



International Bar Association
Business and Human Rights Working Group
London, UK

March 31, 2015

Dear Business and Human Rights Working Group:

The Institute for Human Rights and Business welcomes the proposed IBA Guidance for Business Lawyers on the UN Guiding Principles on Business and Human Rights. The draft document is a welcome and necessary first step towards improved competencies of all business lawyers, whether in-house or outside counsel. The IBA Guidance has broad scope and touches on the key aspects of business lawyers' practice. But there is much to be done to enhance the depth of guidance and to make it relevant for the day-to-day practice of the legal profession. Here are some observations and ideas about how to improve the IBA Guidance.

1. Focus on law firms

In many jurisdictions, in-house counsel of larger companies are encountering the challenges of business and human rights in their particular corporate practices, due to inquiries and demands for advice from the operational departments. In-house counsel are currently left to study and work with issues on corporate social responsibility, environmental, social and governance (ESG) sustainability, and the business and human rights framework under the UN Guiding Principles; otherwise, they are unable to fulfill their corporate functions. As a result, their awareness of business and human rights is relatively high, particularly in the high risk sectors (especially the extractive sector), having been already exposed to a number of dilemmas and challenges.

In contrast, outside counsel could be insulated from the business and human rights debate. Those who do not work frequently with clients with interest in the business and human rights area are apt to be less knowledgeable about how to help their clients respect human rights in their operations. They may display indifference or even hostility when faced with the assertion that business should respect human rights. Of course, this is a general description of the state of practice. Obviously, many law firms large and small have specialists in these emerging areas. But some of the anecdotes leading to such generalization indicate the need for deeper attention and appreciation by law firms.

2. Law firm culture

Part 3, Section II of the IBA Guidance talks about the relatively flat organization of law firms. It is precisely this structure, combined with partner independence in general, that makes creating a robust respect for the business and human rights framework in a law firm so challenging.

As corporate awareness for the Guiding Principles increases, lawyers will increasingly face tricky inquiries from clients. They may be presented with various fact patterns and asked to draw a line between “compliance” and “non-compliance. They may be asked to present options to lessen the client’s responsibilities. And they may represent a client who may opinion-shop several lawyers until they receive the answer they want. All these things could happen where clear-cut answers are impossible and may even be irresponsible. Ultimately what is needed is good judgment. And that is only possible through the interaction of peers, supervisors, and law firm management.

Given financial and time pressures, law firms, like all business, strive to be efficient, which can result in an isolated working environment where lawyers interact with but a small number of colleagues. Partner independence could mean lack of internal debate or oversight by peers or management. These factors make the socialization of new approaches to doing business unlikely without very deliberate action by management. To the extent possible, law firms should create internal support structures, such as mentorships, new practice groups, and management committees to ensure a business and human rights practice is not relegated to an isolated group of lawyers or junior associates who do not interact with other corporate and business lawyers. Similarly, appropriate oversight of sound legal advice around business and human rights should be implemented to ensure the firm stands behind its legal advice on tricky legal situations or questions.

Pro bono practices remain an ideal way for law firms to acquire skills in new areas. Depending on the complexity or severity of the issues involved, however, law firms should make appropriate legal support, judgment, and oversight available, so as to ensure that the challenge is not left to a few pro bono lawyers to address.

3. Tools of the trade

It will be important for IBA to follow up with additional support to help lawyers cope with the changing demands for advice from their corporate clients. For this purpose, training materials, case studies, and internal and external forums for debate are essential. We hope IBA will closely monitor and support the work of the various bar associations around the world to ensure that meaningful tools are available and that they are broadly consistent and yet differentiated for the specific jurisdictions and legal practices.

It is not clear whether the approach to business and human rights issues will be differently handled by common law jurisdictions, as opposed to civil law jurisdictions. Similarly, there may be uniquely specific, but common challenges arising in different legal practices, such as commercial arbitration or intellectual property. Commercial law does not require lawyers to take into account public policy issues, and yet lawyers will be increasingly asked to weigh in on those issues in their practices, if not by their clients, by civil society organizations. While it is neither practical nor desirable for the IBA Guidance document to address all the specific or peculiar circumstances of such legal practice, lawyers do deserve well-crafted tools so that they may counsel their clients professionally and ethically on business and human rights issues and topics.

IHRB looks forward to learning about the outcome of the consultation, and stands ready to work with the Business and Human Right Working Group on the appropriate tools and dissemination of information.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Aizawa', with a stylized, cursive flourish extending to the right.

Motoko Aizawa
Managing Director USA

Cc: Messrs. Michael Maya, IBA Washington DC & Michael Pates, ABA Washington DC