
November 30, 2020

Via Email: wg-business@ohchr.org

United Nations Working Group on Business and Human Rights
c/o United Nations High Commissioner for Human Rights
Palais des Nations
CH-1201 Geneva 10, Switzerland

RE: Request for Input on “Business and Human Rights: Towards a Decade of Global Implementation”

Dear Members of the UN Working Group on Business and Human Rights:

On behalf of the American Bar Association (ABA), I appreciate the opportunity to respond to the request for input by the United Nations Working Group on Business and Human Rights (UNWG) on its new global project, “Business and human rights: towards a decade of global implementation,” also known as “UNGPs 10+/Next Decade.”

The ABA acknowledges the extensive contributions made by the UNWG over the past 10 years to the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). We note, in particular, the UNWG’s leadership of the UN Forum on Business and Human Rights, with participation of a range of governments, businesses, civil society organizations and others. The Forum has fostered greater understanding of the UNGPs and provided an opportunity for discussion and the sharing of information, views and experiences related to their implementation. In addition, the UNWG’s reports (including gender and corporate human rights due diligence), its country visits, and myriad other activities have assisted in clarifying the responsibility of businesses to respect human rights. They have also clarified governments’ obligations to further such respect and to protect against human rights abuses by business.

Over the past decade, the ABA, the largest voluntary organization of lawyers, judges, and legal professionals in the world, has supported and contributed to the implementation of the UNGPs through a considerable array of policies, programs, and publications. The ABA’s responses to the UNWG’s questions in the attached document draw upon this work.

Thank you for considering the ABA’s input as you chart the approach to the implementation of the UNGPs during the next ten years.

Sincerely,



Patricia Lee Refo
President, American Bar Association

Question 1: Where has progress taken place in UNGPs implementation over the course of the last decade? What are the promising developments and practices (by governments, businesses, international organizations, civil society organizations, etc.) that can be built on?

Following the unanimous endorsement of the UNGPs by the UN Human Rights Council, the ABA endorsed 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) as well as the “Human Rights” provisions (Part I, Subpart IV) of the *OECD Guidelines for Multinational Enterprises* (2011), issued by the Organization for Economic Cooperation and Development (OECD).¹ The ABA urges governments, the private sector, and the legal community to integrate into their respective operations and practices the United Nations Framework and Guiding Principles.²

The ABA’s efforts to advance the rule of law and the lawyers’ role and responsibilities, promote the rights of women, and combat human trafficking and corruption have contributed to advancing the implementation of the UNGPs. Therefore, we enumerate below the policies, activities, and publications in these areas that have furthered this implementation.

A. Rule of Law

ABA policy expressly acknowledges that respect for the rule of law is foundational to the effective protection and promotion of human rights. The ABA also believes that human dignity, the inherent, equal and inalienable worth of every person, is foundational to a just rule of law. It has urged governments to ensure that dignity rights - the principle that human dignity is fundamental to all areas of law and policy - be reflected in the exercise of their legislative, executive and judicial functions.³ Through its advocacy for governments to respect the rule of law, the ABA strives to ensure that governments implement policies, legislation and regulations that help prevent, investigate, punish and redress human rights abuses by third parties.

The ABA works to advance integrity and independence of the judiciary and the legal profession,⁴ both within the U.S. and around the globe.⁵ In partnership with the New York City Bar Association and the International Legal Foundation, the ABA has organized and will host a side event at the forthcoming 14th quinquennial U.N. Congress on Crime Prevention and Criminal Justice, in Kyoto, Japan in March 2021 to mark the 30th anniversary of the adoption of the "U.N. Basic Principles on the Role of Lawyers."

In addition, the ABA works to promote accountability through judicial mechanisms by strengthening judicial systems and promoting respect for the legal profession. The ABA’s Rule of Law Initiative (ABA ROLI) provides technical legal assistance in over 50 countries, helping to build sustainable institutions that can deliver justice, foster economic opportunity and ensure respect for human dignity. The ABA is also a member of the Sweden-based International Legal Assistance Consortium (ILAC) and, as a member of its Advisory Council, assists in furthering ILAC’s judicial reform goals in post conflict and fragile countries.

¹ [ABA Resolution 109 \(2012\)](#).

² *Id.*

³ [ABA Res. 113B \(2019\)](#).

⁴ [ABA Res. 106A \(2018\)](#).

⁵ [ABA Res. 111 \(2006\)](#); 103 (2003); [110D](#) and [110E](#) (2007); 10B (2007); [301](#) (1994).

The ABA also recognizes the important role of non-lawyer human rights defenders in protecting the rule of law, and deplores attacks on human rights defenders.⁶ The ABA has urged businesses to implement the analytical and operational framework set forth in *Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies*, a joint report of the Business and Human Rights Resource Centre and International Service for Human Rights.⁷

The ABA also regularly issues Presidential statements condemning the actions of governments for the targeted killings and intimidation of human rights defenders and calling for impartial investigations into such allegations.

The ABA's Center for Human Rights' (ABA CHR) Justice Defenders Program also works globally to support attorneys, judges and human rights defenders facing harassment, arbitrary detention, professional disciplinary proceedings and other ill-treatment through its trial observations, litigation assistance and advocacy campaigns. It also publishes reports noting the progress and challenges of protecting human rights defenders in various countries.⁸

Moreover, the ABA's International Law Section (ABA ILS) conducts programs to raise awareness among U.S. lawyers about the persecution of judges, lawyers and human rights defenders in Poland, Colombia, Turkey and Pakistan. These programs also provide suggestions on what individuals and international organizations can do to support the rule of law.

B. Lawyers

The ABA, which has monitored developments in the implementation of the UNGPs since their adoption, is committed to promoting lawyers' understanding of the UNGPs and contributing to the realization of human rights within the legal profession.⁹ Through training and programs, the ABA encourages lawyers to provide advice on human rights risks to clients consistent with their ethical and professional responsibilities.¹⁰ It has issued guidance to lawyers on their obligation to avoid counseling or assisting a crime or fraud in non-litigation settings.¹¹

The ABA produced a U.S. legal guidance memo for the UN Global Compact Report on Sustainability and the Fiduciary Duty of Boards of Directors,¹² and organized and held side panels at the annual UN Forum on Business and Human Rights relating to the role and responsibilities of lawyers. Moreover, ABA CHR is currently carrying out a project on contractual clauses in which it is working with stakeholders to ensure human rights due diligence in business contracting.¹³

ABA ILS is also currently conducting a series of 12 training sessions for lawyers on business and human rights that includes programs on the role and responsibilities of lawyers related to business and human rights and human rights due diligence, among other topics. Moreover, in

⁶ [ABA Res. 106B \(2018\)](#).

⁷ [ABA Res. 113A \(2019\)](#).

⁸ See for example, [Colombia: Preliminary Report on the Plan of Action for the Protection of Human Rights Defenders at Risk \(July 2020\)](#).

⁹ [Joint Declaration of Commitment on the Development and Promotion of the Field of Business and Human Rights within the Legal Profession \(2015\)](#).

¹⁰ See, ABA Model Rule 2.1

¹¹ See, ABA Formal Opinion 491 (April 29, 2020) on [Model] Rule 1.2(d).

¹² [U.S. Legal guidance memo \(2015\)](#).

¹³ [CHR Business and Human Rights Initiative](#).

November 2019, ABA ROLI held a one-week business and human rights immersion tour of Washington D.C. and Boston for six Pakistani law faculty. The participants observed business and human rights teaching at U.S. law schools, discussed course development and teaching methodology with American faculty, and met with human rights organizations to discuss emerging trends in business and human rights. The Pakistani law faculty also participated in small group discussions to design lesson plans related to business and human rights topics.¹⁴

The ABA has also published several books and guides, including *The Lawyers Corporate Social Responsibility Deskbook: Practical Guidance for Corporate Counsel and Law Firms* (2019), *Designing an Effective Anti-Bribery Compliance Program: A Practical Guide for Business* (2018), *Business, Human Rights, and Sustainability Sourcebook* (2016), and *Corporate Responsibility for Human Rights Impacts* (2015). In addition, the ABA will publish *A Guide to Human Rights Due Diligence for Lawyers* (forthcoming, fall of 2021).

C. Women

The ABA supports the ratification by the United States of the Convention on the Elimination of All Forms of Discrimination Against Women, which it signed on July 17, 1980.¹⁵ It also supports in principle the development of an individual right of petition as an optional protocol to the Women’s Convention as described in the Platform for Action.¹⁶ In addition, the ABA supports the focus of the Platform for Action on the role of law in promoting the equality, equal protection and equal access to opportunities and benefits for women, and affirms the importance of legal literacy to the functioning of democracies and the exercise of human rights by all individuals in society.¹⁷ The ABA also calls upon the United Nations to take prompt steps to facilitate cooperative follow-up work of the Platform for Action by nongovernmental organizations, governments and international organizations.¹⁸

The ABA urges adoption of adequate legal and policy frameworks that prohibit and criminalize gender-based violence online, ensure effective remedies for victims (including protective orders and compensation), and regulate internet intermediaries in accordance with the principles of necessity and proportionality. Further, the ABA urges steps to ensure sufficient allocation of financial and human resources needed to implement laws addressing gender-based violence online and offline.¹⁹

In 2018, ABA ROLI launched its “Women and Girls Empowered” (WAGE) initiative, which supports women’s economic empowerment by providing financial support to women microentrepreneurs and working with local microfinance institutions and civil society to reduce legal and practical barriers that women face in the business world. WAGE has also designed a series of technical assistance interventions to improve women’s financial inclusion and economic participation in El Salvador and Honduras.²⁰ ABA ROLI also participates in the “Reducing Barriers to Women’s Economic Empowerment in El Salvador and Honduras Initiative” (RBI), led by the Grameen Foundation, which takes a holistic view of the challenges

¹⁴ <https://abaruleoflaw.blogspot.com/2020/07/aba-rol-hosts-pakistani-law-faculty.html>.

¹⁵ [ABA Res. 107C \(1996\)](#).

¹⁶ *Id.*

¹⁷ [ABA Res. 107B \(1996\)](#).

¹⁸ [ABA Res. 107D \(1996\)](#).

¹⁹ [ABA Res. 109 \(2008\)](#).

²⁰ [Women and Girls Empowered \(WAGE\) Initiative](#).

that female entrepreneurs face in starting and growing sustainable businesses, including linkages between financial inclusion, gender-based violence and conflict.

The ABA also has organized events examining issues relating to women’s human rights, both at its own meetings as well as at UN fora. Recent examples of programs include “Legal Perspectives on Impact Investing for Gender and Women’s Empowerment” held at the ABA ILS 2020 Meeting,²¹ and “Women’s Rights in Sustainable Development: The New Legal Frontiers” held at the 2016 Session of the UN Commission on the Status of Women. The ABA also organized a program on “Advancing the Role of Women in Peace, Justice, and Strong Institutions” at the 2019 UN High-Level Political Forum, which discussed, in part, economic empowerment, impact investing, meaningful inclusion in the workplace, and workplace protections against sexual harassment and violence.

D. Human Trafficking

The ABA supports legislation to combat human trafficking and urges bar associations to improve laws addressing the trafficking of children, including through the development and adoption of model or uniform anti-trafficking laws,²² The ABA also recommends that international non-governmental organizations, donors, and multilateral agencies work with and support governments to develop and adopt appropriate methodologies to create publicly accessible national databases of information on assistance to victims of sexual violence, enabling stakeholders to coordinate, track, and evaluate this assistance.²³

The ABA is particularly concerned about the treatment of victims of human trafficking. Therefore, it has urged the protection of the rights of trafficking victims,²⁴ including that victims should not be prosecuted for crimes related to their prostitution or other non-violent crimes that are a direct result of the individual’s status as a victim of human trafficking.²⁵

The ABA promotes the education of lawyers, judges and other justice system professionals regarding the legal issues pertaining to the trafficking of minor children.²⁶ Consequently, the ABA has encouraged the development and implementation of training programs for judges, prosecutors, defense counsel, law enforcement officers, immigration officials and other investigators; this training should enable them to identify adult and minor victims of human trafficking, to direct victims and their families to agencies that offer social and legal services and benefits designed to assist victims of human trafficking and to communicate effectively with adult and minor victims who have experienced trauma.²⁷

The ABA has published *Freedom for All: An Attorney’s Guide to Fighting Human Trafficking*,²⁸ to assist businesses, and lawyers advising businesses, to play a part in ending human trafficking. It has also published the *International Guiding Principles on Street Children* that addresses access to justice, legal definitions, monitoring, research, services for

²¹ [Legal Perspectives on Impact Investing for Gender and Women’s Empowerment](#).

²² [ABA Res. 103A \(2011\)](#).

²³ [ABA Res. 105 \(2017\)](#).

²⁴ [ABA Res. 103A \(2011\)](#).

²⁵ [ABA Res. 104F \(2013\)](#).

²⁶ [ABA Res. 103A \(2011\)](#).

²⁷ [ABA Res. 104I \(2013\)](#).

²⁸ [Freedom for All: An Attorney’s Guide to Fighting Human Trafficking](#).

children and youth, stakeholder collaboration, effective institutional systems, the protection of rights, and the involvement of youth in policy making.

The ABA also has formulated the *ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor*.²⁹ The ABA Business Law Section, in conjunction with the ABA CHR, drafted and published model contract clauses for use by companies to provide legally and operationally effective human rights protections for workers in international supply chains.³⁰ Version 2.0 of the model contract clauses will more closely align to the UNGPs, and will be finalized and distributed before the end of 2020.

ABA ROLI has created the *Human Trafficking Assessment Tool* that measures a country's *de jure* and *de facto* compliance with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children that supplements the United Nations Convention Against Transnational Organized Crime. The tool is intended to assist governments as well as civil society organizations working to combat human trafficking. ABA ROLI also provides legal and technical assistance programs in which it partners with state and non-state actors to prevent human trafficking, prosecute perpetrators, as well as identify and protect the victims. The programs encompass legislative drafting, policy formulation, research and analysis, capacity building and training, strengthening multi-sectoral and international cooperation, civic education, strategic litigation, trial monitoring and promoting and protecting victims' rights.

E. Anti-Corruption and Anti-Money Laundering

The ABA has supported efforts to encourage the adoption and implementation of effective legal measures and mechanisms to deter corrupt practices in the conduct of international business.³¹ It has urged steps to support the adoption and implementation by national governments and the international community of effective legal measures and mechanisms that are actively monitored and enforced to deter corrupt practices in the conduct of international business.³²

Further, the ABA supports enactment of reasonable and balanced initiatives designed to detect and prevent domestic and international money laundering and terrorist financing.³³ It also recognizes that human trafficking is often a predicate crime to money laundering. The linkage between the two was explored during a program at the 2020 ABA ILS Meeting "Following the Money to Combat Human Trafficking."

The ABA expressly supports ratification by governments of the United Nations Convention Against Corruption,³⁴ the Inter-American Convention against Corruption,³⁵ and the Council of Europe's Criminal Law Convention on Corruption.³⁶

ABA ROLI has carried out programs to prevent transnational criminal activity and provide appropriate remedies for harm caused by such activity. During 2019, ABA ROLI conducted

²⁹ [ABA Res. 102B \(2014\)](#).

³⁰ [David V. Snyder & Susan A. Maslow, Human Rights Protections in International Supply Chains - Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts, 73 BUS. LAW 1093 \(2018\)](#).

³¹ [ABA Res. 117A \(1995\)](#).

³² *Id.*

³³ [ABA Res. 104 \(2003\)](#).

³⁴ [ABA Res. 110 \(2005\)](#).

³⁵ [ABA Res. 301 \(1997\)](#).

³⁶ [ABA Res. 105A \(2001\)](#).

six programs in South and South-East Asia on this topic. Many of ROLI's programs approach transnational organized crime through the lens of finance. In addition, the activities of ROLI's "Regional Anti-Corruption Advisor" program work toward creating systems and tools to reduce the avenues for corruption and cultural norms and practices within agencies to promote integrity, as well as to promote the use of effective means to investigate the activities that perpetuate corruption. The ABA has supplemented this policy and program work with several publications, namely, *A Compendium of Good Practice to Counter Corruption: A Collection of Briefings and Checklists for Key Sectors*, and *Business Bribes: Corporate Corruption and the Courts*.

F. Other Examples of Progress

ABA CHR's "Access to Remedy Institute" enables the creation of grievance/remedy mechanisms trusted by stakeholders to resolve and deter human rights violations by business enterprises. The ABA CHR "Arbitration Tribunal Project" is also working to develop a specialized forum for resolving human rights-related business disputes.

Moreover, ABA ROLI developed the *Community Level Assessment of the Impact of Mining (CLAIM)*, a practical tool for engaging local communities to assess the human rights impacts of mining projects and identify remedies for mining-related harms.³⁷ ABA ROLI also produced a *Guide for Mining & Communities: Supporting human rights-based development in the context of industrial mining in Guinea*, to establish a shared understanding of the rights and obligations of local communities, mining companies and the State in the context of industrial mining.³⁸

Question 2: Where do gaps and challenges remain? What has not worked to date?

A. Rule of Law

To ensure the protection of lawyers, judges and human rights defenders, governments should be encouraged to report publicly on the progress of investigations. These reports should be detailed and made available to the public in order to ensure the necessary transparency to restore public trust. Governments should be encouraged to maintain a unified database to document the number of human rights defenders threatened and killed to allow a focus on regions and patterns related to the harassment and killings and to prevent further attacks against human rights defenders.

B. Lawyers

The ABA considers that further training of lawyers is a key component in furthering the implementation of the UNGPs.

C. Women

With regards to applying a gender lens to the UNGPs,³⁹ major challenges include a lack of measures and tracking of the prevalence of sexual and gender-based violence, including in

³⁷ [See report here.](#)

³⁸ [See report here.](#)

³⁹ For background, see UN Report on [Gender Lens to the UNGPs](#).

areas of armed conflict, and a lack of donor coordination and transparency. Donors should require quantitative public reporting from funding recipients globally, including disclosure of independent audits or evaluations showing funds expended on services to victims of sexual violence and the services provided using such funds.

In addition, the ABA has noted that most countries do not have specialized laws addressing gender-based violence online, and victims are compelled to use a patchwork of related laws to protect themselves and seek justice, including penal codes, general anti-violence laws, intellectual property laws, and laws on data protection. In this context, it is critical to support a consultative process among legislators, government officials, the legal community, the private sector, and civil society.

D. Human Trafficking

The ABA recommends that international non-governmental organizations, donors, and multilateral agencies work with and support governments to develop and adopt appropriate methodologies to create publicly accessible national databases of information on assistance to victims of sexual violence, enabling stakeholders to coordinate, track, and evaluate this assistance.⁴⁰ The ABA also urges the United Nations, governments, and relevant international actors to develop and implement methodologies to measure and track the prevalence of sexual and gender-based violence and endorses international efforts to improve donor coordination, transparency, and accountability with respect to assistance to victims of sexual and gender-based violence.⁴¹

Further, the ABA recommends that victims should not be prosecuted for crimes related to their prostitution or other non-violent deadly crimes that are a direct result of the individual's status as a victim of human trafficking. In addition, once an individual has been identified as a victim of human trafficking, the victim should be housed appropriately, provided appropriate protection, and assured that their names and identifying information will not be disclosed to the public.

The ABA CHR has recently published a report on human rights violations committed in the India-U.S. supply chain of the Rajasthan sandstone industry. The report specifically identified bonded labor, a form of human trafficking, and child labor as major concerns in the India-U.S. sandstone supply chain.⁴² The report has contributed to the listing of the Rajasthani sandstone on the U.S. Department of Labor watchlist of products.⁴³

E. Anti-corruption and anti-money laundering

To deter and address corrupt practices in the conduct of international business, the ABA recommends that all national governments adopt and implement appropriate and effective legal measures and mechanisms to counter corruption, including active monitoring and enforcement. Further, the ABA recommends that national governments enact reasonable and balanced initiatives designed to detect and prevent domestic and international money laundering.

⁴⁰ [ABA Res. 105 \(2017\)](#).

⁴¹ *Id.*

⁴² See, CHR Report, [Tainted Stones: Bonded Labor and Child Labor in the India-U.S. Sandstone Supply Chain \(August 2020\)](#).

⁴³ *Id.*

Moreover, the full ratification of international and regional conventions on corruption is a fundamental component in addressing corruption in international business transactions. Thus, ratification by all United Nations Member States of the United Nations Convention Against Corruption; ratification by all members of the Organization of American States of the Inter-American Convention against Corruption;⁴⁴ and ratification by the United States of the Council of Europe's Criminal Law Convention on Corruption, are essential.

Over the past decade, the ABA also updated and revised multiple times its publications of "The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational Counsel, Transactional Lawyers and White-Collar Criminal Practitioners" and "The FCPA and the U.K. Bribery Act: A Ready Reference for Business and Lawyers."

Question 3: What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realization of the UNGPs?

A. Women

ABA ROLI's recent research on women's economic status in Cambodia, El Salvador, and Honduras found that women face countless practical and structural challenges in the world of work and business, despite relatively strong legal and institutional underpinnings for gender equality.⁴⁵

Question 4: What systemic or structural challenges need to be tackled to realize sustainable development based on respect for human rights?

The ABA supports the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.⁴⁶ The ABA deems good governance and the rule of law to be essential components to the achievement of sustainable development.⁴⁷ It also considers human dignity, the inherent, equal and inalienable worth of every person, to be foundational to a just rule of law.⁴⁸ The ABA also urges governments to promote the human right to adequate housing⁴⁹ and the human right to adequate food and nutrition.⁵⁰

Question 5: In concrete terms, what will be needed in order to achieve meaningful progress with regard to those obstacles and priority areas? What are actionable and measurable targets for key actors in terms of meeting the UNGPs' expectations over the coming years?

The ABA has taken note of the proliferation of general and sector specific metrics, including the GRI Standards, PRI Standards for Investors, and World Benchmarking Alliance benchmarks, among others. The UNWG may wish to consider carrying out a meta-analysis to crystallize commonalities in benchmarking that could be included in all benchmarks. In addition, guidance from the UNWG on linking benchmarks to reporting would be of benefit to businesses.

⁴⁴ [ABA Res. 301 \(1997\)](#).

⁴⁵ [WE RISE: Reducing Barriers to Women's Economic Empowerment in El Salvador and Honduras](#).

⁴⁶ [ABA Res. 105 \(2013\)](#).

⁴⁷ [ABA Res. 108 \(2003\)](#).

⁴⁸ [ABA Res. 113B \(2019\)](#).

⁴⁹ [ABA Res. 117 \(2013\)](#).

⁵⁰ [ABA Res. 107 \(2014\)](#).