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## The Rise of Environmental, Social and Corporate Governance Disclosures in the United States and Mandatory Human Rights Due Diligence in Europe: Implications for U.S. Lawyers

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THE RISE OF ENVIRONMENTAL, SOCIAL, AND CORPORATE  
GOVERNANCE DISCLOSURES IN THE UNITED STATES AND MANDATORY  
HUMAN RIGHTS DUE DILIGENCE IN EUROPE: IMPLICATIONS FOR U.S. LAWYERS

Marie-Claude Jean-Baptiste

Responsible Business and Environmental, Social, and Corporate Governance Disclosures

Over the past decade, due in part to the devastating impact of the global financial crisis of 2008 and growing awareness of climate change, the world witnessed increasing interest on the part of society in general, and investors in particular, for responsible business. “Responsible business” is the concept that business should be conducted in a way that 1) does not violate fundamental rights of the people affected by the business activity; 2) does not exacerbate environmental harm; and 3) complies with basic principles of good governance.<sup>1</sup> Society’s interest in responsible business has been reflected in growing pressure on businesses to disclose information regarding their impact on the environment and human rights and to take steps to address them. The most obvious example of society’s increasing interest and demand for responsible business is the growth of responsible investment where investors seek to invest in businesses that demonstrate a positive impact on human rights and the environment. Responsible investing has led to growing investor attention to the Environmental, Social, and Governance (“ESG”) indicators of businesses.<sup>2</sup>

ESG refers to a company’s environmental, social, and governance practices, impacts, and risks. ESG disclosure regimes are voluntary, industry led initiatives that reflect the growing expectations of investors and shareholders in sustainable business and ensuring that their investment(s) do not exacerbate environmental and human rights violations. Indeed, over the past several years, mostly due to investor pressure, the ESG disclosure regime, or non-financial reporting, has grown significantly in the United States.<sup>3</sup> The COVID-19 pandemic and related economic impact has increased interest in ESG disclosures.<sup>4</sup> However, there is no mandatory framework for ESG disclosure in the United States. While “U.S. federal securities laws already require companies to disclose certain environmental, social, and risk-related information...,”<sup>5</sup> the majority of ESG related disclosures come from “U.S. public companies (and many privately held

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<sup>1</sup> See, e.g., Organization for Economic Co-operation and Development (OECD), *Policy Framework for Investment User’s Toolkit Promoting Responsible Business Conduct* (2011), <https://www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/42267935.pdf>

<sup>2</sup> See, e.g., Principles for Responsible Investment (PRI), *What is responsible investment?*, <https://www.unpri.org/an-introduction-to-responsible-investment/what-is-responsible-investment/4780.article> (last visited May 20, 2021).

<sup>3</sup> Catherine M. Clarkin, Melissa Sawyer & Joshua L. Levin, *The Rise of Standardized ESG Disclosure Frameworks in the United States* (June 22, 2020), <https://corpgov.law.harvard.edu/2020/06/22/the-rise-of-standardized-esg-disclosure-frameworks-in-the-united-states/>.

<sup>4</sup> Fiona Reynolds, *COVID-19 Accelerates ESG Trends, Global Investors Confirm* (Sept. 3, 2020), <https://www.unpri.org/pri-blog/covid-19-accelerates-esg-trends-global-investors-confirm/6372.article>.

<sup>5</sup> Virginia Harper Ho, *Why the U.S. Is Lagging on ESG Disclosure Reform* (June 2, 2020), <https://clsbluesky.law.columbia.edu/2020/06/02/why-the-u-s-is-lagging-on-esg-disclosure-reform/>.

ones) [that] produce sustainability reports for key stakeholders.”<sup>6</sup> The ESG field is a patchwork of disclosure and reporting models that varies based on industry and investor requirements, among others. This lack of a standardized ESG disclosure regime makes it more burdensome and costly for businesses who have to respond to an array of often duplicative or conflicting requests for ESG reporting. As the interest in ESG disclosure grows, so do calls for greater harmonization among the different reporting models.<sup>7</sup> A few efforts, notably by the International Business Council of the World Economic Forum and the Corporate Reporting Dialogue, have sought to create a standardized ESG disclosure model that would be applicable to companies across industries and geographical areas.<sup>8</sup>

The rapid rise of ESG in the United States demonstrates a growing investor interest in a company’s human rights performance and in seeing companies adopt a human rights culture that is reflected both in the leadership and governance of the company. The “S” in ESG refers to businesses’ human rights performance, as human rights is the core of the “S” in ESG.<sup>9</sup> It is expected that the human rights component of ESG will gain importance in the wake of the COVID-19 pandemic which exacerbated poverty and social inequality. Moreover, COVID-19 recovery programs have a renewed focus on human rights, as business impact on human rights have become even more evident during the pandemic.<sup>10</sup> As investors, business, regulators, and civil society focus on the human rights component of ESG, it is important to recall that business’s human rights performance under the “S” in ESG must be measured through the lens of internationally recognized human rights norms, including the United Nations Guiding Principles on Business and Human Rights.<sup>11</sup>

The growing investor’s, and indeed society’s, interest in ESG in the United States is also demonstrated by an increased focus on the part of regulators, particularly the Securities and Exchange Commission (“SEC”) on ESG. The SEC’s first disclosure standard regarding ESG was issued in a 2010 guidance document covering climate-related disclosures in which it specified a materiality standard for mandated disclosure.<sup>12</sup> In remarks delivered in March, SEC’s Acting Director of the Division of Corporate Finance, John Coates, called on the SEC to play a more active role in creating an effective disclosure regime.<sup>13</sup> That same month, the SEC announced the creation of a “Climate and ESG Task Force” in its Enforcement Division.<sup>14</sup> Recognizing the

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<sup>6</sup> *Id.*

<sup>7</sup> Catherine M. Clarkin, Melissa Sawyer & Joshua L. Levin, *The Rise of Standardized ESG Disclosure Frameworks in the United States* (June 22, 2020), <https://corpgov.law.harvard.edu/2020/06/22/the-rise-of-standardized-esg-disclosure-frameworks-in-the-united-states/>.

<sup>8</sup> Rick A. Fleming & Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality*, Environmental Law Institute (2020), <https://www.sec.gov/files/making-mandatory-sustainability-disclosure-a-reality-white-paper.pdf>.

<sup>9</sup> See John G. Ruggie, *ESG Investing: Coming into its Own—and Not a Moment Too Soon*, Responsible Investment Association of Canada Annual Conference Keynote Address (April 24, 2019).

<sup>10</sup> See, e.g., Cathy Sun, *Business and human rights: ‘building back better’ from COVID-19* (June 9, 2020), <https://www.universal-rights.org/blog/business-and-human-rights-building-back-better-from-covid-19/>.

<sup>11</sup> Ruggie, *supra* note 9.

<sup>12</sup> Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change* (17 CFR PARTS 211, 231 and 241; Release Nos. 33-9106; 34-61469; FR-82), <http://www.sec.gov/rules/interp/2010/33-9106.pdf>.

<sup>13</sup> John Coates, *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets* 2 (March 11, 2021), <https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121>.

<sup>14</sup> The Securities and Exchange Commission, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (March 4, 2021), <https://www.sec.gov/news/press-release/2021-42>.

increased investor's interest and reliance on ESG disclosures, the Task Force will "develop initiatives to proactively identify ESG-related misconduct."<sup>15</sup> The Task Force will also evaluate and pursue complaints on ESG-related issues. The creation of the Task Force follows the earlier appointment of a Senior Policy Advisor on Climate and ESG at the SEC.<sup>16</sup> The SEC also announced this year an increased focus on climate and ESG related risks as part of its examination priorities.<sup>17</sup> These recent developments at the SEC now give a real bite to ESG disclosures, even as none of the proposals in Congress seeking to mandate ESG disclosures have been adopted to date.<sup>18</sup> Positive developments in the United States around ESG still fall short, however, of the non-financial disclosure legislations that are emerging in other jurisdictions, notably within the European Union.

### The United Nations Guiding Principles on Business and Human Rights

The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework is a set of principles that was unanimously endorsed by the United Nations Human Rights Council in 2011.<sup>19</sup> The United Nations Guiding Principles on Business and Human Rights ("UNGPs") provide, for the first time, a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The Principles are based on a 3 pillar framework: the Protect, Respect, and Remedy Framework. Under the "*State Duty to Protect*" (for example, through legislation), the UNGPs recommend that governments provide greater clarity of expectations and consistent rules for business in relation to human rights. The "*Corporate Responsibility to Respect*" principle (for example, through human rights due diligence) is a blueprint for companies on how to know and show that they are respecting human rights. The "*Access to Remedy*" principle ensures that where people are harmed by business activities, there is both adequate accountability and effective redress, both judicial and non-judicial.<sup>20</sup>

The UNGPs have become the gold standard for responsible business practice, receiving recognition from governments, civil society, and corporations worldwide. Although they were originally enacted as a set of voluntary standards, the UNGPs have been incorporated into legislations at both the national and regional levels worldwide which has led to their increased relevance for business and their advisors, including lawyers, particularly in the area of Human Rights Due Diligence. Human Rights Due Diligence, as outlined in the UNGPs, is being

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<sup>15</sup> Id.

<sup>16</sup> The Securities and Exchange Commission, *Satyam Khanna Named Senior Policy Advisor for Climate and ESG* (Feb. 1, 2021), <https://www.sec.gov/news/press-release/2021-20>.

<sup>17</sup> The Securities and Exchange Commission, *SEC Division of Examinations Announces 2021 Examination Priorities* (March 3, 2021), <https://www.sec.gov/news/press-release/2021-39>.

<sup>18</sup> Clarkin ET AL., supra note 7.

<sup>19</sup> Human Rights Council Res. 17/4, U.N. Guiding Principles on Business and Human Rights, Principle 17 (July 6, 2011); <https://www.undocs.org/en/A/HRC/RES/17/4> [hereinafter U.N. Guiding Principles on Business and Human Rights].

<sup>20</sup> Id.

increasingly embedded in business practices and mandatory regulations at both the national and regional levels across the world.

### Human Rights Due Diligence

Human Rights Due Diligence (“HRDD”), is a process through which companies identify, prevent, mitigate, and account for any adverse human rights impact related to their business practices. HRDD involves an assessment of both actual and potential human rights impact of a business.<sup>21</sup> “Done right, Human Right due diligence allows investors to identify and prevent potentially adverse risks before they even occur and address or mitigate readily-identified impacts.”<sup>22</sup> HRDD covers all internationally recognized human rights and is an ongoing process that focuses on risks to rights holders rather than risks to the business. The United Nations Working Group on Business and Human Rights has emphasized the need for companies to incorporate a gender component to their HRDD processes which includes both actual and potential impact on women and girls.<sup>23</sup> In issuing this guidance, the Working Group recognized the disproportionate and differentiated impact that business activities can have on the rights of this already vulnerable and marginalized group.<sup>24</sup>

A key component of HRDD is that it should provide remedies for any adverse human rights impact that the business not only caused but may have contributed to, including impact by third parties with whom it has business relationships.<sup>25</sup> In the latter case, a business should use its leverage to influence, prevent, or mitigate the adverse impact. These are minimum requirements keeping in mind that “[t]he scope and complexity of HRDD that is expected of a business will depend on the circumstances, including factors such as the type and size of the business, its location, the likelihood of severe human rights impacts, and the nature and context of operations.”<sup>26</sup> Businesses should also track the effectiveness of their HRDD and communicate effectively on how their potential human rights impact is being addressed.<sup>27</sup>

### The Integration of the UNGPs into Hard Law

The UNGPs’ HRDD model is increasingly being incorporated into legislations worldwide, particularly in Europe. In Europe, mandatory due diligence legislations based on the UNGPs have been gaining momentum. At the national level, several countries have passed or taken steps to pass HRDD laws. This trend is expected to grow in the wake of the COVID-19 pandemic which laid bare the dangers of the absence of protections for those who may be adversely affected by business

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<sup>21</sup> Id.

<sup>22</sup> Margaux Dillon, *Investors at the forefront of Human Rights Due Diligence* (Nov. 6, 2020), <https://ksapa.org/investors-at-the-forefront-of-human-rights-due-diligence/>.

<sup>23</sup> U.N. Working Group on Business and Human Rights, *Gender lens to the UNGPs*, <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx> (last visited May 20, 2021).

<sup>24</sup> Id.

<sup>25</sup> U.N. Guiding Principles on Business and Human Rights, supra note 19, Principle 17.

<sup>26</sup> British Institute of International and Comparative Law (BIICL) & the Principles for Responsible Investment (PRI), *BIICL and PRI Workshop on Human Rights in Private Equity: Information and Summary* (June 14, 2017), <https://www.unpri.org/download?ac=3989>.

<sup>27</sup> U.N. Guiding Principles on Business and Human Rights, supra note 19, Principle 17.

decisions and the lack of clear standards and rules for businesses on how to identify, prevent, and address such violations.

In March 2021, the European Parliament approved a set of recommendations to the European Commission on mandatory corporate due diligence and accountability, including a Draft Directive on Mandatory Due Diligence on Corporate Environmental and Human Rights Impact Legislation. The Draft Directive covers all sectors and seeks to hold companies accountable for environmental and human rights abuses by subsidiaries and suppliers overseas. It mandates HRDD and calls for independent investigations, fines, and administrative sanctions and for states to put in place a civil liability regime with remedies.

The draft European Union Directive on HRDD provides a framework for businesses to identify, address, and remedy human rights harm that they may have caused or to which they contributed.<sup>28</sup> It applies to operations, distribution, supplies, and investments related to human rights harms, including climate change. The Draft Directive requires companies to conduct Due Diligence related to human rights, environmental, and governance risks in their operations and business relationships, including through their supply chains and subcontractors.<sup>29</sup> It requires business to “identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address, and remediate the potential and/or actual adverse impacts on human rights, the environment and good governance that their own activities and those of their value chains and business relationships may pose.”<sup>30</sup> It calls on companies to align their business strategies and policies with their due diligence strategy.<sup>31</sup> The Draft Directive mandates due diligence on an ongoing basis which should look at whether a company causes or contributes to human rights, environmental, or governance risks.<sup>32</sup> A company’s due diligence strategy must be reviewed annually, be available to the public, and must be communicated to the company’s employees and business partners.

Importantly, the Draft Directive mandates companies to establish grievance mechanisms, in accordance with the UNGPs so that stakeholders may raise concerns regarding human rights, environmental, or governance risks.<sup>33</sup> It specifically refers to Principle 31 of the UNGPs which requires that grievance mechanisms be legitimate, accessible, predictable, equitable, transparent, rights compatible, and a source of continuous learning. Participation in a company’s grievance mechanisms does not preclude stakeholders from pursuing other civil remedies.<sup>34</sup> Companies should provide for or cooperate in providing remedies (financial or non-financial) depending on whether they caused or contributed to the harm.<sup>35</sup>

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<sup>28</sup> Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability art. 1 (2) Eur. Parl. Doc. P9\_TA (2021) [hereinafter EU Draft Directive].

<sup>29</sup> *Id.*; Arnoud R. Willems Et Al., *Rise of Environmental, Social, and Governance Due Diligence in Europe* (February 2021), <https://www.sidley.com/en/insights/publications/2021/02/rise-of-environmental-social-and-governance-due-diligence-in-europe>.

<sup>30</sup> EU Draft Directive, *supra* note 28, art. 1 (2).

<sup>31</sup> *Id.* art 4 (5).

<sup>32</sup> Willems, *supra* note 29.

<sup>33</sup> EU Draft Directive, *supra* note 28, art. 19.

<sup>34</sup> *Id.* art 10 (5).

<sup>35</sup> *Id.* art. 19.

National authorities with power to conduct investigations would be tasked with supervising companies and enforce the due diligence rules.<sup>36</sup> Companies that fail to comply with mandated remedial actions may be subject to administrative fines.<sup>37</sup> Member states are required to have in place a liability regime and provide remedies for companies whose conduct cause adverse human rights, environment, or governance impact.<sup>38</sup> Companies that can prove that they comply with all the requirements of human rights due diligence under the Directive would not be held liable.<sup>39</sup> Additionally, managers and directors might be held individually liable for violating the due diligence obligations.

The Draft Directive calls for special attention to children’s rights.<sup>40</sup> It also calls for meaningful and informed stakeholder engagement as part of a company’s due diligence strategy, including in the process of remediation.<sup>41</sup> Companies are encouraged to adopt a gender perspective in their HRDD process, recognizing the disproportionate and differenced impact of business activities on women and girls.<sup>42</sup>

The Draft Directive would apply to companies that are incorporated or operating in the European Union (“EU”).<sup>43</sup> Businesses operating in Europe, including US companies, will need to adapt their policies and practices to comply with these new rules. It would apply to companies even if they are not governed by EU law and are not established within EU territory if they sell goods or provide services in the EU market. U.S. companies with operations in the EU market will therefore be subject to these rules.

The Organization for Economic Co-operation and Development (“OECD”), of which the United States is a party as well as most of the largest European markets, has also issued a set of Guidelines for Multinational Enterprises (the “OECD Guidelines”).<sup>44</sup> Revised in 2011, the Guidelines require companies to “[r]espect the internationally recognized human rights of those affected by their activities,” and “[c]arry out risk-based due diligence.”<sup>45</sup> The OECD also issued the “Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,” updated in 2016, encouraging companies to vet their suppliers by looking at their potential human rights and environmental impacts.<sup>46</sup> The Guidance also proposes steps companies can take to conduct due diligence in order to prevent, mitigate, and stop human rights risks and use their leverage, where relevant, to mitigate and prevent such risks.<sup>47</sup> Affected parties may bring a complaint before a state National Contact Point (“NCP”), where those are available, alleging violations of the Guidelines. The NCPs are “agencies established by adhering governments to

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<sup>36</sup> *Id.* arts. 12, 13.

<sup>37</sup> *Id.* arts.15 (7).

<sup>38</sup> *Id.* art.19.

<sup>39</sup> *Id.* art 19 (3).

<sup>40</sup> *Id.* ¶¶ 21-28.

<sup>41</sup> *Id.* arts 5 (1).

<sup>42</sup> *Id.* ¶25.

<sup>43</sup> *Id.* art. 2.

<sup>44</sup> Organization for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (2011), <https://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter OECD Guidelines].

<sup>45</sup> *Id.*

<sup>46</sup> Organization for Economic Co-operation and Development (OECD), *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3rd ed. 2016), <https://www.oecd.org/corporate/mne/mining.htm> [hereinafter OECD Due Diligence Guidance].

<sup>47</sup> OECD Guidelines, *supra* note 44.

promote and implement the *Guidelines*.<sup>48</sup> The NCP will assist the parties in finding a settlement or a mutually agreed upon solution to address the issue.<sup>49</sup>

Furthermore, a growing number of jurisdictions have incorporated the UNGPs into their national legislation. In particular, human rights transparency legislation and, in some cases, mandatory due diligence (a step beyond) is now a legal requirement in several countries such as Australia,<sup>50</sup> France,<sup>51</sup> the United Kingdom,<sup>52</sup> Switzerland,<sup>53</sup> and the Netherlands.<sup>54</sup>

The United Kingdom enacted the Modern Slavery Act in 2015 requiring large businesses to publish an annual statement describing measures taken to identify and prevent modern slavery and human trafficking in their supply chains.<sup>55</sup> The reporting requirement can be enforced through injunction, and unlimited fines can be imposed for failure to comply.<sup>56</sup>

In 2017, France enacted a ground breaking Duty of Vigilance Law which includes mandatory HRDD.<sup>57</sup> The law requires large French companies to establish and publish a plan to adequately identify risks and prevent human rights and environmental abuses linked to their activities and those of their subsidiaries, subcontractors, and suppliers.<sup>58</sup> It provides for civil remedies for harm resulting from a company's failure to observe its duty of vigilance under the law.<sup>59</sup>

The Netherlands adopted the Child Labor Due Diligence Act in 2019 which includes mandatory HRDD. The Act, though not yet in force, requires companies operating in the Dutch market to identify, prevent, and mitigate child labor risks throughout their global supply chains. Companies are required to publish a diligence statement on their investigations to prevent and mitigate child labor in their supply chains. The Act puts in place criminal sanctions and administrative fines for failure to comply with the diligence obligations. It also includes the obligation to report to a regulatory body which has not yet been determined.<sup>60</sup>

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<sup>48</sup> Id.

<sup>49</sup> Id.; OECD Due Diligence Guidance, *supra* note 46; OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Section (2017).

<sup>50</sup> See Modern Slavery Act, 2018 (No. 153, 2018) (Austl.), <https://www.legislation.gov.au/Details/C2018A00153>.

<sup>51</sup> Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Duty of Vigilance Law], Journal Officiel de la République Française [J.O.] [Official Gazette of France], March 28, 2017 [hereinafter French Duty of Vigilance Law].

<sup>52</sup> See Modern Slavery Act 2015, c. 30 (UK),

<https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> [hereinafter UK Modern Slavery Act].

<sup>53</sup> See David Oser & Margrit Marti, *Parliament Proposes Alternative to the Responsible Business Initiative* (Jul. 23, 2020), <https://www.homburger.ch/de/insights/esg-reporting-obligations-parliament-proposes-alternative-responsible-business-initiative>.

<sup>54</sup> See Wet van 24 oktober 2019, Stb. 2019.

<sup>55</sup> See UK Modern Slavery Act, *supra* note 52.

<sup>56</sup> See UK Modern Slavery Act, *supra* note 52 §§54, 2.

<sup>57</sup> Proposition de loi instaurant un devoir de vigilance et un devoir de responsabilité à charge des entreprises tout au long de leurs chaînes de valeur [Draft Law on Mandatory Human Rights Due Diligence], Feb. 4, 2021, <https://www.lachambre.be/kvvcr/showpage.cfm?section=/flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=55&dossierID=1903>

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> European Coalition for Corporate Justice, *Human Rights and Environmental Due Diligence*, <https://corporatejustice.org/priorities/> (last visited May 20, 2021); Daniel Sharma & Franz D. Kaps, *Human*



In Switzerland, although a draft law on mandatory HRDD did not receive sufficient canton votes to be enacted, other legislation imposing reporting duties on human rights, environmental, and corruption abuses has been adopted. The new counterproposal imposes reporting and due diligence requirements on certain companies and imposes sanctions for violations.<sup>61</sup>

In Germany, a vote on a proposed mandatory HRDD legislation, based on the UNGPs, is expected in the German Parliament before the end of the year. The Belgian Federal Parliament voted in April 2021 to consider a draft law on mandatory HRDD which would be applicable along a company's supply chain and subsidiaries. The draft law also includes provisions for companies to be held accountable in case of violations.<sup>62</sup> Mandatory HRDD legislations are being considered in many other EU countries including Sweden, Austria, Denmark, Finland, and Luxembourg.<sup>63</sup>

The growth of ESG disclosures in the United States and HRDD legislations in Europe demonstrates a growing expectation and demand at a global level that business act with respect for human rights. The COVID-19 pandemic and related economic impact has also increased interest in ESG and specifically businesses' human rights and environmental footprint. The pandemic laid bare the severe human rights impact that can result from weak or non-existent HRDD frameworks. Business decisions during the pandemic, including cancelling contracts or reneging payments, have severely affected supply chains and workers across the globe.<sup>64</sup> The effects of these business decisions have been particularly acute in places where workers are most vulnerable not only to the health crisis but also the ensuing economic impact.<sup>65</sup> It is therefore expected that in the wake of the pandemic, there will be renewed calls for companies to integrate human rights, in line with the UNGPs as the leading business and human right standard. It is also expected that there will be

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*Rights Due Diligence Legislation in Europe – Implications for Supply Chains to India and South Asia* (March 26 2021), <https://www.dlapiper.com/en/us/insights/publications/2021/03/human-rights-due-diligence-legislation-in-europe/>.

<sup>61</sup> Cleary Gottlieb, *Recent Developments in Business and Human Rights Frameworks in Europe* (Jan. 12, 2021), <https://www.clearygottlieb.com/-/media/files/alert-memos-2021/recent-developments-in-business-and-human-rights-frameworks-in-europe.pdf>.

<sup>62</sup> *Supra* note 57; Centre de Ressources sur les Entreprises et les Droits de l'Homme, *Belgique : Le Parlement fédéral vote en faveur de la prise en considération d'une proposition de loi instaurant un devoir de vigilance pour les entreprises* (Apr. 26, 2021), [https://www.business-humanrights.org/fr/latest-news/belgique-le-parlement-f%C3%A9d%C3%A9ral-vote-en-faveur-de-la-prise-en-consid%C3%A9ration-dune-proposition-de-loi-instaurant-un-devoir-de-vigilance-pour-les-entreprises/?mc\\_cid=5da3e94033&mc\\_eid=932f278e04](https://www.business-humanrights.org/fr/latest-news/belgique-le-parlement-f%C3%A9d%C3%A9ral-vote-en-faveur-de-la-prise-en-consid%C3%A9ration-dune-proposition-de-loi-instaurant-un-devoir-de-vigilance-pour-les-entreprises/?mc_cid=5da3e94033&mc_eid=932f278e04) (last visited May 20, 2021).

<sup>63</sup> EU Draft Directive, *supra* note 28.

<sup>64</sup> *See e.g.*, UN Working Group on Business and Human Rights, *Ensuring that business respects human rights during the Covid-19 crisis and beyond: The relevance of the UN Guiding Principles on Business and Human Rights*, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25837&LangID=E> (last visited May 20, 2021); Cathy Sun, *Business and human rights: 'building back better' from COVID-19* (June 9, 2020), <https://www.universal-rights.org/blog/business-and-human-rights-building-back-better-from-covid-19/>; Business & Human Rights Resource Centre, *COVID-19 – time for COVID-19 AND HUMAN RIGHTS States' Obligations and Businesses' Responsibilities in Responding to the Pandemic Governments, Brands and Employers to Protect Supply Chain And Precarious Workers From Hardship And Infection* (March 11, 2020), <https://www.business-humanrights.org/en/blog/covid-19-time-for-governments-brands-and-employers-to-protect-supply-chain-and-precarious-workers-from-hardship-and-infection/>; Oxfam, *COVID-19 and Human Rights States' Obligations and Businesses' Responsibilities in Responding to the Pandemic* (Aug. 2020), <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621037/dp-covid-19-human-rights-principles-070820-advance-en.pdf?sequence=4>.

<sup>65</sup> *See Id.*

more demand for ESG reporting with a particular attention to business' human rights impacts. One way for businesses to meet this demand is by integrating Human Rights Due Diligence in their ESG traditional analysis of ESG risks and impacts. The failure to explicitly address human rights risks as part of ESG analysis carries significant risks for companies, including commercial risks, reputational risks, and increasingly legal and regulatory risks.<sup>66</sup>

### The Role of Lawyers in Advising Businesses on ESG and the UNGPs

Lawyers play a crucial role in the responsible business ecosystem, commonly referred to as “Business and Human Rights” (or “BHR”). Indeed, lawyers are in a unique position to advise corporate clients on the legal human rights consequences of their actions, both in terms of binding legal obligations and non-binding obligations arising from international law (such as the UNGPs). The lawyer’s role as a trusted advisor has become even more important, as principles, such as ESG and HRDD, are being enshrined into domestic and regional regulations.

The United Nations Working Group on Business and Human Rights and the Office of the High Commissioner for Human Rights (“OHCHR”) have both recognized the integral role that lawyers, in particular business lawyers, play with respect to the implementation of human rights due diligence as required by the UNGPs.<sup>67</sup> The United Nations Working Group has also recommended that law firms and bar associations “integrate human rights risk management in line with the Guiding Principles as a core element of the role of business lawyers.”<sup>68</sup> In addition, the OHCHR recommends that lawyers “be educated on business and human rights generally, and human rights due diligence [as defined in the Guiding Principles] and legal liability specifically.”<sup>69</sup>

Recognizing the importance of BHR competence among lawyers, bar associations across the world have formally adopted or engaged with the UNGPs. These measures have sought twin aims: (1) to promote the UNGPs to the mainstream within bar associations’ themselves, including in their

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<sup>66</sup> CDC, *ESG Topics: Human Rights*, <https://toolkit.cdcgroup.com/esg-topics/human-rights/> (last visited May 20, 2021).

<sup>67</sup> Functions that are potentially relevant to human rights due diligence include legal among others. See UN General Assembly, *Companion Note II to the Working Group on Business and Human Rights’ 2018 Report to the General Assembly A/73/163: Corporate human rights due diligence – Getting started, emerging practices, tools and resources*, (Oct. 16, 2018), <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf>. The Working Group has also stated that “[b]usiness lawyers — both in-house counsel and external firms — have a unique position for shaping the path an enterprise may take with regards to effective human rights due diligence.” UN General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the General Assembly ¶41* (Jul. 16, 2018), <https://undocs.org/A/73/163>.

<sup>68</sup> UN General Assembly, *Companion Note II to the Working Group on Business and Human Rights’ 2018 Report to the General Assembly A/73/163: Corporate human rights due diligence – Getting started, emerging practices, tools and resources*, at p. 20.

<sup>69</sup> This can be done through the inclusion of these topics in law school curricula, continuing legal education and professional development courses, and practitioners’ guidance. Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability. Rep. of the High Comm’r for Hum. Rts. on its Thirty-eighth session, ¶ 36, U.N. Doc. A/HRC/38/20/Add.2 (2018), <https://digitallibrary.un.org/record/1637328?ln=en>

public policy and advocacy activities; and (2) to promote BHR competencies among bar association members. Of relevance to the legal community in the United States, the International Bar Association and the American Bar Association, and at the local level, the State Bar of Texas and the New York City Bar Association have been leaders in the BHR movement.

The International Bar Association (“IBA”) has been quite active on BHR starting with its participation in the formulation of the UNGPs.<sup>70</sup> The IBA has also provided several training and outreach opportunities on BHR<sup>71</sup> and has endorsed the view that lawyers, as “guardians of corporate integrity,” should act in line with the UNGPs.<sup>72</sup> In 2013, the IBA began an extensive consultation process to consider the implications of the UNGPs for its members. The IBA established a working group which received comments from several IBA committees, member associations, societies, and individual members. Three in-country consultations were carried out with national bar associations of Spain, Costa Rica, and Namibia. The working group worked alongside the IBA’s in-house policy unit. Several drafts of a guidance document were presented in IBA meetings between 2014 and 2016. This policy development process produced three separate documents. The first, adopted in 2015, was the “IBA Business and Human Rights Guidance for Bar Associations.”<sup>73</sup> The primary purpose of the Guidance for Bar Associations is to “enable bar associations around the world to increase awareness and understanding of lawyers who advise business clients on the relevance of business and human rights, and particularly the United Nations Guiding Principles on Business and Human Rights and the various laws, policies, and standards that promote business respect for human rights.”<sup>74</sup> In 2016, the IBA published a second document, the “Practical Guide for Business Lawyers,” together with a more detailed commentary known as “The Reference Annex.”<sup>75</sup> The Practical Guide is a concise, basic overview of the UNGPs, designed for business lawyers who may not have any prior expertise in BHR. Finally, in

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<sup>70</sup> International Bar Association, *The IBA’s Business and Human Rights Working Group publishes draft guidance for bar associations and lawyers* (Nov. 20, 2014), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=67452738-0438-4ad3-88ab-0d1b2c4323af>.

<sup>71</sup> See International Bar Association, *UN Guiding Principles on Business and Human Rights Three Years after Adoption* (Mar. 27, 2014), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=554B7A77-3187-4E6D-9B20-E39C639763D4>; International Bar Association, *Business and human rights conference held in Washington, DC*, May 28, 2015, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=669a4583-357e-4dfb-ab04-2a1c20edb00a>.

<sup>72</sup> See, e.g., International Bar Association, *Maintaining Lawyer’s Integrity: Message from the President* (Feb. 29, 2016), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=2e81ebb8-d48c-497e-813c-cd93b41b9397>; see also International Bar Association, *IBA President’s keynote address, Rocky Mountain Mineral Law Foundation conference 2016* (Feb. 18, 2016); <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=54acbf2c-baf9-43d1-af9d-7ca88890f733>.

<sup>73</sup> International Bar Association, *IBA Business and Human Rights Guidance for Bar Associations* (Oct. 8, 2015), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=b9719c7c-212b-4717-8c66-fd028abd6c6a>.

<sup>74</sup> *Id.* p. 1.

<sup>75</sup> International Bar Association, *IBA Practical Guide on Business and Human Rights for Business Lawyers* (June 8, 2016), [https://media.business-humanrights.org/media/documents/files/documents/IBA\\_Practical\\_Guide.pdf](https://media.business-humanrights.org/media/documents/files/documents/IBA_Practical_Guide.pdf)

2017, the IBA produced the first two chapters of a comprehensive BHR handbook for business lawyers.<sup>76</sup> The Handbook is designed to “bring together in one place a diverse collection of educational resources relating to the roles and responsibilities of legal practitioners with respect to business and human rights, including background context and explanation, case scenarios, discussion exercises, frequently asked questions, sample checklists, and further reading and resources.”<sup>77</sup>

The American Bar Association (“ABA”) endorsed the UNGPs in 2012, resolving that “[t]he legal profession is increasingly involved in the field of CSR [corporate social responsibility], including aspects of human rights standards and compliance,” and recognizing “the vital role of lawyers in supporting corporate citizenship and the rule of law.”<sup>78</sup> The UNGPs were cited as “a baseline standard of conduct that appl[ies] to all businesses, whatever their sector, whatever their size, and wherever they operate” (Guiding Principle 14).<sup>79</sup> Significantly, in endorsing the UNGPs, the ABA commented that advising business clients on the UNGPs may constitute part of a lawyer’s obligation under the ABA Model Rule 2.1 – a rule which has been adopted in New York State’s Rules of Professional Conduct.<sup>80</sup> In 2015, the ABA initiated and signed on to – together with several other national bar associations – a “Joint Declaration of Commitment on Business and Human Rights” (the Declaration).<sup>81</sup> The Declaration evidences the ABA’s commitment to promoting lawyers’ understanding of the UNGPs,<sup>82</sup> including developing policies that build upon the UNGPs to ensure the respect of human rights.<sup>83</sup> In this regard, the ABA intends to publish “A

<sup>76</sup>International Bar Association, *Handbook for lawyers on business and human rights (July 2017)*, <https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession> [hereinafter IBA Handbook].

<sup>77</sup>*Id.*

<sup>78</sup>*American Bar Association Resolution No. 109 and Report*, pp. 1-3, 12 (Feb. 6, 2012), [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/Resources/Trafficking%20Policies/2012\\_MY\\_109.pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/Trafficking%20Policies/2012_MY_109.pdf).

<sup>79</sup>*Id.* at p. 5.

<sup>80</sup>See American Bar Association, *Model Rules of Professional Conduct*, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/). Rule 2.1 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,” available at: [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_2\\_1\\_advisor/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/).

<sup>81</sup>*Joint Declaration of Commitment on the Development and Promotion of the Field of Business and Human Rights within the Legal Profession* (Jun. 9, 2015), [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/Joint%20Declaration%20of%20Bar%20Associations%20on%20BHR%20Final%206-16-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/Joint%20Declaration%20of%20Bar%20Associations%20on%20BHR%20Final%206-16-15.authcheckdam.pdf) [hereinafter Joint Declaration]. Other bar associations included the Bar Council of England and Wales, the Bar Council of Malaysia, the Conseil National des Barreaux, Deutscher Anwaltverein, International Bridges to Justice, the Law Society of England and Wales, Union Internationale des Avocats, the Spanish National Bar, and the Law Association for Asia and the Pacific.

<sup>82</sup> American Bar Association, *Re: Request for Input on “Business and Human Rights: Towards a Decade of Global Implementation”* p. 3 (Nov. 30, 2020), [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/aba-response-to-unwg-11-30-20.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-response-to-unwg-11-30-20.pdf) [hereinafter Request for Input].

<sup>83</sup> Joint Declaration, *supra* note 81, p. 1.

Guide to Human Rights Due Diligence for Lawyers” in the fall of 2021.<sup>84</sup> The ABA has also participated in a wide range of BHR-related activities, including providing training to lawyers on the UNGPs. The ABA Section of International Law conducted a series of twelve virtual training sessions for lawyers on business and human rights, including the conduct of human rights due diligence.

Established in 2015, the International Human Rights Committee of the State Bar of Texas’ International Law Section provides information and guidance to lawyers whose clients are involved in international business and who may encounter the human, legal, and reputational risk associated with the violations of internationally recognized human rights.<sup>85</sup> The International Human Rights Committee also assists law firms and law schools to ensure their training and education programs address human rights and the issues presented in international law practices.<sup>86</sup> In 2016, the Committee released a paper entitled the “Impact on International Commercial Law Practices by the New Ethics of Human Rights,” urging the State Bar of Texas and Texan lawyers to prioritize and address international human rights issues not only because they have become the concern of corporate clients, but also because it is “the right thing to do.”<sup>87</sup> The paper noted the importance of the UNGPs and referenced the IBA guidance as a potential framework which the State Bar could adopt – particularly given the ambiguities in human rights obligations and disciplinary rules governing Texan lawyers.<sup>88</sup> The Committee maintains a web-based resource library which refers to the UNGPs as general guidance for members of the State Bar of Texas. However, the Committee does not appear to have formally endorsed the UNGPs. The State Bar of Texas has also issued advice to members to consider the implications of BHR and the UNGPs in the course of their professional responsibilities.<sup>89</sup> In addition, the State Bar of Texas has commissioned advice from the University of Texas Human Rights Clinic on possible amendments to the Texas 28 Disciplinary Rules of Professional Conduct to better align them with the UNGPs.<sup>90</sup>

In 2015, the Human Rights and Access to Justice Program of the Cyrus R. Vance Center for International Justice at the New York City Bar Association launched a Business and Human Rights

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<sup>84</sup> Request for Input, *supra* note 82, p. 4.

<sup>85</sup>The State Bar of Texas, International Human Rights Committee, *Our Purpose*, <https://ilstexas.org/human-rights-committee/>.

<sup>86</sup> *Id.*

<sup>87</sup>Thomas H. Wilson, *Impact on International Commercial Law Practice by the New Ethics of Human Rights* p. 2 (Apr. 11, 2016), <http://web1.amchouston.com/flexshare/003/BusinessLaw/2016/AnnualMeeting/TexasDisciplinaryRulesProfessionalConductHumanRights.pdf>.

<sup>88</sup>*Id.* at p. 8.

<sup>89</sup>Thomas H. Wilson, John Vernon, and James W. Skelton, *Global Thinking: Ethical Issues That May Come Into Play When Texas Lawyers Deal With Clients That Have International Interests*, State Bar of Texas, <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=37264>

<sup>90</sup>Louis Bedford and Keith Lacy, *Texas Bar Association: Bringing Human Rights and Business Principles to Texas*, Human Rights Clinic of the University of Texas School of Law, (Dec. 22, 2017), <https://law.utexas.edu/wp-content/uploads/sites/11/2018/01/2018-HRC-TXBar-memo.pdf>.

Initiative (“the Initiative”), grounded in the UNGPs. Through this Initiative, the Vance Center seeks to draw on the expertise of law firms in the United States and abroad to contribute to the continuing development of best practices in BHR. To that end, the Vance Center has advised international NGOs and organized conferences on these issues. In 2018, it convened the New York City Bar Association’s first Continuing Legal Education (CLE) program on BHR: “Business and Human Rights – What Do They Mean for Lawyers?” bringing together law firms and NGO practitioners. The enthusiastic response to this first BHR CLE showed a willingness on the part of the legal community in New York to learn more about BHR, an area with which most lawyers were previously only vaguely familiar.

In 2019, at the Vance Center’s suggestion, the New York City Bar Association established a Business and Human Rights Working Group (“BHR Working Group”) to (1) consider whether the City Bar should formally endorse the UNGPs; and (2) if so, to develop and implement a strategy to educate and engage the legal community and the broader public with regard to business and human rights (“BHR”). That same year, the working group proposed, and the City Bar approved, a Policy Statement on Business and Human Rights. In the Policy Statement, the first of its kind by a local bar association in the United States, the New York City Bar Association endorsed the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Acknowledging New York City’s role as a hub for global business and the impact that business decisions in New York have both locally and globally on human rights, the City Bar, through the Policy Statement, also resolved to adopt a strategy to guide the legal profession to consider the growing impact of commercial activities on human rights, environmental sustainability, and the rule of law, when serving as advisor to their clients. In the Policy Statement, the New York City Bar also recognizes that Rule 2.1 of the Professional Responsibility Rules includes responsibility to respect human rights, environment sustainability, and rule of law. Currently, in the second phase of its mandate, the New York City Bar’s BHR Working Group is developing a strategy to implement the Policy Statement, including educating and engaging the legal community and the broader public with regard to BHR. The Working Group is focusing particularly on providing guidance for engagement with the United Nations Global Compact and Human Rights and the Environment.

### The Implications of the Rise in ESG Disclosures and HRDD for Lawyers in the United States

Despite the widely acknowledged role of lawyers in advising businesses on human rights, including ESG and HRDD, in the United States, the legal profession’s engagement with the UNGPs has been limited. A study conducted by the Vance Center<sup>91</sup> shows that ten years after the adoption of the UNGPs, very few state and local bar associations in the United States have engaged with the UNGPs.<sup>92</sup> While, at the state level, several bar associations have taken steps to provide BHR training and resources, only the New York City Bar Association has formally endorsed the UNGPs. Overall, with the exception of the State Bar of Texas and the New York City Bar Association, engagement by state and city bar associations in the United States has been limited.

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<sup>91</sup> The Cyrus R. Vance Center for International Justice is a non-profit program of the New York City Bar Association bringing together leading law firms and other partners worldwide to pioneer international justice initiatives and provide pro bono legal representation to social justice NGOs.

<sup>92</sup> The research was conducted in 2019 and updated in 2021. The research is on file at the Vance Center and available upon request.

Lawyers' duties to serve their clients with competence and diligence<sup>93</sup> also includes advising on human rights. In jurisdictions with formal BHR regulatory requirements or legislations, such as ESG disclosure requirements or mandatory HRDD, a lawyer must provide the necessary advice to clients doing business in these jurisdictions. A lawyer may in many situations have either an obligation, or an option, to advise a client of human rights-related issues depending on whether the BHR related principles are mandatory or voluntary in the relevant jurisdictions.

Lawyers have a role not only as technical experts but also as “wise counsellors” to their business clients. They play a crucial role in advising businesses on binding, as well as non-binding, legal principles. As such, given the growing trend towards responsible business practices, lawyers should take the lead in advising businesses to comply with both voluntary and mandatory principles on responsible business. Professor John Ruggie, author of the UNGPs, commented that “corporate lawyers are the most consequential player in BHR.”

Lawyers are also concerned by the rise in ESG disclosure requirements and mandatory HRDD legislations in their own operations. Law firms, for example, are businesses in their own rights and as such must address human rights risks in their procurement processes and their supply chains. Thus, law firms have a responsibility to ensure that their own business activities respect the human rights of workers and communities, including by ensuring that all their employees are provided adequate training. In a paper to the United Nations Working Group on Business and Human Rights, the New York City Bar's Working Group on Business and Human Rights reported that “firms with BHR practices reported substantial integration of the UNGPs into their own operations.”<sup>94</sup> Examples of measures adopted by law firms to operationalize the UNGPs in their own operations include the adoption of responsible business conduct and supplier code of conduct policies, policies regarding sustainability and supply chain transparency, ESG screening of vendors, mandatory BHR training focused on the UNGPs for new and senior lawyers, and HRDD for new clients and matters.<sup>95</sup> “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.”<sup>96</sup>

Too often, however, the liability avoiding approach to legal practice of many lawyers means they avoid advising clients on the human rights impact of their business decisions. Similarly, lawyers often fail to advise clients on human rights because of their lack of familiarity with human rights principles and the UNGPs in particular. As law firms reported in a paper published by the New York City Bar's BHR Working Group, awareness of the UNGPs outside law firm's BHR practices are generally limited.<sup>97</sup> This situation is no longer sustainable given the growing trend towards not just voluntary but binding regulations on responsible business, including ESG and

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<sup>93</sup>See e.g. International Bar Association, *International Principles on Conduct for the Legal Profession* Section 5.2 (May 28, 2011); New York Rules of Professional Conduct R. 1.1, 1.3 (2009, as amended Jun. 24, 2020).

<sup>94</sup>The New York City Bar 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* (Feb. 2021) (on file with the Vance Center).

<sup>95</sup>Id.

<sup>96</sup>Id.

<sup>97</sup>Id.

HRDD. "...[T]he 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..."<sup>98</sup> at US law firms. It is already reported that there is growing recognition at law firms of the linkages between business and human rights and other practice areas.

Even in jurisdictions such as the United States where businesses' human rights impacts are measured through voluntary, not mandatory, ESG disclosure and reporting frameworks, the social costs of environmental and human rights impacts is significant. For businesses to be able to count on sound advice on human rights is not only *permissible*, but may indeed be *vital*. The reputational damage may have a direct and significant effect on a company's bottom line. Indeed, failure to identify and prevent risks to human rights can lead to legal, reputational, political, financial, and operational consequences for a business. Consequently, it is a matter of basic legal competence for lawyers to be able to advise clients on the human rights impacts of their business decisions.

Recent developments on ESG in the United States and mandatory HRDD legislations in Europe evidence a global trend towards the recognition and endorsement of the UNGPs. This adoption of the UNGPs through hard law makes it impossible for lawyers to not incorporate human rights considerations in their advice to clients and their own operations. A lawyer's responsibility to advise clients with competence and diligence includes a responsibility to advise on human rights given the growth of voluntary and binding principles on businesses' human rights impact and the resulting social and economic risks of business-related human rights violations. The failure to explicitly address human rights carries significant risks for companies, including commercial risks, reputational risks, and increasingly legal and regulatory risks.<sup>99</sup> Knowledge of human rights is thus a necessary legal qualification. Businesses increasingly expect counsel to "act as partners" in the identification of wide-ranging reputational risks.<sup>100</sup> Lawyers must be aware of developments towards mandatory HRDD in foreign jurisdictions, such as the European Union and the United Kingdom, where their clients are doing business. They must also be aware of the growing investor and regulator attention to ESG disclosure and reporting in the United States. Indeed, these new developments on mandatory HRDD regulatory and ESG may generate new opportunities for lawyers. In response to these developments, BHR has become a practice area of many firms in both Europe and North America.<sup>101</sup>

In a paper to the United Nations Working Group on Business and Human Rights in which it surveyed New York law firms with BHR practices, the New York City Bar's Working Group on Business and Human Rights explains that prior experiences involving advising clients on ESG

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<sup>98</sup> *Id.*

<sup>99</sup> *Supra* note 68.

<sup>100</sup> See International Bar Association, *IBA Practical Guide on Business and Human Rights for Business Lawyers* (May 28, 2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

<sup>101</sup> See e.g. Foley Hoag, *Global business & Human Rights*, <https://foleyhoag.com/practices/business/global-business-and-human-rights> (last visited May 20, 2021); White & Case, *Business and Human Rights*, <https://www.whitecase.com/law/practices/business-human-rights> (last visited May 20, 2021); Hogan Lovells, *Business and Human Rights*, <https://www.hoganlovells.com/en/service/business-and-human-rights> (last visited May 20, 2021).



has facilitated the integration of the UNGPs within a firm's services to client.<sup>102</sup> There is also evidence that companies are becoming more receptive to advice based on the UNGPs given the increased business related risks (legal, economic, reputational) of non-compliance and the adoption of the UNGPs into hard law. The increased focus on HRDD has also generated a stream of demand for legal advice from businesses. Similarly the growing investor and shareholder attention on businesses ESG performance has increased businesses' interest in their human rights impact in line with the UNGPs. Law firms are increasingly sought after for advice on ESG as related to the UNGPs. The paper revealed an interesting new development as well: "...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."<sup>103</sup>

The growth of ESG in the United States is also bringing about greater awareness of the UNGPs. Lawyers and law firms can thus expect increased demand from clients for advice on the UNGPs, including how they relate to ESG. It is therefore important that lawyers and law firms incorporate the UNGPs in advising clients on ESG. This approach is all the more important given the integration of the UNGPs into hard law which may bring about new obligations for businesses beyond ESG disclosures and reporting. Building awareness and familiarity of the legal community in the United States on the UNGPs is crucial to meet the specific demand from clients for advice on the UNGPs, but also more generally the increasing investor and societal demand for more responsible business conduct.

### Conclusion

In the United States, given the limited engagement of the legal profession with the UNGPs, more needs to be done to educate the legal community on the importance of the UNGPs and BHR more generally. Given their role in either formally regulating the legal profession or providing advocacy and a unified voice as well as enforcing ethical standards, bar associations have a major role to play in educating and mobilizing the legal profession around BHR. At a minimum, bar associations should actively encourage understanding and implementation of the UNGPs through conferences, regional initiatives, and training programs. In such cases, it is recommended that bar associations look to engage directly with their members by way of working groups or training programs, in order to encourage a deeper understanding and adherence to the standards established by the UNGPs. Given their positions of influence in legal and business communities, bar associations should consider endorsing the UNGPs.

It is clear that the global trend is moving towards the recognition and endorsement of the UNGPs and the standards enshrined therein. Responsible business rules and standards, such as the UNGPs, have renewed importance in the wake of the COVID-19 pandemic. Indeed, the pandemic has brought about a global economic crisis with rising unemployment and increased global poverty. Businesses' supply chains were primarily affected by both the economic and health impact of the pandemic. Cancellation of contracts have led to massive dismissal of the most vulnerable workers in the supply chains. In other cases, workers producing personal protective equipment ("PPE") and other goods necessary for the medical needs of the pandemic have been forced to work in

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<sup>102</sup> Supra note 94.

<sup>103</sup> Id.

unsanitary conditions with little labor protection.<sup>104</sup> As countries look to rebuild post Covid, there will and should be a renewed focus on putting in place conditions and protections to prevent these violations. Ensuring that businesses operate in a sustainable way that protect human rights of all those affected will be a central aspect of post-pandemic recovery plans.

Businesses will be looking to lawyers to help them navigate, not only the mandatory legislations and disclosures around HRDD and ESG at home and abroad, but also on soft law principles, such as the UNGPs. It is important that the legal profession stays ahead of these developments and be ready to advise with professionalism and competence on these issues.

Bar associations have a major role to play in bringing their members up to speed on this important and fast-growing area of the law. In doing so, bar associations across the United States should pursue increased cooperation and collaboration to benefit from early experiences of engagement with the UNGPs, such as the examples of the New York City Bar Association and the Vance Center where such initiatives already exist.

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<sup>104</sup> Supra note 64.