

EDITORIAL

Adding Human Rights Punch to the New *Lex Mercatoria*: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice

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In July 2015, the Fédération Internationale de Football Association, otherwise known as FIFA, announced that as a prominent part of its new reforms, it will ‘recognise the provisions of the UN Guiding Principles on Business and Human Rights (‘GPs’)¹ and will make it compulsory for both contractual partners and those within the supply chain to comply with these provisions’.²

Football is undisputedly the world’s top sport. According to its president, the FIFA ‘pyramid’ encompasses ‘209 national associations’, ‘300 million active participants’ in football and ‘1.6 billion people involved directly or indirectly in the game’.³ As a result of football’s vast global reach, this announcement will cause lawyers around the world to scramble to find out what the GPs mean as a practical matter to advise their clients properly. It is but one example among many of the global

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1 The GPs can be downloaded in all official UN languages at <www.ohchr.org/EN/PublicationsResources/Pages/ReferenceMaterial.aspx> accessed 24 September 2015. There are 31 GPs, each of which is followed by an official commentary, which clarifies its meaning and implications.

2 FIFA Executive Committee: FIFA Executive Committee sets presidential election for 26 February 2016 and fully supports roadmap for reform (FIFA.com) 20 Jul 2015 <<http://m.fifa.com/about-fifa/news/y=2015/m=7/news=fifa-executive-committee-sets-presidential-election-for-26-february-20-2666448.html>> accessed 24 September 2015.

3 Extraordinary FIFA Executive Committee Meeting—Press Conference (20 July 2015), video <<http://www.fifa.com/about-fifa/videos/y=2015/m=7/video=extraordinary-fifa-executive-committee-meeting-press-conference-2666423.html>> accessed 24 September 2015.

convergence on the GPs as the authoritative standard on business and human rights. On a deeper level, it shows that the GPs are adding significant human rights punch to private law of contracts, the new *lex mercatoria*, whose global reach and enforceability can affect workplace conditions, the welfare of communities and environmental practices worldwide.⁴

To understand why this is so, it is necessary to understand the origin of the GPs, their relationship to law, the important role that corporate lawyers and bar associations played in their development, the global convergence on the GPs as a universal standard and the challenges and opportunities that lawyers may encounter when advising business.

1. THE GPs ON BUSINESS AND HUMAN RIGHTS

Following 6 years of nearly 50 international consultations, research reports and pilot projects, the UN Human Rights Council unanimously endorsed the GPs. This was the first guidance that the Council and its predecessor body, the Commission on Human Rights, issued on the respective obligations of states and business on human rights. It was the first time that either body endorsed a normative text on any subject that they did not negotiate themselves, and the endorsement was unanimous.

The GPs are based on three interdependent pillars.

First, the state duty to protect human rights (which is based on existing international law), requires states to protect against human rights by business through appropriate law, policy, regulation and adjudication.

Secondly, the corporate responsibility to respect human rights (which is based on minimum global expectations of businesses everywhere), which requires that businesses will adopt and embed a high-level policy commitment to respect human rights, will develop and implement human rights due diligence processes and will have processes in place to remedy human rights harm that they have caused or contributed to.

Thirdly, the need for greater access to remedy requires states to provide access to effective remedy, both judicial and non-judicial, for those affected by business-related human rights abuse, and expects that businesses will establish or participate in effective operational-level grievance mechanisms to identify and address grievances early, before they escalate into human rights harms.

With regard to the second pillar—the corporate responsibility to respect human rights—the GPs do not impose new legal obligations on businesses. But they do not exist in a law-free zone either. The domestic laws of many states already require business to respect human rights in numerous areas, such as privacy, discrimination, workplace and public safety, labour and employment and

4 Ralph Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria' in Philip Alston (ed.) *Non-State Actors and Human Rights* (Oxford 2005).

environmental protection, to name a few. Indeed, compliance with the law is a bedrock requirement of the responsibility to respect human rights.

However, domestic law may not adequately protect all human rights, and in challenging contexts, may not be enforced or may even be in tension with internationally recognized human rights. In such cases, the responsibility to respect human rights exists over and above compliance with, and is not limited by, domestic law. In support, 71% of 853 senior executives worldwide recently surveyed by the Economist Intelligence Unit said that ‘their company’s responsibility to respect [human] rights goes beyond simple obedience to local law’.⁵

2. CONVERGENCE

The uptake of key elements of the GPs has been swift and widespread, compared to other complex and contested areas, such as climate change. According to UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, the GPs are ‘the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights’.⁶

The GPs are increasingly reflected in law and regulation, in public policy, in global, industry-specific or issue-specific standards, in the practice of companies and in the advocacy of civil society. Examples include: evolving human rights disclosure legislation and regulation (including the 2013 revisions to the UK Companies Act requiring listed companies to report on human rights issues where necessary to understand the company’s business,⁷ the 2015 UK Modern Slavery Act⁸ and the European Parliament’s 2014 directive requiring 6000 large public enterprises to report on their human rights performance⁹); government policy developments (including the issuance of National Action Plans on business and human rights,¹⁰ and endorsement by the G7 Leaders in 2015 of the GPs¹¹), international standard setting bodies [such as the OECD Guidelines for Multinational Enterprises¹² and the International Organization for

5 Economist Intelligence Unit, ‘The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights’ <<http://www.economistinsights.com/business-strategy/analysis/road-principles-practice>> accessed 24 September 2015.

6 Zeid Ra’ad Al Hussein, ‘Ethical Pursuit of Prosperity’ (23 March 2015) <<http://www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle>> accessed 24 September 2015.

7 The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 <www.legislation.gov.uk/ukdsi/2013/9780111540169/contents> accessed 24 September 2015.

8 See <<http://services.parliament.uk/bills/2014-15/modernslavery.html>> accessed 24 September 2015. See also, Shift, ‘Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights’ (July 2015) <<http://www.shiftproject.org/publication/mapping-modern-slavery-act-against-un-guiding-principles>> accessed 24 September 2015.

9 See <http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm> accessed 24 September 2015.

10 European Commission’s 2011 Communication on Corporate Social Responsibility <<http://ec.europa.eu/growth/industry/corporate-social-responsibility>> accessed 24 September 2015.

11 G-7 Leaders’ Declaration (8 June 2015) <<https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>> accessed 24 September 2015.

12 See <www.oecd.org/investment/mne/oecdguidelinesformultinationalenterprises.htm> accessed 24 September 2015.

Standardization's corporate social responsibility standard (ISO 26000)¹³]; public commitments by businesses to abide by the GPs¹⁴; and increasing judicial and public advocacy by civil society.¹⁵

3. CORPORATE LAWYERS

Corporate lawyers were closely involved in the shaping of the GPs, and are now involved in their practical implementation. Corporate lawyers were among the most consequential new players brought into the business and human rights debate, due to their access to and influence with the corporate C-Suite. Acting on a *pro bono* basis, lawyers—including law firms and bar associations [notably the International Bar Association (IBA)]—played a major role in the shaping of the concept of human rights due diligence, in developing the remedy pillar of the GPs and in identifying the interplay between corporate law and human rights in dozens of countries. The American Bar Association (ABA) formally endorsed the GPs in 2012. The ABA, the IBA, the UK Law Society and other bar associations, are actively exploring the implications of the GPs for the practice of law.

Within the corporate bar, general counsels are typically on the front line when companies seek advice on the GPs. They have become 'the go-to counselor for the CEO and the board on law, ethics, public policy, corporate citizenship, and country and geopolitical risk'.¹⁶ In some companies, the general counsel's office drives the company's human rights commitments. And even where it does not lead, 'it often plays a critical role in shaping implementation of human rights responsibilities'.¹⁷ As a result, where they may have been sceptical before, the general counsels of leading companies are now challenging their outside law firms to advise them on human rights proactively.¹⁸

In response, some major law firms have established business and human rights practice groups. Indeed, whether or not firms have done so, they are business enterprises within the meaning of the GPs, with their own independent responsibility to respect human rights, subject to their professional responsibilities as organizations of lawyers.

13 See <www.iso.org/iso/discovering_iso_26000.pdf> accessed 24 September 2015.

14 According to the Business and Human Rights Resource Centre, over 370 companies have adopted a formal company policy statement explicitly referring to human rights, as of 24 September 2015. 'Company Policy Statements on Human Rights' <<http://business-humanrights.org/en/company-policy-statements-on-human-rights>> accessed 24 September 2015.

15 For example, CNN, 'Lawsuit against Costco: Label Shrimp as Product of Slavery' (15 August 2015) <<http://money.cnn.com/2015/08/20/news/companies/costco-slavery-thai-shrimp/>> accessed 24 September 2015.

16 Ben Heineman, 'The Rise of the General Counsel' (*Harvard Business Review Blog Network*, 2012) <<https://hbr.org/2012/09/the-rise-of-the-general-counsel/>> accessed 24 September 2015.

17 Rachel Davis and David Kovick, 'Organizing the Human Rights Function within a Company', UN Global Compact Good Practice Note (2014) <www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/GoodPracticeNote_HumanRightsFunction.pdf> accessed 24 September 2015.

18 John Ruggie, 'Corporate Lawyers and the UN Guiding Principles' (2013) <www.shiftproject.org/article/corporate-lawyers-and-un-guiding-principles> accessed 24 September 2015.

4. DEMYSTIFYING HUMAN RIGHTS FOR CORPORATE LAWYERS

The challenge for corporate lawyers is to demystify the subject of human rights and understand how it applies to their legal advice as a practical matter. The UN Global Compact recently commissioned the London law firm of Linklaters to interview 40 general counsels of Global Compact members, who have committed publicly to respect human rights. It found that lawyers felt challenged in dealing with human rights issues, because ‘human rights issues can be hard, complex, messy, and carry significant reputational risk for an organization—many times without clear guidance on how to manage or navigate through them’.¹⁹

Lawyers who are more comfortable advising their clients only on hard law ought to be aware of the fact that the number of new multilateral treaties (hard law) deposited with the UN had been dropping precipitously for nearly two decades. Not a single one has been deposited since 2010, as states, for a variety of reasons, have turned to soft law instruments to deal with complex global problems.²⁰

Particularly in light of this development, it is important that lawyers act not only as expert technical legal advisers, but also as wise counsellors and as leaders.²¹ Acting as a wise counsellor, a lawyer should pay attention to global norms such as the GPs, even where they are not firmly embedded in hard law. When it endorsed the GPs in 2012, for example, the ABA relied its own code of professional responsibility, which requires lawyers to give independent and candid advice, including relevant advice on global norms like the GPs.²² Providing such, enhances the value of the legal advice.

The path towards demystifying the GPs for corporate lawyers, according to the UNGC/Linklaters report referenced earlier, is to:

recognize that human rights issues arise across a wide array of governance, commercial and legal areas and that a respect for human rights needs to be embedded across all aspects of a business . . . By focusing on the human rights aspects of things like supply chains, labor, taxation, data protection and privacy, transactional due diligence, M&A, dispute resolution and enterprise risk management, lawyers will see that human rights issues are just one additional aspect of the ‘familiar’ issues they are already responsible for managing.

19 Linklaters LLP, UN Global Compact, ‘Guide for General Counsel on Corporate Sustainability’ (2015) <<https://www.unglobalcompact.org/library/1351>> accessed 24 September 2015.

20 See <https://treaties.un.org/Pages/DB.aspx?path=DB/MTDSDG/page1_en.xml> accessed 24 September 2015. For a general discussion of why this is the case, see Joost Pauwelyn, Ramsel A Wessel and Jan Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 25 *Eur J Intl Law*.

21 Ben Heineman, William Lee and David William, ‘Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century’ (2014) Harvard Law School Center on the Legal Profession (*‘Lawyers as Citizens’*) <https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf> accessed 24 September 2015.

22 American Bar Association, Resolution No 109, 6 February 2012 and Report <www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.authcheckdam.pdf> accessed 24 September 2015.

5. APPLYING THE GPS TO THE PRIVATE LAW OF CONTRACTS

With this background in mind, we can now turn to the FIFA example that opened this essay. It is emblematic of the types of issues that corporate lawyers will face in advising clients on the new *lex mercatoria*. It begs a key practical question: how should a lawyer advise a company that expects its suppliers to abide by the GPs? The details are far beyond the scope of this essay, but some threshold points can be made. It might be tempting simply to negotiate contractual language in the contracts referencing the GPs and provide audit rights to ensure compliance. Requiring a supplier to adhere to human rights standards in a contract, and reserving the right to audit non-compliance are important tools, but they are only part of the solution.

First, supply chain contract terms specifying human rights standards ‘are often extensive pro-forma documents with boilerplate language that suppliers must sign in order to secure the business. Rarely does a dialogue between company and supplier take place around these supplier codes, and some company leaders question whether they are even read by suppliers’.²³

Secondly, independent research has shown that top-down compliance audits by buyers of their suppliers are not effective, on their own, in ensuring sustainable improvements in respect to workers’ human rights. At best, they serve as snapshots in time, and do not address the supplier’s capacity to actually address any ‘non-compliances’ or human rights issues that are found. Moreover, the threat of terminating the relationship for breach—rather than working with the supplier to build capacity—may simply encourage cheating on standards or the use of unauthorized subcontractors. As a result, leading companies are increasingly moving away from models based purely or largely on social compliance audits towards more collaborative and capacity-building approaches.²⁴

From this, it appears that a more holistic, less traditional, non-tick-box approach is required to fully understand the implications of the GPs for lawyers who negotiate contracts and structure transactions for their business clients. A good starting point is a report filed as an annex to the GPs, entitled ‘Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators’.²⁵ This report was based on extensive multi-stakeholder consultation, particularly with respect to the mining industry in Africa, and is expressly intended for lawyers and others who negotiate long-term investment contracts between investors and states.

While Investor–State contracts are unique (because states are parties and because the contracts have the potential for significant human rights impacts over many

23 Shift, ‘Respecting Human Rights Through Global Supply Chains’, Workshop Report No 2 (October 2012) <www.shiftproject.org/publication/respecting-human-rights-through-global-supply-chains-shift-workshop-report-no-2> accessed 24 September 2015.

24 Richard Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge, 2013).

25 See Prof. John G. Ruggie, Special Representative of the Secretary General ‘Principles for responsible contracts: integrating the management of human rights risks into State-investor contracts: guidance for negotiators,’ A/HRC/17/3/Add.3 (25 May 2011) <<http://www.shiftproject.org/publication/integrating-management-human-rights-risks-state-investor-contract-negotiations-guidance->> accessed 24 September 2015.

years), the guidance provided for them has relevance to a much broader array of contracts; ie the need to identify human rights risks arising from the contract; the need to build proper expectations regarding human rights performance prior to entering into the contract; negotiating language in the contract that properly incentivizes behaviour that respects human rights and disincentivizes behaviour that does not; and managing human rights performance effectively throughout the life of the contract. These principles can be applied to many different types of contracts that lawyers negotiate, such as supply chain contracts, M&A agreements, joint ventures, licensing and franchise agreements and the like.

6. LOOKING FORWARD

The incorporation of human rights principles into commercial practice has been slowly but steadily increasing in recent years. Now, with the global convergence on the GPs as the authoritative standard on business and human rights, this process has accelerated dramatically. It is at the beginning, and there are many details to be filled in. This may be uncomfortable for those lawyers who are unfamiliar with human rights or are uncomfortable providing advice in areas of mixed hard and soft law. But there is little real mystery, and corporate lawyers are more than up to the task of helping to sort out what the GPs mean for their legal practice and for the clients they advise.