

Preface

Recognized international human rights have traditionally been framed as creating duties and obligations for states under treaties and other instruments and elements of international human rights law. Relatively little attention, if any, has been paid to businesses' responsibility for human rights. Many clung to the argument that states had the exclusive responsibility when it came to human rights and that the role of businesses should be confined to complying with the laws and regulations promulgated by states with respect to workplace conduct, use of natural resources, and the like.¹ In recent years, however, the criticism of businesses that accompanied the globalization that dominated the last decades of the twentieth century has shifted more and more attention toward holding businesses, as well as states, accountable for human rights duties and obligations. This trend was exacerbated and accelerated by highly publicized events such as the chemical gas leak at Union Carbide's Bhopal pesticide plant in 1984, which killed thousands in India, the Exxon Valdez oil spill in 1989, disclosures of child labor abuses among the supply chains of well-known global apparel and footwear companies, and the complicity of Western mining, oil, and gas companies in the violence perpetrated by governmental security forces in developing countries.²

The day-to-day operational activities and strategic decisions of businesses inevitably have an impact, both positive and negative, on one or more universally recognized human rights. On the positive side, businesses play a unique role in society as the creators of wealth, sources of employment, deliverers of new technologies, and providers of basic needs.³ At the same time, however, businesses, fixated on profits as the main and often seemingly exclusive goal and purpose of the enterprise, have repeatedly treated their workers poorly, engaged in dangerous or corrupt business activities, polluted the environment, developed and marketed products and services that cause harm to consumers, and become involved in development projects that have

1. G. Brenkert, "Business Ethics and Human Rights: An Overview," *Business and Human Rights Journal* 1 (2016): 277.

2. K. Earley, "From Reaction to Purpose: The Evolution of Business Action on Sustainability," *The Guardian*, October 31, 2017.

3. C. Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford: Oxford University Press, 2019).

displaced or marginalized communities.⁴ The concern about these negative impacts of business activities has increased as corporations themselves have grown in size to the point where many of them are larger than some nation-states.

The standard view has always been that states are legally responsible for addressing the human rights of individuals within their boundaries, including setting and enforcing the rules on how nonstate actors, such as businesses operating within their borders, impact the human rights of the state's citizens, thus implying that the responsibilities of businesses with respect to human rights are those determined by the states. A competing view is that businesses have responsibilities for human rights that are independent of the state, based on social expectations (i.e., a company's "social license to operate") or moral grounds. This view is important in its own right, but it has become particularly relevant given the growth in size and influence of transnational corporations (TNCs), the difficulties that states have had in controlling them, and their impact on the environment and local communities, and in holding them legally accountable for violations of their human rights duties.

Human rights activists, academics, and policymakers have identified and critiqued a number of challenging impediments to enforcement, including the limited liability status for corporations, their subsidiaries, and their agents, which makes it difficult to hold directors and officers responsible for their human rights violations; the ability and willingness of wealthy corporations to bribe state officials to avoid enforcement of local human rights laws; and the difficulties in obtaining jurisdiction over corporations that do business in a particular country and yet maintain their headquarters and assets outside of the country and in delegating responsibility for the activities often associated with human rights issues by outsourcing those activities to unrelated foreign entities. Wealthy TNCs can also exert outsize leverage in foreign countries by conditioning new projects, and the financial investments and local jobs that go with them, on local politicians supporting laws and regulations that are relatively weak (e.g., requirements regarding minimum wages and workers' rights and benefits and/or environmental standards relating to the extraction of raw materials or manufacturing activities) and that keep the costs of doing business in those countries down for the corporation.

Human rights activists have complained that states, particularly developing countries, are often unable or unwilling to enforce human rights obligations in the treaties they have ratified, including regulating activities of businesses. They have argued that the only real hope is that businesses will assume human

4. A. Sharom, J. Purnama, M. Mullen, M. Asuncion, and M. Hayes, eds., *An Introduction to Human Rights in Southeast Asia* (vol. 1) (Nakhorn Pathom, Thailand: Southeast Asian Human Rights Studies Network, 2018), 160. See also C. Lewis, "Businesses' Human Rights Responsibilities," *Forced Migration Review* 41 (December 2012): 25. ("Pollution from factories and mining projects . . . [has] . . . deprived people of their livelihoods, water sources and access to religious and cultural sites. Even where a company is not causing damage to the environment, its mere presence can alter the social composition of the local community or create tensions among different groups and lead to displacement of individuals, families or whole communities.")

rights duties and responsibilities, either voluntarily or pursuant to some form of mandatory framework that creates business human rights obligations directly rather than through a state. Arguably, the stakes are high for businesses, including the possibility of reputational damage and/or disruptions to supply chains caused by human rights crises in foreign countries. As such, they have real incentives to step in and take up the slack caused by a growing sense that environmental and social challenges are overwhelming the resources and regulatory tools of the public sector. One commentator pointed out that “businesses can no longer leave it to markets, governments or a relatively weak civil society to respond . . . [and] . . . [i]t’s in businesses’ interests to take an urgent and proactive role in delivering the transformational change required.”⁵

There is a growing consensus that businesses have a duty to respect human rights. Governmental and intergovernmental bodies have accordingly attempted to establish guidelines that could serve as points of reference for the duties and responsibilities of businesses as they conduct their business activities. The International Labour Organization adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977; the Organisation for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises in 1976 as part of the OECD’s Declaration and Decisions on International Investment and Multinational Enterprises; and the United Nations has engaged in several projects to promote the accountability of businesses for human rights, including the UN Global Compact (adopted in 1999) and the Guiding Principles on Business and Human Rights (endorsed by the Human Rights Council in 2011). Governments have also been involved in multi-stakeholder initiatives to develop sector-specific guidance for human rights due diligence and have acted through various types of domestic legislation.

The International Organization for Standardization (ISO) 26000 Guidance on Social Responsibility points out that the responsibilities of organizations with respect to human rights are independent of the duties and obligations of the state, which means that organizations must act regardless of whether the state is unable or unwilling to fulfill its duty to protect.⁶ ISO 26000 contends that states have a duty and responsibility to respect, protect, and fulfill human rights, and organizations have the responsibility to respect human rights by identifying and responding to members of vulnerable groups within their sphere of influence. At a minimum, organizations should avoid passively accepting or actively participating in infringement of the rights of others, a duty that can only be discharged by undertaking due diligence. Moreover, while the baseline responsibility for businesses and other nonstate organizations is to respect human rights, they need to take into account stakeholder expectations that go beyond respect and may also want to make affirmative contributions to fulfilling human rights for their own sake.

5. <https://www.sustainablepurpose.com>

6. *ISO 26000 Guidance on Social Responsibility* (Geneva: International Organization for Standardization, 2010), v–vi.

As governmental and intergovernmental bodies have begun to act, a number of other factors have been driving companies to undertake human rights due diligence:⁷

- A human rights crisis or scandal, often amplified by reports from nongovernmental organizations and social media, that leads companies to realize that they need to do better and put better human rights risk management and mitigation systems in place and that failure to do so is not only morally wrong but will expose them to reputational and operational risks.
- Increasing legal and regulatory standards driven by a convergence of legal and human rights risks.
- External pressure by financial institutions and the investment community, including increasing investors' expectations regarding ESG (environmental, social, and governance), questions from investors about human rights policy and processes for managing risks, the emergence of rating agencies and benchmarks assessing companies' human rights policies and risk management procedures, shareholder activism and engagement, and conditions set by export credit agencies and development finance institutions.
- Business-to-business pressures, including increased usage of supplier codes of conduct and contract clauses driven by a desire to achieve more sustainable supply chains in operational and commercial terms.
- Pressure from employees and trade unions calling on companies to adopt human rights policies and explain their approach to managing human rights issues in high-risk operations.
- Realization that adopting a human rights due diligence approach is simply the "right thing to do," as the enterprise does not want to become involved in negative impacts on human rights.

Many of the world's best-known and otherwise respected brands have found themselves caught up in debates regarding their own human rights practices and/or those of their business partners—for example, Nike's reliance on the sweatshop practices of its vendors that were prevalent throughout the global garment industry; Apple's use of Chinese subcontractors who repeatedly failed to adhere to even minimal fair labor standards; and questions regarding the policies of Internet companies relating to the protection, use, and sharing of their users' personal information. While the fallout from disclosures of actual or potential human rights issues has sometimes been devastating for specific businesses, others have been able to recover and use the crisis as a catalyst for establishing more reliable and productive processes in their supply chains that have become sources of competitive advantage and enhanced reputational value.⁸

7. Companion Note II to the Working Group's 2018 Report to the General Assembly: "Corporate Human Rights Due Diligence—Getting Started, Emerging Practices, Tools and Resources" (UN Working Group on Business and Human Rights, October 2018), 9.

8. G. Carroll, D. Schifrin, and D. Brody, *Nike Sustainability and Labor Practices 2008–2013* (Harvard Business Review Case, August 13, 2013).

Probably the most highly publicized initiative relating to the relationship between international human rights and the operations of business enterprises has been the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (Guiding Principles). This document was developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises after extensive consultation and was endorsed by the Human Rights Council, the key independent UN intergovernmental body responsible for human rights, in its resolution 17/4 of June 16, 2011.⁹ The Guiding Principles were not intended to impose new legal obligations on business or to change the nature of existing human rights instruments. Instead, their aim is to articulate the meaning of these established instruments for both states and companies and to address the gap between law and practice.¹⁰ Since they were first approved, the Guiding Principles have become the global standard for the respective roles and duties of states and businesses relative to human rights and have been integrated as central elements of other well-known international standards such as the OECD Guidelines for Multinational Enterprises, the International Finance Corporation Performance Standards, and ISO 26000.

Interpretive guidance to the Guiding Principles noted that enterprises recognize that their social responsibilities begin with legal compliance and that the responsibility of enterprises to respect human rights is itself often reflected, at least in part, in laws and regulations. However, the Guiding Principles define enterprises’ responsibilities to respect human rights to extend beyond applicable laws and regulations to include respect for all internationally recognized human rights wherever they operate. In effect, enterprises are expected to include the risk of causing or contributing to gross human rights abuses among all the other legal issues they face in their operations and business relationships. The Guiding Principles are intended to serve as a uniform standard that can be referred to in a variety of contexts for clarity and predictability, including situations where there are no national laws or regulations to protect human rights or where the content and enforcement of laws and regulations that do exist fall short of internationally recognized standards.¹¹

This book is intended as a comprehensive introduction to the key topics relating to understanding how businesses can effectively fulfill their emerging responsibilities to their stakeholders and society in general relating to respect for universally recognized human rights. The book follows the flow of the Guiding Principles and draws on a number of resources, including the OECD

9. See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. The Guiding Principles are sometimes referred to as the “Ruggie Principles,” referring to John Ruggie, the Special Representative for Business and Human Rights, who introduced the principles in 2007 and led the efforts that eventually led to endorsement of the Guiding Principles.

10. *Handbook on Corporate Social Responsibility (CSR) for Employers’ Organizations* (European Union CSR for All Project, April 2014), 18.

11. *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (New York: UN Human Rights Office of the High Commissioner, 2012), 76–77 (commentary on Guiding Principle 23).

Due Diligence Guidance for Responsible Business Conduct. As such, readers will learn about each element in the due diligence process, such as developing human rights policies and commitments, impact assessment, integration, measurement and tracking, and communications and reporting. In addition, the book discusses a number of “special topics” such as businesses’ impact on human rights, governance and management, engagement, labor practices, supply chain management, and discrimination and vulnerable groups, so that readers can develop a comprehensive approach to counseling that covers all areas of potential client issues. The last chapter summarizes how human rights topics are being integrated into existing standards of professional responsibility for lawyers and law firms.

I hope that the book will be an invaluable first resource for attorneys and other professionals involved in counseling their internal and external clients on how human rights should be taken into account in day-to-day operational activities and in transactional situations. While much has been written in the academic and policy worlds regarding whether businesses have done as much as they should to promote respect for human rights, there is little in the way of practical guidance on what steps should be taken. Although guidelines and best practices for human rights due diligence are evolving, there will never be a “one-size-fits-all” approach for the process, and companies will need to continuously assess allocation of responsibilities and resources, both human and financial, to their efforts, particularly as their business footprint expands. A primary goal of this book is to assist lawyers and law firms in counseling their clients on the content and execution of human rights diligence in the course of their day-to-day operational activities and in specific transactional situations.

Business and human rights, like corporate social responsibility, is an emerging topic that will soon be a lasting element of corporate governance, compliance, and risk management practice. A number of the topics included under the umbrella of corporate social responsibility, particularly in the environmental and labor areas, already have developed their own rich collection of laws, regulations, case law, and practice tools. The same will soon be true of business and human rights and other topics, such as stakeholder engagement, social enterprises (e.g., benefit corporations), board oversight of sustainability, community development, and nonfinancial reporting. Given the growing number of societal and political issues that can reasonably be placed under the rubric of human rights, and the apparent inability of governments to deal effectively with those issues, it would seem that attention will inevitably turn to how and when businesses will deploy their substantial resources to develop solutions.

As I was writing these words and finishing the editing necessary to submit the manuscript to the publisher, our world changed as the Covid-19 pandemic swept over us. The UN High Commissioner for Human Rights described the Covid-19 outbreak as “a serious threat to the right to life and to health of people everywhere” and argued that the international human rights framework

could provide “crucial guideposts that can strengthen the effectiveness” of the collective global response to the pandemic.¹² A joint call issued by 60 UN human rights experts included a reminder that the response to the Covid-19 crisis should go beyond public health and emergency measures to address all other human rights as well and emphasized that “the business sector in particular continues to have human rights responsibilities in this crisis.”¹³ In a paper examining companies’ responsibilities for workers and affected communities in the time of the Covid-19 pandemic, the Institute for Human Rights and Business (IHRB) pointed out that companies that have the capacity to act (because of their assets or the resources at their command) can be expected to play a role in helping states meet their obligations to protect human rights. The IHRB went on to say:¹⁴

Companies have clear responsibilities towards their employees. But it is also the case that they have a responsibility towards contractors and their employees (in particular those who work on premises) as well as suppliers, associates, and other partners, consumers, and wider society and the general public who are affected by a company’s presence and operations.

Experts have identified a range of key human rights concerns relating to the outbreak and management of the Covid-19 pandemic, including the need to respect rights, include everyone, and ensure access; protection of the vulnerable; focusing on the disproportionate impact of the crisis on women; eliminating racism and xenophobia; placing limitations on restrictions and surveillance; deploying and using technology; and permitting dissent.¹⁵ According to the IHRB and others, businesses have a role to play in many of these areas:¹⁶

- Companies have a duty of care toward their workers during an emergency situation, such as the Covid-19 pandemic, that includes providing safe and sanitary work conditions in the workplace, protecting workers from exposure to the virus, assisting workers in working from home, providing flexible and generous leave benefits for workers who get sick or must take care of family members who are ill, and acting compassionately when reducing staff due to pandemic-related drops in business.
- Companies involved in the development, production, and sale of devices and software that enable surveillance should be mindful of potential

12. As reported and quoted in *Respecting Human Rights in the Time of the Covid-19 Pandemic: Examining Companies’ Responsibilities for Workers and Affected Communities* (Institute for Human Rights and Business, April 2020), <https://www.ihrb.org/focus-areas/covid-19/report-respecting-human-rights-in-the-time-of-covid19>, 9.

13. *Id.* at 10.

14. *Id.* at 16.

15. *Id.* at 10.

16. *Id.* at 11–15. See also Covid-19: Business and Human Rights (Business and Human Rights/Semilla, April 2020).

misuse of such technologies during the crisis and establish safeguards against such misuse through contractual obligations and other measures that reduce the likelihood of misuse.

- Companies must be mindful of the surge in racism and xenophobia that has accompanied the spread of the Covid-19 virus and take steps to ensure that their goods and services are equally available to all users, regardless of their ethnicity, nationality, or other distinguishing features, and that their workers are protected against racial discrimination in the workplace and from acts of customers and others with whom the company conducts business.
- Companies that employ migrant workers directly, or that are aware of migrant workers in their supply chains, should be mindful of the special needs of such workers for security and safety due to the disruptions caused by the pandemic.
- Companies need to be aware of the specific disproportionate impact of measures taken during the pandemic on women due to the jobs that they generally fulfill, the responsibilities that societies often impose on them as primary caregivers for their children and other family members, and their often limited access to technology.
- Companies need to ensure that workers are adequately informed about the risks associated with working during the Covid-19 crisis and that such workers are able to give their informed consent after taking into account issues such as literacy, language, and age.
- Companies that offer consumer credit, or essential goods and services, should develop special facilities and solutions to provide continuing access for consumers from poorer groups and consumers who have recently lost their jobs and are in need of support for managing their debt or purchasing power.
- Companies should be aware of the human rights risks and impacts to consumers and other users of their goods and services resulting from potential exposure to the virus and contagion risk, provision of digital services, and the continuity of the provision of basic goods and services.
- Companies will be relying on technology for many aspects of their response to the Covid-19 pandemic, and implementation of technological solutions must take into account potential infringement of the privacy rights of workers (e.g., health checks in the workplace and surveillance of productivity for remote working) and customers (e.g., protection of personal information collected as companies roll out digital alternatives for customer service).
- Companies should consider the impacts of their decisions and actions relating to the Covid-19 pandemic on the communities in which they operate such as the economic and social impact of reducing operations and laying off employees and provide communities with information on the steps being taken to strengthen health and safety measures in the company's facilities.

Given all of these considerations, I returned to the manuscript to include additional materials that illustrate how the principles and standards that have developed with respect to business and human rights might be applied by companies during and after the Covid-19 pandemic. As I was making those changes, the world watched in horror as George Floyd, a black man, died in the custody of the Minneapolis police department on May 25, 2020, an event that set off days of large public demonstrations against racial injustice all around the world, often accompanied by vandalism and looting as well as disproportionate police responses that escalated the tensions. As has often happened in the past when such incidents have occurred, businesses large and small were quick to issue statements through social media expressing their concerns about social justice and supporting the Black Lives Matter movement. Many large and well-known brands made commitments to contribute substantial sums to social justice initiatives and supporting minority businesses. However, Darren Walker, the president of the Ford Foundation, criticized the traditional and predictable response of companies in the face of racism in a quote published in an article in *The New York Times*: “The playbook is: Issue a statement, get a group of African-American leaders on a conference call, apologize and have your corporate foundation make a contribution to the N.A.A.C.P. and the Urban League . . . That’s not going to work in this crisis.”¹⁷ The same article led with the headline “Corporate America Has Failed Black America” and went to say: “. . . many of the same companies expressing solidarity have contributed to systemic inequality, targeted the black community with unhealthy products and services, and failed to hire, promote and fairly compensate black men and women.”¹⁸

Surveys showed that a majority of Americans wanted business leaders to seize the challenges and opportunities that have gripped society’s attention in the wake of the events of the first half of 2020 by taking a stand and making and fulfilling commitments to action across a broad spectrum of issues and contexts that includes embedding equality, diversity and inclusion in the boardroom, the workforce and all aspects of organizational culture; financial equity and security; community engagement; involvement in the public square through advocacy for racial justice and re-imaging products and services.¹⁹ Discrimination on the basis of race is a fundamental human rights issue and while States have the primary responsibility under international human rights laws to protect the freedom of everyone and guarantee their dignity and ability to enjoy all of the universally recognized human rights, businesses have a duty to respect those rights and take the necessary steps to promote racial non-discrimination and equality wherever they operate. Businesses have also been called upon to contribute to the Sustainable Development Goals

17. D. Gelles, Corporate America Has Failed Black America, *The New York Times* (June 7, 2020), BU1.

18. *Id.*

19. For further discussion of implementing each of the listed commitments, see A. Gutterman, “Racial Equality and Non-Discrimination,” available at the website of the Sustainable Entrepreneurship Project (www.seproject.org).

established by UN such as access to basic services, participation in decision making, full and productive employment and decent work, reducing income inequality, ensuring equal opportunity, promoting peaceful and inclusive societies, providing justice for all and building effective, accountable and inclusive institutions at all levels.

While the months leading up to the publication of this book have been difficult for many businesses, there are also heartening examples of companies providing relief to their communities and support to essential workers, taking extraordinary steps to protect the safety and economic well-being of their employees and repurposing aspects of their business in order to provide new products and services required by consumers to get through the pandemic.²⁰ We can expect that the lessons from the pandemic will change the landscape for business and human rights in the years to come, and I look forward to discussing that in future editions. For now, I hope this book will make a meaningful contribution to one of the most important topics of our time and help lawyers assist clients that are no longer simply asking about “what is legal,” but instead are seeking wise counseling on “what is right.” As always, I want to thank my family for their unwavering support of my writing projects, and I also want to recognize the great publishing team of the Business Law Section of the American Bar Association.

I have collected many of the resources mentioned in the book and have made them available for readers, as well as for the general public, on the Business and Human Rights page of the website of the Sustainable Entrepreneurship Project (www.seproject.org). Additional information will be continuously posted on my personal website (www.alangutterman.com).

20. Beyond the Call: How Companies Have Stepped Up during COVID-19 (May 12, 2020), <https://www.linkedin.com/pulse/beyond-call-how-companies-have-stepped-up-during-covid-19-hempel/?trackingId=olVL2OA9amYzd%2BuYb7a0Nw%3D%3D>.