

AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF INTERNATIONAL LAW
YOUNG LAWYERS DIVISION
COMMISSION ON SEXUAL AND DOMESTIC VIOLENCE

RESOLUTION

- 1 RESOLVED, That the American Bar Association endorses the United Nations *Protect, Respect and*
2 *Remedy: A Framework for Business and Human Rights* (2008) and its companion *Guiding Principles on*
3 *Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy'*
4 *Framework* (2011).
5
- 6 FURTHER RESOLVED, That the American Bar Association endorses the “Human Rights” provisions
7 (Part I, Subpart IV) of the *OECD Guidelines for Multinational Enterprises* (2011), issued by the
8 Organisation for Economic Cooperation and Development (OECD).
9
- 10 FURTHER RESOLVED, That the American Bar Association urges governments, the private sector, and
11 the legal community to integrate into their respective operations and practices the United Nations
12 Framework and Guiding Principles and the OECD Guidelines.

REPORT

I. INTRODUCTION

A groundbreaking framework has emerged to address the responsibilities of transnational corporations and other business enterprises with respect to human rights.¹ Developed by Harvard professor John Ruggie, the United Nations Secretary-General's Special Representative on Business and Human Rights, and grounded in extensive research and broad consultation with the private sector, non-governmental organizations, law firms, and other stakeholders, the framework addresses the "governance gaps" created by globalization. This *Protect, Respect and Remedy: A Framework for Business and Human Rights Protect*² (hereafter "*Framework*"), along with its companion *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework,"*³ (hereafter "*Guiding Principles*") was adopted by the UN Human Rights Council in June 2011 as "a new set of Guiding Principles for Business and Human Rights designed to provide – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity."⁴

The *Framework* and *Guiding Principles*, as well as the contemporaneous *OECD Guidelines for Multinational Enterprises*⁵ (hereafter *OECD Guidelines*) referenced in the Resolution, all described further below, are becoming the focal point of global policy, practice and advocacy in this vital area. It is timely for the ABA to add its voice to this growing international consensus, which would be consistent with the ABA's far-ranging work in the rule of law and human rights and its existing policy on corporate citizenship.

Moreover, ABA support also would encourage members of the legal profession to engage in this ongoing process, offering their expertise on aspects of the Framework, Guiding Principles and OECD Guidelines as they relate to national and international law and procedures, including judicial and non-judicial remedies.

II. THE FIELD OF CORPORATE SOCIAL RESPONSIBILITY

¹ Citations are provided in subsequent sections of this Report. Note that the London-based Business and Human Rights Resource Centre, www.business-humanrights.org, maintains a dedicated portal on the work of the UN Special Representative on Business and Human rights.

² *United Nations "Protect, Respect and Remedy": A Framework for Business and Human Rights* (2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

³ *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011), available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

⁴ UN Office of the High Commissioner for Human Rights, Press Release of 16 June 2011, available on <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf>.

⁵ *OECD Guidelines for Multinational Enterprises* (2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

The context for various international initiatives on business conduct, including the *Framework* and *Guiding Principles*, is a dramatic expansion in the field of “Corporate Social Responsibility” (CSR).⁶ CSR is closely linked to regulatory compliance, business ethics, corporate governance, and corporate citizenship.

Multiple factors are driving the importance of CSR within business strategy, and substantial analysis is evolving from a managerial, legal, ethical, and public policy perspective.⁷ The following list highlights just a few of these developments:

- The adoption of company policy statements regarding standards of conduct or business ethics, along with compliance programs.
- The evolution of voluntary codes of conduct and intergovernmental initiatives.
- Greater transparency in corporate reporting, with references to the “triple bottom line” of financial, social, and environmental performance.
- The monitoring of activities throughout the supply-chain.
- Engagement with stakeholder groups, including community representatives and civil society.
- The increasing significance of socially responsible investment, which promotes financial decisions based on ethical criteria.
- The market preferences of ethically-conscious and “green” consumers, including support for “fair trade” programs.
- Legal pressures, including the implications of non-binding measures, compliance with various levels of laws and regulations, and mitigation of potential claims.
- The link between CSR and risk management, including legal exposure and reputational harm.
- A growing appreciation for the “business case” to support CSR.

CSR policies and programs are influencing corporate behavior at the local, national and international levels. Moreover, the media, industry organizations, trade unions, and NGO interest groups use CSR as a focal point to ensure that companies are acting in good faith and to encourage greater commitment. The global dimension of CSR promotes human rights, good working conditions, environmental sustainability and anti-corruption. The UN *Framework* links into this extensive and interdisciplinary topic and, in time, will contribute to greater consistency in human rights objectives among many different types of agencies and organizations.

The legal profession is increasingly involved in the field of CSR, including aspects of human rights standards and compliance. The legal basis for holding companies accountable under human rights law

⁶ See generally, Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon, and Donald S. Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility* (2008).

⁷ For a comprehensive text in the field of law, see Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (2009); for an examination of the legal framework for corporate governance and accountability, see Stephen Tully (ed), *Research Handbook on Corporate Social Responsibility* (2005); implications for MNCs and international law are explored in Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility* (2006); regulatory questions are analyzed in Doreen McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007).

has posed a number of theoretical challenges.⁸ While all the complexities cannot be addressed here, several questions are noted by way of example:

- What is the role of non-state actors such as corporations under the *Universal Declaration of Human Rights* and the main human rights covenants?⁹
- Should corporations be held directly accountable for protecting certain human rights, rather than only indirectly through the nation-state as the traditional bearer of human rights obligations?¹⁰
- Can elements of complicity form a basis for holding TNCs accountable under international law?¹¹
- How can companies exercise due diligence to identify, analyze and mitigate human rights risks?¹²

The UN Special Representative for Business and Human Rights has consulted widely with legal experts and provides valuable guidance on these issues in the *Framework and Guiding Principles*.¹³

⁸ For an analysis of some of the conceptual issues surrounding corporate accountability for human rights, see generally Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999); Peter T. Muchlinski, "Human Rights and Multinationals: Is There a Problem?" 77 *International Affairs* 31 (2001); Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," 443 *Yale Law Journal* 111 (2001), and Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (2006).

⁹ See Barbara A. Frey, "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights," 6 *Minnesota Journal of Global Trade* 153 (1997), pp 163-164. For example, Article 30 of the Universal Declaration of Human Rights provides: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein." G. A. Res. 217, UN Doc. A/810 (1948).

¹⁰ See International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002). The Geneva-based ICHR is currently undertaking a follow-up research project on the potential for legally-binding standards of corporate responsibility for human rights; see <http://www.ichrp.org/en/projects/151>.

¹¹ See Andrew Clapham and Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses," 24 *Hastings International and Comparative Law Journal* 339 (2001).

¹² See Mark Taylor, Luc Zandvliet and Mitra Forouhar, *Due Diligence for Human Rights: A Risk Based Approach*, Corporate Social Responsibility Initiative Working Paper No. 53, John F. Kennedy School of Government, Harvard University (2009), available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf.

¹³ In fact, the legal profession was intimately involved in the development of the Framework and Guiding Principles. The International Bar Association (IBA) strongly supported the application of the Framework, and helped to convince the OECD to adopt its new human rights chapter. See, e.g., IBA-WG Response to the OECD Consultation on an Update of the Guidelines for Multinational Enterprises, <http://bit.ly/9mrGpS>. In addition, the IBA CSR Committee urged the UN Human Rights Council to endorse the Guiding Principles. Moreover, hundreds of lawyers provided pro bono assistance in the development of Baseswiki, a Web-based, interactive learning centre on human rights grievance mechanisms, in the Corporate Law Tools Project, a review by close to 20 international law firms of the impact of corporate law in more than 40 jurisdictions on the responsibility to respect human rights – a project that involved, among other firms, Allens Arthur Robinson, Clifford Chance, Linklaters, and Weil, Gotshal and Manges. See Baseswiki.org (<http://baseswiki.org>); Corporate Law Project (<http://www.businesshumanrights.org/Links/Repository/1001537>).

Such questions are not just theoretical – corporations are being confronted with legal actions based on human rights violations. In America, for example, several claims have been brought under the Alien Tort Claims Act (ATCA), which gives federal courts power to hear civil cases brought by foreign citizens for injuries caused by actions “in violation of the law of nations or a treaty of the United States.”¹⁴

The worldwide expansion of human rights-related litigation in recent years is documented by the Business and Human Rights Resource Centre, which has established a special legal accountability portal.¹⁵ The UN *Framework* is likely to influence legal regulations and processes; corporations may find more clarity in standards and compliance requirements, states may step-up investigation and enforcement, and individuals harmed by corporate activities may benefit from enhanced causes of action and access to justice. Indeed, for most businesses, CSR is a voluntary, market-driven, and discretionary standard of conduct that varies greatly from company to company. The *Framework* and *Guiding Principles*, in contrast, constitute a baseline standard of conduct that applies to all businesses, whatever their sector, whatever their size, and wherever they operate (Guiding Principle 14).¹⁶

III. DEVELOPMENT OF THE FRAMEWORK AND GUIDING PRINCIPLES

In April 2005, the UN Commission on Human Rights (which became the Human Rights Council) requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises.¹⁷ The mandate, for an initial period of two-years, aimed:

(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(b) To elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

¹⁴ Judiciary Act of 1789, codified at 28 U.S. Code Sec. 1350. The lead case is *Filartiga v. Pena-Irala*, United States Court of Appeals, Second Circuit, 630 F.2d 876 (1980). See also, Beth Stephens (ed), *International Human Rights Litigation in U.S. Courts* (2008), in which leading human rights litigators and theorists provide an analysis of claims under the ATCA; Peter Henner, *Human Rights and the Alien Tort Statute: Law, History and Analysis* (2009).

¹⁵ See <http://www.business-humanrights.org/LegalPortal/Home>; this portal includes concise profiles of hundreds of lawsuits in which companies are accused of human rights abuses, as well as expert commentaries.

¹⁶ It bears noting here that ABA Model Rule of Professional Conduct 2.1 may well apply in this context. It requires lawyers to exercise “independent professional judgment and render candid advice” and permits them to “refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation”. See http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html. This imperative logically would include applicable international standards in the conduct of a client’s affairs, including the Framework and Guiding Principles where corporate clients are concerned.

¹⁷ E/CN.4/RES/2005/69, 20 April 2005.

(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’;

(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

(e) To compile a compendium of best practices of states and transnational corporations and other business enterprises.

The Secretary-General appointed Prof. John Ruggie of Harvard University to fill this role.¹⁸ In an interim report, Prof. Ruggie framed the key issues surrounding globalization, abuses of human rights and existing responses,¹⁹ and set forth a new strategic direction in addressing issues of business and human rights: He would examine empirical evidence and make normative judgments based on principled pragmatism.²⁰

To further his mandate, Prof. Ruggie conducted extensive international consultations with stakeholder groups representing various regions, industry sectors, and social objectives.²¹ He initiated a series of research projects and held legal workshops to identify existing standards and clarify concepts such as complicity and human rights due diligence. A number of UN agencies and other intergovernmental organizations also weighed in on this process.

Prof. Ruggie’s aim was to seek “the engagement of all actors and policy domains whose expertise and influence can help turn general principles into practical reality.”²² He issued a number of interim documents to provide opportunity for further dialogue and refinement of a framework for business and human rights. In 2007, his mandate was renewed for another year.

1. The “Protect, Respect and Remedy” Framework

¹⁸ ECOSOC Decision 2005/273, 25 July 2005; John Ruggie is Professor of International Affairs at the John F. Kennedy School of Government, Harvard University, and a former Assistant Secretary-General of the UN. Note that the UN Human Rights Council replaced the UN Human Rights Commission.

¹⁹ *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, E/CN.4/2006/97, 22 Feb 2006.

²⁰ In *ibid* at par 81, Ruggie describes this as “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.”

²¹ As indicated *supra* in note 2, the Business and Human Rights Resource Centre (www.business-humanrights.org) hosts a portal dedicated to the work of the Special Representative, providing links to all key documents as well as input from stakeholders. See, for example, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/035, 9 Feb 2007.

²² “Statement to United Nations Human Rights Council – Mandate Review,” Prof. John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva, 5 June 2008.

In June 2008, Prof. Ruggie submitted a report to the UN Human Rights Council entitled: *Protect, Respect and Remedy: A Framework for Business and Human Rights*.²³ The overall rationale of the Framework is introduced as follows:²⁴

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide a permissive environment for wrongful acts by companies of all kinds without sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.

The *Framework* rests on three pillars described as “differentiated but complementary responsibilities”:

The state’s duty to protect the human rights of its people. While this duty is well-established in international law and custom, the focus is on how the state is to protect against human rights abuses by third parties, including business entities. Prof. Ruggie notes that such a duty requires that states “take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access for redress.”²⁵

The corporate responsibility to respect human rights. The report cautions that the responsibilities of corporations “cannot and should not simply mirror the duties of States.”²⁶ Rather, the challenge is to define the duties of companies. Prof. Ruggie emphasizes the need for companies to observe due diligence in understanding and managing the human rights impacts of their operations, and addresses the concept of legal complicity.

The need for more effective access to remedies. Prof. Ruggie observes that state regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses. He concludes that the existing patchwork of judicial and non-judicial mechanisms available to alleged victims of business-related human right abuses remains incomplete and flawed. He also suggests that states should strengthen legal frameworks to “hear complaints and enforce remedies against all corporations operating or based in their territory.”²⁷

Prof. Ruggie’s report aimed to serve as an authoritative focal point for helping to bring coherence to the complexity of the relationship between business and human rights. As noted in its introduction, the report “presents a conceptual and policy framework to anchor the business and human rights debate and

²³ *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 Apr 2008 [hereinafter “UN Framework Report”]. See also the companion report: *Clarifying the Concepts of “Sphere of influence” and “Complicity”* as well as Addendum 1: *Summary of five multi-stakeholder consultations* and Addendum 2: *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*.

²⁴ UN Framework Report, *ibid*, at par 3.

²⁵ UN Framework Report, *ibid*, at par 18.

²⁶ UN Framework Report, *ibid*, at par 53.

²⁷ UN Framework Report, *ibid*, at par 91.

to help guide all relevant actors.”²⁸ In light of the importance of these issues, in June 2008 the UN Human Rights Council “welcomed” the report and renewed the Special Representative's term for three years.²⁹

2. Guiding Principles on Business and Human Rights

The UN Human Rights Council resolution that welcomed Prof. Ruggie’s framework report included the following mandate:³⁰

(a) To provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the state to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation;

(b) To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;

(c) To explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;

(d) To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children;

(e) To identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact;

(f) To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council;

(g) To promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including states, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers’ organizations, workers’ organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings

The work of the Special Representative under this extended mandate resulted in the submission, in March 2011, of a final report that summarizes the work done from 2005 to 2011 and presents *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and*

²⁸ UN Framework Report, *ibid*, summary on title page.

²⁹ A/HRC/RES/8/7, 18 June 2008.

³⁰ *Ibid* at par 4.

Remedy Framework.”³¹ The text of the *Guiding Principles* to “operationalize” the *Framework* was the subject of further extensive consultation and stakeholder engagement.³²

The proposal was well-received by individual governments, business enterprises, civil society and workers’ organizations, national human rights institutions, international standard-setting groups, and UN entities.³³ Significantly, the final report notes that the normative contribution of the *Guiding Principles* does not lie in the creation of new international law obligations “but in elaborating the implications of existing standards and practice for States and businesses, integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.”³⁴

On 16 June 2011, the Human Rights Council endorsed these *Guiding Principles* by consensus.³⁵ It also decided to establish a working group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts appointed for a period of three years. Additionally, it decided to convene an annual Forum on Business and Human Rights to facilitate multi-stakeholder dialogue and dissemination of best practices.³⁶ Thus, efforts toward the implementation of the UN *Framework* and the *Guiding Principles* will continue. It is emphasized that this process draws a crucial economic actor – the business corporation – into closer engagement with human rights questions, both in theory and in practice. More broadly, as dialogue is promoted with agencies such as the World Bank, International Finance Corporation and UN Development Program, it may serve to enhance the place of human rights in international economic law and policy.³⁷

IV. THE OECD GUIDELINES

The Organisation for Economic Cooperation and Development (OECD) engages a wide range of issues related to international investment, business regulation, and corporate governance.³⁸ In the 1970s, it adopted a set of Guidelines for Multinational Enterprises.³⁹ In 2000, it issued revised Guidelines for

³¹ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework,”* A/HRC/17/31, 21 March 2011, Advance Edited Version [hereinafter “UN Guiding Principles Report”].

³² UN Guiding Principles Report, *ibid*, at paras. 10-12.

³³ UN Guiding Principles Report, *ibid*, at par 7.

³⁴ UN Guiding Principles Report, *ibid*, at par 14.

³⁵ “Human Rights and Transnational Corporations and Other Business Enterprises,” UN Human Rights Council Resolution A/HRC/RES/14/4, adopted 16 June 2011, par 1. As noted below, the United States was a co-sponsor of the resolution and expressed its commitment to making the vision of the Guiding Principles a reality.

³⁶ *Ibid*, UN Human Rights Council Resolution, par 6 and paras. 12-17.

³⁷ *Ibid*, UN Human Rights Council Resolution, par 6 (h).

³⁸ The website is www.oecd.org; membership consists of 34 countries, including the US and other advanced economies.

³⁹ The OECD adopted “Declaration and Decisions on International Investment and Multinational Enterprises” on 21 June 1976, to which the Guidelines for Multinational Enterprises are an annex; 15 I.L.M. 9 (1976).

Multinational Enterprises, intended to supplement applicable law and to “complement and reinforce” codes of conduct and other private efforts to promote business responsibility.⁴⁰ Implementation was supported through National Contact Points (NCPs).⁴¹ These OECD Guidelines covered a wide range of issues including disclosure, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition and taxation. In the area of human rights, however, only brief mention was made that enterprises should “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments.”⁴²

A new ethical tone was evident at the 2009 OECD annual summit on “The Crisis and Beyond: For a Stronger, Cleaner, Fairer Economy.”⁴³ The OECD also was closely monitoring the evolution of the UN Framework and Guiding Principles. In May 2011, the OECD launched an updated set of Guidelines for Multinational Enterprises endorsed by the thirty-four OECD members plus eight other countries.⁴⁴ A key policy commitment in the Guidelines calls on companies to “contribute to economic, environmental and social progress with a view to achieving sustainable development.”⁴⁵ While these Guidelines remain voluntary, there are important improvements in implementation.⁴⁶ Of particular note is the incorporation of a new chapter on human rights that provides:⁴⁷

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

⁴⁰ The OECD adopted the Revised Guidelines for Multinational Enterprises on 27 June 2000; available at www.oecd.org/dataoecd/12/21/1903291.pdf.

⁴¹ The Committee on International Investment and Multinational Enterprises recommended that NCPs be set up in all adhering countries to promote the Guidelines and help solve related problems. See the related implementation procedures in the OECD Revised Guidelines, *ibid*, Part II and the commentary at Part III.

⁴² See the OECD Revised Guidelines, *ibid*, Part II - General Policies, par 2.

⁴³ The OECD summit on “The Crisis and Beyond: For a Stronger, Cleaner, Fairer Economy” was held in Paris, 23-24 June 2009. In the wake of the international financial crisis, several government leaders had called for greater ethics and integrity in the economic system. A far-reaching inventory of relevant instruments and initiatives was prepared by the OECD in cooperation with various intergovernmental organizations; see <http://www.oecd.org/dataoecd/35/63/42393042.pdf>.

⁴⁴ *OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct* (25 May 2011). This report presents the “Declaration on Investment and Multinational Enterprises,” to which the updated guidelines are an annex; available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> 25 May 2011.

⁴⁵ *Ibid*, Part I, Chap II - General Policies, par A.1.

⁴⁶ *Ibid*, Part II, Implementation Procedures of the OECD Guidelines for Multinational Enterprises. However, the organization OECD Watch, while welcoming the broader scope of the Guidelines, remains concerned about procedural shortcomings; it will continue to “advocate for instruments and mechanisms that effectively enforce corporate accountability and curb corporate abuses.” See http://oecdwatch.org/publications-en/Publication_3675/view.

⁴⁷ *Ibid*, Part I, Chap. IV - Human Rights.

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts

The official commentary to the chapter notes that it “draws upon the United Nations *Framework for Business and Human Rights ‘Protect, Respect and Remedy’* and is in line with the *Guiding Principles for its Implementation*.”⁴⁸

IV. BUILDING ON THE ABA’S COMMITMENT TO HUMAN RIGHTS, THE RULE OF LAW AND CORPORATE CITIZENSHIP

As indicated in the Resolution accompanying this Report, it is requested that the ABA (1) endorse *Protect, Respect and Remedy: A Framework for Business and Human Rights*; endorse *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework,”* and (2) endorse the human rights provisions of the 2011 *OECD Guidelines for Multinational Enterprises* that reflect this new global approach. It is further requested (3) that the ABA urge governments, the private sector, and the legal community to integrate these provisions into their respective operations and practices.

Such endorsement would build on existing ABA objectives, including those related to corporate citizenship. The ABA repeatedly has affirmed principles related to the advancement and protection of human rights, including most recently in 2007, when the ABA House of Delegates adopted the following recommendation on Corporate Citizenship:⁴⁹

RESOLVED, That the American Bar Association encourages corporations, lawyers, law firms and other professionals to promote corporate citizenship by supporting: compliant and ethical corporate behavior globally; global pro bono services; promotion of the rule of law; encouraging governments to pursue policies that support the rule of law; and sharing of best practices in corporate citizenship.

⁴⁸ *Ibid.*

⁴⁹ American Bar Association, Task Force on International Rule of Law Symposia, Rule of Law Initiative, Report and Recommendation to the House of Delegates, No. 110B, p 1 (August, 2007).

The ABA report associated with that recommendation provides further context for the trend toward greater corporate social responsibility, and makes reference to the importance of human rights.⁵⁰ This recent history offers a valuable foundation for the adoption of the current recommendation.

Moreover, the report emphasizes the vital role of lawyers in supporting corporate citizenship and the rule of law.⁵¹ With this new recommendation in support of the *Framework* and *Guiding Principles*, this vital role can take on an added dimension in advancing issues of corporate responsibility and human rights. Additionally, this complex policy area holds implications for national and international law and raises questions that require the balancing of various interests.⁵² The ABA's endorsement would encourage the ABA and its membership to become involved in the clarification and implementation of the *Framework* and *Guiding Principles*.

This continued involvement is an essential part of the evolving process and is recognized by the United States, which is a member of the UN Human Rights Council and a co-sponsor of the resolution that endorsed the *Framework* and *Guiding Principles*. The U.S. statement of support indicated:⁵³

The United States would like to thank and congratulate the Special Representative for the important progress he has made on this challenging issue, and express our support and commitment to working to make the vision of the Guiding Principles a reality where it matters most – on the ground for people and businesses. As the culmination of several years of work, the Guiding Principles provide a focal point for corporations, States, civil society and other actors as they work to strengthen their respective approaches to the issue of business and human rights. . . .

[A]s we seek to implement the Guiding Principles, we want to stress the importance we attach to the multi-stakeholder process in general, and specific processes dealing with business and human rights. We believe that cooperation and coordination with other international bodies and the dialogue with relevant actors will continue to be a key part of

⁵⁰ *Ibid*, especially pp 2-4.

⁵¹ *Ibid*, pp 5-7.

⁵² Throughout the extensive deliberations and consultations under the Special Representative's mandate, a number of matters posed legal and regulatory implications. These included, for example, the potential need for home states to take regulatory action to prevent abuse by their companies overseas; for governments to strengthen market pressures on companies to respect rights; for export credit agencies to require clients to perform adequate due diligence on their potential human rights impacts; for states to assess how bilateral investment agreements relate to their ability to protect human rights; and for states to respond to the human rights problems businesses can exacerbate in conflict zones. Additionally, various potential judicial and non-judicial mechanisms were considered, including, for example, arbitration, agency oversight, national human rights institutions, National Contact Points as set out in the OECD Guidelines, funding conditions imposed by financial institutions, and establishment of human rights grievance mechanisms by companies themselves. As the UN Framework and Guidelines move to the implementation phase, further legal questions are likely to arise in a variety of contexts.

⁵³ Statement of Deputy Assistant Secretary Daniel Baer, "Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights," 16 June 2011, available at www.humanrights.gov/2011/06/16/.

the success of the mandate and should include the OECD with respect to the OECD Guidelines on Multinational Enterprises...

The commitment of the US, along with that of other diverse nations, holds promise for the successful implementation of the *Framework, Guiding Principles, and OECD Guidelines*. As mentioned, the initiative enjoys widespread support from the public, private and civil society sectors.⁵⁴

Within this shared global platform for action, the ABA can serve as a resource, advisor and advocate to help uphold human rights in the global economy.

Respectfully submitted,

Michael S. Greco
Chair, ABA Center for Human Rights
February 2012

⁵⁴ With the conclusion of the Special Representative's mandate, recommendations are being developed for follow-up actions; see <http://www.business-humanrights.org/SpecialRepPortal/Home/UNactionfollowingendofmandate>.

GENERAL INFORMATION FORM

Submitting Entity: ABA Center for Human Rights

Submitted By: Michael S. Greco, Chair

1. Summary of Resolution(s).

RESOLVED, That the American Bar Association endorses the United Nations *Protect, Respect and Remedy: A Framework for Business and Human Rights* (2008) and its companion *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011).

FURTHER RESOLVED, That the American Bar Association endorses the "Human Rights" provisions (Part I, Subpart IV) of the *OECD Guidelines for Multinational Enterprises* (2011), issued by the Organisation for Economic Cooperation and Development (OECD).

FURTHER RESOLVED, That the American Bar Association urges governments, the private sector, and the legal community to integrate into their respective operations and practices the United Nations Framework and Guiding Principles and the OECD Guidelines.

2. Approval by Submitting Entity.

The Center for Human Rights unanimously approved the proposed Resolution at its fall meeting on September 12, 2011, in Washington, DC.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

As indicated in the Report accompanying the proposed Resolution, the House in 2007 adopted a general policy urging corporate adherence to international human rights principles in the conduct of business activities. The proposed Resolution builds on that policy by endorsing subsequent and broadly supported international instruments that set forth specific principles and guidance for adherence.

5. What urgency exists which requires action at this meeting of the House?

The international instruments that are the subject of the proposed Resolution were issued in summer 2011 and will be implemented by relevant stakeholders in the months and years

ahead. The Resolution, if adopted, will enable the ABA to engage in this process and influence implementation, which will help ensure that human rights are advanced in this important area of human rights concern.

6. Status of Legislation. (If applicable)

The Center for Human Rights is not aware of relevant pending legislation. The U.S. State Department, however, publicly has endorsed the instruments that are the subject of the proposed resolution.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Human Rights anticipates developing a project, based on the proposed Resolution, to advance implementation of the specified international instruments through collaboration with multinational law firms and, by extension, their multinational corporate clients.

8. Cost to the Association. (Both direct and indirect costs)

There are no direct or indirect costs to the Association anticipated as a result of its adoption of the Resolution as ABA policy.

9. Disclosure of Interest. (If applicable)

There are no known interests affected by the proposed resolution among members of the Center for Human Rights or any other members involved in its development.

10. Referrals.

As of the date of the Report/Resolution's filing, the Section of Individual Rights and Responsibilities is a co-sponsor of the proposed Resolution, which also will be referred to the Sections of International Law; Business Law; Labor and Employment Law; Litigation; Antitrust Law; Criminal Justice; Taxation; TIPS; Intellectual Property Law; Real Property, Trust and Estate Law; Environment, Energy and Resources; General Practice, Solo, and Small Firm Division; Government and Public Sector Lawyers Division; and the Young Lawyers Division.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Michael Pates, Director, ABA Center for Human Rights, 740 15th Street, NW, Washington, DC 20005; 202-662-1025; michael.pates@americanbar.org.

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Michael S. Greco, Chair, ABA Center for Human Rights; K&L Gates LLP, State Street Financial Center, One Lincoln Street, Boston, MA 02111-2950; 617-261-3232 (office); 617-470-5852 (cell); michael.greco@klgates.com.

EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association endorses the United Nations *Protect, Respect and Remedy: A Framework for Business and Human Rights* (2008) and its companion *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011).

FURTHER RESOLVED, That the American Bar Association endorses the “Human Rights” provisions (Part I, Subpart IV) of the *OECD Guidelines for Multinational Enterprises* (2011), issued by the Organisation for Economic Cooperation and Development (OECD).

FURTHER RESOLVED, That the American Bar Association urges governments, the private sector, and the legal community to integrate into their respective operations and practices the United Nations Framework and Guiding Principles and the OECD Guidelines.

2. Summary of the Issue that the Resolution Addresses

Whether through direct activity or through supply chains on which they rely, business enterprises have a tremendous impact on the realization (or not) of human rights. The impact can extend from work conditions for employees to environmental quality for populations affected by business operations, and can include such gross human rights violations as modern slavery (labor and/or sex trafficking) of men, women and children across the globe. Conversely, business enterprises, by way of a common set of principles for business conduct as it relates to human rights, can help ensure the observance and advancement of human rights through their collective economic impact on developing and developed countries alike. The international instruments that are the subject of the proposed resolution set forth such principles and, in so doing, offer the promise of advancing human rights in a manner consistent with the respective roles of states, business, and private sector.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed resolution urges ABA endorsement of the specified international instruments to enable ABA engagement in their implementation. Given the core role that lawyers and the legal profession have in the conduct of business, the ABA should continue to have a constructive impact on this burgeoning area of human rights advocacy.

4. Summary of Minority Views

As with any international effort to address multifaceted interests and concerns, not all stakeholders believe that the relevant international instruments strike the right balance – some non-governmental organizations prefer tighter constraints on business, while some private sector commentators prefer fewer. In the main, however, these instruments have received

broad, and unprecedented, endorsement across multiple sectors for their well-considered analysis and balanced approach to often complex issues.