

# When national law conflicts with international human rights standards: Recommendations for Business

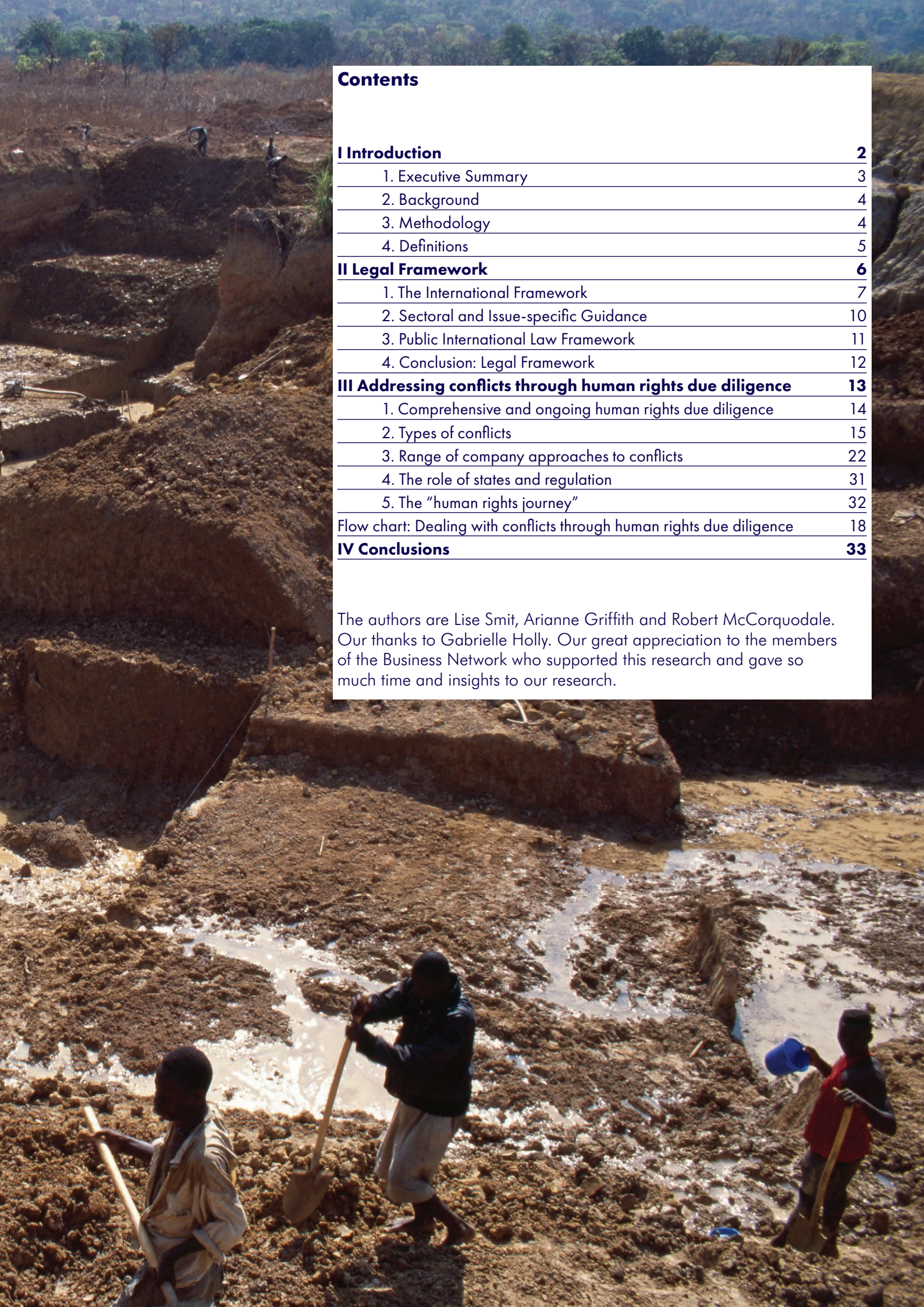




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# | Introduction



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## 1. Executive Summary

The UN Guiding Principles on Business and Human Rights (“UNGPs”)<sup>1</sup> expect business enterprises to respect human rights wherever they operate.<sup>2</sup> Where the local legal context contradicts international human rights standards (“IHR standards”), companies are expected to “[s]eek ways to honour the principles of internationally recognized human rights”.<sup>3</sup> The general principle that companies should adhere to national law, whilst seeking to respect IHR standards, is echoed in other international standards and guidance, without much clarity on how to achieve both when they are opposed.

This paper aims to assist companies by setting out **recommendations** as to how companies could address such conflicts:

1. Undertake comprehensive and ongoing **human rights due diligence** using a human rights lens. This includes identification of actual and potential human rights impacts, actions to address these impacts, tracking the effectiveness of actions taken, and communicating on these efforts.<sup>4</sup>

2. Identify the nature of the conflict which arises between IHR standards and the national law or practice. Our research identified eight **types of conflicts** which companies face:

National law or practice contradicts IHR standards;

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National law falls short of IHR standards;

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Information about national law is not publicly available;

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Inconsistent laws in different jurisdictions;

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No relevant national laws;

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No relevant national enforcement;

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No access to national assessment of compliance with IHR standards; and

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International standards not uniform.

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3. Identify a suitable approach, or combination of approaches, by which the company could seek to adhere to domestic legal requirements whilst respecting IHR standards. Our research showed a **range of approaches** which companies use:

*Internal approaches*, such as limited compliance, global policies with local exemptions, and taking the decision to higher decision-making bodies in the company;

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*Approaches within the value chain*, such as codes of conduct, contractual clauses and leverage;

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*Approaches which involve external engagement*, such as compliance plus leverage, collective engagement, and communication; and

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*Alternative responses to conflicting laws*, such as compliance in alternative ways, taking legal action to challenge conflicting laws,

**‘[T]he UNGPs expect business enterprises to “[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements”.’**

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1 United Nations Office of the High Commissioner for Human Rights “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework”, available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

2 UNGP 23(a).

3 UNGP 23(b).

4 UNGP 17.

delayed compliance and “responsible non-compliance”, and exiting the jurisdiction.

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4. Companies should **publicly express their views**, both individually and collectively. This includes participation in relevant regulatory consultations in order to encourage legal certainty.
5. Companies should **take some action** and not ignore the conflict. This includes taking specific steps such as adopting narrow interpretations of conflicting national laws, using grievance mechanisms to understand human rights impacts, and human rights training for all relevant staff and suppliers.

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## 2. Background

The UN Guiding Principles on Business and Human Rights (“**UNGPs**”)<sup>5</sup> expect business enterprises to respect human rights wherever they operate.<sup>6</sup> Business enterprises often operate in widely different jurisdictions, where laws or practices may contradict international human rights standards (“**IHR standards**”). When facing such conflicting requirements, the UNGPs expect business enterprises to “[s]eek ways to honour the principles of internationally recognized human rights”.<sup>7</sup>

This paper sets out some recommendations for business enterprises to seek to address these conflicts through human rights due diligence (“**HRDD**”).<sup>8</sup>

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## 3. Methodology

This research was undertaken by the British Institute of International and Comparative Law (“**BIICL**”) for its Business Network<sup>9</sup> between June 2017 and May 2018. The research methodology consisted of legal research and analysis, combined with empirical research through anonymous informal, semi-structured conversations and interviews with representatives of transnational companies, being primarily in-house legal counsel and others with good knowledge of implementing the UNGPs. A wide range of sectors were represented, including agriculture, electronics, energy, extractives, financial, food and consumables, internet service providers, manufacturing, retail, and telecommunications.

**‘The general principle that companies should adhere to national law, whilst seeking to respect IHR standards, is echoed in other international standards and guidance, without much clarity on how to achieve both when they are opposed.’**

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5 Above n 1.

6 UNGP 23(a).

7 UNGP 23(b).

8 The issues discussed in this paper are distinct from those arising under the subject areas referred to as the conflict of laws or private international law, which relate to disputes around jurisdiction, choice of law and the recognition and enforcement of foreign judgments.

9 The Business Network was established in January 2017. For more information see: <https://binghamcentre.biicl.org/business-network>.

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## 4. Definitions

The UNGPs refer to “business enterprises” to include a wide range of commercial entities.<sup>10</sup> This paper interchangeably uses the term “company” or “business enterprise” to describe all types of business enterprise regardless of their corporate structure.

**‘[T]he corporate responsibility to respect human rights is a standard of conduct which is increasingly expected by stakeholders, such as investors, regulators and rights-holders.’**

The UNGPs indicate that all business enterprises should respect the “entire spectrum of internationally recognized human rights”, including, at a minimum, those contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.<sup>11</sup>

Unlike states, companies do not currently have binding legal obligations set out in these international instruments. However, due to the influence of the UNGPs, the corporate responsibility to respect human rights is a standard of conduct which is increasingly expected by stakeholders, such as investors, regulators and rights-holders. Cases such as *Vilca v Xstrata*,<sup>12</sup> where a UK court indicated that commitment to the Voluntary Principles on Security and Human Rights could demonstrate a legal duty of care, confirm the increasing persuasiveness of “soft law” standards on the application of binding legal obligations. This paper therefore will refer to international human rights “standards” and “responsibilities”, rather than “obligations”.

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10 The General Principles of the UNGPs provide that the Guiding Principles apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

11 Commentary to UNGP 12.

12 *Vilca & Ors v Xstrata Ltd & Anor* [2016] EWHC 389 (QB) at para 25.

## II Legal Framework





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# 1. The International Framework

## 1.1 The UN Guiding Principles on Business and Human Rights

The UNGPs were adopted unanimously by the UN Human Rights Council in 2011. While it is not a legally binding instrument, it is considered the “global authoritative standard on business and human rights”,<sup>13</sup> and has influenced various other international standards<sup>14</sup> and, increasingly, domestic regulation.<sup>15</sup>

The UNGPs are based on three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights,<sup>16</sup> and access to effective remedies.

The UNGPs acknowledge that companies operate in different jurisdictions and contexts. UNGP 23 provides:

In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

The Commentary to UNGP 23 clarifies that:

Where the domestic context renders it impossible to meet [the responsibility to respect international human rights] fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.

UNGP 23(a) accordingly requires companies to comply with all national laws, “wherever they operate”. However, where national laws contradict internationally recognized human rights standards, UNGP 23(b) expects companies to “seek to honour” IHR standards, whilst still complying with “all applicable” national laws in accordance with UNGP 23(a). It is these opposing requirements, and the practical difficulties they raise for business, that form the subject of this study.

The Office of the High Commissioner for Human Rights (“**OHCHR**”) Interpretive Guide on the Corporate Responsibility to Respect Human Rights (“**Interpretive Guide**”) elaborates on UNGP 23. It states that companies should be prepared with a “basic compass” for situations where the domestic context poses such challenges as “by definition, there will be no easy or standard answers”.<sup>17</sup> It states that where there are no national laws to protect human rights, or when national laws “offer a level of human

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13 International Bar Association, “Practical Guide on Business and Human Rights”, 28 May 2016, available at: <https://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx> at 13.

14 See sections 1.2 and 2 below.

15 See, for example, the French Duty of Vigilance Law, Art 1, Loi Relative du devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.

16 UNGP 15 describes the requirements of the corporate responsibility to respect human rights: “In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”

17 United Nations Office of the High Commissioner for Human Rights (OHCHR) “The Corporate Responsibility to Respect Human Rights: An Interpretive Guide”, available at: [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) at 77.

**'Human rights due diligence is a concept introduced by the UNGPs, as part of the corporate responsibility to respect human rights.'**

rights protection that falls short of internationally recognized human rights standards" companies are expected to "operate to the higher standard".<sup>18</sup> In other situations, the national law or practice may "require (as against merely allowing for)" companies to act in ways that contradict their responsibility to respect international human rights.<sup>19</sup>

Companies may accordingly be faced with a dilemma in choosing between respecting international human rights, on the one hand, and compliance with "all applicable laws",<sup>20</sup> including local laws which conflict with IHR standards, on the other.

It is noted that UNGP 23(b) provides that business enterprises should seek to "honour" the principles of international human rights when faced with conflicting requirements. The use of the term "honour" is unusual in the international human rights framework. The term does not appear in any of the international human rights instruments mentioned in the UNGPs, such as the Universal Declaration of Human Rights.<sup>21</sup> While rare, "honour" has been used in relation to UN Resolutions, where the International Court of Justice has considered that where an original legal obligation was owed by one entity, other entities can be called on to "honour" that obligation as a consequence of the original obligation.<sup>22</sup> Similarly, the word "honour" is used in the UN Convention on the Law of the Sea, where "[t]he [Seabed] Authority and its organs shall recognize and honour the rights and obligations arising from this resolution and the decisions of the Commission taken pursuant to it."<sup>23</sup>

Thus, it could be considered that the term "honour" used in the UNGPs *might* indicate that there is a responsibility on companies, which is a moral one with legal effects, that arises from the legal obligations on states under international human rights law. This approach would be consistent with the use of "social expectations" on companies used in the development of the UNGPs.<sup>24</sup> It might also lead to possible consequences for companies which choose not to "honour" these international human rights principles, such as in states' practices with respect to decisions on procurement, where there is legitimate discretion in the decision-making process.<sup>25</sup>

## 1.2 OECD Guidelines for Multinational Enterprises

Since the adoption of the UNGPs, other international standards have introduced similar references to conflicting standards.<sup>26</sup> For example, the OECD Guidelines for Multinational Enterprises ("**OECD Guidelines**")<sup>27</sup>

18 Ibid.

19 Ibid at 78.

20 UNGP 23(a).

21 The Commentary to UNGP 12 lists the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the ILO core conventions.

22 See, for example, the decision of the International Court of Justice in the *Certain Expenses of the United Nations Opinion* [1962] ICJ Rep 151 at 169: "[O]bligations of the [United Nations] Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly 'has no alternative but to honour these engagements'." See Marko Divac Oberg, "The Legal Effects of Resolutions of the Security Council and the General Assembly in the Jurisprudence of the ICJ" (2005) 16 *EJIL* 879, 881.

23 Paragraph 13 of Resolution II in Annex I to the UN Convention on the Law of the Sea.

24 UN Human Rights Council, "Protect, respect and remedy: a framework for business and human rights", UN Doc A/HRC/8/5 at paras 54-56.

25 See Institute for Human Rights and Business (IHRB), "Protecting Rights by Purchasing Right" (IHRB, 2015), available at <https://www.ihrb.org/pdf/occasional-papers/Occasional-Paper-3-Protecting-Rights-by-Purchasing-Right.pdf>.

26 For example, the Equator Principles, applicable for project finance, were revised in 2013 to include human rights reporting requirements, see: <http://equator-principles.com/>; and the International Finance Corporation's Performance Standards, which set out the World Bank's environmental and social standards to be met by borrowers, include human rights requirements, see: [https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards).

27 OECD, "OECD Guidelines for Multinational Enterprises" (2011), OECD Publishing, available at: [https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises\\_9789264115415-en](https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en).

were updated in 2011 to include human rights wording which echoes that of the UNGPs.<sup>28</sup> The OECD Guidelines are not legally binding on companies, though the “Guidelines are jointly addressed by governments to multinational enterprises”.<sup>29</sup> Companies are encouraged to “observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country”.<sup>30</sup>

The OECD Guidelines provide similar wording to the UNGPs:

The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.<sup>31</sup>

To date, this provision has been invoked in four OECD complaints to the National Contact Points (“NCP”), which are the supervisory bodies for the OECD Guidelines in member states, but are without enforcement powers.<sup>32</sup> In each instance, the approach of the relevant NCP was that the enforcement of local laws is a matter for local authorities in host states.<sup>33</sup> However, the Canadian NCP stated:

Companies are expected to respect human rights and all applicable laws, and to meet or exceed widely recognized international standards for responsible business conduct, including and in particular, the OECD Guidelines. Where host country requirements differ from the international standards, it is the duty of the company to meet the higher, more rigorous standards.

The Government of Canada also expects Canadian companies to operate in accordance with internationally recognized labour standards in all cases, even where a host country fails to enforce domestic laws or implement international standards or in challenging environments such as a weak governance zone, zones of conflict or an unstable political environment.<sup>34</sup>

There may accordingly be consequences within a company’s home state for not meeting IHR standards in the host state.

**‘There may accordingly be consequences within a company’s home state for not meeting IHR standards in the host state.’**

28 See Foreword to the OECD Guidelines which states “Changes to the Guidelines include: A new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights.”

29 OECD Guidelines above n 27, Chapter I, para 1.

30 Ibid, Chapter I, para 3. The OECD’s own Commentary on the Guidelines uses normative language to refer to the actions of companies, such as at OECD Guidelines, Commentary on Human Rights, Chapter IV, para 46: “Operational grievance mechanisms should not be used to undermine the role of trade unions in addressing labour-related disputes.” See Robert McCorquodale and Arianne Griffith, “The Soft Law Nature of the OECD Guidelines: An Impediment for Access to Remedy?” in Nicolas Bonucci and Catherine Kessedjian (eds) *40 Years of the OECD Guidelines*, Editions A Pedone (2018).

31 OECD Guidelines, *ibid*, Chapter I, para 2.

32 *Obelle Concern Citizens & FOCONE v Shell*, NCP Netherlands (filed 29 January 2018), available at: [https://www.oecdwatch.org/cases/Case\\_492](https://www.oecdwatch.org/cases/Case_492); *Trade Unions v Suzuki Motor Corporation*, NCP Japan (filed 10 May 2016), available at: [https://www.oecdwatch.org/cases/Case\\_463](https://www.oecdwatch.org/cases/Case_463); *Former Employees v Banro in the DRC*, NCP Canada, (filed 26 February 2016), available at: [https://www.oecdwatch.org/cases/Case\\_469](https://www.oecdwatch.org/cases/Case_469); *Miningwatch Canada et al v Centerra Gold*, NCP Canada (filed 15 March 2012), available at: [https://www.oecdwatch.org/cases/Case\\_246](https://www.oecdwatch.org/cases/Case_246).

33 For example, see “Initial Assessment of the Canadian National Contact Point” in *Miningwatch Canada et al v Centerra Gold*, *ibid* at 6.

34 Final Statement of the Canadian NCP in *Former Employees v Banro in the DRC* above n 32 at 7.

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## 2. Sectoral and Issue-Specific Guidance

In addition to the UNGPs, questions around national law which conflicts with IHR standards have been highlighted in other forms of sectoral or issue-specific business guidance. This guidance is not legally binding, but does indicate that practices are developing to address these issues.

Examples of sectoral guidance which address such conflicts include the Principles on Freedom of Expression and Privacy<sup>35</sup> of the Global Network Initiative (“**GNI**”), a multi-stakeholder initiative for the information and communications technology (“**ICT**”) sector.<sup>36</sup> Other examples of sector-specific materials which mention such conflicts include the guidance on implementing the UNGPs in the ICT,<sup>37</sup> oil and gas,<sup>38</sup> and employment and recruitment sectors,<sup>39</sup> issued by the European Commission, with support from Shift and the Institute for Human Rights and Business (“**IHRB**”).

Examples of issue-specific guidance which deal with these kinds of conflicts include the OHCHR’s Standards of Conduct for Business on Tackling Discrimination against Lesbian, Gay, Bi, Trans and Intersex People (“**LGBTI Standards**”).<sup>40</sup> Similarly, the Voluntary Principles on Security and Human Rights address these conflicts as they relate to issues of security, and require participant companies to commit to:<sup>41</sup>

[A]ct in a manner consistent with the laws of the countries within which they are present, to be mindful of the highest applicable international standards, and to promote the observance of applicable international law enforcement principles.<sup>42</sup>

Where relevant, the above guidance will be considered further below.

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## 3. Public International Law Framework

International human rights law binds states, and requires them to ensure that human rights are protected within their jurisdictions.<sup>43</sup> UNGP 1 confirms these obligations:

States *must* protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

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35 Global Network Initiative (GNI) “The GNI Principles on Freedom of Expression and Privacy”, available at: <https://globalnetworkinitiative.org/gni-principles/> at 2.

36 See <https://www.globalnetworkinitiative.org/>.

37 The European Commission, Shift and IHRB, *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, available at: [https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/ICT/EC-Guide\\_ICT.pdf](https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/ICT/EC-Guide_ICT.pdf).

38 The European Commission, Shift and IHRB, *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, available at: [https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide\\_O&G.pdf](https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide_O&G.pdf).

39 The European Commission, Shift and IHRB, *Employment and Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, available at: [https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/E&RA/EC-Guide\\_E&RA.pdf](https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/E&RA/EC-Guide_E&RA.pdf).

40 OHCHR, “Tackling Discrimination Against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business”, available at: <https://www.unfe.org/wp-content/uploads/2017/09/UN-Standards-of-Conduct.pdf>.

41 For example, in the Initiative of the Voluntary Principles on Security and Human Rights’ Governance Rules, August 2016, available at: [http://www.voluntaryprinciples.org/wp-content/uploads/2015/04/FHE-DC-163748-v1-Voluntary\\_Principles\\_-\\_Governance\\_Rules\\_with\\_Proposed\\_Changes\\_-\\_January\\_2015.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2015/04/FHE-DC-163748-v1-Voluntary_Principles_-_Governance_Rules_with_Proposed_Changes_-_January_2015.pdf).

42 Ibid at para 2.3 of the Entry Criteria, Appendix 3.1: Framework for the Admission of New Companies at 13. See also Introduction, Voluntary Principles on Security and Human Rights, available at: [http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary\\_principles\\_english.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf).

43 Christine Chinkin “Sources”, in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds) *International Human Rights Law*, Oxford University Press (2014) at 77.

‘Despite their binding obligations, states are generally afforded discretion as to how they meet their international human rights obligations.’

**'[C]ompanies are bound by national law, but should simultaneously seek to adhere to IHR standards.'**

This is a strong statement that these are legal obligations binding on all states. In contrast, companies, including those which operate transnationally, are regulated at national level by domestic regulation,<sup>44</sup> and are not considered to have direct international human rights obligations.<sup>45</sup> The UNGPs, however, introduced corporate human rights responsibilities at the international level, which apply to companies regardless of where they operate, and in addition to compliance with national laws.<sup>46</sup>

Despite their binding obligations, states are generally afforded discretion as to how they meet their international human rights obligations. In accordance with the principle of state sovereignty, "each country [has] complete freedom with regard to how it fulfils, nationally, its international obligations."<sup>47</sup> The consequence of this is that companies which operate in multiple jurisdictions often face different domestic laws, each of which may be intended to comply with that state's international human rights obligations.

Nevertheless, the Commentary to UNGP 1 makes clear that:

States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.

The Commentary continues:

States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication.

In addition, Article 27 of the Vienna Convention on the Law of Treaties ("**VCLT**") provides:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Inter-American Court of Human Rights in its *Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* clarifies this:

Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions.<sup>48</sup>

The VCLT applies only to states, yet the principle set out in Article 27 has implications for business in the context of UNGP 23, insofar as states are

44 European Commission and London School of Economics, *Study on the Law Applicable to Companies (Final Report)*, 2017, available at: <https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1/language-en> at 105.

45 Carlos Lopez, "The 'Ruggie process': from legal obligations to corporate social responsibility?" In Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge University Press (2013) at 63.

46 UNGP 23.

47 Antonio Cassese, *International Law*, Oxford University Press, 2nd Ed. (2005) at 219.

48 Inter-American Court of Human Rights *Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, OC- 14/94, Ser. A, No. 14, para 35.

not entitled to justify domestic laws which contradict their international human rights obligations. In cases where national laws conflict with international human rights, states remain bound, under international law, by the international human rights treaties which they ratified, and by customary international law.

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#### **4. Conclusion: Legal Framework**

UNGP 23 expects companies to comply with national laws which apply to them, while, on the other hand, they should “seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements”. The Interpretive Guide, OECD Guidelines, and other materials all confirm these principles: companies are bound by national law, but should simultaneously seek to adhere to IHR standards. The existing international law framework described above provides no hierarchy of laws which would enable a company to address this “quandary of corporations being simultaneously bound in opposite directions”.<sup>49</sup>

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<sup>49</sup> Yael Ronen, “Big Brother’s Little Helpers: The Right to Privacy and the Responsibility of Internet Service Providers” (2015) 31 (80) *Utrecht Journal of International and European Law* 72 at 79.

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### III

# Addressing conflicts through human rights due diligence

The Interpretive Guide advises companies to use HRDD to deal with the kinds of scenarios described in UNGP 23(b). It states that “[a]n enterprise’s human rights due diligence process should reveal where it may be faced with this kind of dilemma and what measures could prevent or mitigate the risk.”<sup>50</sup>

HRDD is a concept introduced by the UNGPs, as part of the corporate responsibility to respect human rights. Companies are expected to undertake HRDD to “identify, prevent, mitigate and account for how they address their adverse human rights impacts”.<sup>51</sup>

We have accordingly set out below recommendations for business to address these conflicts within the framework of HRDD, as defined in the UNGPs.

### **Addressing conflicts through HRDD: Recommendations for business**

1. Companies should undertake comprehensive and ongoing human rights due diligence using a human rights lens.
2. Companies should identify the nature of the conflict which arises between IHR standards and the national law or practice.
3. Companies should identify a suitable approach, or combination of approaches, by which the company could seek to adhere to domestic legal requirements whilst respecting IHR standards.
4. Companies should publicly express their views, both individually and collectively.
5. Companies should take some action and not ignore the conflict.

## **1. Comprehensive and ongoing human rights due diligence**

HRDD in the UNGPs is described as a comprehensive and ongoing<sup>52</sup> process which includes the identification of actual and potential human rights impacts, taking integrated actions in response to these findings, tracking the effectiveness of these actions and communicating how impacts are addressed.<sup>53</sup> HRDD should take into account all internationally recognized human rights. It should cover human rights impacts within the companies’ own operations as well as those of third parties with which it has business relationships.<sup>54</sup> The complexity and scope of HRDD will depend on the specific contexts in which the business operates.<sup>55</sup>

The Interpretive Guide confirms that HRDD will always be context-specific by indicating that there is “no blueprint for how to respond”, though it is “particularly likely” that companies operating in contexts where domestic law or practice conflicts with IHR standards will “be under closer scrutiny from stakeholders”.<sup>56</sup> This corresponds with the understanding of due diligence as a standard of conduct which requires a higher level of diligence in higher risk situations.<sup>57</sup>

<sup>50</sup> Interpretive Guide, above n 17 at 78.

<sup>51</sup> UNGP 17.

<sup>52</sup> UNGP 17 (c).

<sup>53</sup> UNGP 17.

<sup>54</sup> Ibid.

<sup>55</sup> UNGP 17(b).

<sup>56</sup> Ibid.

<sup>57</sup> Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks “Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises” 2(2) *Business and Human Rights Law Journal* 195.



**'[D]edicated HRDD – using a “human rights lens” – is significantly more effective than existing or piecemeal processes which are not human rights-specific, such as those for health and safety.'**

Although HRDD as a legal standard is still in the early days of its development, it can provide a “compass”<sup>58</sup> for companies where domestic requirements conflict with IHR standards. Indeed, “[e]ven in the event that no such conflict arises, companies benefit from scenario planning and proactive yet flexible response preparation”,<sup>59</sup> which forms part of the process of HRDD. Through their HRDD, companies should be able to determine the exact scope of any conflicting requirements, and their actual or potential impacts on human rights.

BIICL’s previous research has shown that dedicated HRDD – using a “human rights lens” – is significantly more effective than existing or piecemeal processes which are not human rights-specific, such as those for health and safety.<sup>60</sup>

As part of its HRDD, a company should consider the nature of a conflict and its impacts on human rights, and then decide how to approach the situation in a way which best seeks to respect human rights. It should continue to track and monitor the effectiveness of any actions taken,<sup>61</sup> including through the use of grievance mechanisms,<sup>62</sup> and communicate on how it addresses its human rights impacts.<sup>63</sup>

**Recommendation:** Companies should undertake comprehensive and ongoing human rights due diligence using a human rights lens.

## 2. Types of conflicts

The first component of HRDD, as listed in the UNGPs, is the identification of actual or potential human rights impacts.<sup>64</sup>

The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved.<sup>65</sup>

This initial identification includes an assessment of the nature, scope and severity of all the company’s actual and potential human rights impacts.<sup>66</sup> Importantly, this should “[go] beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders”.<sup>67</sup>

58 Interpretive Guide above n 17 at 77.

59 Annie Golden Bersagel “Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements” UN Global Compact Good Practice Note, 13 June 2011 at 5.

60 See McCorquodale, Smit et al, above n 57 at 221-222: “There is a stark contrast between those companies which have undertaken dedicated HRDD and those which only considered human rights in other due diligence processes...Our research strongly suggests that where HRDD is done expressly, human rights impacts of both the company itself and its business partners are significantly more likely to be identified, effectiveness of actions are significantly more likely to be tracked, human rights experts are more likely to be consulted, and a wider range of human rights are likely to be considered.

61 UNGP 20.

62 UNGP 29. The Commentary to UNGP 20 states: “Operational-level grievance mechanisms can also provide important feedback on the effectiveness of the business enterprise’s human rights due diligence from those directly affected.”

63 UNGP 21.

64 UNGP 17.

65 Commentary to UNGP 18.

66 The Commentary to UNGP 18 states: “Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.”

67 Commentary to UNGP 17.

## Types of conflicts between national laws and IHR standards:

National law or practice contradicts IHR standards;

National law falls short of IHR standards;

Information about national law is not publicly available;

Inconsistent laws in different jurisdictions;

No relevant national laws;

No relevant national enforcement;

No access to national assessment of compliance with IHR standards; and

International standards not uniform.

Similarly, the Interpretive Guide indicates that “[u]nderstanding the exact nature, scope and implications of the conflicting requirements is an important first step in identifying ways of addressing the dilemma.”<sup>68</sup> The UN Global Compact (“**UNGC**”) Good Practice Note on Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements also highlights the importance of “[i]dentifying and clarifying the scope of a potential conflict”,<sup>69</sup> and states that:

At a minimum, the enterprise should determine the boundaries of the law as comprehensively and clearly as possible in order to fully understand and maximise the opportunities to mitigate the effects of a potential conflict in a rights-sensitive manner.<sup>70</sup>

As part of the identification of human rights impacts, it is therefore essential that companies determine the type of conflict they are addressing before they can determine what action to take to address the conflict. This section sets out some of the most common ways in which conflicts between IHR standards and domestic requirements, as described in UNGP 23(b), affect business. This aims to facilitate a selection of appropriate responses by companies, as discussed in the next recommendation.

### 2.1 National law or practice contradicts IHR standards

The most obvious example of the conflict described in UNGP 23(b) is where national laws or practices directly contradict IHR standards. This category can be further subdivided into two kinds of conflicts, as described by the OHCHR: those where domestic laws or customs “require”; and those where they “allow for” companies to act in ways which violate human rights.<sup>71</sup>

Where domestic laws merely “allow for” behaviour which contradict human rights, UNGP 23 indicates that companies should adhere to the higher IHR standard. However, where domestic laws or practices “require” corporate behaviour which has actual or potential adverse human rights impacts, companies are faced with “a dilemma when having both to comply with all applicable laws and also to meet the responsibility to respect human rights in all contexts”.<sup>72</sup>

68 Interpretive Guide above n 17 at 78.

69 Bersagel above n 59 at 4.

70 Ibid at 6.

71 Interpretive Guide above n 17 at 78.

72 Ibid.

**'One company representative highlighted that companies which need licences to operate often have "small spaces for opportunity" with states. In contrast, a company representative from a sector which does not rely on licences indicated that they have "generally good relationships with governments".'**

Conflicting local requirements may be contained in regulatory instruments, such as national laws which criminalise same-sex relationships,<sup>73</sup> or in local practice, such as those which may not allow for a senior executive to be a woman.<sup>74</sup> The *Financial Times* in 2017 reported a "conservative culture" in Saudi Arabia where "[t]here are clients who even refuse to talk with women on the phone".<sup>75</sup>

This type of conflict may arise in the ICT sector when a government orders internet and telecommunications suspensions. The suspension of telecommunication services may be authorised by law, such as the Indian Telegraph Act and Information Technology (Amendment) Act, which allow both the Central and State Governments to suspend services where "necessary and expedient" to protect certain public interests.<sup>76</sup> These kinds of shutdowns have drawn condemnation from the UN Special Rapporteur on Freedom of Opinion and Expression,<sup>77</sup> and the UN Human Rights Council.<sup>78</sup>

Government orders for the suspension of internet services may also be requested on an ad hoc basis, and accompanied by threats of violence, such as those which reportedly took place during the 2011 revolution in Egypt.<sup>79</sup> One ICT company indicated that it received legal advice to comply with the instruction to shut down the network on the basis that "sanctions for non-compliance with such an instruction are imprisonment and/or suspension of [the company's] operating license."<sup>80</sup>

## 2.2 National law falls short of IHR standards

In some contexts, national law may contain provisions which protect human rights but which do not meet the standards described in international human rights instruments. The Interpretive Guide states that where human rights protection at the national level "falls short" of internationally recognized human rights standards, companies should "operate to the higher standard".<sup>81</sup>

For example, domestic legislation allowing for the use and acquisition of land may provide for some form of consultation, but fall short of IHR standards of free, prior and informed consent. In the case of *Kaliña and Lokono Peoples v Suriname*, the Inter-American Court of Human Rights found that while the domestic law recognized the "customary law rights" of indigenous peoples as inhabitants of their traditional lands, the state had failed to put in place an appropriate domestic mechanism, law or measure

73 LGBTI Standards above n 40 at 23. It adds: "In financial services, for example, terms of employment may require that criminal conviction must result in termination of employment."

74 See Bersagel above n 59 at 14.

75 Ahmed Al Omran "Saudi Arabia Edges More Women Into Work" *Financial Times*, 1 September 2017.

76 Section 5(2) of the India Telegraph Act (1885), Section 69(1) of the India Information Technology (Amendment) Act (2008).

77 Paras 14 and 15 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017. A/HRC/35/22. See also OHCHR press release "India must restore internet and social media networks in Jammu and Kashmir, say UN rights experts", 11 May 2017, available at: <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21604&LangID=E>.

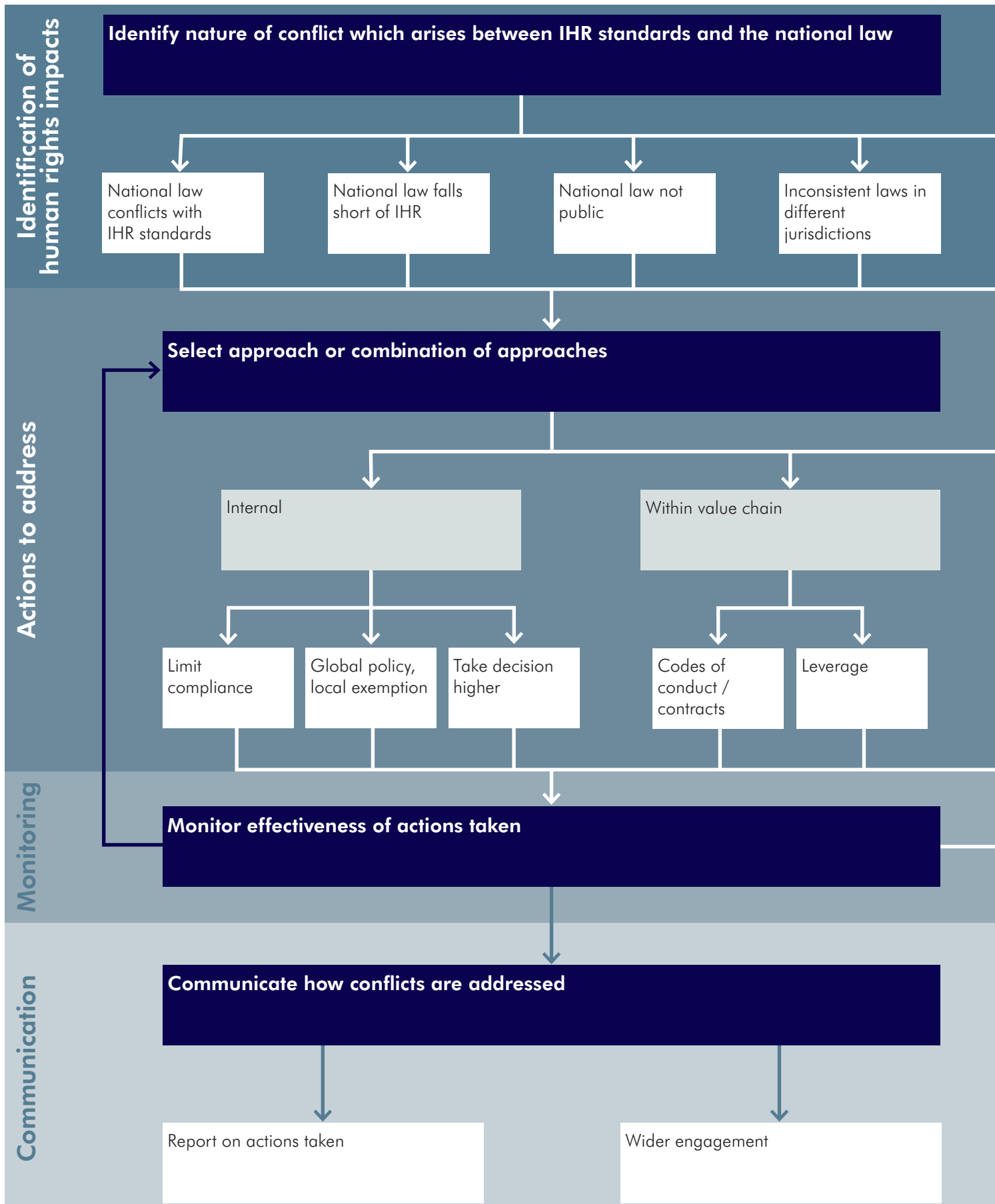
78 Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the internet, 27 June 2016, A/HRC/32/L/20.

79 It has been reported that during the 2011 revolution in Egypt, representatives of Vodafone Egypt were threatened with violence by the State as it pressed for an internet shutdown. Nic Fildes, "The day Vodafone Egypt boss was forced to close the network at gunpoint", *The Times*, 20 October 2012, available at: <https://www.thetimes.co.uk/article/the-day-vodafone-egypt-boss-was-forced-to-close-network-at-gunpoint-c659np96zhv>. The Chief Executive at country level indicated that the company "had no choice but to shut down the network...and had [they] not complied with their order [the company's] people would have been in grave danger." Hatem Dowidar "Vodafone forced to shut down network", Letter to the Editor, *Financial Times*, 3 October 2011, available at: <https://www.ft.com/content/55aae79e-eb6a-11e0-9a41-00144feab49a>.

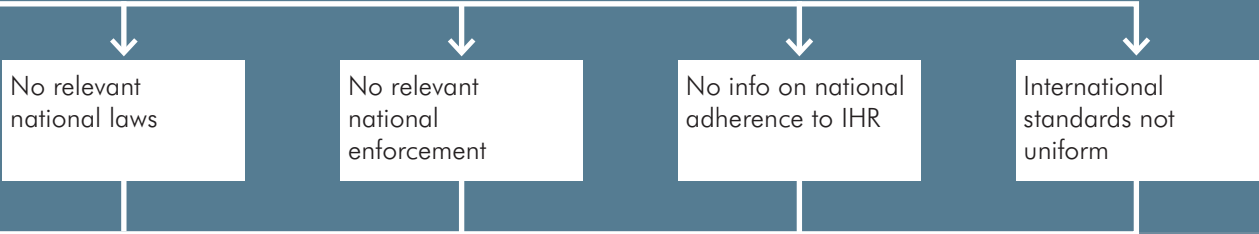
80 A statement from Vodafone released contemporaneously with the event and referring to the network closure, indicated that it was "formally instructed on the morning of Friday 28 January [2011] to shut down the mobile network in specified areas." Vodafone Group Plc "Response on Issues Relating to Mobile Network Operations in Egypt", 22 February 2011, available at: <https://business-humanrights.org/sites/default/files/media/documents/vodafone-statement-re-egypt-22-feb-2011.pdf>.

81 Interpretive Guide above n 17 at 77.

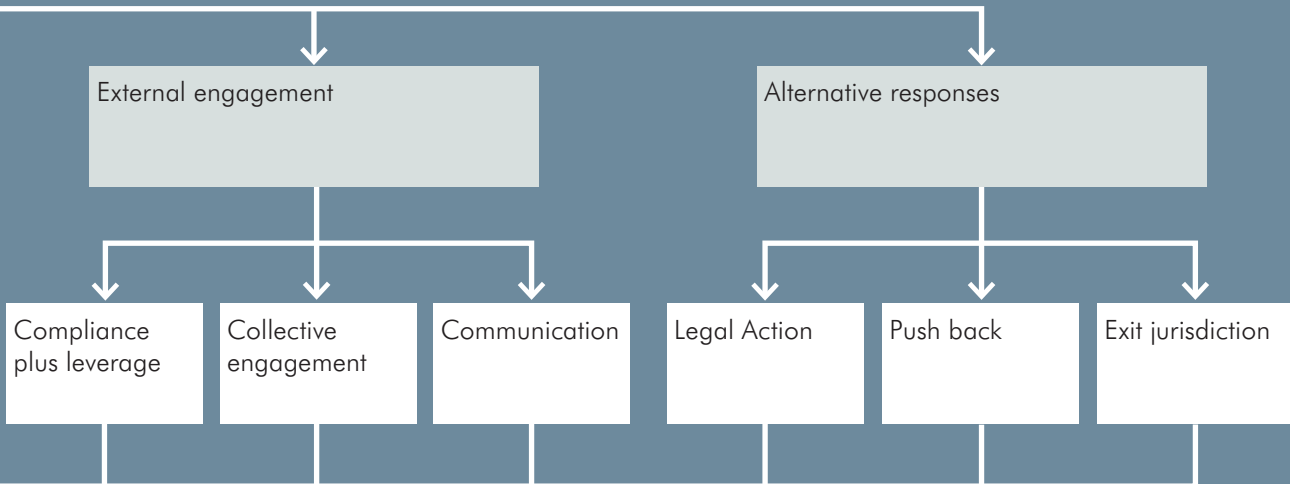
# Dealing with conflicts through human rights due diligence



Identification of  
human rights impacts



Actions to address



Monitoring

Use operational-level grievance mechanisms

Communication

to guarantee their effective participation.<sup>82</sup> The Inter-American Commission on Human Rights also addressed this type of conflict in *Mary and Carrie Dann v United States*:

[T]he [USA], through the development and implementation of the Indian Claims Commission process, has taken significant measures to recognize and account for the deprivations suffered by the indigenous communities...however, the Commission concludes that these processes were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests.<sup>83</sup>

### 2.3 Information about national law is not publicly available

Company representatives indicated that in certain jurisdictions, national regulations are not always publicly available. Some regulations are only available locally, in that the company's local team would sometimes be prohibited from sharing them outside of the jurisdiction, even with their own legal teams elsewhere. Company representatives also referred to the use of royal decrees which the company's legal team were unable to locate.

One of the principles of the rule of law as defined by Tom Bingham is that the law must be publicly available:

All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.<sup>84</sup>

The UK House of Lords has held that legal certainty requires that applicable rules are ascertainable "by reference to identifiable sources that are publicly available".<sup>85</sup> Additionally, the European Court of Human Rights has held that the law must be "adequately accessible...[and] formulated with sufficient precision to enable the citizen to regulate his [or her] conduct".<sup>86</sup>

The Telenor Group has published a report on the relevant laws that authorise government access to communications and information in each of its markets.<sup>87</sup> It notes that "whilst the laws themselves are all publicly available, in practice they tend to be little known and not well understood."<sup>88</sup>

### 2.4 Inconsistent laws in different jurisdictions

In some situations, the law or practice in one jurisdiction may conflict with the law or practice of another jurisdiction where the company also operates. For example, statutory parental leave provisions differ from one jurisdiction to the next.<sup>89</sup> Different laws or practices may also apply within the same jurisdiction. For example, in India, different levels of minimum wage are set in different states.<sup>90</sup>

**'The absence of national law is ... no guarantee that a company will have a blank canvass to implement its global human rights policy consistent with IHR standards.'**

82 *Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs), IACtHR Series C No. 309, 25 November 2015 at paras 208-209.

83 *Mary and Carrie Dann v United States*, IACHR Case 11.140, Report No. 113/01, 15 October 2001 at paras 138-139.

84 Tom Bingham, *The Rule of Law*, Penguin Press (2010) at 8.

85 *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279.

86 *The Sunday Times v The United Kingdom*, Judgment, European Court of Human Rights, No. 6538/74 (26 April 1979) at para 49.

87 Telenor Group, *Authority Requests for Access to Electronic Communication – legal overview*, March 2017, available at: [https://www.telenor.com/wp-content/uploads/2015/05/Authority-Request-Legal-Overview\\_March-2017.pdf](https://www.telenor.com/wp-content/uploads/2015/05/Authority-Request-Legal-Overview_March-2017.pdf).

88 *Ibid* at 3.

89 See discussion under "International standards not uniform" below.

90 Section 3(1) of the Indian Minimum Wages Act (1948).

**'It was stated that it is difficult to track and monitor how products are used further down the value chain.'**

Company representatives indicated that they tend to adhere to the law of their home state or another major state where they operate, if in their view such laws contain higher human rights standards. Company representatives stated that this approach has on occasion led to challenging conversations in other jurisdictions. One company representative mentioned that what “we view as the rule of law, may be viewed there as imperialism”.

It was noted that these conflicts between the laws of different national jurisdictions do not only arise between developed and developing country jurisdictions, but also between the laws of developed country jurisdictions. For example, in 2012 the European Union introduced an Emissions Trading Scheme (“ETS”)<sup>91</sup> to regulate carbon emissions of aviation. In response, the US enacted legislation which prohibits US airlines from complying with the EU’s ETS rules<sup>92</sup> resulting in different standards in the US and the EU. The EU now limits the application of the ETS to intra-EEA flights.<sup>93</sup> This example illustrates that transnational companies may face conflicts when one state issues a law which prohibits the company from complying with the laws in another jurisdiction.

## 2.5 No relevant national laws

Where national laws do not contain human rights protections but do not require action by companies that would violate human rights, companies are, in theory, free to respect IHR standards within their local operations.

Company representatives indicated that in circumstances where there are no national laws which protect the relevant human rights, it may be possible for the company to raise local standards by applying international standards. For example, a company may be the only provider of medical care to a community that had no access to health facilities previously.

However, as we have seen above, even where no national laws exist on an issue, local practices may operate in ways which contradict human rights, such as societal restrictions on women in the workplace. The absence of national law is therefore no guarantee that a company will have a blank canvass to implement its global human rights policy consistent with IHR standards.

Another feature of the absence of a domestic legal framework to protect the human rights in question, is that companies are unable to challenge a conflicting law in domestic courts.

## 2.6 No relevant national enforcement

Some jurisdictions may have enacted legislative provisions to protect human rights, but have weak or no enforcement of them within the domestic legal system. One common example is where local laws prohibit child labour, but in practice there is ineffective monitoring or enforcement by state authorities.<sup>94</sup> In these cases, company representatives stated that they have to do their own investigations into the reality of the operating context, such as through human rights impact assessments, since simply looking at the legal framework does not provide the necessary information.

91 EU Directive 2008/101/EC, 19 November 2008, amended Directive 2003/87/EC. See also Christina Voigt “Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction” in Catherine Barnard (ed), *Cambridge Yearbook of European Legal Studies*, Hart Publishing (2012) at 475-506.

92 European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. 112-200, 27 November 2012.

93 EU Regulation No. 421/2014, 16 April 2014.

94 In Bangladesh, the Labour Law (2006) prohibits child labour and establishes various safeguards in keeping with international standards. However, UNICEF estimates that 93% of child labourers in Bangladesh work in the informal sector and in domestic employment, making the enforcement of relevant laws “virtually impossible”. UNICEF “Child Labour: Bangladesh”, available at: [https://www.unicef.org/bangladesh/children\\_4863.html](https://www.unicef.org/bangladesh/children_4863.html).

One representative indicated that in many cases domestic laws may be progressive but enforcement depends on resources. For example, the governmental body responsible for factory inspections may be understaffed. This is not exclusively a developing country problem: a recent study which examined labour standards in the US found that “an employer would have to operate for 1,000 years to have even a 1 percent chance of being audited by Department of Labor inspectors”.<sup>95</sup>

## 2.7 No access to national assessment of compliance with IHR standards

In some situations, companies find that they need to rely on the assumption that national governments’ own activities are in accordance with international human rights law. However, they often have very little control over, or knowledge about, such activities.<sup>96</sup>

One example from the ICT sector is where a national government requires a company to provide it with customer data. The purpose of the information request may be for legitimate law enforcement which is aligned with IHR standards.<sup>97</sup> However, in other cases, the company may be concerned that the private information of its customers will be used to violate the human rights of the relevant individuals. From a rule of law perspective, it is problematic to expect a company to weigh up the proportionality of the potential infringement of privacy against the potential harm which may occur if the data is not shared.<sup>98</sup> This is an enquiry most suitable to government decision-makers, subject to judicial oversight and challengeable by rights-holders, as the company is “not privy to the state’s information or to its assessment of the situation, concerns or intentions”.<sup>99</sup>

Another manifestation of this challenge is where the company is not a majority shareholder or where it needs to partner with local enterprises. The IHRB’s guidance on operating in high risk countries highlights that “[p]ersuading local partners to adopt standards that conflict with national laws is a hard sell, especially if the partner is State-owned.”<sup>100</sup> It has been noted:

[S]tates are able – and are required – to exercise discretion as to whether to cooperate with other states. They may request assurances and guarantees that no violations would occur, and they can evaluate the credibility of those assurances. Corporations do not have the same luxury, since they operate with a vertical relationship, under a domestic legal regime, which they are not empowered to modify.<sup>101</sup>

Similarly, company representatives indicated that where a multilateral development bank or a governmental or semi-governmental institution is involved in a consortium, the other business partners often rely heavily on those bodies having undertaken HRDD. It has been argued that the state duty to protect human rights implies an expectation on public investors to

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95 Gordon Lafer “The Legislative Attack on American Wages and Labor Standards, 2011-2012”, *Economic Policy Institute* (2013), available at: <https://www.epi.org/publication/attack-on-american-labor-standards/> at 29.

96 See, for example, Ronen above n 49 at 79.

97 Ronen above n 49 at 73.

98 Ibid at 79.

99 Ibid.

100 Institute for Human Rights and Business (IHRB), *From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries*, available at: [https://www.ihrb.org/pdf/from\\_red\\_to\\_green\\_flags/complete\\_report.pdf](https://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf) at 35.

101 Ronen above n 49 at 79.



insist that certain IHR standards are met.<sup>102</sup> However, studies published subsequently have highlighted that this does not always take place.<sup>103</sup>

Companies may themselves be quite far upstream in the supply chain. They may supply a product, such as equipment, to a government or state-owned enterprise, which may use the product for activities with adverse human rights impacts. Company representatives indicated that challenges arise if the company “starts to doubt” whether the government’s activities adhere to human rights. It was stated that it is difficult to track and monitor how products are used further down the value chain, as it is “difficult to second-guess what is going on in government conversations”.

Where a particular government is subject to sanctions for committing human rights abuses, company representatives indicated that the decision not to supply their products would be “clear and straightforward”. However, where the end user is not included on a sanctions list, and does not otherwise have a public record of human rights abuses, companies indicated that they often place considerable reliance on the end user government complying with its own international human rights obligations. It was highlighted in our research that in this area of political power and ambiguity, there is often a difference between “what is legal and what is right”.

## 2.8 International standards not uniform

In certain areas, standards across various jurisdictions are not uniform, or different national standards exceed international standards.

For example, in the context of parental leave rights, different international standards apply concurrently,<sup>104</sup> and allow for considerable flexibility and discretion on the part of states.<sup>105</sup> As a result, domestic regulation varies significantly from one jurisdiction to the next as to the number of weeks, the proportion of earnings, and entitlements afforded to male and female parents respectively.<sup>106</sup>

Accordingly, the international parental rights framework applicable to companies which operate in several of these jurisdictions is not uniform. Moreover, due to these provisions combining leave and pay entitlements, it is unclear which jurisdiction’s standard of protection qualifies as the

**‘In these cases, company representatives stated that they have to do their own investigations into the reality of the operating context, such as through human rights impact assessments, since simply looking at the legal framework does not provide the necessary information.’**

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102 IHRB Guidance above n 100 at 36.

103 Oxfam International and Inclusive Development International, “Owning the Outcomes: Time to make the World Bank Group’s financial intermediary investments more accountable”, October 2016, available at: [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bn-ifc-owning-outcomes-031016-en\\_0.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bn-ifc-owning-outcomes-031016-en_0.pdf).

104 Art 4(1) of the ILO Maternity Protection Convention No. 183 (2000) provides for 14 weeks of maternity leave. Para 1(1) of its accompanying ILO Maternity Protection Recommendation No. 191 (2002) suggests that member states should endeavour to extend maternity leave to a period of at least 18 weeks. Art 3(2) of ILO Maternity Protection Convention No. 103 (1952) provides for only 12 weeks of maternity leave and remains in force for some member states. Moreover, the EU’s Directive on Maternity Leave provides for 2 weeks of compulsory maternity leave, whereas 6 weeks is required under both ILO Conventions. Art 8(2) of the EU Directive 92/85/EEC on “the introduction of measure to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding”, 19 October 1992, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0085&from=en>; Art 6(1) of ILO Maternity Protection Convention (2000) and Art 3(3) of the ILO Maternity Protection Convention (1952).

105 The ILO Maternity Protection Convention *ibid* provides for a minimum of 14 weeks of paid maternity leave (Art 4(1), 6(1)) which includes six weeks compulsory leave after childbirth unless otherwise agreed at the national level (Art 4(4)). Article 6 provides for “cash benefits” to be provided to women on maternity leave “in accordance with national laws and regulations”. It further provides that where the amount is calculated based on previous earnings, it “shall not be less than two-thirds of the woman’s previous earnings” during these 14 weeks. This Convention is currently in force in 26 states. Under Article 8 of the EU Directive 92/85/EEC on “the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding”, 19 October 1992, women are entitled to a minimum of 14 continuous weeks of maternity leave. The Directive provides that payment and/or adequate allowance must be ensured “in accordance with national legislation and/or national practice”, allowing EU member states some flexibility in relation to how this is implemented.

106 For example, paid maternity leave in Germany and the Netherlands lasts for 14 and 16 weeks respectively, and during that time women (or birth parents) are entitled to 100% of their earnings. In contrast, women (or birth parents) in the UK are entitled to 39 weeks of paid maternity leave, but the statutory maternity pay is set at a capped level. See OECD Family database, Parental Leave, available at: [https://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf) at 3.

“highest”. Some companies, including telecommunications provider Vodafone<sup>107</sup> and food products company Danone,<sup>108</sup> have introduced maternity leave policies that cover their global operations. Both companies’ policies exceed the 14 week minimum prescribed by the ILO<sup>109</sup> and the EU,<sup>110</sup> whilst meeting higher requirements imposed at the national level, such as a 16 week minimum in the Netherlands where Vodafone operates.

**Recommendation:** Companies should identify the nature of the conflict which arises between IHR standards and the national law or practice.

### 3. Range of company approaches to conflicts

The Interpretive Guide describes a few ways in which a company could increase its ability to respond appropriately to the conflicts described in UNGP 23(b). These include “embed[ding] respect for human rights into its values” and “prepar[ing] its personnel for ethical dilemmas, through training, scenarios, lessons learned, decision trees and similar processes”.<sup>111</sup> The IHRB Guidance on high risk countries adds that “[g]aps in domestic legislation need to be identified and addressed through internal company policies.”<sup>112</sup> Also, a company should seek to identify “other possible ways to ensure compliance with both standards”.<sup>113</sup>

From our research, we have found that companies use a wide range of approaches to address different conflicts. This section sets out some of the most common approaches, which are based on examples provided by company representatives, industry guidance and legal research.

It is noted that methods aimed at addressing one kind of challenge may not necessarily be effective for others. In some situations, more than one approach may be used simultaneously, or a phased approach might be preferred as part of an ongoing HRDD process. We recommend that companies adopt approaches that best suit the situation.

‘One company representative noted that “change is possible where you have a global organisation, a brand and an industry association willing to push together”.’

107 In 2015 Vodafone introduced a global maternity leave policy, which offers their employees 16 weeks of paid leave. See, Vodafone, “Vodafone pioneers global maternity policy across 30 countries”, 6 March 2015, available at: <http://www.vodafone.com/content/index/media/vodafone-group-releases/2015/global-maternity-policy.html> and Naomi Rovnick, “Vodafone offers equal global maternity leave”, *Financial Times*, 6 March 2015, available at: <https://www.ft.com/content/2fb5d9c8-c3d3-11e4-9019-00144feab7de>.

108 Danone’s 2016 Global Parental Policy provides for a minimum of 18 weeks paid parental leave for a birth parent who is the primary caregiver and further stipulates that local standards will apply “in the event that the local legislation standards are more beneficial”. The Danone Global Parental Policy, October 2016 (updated 23 June 2017), available at: [http://danone-danonecom-prod.s3.amazonaws.com/Parental\\_Policy\\_Final\\_external\\_version.pdf](http://danone-danonecom-prod.s3.amazonaws.com/Parental_Policy_Final_external_version.pdf) at 4. The policy offers primary caregivers who are the legally adoptive parents of the child 14 weeks paid leave.

109 See art 4(1) and 6(1) of the ILO Maternity Protection Convention above n 104.

110 Art 8 of the EU Directive 92/85/EEC above n 104.

111 These steps correspond with the components of HRDD which BIICL and Norton Rose Fulbright identified during a previous study. McCorquodale, Smit et al above n 57 at 223-224.

112 IHRB Guidance above n 100 at 34.

113 Bersagel above n 59 at 5.

## Range of approaches which companies use

### Internal approaches

Limited compliance

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Global policies with local exemptions

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Taking the decision to higher decision-making bodies in the company

### Approaches within the value chain

Codes of conduct and contractual clauses

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Leverage

### Approaches which involve external engagement

Compliance plus leverage

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Collective engagement

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Communication

### Alternative responses to conflicting laws

Compliance in alternative ways

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Taking legal action to challenge conflicting laws

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Delayed compliance and “responsible non-compliance”

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Exiting the jurisdiction

## 3.1 Internal approaches

### 3.1.1 Limited compliance

In certain circumstances, it may be possible to limit compliance in such a way as to avoid human rights abuses. This may be achieved through a narrow interpretation of the relevant law, or compliance only under limited circumstances.

One example is the approach offered by the GNI, which consists of various steps which ICT companies could use to respond to data requests in a human rights-sensitive way. This includes ensuring that procedural requirements are followed,<sup>114</sup> which may assist companies in some cases, insofar as demands are “not always made in full compliance with formalities”.<sup>115</sup> The ICT Sector Guide similarly notes that without “robust processes for handling all requests, [companies] can risk ‘over complying’” by providing more private information to the requesting party than strictly necessary.<sup>116</sup> It suggests that companies narrowly interpret “the content and/or the territorial/jurisdictional scope of requests where they appear to be overly broad”.<sup>117</sup>

### 3.1.2 Global policies with local exemptions

UNGP 16 expects companies to express their commitment to respect human rights in a policy which is approved at the most senior level,<sup>118</sup>

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<sup>114</sup> GNI Principles above n 35.

<sup>115</sup> Ronen above n 49 at 80.

<sup>116</sup> ICT sector guidance above n 37.

<sup>117</sup> Ibid at 45.

<sup>118</sup> UNGP 16(a).

publicly available<sup>119</sup> and “[s]tipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services”.<sup>120</sup> The UNGC Good Practice Note found that “[i]nterviewees agreed that applying the highest standard of conduct for all of the enterprise’s operations across the globe might actually be more efficient than applying separate standards in each jurisdiction.”<sup>121</sup>

Companies with global policies which implement human rights standards into operational practices across all their locations worldwide often find that they need to make a local exemption based on specific circumstances. An example from the LGBTI Standards is to “allow LGBT employees to refuse, without any negative career repercussions, to travel to particular countries where they might face risks.”<sup>122</sup>

The usefulness of exemptions based on local circumstances is, however, limited. Firstly, exemptions from global company policies would only be justifiable where the exemption does not itself violate a human right. For example, a company may make specific arrangements based on the circumstances, such as allowing staff who face discrimination in one jurisdiction to work remotely from another. Also, the proliferation of local exemptions may result in a patchwork approach, which could render the global policy ineffective. The LGBTI Standards highlight the shortcomings of exemptions which allow staff to refuse to travel countries where they may face risk:

While this approach may shield some international staff from risk of abuse, it does little to protect the rights of local LGBTI staff and other LGBTI people that might be impacted by the company in the countries concerned, and nothing to change wider patterns of discrimination in those countries. In some situations it might even contribute towards perpetuating discrimination and fail the company’s responsibility to avoid infringing upon human rights and addressing their adverse human rights impacts under the UN Guiding Principles.<sup>123</sup>

This consideration similarly applies to other local exemptions to global policies.

### 3.1.3 Taking the decision to higher decision-making bodies in the company

Some companies have indicated that questions around conflicting legal requirements of host states are often raised to headquarters, group or parent level in the home state. This enables these decisions to be centralised, and places some distance between the decision-maker and the parties applying pressure on company staff at the local level. For example, the UNGC Good Practice Note describes the possibility that, by forwarding requests for information to headquarters level, an internet service provider could “perhaps positively [affect] incentives for the requesting authority to have legitimate cause”.<sup>124</sup>

Company representatives indicated that where legislation is strictly enforced in some jurisdictions, it is frequently easier to demonstrate the need to adhere to these standards to business partners in other jurisdictions. For example, it was indicated that the US and UK’s exercise of transnational jurisdiction for the purpose of their anti-corruption legislation means that

**‘[Companies] find human rights language useful to respond to public pressure to disclose, as this is the language used by stakeholders such as civil society and, increasingly, investors and regulators.’**

119 UNGP 16(d).

120 UNGP 16(c).

121 Bersagel above n 59 at 4.

122 LGBTI Standards above n 40.

123 Ibid.

124 Bersagel above n 59 at 12.

**‘Companies often find that they themselves need to enforce human rights standards within their value chains.’**

local actors in host states may “understand, even if they are not thrilled” that adherence to these standards is required. This facilitates the implementation of company-wide policies on these issues.

However, centralising decision-making may also expose the company to some legal risks. Emerging case law on parent company liability in jurisdictions such as the UK<sup>125</sup> suggests that the exercise of control by a parent company over the activities of a subsidiary could give rise to a duty of care owed by the parent company to a rights-holder.<sup>126</sup>

### 3.2 Approaches within the value chain

Companies often find that they themselves need to enforce human rights standards within their value chains. This is often done through contractual provisions, such as human rights clauses, or incorporation of supplier codes of conduct that contain human rights standards.<sup>127</sup>

These provisions may include legally binding instructions as to whether and when domestic or IHR standards take precedence. For example, Ikea addresses the conflicts described in UNGP 23 in its contractually binding supplier code of conduct, IWAY, by including the following provision:

The IKEA Supplier shall always comply with the most demanding requirements whether they are relevant applicable laws or IKEA IWAY specific requirements.<sup>128</sup>

A further provision states:

Should the IKEA requirement contradict national laws or regulations, the law shall always be complied with and prevail. In such cases, the Supplier shall immediately inform IKEA.<sup>129</sup>

In some circumstances, contractual clauses can also be used in relationships with governments.<sup>130</sup> However, it was highlighted by company representatives that in some sectors, such as where licences are required for telecommunications operations, it is “pretty impossible to influence terms of contracts which are made through public procurement”. It was highlighted that in these cases, contracts have pre-determined clauses to which few changes can be made, and which apply to all operators.

Contractual clauses may be a helpful tool for companies which are concerned that their product could be used for human rights violations in certain jurisdictions. One example of this scenario presented itself when the Danish pharmaceutical company Lundbeck learned that certain US authorities were using the company’s drug pentobarbital for lethal injection. The drug was developed and commonly used for the treatment of epilepsy, including life-threatening epileptic seizures.<sup>131</sup> The approach adopted by the company was to control distribution through a single sales point and to use contractual clauses which prohibit the use of the drug for capital punishment purposes.<sup>132</sup> In this way, the company sought to limit the use of its product to its intended purpose only.

125 See *Chandler v Cape Plc* [2012] EWCA Civ 525; *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635; *Lungowe and others v. Vedanta and KCM* [2017] EWCA (Civ) 1528 and *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2018] EWCA Civ 191.

126 See *Lungowe and others v. Vedanta and KCM* [2017] EWCA (Civ) 1528 at 83.

127 McCorquodale, Smit et al above n 57 at 215.

128 See Ikea “IWAY Standard”, available at: [http://www.ikea.com/ms/es\\_ES/pdf/reports-downloads/ikea-code-of-conduct-the-iway-standard.pdf](http://www.ikea.com/ms/es_ES/pdf/reports-downloads/ikea-code-of-conduct-the-iway-standard.pdf). See also Lara Blecher “Codes of Conduct: The Trojan Horse of International Human Rights Law?” in *Comp. Labor Law & Pol’y Journal* Vol 38:437 at 451.

129 Ikea IWAY Standard *ibid*.

130 IHRB Guidance above n 100 at 37.

131 Karin Buhmann “Damned If You Do, Damned If You Don’t? The Lundbeck Case of Pentobarbital, the Guiding Principles on Business and Human Rights, and Competing Human Rights Responsibilities” 40 *J.L. Med. & Ethics* (2012) 206 at 206.

132 *Ibid*.

### 3.3 Approaches which involve external engagement

#### 3.3.1 Compliance plus leverage

In some scenarios, a company may not have much of a choice as to whether to comply with local law which contradicts IHR standards. For example, non-compliance may lead to the withdrawal of an operating licence or the closing down of the company in the jurisdiction. Company representatives indicated other factors were also relevant, such as the rights of staff and other individuals (including their safety), the weight and likelihood of enforcement of the legislation, as well as the seriousness of any consequence or conviction.

The OHCHR calls this the “When In Rome” approach, whereby companies adhere to national laws despite such laws conflicting with IHR standards. In order to operate under such circumstances, the company may need to create the necessary exceptions to its global policy based on local conditions, as discussed above.<sup>133</sup>

At the same time as it is complying with the conflicting national law, companies may seek to exercise leverage over relevant stakeholders to help influence alignment of national laws and practices with IHR standards. UNGP 19 provides that appropriate action to prevent and mitigate adverse human rights impacts will vary according to “the extent of [the company’s] leverage in addressing the adverse impact”. The Commentary to UNGP 19 defines leverage as “the ability to effect change in the wrongful practices of an entity that causes a harm”. The Commentary also states that: “[i]f the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it”, and if it lacks leverage it could increase it, for example through “offering capacity-building or other incentives to the related entity, or collaborating with other actors”.<sup>134</sup>

The approach of using leverage to influence local laws to strengthen legal protections aligns with the “Advocate” approach contained in the OHCHR’s LGBTI Standards.<sup>135</sup> Companies may also choose a softer advocacy approach. For example, a number of companies withdrew their sponsorship or other benefits provided to the National Rifle Association of the United States after issues of gun violence and human rights became more prominent.<sup>136</sup>

The UNGPs acknowledge that the degree of leverage a company has in each circumstance may differ.<sup>137</sup> Company representatives confirmed this. For example, companies supplying to large governments in a competitive market may have minimal leverage while those with a large local presence may be able to exercise considerably more leverage. One company representative highlighted that companies which need licences to operate often have “small spaces for opportunity” with states. In contrast, a company representative from a sector which does not rely on licences indicated that they have “generally good relationships with governments”.

#### 3.3.2 Collective engagement

Conflicts between IHR standards and national laws and practices are often systemic. As a result, companies often collaborate in formal groups to address issues which one company is unlikely to be able to solve on its own.

**‘[C]ompanies often collaborate in formal groups to address issues which one company is unlikely to be able to solve on its own.’**

<sup>133</sup> LGBTI Standards above n 40 at 21.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> See Derek Thompson, “Why are Companies Finally Turning against the NRA” *The Atlantic*, 26 February 2018, available at: <https://www.theatlantic.com/business/archive/2018/02/nra-discounts-corporations/554264/>.

<sup>137</sup> Commentary to UNGP 19.

Such collaboration often takes place through industry organisations or multi-stakeholder initiatives.

One company representative noted that “change is possible where you have a global organisation, a brand and an industry association willing to push together”. Another company representative indicated that in some jurisdictions, the ability to engage collectively in this way is of key importance. It enables them to push back against pressure from the government to which they may have otherwise have been subject.

Company representatives noted the utility of sector associations, such as the International Council on Mining and Metals,<sup>138</sup> and the activities of the ACT (Action, Collaboration, Transformation) initiative,<sup>139</sup> a collaborative effort between brands, trade unions and manufacturers to deal with living wage issues. The GNI, mentioned above, is an example of a multi-stakeholder initiative, aimed at respecting privacy and freedom of expression in the ICT sector. Other examples mentioned by company representatives include the Wolfsberg Group, which has published a toolkit on tracking human trafficking and modern slavery for the banking sector,<sup>140</sup> the Fair Labor Association, which has developed standards to protect workers’ rights across industries,<sup>141</sup> and the International Code of Conduct Association (ICoCA), which offers certification to private security companies around human rights.<sup>142</sup>

### 3.3.3 Communication

HRDD as described in the UNGPs includes “communicat[ing] how [human rights] impacts are addressed”.<sup>143</sup> Company representatives indicated that if companies do take a position where they seek to apply IHR standards where there is a conflict with national law or practice, it is often helpful to be transparent about the company’s policies and actions. This corresponds with the expectation set out in the Commentary to UNGP 23 that companies “demonstrate their efforts” to “respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances”.<sup>144</sup>

Company representatives indicated that their companies frequently use human rights language both in their internal processes (such as human rights policies and codes of conduct) and when engaging externally on these issues (such as through reporting). They indicated that they find human rights language useful to respond to public pressure to disclose, as this is the language used by stakeholders such as civil society and, increasingly, investors and regulators.

One company representative stated that although self-criticism in public reporting is “nerve-racking” for legal counsel, stakeholders tend to accept such self-criticism as a demonstration that “trends are in the right direction”. Such a transparent approach can expose a company to reputational and litigation risks. However, HRDD can mitigate these risks. For example, Nestlé was successful in defending a claim under California’s Transparency in Supply Chains Act, as it had been transparent in its actions and undertaken due diligence under the provisions of that law.<sup>145</sup>

**‘[C]ompany representatives indicated that “sometimes you need to break the law in the most ethical way possible”.’**

138 See <https://www.icmm.com>.

139 See <https://www.ethicaltrade.org/act-initiative-living-wages>.

140 See <http://www.wolfsberg-principles.com/>.

141 See <http://www.fairlabor.org/>.

142 See <https://icoca.ch/en/icoc-association>.

143 UNGP 17.

144 Commentary to UNGP 23.

145 *Barber v. Nestlé USA* No. 8:15-cv-1364 (C.D. Cal. Aug. 27, 2015).

Insofar as companies are expected to communicate on how they “seek to honour” IHR standards when faced with conflicting domestic requirements, this becomes challenging when such laws are not publicly available. In these cases, the company may need to rely on evidence of local practice, such as newspaper reports and anecdotal experience of local staff members,<sup>146</sup> in order to “demonstrate their efforts”.<sup>147</sup>

### 3.4 Alternative responses to conflicting laws

If a company decides to consider alternatives to compliance with national law which contradicts international human rights, it can do so in many different ways. For example, one company representative raised the question: “Do you ‘not comply’ and make a statement about it? Or do you ‘not comply’, and when it becomes an issue, bring a legal challenge?” This subsection highlights a few ways in which companies may seek alternative responses to compliance with national laws which conflict with IHR standards.

#### 3.4.1 Compliance in alternative ways

Often companies try to find alternative ways around the conflict. The UNGC Good Practice Note refers to this approach as using “parallel means”.<sup>148</sup> For example, one company representative indicated that they have in the past considered remote working for affected individuals, where a domestic law prevented a person of that gender being the senior manager in charge of the relevant office. Similarly, one response to the societal restrictions which women face in the workplace in certain jurisdictions is the use of female empowerment programmes.<sup>149</sup>

In this way, companies “are sometimes able to be more creative in seeking to meet the objectives behind an internationally recognized human right without violating the letter of a local law that imposes a conflicting requirement”.<sup>150</sup> Bersagel, however, highlights two criticisms of this approach. Firstly, it is rare that parallel structures such as worker councils, a possible alternative where trade unions are prohibited, offer the same effectiveness and protections as trade unions. Secondly, the “sidestepping” of national laws which conflict with IHR standards “may delay pressure for regulatory change” within that state. In this way, the parallel approach may “validat[e] a problematic status quo” by signalling the conflict as being “acceptable or uncontroversial”.<sup>151</sup>

#### 3.4.2 Taking legal action to challenge conflicting laws

Where the conflict arises from local law, companies might be able to bring or support a legal challenge against the law.<sup>152</sup> In some cases, this takes place in local courts, such as the case where 97 companies including Apple, Facebook, Google and Microsoft filed an amicus brief<sup>153</sup> in support

**[A] group of foreign companies operating in South Africa during the Apartheid era adopted the Sullivan Principles, which, in conflict with local laws of the time, provided for racial desegregation of the workplace, as well as equal pay.’**

<sup>146</sup> See also Bersagel above n 59 at 5.

<sup>147</sup> Commentary to UNGP 23.

<sup>148</sup> Bersagel above n 59 at 10.

<sup>149</sup> For example, see ExxonMobil’s female empowerment programmes which offer women training and recruit and promote women to management positions in Papua New Guinea, available at: <http://corporate.exxonmobil.com/en/company/worldwide-operations/locations/papua-new-guinea/community/empowering-women>. See also General Electric’s all-female business process and services centre in Riyadh, Saudi Arabia, available at: <http://middleeast.geblogs.com/en/stories/our-people/hundreds-of-fresh-hires-for-ksas-first-all-female-business-process-services-center/>. See also Bersagel *ibid* at 14, referring to “mostly-female divisions within the enterprise” such as “the marketing or human resources department...consist[ing] solely of women in a local office otherwise dominated by male employees”. She adds however that this practice “does not meet the standard established by international human rights law”.

<sup>150</sup> Bersagel *ibid* at 10.

<sup>151</sup> *Ibid* at 11.

<sup>152</sup> *Ibid*.

<sup>153</sup> Brief of technology companies and other businesses as *Amici Curiae* in support of Appellees in *State of Washington v Donald J. Trump*, Case No. 2:17-cv-00141-JLR.



**‘There is often a misperception on the part of states that companies welcome the absence of regulation.’**

of the suit by the State of Washington against the US ban on migration from various Muslim-majority states.<sup>154</sup> This was initially successful and led to changes to the ban.<sup>155</sup> It is noted that the filing of an amicus brief poses less financial risk than being a party, insofar as damages or costs orders would usually fall on one of the parties. In other cases, legal challenges to conflicting local laws, or lack of protections, could take place through international investment tribunals, which have recently begun considering human rights as part of companies’ international law obligations.<sup>156</sup>

### 3.4.3 Delaying compliance and “responsible non-compliance”

Company representatives indicated that in some instances companies delay compliance with conflicting laws, until pressed to do so. In other situations, company representatives indicated that “sometimes you need to break the law in the most ethical way possible.” The UNGC Good Practice Note refers to this approach as “subtle and not too subtle forms of ‘corporate civil disobedience’” and describes it as “rights-based non-compliance”.<sup>157</sup> One company representative referred to this approach as “responsible non-compliance”.

For example, a group of foreign companies operating in South Africa during the Apartheid era adopted the Sullivan Principles,<sup>158</sup> which, in conflict with local laws of the time, provided for racial desegregation of the workplace, as well as equal pay.<sup>159</sup>

Another example is what the LGBTI Guidance calls the “Embassy approach”, whereby the company aims to provide a “safe space”, for “effectively raising the bar in jurisdictions where those protections are absent from domestic law”.<sup>160</sup> One company representative described this approach as upholding IHR standards within the company’s own operations, based on the view that “these are my offices and these are my fences”.

However, this approach will only be considered if it would not pose any risks to rights-holders, and if the company deems itself to have an adequate level of power or influence. For example, a company representative noted that “the problem with the embassy model is that a company is not an embassy” and so does not have immunity. They highlighted that a company’s employees are not legally protected, and could be at risk due to the company’s non-compliance. They used the example of national law which criminalises same-sex relationships and requires individuals to report other individuals. A company which defies this law, by implementing an internal

154 Complaint for declaratory and injunctive relief in *State of Washington v Donald J. Trump et al* Case No. 2: 17-cv-00141; First amended complaint for declaratory and injunctive relief in *State of Washington and State of Minnesota v Donald J. Trump et al*, Case No. 2:17-cv-00141-JLR.

155 See Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States), 27 January 2017, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>; <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>; Executive Order 13780 (Protecting the Nation from Foreign Terrorist Entry into the United States) 6 March 2017, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>; <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

156 For example, in *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v the Argentine Republic*, ICSID Case No. ARB/07/26, 8 Dec 2016, an international investment tribunal found that private companies’ international human rights responsibilities can be enforced in investment treaty claims. See also Naomi Briercliffe “Holding investors to account for human rights violations through counterclaims in investment treaty arbitration”, *Thomson Reuters Practical Law Arbitration*, 30 January 2017, available at: <http://arbitrationblog.practicallaw.com/holding-investors-to-account-for-human-rights-violations-through-counterclaims-in-investment-treaty-arbitration/>.

157 Bersagel above n 59 at 13.

158 See “The Global Sullivan Principles” available at: <http://hrlibrary.umn.edu/links/sullivanprinciples.html>.

159 S. Prakash Sethi and Oliver Williams, *Creating and Implementing Global Codes of Conduct: An Assessment of the Sullivan Principles as a Role Model for Developing International Codes of Conduct-Lessons Learned and Unlearned*, [2002] 105(2) *Business and Society Review* 169. See also Bersagel above n 59 at 12.

160 LGBTI Standards above n 40 at 21.

**‘[O]ne company representative stated that “all of these things are substitutes for Pillar I [of the UNGPs].”’**

policy supporting LGBTI staff, may not be able to protect its employees from being reported in terms of the local legal requirement.

It is also noted that this approach may not meet the requirement set out in UNGPs 23(a) which expects companies to “comply with all applicable laws”. Accordingly, company representatives emphasised that this approach would only be considered appropriate in extremely limited circumstances.

### 3.4.4 Exiting the jurisdiction

In the event where an actual or potential human rights impact arises, the choice of whether to remain in that jurisdiction or business relationship depends on each individual circumstance. The Interpretive Guide elaborates on the question of leaving a jurisdiction as follows:

In the rare situations where local law or other requirements put an enterprise at risk of being involved in gross abuses of human rights such as international crimes, it should carefully consider whether and how it can continue to operate with integrity in such circumstances, while also being aware of the human rights impact that could result from terminating its activities.<sup>161</sup>

Many companies in this study stated that they will first engage with the government or supplier in order to see if the operating conditions can be improved through leverage.

Some companies interviewed said that they had exited jurisdictions based on human rights-related reasons. The decision may depend on the type of product or service that the company provides. When the company believes that it contributes to the human rights of its local market by supplying basic needs, such as telecommunication services, fortified food or low income financial services, this may influence its decision to stay and exercise leverage. One company representative which supplies basic goods and has operated in almost all jurisdictions across the world for many years, indicated that it has not yet considered exiting a jurisdiction for human rights reasons. They choose to rather “hang on, as history tells us it is better for the community and the country.” The company would withdraw people for safety, but at some later stage the company would “go back in”.

Often the decision whether to exit a jurisdiction based on human rights concerns will also take into consideration the general operational environment and rule of law in the relevant jurisdiction. The UNGC Good Practice Note highlights that “a regime that demonstrates a lack of respect for international human rights concerns is unlikely to assertively enforce the rule of law more generally, further jeopardizing the company’s investments.”<sup>162</sup>

**Recommendation:** Companies should identify a suitable approach, or combination of approaches, by which the company could seek to adhere to domestic legal requirements whilst respecting IHR standards.

<sup>161</sup> Interpretive Guide above n 17 at 79.

<sup>162</sup> Bersagel above n 59 at 16-17.

## 4. The role of states and regulation

Domestic laws and their enforcement are not the responsibility of companies. Instead, these are unambiguously states' duties, both in terms of Pillar I of the UNGPs and the wider international law framework. In addition to regulatory powers, states also have influential public procurement, export credit and export licensing processes at their disposal to support IHR standards, which studies have shown are currently being underutilised to incentivise HRDD.<sup>163</sup>

**'High risk operating environments require companies to invest considerable resources in steps to undertake heightened ongoing HRDD...to compensate for the shortcomings of the domestic legal system in protecting human rights.'**

There is often a misperception on the part of states that companies welcome the absence of regulation.<sup>164</sup> Instead, companies that "seek to honour" IHR standards, as expected by UNGP 23(b), view the absence of state involvement in improving and enforcing human rights-compliant domestic laws in a negative light. High risk operating environments require companies to invest considerable resources in steps to undertake heightened ongoing HRDD, engage in collective initiatives, and exercise various forms of leverage, to compensate for the shortcomings of the domestic legal system in protecting human rights. In describing their HRDD process and collective engagement efforts, one company representative stated that "all of these things are substitutes for Pillar I."

There are various ways for companies to make their position clear. For example, companies which are concerned about the lack of laws and state practices which protect IHR standards can engage with any public consultations on regulatory reforms. In doing so, they not only contribute to the process' legitimacy, but also help ensure that any regulation which follows is clear, fair, efficient and realistic.<sup>165</sup> In some instances, this can be through industry association involvement or multi-stakeholder initiatives, such as GNI in the ICT sector.

However, companies can also demonstrate their support of human rights in less direct ways. For example, during the Sochi Olympics, Google displayed a rainbow-flag doodle<sup>166</sup> in support of LGBTI rights, described in the press as "a not-so-subtle pre-Olympics shot at Russia's less-than-stellar record on gay rights".<sup>167</sup>

The kinds of conflicting scenarios described in UNGP 23(b) would significantly diminish if all states were to meet their international law obligations by aligning their domestic legal frameworks with IHR standards. Until that time, the actions of companies to deal with conflicts between IHR standards and national laws and practices will remain crucial. We recommend that companies work towards seeking states to uphold IHR standards through their individual and collective activity.

**Recommendation:** Companies should publicly express their views, both individually and collectively.

<sup>163</sup> See International Learning Lab on Public Procurement and Human Rights, "Public Procurement and Human Rights: A Survey of Twenty Jurisdictions", July 2016.

<sup>164</sup> John Ruggie, the author of the UNGPs, phrased this misperception as follows: "Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputation and other risks to business." "Protect, respect and remedy framework" above n 24 at para 22.

<sup>165</sup> For example, on 26 June 2014 the UN Human Rights Council established an inter-government working group to consider a binding treaty to regulate the activities of business in international human rights law. See UN Human Rights Council "Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights", available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>.

<sup>166</sup> Google describes Google doodles as: "Doodles are the fun, surprising and sometimes spontaneous changes that are made to the Google logo to celebrate holidays, anniversaries and the lives of famous artists, pioneers and scientists", available at: <https://www.google.com/doodles/about>.

<sup>167</sup> Alex Fitzpatrick, "Google Doodle upholds Gay Rights Ahead of Sochi Olympics", *Time*, 7 February 2014, available at: <http://time.com/5206/google-gay-rights-sochi-olympic-doodle/>.

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## 5. The “human rights journey”

Company representatives frequently referred to their company’s “human rights journey”. One company representative mentioned that they engage with suppliers on a “continuous learning journey”. Another company representative stated that “[i]t is important to keep on improving.”

‘Company representatives frequently referred to their company’s “human rights journey”...“It is important to keep on improving.”’

As operating environments are complex and legal requirements are developing at a different pace, business is likely to continue encounter the types of conflict described above. The IHRB Guidance on high risk countries describes the importance of a considered approach as follows:

So long as the context remains unreformed, abuses will persist. This does not mean the situation is hopeless or that companies are helpless. The choices a company makes and the actions it takes can have a direct bearing on the incidence of abuse and its severity.<sup>168</sup>

Ultimately, these situations cannot be addressed through a tick-box exercise, but need to be dealt with on a case-by-case basis as part of HRDD.<sup>169</sup> There is no one size fits all solution and there is “no blueprint” for addressing these conflicts”.<sup>170</sup>

Our research showed that certain specific steps may be taken as part of a company’s HRDD to address conflicts between IHR standards and domestic requirements:<sup>171</sup>

- Adopt narrow interpretations of laws which conflict with IHR standards;
- Limit compliance only to the minimum necessary to comply with the law;
- Do not agree to government requests that have no basis in national law;
- Use codes of conduct and contractual terms in supply chains which reflect IHR standards, and require the supplier to inform the company when national laws or practices conflict with IHR standards;
- Be aware of possible threats to local staff or other rights-holders when responding;
- Use home state law as a justification for higher standards than host state law;
- Use of grievance mechanisms to understand actual and potential human rights impacts arising from the conflicting law or practice; and
- Training for all relevant staff and suppliers.

**Recommendation:** Companies should take some action and not ignore the conflict.

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<sup>168</sup> IHRB Guidance above n 100 at 39.

<sup>169</sup> Commentary to UNGP 18.

<sup>170</sup> Interpretive Guide above n 17 at 78.

<sup>171</sup> See especially the GNI Principles, above n 35.

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# IV Conclusions



UNGP 23 expects companies to “[c]omply with all applicable laws and respect internationally recognized human rights, wherever they operate”, as well as “[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements.”

While the legal responsibility is on states to uphold IHR standards, many of the human rights risks which companies face are a result of a misalignment between domestic regulation of corporate activity and IHR standards. As such, the kinds of conflicts described in UNGP 23(b) can affect business decisions. These conflicts manifest themselves in a range of ways, as described above, including a lack of domestic human rights protections, weak enforcement by host state authorities, and laws which require corporate conduct which violates human rights.

The international human rights framework does not currently provide for a clear legal hierarchy or rules of interpretation to enable companies to adhere to both domestic legal requirements and respect IHR standards in all circumstances. The UNGPs, the OHCHR Interpretive Guide and the OECD Guidelines all recognize that when domestic legal requirements conflict with IHR standards, companies are being pulled in two opposite directions. Industry and issue-specific guidance such as the OHCHR’s LGBTI Standards and the GNI have provided some examples of practical ways in which companies could seek to bridge these opposing requirements in specific circumstances.

In this paper, we have analysed this guidance, as well as examples provided by company representatives, to develop recommendations for companies to respond to these conflicts with the framework of HRDD. HRDD is a core part of the responsibility on companies to respect human rights under the UNGPs. By undertaking HRDD, companies can identify the possible human rights impacts of the national law or practice, try to mitigate the consequences, and are better able to account for their activities. By so doing they can demonstrate that they are undertaking their best efforts to address the conflict in accordance with UNGP 23.

**‘Ultimately, these situations cannot be addressed through a tick-box exercise, but need to be dealt with on a case-by-case basis as part of HRDD.’**



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