



# ADVOKATFORENINGEN

## BUSINESS AND HUMAN RIGHTS FOR LAWYERS

Guidance for Norwegian lawyers and law firms on how human rights should be respected in the practice of law, and recommendations to the Norwegian Bar Association about the measures that should be taken to promote the UN Guiding Principles on Business and Human Rights (UNGP) among Norwegian lawyers.

### 1. Introduction - background and the committee's report

Lawyers run a business activity. Often, it is the case of very extensive business activities and services to Norwegian and foreign enterprises. In addition, law firms have their own employees and are themselves purchasers of goods and services. Today, this means that lawyers are not only bound by the Code of Conduct for Lawyers in their law practice, but that also the requirements of responsible business conduct apply to lawyers and law firms. When it comes to the responsibility of businesses to respect human rights, the UNGP from 2011 are central as the recognized, global standard.<sup>1</sup>

The Government has followed up the UNGP with a National Action Plan whereby it is expected that all Norwegian companies acquainted themselves with the UNGP and use these principles for the development of their strategies for responsible business conduct, where this is relevant.<sup>2</sup>

The UNGP apply to all types of business activities, and there is little doubt that the principles also apply to lawyers and law firms. On the international level, the International Bar Association (IBA) has adopted guidelines on business and human rights for Bar Associations<sup>3</sup> and business lawyers<sup>4</sup> respectively - both based on the UNGP. The UNGP and IBA's guidelines are followed up by national Bar Associations. Sveriges advokatsamfund (the Swedish Bar Association) has prepared and adopted a programme for the Bar Association and guidelines for corporate law firms on business and human rights.<sup>5</sup> At the same time, the Swedish Bar Association adopted a new rule in its Code of Ethics. The Law Society of England and Wales has prepared a guide entitled "Business and Human Rights: A Practical Guide", based on recommendations from the Society's "Business and Human Rights Advisory Group".<sup>6</sup> Several leading international law firms have adopted their own human rights policies.<sup>7</sup>

<sup>1</sup> The OECD guidelines for multinational corporations were changed in 2011 so that Chapter IV on human rights is consistent with the UN guiding principles. These instruments are thus similar in this area.

<sup>2</sup> The action plan was launched in October 2015 and can be found at:

[https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/naringsliv/ud\\_naeringsliv\\_og\\_menneske\\_uu-versjon2.pdf](https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/naringsliv/ud_naeringsliv_og_menneske_uu-versjon2.pdf).

<sup>3</sup> IBA Business and Human Rights Guidance for Bar Associations, adopted 8th October, 2015, found at:

<file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/KYAQ5PZ2/IBA%20Business%20and%20Human%20Rights%20Guidance%20for%20Bar%20Associations.pdf>.

<sup>4</sup> IBA Practical Guide on Business and Human Rights for Business Lawyers, adopted 28, May 2016, is located at:

[file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/7ZQP3KK2/IBA\\_Practical\\_Guide\\_\(June%202016\).PDF](file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/7ZQP3KK2/IBA_Practical_Guide_(June%202016).PDF).

<sup>5</sup> Adopted by Sweden's advokatsamfund 9th June, 2016, found at:

[https://www.advokatsamfundet.se/globalassets/advokatsamfundet\\_sv/advokatyirket/arbetsgruppsrapport\\_foretagande\\_och\\_manskliga\\_rattigheter\\_business\\_and\\_human\\_rights.pdf](https://www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/advokatyirket/arbetsgruppsrapport_foretagande_och_manskliga_rattigheter_business_and_human_rights.pdf).

<sup>6</sup> Business and Human Rights: A practical Guide can be found at:

<file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/KYAQ5PZ2/law-society-business-and-human-rights-guide.pdf>.

<sup>7</sup> For example, Clifford Chance:

[https://www.cliffordchance.com/expertise/practice\\_area/litigation\\_dispute\\_resolution/business-human-rights.html](https://www.cliffordchance.com/expertise/practice_area/litigation_dispute_resolution/business-human-rights.html) and Hogan Lovells: <https://www.hoganlovells.com/en/human-rights-policy>.

The Bar Association's Executive Board has decided that a programme should be prepared for the Bar Association's work to promote the UNGP as well as practical guidelines for Norwegian law firms about business and human rights. The Executive Board appointed on 30th April 2017 an ad hoc committee for the development of such a programme for the Bar Association, and guidelines for Norwegian lawyers and law firms, intended to contribute in securing knowledge of, and compliance with, the UNGP within the legal profession. The Committee has been made up of:

Frode Elgesem, lawyer, Elgesem advokatfirma, - leader  
Nils Thommessen, lawyer, Advokatfirmaet Wiersholm  
Anne Sofie Bjørkholt, lawyer, Advokatfirmaet BA-HR  
Siv Blanca Børge-Ask, lawyer, Union Gruppen  
Morten Andreas Lind, senior associate, Advokatfirmaet CLP<sup>8</sup>

Associate lawyer Amna Avdagic has been the Committee's Secretary.

The mandate is attached to this report. The Committee's work was completed in November 2017.

In this report, the Committee firstly presents an introduction to the UN guiding principles, followed by an account of the purpose of the guide and the importance of the UNGP for lawyers and law firms. Recommendations to the Bar Association can be found in Appendix 2 and the practical guide to lawyers and law firms can be found in Appendix 3 A. Appendix 3 B gives a special guide for corporate lawyers. To help with the law firms' work with implementing the UNGP there is, in Appendix 4, a proposal for a standard text in the standard letter of confirmation of assignments, and in Appendix 5 an example of a human rights policy for law firms.

At the end of the report, there are links to useful resources that can be found on the internet.

## **2. The UN guiding principles for business and human rights (UNGP)**

The UNGP received unanimous endorsement from the UN Human Rights Council in June 2011. The principles apply to all types of businesses regardless of size, industry, business context, ownership or structure. The principles are the result of a comprehensive, six-year process where interested parties were consulted. The work was led by professor John Ruggie of Harvard's Kennedy School of Government, who was appointed as Special Rapporteur for the UN Secretary General, Kofi Annan.

The UN's guiding principles are not legally binding. But they are nevertheless regarded as the authoritative global standard for the human rights responsibilities of enterprises. A growing number of enterprises implement the principles, and require of their suppliers and business partners that they follow the same standard. The principles also find their way into legislation in various ways. The Norwegian Public Procurement Act section 5 is an example of this. The same is the proposed new requirement to non-financial reporting, i.e. regarding statements on corporate social responsibility in section 9-5 in NOU 2015:10 The Accounting Act. Of legal developments in other countries, one can mention specifically the

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<sup>8</sup> Morten Andreas Lind acceded the office as deputy judge at Vesterålen District Court in August of 2017, but continued as a member of the committee also afterwards.

Modern Slavery Act in the United Kingdom<sup>9</sup>, and a general law on the duty of large corporations to conduct due diligence assessments in France<sup>10</sup>. This tendency is expected to continue and emphasizes the need for expertise in law firms on business and human rights.

The UNGP are built on the "protect, respect and remedy" framework. This assumes that the principles are built on three pillars: (I) The State's existing obligation to respect, protect and fulfil human rights and fundamental freedoms (II) enterprises' responsibility to respect human rights and (III) the need for rights and obligations to be matched by appropriate and effective remedies when breached. It is particularly pillar II that is of importance to a private law firm, but also pillar III can entail requirements.

The basic requirement is that businesses should avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur. Further, businesses should seek to prevent and mitigate adverse human rights impacts that are directly linked to their operations, products or services by its business relations. Accordingly, a business can be connected to adverse human rights impacts in three ways:

- The business can cause adverse human rights impacts.
- The business can contribute to adverse human rights impacts.
- The business' operations, products or services can be directly linked to human rights impacts by a business connection.

Businesses are expected to avoid causing or contributing to adverse human rights impacts through their own activities, and also to address such impacts if they occur. In addition, businesses are expected to use their best efforts to prevent and remedy violations that are directly linked to the company's operations, products or services by a business relationship, even if the company itself has not caused or contributed to the violation.

It is thus not sufficient to keep "order in your own house" – you must also keep track of risks of human rights impacts which the business can be linked to throughout the entire supply- or value chain, and by other business relationships. On the other hand, different businesses work differently with risks, depending on where one is in the value chain. For example, an investor might require and use information that is collected by the company it has invested in, and may as a starting point rely on the preventive work being done in this company after having assured itself that the work keeps to a good standard.

For businesses to ensure respect for human rights, the UNGP directs enterprises to three basic elements of this work:

- The company must have a human rights policy commitment to meet its responsibility to respect human rights, and this must be embedded and implemented in the organization.
- The company must carry out human rights due diligence to identify, prevent, mitigate and account for how the company addresses its responsibility to respect human rights.
- The company must have a process in place that enables it to remediate any adverse human rights impacts that it has caused or contributed to.

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<sup>9</sup> Modern Slavery Act 2015: <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

<sup>10</sup> See for example: <https://business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains>.

The principles state expressly that the way companies handle this responsibility may vary according to the company's size, industry, sector and operational context, as well as the severity of the risks and impacts that the business is involved in or directly linked to. This means that there is no question of a "one size fits all" and small businesses will not necessarily be able to put as extensive resources into this work as large multinational corporations. But everyone has to do something, and risks of severe human rights impacts must always be dealt with.

The concept of human rights is broad, and business activity can affect virtually the whole spectre of rights. The UNGP makes reference to "The International Bill of Rights" as providing an authoritative list of the core internationally recognized human rights. This is made up of the UN Declaration of Human Rights from 1948, the United Nations conventions of 1966 on economic, social and cultural rights and on civil and political rights and the eight ILO's core conventions. But it may also be necessary to consider other international human rights instruments if the cases warrant it. In light of this, it is necessary for the companies to prioritize the risks that are associated with their business and start the work by dealing with the most severe risks.

### **3. The purpose of the practical guide to lawyers and law firms**

The purpose of the practical guide is to explain how the UNGP can be implemented in a legal practice. Today, there is a clear expectation that all segments of business meet their responsibility to respect human rights. The lawyers' efforts to respect human rights in their work will also naturally follow from the basic ethical requirement for lawyers "to promote justice and prevent injustice", see Code of Conduct for Lawyers ("RGA") section 1.2.

On the practical level, the guidance, the proposal for the text in assignment confirmations and the example of a human rights policy, facilitate the concrete implementation of the UNGP, and, moreover, contribute to a practice within the legal business. It is not the purpose of the guidance to recommend that Norwegian lawyers and law firms aim at a higher or more demanding standard than that which follows from the UNGP or IBA's guidance. The purpose is to create a guidance in Norwegian, based on a review undertaken by Norwegian lawyers, and that can be adopted by the Norwegian Bar Association. The purpose has been to provide as specific guidance as possible in an area where there is still some uncertainty.

It is emphasized once again that the UNGP are not legally binding. Nor does the guide introduce any new legal obligations. On the other hand, the UN guiding principles are not something you "join" or "agree" to be bound by. The UNGP apply - as far as they reach - to all business sectors. Lack of compliance with the UNGP would also amount to an issue under Chapter IV of the OECD Guidelines for Multinational Enterprises. This could possibly form the basis for a complaint to the OECD National Contact Points.<sup>11</sup>

The practical guidance should contribute to an increased awareness about the responsibility to respect human rights. There is a need for increased expertise among Norwegian lawyers and law firms regarding the business sector's human rights responsibilities. Clients have requested advice on this subject, and thus increased expertise also provides new business opportunities. Much of this will be a natural

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<sup>11</sup> See the OECD Guidelines for Multinational Enterprises , Part II.

extension to the already well-known advisory work within the compliance field (anti-corruption, competition law, environment, etc.). New areas of advisory services may be related to drafting of contracts with the aim of ensuring access to information about, and right to follow up, human rights work in the client's supply chain, assistance with drafting or improving the client's own guidelines and its other efforts to prevent and address human rights risks and impacts, handling of specific risks and concrete issues, assistance in the design and running of complaints systems as well as new elements of financial due diligence - to name but a few.

In addition, increased expertise will contribute to an effective implementation of the principles - and thus a more efficient handling of risks - in their own law practices. It can be very harmful to the reputation, and thus the business, if the firm becomes involved in, or linked to, severe, adverse human rights impacts – and this is especially so, if this happens without the firm being able to prove that there are systems in place to deal with such risks. An important aspect of the guidance to the UNGP is therefore that it will help law firms to address risks of adverse human rights impacts in the firm's value chain.

As with businesses in general, law firms that act responsibly will also be attractive business partners. In the business sector, requirements of responsible business conduct are being established to an ever increasing extent for the actors you do business with. In practice, it is required more and more often that a company must document good and effective internal guidelines and procedures for responsible business conduct, including for anti-corruption, environmental responsibility and human rights. Many law firms have already observed their clients' increasing focus on human rights, and it must be assumed that this will increase in the years ahead. The Bar Association's guide is intended to be a support to the firms' work to improve their handling of the risks of being linked to adverse human rights impacts, and thus to develop in accordance with the said trend.

Experience also shows that companies that have a clear profile when it comes to responsible business conduct are attractive employers. Law firms that follow the guidance will clearly show that they are working to respect human rights and will probably stand stronger in the recruitment of young and dedicated lawyers, and this will also have a motivational effect internally.

The implementation of the UNGP in a law practice must be adapted to legal frameworks and other ethical rules for lawyers. The UNGP are flexible and there is no doubt that they must be adapted to the specific requirements of a lawyer's practice. Typically, lawyers' duty of confidentiality imposes limits to the investigations and measures that can be carried out in a specific case, and - not least - what the firm may report on. Nor can the general right to seek legal advice to obtain clarification of a legal position be limited, not even for the most brutal molester. The lawyer should also preserve its independence and work with the client's best interests in mind, and within the assignment he or she has received. In litigation, there must be broad limits for defending the client's interests. Such issues, and the relationship to other basic requirements pertaining to lawyer's practice, need to be considered in the development of the firm's guidelines and the work with each client and case.

Law firms are expected to respect human rights in their own purchasing practice and as an employer. In addition, the lawyer must avoid contributing to adverse human rights impacts through his or her advice. And lawyers can, within the Code of Conduct for Lawyers, play an important role in ensuring respect for human rights in their work with clients. Through clear guidelines, good human rights due diligence, advisory work and training, lawyers can provide their clients with significant value. In many cases, lawyer and client have a long-lasting cooperation. As a "trusted advisor" it will often be natural and valuable that

the lawyer also advises on human rights risks associated with the projects that he or she is involved in, and how these may best be handled. The lawyer should also have readiness to consider whether there are assignments that one should not accept or assignments which one – within the Code of Conduct for Lawyers — should withdraw from in cases where the client does not follow the lawyer's advice. In connection with this guidance, a suggestion has been prepared for formulations in a standard letter of confirmation of assignments, which are aimed at such situations, and an example of a human rights policy for law firms.

The guidance is assumed to have the greatest practical importance for corporate law firms. But also in other law firms, the relationship to human rights can emerge and questions may arise whether a concrete assignment should be accepted where the client is going cause or contribute to adverse human rights impacts; whether there is a need for specific advice on human rights risks associated with the assignment; or whether the lawyer should withdraw from the assignment if the client does not follow his advice. In-house lawyers will often have a key role when it comes to ensuring that the business they work in is compliant with the requirements to responsible business, including the responsibility to respect human rights.

### **Internet resources**

1. UN Guiding Principles on Business and Human Rights:  
[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
2. IBA Business and Human Rights Guidance for Bar Associations:  
<file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/URO4Q38A/IBA%20Business%20and%20Human%20Rights%20Guidance%20for%20Bar%20Associations.pdf>
3. IBA Practical Guide on Business and Human Rights for Business Lawyers:  
[file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/EHV97Z5T/IBA\\_Practical\\_Guide\\_\(June%202016\).pdf](file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/EHV97Z5T/IBA_Practical_Guide_(June%202016).pdf)
4. The Swedish advokatsamfundet: Företagande och mänskliga rättigheter (Business and Human Rights):  
[https://www.advokatsamfundet.se/globalassets/advokatsamfundet\\_sv/advokatycket/arbetsgruppsrapport\\_foretagande\\_och\\_manskliga\\_rattigheter\\_business\\_and\\_human\\_rights.pdf](https://www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/advokatycket/arbetsgruppsrapport_foretagande_och_manskliga_rattigheter_business_and_human_rights.pdf)
5. Law Society of England and Wales: Business and Human Rights Advisory Group Recommendations:  
<http://communities.lawsociety.org.uk/Uploads/i/v/c/BHRAGfinalRecommendations.pdf>
6. Law Society of England and Wales: Business and Human Rights A Practical Guide:  
<file:///C:/Users/kj49/AppData/Local/Microsoft/Windows/INetCache/IE/EHV97Z5T/law-society-business-and-human-rights-guide.pdf>
7. CCBE: Corporate Social Responsibility and the Legal Profession Guidance II:  
[http://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/CSR/CSR\\_Guides\\_recommendations/EN\\_CSR\\_20140206\\_CSR-and-the-Legal-Profession-Guidance-II.pdf](http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CSR/CSR_Guides_recommendations/EN_CSR_20140206_CSR-and-the-Legal-Profession-Guidance-II.pdf)
8. CCBE: Corporate Responsibility and the Role of the Legal Profession:  
[http://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/CSR/CSR\\_Position\\_papers/EN\\_CSR\\_20130207\\_CSR-and-the-role-of-the-legal-profession.pdf](http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CSR/CSR_Position_papers/EN_CSR_20130207_CSR-and-the-role-of-the-legal-profession.pdf)

9. Law Firm Business and Human Rights Peer Learning Process: <https://business-humanrights.org/sites/default/files/documents/Law%20Firm%20BHR%20Peer%20Learning%20Process%20Report%20-%20FINAL%20ONLINE.pdf>
10. Article by Professor Cees van Dam: *Enhancing Human Rights Protection: A Company Lawyer 's Business*: <http://docplayer.net/25752884-Enhancing-human-rights-protection-a-company-lawyer-s-business-inaugural-lecture-rotterdam-school-of-management-erasmus-university.html>
11. Article by Frode Elgesem: Næringslivets menneskerettighetsansvar – også for advokater, Advokatbladet nr. 8/9 2016: <http://viewer.zmags.com/publication/c82ed879#/c82ed879/52>
12. Article by Frode Elgesem: *Ansvarlig næringsliv – en introduksjon*, Juristkontakt nr. 8 2016: <http://www.juristkontakt.no/i/2016/8/juko-2016-08-b-976>

## **PRACTICAL GUIDANCE FOR LAWYERS AND LAW FIRMS ON BUSINESS AND HUMAN RIGHTS**

- 1. The firm should make the guidance prepared by the Bar Association easily available to all the firm's lawyers and other employees. Training in the UN Guiding Principles on Business and Human Rights and the Bar Association's guidance should also be carried out.**
- 2. The firm must draw up a human rights policy that is anchored at the highest level, i.e. in the company meeting/partner meetings. A partner should be appointed as responsible for the implementation of the policy or, if applicable, that the responsibility for the implementation is included in the existing governance structure (e.g. the ethics committee). Active work must be carried out with internal communication and training so that everyone in the firm, and especially those who work with clients and assignments in risk areas, are familiar with the policy and the relevant guidelines and procedures.**

The firm's human rights policy should include the following elements:

- An explicit statement that the firm and the lawyers who work in the firm will respect human rights within the framework of their role as lawyers, including basic ethical rules and principles for the legal profession.
- A description of who is responsible for the implementation of the policy, and the internal processes that are established to ensure compliance and to address issues related to the implementation
- The firm's expectations to lawyers and employees when it comes to respect for human rights
- The firm's expectations to its business relationships, including to the firm's clients in connection with the assignments that the firm accepts

The Bar Association has created a model policy that can be used as a starting point for the work of developing a policy tailored to the individual firm. The model policy must therefore be further developed with descriptions of responsibility, internal organization, etc. adapted to the individual firm.

The policy must be publically available.

It is important that the work of the policy is anchored well internally, so that the content is understood and has support when the policy is made public. Work on the policy may be an opportunity to establish dialogue across professions and market groups, so that the lawyers can share experiences and discuss among themselves how best to contribute to avoiding or minimizing human rights violations.

Further, the policy should be based on a realistic and specific assessment of how, and in what situations, your firm's business can have an impact on human rights. It can be helpful to obtain input from outside, including from client seminars, meetings with industry associations and/or meetings with organizations etc. that can provide information about the markets, industries and countries in which the firm is often involved.



- 3. The firm should carry out human rights due diligence based on the UN Guiding Principles on Business and Human Rights and the Bar Association's guidance. The central element of the human rights due diligence is an analysis of the risks that the firm might cause, contribute to, or be directly associated with, adverse human rights impacts. The risk assessment should be adapted to the company's size and business, and the typical situations where the firm is at risk of being directly linked to adverse human rights impacts in its work directed towards clients.**

Lawyers and law firms shall not conduct general human rights due diligence on their clients. Furthermore, there are a number of assignments where it is often not relevant to use the UN Guiding Principles. This typically applies to litigation assignments and inquiries from clients who want to clarify their legal position. If such assignments involve possible adverse human rights impacts, the lawyer must consider in the usual way whether he or she would accept to take on the case, but the UN Guiding Principles are normally not a hindrance to providing assistance.

Lawyers and law firms regularly have a large number of clients. The client- and case portfolio will also vary over time. Due diligence- and risk assessments must therefore be carried out at a general level in the first instance. Such general due diligence assessments should be repeated at regular intervals, so that they can take advantage of experience, changes to client- and case load and changes in the market for the firm's services in general.

The work of the firm's overall due diligence assessment has already started with the preparation of the firm's policy, see item 2 above. It is about obtaining a good understanding of the risk that the firm can be involved in adverse human rights impacts. This will depend on your firm's business profile. A transaction business could be linked more often to adverse human rights impacts than a litigation practice. Moreover, an internationally-oriented practice could be linked more often to adverse human rights impacts than a local law practice. The risk will also be higher if one assists clients that are involved in jurisdictions with a weak system of government. In addition, information can be obtained about whether certain sectors and clients are more often involved in human rights violations than others.

In the first instance it is a case of acquiring a good understanding of the general risk picture that your firm is facing. This should be based both on the input from internal resources, your own investigations and external input.

The firm must understand what are **the most salient risks** in the business it runs. This is done based on three criteria:

- The severity of possible impacts
- The scope of possible impacts
- Whether the damage can be put right – remedially

There is a lot of information available on the risk of adverse human rights impacts in specific jurisdictions and territories, business sectors and companies. A survey should be made in a law firm of which clients and business sectors the firm often and/or typically assists, and an analysis should be done of the risk of being involved in adverse human rights impacts, based on the available information and knowledge. The knowledge that the firm thus builds up - and maintains - will provide the basis for a prioritization of work, but also i.a.:

- More valuable advice to clients
- Internal training and increased interest in human rights issues among the firm's lawyers
- Internal readiness for assessment of assignments so that the firm is in control of the risks and that loss of reputation can be avoided

Box 1: Overall assessment of the risk of being associated with adverse human rights impacts

The law firm should be aware that it is itself an employer and purchaser of goods and services. The firm should make suppliers aware of their expectations when it comes to compliance with the UN Guiding Principles, and in certain cases it may be relevant to consider the risks in their own business, for example in respect of certain suppliers.

The law firm's overall due diligence assessments will form the basis for internal routines and procedures in connection with the intake of new clients and assignments, as well as the follow-up of the assignments, see items 4-5 below. It is particularly in the context of the lawyer's work with specific assignments that there might be expectations that he or she can help to avoid or mitigate adverse human rights impacts, see items 6-7 below.

**4. The due diligence assessments should form the basis for internal routines and procedures in connection with the intake of new clients and assignments, as well as the follow-up of the assignments. Routines should be coordinated with the firm's other practices related to the risk of money laundering, corruption, etc., and should be updated on a regular basis.**

The law firm should establish procedures to ensure that it carries out an assessment of the risk of being associated with adverse human rights impacts when taking on new clients and assignments. This assessment should be integrated in other routines to avoid unnecessary bureaucracy and double treatment. For example, the controls that are required as a result of money-laundering regulations, typically identity control, will also be relevant as the starting point for an assessment of the risk of being

associated with human rights impacts.

However, routines are not always enough. Every lawyer must also have a basic knowledge of the potential risks and the "red flags" that should lead to more thorough investigations being carried out.

One simple routine will be that cases where questions might be raised as to whether the firm could be linked to adverse human rights impacts must be submitted and discussed in the company's Ethics Committee before the assignment is accepted, and that the Ethics Committee can recommend how the risk should be handled vis-à-vis the client. Who has the authority to accept or decline an assignment varies from firm to firm.

- 5. When taking on new clients and assignments, the firm should - where it is relevant, and taking into account the role of a lawyer and the basic lawyer's code of ethics and principles - identify the risks that the firm might contribute to adverse impacts or be directly associated with potential impacts, if it accepts the assignment. The assessments can be based on the client's information or the firm's own assessments and assumptions, etc. On this basis, the firm should carry out an evaluation of whether to take on the assignment or decline to assist. In the assignment confirmation, reference should be made to the firm's human rights policy and expectations to the client, and the criteria for terminating the assignment should be formulated.**

When the law firm takes on new clients or assignments, it should carry out a human rights due diligence. In many cases - perhaps the vast majority - a basic initial screening will suggest that one continues in the usual way without the need for a more thorough review. This may be because the basic code of ethics for lawyers dictates that the client should receive assistance regardless, or that there are no indications that the assignment would involve the firm contributing to, or being linked to, adverse human rights impacts.

If there are "red flags" that indicate that a more thorough evaluation should be carried out, the firm should obtain as much information as possible. The search for information can now be more targeted since the assignment has been specified. The possibilities for doing external search is limited, however, by lawyer-client confidentiality which means that the client relationship and assignment cannot be disclosed to outsiders. Nevertheless, there will be a large amount of information available from open sources. In a number of cases, it will also be possible to take this up with the client.

It will be up to the firm itself how the work of the human rights due diligence assessment is organized. As mentioned, it can be appropriate to coordinate this work with other work being done in connection with the intake of new clients and assignments. In many cases it will be appropriate to have an ethics committee that has special responsibility and expertise to also handle cases where there are questions about how the assignment will impact the human rights of people affected by the project with which the firm has been requested to assist.

Box 2: Example of implementation of due diligence assessments in a law firm.

A law firm receives a request to undertake an assignment for a company engaged in fertilizer and agricultural chemicals. The company uses phosphates in its production and now plans to enter into agreements with a new supplier that bases its deliveries of phosphate from Western Sahara. The assignment entails assistance in the formulation of the contract and negotiations to get the contracts in place.

Here there are a number of "red flags": Morocco's occupation is hotly contested and the criticism is well known. Over many years reports have been published of serious human rights violations against the Saharawi people of Western Sahara. The Norwegian Government does not recognize Morocco's sovereignty over the area and discourages Norwegian businesses from running private business activities there.

The law firm should have routines and knowledge to ensure that such a request is picked up, and to carry out as thorough investigations as possible as to the nature of the assignment and its connection to possible human rights impacts. A great deal of information is available from open sources, and there are also organizations you can contact to obtain general knowledge. The firm can therefore acquire a good basis for evaluating the risk. Such a request will also - because it concerns entry into an obviously high-risk area - be appropriate for a dialogue with the client about the human rights situation in Western Sahara and how the company relates to that. The investigation can also include an assessment of the client's human rights policy, the due diligence the client has done and requirements that the client makes to its sub-suppliers.

Based on a thorough assessment of the risks associated with the specific assignment, the firm must carry out an assessment of whether to accept the assignment or refuse it. If the assessment is that the firm, by assisting the client, either contributes to adverse human rights impacts or becomes directly linked to severe impacts, it will be problematic, in relation to the UN Guiding Principles, to accept on the assignment. If one accepts on the assignment, a plan must be set up for avoiding and mitigating the risks, see item 6 below, and the firm must be prepared to take the reputational risk that can be caused by getting involved in the assignment.

If the law firm wants to take the responsibility for human rights seriously, and have leverage to manage risks and negative impacts on the affected people's human rights that arise underway in the assignment, an effort should be made - where relevant - to clarify the firm's human rights policy before the assignment is accepted and has started. The letter of confirmation of an assignment will be central here. Information and a disclaimer can be included so that the firm is enabled to address such issues in the ongoing dialogue with the client, for example in established arrangements for client follow-up talks, and so that the law firm can withdraw from the assignment, for example, if the client does not assist in avoiding serious and recurring issues, see item 7 below.

A proposal for the text in the assignment confirmation is attached to this guide.

**6. If the firm accepts the assignment, there should be a plan for how the risk of adverse human rights impacts should be handled. Such a plan may include the desire for a dialogue with the client, offer of special advice, offer training to the client and other appropriate measures.**

What such a plan should contain will vary according to the specific circumstances. A dialogue about the risks of adverse human rights impacts might lead to the law firm being asked to assist with the development of the client's own guidelines and practices, contracts with suppliers or other business partners, and the development of the client's strategies to avoid or mitigate adverse impacts. The assistance might also apply to teaching and training of the client and/or the client's own sub-suppliers. Lawyers will also be particularly well suited to assist with the development of complaint mechanisms and the handling of specific cases that might arise.

Furthermore, such a plan might include the law firm's own measures, such as to continue with their own investigations, regular internal reporting and assessment, and that the risk of human rights violations should be a regular part of follow-up conversations with the client. If specific risks for adverse human rights impacts are identified, these should be mentioned along with a description of how the law firm can use its leverage to seek to avoid or mitigate the impacts.

The plan need not be very comprehensive, but should contain concrete points that provide the basis for measurement and follow-up, see point 8 below. Frequently, the points from the minutes of a meeting of the company's admission committee or the like will be suitable.

A law firm is asked to assist a client in connection with an acquisition. The target company works with the development of plantations and is very profitable. In one of the countries where the company does business, there is great dissatisfaction among the local inhabitants because the company has bought up large agricultural areas. Preliminary investigations show that the target company may have used a large number of front companies to bypass local legislation intended to ensure the maintenance of smaller, traditional farms. However, the local legislation is unclear and not strictly enforced. The establishment of the target company's plantation has led to the loss of agricultural land, water shortage due to pollution, and the use of brutal security forces to prevent rebellion.

The law firm picks up these issues and makes a preliminary due diligence assessment in order to better understand the risks. The conclusion is that there is a significant risk that the target company has contributed to adverse human rights impacts and that these may still be taking place.

The company takes up these issues with the client. In the dialogue an explanation is given of the UN Guiding Principles and the business risk. Furthermore, note is taken of the observation that such impacts are more and more often included as part of the valuation of the target company, see e.g. <https://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf>.

The law firm sets up a plan for how risks should be handled, especially which points should be addressed in the dialogue with the client. The firm accepts the assignment because the client, on the basis of the initial dialogue, agrees that the assignment should include that:

- a "human rights due diligence" should supplement the financial due diligence,
- a plan is set up, preferably in dialogue with the local authorities, for how the company, after the acquisition, should help to prevent and mitigate further adverse human rights impacts and
- effective complaint mechanisms are established for the local inhabitants.

Based on this, the law firm prepares a simple plan for its follow-up of the assignment:

- The allocation of relevant and competent resources
- Follow-up of the client's plan at regular intervals
- Readiness to implement their own investigations and further dialogue if necessary.
- Feedback to the firm and learning from experience from the assignment

Box 3: Example of the law firm's initial due diligence assessment, planning of how risks to human rights violations should be handled and successful dialogue with the client.

**7. If the firm has undertaken an assignment where there is a risk of serious adverse impacts to people's human rights or serious impacts occur, and the client - contrary to the lawyer's advice - is not willing to take action to avoid or mitigate impacts, the firm should consider whether it should withdraw from the assignment.**

Withdrawing from an assignment will be a dramatic decision, but it is by no means a completely unknown problem for lawyers, see Code of Conduct for Lawyers point 3.1.6. Expectation to the clients and the conditions whereby the law firm can terminate the assignment should therefore be specified in the letter of confirmation of an assignment, see item 5 above.

A decision to withdraw must be based on a comprehensive assessment that is first appropriate after the lawyer has tried to use his or her influence to avoid, prevent or mitigate the impacts, and the impacts still continue. The firm must also include in the assessment how important the assignment is and whether there is, nonetheless, a prospect of a positive development over time. Also, the consequences following a withdrawal must be considered. It is not necessarily the case that human rights will be better taken care of by the firm pulling out. Therefore, it also matters what the situation might be for those who are affected by the client's operations if the law firm withdraws.

That the law firm decides to continue with their client relationship, together with their continued efforts to influence the development in a positive direction, may thus be just as right as to pull out. If possible, the firm should obtain the client's consent to explaining in public why it is continuing the assignment, if the client and the law firm should be exposed to public criticism.

**8. The firm should gauge and evaluate how the company manages to fulfil the expectation to respect of human rights.**

Assessment and evaluation of a law firm's efforts can be difficult since the firm has limited access to information about the assignments, and is often only engaged in relation to specific issues related to a project. Therefore, it is not always easy to understand what impact its assistance has on the human rights of people who are affected by the client's project.

Nevertheless, the law firm should set up in its internal work some simple themes for the measurement of whether the objectives of its human rights work are achieved. Regular reporting, assessment and evaluation of performance and potential for improvement, are important in order to take advantage of experience and develop the firm in the right direction.

Themes for the law firm's evaluation and measurement could be:

- Did we manage to identify the human rights risks at the start-up of the assignment?
- Did we try to discuss the risks with the client?
- Did we monitor the assignment with a view to investigating and clarifying whether our assessment of the risks was right, whether the client carried out measures to deal with the risks, and whether the circumstances changed along the way so that new discussions became necessary?
- What kind of human rights impacts happened in connection with this assignment and how serious were they?
- What did we do to try to avoid, prevent or mitigate the risks?
- What did we learn from this assignment and how are the lessons used to improve our routines?

Box 4: Themes for a law firm's assessment and evaluation of its human rights work.

**9. The firm should report publicly about how it works with human rights, but only on a general level. It is necessary that the duty of confidentiality be respected.**

The law firm's human rights policy and standard assignment confirmation should be available to the public.

In the firm's annual reports, on its home page or otherwise, it should be communicated publicly and on a regular basis how the firm's work with human rights is set up in the company and its expectations to the clients and their own suppliers. Furthermore, an account should be given of the firm's pro bono work and external activity in promoting the principles of business and human rights.

Obviously, it is not expected that lawyers and law firms report publicly on individual cases, or in a way that can identify individual cases or clients. Therefore, it should also be made known that the lawyer has a special role, and that the basic ethical principles of lawyers are not set aside by the UN Guiding Principles.

**10. The firm is only responsible for offering effective legal remedies to repair damages in cases when the lawyer or the firm itself has caused or contributed to violations. This will only be the case in exceptional cases. However, the lawyer should consider contributing to the creation of effective complaint mechanisms with clients that do business that involves the risk of human rights violations.**

**11. Law firms should contribute actively to the promotion of the UN Guiding Principles on Business and Human Rights through pro bono programmes and other external activities.**

This is a more secondary expectation, but still an important part of the lawyer's contribution to the promotion of the UN Guiding Principles. On the other hand, some such measures can be viewed as an integral part of the law firm's own fulfilment of the expectations in the UN Guiding Principles. Client workshops on the UN Guiding Principles and the OECD Guidelines for Responsible Business Conduct - particularly seminars that are targeted at specific industries, client groups or individual clients - could in



themselves be measures aimed at preventing or mitigating the risks of adverse human rights impacts that the law firm is linked to through a business connection (i.e. a client relationship). The same applies to newsletters and general reviews of the human rights risk in different regions, countries and industries. Other contributions may apply to information about international developments, including relevant statements, industry initiatives etc., information to clients about relevant cases from the courts. National OECD Contact Points and other complaint mechanisms are also important. Over time this will help increase the understanding of the UN guiding principles by the client and facilitate dialogue on these issues.

## PRACTICAL GUIDE FOR IN-HOUSE LAWYERS ON BUSINESS AND HUMAN RIGHTS

The UN Guiding Principles will also have significance for in-house lawyers (internal lawyers/internal legal department), both in relation to the exercise of the internal legal practice itself, and as an employee in the company that will itself be covered.

A company's legal department will often be central to the company's handling of legal risk and reputational risk associated with "soft law", such as the UN Guiding Principles and other international instruments and initiatives. The lawyers in the Legal Department also have good knowledge of the company and its business activities, and will therefore often be better equipped than external lawyers to assist their company in implementing the UN Guiding Principles and to take the necessary initiative where there is a risk of causing, contributing to, or being directly linked to adverse human rights impacts. Legal departments will therefore also often be given responsibility for internal training and guidance on the guidelines that the company has to avoid adverse human rights impacts, corruption and other requirements of responsibility. Therefore, it is important that in-house lawyers acquire good knowledge of the UN's Guiding Principles and what these mean for their company.

In-house lawyers operate as lawyers, even though it does not take place in private practice. The guidance in Appendix 3 A can, therefore, be useful as a starting point since it both provides general information about what is expected of lawyers, based on the UN Guiding Principles, and at the same time takes into account the basic ethical principles that otherwise apply for lawyers. However, some adjustments must be made:

- It would not be natural for in-house lawyers to have their own human rights policy. But it will often be natural for in-house lawyers to be commissioned to design their company's policy, guidelines and procedures for the handling of human rights risks. If the company does not have a policy, guidelines or procedures, it might be natural for the legal department to initiate the company's work to meet the expectations of the United Nations guiding principles and, in addition, contribute in the implementation of this work and also with its internal advisory services.
- It is not natural for in-house lawyers to instigate due diligence assessments on their own. On the other hand, an in-house lawyer will be well placed to raise with relevant parts of the management the necessity of carrying out due diligence assessments for the projects that the company commences, and is involved in. Similarly, the in-house lawyer, will, if he has the relevant knowledge, have a particular call to take the initiative to avoid, prevent and remedy risks and adverse impacts that the company causes or contributes to, as well as taking the initiative to prevent and mitigate the risks and violations with which the company is directly linked.
- How the company arranges its assessment, evaluation and external reporting, will vary greatly. The same applies to the in-house lawyer's role in this work. But here too, the legal department will often have a role as the initiator and advisor, to ensure that the company meets the expectations of the UN Guiding Principles.

## EXAMPLE OF THE HUMAN RIGHTS POLICY FOR A LAW FIRM

The UN Guiding Principles on Business and Human Rights received the unanimous endorsement of the UN Human Rights Council in June 2011. It follows from these principles that businesses have a responsibility to respect human rights.

The UN Guiding Principles also apply to law firms, but however do not set aside the basic ethical principles of the legal profession.

Law firm "§", its lawyers and staff will respect human rights in accordance with the UN Guiding Principles on Business and Human Rights. We will be an active partner for our clients in the work of ensuring respect for human rights.

Law firm "§" is actively working to implement respect for human rights in our practice and our business activities. We will support efforts to promote human rights, including through our external, voluntary activities and pro bono work.

The responsibility to respect human rights does not limit the right for anyone to seek assistance from a lawyer to obtain clarification of its legal position or to receive a robust defence in civil lawsuits and in criminal cases. Nor does the responsibility change lawyers' duty of confidentiality, requirements to independence, or other basic ethical principles of the legal profession.

Law firm "§", expects the company's suppliers to respect human rights in accordance with the guiding principles of the United Nations.