

Respecting Human Rights in the Energy and Natural Resources Sector

A Practical Guide by Hogan Lovells' International
Business and Human Rights Group



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Introduction

Criminal liability for complicity in murder, torture and war crimes; civil liability running to hundreds of millions of dollars: courts around the world are extending their jurisdiction to business related human rights impacts in the energy and natural resources sector, including those which occur extra-territorially and throughout a business's value chain. The legal consequences of failing to respect human rights are both real and grave.

This is a practical guide for in house lawyers, compliance departments and management to help them understand and reduce legal risk by effectively identifying, preventing and mitigating human rights risk.

This guide explains how the responsibility to respect human rights applies to businesses operating in the energy and natural resources sectors and how failure to respect human rights can increase a business's legal risk. It is relevant to all businesses with an interest in the sector, including mining companies involved in extraction and beneficiation, oil and gas companies, the businesses which build and maintain the infrastructure to support their operations and the institutions which provide them with finance. It is particularly relevant where economic activity is situated in a territory where the rule of law is weak or where the state has a poor record of human rights compliance. It is part of a series of sector specific guides produced by our International Business and Human Rights Group.



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Business and human rights – the legal framework

What are the sources of international human rights law?

The core human rights are expressed in the 1948 Universal Declaration of Human Rights. Subsequently, the UN drafted, and states ratified, various legally binding conventions promising to respect, fulfil and protect human rights. Together with the Universal Declaration and ILO Fundamental Principles, two of these Conventions, the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), - constitute the “International Bill of Rights”. This is the bedrock of the international human rights regime.

It is supplemented by other “Core Conventions” targeting specific rights (such as the Convention Against Torture) and specific groups (such as the Convention on the Rights of Persons with Disabilities) as well as declarations, guidelines and principles. Through the jurisprudence of national courts, regional human rights bodies and various UN bodies, the contours of international human rights law have gradually been drawn.

In practice, in order to identify and define a particular human right, it will be necessary to consult a range of sources, starting with the International Bill of Rights, the Core Conventions and General Comments of the various UN Treaty Bodies. In certain circumstances (for example in a conflict zone or where the rights of indigenous people are engaged), it will be necessary to consider a wider range of sources. In sections 3 and 4, we look at how certain rights which are particularly relevant to the energy and natural resources sector have been defined.

How does international human rights law apply to businesses in general?

It is the responsibility of all private actors, including businesses to “respect” human rights. What this means in practice is set out in the UN Guiding Principles on Business and Human Rights (UNGPs). In short, businesses “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.

Businesses can be involved in an adverse human rights impact in a number of ways, whether through their own operations or through a “business relationship” (including with a supplier, joint venture partner, subsidiary or client). The nature of this involvement will determine how a business is expected to respond:

| If there is a risk of... | Causing ¹ an impact | Contributing ² to an impact | Being directly linked ³ with an impact |
|---|---|---|---|
| The business should ... | Cease or change the activity in order to prevent or mitigate the impact | Use leverage over third parties to mitigate or prevent the impact | |
| If the impact actually occurs, the business should... | Cease or prevent the impact and actively engage in its remediation, either directly or in cooperation with others | Cease or prevent its contribution to the impact and contribute to the remediation of the harm | Consider whether to remediate (although there is no requirement to do so) |

¹ “Causation” refers to a situation where, on its own, a business removes or reduces a person’s ability to enjoy a human right

² “Contribution” refers to a situation where a business incentivises, facilitates or enables an adverse impact by a third party. It involves elements of causality and knowledge (both actual and constructive). The more significant the causal connection and the more the business knew or should have known, the more likely it is that the business will have contributed to (as opposed to being directly linked with) an adverse human rights impact.

³ “Direct linkage” refers to a situation where a business has not caused or contributed to an adverse human rights impact, but there is nevertheless a direct link between its operations, products or services and an adverse human rights impact

To identify whether and how they are involved in an actual or potential adverse human rights impact and determine the appropriate response, businesses should have in place “*policies and processes appropriate to their size and circumstances*”, including a human rights due diligence process⁴. This overlaps with a business’s responsibilities to carry out human rights due diligence under various other sources of “soft” law, including the Voluntary Principles on Security and Human Rights, the OECD Guidelines for Multinational Enterprises and OECD Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas.

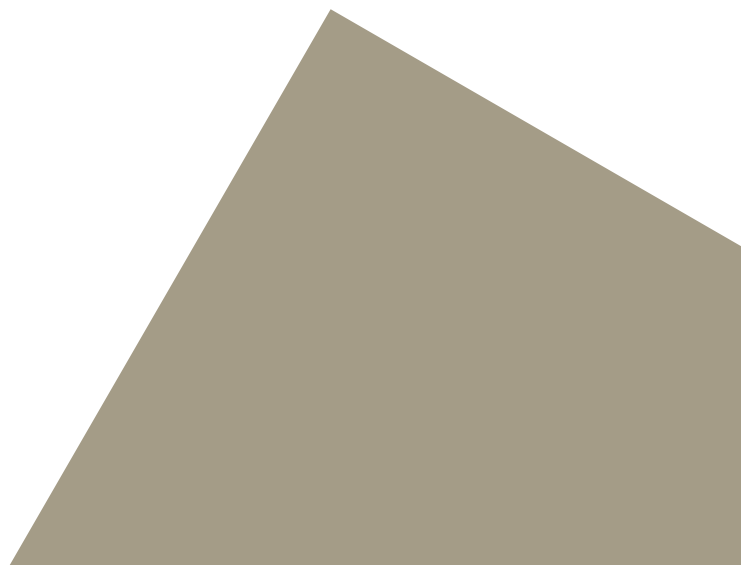
What happens if a business fails to respect human rights?

The primary duty under international human rights law is on the state and the UNGPs do not create any new international legal obligations. Accordingly, the UNGPs are often referred to as “soft” law. However, this label can be misleading. A business which does not respect human rights exposes itself (and, in certain circumstances, its personnel) to potential legal liability as well as to adverse publicity and the risk of boycotts and divestment.

Most commonly, this liability will arise under the domestic law of the “territorial state”, that is the state where the human rights impact takes place. This may be under specific human rights law or it may be under another area of the law which does not expressly refer to human rights, like non-discrimination provisions in employment law, privacy law, health and safety law or general tort law. Not every state effectively protects every human right under its domestic law. Nevertheless, some states will exercise extra-territorial jurisdiction over certain adverse human rights impacts in order to provide rights holders with access to a remedy. For example:

- a) A UK domiciled parent company and its overseas subsidiary may be sued in the English courts for an extra-territorial human rights impact framed as a tort (or some other civil wrong). See, for example, the claim against Vedanta plc and its Zambian subsidiary for injury allegedly caused by pollution from a copper mine in northern Zambia;
- b) Involvement in an adverse human rights impact may be framed as a crime (or, more commonly, complicity in a crime) under international law and prosecuted in the domestic courts of any state on the basis of universal jurisdiction, irrespective of where the crime took place. In addition, the International Criminal Court has expressed interest in prosecuting business executives associated with land grabs and large scale environmental damage;
- c) Under the Alien Tort Claims Act, U.S. courts have civil jurisdiction over torts committed outside the United States in violation of the law of nations. This has been exercised to extend liability to corporations for complicity in torture, forced displacement and other war crimes. In 2018, the Supreme Court excluded jurisdiction over non-U.S. companies under the ATCA but there remains scope for liability for U.S. companies, which could include claims against U.S. parent companies in relation to the activities of their non-U.S. subsidiaries.

4 UNGP 15



Several states have introduced legislation to make elements of the corporate responsibility to respect human rights binding under domestic law. For example, the Modern Slavery Act in the UK, the Duty of Vigilance Law in France and the Dodd Frank Act in the USA require that some companies make public statements about human rights due diligence. Other states (for example Australia and Switzerland) are looking at the introduction of similar legislation.

The partial and targeted nature of these measures and their difference in scope, sanction and jurisdictional reach has created a mosaic of obligations that may apply to a single global company and its personnel in the various jurisdictions where it operates. Navigating this shifting and sometimes contradictory regulatory landscape is complex. In this context, a “compliance” based approach, seeking to do the minimum required to comply with applicable “hard” law is problematic. So is treating human rights as a purely social issue which can be detached from considerations of legal risk.

We consider that the safest way to reduce legal risk is to move from a “compliance” approach to a “prevention and transparency” approach, treating human rights risk as legal risk and ensuring that your organisation fulfils its responsibility to respect all human rights, wherever it operates. Not only will this reduce legal risk, it will “future proof” your business against further regulatory changes and boost confidence amongst investors, consumers and affected communities.



Business and human rights – what is the relevance to the energy and natural resources sector?

According to research carried out by the UN, business related human rights impacts occur more frequently in the extractive sector than in any other. Further, it is estimated that over two thirds of business related human rights impacts occur in Africa, Latin America, Asia and the Pacific⁵. Businesses operating in the sector have faced civil claims worth hundreds of millions of dollars, boycotts, divestment campaigns and their executives have faced personal, criminal liability. In this context, it is crucial that businesses operating in the sector understand human rights risk, how they might become involved in an adverse human rights impact and what they should do to regulate their conduct in response.

How might a business in the energy and natural resources sector be involved in an adverse human rights impact?

Like any business, businesses in the energy and natural resources sector may **cause** an adverse human rights impact.

This may occur in relation to its own personnel. If, for example, it discriminates against women, members of the LGBTIQ community or a racial group in its recruitment practices, it will “cause” an adverse human rights impact. Accordingly, it will be responsible for ceasing the discriminatory practice and actively engaging in its remediation, for example through financial compensation. In most jurisdictions, this will likely be determined in accordance with the relevant domestic employment law. Where this is not the case (either because of a gap in the law or because the law is not enforced), business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate these efforts. This might mean paying compensation even though this is not strictly required under domestic law.

Another example of causation commonly encountered in the extractive sector is in relation to environmental rights. A mine operator, for example, that is responsible for discharge of toxic substances into a local water course may cause a range of adverse human rights impacts (see below “environmental rights”). This may result in civil or criminal liability under domestic law or overseas, for example in the courts where the parent company is domiciled. Even if such liability

does not arise, the business will still have caused an adverse human rights impact according to the UNGPs. It will be expected to cease the activity resulting in the impact (for example by taking steps to prevent further pollution) and actively engage in its remediation, most likely by providing compensation.

Impacts caused by a third party

The nature of the services and products offered by businesses in the energy and natural resources sector also raises the possibility of involvement in an adverse impact caused by a third party, including a state or a company in its supply chain. For example, an investor could be involved in environmental impacts caused by an operator; an operator could be involved in torture or forced eviction committed by state authorities providing security for its operations; or a business could be involved in child labour used by artisanal miners in its supply chain.

It is not always easy to determine whether this involvement amounts to **contribution** to an impact as opposed to **direct linkage** with an impact through its products and services. However, under the UNGPs, this distinction is significant as it will determine whether the business is required to contribute to the remediation of the impact. Therefore, it is necessary for the team tasked with due diligence to be able to categorise the nature of involvement in a potential or actual human rights impact.

⁵ Human Rights Council, Addendum to Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5/Add.2

Where a business **contributes** to an adverse impact, it will be required to cease or change the relevant activity in order to prevent or mitigate the impact and to contribute to its remediation. Based on guidance provided by the UN for other sectors⁶, we consider that the following, non-exhaustive list of factors will be material in determining whether the business contributes to, or is directly linked with, an impact:

- a) Whether it **motivates or incentivises** the harm. For example, where a mine operator puts pressure on state security to create a secure working environment, knowing that it is likely that the state will use techniques which violate fundamental rights, the operator will likely be seen to contribute to that impact⁷;
- b) Whether it **facilitates** the harm. That is whether it knowingly adds to conditions which make it possible for someone else to cause harm. For example, where an investor knowingly invests in a company which uses child labour so that it can expand its operations, it may facilitate and therefore contribute to further instances of child labour;
- c) The quality of the business's human rights **systems** and due diligence **processes**. A business's failure to act upon information which was or should have been available to it may change a situation of "direct linkage" to one of "contribution". Take the example of a cement company which sources materials from artisanal miners in an area where child labour is widely used. Where the cement company could, by conducting reasonable due diligence, identify the risk of child labour but instead chooses not to carry out due diligence, a situation of linkage may become one of contribution, therefore requiring participation in remediation.

These situations might also lead to hard legal liability as a secondary party or "accomplice" to a crime. There is no uniform standard for secondary liability however some states will prosecute involvement in a crime even where the contribution is insubstantial and the accomplice lacks actual knowledge of the primary crime.

The final category of involvement is "**direct linkage**". This arises where a business does not cause or contribute to an adverse human rights impact but is otherwise linked to it through its products, operations or services. For example, where a supplier subcontracts work to a supplier who (without the purchaser's actual or constructive knowledge) uses child labour, the purchaser will be directly linked to the impact. Once they become aware of this link, the purchaser has a responsibility to act. However, it is not required to remediate the harm (see further below).

Termination

A common response to such information would be to terminate the contract with the supplier. The threat of termination may be a useful way of exercising leverage over the supplier to prevent, mitigate and remediate adverse human rights impacts which it causes or contributes to and we recommend including a provision in your contracts with suppliers to give you this right (see the model clause included at **Annex 1**).

However, termination is not always the right answer. The UNGPs require that a company which is directly linked with an adverse human rights impact uses its leverage over the party that causes or contributes to the impact to mitigate and / or remedy its impact and to prevent future impacts. The effectiveness of a remedy should be judged according to what the rights-holder would consider to be effective. Termination will not necessarily achieve these objectives and may in fact cause further human rights impacts (for example where a poor community immediately loses the economic activity associated with the prohibited child labour). Instead of immediate termination, an appropriate response might be for the purchaser to give notice of the adverse human rights impact to the supplier and threaten to terminate unless it is remedied within a reasonable period of time. The remedy employed by the supplier may involve compensation to the affected child workers, reintegration into education or the implementation of policies and mechanisms to prevent further instances of child labour.

⁶ See, for example, OHCHR Banking Sector Guidance

⁷ In circumstances relating to security provided by public or private security forces, companies should observe the Voluntary Principles on Security and Human Rights

In practice, many of the impacts associated with a business's products and services will fall into the category of "direct linkage" meaning that its primary responsibility will be to use leverage over third parties to prevent and mitigate a future impact and remediate an actual impact (rather than, necessarily, contributing to remediation itself). This is especially the case where the business has adequate due diligence procedures in place and integrates the findings into its operations.

Using leverage to prevent or mitigate an adverse human rights impact

Leverage is an advantage that gives power to influence a third party. In the context of the UNGPs, it refers to the ability to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.⁸

It is the responsibility of a business to use its leverage over third parties to mitigate or prevent an adverse human rights impact. Where a business does not have sufficient leverage to do so, it is expected to take steps to increase its leverage. Some examples include: providing capacity building on human rights to state security forces engaged in security for a business's operations; inserting clauses in supply contracts which require the downstream supplier to implement the operational principles of the UNGPs and giving a right to terminate where it fails to do so (see **Annex 1**); or engaging directly with the management of a supplier to improve its human rights systems and processes.

What does the responsibility to remediate entail?

The UNGPs require that, where a business causes or contributes to an adverse impact, it provides for or cooperates in its remediation through legitimate processes taking care not to preclude access to judicial or non-judicial grievance mechanisms. Otherwise, where a business's products or services are directly linked with an adverse impact, it may participate in remediation but it is not required to do so (unless this is required by domestic law). Businesses in the extractive sector should bear the following in mind:

- a) Remediation may involve financial compensation or settlement. Alternatively (or additionally), it may involve an apology, provisions to ensure that the harm does not recur, restitution or rehabilitation, or some other remedy agreed by the parties. The business seeking to remediate should be guided by what those affected by the impact would view as an effective remedy. Where it agrees to provide financial compensation by way of a settlement agreement, the business needs to consider whether it is possible as a matter of the applicable domestic law to bar further claims;
- b) There may be judicial mechanisms under domestic law which provide for a remedy. It is the responsibility of a business which is involved in an adverse human rights impact to actively cooperate with these mechanisms. In addition, and in particular in the absence of such a mechanism, a business may seek to remediate an adverse impact through its own operational grievance mechanism. The UNGPs require that this is: legitimate, accessible, predictable, equitable, transparent, rights compatible, a source of continuous learning and based on engagement and dialogue;
- c) Where a business contributes to an adverse impact caused by a third party, the UNGPs do not shift the burden of responsibility for the impact from that party. It retains its own responsibilities for remediation; it is the role of the contributing business to actively participate in the remediation;
- d) Where multiple parties contribute to an adverse human rights impact, it may be appropriate to provide a differentiated share of remediation. Where the parties cannot agree to the appropriate differentiation, it may be appropriate to participate in mediation or adjudication by a neutral third party; and
- e) Where a third party refuses to meet its share of responsibility for an impact, the contributing company should seek to exercise leverage over the client to encourage it to do so, for example by threatening to withdraw future business from a partner who refuses to cooperate.

⁸ OHCHR FAQs about the UNGPs, p.43

Which particular human rights are likely to be relevant to the energy and natural resources sector?

Companies in the energy and natural resources sector have been involved in disputes about a number of substantive rights impacts. To help identify, prevent and mitigate these rights impacts, the following section analyses certain rights which are at particular risk in the sector.

Forced eviction

The UN defines this as: *“the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”*⁹

Forced eviction will directly impact on a person’s right to an adequate standard of living, including the right to adequate housing (Art 11 ICESCR). It has also been interpreted to impact a number of other rights contained in the International Bill of Rights, including: the right to life (Art 6 ICCPR); freedom from cruel, inhuman and degrading treatment (Art 7 ICCPR); security of person (Art 9 ICCPR); privacy (Art 17 ICCPR); health (Art 12 ICESCR); property (Art 17 UDHR). Forced evictions are, in many instances, discriminatory in nature and disproportionately affect marginalised groups.

Where forced eviction occurs in the context of an armed conflict, it may constitute a war crime¹⁰. When it occurs as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack, it may constitute a crime against humanity¹¹. These are crimes under customary international law and, in principle, can be investigated and prosecuted by any state on the basis of universal jurisdiction, irrespective

of other jurisdictional links. Importantly, such liability attaches to the primary perpetrator and to other persons who assist the crime (for example someone who encourages or assists such a crime)¹⁰. Such secondary liability may attach to representatives of companies in the energy and natural resources sector and can ultimately result in a lengthy custodial sentence.

It is important to note that forced eviction is not linked to property rights under domestic law. Regardless of the type of tenure, everyone has the right to be protected against forced eviction. This is an example of an area where international human rights law requires more of a business than compliance with the domestic law.

While the state retains the primary responsibility for protecting individuals from forced evictions, businesses are independently responsible for respecting this right. This means preventing and addressing the human rights impact so far as it is connected to its activities. Further, a business could be involved in forced eviction carried out by state representatives or other private actors. In practice, where there is a risk that operations in which a business is involved will result in forced eviction, the business should take steps to prevent this, including by using leverage over third parties. This might include:

⁹ UNOHCHR Fact Sheet No. 25 on Forced Evictions at [5]

¹⁰ See Art 8 of the Rome Statute; Art 53 Geneva Convention (IV); Art 54 First Additional Protocol; Article 14 of the Second Additional Protocol

¹¹ See Art 7 of the Rome Statute



- Exploring and considering alternatives to eviction (for example pursuant to a land sharing agreement)
- Facilitating (or preparing on the state's behalf) an eviction impact assessment
- Lobbying the state to ensure that any evictions respect human rights and due process (that is, the right to be treated fairly, efficiently and effectively by the administration of justice)
- Ensuring that the right to meaningful consultation and participation is respected at all stages of the process (there are specific requirements where the evictions may affect indigenous people, see below)
- Lobbying the state to ensure that legal remedies are available at all times (including by assisting rights holders in accessing legal aid)
- Ensuring that adequate compensation is provided in advance
- Establishing or participating in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted

Free prior and informed consent

Indigenous peoples enjoy the protection of general human rights standards but also standards specifically applicable to them¹². They enjoy special protections to ensure that actions that result in dispossessing them of their lands are prevented or remedied. In this context, indigenous peoples cannot be forcibly removed from their lands without their free, prior and informed consent (“**FPIC**”).

FPIC has a specific and technical meaning and failure to respect this right has been the subject of complaints against companies operating in the energy and natural resources sector by representatives of indigenous peoples. However, the right is not expressed in the International Bill of Rights or in any of the Core Conventions. Rather, it is derived from other treaty

¹² There is no accepted official definition of “indigenous”. Instead, the UN Permanent Forum on Indigenous Issues describes the term in the context of: self-identification as an indigenous person; historical continuity with pre-colonial societies; strong link to territories and natural resources; distinct social, economic or political systems; distinct language culture and beliefs; non-dominant groups in society; resolution to maintain and reproduce ancestral environments as distinctive peoples and communities. See fact sheet.



norms, including the right to self-determination affirmed in common Article 1 of the ICCPR and ICESCR, the principle of non-discrimination and the right to develop and maintain cultures under Arts 27 ICCPR and 15 ICESCR. The contours of the right to FPIC have been developed through General Comments of the treaty bodies and the right to FPIC is expressly affirmed in the Declaration on the Rights of Indigenous Peoples which provides (amongst other things) that:

- a) Indigenous peoples shall not be relocated from their land without FPIC (Art 10);
- b) Indigenous people have the right to redress where their land is taken, used or damaged without FPIC (Art 28);
- c) States take effective measures to ensure that there is no storage or disposal of hazardous materials on indigenous peoples' land (Art 29); and
- d) States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain FPIC prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Art 32).

There are technical nuances to respecting the right to FPIC. In some circumstances, (for example the relocation of indigenous peoples or the storage of hazardous materials), it is necessary to obtain actual consent prior to proceeding. In other circumstances, it is only necessary to have consent as the objective of consultation. "Free", "Prior" and "Informed" each have specific meanings which affect the nature and scope of a consultation and consent process.

What does this mean for a business? Some of these propositions place specific obligations on states. A business is not expected to step into the shoes of the

state and fulfil its responsibility to respect or promote human rights. However, it will be expected not to reduce or remove the right and to exercise leverage over the state to ensure that it fulfils its obligations. It could do this by making FPIC a condition of operating. The operator may find that the state has limited capacity or knowledge about FPIC - if this is the case, it would be appropriate to offer training to the state on the nature of its obligations or technical assistance on the design of a consultation and consent process.

Environmental rights

Environmental damage caused by companies in the energy and natural resources sector can impact a range of substantive rights. According to the UN Special Rapporteur on human rights and the environment, a safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation and there are growing calls for the global recognition of the right to a safe and healthy environment¹³.

This is also an area where human rights law intersects with other sources of law, at both a domestic and international level. As outlined above, there has been a series of cases in the UK where the UK domiciled parent of a multinational group and its foreign operating subsidiary have been sued in the English courts for breach of tortious and statutory duty. The Chief Prosecutor and judges at the ICC have recently called for the development of international criminal law to cover widespread environmental damage and indicated that this is an area where it would be appropriate to prosecute business leaders.

Most companies operating in the energy and natural resources sector will already have procedures in place to prevent and mitigate the risk of environmental damage. It is crucial that these are effectively implemented, wherever the business operates and irrespective of any weaknesses in the domestic legal regime.

¹³ See, for example, the March 2018 press release by John Knox, UN Special Rapporteur in this area

Conclusion

Identifying these rights and understanding how their contours have been drawn through the jurisprudence of the United Nations and others so as to give rise to obligations for a business in the energy and natural resources sector is a complex task. It requires specialist legal knowledge of international human rights law and its interaction with the UNGPs, domestic and international law. Businesses are nevertheless expected to understand this and structure their operations accordingly. What's more, the same applies to the full spectrum of international human rights law and failure to get it right can materially affect a business's legal risk profile and bottom line. In extreme cases, the liberty of its executives may be at risk.

In this context, businesses should either take steps to engage external, legal specialists to assist with identifying and managing human rights risk or they need to ensure that their in house legal teams are equipped with the necessary skills and expertise to do so. Either way, Hogan Lovells International Business and Human Rights Group can help.



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Annex one

Standard form human rights clause for a supply contract (pro-Customer)¹⁴

Definitions

Human Rights: internationally recognised human rights understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.

[Human Rights Policy: the Customer's human rights policy [attached as Schedule 1][, as amended by notification to the Supplier from time to time].]

[Human Rights Due Diligence Questionnaire: the Customer's human rights due diligence questionnaire [attached as Schedule [2]][, as amended by notification to the Supplier from time to time].]¹⁵

Compliance with human rights laws and responsibility to respect human rights

In performing its obligations under this agreement, the Supplier shall:

- a) comply with all Human Rights laws, statutes, regulations [and codes] from time to time in force¹⁶;
- b) [comply with the Human Rights Policy OR have and maintain throughout the term of this agreement its own policies and procedures to ensure its compliance with Human Rights principles];
- c) include in contracts with its direct subcontractors and suppliers Human Rights provisions which are at least as onerous as those set out in Clause 1 and Clause 2.

Responsibility to respect human rights¹⁷

In performing its obligations under this agreement, the Supplier shall respect Human Rights and ensure that its operational policies reflect the responsibility to respect Human Rights in accordance with the UN Guiding Principles on Human Rights, meaning that it shall:

- a) identify, prevent and mitigate any potential or actual adverse Human Rights impacts resulting from its activities or through its relationships with subcontractors, suppliers or other third parties;
- b) remediate any actual adverse Human Rights impacts which it causes or to which it contributes as soon as is practicable, including through, as appropriate:
 - i) providing adequate compensation or other appropriate remedy to any victim of the adverse impact;

- ii) addressing the cause of the adverse impact so as to avoid further similar adverse impacts; and
- iii) revising its operational policies and procedures, and any other action as may be necessary to seek to avoid similar adverse impacts in the future.

Due diligence

The Supplier represents and warrants that [as at the date of this agreement]:

- a) its responses to any Human Rights Due Diligence Questionnaire are complete and accurate; and
- b) neither the Supplier nor any of its officers[, OR or] employees [or other persons associated with it]:
 - i) has been convicted of any offence involving an adverse human rights impact; and
 - ii) [having made reasonable enquiries, so far as it is aware OR to the best of its knowledge] has been or is the subject of any investigation, inquiry or enforcement proceedings by any government, administrative or regulatory body regarding any offence or alleged offence of or in connection with an adverse Human Rights impact.

The Supplier shall implement due diligence procedures, in accordance with the UN Guiding Principles on Business and Human Rights, for its own operations, [and] [direct] subcontractors[, OR and][suppliers] [and other participants in its supply chains] to identify actual or potential Human Rights impacts in its supply chains and take the necessary steps to prevent, mitigate or remediate an adverse impact¹⁸.

Security and human rights

In performing its obligations under this agreement, the Supplier shall in any provision of security for its operations or in its dealings with the police, military or other security forces assure compliance with the norms of the Voluntary Principles on Security and Human Rights.]

Subcontracting

The Supplier shall not subcontract its obligations under this agreement [without the prior written consent of the Customer].

[In order to help the Customer reach a decision on a proposed subcontract, the Supplier shall provide the Customer [with a copy of any proposed subcontract,

together] with any [other] information that the Customer may reasonably require about the proposed subcontractor.]

[If the Customer agrees that the Supplier may subcontract its obligations, the Supplier shall implement an appropriate system of [due diligence,] [audit] [and] [training] for its subcontractors.]

Reports¹⁹

The Supplier shall notify the Customer as soon as reasonably practicable if it becomes aware:

- a) of any potential or actual adverse Human Rights impact resulting from its activities or through its relationships with subcontractors, suppliers or other third parties;
- b) that its responses to the Customer's Human Rights Due Diligence Questionnaire are no longer complete and accurate;
- c) that it or any of its officers[, OR or] employees [or other persons associated with it];
- d) have been convicted of any offence involving a breach of Human Rights; or
- i) are the subject of any investigation, inquiry or enforcement proceedings by any government, administrative or regulatory body regarding any offence or alleged offence of or in connection with a breach of Human Rights; or
- ii) of any actual or potential breach of its obligations under Clause 1 and Clause 2.

Record keeping and audits

The Supplier shall:

- a) maintain a complete set of records to trace the supply chain of all goods and services provided to the Customer in connection with this agreement; and
- b) permit the Customer and its third party representatives to inspect the Supplier's premises and records, and to meet with the Supplier's personnel to audit the Supplier's compliance with its obligations under this clause.

[Indemnity

The Supplier shall indemnify and keep indemnified the Customer against any losses, liabilities, damages, costs (including [but not limited to] legal fees) and expenses incurred by[, or awarded against,] the Customer as a result of any breach of Clause 1 to Clause 7.]

Termination²⁰

The Customer may terminate the agreement with immediate effect by giving written notice to the Supplier if:

- a) the Supplier commits a breach of the [Human Rights Policy OR [COMPLIANCE WITH LAWS AND POLICIES CLAUSE] [DUE DILIGENCE CLAUSE] [SUBCONTRACTING CLAUSE] [REPORTS CLAUSE] [AUDIT CLAUSE]]; or
- b) if such breach has not been remedied in accordance with notice given by the Customer specifying the breach and requiring its remedy within a reasonable period of time.

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15 According to UNGP 12, the International Bill of Human Rights comprises the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict, enterprises should respect the standards of international humanitarian law.

16 Human rights laws and regulations will cover a range of laws applicable to the goods or services provided under the contract. Some laws expressly refer to human rights, for example, the French Duty of Vigilance Law. Other laws refer to a specific right, such as the UK Modern Slavery Act 2015. Other relevant laws will not expressly refer to human rights but will overlap with the subject matter (for example, health and safety regulations). "Codes" will bring any applicable industry codes within the scope of the clause, for example the Kimberley Process for trade in diamonds. As a pro-customer clause, the onus is on the supplier to determine laws within the ambit of this provision and ensure its compliance.

17 UNGP 11 confirms that the responsibility to respect exists over and above compliance with national laws and regulations. This will be particularly relevant where the supplier operates in a jurisdiction where national law does not effectively prevent human rights impacts; the supplier will be required to take steps to ensure that it respects human rights notwithstanding a lacuna in the national law.

18 This provision requires the supplier to carry out its own due diligence. This offers an additional level of protection and encourages the supplier to fulfil its responsibility. However, it will not be a substitute for customer's own due diligence.

19 This provision is important to assist the customer in fulfilling its own responsibility to carry out human rights due diligence. It may not be feasible to carry out intensive due diligence on every single supplier (although intensive due diligence may be appropriate where the supplier is operating in a particularly high risk jurisdiction or sector). Placing a residual reporting obligation on suppliers will allow the customer to show that it is carrying out a basic level of due diligence.

20 Termination is not required under the UNGP. According to UNGP 19, it is only where a customer lacks leverage to prevent or mitigate an adverse impact and is unable to increase its leverage that a customer should consider ending the relationship. In doing so, the customer should take into account credible assessments of the potential human rights impacts of termination. There may be circumstances in which rights-holders are better served by the customer maintaining the relationship and further attempting to build leverage over the supplier to enable it to prevent, mitigate and remediate an impact. This clause may be added to the termination clause in the agreement. The drafter will need to consider which breaches will result in a right to terminate the agreement immediately and which can be remedied, and how this fits with the other termination provisions in the agreement.

Annex two

Useful sources of further information

- UN Guiding Principles on Business and Human Rights
- OHCHR FAQs about the UNGPs
- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- ILO Fundamental Principles
- Voluntary Principles on Security and Human Rights
- Human Rights Council, Addendum to Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5/Add.2
- OECD Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas
- OECD Guidelines for Multinational Enterprises

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