against Corruption¹⁴⁸ does not define the term, the definition provided by Transparency International “the abuse of entrusted power for private gain” is frequently used.¹⁴⁹ As the Office of the High Commissioner for Human Rights has noted “[h]uman rights are indivisible and interdependent and the consequences of corruption touch upon them all – civil, political, economic, social and cultural, as well as the right to development.”¹⁵⁰ Corruption affects individuals, groups of individuals, particularly vulnerable groups such as women, children, persons with disabilities, minorities, and indigenous peoples, and society in general.¹⁵¹ Corrupt practices result in funds being diverted from development and therefore affect the ability of a government to ensure human rights and also weaken public institutions and the rule of law.¹⁵²

Tax abuse, fraud, and evasion also are being linked to human rights violations. For example, the International Bar Association published a report in 2013 that highlights that tax abuse, defined as practices that violate the letter or spirit of global or national tax laws and policies, can significantly impact upon human rights.¹⁵³

148. G.A. Res. 58/4, art. 2 (Oct. 31, 2003).

149. *Anti-Corruption Glossary*, TRANSPARENCY INT’L, <http://www.transparency.org/glossary/term/corruption> (last visited Nov. 1, 2015).

150. OHCHR, THE HUMAN RIGHTS CASE AGAINST CORRUPTION 4, <http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCASEAGAINSTCORRUPTION.pdf>.

151. Human Rights Council Advisory Comm., Report on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights, U.N. Doc. A/28/73, ¶ 20(b) (Jan. 5, 2015).

152. *Id.* ¶ 20(c).

153. See INT’L BAR ASS’N, TAX ABUSES, POVERTY AND HUMAN RIGHTS 95 (2013) (providing a framework on tax abuse and its impact on human rights).

b. The Incorporation of Human Rights into the Legal and Non-legal Business Environment

International human rights law standards may be found in national legislation and regulations and create binding obligations for a company, but they also are increasingly incorporated into non-binding norms, which become integrated into the social expectations for businesses.¹⁵⁴ Thus, the incorporation of human rights laws standards at the national law level will first be examined and then their utilization in other ways that influence businesses will be explored.

i. Incorporation of human rights law standards within national law

Businesses generally operate within a legislative and regulatory context established by States, which sets standards, most of which apply within the national territory. This framework includes laws pursuant to the State's international human rights obligations arising primarily under treaties. In the United States, federal and state laws generally provide standards that ensure protection of human rights, for example through health and safety laws related to the workplace, labor laws concerning maximum hours of work, and overtime, and constitutional protections for freedom of religion and other rights.¹⁵⁵ However, many countries in the developing world do not have a sufficient regulatory system geared toward preventing human rights abuses by businesses.¹⁵⁶ Thus, a country may lack, for example, legislation to ensure that persons are protected from human rights abuses as employees or as local inhabitants affected by the operations of the company, whether it be pollution or the taking of land. Even where a country has

154. Dinah Shelton, *International Law and 'Relative Normativity'*, in INTERNATIONAL LAW 137, 159-63 (Malcom D. Evans ed., 4th ed. 2014).

155. *E.g.*, U.S. CONST. AMENDS. I-XIV; Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (2012) (health and safety of workplace); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2012) (as amended) (labor laws); Lance Compa, *Legal Protection of Workers' Human Rights: Regulatory Changes and Challenges in the United States*, CORNELL INT'L L. REV. (2010) (assessing efforts to promote the rights of workers and their organizations in terms of human rights).

156. HUMAN RIGHTS WATCH, WORLD REPORT 2013: EVENTS OF 2012, at 34 (2013).

such laws, it may not have the ability to enforce them.¹⁵⁷ This could result from a situation of insufficient internal resources, internal conflict, a non-democratic form of government, or pressure to exploit natural resources or to attract foreign investment.

Nearly all U.S. laws that provide protection to persons affected by businesses' actions in the United States do not have an extra-territorial effect, that is, they do not extend to business operations beyond U.S. borders.¹⁵⁸ Yet, in recent years, the United States has adopted measures that impose human rights obligations on U.S. businesses and in some cases their suppliers as well conducting business outside the United States. These tend to be of two types: either measures concerning the situation in a particular country or measures addressing a specific human rights issue.

Two countries are the subjects of U.S. regulations to try to avoid businesses' contributions to human rights violations in those countries: Burma and the Democratic Republic of Congo. The United States put in place *Responsible Investment Reporting Requirements*, in 2012, for U.S. businesses making an investment of more than \$500,000 in Burma,¹⁵⁹ in connection with a prudent lifting of sanctions but continuing vigilance concerning the Burmese government's treatment of its citizens.¹⁶⁰ These requirements, which took effect in May 2013, require businesses, which meet the criteria, to submit an annual report to the U.S. government, including a version that is to be

157. OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 21, 28, U.N. Doc. HR/PUB/12/02 (2012), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

158. See generally Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights*, 10 TEMP. INT'L & COMP. L.J. 123 (1996). The United States does have laws that apply extra-territorially to businesses' actions that indirectly affect human rights, such as the Foreign Corrupt Practices Act of 1977 concerning bribery, which applies to all U.S. persons and to foreign firms and persons who cause, directly or through agents, an act that furthers a corrupt payment that takes place within the United States. 15 U.S.C. § 78dd-1 (1977).

159. See generally *Responsible Investment Reporting Requirements*, OHCHR, <http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf> (last visited Sept. 1, 2015) (requiring any U.S. person who invests \$500,000 or more in Burma, or in Burma's oil and gas sector, to complete certain reporting requirements).

160. HUMAN RIGHTS WATCH, *supra* note 156, at 10.

made publicly available.¹⁶¹ The report is to cover human rights, labor rights, and environmental and anti-corruption policies and procedures.¹⁶² Payments to the Government of Burma, other national authorities and state-owned businesses also must be reported if such payments exceed a total of \$10,000.¹⁶³ Moreover, the report should specify any human rights, labor or environmental risks that have been identified through due diligence and any steps that the business has taken to mitigate such impacts.¹⁶⁴

In addition, “conflict minerals,” that is, minerals such as gold, tin, tungsten, and tantalum, (minerals used in such everyday items as automobiles, consumer electronics and jewellery) mined in the Democratic Republic of Congo (DRC), as well as neighbouring countries, and then sold through unofficial channels to finance armed groups in the conflict in the DRC, are the subject of Securities and Exchange Commission (SEC) rules adopted in 2012 issued pursuant to section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act adopted in 2010.¹⁶⁵ Under the SEC rules, companies are required to carry out due diligence on their supply chains to ensure they do not source these “conflict minerals” and file an annual report with the U.S. government.¹⁶⁶ The rule is expected to affect some 6,000 U.S. companies.¹⁶⁷ A few States, such as California and Maryland, have adopted laws that link up to

161. *Responsible Investment Reporting Requirements*, *supra* note 159.

162. *Id.* at 3.

163. *Id.* at 5.

164. *Id.* at 3.

165. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213-15 (2010) (codified as amended at 15 U.S.C. § 78m(p)).

166. *See* 15 U.S.C. § 78m(p)(1)(A) (requiring the SEC to promulgate rules related to disclosure of conflict minerals’ source and chain of custody); 17 C.F.R. § 240.13p-1 (requiring covered entities to file reports on Form SD “disclosing the information required by the applicable items of Form SD as specified in that Form”); 17 C.F.R. § 249b.400 (requiring Form SD, the specialized disclosure report, to be filed for “resource extraction issuers that are required to disclose the information” pursuant to 15 U.S.C. § 78m(p)); U.S. Sec. Exch. Comm’n, Form SD, Specialized Disclosure Report (OMB Number 3235-0697).

167. Andrew Zajac, *SEC Conflict Minerals Rule Violates Free-Speech Rights*, BLOOMBERG (Apr. 14, 2014, 5:51 PM), <http://www.bloomberg.com/news/articles/2014-04-14/sec-conflict-minerals-rule-violates-free-speech-rights>.

reporting requirements under the Dodd-Frank Act;¹⁶⁸ where a business has violated the disclosure obligations concerning conflict minerals under the federal act, then they can be barred from procurement contracts within the State.

The U.S. federal government also has incorporated human rights requirements into its procurement procedures in order to address the risks of labor abuses of children and trafficking. Under Executive Order 13126, *Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor*, federal contractors supplying products that are determined by the Department of Labor to pose particular human rights risks must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items.¹⁶⁹ Executive Order 13627 *Strengthening Protections Against Trafficking in Persons in Federal Contracts* requires federal contractors and subcontractors to annually certify that neither they nor their employees have engaged in any trafficking-related activities.¹⁷⁰ This order applies to all federal contracts for services or goods whether performed in the United States or abroad.¹⁷¹ The provisions were strengthened in 2015 through amendments to the Federal Acquisition Regulation including those relating to awareness, compliance and enforcement.¹⁷² Violations of the provisions of either Executive Order can lead to suspension or termination of the contract and being barred from obtaining contracts with the federal

168. See, e.g., 2011 Cal. Legis. Serv. Ch. 715 (West) (codified as CAL. PUB. CONT. CODE § 10490 (West 2015)) (listing the reporting requirements for scrutinized companies); 2012 Md. Laws Ch. 257 (codified as MD. CODE ANN., FIN. & PROC. § 14-413).

169. Exec. Order No. 13126, 64 Fed. Reg. 32383, 32383 (1999). See *Prohibition of Acquisition of Product Produced by Forced or Indentured Child Labor*, 66 Fed. Reg. 5346 (Jan. 18, 2001) (implementing Executive Order 13126 as 48 C.F.R. § 22.1503(c)).

170. Exec. Order No. 13627, 77 Fed. Reg. 60029, 60031 (2012); see *Federal Acquisition Regulation; Ending Trafficking in Persons*, 80 Fed. Reg. 4967 (Jan. 29, 2015) (implementing Executive Order No. 13627 and codifying it at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, & 52).

171. Exec. Order No. 13627, at 60030 (regulating entities with U.S. contracts within the United States and abroad).

172. *Federal Acquisition Regulation Ending Trafficking in Persons*, 80 Fed. Reg., 4968 (Jan. 29, 2015).

government in the future.¹⁷³ There is also a right of action in connection with violations of Executive Order 13627 under the Trafficking Victims Protection Reauthorization Act.¹⁷⁴

At the State level, California adopted the 2010 California Transparency in Supply Chains Act, which requires companies to disclose information concerning steps taken to ensure the supply chain is free of slavery and human trafficking.¹⁷⁵ In 2015, California issued new guidance on disclosures that companies must make and the California Department of Justice sent letters to certain companies concerning their compliance with the legislation, thereby indicating a stepping up of enforcement of the Act.¹⁷⁶ In addition, more than 40 cities have adopted “sweatfree” purchasing policies and resolutions, pursuant to which they commit to avoid doing business with suppliers using sweatshop sources for apparel or textiles.¹⁷⁷

The United States is not the only country to adopt legislation addressing particular human rights issues. In 2015, the UK adopted an anti-slavery act.¹⁷⁸ The European Union is currently considering a regulation on conflict minerals imported into the EU, not just from the DRC and surrounding countries, as covered under the U.S. legislation, but from conflict affected and high risk areas across the world.¹⁷⁹ Governments are

173. Elizabeth A. Lalik & Katherine A. Fearn, *Anti-Trafficking Regulations Impose New Obligations on All Federal Contractors*, SOC. FOR RES. MGMT. (Apr. 15, 2015), <http://www.shrm.org/legalissues/federalresources/pages/far-trafficking.aspx>.

174. 18 U.S.C. § 1595.

175. 2010 Cal. Legis. Serv. Ch. 556, at 1-3 (codified as CAL. CIV. CODE § 1714.43 (West 2015)).

176. See ATT’Y GEN., CAL. DEP’T OF JUSTICE, *The California Transparency in Supply Chains Act, A Resource Guide*, at ii, (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> (providing guidance on disclosure practices); CAL. DEP’T OF JUSTICE, *Form Letter re: The State of California’s Transparency in Supply Chains Act*, (Apr. 1, 2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/letter.pdf> (providing a generic template for letters to corporate general counsel informing them of disclosure requirements).

177. See *Adopted Policies*, SWEATFREE CMTYS.: A NETWORK FOR LOCAL ACTION AGAINST SWEATSHOPS (June 2012), <http://www.sweatfree.org/policieslist> (listing cities, states, and school districts that have adopted sweat-free procurement policies).

178. Modern Slavery Act 2015, c. 30 (United Kingdom).

179. *Conflict Minerals: MEPs Ask for Mandatory Certification of EU Importers*, EUROPEAN PARLIAMENT: NEWS (May 25, 2015), <http://www.europarl.europa.eu/news/en/>

imposing requirements on companies with which they do business. The Dutch government applies social criteria to its public procurement.¹⁸⁰ The Brazilian government has created a register of companies that have been fined for using slave labor, termed the “Dirty List.”¹⁸¹ When companies are blacklisted in Brazil, public financial institutions and many private banks deny credit and services to these companies.¹⁸² Moreover, in some countries, the responsibility of businesses to respect human rights is permeating the responsibilities of the Board of Directors. In Indonesia, following the adoption of a 2012 regulation, the Boards of Directors of companies involved in natural resources are responsible for social and environmental responsibilities and the way in which they implement this obligation must be disclosed in the Company’s annual work plan.¹⁸³

ii. Influence of international human rights laws standards beyond national law

The lack of hard law regulations that extend beyond U.S. borders to regulate businesses’ respect for human rights belies a global phenomenon that is occurring in which human rights affect how businesses carry out their operations around the globe. This phenomenon is particularly visible from the requirements imposed on businesses that wish to obtain funding. The Overseas Private Investment Corporation, the U.S. Government’s development finance institution that helps U.S. businesses expand into developing markets, has adopted the

news-room/content/20150513IPR55318/html/Conflict-minerals-MEPs-ask-for-mandatory-certification-of-EU-importers.

180. GISELA TEN KATE, STICHTING ONDERZOEK MULTINATIONALE ONDERNEMINGEN [CENTRE FOR RESEARCH ON MULTINATIONAL CORPS.], A REVIEW OF DUTCH POLICY FOR SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT 2 (2014).

181. ILO, THE GOOD PRACTICES OF LABOUR INSPECTION IN BRAZIL: THE ERADICATION OF LABOR ANALOGOUS TO SLAVERY 13-14, 34 (2010).

182. See U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, BRAZIL 2013 HUMAN RIGHTS REPORT 30, <http://www.state.gov/documents/organization/220636.pdf> (explaining that “[i]nclusion on the “dirty list” ha[s] serious financial consequences”).

183. Cornel Juniarto & Andika Riyandi, *Law Firm Management News October 2012 – CSR Regulation in Indonesia*, INT’L BAR ASS’N (last modified Sept. 12, 2012), <http://www.ibanet.org/Article/Detail.aspx?ArticleUId=103427a1-0313-4d6c-b7f7-c5deb0bedbb5>.

International Finance Corporation's performance standards (IFC Standards).¹⁸⁴ These standards require businesses to respect human rights, to "establish and maintain a process for identifying the environmental and social risks and impacts of the project" and to devise programs to address such impacts.¹⁸⁵ The U.S. Export-Import Bank also has adopted the IFC Standards.¹⁸⁶ Moreover, currently 70% of project finance debt in emerging markets is provided by financial institutions that have adopted the Equator Principles, which principles also incorporate the IFC's Standards.¹⁸⁷ Thus, U.S. businesses seeking financing for projects in developing countries need to ensure that they are aware of their impacts on human rights and are willing to take action to address those impacts.

In addition, new types of companies are being formed that have social objectives as a key component of their mission. Thirty-one U.S. states now have public benefit corporation legislation,¹⁸⁸ which provides for the creation of companies that are for profit but operate in a responsible, socially-conscious and sustainable manner.¹⁸⁹ Further, various avenues for assessing the social and economic performance of companies are being undertaken, such as Dow Jones Sustainability Indices, which

184. *Renewable Resources: OPIC Corporate Sustainability Statement*, OVERSEAS PRIVATE INV. CORP., <https://www.opic.gov/opic-action/renewable-resources/OPIC-Corporate-Sustainability-Statement> (last visited Aug. 28, 2015).

185. INT'L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 3 (2012), http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES.

186. See *Annex A: Environmental and Social Guidelines*, EXP.-IMP. BANK OF THE U.S., <http://www.exim.gov/policies/ex-im-bank-and-the-environment/international-environmental-and-social-guidelines> (last visited Aug. 29, 2015) (noting that "[t]he default international guidelines applicable to private sector projects are the [IFC] Performance Standards").

187. *About the Equator Principles*, THE EQUATOR PRINCIPLES ASS'N, <http://www.equator-principles.com/index.php/about-ep/about-ep> (last visited Sept. 24, 2015); THE EQUATOR PRINCIPLES ASS'N, THE EQUATOR PRINCIPLES, JUNE 2013 5 (2013), http://www.equator-principles.com/resources/equator_principles_III.pdf.

188. Benefit Corp., *What is a Benefit Corporation?*, <http://benefitcorp.net> (last visited Aug. 29, 2015).

189. WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION 1 (2012), <http://benefitcorp.net/sites/default/files/documents/Benefit%20Corporation%20White%20Paper.pdf>.

evaluate the economic, environmental and social performance of the largest 2500 companies listed on the Dow Jones Global Total Stock Market Index.¹⁹⁰ Moreover, a growing number of shareholder actions related to human rights issues are being brought against U.S. companies.¹⁹¹

Most importantly, businesses themselves are increasingly committed to respecting human rights throughout their operations. A recent online survey of 853 senior corporate executives by The Economist Intelligence Unit carried out at the end of 2014 resulted in 83% of the respondents indicating agreement with the view that human rights are a matter for business as well as for governments.¹⁹² Another sign of the degree of internalization of social issues within companies is their increased production of corporate responsibility reports. A KPMG survey has shown that nearly three quarters of the 100 largest companies in each of 41 countries, for a total of 4,100 companies, are producing a corporate responsibility report.¹⁹³ Consequently, whether motivated by the objective of being good corporate citizens, complying with supplier expectations, utilizing their good environmental, social and governance practices to market their businesses, avoiding bad publicity, or a combination of these reasons, an increasing number of businesses are concerned about their compliance with human rights standards.

190. DOW JONES INDEXES & SAM, DOW JONES SUSTAINABILITY INDEXES 3, 10 (2010), http://www.sustainability-indices.com/images/review-presentation-2010_2.pdf. For an overview of various initiatives to assess the human rights impacts of businesses, see Damiano De Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities*, 37 Hum. Rts. Q. 511 (2015).

191. AS YOU SOW, PROXY PREVIEW 2015 5 (2015), <http://www.proxypreview.org/Proxy-Preview-2015.pdf> (reporting that the number of shareholder resolutions on human rights and labor is up 15% for 2015). The resolutions include requests that businesses carry out risk assessments of their operations, requests to companies to address recruitment fees of migrants, in connection with concerns about human trafficking, to six tobacco companies, among others. *Id.* at 7.

192. THE ECONOMIST INTELLIGENCE UNIT, THE ROAD FROM PRINCIPLES TO PRACTICE: TODAY'S CHALLENGES FOR BUSINESS IN RESPECTING HUMAN RIGHTS 10 (2015).

193. KPMG INT'L, THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2013 11 (2013), <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/kpmg-survey-of-corporate-responsibility-reporting-2013.pdf>.

Thus, the expectation that businesses respect human rights remains even following the Supreme Court's decision in the *Kiobel* case in 2013.¹⁹⁴ *Kiobel* brought an end to many of the cases alleging human rights violations brought under the U.S. Alien Tort Claims Act, which had been the primary means used by foreign plaintiffs to sue MNCs in the United States for human rights violations committed abroad.¹⁹⁵ Therefore, lawyers are being called upon to advise businesses on not only legislation and regulations but also soft law instruments relating to human rights and businesses.

C. *Practical Difficulties for Lawyers*

The challenges lawyers face related to understanding the framework for the business and human rights area and international human rights standards are accompanied by an array of practical problems.

One of these challenges is that as businesses are expected to respect human rights globally, lawyers must ensure that their clients obtain pertinent information about whether the national laws in a country relevant to the enterprise's operations are below, meet or exceed human rights standards. Some laws might be clearly deficient, such as where employees are not allowed to organise into workers bodies to assert their rights, a violation of the right to freedom of association. Yet, in many situations it will be more difficult to assess whether the national

194. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). *Kiobel* held that “the presumption against extraterritoriality applies to claims under the [Alien Tort Claims Act],” thus barring claims “seeking relief for violations of the law of nations occurring outside the United States.” *Id.* at 1669.

195. Nicola Jägers et al., *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, in AGORA: REFLECTIONS ON KIOBEL, EXCERPTS FROM THE AMERICAN JOURNAL OF INTERNATIONAL LAW AND AJIL UNBOUND e-36, e-36, e-41 (2014), <http://www.asil.org/sites/default/files/AGORA/201401/AJIL%20Agora%20Reflections%20on%20Kiobel.pdf>. However, lawyers, civil society, and others continue to seek other avenues for holding MNCs legally responsible for human rights violations. Cases are proceeding against companies concerning violations of human rights in various countries under different theories, such as tort liability. See, e.g., *Complete List of Cases Profiled*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled> (last visited Sept. 11, 2015) (listing cases pending in many countries around the world with a variety of underlying theories of law).

laws are in conformity with international human rights standards. For example, where the State asserts ownership over land traditionally used by an indigenous community and leases the land to a company for resource extraction, the issue of whether there is a violation of rights may not be clear without a thorough understanding of the applicable international standards related to property rights and indigenous peoples' rights, including customary and community law rights. Even where national laws conform to international human rights law standards, existing laws may not be enforced. Therefore, for example, where a country has laws on the minimum age for employees, lawyers may still need to verify, through human rights organizations' reports or other sources, that industry practices in the particular sector are consistent with human rights principles in ILO conventions. While States' compliance with human rights is evaluated and reported in the annual human rights assessment publications by the U.S. State Department and Amnesty International reports,¹⁹⁶ and these include references to the existence or absence of national laws, there is no comprehensive, publicly available document that fully assesses compliance of States' legislation and regulations with international human rights standards.

196. See *Human Rights Reports*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/> (last visited Sept. 23, 2015) (choose a report year, then select country from "Countries/Region" dropdown menu) (providing reports on human rights in various countries); see, e.g., Amnesty Int'l, *Amnesty International Report 2014/15: The State of the World's Human Rights*, <https://www.amnesty.org/en/documents/pol10/0001/2015/en/> (reporting the state of human rights in 160 countries and territories during 2014). The U.S. State Department reports assess the existence of legislation on particular topics as well as compliance with such legislation but do not cover all of the economic, social, and cultural rights. See *Country Reports on Human Rights Practices for 2014, Overview and Acknowledgments*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> (last visited Sept. 23, 2015) (noting that the rights covered by the reports are based in international agreements, including internationally recognized civil, political, and worker rights). Compare International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4 (reflecting that the United States has signed but not ratified this international agreement concerning economic, social and cultural rights), with International Covenant on Civil and Political Rights, Dec. 16, 1966, 993 U.N.T.S. 172 (reflecting that the United States has signed and ratified an international agreement on civil and political rights).

Another difficulty is that the UNGPs' reference to "international human rights" raises an issue as to how regional human rights treaties should be treated by lawyers. Regional human rights treaties include: the European Convention on Human Rights and Fundamental Freedoms and the European Social Charter for the 47 Council of Europe countries;¹⁹⁷ the American Convention on Human Rights for the 35 member States of the Organization for American States;¹⁹⁸ the African Charter on Human and Peoples' Rights for the 54 States of the African Union;¹⁹⁹ the Arab Charter on Human Rights for the 22 member States of the League of Arab States;²⁰⁰ and the ASEAN Human Rights Declaration relevant to the 10 member States of the Association of Southeast Asian Nations.²⁰¹ Specifically, questions arise as to how businesses are to reconcile regional and international human rights standards. The UNGPs mention "internationally recognized human rights"²⁰² but do not make any reference to regional human rights standards and how to resolve inconsistencies between the application of international human rights standards and relevant regional standards.

Particular attention needs to be given to how law firms should address conflicts that arise between lawyers' role in advising businesses on human rights and their obligations under codes of professional conduct. For example zealous representation of a business client could result in harm to an opposing party, comprised of persons alleging violations of human rights. In particular, a corporate attorney might, for example, abuse the discovery process by making extensive requests for documentation and depositions knowing that the claimants asserting human right infringements against the company may have difficulty financing such costs. Similarly, a

197. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; European Social Charter, *open for signature Oct. 18, 1961*, E.T.S. No. 35.

198. American Convention on Human Rights: "Pact of San Jose, Costa Rica", Nov. 22, 1969, 1144 U.N.T.S. 144.

199. African (Banjul) Charter on Human and Peoples' Rights, *supra* note 147.

200. *Arab Charter on Human Rights*, 12 INT'L HUM. RTS. REP. 893, 893-94 (2005).

201. *ASEAN Human Rights Declaration*, ASEAN (Association of Southeast Asian Nations) (Nov. 18, 2012), <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>.

202. *Implementing the U.N. Framework*, *supra* note 42, at 13.

question could be raised about the appropriateness of a libel suit against a civil society organization that brought a suit against a business on behalf of persons whose rights have been adversely impacted by a business's actions.

Lawyers also will need to have a thorough understanding of the scope of the expectation on businesses to respect human rights. This would include understanding human rights due diligence requirements on businesses, as provided in the UNGPs,²⁰³ and the difference between this type of due diligence and the due diligence that law firms are familiar with in connection with the issuance of securities or representations and warranties in a contract. Lawyers would also benefit from guidance on distinguishing between when a business contributes and when a business is directly linked to an adverse human rights impact, since the differences can be difficult to discern, but the expected response of the business is different in the two situations under the UNGPs.²⁰⁴

If lawyers are to advise their business clients on human rights, then they must be able to assess the extent to which a company is committed to and is implementing respect for human rights. Though many of the major MNCs have not only adopted policies relating to human rights, but have staff devoted to the topic in both risk management and corporate social responsibility departments, this does not inevitably lead to the conclusion that the business respects human rights. It may, however, raise the presumption that the business does so. In contrast, many small and medium business enterprises may not be aware of business and human rights issues and may not have

203. *Id.* at 17.

204. In accordance with the UNGPs, when a business *contributes* to an adverse human rights impact the business is responsible for taking steps to cease or prevent further contribution. Additionally, the business should use its leverage to mitigate any remaining impact by other parties involved to the greatest extent possible. A business's operations, products or services can be *directly linked* to adverse human rights impacts through its business relationships. In this case, the business is not responsible for the adverse impact nor for taking remedial measures although it may opt to take a role in the remedial measures if it wishes to do so. The business should use leverage over the business client to mitigate the risk that the abuse continues or recurs. *See The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, OHCHR, HR/PUB/12/02 15, 18 (2012) (explaining the three basic ways businesses and enterprises become entangled in human rights issues and how the businesses should react).

personnel with specific responsibility for the area. Finally, lawyers will certainly be confronted with the problem of not having human rights advice included in the scope of work requested by a law firm, particularly where lawyers carry out one-off representation of a client. This raises challenging issues for the firm as to whether it can, must, or should provide the business client with advice on human rights risks and compliance.

V. LOOKING FORWARD

Businesses will be increasingly requesting the law firms that advise and represent them to incorporate human rights risks into their advice to them. As suppliers of services to businesses, law firms also will be more frequently requested to certify that the firms themselves are committed to respecting human rights.²⁰⁵ Therefore, guidance from bar associations and law societies is essential.

As the American Bar Association and other legal organizations, which have endorsed the Joint Declaration, consider appropriate steps to promote the realization of human rights and to educate lawyers about human rights in the business context, they will need to reflect upon and address the challenges lawyers face. Specifically, they need to consider the challenges of providing a workable but comprehensive framework to lawyers for the business and human rights area and of explaining the nature of international human rights standards to lawyers. They also will need to provide guidance relative to the practical problems lawyers face in providing businesses with advice to assist them to comply with human rights standards.

Three steps can be envisioned in this process. First, efforts to raise the general awareness of lawyers about the area of business and human rights and sensitize lawyers to the importance of incorporating human rights considerations into their practices should be undertaken. This could be done by more extensively incorporating the topic of human rights into

205. COUNCIL OF BARS & LAW SOC'YS. OF EUR., CORPORATE RESPONSIBILITY AND THE ROLE OF THE LEGAL PROFESSION 10 (2013), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_07022013_CSR_and_1_1361955115.pdf.

seminars and discussions on business law topics, for example in the areas of: mergers and acquisitions, investment financing and supply chains, among others.

Second, an assessment of the tools that lawyers require to assist them with furthering the corporate responsibility to respect human rights should be carried out. A starting point for this assessment would be the U.N. *Guiding Principles on Business and Human Rights: A Guide for the Legal Profession*, which provides advice on how lawyers can implement the UNGPs.²⁰⁶ Following an analysis of the professional codes of conduct from nine jurisdictions, the guide highlights some of the key issues that bar associations should address. In addition, the International Bar Association's 'Business and Human Rights Guidance for Bar Associations' and draft 'Guidance for Business Lawyers on the U.N. Guiding Principles on Business and Human Rights', provide valuable guidance on implementation of the UNGPs.²⁰⁷ Moreover, the European Council of Bars and Law Societies of Europe, which initially formulated guidelines on corporate social responsibility in 2003, issued a 2013 version 'Corporate Responsibility and the Role of the Legal Profession', which incorporates the UNGPs, but also considers a range of initiatives by international and private organizations and provides valuable background on corporate social responsibility initiatives.²⁰⁸ This should also serve as a valuable reference.

As a third step, guidance and training should be provided to lawyers on business and human rights. Even if clear-cut answers cannot be provided on all conceptual and practical issues, it is important to highlight the challenges and complexities that lawyers will face as they incorporate human rights into their practices. Numerous guides have been developed since the U.N. Human Rights Council's endorsement of the UNGPs in 2011.²⁰⁹ While most of these guides are geared

206. Advocates for Int'l Dev., *supra* note 11.

207. INT'L. BAR ASS'N, *supra* note 11. Part 2, IV. should be of particular relevance to lawyers with its sections on specific legal practice areas. *See generally id.* pt. 2, IV.

208. *Corporate Responsibility and the Role of the Legal Profession*, COUNCIL OF BARS AND LAW SOC'YS OF EUROPE (July 2, 2013), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_07022013_CSR_and_1_1361955115.pdf.

209. *See, e.g., Business and Human Rights: Overview*, OHCHR, <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> (last visited Sept. 4, 2015) (stating

toward businesses, they should nevertheless provide assistance in compiling a guide for lawyers. In addition to general information about business and human rights, guidance and training relevant to different business-sectors, such as the extractive industry, the IT industry, consumer products, and tourism and travel would also be useful. Training on cross-cutting topics such as supply chains and labor issues also would be of value to lawyers. Bar associations will need to ensure that any approach they adopt is also appropriately designed to address the needs of small and medium-sized law firms and not just those of large multi-jurisdictional law firms.

Training on business and human rights should be required for all lawyers as this topic, like that of ethics, pervades nearly all areas of practice. This will likely impact upon the curriculum of law schools as well, which should also incorporate classes on the topic.

Bar Associations also might consider assisting the Working Group on Business and Human Rights in cooperation with the U.N. Office of the High Commissioner for Human Rights to clarify both the business and human rights framework and the content of internationally recognized human rights applicable to businesses. Lawyers can undoubtedly make valuable contributions to further elaboration and development of these areas. Bar associations could also usefully work to compile regulations and information on human rights standards in an accessible format for lawyers and work with governments in ensuring that legislation/regulations incorporate respect for human rights in a manner consistent with international human rights standards.

In sum, law firms and lawyers should understand that there is no need to fear a complete overhaul of the lawyer-client relationship or the manner in which lawyers practice law; a step-by-step approach to the incorporation of human rights into their practices is required and the business and human rights area can be integrated over time. What will perhaps assist lawyers the most is a change in thinking – businesses do have the responsibility to respect human rights and lawyers are

that OHCHR has issued interpretative guides to Corporate Responsibility in English, French, and Spanish in response to the 2011 Guiding Principles).

uniquely situated to assist them to do so. This idea will serve as a catalyst for the changes to come.

