

## *Human Rights Due Diligence: Do we need mandatory standards for due diligence?*

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Do we need mandatory standards for due diligence? Yes.

I will try to explain my answer by making a couple of very brief points about due diligence, the state duty to protect human rights and end with a brief mention of a new project that I hope will provide a more detailed answer to the question of how regulating due diligence can be made fair and effective.

### *First, a few words about human rights due diligence.*

Due diligence is a process undertaken by a business to prevent or mitigate actions that infringe upon the rights of others. Due diligence reflects the theory of attribution for human rights responsibilities now recognized in international soft-law. Embedded in the UN Guiding Principles, the OECD Guidelines, and the EU CSR Strategy is the idea that business responsibility arises – not from a “sphere of influence” – but from a business’ activities and relationships, its impacts.

Due diligence for human rights is a functional concept intended to generate practical steps by businesses to respect human rights. But due diligence is also a concept that comes from law, and specifically law applicable to business activities. When used – for example – in securities law, or in anti-corruption law, or more recently in conflict minerals law in the U.S. and Africa – due diligence is a way for companies to show compliance with specific legal provisions or respect for established principles of law.

Due diligence is, in other words, both a new international soft-law norm and a national regulatory or legal concept that has stood the test of time. As a business practice, it is familiar to business and is not an unusual or unreasonable demand that citizens and their governments might make of business. The Responsibility to Respect by definition delimits responsibility of a business to the activities and relationships in which the business is involved and does not extend responsibility to the entire universe of potential human rights abuse within a particular jurisdiction (presence is not responsibility). Due diligence offers a method to put this principle into practice.

### *But why regulate due diligence? And why do so at the national level?*

**First, in principle, the regulation of market-based activity is first and foremost a national function.** Similarly, the protection of human rights is a duty of states. Governments harmonize standards and coordinate both internationally, or trans-nationally – processes which have

already begun with respect to business and human rights – but they enforce rules governing the economy and protecting human rights nationally.

**The second reason is to clarify compliance** Today, complexity of CSR options and uncertainty about enforcement of human rights obligations creates uncertainty (and litigation risks) for business working abroad. Only changes in national laws and regulations can reduce these risks. Businesses want to know what laws to obey in the jurisdictions in which they operate. Rules that set out standards that explain how due diligence enables a business to be in compliance with human rights would go a long way – in my view are essential – to making the responsibility to respect an effective standard.

**Third, today, access to justice for victims of business related human rights violations are hobbled by a range of legal and practical obstacles that only changes in national laws and regulations can fix.** To function effectively, judicial and non-judicial remedies need clear standards against which to judge business involvement in human rights violations. Rules that set out how human rights due diligence can be a standard of compliance would help clarify the rights of victims, and lower the barriers to access to justice.

**In short, legally mandatory human rights due diligence requirements at the national level would go a long way toward clarifying expectations for both victims of business-related human rights abuse and businesses themselves.** Both would gain in terms of the clarity as to unacceptable behavior, the predictability of binding law and the options available for remedy.

*To this end, the Human Rights Due Diligence Project (“HRDD Project”) has been launched by the International Corporate Accountability Roundtable (“ICAR”), the European Coalition for Corporate Justice (“ECCJ”) and the Canadian Network on Corporate Accountability (“CNCA”).*

These groups represent the leading civil society voices on business and human rights, and they have commissioned an Expert Team to formulate legal and policy recommendations to governments on ways to promote due diligence to prevent, remedy and mitigate adverse human rights impacts.

I serve as part of this Expert Team, along with Professor Olivier de Schutter, Professor Anita Ramasastry and Robert Thompson. Through regional consultations with legal experts, and through our own independent research, we are seeking to uncover examples of ways in which different states use regulatory authority to mandate or encourage businesses to engage in human rights due diligence activity, for example in areas that are akin to human rights (e.g. labor rights, environment), or otherwise provide useful analogs in well-established corporate compliance practices (e.g. anti-corruption).

Our consultations have just kicked off, with an EU Consultation two weeks ago here in Copenhagen. Our US Consultation is next, in June, a Pan-Asia Consultation in August and we are beginning to plan Consultations in Africa and Latin America.

Essentially, the objective of the HRDD project is to answer the question of how States can, through law and regulation, encourage due diligence behavior based on research into existing state practice; or, to put it another way, we are working to make the connection between

Pillars 1 and 2 of the GPs. By looking at how the legal systems in countries in every region already require due diligence by business (either directly in statute or indirectly through incentives in law), the project aims to develop a principled basis for designing requirements for business due diligence in the area of human rights.

On behalf of my fellow members of the Expert Team for the HRDD Project, I would like to conclude by saying we look forward to releasing a final set of principles and recommendations at the end of the year, and to continued discussions on this important topic with civil society, governments and in multi-stakeholder groups like this one.

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