Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles

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The Guiding Principles on Business and Human Rights were endorsed by the United Nations Human Rights Council in June 2011 and are now an international standard in this area. This article explores the implications of the Guiding Principles for business enterprises operating in the oil and gas sector where there are human rights impacts of their operations. It considers the responsibility to respect human rights by these business enterprises, including in relation to remedies for victims, and the actions that should be taken by responsible and prudent business enterprises to implement the Guiding Principles.

Close consideration of the concept of due diligence is undertaken, which is a broad responsibility on business enterprises to identify their actual and potential human rights impacts (including by third parties) and then to address them through policies, practices and mechanisms. This position is considered in light of surveys and interviews of existing practices in the oil and gas sector. The consequences of this responsibility under the Guiding Principles are also examined through consideration of contractual issues, where a business enterprise’s leverage over third parties is of relevance, and analysis of the many legal risks that might arise.

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While the Guiding Principles do not, of themselves, create new law, it is evident that there are many legal issues that do arise, and are likely to do so at an increasing rate, and that all parts of a business enterprise are affected. This article discusses practical and legal issues which business enterprises operating in the oil and gas sector may face in their efforts to discharge their responsibility to respect human rights.

1. Introduction

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.¹

On 16 June 2011, the Guiding Principles on Business and Human Rights (‘Guiding Principles’) were unanimously endorsed by the United Nations Human Rights Council.² This was a watershed moment.³ For at least 30 years, successive efforts to develop universal international standards designed to avoid adverse impacts on human rights connected with the activities of transnational corporations and other business enterprises had failed. This was attributed to conceptual confusion and lack of consensus.⁴ Over six years, Professor John Ruggie, who was appointed in 2005 as the UN Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises,⁵ sought to resolve the conceptual confusion and, ultimately, achieved a unique consensus on the way forward.

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During his first three-year mandate, the SRSG constructed a conceptual framework (the ‘Framework’) comprised of three pillars:

(i) States have a duty to protect against human rights abuses committed by third parties, including business enterprises;
(ii) business enterprises have a responsibility to respect human rights; and
(iii) victims of business-related human rights abuses need access to effective remedies.

In 2008, the Human Rights Council welcomed the Framework and resolved to extend the SRSG’s mandate for a further three years in order that he could develop recommendations to ‘operationalize’ these core principles. This led to the Guiding Principles.

The Guiding Principles build upon the Framework and are intended to provide practical guidance on how states and business enterprises can enhance ‘standards and practices . . . so as to achieve tangible results for affected individuals and communities’. There are 31 Guiding Principles (or GPs) in total, each accompanied by a short commentary. Further guidance (the ‘Interpretive Guide’) elaborating on the Guiding Principles, in particular the principles relating to business enterprises’ responsibility to respect human rights, has subsequently been published by the OHCHR.

A number of other international instruments and standards have recently been revised in order to align with the Guiding Principles. For example, the Organisation for Economic Co-Operation and Development (OECD) Guidelines for Multinational Enterprises (‘OECD Guidelines’) were revised in 2011 to include a chapter on human rights ‘which is consistent with the Guiding Principles’ and revisions to the International Finance Corporation (IFC) Policy and Performance Standards on Environmental and Social Sustainability, which took effect as of 1 January 2012, refer

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8 OHCHR, Guiding Principles (n 1) 1.


to the ‘private sector responsibility to respect human rights’. In a recent address to the AIPN, Ruggie described the convergence of standards as ‘unprecedented’, noting that many governments and companies were taking steps to align their own policies with the Guiding Principles.

Of course, the Guiding Principles do not purport to constitute a manual, answering all questions as to how business enterprises can discharge the responsibility to respect human rights. It is necessary, therefore, to consider in further detail the application of the Guiding Principles in different sectors and contexts. In a 2010 note, the SRSG remarked that ‘the debate concerning the responsibilities of business in relation to human rights became prominent in the 1990s, as oil, gas, and mining business enterprises expanded into increasingly difficult areas.’ To this day, allegations of human rights abuse (or complicity in human rights abuse) continue to be made against oil and gas corporations, particularly in respect of their operations in conflict-affected areas. Scrutiny and criticism of the sector, including lawsuits, has forced these companies to consider how adverse human rights impacts can be avoided. This means that some companies have already achieved a high level of sophistication in understanding and managing human rights impacts.

This article explores the implications of the Guiding Principles for business enterprises operating in the oil and gas sector (referred to in this article as ‘OGBEs’). For the purposes of this article, we assume that OGBEs wish to be seen as responsible corporate citizens, not causing or contributing to negative human rights impacts. There are various justifications for this assumption: not least the interest of OGBEs in protecting their reputation and maintaining their social licence to operate. In this context, it is also suggested that financial benefits may accrue to business enterprises that proactively address social concerns. More broadly, in the wake of the current global financial crisis, the private sector faces a new social and political landscape dominated by demands for moral, ethical and responsible capitalism.

The discussion in this article reflects three basic propositions, reflected in the Guiding Principles:

(i) the responsibility to respect human rights applies to all business enterprises regardless of their size, operational context, ownership and legal structure;\(^{17}\) 
(ii) business activities can impact upon the full spectrum of human rights;\(^{18}\) and 
(iii) there is no ‘one-size-fits-all’ approach for discharging the responsibility to respect human rights. The means by which the responsibility is met will be proportional to factors such as the size and capacity of the enterprise and the severity of impacts which may be caused by its activities.\(^{19}\)

Although the Guiding Principles do not purport to create new legal obligations, they emphasize that the area of business and human rights is not a ‘law free zone’.\(^{20}\) Existing domestic laws or regulations, for example, may impose requirements on business enterprises that are based on a state’s international human rights obligations.

A particular feature of the oil and gas sector today is the prominence of national oil companies (NOCs) and other state-owned OGBEs. According to the Guiding Principles, state-owned enterprises have the same responsibilities in relation to human rights as private sector enterprises.\(^{21}\) States, however, are exhorted to take additional steps to protect against the risk of human rights abuses occurring in connection with the activities of enterprises owned or controlled by the state, including NOCs.\(^{22}\) It is beyond the scope of this article to consider the nature and extent of state obligations in this area, or the particular implications of such obligations for NOCs and other state-owned OGBEs. Similarly, this article does not include a detailed discussion of the state duty to protect human rights. Although the scope and nature of that legal duty is considerable,\(^{23}\) states

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17 OHCHR, Guiding Principles, GP14 (n 1) 15.  
18 OHCHR, Guiding Principles, GP12 and commentary (n 1) 13.  
19 See SRSG 2011 (n 6) 5:  
[‘The Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realised will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.’]  
21 OHCHR, Guiding Principles, GP4 and commentary (n 1) 7.  
22 OHCHR, Guiding Principles, GP4 (n 1) 6. It is noted that, from the state perspective there may be good commercial reasons to ensure that the NOC complies with the same standards as private sector OGBEs, including (i) to enable the NOC to compete with the private sector; and (ii) because the NOC may be expected to comply with equivalent standards when (as is common) the NOC is party to joint operations with private sector OGBEs.  
have begun efforts to implement the Guiding Principles. Measures adopted by states pursuant to the recommendations contained in the Guiding Principles may well affect the oil and gas sector directly.

This article adopts a methodology that combines literature, policy and legal research with qualitative insights obtained through interviews with OGBE representatives and a survey of AIPN members. The authors’ desk-based research involved a review of the existing academic literature and consideration of international and regional legal documents, national laws and jurisprudence. The authors also examined information that OGBEs disclose publicly regarding their policies and practices in relation to human rights issues. This included analysis of human rights policies and corporate social responsibility (CSR) reports published by OGBEs.

In December 2011, AIPN members were invited to respond, on an anonymous basis, to an online survey. A total of 97 responses was received, which appeared to be from a wide range of business enterprises, regions and people involved with OGBEs. The primary objective of the survey was to gain a sense of the level of awareness of the Guiding Principles and the work of the SRSG amongst AIPN members; and of the prevalence and content of OGBE policies with regard to human rights. The survey questions focused on company policies relevant to human rights, including CSR and sustainability policies, codes of conduct and codes of ethics.

It should be emphasized that the responses to the online survey may not be representative of the level of awareness of human rights issues and of the prevalence and content of human rights policies in the oil and gas sector as a whole. Respondents to the survey were self-selecting and the companies they were employed by were not identified, meaning that multiple responses from certain companies may have been received. Nevertheless, the authors drew a number of insights from the survey responses which informed their further research.

The authors also conducted interviews with a number of OGBE representatives, expert consultants and other senior professionals involved in the oil and gas sector. The persons who agreed to be interviewed did so on the basis that their responses would not be attributed to them personally and that their affiliations would not be identified. These interviews have informed the authors’ further research and the conclusions of this article. While an aim of this article is to prompt discussion and identify areas for further research, it is hoped that the article will also be of practical interest to legal counsel working within OGBEs and others working in the sector, including lawyers in private practice.

The article will begin by introducing the first two pillars of the Framework as reflected in the Guiding Principles, particularly as they relate to business enterprises’ responsibility to respect human rights, and then will consider the third pillar of the Framework.

24 For example, the European Commission is undertaking a project to develop sector-specific guidance on the corporate responsibility to respect human rights and, in February 2012, selected the oil and gas sector as one of three sectors for which guidance would be developed. It is expected that the guidance will be published in 2013.

25 It was not possible to verify independently the information business enterprises publicly disclosed about their own policies and operations.

26 Most respondents identified themselves as having either a managerial or legal role within their organization.
concerning access to remedy, with a particular focus on the role of operational-level grievance mechanisms. The following section summarizes the results of the authors’ research regarding existing approaches to management of human rights issues in the oil and gas sector. In addition to commenting on the content of existing OGBE policies in relation to human rights, this section also contains insights from the survey and interviews conducted by the authors. The next two parts discuss some of the ways in which the responsibility to respect human rights is relevant to contractual relationships in the oil and gas sector; and identifies certain non-contractual legal risks that may arise in the event of adverse human rights impacts connected with the activities or relationships of OGBEs.

2. The Guiding Principles

Although the primary focus of this article is the responsibility of business enterprises to respect human rights, the Framework comprises three pillars and it is important to consider all of them as part of the context to this discussion. In particular, it is necessary to understand what the Guiding Principles say about the nature and scope of the state duty to protect human rights in order to appreciate the current and developing international legal framework and how it relates to, informs and affects business enterprises’ responsibility to respect human rights.27

The state duty to protect human rights

According to the Guiding Principles, states have a ‘duty to protect’ individuals in their territory and/or jurisdiction from human rights abuse by third parties, including business enterprises. As elaborated within the Guiding Principles, this legal duty has certain practical implications for OGBEs, not least because the duty is said to require states to take ‘appropriate steps to prevent, investigate, punish and redress... human rights abuse through effective policies, legislation, regulations and adjudication’. The failure to take such steps may breach a state’s international human rights law obligations.28

States should assess, and periodically reassess, the adequacy of their laws against their legal duty to protect. Moreover, they should take appropriate steps to amend their laws and practices in light of such analysis. GP8 refers, in particular, to the need for vertical and horizontal ‘policy coherence’.29 Further, states are expected to use their influence with other states (and within multinational institutions) to fulfil their duty to protect.30 Already some states are active in considering how to respond to the recommendations contained in the Guiding Principles,31 and a number of governments are currently

27 The third pillar of the Framework, on access to remedy, is considered in Section 3, with particular attention paid to the aspects that are specifically relevant to business enterprises’ responsibility to respect: that is, operational-level grievance mechanisms.

28 OHCHR, Guiding Principles, GP1 and commentary (n 1) 3.

29 OHCHR, Guiding Principles, GP3 and commentary (n 1) 5, referring to a ‘smart mix’ of measures needed to ‘foster business respect for human rights’.

30 See eg OHCHR, Guiding Principles, GP9 and GP10 (n 1) 11.

consulting with business and other stakeholders in relation to the formulation of coherent national policies on business and human rights.\(^{32}\)

GP2 provides that states should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. To the extent that states seek to codify this expectation in laws or regulations, GP2 notes that states might choose to adopt measures within their jurisdiction that have extraterritorial effect, although such measures are ‘not generally required under human rights law’.\(^{33}\) Beyond the sphere of law and regulation, GP3 urges states to provide effective guidance to business enterprises on how to respect human rights. In practice, this might include identification of knowledgeable contact points within particular government departments (or located at diplomatic or trade missions overseas), dedicated websites or other information resources.\(^{34}\)

The Guiding Principles also recommend that states should encourage and, where appropriate, require business enterprises to communicate how they address their human rights impacts. There are indications that some states may impose new corporate reporting requirements in this area.\(^{35}\) The Guiding Principles’ emphasis on the particular appropriateness of disclosure requirements where the nature of business operations or operating contexts pose a significant risk to human rights\(^ {36}\) suggests that extractive sector enterprises, including OGBEs, may be primary targets of any additional requirements.

The Guiding Principles encourage states to use their procurement requirements in order to secure business respect for human rights.\(^{37}\) In addition, governments are often very active in their support of their corporations through financing, such as the provision of export credits and political risk insurance, and through developing essential contacts in other states and participating in government trade missions abroad; in these contexts, the Guiding Principles recommend that states ‘should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those...
business enterprises or projects receiving their support’. In entering into investment treaties and trade agreements and in relation to other economic instruments or when pursuing business-related policy objectives, states ‘should maintain adequate domestic policy space to meet their human rights obligations’.

States will be mindful that their international legal responsibility might be engaged in relation to human rights impacts attributable to particular business enterprises with which they have a relationship. While actions by corporations (as private bodies) are not generally attributable to a state so as to engage the state’s international legal responsibility, these actions may be attributable to a state in certain circumstances. This should act as an additional incentive to states to ensure that business enterprises with which they deal discharge their responsibility to respect human rights.

The foregoing discussion is not intended to provide an exhaustive treatment of states’ obligations under international human rights law. Rather, it serves to emphasize the fact that states’ legal duties under international human rights law may affect business enterprises in numerous ways, including with respect to their responsibility to respect human rights. The existence of the corporate responsibility to respect human rights does not alter or diminish the legal obligations owed by states. The remainder of this section considers the nature of the corporate responsibility to respect human rights and the means by which it may be discharged by business enterprises.

**The corporate responsibility to respect human rights**

The Guiding Principles are divided into ‘foundational’ and ‘operational’ principles. The ‘foundational’ principles relating to business enterprises’ responsibility to respect human rights address a range of core questions about the nature of this responsibility including:

(i) What is the basis for business enterprises’ responsibilities? Are they derived from international law, domestic law, voluntary commitments or some other source?
(ii) Are all human rights relevant, or only a specific sub-set of them?
(iii) What is the extent of business enterprises’ responsibilities relating to human rights? Given that these responsibilities are not equivalent in basis or scope to

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38 ibid GP4 7.
39 ibid GP9 11.
40 The International Law Commission (ILC), in its Articles on the Responsibility of States for Internationally Wrongful Acts, identifies four situations in which the acts of non-state actors such as corporations can be attributed to the state. First, where a person or entity was empowered by law to undertake particular governmental activities; secondly, where a person or entity was acting under the instructions or direction or control of the state; thirdly, where the state adopts or acknowledges the acts of a person or entity as its own acts; fourthly, where a state is complicit in the wrongful activity of a non-state actor or fails to exercise due diligence to prevent harm resulting from the actions of a non-state actor. (‘Articles on the Responsibility of States for Internationally Wrongful Acts’ in International Law Commission, ‘Report of the International Law Commission on the Work of its 53rd Session’ (2001) UN GAOR 56th Session Supplement No 10 UN Doc A/56/10 (the ‘ILC Articles’) <http://www.un.org/documents/ga/docs/56/a5610.pdf> accessed 31 August 2012.)
41 See OHCHR, commentary to GP1 (n 1) 3: ‘States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them.’
42 OHCHR, Guiding Principles, GP4 (n 1) 6. The commentary to GP4 states that ‘the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights’.
states’ legal obligations under international human rights law, how are they to be understood?

Business enterprises do not have general obligations under international human rights law. Rather, the Guiding Principles’ conception of the responsibility to respect human rights represents a ‘global standard of expected conduct’, as reflected in a range of voluntary and soft law initiatives. Obviously, business enterprises may have legal duties related to human rights under applicable domestic laws, for example, in the field of labour law. However, domestic legal protection for human rights may be weaker than is required by international law (or non-existent) and here the Guiding Principles emphasize that the corporate responsibility to respect human rights ‘exists independently of states’ abilities and/or willingness to fulfil their own human rights obligations [and] ... over and above compliance with national laws and regulations’.

A survey conducted for the SRSG concluded that business enterprises can have adverse impacts upon nearly all human rights. Accordingly, the Guiding Principles provide that the responsibility to respect extends to all ‘internationally recognized human rights’, meaning—at a minimum—the rights contained in: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the principles concerning fundamental rights in the eight core International Labour Organization (ILO) Conventions set out in the Declaration of Fundamental Principles and Rights at Work. Therefore, all internationally recognized human rights are involved, but some will have greater potential to be impacted by particular business enterprises in different circumstances depending, for example, on the nature of operations and their location.

The terminology used by the Framework and the Guiding Principles is that business enterprises have a responsibility to ‘respect’ human rights. This is in contrast to

SRSG 2010 (n 20) 55.
44 OHCHR, Guiding Principles, GP11 and commentary (n 1) 13; SRSG 2010 (n 20) 55.
46 OHCHR, Guiding Principles, GP12 (n 1) 13.
48 See OHCHR, Interpretive Guide (n 9) 10.
the broader and deeper duties of states: ‘all human rights, [impose] three types or levels of obligations on states parties: the obligations to respect, protect and fulfil’. GP11 elaborates that the responsibility to respect human rights means that business enterprises ‘should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’. In his 2008 report to the Human Rights Council, the SRSG explained that ‘not to infringe on the rights of others’ means ‘put simply, to do no harm’. However, the Guiding Principles also stress that business enterprises may need to take active steps to ensure that they do no harm: ‘a positive element of action is required not just a passive avoidance of harm’.

The active steps required to discharge this responsibility to respect human rights are outlined by the Guiding Principles in considerable detail. These are introduced in GP13 which states that the responsibility to respect human rights requires that business enterprises:

(i) avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur; and
(ii) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

The Guiding Principles provide guidance to business enterprises both on practical measures to be taken to ensure that, throughout their operations, the appropriate respect for human rights can be achieved and on factors to be taken into account when exercising judgments towards attaining the standard of conduct required to discharge the responsibility. The practical means by which business enterprises may discharge the responsibility to respect human rights are discussed in detail below. Before proceeding to that

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51 ECOSOC 2000, ibid 33 (emphasis in source).
52 OHCHR, Guiding Principles, GP11 (n 1) 13.
53 SRSG 2008 (n 6) 24.
55 The steps required to discharge the responsibility to respect human rights as described in the Guiding Principles may be more limited than commitments undertaken voluntarily by business enterprises, such as the commitment made by members of the UN Global Compact (UNGC; including many OGBEs) who undertake, among other things, to ‘support and respect human rights’ (emphasis added), which entails ‘making a positive contribution…to promote or advance human rights’. See UNGC, Principle 1 <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html> accessed 31 August 2012.
discussion it is relevant to consider the nature of the responsibility to respect and the standard of conduct it requires.

The nature of the responsibility to respect human rights

GP13 draws attention to a crucial distinction in the Guiding Principles: that between a business enterprise’s responsibility for adverse human rights impacts that it causes, or contributes to, and a business enterprise’s responsibility with respect to adverse human rights impacts resulting from the activities of persons or entities with which the enterprise has a relationship. Where the activities of a business enterprise ‘cause (or may cause)’ adverse human rights impacts, the enterprise should take the necessary steps to cease or prevent the impact. \(^56\) Where a business enterprise identifies that it has caused an adverse impact, it should provide for remediation of the impact. \(^57\) Although (as discussed in the next section), a business enterprise must act with due diligence to identify and avoid adverse human rights impacts, the Guiding Principles suggest that the responsibility for remediating adverse human rights impacts which it does identify \(^58\) exists independently of the degree of diligence the business enterprise exercised to prevent such impacts in the first place. \(^59\) Therefore, in relation to human rights impacts that a business enterprise accepts it has caused, an arguably strict standard applies, \(^60\) requiring active engagement in remediation. \(^61\)

Where the activities of a business enterprise ‘contribute (or may contribute)’ to an adverse human rights impact, the enterprise should take the necessary steps to cease or prevent its contribution and should use ‘leverage’ to mitigate any remaining impact to the greatest extent possible. \(^62\) In this respect, ‘leverage’ exists where an enterprise ‘has the ability to effect change in the wrongful practices of an entity that causes a harm’. \(^63\) Again, the expectation so far as matters are within the direct control of an enterprise is an absolute one; the business enterprise should take the necessary steps to cease or prevent its contribution. Where the business enterprise contributes to impacts that have other

\(^56\) OHCHR, Guiding Principles, GP19 and commentary (n 1) 21.

\(^57\) ibid GP22 24.

\(^58\) The Interpretive Guide clarifies that the responsibility to provide a remedy elaborated in GP22 applies only to situations where the business enterprise itself recognizes that it has caused or contributed to an adverse human rights impact (emphasis in source). It may identify that it has caused or contributed to adverse impacts through its own impact assessments, grievance mechanisms or other internal processes; or the impact may be brought to its attention by other sources and confirmed by the business enterprise’s own investigations. See OHCHR, Interpretive Guide (n 9) 54–5.

\(^59\) OHCHR, Guiding Principles, GP22 (n 1) 24. In this regard, the responsibility to respect is consistent (in terms of the standard of conduct expected) with the basic obligation of states to respect human rights under international law. A state’s legal responsibility for direct violations of human rights does not turn on an assessment of whether the state acted diligently. Similarly, a business enterprise that acts diligently, but nevertheless engages in conduct that results in a direct and serious human rights impact on communities affected by its operations and does not take steps to remediate that impact, will have failed to meet its responsibility to respect.

\(^60\) This does not mean that legal accountability or liability necessarily follow for an adverse human rights impact that is caused but not remedied, if there is no applicable and enforceable legal standard; but, on the face of it, the responsibility to respect set out in the Guiding Principles may not have been met. ‘An enterprise cannot, by definition, be meeting its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation’. OHCHR, Interpretive Guide (n 9) 54.

\(^61\) OHCHR, Guiding Principles, GP22 and commentary (n 1) 24.

\(^62\) ibid 21–2.

\(^63\) ibid. The Interpretive Guide (Key Concepts) expands the understanding by noting that ‘[l]everage is an advantage that gives power to influence’. See OHCHR, Interpretive Guide (n 9) 5.
origins, it should consider how it may seek to address matters that are not within its
direct control by using means available to it to seek to effect change in the behaviour of
other parties contributing to the impact. Where a business enterprise identifies an adverse
impact to which it has contributed, the enterprise is also expected to take remedial action
proportionate to the extent of its contribution and, including by using leverage, should
encourage and cooperate in remedial action by others who have contributed to such
impact.64

The Guiding Principles accept that a complex situation arises where an adverse human
rights impact is attributable to a third party (not the business enterprise itself), but the
impact is directly linked to a business enterprise’s operations, products or services by its
business relationship with that third party. In such situations, the Guiding Principles
place a responsibility on the business enterprise, even though it has not contributed to the
relevant impacts. This has been characterized as a ‘leverage-based’ responsibility,65
which requires that a business enterprise seek to prevent or mitigate harm caused by
other entities, even when the business enterprise itself does not cause or contribute to
that harm.66 It has been suggested that this responsibility to take steps to prevent other
entities from infringing human rights may be better understood as a responsibility to
‘protect’ human rights, albeit, in this case, a limited one.67

The responsibility that the Guiding Principles attribute to business enterprises with
respect to human rights impacts caused by third parties may be characterized as one of
‘due diligence’.68 Such a standard of conduct is familiar to international lawyers. Under
international human rights law, the state is responsible for an action by a private actor,
such as a corporation, where the state failed to act with due diligence to prevent the
violation or to respond to it appropriately.69 In these circumstances, a state’s obligation is

64 OHCHR, Guiding Principles, GP22 (n 1) 24.
65 Stepan Wood, ‘Four Varieties of Social Responsibility: Making Sense of the ‘Sphere of Influence’ and ‘Leverage’ Debate via the
cfm?abstract_id=1777505> accessed 31 August 2012. Wood distinguishes ‘leverage-based negative responsibility’ from ‘negative
impact-based responsibility’ (emphasis added).
66 ‘If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it.’ OHCHR, Guiding
Principles, GP19 and commentary (n 1) 22.
67 Bilchitz (n 50) 207. Similarly, Radu Mares argues that ‘a core company’s responsibility to act [to prevent human rights
infringement by a related entity] does not result naturally from a broad responsibility to respect, that is ‘to do no harm’; it
is additional to that and needs to be justified separately’. See Radu Mares, ‘Responsibility to Respect: Why the Core Company
Should Act When Affiliates Infringe Human Rights’ in Radu Mares (ed), Siege or Cavalry Charge? The UN Mandate on Business
and Human Rights (Brill/Martinus Nijhoff 2012) 9.
68 SRSG, ‘Clarifying the Concepts of “Sphere of Influence” and “Complicity”: Report of the Special Representative of the
Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John
69 See eg Velázquez Rodríguez Case, Inter-Am Ct HR (Ser C) No 4 (1988), 172 <http://www.unhchr.org/refworld/docid/403279a94e.html> accessed 31 August 2012. Similarly, art 4(c) of the Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993 requires states to ‘exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women’. UNGA Res ‘Declaration on the Elimination of
Violence against Women’ (20 December 1993) UN Doc A/RES/48/104 <http://www.un.org/documents/ga/res/48/a48r104.htm> accessed 31 August 2012. In addition, art 3 of the International Law Commission’s Draft Articles on Transboundary Harms requires states to exercise due diligence to prevent significant transboundary harm (such as environmental pollution) emanating from their territory. See ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with
un.org/ilc/texts/instruments/english/comments/9_7_2001.pdf> accessed 31 August 2012. See also ILC Articles (n 40).
not to prevent third parties from committing wrongful or harmful acts _per se_ but to satisfy a certain standard of conduct in attempting to prevent the commission of wrongful or harmful acts by others. The responsibility imposed on business enterprises by the Guiding Principles may be viewed in a similar way.

The commentary to GP19 identifies factors to assist a business enterprise in assessing the steps a standard of due diligence requires in a given situation. Among the factors that will enter into the determination of the appropriate action are: the existence of leverage with respect to the entity concerned (that is, the extent of the enterprise’s ability to effect change in the other entity’s behaviour, and how that might be exercised); how crucial the commercial relationship is to the enterprise; the severity of the adverse human rights impact; and whether terminating its relationship with the entity causing such impact would have further adverse human rights consequences. The business relationship itself, and the balance of mutual interests of the parties in the continuation of the relationship (and on what basis) will be critical in any given case in determining what leverage exists.

The Guiding Principles emphasize that a business enterprise will have to undertake a careful balancing exercise to decide what kind of leverage it can exert and how. The business enterprise must weigh up the costs and implications of doing so. Commercial considerations are germane, but the human rights consequences of particular courses of action are clearly also a very relevant factor.

One difficult issue in considering the responsibilities that may arise with respect to human rights impacts caused by third parties is the extent of a parent company’s responsibility with regard to the activities of subsidiaries and other related companies within a corporate group. Although the use of the term ‘business enterprise’ in the Guiding Principles could be taken to suggest that the responsibility attaches to a corporate group as a whole, differences of approach are possible depending on the legal structures within groups and the variety of jurisdictions in which subsidiaries are registered or where operations occur. Thus the Guiding Principles state that ‘[t]he means through which a business enterprise meets its responsibility to respect human rights may . . . vary depending on whether, and the extent to which, it conducts business through a corporate group or individually.’ This could be read to support the proposition that the responsibility to respect attaches to the corporate group as a whole, although the means of discharging that responsibility may be spread within the group. At the very least, subsidiaries are entities with which a parent has direct relationships, implying that, as

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70 For example, the concept of ‘enterprise liability’ may apply in some contexts. It has been used by Indian courts, e.g. to explain the circumstances under which a parent company is strictly liable for certain forms of conduct by a subsidiary. Peter Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 Cambridge Journal of Economics 915, 924.

71 The submissions made to the SRSG in a public consultation process regarding an advanced draft of the Guiding Principles indicate polarized views of corporations and civil society on this point. These submissions are available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> accessed 31 August 2012.

72 OHCHR, Guiding Principles, GP14 and commentary (n 1) 15.

73 This impression is reinforced by the Guiding Principles’ description of the doctrine of separate legal personality of subsidiaries as an obstacle to effective remedies, rather than as a challenge relating to the allocation of responsibility between formally distinct legal entities. See OHCHR, Guiding Principles, GP14 (n 1) 15.
a minimum, parent companies are expected to exercise leverage over their subsidiaries to seek to ensure that they respect human rights.  

**Practical guidance for implementing the responsibility to respect**

As noted above, the responsibility to respect human rights as described in the Framework and Guiding Principles is not a passive responsibility that can be discharged through benign neglect.  

Respecting human rights means taking active and conscious steps to understand and respond to potential adverse impacts. These steps are summarized in GP15 and in the ‘operational’ principles (GP16 to GP21) which follow. GP15 provides that business enterprises should put in place policies and processes appropriate to their size and circumstances, including:

(i) a policy commitment to meet their responsibility to respect human rights;  
(ii) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and  
(iii) processes to enable the remediation of any adverse human rights impacts they cause or contribute to.

The first two elements, along with other steps that business enterprises need to take to implement the responsibility to respect human rights, are discussed in this section. Issues relating to remediation are discussed in Section 3. It should be noted that the actions required to discharge the responsibility to respect go beyond purely philanthropic activities. Human rights are entitlements, not interests to be weighed and balanced; thus a failure to respect human rights in certain areas cannot be offset by positive benefits provided in other contexts. These considerations may require a significant shift in the way in which many business enterprises understand and respond to human rights issues.

**A policy commitment to respect human rights**

The Guiding Principles provide detailed guidance on what a policy commitment to respect human rights should look like. First, a statement of policy should be approved at the ‘most senior level’ of the business enterprise. Senior-level buy-in is critical to the

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74 Radu Mares, ‘Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights’ in Mares (n 67) 3.
76 OHCHR, Guiding Principles, GP16 (n 1) 16.
77 ibid GP17–GP21 17–24.
79 ibid (n 1) 13. On problems which may arise in imposing ‘European’ or ‘Western’ notions of CSR and business ethics in contexts where philanthropic activities are emphasized see Jędrzej George Frynas, ‘Corporate Social Responsibility in the Oil And Gas Sector’ (2009) 2 Journal of World Energy Law and Business 178.
81 OHCHR, Guiding Principles, GP16 (n 1) 16.
human rights policy becoming part of the culture of an enterprise. The policy commitment itself may be of high level; but embedding the policy entails consideration of what the commitment to respect human rights requires in the context of day-to-day operations, ensuring the policy is elaborated and enshrined within more detailed operational procedures and defining lines of responsibility and accountability for its achievement. Therefore, the policy should also be informed by appropriate expertise and reflected in operational policies and procedures necessary to embed and implement the policy throughout the enterprise.

Addressing the optimal approach and then defining appropriate lines of responsibility and accountability may be particularly challenging in large and internally complex OGBEs. An important consideration will be whether a centrally managed human rights policy can be implemented effectively on a group-wide basis. Account will need to be taken of the differing roles and responsibilities of managers and on-site personnel at the operational level, and of various functions within each business, such as human resources, CSR, public affairs/communications, risk, compliance and legal departments. There may also be a role for the audit function of a business enterprise in tracking and reporting on responses to actual and potential human rights impacts.

OGBEs also need to avoid the temptation to treat human rights issues in isolation from operational, commercial and other considerations which may arise: ‘[j]ust as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships’. Thus, human rights processes should operate coherently with other internal processes designed to govern an enterprise’s activities, and should be reflected in other relevant policies within the business (such as those setting performance incentives for personnel, and governing procurement practices for external contractors and suppliers). Importantly, responsibility and reporting lines need to allow information flows and decision-making that are informed (at the appropriately senior level) both by the responsibility to respect human rights, as well as the commercial context within which the business enterprise operates.

Although a ‘statement of policy’ may take many forms, GP16 makes it clear that, at a minimum, it should stipulate the enterprise’s human rights expectations of employees, business partners and other parties directly linked to its operations, products or services. GP16 also requires that the statement of policy be made publicly available, and be actively communicated to personnel and business partners. As the Guiding Principles put it, business enterprises need to ‘know and show’ that they have discharged their

82 OHCHR, Interpretive Guide (n 9) 22.
83 OHCHR, Guiding Principles, GP16 (n 1) 16.
84 ibid.
85 ibid.
86 OHCHR, Guiding Principles, GP16 and commentary (n 1) 17.
87 ibid 16–17.
responsibility to respect.\textsuperscript{88} This does not mean that detailed operational policies and procedures need to be publicized, as these are not typically in the public domain, rather their purpose being to translate the business enterprise’s policy commitment into operational terms.\textsuperscript{89}

To be meaningful in practice, a human rights policy should become part of the fabric and culture of a business enterprise. To this end, appropriate internal communication and training will be vital. A variety of guidance documents and training tools are available which OGBEs might wish to draw upon in crafting enterprise-specific programmes.\textsuperscript{90} One initial obstacle in integrating respect for human rights into corporate governance may be the unfamiliarity of the language of human rights. Case studies illustrating the ways in which business activities might impact on a range of different human rights may help to clarify the scope and extent of the responsibility to respect.\textsuperscript{91}

\textbf{Human rights due diligence}

Human rights due diligence is a core concept of the Guiding Principles. Undertaken appropriately, it should inform an enterprise’s policy commitment and the conduct of its business generally. The Interpretive Guide defines ‘due diligence’ as:

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent \[person or enterprise\] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.\textsuperscript{92}

This definition supports an understanding of due diligence in two different senses. First, it contemplates the standard of conduct that a business enterprise should meet in discharging its responsibility, as has been discussed above. Secondly, ‘human rights due diligence’ describes a ‘process’ which business enterprises may use to ensure that they discharge their responsibility to respect human rights.\textsuperscript{93} In this sense, due diligence allows

\textsuperscript{88} ibid 16.
\textsuperscript{89} OHCHR, Interpretive Guide (n 9) 22.
\textsuperscript{92} OHCHR, Interpretive Guide (n 9) 4.
an enterprise to ‘identify, prevent, mitigate and account for’ adverse human rights impacts.\textsuperscript{94} GP17 defines the parameters for human rights due diligence, while GPs 18–21 elaborate its essential components.\textsuperscript{95}

Due diligence will be a concept familiar to most OGBEs, who may use due diligence-based processes in order to comply with legal obligations imposed upon the company or its officers.\textsuperscript{96} Business enterprises also routinely undertake due diligence exercises to identify legal, regulatory, political, environmental and social (E&S) risks arising in relation to particular projects, transactions or corporate acquisitions. Due diligence may also be used to refer to identification and management of financial risks.\textsuperscript{97} In this way, the use of the term due diligence in the Guiding Principles seeks to link the corporate responsibility to respect human rights to established concepts of due diligence as a process for managing commercial and legal risks.\textsuperscript{98}

Whilst the Guiding Principles acknowledge that human rights due diligence may be incorporated within the broader enterprise risk management processes of a business, it is important to note that what the Guiding Principles mean by ‘human rights risks’ differs from other risks that are commonly managed though corporate risk management processes. Thus, human rights due diligence processes must be designed not only to identify potential risks to the business enterprise itself, but must also take account of the potential for operations to lead to adverse human rights impacts, thus creating risks to third-party rights-holders.\textsuperscript{99} This does not detract from the fact that causing harm to rights-holders also poses risks to the business itself including, for example, the risk of reputational damage or potential legal liability. Numerous tools have been developed to assist business enterprises to understand international human rights instruments and to develop effective due diligence processes in order to identify human rights risks.\textsuperscript{100}

\textsuperscript{94} OHCHR, Guiding Principles, GP17 (n 1) 17.

\textsuperscript{95} OHCHR, Guiding Principles, GP17 and commentary (n 1) 18.

\textsuperscript{96} For example, under the US Federal Securities Act of 1933 (15 USC 77a, s 11 b1) a company director can avoid liability for the omission of material fact in a securities offering by demonstrating that he or she ‘had, after reasonable investigation, reasonable grounds to believe and did believe . . . that the statements therein were true and that there was no omission to state a material fact’ (William K Sjostrom Jr, ‘The Due Diligence Defense under Section 11 of the Securities Act of 1933’ (2005) 44 Brandeis Law Journal 549, 554). The Supreme Court has described this as a due diligence defence (Herman & MacLean & Huddleston 459 US 375 (1983)). Lucien Dhooge has proposed that a similar defence of due diligence be recognized for claims for corporate liability under the Alien Tort Claims Act 28 USC s 1350 (Lucien J Dhooge, ‘Due Diligence as a Defence to Corporate Liability Pursuant to the Alien Tort Statute’ (2008) 22 Emory International Law Journal 455, 496–8).


\textsuperscript{99} OHCHR, Guiding Principles, GP17 and commentary (n 1) 18 explains: ‘Human rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.’ The distinction between risks to the business and risks to the rights–holder is sometimes overlooked, even in other commonly referenced international standards relating to business and human rights. See eg ‘Voluntary Principles on Security and Human Rights: Implementation Guidance Tools’ (2011) <http://www.voluntaryprinciples.org/files/Implementation_Guidance_Tools.pdf> accessed 31 August 2012 (‘Voluntary Principles Guidance’).

To the extent that the role of risk management systems is, in most contexts, understood to facilitate informed risk taking by an enterprise, such systems may require adaptation to account for the fact that a primary goal of human rights due diligence is to identify and avoid risks to the rights of others. Of course, the Guiding Principles accept that there are situations in which human rights impacts may not be avoided completely, but are capable only of mitigation or remedial action. In such circumstances, a business enterprise may have to prioritize action to avoid and mitigate the most severe impacts, while remediating impacts that it has been unable to avoid. The approach described in GP19 and its commentary suggests that a ‘risk-based’ approach similar to that employed more broadly within business systems may well be justified in some cases. However, it must be recognized that the balancing of considerations and the consequent assessment of risk and appropriate action in relation to ‘human rights risks’ is nuanced.

Some aspects of the responsibility to respect may be reflected within business enterprises’ compliance systems, which in turn may form part of their overall risk management framework. Compliance programmes used in relation to anti-bribery and corruption, for example, could provide a model familiar to many business enterprises. However, a compliance approach is not necessarily compatible with all processes foreseen by the Guiding Principles since not all areas relevant to the responsibility to respect are the subject of domestic law or regulation, nor precisely formulated standards. A strict compliance approach might be reserved for those areas where applicable laws drive a particular outcome, where other legal risks arise, or where objective criteria exist against which performance can be measured. It will be for each OGBE to identify the optimal approach for its needs: the important message of the Guiding Principles is that business enterprises need to consider carefully how to integrate human rights policies, processes and due diligence into their existing organizational frameworks, to maximum effect.

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101 This view of risk management is reflected in the UK Financial Reporting Council’s (FRC’s) recommendations on implementation of the UK Corporate Governance Code: ‘Since profits are, in part, the reward for successful risk-taking in business, the purpose of internal control is to help manage and control risk appropriately rather than to eliminate it.’ See Internal Control: Revised Guidance for Directors on the Combined Code (The FRC 2005) <http://www.frc.org.uk/FRC/media/Documents/Revised-Turnbull-Guidance-October-2005.pdf> accessed 31 August 2012.

102 SRSG 2010 (n 20) 66.

103 The definition of ‘human rights risks’ in the Interpretive Guide (Key Concepts) is relevant here. OHCHR, Interpretive Guide (n 9) 5.

104 It should be noted that anti-bribery and corruption compliance models have been developed in response to domestic laws providing for significant civil and criminal penalties (in some cases applying extra-territorially) combined with increasingly aggressive enforcement action. Nevertheless, due diligence processes described by the UK Ministry of Justice’s Guidance to s 9 of the Bribery Act 2010 use the language of risk management, and may provide useful analogies for enterprises considering how to implement the human rights due diligence process required by the Guiding Principles. See, in particular, Principles 3 and 4, Ministry of Justice, ‘The Bribery Act 2010: Guidance’ <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> accessed 31 August 2012.

105 It has been argued, however, that the risk of ‘enormous potential legal liability’, significant reputational harm and substantial legal bills connected with human rights litigation (particularly in the USA) justifies treating human rights as a compliance issue (Jonathan C Drimmer, ‘Human Rights and the Extractive Industries: Litigation and Compliance Trends’ (2010) 3 Journal of World Energy Law and Business 121, 130–1).
**Human rights impact assessment**

GP18 explains that human rights due diligence involves, as an initial step, identification and assessment of actual and potential human rights impacts associated with a business enterprise’s operations, products, services and relationships. The purpose of the assessment is to enable the business enterprise to determine what action it may take to avoid or respond to impacts and to prioritize its response accordingly. This risk assessment process should be evidence based. It may involve a mapping of relevant business activities and relationships, and then gathering and evaluating information concerning the actual and potential human rights impacts of these activities.106

When assessing the extent to which internal processes are already aligned with the Guiding Principles, it is likely that many enterprises will find that some human rights issues are already addressed by relevant policies and procedures. For example, employee relations policies and procurement policies will no doubt address human rights issues although not necessarily in human rights terms. However, areas requiring further attention or modification may also be identified. The Guiding Principles emphasize that external expertise may be necessary in some areas. In particular, it is suggested that an outside perspective may be helpful during the initial stages of mapping existing policies and processes against the Guiding Principles.

The Guiding Principles also emphasize the importance of stakeholder engagement.107 Specifically, it is said that effective due diligence requires consultation with persons or groups who could be impacted by a business enterprise’s activities. Particular attention may be required in relation to the rights of vulnerable communities or groups and many OGBEs will be aware that international standards exist in this area, for example, standards regarding consultations with indigenous peoples.108 This is another area in which external expertise may be useful to facilitate engagement and the identification of impacts the enterprise may not itself have foreseen.

GP18 emphasizes that when planning new projects or activities, human rights impact assessments (HRIA) should be undertaken at the earliest feasible stage.109 E&S and/or health, safety and environment (HSE) impact assessments are undertaken as a matter of course for many projects in the oil and gas sector and are likely to be designed to identify issues relevant to certain human rights. It is clear that due diligence is not the sole preserve of specific project management, however, and it is vital to remember that the requirement for due diligence extends to enterprise-wide activities and all contexts.

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107 See eg GP18 and commentary, GP20, and GP21 and commentary.
109 ibid.
**Effective integration and ‘appropriate action’**

Having identified actual and potential human rights impacts, GP19 recommends that enterprises ‘should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action’. In order to be able to take appropriate action, business enterprises need to have processes that capture relevant findings from impact assessments and ensure communication of those findings to relevant decision-makers. Responsibility, budget allocation and oversight for preventing and mitigating adverse human rights impacts need to be assigned to appropriate levels within the business enterprise to ensure that this occurs.\(^{110}\)

How a business enterprise should respond to the actual and potential adverse impacts that it identifies depends on whether the business enterprise causes or contributes to the adverse impact, or whether it is implicated solely because the impact is directly linked to its operations, products or services by a business relationship. Some of the considerations that arise in this context have already been discussed in this section. While all actual and potential impacts identified by a business enterprise’s due diligence should be addressed, in some situations and for some OGBEs, it may not be possible to address all of them simultaneously. GP24 recognizes that it may be necessary to prioritize responses to the most severe impacts or in relation to impacts where a delayed response would make the impact irremediable.\(^{111}\)

**Tracking and reporting**

The process of human rights due diligence described in the Guiding Principles calls for tracking and reporting of measures taken by a business enterprise to identify, prevent and mitigate adverse human rights impacts. According to the Guiding Principles, tracking is important to ensure the effectiveness of measures taken to prevent adverse impacts because it can trigger further assessment and action when necessary and can assist to promote learning within an organization. Due diligence can inform the development of key performance indicators within a particular business enterprise, which may in turn assist management to gauge the effectiveness of human rights policies and risk management processes. As with the process of identifying and assessing potential impacts, it is recommended that tracking the effectiveness of responses should involve consultation with affected stakeholders.\(^{112}\)

GP21 also recommends that business enterprises should be prepared to communicate externally the steps they have taken to respond to actual and potential human rights impacts in order to ensure ‘a measure of transparency and accountability to individuals or groups who may be impacted’.\(^{113}\) Issues relating to disclosure and public reporting of internal activities are often sensitive for businesses. Business enterprises may, for example,

\(^{110}\) OHCHR, Guiding Principles, GP19 (n 1) 20–2.

\(^{111}\) Further guidance in this regard may be found in the commentary to GP24 (OHCHR, Guiding Principles (n 1) 26) and in the Interpretive Guide (OHCHR, Interpretive Guide (n 9) 70–2).

\(^{112}\) OHCHR, Guiding Principles, GP20 (n 1) 22.

\(^{113}\) Ibid GP21 and commentary (n 1) 24.
have legitimate concerns in relation to the disclosure of commercially sensitive information, or may have legal obligations to third parties to keep certain information confidential. There might also be legitimate reasons for keeping the details of ongoing disputes with stakeholders confidential, for example, where this will facilitate candid discussion or mediation. OGBEs will wish to reflect on the extent to which they currently report on human rights-related issues and what further information might be made available, to whom and in what detail and format, to align with the expectations of the Guiding Principles.

**Respecting human rights in conflict zones and fragile states**

OGBEs often operate in challenging environments, including conflict zones or fragile states. Conflict zones require no definition. The World Bank defines ‘fragile states’ as states characterized by ‘weak institutional capacity, poor governance, and political instability’.

Most fragile states are affected by ongoing conflicts or by internal armed violence and disorder; those that are not may recently have emerged from a period of conflict. The state duty to protect human rights extends to situations where there is internal armed conflict, where actions that violate human rights are committed by paramilitary or armed opposition groups, and even in parts of a state’s territory where the government is not currently exercising effective control. However, in such states (and in conflicts which are international armed conflicts) it is very likely that the host government will either not be in a position effectively and properly to discharge the state’s obligations and/or will be unwilling to do so.

Although the Guiding Principles do not place different or additional responsibilities on business enterprises when they operate in conflict zones or fragile states, they do emphasize that discharging the responsibility to respect human rights may require business enterprises to take additional or different steps in such environments, given the potential severity of human rights impacts which may occur. Operating in conflict zones and fragile states also entails an increased risk of being implicated in gross human rights abuse, which may lead to legal liability in some instances. Moreover, business

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115 Some OGBEs currently report on human rights issues in accordance with human rights performance indicators developed by the Global Reporting Initiative (GRI) which include, eg quantitative indicators in relation to the total number of hours of employee human rights training conducted during the reporting period. GRI, ‘Sustainability Reporting Guidelines - Version 3.1’ (2011); accessed 31 August 2012. GRI and the IPIECA have also published reporting guidance on human rights issues specifically tailored for OGBEs.


118 See eg Hance v Moldova and Russia, [2004] ECHR 48787/99.

119 See eg Ergi v Turkey [1998] ECHR 23818/94; Timurtas v Turkey [2000] ECHR 23531/94; and OHCHR, Guiding Principles, GP7 (n 1) 8–9.

120 In the Guiding Principles, issues relating to business enterprises’ operations in conflict zones and fragile States are primarily addressed as matters of ‘context’. See OHCHR, Guiding Principles, GP23 and GP24 (n 1) 25–6.

121 OHCHR, Guiding Principle, GP23 and commentary (n 1) 25–6. The risk of legal liability is discussed further in Section 6.
enterprises that operate in conflict zones and fragile states are more likely to engage in business relationships with third parties that are or might become involved in armed conflict or activity resulting in severe adverse human rights impacts. Such third parties include the host state itself and its agents (such as police and armed forces), and non-state actors such as private security forces. In this context, questions regarding the OGBE’s responsibility with regard to the human rights impacts of third parties with which it has a relationship are likely to be particularly acute. Because of the risks of being accused of complicity in gross human rights abuses committed by others, and the consequent risk of legal liability, OGBEs are advised to treat such risks as a legal compliance issue.\textsuperscript{122}

The possibility that OGBE operations may exacerbate existing human rights problems in high-risk environments will generally justify seeking expert guidance from a variety of sources on the management of the risk and how to discharge the responsibility to respect human rights despite the challenges.\textsuperscript{123} Such advice will inform the OGBE’s due diligence processes,\textsuperscript{124} as should relevant published studies and guidance.\textsuperscript{125} Engagement with stakeholders will also be particularly important in such contexts to ensure that operations in conflict zones and fragile states are not unwittingly contributing to adverse human rights impacts.\textsuperscript{126} The Guiding Principles also suggest a particular expectation around reporting the way in which business enterprises address their actual and potential human rights impacts in high-risk environments,\textsuperscript{127} so long as this increased transparency does not of itself increase risks to human rights.\textsuperscript{128}

The Guiding Principles provide only limited guidance regarding conflict zones and fragile states. Several other instruments are specifically addressed to these situations and some more detailed guidance on risk assessment and best practice in dealing with human rights in conflict zones exists.\textsuperscript{129} The Interpretive Guide suggests that OGBEs need a detailed and dedicated action plan for dealing with issues arising in high-risk environments; a ‘compass’ to guide OGBE representatives through decision-making and responding to difficult situations.\textsuperscript{130} It is particularly important that OGBEs operating

\textsuperscript{122} See the discussion of Legal Risks in Section 6 and OHCHR, Guiding Principles, GP23 and commentary (n 1) 25–6.
\textsuperscript{123} OHCHR, Guiding Principles, GP23 and commentary (n 1) 25–6.
\textsuperscript{124} OHCHR, Guiding Principles, GP19 and commentary (n 1) 22.
\textsuperscript{127} OHCHR, Guiding Principles, GP23 and commentary (n 1) 24, and OHCHR, Interpretive Guide (n 9) 66–7.
\textsuperscript{128} OHCHR, Guiding Principles, GP21 and commentary (n 1) 24.
\textsuperscript{130} OHCHR, Interpretive Guide (n 9) 65–6.
in conflict zones, fragile states and other unstable or volatile environments are prepared with a crisis management plan.

OGBEs may be unable to conduct operations safely within a state without assistance from some of the agencies of the state, including the police or military, to protect personnel and property. In this context, the Voluntary Principles on Security and Human Rights (‘the Voluntary Principles’)\(^{131}\) provide a widely accepted standard for managing human rights risks which may arise. The Voluntary Principles were devised by a small group of governments in cooperation with the private sector and address the interactions between business enterprises and public and private security forces. They embody the same basic approach as the Guiding Principles of seeking to identify and prevent adverse human rights impacts through due diligence processes (or ‘risk assessment’ in the language of the Voluntary Principles), while providing additional specific guidance on human rights risks relating to the provision of security for private sector personnel and property.\(^{132}\)

One of the most problematic issues for OGBEs in managing human rights risks in conflict zones or fragile states is likely to be determining the steps they can and should take to engage a host state regarding specific human rights issues. GP13(b) implies that, where OGBE due diligence identifies adverse human rights impacts caused as the result of action or inaction attributable to the governments with which they do business and which are directly linked to the OGBE’s operations, products or services as a result of their relationship with that government, the OGBE’s responsibility is to seek to prevent or mitigate such impacts. This does not mean that the OGBE has responsibility for the conduct of the host state. Rather, as discussed earlier in this section, a due diligence standard of conduct applies, which requires that the OGBE should take reasonable steps, in light of the particular circumstances, to seek to prevent or mitigate adverse impacts.

As a minimum, the OGBE should conduct a conscious appraisal of the extent of its influence over the host government, and should consider the ways in which this influence might be deployed to encourage the host government to avoid infringing human rights. Where the business enterprise feels it lacks leverage, the Guiding Principles suggest it may seek to increase it by, for example, offering assistance with capacity-building or other incentives. Where efforts to gain or exert leverage fail, the business enterprise should consider ending the relationship. Consideration of termination should take into account ‘credible assessment of any potential adverse human rights impact of doing so’.\(^{133}\) Thus, it is recognized that in some situations, terminating an OGBE’s relationship with a host government might actually exacerbate a human rights situation, for example, by removing any positive influence that the OGBE may be able to bring to bear.

Clearly, discharging the responsibility to respect human rights in conflict zones and fragile states is one of the major challenges facing many OGBEs, requiring careful and


\(^{132}\) ibid. The Interpretive Guide also offers guidance on the approach to due diligence expected where an enterprise’s facilities will be protected by State security forces. See OHCHR, Interpretive Guide (n 9) 36.

\(^{133}\) OHCHR, Interpretive Guide (n 9) 43.
expertly guided due diligence and a sophisticated application of its conclusions. Often, there will be a fine line between the risk of being accused of supporting a government with a poor human rights record and thus of complicity in its wrongs, and of exacerbating human rights impacts on local populations by detaching from the relationship with the state.

Conclusions
This section has introduced the state duty to protect, which is the first pillar of the Framework, and business enterprises’ responsibility to respect human rights, which is the second. In particular, the responsibility to respect has been elaborated by reference to the Guiding Principles as the responsibility of business enterprises to act with due diligence to identify their actual and potential human rights impacts (and those to which they may be linked by their operations, products and services, although attributable to third parties), and then to address them.\textsuperscript{134} Discharging this responsibility requires active steps, the first of which is human rights due diligence, the findings from which should inform the business enterprise’s actions to respect human rights, generally, and in particular transactional or project contexts. Due diligence will also permit a meaningful commitment to an appropriate human rights policy, and the implementation of that policy in an integrated way throughout an enterprise. Aligning policies and processes with the Guiding Principles cannot be achieved overnight; and due diligence will be ongoing, necessarily refreshing a business enterprise’s approach as new opportunities are explored and products and services developed.

Embedding the policies and processes for discharge of the responsibility to respect human rights throughout an enterprise raises particular challenges for OGBEs. The Guiding Principles recognize that acting consistently with the responsibility will often require complex analysis and the exercise of difficult judgments. In this regard, the Guiding Principles are not prescriptive; they provide a principled but pragmatic framework for the processes that will be involved. In the next section, the third pillar of the Framework concerning access to remedy is discussed, with particular reference to the role of operational-level grievance mechanisms.

3. Access to remedy—grievance mechanisms
The third pillar of the Framework concerns the need for victims of business-related human rights harms to be provided with effective access to remedies, and this is addressed in GPs 25–31. First, it is emphasized that states have obligations under international human rights law to ensure that their domestic legal systems provide victims of business-related human rights abuse with access to effective remedies, which can be judicial or non-judicial.\textsuperscript{135} Secondly, where business enterprises have caused or contributed to adverse human rights impacts, they should provide for or cooperate in their

\textsuperscript{134} OHCHR, Guiding Principles, GP13 (n 1) 14.

\textsuperscript{135} ibid GP25 (n 1) 27.
remediation through legitimate processes. Thirdly, to make it possible for grievances to be addressed early and remedied directly, business enterprises should ‘establish or participate in effective operational-level grievance mechanisms’ for individuals who may be adversely impacted.

In this regard, ‘operational-level grievance mechanisms’ are defined as processes ‘that operate at the interface between a business enterprise and its affected stakeholders’ and are, therefore, ‘directly accessible to those who may be impacted’ by the business enterprise. The discussion that follows is confined to such grievance mechanisms.

Examples from practice include mechanisms established to deal with grievances arising out of the construction of major pipelines and involving numerous OGBEs and other organizations, to processes designed to allow affected communities to bring complaints to the attention of local managers.

It was beyond the scope of this article to consider in detail the implications for OGBEs of external processes, including non-judicial grievance mechanisms administered by governments or other organizations.

Effectiveness criteria for operational-level grievance mechanisms

The characteristics that non-judicial grievance mechanisms (including those established at operational level) must possess to be considered ‘effective’ are listed in GP31: namely, the mechanism should be legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning; and based on engagement and dialogue. These criteria reflect principles to be applied flexibly in accordance with particular circumstances, and were subject to extensive ‘road-testing’ by the SRSG and consequent adaptation during the course of their development. Each is considered in turn below.

A key challenge for OGBE legal counsel which should be borne in mind throughout this discussion and in connection with the design of operational-level grievance mechanisms relates to the fact that grievances may signal potential litigation. While an oft-cited

136 This includes supporting judicial and other mechanisms. See OHCHR, Guiding Principles, GP22 and commentary (n 1) 24–5.
It is important that, at a minimum, a grievance mechanism is consistent with all applicable requirements of national law, such as those protecting confidentiality or imposing requirements on representation. See Caroline Rees, ‘Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned’ (Harvard Kennedy School 2011) <http://www.business-humanrights.org/media/documents/ruggie/grievance-mechanism-pilots-report-harvard-csi-jun-2011. pdf> accessed 31 August 2012, 41. There may be rare cases in which requirements of national law that would govern the operation of a formal grievance mechanism are inconsistent with internationally recognized human rights. In these circumstances, a business enterprise may need to consider less formal grievance mechanisms—mechanisms in which there is a greater emphasis on dialogue or consultation—to ensure that the grievance mechanism is consistent with the overarching responsibility to respect human rights.

137 OHCHR, Guiding Principles, GP29 (n 1) 31.

138 Rees (n 136) 8.

139 The responsibility of business enterprises to address adverse impacts on human rights will necessarily extend to adequate processes within which impacts on employees’ rights may be dealt with, but the specific issues associated with such mechanisms are not addressed in this article. This article also does not consider the relationship between operational-level governance mechanisms and other forms of dispute settlement.

140 See eg the case studies in Rees (n 136), in particular the description of the grievance mechanism established in connection with Sakhalin Energy Investment Corporation’s project on Sakhalin Island, Russia, which was developed as a joint venture between Gazprom, Royal Dutch Shell, Mitsui & Co and the Mitsubishi Corporation.

141 Including eg the Ombudsman function of the World Bank Office of the Compliance Advisor/Ombudsman, which provides an independent recourse mechanism for people affected by projects supported by IFC and/or the Multilateral Investment Guarantee Agency.

142 OHCHR, Interpretive Guide (n 9) 64.
benefit of grievance mechanisms is to allow early resolution of grievances and thereby to avoid the need for litigation, principles of transparency and engagement may, on occasion, come into conflict with the need to manage carefully processes (such as voluntary disclosure of documents) which can compound litigation and other legal risks.

**Legitimacy**

In order for a grievance mechanism to be effective it must be perceived as legitimate by the stakeholder groups for whose use it is intended. Thus, it must represent a credible commitment by the business enterprise to be held accountable for its human rights impacts. A grievance mechanism need not be formally independent from the business enterprise to which it relates in order to be perceived as legitimate. However, in circumstances where there is a history of mistrust and conflict between stakeholders and the business enterprise, formal independence may be necessary.

**Accessibility**

Grievance mechanisms can only be effective in mitigating or remediating human rights impacts if those who have suffered adverse impacts are able to access the mechanism. What is required will depend on the particular context in question. Invariably, business enterprises need to publicize and explain the grievance mechanism to potentially affected stakeholders. OGBEs will also need to consider geographic obstacles to effectiveness and accessibility—for example, a pipeline may affect communities many hundreds of miles from operational headquarters—as well as barriers of language and literacy, and the specific considerations pertaining to cultural context.

**Predictability**

Predictability, in the sense of prospective clarity about how the grievance mechanism will operate, is essential if it is to be perceived as legitimate and effective. A balance must be struck between a relatively informal process in which grievances can be resolved expeditiously and more formal processes, which allow for the investigation of the factual basis of a grievance. What is crucial is that, regardless of how the balance is struck, the grievance mechanism provides ‘a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation’.

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143 Rees (n 136) 14.
144 The pilot projects carried out by the SRSG suggest independence is less important than other factors, such as whether stakeholders have played a role in designing the mechanism. See Rees (n 136) 15.
146 Ibid 15.
147 Rees (n 136) 18.
148 OHCHR, Guiding Principles, GP31(c) (n 1) 33.
Equitability

Equitability refers to the requirement that those using the grievance mechanism should have roughly equal ability to access information, advice and expertise as compared to the business enterprise itself; this reflects fundamental principles of procedural fairness. This principle raises general issues, such as whether assistance is to be available for individuals seeking to bring claims, as well as issues that will be specific to individual grievances, such as the extent to which a business enterprise is willing to disclose information relevant to grievances that it would otherwise consider commercially sensitive. Equitability may in some circumstances require an OGBE to fund services—through arms-length arrangements—that support stakeholders in bringing grievances.

The principle that grievance mechanisms should be equitable will often be one of the most difficult for OGBEs to achieve: there will always be an inherent imbalance with respect to access to information and resources. The difficulty is in the tension between providing the necessary information and support to complainants for a grievance mechanism to operate effectively and business enterprises’ interest to minimize the expense and complexity of the mechanism. Yet a grievance mechanism is unlikely to be perceived as legitimate if there is a significant imbalance in the expertise available to the business enterprise compared to that available to complainants. Well-informed stakeholders may mean speedier resolution of issues (an outcome favoured by all parties).

Transparency

The idea behind this principle is that the predictability and legitimacy of a grievance mechanism will be improved if information about its operation is made publicly available. This might involve publishing information about the number of disputes dealt with and examples of the ways in which particular grievances have been resolved. The principle of transparency does not require the disclosure of all information: there may be legitimate reasons for keeping individual grievances confidential, including the importance of protecting complainants from retaliation.

Rights-compatibility

The principle of rights-compatibility requires a business enterprise to ensure that a grievance mechanism provides an adequate remedy for adverse human rights impacts for which it is responsible, and to ensure that the outcomes themselves do not create adverse human rights impacts (by being discriminatory as between complainants of different ethnicity, for example). Thus, the Guiding Principles require that the ‘outcomes and remedies accord with internationally recognized human rights’.

150 Reen (n 136) 23.
152 OHCHR, Guiding Principles, GP31(f) (n 1) 34.
‘Rights-compatibility’ does not mean that grievances have to be presented in human rights terms. Many complaints that invoke notions of fairness or raise objections to lack of consultation may, at their core, be human rights grievances. There is no requirement that a grievance mechanism ‘translate’ complaints into human rights language in order to address them. Moreover, mechanisms should not be limited to situations in which adverse human rights impacts have already occurred as this could inhibit the prevention of human rights impacts and have the undesirable result that grievances are only addressed after they have escalated.153

A source of continuous learning

The principle that grievance mechanisms should be a source of continuous learning is central to the effectiveness of operational-level grievance mechanisms. In that respect, grievance mechanisms play an important role in due diligence processes: ‘[b]y analyzing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly.’154 In all situations, an OGBE will wish to track the number of cases dealt with by the grievance mechanism, the issues raised by those cases and the way in which they were resolved. If similar issues recur repeatedly through the grievance mechanism, it follows that they should be raised with relevant divisions of the business enterprise with oversight responsibility for the operations associated with the relevant human rights impacts, to try to address root causes in a systematic way and respond to them. A low number of complaints will not necessarily indicate that the grievance mechanism is operating successfully. On the contrary, it may indicate a lack of awareness of, or lack of trust in, the mechanism. Quantitative data should therefore be interpreted in conjunction with qualitative information regarding the awareness and effectiveness of the mechanism and lessons to be gleaned.155

Engagement and dialogue

To be effective, an operational-level grievance mechanism should be based on engagement and dialogue. This echoes the point that a grievance mechanism is more likely to be perceived as legitimate if affected stakeholders have been involved in designing the mechanism.156 This is particularly true of grievance mechanisms that are not formally independent of the business enterprise in question. Building dialogue into grievance mechanisms raises certain challenges, and how they are best resolved will depend on circumstance-specific factors. A useful way for OGBEs to approach this principle is to ensure that grievance mechanisms are designed to be consistent with other elements of business enterprises’ stakeholder engagement, such as community consultation and social investment.

153 OHCHR, Interpretive Guide (n 9) 58.
154 OHCHR, Guiding Principles, GP29 and commentary (n 1) 32.
155 Rees (n 136) 26.
156 Ibid 24.
Grievance mechanisms in the oil and gas sector

The challenges involved in implementing effective operational-level grievance mechanisms are not confined to the oil and gas sector but certain features of the sector are likely to give rise to particular issues. For example, many projects in the sector involve multiple business enterprises (and may also involve the host state as a commercial partner). Diverse structures and contractual arrangements are used to manage and allocate the commercial and non-commercial risks associated with such contracts, including between joint venturers, and in respect of sub-contractors.

In practice, it may normally be the lead participant(s) in such projects—either individually or collectively—who will be responsible for the design and implementation of an appropriate operational-level grievance mechanism, in which the junior participants will be invited to participate or cooperate. However, where several different business enterprises are involved in a single project, it will always be necessary to consider whether it makes more sense for grievances to be addressed through a single mechanism, or through separate mechanisms. The former approach is generally more likely to be aligned with the perspective of external stakeholders, who are often not in a position to distinguish between the actions of different corporate entities working on a single site or project, and therefore may feel they need a single point of contact through which to communicate issues and seek their resolution.157

Other challenges arise in contexts where there are alternative fora in which stakeholders might raise disputes. In some cases, it may be both possible and desirable for different mechanisms to operate in parallel. However, different mechanisms may produce conflicting outcomes inconsistently with the requirement that mechanisms should be predictable.

There is a great deal of useful information relating to the design of grievance mechanisms that is now publicly available, some of which was produced through the evidence-based approach adopted in the development of the Framework and the Guiding Principles.158 In practice, one of the biggest challenges for OGBEs will be to move from isolated examples of good practice, to greater consistency in meeting the Guiding Principles’ criteria for effectiveness, both within corporate groups and throughout the sector as a whole.159


Conclusions
This section has considered the recommendations made by the SRSG in relation to improving access to remedies for victims of business-related human rights abuse. Particular attention has been paid to the criteria for effective operational-level, non-judicial grievance mechanisms as articulated in the Guiding Principles and challenges which may arise in designing and implementing such mechanisms in the oil and gas sector. In the next section, existing approaches to the management of human rights issues in the oil and gas sector are discussed, including insights on the content and implementation of human rights policies and the role of grievance mechanisms in that context.

4. Existing approaches to management of human rights issues in the oil and gas sector
This section reports on the results of research regarding existing approaches to management of human rights issues in the oil and gas sector. This research included an online survey which invited AIPN members to respond to a series of questions regarding, among other things, their company’s policies with respect to human rights and CSR. The authors also conducted in-depth interviews with OGBE representatives and senior industry figures. In addition, the authors reviewed publicly available information (principally company websites and public reports) in order to assess the prevalence and content of OGBE human rights policies.

For the purposes of this article, the authors reviewed the publicly communicated statements of policy of more than 100 OGBEs. In doing so, the authors did not seek to confirm whether individual policies complied with the recommendations in GP16 regarding the form and content of human rights policies, as discussed in Section 2. Given that the Guiding Principles were only endorsed by the Human Rights Council in June 2011, it is reasonable to expect that many OGBEs will still be (and indeed are) undertaking assessments of the steps required to align their existing policies with the Guiding Principles.

Prevalence of OGBE human rights policies
A review of the corporate websites and published CSR reports of the world’s largest OGBEs revealed that the majority of publicly listed companies have adopted human rights policies. However, it appears that relatively few of the largest state-owned...
OGBEs have adopted human rights policies. The sample reviewed by the authors included 102 OGBEs, including:

(i) 54 OGBEs ranked in the Financial Times’ (FT) Global 500 (the ‘FT 500’);162
(ii) 27 NOCs and other state-owned OGBEs from the Organization of Petroleum Exporting Countries (OPEC) Member States;163 and
(iii) 21 NOCs and other state-owned OGBEs from non-OPEC states included in the Energy Intelligence Top 100 companies.164

OGBEs were deemed to be ‘state-owned’ in cases where a state held 10 per cent or more of the voting shares in the company. This categorization is consistent with the definition of state-owned multinational enterprises used by the United Nations Conference on Trade and Development (UNCTAD).165

The website of each OGBE and its annual public reports (including CSR reports) for the previous three years166 were reviewed in order to determine whether the company had adopted a human rights policy. OGBEs were determined to have adopted a human rights policy in cases where a clear policy statement regarding human rights was published on the company website or included in the company’s CSR or other public reports. In a small number of cases, company CSR reports or other public documents were identified, which mentioned human rights but which did not confirm that the company had adopted a policy regarding human rights. Table 1 highlights some of the results of the review.

The authors also recorded whether each OGBE was a participant in the UNGC on the basis that participation entails a commitment to support and respect human rights and because the UNGC has been active in promoting the Guiding Principles and has produced guidance for participants relating to the design and implementation of human rights policies.167

162 As of March 2011, a total of 54 OGBEs were included in the FT 500 (which includes the 500 largest publicly listed companies in the world ranked by market capitalization). Forty-six companies are categorized as ‘Oil and gas producers’ and eight companies are categorized as ‘Oil and gas service providers’. For the complete list, see FT Global 500 2011 <http://media.ft.com/cms/33558890-98d4-11e0-bd66-00144feab49a.pdf> accessed 31 August 2012.

163 A number of OPEC Member States have more than one NOC or State-owned OGBE. In the case of Indonesia, Iran, Kuwait, Nigeria and the UAE, all NOCs and other State-owned OGBEs were included in the sample. State participation in the Iraqi oil sector involves 20 or more regional companies and only the State Oil Marketing Organisation and the North Oil Company were included in the sample reviewed by the authors.


165 The UNCTAD definition includes:

[enterprises comprising parent enterprises and their foreign affiliates in which the government has a controlling interest (full, majority, or significant minority), whether or not listed on a stock exchange . . . control is defined as a stake of 10 per cent or more of the voting power, or where the government is the largest single shareholder. State-owned refers to both national and sub-national governments, such as regions, provinces and cities.]


167 A number of the companies reviewed did not provide documents in English and/or had websites which were not functioning at the time of review. These companies have been excluded from the authors’ review.
Table 1. Review of information published by large OGBEs—summary of results

<table>
<thead>
<tr>
<th>OGBEs</th>
<th>Number of companies with publicly available human rights policies</th>
<th>Number of companies participating in the UNGC</th>
<th>Number of companies reporting on human rights issues in accordance with GRI guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oil and gas service providers in the FT 500</td>
<td>7 of 8 (88)</td>
<td>1 of 8 (13)</td>
<td>3 of 8 (38)&lt;sup&gt;a&lt;/sup&gt;</td>
</tr>
<tr>
<td>Oil and gas producers in the FT 500</td>
<td>28 of 46 (61)</td>
<td>20 of 46 (43)</td>
<td>22 of 46 (63)&lt;sup&gt;b&lt;/sup&gt;</td>
</tr>
<tr>
<td>State-owned oil and gas producers in the FT 500</td>
<td>7 of 13 (54)</td>
<td>10 of 13 (77)</td>
<td>7 of 13 (54)&lt;sup&gt;c&lt;/sup&gt;</td>
</tr>
<tr>
<td>NOCs and other state-owned OGBEs from OPEC Member States (not included in FT 500)</td>
<td>0 of 27 (0)</td>
<td>0 of 27 (0)</td>
<td>0 of 27 (0)</td>
</tr>
<tr>
<td>NOCs and other state-owned OGBEs from non-OPEC states (not included in FT 500)&lt;sup&gt;d&lt;/sup&gt;</td>
<td>6 of 16 (38)</td>
<td>4 of 21 (19)</td>
<td>5 of 16 (44)&lt;sup&gt;e&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

Values are represented as number with percentages within parentheses.

<sup>a</sup> Saipem referred to the GRI (Global Reporting Initiative - see n 115) in its 2011 CSR Report but did not report against any GRI indicators. See ‘Saipem Sustainability’ (2011) <http://www.saipem.com/site/Home/Sustainability.html> accessed 31 August 2012.

<sup>b</sup> Each of Apache Corp, Canadian Natural Resources Ltd, Cenovus Energy, Imperial Oil Limited, Sinopec, Suncor Energy Inc and Talisman Energy Inc reported against GRI indicators in their latest available CSR report but did not report against human rights indicators.


<sup>d</sup> There are 21 non-OPEC NOCs/State-owned OGBEs in the Energy Intelligence Top 100, namely: China National Petroleum Corporation, CPC Corporation, Ecopetrol S.A, Egyptian General Petroleum Corporation, Korea National Oil Corporation (KNOC), MOL Hungarian Oil & Gas Company, Mubadala Development Company, Oil India Limited, OMV, Petroleum Development Oman, Pemex, Petronas, Petrovietnam, PGNiG SA, State Oil Company of Azerbaijan Republic (SOCAR), Syrian Petroleum Company, OAO Tatneft, Turkmengas, Turkmenneft, Uzbekneftegaz, and Yacimientos Petrolíferos Fiscales Bolivianos.

Similarly, the authors recorded whether each OGBE stated that it reported on human rights in accordance with the GRI guidelines. The results of this classification were interesting in highlighting the fact that relatively few state-owned OGBEs and OGBEs classified as ‘service providers’ are participants in the Global Compact and/or report on human rights issues in accordance with GRI guidelines.

Survey responses

A total of 97 AIPN members responded to the survey. Most questions required only a ‘yes’ or ‘no’ answer, although respondents were able to provide additional information or comments in response to particular questions. Respondents did not necessarily answer every question. Almost half of all respondents confirmed that their company had a human rights policy, with the remaining proportion stating that their companies either had no such policy or that they did not know of its existence. Less than half of the respondents indicating that their company had a human rights policy also stated that the company was a participant in the UNGC, whereas none of the respondents from companies stating they did not have human rights policies indicated that the company was a participant.

The number of respondents familiar with the Guiding Principles was slightly higher in companies with human rights policies. A majority of respondents from companies with CSR policies (but not human rights policies) were not personally familiar with the Guiding Principles, compared with a smaller majority of respondents from companies with human rights policies. Around half of the respondents from companies with human rights policies confirmed that these policies referred to the Guiding Principles and/or to the work of the SRSG.

A small number of responses demonstrated an awareness of the content of the Guiding Principles sufficient to explain how the policy of the respondent’s company reflected the GPs relating to human rights due diligence and the establishment of grievance mechanisms. A number of respondents clarified that human rights issues were the subject of various company policies (e.g., policies relating to social or community issues, environment, health and safety, security and indigenous peoples) which did not necessarily refer expressly to human rights. Some respondents also noted that their company’s human rights policies referred to international standards other than the Guiding Principles, such as the ILO Declaration on Fundamental Principles and Rights at Work and the Voluntary Principles.

Slightly less than half of the respondents from companies with human rights policies indicated that the company’s CSR manager or department was responsible for monitoring compliance with the policy, while fewer respondents indicated that this responsibility lay with the company’s general counsel or legal department. Less than half of respondents from companies with CSR policies (but not human rights policies) indicated that the CSR

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167 Amis (n 90).

manager or department was responsible for monitoring compliance with the policy and even fewer respondents said that the general counsel or legal department was responsible.

Respondents were asked whether their company policy required assessment of potential human rights impacts of proposed business activities prior to undertaking such activities. In companies with human rights policies, a majority of respondents confirmed that this was a requirement. In companies with CSR policies (but not human rights policies) less than a half of respondents said that human rights impact assessment was mandatory. Respondents were also asked to confirm whether company policy required the establishment of human rights grievance mechanisms. In companies with human rights policies, around a half of respondents said that the policy committed the company to establish grievance mechanisms. In companies with CSR policies (but not human rights policies), a minority of respondents said that the policy committed the company to establish grievance mechanisms.

Content and implementation of OGBE human rights policies

The following section briefly describes the content of OGBE policies reviewed by the authors and the responses of OGBE representatives and industry professionals interviewed by the authors to questions relating to the implementation of human rights policies. It should be noted that the content and format of human rights policies varies widely. The Guiding Principles do not require a stand-alone human rights policy and these are currently less common than commitments relating to human rights contained within CSR policies, codes of conduct or codes of ethics. A small number of OGBE policies reviewed by the authors referred expressly to the Framework and/or the Guiding Principles. Others expressed a commitment to ‘respect’ human rights, consistent with the language used in the Framework and the Guiding Principles but without specifically referring to either.169 Some interviewees commented that human rights ‘language’ was not necessarily meaningful to building human rights considerations into everyday operational concerns in the sector (one interviewee said it was ‘unhelpful’).170

GP16 recommends that a human rights policy should be ‘reflected in operational policies and procedures necessary to embed it throughout the business enterprise’. Many interviewees said that implementation was a major challenge. Interviewees confirmed that senior (ie board level) approval of human rights policy was critical to setting the ethical tone of an organization. Interviewees also stressed that a range of departments and functions need to be involved in implementing human rights policies. Most commonly, CSR and legal departments were identified as necessary contributors, with compliance and public relations departments also identified, but less often. Notably, the role of lawyers in implementing human rights policies was considered to be of mixed value: some interviewees felt that lawyers tended to focus on risk and liability issues rather than


170 Such views are by no means unique to the oil and gas sector. See eg Fiona Haines, Kate MacDonald and Samantha Balaton-Chrimes, ‘Contextualising the Business Responsibility to Respect: How Much is Lost in Translation?’ in Mares (n 67).
on practical problem solving. Conversely, a (non-lawyer) expert consultant engaged by a major European OGBE to review its policies and processes saw lawyers as playing a crucial role in the implementation of human rights policies, noting further that some of the most effective OGBE approaches were driven by legal teams.

A number of interviewees identified potential legal liability as a key driver of ‘compliance’, alongside broader risk management imperatives including the need to protect and enhance the OGBE’s reputation. In one case, an interviewee indicated that a human rights policy had been adopted primarily in order to qualify for inclusion in an ‘FTSE4Good’ stock index.\(^{171}\) It was also said that greater attention needed to be paid to profit-drivers for implementation, in particular the quantification of the costs associated with failure to adhere to the responsibility to respect human rights.\(^{172}\)

Many OGBE policies currently refer to social and environmental impact assessment while relatively few refer specifically to HRIA.\(^{173}\) In some cases, assessment of human rights impacts is referred to as a component of social and environmental impact assessment.\(^{174}\) The policy of a major OGBE states that ‘it is critical to perform [an HRIA] as early as possible in the life cycle of a project, ideally prior to the completion of design and the start of significant construction’.\(^{175}\) Another major OGBE states that it uses a tool developed by the Danish Institute for Human Rights to guide its risk assessment.\(^{176}\) Consistent with the recommendations of GP18, some policies referred to the possibility of consulting experts or local non-governmental organizations (NGOs) and/or engaging with other stakeholders when conducting an HRIA.\(^{177}\) Some existing policies emphasize the need to evaluate the policies and behaviour of potential partners as a key component of human rights due diligence.\(^{178}\)

In reviewing OGBE policies, the authors took particular note of references to human rights issues arising in the context of the OGBE’s relationships with business partners. A typical example of a reference to expectations of an OGBE with respect to business partners (as opposed to obligations on business partners) is found in the human rights policy of a leading independent OGBE which states that ‘[w]e expect contractors...’\(^{179}\)


\(^{173}\) Susan Aaronsen and Ian Higham, ‘Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms’ (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1922224> accessed 31 August 2012. This research compared the human rights policies of 275 business enterprises concluding that only 26 policies claimed that the relevant enterprise conducted HRIA as a matter of course.


\(^{178}\) Eni (n 179) 9.
suppliers to respect our voluntary commitments, Code of Business Conduct and Ethics, and Environment, Health and Safety, Social Responsibility and related policies.\textsuperscript{179} This may be contrasted with the policy of a US OGBE which, in relation to suppliers, states that ‘\textit{w}e encourage our suppliers to treat their employees, and to interact with communities, in a manner that respects human rights.’\textsuperscript{180}

Some policies take the position that all business partners should subscribe to and comply with the OGBE’s policy on human rights.\textsuperscript{181} Others recognize that some contractors and suppliers will require assistance to achieve compliance with international standards. For example, the policy of an independent producer from the UK states:

\begin{quote}
We understand that local, social, political and cultural conditions may present challenges for immediately conforming to international standards on the part of our business partners. We will look for evidence of their commitment to working towards such standards, and will withdraw from relationships where no positive progress is made over time.\textsuperscript{182}
\end{quote}

Some OGBE policies stated that provisions regarding human rights should be included in contracts with third parties as a matter of course. For example, the human rights policy of one of the largest North American OGBEs states that contracts related to activities outside the USA ‘\textit{s}hall include provisions with respect to the observance of Human Rights, as well as the laws and professional standards of the host Foreign Government, and provide appropriate and practical monitoring mechanisms’.\textsuperscript{183} The authors asked all interviewees whether their company routinely included references to human rights standards in contracts with third parties. Responses to this question were mixed. One interviewee working within the legal department of a European-headquartered OGBE remarked that he had never seen a human rights provision included in a contract. Others stated that enforcing such clauses is difficult and that to the extent they are currently included in contracts with business partners, this is to signal the importance of human rights to the supply chain rather than with a view to enforcing the clause.

It is relevant to recall that GP23 emphasizes that business enterprises should comply with all applicable laws. However, when faced with conflicting requirements, business enterprises should ‘seek ways to honour the principles of internationally

\textsuperscript{179} Hess (n 174) 2.
\textsuperscript{181} See eg BP (n 180) 10: Employees who engage third parties such as contractors, agents or consultants to work on behalf of BP must seek to make these parties aware of our code of conduct, and should seek their co-operation in adhering to the code — including, where possible, a contractual requirement to act consistently with the code when working on our behalf.
recognized human rights'. Many policies recognize that domestic laws in states where OGBEs are operating may not reflect international standards. In the case of a UK-based independent OGBE its Code of Business Conduct provides:

We comply with all applicable local and international laws within the countries where we do business. Where differences exist between the standard of the law or regulations and the requirements of the Code the higher standard will be applied. Where laws conflict or you are unsure of the correct action to take you should consult with your legal advisor.

The commentary to GP23 recommends that an enterprise faced with conflicting legal requirements, or difficulties in meeting international standards, may benefit from consulting with external parties, including governments. In this regard, some OGBE policies refer to engagement with governments, albeit in general terms or without referring to human rights issues. Only a small number of policies identified by the authors expressly contemplate engagement with host governments on human rights issues. For example, the code of conduct of a leading independent OGBE headquartered in Canada states that the company will ‘promote adherence to and respect for human rights principles in our areas of operation . . . will not be complicit in human rights abuses [and] will strive to advance best practices with host governments, partners and third parties’. Other policies refer more broadly to engagement activities intended to promote positive human rights outcomes.

Commitments to engage in dialogue with governments regarding human rights demonstrate one of the ways in which OGBEs can seek to exert leverage in order to mitigate or avoid adverse human rights impacts. Of course, while such commitments can be expressed in simple terms, implementation is likely to be much more complex. The general counsel of a European-headquartered OGBE interviewed by the authors referred to the following:

‘While it is the fundamental role of government to safeguard basic human rights, we too have a responsibility to our multinational workforce, the communities where we operate and business partners to adhere to the principles of human rights. We collaborate through trade, professional, cultural and other membership forums to affect positive outcomes in human rights reform.'
to their experience in attempting to discuss human rights issues with a host government, describing the reaction of officials as ‘hostile’ and surmising that the government reacted in this way because they resented the implication that the government was not doing its job properly.

GP20 recommends that business enterprises should track the effectiveness of their response to actual or potential adverse human rights impacts. As illustrated in Table 1 above, a significant number of OGBEs report annually on their performance relative to the GRI human rights performance indicators. It was beyond the scope of the present research to review such reports in detail. It is, however, relevant to note that the GRI human rights performance indicators include ‘core’ indicators on contracting and procurement practices (discussed in the next section) and relating to impact assessment and remediation, including grievance mechanisms. It was also noted by interviewees that grievance mechanisms were key to effective implementation of human rights as they contribute to performance monitoring.

Very few human rights policies reviewed included detailed information on practices with regard to grievance mechanisms. To the extent that grievances citing alleged adverse human rights impacts linked to the OGBE, or complaints regarding non-compliance with its human rights policy, were contemplated in the published materials reviewed, it appeared that the focus was on providing means (such as anonymous ‘hotlines’ or identification of responsible management personnel) for employees, rather than external parties, to report instances of non-compliance.

This is not to say that OGBEs do not recognize and appreciate the importance of operational-level grievance mechanisms or, more broadly, seeking feedback on performance from external stakeholders as recommended by GP20. For example, an IPIECA Human Rights Taskforce is working on the issue of grievance mechanisms as a discrete work-stream within a broader project considering implications of the Guiding Principles for the oil and gas sector.

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191 GRI (n 115).

192 For example, ExxonMobil's '2010 Corporate Citizenship Report’ states:

> We... recognize the need for local populations to be able to voice and resolve concerns related to a project without fear of retribution. Our Upstream Socioeconomic Management Standard includes provisions for establishing a grievance mechanism, where appropriate. While our BPEA [Best Practices in External Affairs] engagements provide an important means to hear and address community concerns, grievance mechanisms provide a systematic and transparent process for local people to raise concerns, which can be addressed by the company within an appropriate timeframe.


193 IPIECA is the global oil and gas industry association for E&S issues. See <http://www.ipieca.org/about-us> accessed 31 August 2012.

Interview responses suggested that grievance mechanisms are one of the better understood elements of the Guiding Principles. Moreover, interviewees generally indicated strong support for effective grievance mechanisms, not least because some OGBEs consider that there is a strong business case for effective grievance mechanisms at the operational level. Several interviewees noted that well-designed operational-level grievance mechanisms can resolve minor concerns before they escalate into major conflagrations. Effective mechanisms are particularly important, where projects may operate for decades and unresolved grievances can become intractable. Interviewees emphasized the importance of establishing grievance mechanisms early in the project cycle before significant conflicts arise. One interviewee noted that the early identification of stakeholders' concerns is an important part of wider due diligence processes to identify actual and potential adverse human rights impacts. Conversely, a poorly designed grievance mechanism (or failure to establish a mechanism) may reinforce perceptions that a business enterprise is indifferent to the concerns of stakeholders.

One interviewee suggested that framing grievances in human rights terms could impede the operation of a grievance mechanism by encouraging a more adversarial, legal approach to dispute resolution instead of the more constructive, problem-solving approach necessary for a grievance mechanism to operate successfully. Another pointed out that it can prove unhelpful when OGBEs focus on ‘winning’ disputes rather than addressing stakeholders’ concerns in a careful, conciliatory and respectful manner.

Conclusions

The authors’ review of publicly available information shows that the majority of the largest OGBEs have adopted human rights policies of some description, although very few state-owned OGBEs have done so. Although those responding to the survey evidenced relatively low awareness of the Guiding Principles, many interviewees were familiar with them, demonstrated a detailed understanding and offered useful observations on what is required for effective implementation of OGBE human rights policies. Some policies specifically mentioned an approach whereby contractual counterparties would be required to follow an OGBE’s code of conduct (which might include human rights coverage). This is likely to reflect an increasing trend in practice as OGBEs seek to discharge their responsibility to respect human rights by taking steps to secure assurances of commensurate respect from contractors, suppliers and the like. Issues that arise in contractual relationships when taking account of the Guiding Principles are discussed in greater detail in the next section.

195 A number of the companies interviewed had undertaken or participated in pilot projects pertaining to grievance mechanisms already and, therefore, might not reflect the experience of the pool of companies surveyed more broadly.
196 OHCHR, Interpretive Guide (n 9) 64.
5. Contractual relationships

OGBEs enter into many different types of contractual relationships with a variety of contracting parties. These may range from large-scale investment agreements with states, to joint venture contracts with other OGBEs and supply contracts with private sector business enterprises relating to the provision of goods and services around the world. This section anticipates ways in which the responsibility to respect human rights may arise in connection with contractual relationships and, in particular, examines the concept of leverage in that context. The authors have chosen to highlight certain aspects that are likely to confront the oil and gas sector routinely. Challenges also arise in other contexts not specifically addressed here but that will warrant further consideration.

Given the complexity of supply chains in the sector and the prevalence of local content requirements, particularly in less-developed countries, OGBEs seeking to ensure human rights ‘best practice’ may face the challenging task of educating and building the capacity of less well-resourced, and possibly sceptical, local partners. Joint ventures present particular challenges for OGBEs seeking to exert leverage via the inclusion of human rights provisions in contracts. A key challenge is how to address human rights within the framework of a joint operations agreement, where day-to-day operational control and responsibility will be allocated to a single joint venture partner. These issues are discussed below. A brief discussion regarding specific recommendations the SRSG made in relation to negotiation of agreements with states is also included in this section.

Contractual relationships and the concept of leverage

As discussed in Section 2, an OGBE’s responsibility to respect human rights requires a range of possible actions where due diligence identifies actual or potential human rights impacts that the OGBE may cause or contribute to, or impacts which are (or may be) linked to the OGBE’s operations, products or services as the result of a business relationship. Due diligence may identify such issues before a contract is signed or during the course of a relationship, as a result of transaction or ongoing relationship monitoring. Accordingly, the OGBE may have to consider how to discharge its responsibility to respect human rights at multiple stages over the life of a contract: first, during the negotiation and drafting of a contract; then, during the term of the contract; and lastly, in consideration of whether the contract should be terminated.

Relevant guidance within the Guiding Principles indicates, in summary, that where a business enterprise is in a position to be able to control an outcome (where the business enterprise may cause or contribute to an impact), it should seek to prevent or mitigate the human rights impact. Where the enterprise has no direct control, for example, because

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198 For example, in relation to mergers and acquisitions, human rights due diligence should be a feature of broader due diligence exercises. Where particular human rights risks or differences in approach to human rights issues within legacy and successor enterprises are identified, these issues may need to be addressed within transactional documentation and beyond. See OHCHR, Guiding Principles, GP17 and commentary (n 1) 18.

199 OHCHR, Guiding Principles, GP17(c) (n 1) 18 makes it clear that human rights due diligence ‘should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve’.
the impact is caused by a third party’s actions but is linked to the enterprise’s operations, products or services as a result of its relationship with the third party, the enterprise should seek to use leverage to secure outcomes which avoid or mitigate any adverse human rights impacts.

For the purpose of the Guiding Principles, leverage is defined as the ‘ability to effect change in the wrongful practices of an entity that causes a harm’. Where a business enterprise has leverage to prevent or mitigate an adverse impact, it should exercise it. If it lacks leverage, it should explore ways of increasing it. Leverage will clearly exist as between negotiating parties to a contract, with greater (or sometimes all) leverage accruing to the party with the balance of negotiating power. Where negotiating positions are more evenly balanced, the exercise of leverage may require difficult decisions regarding concessions which might be made in order to secure the prevention or mitigation of adverse human rights impacts. The Guiding Principles recite factors that will enter into the determination of the appropriate action in such situations and possible responses.

The Interpretative Guide contains a decision-making matrix to be applied where the relationship with a counterparty results in the business enterprise being linked to an adverse human rights impact through its operations, products or services. Just as a business enterprise needs to prioritize action with respect to prevention or mitigation of adverse human rights impacts throughout its operations, so prioritization of issues within a negotiating context will occur. In that regard, prioritization of issues needs to take account of the need to secure respect for human rights (accounting for the significance and severity of the human rights impact in question) and not exclusively of the commercial priorities of the business enterprise.

In determining how leverage should be exercised within the contracting process to avoid, prevent or mitigate potential or identified human rights impacts there should be coordination between pre-contractual due diligence undertaken by the business enterprise and steps agreed between the parties to discharge the responsibility to respect human rights. Human rights considerations should therefore be addressed in
procurement and tender processes, to make human rights expectations clear at the earliest stage of business relationships.\footnote{The Interpretive Guide also describes the nature of the assessment which should be undertaken where an enterprise is considering entering into a new relationship with a third party and discovers that the third party has previously been involved in human rights abuses. See OHCHR, Interpretive Guide (n 9) 44.}

Contractual relationships generally involve a degree of co-dependency with the performance of one side of a bargain being conditional upon performance by the other party. As a result, as soon as a contract is concluded, a business enterprise is engaged in a relationship that may lead to human rights impacts beyond its direct control. Articulating expectations concerning respect for human rights within specific contractual provisions is one means by which an enterprise can seek to guard against the other party performing the contract in a way that is potentially harmful to human rights. For example, contracts might include:

(i) general or specific assurances by a party that it will respect human rights;
(ii) covenants in relation to conduct with defined obligations or references to relevant external standards; and/or
(iii) clauses identifying human rights impacts which are possible (or likely) in specific contexts and establishing the steps to be taken to avoid, prevent or mitigate such impacts.

The nature and content of the assurances to be given will vary.\footnote{Lucinda Low and Jonathan Drimmer provide examples in 'Specific Corporate Compliance Challenges by Industry: Extractive Industry — Energy' in Carole Basri (ed), Corporate Compliance Practice Guide, (LexisNexis 2011) 50.18(2)(b): As with all companies, it is prudent for all extractive companies engaged in business dealings with third parties to enter written contracts with those parties before engaging them to perform services, including provisions: mandating adherence to the company’s code of conduct and making prohibited practices a breach of the agreement; requiring that key third-party employees undergo training in areas of relevant concern and provide periodic certifications; declaring the company’s expectation that the third-party will adhere to all civil and criminal laws, specifying those of greatest interest—such as the FCPA [Foreign Corrupt Practices Act], ATS [Alien Tort Statute], and others—as well as applicable industry standards; requiring the third-party to include comparable compliance representations and covenants in its agreements with subcontractors; demanding documentation of significant expenditures; and other relevant protections discussed in prior chapters. For joint-venturers, in addition to the above, include provisions that set forth how decisions will be made and compensation and fees will be determined, that cover agents and third-parties, that explain the budgeting process and approvals, and other pertinent requirements. All contracts also should include provisions that permit some means of monitoring third-party conduct.}

It is important, however, to assess the ability of the counterparty to...
deliver on those commitments. The Interpretive Guide observes that:

concluding terms of contract that require or incentivize respect for human rights absent reasonable evidence that the other party is both willing and able to meet the requirements renders this less meaningful both as a preventative mechanism and in terms of leverage, and leaves the enterprise exposed in terms of human rights risks.208

A business enterprise does little to discharge the responsibility to respect by securing contractual promises that it knows or suspects will not be fulfilled. In this regard, a business enterprise may need to consider providing support to the counterparty towards compliance with commitments relating to human rights, such as capacity-building.209 In this context, the contract may also impose additional obligations on the counterparty, such as an obligation to ensure that employees receive or participate in relevant training.

In dealing with human rights issues in the contractual context, business enterprises need to focus not only on provisions positively addressing the risk of adverse impacts and how to avoid or mitigate them, but also on other terms of the contract that could undermine those designed to address potential human rights impacts. For example, it has been observed that contracts incentivizing cost minimization and speed of delivery may compromise suppliers’ ability to adhere to human rights standards.210

Given the ongoing due diligence that is expected in relation to business relationships and human rights, business enterprises will wish to ensure, when concluding contracts, that they have mapped the likely issues that might arise and how these will be addressed within the relationship. To the extent that expectations in relation to human rights are incorporated into contractual terms, business enterprises need to be in a position to assess whether those terms are fulfilled and understand what, if any, consequences will arise for shortcomings; in other words, it is necessary to monitor performance of the contract. Contractual terms which facilitate monitoring of performance on human rights issues might include a right to audit a business partner’s records relevant to that performance. In this way, the terms of the contract can give the business enterprise additional leverage in relation to human rights issues.

Business enterprises may be tempted to seek to shift the burden of addressing adverse human rights impacts onto others with whom they have business relationships, through relevant provisions in contracts. While the Guiding Principles do not preclude an allocation of contractual responsibility in relation to human rights impacts associated with a project or transaction, it is important to acknowledge that the responsibility to respect human rights by a business enterprise is not necessarily discharged if this approach is

208 OHCHR, Interpretive Guide (n 9) 43.
taken. Adherence to the Guiding Principles will require ongoing due diligence on the part of the business enterprise, to ensure that any delegated or allocated responsibilities relating to the avoidance or mitigation of human rights impacts for which a business enterprise has responsibility are effectively discharged.

If a business enterprise does rely upon contractual provisions to seek to discharge its responsibility to respect human rights, attention needs to be paid to the possibility of non-compliance by a counterparty. How particular provisions are framed will affect the consequences of any breach. OGBEs will need to consider whether damages are an appropriate and sufficient remedy, or whether it is necessary to have a right to specific performance. If, during the course of a relationship, a business enterprise concludes that it no longer has any or sufficient leverage to prevent or mitigate adverse impacts, it may be appropriate for it to consider terminating the relationship.211 In such cases, the business enterprise’s position will be stronger if any contract has been drafted in terms which facilitate that outcome.212

OGBEs may be on the receiving end of leverage from external sources with respect to their responsibility to respect human rights. It has been suggested that the imposition of E&S performance standards by the IFC (and, in the private sector, by the Equator banks)213 has been a key driver for improvements in the performance of OGBEs and other extractive sector enterprises in relation to E&S issues.214 As noted above, the IFC has recently revised its Policy and Performance Standards on Environmental and Social Sustainability, including to take account of the Guiding Principles. Contracts concluded in relation to oil and gas projects supported by IFC may be subject to greater scrutiny as a result of the inclusion of disclosure requirements for certain extractive sector contracts and new requirements in relation to establishment of grievance mechanisms.215

Other external pressures may influence OGBE behaviour in the contractual context. In particular, public sector procurement requirements may oblige contractors to ensure that social and environmental standards are observed throughout their supply chains, and human rights issues managed appropriately.216 More broadly, various governments have adopted (or are considering the adoption of) legislation requiring greater transparency regarding steps taken by business enterprises to ensure that human rights are respected throughout supply chains. For example, the California Transparency in Supply Chains Act requires certain companies engaged in retail trade and manufacturing (and doing business in California) to report on the measures they are taking to prevent slavery and human trafficking from occurring in their supply chains.217

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211 OCHCR, Guiding Principles, GP19 and commentary (n 1) 21–2.
212 The Guiding Principles suggest that the business enterprise should consider the potential adverse human rights impacts of exercising an option to terminate before doing so. See OCHCHR, Guiding Principles, GP19 and commentary (n 1) 22.
214 IIED (n 215) 19.
215 IFC (n 11).
216 Radu Mares, ‘Business and Human Rights after Ruggie’ in Mares (n 67) 21.
217 s 1714.43 of the California Civil Code and s 19547.5 of the California Revenue and Taxation Code.
Supply chains raise extremely complex issues as regards the discharge of the responsibility to respect human rights and the extent of a business enterprise’s responsibility in relation to adverse impacts occasioned by third parties within the supply chain. Although legislative measures or contracts may seek to impose obligations on business enterprises that extend throughout their supply chain, the responsibility to respect human rights will not necessarily extend so far. GP19(b)(i) envisages responsibility, and the possibility of effective leverage, only with respect to impacts ‘directly’ linked to a business enterprise’s operation, products or services by a business relationship. Responsibility, in practice, will only extend to actual and potential impacts which the business enterprise is able to identify through the application of due diligence, or having received notification (through a process such as a grievance mechanism). Lengthy supply chains will not necessarily permit the information flows needed for full due diligence, nor the effective exercise of leverage.218 OGBEs at the top of a contractual chain may be able to impose requirements through many levels but, beyond a certain point, this may more accurately be characterized as a voluntary exercise, as opposed to one dictated by observance of the responsibility to respect.

**Joint ventures**

The authors’ review of published OGBE policies found that some stipulate that requirements relating to human rights should be included in joint venture agreements.219 The most recent revision of the AIPN Model International Joint Operating Agreement (AIPN Model JOA) does not expressly refer to human rights but imposes a number of potentially relevant obligations on the joint venture operator. For example, the operator is obliged to conduct joint operations in accordance with the terms of the production sharing contract (PSC) or equivalent contract, applicable laws of the host state and always ‘in a diligent, safe and efficient manner in accordance with good and prudent petroleum industry practices and field conservation principles generally followed by the international petroleum industry under similar circumstances’.220 The operator is also obliged to prepare and carry out operations in accordance with an ‘HSE Plan’, which will be ‘designed to achieve safe and reliable conduct of operations and activities, to avoid significant and unintended impact on the safety and health of people, on property and on the environment’.221

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219 For example, BP (n 180) 10 states that:

In joint operations, where BP is the operator and thus has contractually mandated control over standards of operation, we will apply our code principles directly. In circumstances where BP is not the operator, we will seek to influence our joint venturers to persuade the operator to adopt similar principles.


221 ibid, arts 4.2 (Rights and Duties of Operator), 4.2.B.1 and 4.2.B.2.

222 ibid, arts 4.2, B.15 and 6.6 (HSE Plan).
An OGBE representative interviewed by the authors noted that the obligations of the operator under the AIPN Model JOA do not necessarily extend to avoidance of all potential adverse human rights impacts due to the restrictive definition of ‘Joint Operations’223 and the limited scope of the agreement, such that activities of the parties outside the contract area or outside the terms of the PSC are not subject to the terms of the JOA.224 Moreover, the definition of HSE Plan does not expressly encompass human rights of third parties, although there is certainly overlap between protection of certain human rights and the concerns addressed by the HSE requirements.

To the extent that an HSE Plan incorporated detailed standards and procedures for the avoidance of adverse human rights impacts, the JOA terms would provide non-operator parties with the ability to monitor and enforce such standards to avoid non-compliance by the operator.225 An obligation may also be imposed on the operator to require that its ‘contractors, consultants and agents undertaking activities for the Joint Account’ manage HSE risks consistently with the HSE Plan.226 The obligation of the operator under the AIPN Model JOA to prepare and implement an HSE Plan recognizes that different projects will have a different HSE risk profile, calling for a bespoke approach to risk management. In each case it will be necessary to identify project-specific risks, to assess the capacity of the operator and other parties to comply with the standards which are sought to be imposed and to identify potential obstacles to compliance, including to ensure that provisions of the PSC will not interfere with the ability of the joint venture partners to operate in accordance with international standards.

**Contracting with states**

Almost every major oil and gas project will involve some form of agreement with the government of the state in which the project assets are located (the ‘host state’). These agreements may take the form of host government agreements negotiated for particular projects or PSCs based on a model form. Early in his mandate, the SRSG decided to investigate allegations that stabilization clauses might ‘infringe on the state’s international legal obligations to regulate industry so as to protect rights in the face of major investment projects’.227 Stabilization clauses are, of course, a common feature of agreements

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223 ibid, art 1.2 (Definitions):

‘Joint Operations’ means the operations and activities within the scope of this Agreement (or whose purpose at the time undertaken was within the scope of this Agreement) conducted by Operator on behalf of all Parties, including Exploration Operations, Appraisal Operations, Development Operations, Production Operations, and operations and activities for the purposes of Decommissioning.

224 AIPN Model JOA, art 3.3 (Scope) provides, among other things, that the purpose of the agreement is ‘to establish the respective rights and obligations of the Parties concerning operations and activities under the Contract’ (ie a PSC or equivalent agreement with the host State or host State entity (emphasis added)) and excludes from the scope of the agreement various activities including, construction and operation of downstream facilities.

225 ibid, art 6.6.B includes alternative provisions relating to ongoing monitoring of the operator’s compliance with the HSE Plan including a provision which would require the operator to establish an annual audit programme entailing independent review and verification of compliance with the HSE Plan and effectiveness of the HSE Plan.

226 ibid, art 6.6D.

between states and OGBEs. Critics argue that stabilization clauses have an adverse impact on human rights because they limit the host state’s ability to introduce new laws in order to protect or promote human rights.\footnote{228}

The IFC supported a research study undertaken jointly with the SRSG to investigate these criticisms. The study involved a review of 76 contracts and 12 model agreements from a range of industrial sectors and jurisdictions. More than half of the contracts reviewed were found to contain stabilization clauses which applied with respect to all new laws, including laws dealing with environmental or social issues and the overwhelming majority of these related to projects in countries outside the OECD.\footnote{229} The study concluded that wording of the most broadly drafted clauses appeared to allow investors to avoid complying with (or to seek compensation for complying with) new laws introduced by the host government in pursuit of environmental or social objectives. It was, therefore, concluded that the evidence gathered by the study supported the hypothesis that stabilization clauses could have a chilling effect on a host state’s ability to implement its international obligations with regard to human rights.\footnote{230}

In an interim report to the Human Rights Council in 2008, the SRSG said that, as a consequence of stabilization clauses, ‘host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration’.\footnote{231} The SRSG pointed to an imbalance between investment protection and the state’s duty to protect human rights which he said was ‘particularly problematic’ for developing countries.\footnote{232}

It has been argued that the case against stabilization clauses is not supported by evidence that investors in practice use them to deter legitimate law reform.\footnote{233} However, a stabilization clause which is not strictly limited in its application (eg to fiscal matters) or which fails to include carve-outs\footnote{234} for bona fide environmental or social legislation may indicate that both parties have failed to consider the possibility of future law reform in these areas.\footnote{235} More broadly, such a clause may indicate a failure of the parties properly to...
reflect in the contract their respective obligations and responsibilities regarding the protection of human rights and the environment.

The SRSG subsequently decided to investigate 'other clauses and issues [arising in the context of state–investor contract negotiations] that directly impact rights and sustainable development'. 236 Following further extensive consultation with various stakeholders, including representatives of a number of major OGBEs, a document entitled 'Principles for Responsible Contracts' was submitted to the Human Rights Council in May 2011 as an 'Addendum' to the SRSG’s final report (which largely comprised the Guiding Principles). 237 The Principles for Responsible Contracts are intended as a guide to negotiators 'to help integrate the management of human rights risks into... contract negotiations between host state entities and foreign business investors' and are expressly addressed to contracts for 'resource exploration or exploitation'. 238 Further, the principles are relevant to 'state–investor contracts', defined as a contract made 'between a host state and a foreign business investor or investors'. 239

As a matter of the domestic law of the host state, it will not necessarily be the case that a state-owned corporation, such as a NOC, represents the state for the purpose of contract negotiations. It will, therefore, depend on the particular circumstances whether a contract negotiated with an NOC should be classified as a state–investor contract. If the NOC does represent the state, then the state’s duty to protect human rights is, arguably, engaged. In other cases, the NOC may be acting purely in a private commercial capacity in which case it may be correct to treat the NOC as any other private sector enterprise. 240

In the authors’ view, the Principles for Responsible Contracts are best understood as applying in the context of negotiations between private sector OGBEs and NOCs, where the contract in question is the primary instrument establishing the legal framework for the OGBE’s investment or operations in the host state and/or where the NOC exercises some regulatory or quasi-regulatory functions. 241 The Principles for Responsible Contracts are likely to be most important where the host state lacks a modern legal framework and/or institutional capacity necessary to regulate properly the E&S impacts of large-scale projects. In these circumstances, it is said that the contract becomes, in effect, a supplement (or alternative) to domestic laws and regulations. 242


238 ibid 1.

239 ibid 5.

240 For a discussion of the often complex relationship between state, society and NOCs and an argument that regulatory and social matters are properly the prerogatives of government and not the NOC, see Valérie Marcel, Oil Titans: National Oil Companies in the Middle East (Chatham House 2006) 77.

241 In the Principles for Responsible Contracts it is stated that '[f]or the purposes of this guide, "State" refers to any State entity, national or local.' (SRSG, Principles for Responsible Contracts (n 242) 6).

242 See eg Principle 3 regarding project operating standards.
The Principles for Responsible Contracts emphasize, among other things:

(i) the importance of conducting human rights due diligence in advance of contractual negotiations to identify actual and potential human rights impacts and ensuring that negotiating teams include human rights experts or (at least) have access to human rights expertise;

(ii) that contracts should clearly delineate responsibilities for mitigating the risks of adverse human rights impacts;

(iii) that the laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project;

(iv) that stabilization clauses should be carefully drafted so that any protections for investors against future changes in law will not interfere with bona fide efforts by the state to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations;

(v) that in cases where the contract envisages that the investor will provide services beyond the scope of the project, such service provision ‘should be carried out in a manner compatible with the state’s human rights obligations and the investor’s human rights responsibilities’. The importance of ensuring sustainability of the services beyond the project lifecycle is emphasized;

(vi) that physical security for the project’s facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards;

(vii) the importance of community engagement programmes and grievance mechanisms;

(viii) that states should ensure they have a contractual right to monitor and enforce the standards included in the contract in relation to human rights; and

(ix) that contracts should be disclosed and the scope and duration of any exceptions to disclosure should be based on compelling justifications.

The Principles for Responsible Contracts suggest that parties seek to identify ‘legislative, regulatory and enforcement gaps’ and suggests that these may be supplemented with external standards ‘such as those created by lenders, international industry bodies . . . or internationally recognized guidelines or standards’. In fact, industry standards, while frequently referred to in many contracts in the oil and gas industry, may be inappropriate due to the local context. For example, IPIECA has been involved in the development of relevant ‘good practice’ standards for the oil and gas sector but has not yet recommended that they may be referenced in contracts as a means of dealing with deficiencies in domestic law. See IPIECA, ‘Guide to Successful, Sustainable Social Investment for the Oil and Gas Industry’ (2008) <http://www.ipieca.org/sites/default/files/publications/SocialInvestmentGuide_0.pdf> accessed 31 August 2012.

In this area, contracts with the State for provision of security pose unique risks for OGREs. Such contracts can create potential for legal liability if they involve provision of material assistance such as radios, vehicles, fuel, food or money to state security forces who are subsequently alleged to have perpetrated human rights abuses.

Here it is pertinent to note that the IFC’s revised Policy on Environmental and Social Sustainability requires that IFC clients publicly disclose material payments to governments and introduces requirements for mandatory disclosure of contracts with governments relating to IFC-supported projects in the extractive sectors (n 11).
Conclusions
Both the Guiding Principles and the Principles for Responsible Contracts emphasize that OGBEs can exert leverage towards the avoidance and mitigation of negative human rights impacts through contractual provisions. In some cases, contractual stipulations may be the only practicable way in which an OGBE can ensure that it does not fail to meet the responsibility to respect. In particular, human rights clauses may allow OGBEs to manage and control the risk that the activities of their business partners will have a negative impact on human rights, including in circumstances where there is no direct causal link between the operations of the OGBE and the impact in question. As OGBEs fully integrate and implement the Guiding Principles, there is likely to be an increased appreciation of the role of contractual provisions in assisting to discharge the responsibility to respect human rights. As with all contractual terms, care will be needed to ensure that they are crafted in a way that addresses the relevant human rights risks without inadvertently increasing other risks for the OGBE or other human rights impacts.

6. Legal risks
It has already been noted that, although the Guiding Principles do not impose legal obligations on business enterprises, the area of business and human rights is not a ‘law free zone’. Law becomes relevant to the responsibility to respect as reflected in business enterprises’ use of contractual terms, as has been discussed in Section 5. This section discusses in general terms some further legal risk areas for OGBEs, including issues that arise in connection with their implementation of the Guiding Principles.

The view is sometimes expressed that lawyers can stifle business enterprises’ effective management of human rights issues by taking an overly technical and legalistic approach, which undermines imaginative responses to challenging issues. Lawyers may also react cautiously to some of the trends consequent on the Guiding Principles—increased pressure for transparency, public reporting and extensive stakeholder engagement in relation to human rights issues—imagining that widespread dissemination of information and analysis on human rights issues relevant to business might only increase litigation.

Lawyers advising OGBEs need to be mindful of the potential use as evidence in legal proceedings, in media campaigns and other fora of documents and statements made by a business enterprise that relate to the responsibility to respect human rights. These risks increase as human rights-related documents proliferate, and as business enterprises seek to discharge the responsibility to respect through the inclusion of provisions in contracts, in policies, internal processes, decision-making, due diligence records and associated management information.

In the specific context of the Guiding Principles, it has been suggested that the responsibility to respect human rights, in particular the concept of human rights due diligence, ‘is likely to develop into a binding legal duty of care under tort law for both management

246 SRSG 2010 (n 20) 66; Amis (n 90) 6.
and the corporation’. \(^{247}\) It has not yet reached that level; but even as things stand, conducting human rights due diligence processes, investigating the issues, and recording analysis and conclusions on human rights impacts have the potential to increase legal risk, unless undertaken carefully and with a clear understanding of the nature and extent of the responsibility to respect.

The remainder of this section examines circumstances in which OGBEs may be exposed to potential legal liability with respect to human rights impacts, including:

(i) if they cause or contribute to (or are ‘complicit’ in) a violation of human rights, regardless of where they operate;
(ii) with respect to alleged or assumed duties in relation to human rights; and
(iii) where business enterprises operating globally find themselves confronted with different and potentially conflicting legal standards.

Legal risks in the area of business and human rights are likely to increase as third parties (including activist groups) make use of non-judicial and other fora to confront business enterprises with allegations of shortcoming with their human rights record. An example is the specific instance procedure established to facilitate the resolution of disputes relating to the OECD Guidelines.\(^{248}\)

Lawyers advising OGBEs will need to monitor new legal and regulatory initiatives at the international, regional and domestic level deriving from states’ implementation of the Guiding Principles that may refine the legal framework and increase mandatory requirements on OGBEs, including with respect to reporting.

Much has been written on corporate accountability for violations of human rights and upon concepts pursuant to which legal liability may exist within particular jurisdictions or internationally.\(^{249}\) The SRSG had the benefit of detailed, comprehensive

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\(^{248}\) In States adhering to the OECD Guidelines (n 10), it is possible for third parties to submit complaints to a National Contact Point (NCP) in circumstances where the conduct of an OECD enterprise is alleged to be contrary to the Guidelines. The so-called specific instance procedure in practice allows persons affected by an enterprise’s operations and who consider that the enterprise has failed to comply with the Guidelines to lodge a complaint with the relevant NCP. It is also possible for persons who are not directly affected by an enterprise’s conduct (such as trade unions, NGOs or other civil society groups) to submit complaints via the NCP process if they can demonstrate a significant interest in the matter or where they represent affected persons. There is no legal obligation on enterprises to participate or cooperate in the NCP process and the determinations issued by NCPs are not legally binding. Nevertheless, there may be negative reputational consequences for enterprises who fail to cooperate in the process or in cases where an NCP determines that the enterprise has failed to adhere to the OECD Guidelines. The extractives sector accounts for a significant majority of complaints submitted to NCPs in recent years and the number of complaints may well increase as NGOs and others become aware of the process, and as governments adhering to the OECD Guidelines take active steps to improve the process, including to ensure that complaints are resolved in a timely manner. See further, ‘Draft Workshop Report – OECD National Contact Points and the Extractive Sector’ (23 March 2012, The British Academy, London).

analyses of existing systems and of some issues in preparing the Framework and Guiding Principles. A very brief summary is provided below of some issues under international law and within specific domestic fora in order to indicate the breadth of possible legal liability issues.

**Criminal liability**

International law generally regulates the relationships of two of the subjects of international law: states and international organizations. The relatively recent development of international criminal law has served to tackle international criminal responsibility for certain acts committed by individuals. International criminal law essentially comprises the ‘three core crimes of genocide, crimes against humanity and war crimes’, and within these there are breaches of some human rights, such as the prohibitions on torture and slavery. There is currently no international tribunal with jurisdiction over business enterprises.

The issues which have arisen are, therefore, whether corporations may be prosecuted in domestic courts for alleged violations of international criminal law, and whether alleged corporate violations of international criminal law may form the basis for civil liability in domestic courts. Australia, Belgium, Canada, The Netherlands, South Africa and the UK have fully implemented certain international criminal law offences into national legislation and, although untested, it has been argued that these would allow corporations to be prosecuted based on existing national doctrines of corporate criminal liability.

Moreover, under the laws of Australia, Canada, The Netherlands and the UK, serious international crimes are subject to universal jurisdiction, meaning that jurisdiction exists regardless of the nationality of the defendant or the location where the crime is committed.

Allegations that corporations have violated international criminal law typically involve an allegation that the corporation aided and abetted the perpetration of crimes by third parties, rather than an allegation that the corporation was the

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254 Ramasastry and Thompson (n 257).

255 Ibid.
Commentators have suggested that the circumstances in which a corporation or business enterprise might be liable for aiding and abetting can be derived from the decisions of international tribunals in cases involving allegations against individuals. In this regard, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that ‘the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime’. The ICTY decided that the mens rea for aiding and abetting liability (under customary international law) is based on knowledge saying that ‘[w]hat is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.’ Similarly, the judgment of the Special Court for Sierra Leone in the Charles Taylor case holds that, as a matter of customary international law, the mental element of the aiding and abetting offence is based on the alleged offender’s knowledge that his or her act would, or was likely to, assist the commission of the crime and the alleged offender’s awareness of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.

OGBEs and other business enterprises may be accused of aiding and abetting violations of international criminal law in circumstances where they have knowingly provided financial or logistical support to perpetrators of gross human rights abuses, including state military or security forces or armed non-state groups. The risk of this sort of accusation is most acute where business enterprises use public or private security forces to protect their property or personnel in conflict-affected areas or in states where there is a record of gross human rights abuses perpetrated by security forces.

A prudent business enterprise should operate on the assumption that links between its operations and violations of international criminal law carry a risk that efforts will be made to prosecute the enterprise, or its directors, officers or managers. Given that criminal prosecution in domestic legal systems generally (but not always) requires state intervention, and will rarely lead to compensation for victims, it is also likely that such links may form the basis for civil claims. The question of whether corporations may be legally complicit in violations perpetrated by other actors—for example, by providing

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256 SRSG, ‘Sphere of Influence and Complicity 2008’ (n 68) 29. The Rome Statute recognizes complicity as a mode of liability for individuals. Article 25(3)(c) states that a person is criminally responsible if that person, for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission. The principle of individuals’ legal complicity in international crimes has been accepted in some domestic jurisdictions. In 2007, a Dutch businessman was convicted of complicity in war crimes for supplying chemicals to the Iraqi government knowing that they would be used in the production of mustard gas. See Public Prosecutor v Van Anraat LIN BA4676, 2200050906-2 (ILDC 753 NL 2007).


258 Prosecutor v Furundzija (Judgment) ICTY-95-17/1-T (10 December 1998) 235.

259 Prosecutor v Tadic (Judgment) ICTY-94-1-A (15 July 1999) 220.

260 Prosecutor v Charles Ghankay Taylor (Judgment) SCSL-03-01-T (18 May 2012) 178–9. Other authority holds that criminal intent or purpose on the part of the principal accused, and not the act of aiding and abetting the criminal conduct of the principal offender, is required; see the discussion in Farrell (n 262).

261 Business enterprises may also be perceived to be ‘complicit’ in the acts of third parties in a non-legal sense, eg in circumstances where they are seen to benefit from abuses committed by third parties. See OHCHR, Interpretive Guide (n 9) 4.
logistical support to military forces who have committed atrocities—has been of considerable importance in civil litigation involving alleged violations of international criminal law, in particular cases under the US Alien Tort Statute (ATS).

Civil liability

Efforts are increasingly being made in courts around the world to hold business enterprises to account for alleged involvement in human rights violations. Few domestic fora have yet permitted private law actions for breaches of international human rights or humanitarian law; more frequently, domestic tort law provides the primary basis for such claims. Jurisdictional rules will often prove fatal to claims relating to events that have occurred outside the territory of the forum state. However, there is increasing interest in issues of extra-territorial liability. The following section includes a brief overview of human rights litigation, including claims against business enterprises under the ATS, and a short discussion of the potential for liability under domestic tort law for human rights harms based on the concept of assumption of responsibility.

The ATS

The ATS is an 18th-century law that provides that: ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’ The ATS was enacted by the First Congress and its historical origins are hotly debated.

Having lain dormant for almost 200 years, a wave of litigation followed a 1980 decision allowing a claim for torture against a former foreign state official. Subsequently, human rights litigants have sought to use the ATS to bring claims against corporations. Because the ATS is drafted in very general terms, these cases have generated a substantial jurisprudence and have attracted significant academic interest and public controversy.

262 A joint study by Fafo and the International Peace Academy revealed that 15 of the 16 states reviewed said it would be possible to bring civil claims against business entities associated with breaches of international humanitarian and international criminal law. Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law (Fafo and International Peace Academy 2004). See also Ramasastry and Thompson (n 257).


265 Alien Tort Claims Act, 28 USC s 1350.


267 Filartiga v Pena-Irala, 630 F 2d 876, 887–9 (2d Cir 1980).
In 2004, an ATS case reached the US Supreme Court but on issues that were narrowly framed. In *Sosa v Alvarez-Machain*, the Supreme Court clarified that the ATS is a jurisdictional statute that did not create a new cause of action, and that it did not permit actions based on all violations of international law. Rather, claims under the ATS for ‘violations of the law of nations’ needed to be based on norms of international law that were established, recognized by the ‘civilized world’ and sufficiently specific.

*Sosa* related to a defendant who was an individual. Since the mid-1990s, however, there had been an increasing trend for litigants to bring ATS claims against corporate defendants. Companies in the extractive sector, including oil and gas companies, have been frequent targets. Many of these claims have alleged that the corporate defendant was complicit in acts committed by foreign security forces (including foreign police, military or paramilitary forces).

Until recently, it was largely assumed—but rarely argued or decided—that corporations could be liable under the ATS. Then in 2010, a two-judge majority of the Federal Court’s Second Circuit in *Kiobel v Royal Dutch Petroleum Co* held that that the ATS does not allow claims to be brought against corporations, as customary international law does not recognize the concept of corporate liability. Later that year, a majority of the District of Columbia Circuit came to the opposite view in *Doe v Exxon*, and expressly rejected the *Kiobel* majority’s analysis of international law. In *Sarei v Rio Tinto*, a seven-judge majority of the Court of Appeals for the Ninth Circuit agreed with the *Exxon* majority. This provided the split in circuits needed to persuade the Supreme Court to consider the issue of whether corporations may be held liable under the ATS, a question that remains undecided at the time of writing.

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269 The Court cited ‘violation of safe conducts, infringement of the rights of ambassadors, and piracy’ as examples of norms of this sort that would have been recognized at the time of the ATS drafting. The Court accepted that new norms of international law could be actionable under the ATS but was cautious to limit the scope of such actionable norms.

270 See Drimmer and Lamoree (n 268) 460–5. In general, US courts have looked to customary international law on aiding and abetting liability to assist in determining the principles governing corporate complicity for violations of the law of nations. The majority in *Doe v Exxon*, 654 F 3d 11 (DC Cir 2011) endorsed the view that the mens rea required only knowledge, whereas the minority judges in *Kiobel* (n 277) 192 would have limited aiding and abetting liability to situations where assistance to perpetrators is provided ‘with a purpose to advance or facilitate’ the violation of international law. See also Presbyterian Church of Sudan v Talisman Energy Inc, 582 F 3d 244 (2d Cir 2009) and Angela Walker, ‘The Hidden Flaw in *Kiobel*: Under the Alien Tort Statute the mens rea Standard for Corporate Aiding and Abetting is Knowledge’ (2011) 10 Northwestern Journal of International Human Rights 119.


272 *Kiobel v Royal Dutch Petroleum Co*, 621 F 3d 111 (2d Cir 2010).

273 *Doe* (n 275).


275 The appeal was argued before the Supreme Court in February 2012, having inspired more than 30 amicus briefs from a range of interested parties including academics, civil society organizations, corporations (including other OGBEs) and foreign governments. On 5 March 2012, in an unusual development following oral argument, the parties were directed to file supplemental briefs addressing the question whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the USA. See <http://www.supremecourt.gov/Query.aspx?FileName=/docketfiles/10-1491.htm> accessed 31 August 2012. The Court did not provide a reason for
Assumption of responsibilities relating to human rights (duty of care)

Domestic tort law may permit claims against business enterprises where their acts or omissions have caused adverse human rights impacts for which an adequate remedy has not been provided. Such claims have faced jurisdictional obstacles where the relevant harms were suffered overseas and, in particular, where an overseas subsidiary of a corporate parent being sued in the home jurisdiction was the entity that allegedly caused the impact within the overseas jurisdiction. In common law jurisdictions, potential liability may involve side-stepping organizational structures that traditionally have shielded the parent incorporated in the forum state (the ‘corporate veil’), for example, by finding that a duty of care existed between the parent and the alleged victim, so as to permit direct action against it.

In this context, we consider the extent to which ‘positive’ actions taken by companies in efforts to avoid adverse human rights impacts—such as adoption of human rights policies, performance of due diligence and/or use of human rights clauses in contracts—may be used as a basis for claims that a duty of care is owed to third parties whose human rights might be impacted by the operations of an OGBE. The following discussion is confined to English case law that may be indicative of a trend, and influential in future cases.

As a matter of English law, the question of whether a duty of care exists involves a three-stage test. First, it must be established that the damage or loss suffered by a claimant was foreseeable. Secondly, there must be a sufficient degree of proximity between the claimant and alleged tortfeasor. Thirdly, it must be just and reasonable that the law should impose a duty of care. The existence of OGBE policies recognizing risks to human rights related to their operations could become relevant in litigation alleging harm, to the questions of whether: (i) harm caused to the rights of a third party was foreseeable; (ii) there is sufficient proximity between the third party and the OGBE; and

ordering further argument in Kiobel although it was clear that the question of extraterritoriality was on the minds of several members of the Court who observed that many ATS cases have no connection to the USA. Limiting the scope of the ATS to conduct within the USA and on the high seas, eg would leave only a limited universe of potential claims, such as claims involving assaults on ambassadors or claims involving piracy, which some have argued reflect Congress’ original intent in enacting the ATS and which would significantly reduce the volume of international human rights litigation in US courts. The Court will hear further oral argument in Kiobel after 1 October 2012, and a decision is expected before the end of the Court’s term in June 2013. Since the Court ordered further argument, a further 51 amicus briefs have been submitted including a brief signed by the SRSG supporting neither party and which states that the interest of the SRSG (and the other authors of the brief) is ‘ensuring the accurate interpretation of the SRSG’s work.’ The SRSG’s brief states, among other things, that during the course of his UN mandate, the SRSG ‘concluded that corporations may have direct responsibilities under international law for committing international crimes, including crimes against humanity, torture, genocide, and slavery’. See Brief Amici Curiae of Former UN Special Representative for Business and Human Rights, Professor John Ruggie, Professor Philip Alston; and The Global Justice Clinic At NYU School of Law in Support of Neither Party (12 June 2012) <http://shiftproject.org/sites/default/files/No.%2010-1491%20ac%20UN%20Special%20Representative.pdf> accessed 31 August 2012.

An examination of tort law issues in other jurisdictions is beyond the scope of this article. In particular, this article does not consider US tort law, although ATS cases often invite parallel domestic tort claims. For a comparative study of human rights litigation involving multinationals in civil law states and various jurisdictions outside Western Europe and the USA, see Muchlinski, ‘Private Law Remedies against MNEs’ (n 268).

Caparo Industries plc v Dickman & Ors [1990] 1 All ER 568, 5.
(iii) in the circumstances it is just and reasonable to impose a duty of care on the OGBE. These questions may be linked; the fact that harm to third parties is reasonably foreseeable as the result of an OGBE operation is relevant to whether the requisite degree of proximity exists.279

The English courts have considered the relevance of corporate risk management policies to the establishment of a duty of care in a number of cases involving claims against parent companies for injury suffered by employees of subsidiary companies. Case law suggested the possibility, in appropriate factual contexts, of the existence of such a duty between parent company and subsidiary employees, but the issue remained undecided until 2012.280 In the case of Chandler v Cape Plc,281 the claimant had worked for a subsidiary of the defendant, Cape Plc. Mr Chandler contracted asbestosis as result of exposure to asbestos dust during the course of his employment. Mr Chandler sued Cape Plc because the subsidiary had been dissolved and the subsidiary’s insurance policy contained an exclusion regarding asbestosis claims. Mr Chandler’s case depended on showing that Cape Plc owed him a duty of care.

The English Court of Appeal held that in appropriate circumstances, the law may impose on a parent company a duty of care in relation to the health and safety of its subsidiary’s employees. The court held that the following factors could give rise to such a duty: (i) the business of the parent and subsidiary are in a relevant respect the same; (ii) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (iii) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (iv) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.282

On the facts of Chandler v Cape, the Court found that the Cape Plc had assumed responsibility for the health and safety of its subsidiary’s employees. In relation to the fourth factor listed above, the court referred to evidence that Cape Plc was responsible for setting specifications of the products to be manufactured by its subsidiary; that the subsidiary relied on technical knowhow source from Cape Plc and followed Cape Plc working practices; that health and safety specialists employed by Cape Plc were involved in assessing health risks of asbestos exposure and devising practices to manage those risk; and that Cape Plc had established group policies regarding health and safety, which were to be followed by subsidiaries.283

280 In Connelly v RTZ [1999] CLC 533, the claimant had worked at a uranium mine located in Namibia and owned by a Namibian subsidiary of an English company, RTZ. The claimant suffered from cancer, allegedly due to exposure to radioactive ore during the course of his employment. In the course of considering an application to strike out the claim, Wright J remarked upon the claimant’s allegation that RTZ had adopted and implemented a health and safety policy to be observed by its subsidiaries, and that it therefore owed the claimant a duty of care. Wright J expressed the view that if the claimant’s allegations could be made out—including that the parent had taken on the responsibility for devising an appropriate policy for health and safety at the subsidiary employer, and that the policy was implemented—then it was likely that the elements required to give rise to a duty of care existed. The claimant was ultimately unable to pursue the claim as it was time-barred.
281 Chandler (n 276).
282 ibid 80.
283 ibid 72–6.
Following the reasoning in Chandler v Cape, it might be expected that claimants in future cases could seek to argue that the adoption and implementation of human rights policies across corporate groups is relevant to the question of whether the parent company owes a duty of care to persons whose human rights are adversely impacted by the operations of subsidiaries. In this respect, the adoption of group-wide policies developed and implemented centrally by parent companies and applicable to the activities of operating subsidiaries may increase the potential for allegations that the parent company has assumed such a duty of care towards third parties affected by the operations of subsidiaries. At the very least, claimants can be expected to seek to establish parent company knowledge of relevant human rights risks, and to identify instances where parent companies have employed specialists or deployed technical expertise in relation to subsidiary activity in a way that supports reliance on the reasoning in Chandler v Cape. Another issue that is likely to emerge in any such litigation is the relevance of particular statements or assurances made in corporate documents, such as human rights policies, in determining the relevant standard of care, if a duty is held to exist.284

Of course, aspiring to high standards may be linked with reputational benefits. However, in promoting the OGBE as a responsible or ethical corporate citizen and in the adoption of internal and external policies and standards, a degree of caution is justified.285 A rigorous approach to human rights due diligence should include a review of applicable laws, regulations, norms and expectations, and should consider how standards might evolve in future.286 Although there are clearly litigation risks associated with the adoption and management of internal policies dealing with potential human rights impacts, the risks can be minimized by ensuring that policy commitments are realistic, that OGBEs apply the budgets and resources to implement and manage them properly, and then monitor corporate performance by reference to them. The risks underline the benefits of a proactive approach in this area, including treating the risk of adverse human rights impacts linked to OGBE operations as a legal compliance issue.287

In addition to the risk of tort liability, failure to adhere to voluntarily adopted standards may have other consequences for an OGBE. Campaigners in favour of broader accountability may pursue a variety of tactics, including negative publicity campaigns, pressuring politicians to initiate public enquiries into the conduct of corporations and calling on regulators to review standards or to investigate particular incidents.288 Some of the most well-organized efforts to close perceived accountability gaps have

284 In the case of <i>Maria Alberto Tabra Guerrero & Others v Monterrico Metals Plc</i> [2009] EWHC 2475 (QB) the claimants were Peruvian nationals who allegedly suffered torture and other human rights abuses during the course of protests against the development of a copper/molybdenum mine in Peru. The claimants alleged, among other things, that the defendants were aware of the history of human rights abuses committed by the police and private security firms in connection with popular protests against extractive sector projects in Peru. In the claimants’ submission, such knowledge meant that the defendant companies were liable for failing to take steps to prevent the abuse allegedly suffered by the claimants. The case settled before trial without admission of liability.


287 ibid. See also Drimmer (n 105).

288 For a discussion of tactics frequently pursued in addition to litigation strategies, see Drimmer and Lamoree (n 268).
involved campaigns to persuade national governments and regulators to implement mandatory public reporting requirements for corporations in relation to E&S impacts.

**Reporting obligations**

GP3 (which deals with state regulatory and policy functions) recommends that states should ‘[e]ncourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.’ This recommendation was based, in part, upon state practices identified in a survey of corporate and securities law in 39 jurisdictions. Based on this survey, the Special Representative concluded that:

inadequate identification, management and reporting of human rights impacts harmful to a company’s short- or long-term interests exposes companies, their directors and officers to the risk of non-compliance with a variety of rules relating to corporate governance, risk management and market safeguards; where human rights issues are not immediately harmful to a company’s business, several States’ corporate and securities laws recognise that responsible corporate practice should avoid negative social or environmental consequences.289

In the European Union, steps are being taken towards the introduction of new reporting requirements relating to human rights. In October 2011, the European Commission published a new policy regarding CSR indicating, among other things, the Commission’s intention to achieve better alignment between European approaches to CSR and international instruments such as the Guiding Principles and the OECD Guidelines. The Commission also indicated that it recognized the responsibility to respect human rights as an integral component of CSR and that, amongst other actions towards implementation of the Guiding Principles, it would propose EU legislation aimed at improving company disclosure of social and environmental information.290

In the UK, the Government has conducted a series of public consultations on reforms to reporting requirements applicable to English companies. One of the questions posed was whether quoted companies should be explicitly required to report on human rights issues. The Government reported that a substantial majority of those who responded to the question were in favour of such an explicit requirement.291 It is expected that the UK Government will publish new draft regulations for company reporting in the first half of 2013.


290 EU Strategy Paper (n 31). In the USA, the Securities and Exchange Commission has adopted rules regarding disclosure and reporting obligations with respect to the use of conflict minerals in order to implement the requirements of s 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection Act <http://www.sec.gov/news/openmeetings/2012/ssamtg082212.htm> accessed 31 August 2012.

A coalition of NGOs based in London has been actively campaigning for stricter rules (and stricter enforcement) on company reporting of environmental, employee, community, social and human rights issues. A study commissioned as part of this campaign studied the reporting of non-financial information in annual reports of companies in the FTSE 100 index. This study concluded that human rights issues ‘were in general poorly reported’ and it was noted that a number of oil and gas companies which are participants in the Voluntary Principles on Security and Human Rights ‘did not report on security issues at all’. It is possible that stricter requirements, or new mechanisms for the enforcement of existing requirements, will be introduced in the UK.

Members of the UK All Party Parliamentary Group on International Corporate Responsibility have called on the Government to amend the Financial Services Bill to include a ‘good conduct’ rule for extractive companies seeking to list on the London Stock Exchange or the Alternative Investment Market. Groups supporting this proposal have noted that it is not without precedent. In addition, shareholders and socially responsible investors are taking increasing interest in OGBE management of human rights issues and risks. Concerns raised by shareholders are a source of additional pressure for the publication by business enterprises of information concerning their implementation of human rights policies and related matters.


294 ibid 9.

295 The Financial Reporting Council (FRC) has responsibility for ensuring that the reports of public companies and large private companies comply with the requirements of the Companies Act. In 2010, a complaint was made to the Financial Reporting Review Panel (FRRP) which has responsibility for ensuring that the reports of public companies and large private companies comply with the requirements of the Companies Act. This alleged that Rio Tinto plc had failed to report properly on various social, environmental and human rights issues. FRRP, ‘Statement in Respect of the Report and Accounts of Rio Tinto Plc’ (2011) <http://www.frc.org.uk/News-and-Events/FRC-Press/Press/2011/March/Statement-by-the-Financial-Reporting-Review-Panel.aspx> accessed 31 August 2012. NGO groups were critical of the FRRP’s decision to resolve the matter without reporting a finding of non-compliance after Rio Tinto voluntarily included new information in its 2010 annual report.


The US Government has imposed extensive reporting requirements for US companies and individuals investing in Burma following the easing of US economic sanctions. The information which must be provided by US individuals and companies who are subject to the reporting requirements includes, policies and procedures regarding human rights and workers rights, including policies and procedures for community engagement and grievance mechanisms and information regarding human rights due diligence undertaken by the investor and steps taken to mitigate risks. Most of the information provided by investors subject to these reporting requirements will be made publicly available.

Detailed scrutiny of corporate reporting by major international NGOs coupled with the introduction of governmental requirements to report on matters relating to human rights demonstrates how ‘soft laws’ can be used to put pressure on companies to be more transparent regarding the human rights impacts of their operations, and steps taken by them to avoid or mitigate those impacts. From a governmental point of view, such reporting requirements may seem a relatively easy route by which to be seen to address particular human rights issues. Whilst the beneficial effects of such reporting (in terms of promoting and protecting the human rights at issue) can be difficult to quantify, the burden placed on companies (in terms of the resources required and costs involved in reporting) may be considerable. Whether the data collection and analysis necessary for such reporting can also be put to beneficial internal use (in terms of providing indicators to be fed into ongoing due diligence, or other relevant management information) will be worth investigating.

**Conflicting legal requirements**

It goes without saying that a business enterprise should comply with all applicable laws. A difficult issue arises for business enterprises, however, when national law is inconsistent with the internationally recognized human rights that a business has a responsibility to respect. An example would be an OGBE operating in a state that bans trade unions, which is a position contrary to the right to freedom of association. Although the SRSG acknowledged the ‘dilemma’ that such situations pose for businesses who must seek to comply with all applicable laws and also to meet the responsibility to respect human rights in all contexts, little guidance is provided as to how they should be addressed.

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299 Also known as Myanmar.

300 Department of State, ‘Reporting Requirements on Responsible Investment in Burma’ (11 July 2012), accessed 31 August 2012. At the time of publication the reporting requirements remained subject to approval by the US Office of Management and Budget.


302 The right to freedom of association is enshrined in the ILO Declaration on Fundamental Principles and Rights at Work (n 173).

Human rights due diligence processes should identify where a business enterprise may be faced with this kind of dilemma and the enterprise’s assessment of measures that may be taken to prevent or mitigate consequent risk.\(^{304}\) In the case of restrictions on freedom of association, for example, this could involve allowing representation of workers within the company with no interference from management and facilitating free, waiver-driven elections of workers’ representatives;\(^{305}\) it might also require the business to take steps to ensure that the pay, conditions and safety of workers were not prejudiced by the restrictions on their right to associate. In cases where there is a direct conflict of requirements, the dilemmas are particularly acute and there is ‘no single blueprint for how to respond’.\(^{306}\) The existence of such situations magnifies the legal risks that exist for OGBEs in the discharge of the responsibility to respect human rights.

### Conclusions

The authors consider the better view to be that, if business enterprises embrace the Guiding Principles and seek to integrate respect for human rights throughout their operations, any potential legal risks should be capable of appropriate management. This requires a recognition that legal risks do arise and that lawyers have a role to play. It is implicit in the Guiding Principles that dilemmas are to be expected and judgments required in very grey areas. In that context, lawyers should help business enterprises to navigate risk appropriately and to justify, where necessary, actions that have been taken. Although adequate due diligence in accordance with the Guiding Principles will not automatically provide a defence in litigation,\(^{307}\) it may well act in an OGBE’s favour as evidencing the reasonableness of steps taken to identify, understand and address human rights impacts.\(^{308}\)

Current soft law standards, such as the OECD Guidelines, have already been updated to reflect the developments in the Guiding Principles. However, some commentators are calling for new treaty-based requirements.\(^{309}\) This is an approach that the SRSG himself had rejected over the course of his mandate because he felt that the political climate was not conducive to negotiation and adoption of such an instrument, and that even if political will existed, it would take too long for positive results to reach victims.\(^{310}\)

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\(^{304}\) OHCHR, Interpretive Guide (n 9) 66–7. The Guiding Principles imply that, in such situations, steps should be taken to seek to prevent or mitigate the human rights risks: see OHCHR, Guiding Principles, GP23 (n 1) 25.  
\(^{305}\) SRSG 2009 (n 308) 68.  
\(^{306}\) OHCHR, Interpretive Guide (n 9) 66–7.  
\(^{307}\) The argument that satisfying a due diligence standard of conduct should be available as a defence to claims of corporate liability for human rights violations was specifically rejected by the SRSG. SRSG 2010 (n 20) 68.  
\(^{308}\) It is possible that States, in discharging their Pillar 1 duties, will seek to provide protections for conforming business enterprises as well as sanctions for shortcomings. For example, in the commentary to GP3 it is suggested that ‘[i]ncentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceedings.’ OHCHR, Guiding Principles, GP3 and commentary (n 1) 6.  
Nevertheless, the SRSG did not preclude or discourage future developments in international law, including in the form of new international treaties.\(^{311}\)

The risk of litigation (and, possibly, of legal liability) relating to adverse human rights impacts alleged to be caused by OGBE operations may be expected to increase following the adoption of the Guiding Principles. Where judicial and other traditional legal remedies do not produce results, resort will increasingly be had to other means of publicizing allegations against OGBEs, and in this context it can be expected that the Guiding Principles will be used as a yardstick by both OGBEs and by the authors of such allegations. Increased scrutiny of business enterprises’ human rights performance will affect the speed of these developments: in particular, the trend towards voluntary disclosure and the progressive introduction of some mandatory reporting requirements is likely to increase their momentum. If OGBEs (and other enterprises) do not voluntarily embrace the Guiding Principles, as international standards and social expectations evolve, the pressure for legislative and other regulatory responses will be increased.

7. Conclusions

After years of effort by the United Nations and other actors to develop consensus on the responsibilities of business with respect to human rights, the Framework and the Guiding Principles are now seen as the international standard in this area. Based on a combination of literature review and empirical analysis, this article has explored the application of the Guiding Principles to the oil and gas sector, and the implications that may arise.

OGBEs have played a central role—often cast as the villain—in debates regarding the human rights impacts of business and the responsibility and accountability of the private sector for adverse human rights impacts arising in connection with oil and gas operations. This focus is due in large part to the high-risk areas in which many oil and gas investments are made, the long-term and large-scale nature of relevant projects and the various human rights impacts that can arise from OGBE activities. Many OGBE investments involve close relationships with states with poor human rights records, encouraging keen public scrutiny with respect to the direct or indirect involvement of OGBEs in relevant impacts. This scrutiny reflects a more widespread mood towards higher expectations on business enterprises generally, a mood that has been manifested in both economic and legal drivers for corporate accountability and affirmed by the Guiding Principles.

The Guiding Principles cannot be implemented automatically. This article has clarified how they can be applied appropriately. It has also highlighted aspects of policy and practice that are relevant in ensuring that the Guiding Principles are applied effectively, including by providing avenues for third parties to have their grievances heard. It has been emphasized that the Guiding Principles require OGBEs to apply due diligence to

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identify and then to avoid, mitigate or remedy any adverse human rights impacts that they cause or contribute to. In addition, so far as an OGBE possesses leverage over the entity in question, OGBEs should seek to prevent or mitigate adverse human rights impacts to which they are linked by their operations, products and services that have been caused by entities with which they have a business relationship.

While the Guiding Principles do not, of themselves, create new law, it is evident that there may be legal consequences for OGBEs as a result of their implementation. The role of lawyers will be to advise business enterprises on the appropriate course to discharge the responsibility to respect while identifying and managing legal risks. This article has identified that much positive progress is already being made by many in the sector towards implementation of the Guiding Principles. Of course, work remains to be done and this article has identified just some of the challenges and complexities OGBEs will face in their efforts to discharge the responsibility to respect human rights. By further building upon existing knowledge and experience in their sector and beyond, all OGBEs can play an important role in achieving the stated objective of the Guiding Principles to enhance 'standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities'.

312 OHCHR, General Principles, Guiding Principles (n 1) 1.