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A Human Rights Perspective on Professional Responsibility in Global Corporate Practice

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A HUMAN RIGHTS PERSPECTIVE ON PROFESSIONAL RESPONSIBILITY IN GLOBAL CORPORATE PRACTICE

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The direct applicability of human rights law to the attorney-client relationship has serious implications for ethical corporate governance. In addition to creating criminal and civil risks for lawyer and client alike, the specter of human rights violations in business dealings gives rise to myriad ethical questions for corporate lawyers to consider and resolve. These include matters such as the legitimate object and scope of corporate representation, conflicts of interest, duties to withdraw, and matters of competence and communication in corporate governance. They also raise questions of professional secrecy and whether ethical codes permit (or even require) lawyers to reveal confidential information, either to prevent harm or to protect the corporate client from its own malfasant employees. These ethical concerns also affect supervisory relationships and duties to report misconduct by other lawyers.

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I. INTRODUCTION

The interplay between business and human rights presents a complex set of challenges for corporate lawyers. As business becomes increasingly global, often through a lengthening supply chain and a widening range of outsourced functions, the risk of a corporation directly or indirectly violating human rights continues to grow as

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well.¹ The international community continues to debate the optimal intersection of business and human rights; although some consensus exists,² many of the norms in question have yet to develop into firm rules of international law.³

Corporate lawyers can play a key role in this area by working with business clients to develop standards and appropriate compliance frameworks to address the unique global risks that human rights present to the business sector. But certain risks for lawyers have grown as well, and corporate counsel increasingly must manage new and shifting dimensions of ethical risk as they practice law in rapidly-globalizing business environments. This includes not only personal hazards (an individual lawyer's compliance with ethical rules) but also ethical risks at the enterprise level for organizations – law firms and legal departments – that serve clients in this area.

II. CORPORATE LAWYERS AND HUMAN RIGHTS

At the outset, it is worth noting an important parallel between legal ethics and human rights law. Like the principles underlying human rights, the professional frameworks governing lawyers reflect a mixture of normative value statements and pragmatic conduct regulation. The ABA Model Rules⁴ and similar codes⁵ juxtapose the

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1. *See generally* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999) (detailing the range of issues presented, including human rights standards and responsibilities of transnational corporations).
 2. *See generally* U.N. Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Rep. of the Secretary-General, U.N. Doc. No. A/HRC/17/31 (Mar. 21, 2011); *see also* Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., U.N. Doc. A/HRC/RES/17/4, at ¶¶ 6, 13, 15 (Jul. 6, 2011) (adopting the Guiding Principles and establishing an ongoing working group to disseminate the standards and assess their effectiveness).
 3. *See, e.g.*, Guillaume Long, Chair-Rapporteur, Draft report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Oct. 23-27, 2017, available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx> [<https://perma.cc/D328-UWTZ>] (discussing proposals on a draft instrument to regulate activities of transnational corporations and other business enterprises).
 4. This writing draws extensively on the American Bar Association's Model Rules of Professional Conduct, which have been widely adopted (albeit with some variation) throughout the United States. *See* MODEL

profession's highest aspirations with detailed requirements on how law must be practiced. The legal profession "operationalizes" ethics through a self-regulatory regime incorporating the traditional compliance strategies of bounded professional discretion, safe harbors, and significant penalties for breach.

Although human rights encompass a wide range of human endeavors and issues, this article focuses more narrowly on the unique implications of serious human rights violations for corporate practitioners – the collateral impacts on the ethical regulation of lawyers in private practice. It argues that human rights law directly impacts the attorney-client relationship. Human rights violations thus subject corporate lawyers to a set of liability risks that do not exist for other corporate officers and employees: the potential for disciplinary sanctions arising out of breaches of the rules of professional conduct governing the legal profession.

At the outset, it is important to note that corporate lawyers are hardly the only legal practitioners interacting with human rights. Government lawyers arguably have far more regularized day-to-day interaction with human rights issues.⁷ Indeed, the most high-profile examples of lawyers becoming embroiled in human rights violations have involved government attorneys.

The most notorious example is that of the Nazi lawyers who contributed to genocide and other human rights violations in the

RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016) [hereinafter MODEL RULES].

5. Although the Model Rules are useful for analytic purposes, they by no means are the final word on ethical questions. Every state and foreign country has its own ethical regime governing its lawyers and regulating interactions with other disciplinary systems. *See, e.g.*, MODEL RULES r. 8.5 cmt. 7 (applying choice of law provisions to "transnational practice" by American lawyers); *see also* Code of Conduct for Lawyers in the European Union Rule 1.5 (specifying that lawyers must follow the EU's transnational practice rules as well as the requirements of their home jurisdictions).
7. Some have described, for example, the "loose network of lawyers across a number of government agencies who together provide legal advice on the most sensitive issues to military and civilian decision makers, their focus being on U.S. domestic and international legal obligations." *See* David Kaye, *The Legal Bureaucracy and the Law of War*, 38 GEO. WASH. INT'L L. REV. 589, 592 (2006) (detailing the intersecting and overlapping roles of lawyers in the Department of Defense, the State Department's Office of the Legal Adviser, the legal adviser to the National Security Council, the Office of Legal Counsel at the Department of Justice, and White House and vice presidential lawyers and noting that "[d]uring the armed conflicts since 9/11, all five of these organizations have given legal advice.").

Third Reich.⁶ More recently, the so-called “torture memos” drafted by White House lawyers implicated serious human rights issues. These memos authorized severe interrogation policies toward detainees, applying a highly questionable definition of torture.⁷ There has been vigorous debate over whether these memoranda authorized torture in violation of international law or violated the professional obligations of their authors.⁸ Although the Justice Department’s Office of Professional Responsibility determined that the authors committed professional misconduct by failing to provide competent, objective, and comprehensive advice,⁹ the OPR’s findings were overturned on the grounds that OPR had failed to identify any meaningful standard against which to assess the legal analysis provided.¹⁰ The role of the

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6. See, e.g., Matthew Lippman, *The Prosecution of Josef Altstoetter et al.: Law, Lawyers and Justice in the Third Reich*, 16 PENN STATE INT’L L. REV. 343 (1998) (discussing human rights violations by Nazi lawyers in the Third Reich).
 7. The memoranda are reproduced and analyzed in *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (David Cole, ed., 2009). For a detailed analysis of legal and factual issues, see PHILIPPE SANDS, *TORTURE TEAM – RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).
 8. Compare Jordan J. Paust, *International Crimes Within the White House*, 10 N.Y. CITY L. REV. 339 (2007) (arguing that memoranda and numerous other administration policies violated international law), and Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 368 (2007) (arguing that torture memo was “arguably criminal” and “[a]t a minimum . . . [the authors] were reckless as to the commission of acts of torture and appeared to outright encourage the cruel, inhuman, or degrading treatment of detainees by U.S. interrogators.”), with Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT’L L. 449, 454 (2009), and Eric Posner & Adrien Vermeule, *A ‘Torture’ Memo and Its Tortuous Critics*, Wall St. J., July 6, 2004, at A22 (suggesting that memoranda authors “provided reasonable legal advice and no more, trusting that their political superiors would make the right call.”).
 9. See Office of Prof’l Responsibility, Dep’t of Justice, Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 251, 255 (2009) [hereinafter “OPR Memo”], available at https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf [<https://perma.cc/4GXA-QYVK>] (determining that authors committed professional misconduct by failing to provide competent, objective, and comprehensive advice).
 10. See Department of Justice, Memorandum of Decision Regarding Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memorandum Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on

government lawyers in this context has been studied extensively in scholarship addressing criminal¹¹ and civil¹² liability, legal ethics,¹³ moral wrongfulness,¹⁴ social science,¹⁵ prosecution in overseas jurisdictions,¹⁶ and the domestic¹⁷ and foreign¹⁸ policies of the United States, and there remains little to add to that debate.

The role of government lawyers differs sharply in many respects from that of corporate counsel operating in the private sector. Judicial officials and prosecutors, for example, have duties extending beyond

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- Suspected Terrorists, Jan. 5, 2010 [hereinafter *DOJ Memo*], available at https://www.aclu.org/files/pdfs/natsec/opr20100219/20100105_DAG_Margolis_Memo.pdf [<https://perma.cc/GPD5-ESH7>]; see also David D. Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT'L SECURITY L. & POL'Y 455 (2010) (detailing the Office of Professional Responsibility investigation and Margolis review).
11. See, e.g., Markovic, *supra* note 9 (discussing ways in which lawyers might become implicated in war crimes).
 12. See, e.g., Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715 (2006) (analyzing the potential liability of the United States and its officials for torture under current domestic law).
 13. See, e.g., Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006) (considering strained interpretations of international law by authors of the torture memos).
 14. See, e.g., W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005) (analyzing lawyer advice on torture).
 15. See, e.g., Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics*, 4 UTAH L. REV. 1563 (2011) (proposing use of social science compliance theory to address ethical failures of governmental legal advisors as a means of both better understanding prior ethical lapses and ensuring ethical adherence prospectively).
 16. See, e.g., Kai Ambos, *Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 CASE W. RES. J. INT'L L. 405 (2009) (assessing the potential for criminal prosecution of lawyers in Belgium, Spain, and Germany).
 17. See, e.g., Wayne Sandholtz, *Closing Off the Torture Option*, 18 S. CAL. INTERDISC. L.J. 589 (2009) (discussing role of executive orders in domestic torture policy); see also Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL'Y 57 (2009) (evaluating the Bush Administration's overall approach to international law and diplomatic relations).
 18. See, e.g., Harold Hongju Koh, *The Wolfgang Friedmann Lecture: A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005) (addressing the illegality of torture and cruel, inhuman and degrading treatment and the scope of the president's constitutional authority in this realm).

merely facilitating the government's interest in advocacy and other settings.¹⁹ Special rules that aim to account for the public's interest in legal work,²⁰ as well as additional specialized rules of practice for certain governmental agencies, reflect these obligations.²¹

Government lawyers also have differing obligations to the organizational client itself.²² Indeed, it can be difficult to sort out the actual identity of the lawyer's "client" in the first place. Although – like corporate lawyers – government lawyers represent an abstract entity with legal personality, serious questions can arise about which of multiple interlocking entities is the "real" client (for corporate lawyers, subsidiary, parent, or both, versus branch office or division of the US Attorney's office, the Department of Justice, or the United States government as a whole for government lawyers).²³ Government lawyers have broader "responsibilities and obligations of loyalty that go beyond those of private attorneys . . . [to encompass] the American public and its collective interests and values."²⁴ They also face far greater political repercussions and concerns about external influence in legal matters than private sector attorneys, particularly when

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19. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) (a government lawyer "is representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it should win a case, but that justice shall be done . . .").
 20. *See, e.g.*, MODEL RULES r. 1.11 (special duties of current and former government officers and employees) *and* r. 3.8 (special responsibilities of prosecutors).
 21. *See, e.g.*, DOJ Memo, *supra* note 11, at 11 (the Department of Justice Office of Professional Responsibility "finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy"), *quoting* OPR Memo, *supra* note 10, at 18. It also uses a preponderance evidentiary standard, in contrast to the clear and convincing standard typically employed by bar disciplinary authorities. *Id.*
 22. *See* MODEL RULES r. 1.13 cmt. 9 (in assessing a lawyer's obligations under Rule 1.13, "when the client is a governmental organization, a different balance may be appropriate . . . for public business is involved."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 (2000) ("Representing a Government Client") *and* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-405 (1997) ("Conflicts in Representing Government Entities").
 23. *See* MODEL RULES r. 1.13 cmt. 9 (detailing attorney's duties to governmental clients).
 24. Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 693 (2004).

foreign relations are involved.²⁵ Given these many differences, this article excludes public sector lawyers from further discussion here.

The *context* in which corporate practitioners operate also bears consideration. Although this writing focuses on the ethical duties of corporate counsel, it does not distinguish between in-house versus external counsel and law firms. It focuses on ethical obligations stemming from the corporate legal work itself, rather than the setting in which lawyers perform it. This is not to say that there are not practical differences between in-house and outside counsel. In-house lawyers, for example, most likely would have greater access to information about the true nature of corporate transactions that violate human rights. They also may be more culpable by virtue of holding a position of greater influence over the company than outside lawyers. Significant *legal* consequences also may stem from a lawyer's employment status, such as markedly different confidentiality protections for in-house versus outside lawyers between the United States and Europe.²⁶

In-house counsel also face liability in their capacity as members of senior management, where they often must meet more rigorous standards in corporate governance than non-lawyers.²⁷ This turns on important – yet here extraneous – questions of whether the inside lawyer operated in a business capacity or a legal one. Despite their importance, this article puts aside such questions in favor of a sharper focus on the ethical implications of counsel's work as legal advisor and facilitator. The various benefits,²⁸ drawbacks,²⁹ and special challenges³⁰ to lawyers who serve as corporate directors also are not discussed.

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25. *Id.* (noting that “foreign policy decisions are often highly political, and policymakers and others who influence policy are often skeptical concerning the relevance of international law.”).
26. *Compare* Case No. C-550/07-P, *Akzo Nobel Chemicals and Akros Chemicals v. European Comm'n*, 2010 E.C.R. I-09301 (in-house communications “do not merit the protection afforded by legal professional privilege, no matter how often they are made, how highly significant they are or how useful they are to the undertaking.”), *with* *Upjohn v. United States*, 449 U.S. 383 (1981) (attorney-client privilege protects communications conducted to facilitate legal advice to the company).
27. *See, e.g.*, *Escott v. BarChris Construction Corp.*, 283 F.Supp. 643, 690 (S.D.N.Y. 1968) (lawyer-director who helps to draft a securities registration statement is required to conduct a more detailed inquiry than a non-lawyer director who is not involved in the drafting process).
28. *See* Carolyn T. Thurston, *Corporate Counsel on the Board of Directors: An Overview*, 10 CUMB. L. REV. 791, 792 (1980) (noting that lawyer-directors enable the board “to consult the attorney before taking an action . . . [and to recognize] developing legal problems in their early stages” by providing the lawyer with access to the company's conduct and affairs).

III. THE ETHICAL IMPLICATIONS OF HUMAN RIGHTS VIOLATIONS

This article now will consider three specific categories of ethical rules implicated by human rights violations. The first of these is the conflicts of interest that can arise when a corporate client violates human rights. These in turn relate to the legitimate object of legal representation and also implicate the lawyer's obligation to withdraw from the representation.

Second is the lawyer's duty of confidentiality. Does, for example, the crime/fraud exception to the attorney-client privilege apply to conduct that is illegal under international law? The article also discusses the role of human rights in broader duties of professional secrecy – whether those duties permit (or even require) lawyers to reveal confidential information, either to prevent crimes or serious injury or to protect a corporate client from its own malfeasant employees.

Third, human rights have the potential to impact professional relationships existing *between* lawyers, which are governed by special ethical rules. Specifically, lawyers have duties to supervise other lawyers and non-lawyer professionals to ensure ethical compliance. They also must report ethical breaches by other attorneys to the appropriate disciplinary authorities.

A. *Conflicts of Interest and Mandatory Withdrawal*

Lawyers have a conflict of interest whenever “there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”³¹ Some conflicts can be waived, but only if the lawyer “reasonably believes that [counsel can] provide competent and diligent representation”³² and when “the representation is not prohibited by law.”³³

Neither standard is likely to be met here. Lawyers have an ethical duty to refrain from criminal conduct in their personal and

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29. *See Lawyer-Directors are Key Targets for Plaintiffs' Lawyers, ABA Group Told*, 21 SEC. REG. & L. REP. (BNA) 1272 (1989) (suggesting that lawyers who serve as directors must “be ‘certifiably nuts’ because of the likelihood of being sued.”).
 30. *See* ABA Op. 98-410, Lawyer Serving as Dir. of Client Corp. (allowing lawyers to serve as directors but noting significant challenges with conflicts of interest, confusion over the lawyer's role, and the applicability of the attorney-client privilege).
 31. *See* MODEL RULES r. 1.7(a)(2).
 32. *Id.* at r. 1.7(b)(1).
 33. *Id.* at r. 1.7(b)(2).

professional lives. While this obligation does not cover every criminal act, disciplinary measures are warranted whenever conduct amounts to “serious crimes”³⁴ or involves “moral turpitude.”³⁵ Although the application of these concepts occasionally leads to questionable results,³⁶ the violence and ill treatment inherent in human rights violations almost certainly qualifies as a “serious crime” and/or an offense of “moral turpitude.”³⁷ Apart from policing their own conduct, lawyers also are expressly prohibited from helping their clients to commit crimes.³⁸

Engaging in or facilitating a client’s serious human rights violations thus creates two separate conflicts of interest for the corporate lawyer. First, the representation itself is “prohibited by

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34. *See, e.g.*, VT. R. PROF. CONDUCT r. 8.4(b) (misconduct for lawyers to “engage in a ‘serious crime,’ defined as “illegal conduct involving any felony or involving any lesser crime [of dishonesty] . . . or an attempt or a conspiracy or solicitation of another to commit a ‘serious crime.’”).
 35. South Carolina, for example, adds a prohibition on engaging in “conduct involving moral turpitude.” *See* S.C. R. PROF. CONDUCT r. 8.4. In Georgia, a lawyer violates 8.4 by being “convicted of a felony” or “a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer’s fitness to practice law.” *See* GA. R. PROF. CONDUCT r. 8.4. Some states combine the concepts. *See, e.g.*, TEX. R. PROF. CONDUCT r. 8.04(A)(2) (lawyers must not “commit a serious crime or commit any other criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” and defining “serious crime” to include “any felony involving moral turpitude . . .”).
 36. *See, e.g.*, Grievance Administrator v. Carthew, Nos. 10-74-AI and 10-81-JC (Mich. Attorney Disciplinary Bd. 2011) at 1, 5 (affirming suspension of 179 days, and thus allowing automatic reinstatement, for a lawyer pleading no contest to using a “computer to commit the crime of possession of child sexually abusive material” because the lawyer “did not intentionally seek pornographic materials involving minors”) *and In re Grant*, No. 09-C-12232 (CA State Bar Review Dep’t 2011) at pp. 2-3 (determining that possession of child pornography is not moral turpitude per se, although actual or attempted child molestation is).
 37. *See, e.g.*, Rome Statute of the Int’l Crim. Court, 2187 U.N.T.S. 90 art. 5 (July 1, 2001) [hereinafter *ICC Statute*] (genocide, crimes against humanity, and war crimes predicated on underlying conduct such as murder, cruel treatment, serious forms of discrimination, and the like) and art. 25(3)(a)-(c) (means of criminal perpetration); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 arts. 1, 2 (acts of physical or mental torture).
 38. *See, e.g.*, MODEL RULES r. 1.2(d) (prohibiting lawyer assistance in client crimes or fraud) *and* MODEL RULES r. 8.4(b) (providing that it is misconduct to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).

law” and thus unethical.³⁹ Second, human rights violations create the specter of personal criminal liability for any lawyer who assists in their perpetration, such that the lawyer’s personal interests would impermissibly impact the representation.⁴⁰ The Nuremberg progeny make very clear that lawyers and corporate officials are subject to individual criminal prosecution when legal frameworks⁴¹ or commercial endeavors⁴² become instruments of international crimes.⁴³ This precedent remains valid today,⁴⁴ and the International Criminal Court’s recent articulation of its willingness to investigate the role of corporate actors in international crimes⁴⁵ certainly should give pause to both corporate officials and the lawyers who represent them.

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39. See MODEL RULES r. 1.2(d) (prohibition on assisting with illegal or fraudulent conduct) and MODEL RULES r. 1.7(b)(2) (lawyers may not represent a client if when the representation is “prohibited by law”).
40. See MODEL RULES r. 1.7(a)(2) (prohibiting representation if there is risk of a conflict with a lawyer’s personal interests).
41. See *United States v. Alstötter*, Case No. 3, Opinion and Judgment, Trials of War Criminals Before the Nuremberg Military Tribunal Volume III (U.S. Mil. Trib. April 1949) (prosecution of German judges and prosecutors); see also *United States v. von Weizsaecker*, Case No. 11, Opinion and Judgment, Trials of War Criminals Before the Nuremberg Military Tribunal Volume XIV (U.S. Mil. Trib. April 1949) (prosecution of Nazi government lawyers).
42. See *United States v. Krauch*, Case No. 6, Opinion and Judgment, Trials of War Criminals Before the Nuremberg Military Tribunal Volume VIII (U.S. Mil. Trib. April 1948), *United States v. Krupp*, Case No. 6, Opinion and Judgment, Trials of War Criminals Before the Nuremberg Military Tribunal Volume XI, at 1448 (U.S. Mil. Trib. April 1948), and *United States v. Krupp*, Case No. 5, Opinion and Judgment, Trials of War Criminals Before the Nuremberg Military Tribunal Volume VI (U.S. Mil. Trib. April 1947) (series of criminal cases brought against German industrialists).
43. See, e.g., *HoF’s Gravenhage* [The Hague Court of Appeal], May 9, 2007, *Prosecutor v. Van Anraat*, No. LJN-BA4676 (Netherlands) (finding corporate executive who supplied chemical weapons materials to Saddam Hussein guilty of complicity in violations of the laws and customs of war).
44. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 179 (2d Cir. 2009) (“The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts . . . —are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*, from which no derogation is permitted, irrespective of the consent or practice of a given State.”) (internal quotations and citations omitted).
45. See THE OFFICE OF THE PROSECUTOR, INT’L CRIMINAL COURT, POLICY PAPER ON CASE SELECTION AND PRIORITISATION 14 (2016) available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [perma.cc/WA7S-F6QS] (noting that “the Office will give particular consideration to prosecuting Rome Statute crimes that

This is not to suggest that the mere *possibility* of prosecuting corporate lawyers for international crimes makes such prosecution *imminent*. International prosecution cannot take place without sufficient pragmatic opportunity and political will on the part of the relevant actors to take an accused into custody in the first place. This is hardly a given,⁴⁶ as demonstrated by the International Criminal Court's inability to secure the arrest of Sudan's president for egregious international crimes committed in Darfur.⁴⁷ Nevertheless, the rapidly globalizing commercial environment suggests that corporate lawyers should at least consider the potential for criminal prosecution abroad. This holds true particularly in light of the ICC prosecutor's power to initiate investigations on its own volition and the willingness of private parties (e.g., human rights NGOs) to bring matters to the ICC's attention in the hope of prompting an investigation.⁴⁸

are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”).

46. See, e.g., Louis B. Sohn, *From Nazi Germany and Japan to Yugoslavia and Rwanda: Similarities and Differences*, 12 CONN. J. INT'L L. 209, 216-17 (1997) (noting difficulty in obtaining custody of high level offenders in the former Yugoslavia, in contrast to Nazi officials following Germany's military defeat in World War II).
47. See, e.g., Prosecutor v. Al-Bashir, Case No. 02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 92-93 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF [<https://perma.cc/7DXP-SB6L>] (indicting Sudan's president and commander-in-chief on charges of war crimes and crimes against humanity); see also Somini Sengupta, *Omar al-Bashir Case Shows International Criminal Court's Limitations*, N.Y. Times (June 15, 2015), <https://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html> [<https://perma.cc/3YYE-RKXJ>] (discussing case history and failure of other African states to arrest al-Bashir, despite the mandate from the ICC and UN Security council to do so).
48. See, e.g., TENDAYI E. ACHIUME ET AL., COMMUNIQUÉ TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT UNDER ARTICLE 15 OF THE ROME STATUTE: THE SITUATION IN NAURU AND MANUS ISLAND: LIABILITY FOR CRIMES AGAINST HUMANITY, Feb. 14, 2017, available at <https://law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/> [<https://perma.cc/3HDD-AVJW>] (group of law professors and NGOs requesting that the ICC prosecutor investigate public and corporate officials in Australia who allegedly committed the crimes against humanity of unlawful imprisonment, torture, deportation, persecution and other inhumane acts in the incarceration of refugees on Australia's offshore detention centers on Nauru and in Papua New Guinea).

The risk of civil liability strikes closer to home in creating active conflicts of interest— both for corporate clients and the lawyers themselves. If they are directly involved in such conduct, lawyers could be sued civilly based on allegations that their legal work facilitated corporate human rights violations.

Historically, many cases alleging human rights violations have been brought against corporations and individual corporate officers in US federal courts under the Alien Tort Statute.⁴⁹ A conflict of interest could arise in an ATS case, for example, that alleges lawyer and client acted as joint tortfeasors with divergent litigation interests. Corporate defendants also could seek indemnity, relying on an “advice of counsel” defense, or assert malpractice claims that the lawyer’s incompetence exposed the company to ATS liability. Another context would involve governmental investigations into alleged wrongdoing.⁵⁰ Still more could arise from shareholder activism, where the lawyer is alleged to be complicit in the company’s human rights violations, or to have helped to misrepresent or conceal them, thus leading to inaccurate public filings and a negative impact on the company’s stock price. A lawyer’s involvement in a civil lawsuit involving a client also creates genuine questions about the “self-defense” exception⁵¹ to the ethical duty of confidentiality (discussed below).⁵² And where potential claims ripen into actual litigation, the prohibition on lawyers serving as advocates and witnesses in the same proceeding applies as well.⁵³

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49. 28 U.S.C. § 1350 (Westlaw through Pub. L. No. 115-62) [hereinafter “ATS”]. For more, *see generally* DAVID NERSESSIAN, FEDERAL JUDICIAL CENTER, INTERNATIONAL HUMAN RIGHTS LITIGATION: A GUIDE FOR JUDGES , 45-47 (2016) (collecting ATS cases brought against corporations).
 50. *See, e.g.*, In re Chiquita Brands Int’l, Inc., 690 F.Supp.2d 1296 (S.D. Fla. 2010) (ATS claims and shareholder litigation arising out payments of “protection” money to terrorist organization that extorted funds from local subsidiary).
 51. *See* MODEL RULES r. 1.6(b)(5) (outlining when a lawyer may reveal confidential information for self-defense reasons); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. C (AM. LAW INST. 2000) (exception enables lawyer “to defend against charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions” and includes credible threats as well as actual filings).
 52. *See, e.g.*, Application of Friend, 411 F.Supp. 776, 776 (S.D.N.Y. 1975) (self-defense exception permitted disclosure of confidential client information to grand jury investigating alleged criminal conduct by lawyer and client).
 53. *See* MODEL RULES r. 3.7 (limitations on lawyer serving as an advocate when the lawyer also may be called upon to testify as a witness).

Recent trends in federal courts limiting ATS liability may reduce the volume of cases but cannot eliminate the underlying risks. While the Supreme Court narrowed the gateway in 2013, ATS jurisdiction remains proper when the underlying human rights violations “touch and concern” the United States.⁵⁴ And although a more recent Supreme Court decision eliminated theories of corporate liability under the ATS, at least for foreign corporations,⁵⁵ the ruling does not limit claims against individual corporate officers, directors, and employees who become involved in human rights violations (and whose interests also may diverge from the corporate lawyer’s).⁵⁶ Civil liability can also exist in cases brought in overseas jurisdictions.⁵⁷ Regardless of forum, the prospect of personal liability creates additional conflicts of interest between lawyer and client that require withdrawal.⁵⁸ (It is the divergence of legal interests between lawyer and client, rather than the nature or location of the forum in question, that gives rise to the conflict).⁵⁹

Lawyers also face bar discipline for violating human rights.⁶⁰ Even if the lawyer escapes personal criminal or civil liability, the underlying violence and deprivations inherent in human rights violations constitute their own disciplinary violation.⁶¹ This creates a third layer

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54. *See* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (holding that cases must be dismissed unless the underlying facts “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application [of the ATS].”).
 55. *See* *Jesner v. Arab Bank, PLC*, ___ U.S. ___, 138 S.Ct. 1386 (2018).
 56. *Id.* at 1405 (noting that “plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.”)
 57. Such cases increasingly are being brought in Canada, for example. *See, e.g.*, Sean E.D. Fairhurst & Zoë Thoms, *Post-Kiobel v. Royal Dutch Petroleum Co.: Is Canada Poised to Become an Alternative Jurisdiction for Extraterritorial Human Rights Litigation?*, 52 ALTA L. REV. 389 (2014) (discussing recent human rights cases brought by foreign nationals in Canada).
 58. *See* MODEL RULES r. 1.16(a)(1) (mandatory withdrawal if representation would result in an ethics violation).
 59. *See* MODEL RULES r. 1.7(a) (“A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.”).
 60. *See* MODEL RULES r. 8.4(b) (criminal acts by the lawyer) *and* r. 8.4(a) (violation of Rules of Professional Conduct, arising out of violations of Rule 1.2(d) for counselling or assisting in criminal conduct by clients in violation of Rule 1.2(d) and/or representing a client despite a conflict of interest under Rule 1.7(a)(2)).
 61. Facilitating human rights violations based on discriminatory conduct, for example, most likely constitutes a disciplinary violation of its own,

of conflicts that cannot be cleared through client consent. Because such conduct in almost all cases is “prohibited by law,” the conflict per se cannot be resolved.⁶² It also seems clear that these scenarios present “a significant risk that the representation . . . would be materially limited . . . by a personal interest of the lawyer”⁶³ that cannot be mitigated through informed consent by the client.⁶⁴ Apart from this, one would think (or at least hope) that lawyers would regard serious human rights violations with such personal anathema that they could not reasonably conclude they could provide competent and diligent representation to clients who insist on directly pursuing (or indirectly causing) such ends.⁶⁵

As a consequence of all of this, the corporate lawyer must withdraw from representation in the underlying transaction(s) in which such claims arise and probably must stop representing the corporate client entirely. All US jurisdictions prohibit lawyers from assisting in client crimes and require immediate withdrawal in such circumstances.⁶⁶ Lawyers also must withdraw where continued representation would result in professional misconduct.⁶⁷ Any lawyer who represents a client in such circumstances violates the ethical prohibition on representing clients with concurrent conflicts of interest.

Separate from the question of what lawyers *must* do is the question of what they *should* do. The Model Rules *allow* withdrawal where prior legal work was unknowingly “tainted” by its connection to serious human rights violations⁶⁸ or where the lawyer suspects such

whether or not it also satisfies the elements of a criminal human rights violation. *See* MODEL RULES r. 8.4 cmt. 3 (“A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.”).

62. *See* MODEL RULES r. 1.7(b)(2) (lawyer may not represent a client if representation is “prohibited by law”).
63. *Id.* at r. 1.7(a)(1).
64. *Id.* at r. 1.7(b).
65. *Id.* at r. 1.7(b)(1) (conflicts can be cleared only if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client”).
66. *See* Roger C. Cramton, George M. Cohen & Susan P. Koniak., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 783 nn. 225-226 (2004).
67. *See* MODEL RULES r. 1.16(a)(1) (prohibiting representation that requires a lawyer to violate ethical rules or other laws).
68. *Id.* at r. 1.16(b)(3) (for prior conduct, lawyer *may* withdraw where “the client has used the lawyer’s services to perpetrate a crime . . .”).

violations but does not “know” of them.⁶⁹ In any case, human rights violations typically involve conduct that breaches the most fundamental canons of the social compact (e.g., those protecting human life and dignity). A corporate attorney faced with client conduct so fundamentally at odds with even the most basic levels of decency and humanity may overtly limit the scope of the representation to exclude it entirely.⁷⁰ The duty to provide competent representation⁷¹ in and of itself requires a lawyer to point out that companies should avoid human rights violations whenever possible.⁷² Lawyers faced with recalcitrant clients thus also should withdraw on the basis that “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”⁷³

B. Exceptions to Professional Secrecy

The lawyer-client relationship includes special protections for communications (the attorney-client privilege),⁷⁴ documentation (work product immunity),⁷⁵ and other information relating to the representation.⁷⁶ Lawyers must maintain a client’s confidences and employ reasonable measures to keep such information secret.⁷⁷ The

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69. *Id.* at r. 1.16(b)(2) (lawyer *may* withdraw where “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal . . .”).
70. *See* MODEL RULES r. 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”).
71. *See* MODEL RULES r. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).
72. *See* MODEL RULES r. 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, *a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.*”) (emphasis added).
73. *See* MODEL RULES r. 1.16(b)(4); *see also id.* at r. 1.16(b)(7) (withdrawal where “other good cause” exists).
74. *See, e.g.,* Upjohn v. United States, 449 U.S. 383 (1981) (recognizing corporate attorney-client privilege).
75. *See, e.g.,* FED. R. CIV. P. 26(b)(3) (heightened protection for attorney mental impressions and opinion work product).
76. *See, e.g.,* MODEL RULES r. 1.6(a) (broad protection covering “information relating to the representation of a client”).
77. *Id.* at r. 1.6(c) (“A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”).

duties of professional secrecy change markedly, however, when a lawyer becomes aware of either illegal or potentially injurious conduct.

The most serious human rights violations amounting to international crimes probably warrant the application of the crime/fraud exception to the attorney-client privilege. This exception prevents the privilege from attaching to communications where a client seeks to further criminal ends through a lawyer's services.⁷⁸ As a consequence, neither lawyer nor client can assert the privilege to resist compelled testimony about the human rights violations in question. Similar principles may apply to remove the ordinarily-applicable protections provided by the attorney work product doctrine.⁷⁹ Even violations that occurred long ago fall outside of the privilege and work product protections; statutes of limitation do not apply to international crimes⁸⁰ (nor, for that matter, to lawyer discipline).⁸¹ Both lawyer and client thus can be held to account for an unlimited temporal period.

Even if such conduct technically fails to qualify as criminal at the international level,⁸² human rights violations nevertheless impact the

78. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (AM. LAW INST. 2000) (outlining when attorney-client privilege does not apply); see also *Clark v. United States*, 289 U.S. 1, 15 (1933) (recognizing crime/fraud exception to attorney-client privilege).

79. Compare *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994) (client waiver does not deprive attorney of work product protection, and vice versa), and *In re Grand Jury*, 211 F.Supp.2d 555, 559 (M.D. Pa. 2001) (lawyer may continue to assert protection even if the client wants to waive it), with *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 262 (Bankr. S.D.N.Y. 2005) (if client seeks waiver, lawyer may not assert factual work product protection but may for opinion work product).

80. See, e.g., Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2931 (XXIII), Annex, 23 U.N. GAOR Supp. No. 18, U.N. Doc. A/7218, at art. 1 (Nov. 11, 1970).

81. See, e.g., MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 32 (AM. BAR ASS'N 2002) ("Proceedings under these rules shall be exempt from all statutes of limitations."). The "[c]onduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice Misconduct by a lawyer *whenever it occurs* reflects upon the lawyer's fitness." *Id.* at cmt. (emphasis added).

82. This could occur, for example, if the "chapeau" (contextual) elements of international crimes (armed conflict in the case of war crimes, a widespread or systematic attack on a civil population for crimes against humanity) are absent. See, e.g., ICC Statute, *supra* note 38 at Arts. 7 and 8 (defining crimes against humanity; stating the jurisdiction of the international criminal court in respect to war crimes). The underlying conduct – murder, torture, etc. – typically constitutes a domestic crime and violates an important human rights interest (life, bodily integrity,

lawyer's confidentiality obligations in other ways. Under the Model Rules: "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer believes reasonably necessary . . . to prevent reasonably certain death or substantial bodily harm" ⁸³ The policy underlying this exception is preventing harm and the "overriding value of life and physical integrity," such that lawyers are allowed (but not required) ⁸⁴ to disclose confidences even where the client is not responsible for the harm in question. ⁸⁵ This exception would apply to human rights violations because they involve highly injurious conduct, whether or not they also constitute "crimes." Because Rule 1.6(b) allows but does not require disclosure, a decision to maintain confidence does not automatically call for discipline under the Model Rules. ⁸⁶

In practice, however, the applicable standards vary widely by jurisdiction. Some states *require* disclosure based solely on the nature of the harm itself. The threatened injury need not be criminal, need not involve conduct by the client, ⁸⁷ and need not even be imminent. ⁸⁸

etc.), thus justifying the application of the crime/fraud exception in any event.

83. MODEL RULES r. 1.6(b)(1). The predecessor Model Code – which is still the basis of ethical regulation in some states – was broader and allowed counsel to disclose a client's "intention . . . to commit a crime and the information necessary to prevent the crime." *See* MODEL CODE OF PROF'L CONDUCT DR 4-101(C)(3) (AM. BAR ASS'N 1980) (allowing lawyers to reveal information given by client in order to prevent crime).
84. *See* MODEL RULES r. 1.6 cmt. 6.
85. An example could be a vendor, such as a private security company, who commits human rights violations while providing services on the client's behalf. *See, e.g., Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (allegations of murder, forced labor, rape and torture committed against Burmese villagers by security forces during the construction of a gas pipeline in Burma).
86. MODEL RULES r. 1.6 cmt. 15.
87. *See, e.g., WASH. R. PROF. CONDUCT r. 1.6(b)(1)* (requiring lawyer to disclose confidential information when the lawyer "reasonably believes" that disclosure is necessary to prevent "reasonably certain death or substantial bodily harm."). "Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." *Id.* at cmt. 6.
88. MODEL RULES r. 1.6 cmt. 15 (for example, "... a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.").

Other states limit mandatory disclosures either to criminal conduct by the client⁸⁹ or to cases involving *imminent* death or substantial bodily injury.⁹⁰ A small number of jurisdictions focus on the lawyer's *certainty* that a crime will occur, requiring reporting in clear cases⁹¹ but granting discretion in others.⁹² Others even mandate that lawyers seek to dissuade the client before disclosure is required⁹³ or permitted.⁹⁴

Limitations restricting disclosure to "criminal" conduct are strictly construed, even in cases of a highly injurious and imminent threat.⁹⁵ The rules do not require a highly specific or absolute threat, however. Conduct generally posing a substantial risk to human life (e.g., arson) qualifies even if the instrumentality of injury does not guarantee that harm will occur.⁹⁶ Although each case is fact-specific, lawyers may make reasonable inferences about the potential for injury

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89. *See, e.g.*, VA. R. PROF. CONDUCT r. 1.6(c)(1) (requiring disclosure of a client's intent to commit a crime).
90. *See, e.g.*, IOWA R. PROF. CONDUCT r. 32:1.6(b)-(c) (requiring disclosure "to the extent the lawyer reasonably believes necessary...to prevent imminent death or substantial bodily harm" but permitting disclosure where harm is threatened but not imminent).
91. *See, e.g.*, TEX. R. PROF. CONDUCT r. 1.05(e) ("When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.").
92. *See, e.g., id.* at r. 1.05(c)(7) ("A lawyer may reveal confidential information . . . [w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.").
93. *See, e.g.*, GA. R. PROF. CONDUCT r. 1.6(b)(3) ("Before using or disclosing [confidential information] . . . if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.").
94. *See, e.g.*, NEV. SUP. CT. R. 156(3)(a) (permitting disclosure only when the attorney's services were used to further the crime or fraud and requiring the lawyer to attempt to persuade the client to take corrective action).
95. *See, e.g.*, State Bar of Ariz. Ethics Comm., Formal Op. 91-18, at 2-6 (1991) ("...suicide clearly is an act involving 'death or substantial bodily harm,'" but because it was not also a crime, "a strict literal reading of the confidentiality rule and its exceptions [led the board] to conclude that the attorney could not, under any circumstances, reveal his client's intention to commit suicide").
96. *See, e.g.*, Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 110-11 & n.1 (1997) (no question as to ethical propriety of attorney's disclosure where client threatened to burn down a building).

based on the facts as they understand them at the time.⁹⁷ Gross human rights violations would almost certainly qualify as “criminal” conduct, such that the lawyer may (or even must) reveal information about the crimes.⁹⁸

Additional rules apply when corporate lawyers represent organizational clients (and they usually do). The client is the entity itself, not its individual officers, directors, or employees.⁹⁹ Rule 1.13 creates special reporting duties for lawyers who become aware that a corporate agent is breaching a duty to the organization, violating the law in a way that could be imputed to it, or engaging in other conduct likely to cause it harm.¹⁰⁰ Causing the corporation to engage in or facilitate serious human rights violations almost certainly qualifies under all three provisions, such that counsel must “proceed as is reasonably necessary in the best interest of the organization.”¹⁰¹

At a minimum, the lawyer *must* report human rights violations to senior corporate officials.¹⁰² If upward reporting proves ineffective,¹⁰³ the corporate lawyer has a difficult choice to make. If the human rights violations present a reasonably certain threat of substantial injury to the corporation that amounts to a clear violation of law, Rule 1.13(c) *permits* the lawyer to report outside the organization to

97. *See, e.g.*, McClure v. Thompson, 323 F.3d 1233, 1247 (9th Cir. 2003) (because lawyer reasonably believed that disclosure of location of kidnapped children that lawyer thought were still alive – but who turned out to be killed by client, along with client’s wife – was necessary in order to prevent imminent loss of life or substantially bodily harm, lawyer’s conduct “did not violate the duty of confidentiality in a manner that rendered his assistance constitutionally ineffective.”).

98. Special rules also require lawyers to disclose confidences to prevent or rectify fraud on a tribunal, but because legal practice in the dispute resolution context is not addressed here, these rules are not discussed further. *See* MODEL RULES r. 3.3(b) (duty of candor toward the tribunal and obligation to disclose to remediate criminal or fraudulent conduct relating to a legal proceeding).

99. *See* MODEL RULES r. 1.13(a).

100. *Id.* at r. 1.13(b).

101. *Id.*

102. Lawyers must continue to “report up” all the way to the board of directors, if circumstances require. *See* MODEL RULES r. 1.13 cmt. 5 (requiring attorneys to refer the matter to a higher authority when reasonably necessary to “enable the organization to address the matter in a timely and appropriate manner”).

103. Ineffectiveness here means that the “highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law...” *See* MODEL RULES r. 1.13(c)(1).

the extent necessary to prevent substantial injury to it.¹⁰⁴ When corporate lawyers represent a publicly-traded company, additional “up the ladder” reporting duties and disclosure options apply under the Sarbanes-Oxley Act.¹⁰⁵ These duties are triggered by a material violation of a federal or state securities law – for example, a corporate client concealing human rights violations (and the liability risks they entail) and/or deceptively mischaracterizing the nature of its overseas conduct, partnerships, etc. in financial reports.¹⁰⁶

C. Ethical Risks Created by Other Lawyers

Corporate lawyers rarely act alone, and another area of ethical risk exists for lawyers who fail to properly address misconduct by others. Counsel cannot sit idly by after witnessing misconduct by other attorneys. Even misconduct that a corporate lawyer simply learns about can create a duty to report the behavior – even when no supervisory or other transactional relationship exists. As the front line of enforcement in a self-governing profession, the Model Rules *require* the reporting of other lawyers whenever their conduct “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”¹⁰⁷ Human rights violations certainly reflect on a lawyer’s fitness to practice law, and legal counsel’s involvement in them thus must be reported. A knowing failure to report itself constitutes misconduct.¹⁰⁸ Lawyers are honor bound to police their colleagues and face serious consequences when they fail to do so.

Other self-regulating duties contemplate a pre-existing relationship between lawyers. This usually involves lawyers practicing

104. *Id.* at r. 1.13(c) (providing that a lawyer “may reveal [confidential] information” but is not required to).

105. *See* Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.3(b) (2005) (requiring attorneys to comply with additional reporting standards in instances of material violations); *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (requiring the SEC to promulgate a rule setting forth “minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers”).

106. Lawyers who become involved in facilitating corporate falsehoods (eg, by preparing or reviewing inaccurate financial reports) also are subject to bar discipline for engaging in deceptive conduct. *See* MODEL RULES r. 7.1 (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”).

107. *See* MODEL RULES r. 8.3(a). There is an exception from reporting where the grounds for the report are confidential. *Id.* at r. 8.3(c) (excluding otherwise confidential information or information gained through participation in a “lawyer’s assistance program”).

108. *See* MODEL RULES r. 8.4(a) (failing to report is misconduct).

together in one law firm or corporate legal department. Model Rule 5.1 imposes structural obligations when lawyers work together in such collectives:

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Ethical responsibility extends both horizontally and vertically. Rule 5.1(a) focuses on the collective duty of managerial lawyers to put into place systems – appropriate for their particular organization – designed to ensure that *all* of the organization’s lawyers (peers as well as subordinates) meet their ethical obligations.¹⁰⁹ Discipline flows from the failure to put appropriate *mechanisms* in place, regardless of whether an ethical breach by another lawyer actually occurs. The lack of systems, or unreasonable systems, is enough.

The Model Rules also impose *individual* supervisory duties, such that a lawyer with “direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”¹¹⁰ Managerial and supervisory lawyers also face liability for ordering disciplinable conduct in the first place or for knowingly ratifying it after the fact.¹¹¹ All three obligations apply in similar fashion with respect to non-lawyer staff (e.g., paralegals, foreign legal consultants, etc.), although the supervisory standards themselves are somewhat different.¹¹²

These provisions should give corporate lawyers considerable pause. A rogue lawyer overseas implicated in human rights violations could subject American corporate counsel to ethical liability within the United States, not only for insufficient supervision, but also for

109. See MODEL RULES r. 5.1(a); see also *Matter of Farmer*, 263 Kan. 531, 537 (1997) (imposing discipline for hiring inexperienced lawyers to provide bankruptcy services in auxiliary offices but failing to supervise, train, educate, or mentor them, as well as failing to review junior attorneys’ work).

110. MODEL RULES r. 5.1(b).

111. *Id.* at r. 5.1(c)(1).

112. See MODEL RULES r. 5.3(a) (structural obligation), 5.3(b) (supervisory obligation), and 5.3(c) (imputation of violations to lawyer). This is particularly important with respect to supervisees located outside the firm or legal department (e.g., non-lawyers assistants located overseas); see also *id.* at r. 5.3 cmt. 3 (“When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.”).

failing to have sufficient structures and procedures in place to detect and redress ethical wrongdoing.

A related issue arises on the other side of the relationship – that of the legal supervisee – when a non-US lawyer supervises a junior lawyer admitted in the US in a foreign law firm or corporation. American lawyers working abroad still must comply with the ethical obligations of the US jurisdiction(s) in which they are admitted.¹¹³ Within this context, the Model Rules normally provide a “safe harbor” for junior lawyers confronted with ethical issues. Although junior lawyers must exercise independent judgment and are not shielded simply because they were directed to engage in unethical conduct,¹¹⁴ when reasonable minds can differ on what the ethical rules require, junior lawyers may rely on a reasonable interpretation by supervisory counsel.¹¹⁵

That said, it remains unclear whether an American lawyer can rely on a reasonable resolution of an ethical issue relating to human rights by a senior practitioner when the senior lawyer is not admitted in an American jurisdiction. An overseas senior lawyer’s qualifications to resolve an ethical issue under US law may be difficult to establish. In other nations, “legal” work may or may not be performed by individuals considered “lawyers” in the American sense. Some countries (e.g., Japan, with its 2% bar passage rate)¹¹⁶ recognize only a small fraction of legal service providers as lawyers, such that many legal transactions are handled by individuals who are not regarded as official members of the bar. Many foreign jurisdictions also distinguish lawyers via their functional categories, creating regulatory requirements that differ between lawyers who appear in court, counsel who prepare pleadings, attorneys who prepare wills, corporate

113. See MODEL RULES r. 8.5(a) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”).

114. See MODEL RULES r. 5.2(a) (“A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”).

115. *Id.* at r. 5.2(b) (“A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”).

116. See Thomas Flannigan, *Opening Up Japan to American Lawyers*, Japan Policy Research Institute Critique, Vol. II, No. 9 (Oct 1995) available at http://www.jpri.org/publications/critiques/critique_II_9.html [<https://perma.cc/T8ZW-UJDX>] (describing 2% admission rate and “the mother of all bar exams” which also requires all test takers to demonstrate perfect fluency in Japanese).

charters, and contracts, and practitioners who provide business and taxation advice.¹¹⁷

Putting aside recent proposals to expand practice by foreign lawyers in the United States,¹¹⁸ admission procedures vary widely by jurisdiction. Some states treat foreign “lawyers” as admitted even when they are not members of that state’s bar, either in the context of pro hac vice permission, as a special privilege for in-house counsel, or pursuant to limited practice rules.¹¹⁹ It thus can be hard to tell if a given foreign lawyer even qualifies as such in the United States, especially if the representation in question is not anchored in court proceedings. Given the wide differences even among American states on ethical matters, let alone between countries with entirely different legal systems, reliance on non-admitted lawyers might be unreasonable per se.¹²⁰

Apart from such formal categorization, other important differences exist in what might be described as lawyer temperament. Legal practice in the United States is characterized as entrepreneurial and proactive in its mixture of legal problem solving with business and legal counseling.¹²¹ The U.S. approach contrasts sharply with that

117. See, e.g., Mary C. Daly, *What Every Lawyer Needs to Know about the Civil Law System*, 1998 PROF. LAW. 37, 40-42 (1998) (distinguishing between lawyers who appear before court in adversarial roles and lawyers who draft, certify, and store documents).

118. See ABA Comm. on Ethics 20/20 Proposal, Model Rule 5.5 and Foreign Lawyers (Sept. 19, 2011) (proposals to extend the registration of in-house counsel rules to include foreign lawyers and to allow foreign lawyers to apply to practice pro hac vice in conjunction with local counsel).

119. See MODEL RULES r. 5.5(c), 5.5(d). Other rules treat foreign lawyers as “admitted” in order to exercise of the full range of disciplinary sanctions over lawyers who provide or offer legal services in that state, whether or not they have permission from the bar regulators to do so. See MODEL RULES r. 8.5(a) (foreign lawyers providing “any legal services” in the United States are subject to discipline under the Model Rules). This is a sensible approach for disciplinary jurisdiction but is unhelpful here for purposes of Rules 5.1, 5.2 and 5.3.

120. In an opinion relating to the outsourcing of legal work to overseas lawyers, the ABA noted that it may be necessary to treat overseas counsel as a non-lawyer in order to comply with the applicable ethical rules. See A.B.A. Op. 08-451, *Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services*, at 4 (Aug. 5, 2008) (noting that “...it will be more important than ever for the outsourcing lawyer to scrutinize the work done by the foreign lawyers – perhaps viewing them as non-lawyers – before relying upon their work in rendering legal services to the client.”).

121. See Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1068 (1997) (describing lawyers in the United

of many foreign jurisdictions, where legal practice “is more formal and stylized” and legal counsel “practice decision consulting, not legal risk analysis.”¹²² These differences cut both ways. On one hand, the more deeply embedded a lawyer is in the corporate processes leading to the violation, the more likely counsel is to be culpable when those corporate dealings perpetrate or otherwise facilitate a human rights violation. On the other, the more a lawyer comes from a culture where the client rules the roost and lawyers simply do as they are told, the more likely the lawyer is to create ethical liability by omission.

With corporate activity and attendant human rights violations potentially touching multiple states and/or foreign jurisdictions, additional complications immediately arise in determining which jurisdiction’s ethical rules and limited admission requirements apply to these questions. Clearly all concerned have an interest in getting the answers right. The ethical implications of potentially serious human rights violations are exactly the kind of high stakes issue that requires “a consistent course of action or position”¹²³ among practitioners working together. Yet the resolution of such questions in the transnational context involves evaluating interlocking determinations of “reasonableness” in terms of: (i) what law governs the ethical question in the first place;¹²⁴ (ii) whether a foreign attorney qualifies as a “lawyer” with a duty to report ethical breaches under Rule 8.3¹²⁵ as well as whether counsel qualifies as a “senior lawyer”¹²⁶ upon whom a junior lawyer may rely under Rule 5.2; and (iii) both structural and individual supervisory obligations relating to junior

States as mixing “business and legal counseling with little concern for the boundaries between them.”).

122. *See id.* at 1077-78 (explaining that foreign legal systems do not share this “proactive” model); *see also id.* at 1073 (noting that “[t]he enthusiasm with which U.S. business lawyers . . . embrace the proactive model of lawyering stands in sharp contrast to its absence in other legal systems.”).
123. *See* MODEL RULES r. 5.2 (recognizing that supervising attorneys must “assume responsibility” for a decision for there to be any course of action).
124. This involves choice of law questions governed by Rule 8.5 as well as the application of the safe harbor protection in Rule 8.5(b)(2). *See* MODEL RULES r. 8.5 (the safe harbor protects lawyers from discipline if the lawyer’s conduct conforms to the jurisdiction in which the lawyer reasonably believes the “predominant effect of the lawyer’s conduct will occur.”).
125. *See* MODEL RULES r. 8.3(a) (reporting duty).
126. *See* MODEL RULES r. 5.2 cmt. 2 (subordinate lawyer’s reliance on supervisory lawyer).

lawyers and non-lawyer assistants.¹²⁷ Ironically, these are exactly the kind of difficult questions about which reasonable legal minds can differ (and about which junior lawyers could most use guidance from senior counsel).

IV. CONCLUDING THOUGHTS

International human rights law can have a surprisingly important impact on the relationship between lawyer and corporate client. Counsel must be sufficiently skilled to recognize the wide potential scope of human rights accountability in the corporate context (MR 1.1). Lawyers must not counsel or assist clients in criminal conduct (e.g., any human rights violation involving violence or serious rights deprivations) (MR 1.2). They must timely and properly communicate to clients the legal risks involved, how to avoid liability, and how these (and many other) limitations necessarily impact the scope of the legal representation at issue (MR 1.4).

When such conduct occurs, however, exceptions to confidentiality rules may permit or even require disclosing client secrets in order to prevent the crimes and/or harm arising from them (MR 1.6). Actual or potential rules violations also raise the specter of a variety of conflicts of interest (MR 1.7). Because they are difficult to resolve, even with client consent, conflicts of interest arising out of human rights violations normally will require counsel to withdraw from the representation, or at the very least permit the lawyer to do so. (MR 1.16).

Because corporate attorneys rarely act alone, the impact on the lawyer's relationships with other lawyers also must be considered. Counsel must properly supervise fellow lawyers (MR 5.1, 5.3) and ultimately must report lawyer malfeasance to the appropriate disciplinary authorities (MR 8.3). Lawyers who provide assistance in a client's crimes or who fail to meet all of the ethical requirements noted above face a full range of disciplinary sanctions for this misconduct, up to and including disbarment (MR 8.4).

None of this is easy to sort out because the lawyer's ethical obligations are layered on top of the other criminal, civil, and regulatory systems that apply to the company and industry in question. The upshot is that lawyers may be restricted in a way that other corporate actors (whether C-Suite executives, divisional managers, or functional / operational employees) are not. Lawyers must hold themselves to a higher standard, however, and ensure that they meet their ethical obligations. If they fail to do so, they are

127. *See* MODEL RULES r. 5.1 (detailing structural obligations of law firm partners and "other lawyers possess[ing] comparable managerial authority" to supervise lawyers); *see also* MODEL RULES r. 5.3 (detailing obligations with respect to non-lawyer assistants).

deviating from the standard of appropriate corporate representation in the global setting and exposing themselves to malpractice liability and disciplinary sanctions.

A final point is that neither human rights nor the ethical risks they create are static considerations. Continual re-assessment is necessary, particularly where the business representation in question is linked to an unstable geo-political environment. Corporate lawyers must proactively analyze not only how such developments affect their business clients, but also how these shifts impact themselves, their colleagues, and the ethical standards they have pledged to uphold as legal professionals.