

**Business & Human Rights Seminar  
Law Faculty, University of Geneva  
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**Summary**

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The Human Rights Commission of the Bar Association of Geneva, together with the Law Faculty of the University of Geneva and the International Bar Association, organized a Seminar on « Business and Human Rights », on November 17, 2016 at the University of Geneva. Members of legal professions are increasingly aware of the necessity to take into consideration the tight link between business and human rights in their professional practice.

The Business & Human Rights seminar aimed at presenting the United Nations Guiding Principles on Business and Human Rights to lawyers, company lawyers, and representatives of civil society. Not only were the principles introduced. The purpose was also to explain the practical implications of these principles to the different actors who attended the seminar. During three different workshops, the participants examined the rights and duties of lawyers, companies and banks regarding human rights.

During the plenary session, the participants familiarized themselves with the international context of Business and Human Rights. The speakers presented the Global Pact of the United Nations launched by the United Nations Secretary General in 1999, a key instrument in the shaping of companies' activities for a better respect of human rights. Besides, the 2011 Guiding Principles adopted by the Human Rights Council was introduced as representing a cornerstone in the process of tailoring the relationships between businesses and human rights. The speaker observed that this instrument took a step further in completing this task. Not only does it design a framework for States and the private sector, but it also concerns banks, lawyers, and business legal advisers. The implementation of these principles for this new set of actors has been explored and discussed by the practitioners and scholars who attended the Seminar.

The opening speech underlined the significance of studying “Social and Environmental Responsibility” for the Law Faculty of Geneva and mentioned the different research projects that have been conducted in this field at the University of Geneva. The oral statements that followed highlighted the influence of codes of conduct on contracts and transactions between companies and their clients or suppliers. These codes of conduct seek the respect of human rights, and specifically targets security, health, and environment protection. They touch upon

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a wide range of issues. The codes of conduct affect various actors in their relationship with the companies: the clients, the staff, the shareholders and the local communities. Therefore, these codes play an increasing role, substantively and quantitatively, in the professional practice of lawyers and companies' legal advisers.

The Swiss Coalition for Corporate Justice recalled that companies must respect internationally recognized human rights and international environmental standards, including in their activities abroad. Switzerland has the greatest number of multinationals per capita. The Initiative of the Swiss Coalition for Corporate Justice translates the obligations flowing from the UN Guiding Principles in Swiss law. It broadens the scope of mandatory due diligence by extending it to the protection of the environment. With 120.000 signatures in October 2016, the Initiative can now be subject to parliamentary scrutiny and could be put to a referendum in the following years.

Then, the three pillars of the Guiding principles were presented. The speakers referred to 1° the States' obligation to protect when third parties, including companies, violate human rights; 2° corporate responsibility to respect human rights; and 3° access to effective remedies when a company violates human rights.

A representative of the working group responsible for developing a treaty on business and human rights presented the practical involvements of the Guiding Principles. This intergovernmental working group was created by a Resolution of the Human Rights Council in 2014. It is composed of five independent experts, who held their two first sessions in July 2015 and October 2016 in Geneva.

During the plenary sessions, the panelists emphasized the responsibilities and duties established by the Guiding Principles. Principle 4 prescribes that States shall act with due diligence. Principle 5 determines that States should exercise adequate oversight in order to meet their international human rights obligations when they contract with business enterprises to provide services that may impact upon the enjoyment of human rights. It was also underlined that Principle 6 demands that States promote the respect for human rights by business enterprises with which they conduct commercial transactions.

Two great concerns of the application of the Guiding Principles were identified. Firstly, the application of the principles by companies in their supply chains is challenging. Indeed, the model of production chain is at the core of global economy today. The collapse of the Rana Plaza building in Bangladesh in 2013 is one of the many tragedies that have shown the importance for multinational companies to respect human rights throughout their supply chain. It is necessary to develop tools for companies to encourage their suppliers and contractors to respect human rights. Moreover, the conditions for engaging the responsibility of companies for the conduct of their suppliers and contractors should be specified.

Secondly, there are still too few States who undertake and develop national action plans on Business and Human Rights. National action plans consist in identifying the gaps in the implementation of the Guiding Principles at the national level. The plans must also determine the concrete measures that have been adopted / that are foreseen to address these problems. So far, only eight States have published their national action plans, while twenty-eight are being drafted. These numbers show how difficult it is for States to benefit from the cooperation

of relevant ministers and companies in order to collect data. Yet, to be optimal and in order to be as inclusive as possible, these plans should take into account different actors' point of view.

### **“Business and Human Rights for corporations” Workshop**

The working group on “Business and Human Rights for Corporations” was constituted of three experts respectively representing the government, a firm and a non-governmental organization. The Federal Department for foreign affairs representative underlined the projects undertaken by military and private security companies to protect human rights and international humanitarian law in conflict zones. A code of conduct was adopted in 2010 and the International Code of Conduct Association (ICoCA) was created in 2013 in Geneva. More than 700 military and private security companies signed the Code of Conduct (ICoC) and 136 of them joined the ICoCA. The Association controls the application of the code of conduct. This framework takes a step further in the process of protecting human rights in business activities. Indeed, the companies party to the Code are subject to a process of certification. Their activities are monitored and complaints can be filed against them.

A representative of Amnesty International gave a historical account of the link between business and human rights since the 90s. Several scandals such as the Bhopal disaster of 1984, but also the amplifying effect of the “Conflict Diamonds” on the hostilities in Africa, led to the adoption codes of conduct to regulate business activities. The speaker pointed out companies' duties deriving from the due diligence principle: duties of preventing, mitigating and addressing human rights violations. Corporations must establish control mechanisms and audit procedures. The panelist stressed the necessity of the having the Sustainability Reporting Guidelines. Indeed, they appear as a tool to undertake an external control over the impact of business activities on human rights.

Furthermore, the Guiding Principles establish duties for mother companies throughout the supply chain activities. States, for their part, must make sure that corporations analyze the activities of their suppliers. They must demand that companies demonstrate that all reasonable measures were taken to avoid any violation of human rights all along the production chain.

The *Lundin Petroleum* representative examined the corporate social responsibility through the example of exploration and development of oil industry. She explained that corporations rarely conduct their activities alone. Thus, the bad reputation of one company can impact on a partner company, or even on an entire field of production. Following a risk management approach, corporations thus have to develop specific policies and take special measures. The awareness of the risks related to human rights violations leads corporations to implement preventive mechanisms. These risks include the possible negative impacts of business activities on the right to health, the right to a healthy environment or the principle of non-discrimination. If a corporation is not considered a “good corporate citizen”, the said corporation will have a mediocre, if not bad, reputation. As a result, the company can even face economic difficulties.

### **“Business and Human Rights for Lawyers and In-House Counsel” Workshop**

The “Business and Human Rights for Lawyers and In-House Counsel” Workshop was composed of lawyers, three practitioners and one scholar. In their introducing remarks, the

panelists made general observations on the legal nature of the Guiding Principles. They declared that notwithstanding their non-binding nature, the Guiding Principles constitute an important legal instrument. A parallel was drawn with the European Prison Rules that provide non-binding rules on good practices and principles in the treatment of detainees and the management of detention facilities to the members of the Council of Europe. According to these rules, which are long followed by the Swiss Federal Supreme Court, the protection of personal freedom and other fundamental rights must be taken into account. Besides, some of the Guideline Principles are binding, such as the State's duty to protect when third persons, like companies, commit human rights violations. The speaker indicated that according to the European Court of Human Rights's decision *Haldimann and al. v. Switzerland* of February, 24 2015, "naming and shaming" activities must be protected on the basis of freedom of expression.

Then, the International Bar Association (IBA) Legal Adviser introduced the IBA Practical Guide on Business and Human Rights for Lawyers. This Guide was created by the IBA Council on May 28, 2016. Human rights and (legal) risk management are now a core concern for corporations. Therefore, lawyers must include a human rights dimension to their professional practice. The IBA Guide for Lawyers aims at explaining how the Guiding Principles can be used in lawyers consulting practice. The Guide also contains an analysis of the Guiding Principle's possible implications for law firms, as being commercial enterprises required to respect human rights. The IBA Guide reveals the catalytic effect of the Guiding Principles. This effect was enhanced by recent national legislation that incorporate those principles. For instance, the Modern Slavery Act adopted in 2015 in the United Kingdom establishes the obligation for corporations to include a statement on slavery and human trafficking in their annual report and accounts.

Two other panelists underlined the necessity to heighten legal practitioners' awareness of human rights risks. In that regard, the IBA could play the crucial role of harmonizing the practices across the different bar associations of the world. The speakers warned the audience on the increasing resort of corporations to external (non-legal) advisers. This phenomenon is worrying. Indeed, some recommendations formulated by these advisers may not sufficiently or correctly take into account the global legal framework in which the corporations operate.

### **“Business and Human Rights for Banks” Workshop**

The “Business and Human Rights for Banks” Workshop aimed at analyzing the implications of the *Guiding Principles* for bankers. Firstly, it entailed for the panelists to underline the relevance of these principles in financial relationships. A speaker who is a professional of the banking sector mentioned that the authors of the Guiding Principles did not really have financial undertakings while drafting the guidelines. Still, some principles can easily be applied to banks. Principle 16, for instance, demands that companies formulate a statement of principle, which has to be approved by the highest degree of the said company, and rendered public. Besides, according to Principle 17, banks must exercise due diligence in order to identify and prevent the activities that could have a negative impact on human rights. This due diligence must apply to risk managements mechanisms and should be accompanied by remedial measures.

However, the panelist underlined the specific difficulties than banks face in the application of the Guiding Principles.

In general, banks must exercise due diligence when its own activities can have a negative impact on human rights, but also when this negative impact directly flows from the bank's activities that are related to its business relationships. In this second scenario, the bank will be responsible if it is financially linked to the offending entity. For instance, a bank will be responsible if it financially supports a company who commercializes goods if, through this commercial activity, the bank ends up funding activities of an armed group that violates human rights.

An example of risk management is sketched below:



**Source: *Crédit Suisse***

In order to confront these risks, banks can follow different approaches. Banks can either control only high risk activities (this is the *Crédit Suisse* risk management model), or they can control all operations conducted by the bank (this is for example the *UBS Environmental and Social Risk Policy* risk management model). In both cases, the human rights risks have a specific place distinct to other risk management activities in the banking industry (prevention of money laundering, terrorism, or corruption). Thus, risk management is now an activity that contains a wider range of distinct categories.

**Fifth United Nations Forum on Business and Human Rights**  
**Palais des Nations, Geneva**  
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**Summary**

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The fifth United Nations (UN) Forum on Business and Human Rights took place in Geneva from 14-16 November 2016. Born upon the initiative of the UN Human Rights Council, the Forum is a multi-stakeholder platform to “discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights.”

The 2016 Forum was entitled "Leadership and Leverage: Embedding human rights in the rules and relationships that drive the global economy". The 2016 Forum programme broke down the concept of “leadership and leverage” into State leadership and leverage, business leadership and leverage, and the role of financial institutions. The goal in adopting this approach was to demonstrate the role of different stakeholders along the value chain and across business relationships.

Discussions on State leadership and leverage have focused on the role of economic actor that can be played by States. Participants emphasized on the possibility for Governments to step up their efforts to protect human rights in their own business-related operations.

Among the various themes explored during the Forum, the role of the State as an economic actor has proved to be highly significant. Government procurement was identified as worthy of further analysis. Government procurement refers to the goods and services that government agencies purchase with public resources and for public purposes. It accounts for an important share of the GDP of an economy, as well as of international trade. Promoting the respect of human rights has classically not been a top priority of procurement regimes. Rather, governments have focused on other objectives, such as supporting small and medium enterprises (SMEs). Therefore, the protection of human rights has to be integrated into the design of public procurement regimes. Yet, the classical aims of public procurement and the protection of human rights can clash. This risk must be considered and addressed. The adoption of human rights standards may result in greater costs. Such expenses would be hard to afford for SMEs. In addition, government may have difficulties to monitor SMEs, mainly because of the size of their activities.

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To overcome these difficulties, public procurement criteria must be designed according to the foreseen objective. It will be variously tailored whether the goal sought is to shape a given market or if it is to shape the business practice of a single enterprise.

Export credit agencies (ECAs) are also revealing of the role of the State as an economic actor. These agencies provide government-backed support to corporations that seek to do business in lower income countries. The operations of ECAs, therefore, tend to involve a high risk of human rights violations. Insofar as ECAs provide crucial financial support to their clients, their leverage can be important vis-à-vis their home companies, as well as overseas enterprises.

The case of the Norwegian Export Credit Guarantee Agency helped the participants understand that ECAs exercise their leverage by showing a business case for the respect of human rights. Initiatives taken at the multilateral level are also important to harmonize government procurement regimes. In particular, the Organization for Economic Co-operation and Development (OECD) has taken important steps in this direction. In November 2016, the members of the Working Party on Export Credits and Credit Guarantees (ECG) have adopted a set of principles and guidelines that revises the 2008 Agreement on Sustainable Lending Principles and Guidelines. This represents an important development. However, the revised OECD guidelines remain centered on financial sustainability, rather than embracing a human rights language. It will therefore remain hard to use these guidelines as a practical tool for ECAs to include human rights protection in their operations.

Concerning the role of business, the Forum has explored some recent developments concerning the access to remedies. Both judicial remedies and operational grievance mechanisms have received thorough attention. Operational grievance mechanisms are operational level mechanisms set up by business to redress harm stemmed from their operations. As several case studies have shown, the success of these mechanisms heavily depends on the involvement of local communities in designing them. It is also important to avoid that operational grievance mechanisms replace altogether judicial forms of remedies. There is indeed evidence that, whereas operational grievance mechanisms can deal effectively with relatively minor human rights violations, they are ill-suited to provide redress for more serious types of violations.

More generally, the Forum has highlighted the crucial link between the Guiding Principles and the contribution that business can make to the Sustainable Development Goals (SDGs). By stepping beyond the dichotomy between “respecting” and “promoting” human rights, the Guiding Principles make human rights integration a tool for enterprises to bear a genuine impact upon the communities where they operate. This is precisely the role that business is called upon to exercise in the context of the SDGs. The twofold concept of “leadership and leverage” captures well all the nuances of this role across the value chain. The choice of this theme for the 2016 Forum shows that the reflection on the links between business and human rights has ripened into full maturity. The 2016 Forum has also registered a record participation by business. This figure bodes well for the future implementation of the SDGs.