

REPORT BY THE BUSINESS & HUMAN RIGHTS WORKING GROUP
RESPONSE TO REQUEST FOR INPUT ON BUSINESS AND HUMAN RIGHTS:
TOWARDS A DECADE OF GLOBAL IMPLEMENTATION

UNGPS10+/NEXT DECADE BHR PROJECT

I. INTRODUCTION

The New York City Bar Association (City Bar) submits this paper in response to the Open Call for Input of the United Nations Business and Human Rights Working Group in connection with the upcoming tenth anniversary of the unanimous endorsement by the Human Rights Council of the United Nations Guiding Principles on Business and Human Rights (UNGPs). We are pleased to assist the UN BHR Working Group’s effort through its “UNGP10+ Project” to “develop an ambitious vision and roadmap for implementing the UNGPs more widely and more broadly between now and 2030.”

In response to the Working Group’s request for the perspectives of a wide range of stakeholders, this paper addresses the experience of law firms with respect to the UNGPs, including developments, successes, and challenges. The paper is primarily based on feedback from three major global law firms with offices across multiple jurisdictions. Each of the firms has a dedicated Business and Human Rights practice and participates in the City Bar’s Working Group on Business and Human Rights.

As this submission reflects, law firms and lawyers incorporate the UNGPs into the legal advice they provide to businesses and the operations of the firms themselves. Specifically, we address: (1) the experience of lawyers in counseling clients on the UNGPs; (2) the firms’ implementation of the UNGPs in their own operations; and (3) challenges firms have faced in both areas.

II. COUNSELING CLIENTS WITH RESPECT TO THE UNGPs

A. General Client Acceptance

Each of the participating firms has incorporated and applied the UNGPs extensively in its advice to commercial clients through practice groups and individual attorneys focused on global business and human rights. Experience in the field of human rights and corporate social responsibility before formal endorsement of the UNGPs, including advising clients on human rights, social and environmental laws, regulations, and normative standards, has facilitated the integration of the UNGPs into the firms’ respective client work.

In general, firms reported that clients have been receptive to advice based on the UNGPs and have shown an appreciation of what may be described as the “business case” for conforming their conduct to the UNGPs – namely, the risk of adverse legal, economic, reputational, and operational consequences that arises from violating the Guiding Principles. One participant noted that this trend has been influenced by the adoption of the UNGPs through “hard law” such as the California Transparency Act, the UK Modern Slavery Act and the French Duty of Vigilance Law. In addition, the firms noted that the increasing focus on due diligence as both a legal requirement and a mechanism for risk identification and mitigation has provided advisory opportunities with respect to transactions and supply chain management. Another participant noted, however, that there is some self-selection among clients, because those seeking advice relating to the UNGPs are largely attuned to and concerned about BHR issues, and therefore may not be reflective of business clients as a whole.

Participants further attributed heightened interest in the UNGPs to the growing prominence of environmental, social and governance (ESG) issues, which has resulted in shareholder and investor pressure on businesses with respect to human rights. One firm noted that the increasing use of benchmarks by shareholders and investors to compare companies’ performance on ESG has driven clients to increase attention to their human rights compliance programs, and in turn, their receptivity to the UNGPs. Another participant observed specific ESG-related focus on the UNGPs by the financial sector, noting that private equity firms have sought advice on the relationship between the UNGPs and ESG issues.

B. Varying Levels of Uptake Based on Client Familiarity, Industry and Geography

Firms noted that the application of the UNGPs to client advice and client acceptance has varied depending upon the client’s experience and specific incentives to comply with the UNGPs, as well as the industry and geographic location of the client.

Participants reported that client receptiveness has varied across different categories of clients: (1) those that have been dealing with BHR challenges for many years and wish to integrate UNGP approaches throughout their business; (2) those for whom the area is new and want to learn but who may need encouragement to invest in a full integration approach; and (3) those that address human rights risk because it is a legal requirement (*e.g.*, to satisfy disclosure regimes).

Another firm noted that clients have tended to be more incentivized to engage with the UNGPs where: (1) they are aware and understand the relevance of the UNGPs to their businesses; (2) they are subject to legal requirements with respect to BHR; (3) they have experienced public scandals or are aware of reputational hazard from BHR violations; (4) their governments have endorsed the UNGPs; (5) they are subject to stakeholder pressure; (6) BHR is a priority relative to the various pressures that they face; and (7) their decision-makers are vested with authority and accountability for the UNGPs.

One participant noted that the extent to which the firm’s advice will refer specifically to the UNGPs depends on the client’s familiarity with the principles. Advice to clients that have previously focused significant attention on BHR issues cite to the UNGPs in detail, while advice to clients less familiar with those issues will be framed in more general principles, focused on the

risks posed by drivers such as litigation, regulations, benchmarks and increasing shareholder demands. The firm will then rely on the UNGPs as a blueprint for how to go about addressing these challenges.

Firms also reported that where awareness and commitment are higher, clients may specifically ask what they need to do to operationalize their “responsibility to respect,” including through legal mechanisms such as contracts or by building due diligence into their transactions. Often clients have made a policy commitment to operate in accordance with the UNGPs and want to know how that might affect legal risk. They often also want to align their disclosures with the UNGPs.

One firm observed that clients are most receptive to advice expressly invoking the UNGPs in sectors with the highest level of human rights risk, such as the extractive industry, in which companies have had to address that risk for some time due to specific necessity or industry norms. That participant also identified clients as especially accepting of the UNGPs in regions with a particular regulatory focus on supply chain issues, such as human trafficking and conflict minerals. Another participant reported high levels of acceptance by manufacturers for workers’ rights, including modern slavery, and companies in the information technology and communication sectors for data privacy issues.

A participant also noted that the UNGPs are increasingly referenced in litigation as well as international arbitration matters. For example, in various international arbitration cases regarding mining in South America, States have argued that investment treaties ought to be interpreted in accordance with the UNGPs.

The UNGPs have played a role in the lobbying work of one of the participating firms, which reported utilizing the UNGPs in lobbying for the conflict minerals provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

III. PROGRESS IN FIRMS’ IMPLEMENTATION OF THE UNGPs

The participating firms reported integrating the UNGPs internally concerning their operations, *pro bono* programs and BHR initiatives.

A. Operational Integration

Firms with BHR practices reported substantial integration of the UNGPs into their own operations. Two firms noted that their internal integration of the UNGPs built upon their existing membership in the UN Global Compact (UNGC), due in part to the overlapping nature of the obligations of the UNGPs and the UNGC. One observed that its annual progress reports to the UNGC have required it to identify and manage the impact of its operations and supply chain on human rights, labor rights, the environment, and anti-corruption.

One of the participants noted that members of the firm’s BHR practice felt it important to “practice what we preach,” and that the firm’s management was receptive to that concept. Accordingly, the firm’s policies are informed by the UNGPs, including through a Responsible

Business Conduct policy, under which the firm’s personnel are required to follow responsible business principles. The firm reports that its management committee has responsibility for policies for its own operations, such as diversity and inclusion, sustainability, carbon footprint, supplier code of conduct, and supply chain transparency. The firm adheres to its reporting requirements and publishes the results on its web page.

Another participant noted that the firm has implemented a Responsible Business Working Group that oversees its efforts to ensure that its suppliers operate in alignment with the UNGPs. This includes steps to incorporate environmental, social and governance screening into its vendor selection process and include contractual commitments related to the UNGC’s ten principles in its vendor agreements. The firm noted that its supply chain is complex, as it operates in many countries under local rules and in many cultures, all of which influence how it can implement its commitments to the UNGPs. This complexity requires the firm to consider carefully the language of its contracts for its vendor relationships, which it described as a time-consuming endeavor.

Several firms have introduced mandatory training sessions on business and human rights, including the UNGPs, for both newly hired and more senior lawyers by practice group, as well as for key business services professionals. The firms also reported informing personnel about BHR issues through newsletters, thought leadership pieces, firm meetings, committee meetings and town hall meetings. One firm reported implementing human rights due diligence processes into client and matter onboarding.

B. Pro Bono Work and BHR Initiatives

All participants identified engaging in significant *pro bono* work and initiatives based on or overlapping with the UNGP. For example, participating firms have supported the Law Firm Peer Learning Initiative of the Business & Human Rights Resource Centre, the Cyrus R. Vance Center for International Justice, the Institute for Human Rights and Business (IHRB), and the BHR Committee of the IBA; have participated on panels focused on the UNGP such as the ABA International Law Section International Human Rights Committee’s recent presentation “Engaging Business and Human Rights”; and have developed human rights best practice and risk prevention guidance as well as training sessions for corporations on genocide prevention.

One participant noted the firm’s policy of providing “hard credit” for *pro bono* work, adopting strategic *pro bono* relationships focusing on human rights, and supporting engagement on boards and in memberships of human rights-focused groups. Another participant noted the firm’s involvement in numerous initiatives involving the UNGPs, including, for example, advising the UN Environment Programme Finance Initiative on the implications of the Guiding Principles for the banking sector, conducting multiple human rights impact assessments in connection with projects in over 30 countries over six continents, and serving as an assessor for companies participating in the Global Network Initiative. One participant noted assistance in the development of training curriculum on the UNGPs for corporations.

IV. CHALLENGES IN IMPLEMENTING THE UNGPS

Challenges to uptake and implementation identified by participating firms included: (1) the voluntary or “soft law” nature of the UNGPs; (2) lack of familiarity with the UNGPs within other practice groups in the firm; (3) perceived tension between human rights and client advocacy; and (4) the proliferation of varying and overlapping BHR standards.

A. UNGPs as Non-Binding Standards

Participants reported that the non-binding nature of the UNGPs in some instances has posed a challenge with respect to client acceptance. As one participant observed: “The challenge from a legal perspective is that we are often asked what clients are ‘required’ to do. And the soft requirement to ‘respect’ leaves much to the discretion of individual organizations, absent the backstop of industry principles or legal requirements.”

Another participant noted that the voluntariness of the UNGPs has in some instances failed to impress upon clients the urgency of compliance. That participant added, however, that the distinction in the view of certain clients between “hard law” and “soft law” has been breaking down due to the increasing incorporation of the UNGPs into hard law, the BHR-driven pressure from shareholders on companies, and the increasing use of BHR and ESG benchmarks.

With respect to uptake of the UNGPs within firms, one participant identified the principal obstacle as uneven awareness and appreciation of the risks that the UNGPs are intended to mitigate or avoid while predicting that law firm participation will rise as BHR moves increasingly from a topic of discussion and “ideals” to one of material risk that needs to be mitigated. As one participant observed: “All businesses are subject to the UNGP and we are a business, and clients increasingly expect us to align with them with respect to human rights just as in other areas of focus (*e.g.*, diversity & inclusion).”

B. Perceived Tension Between Human Rights and Client Advocacy

Participants also identified a challenge in taking potentially client-facing positions with respect to the UNGPs, which can give rise to tensions between a mission-driven human rights approach, a risk-management advisory approach, and the approach as counsel to clients accused of human rights violations or as advisors with respect to what is permissible within the boundaries of the law. In particular, one firm noted that an obstacle may arise due to tensions between the requirements of the UNGPs and client expectations of zealous advocacy by their lawyers. That participant also pointed to the challenge for a global firm in doing business in or advising clients with respect to jurisdictions that have significant human rights issues. While clients generally are willing to listen to sound advice, and most clients now appreciate that a realistic appraisal of human rights risk is in their interests, clients also want representatives who they are confident are zealously “in their corner.”

The participant further noted that this could lead to debate within a firm among those of different views, including those with different practice focuses. To take an obvious example, the approach to advising with respect to an acquisition in an extractive industry in a sensitive jurisdiction may be dramatically different for a human-rights focused advisor and a transactional attorney. These differences are not susceptible to easy answers, but in a firm with both an

institutional commitment to the Guiding Principles and a culture of respectful debate, these issues are expressly at the forefront in a way that they were not a decade ago.

C. Varying Levels of Familiarity with UNGPs Beyond BHR Practice Group

Participants reported varying, though increasing, levels of familiarity with the UNGPs outside of their BHR practice groups. One participant observed that risk-management focused practices, such as those that already provide due diligence or regulatory advisory services in the transactional context, have been the readiest points of entry beyond dedicated BHR practices. That participant noted that the firm houses its BHR practice within its Disputes Resolution group, because of the relevance of public international law and because liability and accountability are drivers for change. That practice serves as a resource for the firm's transactional practices, although the firm also noted expertise in its corporate group.

Another participant reported that awareness of the UNGPs outside the firm's BHR practice to date has been generally limited, with the exception of its Labor and Employment group, whose work has touched upon the UNGPs. That said, the participant noted growing recognition within the firm of the linkages between business and human rights and other practice areas, including litigation (particularly white collar matters) and mergers and acquisitions. This has been especially so with respect to anti-bribery, anti-corruption and trade sanctions issues, which arise in each of these practice areas and intersect with BHR. Moreover, the growing prominence of ESG, and increasing calls for enhanced disclosure of companies' ESG impacts and practices, is leading to an increasing focus on the connection between BHR, including compliance with the UNGPs, and corporate governance issues, which are handled predominantly by the firm's transactional lawyers.

D. Fragmentation of BHR Standards

Participants reported that the multiplicity of human rights standards has not posed a significant challenge to achieving client awareness and acceptance of the UNGPs, as these standards are symbiotic. While one participant noted that the proliferation of standards and frameworks and depth of expertise in the field "can make the area seem daunting or impenetrable to a novice," the core UNGP principles – protect, respect, remedy – are relatively approachable, facilitating lawyer and client understanding. Participants also observed that lawyers are well-prepared to synthesize the various governing regimes and standards and explain them to clients, given that these tasks are part of a lawyer's general role and training, regardless of practice area.

V. CONCLUSION

The UNGPs set the stage for the implementation of business and human rights principles across industries. They have become a key component of the advice that the firms collaborating on this paper provide to their business clients. Client acceptance of the UNGPs is growing particularly among clients located in regions with a specific regulatory focus on supply chain issues, such as human trafficking and conflict minerals. To a significant extent, the Guiding Principles have also served as the blueprint by which the firms have operationalized business respect for human rights internally.

We believe that further collaboration among the UN Working Group and the City Bar's Working Group on Business and Human Rights, other BHR focused organizations, companies, and law firms could help respond to the challenges identified in this paper, including furthering client acceptance in view of the non-binding nature of the UNGPs, reconciling human rights objectives with the expectation of zealous advocacy, and the need for additional uptake within firms. We also see further scope for deepening law firm expertise on the significance of the UNGPs to ESG issues, the practical relationship between, and application of, various human rights standards, and the trend towards incorporation of the UNGPs into domestic laws.

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