The General Counsel as Partner in Shaping a Corporate Culture That Respects Human Rights

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Harvard Kennedy School Professor John Ruggie, author of the UN Guiding Principles on Business Rights (‘UNGPs’), has written that corporate lawyers were among the most consequential players that he invited into the business and human rights debate, due to their influence with the corporate C-Suite. Here, I aim to explore the professional and organizational implications of the UNGPs for the general counsel of companies that have committed to respect human rights.

A commitment to respect human rights must be embedded into the company’s culture. Culture consists of the authentic norms and values of a company. When it comes to human rights, the elements of such a culture include respect for and empathy with all people, openness and learning, empowerment with responsibility, and coherence. Acting as technical legal experts, wise counselors, and leaders, the general counsel can partner with senior executive management to drive those values into the culture, and make them how things are done at a company.

In this note, I offer several suggestions on how this can be done

First, general counsel should understand what human rights due diligence means, and prepare their companies to comply with the increasing law and regulation that mandates compliance it.

Second, general counsel should work with senior management to respond to the increasing demands of investors for evidence that companies are effectively identifying are addressing their human rights risks, as witnessed by the rapidly increasing use by investors of ESG factors in their decisions.

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1 This paper reflects my personal views only, and not necessarily those of any organization or person with whom I am or have been affiliated, which are listed below only for identification. Since 2008, I have acted as senior legal counsel to Harvard Kennedy School Professor John Ruggie, author of the UN Guiding Principles on Business and Human Rights (UNGPs) during his UN mandate; general counsel and senior advisor to Shift (the leading center of expertise on the UNGPs); Senior Program Fellow of the Corporate Responsibility Initiative at the Harvard Kennedy School of Government; and former chair of the IBA’s Business and Human Rights Working Group. I am grateful for the thoughtful insights of Malcolm Rogge at Harvard Law School regarding the devolution of the business responsibility to respect human rights to corporate counsel.


Third, general counsel can and should work as members of the senior executive team to develop, review, monitor, and improve the necessary governance processes and procedures to drive its commitment to respect human rights into its culture.

Finally, general counsel can and should use their authority as leaders of the legal function to champion the company’s commitment to respect human rights.

A. THE BACKGROUND, CONTENT, AND UPTAKE OF THE UNGPS

The logical starting point is the 2011 UNGPs, which constitute the authoritative global standard on business and human rights. They reflect a strong consensus by states, businesses, and civil society on how to address business involvement in human rights abuse. As a result of the rapid increase in global trade since the 1990s, the increase in global trade has cut off millions of from the benefits of development, and suffered human rights harm. This suffering has occurred on the way down, too; the precipitous free fall of the global economy due to the COVID-19 pandemic has resulted in the unemployment of millions of supply chain workers worldwide, and will dramatically increase the level of global poverty.

The UNGPs were drafted by Professor John Ruggie, as the Special Representative to the UN Secretary General on Business and Human Rights, following a six-year period of multistakeholder consultations, research, and pilot projects. The resulting consensus among States, business, and civil society led to their unanimous endorsement in 2011 by the UN Human Rights Council, and their subsequent wide global uptake.

1. Content of the UNGPs

The UNGPs consist of 31 principles and integrated commentary that operationalize Ruggie’s “Protect, Respect, and Remedy” framework, which are based on three mutually supporting pillars: (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) the need for greater access to remedy.

Pillar One: The state duty to respect human rights from abuse by third parties, including businesses. (UNGPs 1-10)

States discharge this legal duty, imposed by international human rights laws, through effective policies, regulation, and adjudication. The UNGPs do not create new legal obligations for states. Rather, they recognize existing obligations that international human rights laws impose on States to protect people from human rights harms committed by third parties, including businesses.

Pillar Two: The corporate responsibility to respect human rights (UNGPs 11-24)

The responsibility to respect human rights applies to all business enterprises, regardless of size, sector, location, and organizational structure. It means not infringing on internationally recognized human rights both in a business’s own operations and in its business relationships,

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including in its entire value chain. This responsibility is not by itself a legal duty and is not limited by local law. However, it does not exist in a law free zone. It is not a voluntary sign-up standard.

To meet this responsibility, businesses are expected to:

- publicize a high-level commitment to respect human and embed it in the organization (i.e., engrain the commitment in its culture, as the way things are done);
- conduct human rights due diligence; and
- remedy harm that they caused or contributed to.

Companies are expected to conduct human rights due diligence from the perspective of the affected stakeholder in order to determine the human rights risks of a company’s operations and business relationships.

Human rights due diligence is an ongoing process with four stages, in which businesses should:

- identify their risks of harm to people (from their perspective);
- integrate their findings into their businesses operations and their responses to the risks;
- track their human rights performance; and
- be prepared to communicate their performance as appropriate (for example, to persons who are at risk).

**Pillar Three: The need for greater access to remedy by victims (UNGPs 25-31)**

States have the primary obligation under international human rights law to ensure that those who are affected by human rights abuses in their territory and/or jurisdiction have access to effective remedy, both judicial and non-judicial.

As part of their responsibility to respect human rights, businesses are expected to remedy human rights impacts that they caused or contributed to, in proportion to their contribution. Businesses should also establish or participate in operational level grievance mechanisms in order to resolve grievances quickly and serve as a feedback loop.

### 2. Uptake of the UNGPs

The uptake of the UNGPs has been rapid and broad, and has spread far beyond their UN origins. The UNGPs are embedded in global multistakeholder norms, global, national and regional governmental policy, mandatory human rights due diligence laws, reporting and disclosure laws and regulations, bilateral treaty arbitration decisions, the private law of contracts, the practices and policies of leading companies and business organizations, nonjudicial dispute resolution mechanisms, the skyrocketing growth in the use of Environmental, Social, and Governance (ESG) factors by investors, and the advocacy of civil society.  

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Mandatory Due Diligence

In particular, human rights due diligence under the UNGPs is rapidly concretizing into a legal duty of care owed by business to affected stakeholders. On April 29, 2020, the European Commissioner for Justice announced its plan to legislate mandatory corporate environmental and human rights due diligence in the EU in line with the UNGPs. The EU is the world’s largest trading bloc. The prospect of an EU-wide legislation mandating similar human rights due diligence is therefore highly consequential for companies that do business with and in the EU. France and the Netherlands have already enacted their own mandatory human rights due diligence statutes. Similar laws are also under consideration by other EU countries.

In addition, in a 2020 common law case in Canada, the Supreme Court of British Colombia held that customary international law was a part of Canadian common law, and therefore applied to allegations that a Canadian mining company engaged in crimes against humanity, forced labor, and torture at its mine in Eritrea.

In the U.S., a plaintiff class of child cobalt miners in the Democratic Republic of the Congo allegedly forced to work in highly dangerous conditions at less than subsistence wages have imported human rights due diligence into a statutory claim under the U.S. Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595 et. seq., against major multinational electronics and automobile companies.

Notre Dame Law School Professor Emeritus Doug Cassel has argued that the time for judicial recognition of a common law duty of care to exercise human rights due diligence is ripe, since the basic elements of such a duty—foreseeability, proximity, fairness, and public policy— are in place. This also has implications for claims against home state parent companies by local residents claiming that the parent had a duty of care to exercise human rights due diligence to protect them from human rights violations by their host state subsidiaries. No common law cases have so ruled explicitly, but they have come close in the U.K. and Canada.

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8 The statute subjects defendants to civil liability if they participated in a venture, knowingly received anything of value from the venture, and ‘knew, or should have known’, that the venture had engaged in forced labor. Plaintiffs allege that defendants failure to exercise human rights due diligence are designed to support the claim that defendants knew or should have known that their products had been manufactured with child slave labor. See Class Action Complaint, Jane Doe 1, etc. v. Apple Inc 1, etc., U.S. District Court for the District of Columbia, 16 December 2019, available at https://www.classaction.org/media/doe-et-al-v-apple-inc-et-al_1.pdf, accessed March 11, 2020.


10 See discussion in Beyond CSR, supra, n. 5, pp. 28-29, regarding the cases of Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents), [2019] UKSC 20 (April 2019), available at
As a result, prudent general counsel will want to ensure that their companies are prepared to comply with existing legal requirements to conduct human rights due diligence, and as a matter of future proofing and resilience, to comply with such requirements that are likely to be imposed later.

b. Investor Interest in predicting human rights performance

In addition to the growth of mandatory due diligence law, general counsel should pay close attention to growing investor interest in a company’s human rights performance, which is ultimately grounded in the company’s culture.

As noted earlier, Environmental, Social, and Governance (ESG) factors, have become increasingly important to investors and have accounted for an exponential growth of investment funds that use ESG criteria. The COVID-19 pandemic has not slowed this down, but is seen as an ‘accelerator’ of the growth of ESG investment. This underscores the importance of leading indicators that predict future ESG performance.

The ‘S’, or social impact, factor in ESG measures ‘how well a company manages its risks to people connected with its core business’ and is therefore ‘heavily populated with labour and human rights elements’. The UNGPs have therefore become critically important to investors as an indicator of a company’s social performance as a component of ESG.

The interest by investors in ESG factors has intensified efforts to identify accurate predictors of a company’s future human rights performance, otherwise known as leading indicators.

Of course, assessments of human rights harm that have already occurred are accurate; such as buyer involvement in the tragic 2014 Rana Plaza building collapse that killed over 1,000


13 Sustainable Investing, supra n. 11.

14 Id.

garment supply chain workers. But this is a lagging indicator of human rights harm, not a leading indicator.

Unfortunately, most leading indicators of human rights performance currently in use are poorly predictive metrics, such as the number of hours of human rights training given to staff, the number of human rights clauses in contracts, or number of social audits at operational sites and supplier factories. focused on labor issues.\textsuperscript{16} Moreover, the majority of buyers don’t audit below their first tier, even though human rights problems may originate at more remote tiers.\textsuperscript{17}

Other leading indicators in use consist of internal governance mechanisms to ensure respect for human rights—such as codes of conduct, organizational structures, roles, responsibilities and incentives. These are very important, but by themselves, they are formal and aspirational. To be effective, they must be engrained in the company’s culture.

B. CORPORATE CULTURE

The foundational leading indicator of future human rights performance is the organization’s culture.\textsuperscript{18} The UNGPs require a embedding the organization’s public commitment to respect human rights into the organization’s culture as the ‘way things are done’.\textsuperscript{19} Culture consists of the company’s authentic norms and values. It is what the organization really believes and how it really acts. It not aspirational, but actual. Since ‘culture eats strategy for breakfast’, it is a top priority of corporate leadership.\textsuperscript{20} Culture has both organizational and individual dimensions: the organization’s actual goals and strategies for achieving them, and how individual members of the organization (including general counsel and their staff) actually behave. Culture can’t be engineered, but it can be shaped with the right leadership and governance.

Culture has particular relevance to respecting human rights. In workplace safety, for example, a culture of safety is the canary in the coal mine. If it is missing, people will be injured at work notwithstanding the company’s stated goals and formal governance systems.\textsuperscript{21}

The norms and values of a rights respecting culture can be posited as: (1) respect for the dignity of all individuals and empathy with them; (2) openness and learning; (3) individual empowerment and learning; and (4) coherence, which are elaborated as follows:\textsuperscript{22}

\textsuperscript{16} Performance Metrics, supra n. 15, p. 3.

\textsuperscript{17} Id.


\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Leading Indicators, supra, n. 15

\textsuperscript{22} Corporate Culture, supra n. 18. These four norms and values are based on literature review in the field of business and human rights and other related fields with more mature evaluation methodologies (such as safety
1. **Respect for the dignity of all individuals and empathy with them.**

The COVID-19 pandemic, with its dramatic devastation of the health and economic status of millions around the world, has highlighted the need for empathy-driven models of company leadership.\(^{23}\) ‘Respect means treating individuals with dignity and appreciating that they all have inherent human rights, whatever their “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Empathy is the cognitive ability to stand in another’s shoes and understand how they feel.’\(^{24}\)

An organization with a rights respecting culture knows and cares about its involvement in human rights harm, including to remote individuals and communities. Respect and empathy are particularly critical values for respecting human rights in a company with globalized operations and interests, where remoteness from the person being harmed may desensitize senior corporate management even to gross human rights abuses in their supply chain. The UNGPs expect that companies will assess and address human rights risks from the perspective of stakeholders. That cannot be done without respect and empathy as a core corporate value.\(^{25}\)

General counsel can support this value by refraining from an exclusively winner-takes-all, liability-avoiding approach to legal practice, without regard to stakeholder impact.

2. **Openness and learning.**

An organization that respects human rights seeks out to identify and address human rights issues and learn from its mistakes. This is not unique to human rights, but it permeates each element of the corporate responsibility to respect human rights. It expects that the company will (a) actively search for human rights problems that it isn’t already aware of (e.g., abuse in the remote tiers of its supply chain); (b) accept responsibility when things go wrong (e.g., providing remedy when it causes or contributes to abuse; and (c) be transparent about problems, even when they are not fixed.

General counsel can support this value by ensuring that legal privilege is not overused in a way that chills internal and external discussion of human rights issues in order to solve them and build trust.

3. **Individual empowerment and responsibility**

Those who work in an organization that respects human rights are motivated to raise and address human rights issues responsibly. This includes lawyers. Even if they don’t have explicit

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and business ethics), plus interviews that were conducted with over a dozen experts and executives in these fields. Id., p 3.


\(^{24}\) Corporate Culture, supra, n 18, p. 11.

\(^{25}\) Id.
human rights functions, they have the ability to tell right from wrong, and should speak up; e.g., when the company’s products and services pose a risk of severe harm to people.

General counsel can support this value by reviewing, challenging, and improving the governance processes that encourages feedback on the company’s human rights performance, and learning from mistakes.

4. Coherence

A rights-respecting organization respects human rights notwithstanding inevitable tensions with other business goals. Doing so reinforces the authenticity of the company’s public commitment to respect human rights. It expects that the company will harmonize financial, performance, and human rights goals, and that the company will behave consistently from the top down and across organizational silos. Otherwise, internal and external stakeholders will not believe that the company truly respects human rights.

Corporate lawyers can support this value by ensuring that in-house and external lawyers act consistently with the company’ commitment to respect human rights.

C. The Three Roles of General counsel: technical legal experts, wise counselors and leaders

Drawing from the 2014 report of the Harvard Law School Center for the Legal Profession, Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century,26 the International Bar Association (IBA) has recognized27 that general counsel act in three capacities when it comes to human rights: technical legal experts; wise counselors, and leaders. Awareness of these three roles helps to identify the areas where general counsel can support the company’s commitment to respect human rights.

1. Technical legal experts

A technical legal expert advises companies on what it can and cannot do legally. In light of the increasing reflection and incorporation of human rights due diligence into hard law, understanding what respecting human rights means for the business is becoming a matter of basic competence in advising the business on present and future legal compliance.28 This

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includes not only compliance with existing law, but also with what the law is likely to be in the future. Given the arc of the uptake of the UNGPs since their endorsement, it is likely that there will be more, not less, law requiring alignment with the UNGPs, including human right due diligence.

Moreover, beyond their reflection in mandatory due diligence laws, the UNGPs are also reflected in legal requirements arising from reporting and disclosure obligations, business to business transactions (via incorporation of the UNGPs into contracts), project finance documents, bilateral treaty obligations, and the like. All of these matters require the close attention of general counsel.

2. Wise counselors

As a wise counselor, general counsel work with executive management to decide what is right or fair in the businesses sustainable interest, including whether to follow soft law norms, such as the UNGPs, even where they are not reflected in hard law. This is because soft law can have a hard bite.

In his well-known law review article on legal independence, Stanford Law School Professor Robert Gordon has written that even when business lawyers advise clients on hard law compliance, it is almost impossible for them to avoid making judgements about how client actions will affect the public interest; e.g., whether a technically legal course of action that causes harm to stakeholders will nevertheless engender public condemnation. This type of lawyering is not at all new. For example, Gordon referred to former U.S. Supreme Court Justice Louis Brandeis, who as a private business lawyer a century ago tried to identify sustainable solutions to resolve management-labor strife, which addressed the needs of all parties to the conflict, including stakeholders.

The American Bar Association’s Model Rule of Professional Conduct 2.01 recognizes the value of such a stakeholder-aware approach to corporate legal practice. Rule 2.01 provides that in order to discharge their role as independent counsel, lawyers should advise their clients on relevant context, including the impact of a client’s proposed action’s impact on stakeholders. It observes, ‘Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant.’ (emphasis added added).

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29 Beyond CSR, supra, n. 5.


31 Gordon, supra, n. 30.

32 Comment on ABA Model Rule of Professional Conduct 2.01, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_cond
As a result, international, regional, and national bar associations recognize that the UNGPs and related soft law human rights norms are relevant to corporate law, and have urged their members to implement the UNGPs into legal practice.\textsuperscript{33} For example, in 2018, the European Bars Federation/Fédération des Barreaux d’Europe (FBE), recommended that its 250 European bar association members representing 800,000 lawyers make far-reaching and proactive efforts to embed the UNGPs into all areas of legal practice, including considering amending professional codes of conduct for lawyers.\textsuperscript{34} One of FBE’s associations, the Geneva Bar Associations, amended its professional code of conduct to provide that lawyers should do their best to mitigate the risks of human rights abuses by corporate clients by promoting their inclusion up front in the early stages of their advice or when helping to prepare agreements or contracts.\textsuperscript{35}

3. Lawyers as leaders

General counsel act not only as technical experts and wise counselors, but also as leaders. They often have significant decision-making authority of their own in their organization, particularly in the manner in which legal services are provided. This plays out in several ways when it comes to respecting human rights.

First, general counsel should ensure that the legal function plays the lead role helping the company to avoid involving in the managing the risk of company involvement in gross human rights abuses, such as genocide, slavery, torture, and rape, whether or not the local jurisdiction prosecutes them. (UNGP 23(c)). This should be deemed a matter of legal compliance within the company, even if national law does not cover it.


Second, even where the legal department does not take the lead, it should partner with senior management in evaluating and managing the company’s human rights risks, legal and non-legal. The general counsel would naturally be involved in: (a) reviewing and challenging the company’s business model for red flags of human rights risks; (b) designing and implementing appropriate governance systems designed to address human rights risks and drive respect for human rights into the organization’s culture; (c) ensuring the public disclosure of salient human rights risks; (d) establishing and measuring human rights performance targets and outcomes; and (e) providing for assurance of human rights disclosures.  

Finally, as a member of the executive management team, general counsel should champion the norms and values of a corporate culture that respects human by ensuring that legal services are provided with respect for human rights. Malcolm Rogge notes that a practical matter, the exercise of the responsibility to respect human rights ultimately devolves to natural persons, including prominently the corporate counsel, who is charged both with protecting the company from legal liability and shaping its ethical culture, ‘including its disposition toward the vexing question of human rights responsibility.’

D. CHAMPIONING RIGHTS RESPECTING BEHAVIOR

Championing rights-respecting behavior, means among things, ensuring that the legal advice and services provided to the organization support, and do not undermine, the company’s commitment to respect human rights. This is not always the case, however. The UN Office of the High Commissioner on Human Rights in 2018, in its report to the UN General Assembly, has observed a tension between the business lawyer’s role as wise counselor and a narrowly technical approach to avoiding legal liability:

Business lawyers — both in-house counsel and external firms — have a unique position for shaping the path an enterprise may take. Often, they are seen as one of the main obstacles to adopting effective human rights due diligence, with a traditional narrow focus on legal risk. However, some bar associations, large law firms and in-house counsel endorse the Guiding Principles and acknowledge that human rights due diligence should be a core part of the advice provided by a wise counsellor.

A narrow approach to corporate legal practice that prioritizes legal liability avoidance over respect for human rights undermines the norms and values of a rights respecting culture. In

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37 Ben W. Heineman, Jr., Inside Counsel Revolution, (ABA 2016), Chapter 4 (The Cultural Imperative).

38 Rogge, supra, n 30, pp. 2 and 5.

Malcolm Rogge’s words, “when it comes to human rights, focusing narrowly on avoiding liability misses the forest for the trees.”  

An exclusive focus on legal liability avoidance stems from the stakeholder primacy model of corporate governance. Even before the COVID-19 pandemic, the doctrine of stakeholder primacy has been criticized and challenged. The pandemic has underscored the inherent weakness of a governance model that treats stakeholder impacts as an afterthought. To quote a recent blog by Helle Bank Jorgeson and Tom Cummings:

The COVID-19 virus has been a wake-up call that reveals the consequences of our constant pursuit of ever-cheaper products and services, global just-in-time supply chains, share buybacks and cutting CAPEX to reward short-term shareholder dividends that are deemed to be added-value.

Suddenly we see the blind spots. Our very lean global supply chains fail when all the supply comes from one region under lockdown. We witness how changing the configuration and software of an airplane for short-term profit sacrifices redundancy and safety. Then we notice when that same company is first in line for corporate bailouts. Trust is a bank account that is filled up by long-term trustworthiness. Our limited focus on shareholder value has drained our loyalty account with other stakeholders, just at the moment we most need their trust.

As a practical matter, general counsel inevitably must take stakeholder impacts into account in their decision-making when it comes to human rights. Doing so is necessary not only to meet increased legal requirements arising from the uptake of the UNGPs, but also the expectations of investors and other external stakeholders as demonstrated by the rise in ESG investing. Therefore, treating adverse impacts on stakeholders as collateral damage in a winner-takes-all legal fight is bound to have unpleasant consequences for the shareholders. Severe harm to stakeholders and severe harm to shareholders tend to converge in the mid to long term.

E. LEVERAGE POINTS FOR SUPPORTING A RIGHTS-RESPECTING CULTURE

Since general counsel can and should exercise their roles as technical experts, wise counselors, and leaders to champion the company’s commitment to respect human rights and engrain it in the company’s culture, the next question is how can this be done?

One answer is to identify and use key points of leverage within the company to model rights-respecting behavior in the delivery of legal services. As noted at the outset, in exercising human rights due diligence, businesses are expected to build or exercise leverage with others.

40 Rogge, supra, n. 30, p. 5.
to avoid involvement of human rights harm. Leverage means influencing others. Leverage is normally thought of in terms of influencing external parties (suppliers, governments, etc.), but leverage can be internal too.

Set out below are suggestions of four leverage points which the general counsel can use to model behavior and influence the organization: (1) seeing human rights risks thorough the eyes of the stakeholder; (2) fostering an open and learning culture; (3) ensuring that external representatives act consistently with the company’s commitment to respect human rights; and (4) structuring contracts that respecting human rights (using procurement contracts as a model).

**Leverage Point No. 1. Seeing human rights risks through the eyes of the stakeholder.**

At the core of human rights due diligence is the need to see human rights risks through the eyes of the stakeholder. As technical legal experts and wise counselors, general counsel can and should understand the unique features of human rights due diligence, and not conflate it with business due diligence. The processes have similarities, but they are significantly different. Professor Ruggie explained that businesses typically view due diligence in 'in strictly transactional terms—what an investor or buyer does to assess a target asset or venture.'

Instead, he used the term more broadly, as a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks. In his view, without conducting human rights due diligence from the perspective of the stakeholder, “companies can neither know nor show that they respect human rights, and therefore cannot credibly claim that they do.”

It is traditional for business lawyers to look at risks mainly through a materiality lens, defined in terms of commercial, legal, and financial risks to business that rise above a risk-adjusted quantified dollar threshold. However, this narrow focus can lead to an unfortunate toleration by the company of its involvement in severe human rights risks, and an underreporting of its real human rights risk profile. Examples would be the categorization of wrongful death claims as non-material because they are covered by liability insurance, or wrongful death claims that arise in countries where victims do not have adequate access to remedy. However, in the end, company involvement in human rights harm, particularly severe harm, is not sustainable to the preservation and growth of shareholder value.

**Leverage Point No. 2. Fostering an open and learning culture**

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The increasing absorption into hard law of the UNGPs means that corporate involvement in human rights harm may give rise to legal liability. This speaks to the role of the general counsel as technical legal expert. Companies should be encouraged to communicate in confidence with their legal counsel to evaluate their compliance with new human rights legal requirements, both in the context of structuring transactions or analyzing and defending claims asserted against the company. Companies have an interest in protecting the “legitimate requirements of commercial confidentiality”. (UNGP 17). This includes confidential attorney client communications. Such communications need not be disclosed to affected stakeholders.

However, maintaining the confidentiality of attorney client communications is not a certain thing, as shown by the hacking of privileged documents from thousands of business clients from an international law firm in the Panama Papers case. In the human rights context, is also likely that human rights impacts assessments conducted by legal counsel for a company will ultimately become public. For example, in the Nevsun case discussed above, Lloyd Lipsett, a lawyer and human rights expert who was retained by the company, used the UNGPs as a procedural framework in his human rights impact assessment of the company’s mine in Eritrea. The Canadian House of Commons requested Lipsett’s testimony, and the court considered that testimony over the company’s objections.

Moreover, general counsel should take steps as wise counselors to ensure that legal privilege is not used to chill internal discussions to resolve human rights problems, and to build trust with external stakeholders by being candid and open about problems. A recent and notorious example of this problem is the General Motors ignition key scandal, where the General Motors product safety and legal teams used legal privilege to slow-walk the investigation, discovery, and public disclosure of a design defect for 10 years. The defect had caused airbags not to deploy in accidents when the ignition key became loose and moved. The defect resulted in the deaths of 124 people, the recall of 300 million cars worldwide, and the payment of $900 million in a Deferred Prosecution Agreement to the U.S. An independent report to GM’s Board strongly criticized the role of the legal department in fostering a closed culture, which chilled the candid

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internal discussion and investigation of safety issues, out of fear that discovery of problems could result in increased product liability awards in court.  

**Leverage Point No. 3. Ensuring that the company’s external representatives act consistently with the company’s commitment to respect human rights**

As leaders of the legal function, general counsel are ultimately responsible for hiring external representatives who speak for of the company individually or as members of industry groups. As a result, they should ensure that their external representatives behave consistently with the company’s own commitment to respect human rights. Examples areas where this might not occur, depending on the circumstances include: (a) hiring local outside counsel to set up dummy companies in order to acquire small parcels of land for a plantation allegedly in order to avoid national law intended to preserve small land holdings in a former conflict zone; (b) hiring law firms to engage in Strategic Litigation against Public Participation (SLAPP) litigation allegedly for the purpose of chilling the expression of public concerns regarding a proposed pipeline’s adverse impacts on the rights of indigenous people; and (c) allegedly participating in and funding business associations that lobby States to condition COVID-19 pandemic relief aid legislation on indemnifying employers from liability in order to coerce vulnerable workers laid off by the pandemic to return to work in unsafe conditions.

**Leverage Point No. 4: Structuring contracts to respect human rights**

General counsel are ultimately responsible for the structuring of a wide variety of contracts and agreements, including procurement contracts, M&A agreements, licensing agreements, foreign investment-host government agreements (e.g., mining concessions and profit sharing agreements and the like), and tax agreements with States, among many others. Each has implications for human rights and can be crafted in ways that mitigate the risk of company involvement in human rights abuse.


53 IBA Reference Annex, supra, n. 27, Section 3.3.3
Here, I focus on contracts for the purchase of goods, because they were the first contracts to receive attention in the business and human rights context, and preventing supply chain human rights abuse is increasingly the focus of current legislation and regulation.

General counsel can and should take steps to mitigate the human rights impacts associated with procurement contracts. Here are six suggestions which involve: (1) challenging the procurement business model; (2) setting human rights performance standards; (3) mapping the entire supply chain; (4) supporting and not undermining the supplier’s performance of its human rights responsibilities; (5) providing remedy; and (6) mitigating the human rights impact of supplier termination.

1. **Challenging the procurement business model.**

First, as members of the senior executive team, general counsel can help to review and challenge the business model for the procurement process, in order to determine whether it is a Red Flag for involvement in human rights abuse. For example, among the contributing root causes that have been identified for the tragic Rana Plaza factory collapse in 2014 in the Ready Made Garment Sector in Bangladesh were:

- The reliance by buyers and suppliers on the ‘indirect sourcing model’ in which buyers use independent purchasing agents that subcontract out to a shifting and opaque network of unregulated and unauthorized smaller suppliers, in order to secure the cheapest cost of labor;

- The so-called ‘fast fashion’ business model in the garment industry, in which buyers place a premium on speed by suppliers in adjusting their production to respond to rapidly changing fashion demands.

As discussed in Leverage Point 5 below, where buyers contribute to human rights harm by suppliers, they are expected to contribute to remedy, to stop their actions that contribute to harm, and to use or build their leverage to influence others to do so. By working with senior management to understand the inherent human rights risks of the procurement business model, and ensure that the buyer takes effective steps to mitigate them.

2. **Setting human rights performance standards and assessing supplier capacity**

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Avoiding and mitigating human rights risks in the procurement function requires a buyer to assess whether the supplier has the financial and managerial capacity to honour its human rights responsibilities under the contract (including the capacity to provide remedy). The supplier’s squeezed profit margin, last minute changes by the buyer in design, quantity and delivery, and the systemic challenges presented by the sector and country (e.g., corruption, lax factory building and fire safety code enforcement, unavailability of independent trade union membership for workers), can all impair this capacity. If these and similar factors are not assessed, the result is likely to be, in Amnesty’s words, ‘paying for a bus ticket and expecting to fly’. 

In addition, the buyer and supplier should understand what is expected of them, through a process of dialogue, rather than by merely adding to the contract a boilerplate reference to the buyer’s supplier code of conduct that is rarely discussed except in cases of breach. This dialogue, and the contract, should clearly cover the specific ‘salient’ human risks that the parties should prioritize (e.g., forced labor, child labor, workplace injury and death).

3. **Mapping the entire supply chain to identify human right risks**

General counsel should ensure that as part of the contracting process, the company identifies all of its most salient human rights risks in its supply chain. However, most multinational companies fail to map human rights impacts beyond the first tier or two of their supply chains. Many lawyers are traditionally reluctant to advise their clients to look for unknown problems out of concern that known risks generate a responsibility to do something about them. But if companies do not map the risks of their entire supply chain, they may report an understated human rights risk profile until they are exposed on social media. As Warren Buffet has reputedly said, ‘when the tide goes out, you can tell who is swimming naked’.

Therefore, human rights due diligence expects that businesses will identify risks for the entire supply chain, including down to the raw materials that are used for the goods that the buyer eventually purchases. A business is expected to map its entire value chain in order to

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understand the full scope of its impacts, prioritize the most severe impacts, and identify other actors that have a role to play in exercising leverage. The most severe harm can occur in remote tiers of the chain; e.g., child miners forced to work in hazardous conditions at less than subsistence wages to dig minerals ultimately used in electronics products.

4. Contractually committing to support and not undermine supplier’s efforts to meet its human rights performance responsibilities

To repeat an old legal saying, ‘the contract is king.’ If it does not reflect a buyer’s human rights responsibilities, buyers and suppliers will give them low priority. The contract is not a one-way street, since the actions of both parties in combination can result in human rights harm.

As noted earlier, buyer purchasing and sourcing practices in the apparel industry can force supplies to cut safety corners, contributing to the Rana Plaza tragedy in 2014. Better Buying, an independent, supplier-centric rating agency, identifies and ranks buyers based on seven purchasing and sourcing practices in the apparel industry that could contribute to human rights harm by suppliers: planning and forecasting, design and development, cost and cost negotiation, sourcing and order placement, payment and terms, management of the purchasing process, and harmonization with the company’s CSR practices.

Thus, general counsel should take steps to ensure that the procurement contract reflects the buyer’s undertaking to support and not undermine a supplier’s efforts to meet its human rights responsibilities. By doing so, the buyer stands a much better chance of not being deemed to have contributed to impacts caused by the supplier. This is discussed in the next section immediately below.

5. Providing for remedy

Avoiding and resolving legal disputes between the company and the stakeholder sit squarely in the zone of the general counsel. In order to support the company’s commitment to respect human rights, they should avoid taking an approach of fighting stakeholder claims, ‘until Hell freezes over and then fighting on the ice’, a phrase attributed to a U.S. Civil War military officer when asked to surrender.

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As noted earlier, in exercising human rights due diligence, businesses are expected to provide or contribute to remedy to human rights harm that they caused or contributed to. There are many different forms of remedy, including ‘apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.’ (UNGP 25, Commentary).

The business responsibility to provide remedy has two parts.

- First, a company should actively participate in the remediation of human rights harm that it identifies (i.e., recognizes) it has caused or contributed to (UNGP 22). This means providing for, or cooperating in, legitimate remedial processes, such as a court or a non-judicial grievance mechanism, that are appropriate to the nature of the harm. If the company disagrees that it caused or contributed to harm, it can contest the allegation, in court or in a nonjudicial dispute resolution process, such as mediation or arbitration.

- Second, businesses should establish or participate in operational-level grievance mechanisms in order to prevent and address grievances early, before they amount to human rights impacts. Such mechanisms can also act as an important feedback loop to identify particular issues or trends and prevent future problems (UNGP 29). Collaborative initiatives by industry bodies and others should also ensure the availability of effective grievance mechanisms (UNGP 30).

Non-judicial grievance mechanisms should meet specific effectiveness criteria: legitimacy, accessibility, predictability, equitability, transparency, rights compatibility, be a source of continuous learning. The operational-level grievance mechanisms that companies support or provide, should, in addition, be based on engagement and dialogue (UNGP 31).

The company’s responsibility to provide or contribute to remedy applies only where where the organization itself recognizes that it has caused or contributed to an adverse human rights impact. The company can contest that in good faith in a judicial or non-judicial process, as appropriate. Remedial processes could include state-based mechanisms that can order remediation, such as courts and other processes, as well as nonjudicial dispute resolution processes (e.g., arbitration, mediation, ombudsman, OECD National Contact Point, etc.)

The circumstances under which a company should directly provide for remedy vary. For examples, where crimes have been committed, and a State-based judicial proceeding is underway, it company may defer to that proceeding rather than pursue direct remediation. Where a buyer has contributed to harm by a supplier, but the supplier is the primary cause, the

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65 As a practical matter, buyers do not cause harm directly to supply chain workers, although it is theory possible for them to do so. As a result, contribution and linkage are the modes of buyer involvement that usually apply to supply chain harm.


67 Id. Q. 63.

68 Id. Qs 67 and 68.
and is either providing remediation or being held to account through a legitimate State-based mechanism, it will typically be appropriate [for the buyer] to defer to that process whenever a parallel remediation process would undermine it.\(^{69}\)

However, multinational buyers commonly draft procurement contracts with language to avoid any inference that they owe a legal duty of care to supply chain workers, effectively denying workers direct access to remedy against the buyer. Common clauses required by buyers to achieve this end include: disclaimers of obligations to third parties (such as workers for suppliers and contractors); disclaimers of obligations to monitor, inspect, and control the manner of work of suppliers; and requirements that the supplier indemnify the buyer for any harm caused by the suppliers.\(^{70}\)

The effect of such disclaimers, combined with the lack of a contractual commitment to support and not to undermine the supplier’s human rights performance obligations discussed in the prior section, is to offload the buyer’s human rights due diligence responsibility onto the supplier. However, that responsibility cannot be delegated under the UNGPs.

6. **Mitigating the human rights impacts of termination on vulnerable workers.**

Buyer termination of suppliers under the contact represents a particular risk of harm to vulnerable workers, as seen by the practice of buyers in response to the COVID-19 pandemic to use force majeure clauses to terminate suppliers. These clauses enable buyers to terminate a contract for unforeseeable and uncontrollable events that make buyers unable to perform. In light of the government curtailment of business (through travel bans, border restrictions, limits to gatherings of people, the closure of non-essential businesses, and the cancellation of public events, etc.) multinational buyers have invoked force majeure to cancel supplier contracts.\(^{71}\)

Such terminations has devastated suppliers and thrown their vulnerable workers onto the street. In many industries, such as the Ready- Made Garment (RMG) sector, suppliers have very tight margins due to a long history of being squeezed by buyers.\(^{72}\) Millions of supply chain workers have been thrown out as factories closed. It is predicted that global poverty rates are forecast since the first time since 1988, and that half a billion people will become destitute as a result of the COVID-19 pandemic.\(^{73}\)

\(^{69}\) Id., Q 64.

\(^{70}\) See articles by Sherman and Dadush in n. 64, supra.


Some prominent companies have acted responsibly to try to mitigate the impacts on supply chain workers, but many have not.\textsuperscript{74} This has engendered public condemnation, including by civil society\textsuperscript{75} and has resulted in a plea by 195 long-term investors representing over USD $4.7 trillion in assets under management to maintain supplier relationships by maintaining timely and prompt payments\textsuperscript{76}. Guidance is available regarding the concrete steps that buyers can take to mitigate these impacts.\textsuperscript{77}

Therefore, when corporate lawyers are asked whether a buyer can legally terminate a supply chain contract for force majeure, they must also address that the question of whether a buyer should do so in light of harmful human impacts.

**Conclusion**

General counsel have a critical role to play in supporting the efforts of companies that commit to respect human rights and to engrain that respect into their cultures. To do so, general counsel should be prepared to act partner with senior executive management to ensure that their organizations are prepared to comply with existing and future mandatory human rights due diligence requirements and to meet the increasing demands by investors and other stakeholders for evidence that the organization is respecting human rights in alignment with the UNGPs. This will involve a shift away from an exclusive focus on protecting the company from legal liability, regardless of stakeholder impact. Rather, it will entail balancing the company’s need to protect itself from legal risk with its need to take human rights impacts on stakeholders into account in how it earns its money.


See also, *Jane Nelson interview*, supra, n. 23.


\textsuperscript{77} Better Buying Institute, *Special Report Guidelines for “Better” Purchasing Practices Amidst the Coronavirus Crisis and Recovery* (April 2, 2020). The Guidelines include: (a) collaborating in true partnership with suppliers; (b) securing the cash needed to cover contractual obligations, including accounts payable with suppliers; (c) discussing with suppliers their financial health and whether they have the cash/liquidity necessary to retain workforce for at least three months; (d) accepting and paying all existing purchaser orders for goods that have been shipped, are ready or in progress, or are cut, and not resorting to outright cancellations; (e) rationalizing current assortment plans and reconfigure orders to continue producing viable products; (f) engaging suppliers to manufacture masks and other needed personal protective equipment for workers on the front lines; (g) extending delivery dates/accepting shipping delays as necessary; (h) paying a portion of orders that have not been cut and future orders that are affected by changes in volume, have delayed shipping deadlines, or are on hold.