

**AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

1 RESOLVED, That the American Bar Association endorses, and urges business
2 enterprises to implement, the analytical and operational framework set forth in the
3 report, "Shared Space Under Pressure: Business Support for Civic Freedoms and
4 Human Rights Defenders: Guidance for Companies," published jointly by the Business
5 and Human Rights Resource Centre and the International Service for Human Rights
6 (September 2018).

REPORT

Background

In September 2011, the Center for Human Rights launched the global Justice Defenders Program, which supports human rights defenders (lawyers, advocates, and journalists) suffering governmental reprisal for their human rights advocacy. Funded by a grant from U.S. State Department, to date the Justice Defenders Program has helped more than 1,000 advocates in more than 60 countries, and leveraged more than \$3 million in *pro bono* assistance.

In February 2012, at the Center's behest, the ABA House of Delegates endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs), the new global standard by which the impact of business activities on human rights are evaluated and addressed.¹

Upon adoption of that policy, the Center established its Business and Human Rights Project to help effectuate the policy and promote implementation of the UNGPs globally. Guided by a diverse, multi-disciplinary and multi-sectoral advisory board comprised of experts from across the globe, one of the project's primary aims is to enhance the private sector's ability and willingness to confront and resist governmental corruption in developing countries.

To the benefit of this ABA work on human rights defenders and business and human rights, an important new analytical and operational framework has been developed in the report, "[Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies](#)" (hereafter "Shared Space"), published jointly in September 2018 by the Business & Human Rights Resource Centre and the International Service for Human Rights.

As its title implies, Shared Space posits that the private sector benefits from the work of human rights defenders (HRDs) and therefore should lend its collective weight and influence to supporting that work, for the sakes of both HRDs and business:

Business and civil society operate in and benefit from a "shared space" defined by common, fundamental elements. The rule of law and freedom of expression, association and assembly are essential to the realization of all human rights, to good governance and accountable institutions. These

¹ The UNGPs are based on three conceptual "pillars" by which governments have a responsibility to protect human rights (Pillar I); business enterprises have a responsibility to respect human rights by conducting due diligence to prevent or mitigate harmful impacts (Pillar II); and both government and business have a responsibility to provide a reliable remedy for such harms (Pillar III).

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elements are also critical to stable, profitable and sustainable business environments in which companies thrive and economies prosper.²

Yet this shared space is as much an ideal as it is a reality. The strength of the shared space is tested by a history and legacy of mistrust between elements of civil society and business, especially between multinational corporations in certain industries and local communities in the Global South. This mistrust reflects actions, whether intentional or inadvertent, by individual companies and even entire industries to undermine civic freedoms and to undercut human rights defenders (HRDs). It persists in episodic conflicts and confrontations in almost every region. Yet standards and practices have evolved over the last two decades to encourage or require companies to respect human rights – however incompletely and inconsistently. Moreover, company engagement and consultation with local communities and stakeholders is overcoming conflict and confrontation in places and ways that encourage further progress.³

Shared Space seizes upon this growing moment of “overcoming conflict and confrontation” to provide an analytical framework by which companies can more systematically weigh the risks, benefits, means, and methods of supporting the work of HRDs and reaping its long-term economic benefits. In the process, such deeper supportive engagement by business would advance the purposes of the UNGPs, on which Shared Space is largely based.⁴

As illuminated further below, the ABA’s endorsement of the Shared Space framework will enable relevant ABA entities to encourage implementation of the Shared Space guidance by the private-sector, and thereby leverage the considerable influence of the legal profession throughout the work of business to protect HRDs (as does the Justice Defenders Program) and thus advance human rights and a just rule of law for all.

² Business & Human Rights Resource Centre and International Service for Human Rights, “Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies” (hereafter “Shared Space”) (Sept. 2018), at 6, *available at* https://www.business-humanrights.org/sites/default/files/documents/Shared%20Space%20Under%20Pressure%20-%20Business%20Support%20for%20Civic%20Freedoms%20and%20Human%20Rights%20Defenders_0.pdf.

³ Shared Space, *supra* n.2, at 6.

⁴ Indeed, while acknowledged as the global standard by which the private sector should conduct its activities in relation to human rights, the UNGPs are voluntary and so do not carry the force of law (though they might acquire the status of customary international law and, as such, become enforceable). The private sector’s voluntary participation in having developed and now implementing the UNGPs therefore is critical to realizing the business community’s enormous potential to advance human rights while also thriving in the marketplace. Shared Space offers practical and potentially profitable means of extending the private sector’s voluntary support of the UNGPs beyond the due diligence standards set forth therein.

The Guidance

The guidance set forth in Shared Space is premised on three conceptual “contexts”: the normative framework; the business case; and a moral choice. The remainder of this report draws heavily on Shared Space itself to elucidate these contexts, and closes with a suggested framework for corporate decision-making within them.

1. The Normative Framework

Governments must be the primary guarantors of civic freedoms and protectors of HRDs. But governments are also usually those who initiate pressures on civic freedoms and perpetrate attacks on HRDs, even as companies may be sometimes complicit or even directly responsible.

The Shared Space normative framework therefore centers on the second pillar of the UNGPs, clarifying the company responsibility to respect human rights. The responsibility to respect sets the clear expectation that companies should avoid causing or contributing to adverse impacts connected to their business operations or relationships; exercise due diligence to identify, prevent, mitigate and account for how they address such adverse impacts; and provide for or cooperate with remediation when necessary.

Yet there is an emerging view in the business and human rights community that the responsibility to respect human rights can extend beyond cases where companies may cause, contribute, or are linked to a human rights harm per the UNGPs. Indeed, while there is a clear normative responsibility for companies to respect human rights as set forth in the UNGPs, companies have a discretionary opportunity to go above and beyond these defined responsibilities and expectations. In fact, a growing number of companies are taking certain actions that demonstrate that they interpret their responsibility to respect human rights in ways that can be seen as promoting and even in some circumstances protecting human rights – especially in recent responses to threats to civic freedoms and human rights defenders.

Companies therefore should follow first and foremost this overall normative framework (anchored in the UNGPs), and reinforced by other international, regional and national standards.⁵ They should also be informed by evolving

⁵ See Shared Space at 29-30 (internal citations omitted). “The UN Declaration on Human Rights Defenders recognizes that everyone ‘has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.’” Further, the UNGPs

have been incorporated in the 2011 revision of the OECD Guidelines for Multinational Enterprises and in the revisions to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Importantly, the 2018 OECD Due Diligence Guidance for Responsible Business Conduct makes specific references to reprisals

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expectations that the corporate responsibility to respect human rights can extend to promoting and even protecting human rights in certain circumstances.⁶

2. The Business Case

The business case should be subordinated to the determination of whether there is a normative responsibility to act based on the UNGPs. But if there is not such a clear responsibility, there is a compelling business case for companies to support civic freedoms and HRDs based on the premise that companies and civil society alike depend on the shared space of accountable governance; and that HRDs play critical roles in protecting and expanding civic freedoms which benefit both companies and individuals.

Companies need transparency, accountability, and predictability to enable sustainable and profitable growth and to encourage entrepreneurship and innovation. For these foundational elements of the shared space to survive and thrive, companies should support and defend civic freedoms and human rights. Moreover, such support can help companies to manage operational and reputational risk; to build competitive advantage with increasingly conscious consumers, investors and employees; to overcome legacies of mistrust; and to secure the social license to operate both locally and globally. The business case also considers the risks of inaction in contrast to the risks of action in preserving this shared space.

3. A Moral Choice

Moral objectives are of course embedded in the normative responsibility to act consistent with the UNGPs, which are in turn anchored in the Universal Declaration of Human Rights. But as with the business case, they are salient – indeed essential – for companies to consider as they decide whether to act on issues and in situations where they have a discretionary opportunity rather than that normative responsibility

The moral choice challenges companies to act in accordance with the two corollary principles of “do no harm” anywhere and “do good” when possible.

against civil society and human rights defenders who document, speak out about, or otherwise raise potential and actual human rights impacts associated with company operations. It also mentions HRDs and CSOs defenders as relevant stakeholders for engagement.

⁶ *Id.* at 30 (internal citations omitted). An example of this is found in the UN Sustainable Development Goals (SDGs), which set forth 17 global social and economic development objectives and have attracted significant commitment and action on the part of both states and major companies around the world since their launch in 2015. SDG 16 is “dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. Protection of civic freedoms and human rights defenders are critical elements for meeting SDG16.

These moral considerations are rooted in centuries of religious theology and moral philosophy which inform both commonplace ethics and contemporary jurisprudence.

The “do no harm” principle implies a moral obligation to avoid perpetrating damaging actions or supporting those by others, including legal, legislative or regulatory efforts by governments that undermine civic freedoms and HRDs. The “Good Samaritan” principle goes further, recognizing a duty to protect the civil society space – including specific civic freedoms and certain HRDs – against attacks. These corollary principles challenge companies to make moral choices at both the organizational and individual levels: individuals cannot act unilaterally within companies except in rare circumstances; but they can contribute to the development of ethical and accountable corporate cultures.

Further, the “do no harm” principle is reinforced by jurisprudence in which omission or inaction may be equated with complicity. Therefore, consistent with their normative responsibility to respect human rights established by the UNGPs, companies are expected to make certain moral choices to “do no harm.” Such expectations include ensuring that their business operations and public policy positions do not contribute to the erosion of the civic freedoms on which their shared space with civil society depends – or to the endangerment of individual HRDs or local communities.⁷

The corollary of the “do no harm” anywhere principle is “do good when possible” derived from the age-old “Good Samaritan” principle. The principle, however, is not categorical: companies will be held accountable only if acting would not expose them to unreasonable risk. Such a situation would arise when companies use leverage or deploy resources to assist HRDs in the face of attack or hardship in instances where acting imposes little or no serious risk to their own personnel. (However, if the adverse human rights impact in question is linked to the company through its business relationships, it has a responsibility to respect human rights under the UNGPs, and it will be expected to seek to prevent or mitigate the impact.) Decisions to act in these ways may also serve to further the company’s external reputation, thus demonstrating alignment between the business case and a moral choice.

4. Decision-making Framework

The decision framework offered in Shared Space is both analytical and operational: analytical to assess the critical factors useful to make such determinations; operational to evaluate the spectrum of actions that companies can take in various circumstances. The framework is not designed necessarily to result in an affirmative determination to act in any or all circumstances; indeed, it identifies a range of risks related to company action as well as to inaction. But it supports the conclusion that in many circumstances, companies can and should

⁷ *Id.* at 35-36.

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act to protect civil society space and/ or to defend HRDs or organizations against government attacks and repression.

Again, there are two rationales leading to company action on behalf of civic freedoms and HRDs:

- A normative responsibility to act consistently with the UNGPs if the company has caused, contributed or is linked to a human rights harm or adverse impact through its direct operations or relationships; and
- A discretionary opportunity to act, even if one of these factors pertaining to the UNGPs do not apply, by drawing on the business case, weighing the costs of action versus inaction, and making a moral choice.

Thus, the four steps outlined below set forth a logical progression of factors that companies can evaluate in making the determination whether to engage:⁸

- i. Establish the reality and severity of the harm threatened to the civic freedom or human rights defender, including the veracity of the allegations and the credibility of their source.

As companies determine whether to act – as a normative responsibility or a discretionary opportunity – they should first focus on the facts of the issue or situation. They will often be aware of an issue or situation through the media and/or be approached by a CSO/NGO, HRD or trade union to address it. Most important and urgent is an assessment of the reality and severity of the risk, threat or allegation. The UNGPs set forth a due diligence framework that should inform company assessments of these factors

- ii. Establish the degree of company involvement – cause, contribution or other linkage to the threat or the harm (consistent with UN Guiding Principle 13).

The first concern for a company when faced with an attack on civic freedoms or HRDs is establishing a normative basis for a response. Under international human rights law, as reaffirmed by the UNGPs, the primary duty to protect human rights lies with governments. Yet as outlined in the normative framework, companies have the scope to act when governments fail to uphold their duty to the protect the rights of their citizens or commits human rights violations directly. Moreover, if the companies' own actions or omissions cause

⁸ Shared Space at 39-40. The first three steps pertain to actions compelled by the normative responsibility of companies in certain circumstances. The first, third and fourth steps pertain to actions encouraged by the discretionary opportunity of companies in certain circumstances. The Guidance goes on to apply the proposed decision-making framework in various illustrative, real-world scenarios.

or contribute to the harm or impact, or if they are directly linked via business relationships, the UNGPs establish that they have a responsibility to act.

- iii. Identify the form(s) of company action, taking into account its leverage, that maximize the potential positive impact on civic freedoms and/or HRDs.

As outlined in UN Guiding Principle 19, if a company has caused or may cause a negative human rights impact, the company should take necessary steps to stop or prevent the impact. Furthermore, if a company either contributes or is linked to a negative human rights impact, the company should use its leverage to mitigate the negative impact as much as possible. In other words, “[i]f the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it.”

- iv. Identify the relative risks of action and inaction to the civil society/rights holders and to the company relative to the issue or situation.

If direct “cause, contribute” or other direct linkage between a company and the threat or harm cannot be established in relation to an issue or situation, companies still have the discretionary opportunity to act based on the business case and a moral choice. The last step in making such a determination of whether – and if so how – to engage is to consider the range of risks for the company itself as well as for the civil society, local community and/or HRDs for which they are considering support. While companies will understandably be inclined to consider the risks of action first, they should also consider just as carefully the risks of inaction.

Both individuals and law firms providing counsel to business on human rights issues – and company decision-makers themselves – consider many of the risks cited when some argue for inaction are more perceived than material. Such perceived risk can have a chilling effect, as key decisionmakers in companies tend to err on the side of caution – and overlook the corollary risks of inaction. Nonetheless, responsible companies should give careful consideration to both the risks of action and inaction. Realistic perception of the risks is improved through consultation with various civil society stakeholders, as well as home country government embassies, to provide context for the company’s actions. Building relationships with local community service organizations and HRDs can lead to better information sharing between civil society and company decision-makers.

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Conclusion⁹

As more companies are coming to appreciate, the civil society space is the basis of sustainable and profitable business. Governments and leaders come and go: authoritarian regimes may become democratic; democracies may become illiberal. But communities – physical and digital – endure for the long run. People remember who does what to help or hurt them as nations and governments rise and fall.

Companies cannot expect to operate sustainably and profitably without some degree of support from civil society in the face of growing pressures and expectations for transparency and accountability, reinforced by standards and regulations. Companies must command the support of their employees and shareholders, their customers and users; they must protect their brands and reputations. All are at risk if they undermine or violate the shared civil society space.

Multinational corporations – above all – know that they are both powerful and vulnerable in the 21st century world of geopolitical as well as technological disruption. Now they need to understand that the global and local civil society space is their business environment as much as any government jurisdiction. Now they must also recognize that the shared space is under pressure, threat and even attack around the world. The challenge for companies is not to pick fights with governments in whose countries they operate, but neither to avoid action when they have a clear responsibility or opportunity. The challenge is to take stands – carefully but deliberately – when the shared civil society space is under pressure, threat or attack. The opportunity for companies is to support and defend that shared space when it is imperiled and can no longer be taken for granted.

Lawyers, therefore – whether in-house or external counsel – are key players in this analytical and operational framework to protect the space that their corporate clients share with HRDs, and to create the better future that all seek. As the national representative of the legal profession in the United States, enjoying global reach and influence, the American Bar Association should back this process in both word and deed.

Respectfully submitted,

Hon. Bernice B. Donald
Chair, Center for Human Rights
August 2019

⁹ Shared Space at 53.

GENERAL INFORMATION FORM

Submitting Entity: Center for Human Rights (CHR)

Submitted By: Hon. Bernice B. Donald, Chair

1. Summary of Resolution(s). RESOLVED, That the American Bar Association endorses, and urges business enterprise to implement, the analytical and operational framework set forth in the report, “Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies,” published jointly by the Business and Human Rights Resource Centre and the International Service for Human Rights (September 2018).

The analytical and operational framework referenced in the resolution provides guidance to business enterprises in using their influence to protect the civic space they share with human rights defenders and, in so doing, to strengthen the political, social, economic, and legal climate in which they operate, thereby enhancing their own business operations. The key elements of the framework are 1) the existence of a relevant normative framework (applicable international standards either compel or strongly urge action by the enterprise); 2) the business case (international standards may be agnostic or silent on the question, but it makes good business sense for the enterprise to act); and 3) moral choice, where neither 1 nor 2 above are compelling but the enterprise chooses to take a moral stand on behalf of the human rights defender(s). Thus, the framework rests on either a normative responsibility to act or a discretionary opportunity to act.

A companion analysis to the framework outlines four steps that set forth a logical progression of factors that companies can evaluate in making the determination whether to engage: i) Establish the reality and severity of the harm threatened to the civic freedom or human rights defender, including the veracity of the allegations and the credibility of their source; ii) establish the degree of company involvement – cause, contribution, or other linkage to the threat or the harm (consistent with UN Guiding Principle 13); iii) identify the form(s) of company action, considering its leverage, that maximize the potential positive impact on civic freedoms and/or human rights defenders; and iv) identify the relative risks of action and inaction to the civil society/rights holders and to the company relative to the issue or situation.

2. Approval by Submitting Entity. The resolution was approved by the CHR Board in April 2019.
3. Has this or a similar resolution been submitted to the House or Board previously? No.

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4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution supports the 2012 policy endorsing the United Nations Guiding Principles on Business and Human Rights.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. CHR will promote the Shared Space Guidance among private-sector audiences and urge its implementation as appropriate.
8. Cost to the Association. (Both direct and indirect costs) No additional direct or indirect costs to the Association are anticipated.
9. Disclosure of Interest. (If applicable) N/A
10. Referrals. The Resolution with Report has been referred to the Business Law Section, the Section of Civil Rights and Social Justice, the Health Law Section, the Section of International Law, the Section of Labor and Employment Law, and the Section of Litigation, as well as the Center for Public Interest Law and the Commission on Domestic & Sexual Violence, the Commission on Immigration, and the Commission on Sexual Orientation and Gender Identity.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Michael Pates, CHR Director
American Bar Association
1050 Connecticut Ave, NW, Fourth Floor
Washington, DC 20036
202/662-1025
michael.pates@americanbar.org
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Hon. Bernice B. Donald, CHR Chair
American Bar Association
1050 Connecticut Ave, NW, Fourth Floor
Washington, DC 20036

240/476-1870 (CHR Director)
Amy_Robinson@ca6.uscourts.gov (assistant)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association endorses, and urges business enterprises to implement, the guidance set forth in the report, “Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies,” published jointly by the Business and Human Rights Resource Centre and the International Service for Human Rights in September 2018.

2. Summary of the Issue that the Resolution Addresses

Business enterprises have tremendous potential both to advance developing economies and, in the process, to harm affected populations, particularly to the extent that business practices support corrupt governments directly or indirectly. This often means that business also has the influence and the opportunity to support human rights defenders who confront those governments and promote greater adherence to the rule of law. The Guidance that is the subject of the resolution provides an analytical and operational framework by which business, including legal counsel, can provide such support and, in so doing, enhance the human rights of affected populations while improving the overall business climate.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Building on February 2012 ABA policy endorsing the United Nations Guiding Principles on Business and Human Rights, the resolution endorses a framework for decision-making by business enterprises to support human rights defenders working to improve the rule of law “space” they share with business.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None received thus far.