

Fordham Law Review

Volume 84 | Issue 5

Article 8

2016

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Recommended Citation

Milton C. Regan Jr. and Kath Hall, *Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights*, 84 Fordham L. Rev. 2001 (2016).
Available at: <https://ir.lawnet.fordham.edu/flr/vol84/iss5/8>

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LAWYERS IN THE SHADOW OF THE REGULATORY STATE: TRANSNATIONAL GOVERNANCE ON BUSINESS AND HUMAN RIGHTS

Milton C. Regan, Jr. & Kath Hall***

INTRODUCTION

Recent years have seen increasing attention to the human rights impacts of transnational business operations.¹ The 2011 United Nations (UN) Guiding Principles on Business and Human Rights (“the Principles”), for instance, state: “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”² The Principles describe this duty as not binding, but not voluntary.³ At the same time, imposing responsibility for adverse human rights impacts has been hampered by the absence of an international sovereign that can impose and enforce legally binding obligations. In addition, the effectiveness of national regulation may be weakened by differences in the quality of legal systems or the inability to reach conduct beyond a country’s borders.

One response to these challenges has been the rise of a system of transnational “governance.” The term “governance” incorporates the network of actors, instruments, and mechanisms that to varying degrees regulate transnational corporations apart from formally authoritative state

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1. *See infra* Part I.
2. U.N. Human Rights: Office of the High Commissioner, *United Nations Guiding Principles on Business and Human Rights*, 13, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UN Guiding Principles].
3. U.N. Human Rights: Office of the High Commissioner, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, 9, U.N. Doc. HR/PUB/14/3 (2014) (discussing the legal status of the Principles).

laws.⁴ The actors within this system include international organizations, nongovernmental organizations (NGOs), industry and professional organizations, and private sector service providers. The regulatory instruments include both “hard law” that is legally binding and “soft law” that is designed to influence behavior through more informal mechanisms.⁵ This system of governance differs from conventional legal regulation in that both public and private actors are involved in rule formation, many provisions are voluntary, there often is no formal penalty for violations, and anticipated financial or reputational concerns sometimes may be the most significant determinant of behavior.

In light of these differences, we ask what, if any, role is there for lawyers to advise business clients on human rights? Is there a legal duty to respect human rights? Does the answer to that question determine whether a company looks to lawyers for advice on human rights issues, as opposed to seeking advice from management consultants or other professionals who advise on corporate social responsibility or sustainability?

In this Article, we begin to explore such questions by drawing on interviews⁶ with twenty-nine lawyers involved in the business and human rights field. These interviews indicate that awareness of the range of governance initiatives that exist in this area still is limited to a relatively small group of elite lawyers and that even amongst these lawyers, there is no consistent approach being adopted to providing advice on the issues. Whereas some lawyers are finding regular opportunities to raise concerns about human rights impacts of their client’s operations, others are still developing a systematic approach to providing this advice. Advising clients on human rights issues is easiest when their impact potentially creates legal liability. However, even in cases involving nonbinding standards, lawyers may advise on reputational and illegal impacts, or alert clients that standards indicate an emerging consensus on issues that may eventually be incorporated into “hard law.” Finally, multinational companies and those with extended supply chains are especially likely to want advice on the full range of human rights issues relevant to their operations. This may include advice on potential criticism by NGOs, customers, investors, shareholders, or other stakeholders. While lawyers have no professional monopoly on identifying such risks, they may be in an especially advantageous position to warn companies about them. This may particularly be the case for inside counsel, although outside counsel also contribute to this process. In these ways, lawyers are beginning to play an important role in strengthening the system of transnational governance that regulates business and human rights.

In setting the background to our discussion of lawyers’ role in this context, Part I of this Article provides a general overview of the emergence of the transnational governance regime. Part II then describes some of the

4. See *infra* Part I.C.

5. See *infra* Part II.

6. The interviews are on file with the authors.

governance instruments that attempt to prevent and rectify the adverse human rights impacts of business activities. Part III discusses the extent to which lawyers are advising their business clients on human rights issues, the factors that may inhibit or encourage the provision of such advice, and how the lawyers who are raising these issues are framing these discussions with their clients. Finally, Part IV suggests further areas of inquiry that may enrich our understanding of the role that lawyers can play in helping construct a transnational governance regime on business and human rights.

I. THE GROWTH OF TRANSNATIONAL BUSINESS AND GOVERNANCE

This part discusses the dynamics that have prompted greater economic globalization over the last few decades and how this trend has prompted efforts to hold transnational businesses accountable for the impacts of their operations. Part I.A describes how public policies, technological innovation, and corporate strategies have resulted in business activities that increasingly span multiple national boundaries. Part I.B discusses how divergence in regulation among different countries both creates opportunities for business advantage and prompts efforts to achieve some degree of transnational regulatory convergence. Finally, Part I.C describes the system of transnational governance that has emerged, which reflects a combination of actors and initiatives that aim to address the impacts of transnational business operations.

A. *Intensifying Economic Globalization*

Over the last few decades, transnational governance efforts have occurred against the backdrop of public policies that have focused on removing formal trade barriers, capital market restrictions, and national regulation that create obstacles to the free movement of goods, services, and investment.⁷ These policies reflect the belief that the best way to achieve economic progress in many developing countries is by focusing on an export strategy that capitalizes on the lower costs of labor and other resources within these jurisdictions.⁸ In particular, during the last decades of the twentieth century, declining communication and transportation costs, along with improved logistics technology, significantly increased the potential for globally integrated markets.⁹ As a result, more companies developed business activities around the world. Manufacturing companies in particular began to move parts of their operations to jurisdictions with lower costs and less demanding regulatory regimes.

7. See generally ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* (2011); MONICA PRASAD, *THE POLITICS OF FREE MARKETS: THE RISE OF NEOLIBERAL ECONOMIC POLICIES IN BRITAIN, FRANCE, GERMANY AND THE UNITED STATES* (2006).

8. See generally JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

9. See GLENN MORGAN, PEER HULL KRISTENSEN & RICHARD WHITLEY, *THE MULTINATIONAL FIRM: ORGANIZING ACROSS INSTITUTIONAL AND NATIONAL DIVIDES* 287–88 (2001); SOL PICCIOTTO, *REGULATING GLOBAL CORPORATE CAPITALIZATION* (2011); JOHN RUGGIE, *JUST BUSINESS*, at xxvii–xxx (2013).

Around the same time, the structure of operations in many major companies began to move from mass production and consumption toward differentiated markets and flexible production. This led many companies to reduce their investment in fixed assets and to move toward reliance on outside suppliers that are able to configure their products in response to changes in market conditions. As a result, operating models developed that involved networks of multiple entities in supply chains that stretched across several countries. These networks involved a move toward a production process that focused on subsidiaries and independent contractors, each contributing specific inputs at various stages along the supply chain. Many contractors also developed their own supply chains by subcontracting out portions of the process for which they were responsible. In some cases, large companies completely abandoned any involvement in the production of their goods, instead focusing on marketing products and maintaining a corporate image with which their consumers could easily identify.

Such developments did not automatically enable companies to operate seamlessly across jurisdictions. Instead, the reduction of trade and technological barriers revealed a world of multiple legal systems that imposed differing, and at times conflicting, legal demands. As Sol Picciotto puts it, “Th[e] shift towards more ‘open’ national economies did not create a unified and free world market but, like an outgoing tide, it revealed a craggy landscape of diverse national and local regulations.”¹⁰ Tim Buthe and Walter Matli observe that national differences in product standards became more visible and more economically important “because they now impeded trade in goods that few had even thought of exporting or importing previously, when transport costs and tariffs had made trade prohibitively costly.”¹¹ As a result, companies faced a world of regulatory divergence with differing regulations on environmental impacts, labor conditions, securities disclosures, insolvency, sales practices, data privacy, intellectual property protection, investment conditions, and many other issues within each jurisdiction in which they operate.

B. Regulatory Divergence and Convergence

The existence of differences between national legal systems opened up opportunities for companies to benefit from regulatory divergence even as it simultaneously created pressure for regulatory convergence. Transnational companies benefit from divergence by locating activities in jurisdictions with the fewest constraints on the pursuit of profitability. Countries often compete vigorously for foreign investment by tailoring their regulatory regimes to the needs of such companies. The result can be the proverbial

10. PICCIOTTO, *supra* note 9, at 10.

11. TIM BUTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* 134 (2011).

“race to the bottom,” in which jurisdictions with the least onerous regulatory demands capture the most investment.¹²

While the transnational company can benefit from regulatory divergence, its global operations also require a certain amount of regulatory convergence. A company subject to multiple conflicting legal demands as it moves goods, services, and capital across jurisdictions can incur substantial administrative costs in meeting these demands. Furthermore, officials in different countries may possess varying amounts of discretion in interpreting and enforcing national laws, based on political and cultural considerations that are opaque to outsiders. This can introduce considerable unpredictability for a company that is attempting to allocate capital among competing internal operations and to assess the performance of multiple profit centers based on common metrics. At least some degree of regulatory convergence across jurisdictions is necessary to reduce this threat.

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

Lawyers can also be involved in activities aimed at achieving regulatory convergence. In particular, there has been a growing focus on the creation of rules, standards, and guidelines that are applicable across national borders. While these instruments may be created by law firms, more often, lawyers advise and assist international organizations, NGOs, industry bodies, and private service providers to develop standards aimed at convergence. These efforts enhance the ability of companies to operate across multiple boundaries by making the environment in which they operate more predictable, even though some differences may remain. Such uniformity enables companies to assess with greater precision the profitability of various activities across the globe, thereby improving their ability to efficiently allocate capital.

Harmonizing rules and standards across borders can also contribute to a company’s “social license” to operate in various countries.¹³ This increasingly important license reflects community support for a company’s

12. For an empirical analysis of the complex consequences of this phenomenon, see NINA RUDRA, *GLOBILIZATION AND THE RACE TO THE BOTTOM IN DEVELOPING COUNTRIES: WHO REALLY GETS HURT?* (2008).

13. NEIL A. GUNNINGHAM ET AL., *SHADES OF GREEN: BUSINESS, REGULATION, AND ENVIRONMENT* 36 (2003); JOHN MORRISON, *THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE* 8–13 (2014).

activities based on the perception that those activities are legitimate and in accordance with basic notions of justice. Failing to obtain such support can be costly for a company. These costs may include consumer boycotts, drops in share price, increases in the cost of capital, damage to reputation, or host country reluctance to approve investments or projects.¹⁴

The results of efforts by lawyers and others to achieve regulatory convergence form part of the emerging system of transnational governance. This system has various features that distinguish it from conventional government regulation. In particular, in the absence of a single transnational regulatory body, both public and private entities are now involved in creating binding and nonbinding instruments that seek to establish common rules and standards to govern transnational commercial activities.

C. Systems of Transnational Governance

In the absence of an international sovereign with regulatory authority over global corporate activities, transnational actors have increasingly looked to other forms of “law making” that can create what Niklas Luhmann calls “a social system which depends upon the congruent generalisation of normative behavioral expectations.”¹⁵ The result has been the development of systems of “transnational governance” in areas such as sale of goods, insurance, insolvency, intellectual property, environmental protection, anticorruption, and human rights.¹⁶

These systems of transnational governance have several distinctive features. First, transnational governance involves a range of both public and private actors. These generally include international organizations, NGOs, industry groups, professional organizations, private sector service providers (including lawyers), and major corporations. This means that, as Jennifer Green puts it, “[T]he right to make rules is not restricted to states.”¹⁷ Authority in this setting arises not from formal legal delegation, but from the willingness of others to be bound by a party’s guidance. As Green argues, “[W]hen actors consent to be bound by rules, they create authority.”¹⁸ Such consent largely rests on the legitimacy of the actor, which in turn is based on qualities such as technical expertise, an inclusive

14. See generally MORRISON, *supra* note 13.

15. NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 82 (2d ed. 2014).

16. For overviews of this phenomenon, see generally JAN-CHRISTOPHE GRAZ & ANDREAS NOLKE, TRANSNATIONAL PRIVATE GOVERNANCE AND ITS LIMITS (2008); GOVERNANCE ACROSS BORDERS: TRANSNATIONAL FIELDS AND TRANSVERSAL THEMES 17–19 (Leonhard Dobusch, Philip Mader & Cigrid Quack eds., 2013); HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS 30 (Thomas Hale & David Held eds., 2011); NETWORKED GOVERNANCE, TRANSNATIONAL GOVERNANCE, AND THE LAW 262 (Mark Fenwick, Steven Van Uystel & Stefan Wrbka eds., 2014); TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION 139 (Marie-Laure Djelic & Kierstin Sahlin-Andersson eds., 2006).

17. JESSICA F. GREEN, RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE 29 (2014).

18. *Id.* at 27.

deliberative process, or a dominant position in a relevant market. Thus, “[A]uthority need not be legally binding to gain adherents. If private actors are able to legitimate their claims to authority, others will voluntarily adopt the rules. Potential governors then acquire authority and become governors in fact.”¹⁹

Second, transnational rules and standards develop in a range of less formal contexts than those in which traditional governmental regulation occurs. Martin Haajer and Hendrik Wagenaar suggest that “there is a move from the familiar topography of formal political institutions to the edges of organizational activity, negotiations between sovereign bodies, and inter-organizational networks that challenged the established distinction between public and private.”²⁰ Thus, gatherings convened by international organizations and NGOs, industry conferences, meetings of professional associations, and informal communications among actors in various networks are all possible sites where ideas are proposed, developed, and refined.

Third, transnational governance regimes incorporate a range of binding and nonbinding instruments including national and international laws, industry and commercial standards, corporate codes of conduct, and guidelines issued by international organizations and professional bodies. The nature and effect of these instruments is not as sharp as the distinction between hard and soft law.²¹ For instance, compliance with voluntary standards is often monitored by NGOs, consumer groups, and investment consultants who may then criticize a company for noncompliance. This can serve as a form of informal enforcement, with serious financial and reputational consequences flowing from it.

Companies may also incorporate voluntary standards into their contracts with retailers and manufacturers, so that failure to comply with the standards can be a basis for future termination. Voluntary standards and

19. *Id.* at 30. Some transnational actors also acquire authority and legitimacy through invocation of universal principles such as justice or human rights. NGOs in particular often gain influence by publicizing the harms imposed by transnational business operations, or by criticizing the actions of suppliers or joint venture partners. This publicity then can lead to actions such as calls for boycotts or other consumer action. In recent years, these actions have resulted in corporate concern for its reputation and have frequently prompted changes in management policy and practice. *See, e.g.*, SHELL GROUP, PROFITS AND PRINCIPLES: DOES THERE HAVE TO BE A CHOICE? (1998); Paul Lewis, *Blood and Oil: A Special Report: After Nigeria Represses, Shell Defends Its Record*, N.Y. TIMES (Feb. 13, 1996), <http://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html?pagewanted=all> [<https://perma.cc/E3ED-37C2>].

20. Maarten Hajer & Hendrik Wagenaar, *Introduction, in DELIBERATIVE POLICY ANALYSIS: UNDERSTANDING GOVERNANCE IN THE NETWORK SOCIETY* 3 (Maarten Hajer & Hendrik Wagenaar eds., 2003).

21. While there is not complete agreement about the meaning of these terms, one prominent overview maintains that hard law “refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.” Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421 (2000). By contrast, “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.” *Id.* at 422.

principles may become sufficiently accepted that they are incorporated into national legislation. Finally, transnational rules and norms can circulate throughout networks, with various actors incorporating them into their practices in ways that reinforce their influence. Thus, as Sigrid Quack has observed, transnational lawmaking “represents global institution building that involves continuous transformations between ‘soft’ and ‘hard’ regulation.”²²

Finally, transnational governance operates primarily through networks of loosely connected actors rather than in top-down, command-and-control fashion. Sol Picciotto suggests that the network metaphor expresses “[t]he destabilization of normative hierarchy” and reflects the absence of a unified sovereign with undisputed regulatory authority over transnational activities.²³ Saskia Sassen argues that transnational governance is creating “new assemblages of authority, rights and power and . . . diverse jurisdictional geographies” that unsettle national and international authority.²⁴ As Picciotto notes, this central feature of governance distinguishes the post-liberal from the classical liberal system.²⁵ In the latter, legal rules fell into relatively clear categories and hierarchies, with international law binding states and national or local law governing legal persons.²⁶ This made it possible, at least in principle, to determine the validity of rules and to decide which should apply in a particular situation. In networked governance, normative systems overlap and interpenetrate each other and the determination of the legitimacy of an activity under any one system is rarely definitive, as powerful actors may be able to challenge it by reference to another system. The result is that “in this ‘network society’ the public and the private, which were never truly separate social spheres, have become harder to distinguish, and their interactions and permutations have become more complex.”²⁷

An important consequence of the networked nature of transnational governance is what Terence Halliday and Bruce Carruthers describe as “recursivity.”²⁸ The recursive process involves ongoing exchange, contestation, negotiation, and revision of norms among the international, national, and local level. Various actors compete to have their respective descriptions and diagnoses become the accepted way to identify what is labeled as a “problem.” This has ramifications for which measures are seen as appropriate responses, as well as which actors are best situated to take the lead in addressing the problem. The concept of recursivity thus

22. Sigrid Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14 ORGANIZATION 643, 644 (2007).

23. See PICOTTO, *supra* note 9, at 17.

24. See generally SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

25. See PICOTTO, *supra* note 9, at 13.

26. See *id.* at 28.

27. *Id.* at 8.

28. See generally Terence C. Halliday & Bruce C. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Industry Regimes*, 112 AJS 1135 (2007).

“replaces a global-centric, top-down concept of norms traveling from the center to the periphery with a dynamic, recursive process of exchange and negotiation between transnational, national, and even local norms.”²⁹

II. BUSINESS AND HUMAN RIGHTS

This part discusses the increasing attention to the human rights impacts of business operations over the last few decades and the initiatives that have resulted from such attention. Part II.A describes some of the major events that served to heighten awareness of the risk to human rights from business activities. Part II.B describes the major international instruments that address human rights in general, while Part II.C focuses on the leading global programs that address human rights in the context of business operations.

A. *The Growing Attention to Business and Human Rights*

The development of a transnational governance regime focused on business and human rights developed out of a growing global awareness of the possible human rights impacts of business activities. A number of global events led to this awareness. One of the earliest was the December 1984 gas leak at Union Carbide’s pesticide plant in Bhopal, India.³⁰ Union Carbide India Limited (UCIL) was 50.9 percent owned by a U.S. parent company and 49.1 percent owned by Indian banks and private shareholders.³¹ The leak resulted in methyl isocyanate circulating through the shanty towns surrounding the plant, causing almost 3800 confirmed deaths and another 3900 permanent severely disabling injuries.³² One study found that the spontaneous abortion rate and the still birth rates in the area following the gas leak were more than three times the national average.³³

The effects of the disaster on the U.S. parent company were significant. Six months after the leak, the *New York Times* reported that Union Carbide had “seen its stock plummet, its financial health challenged by multi-billion dollar lawsuits and the pace of its strategic acquisitions slow due to problems in raising cash.”³⁴ Numerous lawsuits alleging common law tort violations were filed by victims in the United States and India at both the

29. TERRENCE HALLIDAY & GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERS* 693 (2015).

30. INGRID ECKERMAN, *THE BHOPAL SAGA* 3 (2004); *see also* KIM FORTUN, *ADVOCACY AFTER BHOPAL: ENVIRONMENTALISM, DISASTER, NEW GLOBAL ORDERS* (2001).

31. *See* RUGGIE, *supra* note 9, at 6–8.

32. ECKERMAN, *supra* note 30.

33. *Id.* at 3; FORTUN, *supra* note 30.

34. Stuart Diamond, *Warren Anderson: A Public Crisis, a Personal Ordeal*, N.Y. TIMES (May 19, 1985), <http://www.nytimes.com/1985/05/19/business/warren-anderson-a-public-crisis-a-personal-ordeal.html> [<http://perma.cc/L58H-HEE5>].

state and federal levels.³⁵ In 1989, Union Carbide made a payment of \$470 million, which was criticized as severely inadequate.³⁶

The catastrophic consequences of the disaster prompted some of the first global efforts to frame business responsibility in terms of international human rights. Several national and international NGOs were established, some of which still focus on providing assistance to the victims today.³⁷ Attempts were also made to respond to the regulatory gap in corporate liability for harms caused overseas. For example, the Charter on Industrial Hazards (“the Charter”) was created to “reflect the views and concerns of persons injured and distressed by industrial hazards.”³⁸ The Charter was finalized in 1996 and invoked the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social, and Cultural Rights, and several other relevant international human rights instruments.³⁹

Other early cases that focused attention on the impacts of business activities in the extractive industry included Royal Dutch Shell’s operations in the 1980s and early 1990s in the Ogoniland area of Nigeria⁴⁰ and Talisman Energy’s operations in Sudan.⁴¹ Growing public attention also was drawn to allegations of human rights abuses in large global supply chains. Nike was one of the first manufacturing companies to face this scrutiny due to the outsourcing of all of its production into Asia. Problems within Nike’s supplier factories included low wages, abusive and unsafe working conditions, and the use of child labor. The result was that the company became “a poster child for corporate villainy,”⁴² with violent strikes at several factories and protests over the sale of Nike products in twenty-eight U.S. states and twelve countries.

The result of the widespread campaign against Nike was increased awareness of labor conditions in global supply chains. It also brought together labor and consumer advocates and marked the emergence of a significant transnational NGO network that continues to monitor and publicize the human rights impacts of business operations.⁴³ Mobilization of these groups demonstrated the major impact that widespread publicity could have on a company’s reputation. Many subsequent consumer

35. *Id.*

36. Sanjoy Hazarika, *Bhopal Payments by Union Carbide Set at \$470 Million*, N.Y. TIMES (Feb. 15, 1989), <http://www.nytimes.com/1989/02/15/business/bhopal-payments-by-union-carbide-set-at-470-million.html?pagewanted=all> [<https://perma.cc/58Y6-R33L>].

37. ECKERMAN, *supra* note 30, at 3–4.

38. GLOB. POLICY FORUM, CHARTER ON INDUSTRIAL HAZARDS, <https://www.globalpolicy.org/component/content/article/212/45285.html> [<http://perma.cc/Z2AV-XGBY>].

39. *Id.*

40. RUGGIE, *supra* note 9, at 9–14.

41. PENELOPE SIMMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE 22–78 (2014).

42. Michael Connor, *Corporate Responsibility at a Tipping Point*, BUS. ETHICS (Jan. 24, 2010), <http://business-ethics.com/2010/01/24/2154-nike-corporate-responsibility-at-a-tipping-point/> [<https://perma.cc/7TMY-GHE2>].

43. See George H. Sage, *Justice Do It! The Nike Transnational Advocacy Network: Organization, Collective Actions, and Outcomes*, 16 SOC. SPORT 205 (1999).

boycotts and “naming and shaming” campaigns against major companies followed the template established during the activities directed at Nike.

By 2007, it was clear that human rights abuses by corporations operating outside their home jurisdiction were significant and widespread. A Harvard report on 320 cases alleged to have occurred between 2005 and 2007 found that the extractive industry accounted for the largest percentage of allegations, followed by the retail and consumer product sector, the pharmaceutical industry, the infrastructure and utility sector, and the food and beverage industry.⁴⁴ Alleged violations by clothing and sporting goods companies had the most impact on workers, while the extractive community had the most effect on communities.

While 60 percent of the adverse impacts were caused directly by transnational companies, 40 percent were indirect impacts caused by third parties such as suppliers, individuals, states, representatives of states, and other businesses.⁴⁵ The report concluded:

[T]he presence of all sectors and regions in the allegations supports the need for all corporate actors to consider the human rights implications of their activities. Moreover, the study indicates that the subject of this consideration should not be a short-list of rights but actually the full range of human rights. And given the number of allegations of indirect abuse, firms should also consider the human rights records and activities of those with whom they have relationships—the allegations show that a firm may be held accountable by stakeholders where it contributes to or benefits from third party abuses.⁴⁶

Reports such as this were significant in the lead up to the release of the draft Principles in 2008 that we discuss below.⁴⁷ The lack of effective remedies under this regime, however, was made clear in 2013 with the Rana Plaza collapse in Dhaka, Bangladesh.⁴⁸ Bangladesh is the world’s second-largest apparel exporting nation behind China, and the Rana Plaza building contained several factories that manufactured clothing for companies from Europe and the United States, including Benetton, Bonmarché, Monsoon, Mango, Matalan, Primark, and Walmart.⁴⁹ When the factory caught fire on April 24, 2013, 1129 people died, with another 2515 injured.⁵⁰ More than

44. JOHN RUGGIE, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, ADDENDUM: CORPORATIONS AND HUMAN RIGHTS: A SURVEY OF THE SCOPE AND PATTERNS OF ALLEGED CORPORATE-RELATED HUMAN RIGHTS ABUSE 9 (2008).

45. *See id.* at 11. Of the direct impacts, 34 percent involved workers, 50 percent involved communities, and 16 percent involved end-users such as consumers. *See id.* at 18. Of the cases involving indirect impacts, about 60 percent affected workers, and 40 percent affected communities. *Id.*

46. *See id.* at 4.

47. *See infra* Part II.C.1.

48. N.Y.U. STERN CTR. FOR BUS. & HUMAN RIGHTS, BUSINESS AS USUAL IS NOT AN OPTION: SUPPLY CHAINS AND SOURCING AFTER RANA PLAZA (2014).

49. *2013 Savar Building Collapse*, WIKIPEDIA, https://en.wikipedia.org/wiki/2013_Savar_building_collapse (last visited Mar. 27, 2016) [http://perma.cc/PE4D-SZVM].

50. *Id.*

half of the victims were women, along with a number of their children who were in nurseries within the building.⁵¹

The day before the collapse, a television news program showed cracks in the building, and government authorities had requested an evacuation until an inspection could be conducted. Later that day, however, the owner of the factory declared that the building was safe and that workers should return the next day. Some commentators argued that the decision by managers to send workers back into the factories was due to pressure from overseas companies to complete orders. The head of the Bangladesh Fire Service & Civil Defense said that the upper four floors had been built without a permit. The building's architect noted that the building was planned for shops and offices, not for factories. One garment manufacturer's website indicated that the building had been built on a pond without authorization and that substandard material was used during construction, which led to an overload of the structure that was aggravated by vibrations from generators in the building.

The disaster triggered large demonstrations and some rioting in Bangladesh. In November, a ten-story garment factory that supplied Western brands was allegedly burned down by workers angered over rumors that a demonstrating worker had died from police fire. The Bangladeshi government announced that new measures to ensure safety would lead to the closure of several garment plants. Seven inspectors were suspended and accused of negligence for renewing the licenses of garment factories in the building. In June 2015, Bangladeshi police filed murder charges in connection with the collapse against forty-two people, including the owners of the building.

The International Labour Organization (ILO), in consultation with government, industry, and labor representatives, investigated the collapse and issued a set of recommendations. In addition to calling for strengthening building and safety codes and practices, it emphasized the importance of the Bangladeshi government passing legislation to "improve protection, in law and practice, for the fundamental rights to freedom of association and the right to collective bargaining, as well as occupational safety and health."⁵²

Of the twenty-nine brands identified as having sourced products from the Rana Plaza factories, nine attended meetings in November 2013 to agree on a proposal for compensation to the victims.⁵³ By March 2014, seven of these brands had contributed to the Rana Plaza Donor's Trust Fund compensation fund, which is backed by the ILO. In July 2013, a group of seventeen major North American retailers that included Wal-Mart, Gap, Target, and Macy's announced the Alliance for Bangladesh Worker

51. *Id.*

52. *Conclusions of the ILO's High Level Mission to Bangladesh*, INT'L LABOR ORG. (May 4, 2013), http://www.ilo.org/global/about-the-ilo/activities/statements-speeches/WCMS_212463/lang-en/index.htm [<http://perma.cc/QF9D-69KJ>].

53. Several companies refused to sign, including Wal-Mart, Carrefour, Mango, Auchan, and Kik. The agreement was signed by Primark, Loblaws, Bonmarche, and El Corte Ingles.

Safety⁵⁴ (“the Alliance”). Members of the Alliance pledged funding of at least \$42 million for an inspection project, with some others promising loans totaling \$100 million to help finance necessary safety improvements. Around the same time, seventy European companies announced an accord under which they agreed to inspect all of the factories they use in Bangladesh within nine months, develop plans to remedy problems that are identified, and “ensure that sufficient funds are available to pay for renovations and other safety improvements.”⁵⁵ Some labor organizations and NGOs praised the European program in contrast to the U.S. one, on the ground that the former committed the companies to paying for whatever improvements in the factories were necessary.⁵⁶

As this event demonstrates, public and political pressure continue to be brought to bear on transnational companies to fill the governance gap existing around liability for human rights violations caused by their operations, producers, and suppliers. Influential actors increasingly regard the human rights impacts of business operations as not solely the responsibility of the countries in which companies do business, but as an issue of international concern requiring collaboration among a variety of parties. As we discuss below, initiatives to deal with this gap are developing. To date, however, none have imposed binding obligations or liability on companies with respect to the human rights impacts of their activities.

B. Key Governance Instruments and Initiatives on Human Rights

While a range of legal approaches has been adopted with respect to business and human rights, each involves its own distinct combination of actors, procedures, and incentives. Some encourage companies to identify and disclose voluntarily the impacts of their operations. Others involve mandatory reporting requirements but do not prescribe specific conduct. Still, others consist of private regulatory schemes to which companies can voluntarily adhere. These approaches all tend to take the form of rules and instruments that are not legally enforceable, but which still have the potential to influence business reputation and credibility. Furthermore, as some standards become more widely accepted, there is an increasing likelihood that they will be incorporated into national law through common law standards of care or government regulation.

54. The five-year initiative provides for participating companies to inspect within twelve months the estimated five hundred Bangladeshi factories that the companies use and to assess conditions based on a common safety standard. The companies then work with factory owners, the government, and civil society groups to explore how to finance necessary improvements. Steven Greenhouse & Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES (July 10, 2013), http://www.nytimes.com/2013/07/11/business/global/us-retailers-offer-safety-plan-for-bangladeshi-factories.html?_r=0 [https://perma.cc/E2AA-XBEF].

55. *Id.*

56. *Id.*

All of these governance initiatives exist alongside or under the international law framework that places responsibility on states to regulate and protect human rights. The original document setting forth general human rights principles is the 1948 UN Universal Declaration of Human Rights⁵⁷ (“the Declaration”). Two further UN covenants, namely the International Covenant on Civil and Political Rights⁵⁸ and the UN Universal Declaration of Human Rights Convention on Economic, Social, and Cultural Rights,⁵⁹ together with the Declaration, constitute the International Bill of Human Rights.⁶⁰ States fulfill their responsibilities under these and other treaties through the adoption of domestic law or direct incorporation of the treaty in their domestic legal systems. While the obligations set forth in the Declaration are directed to “every organ of society,”⁶¹ the traditional perspective distinguishes between public and private actors. As such, “The state is seen as the main entity responsible for implementing programmes to reduce poverty, to promote human development and generally to protect and promote human rights.”⁶²

The International Bill of Human Rights has been supplemented by additional UN treaties that elaborate upon prohibitions against racial discrimination, discrimination against women, and torture. These treaties also affirm the rights of children, migrant workers, and persons with disabilities. In addition, the ILO has adopted conventions dealing with workplace rights. The ILO Declaration on Fundamental Principles and Rights at Work⁶³ (“the ILO Declaration”) lists freedom of association and recognition of collective bargaining; elimination of all forms of forced or compulsory labor; abolition of child labor; and elimination of discrimination with regard to employment and occupation.⁶⁴ While the next section discusses the major programs on the global level, there are a variety of other initiatives that focus on specific issues or industries, with a combination of public and private actors involved in their creation and implementation.⁶⁵

57. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

58. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 14688.

59. G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

60. G.A. Res. 217 (III), International Bill of Human Rights (1966).

61. See Universal Declaration of Human Rights, *supra* note 57, at 1.

62. See THE BUSINESS OF HUMAN RIGHTS (Aurora Voiculescu & Helen Yanacopulos eds., 2011).

63. INT’L LABOUR ORG., DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998).

64. See *id.*

65. For an excellent discussion of many of these, see SIMMONS & MACKLIN, *supra* note 41, at 79–177.

C. The Leading Global Programs

1. The UN Guiding Principles on Business and Human Rights

After decades of pressure to create a system of governance dealing with business and human rights, the Principles were adopted in 2011 by the UN Human Rights Council.⁶⁶ The Principles are the product of a project coordinated by Professor John Ruggie, acting as Special Representative of the Secretary General of the UN.⁶⁷ Since their adoption in 2011, the Principles have gained acceptance as a useful framework for structuring both governmental and business approaches to meeting human rights obligations.

The Principles were preceded by the 2003 publication of *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (“the Norms”), which were prepared by the UN Sub-Commission on the Promotion and Protection of Human Rights.⁶⁸ The Norms provided that business enterprises, in addition to states, were responsible for promoting and securing the human rights set forth in the Declaration. The draft of the Norms elaborated that “[w]ithin their respective spheres of activity and influence,” companies “have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law.”⁶⁹ The Norms thus imposed on companies a duty not only to respect human rights, but also the same duties as states to promote and fulfill these rights.

The Norms generated considerable controversy, and the UN Commission on Human Rights ultimately declined to endorse them. Professor Ruggie also explicitly rejected this approach at the outset of his project, stating that “the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights.”⁷⁰ As a result, the Principles were organized around states’ existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; the role of business enterprises in complying with all applicable laws and respecting human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached. The

66. UN Guiding Principles, *supra* note 2.

67. Special Representative of the U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

68. U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

69. *Id.*

70. Special Representative of the U.N. Secretary-General, *Interim Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

Principles thus rest on the notion of three core obligations (or pillars): states are to protect human rights, businesses are to respect them, and both are to provide appropriate remedies for their violation.

The responsibility to respect human rights requires businesses to avoid infringing human rights and to address any adverse impacts “with which they are involved.”⁷¹ The source of the rights is primarily the International Bill of Human Rights and the ILO Declaration. The commentary to the Principles states: “The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”⁷² Furthermore, the responsibility “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”⁷³ When national law conflicts with international human rights principles, businesses “are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances.”⁷⁴

The Principles provide that businesses must not cause or contribute to adverse human rights impacts through their own activities and must also seek to prevent or mitigate adverse impacts that are “directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”⁷⁵ The commentary to the Principles states that “activities” include both actions and omissions and that business relationships include those with “business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.”⁷⁶

To meet their responsibilities, it is recommended that businesses have in place a formal commitment to respect human rights, approved at the most senior level of the company; a due diligence process to identify, prevent, mitigate, and account for the company’s impact on human rights; and a process to provide remedies for any adverse impacts they cause or to which they contribute.⁷⁷ In engaging in due diligence, it is recommended that companies evaluate actual and potential violations—a process that should include both reliance on experts and meaningful consultation with potentially affected groups. They also should publicly communicate these efforts to all stakeholders, including those on whom their business operations may have an impact.

With respect to remedies, the Principles suggest that businesses establish “operational-level grievance mechanisms” for those adversely affected by

71. UN Guiding Principles, *supra* note 2, at 13.

72. *Id.* at 14.

73. *Id.* at 13.

74. *Id.* at 25.

75. *Id.* at 14.

76. *Id.* at 15.

77. *Id.* at 15–16.

the companies' operations.⁷⁸ Such processes should be “[b]ased on engagement and dialogue” with stakeholder groups for whose use they are intended.⁷⁹ Grievance procedures should be seen as legitimate, accessible, predictable, equitable, transparent, consistent with internationally recognized human rights, and a source of continuous learning.

The European Union endorsed the Principles in its 2011 Corporate Social Responsibility Strategy and is committed to support their implementation.⁸⁰ The American Bar Association and the U.S. government also endorsed the Principles,⁸¹ and the provisions have been incorporated into the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises⁸² (“the OECD Guidelines”) and the International Finance Corporation’s Sustainability Framework.⁸³ To support the adoption of the Principles, the UN Human Rights Council established a Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (“the Working Group”) to promote dissemination and implementation of the Principles. The Working Group has encouraged states to meet their responsibility to protect human rights by developing National Action Plans on Business and Human Rights and has published guidance on how states should engage in this process. As of February 2016, ten countries had completed plans, nineteen were in the process of doing so (including the United States), and civil society organizations had taken initial steps to develop plans in seven other countries.⁸⁴

A UN Working Group on the issue of business and human rights reported to the General Assembly in May 2015 that the Principles have been incorporated into frameworks of international organizations, regional organizations, countries, industry bodies, and companies.⁸⁵ While the Principles are the most significant initiative to date that places responsibility on businesses with respect to human rights impacts, other initiatives operate alongside the Principles to create a broad framework of transnational governance. None of these initiatives, however, create widespread obligations on companies to address the human rights impacts of their operations. This means that, as discussed in Part III below, lawyers

78. *Id.* at 31–32.

79. *Id.* at 34.

80. *Corporate Social Responsibility: National Public Policies in the European Union* (2011).

81. ABA, Resolution 109 (endorsing the UN framework for business and human rights and also the Principles and the OECD).

82. Org. for Econ. Co-operation & Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (2011) [hereinafter OECD Guidelines], <http://www.oecd.org/daf/inv/mne/48004323.pdf> [<https://perma.cc/9CJK-MJUP>].

83. Int’l Fin. Corp. [IFC], *IFC Sustainability Framework* (2012).

84. *State National Action Plans*, U.N. HUM. RTS.: OFF. HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Mar. 27, 2016) [<https://perma.cc/3885-CHUL>].

85. *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 3–5, U.N. Doc. A/HRC/29/28 (2015).

advising corporate clients adopt a range of approaches to the relevance of the governance framework on business and human rights.⁸⁶

2. OECD Guidelines for Multinational Enterprises

The OECD Guidelines were established in 1976 and set forth principles of good business practice that are consistent with applicable laws and internationally recognized standards.⁸⁷ While the original OECD Guidelines focused on companies' compliance with the law of the host countries in which they do business, the current version places more emphasis on international standards.⁸⁸ This current version contains a separate chapter on human rights and follows the framework of the Principles. The OECD Guidelines provide that companies should respect human rights and, at a minimum, should be guided by the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration.⁸⁹

Similar to the Principles, the OECD Guidelines state that enterprises should have a policy commitment to respect human rights; avoid causing or contributing to adverse human rights impacts; seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products, or services by a business relationship, even if they do not contribute to those impacts; conduct due diligence to identify risks of adverse human rights impacts that they might cause, or to which they might contribute or be directly linked; and provide redress for human rights violations for which they are responsible.⁹⁰

The OECD Guidelines are voluntary and cannot be enforced against multinational companies. They do, however, require participating states to establish and fund National Contact Points (NCP) where complaints can be filed by members of the public, NGOs, unions, and governments about failure to comply with the OECD Guidelines.⁹¹ Participation in the complaint process is voluntary. In general, the NCPs are expected to provide consultation and assistance to companies accused of noncompliance to help them conform their conduct to the OECD Guidelines, although they are not able to monitor implementation of any agreement that is reached through this process.

Since its establishment, the U.K.'s NCP has been especially active, moving toward a quasi-judicial process that in some cases culminates in a determination on whether a company has failed to comply with the OECD Guidelines.⁹² Although it has no authority to impose changes on company

86. *See infra* Part III.

87. OECD Guidelines, *supra* note 82.

88. *Id.* at 3.

89. *Id.* at 32.

90. *Id.* at 19–20.

91. *Id.* at 68.

92. One such determination, for instance, involved a complaint about the United Kingdom company, Afrimex, in connection with its operations in the Democratic Republic of the Congo (DRC). The NCP found that Afrimex had violated the OECD Guidelines by

practice, the NCP does make recommendations on how companies can improve their compliance with the OECD Guidelines. Not all NCPs have assumed as active a role as in the United Kingdom, however, nor do many have the resources to do so.

3. UN Global Compact

The UN Global Compact (“the Compact”) is a voluntary initiative established in 2000 to provide a framework for companies to report their efforts dealing with issues such as human rights, labor conditions, the environment, and anticorruption.⁹³ It is designed to serve as a “call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.”⁹⁴ More than eight thousand businesses and four thousand nonbusiness organizations have joined the Compact.⁹⁵ Participants agree to abide by ten basic principles, which are derived from the Universal Declaration of Human Rights, the ILO Declaration, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption. The two principles that relate to human rights are that businesses should support and respect the protection of internationally proclaimed human rights and make sure they are not complicit in human rights abuses.

Companies that are members of the Compact submit an annual report that is posted on the UN website. A company must provide an explanation if it is not reporting on any aspect of the Principles. Companies that meet the minimum requirements are designated as “GC Active,” while those that go beyond the minimum requirements by reporting on the company’s implementation of advanced criteria and best practices qualify as “GC Advanced.”⁹⁶

If a participant does not submit a report that meets the minimum requirements, it is given twelve months to resubmit, after which time it is designated as “non-communicating” on the Compact website.⁹⁷ If the company then fails to submit a conforming report within twelve months, it is expelled from the Compact and has to reapply.⁹⁸ As of February 2016,

failing to apply sufficient pressure on its business partners to induce them to cease trading in minerals where those sales provided revenues that funded the continuation of the war in that country. FINAL STATEMENT BY THE UNITED KINGDOM NATIONAL CONTRACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: AFRIMEX (UK) LTD. (2008).

93. *Global Compact: The World’s Largest Corporate Sustainability Initiative*, U.N., <https://www.unglobalcompact.org/what-is-gc> (last visited Mar. 27, 2016) [<https://perma.cc/H4W9-HDFB>].

94. *Id.*

95. *What Is a Global Compact?*, U.N., <https://www.unglobalcompact.org/what-is-gc> (last visited Mar. 27, 2016) [<https://perma.cc/HWW4-QFDM>].

96. *Id.*

97. *Id.*

98. *Id.*

there were 1436 “non-communicating” participants and 6160 that had been expelled.⁹⁹

While the idea behind the Compact is that stakeholders will use the information to assess and engage with companies on the issues discussed, some observers have criticized it for failing to prescribe specific requirements for participating companies and leaving it to them to determine how to implement the broadly defined standards. The concern is that companies may enhance their reputations simply by signing the Compact without making serious commitments to operating in a sustainable fashion. The extent to which the Compact has prompted changes in behavior is also unclear. As one scholar concluded, “[As] the goal of the [Compact] is to serve as a ‘learning platform,’ it is difficult to devise a metric for measuring its impact, if any, on corporate behavior.”¹⁰⁰

III. ADVISING BUSINESSES ON HUMAN RIGHTS

As discussed above, most initiatives aimed at increasing business responsibility to respect human rights consist of nonbinding standards that have few formal legal consequences.¹⁰¹ In particular, the rights that the duty to respect is intended to protect under the Principles are contained in advisory instruments that are unenforceable or in treaties that impose obligations only upon nation-states. Furthermore, the rights in such documents are expressed in very broad terms, such that the meaning may vary considerably in different situations. The business duty to respect human rights thus differs from conventional legal obligations on which lawyers typically advise clients. What, if any, role does this leave for lawyers with respect to this duty?

We looked for answers to this question in interviews with twenty-nine persons involved in the business and human rights field. Two were senior lawyers in corporate legal departments, while thirteen were in law firms. Of those in law firms, six were mid-level partners or counsel, and seven were senior partners or counsel. The remaining fourteen interviews were with mid-level or senior people in organizations that focus or advise on business and human rights. Eight interviews were conducted in person, while the rest were conducted via telephone or Skype video. All interviews were an hour or an hour-and-a-quarter. While the group does not represent a random sample, it does consist of people with considerable expertise in business and human rights. Their observations provide useful insights into the dynamics that shape the business duty to respect human rights and lawyers’ provision of advice on this duty.

The discussion below focuses on a number of factors that we found influence lawyers’ willingness to advise on business and human rights. The first is the nonbinding nature of human rights obligations, which can cause reluctance and uncertainty for lawyers in approaching the issue. The

99. *Id.*

100. SIMMONS & MACKLIN, *supra* note 41, at 122.

101. *See supra* Part II.A.

second is the different ways in which lawyers frame issues of human rights to make them more relevant to their clients' interests. Of the various options available, the risk management lexicon was considered the most effective in engaging clients on human rights issues. The final factor affecting lawyers' willingness to discuss human rights issues is the relationship with inside counsel. As many interviewees commented, the development of a framework to deal with the human rights impacts of business activities is still in the early stages. This means that lawyers also are in the early phase of determining how to raise these issues and what these developments means for their sense of themselves as professionals.

A. Lawyer Reluctance

A common theme identified by interviewees was the reluctance by some members of the bar to accept that lawyers should provide advice on anything beyond enforceable legal provisions. One interviewee who works with lawyers from various countries observed that there are some law firms that tell their lawyers not to discuss the Principles "because they are not law . . . my only job is to counsel you on what is the law."¹⁰² Another said that even for inside counsel, there is a lot of discomfort with human rights because it is soft law. "When it gets to the general counsel's office it [can] get complicated because they're lawyers and they feel much more comfortable advising on hard law."¹⁰³ A key obstacle to lawyers providing advice on human rights therefore is that these rights "started with international standards and norms and things that lawyers don't usually deal with."¹⁰⁴

One expression of skepticism about lawyers' role to advise on the nonbinding duty to respect human rights was stated by Jonathan Goldsmith, Secretary General of the Council of Bars and Law Societies of Europe (CCBE). Commenting on the International Bar Association (IBA) guidance, Goldsmith questioned "whether it is useful for the IBA to publish something where so many of the difficult questions remain unresolved."¹⁰⁵ He suggested that these questions include:

- What does it mean to respect human rights when the role of lawyers is to advise on respecting laws (which may not always cover the human rights in question)?
- What is the impact on the responsibility of lawyers—whether legal or ethical—to their clients if they advise on human rights rather than on the law?
- Is there a distinction between advising clients about the existence of human rights standards which go beyond the legal

102. Interview with Subject 21 [hereinafter Interview 21] (on file with the authors).

103. Interview with Subject 13 [hereinafter Interview 13] (on file with the authors).

104. Interview with Subject 25 [hereinafter Interview 25] (on file with the authors).

105. Jonathan Goldsmith, *Business, Human Rights—and Meaning*, LAW SOC'Y GAZETTE (Mar. 3, 2015), <http://www.lawgazette.co.uk/analysis/comment-and-opinion/business-human-rights-and-meaning/5047211.article> [<http://perma.cc/6844-EK4F>].

requirement, and advising clients that they must comply with those standards which go further than the law?¹⁰⁶

Interviewers suggested that a second source of lawyer reluctance is that some lawyers see advising on human rights as involving moral judgments about their clients. As one lawyer noted:

[H]istorically lawyers have always been very comfortable in putting a distance between us and the client's commercial objectives: "We just advise on the law, it's not my role to question the client's objectives. Clearly if they are illegal I can't be complicit and I may withdraw my services, but if they want to sell tobacco products or mine uranium or move a community [off its land] that's entirely for the client to decide."¹⁰⁷

Lawyers' tendency to think in terms of legal compliance programs also can create discomfort and uncertainty about their role with respect to the Principles. One lawyer asked:

What tick do you have to put in what box to do the right thing? [F]or example, . . . if you find that you have a supplier and may have child labor in the supply chain, the old business approach to human rights before the [Principles] would say, "Okay, stop using the supplier so you can say you don't have child labor in your supply chain." But everyone knows now that child labor is . . . a very complex issue and cutting those factories out of your supply chain may actually bring harm to the people you're trying to protect. So the new idea with the [Principles] is even when you pull out you have to think about what the human rights implications are [I]t may be that your first step is to work with suppliers to try and put the children in school, change the rules about suppliers, it's a whole process now that we need to go through. . . . [H]ow could you express that in compliance terms?¹⁰⁸

One lawyer who has worked with companies from several countries suggested that U.S. lawyers' advice tends to be driven more by considerations of legal liability than does advice from lawyers in other countries. She recalls one company turning to both French and U.S. counsel for advice. French counsel "basically advised [the company] to follow human rights principles."¹⁰⁹ By contrast, "the American legal advice was very strongly [based on] legal liability: 'Don't do X, Y, or Z even though people are asking you to do it; just follow your legal liability.'"¹¹⁰ She suggested that in the United States, "[t]here is not a whole lot of understanding or even respect for the UN Guidelines; I think that's in the legal culture."¹¹¹

106. *Id.*

107. Interview 25, *supra* note 104.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

On the other hand, some interviewees suggested that lawyers from civil law jurisdictions might be less receptive than those from common law jurisdictions to the notion that a lawyer should advise on open-ended standards in addition to formal legal provisions. One interviewee suggested that the instinct in a civil law system is to say, “[H]ow do I think about what salient human rights impacts are? [W]e need to elaborate exactly which ones [we’re] talking about, exactly what sorts of actions and impacts, and then I can deal with this.”¹¹² Thus, the civil law lawyer will say, “We need to write our own code and elaborate every potential human rights adverse impact scenario [in sections] one through 510.”¹¹³

Another lawyer from a common law jurisdiction, however, questioned whether the civil law system is quite this rigid. He suggested it depends on the area of law involved:

If you are an administrative lawyer dealing with environmental law, you tend to look at what the regulations provide, end of story. But when you are dealing in a commercial context and you’re looking at negligence lawsuits judges are permitted to look at standards. . . . I think that even in the civil law it’s not quite as black and white as you might think. . . . A German judge in a commercial dispute is entitled to look at standards outside the law.¹¹⁴

Interviewees thus indicated that there is resistance in some quarters to lawyers advising on human rights. There may even be some who are unsure of how they would incorporate nonbinding standards into their conversations with clients. Many interviewees, however, also suggested that the main obstacle to providing such advice may be that many lawyers simply are not familiar with the Principles.

B. Talking About Human Rights

The interviewees indicated that business clients differ in their awareness of human rights responsibilities and the need for advice on them. Not surprisingly, large multinational companies, those in the extractive industries, and companies with global supply chains are most aware of the human rights risks of their operations. In contrast, the companies that appear to be least aware of human rights concerns are smaller national companies that focus on domestic markets. Many of these national companies, however, are part of the supply chains of multinational businesses. Several interviewees suggested that this likely will be an important impetus in increasing small and medium enterprise awareness of human rights impacts.

Interviewees also suggested that lawyers find different ways to discuss human rights issues with business clients. In general, the approach most likely to resonate with clients is to focus on the potential risks to the company of human rights violations. Clients vary, however, in how

112. *Id.*

113. *Id.*

114. Interview 13, *supra* note 103.

sensitive they are to different types of risks, which can range from the prospect of legal liability to criticism from consumers, investors, or local communities. Furthermore, the Principles state that human rights risk analysis should focus on the risk to rights holders, not simply risk to the company. This requires a shift in perspective. As a result, interviewees expressed a range of opinions on how lawyers could best frame issues of business and human rights with their clients.

C. *The Risk Management Lexicon*

Modern corporations spend a considerable amount of resources engaged in “enterprise risk management,” which “include[s] not just risks associated with accidental losses, but also financial, strategic, operational, and other risks.”¹¹⁵ Human rights violations can create such risks, which makes advising on how to prevent them seem like a natural topic to include in such analysis. For this reason, the Principles suggest that “[h]uman rights due diligence can be included within broader enterprise risk-management systems.”¹¹⁶

D. *Risk of Legal Liability*

One risk on which lawyers traditionally advise is the risk of legal liability. If we think of the type of issues on which lawyers may advise as a set of concentric circles, the issue of legal liability constitutes the inner circle. While there is some national regulation prohibiting egregious conduct such as human trafficking, the liability of companies in developed countries often depends on complex determinations of responsibility for the actions of subsidiaries or contractual partners in developing countries. In light of this, in many cases the most immediate concerns about direct liability of major corporations tend to be based on compliance with reporting and disclosure requirements.

Reporting and disclosure requirements generally do not restrict the company’s operations, but simply require information about them. Therefore, discussions about potential liability focus primarily on whether the information is accurate. These discussions, however, have the potential also to direct corporate attention to human rights issues in a couple of ways. First, as one lawyer put it, “In order to get to the reporting outcome you have to implement processes which will allow you to come up with the information you need to report.”¹¹⁷ Assembling and analyzing the information necessary to make disclosure can lead to more wide-ranging conversations about corporate activities and the extent to which they risk violating human rights.

115. Margaret Rouse, *Enterprise Risk Management (ERM) Definition*, TECH TARGET (May 2010), <http://searchcio.techtarget.com/definition/enterprise-risk-management> [http://perma.cc/QJR8-7MXZ].

116. UN Guiding Principles, *supra* note 2, at 18.

117. Interview with Subject 19 (on file with the authors).

Second, disclosure can be a way of holding a company accountable to stakeholders and the public at large, regardless of any potential legal liability. Reporting provisions typically require a company to disclose its efforts to avoid adverse human rights impacts. A company that discloses its failure to make any efforts on human rights issues is likely to attract criticism that could affect its standing with customers, investors, or officials that may be in a position to grant or deny regulatory approvals. Furthermore, where convergence around appropriate practices is starting to emerge, companies that fail to adopt these practices are likely to be subject to similar criticism and potential adverse action by stakeholders. Discussions of compliance with reporting and disclosure requirements can create opportunities for lawyers to advise companies on the broader risks of human rights violations and the importance of minimizing them.

Finally, the potential for convergence around appropriate compliance and reporting practices could have implications for corporate liability under the common law or customary international law. Acceptance of certain standards by a majority of companies in a given industry, for instance, or those facing a common human rights risk, could lead to a judicial finding that acting in accordance with these standards is required to meet the appropriate tort law standard of care. As one lawyer put it, “The standard of care is something that has evolved,” and there is “an expectation for [companies within an industry] that if the industry comes up with a code of conduct and you are not subscribing to that code of conduct something is wrong with you.”¹¹⁸

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

E. Legal Risks of Nonbinding Standards

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

If the contractual partner is a host state, acceptance of standards may be a condition of bidding for a project, or violation of them may result in denial of approval or termination of the project. Companies in developing

118. Interview with Subject 17 [hereinafter Interview 17] (on file with the authors).

countries are now being encouraged to insist on protection of human rights and other assurances in investor agreements, with an increasing roster of lawyers and consultants providing assistance to them in negotiating and implementing agreements with such terms.

Lawyers who act for companies that are parties to agreements that contain such standards need to advise their clients about the extent to which they may be in compliance or breach. As with discussions about potential legal liability, such conversations can be the impetus for evaluating and strengthening a company's processes for avoiding various types of adverse human rights impacts. As one lawyer put it, this can impress upon clients "the need to be proactive and not simply react as issues or controversies arise."¹¹⁹

In addition, some government entities that are not contractual partners with a company may use information about the company's failure to comply with nonbinding standards as the basis for adverse action. Canada, for instance, provides that its Export Credit Agency is authorized to deny or terminate funding for a Canadian mining company that refuses to participate in an OECD NCP process initiated in response to a complaint against the company.¹²⁰ More generally, it is not hard to imagine that a government agency that is deciding whether to issue a regulatory approval of some sort may well take into account a company's record on human rights issues.

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

A client sends me their code of conduct or their business ethics policy and says, "Well, do you think we've got a problem here?" And the oil and gas mining sector or the telecommunications or electricity sector have got a bunch of codes and . . . template agreements dictated or agreed between the sector. And lawyers quite happily interpret those documents, even though they've got no more standing from a national law perspective than any other documents.¹²¹

F. Nonbinding Standards As Hard Law in Waiting

Transnational businesses operate in a world of considerable uncertainty. One significant source of uncertainty involves which regulatory provisions are likely to be imposed in the future, or what contract terms counterparties may request or financial institutions may require. Lawyers who advise on nonbinding standards are in a position to offer some insight into these questions, thereby enabling clients to anticipate and plan for legal

119. Interview with Subject 9 (on file with the authors).

120. Interview 25, *supra* note 104.

121. Interview with Subject 3 (on file with the authors).

requirements that may emerge down the road. As one lawyer succinctly stated, “Soft law can be hard law in waiting. The law is a lagging indicator of what’s considered ethical, so that what may be considered unethical today may be illegal tomorrow.”¹²² Another captured this idea by saying that nonbinding standards also include the “unspoken expectations of the public.”¹²³

Many lawyers drew analogies to the early days of concern about environmental issues. There was very little hard law, and when “naming and shaming” proved ineffective, the government “pick[ed] the practices of the most . . . progressive companies and use[d] that as the basis for what [it] impose[d] on everybody else.”¹²⁴ These voluntary practices were an important foundation for the numerous environmental statutes that eventually followed.

This perspective suggests that a lawyer who discusses nonbinding standards with a client is advising on the “law” in an expansive sense that is sensitive to the fluid relationship among ethics, norms, and formal law. She is attempting to provide a client not simply with a snapshot, but a moving picture.

G. Business Risk: The Social License

The preceding types of risks to a business arising from the human rights impacts of its operations can all be conceptualized in terms of gradually expanding concentric circles of legal risk. It may be, however, that in some cases there is no plausible basis for conceptualizing the human rights risk to the company as falling within one of these circles. At the same time, there may be other types of risks that are relevant to the client’s business. Is there any role for the lawyer in advising on such risks? Lawyers may not be able to claim any particular professional expertise with respect to them. At the same time, many of these risks will reflect stakeholder and public perception that the company has violated common ethical norms. This is a matter with respect to which a lawyer may have insight because of the broad relationship between such norms and the law. Many lawyers traditionally have fulfilled this role by acting as a client’s trusted advisor. To the extent that they act in this role, lawyers will bring to the client’s attention the various types of business risks that may result from imposing adverse human rights impacts.

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

122. Interview 13, *supra* note 103.

123. Interview 17, *supra* note 118.

124. *Id.*

There is under the national legislation an ability to move the community . . . but the compensation is very nominal and de minimis, and there is no right to have the decision reviewed. We would say, “Well look, there is clearly a national law that deals with this, but from the United Nations Guiding Principles perspective you would also want to raise with the client perhaps the difference between the national law standard and international human rights standards.” [Under the latter] you would expect a reasonable level of compensation and a review process or a grievance mechanism for those who were unhappy with the decision.¹²⁵

The lawyer continued:

And you might try and explain why you are raising these issues with the client because they are not legal issues. In other words, the client will ask the question, “What can I do?” They are not interested in what else can I not do or should I be doing. To that you can say, “Well, have you thought about from a business perspective the potential disruption, will there be protests, what’s this going to cost in terms of project delay, the impact to your reputation when you are on the front page of all the local newsletters, when perhaps you’ve got to go before a government commission and you want an approval for another project in two or three years’ time?”¹²⁶

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

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

125. Interview with Subject 2-3 [hereinafter Interview 2-3] (on file with the authors).

126. *Id.*

provides a more sustainable social and economic environment for the company over the thirty-year life of the project?

In both of these instances, compliance with national or local law will not necessarily insulate a company from criticism. Depending upon the issue, there may be emerging international expectations of ethical behavior to which the public may hold a company. These expectations are the basis of what some observers have called a company's "social license."¹²⁷ This license reflects the public's sense of the legitimacy of a company's operations. One lawyer suggested that, with respect to human rights impacts, "you certainly look at the risk of legal violations but you also look at the risk of what happens when you violate soft law global norms because that can cause all kinds of problems that can ultimately lead to the loss of a company's social . . . license to operate."¹²⁸

The likelihood that a company will be held accountable for breaching accepted public norms has increased substantially in recent years with advances in telecommunications technology and the rise of international NGOs and other significant actors in the transnational sphere. One interview subject said that lawyers need to advise clients that "[p]eople are in touch with each other and NGOs are out there. [There are] a lot of forces at work that did not exist ten or twenty years ago. The impacts on people can lead to serious consequences."¹²⁹

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

A lawyer who advises a client on risks to its social license is not acting as a decision maker with respect to such risks. Rather, her role is to ensure that the client is aware of these considerations in deciding how to proceed. Corporate management increasingly looks to both outside and inside counsel for advice on the full range of risks that a company faces. As a scholar and corporate general counsel observed, "[L]egally astute top management teams take a proactive approach to legal matters. They bring counsel in early to assist not only in assessing legal risk but also in creating a strategy and a plan of execution that maximizes realizable value while

127. GUNNINGHAM ET AL., *supra* note 13; MORRISON, *supra* note 13.

128. Interview 13, *supra* note 103.

129. Interview 17, *supra* note 118.

eliminating any unnecessary legal or business risks.”¹³⁰ Serving as the company’s lawyer requires contacts with persons throughout the organization, which can put inside counsel in a position to identify and analyze risks and opportunities across the full range of a company’s operations. This feature of the job, along with lawyers’ traditional training in identifying and assessing risk, is resulting in more companies turning to lawyers for wide-ranging advice.

IV. BEYOND LEGAL AND BUSINESS RISK

Focusing on expanding concentric circles of risk is a way to include human rights concerns within the enterprise risk assessments that an increasing number of companies are already performing. Simultaneously, this focus on risks to the company is analytically distinct from an emphasis on risks to rights holders. As the Principles emphasize, human rights due diligence needs to “go[] beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.”¹³¹ In keeping with this, the Principles also say, “Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.”¹³² This part discusses how business lawyers may be most effective in encouraging their clients to adopt this perspective.

A. Risks to Rights Holders

It is understandable that lawyers attempting to minimize the adverse impact on human rights of business activities would tend to stress the risks to the company of imposing such limits. Businesses generally operate in highly competitive environments. Impacts on human rights thus may be most likely to enter into deliberations when they can be framed as potential costs to the company. As a pragmatic matter, an effective way to minimize risks to rights holders can be to persuade management to minimize risks to the company, because this aligns the interest of the latter with the former.

Such an approach reflects the view that outcomes are more important than motives in assessing behavior. Philosopher Robert Goodin, for instance, suggests that simply identifying the moral dimension of an issue will not necessarily suffice to motivate changes in behavior (or need prompting concern with that dimension be considered the only measure of success). As Goodin observes, most actions “probably proceed from a multiplicity of motives, some good and some bad So in a way it does

130. Constance Bagley & Mark Roellig, *The Transformation of General Counsel: Setting the Strategic Legal Agenda 3* (2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201246 [https://perma.cc/WJ4X-M675].

131. UN Guiding Principles, *supra* note 2, at 18.

132. *Id.* at 26.

not really even make very much sense to expect a conclusive answer to the question, ‘What motive[s] lay behind that act?’”¹³³

Consistent with this pragmatic approach, several lawyers who professed strong commitment to advancing business respect for human rights emphasized that their focus is on finding practical ways to reduce risks to rights holders rather than ensuring the purity of clients’ motives. As one lawyer put it: “If I can show them a way where they can make money and at the same time not . . . violate someone’s human rights that will allow them to continue to operate and at the same time give relief to these victims, then I’ve done my job.”¹³⁴ Another lawyer who described herself as “passionate” about human rights issues commented, “I don’t think as a business community we’ve reached [a] tipping point” such that companies consider human rights impacts from a purely altruistic perspective.¹³⁵ As a result,

I think any conversation has to involve a reference to what value that client would see in this kind of proposition. It might be as a shareholder or it might be at governance level, so it might be more of a management kind of issue than a profit issue. But there has to be some kind of a sale.¹³⁶

At the same time, focusing on risk to the company will not necessarily always align the interests of the company and those affected by its actions. For instance, affected rights holders may not be in a position to exert pressure on a company that will affect its financial condition or its reputation with stakeholders such as customers, investors, or government regulators. The Principles, for instance, declare that companies should set priorities based on human rights risks and based on the severity of the potential adverse impacts. One lawyer, however, expressed skepticism that companies actually do this: “I don’t know one company that actually prioritizes in that way. Because they prioritize based on where the squeaky wheels are and where the company is going to get bit.”¹³⁷

A company that acts based on cost-benefit calculations thus may leave rights holders vulnerable to the possibility that in any given instance, the calculation will not favor taking their interests into account. As Goodin puts it, “We want to get people to do the right thing *regularly* and *systematically*, and the surest way to do that simply has to be to get them to do the right thing for the right reason.”¹³⁸ The best way to get a company to minimize risks therefore is for managers genuinely to be concerned about the persons who will be affected if those risks materialize. When this occurs, people treat rights as a hard constraint that is not contingent on cost-benefit calculations.

133. ROBERT GOODIN, *MOTIVATING POLITICAL MORALITY* 9 (1992).

134. Interview 21, *supra* note 102.

135. Interview with Subject 10 [hereinafter Interview 10] (on file with the authors).

136. *Id.*

137. Interview 25, *supra* note 104.

138. GOODIN, *supra* note 133, at 9.

The challenge for business lawyers thus in effect is how to help inculcate a deontological perspective in clients who operate in a domain dominated by consequentialist thinking. The lawyers we interviewed acknowledged the difficulty of this task, but some held out hope that it could succeed. For instance, while risk management is a natural vehicle for discussions about the risks of adverse human rights impacts, these discussions do not necessarily sharply distinguish between the risks to the company and to the rights holders. Even simply considering whether violations may occur that represent risks to the company requires imagining the reactions of average persons who are guided by the standards of ordinary morality. This process of taking the perspective of persons outside the company requires imaginative evaluation of the company's operations according to moral considerations rather than simply self-interest. That evaluation may initially be for the purpose of determining whether public moral reactions will result in criticism of the company. It seems plausible to imagine, however, that the habit of consulting ordinary morality will lead to moral standards being a direct, rather than derivative, influence on behavior.

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

We can gain some insight into the possibilities for changes in business client perspectives from what has been called a "constructivist" approach to international relations. That approach challenges the realist view that actors in the international realm operate on the basis of interests that are exogenous to norms and law and that it is these interests, rather than normative or legal considerations, that determine their behavior.¹³⁹ Constructivists argue for the importance of conceptualizing actors as members of social and discursive communities whose conceptions of their own interest may be reshaped by participation in such communities.¹⁴⁰ Interests, in other words, are endogenous to norms and law.

This suggests that increasing attention to and discussion of the human rights impacts of business activities could gradually change companies' understandings of their identities and interests. Some companies already, for instance, purport to distinguish themselves as socially responsible. Even if this self-presentation initially is meant to serve instrumental financial interests, it creates an identity to which persons both inside and outside the company can hold it accountable. A constructivist perspective

139. See J. SAMUEL BARKIN, *REALIST CONSTRUCTIVISM: RETHINKING INTERNATIONAL RELATIONS THEORY* (2010).

140. For a useful comparison and synthesis of the realist and constructivist perspectives, see *id.*

suggests that interaction among actors has the potential to solidify this corporate identity, so that it serves as a motivation for acting in socially responsible ways. To the extent this occurs, what is in the interest of rights holders is in the interest of the company—not because of cost-benefit analysis, but because a particular conception of identity has been internalized in the company culture.

Ultimately, it may be unrealistic to imagine that companies will focus on the risks of adverse human rights impacts without ever considering their impact on their own economic viability. As one lawyer put it, counsel needs to emphasize that establishing priorities is about focusing on “the risk to humans, not to the company,” but “[i]t’s probably always going to be some sort of balance, because at the end of the day the people who make the decisions are looking at income. So what you can hope for is some sort of balance.”¹⁴¹

B. The Role of Inside Counsel

Another dynamic that shapes the likelihood and nature of lawyers’ advice on human rights issues is the relationship between inside and outside counsel. Inside counsel have gained significant influence over the past few decades, and several interviewees saw them as crucial in sensitizing companies to the need to consider the human rights impacts of their operations. One law firm lawyer commented: “The in-house counsel [role] has changed. They are starting to see . . . that they have a broader remit [that] may mean interacting with human rights issues.”¹⁴²

Their crucial role within the company thus means that “internal counsel are really the key to unlocking this for external counsel, giving them a level of comfort and confidence about raising [human rights] issues with clients.”¹⁴³ Internal counsel who seek to raise awareness of these issues within companies can enlist outside counsel to play certain roles in support of such an effort. Outside counsel can be in a position, for instance, to describe what other companies in an industry are doing with respect to human rights impacts, including commitments to adhere to certain voluntary standards. They also can provide in-depth analysis of potential human rights issues based on familiarity with how standards are being interpreted and applied. Additionally, they may be especially well-positioned to advise on which standards are likely to be incorporated into hard law. These roles reflect the fact that general counsel typically must be generalists who attend to a wide range of issues, while outside counsel often develop more focused expertise. This can enable outside counsel to provide valuable support by reinforcing inside counsel initiatives. As one law firm lawyer put it, “Our job is to help that person within the company who is

141. Interview 25, *supra* note 104.

142. Interview 2-3, *supra* note 125.

143. *Id.*

trying to drive change and give them as many arrows in their quiver as we can.”¹⁴⁴

To what extent are outside counsel likely to be the ones to initiate discussions of human rights, rather than respond to inside counsel requests for advice? There was a divergence of opinion among our interviewees on how likely this is and on the extent to which it is the lawyer’s role to do so. As one lawyer stated,

Normally the relationship between the lawyer and the client is such that the lawyer reacts to what the client wants and that’s kind of it . . . A lawyer has to be very, very careful when he or she starts trying to persuade a client to do something that the client isn’t already inclined to do He can easily become labeled a troublemaker, an idealist, someone who is off the program if [he is] not careful.¹⁴⁵

At the same time, outside counsel may take the initiative because she wants to be seen as a trusted advisor rather than simply a purveyor of technical services. As one lawyer noted, “It’s much more valuable when a firm becomes . . . a wise counselor than if it’s just a commodity provider of specialized services. . . . I think outside counsel want to be able to understand how they can provide that wise counsel.”¹⁴⁶ Another lawyer echoed this point:

[T]he climate for outside counsel lawyer is so competitive you need to have an advantage What differentiates you is what extra value you [are] bringing. If you are a lawyer who knows about these principles, who understands them, who can translate that into language that your client can (a) appreciate and (b) profit from, you are going to be at an advantage You can convey the information and they can take that information and use it to build their business. You provide a service . . . a valuable service.¹⁴⁷

Outside counsel also may come to see herself as having a professional responsibility to raise concerns about human rights impacts. The IBA guidance says: “[A]dvising business clients on how to manage their legal risks by preventing and mitigating their involvement in negative human rights impacts falls within a lawyer’s ethical obligations under the IBA International Principles [on Conduct for the Legal Profession].”¹⁴⁸ Rule 1.1 of the European Bar’s Code of Conduct for Lawyers in the European Community states that a lawyer’s ethical obligations include those that she owes to “the public for whom a free and independent profession . . . is an essential means of safeguarding human rights in the face of the power of the state and other interests in society.”¹⁴⁹ The American Bar Association’s

144. Interview with Subject 15 (on file with the authors).

145. Interview 17, *supra* note 118.

146. Interview 13, *supra* note 103.

147. Interview 21, *supra* note 102.

148. INT’L BAR ASS’N, BUSINESS AND HUMAN RIGHTS GUIDANCE FOR BAR ASSOCIATIONS 33 (2015).

149. EUROPEAN CODE OF CONDUCT FOR LAWYERS r.1.1 (COUNCIL OF BARS & LAW SOC’YS 2013).

report accompanying its resolution endorsing the Principles, for instance, stated:

It bears noting here that ABA Model Rule of Professional Conduct 2.1 may well apply in this context. It requires lawyers to exercise independent professional judgment and render candid advice and permits them to refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. This imperative logically would include applicable international standards in the conduct of a client's affairs, including the Framework and Guiding Principles where corporate clients are concerned.¹⁵⁰

The reference in Rule 2.1 to discussing considerations beyond law is framed in discretionary rather than mandatory terms.¹⁵¹ This means that perceptions of what constitutes "law" will have an important bearing on the scope of the lawyer's duty under Rule 2.1 and similar professional standards. One lawyer did suggest, however, that the day may come when a lawyer's failure to advise a client of the potential risks to the company arising from, say, local opposition to a project could lead the client to allege that the lawyer failed to provide adequate advice.¹⁵² The fluid relationship among international norms, standards, and hard law thus may have the potential to reshape understandings of the lawyer's role.

Finally, law firms conducting human rights due diligence may result in occasions for lawyers to initiate discussions of the impacts of client activities. The IBA guidance states that law firms as businesses can be

expected to meet the responsibility to respect human rights in all of their activities (including in their employment of lawyers) and in their business relationships, both with other law firms and business enterprises such as suppliers, and in the services they provide to their clients. Law firms that fail to respect human rights can therefore expect to be increasingly exposed to similar legal and non-legal risks as other businesses that also fail to do so.¹⁵³

In order to meet its obligation, a law firm "needs to assess whether there are any actual or potential human rights impacts that may be directly linked to the firm's services for a client."¹⁵⁴ The IBA guidance suggests that a firm may be seen as contributing to an client's adverse human rights impact "when it provides services to enable the client to take actions that are legal (or at least not clearly illegal), but which the firm knows, or ought to know in the exercise of reasonable due diligence, will result in adverse impacts on human rights."¹⁵⁵

A firm that has such a due diligence process in place to avoid contributing to human rights violations could make it easier for its lawyers

150. ABA, *supra* note 81, at 5 n.16.

151. See MODEL RULES OF PROF'L CONDUCT r.2.1 (AM. BAR ASS'N 2015).

152. Interview with Subject 8 [hereinafter Interview 8] (on file with the authors).

153. INT'L BAR ASS'N, *supra* note 148.

154. *Id.*

155. *Id.* at 58.

to initiate discussions of human rights issues with clients by enabling the lawyers to say that they are simply following standard firm policy. The extent to which firms are willing to put such a process in place may vary, however. First, firms may contest the assumption that they should be regarded as contributing to a client's human rights violations in any instance in which they are simply providing advice on what conduct complies with the law. The traditional view of the lawyer's role as a neutral partisan is that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities."¹⁵⁶ On this view, the lawyer is not morally accountable for how the client chooses to use her advice as long as the lawyer does not counsel or assist the client in conduct that the lawyer knows is "criminal or fraudulent."¹⁵⁷

Some lawyers we interviewed, however, suggested that the standard conception of the lawyer's role may not be as persuasive when a lawyer is acting in an advisory capacity, as opposed to when she is engaged in litigation. Indeed, some lawyers stated that they themselves do not accept this concept in the advisory context.¹⁵⁸ This is because an advisor can be a vital partner in helping a client imagine and pursue a specific course of action, as opposed to a litigator who encounters the client's conduct after the fact and attempts to fashion the best explanation for it.¹⁵⁹ The advisor thus arguably bears more responsibility for the behavior of the client than does the litigator.

Second, a firm may be reluctant to establish a due diligence process because it fears that doing so may strain relationships with current and prospective clients who may regard the firm as passing moral judgment on their activities. A due diligence process therefore will need to be widely adopted among law firms in order to avoid this potential competitive disadvantage. Otherwise, "people are just cutting themselves out of the market in order to have somebody else pick up that work."¹⁶⁰ This suggests that there may be a collective action problem among firms; none may want to risk being disadvantaged by being the first to inaugurate human rights due diligence, even though firms would be better off if all agreed to do so. The market dynamics by which firms may overcome this obstacle would require analysis beyond the scope of this Article, but it is important to recognize the challenge.

CONCLUSION

A lawyer's willingness and opportunity to advise business clients on the nonbinding elements of the duty to respect human rights is likely to vary.

156. MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 2015).

157. *Id.* r. 1.2(d).

158. See Interview with Subject 4 (on file with the authors); Interview with Subject 5 (on file with the authors); Interview 8, *supra* note 152.

159. Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 SO. CAL. L. REV. 507 (1994).

160. Interview 10, *supra* note 135.

Advising on soft law that may have hard law consequences is the role with which lawyers are most likely to be comfortable and is an activity that falls within the core of their traditional professional responsibilities. Some lawyers may be uncomfortable with moving beyond that core to focus on broader concerns. At the same time, many major corporations now expect general counsel to provide an assessment of the full range of risks that the company may face. The pervasiveness of social media and the activities of NGOs can make potential adverse human rights impact a significant risk for some companies. This suggests that inside counsel—at least in major companies—may increasingly attend to this risk. It remains to be seen whether an established role for outside counsel will emerge from this process. As many interview subjects commented, we are in the early phase of attention to the human rights impacts of business activities. This means that lawyers also are in the early phase of determining what these developments will mean for their sense of themselves as professionals.

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

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