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Corporate law firms and their human rights responsibilities

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ABSTRACT

The area of Business and Human Rights, applies to all enterprises, including corporate law firms, which have not been examined yet, as thoroughly as others. On the other hand, the profession of law is regulated by codes of conduct that limit the actions of lawyers when they are preforming their mandate. Through a comparative legal methodology this research seeks to find out if the human rights responsibilities of corporate lawyers in their role as advisors are compatible with their professional obligations.

Key words: Business and Human Rights; UN Guiding Principles on Business and Human Rights; Codes of Conduct; Legal Profession; Corporate Lawyers; Client's Best Interest.

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ABBREVIATIONS

UNGP's	United Nations Guiding Principles on Business and Human Rights.
UDHR	Universal Declaration of Human Rights.
IBA	International Bar Association
ICC	International Criminal Court
IBAHRI	International Bar Association's Human Rights Institute
ABA	American Bar Association
ATS	Alien Tort Statue
ABA MRPC	American Bar Association Model Rules of Professional Conduct
IPCLP	International Principles on Conduct for the Legal Profession
CCPELP	Charter of Core Principles of the European Legal Profession
CCEL	Code of Conduct for European Lawyers
SRA	Solicitors Regulation Authority

INTRODUCTION

BACKGROUND

The concept of business and human rights is not new any longer. It has been 7 years since the United Nations Guiding Principles on Business and Human Rights (UNGP's) were created.

Furthermore, the discussion of its applicability has mainly focused on industries such as mining or garment enterprises, where the negative impacts on the human rights of stake holders are more evident. Moreover, many articles have been written about the effects that these types of industries have had regarding the supply chain, such as cotton field workers or employees of assembly factories.

Nevertheless, the discussion of the impact that the UNGP's have on businesses should not be narrowed to a few, as there are more scenarios that can also affect the human rights of stakeholders which haven't been discussed to a large degree. Furthermore, the UNGP's states that 'the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure'[1].

Hence, to give a fresh perspective to the study and discussion of business and human rights, this research will focus on a business sector that hasn't been explored but has an important impact on the human rights of people: corporate law firms.

It needs to be noted that this thesis will not focus on the responsibilities of corporate law firms to respect human rights on their own, but rather, it will explore the impact of the UNGP's on the services they provide, specifically with respect to advising a company. In other words, to make a clear delimitation, this research will explore what is expected from of corporate lawyers when serving a company as advisors.

Lawyers are not free to manage their services as they please. The profession of law is characterized by its self-regulatory system. Usually, the body in charge of this action is a bar association, which can have a different name depending on the

[1] United Nations *Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework* (2011) art 14

country, but the result is the same: a regulatory body made by lawyers for lawyers. Furthermore, these legal associations certificate new lawyers and issue codes of conduct that contain the rules that all lawyers must follow to be able to practice law.

In this sense, this thesis will study the correlation between the rules embedded in the codes of conducts that all lawyers must follow in their role as advisors and the expectations of the UNGP's regarding the law firm's duty to protect the human rights of their stakeholders.

RESEARCH QUESTION

Thus, through comparative legal research, this thesis will seek to answer the following question:

Is there a conflict between the human rights responsibilities of corporate lawyers in their role as advisors under international soft law (UNGP's) and their professional responsibilities under professional codes of conduct?

To resolve this question, instruments such as the United Nations Guiding Principles on Business and Human Rights, the International Bar Association Practical Guide on Business and Human Rights for Business Lawyers, its Reference Annex, codes of conduct from different countries, several specialized books and articles related to the topic, will be studied and utilized. The full list of resources is available in the bibliography.

STRUCTURE

The first chapter discusses the relevance of soft law in the international field since the main instrument utilized in this thesis is voluntary. Moreover, examples concerning how soft law has helped to shape the international human rights law environment will be provided. Also, the importance of the International Bar Association to international in reference to international law will be stressed.

Chapter two, starts by providing a small description of the UNGP's and the human rights responsibilities that all companies have in general. Subsequently, the Protect, Respect, Remedy framework will be described. Finally, this chapter will explain the

instances in which lawyers may cause, contribute or may be directly linked to human rights abuses.

The third chapter offers an analysis of codes of conduct from different countries and regions, which will lead to discover the principles that govern the profession of law. Furthermore, since companies are legal entities, the meaning of what does the **best interest of the client** means will be confronted. This research will look into corporate law to give an answer to this issue.

The fourth chapter will analyse the compatibility of the human rights expectations of corporate lawyers in their role as advisors and the principles that govern the profession of law. Moreover, a modified human rights due diligence for the profession of law will be explored.

CHAPTER ONE: IMPORTANCE AND FUNCTIONS OF SOFT LAW

1.1 UNDERSTANDING SOFT LAW

In the international law field, unlike local jurisdictions, there are certain rules that are still considered to be part of the legal regime even if they are not binding or in other words, they are soft[2].

First, before exploring the concept of soft law, it is important to understand how international law is made. To put it simple, international law is created by States consensus: two or more States agree on the obligations and consequences they are willing to accept[3].

There is not an established way on how international law is made since independent States are the makers and main actors[4]. Nevertheless, article 38 of the Statue of the International Court of Justice[5] provides a list of what can be considered international law. First, it mentions conventions and treaties, which are the most common examples of international law. Second, it notes about customary and the general principles of law. Finally, it refers to judicial decisions and academic papers from the 'most qualified publicist'. It is important to point out that this list is not exhaustive[6].

Some scholars have rejected the idea of using the article mentioned above as the "holy grail" that establishes the sources of international law[7]; nevertheless, for practical and academic purposes, it is a useful way to explain the sources of

[2] Thomas Gammeltoft-Hansen, Stéphanie Lagoutte and John Cerone, 'Introduction' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 1.

[3] Jan Klabbers, *International Law*, (2th edn, Cambridge University Press 2017) 24

[4] Ibid

[5] '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.'

[6] Klabbers, *International Law* (n 3) 24

[7] Dinah Shelton, 'Normative Hierarchy in International Law' [2006] The American Journal of International Law 291, 291

international law. In this sense, the list mentioned in the former paragraph contains just some of the forms international law can take. Nonetheless, other kinds of international law are also acceptable[8].

It is important to state that lawyers should not forget that agreements between sovereign States are the main object and subject of international law. Moreover, States have the free will to create law as they see proper[9]. Likewise, they not always agree on a binding instrument, although they will accentuate certain principles[10]. Derived from this practice, a new concept emerges: **soft law**.

There is not a legal or specific definition of soft law[11], yet, soft law has different names such as declarations, resolutions or guidelines to name a few[12]. This practice brings numerous problems, but it is generally acceptable to refer to soft law in a negative lacking way[13]; as an international instrument that has the characteristics of a regular "treaty", except for the legal obligation to apply it. Therefore, it is seen as the antonym of hard law[14].

The concept of soft law has come with opposition such as professor Jan Klabbers who, in his article *The redundancy of soft law* argued for the binary thesis of binding and non-binding law. At the end of this article, he noted 'Isn't it about time to discard the [soft law] thesis altogether and proclaim the redundancy of soft law?'[15]. On the same subject, Alan Boyle, in his chapter on soft law, he mentions Prosper Weil and also argues for the thesis of law and no law[16]. Thus, these scholars argue that the whole concept of soft law should be eliminated, as it makes no sense from a binary point of view.

John Cerone on his chapter *A Taxonomy of Soft law*, states that soft law should not be

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[8] Klabbers, *International Law* (n 3) 24
[9] Shelton (n 7) 299
[10] Alan Boyle, 'Soft Law in International Law-Making' in Malcom D. Evans (ed), *International Law* (Oxford University Press 2010) 122
[11] John Cerone, 'A Taxonomy of Soft Law' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 15
[12] Boyle (n 10) 124
[13] Lagoutte, Gammeltoft-Hansen and John Cerone (n 2) 3.
[14] Boyle (n 10) 124
[15] Jan Klabbers, 'The Redundacy of Soft Law' [1996] Nordic Journal of International Law 167
[16] Boyle (n 10) 123

seen at the same level as hard law, but it should not be disregarded as unimportant[17]. He argues that even if soft law cannot be seen as "law", it can influence hard law and sometimes achieve the effect it wants to reach without being binding[18]. He describes it as 'rules (prescribing conduct or otherwise establishing standards) that are in the process of becoming, though may not ultimately become binding rules of international law in the form of any of the established sources of international law –customary law, general principles of law, or as a binding interpretation of a rule of treaty law'[19][20].

Soft law can also be referred as the **embryo** of hard law[21]; meaning the first step for an idea to come to life in the international law world. However, it needs to have the possibility of becoming "hard law" to be able to be considered soft law[22], in other words, it needs to have some traction[23].

1.1.1 ROLES OF SOFT LAW.

As explained above, some scholars have disregarded soft law by describing it as unimportant. Although it is true that it has its downsides, the main one being the lack of enforceability, one can ask why does it even exist? Why a "rule" that can be observed voluntarily should even have the word "law" in its name?

First, it is important to mention that international law has two different traits: (legal) bindingness and enforceability[24]. The former signifies that States have the obligation to obey the instrument that they agreed on, and the latter is a direct consequence of the first, meaning that if States do not comply with the obligation, there will be a legal consequence[25].

Thus, soft law has always been undermined because it lacks both of these traits since it is not legally binding and therefore cannot be enforced[26].

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[17] Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (n 11) 16-17
[18] Ibid 17
[19] Ibid 18
[20] For the purpose of this thesis I will use this conception as it describes perfectly the role and impact the United Nations Guiding Principles of Human Rights have had
[21] Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (n 11) 20
[22] Ibid
[23] Ibid 22
[24] Verena Rošic Feguš, 'THE GROWING IMPORTANCE OF SOFT LAW IN THE EU' [2014] InterEULawEast: Journal for International & European Law, Economics & Market Integrations 145, 147.
[25] Ibid
[26] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' [2000] International

Nonetheless, soft law plays different important roles that shape the international realm; it can serve as a first step leading to the creation of a hard law instrument when States are not yet ready for a binding instrument; it can also be used to set specific or technical rules to an already existing hard law instrument. Moreover, it can also function as a way to interpret a treaty or a convention or give more strength to an argument[27]. Thus, it can be stated that soft law has two main functions: 'norm-filling and norm-creating'[28].

Hence, the role of **embryo** of law described before can be clearly grasped in the development of the International Human Rights Law scheme. After the Second World War, States knew that they needed a new international scheme providing a primary space to human rights. However, they were not ready to have international obligations regarding this topic; hence, they created the Universal Declaration of Human Rights (UDHR), a soft law instrument, where the States stated their expectations on the topic of human rights. It would be years before an actual binding instrument were put into place. Thus, the UDHR was the device that gave birth to all of the subsequent binding instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[29].

Moreover, soft law can play a crucial part in the making of customary law. According to article 38 of the International Court of Justice's statue, international law can take different forms, one of the two most important ones being customary law. Thus, soft law can provide evidence of the *opinion juris* necessary for the custom to be considered law[30].

Likewise, soft law can also be used to set **specific or technical rules** to an already existing hard law instrument. An example of this role, is the Copenhagen Process on the Handling of Detainees in International Military Operations, where a group of States discussed and created a new instrument regarding how to handle 'detention in international military operations'[31]. It should be noted that in the beginning of the instrument, the Copenhagen Process recognizes that no new legal obligations are

Organization 421, 422

[27] Lagoutte, Gammeltoft-Hansen and John Cerone (n 2) 1

[28] Ibid 6

[29] Ed Bates 'History' in Daniel Moeckli and others *International Human Rights Law* (3th edn, Oxford University 2018) 18-19

[30] Shelton (n 7) 320

[31] Lagoutte, Gammeltoft-Hansen and John Cerone (n 2) 10-11.

being created. Instead, its objective is to clarify the existing international law on the subject[32], which goes along with the role described in this chapter.

Furthermore, soft law can also serve as way to **interpret** a treaty or a convention; an example of this function is the General Comments from the Committee of the Covenant on Economic, Social and Cultural Rights that provides guidance to States on how to fulfil their obligations that derive from the convention.

Finally, soft law has also been relevant regarding how cases have been resolved. Even Jan Klabbers, a known rejecter of the soft law thesis, has recognized that soft law has played, at least in some cases, an important role when an international organism had to make a final decision on a given case. He mentions, in his article cited above, the *Texaco-case* and how the arbitrator used the Declaration on Permanent Sovereignty over Natural Resources, and how the International Court of Justice has used resolutions from the General Assembly, the way the General Agreement on Tariffs and Trade panel used a resolution from the United Nations Economic and Social Council, and the manner in which the Court of Justice of the European Communities used a resolution from the Council of Ministers[33]. Moreover, the International Court of Justice has relied on the General Assembly resolutions, a soft law instrument, as justification for their determinations, as showed in the *Nicaragua case*[34]. However, it is significant that Klabbers undermines the role of the soft law instruments in these decisions[35].

Furthermore, another significant illustration of the prominence of soft law in the international law realm is the United Nations Declaration on the Rights of Indigenous People, which has given indigenous communities another tool to defend their rights. Its impact is considered to be so substantial that Austria, Canada, New Zeeland and the Unites States of America have opposed[36].

It is obvious that a court's resolution can't solely rely on soft law, as hard law is always necessary to justify a judicial resolution. Nevertheless, soft law undoubtedly

[32] *The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines* (2012) para II.
[33] Klabbers, 'The Redundacy of Soft Law' (n 15) 172-174.
[34] Ibid
[35] Ibid
[36] Lagoutte, Gammeltoft-Hansen and John Cerone (n 2) 11

may strengthen an argument. Indeed, the foundation of the argument will be hard law, but soft law can play a big role in the final resolution. Most of the cases can go either way in a court room. Yet, soft law can add just what one side's argument needs to come out victorious.

It is worth to mention that these roles are not exclusive, they are just used for academic purposes, for instance the United Nations Guiding Principles on Business and Human Rights are a soft law instrument that was made because States are not ready to subscribe to a binding instrument on this topic. However, it also interprets the international human rights law binding instruments and sets specific expectations to businesses on how to respect human rights[37]. Another example is the General Comments mentioned above. From these interpretations of binding instruments new rights have emerged, such as the right to water[38].

In this sense, it is undeniable that soft law plays a big role in international law, especially in international human rights. Despite what the soft law rejecters might say, it has influenced reality as any other binding instruments and therefore, it is prudent to study it, understand it and apply it. Likewise, States endorse these instruments and oppose them. They are used to develop the protections of already stablished human rights treaties, but also, they are used to delimit and narrow their interpretations. Soft law is gaining more and more acceptance, and consequently, its utility should not be undermined and ignored. If someone calls herself or himself an international lawyer, she or he needs to be aware of the soft law instruments that also regulate the international field or take the risk to fall behind.

1.2 INTERNATIONAL BAR ASSOCIATION

Before moving to the next part of this research, it is imperative to mention the importance of the International Bar Association (IBA), as this thesis will use instruments created by this institution.

The IBA is a 'federated and delegated' organization that represents the bar associations and law societies from around the world. The IBA is not the only of its kind. There are many other international lawyer's organizations, but the IBA is the

[37] This topic will be analyzed on the next chapter.
[38] Lagoutte, Gammeltoft-Hansen and John Cerone (n 2) 10.

largest and one of the most important groups of its type[39]. Its main focus is to 'influence[s] the development of international law reform and shape[s] the future of the legal profession throughout the world'[40]. It also intends 'to promote the principles and aims of the United Nations'[41]

According to its website, the International Bar Association was founded in 1947 by a few national bar associations. Currently, it has more than 80,000 individual members and 190 bar associations and law societies from 160 countries[42]. This is not an insignificant achievement. Organizing and uniting that many bar associations is not a simple task. It should be remembered that unlike other professions, lawyers were always separated in groups, usually 'justice-advocates (barristers), attorneys (solicitors), judges, professors, notaries and prosecutor'; later when lawyers started to organize, they did it in a regional scheme[43]. Therefore, creating and maintaining an international organization of lawyers from all over the world shows the relevance the IBA upholds in the legal profession around the world.

The IBA not only issues periodical journals and books. Additionally, it has released several guidelines that are the leading standards of international legal practice around the world, such as the Standards for the Independence of the Legal Profession, Standards and Criteria for the Recognition of the Professional Qualifications of Lawyers, the International Principles on Conduct for the Legal Profession or the Practical Guide on Business and Human Rights for Business Lawyers. All of these publications are made by a multicultural committee of lawyers from around the world. As an example, the Rules on the Taking of Evidence in International Arbitration were made by lawyers from the United States of America, Germany and Hong Kong, which gives a broader scope when making a new instrument.

With publications like the mentioned above, the IBA has shaped the legal profession on an international level. All of these guidelines are endorsed by the bar associations that the IBA represents. In addition, this organization has been and continues to work

[39] Amos J. Peaslee, 'The International Bar Association' [1948] The American Journal of International Law 164, 164

[40] 'The IBA' < https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx> accessed 23 May 2018

[41] Sue Jackson, 'The International Bar Association and UNIDROIT/*L'Association Internationale du Barreau et UNIDROIT*' [1998] Uniform Law Review 786, 786

[42] 'The IBA' < https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx> accessed 23 May 2018

[43] Robert Nelson Anderson, 'The International Bar Association: Its Establishment and Progress' [1950] American Bar Association Journal 463, 463

in conjunction with the United Nations and the Council of Europe and has been granted a consultant status in both of these organizations[44]. Also, the IBA helped the International Criminal Court (ICC) to develop its code of conduct for defense lawyers which concluded with the adoption of the Code of Professional Conduct for Counsel, by the ICC on 2005[45].

The work of the IBA is of utter importance in a globalizing world where different law practices collide, and common ground needs to be placed.

Following this effort, the IBA created the Minimum Standards of Judicial Independence, the Standards for the Independence of the Legal Profession and the Statement of General Principles for the Establishment and Regulation of Foreign Lawyers, which intends to build common principles lawyers should address when practicing law and harmonize different law practices and traditions from around the world, setting some minimum standards.

The IBA created in 1995 the International Bar Association's Human Rights Institute (IBAHRI)[46], which is an 'autonomous and financially independent entity' in charge of dealing with with human rights issues and the independence of lawyers[47].

The main activities of the IBAHRI consist in fact-finding and creating expert reports on specific countries and subjects. Also, through trial observations, the IBAHRI sends observers 'to attend hearings to assess the independence of the legal profession'[48] and in the case that the law practitioner suffers harassment, the IBAHRI offers support[49]. In addition, the IBAHRI also publishes each year an annual human rights report.

It was just a matter of time for the UNGPs to influence the IBA. After years of discussion, the IBA council adopted in 2015 the IBA Business and Human Rights

[44] Gerald J., McMahon and Deuchler Werner, 'Meet the International Bar Association' [1978] American Bar Association Journal 554
[45] International Criminal Court *Resolution ICC-ASP/4/Res.1* (2005)
[46] 'About the IBAHRI' < https://www.ibanet.org/Human_Rights_Institute/IBAHRI-About.aspx> accessed 23 May 2018
[47] Ibid
[48] 'Trial observations' <https://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/trial_observations.aspx> accessed 23 May 2018
[49] 'About the IBAHRI' < https://www.ibanet.org/Human_Rights_Institute/IBAHRI-About.aspx> accessed 23 May 2018

Guidance for Bar Associations and then, in 2016, embraced the **Practical Guide on Business and Human Rights for Business Lawyers**. The first one deals with the issue of how domestic bar associations can implement the concept of business and human rights into their own operations and the latter aims to discern the role of law practice, especially regarding business lawyers and their duty to respect human rights taking into consideration the specific technical that service lawyers provide, which makes it central to this research.

1.3 SUMMARY

This chapter has explained the importance of soft law. Instruments of this nature are an important part of the analysis of this study. Moreover, it has shown, with concrete examples, the different roles that soft law has and how it has helped shape the international law realm, especially in the international human rights law scheme. Finally, this section has shown the importance of the IBA and why its instruments are being used in this research.

The next step is to explore the soft law instrument which is crucial for this research: The United Nations Guiding Principles on Business and Human Rights.

CHAPTER TWO: APPLICATION OF UNGPS TO THE LEGAL PROFESSION

2.1 BUSINESS AND HUMAN RIGHTS.

There are different soft law instruments that are used to protect human rights. Moreover, after the UDHR gave birth to the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights, new treaties and binding instruments protecting specific vulnerable groups have emerged. Nevertheless, their main focus has always been the relation between States and people leaving out third parties.

In 2004, after the fall of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights, the United Nations Commission on Human Rights appointed professor John Ruggie with the task to 'identify [the] standards of corporate responsibility'[50].

In 2008, John Ruggie came up with a new framework consisting on the principles 'Protect, Respect and Remedy'. This scheme was endorsed by the now Human Rights Council. Furthermore, the Council extended his mandate with the objective of creating a new 'concrete guidance regarding the obligations of states and responsibilities of business'[51].

John Ruggie mandate ended in 2011 with the creation of the United Nations Guiding Principles on Business and Human Rights[52]. This was not a binding treaty or an international code of conduct[53]; instead, he delivered an instrument that could serve as guidance on how the international human rights law framework impacts the relationship between States and corporations in a globalizing world[54]. His goal was to

[50] United Nations Commission on Human Rights *Human rights and transnational corporations and other business enterprises* (Human Rights Resolution 2005/69)
[51] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress', in Radu Mares (ed) *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (Martinus Nijhoff Publishers, Leiden Boston 2012) 1-3
[52] Ibid 3
[53] Ibid 5
[54] Ibid 24

simplify this complex subject[55], and also to be pragmatic; therefore, this instrument could be useful and have an effect where it matters the most: the life of regular people[56]. Hence, the UNGPs set the standards on business and human rights[57].

After the publication of the UNGPs, several international governmental organizations started incorporating the principles of this instrument to their framework[58], such as the Organization for Economic Co-operation and Development, the Worlds Bank's International Finance Corporation and the International Organisation for Standardisation, to name a few[59]. Likewise, the UNGPs have impacted national and regional laws as the Modern Slavery Act (2015) in the United Kingdom, the *Loi de Vigilance* in France (2017)[60], the Dodd- Frank Act in the United States of America[61] and the Regulation (EU) 2017/821 in the European Union, regarding conflict minerals[62], which shows the importance that this soft law instrument has had.

However, the UNGPs have come with critics from all fronts. This instrument has been criticized for basing its framework in the voluntarism or "goodness" of companies and lack of coerciveness[63]. In response to the critics of the voluntarism character of the UNGPs John Ruggie responded that at the moment there is not the political will or the capacity for a treaty regarding corporations. Nevertheless, this is a first step in the subject[64]. Here, John Ruggie plays with the idea stated above that the UNGPs can be considered an **embryo** of a more coercive instrument.

It is evident that, the relationship between business and human rights is complex. On one hand, the goal of business is to be profitable in the long term by providing a product or a service[65], and on the other, the duty of the State is to look for the wellbeing of its population. Thus, States have the obligation to protect individuals from human rights

[55] Ibid 5
[56] Ibid 7
[57] Ibid 23
[58] Ibid 22-23
[59] Ibid 7
[60] Maddalena Neglia, 'The UNGPs — Five Years on: From Consensus to Divergence in Public Regulation on Business and Human Rights' [2017] Netherlands Quarterly of Human Rights 289, 306
[61] Ibid 299
[62] *Regulation (EU) 2017/821 of the European Parliament and of the Council* (OJ : JOL_2017_130_R_0001 2017) par 5
[63] Mares, *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (n 51) 8
[64] Ibid 29
[65] This idea is studied in detail on chapter 3.

abuses from third parties, including business enterprises[66].

However, States may neglect their obligation for different reasons, the most common one being corruption[67]. Also, businesses are starting to surpass some States in terms of economic weight, which translates into weaker States and more powerful enterprises that can use their supremacy to their advantage, leaving the people defenceless against a new "leviathan"[68].

The UNGPs do not encourage or dissuade binding instruments regarding human rights responsibilities of companies around the world[69]. Business have impacted human for a long time. Nevertheless, the idea that enterprises should have responsibility for the human rights abuses they commit is new. States have always been the centre of attention of international human rights law.

However, the importance of this soft law instrument should not be undermined. It is the first time that there has been a mayor agreement on how to deal with human rights and business, which underlines the error of overlooking its significance[70].

There has been concern about the scenarios where a conflict between the UNGPs and the national law could take place. Companies can be caught in the middle of the discussion, having different groups pulling companies in different directions, yet enterprises should 'find a way to honour the spirit of international standards without violating national law'[71].

It is also important to remember that having a universal rule is almost impossible. The circumstances or 'conditions' play a key role on how to proceed if two frameworks collide; one of them will be prioritized given the specific conditions[72]

[66] UNGP's art 1.
[67] David Hess and Thomas Dunfee 'Taking responsibility for bribery. The multinational corporation's role in combating corruption' in Rory Sullivan *Business and Human Rights: Dilemmas and Solutions* (Greenleaf Publishing Limited 2003) 261
[68] Concept used by Thomas Hobbes to describe the power of the State.
[69] Mares, *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (n 51) 24-25
[70] Ibid 2
[71] Ibid 24
[72] Robert Alexy, 'On the structure of legal principles' [2000] Ratio Juris 294, 296

2.2 CORPORATE RESPONSIBILITIES UNDER UNGPS

The UNGP's are based on the "Protect, Respect and Remedy" framework; which means that States have the obligation to **protect** their population from human rights abuses enacted by third parties. To achieve this obligation, States must take steps to 'prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'[73].

A clear example on how States could address this obligation would be if a company is poisoning the water supply of a Community. In this instance, the obligation of the State is to intervene and make the enterprise stop the activity that is polluting the water; moreover, the State in this example evidently has already failed its duty to protect, that is, it was its obligation to prevent the contamination of the water, first by creating strong and clear legislation that safeguards the rights of people and the respect for the environment, and second, by enforcing this legislation[74].

Likewise, **respect** means that companies should avoid violating human rights as a consequence of their operations, and if they are already embedded in these circumstances, they should stop or mitigate the harmful impact[75]. Using the same example, a company should not start an operation knowing that it will pollute the water reserves of a community, and if they did not know that it happened, the company should address the problem, even if the law does not enforce a protection in this situation.

Finally, **remedy** means that victims need to have useful mechanisms, judicial and non-judicial to get access to compensation in case the operations of a company caused them damages[76]. Following the same example of the company that has already polluted the water supply of a community, it would be imperative that first, the enterprise would stop the action that is the cause of this problem. Then, the company itself would need to take steps to correct the harm it has already done to the population without the intervention of the State. Nonetheless, **remedy** also means that the victims should have the opportunity to use the State's judicial system to seek

[73] UNGP's art 1
[74] Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* (2003)
[75] UNGP's art 11 and 13
[76] UNGP's art 22 and 25

reparation for the damages done.

Thus, the responsibility that businesses have to respect human rights means that at the minimum, enterprises should acknowledge at least the International Bill of Human Rights[77] and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work[78].

In order for companies to fulfil their responsibilities regarding human rights, they should make a public statement approved by the most senior level regarding their human rights policies concerning their operations and the result that they want to achieve from these policies[79].

Moreover, enterprises should implement a "Human Rights Due Diligence", which means an ongoing process to 'identify, prevent, mitigate and account for how they [businesses] address their adverse human rights impacts'[80]. These effects can be divided into three categories: causation, contribution and linkage[81].

"To cause" means that the company by its own operations has negative impacts on the rights of people. For instance, polluting a river or forcing people to work for more than twelve hours a day. "To contribute" signifies that enterprises do not violate human rights by themselves, but that they play a role in the action that has a negative impact on the human rights of individuals. For example, requiring a massive order to a supplier that will clearly violate the workers' rights or financing a project that will result in the violation of human rights[8283].

This distinction can be complex and has been subject to much discussion. However, the Debevoise Business Integrity Group in collaboration with Enodo Rights created the *Discussion Draft Practical Definitions of Cause, Contribute, and Directly Linked,* which developed a three-question test to determine if a certain activity can be considered "cause" or "contribution". The first step is to ask, 'Is there an actual or

[77] UDHR, ICCPR, ICSECR
[78] UNGP's art 12
[79] UNGP's art 16
[80] UNGP's art 17
[81] UNGP's art 17
[82] Office of the United Nations High Commissioner for Human Rights *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector* 5-6
[83] United Nations *Frequently Asked Questions About the Guiding Principles on Business and Human Rights* 31.

potential adverse human rights impact?', Afterward, if the answer is affirmative, the subsequent question would be 'Do the company's activities (including omissions) materially increase the risk of that impact?'. Lastly, 'If so, would the company's activities (including omissions) in and of themselves be sufficient to result in that impact?'. If these answers are positive, the result becomes a "cause" scenario. Nonetheless, if the answer to the third question is negative, the outcome can be categorized as a "contribution" *[84]*.

Finally, according to the High Commissioner for Human Rights, direct linkage 'refers to linkage between the harm and the enterprise's products, service and operations through a provider (the business relation)'[85]. For example, if a supplier subcontracts another, without the knowledge of the company that hired the first one, and the latter uses child labour, the business enterprise hasn't caused or contributed to human rights violations. Nevertheless, there is a direct linkage between the main company and the human rights abuses committed[86]. The key element of the "direct linkage" concept is that the business enterprise is not the one causing or contributing to human rights abuses, however, the situation is created by the actions of its suppliers. In other words, there is a "middle man" between the harm and the company, and the 'linkage' is a consequence of the company's business relationships. Lastly, this association needs to be mutually beneficial between company and supplier[87].

Moreover, The *Discussion Draft* also created a three questions exercise regarding direct linkage. The first question is: 'Does the business have a relationship for mutual commercial benefit with the state or non-state entity?', next one has to ask, 'Does the benefit provided by the state or non-state entity retain consistent form as it is transmitted to the company's products, operations, or services?'. Finally, 'When acting to provide the benefit that is the object of the relationship, did the state or non-state entity materially increase the risk of the adverse human rights impact which occurred or may occur?'. Only if the answer to the three questions is affirmative, it can be said

[84] Debevoise Business Integrity Group in collaboration with Enodo Rights, 'Practical Definitions of Cause, Contribute, and Directly Linked to Inform Business Respect for Human Rights. Discussion Draft' (9 February 2017) <https://www.business-humanrights.org/sites/default/files/documents/Debevoise-Enodo-Practical-Meaning-of-Involvement-Draft-2017-02-09.pdf> accessed 23 May 2018

[85] UN High Commissioner for Human Rights *Request from the Chairof the OECD Working Party on Responsible Business* Conduct par 9

[86] *Frequently Asked Questions About the Guiding Principles on Business and Human Rights* 31

[87] Debevoise Business Integrity Group in collaboration with Enodo Rights (n 84) 13-14

that there is a direct linkage of the company with human rights infringements[88].

Thus, the first step in the human rights due diligence is to identify actual or possible human rights violations. The next step for a company is to act upon this discovery. If the enterprise is causing the violation, then it needs to stop its damaging operations, or if a risk of harm rises, it needs to avoid the activity or mitigate its effects[89].

Now, if the company is contributing to the negative effect, it should stop the activity that is contributing to the violation. Additionally, it needs to use its leverage to 'mitigate any remaining impact'[90].

Continuing in the same subject, if the negative impact is directly linked to the company's operations; first, it needs to use its leverage to mitigate the impact, then if the leverage is too weak or none existent, it should try to find a way to improve the leverage. Finally, if there is no manner to achieve these results, the company should terminate its business relation, always taking into consideration the negative impact this action might have. If the relationship is "crucial" to the operations of the company, then it should make an effort to find alternative practices, but never forgetting that in the time that the relationship continues to exist, the enterprise should demonstrate how it is trying to alleviate the negative impact consequence of its relationship[91].

2.3 RESPONSIBILITIES OF LEGAL PROFESSIONALS UNDER UNGPS

First, it is important to define what the legal profession is, as the definition itself gives cues on the nature of its self-regulation. One can describe it as an economic activity, specifically a 'service industry working to serve the people, particularly the consumer of legal services'[92]. Hence, it is evident that this definition originates from a 'free market' or liberal theory, where the least intervention of the State is the most effective. Therefore, the market and competition will naturally regulate the profession, giving space to economic growth. Moreover, a hard regulation could be harmful for the

[88] Debevoise Business Integrity Group in collaboration with Enodo Rights (n 84)
[89] UNGP's art 19 commentary
[90] UNGP's art 10 commentary
[91] UNGP's art 19 commentary
[92] Mary Seneviratne, *The Legal Profession: Regulation and the Consumer* (Sweet & Maxwell 1999) 21.

economic activity[93]. Moreover, the American Bar Association (ABA) defines lawyer as 'a member of the legal profession, [a lawyer] is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice'[94]. In other words, a lawyer is a person that is certificated by the State or a legal association to be able to provide legal services, such as to represent a client in a court or advice clients regarding their rights and obligations.

Nevertheless, it should be noted that lawyers play and important role in maintaining the rule of law. Furthermore, as a business, some form of regulation is necessary in order to protect the consumers[95]. Hence, the complexity of the law profession having a dual nature of a business and an essential part of the stability of a State and the rule of law.

The next step is to precise if lawyers cause, contribute or have a direct linkage to human rights abuses.

First, law firms can have a direct negative impact on human rights by their own activities, for example, if law firms discriminate applicants regarding their gender or race when hiring new lawyers, or when law firms require overwhelming work hours from their workers. However, law firms can also directly violate human rights trough their activities as lawyers. The Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers give an example of this: '(…) a firm could bribe a judge to obtain a favourable ruling in a lawsuit. This patently illegal conduct would infringe directly upon the right to a fair trial and the right to equal protection of the law'. Nevertheless, these kinds of scenarios are the least likely to happen[96]. Law firms are prone to be on a **contribution** or **linkage** scenario.

Thus, law firms can **contribute** to human rights abuses, only when they use their legal knowledge to help clients to get around the law or find loopholes, even with the knowledge that the outcome of the client's activity will have a negative impact on the human rights of stakeholders.

[93] Ibid
[94] American Bar Association, *Model Rules of Professional Conduct* (United States of America) Preamble.
[95] Mary Seneviratne, (n 92) 25
[96] International Bar Association, *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016) 42

An example of this scenario could be the legal strategy used by the attorneys of Shell in the case *Kiobel v. Royal Dutch Petroleum* as they were arguing for a much narrow interpretation of the Alien Tort Statue (ATS), which allowed the United States of America (USA) courts to have extra territorial jurisdiction over acts committed in foreign countries by nationals or USA entities[97].

It is important to mention that lawyers in their roles of representation of a client in a court is out of the scope of this thesis. However, the implications of such a ruling go beyond the individuals in this case, since a precedent as such could destroy what has been achieved regarding the ATS. In that regard, John Ruggie stated 'the stakes are so high'[98].

Therefore, this is an example of how lawyers can contribute to human rights abuses. Shell's attorney **knew** that by making arguments against the application of the ATS, they would restrict its scope, thus negating victims the possibility of access to justice, which violated their human rights.

Another example of this scenario is when a law firm helps a company to establish another one so that the main company can outsource its workers. Therefore, the main company will not have the obligation to provide social security to their employees.

On this subject, the Reference Annex mentions three examples: 'Establishing anonymous shell corporations and using law firm bank accounts for the purpose of enabling a senior government official of a highly impoverished country —whose citizens lack access to adequate health care and high rates of infant mortality— to launder money obtained under suspect circumstances from his business arrangements involving the country's public natural resources'. 'Establishing anonymous off-shore corporations to enable the client to avoid international embargoes in order to fund the bombing of civilians during that country's civil war'. 'Proactively designing, developing and implementing unfair and deceptive debt collection practices in order to obtain consent orders for the garnishment of 50 to 100 per cent of the wages of tens of thousands of low wage earners, thereby depriving

[97] John G. Ruggie, *KIOBEL AND CORPORATE SOCIAL RESPONSIBILITY* (Harvard Kennedy School September 4, 2012
[98] Ibid

them of their rights to access to the courts for remedy, to an adequate standard of living and to a family life'[99].

Finally, in what is the most common scenario, law firms can be **directly linked** with human rights abuses when advising their clients. For example, a client can seek the services of a law firm to help him or her to get a permit to start mining operations in an area near a community, then the lawyer in good faith proceeds with all the legal steps to get the mining permit; however, the mining company as a result of its operations pollutes the water of the nearby community causing health issues to the people in that community.

In the same way, the Reference Annex also gives also an example of this situation: 'a lawyer for a company acting on behalf of an international manufacturer and seller of portable ultrasound equipment negotiates and drafts contracts for the sale and licensing of such equipment in a country that discourages the birth of female children. The lawyer then learns that the equipment sold under the contract has been used to identify female fetuses for abortion'[100].

Hence, taking all of the above into consideration, it can be affirmed that law firms can **contribute** to human right abuses when lawyers **know** that the intentions of their clients are to violate human rights, and yet, still lawyers decide to advise them or help them reach their goal, because it is evident that without the legal knowledge provided by lawyers, the clients would not be able to achieve their objectives.

Likewise, lawyers can be directly linked to human rights abuses even if they advise their client in **good faith**. Thus, when lawyers help their client achieve a goal and as a consequence of the company's activity, the human rights of the company's stakeholders get impact negatively, lawyers can be directly linked to the human right abuses committed by their clients as a result of the relationship between lawyer and client.

It should be noted that the difference between contribute and being directly linked is the lawyers' **knowledge** of the company's true ambitions. To have a better understanding of this issue, a comparison with criminal law is essential.

[99] *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (n 97) 42
[100] Ibid 42

When a lawyer **causes** negative impacts on human rights of stakeholders, he or she has the *mens rea* and *actus reus* components. In other words, the action has a negative impact, the lawyer knows it and decides to still perform it[101].

In this sense, when a lawyer **contributes** to human rights abuses, he or she also knows that the activity will have a negative impact. However, in this case the lawyer is not the active executor as the activity is made by their clients. Thus, the lawyer advises –aids–, and the client performs the activity. In this scenario, the lawyer does not have an active role, however he or she knows –*mens rea*– that the activity that his or her client is going to implement, will have negative impacts in the human rights of their stakeholders –*actus reus*–. Hence, an analogy with the criminal term "accomplice" can be made, since the lawyer "aided" the client in committing an action that will have a negative impact on the human rights of their stakeholders[102].

Furthermore, when a lawyer is **directly linked** to human rights abuses, he or she does not have the knowledge –*mens rea*– that the activity of the client will violate human rights. Nevertheless, there is still an action that violates the human rights of stakeholders –*actus reus*– but the lawyer lacks the knowledge –*mens rea*– to be held "accomplice" –contribution scenario– of this action, as he or she does not know that his or her advice is being used to abuse the human rights of stakeholders. That is why, even the UNGP's do not expect a compensation from the law firm –remedy– in this type of scenario[103].

Thus, when a lawyer is directly linked to human rights abuses because of the advice he or she is providing to his or her client[104], and the lawyer becomes aware that his or her client is violating human rights with help of the lawyer's advice –*mens rea*–, and yet, the lawyer stays in that relationship, his or her involvement could change from being directly linked to contributing to human rights abuses, due to the fact that the lawyer would then have the knowledge of what the client is doing with his or her advice. It is evident that in this instance, the lawyer now knows that his or her advice is being used to violate the human rights of people –*actus reus*–. Thus, by staying in

[101] Grace E. Mueller, 'The Mens Rea of Accomplice Liability' [1988] Southern California Law Review 2169.
[102] Ibid
[103] Ibid
[104] It is assumed that the lawyer does not know that the activity the client is performing is violating human rights of the client's stakeholders.

the relationship, the lawyer is tacitly –or sometimes willingly– consenting to "aid" his or her client to violate the human rights of stakeholders –*mens rea*–.

In the article *Categories of Corporate Complicity in Human Rights Abuses,* Andrew Clapham and Scott Jerbi discuss the *Akayesu* case of the International Criminal Tribunal for Rwanda, where the tribunal states that 'As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence'[105].

This case highlights the importance of the mental element or knowledge. Thus, when translated to the topic of this research, it is obvious that when lawyers discover the negative intentions of their clients and continue providing legal advice, they position themselves in a "contribution" scenario.

2.4 SUMMARY

This chapter has explained the history and importance of the UNGP's, one of the core instruments necessary for this research. Moreover, it was explained the "Protect, Respect and Remedy" framework in which this instrument is based on, as well as the "Human Rights Due Diligence" that companies should implement. Also, it showed how the UNGP's impact the legal profession, specifically how law firms can contribute, cause or be directly linked to human rights abuses.

Hence, are lawyers allowed to follow this voluntary instrument? What are the rules that govern the profession of law? These questions will be explored in the next chapter.

[105] Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' [2001] Hastings International and Comparative Law Review 339, 343

CHAPTER THREE: PRINCIPLES OF LAWYERS AS ADVISORS.

3.1 SELF REGULATION OF THE LEGAL PROFESSION

Self-regulation at the professional level has been the primary source of regulation for lawyers, as they need the freedom to be able to represent and advice their clients without the fear of prosecution from the State or third parties.

First, lawyers as any other individual in the world enjoy the right of freedom of association[106], which gives them the right to join with other peers with the objective to represent their interest, train new lawyers and protect their professional integrity[107]. Moreover, through these organizations lawyers have the right to issue Codes of Conduct, which contain the legal, professional and ethical obligations that lawyers should abide in the performance of their occupation. Likewise, these associations have also the right to develop sanction mechanisms for the lawyers that breach the codes of conduct[108].

Furthermore, the Basic Principles on the Role of Lawyers, instrument adopted by the United Nations, states in its preamble that 'professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest'[109].

It is true that self-regulation is not the only way to set rules for the performance of a profession. There can also be laws created by the government implemented by a government agency[110]. For example, in México there are no associations to regulate any specific professions. However, each state has its own law that establishes the

[106] United Nations *Basic Principles on the Role of Lawyers* art 23
[107] Ibid art 24
[108] Ibid arts 27 and 28
[109] Ibid Preamble
[110] Seneviratne (n 93) 25

rules for all professions[111].

Nonetheless, the focus of this thesis is the self-regulation system that lawyers in several countries have developed since self-regulation 'remains as the principal controlling device for professional occupations'[112].

Typically, lawyers specialize on one branch of law, such as civil, criminal, labour or corporate law. Thus, usually individuals use the services provided by these kinds of lawyers a few times in their lifetimes. For example, if an employee is unjustifiable fired by a company, he will search the services of a lawyer to help him or her with this problem. This kind of relationship gives more weight to lawyers when negotiating the terms and conditions of the mandate; in other words, lawyers have a bigger leverage in the negotiation.

However, in corporate law this scenario changes, as lawyers hired by companies cannot be placed in the same position as individuals. Company's matters generally imply a larger amount of profit to the lawyer, the tables turn, and lawyers compete to be hired by a company, which gives the enterprise more control over the lawyer unlike individual clients[113].

Moreover, when one talks about lawyers, one should be more specific, as lawyers can have different roles. Hence, before analysing the responsibilities lawyers have according to the codes of conduct, it is imperative to delimit the roles that this thesis is going to focus on, as obligations can change according to what role lawyers are performing.

The American Bar Association Model Rules of Professional Conduct (ABA MRPC), notes on the preamble a simple way regarding how to divide the legal profession. It mentions that lawyers can be seen as advisors, advocates or negotiators.

All of these functions are significant. Nevertheless, the role of advisor will be the focus of this thesis. Hence, an advisor can be defined as a lawyer who is hired to

[111] As an example see *Ley Reglamentaria del Artículo 5º. Constitutional, Relatico al Ejercicio de las Profesiones en la Ciudad de México* (information only in Spanish)
[112] Seneviratne (n 92) 26
[113] Ibid 21-23

explain what the rights and obligations of a client in a certain situation are[114]. This is one of the most common roles lawyers play, as they are the experts in the legal field. Therefore, their job is to know all applicable law and case law, and how to apply them in each case. This concept is related to the title of counsellor. In some countries there are differences between 'advisor' and 'counsellor' but in this thesis, rather than focusing on the title, the emphasis will be on the action; in other words, this paper will focus on the act of explaining the rights and legal obligations that a client can have, given a particular or possible problem by a certified lawyer.

Furthermore, this thesis will focus on corporate lawyers. Thus, a corporate lawyer's job as an advisor will be to explain the consequences of the activity the client wants to achieve and what is not allowed to do.

3.2 PRINCIPLES THAT GOVERN THE ACTIVITIES OF LEGAL PROFESSIONALS.

After delimiting the scope of this thesis and analysing the connexion between lawyers and the UNGP's, the next step is to explore what rules lawyers must follow when exercising their profession.

First, it is important to stress that in all of lawyer's professional interactions, there is always contractual relationship in which a client hires a certified lawyer that will look out for his or her best interest[115].

Second, not only lawyers have different roles, but also those roles emanate particular obligations in each specific country. However, the purpose of this chapter will be, through reviewing different regulations to determine the most common principles that govern the legal profession as advisors. These principles can be found in the codes of conducts, which are the self-regulatory mechanisms that the legal profession usually utilizes to control the actions of lawyers.

Thus, to achieve this goal, this thesis uses national codes of conduct such as the ones from the Unites States of America, United Kingdom and Sweden. These countries were selected because of their importance in the international law field and also to

[114] *ABA Model Rules of Professional Conduct* Preamble
[115] The concept of "best interest" will be discussed later on this chapter.

circumvent the language barrier, as all of these codes of conduct can be found in English.

However, also regional and universal regulations will be used, such as the Code of Conduct for European Lawyers and the IBA International Principles on Conduct for the Legal Profession, in effort to give a broad (as much as the limitations of this thesis allows) scope to this research. Nonetheless, it should be mentioned that this method can be used with any code of conduct in any jurisdiction.

3.2.1 INDEPENDENCE

One of the core principles of the law practice is **independence**. As mentioned above, the right of lawyers to not be subject to harassment as a result of their practice and to be able to practice without interference from the government or third parties is utterly necessary for the rule of law.

The International Bar Association in its International Principles on Conduct for the Legal Profession (IPCLP), mentions that lawyers need to be able to act 'free from direction, control or interference' from third parties; in other words, when advising a client, lawyers need to provide an unbiased assistance[116]. The Charter of Core Principles of the European Legal Profession (CCPELP), also mentions that lawyers must be independent from influence of the State, and from 'other powerful interest' and from clients. In this way, lawyers can be trusted by third parties or other possible clients in the future, which gives a better understanding of the principle[117]. Likewise, the Code of Conduct for European Lawyers (CCEL) indicates that lawyers need to be free from all influence, 'especially such as may arise from his or her personal interests' to be able to conduct their work efficiently; most importantly, lawyers must not 'compromise their professional standards in order to please the client, the court or third parties'. Moreover, on the specific subject of this thesis, the CCEL mentions that when lawyers are in their role as advisors, they must not act in their own personal interest or pressure from other sources, otherwise the advice offered will have little value[118].

[116] International Bar Association *International Principles on Conduct for the Legal Profession* art 1
[117] Council of Bars and Law Societies of Europe *Charter of core principles of the European legal profession* (2006) Principle (a)
[118] Council of Bars and Law Societies of Europe, *European Code of Conduct* art 2.1

On the same matter, the ABA MRPC[119] notes that lawyers shall always give independent and candid advice[120]. The Solicitors Regulation Authority (SRA) of the United Kingdom, indicates in its Handbook that lawyers shall not compromise their independence[121]. The Code of Conduct for the Members of the Swedish Bar Association, remarks that an independent legal profession is essential for a society governed by the rule of law and a necessity for the protection of the rights of people. Moreover, independence is necessary for lawyers to look for the best interest of their clients. However, at the same time, a lawyer also needs independence from the client to be able to fulfil its role as an actor of justice and the law. In the specific role as an advisor, lawyers must not act on their personal interests. They need to avoid being influenced by themselves or by third parties. In this manner, law professionals can always pursue what is best for their client's interest[122].

3.2.2 CONFIDENTIALITY

Another principle that regulates the conduct of lawyers is **confidentiality**. Lawyers shall always keep private their conversations with their actual and possible clients. That is, it is the duty of lawyers to never disclose any information of their clients to anyone, including the government. It is also important to mention that this duty begins when a person (possible client) approaches a lawyer for the first time and also extends after the relation ends, so that the client is confident that all the information he or she gave to the lawyer will not be disclosed to third parties.

The CCPELP, mentions that it is not only the duty of lawyers to respect the professional secrecy, but that the rule of not disclosure of private conversations is a human right of the client[123]. The CCEL, rightly notes that it is the nature in the legal practice that clients would share information with their lawyers that otherwise would not share with anyone else; therefore, for an effective legal practice it is imperative for a client to be able to trust his or her lawyers. In this sense, part of this trust consists on the client having the assurance that his or her information will not be disclosed by his or her

[119] The American Bar Association is not the organization entitled to regulate the legal profession, its membership is voluntary, the one in charge of this in the United States of America is the bar association of each state. Nevertheless, I will use this instrument since it embodies the common practice of that country, moreover several states have incorporated these rules in their own code of conducts.
[120] ABA *Model Rules of Professional Conduct* art 2.1
[121] Solicitors Regulation Authority, *Handbook. Code of Conduct* rule 3
[122] Swedish Bar Association, *Code of Professional Conduct for Members of the Swedish Bar Association* art 1.
[123] *Charter of core principles of the European legal profession* principle (b)

lawyers with other persons[124].

Following the same idea, the ABA MRPC, declares that lawyers are not allowed to share any client's information unless the client gives his or her consent. However, it also indicates several exceptions to this rule such as to prevent certain death or harm, prevent a crime or to comply with the law or a court order, to name a few[125]. The SRA Handbook, also discusses that confidentiality is essential in the relationship between client and lawyer, and disclosure can be done when permitted by the law or with consent of the client. Moreover, it mentions that this principle must be followed by all of the employees of a law firm, not only the lawyers. In the same way, this instrument also acknowledges the duty to disclose information to clients; therefore, if a lawyer cannot disclose information to a client, he or she needs to terminate the relationship[126].

The Swedish Code of Conduct establishes the same regulatory framework as its counterparts; lawyers have the duty of confidentiality regarding the information provided by the client within the relationship arisen from the contract between them. This duty also applies to other employees of the law firm and is also in place before the relationship commences and ceases to exist. The Swedish Code also recognizes an exception to disclose information when the law allows it or if the client gives consent. It also mentions an exception when disclosure is necessary for the lawyer to defend himself or herself. Moreover, it introduces the concept of discretion, which means that a lawyer working in a law firm must not 'enquire' about matters being dealt by other lawyers in the same law firm[127].

3.2.3 CONFLICT OF INTEREST

Another principle that all lawyers need to take into consideration is the avoidance of conflict of interest. Lawyers must not begin a working relationship with a client when they know there is a conflict of interest between themselves and the client because of working related issues or personal beliefs of the lawyers. Also, if the contractual relationship has already begun and the lawyer finds out that there is a conflict of interest, he or she needs to terminate the relationship. Moreover, it is relevant to

[124] *Code of Conduct for the European Lawyers* art 2.3
[125] ABA MRPC art 1.6
[126] 'SRA Handbook' chapter 4
[127] *Code of Professional Conduct for Members of the Swedish Bar Association* art 2.2

insist that lawyers need to be aware of their duty of confidentiality when discussing a conflict of interest with different clients.

The IPCLP, notes that lawyers shall not put themselves in a 'position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client' except when the law permits it, or if allowed, the clients give consent. It also stresses that 'lawyers must not allow their own interests to conflict with or displace those of their client'. Moreover, this instrument indicates that lawyers must not use excessive influence over the client, by forcing them to give in into the lawyer's interests[128].

Likewise, the CCPELP provides better insight on when there might be a conflict of interest. It mentions that a lawyer must not represent two clients that have or might have the same interest in a specific matter. Also, this instrument indicates that lawyers shall not initiate a relationship with a client when they have possession of confidential information of a client that can affect the outcome of the mandate of another client. This principle is closely related to the other principles of independence, confidentiality and loyalty[129]. The CCEL, in the same way, states that this duty is extended if information protected by the duty of confidentiality can create a conflict of interest between former clients and new clients. In the same way, this concept applies to all members of a law firm[130].

Also, the ABA Model Rules, remarks that lawyers incur in a violation of the principle of conflict of interest if the representation of a client affects negatively another client or when a risk may arise when representing a client limits the actions of the lawyer towards his or her other clients. However, the Model Rules allows working with a client if the lawyer believes that his or her performance will not be compromised by this action; that is, it is not prohibited by the law or if the clients give their consent[131]. The SRA code of conduct reiterates that there can be a conflict of interests between the lawyer and the client or between two different clients that the same lawyer represents. Likewise, this instrument mentions that a law firm needs to have a mechanism to identify possible conflicts of interests to see if anyone at the firm is limited in his or her

[128] *International Principles on Conduct for the Legal Profession* art 3
[129] *Charter of core principles of the European legal profession* principle (c)
[130] *Code of Conduct for the European Lawyers* art 3.2
[131] ABA MRPC art 1.7

actions to act in the best interest of the client because of financial interests, personal relationships, the appointment of the lawyer or the lawyer's family to public office, commercial relationships or the lawyer's employment[132].

Furthermore, the Swedish code of conduct provides another view of how to identify possible conflict of interests; if the lawyer has assisted or is currently working with the opposing party in the same matter, the knowledge given in confidentiality to the lawyer might be at risk. It would be a similar situation if the lawyer or a close family member has an interest in the matter. In this manner, this instrument adds a broader scope by stating that there can be a conflict of interest if there is any circumstance that limits the lawyer's actions to look for the best interest of his or her client. It also mentions the lawyer when reviewing the mandate that he or she is going to take, discovers that there might be a conflict of interest with another client, and he or she cannot share this information with the new possible client because of the principle of confidentiality, then the lawyer should reject the new mandate[133].

3.2.4 COMPETENCE

Another principle that lawyers have to honour is that these professionals need to conduct themselves with competence and on time. In this way, lawyers must have the proper legal knowledge to be able to advise their clients. This requirement is usually achieved when a lawyer is certified by a legal association to exercise the profession of law. Nevertheless, besides this professional condition, it is imperative that lawyers be aware of new legislation and case law that might affect the interests of their clients.

On this subject, the CCPELP declares that lawyers shall not take on a case in which he or she does not have the knowledge to proper advice or represent his or her client. Rightly, this instrument stresses that law is changing at a fast pace and therefore, it is the responsibility of the lawyer to keep up with his or her own professional development[134]. In the same manner, the ABA model rules mention that lawyers need to have the necessary skills and knowledge to be able to perform an adequate job of advising or representing their clients. Moreover, lawyers need to be aware of

[132] 'SRA Handbook' chapter 3
[133] *Code of Professional Conduct for Members of the Swedish Bar Association* article *3.2*
[134] *Charter of core principles of the European legal profession* principle G

changes in the law and stay up to date through continuing education[135]. Additionally, when giving advice, it is essential to not take the law into consideration, but also consider other factors that might be relevant such as '**moral, economic, social and political**' aspects[136].

The SRA code also indicates that lawyers need to act with competence regarding the circumstances of each case[137]. Furthermore, when the instrument makes a reference regarding how a law firm should be managed, this instrument indicates that it is the responsibility of the law firm to train and keep the competence of all its lawyers to achieve an appropriate work[138]. The Swedish Code of Conduct regarding this principle mentions that to maintain their competence when advising or representing a client, lawyers need to constantly monitor the development of the law and continue with his or her training[139].

Finally, it is important to reflect on what the Peer Learning Process reported: 'Concerns have been expressed that, in the future, clients may consider malpractice lawsuits against firms that failed to incorporate business and human rights considerations where that was needed for the specific advice sought'[140]. Therefore, sooner or later, law firms will not only be demanded by their clients that their lawyers can advise on business and human rights, but if they fail to do it, clients might take legal actions for this omission.

3.2.5 CLIENTS' INTERESTS AS PARAMOUNT

Another principle that governs the conduct of lawyers is that they shall always treat their client's interest as their main objective. In this way, once their relationship begins, the client's needs will become the lawyer's interest, and the lawyers shall always look over the interest of the client. Nevertheless, this principle has limits set by the law and the codes of conduct, even if clients request their lawyers to promote their interest "no matter what", the actions of lawyers will be restricted by the law and

[135] ABA MRPC rule 1.1
[136] ABA MRPC rule 2.1
[137] 'SRA Handbook' art 1.5 first section
[138] Ibid, Second section O 7.6
[139] *Code of Professional Conduct for Members of the Swedish Bar Association* art 2.5
[140] 'Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report' (2016) 15

the rules that govern the profession of law.

On this subject, the IBA instrument declares that this principle is closely related to the concept of 'conflict of interest', as if lawyers aim to give the best advice for a client, they need to be free from any influence of third parties and their own. However, the actions of lawyers are always restricted by their duties to the courts, the law, justice and the ethical standards[141]. The CCEL insists that lawyers shall always put the interests of their clients before their own. Lawyers need to always act in the best interest of their clients. Nevertheless, the actions of lawyers are always subject to the law and rules of the codes of professional conduct[142]. Moreover, the ABA Model Rules mention that lawyers shall always stand for the clients' interests, and the clients are the ones who determine what this means. In other words, the clients are always in the highest position in the contractual relationship between them. However, even if clients are the highest authority in this relationship, lawyers are restricted by the law and professional code of conducts; also, lawyers are the ones that have the special and technical knowledge of the law, that is why the client and the lawyer need to discuss what are the outcomes they expect form this relationship[143].

On the same subject, it is interesting that the first principle that the SRA code mentions is that lawyers must always uphold the rule of law, as lawyers also have obligations to the courts and the public interest. It also references that lawyers must act in the best interest of their clients by always acting in good faith, representing their clients with the highest respect to the principles of confidentiality and avoiding conflict of interest[144]. Moreover, the Swedish code mentions that lawyers shall always show loyalty to their clients and are obliged to always act in the best interest of their clients 'within the established framework of the law and good professional conduct'. Moreover, this instrument states that lawyers 'must not promote injustice'[145].

There are other principles inside the codes of conduct that govern the practice of law; nevertheless, the ones mentioned above are the ones that have a greater impact on this thesis. Furthermore, after analysing them, it is clear that they are all

[141] *International Principles on Conduct for the Legal Profession* art 5
[142] *Code of Conduct for the European Lawyers* art 2.7
[143] ABA MRPC art 1.3
[144] 'SRA Handbook' principles 1 and 4
[145] *Code of Professional Conduct for Members of the Swedish Bar Association* art 1.

interconnected, and they are all necessary for lawyers to provide an appropriate advice to their clients, looking always for the client's **best interests**, but also honouring the profession of law and their duties to the State and the public interest.

3.2.6 BEST INTEREST OF THE CLIENT

Before moving on to the next chapter, it is also important to explore what "the best interest of the client" means. First, lawyers can have different types of clients. A person accused of committing a crime will search the aid of a lawyer to prove his or her innocence. Therefore, providing sufficient evidence and creating good arguments to achieve this goal will be the in the best interest of the client. Another good example would be the case of an individual or individuals who seek legal advice to adopt a child. In this case the goal of the lawyer will be to prove to a court or government agency that it is in the best interest of the persons and the minor that the adoption is successful. Likewise, a person that is having immigration problems will seek the assistance of a lawyer to help him or her to achieve his or her immigration status. Consequently, the best interest of the client will be to find a solution to the client's immigration status problem.

In these examples, finding the most beneficial steps in the best interest of the client is frequently self-evident as there are actual persons involved, who can speak for themselves to let the lawyer know what their intentions are. However, when companies are involved, the answer to what the best interest of the client is gets complicated.

Companies are entities that even if they have a legal personality, they cannot make decisions on their own. All of these resolutions are to be made by an actual person. On this subject, the ABA model rules mention that companies can act through its constituents, who can be directors, officers, shareholders or any other member of the enterprise allowed to make decisions representing the company[146].

For the purpose of this thesis, it necessary to set a clear between shareholders and others. First, a stakeholder is any person that is affected by the activities of a company[147] and a shareholder is 'an individual, institution, firm, or other entity that

[146] ABA MRPC comment on rule 1.13
[147] Christine A. Mallin, *Corporate governance* (Oxford University Press, 2016) 65

owns shares in a company'[148]. Directors or officers are those in charge of the decision making for the company. That is, they have the responsibility to run the company, in other words the manager of the business.

3.2.6.1 INTEREST OF THE COMPANY

Each particular business has its own objective that differs from one to another depending on the nature of the enterprise. For example, the specific activity or goal of a mining company is to extract minerals. However, in this thesis, the objective is to find out what is the **ultimate interest of companies** in general that lawyers should fight for, as something different from their specific objective.

To understand what the interest of any company as a whole is, it is necessary to look at the **corporate governance** scheme.

Thus, the UK corporate act mentions that it is the duty of directors to 'promote the success of the company for the benefit of its members as a whole'. To achieve this goal, they have to take into consideration the long-term consequences of any decision, 'the interest of the company's employees' and 'the impact of the company's operations on the community and the environment'[149], amongst others. To measure this success, the law requires that the directors write a report to inform how the representatives of the company have performed, so the success of the company can be assessed[150].

According to the Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, several jurisdictions adopt the "enlighten shareholder" approach which indicates that 'the company's best interests can correspond to the interests of a range of actors, extending beyond those of the shareholders, if such consideration promotes the company's long-term success'[151]. However, it also remarks that in some jurisdictions, the interest of companies is translated into the interest of the shareholders[152].

This instrument also mentions that in the United Kingdom the success of the company

[148] Ibid 65
[149] Companies Act (2006 UK) s 172
[150] Ibid s 417
[151] Human Rights Council *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises* (23 May 2011) para 57
[152] Ibid 56

also includes the necessity to maintain a high reputation. Nevertheless, directors can risk damage to the company's reputation if this can help the company's long-term value[153]. Moreover, directors can be hold accountable 'for failing to avoid legal risk and reputational damage', even though this can be difficult to prove in a court[154].

Professor Radu Mares in his book *The Dynamics of Corporate Social Responsibilities* quotes the Millstein Report that states: 'Generating economic profit so as to enhance shareholder value in the long term, by competing effectively, is the primary objective of corporations in market economies'[155]. Mares also quotes the Company Law Review Steering Group which mentions: '(…) the interest of members at any time consist of an interest in the value of the enterprise as a revenue generating entity in the future, including the medium and longer term'[156]. Moreover, in the United States system 'the best interest of the corporation is generally understood to coincide with the best long-term interest of the shareholders[157].

The American Law Institute mentions that the interest of a company is to 'enhancing corporate profit and shareholder gain' and to 'maximize their wealth for the benefit of their shareholders'[158]. On this subject, in France, the Vienot Report I, declares that the company's interests stand separate from the ones of shareholders, employees and others. It also stresses that the objective of all those involved in a company (stakeholders) is precisely that the company remains in business and prospers[159]. Furthermore, in the case of Germany acting in the best interest of the company can be understood as 'to increase the sustainable value of the enterprise[160]. Moreover, in the Netherlands the objective of a company is understood as to continue its own existence, that is, to have a 'sustainable, stable, and continuous growth'[161].

Thus, it can be concluded that the ultimate goal of any company, or in this case the "best interest" of the client –an enterprise– that corporate lawyers must fight for is, over all things, **profitability in the long term**. That the investments of shareholders

[153] Ibid 62
[154] Ibid 64
[155] Radu Mares, *The Dynamics of Corporate Social Responsibilities* (Martinus Nijhoff Publishers 2008) 31
[156] Ibid 32
[157] Ibid 22
[158] Ibid 33
[159] Ibid 35
[160] Ibid
[161] Ibid 36

generate revenue without harming the reputation of the company, otherwise this damage will lead to economic loss. Also, this profitability should be measured in a medium or long-term perspective. This way, the company can be in business generating profits for a long time.

As an example on this subject, the Swedish Law Firm on its 2017 sustainability report, mentions on the subject of long-term value: 'We integrate human rights, working conditions, the environment, as well as business ethics and anti-corruption in our advice, ensuring we remain a long- term partner for our clients and inspire their confidence'[162].

3.3 SUMMARY.

This chapter has explained how the profession of law is regulated. Likewise, after exploring different codes of conduct, it has set five core principles that lawyers must follow when providing their services as advisors to corporate clients. Finally, this section has defined what lawyers should understand when referring to the company's best interest.

Thus, several questions arise, should lawyers enquire their clients and determine what are their intentions further than the job they were hired to do if they suspect there could be human rights abuses as a consequence of this? Does this action contravene the professional obligations of lawyers? And, what can lawyers do if tensions emerge with the manager of the company? The answers to these and other questions regarding this subject will be analysed in the next chapter.

[162] Mannheimer Swartling, 'Annual and sustainability report 2017' <https://www.mannheimerswartling.se/globalassets/arsrapporter/annual-and-sustainability-report-2017.pdf> accessed 23 May 2018

CHAPTER FOUR: BEYOND THE LAW, HUMAN RIGHTS DUE DILIGENCE OF LAW FIRMS.

The focus of this thesis is the role of lawyers as advisors. Consequently, this role is not compatible with a "causing" scenario and therefore, the function of lawyers being directly responsible for resolving cases regarding human rights abuses will not be examined in this work.

Hence, as noted above, lawyer's performance on their role as advisors is regulated by professional code of conducts. Therefore, the next step is to analyse the relationship between these rules and the expectations of the UNGP's.

Different expectations arise when lawyers contribute or are directly linked to human rights abuses. For a better understanding of what is expected from law firms, this thesis will follow the table provided by the IBA Practical Guide on Business and Human Rights for Business Lawyers[163].

4.1 HUMAN RIGHTS COMMITMENT

First, in both of these scenarios, law firms are expected to show a human rights commitment. It is important to remember that this commitment should be approved by the most senior level at the law firm and should take into consideration all stakeholders. Human rights expectations of the personnel and business partners should be included. Here, a unique difference from other enterprises begins, and a question arises: Should law firms in their public commitment to respect human rights address their expectation of clients to do the same? Yes. However, it is important to mention that this thesis concentrates on the role of advisor, and therefore, the function of the lawyer representing a client in court remains out of the central topic.

Having a public commitment to respect human rights does not contradict any of the principles that govern the legal profession mentioned in Chapter 2, as a public commitment to respect human rights does not infringe the independence of lawyers, nor does it violate the principle of confidentiality. Moreover, this commitment shows

[163] International Bar Association *Practical Guide on Business and Human Rights for Business Lawyers* (2016) 33-37

clients that the law firm is competent, and their lawyers are trained not just in technical legal advice. It also demonstrates how companies should address their human rights responsibilities, which if not attended they could escalate and result in economic harm to the company.

Furthermore, these human rights responsibilities are voluntary at the time, but little by little are permeating in the domestic field, such as the Modern Slavery Act of the UK. Hence, a public commitment shows proof that lawyers of the law firm have this knowledge and provides an added value to the services provided by law firms.

On this subject, it is also important to state that according to the 2016 Report on Law Firm Business and Human Rights Peer Learning Process, 'Demand for advice on legal and non-legal risks associated with involvement in adverse human rights impacts has been steadily rising in recent years'[164]. Also, 'clients are increasingly asking their law firms for evidence of commitment to human rights'[165].

For example, the website of the law firm Mannheimer Swartling, mentions their commitment to provide advise taking into consideration 'UN's Global Compact: human rights, labour, environment and anti-corruption'[166]. However, not all law firms have done this. For instance, the law firm Gernandt & Danielsson, on its website mentions the commitment to their client's best interest, and the loyalty to their clients, but there is no mention of their commitment to human rights[167]. This are just two different examples of law firms in Sweden with different approaches on how they practice their profession.

It is important to remember that the UNGP's do not create new responsibilities to businesses. However, possible conflicts or tensions can be avoided early on. As said above, giving that law firms are subject to the free market, **a client can decide** the kind of law firm they will hire, one that cares about respecting human rights or one that does not. However, this decision can also show the company's commitment to human rights and their own UNGP's expectations.

[164] *Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report* 8
[165] Ibid 13
[166] Mannheimer Swartling, 'Corporate Sustainability and Risk Management'<https://www.mannheimerswartling.se/en/expertise/practice-areas/corporate-sustainability-and-risk- management/> accessed 23 May 2018
[167] Gernandt & Danielsson, 'Values' <https://www.gda.se/en/about-gd/values/> accessed 23 May 2018

4.2 ASSESSING HUMAN RIGHTS IMPACTS.

The next expectation mentioned on the IBA guide, is that law firms should assess the impact of their activities on stakeholders. 'This includes risks from the firm's overall operations and risks from the services it provides to a client'[168].

This expectation can be divided into two categories: before and after the mandate starts to exist.

4.2.1 BEFORE THE MANDATE

As it has been mentioned in this work, law firms are a particular kind of business. Clients will not just hire a law firm to represent them without a prior conversation. Usually, clients and lawyers meet and talk about what the client's expectation from the lawyers, who can accept or reject this mandate.

When negotiating a possible mandate, clients need to feel that they can trust their lawyer, so they can tell them the exact interest and result they are seeking. Thus, the principle of confidentiality becomes of utterly importance as this trust can only be achieved if the clients are certain that the lawyer will not disclose any information that they have provided to their lawyer.

After both, lawyers and client achieve an understanding on what is expected from the law firm, the former should not only see if the goal expressed by the client is according to the law but should also asses if this goal does not contravene human rights standards of stakeholders.

This action does not go against the principles embedded in the codes of conduct. Moreover, these codes encourage lawyers to follow this approach, as they urge lawyers not to be only aware of the applicable law, but of other factors that could negatively affect their clients, for example, human rights abuses.

Here, it is important to make a distinction between contribution and direct linkage.

As already noted above, when lawyers **contribute** to human rights abuses, they know the intentions of their client is. They are also aware that by advising their client

[168] *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (n 96) 39

and helping him or her to achieve his or her goal, they will contribute to the violation of human rights of stakeholders. Thus, a proper assessment or in other words, a proper conversation with clients becomes essential. This way, if lawyers realize the negative intentions of the potential client, it is expected that lawyers should reject the mandate. This idea will be discussed later in this chapter.

However, as it has been shown identifying a **direct linkage** to a possible client is far more complex. In these cases, usually lawyers act in "good faith", as they are hired to perform a specific job. Thus, two questions arise: Should lawyers go beyond their usual responsibilities and enquire as to what the client is planning to accomplish with the help lawyers provide? And, does this contravene professional codes of conducts?

The answer to the first question is **yes**. Lawyers should ask more questions to their clients to comply with the expectations of the UNGP's, as this is the only way lawyers can have a better and a broader understanding of what their clients are actually seeking to achieve with the help of their lawyers. In this sense, the Reference Annex mentions three different question that can help law firms to asses' possible linkages to human rights abuses:

'Who are the stakeholders whose rights may be affected by the activity or project for which legal advice or services are being sought? What is the severity of a potential impact? What is the likelihood of potential impacts, based on the client's operating context, business relationship context and management system context?'[169].

Regarding the second question, the answer is **no**, enquiring clients about their human rights impacts does not contravene professional obligations of lawyers towards their clients.

First, as seen in this thesis, all the conversations of clients with lawyers are under the protection of the principle of confidentiality, even those that occur before the beginning of the mandate. In this way, possible clients can speak freely with the law firm and be assured that lawyers will not disclose any information that is revealed to them. And, lawyers are allowed to ask any question regarding their mandate, knowing in advance that, if a law firm is directly linked to human rights abuses, this fact can hurt the law firm's reputation and business.

[169] Ibid 40

Moreover, lawyers must always look for the best interests of their clients and having these conversations prior to the beginning of the mandate help achieve this obligation of lawyers.

As stated, the interest of companies is to be profitable in the long term without damaging their reputation, which would translate into economic loss. Thus, sharing their goals and expectations with the most detail possible, enable lawyers to help them achieve their ultimate goal. Moreover, in the case that clients don't do this, lawyers should enquire them to find out all the aspects of the client's goal, thus, lawyers can advise their clients and look out for their interests in the best way possible.

Furthermore, it is essential to mention that law firms have obligations with possible, actual and future clients[170], thus assessing the possible human rights risk of taking new clients would strengthen the law firm's commitment to human rights. These actions, will fortify the confidence of possible future clients that want to partner with a law firm that respect human rights.

On this subject, the 2016 Report on Law Firm Business and Human Rights Peer Learning Process mentions that some law firms 'are taking steps to reflect on actions that would be required to integrate human rights into the firm's risk mapping and client acceptance procedures'[171], and that 'firms operating in England and Wales are required to have processes in place to assess client risk in the area of money laundering, and may be leveraging these existing processes to integrate a human rights lens into efforts to map client risk'[172].

4.2.2 DURING THE MANDATE

It is important to remember that human rights due diligence should be an ongoing process. Thus, even if law firms comply with the UNGP's expectation of identifying possible human rights violations as a result of the law firm's business relationships before the mandate begins; that is, before the signing of the contract that binds the law firm with its client and determine that there are no risks of human rights abuses;

[170] Discussed on Chapter 3
[171] *Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report* 12
[172] Ibid 19

later on, the law firm can discover that the circumstances have changed during the life of the mandate. Thus, law firms should establish mechanisms to continuously assessing how they are affecting the human rights of stakeholders by advising their clients[173].

On the effort that this thesis is not repetitive, it is important to say that assessing possible contribution or direct linkage to human rights abuses after the creation of the contractual relationship between clients and lawyers does not contravene the obligations of lawyers under professional code of conducts. In this sense, the principles of confidentiality, independence, best interest of the client and conflict of interest, are not violated by this action. Moreover, these principles govern the relationship even before it legally begins. Most obligations of lawyers start the moment a possible client approaches the lawyer to negotiate the terms of the mandate, as demonstrated above.

Furthermore, the argument of the best interest of the client gains more weight because there is a contractual obligation of lawyers to pursue the best interest of the client and seek its achievement as a contractual priority. Thus, if lawyers are suspicious that human rights are being violated as a result of the activities of the company, lawyers should enquire the managers or those responsible of the operations. In this way lawyers would be able to advise them and help them to find a solution that will not injure the company economically nor its reputation and thus, will not contribute or be directly linked to human rights abuses.

It should be remembered that clients hire lawyers because of their special knowledge. Moreover, according to the professional codes of conducts, it is the lawyers' obligation to be aware of not only any law that may impact their client but also any factor that may harm a company and use this knowledge to do their job, which is to look for the client's best interest.

In this sense, a new question emerges: if a law firm finds out that it is contributing or is directly linked to human rights violations, what steps should a law firm take regarding this issue?

[173] International Bar Association*, Practical Guide on Business and Human Rights for Business Lawyers* (n 162) 35

4.3 INTEGRATING AND ACTING UPON INVOLVEMENT IN HUMAN RIGHTS IMPACTS ACTUAL AND POTENTIAL.

It is important to insist that business lawyers are hired to advise and lookout for the interest of a company, a legal entity and not lookout for the interest of the people that the company acts through. Correspondingly, companies have a specific goal: to be profitable in the long term without risking their reputation or economic loss.

4.3.1 BEFORE THE MANDATE

When negotiating a new mandate with a new client, if the law firm recognizes that the goal the client has in mind —for which he or she is seeking advice from the lawyer— can violate human rights of stakeholders, the lawyers are expected to notify his or her client that the activity pursued will lead to a human rights violation and should guide and advise the client regarding how he or she can fulfil his or her human rights responsibilities.

There is no impediment to lawyers on taking this action. Lawyers are hired to help their clients. Therefore, by letting the client know about not only their legal obligations but also their human rights responsibilities according to the UNGP's, lawyers are acting correspondingly to the principle of competence by pursuing the interest of the client as paramount. Failing to comply with their human rights responsibilities can lead to an economic loss to the client.

In any case, if the client persists on the initial idea after the law firm has informed them that the activity intended can violate human rights of stakeholders, lawyers are expected to **reject** the mandate.

Again, the UNGP's do not create new responsibilities for lawyers; they would be legally obligated to reject the contract only if the mandate involves advising a client on illegal matters. The Swedish Code of Conduct illustrates this type of situation through its first rule: 'An advocate must not promote injustice'. In this section the code indicates: 'It goes without saying that an advocate must not aid crime'[174]. Also, the Code of Conduct for European Lawyers mentions on the commentary regarding the article

[174] *Code of Professional Conduct for Members of the Swedish Bar Association* rule 1 commentary

3.1, that lawyers that lawyers generally have the right to refuse a mandate[175].

Hence, if the law firm does not wish to contribute or be directly linked to human rights violations, it should reject the mandate. It is evident that this type of action does not contravene the rules set by the code of conducts, as lawyers have the right to independently provide their services to whomever they want. On this subject the Swedish Code of Conduct is very clear, rule 3.1 states: 'An advocate is not obliged to accept a mandate offered'[176].

It should be stressed, that this thesis focuses on the analysis of lawyers' in their role as advisors. Thus, if a client is seeking a defence lawyer because they have already violated human rights, and needs representation in a court, then, the client has the human right to have legal representation in court to be defended. However, this situation goes beyond the scope of this thesis.

Moreover, the principle of conflict of interest imposes a duty to lawyers to always treat their client's interest as paramount, without interference from third parties and their own. Therefore, if lawyers already have a public letter that states their commitment to respect human rights, it is expected that the law firm will not accept a mandate where their lawyers would contribute or would establish a direct link with human rights violations as a result of the activities of the company they are advising.

Also, it is important to mention that lawyers are bound by the principle of confidentiality; thus, if they discover that the company with which they are negotiating a mandate will violate human rights, lawyers cannot disclose this information. Rather, they are only allowed to reject the mandate. Yet, a window opens if the actions of the company are considered to be international core crimes, like the ones prescribed by the Statue of Rome. Then lawyers should be able to disclose this information, as these violations are considered crimes against humanity. One example of this situation would be if a company seeks the assistance from a law firm to establish anonymous off-shore corporations to avoid international embargoes in order to fund the bombing of civilians during that country's civil war[177]. In this case, it is expected that lawyers disclose this information.

[175] *European Code of Conduct* article 3.1 commentary
[176] *Code of Professional Conduct for Members of the Swedish Bar Association* rule 3.1
[177] *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (n 96) 42

On this subject, the ABA Model Rules, precise that lawyers can disclose information if they think that their clients will commit a crime, a fraud or, if by disclosing information, lawyers can prevent certain death and bodily harm[178]. Also, the Swedish code of conduct states that 'to avoid violation of the anti-money laundering legislation, the Advocate must report a client to the police'[179]. Hence, disclosing information when a law firm finds out that the company that they are working for, is planning or is already committing gross human rights violations does not contravene the principle of confidentiality.

4.3.2 DURING THE MANDATE

4.3.2.1 ADVISING USING LEVERAGE.

The lawyers' role as advisors puts them into a particular position toward their clients. It is undeniable that corporate lawyers are also hired by companies as any other individual but cannot be placed in the same position, as a result of the specific technical knowledge they have and the particularity of their services. Consequently, lawyers are in a privileged situation where they can guide the representatives of the organization to make better decisions. Therefore, when lawyers are in their role as advisors, it is expected that they use this privileged position to guide their clients on a path that respects human rights.

On a first glance, this action might seem as if the law firm were to impose its agenda on the client and therefore, a violation to the principle of conflict of interest. Nevertheless, this assumption is incorrect.

It is imperative to emphasize that lawyers are hired to pursue the interest of their client. Hence, if a law firm is hired to advise a company that wishes to be profitable in the long-term, the law firm will make the effort to direct the enterprise to reach its goals without damaging its reputation.

Therefore, using leverage to guide a company to respect human rights is an action prohibited by the principles embedded in codes of conduct. First, the law firm already should have a public commitment to respect human rights, and thus, the client would

[178] ABA MRPC rule 1.6
[179] *Code of Professional Conduct for Members of the Swedish Bar Association* rule 3.7.2

be aware that respecting human rights is a core value of the law firm. Second, as discussed before, even if the company is not violating any legal provision, if an activity causes a negative effect on the human rights of its stakeholders, this will translate into an injury to the reputation of the company, which will lead to an economic loss; therefore, the company would no longer be profitable in the long term. This would mean, that the law firm did not do everything in its power to help the company to achieve its ultimate goal, and at the same time, the law firm would have failed at doing its job.

Moreover, the Reference Annex mentions that 'these professional obligations do not restrict a lawyer's ability to advise a client in confidence of the steps that the client can take in the client's best interests to avoid or mitigate harming human rights under the UNGPs'. This document, also says that '[t]he ability of a lawyer to provide such advice may vary'. If the national law already protects human rights, then the lawyer just needs to advice his or her clients on how to comply with the law. However, if the law does not provide these forms of protection or it is ambiguous, lawyers should guide their clients regarding the mitigation or avoidance of negative effects on the human rights of their stakeholders. Nevertheless, there is no guarantee that clients will listen to their lawyers[180].

On this subject, the 2016 Law Firm Business and Human Rights Peer Learning Process mentions that '[w]here law firms find that they could be directly linked to negative impacts through their advice, they are asked to build and exercise leverage (…) to prevent or mitigate these impacts'[181].

4.3.2.2 REPORTING UP

Generally, the interests of directors or managers are aligned with the ones of the company they administrate and represent. However, this is not always the case. Likewise, it is important to make a difference between risky decisions of directors in pursuit of the best interest of the company, and clear actions of directors acting in their own interest.

In this sense, directors have two duties: the duty of loyalty and the duty of care. Within

[180] *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (n 96) 43
[181] *Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report* 22

the second one, directors have a broad margin of action where the law allows them to take risks to make the company more profitable. This margin of action is necessary to provide directors the tranquillity that if they take risks to make the company more profitable and the plan does not succeed, they won't hold any legal reasonability. The magnitude of this right is seen in the interaction with courts, as it is not in the judge's jurisdiction to decide whether a director's idea was a suitable business move. Thus, judges can only act if it is clear that the director acted with the intention of damaging the company and for his or her own interest[182].

Lawyers are hired to look for the interest of the company; therefore, if a director is taking a risky decision that can negatively affect the human rights of the company's stakeholders, lawyers should "report up" to the next person in hierarchy until they reach the highest point. This includes even the shareholders, as this risk can injure the company.

This action does not contravene the principle of confidentiality, since, as noted several times, lawyers represent the legal entity and not the directors. Lawyers owe loyalty to the company, not to individuals working for the company. Also, this action does not involve sharing information with outsiders; consequently, lawyers will not violate the principle of confidentiality.

On this subject, the ABA model rules precisely mention that lawyers represent the organization that hires them. Then, it continues to declare that if a lawyer working for an organization is aware of a potential action by a company representative that will violate the law and will likely injure the organization, the lawyer is obliged to 'refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority'[183].

Moreover, the action of reporting up, was vastly discussed after the Enron scandal[184], but this duty should not be constrained only to frauds, rather, it should also cover the possible negative human rights impacts, consequence of the director's decisions. First, if lawyers don't "report up" they can contribute or be directly linked to human rights

[182] Mares, *The Dynamics of Corporate Social Responsibility* (n 155) 28
[183] ABA MRPC rule 1.13.
[184] Jill E. Fisch and Kenneth M. Rosen, 'Is There a Role for Lawyers in Preventing Future Enrons' [2003] Villanova Law Review 1097

abuses. Second, more than just being allowed by the professional codes of conduct, lawyers have a duty to the company to always look for their best interest. Thus, reporting up will fulfil the expectation of the codes of conduct and the UNGP's.

Also, this action does not cause a conflict of interest. As stated in other sections of this work, the contractual obligations are to the legal entity and not to the directors. Moreover, companies hire lawyers because of their special knowledge to defend their interest. Thus, it would be a violation to the principle of competence if lawyers do not take into consideration all the factors that could potentially hurt the company. Therefore, if lawyers do not report to a higher authority within the company that a plan proposed by a director might be a risk or it is already having negative effects on the human rights of stakeholders, lawyers will fail on the job they were hired to accomplish.

Finally, it is important to mention that the use of leverage with clients and working on increasing this leverage 'should continue to be supported by leadership across the profession and by its professional bodies, regulators and leading law schools and professional education providers'[185].

4.3.2.3 WITHDRAWAL

It is important to mention that withdrawal from the client should be considered as a last resort. Lawyers should talk, negotiate and guide to comply with their commitment to look after the best interest of the client. However, if there were disagreements between lawyer and client, the former must not walk away from the case as a first option. Lawyers must be aware that they are bound by a contract with their clients and withdrawing is strictly regulated by the codes of conduct.

On this subject, the Swedish Code of Conduct declares that lawyers cannot withdraw from a mandate unless the client gives his or her consent. However, this document also mentions that the consent of the client is not required if 'the client **instructs** the Advocate to handle the mandate in a manner which is **futile** or **contrary** to the best interests of the client, and despite being made aware thereof, maintains the

[185] *Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report* 23

instruction'[186]. The CCEL, mentions that lawyers have the right to withdraw from their mandate, however they need to ensure that the client has time to find other legal assistance to prevent an injury to the client[187].

Also, the SRA handbook indicates that lawyers should consider 'cease to act' if they cannot act on the best interest of the client[188]. Moreover, it remarks that if a lawyer has to cease to act for a client, it is essential to explain to the client possible alternatives to continue pursuing their matter[189]. Furthermore, lawyers should not stop acting for their client without a good reason and without providing a reasonable notice[190].

Likewise, the ABA Model Rules declares that lawyers can withdraw from the representation of a client if the mandate will result on the violation of the code of conduct or another law. In reference to the same topic, these rules mention that a lawyer can withdraw if he or she believes that the course of action the client is **persisting** on, will result on a crime or a fraud, or if the client has used the services of a lawyer to commit a crime or a fraud. Furthermore, the model rules refer that lawyers have the right to withdraw if 'the client insists upon taking action that the lawyer considers **repugnant** or with which the lawyer has a fundamental disagreement'[191].

After looking at these examples, it is clear that withdrawing from a representation is more complicated than just rejecting the mandate when negotiating with the client. First, it is the right of lawyers to withdraw from a mandate; however, there should be a **valid reason** for this action; also, lawyers need to provide their clients **time** and **guidance** regarding their next steps and actions on what to do with their matter.

Thus, withdrawing because lawyers do not wish to contribute nor want to be linked to human rights abuses by advising their clients, does not contravene the rules that regulate the conduct of lawyers. As insisted throughout this thesis, the main responsibility of lawyers is to look for the best interest of their clients. If lawyers cannot perform their duties because the representatives of the company are careless

[186] Code of Professional Conduct for Members of the Swedish Bar Association rule 3.6; emphasis added
[187] *European Code of Conduct* rule 3.1.4
[188] 'SRA Handbook' chapter 1 IB1.7
[189] 'SRA Handbook 'chapter 1 IB 1.10
[190] 'SRA Handbook' chapter 1 IB1.26
[191] ABA MRPC rule 1.16

regarding the potential or real damages to the company, then lawyers should withdraw to avoid acting against the best interest of the company.

Moreover, law firms are also enterprises and have their own human rights responsibilities. Thus, by associating with clients who abuse human rights, the law firm's own long-term profitability would be at risk, as their own reputation can be harmed which will also be translated in economic loss. Also, more and more clients want to hire law firms that respect human rights[192].

On this subject, the Reference Annex mentions that withdrawal should be considered as a last resort: 'Moreover, staying in the relationship, and continuing to try to advance the business case to the client of preventing and mitigating human rights impacts (within the scope of the attorney client relationship), may serve the purposes of the UNGPs better than leaving (if that is possible) and being replaced by another firm whose lawyers say nothing about the client's potential human rights impacts'[193].

However, withdrawal from a mandate as a result of facing "evil" has been a discussion in the law profession for a long time. What should lawyers do? Should they just retreat? Should they try to aim for the lesser evil? These enquiries were particularly discussed after World War Two[194]. However, for the purpose of this thesis when facing human rights abuses perpetrated by their clients, lawyers should seriously consider withdrawal only as a last resort. Initially, they should use the leverage[195] they have at hand. Regarding this issue, the 2016 Peer Learning Process mentions that '[i]n practice, firms may find that they have more opportunity to positively influence human rights by accepting the transaction and working with the client to minimize risks to human rights over time'[196].

Hence, taking all of the above in consideration, if lawyers know that the activity pursued by the representatives of the company will become harmful, once lawyers have taken the previous steps, they are allowed to withdraw. Otherwise, if they continue in the mandate, lawyers would be considered accomplices of the injury to the

[192] *Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report* 13
[193] *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (n 97) 44
[194] Hans Petter Graver, *Judges Against Justice* (Springer 2015)
[195] Advise, guide and report up
[196] *Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report* 23.

company's best interest. In this way, lawyers will be breaking the most important principle regulated by the codes of conduct, which is to lookout for their client's best interest.

Furthermore, there are drastic instances in which the relationship –between law firm and client– may be crucial for the law firm to survive and avoid bankruptcy. In this case, the law firm should be ready to deal with the reputational, financial or legal consequences[197].

However, even if the law firm continues with the mandate, their lawyers should at all times try to use its leverage to guide the client in a path where the company no longer violate the human rights of its stakeholders[198].

Moreover, it is essential to emphasize that if the law firm stays in a mandate where its clients are abusing human rights, this action could change the level of involvement of the law firm from direct linkage to contribution. Additionally, even if the law firm were to provide *pro bono* services or donate money to charity, this does not 'offset a failure of its duty to respect human rights'[199].

4.3.2.4 DISCHARGE.

It is essential to state the consequences that using leverage can have on law firms. First, clients have the right to discharge their lawyers at any time. However, the consequences of this action should generally be discussed before the mandate and should be written in the contract[200].

Thus, there are instances when representatives of the company discharge their lawyers because the former insist on taking the route of their initial plan, against what the lawyers have advised them. In this type of cases, the ABA model rules mention that lawyers 'shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge'[201]

However, the point of the human rights due diligence consists on avoiding this level of

[197] UNGP's art 19 commentary
[198] Ibid
[199] UNGP's art 11 commentary
[200] ABA MRPC Comment on rule 1.16
[201] ABA MRPC rule 1.13

confrontation. If the law firm has a human rights public commitment, the company that wishes to hire the former, will be aware of the way that particular law firm provides its services and if the goals of the company does not align the values of the firm the enterprise has the option to hire other one that does not address its human rights responsibilities. However, the decision of the company will also show its level of commitment to its own human rights expectations.

4.4 TRACKING

This expectation from the UNGP's does not cause too many issues, as tracking means to evaluate how the law firm's advising to companies has impacted the human rights of stakeholders. This is an internal process that doesn't involve the clients; therefore, it is not an action prohibited by codes of conduct.

Yet, it is important to mention how law firms can achieve this expectation. On this subject, the Reference Annex mentions several recommendations on how law firms can track their success when dealing with clients that can or are harming the human rights of stake holders. In this case, one can ask, did the law firm appropriately identify the potential human rights risk when negotiating the mandate with the client? Did the lawyers discuss the risks with the client? If the circumstances changed, did lawyers act on them? If there were human rights abuses by the company, what did the law firm do? Finally, what did the law firm learn from the mandate?[202]

4.5 COMMUNICATING

First, it imperative to remember that one of the most important principles that govern the legal profession is confidentiality. On the other hand, the expectation of communicating includes disclosing information to third parties, which is strictly regulated by codes of conduct, as trust is a core value within the client lawyer relationship. Thus, law firms are not allowed to disclose any information about their clients. Nevertheless, there are still some alternatives where law firms can act while maintaining respect to their human rights responsibilities.

On one hand, law firms are allowed to share how they have handled their UNGP's

[202] *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (n 96) P 45

expectations anonymously[203]. However, this can result troublesome. To illustrate, if a law firm shares a report on how they have dealt with clients and their human rights expectations, and the law firms omits the names in accordance with the principle of confidentiality, but yet, includes the activity their clients were engaged on, third parties may still assume the client's identity. Therefore, law firms should be careful if they decide to share a public assessment, as they can violate the confidentiality principle.

One way they can realize this expectation is to share a general assessment without names, activities or any information that can identify their clients. On the other hand, this can leave a general assessment which in the end will communicate nothing.

Moreover, law firms can have a better impact to the realization of this expectation when they advise their clients on how to communicate the ways in which they have handled their human rights responsibilities[204].

Lawyers, as suggested earlier on, are bound by the principle of competence, thus they should not only know the law but everything that can affect their clients. In this sense, lawyers should be aware of the UNGP's, so they can advise their clients in reference of how they can fulfil their own human rights responsibilities. Moreover, lawyers should help their clients regarding how to prepare a human rights report. This way, law firms can fulfil their own expectation of communicating without violating any professional rules. Likewise, with this action, lawyers would be honouring the principles embedded in the codes of conduct as they are looking out for the best interest of the client.

Finally, an example as to how some law firms have been able to fulfil this expectation are: the 2017 Sustainability Report from the Swedish law firm Mannheimer Swartling[205], and the 2017 Responsible Business Report from the UK law firm Clifford Chance[206]. In these reports, the two law firms disclose how incorporated their human rights responsibilities into their practice.

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[203] International Bar Association*, Practical Guide on Business and Human Rights for Business Lawyers* (n 162) 37
[204] Ibid
[205] Mannheimer Swartling, 'Annual and Sustainability Report 2017' <https://www.mannheimerswartling.se/globalassets/arsrapporter/annual-and-sustainability-report-2017.pdf> accessed 23 May 2018
[206] Clifford Chance, 'Responsible Business Report 2017' <https://www.cliffordchance.com/content/dam/cliffordchance/About_us/Responsible-Business2017.pdf> accessed 23 May 2018

4.6 REMEDIATION

First and foremost, it is important to remember that when companies are directly linked to human rights abuses as a result of their business relations, there is no expectation from the UNGP's to contribute to the remediation of the harm to the human rights of stakeholders

Hence, there is only an expectation to remedy the harm done when lawyers contribute to human rights violations, in other words, when lawyers help their clients to achieve their goal, even though the members of the law firm know that the activity of the company will have a negative impact on the human rights of the stake holders of the company.

On this subject, the Peer Learning Process Report notes that 'it is expected that firms avoid contributing to adverse human rights impacts through the advice they provide to clients and **address any impacts** that they may have contributed to'[207].

Moreover, the UNGP's provides examples on how remedy can be achieved. The commentary on article 25 states: 'Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition'[208]. However, if law firms decide to fulfil this UNGP's expectation, they must not violate the principles that govern the profession of law.

Thus, since this expectation involves a third party (stakeholders), lawyers need to be attentive to not violate the principle of confidentiality. For example, if a law firm considers that a public apology or a written commitment of non-repetition is necessary, they should be careful to not disclose any confidential information of their client.

On the other hand, if it is decided whether to provide financial or non-financial compensation, in the form of money, medical or psychological treatment, the costs should be proportionally divided between the client and the law firm. This percentage should be established between client and lawyers, when the terms of the mandate are

[207] *Law Firm Business and Human Rights Peer Learning Process: Emerging Practice, Insights and Reflections. Workshop Report* 22
[208] UNGP's art 25 commentary

set, or in case it wasn't negotiated, the proportion in which each one will contribute should be consulted when the decision is being explored.

On another subject related to the expectation of remedy, it is important to mention that lawyers have the right to not be identified with their clients or their client's cause[209]. However, as mentioned already, when lawyers contribute to human rights abuses, they comprehend the consequences of their actions. For example, if the law firm is helping its clients to create a new company to evade social security fees, the law firm is contributing to a negative impact regarding the human rights of the employees of their clients; therefore, this principle does not to apply because the law firm is actively contributing to a human rights violation.

Thus, the expectation regarding lawyers contributing (proportionally) to the remediation of human rights abuses, as consequence of the activity of one of their clients when acting as advisors to a company, does not contravene the right of lawyers to not be identified with their clients or their client's cause.

However, when lawyers provide advice "in good faith", and the clients use this advice to abuse the human rights of their stakeholders, without mentioning it to their lawyers, the principle to not be identified with their clients applies, since lawyers were just doing their job to advise their clients, and the client deliberately hid its true objective and misused the help of the lawyer.

It is interesting how the UNGP's expectations regarding remedy apply in the same way, as there is no expectation when a business, in this case a law firm, is only directly linked to human rights abuses but there is one when it contributes to a human rights violation.

On this matter the IBA guide for business lawyers declares that the expectation of remedy regarding law firms is 'highly problematic'. However, law firms can have a better impact by helping their clients to establish mechanisms to provide remediation for the victims of human rights abuses[210].

It is important to remember that no matter how much individuals plan, even with the

[209] United Nations *Basic Principles on the Role of Lawyers* art 18
[210] International Bar Association*, Practical Guide on Business and Human Rights for Business Lawyers* (n 162) 37

best policies and practices, circumstances change, accidents happen and 'a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent'. Therefore, there is no doubt that helping a client to be prepared for unexpected events should also be part of the lawyer's job.

Assisting in establishing grievances mechanisms within the company is compatible with the codes of conducts that govern the legal profession, as lawyers are hired to advise their clients how to achieve a goal and to look for their best interest. If the activities of the company have already impacted negatively the rights of stakeholders, the company will be injured on a reputational level, which will translate into economic harm. Thus, it is the job of lawyers to mitigate this harm, and the best way to do this is to implement non-judicial mechanisms within the company. This way, lawyers are helping the company to continue to be profitable by mitigating the economic loss that human rights abuses can escalate to.

This action does not contradict the principle of confidentiality as it is a mechanism within the company and third parties are not involved. Moreover, regarding the principle of competence, it is the duty of lawyers to have a broad knowledge of not only the law but of anything that may affect the company. In this case of a voluntary instrument like the UNGP's. Therefore, lawyers should have knowledge regarding how to implement self-remediation mechanisms in case the company gets involved in human rights violations.

Moreover, the UNGP's discusses that non-judicial mechanisms can 'be adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes'. Furthermore, these mechanisms have particular benefits such as 'speed of access and remediation, reduced costs and/or transnational reach'[211]. Other benefits of non-state mechanisms are that they can help the company to identify adverse human rights impacts as part of their human rights due diligence ongoing process and may prevent harms from escalating[212].

Also, operational-level, non-judicial mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source on a continuous level

[211] UNGP's art 28 commentary
[212] UNGP'S art 29 commentary

and be based on dialogue[213]. Additionally, access to remedy has always been a problem to victims, as law services are usually expensive, which limits the accessibility for victims. Hence, law firms can contribute to change this situation by helping companies to design suitable operational-level grievances mechanisms.

Furthermore, it is important to mention that if human rights are protected by the domestic law and a company would violate these rights, the judicial system of the State would start its machinery. Then the lawyer, if the mandate allows it, or a new one is created, would change his or her role from being an advisor to becoming an advocate.

[213] UNGP'S art 31

CONCLUSION

To shed light to the central research question of this thesis, it is essential to delineate the foremost outcomes of this research.

First, after examining a number of texts and cases, this research has shown that despite the fact that soft law is voluntary, there is no doubt that it plays a big role in shaping the realm of international law. Moreover, it has been demonstrated that soft law provides individuals crucial instruments to fight for their rights.

This work has provided an outlook of the main functions of soft law, which can be summarized as: an **embryo** of hard law, when States are not ready to agree on a binding instrument. It also serves as a way to set **specific or technical rules** to a hard law treaty. Likewise, soft law can also serve as way to **interpret** a treaty or a convention. Moreover, soft law instruments can be used as a way to give more strength to an argument in court.

This thesis has also presented that in the relatively new area of the study of Business and Human Rights, the main soft law instrument is the United Nations Guiding Principles on Business and Human Rights, applies to all enterprises, including corporate law firms which have not been examined yet, as thoroughly as others.

Moreover, this research has found that corporate law firms can cause, contribute and be directly linked to human rights abuses when advising their clients. Furthermore, a law firm in its role as advisor, **contributes** to human rights abuses when its lawyers know that with the help of their legal assistance, a company is violating the human rights of its stakeholders. On the other hand, lawyers can be **directly linked** to human rights abuses when even if they provide advise taking into consideration the law and human rights standards, the client deliberately utilizes the advice provided –without the lawyer's knowledge– to achieve a goal that will have a negative impact on the human rights of stakeholders.

Additionally, this research has found that independence, confidentiality, avoidance of conflict of interest, competence, and always lookout for the best interest of the client are the five principles that govern the profession of law regarding the role of lawyers as advisors. In the same way, this research found that the best interest of any

company –in this case, the client– is to be profitable in the long term. Thus, this objective becomes paramount of lawyers.

Thus, after taking into account all of the factors evaluated throughout this work, this analysis' conclusion is that overall **there is no conflict between the principles that govern the profession of law and the human rights expectations of corporate law firms in their roles as advisors**.

Nonetheless, an **exception** was found. Law firms are bound by the principle of confidentiality and must be cautious with the disclosure of information, especially when third parties are involved, for example, in the expectation of reporting.

Furthermore, this research has found that corporate law firms, in their role as advisors, have to undertake their own human rights due diligence under the UNGP's, and thus, they should take a number of steps adjusted to their specific role.

In this sense, law firms should have a human rights commitment. Adopting this public pledge can prevent conflicts or tensions between lawyers and clients. Moreover, during negotiations, lawyers should communicate their concerns about the possible human rights abuses with their client. It is crucial to remember that lawyers are allowed to ask additional questions in reference to the activity they intend to achieve. However, if the parties do not reach an agreement, law firms should reject the mandate.

Moreover, even when all steps and precautions are taken, an unforeseen outcome may arise, and the human rights of stakeholders can be violated unintentionally. Hence, if the activity the client-company is carrying out has an unexpected negative impact on the human rights of the company's stakeholders, lawyers should use the position they occupy to first all, advise and guide the company's representatives on how to deal with the human rights violation according to the UNGP's. Subsequently, if the manager or director insists on continuing with the detrimental activity, lawyers should "report up" to the next authority, reaching the highest person in the company hierarchy, including shareholders. However, it should be noted that the manner in how corporate law firms deal with their human rights responsibilities, is constrain by the size of the firm and how crucial the mandate is for the law firm.

Finally, if the company's representatives insist on continuing violating the human rights of stakeholders, lawyers should withdraw from the mandate or else, the law firm would be contributing to human rights violations.

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