

## **Bar Associations and the Business and Human Rights Agenda: A Regional Vision 10 years after the Guiding Principles**

### **Session Report**

#### **Introduction**

The [Vance Center for International Justice](#), a program of the New York City Bar Association, held a virtual session: “**Bar Associations and the Business and Human Rights Agenda: A Regional Vision 10 years after the Guiding Principles**” on October 4, 2021 as part of the [United Nations’ VI Regional Forum on Business and Human Rights in Latin America and the Caribbean](#).

The session brought together more than a dozen bar associations from Latin America and the Caribbean and focused on the role of lawyers in the implementation of the Guiding Principles on Business and Human Rights (“Guiding Principles” or UNGPs), the intersection between the Guiding Principles and the ethical responsibility of lawyers, the role of bar associations, and the experience of bar associations that have adopted the Guiding Principles.

Marie-Claude Jean-Baptiste, Programs Director at the Vance Center, moderated the session and led the discussion with the following panelists:

- Alejandra Parra, Head of BHR practice at [Kunstmann Spiess – Abogados](#)
- Douglass Cassel, Counsel, [King & Spalding](#)
- Maria Noel Leoni, Regional Manager for Latin America, [BHR Resource Center](#)
- Samantha Rowe, Partner, [Debevoise & Plimpton](#)
- Silvia Marchili, Partner, [White & Case LLP](#)

#### **Background**

Since the United Nations Human Rights Council unanimously endorsed the Guiding Principles, lawyers have been recognized as playing a crucial role in their implementation. The United Nations Working Group on Business and Human Rights and the Office of the High Commissioner for Human Rights (OHCHR) has recognized the integral role that lawyers play with respect to the implementation of human rights due diligence as required by the UNGPs.<sup>1</sup> The UN Working Group has recommended that law firms and bar associations “integrate human rights risk management in line with the Guiding Principles as a core element of the role of business lawyers”.<sup>2</sup> In addition, the OHCHR recommends that lawyers “be educated on business and human rights generally, and human rights due diligence [as defined in the Guiding Principles] and legal liability specifically.”<sup>3</sup> However, despite the widely acknowledged role of

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<sup>1</sup> Functions that are potentially relevant to human rights due diligence include legal, among others. See UN General Assembly, *Companion Note II to the Working Group on Business and Human Rights’ 2018 Report to the General Assembly A/73/163: Corporate human rights due diligence – Getting started, emerging practices, tools and resources*, Version 16.10.2018 available at: <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf>. The Working Group has also stated that “[b]usiness lawyers — both in-house counsel and external firms — have a unique position for shaping the path an enterprise may take with regards to effective human rights due diligence.” UN General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the General Assembly*, 16 July 2018, A/73/163, at paragraph 41, available at: <https://undocs.org/A/73/163>.

<sup>2</sup> UN General Assembly, *Companion Note II to the Working Group on Business and Human Rights’ 2018 Report to the General Assembly A/73/163: Corporate human rights due diligence – Getting started, emerging practices, tools and resources*, at p. 20.

<sup>3</sup> This can be done through the inclusion of these topics in law school curricula, continuing legal education and professional development courses, and practitioners’ guidance. UN Human Rights Council, *Improving accountability and access to remedy*

lawyers in implementing the UNGPs, throughout the Latin American and Caribbean region, the legal profession's engagement with the UNGPs has been limited. Similarly, bar associations in the region have had little engagement with the UNGPs.

Recently, there has been a growing trend of implementation of the Guiding Principles in national and regional laws, which has generated greater interest on the part of lawyers. Similarly, bar associations have taken various approaches towards the recognition of either the UNGPs specifically, or the standards espoused by the UNGPs. As the legal profession is paying greater attention to the UNGPs and looking to bar associations for guidance, the role of bar associations in providing guidance to lawyers in navigating these new legal concepts has never been more important.

Seeking to foster discussion on the role of the legal profession in this context, the Vance Center organized a preliminary session to the VI Regional Forum on Business and Human Rights in Latin America and the Caribbean, which brought together, for the first time, bar associations from across the region. The session aimed to sensitize bar associations on the Guiding Principles and highlight the importance of their involvement in this issue. The session focused on the following questions:

- What are the UN Guiding Principles on Business and Human Rights?
- What is the role of lawyers in implementing the Guiding Principles (both those representing business and those representing victims)?
- What is the intersection between the ethical responsibility of lawyers and the Guiding Principles? Do the Guiding Principles create new ethical standards?
- What is the current status and trends in the implementation of the Guiding Principles in law? Does that change the ethical responsibility of lawyers?
- What impact has the adoption of the Guiding Principles had on the administration of justice even in countries where there is no legislation requiring companies to conduct due diligence?

### **Challenges and Best Practices**

Some of the key issues discussed at the session included challenges that bar associations and lawyers in the region face in engaging with the BHR agenda, as well as some best practices from the Latin American and Caribbean region.

Three main challenges arose during the discussion: 1) difficulty ensuring that soft law principles, such as the Guiding Principles, are properly applied; 2) lack of knowledge of the Guiding Principles by lawyers; and 3) the fragmentation of BHR practice in the region.

#### *Ensuring that soft law principles are properly applied and enforced*

Although societal pressure on companies to respect and promote human rights has increased over the last ten years since the Guiding Principles were adopted, ensuring that the Guiding Principles are enforced in practice can at times be difficult. In some jurisdictions in Latin America, the concept of soft law is less familiar to lawyers compared to jurisdictions with an Anglo-Saxon legal tradition, which can hinder its proper application.

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*for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability: Report of the United Nations High Commissioner for Human Rights, 1 June 2018, A/HRC/38/20/Add.2, at paragraph 36, available at: [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/38/20/Add.2](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/20/Add.2).*

### *Lack of knowledge of the Guiding Principles by lawyers*

Although the Guiding Principles were adopted ten years ago, lawyers, particularly business lawyers, in the region remain unfamiliar with the principles. Several of the participants highlighted the need for additional training for lawyers on not just what the Guiding Principles are, but also on how to use them in practice when advising clients. The need for the Guiding Principles to be incorporated into existing codes of ethics and trainings on business related matters was also raised.

### *The fragmentation of BHR practice in the region*

Throughout law firms in the region, BHR practice has been very fragmented and has tended to focus on ESG (environmental, social, and good governance issues) rather than on business and human rights and the Guiding Principles. BHR practice per se is still relatively new for Latin-American firms and businesses. As a result, there has been very little systematization of BHR practice – in terms of standards being adopted – domestically or at the regional level. Some companies, however, particularly larger international companies, have started to request that their lawyers be more knowledgeable of BHR issues so we can expect greater interest by law firms and business in the region in BHR.

### *Best Practices*

In addition to challenges, participants identified best practices in the region including how courts have looked to the Guiding Principles for guidance in deciding cases and how bar associations have introduced guidance on BHR for members. Latin American courts, in Colombia for example, have been very progressive in referring specifically to the Guiding Principles as a tool of interpretation, a development we have not seen in courts in the United States or England. Additionally, the Brazilian Bar Association was mentioned specifically as an example of a bar association that has indirectly introduced BHR related principles. The Code of Ethics and Discipline of the Brazilian Bar Association establishes that a lawyer is a defender of human rights and obliges lawyers to refrain from rendering services to those who violate the ethics, morals, honesty and dignity of another person.

### **Looking Forward: Next Steps**

The session concluded with a discussion among the participating bar associations on the current and potential leadership they can assume in implementing the Guiding Principles in the region. These bar associations committed to working to ensure that there is greater awareness of the Guiding Principles among their members by collaborating in the dissemination of the Guiding Principles, providing trainings on BHR and the Guiding Principles, and encouraging dialogue between bar associations and civil society on this issue.

The session was organized by the Vance Center's [Human Rights and Access to Justice Program's Business and Human Rights Initiative](#). Launched in 2015, the Business and Human Rights Initiative ("the Initiative"), draws on the expertise of law firms in the United States and abroad to contribute to the continuing development of best practices in BHR. As part of this initiative, the Program has [advised international NGOs and organized conferences on these issues](#). The Vance Center led discussions within the New York City Bar Association that culminated in the creation of the [City Bar's Business and Human Rights Working Group](#) in 2019 and the adoption in 2020 of a [Policy Statement on Business and Human Rights](#) that endorses the Guiding Principles.