

Business and Law of Obligations : The UN Guiding Principles on Business and Human Rights, the New Authoritative Standard for Companies

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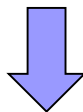
Association of International Business Lawyers
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PLAN

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1. The Context

- 2011 Unanimous endorsement by the UN Human Rights Council of the **Guiding Principles on Business and Human Rights (UN Guiding Principles or UNGPs)** (UN Doc. A/HRC/17/31 and A/HRC/RES/17/4)
=> principles approved by States, civil society and the business world



- 2011 **OECD Guidelines for Multinational Enterprises** amended (New Chapter IV consistent with the UNGPs)
- 2011 **EU Renewed Strategy for Corporate Social Responsibility** (“authoritative guidance is provided by (...) the UNGPs”)
- 2013 Resolution by the **Human Rights Council** to elaborate an **International Legally Binding Treaty on Business and Human Rights** (UN Doc. A/HRC/RES/26/9)

1. The Context

- 2013 **Thun Group of Banks** issued a **Discussion Paper** for Banks on Implications of Principles 16–21
- 2015 **British Modern Slavery Act**
- 2015 **Chinese Chamber of Commerce of Metals, Minerals & Chemicals Importers and Exporters** established **due diligence guidelines** based on the UNGPs
- 2016 **Council of Europe** issued **Recommendation CM/Rec(2016)3** to member States **on Human Rights and Business**
- 2017 **France's Law on the Corporate Duty of Vigilance**
- 2019 **National Action Plans** produced or in process in 45 States

1. The Context

In 2005, the UN Secretary-General appointed Prof. John Ruggie as Special Representative “*on the issue of human rights and transnational corporations and other business enterprises*”

- The main mandate was to **make recommendations** on the **respective roles and responsibilities of States and enterprises in the field of human rights**, and in particular to “*identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises*” (UN Commission on Human Rights, Resolution 2005/69, § 1a)
- The mandate was **not** about **the creation of new legal standards** but about **surveying different existing legal rules and practices** in order to provide concrete guidance and a course of action based on **the practice followed** (UN document A/HRC/17/31, § 4, § 11)

2. What is expected ?

3 Pillars Framework:

1. **State** Duty to **Protect** (UNGPs 1 – 10)

- Policies
- Regulation
- Adjudication

2. **Corporate** Responsibility to **Respect** (UNGPs 11 – 24)

- Act with due diligence to avoid infringement
- Address adverse impacts on human rights

3. **Victims'** access to **Remedy** (UNGPs 25 – 31)

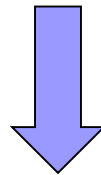
- Effective access for victims
- Judicial and non-judicial

2. What is expected from Corporations ?

Guiding Principle 15 (b) :

In order to meet their **responsibility to respect human rights**, **business enterprises** should have in place **policies and processes appropriate to their size and circumstances**, including:

A human rights **due diligence process** to **identify, prevent, mitigate** and **account for how they address** their impacts on human rights



Process : Principles 17 to 21

2. What is expected from Corporations ?

Human Rights due diligence involves **4 core components**:

1. **Identifying and assessing actual or potential adverse human rights impacts** that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
2. **Integrating findings from impact assessments across relevant company processes** and taking appropriate action according to its involvement in the impact;
3. **Tracking the effectiveness of measures** and processes to address adverse human rights impacts in order to know if they are working;
4. **Communicating on how impacts are being addressed** and showing stakeholders –in particular affected stakeholders– that there are adequate policies and processes in place.

2. What is expected from Corporations ?

Corporations should conduct **due diligence to identify** (Principle 17):

1. Adverse human rights impacts they might **cause** through their **own activities**;
2. Adverse human rights impacts they might **contribute** through their **own activities**

The UNGP definition of “contributing” is related to, although distinct from, the legal notion of complicity. Contributing to an adverse human rights impact has a **broader sense than the legal definition of complicity** (Article 25 Swiss Criminal Code / Article 50 (1) Swiss Code of Obligations)

3. Adverse human rights impacts they might be **directly linked** to their operations, products or services **through their business relationships**

2. What is expected from Corporations ?

■ **Direct linkage** of a Corporation (Principle 13)

- Business enterprises may be involved with **adverse human rights impacts** - which **include both actions and omissions** - if two test conditions are met :
 1. Impacts are directly linked to the Corporation's **operations, services, or products**;
 2. The Corporation is **connected** to the entity committing the abuses **through its business relationships**

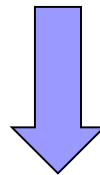
Example: A Corporation provides funds or services to a company which finances certain people, for example by buying or trading goods from suppliers in a conflict area, and the proceeds of these goods sales are alleged to fund the activities of armed groups involved in human rights abuses in the said conflict area.

3. The Risks

1. First Risk Assessment : Impacted People

2. Reputation

- Adverse human rights impacts that the Corporation “*may **cause** or **contribute** to through its own activities, or which may be **directly linked** to its operations, products or services by its business relationships*”



Broader than complicity => possible scandals / media or social campaigns

- Even if Civil and/or Criminal Proceedings won => negative impact

3. The Risks

3. Civil Liability (Article 97 Swiss Code of Obligations (CO) / Article 41 CO + Article 50-51 CO)

- **1) Damage 2) Breach of Contract or Law 3) Causal Link 4) Fault**
- **Directors / Managers and the Corporation** : Article 55 of the Swiss Civil Code states that “*The governing bodies express the will of the legal entity (1). They bind the legal entity by concluding transactions and by their other actions (2). The governing officers are also personally liable for their wrongful acts (3)*”.

3. The Risks

4. Criminal Liability (Article 102 (1) + (2) Swiss Criminal Code (SCC))

- **Individuals (Directors / Managers)** : International and National Levels
(Article 28 (b) Rome Statute ; Article 264k SCC)
- **Individuals and the Corporation** : in connection with a limited number of offences (including money-laundering, corruption in the public or private sector, criminal organisation and financing terrorism), a **corporation's** criminal liability may also be engaged irrespective of the criminal liability of the **natural persons** “(...) *provided the undertaking is responsible for failing to take **all the reasonable organisational measures** that were required in order to prevent such an offence*” (Article 102 (2) SCC)
- Swiss Federal Supreme Court's Decision: 6B_124/2016 of 11 October 2016

3. The Risks

5. Denunciation / Complaint from States, NGOs, other entities

- To Administrative Authorities and/or International or National Criminal Authorities

6. Foreign Jurisdictions in application of International or National Law

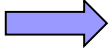
- Remember :
- Holocaust Civil Cases in the US by the Holocaust Survivors against Swiss Banks
 - Criminal Case in Spain against a Bank for its involvement with the Pinochet Regime

3. The Risks

Tools are available:

- Corporate Social Responsibility Risk Check (www.mvorisicochecker.nl/en)
- Corporate Human Rights Benchmark (www.corporatebenchmark.org)
- Guide to Corporate Human Rights Impact Assessment Tools (<https://www.commdev.org>)
- OECD Due Diligence Guidance for Responsible Business Conduct (<https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>)

4. The UN Guiding Principles: Binding or Non-Binding ?

- United Nations : “*In law, “due diligence” is a standard of care. **The Guiding Principles provide a global standard for human rights due diligence.***” (A/HRC/32/19/Add.1, para. 22)
- Council of Europe : “*the **current globally agreed baseline** in the field of business and human rights*” (Recommandation CM/Rec(2016)3 of 2 March 2016, para. 1)
 Expectations of legislative or other measures as may be necessary **to ensure civil and criminal liabilities** based on the GPs (CM(2016)18-addfinal of 2 March 2016, para. 54 ff. and 67 ff.)
- Swiss Federal Council : “*The **Guiding Principles** establish for the first time **an internationally recognized framework** on how **to oblige industrial companies to respect human rights** in the State where they are active and to ensure that victims of violations are effectively compensated*” (Rapport de droit comparé, Mécanismes de diligence en matière de droits de l’homme et d’environnement en rapport avec les activités d’entreprises suisses à l’étranger of 2 May 2014, p.3)
- The Chinese Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC), established due diligence guidelines based on the GPs

4. The UN Guiding Principles: Binding or Non-Binding ?

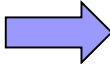
- Swiss Federal Supreme Court (ATF 140 I 125, § 3.2 ; ATF 141 I 141, § 6.3.3):

*“The European Prison Rules – and a fortiori their commentary – are mere **guidelines** for the member states of the Council of Europe. However, as a reflection of the legal traditions common to these States, the Federal Supreme Court has long considered them **in the realization of personal freedom and other fundamental rights guaranteed** by the Cst. and by the ECHR. They are referred to as “penitentiary detention code” or “**soft law**”, nevertheless **relatively binding for the authorities**. Unlike the relevant federal or cantonal law, this corpus of legal norms has the **merit of specifying the desirable organisation**, equipment, cell size or surface area that every prisoner is entitled inside the latter”*

4. The UN Guiding Principles: Binding or Non-Binding ?

- **Tort Law** - ATF 126 III 113, § 2 b) :

*“In order to determine concretely what are the duties of prudence, can be taken into account rules enacted to ensure security and avoid accidents. In the absence of legal or regulatory provisions, **it is also possible to refer to analogous rules from private or semi-public associations, where they are generally accepted.**”*

 see above how the GPs have acquired a general recognition as a standard of reference with respect of due diligence with regard to Human Rights

- **Contract Law** - Article 19 (1) Swiss Code of Obligations :

*“The **terms of a contract may be freely determined within the limits of the law**”*

4. The UN Guiding Principles: Binding or Non-Binding ?

- **Contract Law – Implementation of CSR**

- Implementation of the CSR approach by the Company internally:
adoption of a code of conduct (with or without ISO type label)
- Communication of the CSR approach externally, including through a website
Example: TOTAL
(<https://www.sustainable-performance.total.com/fr/nos-enjeux/ethique/droits-de-lhomme>)

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4. The UN Guiding Principles: Binding or Non-Binding ?

The screenshot shows a web browser window with the URL sustainable-performance.total.com/fr/nos-enjeux/ethique/droits-de-lhomme. The page header includes the Total logo and navigation tabs: NOTRE VISION, NOS ENJEUX (highlighted), REPORTING, and INDICATEURS. A search bar is located in the top right corner.

The main content area contains the following text:

Total a publié en 2016 un [premier document d'information Droits de l'homme](#), conforme au Guide de Reporting des Principes directeurs des Nations Unies, devenant la première société du secteur pétrolier et gazier à le faire. [Une version mise à jour de ce document est parue en 2018.](#)

Le Forum des Nations Unies sur les entreprises et les droits de l'homme 2018 a invité le Président-directeur général à participer à un panel de hauts dirigeants d'entreprises lors de la séance plénière d'ouverture le 26 novembre 2018. Cette opportunité a permis à Total d'exposer la façon dont le Groupe intègre le respect des droits de l'homme dans ses opérations et sa chaîne de valeur et met en pratique la diligence raisonnable en matière de droits de l'homme, ainsi que de rappeler les défis à relever.

La démarche de Total en matière de respect des droits de l'homme s'appuie sur des engagements écrits, une organisation dédiée, un programme de sensibilisation et de formation et des dispositifs d'évaluation et de suivi pour mesurer l'efficacité des actions du Groupe.

DES ENGAGEMENTS ÉCRITS

Total s'engage à respecter les droits de l'homme internationalement reconnus partout où le Groupe exerce ses activités, en particulier la Déclaration universelle des droits de l'homme, les conventions fondamentales de l'Organisation internationale du travail, les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme et les [Principes volontaires sur la Sécurité et les Droits de l'homme \(VPSHR\)](#).

A red button labeled 'Télécharger' is visible on the right side of the page.

The Windows taskbar at the bottom shows the search bar with the text 'Taper ici pour rechercher', several application icons, and the system tray with the time 23:34 and date 19.11.2019.

5. Case study

- **France** : The Franco-Swiss **parent Company LafargeHolcim** along **with several former of its Directors** indicted for financing terrorism, violation of embargo and endangering the life of another.
- **Sudan**: Oil Companies May Be Complicit in Atrocities in South Sudan.
“Sweden began the prosecution of the chairman and chief executive officer of a Swedish oil company, Lundin, in October 2018 for crimes against civilians. Those arose from military operations in the late 1990s and early 2000s that were intended to clear the area for oil production and that involved widespread abuses”
New York Times reports (<https://www.nytimes.com/2019/02/20/world/africa/south-sudan-oil-war-crimes.html>)

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Thank you !



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