**Prevention in the Zero Draft on a Business and Human Rights Treaty**

**Professor Robert McCorquodale[[1]](#footnote-1)**

**Introduction**

1. Thank you for inviting me to assist the Working Group in relation to draft Article 9.
2. Many commentators, including John Ruggie, have specifically supported the inclusion of an Article on Prevention, as have others in their opening statements here. I agree with them on the basis of the work I have undertaken with businesses, governments, international organizations and civil society. If the human rights impacts of business could be prevented before they occur, then it would dramatically improve the daily lives of many people around the world.
3. In my very limited time, I wish to make brief comments on just 4 issues raised by draft Article 9 and make 1 general comment.

**Human Rights Due Diligence**

1. My general comment is that Article 9 uses the wrong terminology for the key term in it.
2. The terminology used is **“due diligence”,** while the terminology used by the UN Guiding Principles on Business and Human Rights (UNGPs) is “**human rights due diligence**”(HRDD). These are substantially different.
3. “Due diligence” as a business term is normally a single process of investigation conducted by a business to identify and manage its own commercial risks. It is one-off and often tick-box process.
4. HRDD was deliberately chosen as a new term, so as not to confuse it with business due diligence and to link it with international human rights law.[[2]](#footnote-2) It is an ongoing process[[3]](#footnote-3) and is focussed on the human rights impacts on others of the business’ activities and is not initially about the risk to the business.[[4]](#footnote-4) The management risk to the business then arises in how it deals with and prevents the human rights impacts .
5. My strong recommendation is that “human rights” must be added before “due diligence” wherever it occurs in this Article and in the Treaty and Optional Protocol.

**Mandatory HRDD**

1. To turn to my 4 specific points. First, Article 9 does broadly – but not precisely - cover the four elements set out by the UNGPs, as mandatory HRDD.[[5]](#footnote-5)
2. There is, though, no specific “mitigation” or “tracking” aspects, and these should be added as both are important elements of HRDD. The OECD Guidance on Responsible Business Conduct in relation to HRDD is a very good template for how this aspect of this draft Article could be improved, and would help clarity for businesses and governments, as well as civil society.
3. I note that Article 9.2(c) includes “financial contributions” within the coverage of the operations for which there are HRDD requirements. I think that the role of the financial institutions is significant in this area, as seen by the recent decision of the Australian OECD National Contact Point concerning ANZ Bank and its financial support of sugar companies in Cambodia despite human rights abuses being evident.[[6]](#footnote-6) The specific inclusion of financial institutions within the businesses covered by this Article and across the entire draft should be made clearer.
4. I also note the absence of reference in the draft to the responsibilities of international organizations and these should be included in the draft somewhere.

**SMEs**

1. My second point is that I have concerns about the ability of States expressly to exclude small and medium-sized businesses (SMEs) from the obligations under Article 9.5.
2. I am very aware of the difficulties of including a significant burden on SMEs of many of the obligations, not least as I have run a small business myself. However, this specific exclusion could lead to a form of immunity for the activities of SMEs, not least as they can have significant impacts on human rights, as the UNGPs noted. [[7]](#footnote-7) It could also lead to the creation of new legal structures by transnational corporations of a series of SMEs, which would undermine the purpose of the treaty.
3. I think that there is another way to approach this issue. That is to require States to raise awareness, provide dedicated support and incentivize SMEs to implement the treaty, as was recommended by the Working Group on Business and Human Rights.[[8]](#footnote-8) It may also be possible to enable SMEs to rely on the HRDD of larger businesses in their supply chain, as long as they are aware of this, as part of any defence to a claim against them, including by the larger business itself.

**Duty to Prevent**

1. My third point is that Article 9.2(c) refers to “preventing harm”. Some concerns have been raised that this is different to that of “seeking to prevent” human rights impacts under GP 13. I understand these concerns and the possible impact on business of increasing the responsibilities on them.
2. In my view, it is correct, and in keeping with the UNGPs, to have the obligation as one of a duty to prevent with respect to the business’s *own* actions, including all those entities such as subsidiaries, within its enterprise and control. After all, the reference to “seeking to prevent” human rights impacts in GP 13 is *only* in relation to the harm arising from the business relationships of a business and not from its own activities.[[9]](#footnote-9)
3. A duty to prevent human rights harms on a business for its own activities that cause or contribute to human rights harms, would reinforce the core concern of the draft Treaty of prevention of human rights impacts. It also moves the obligations from being on victims to show a business link, a causal connection and a necessary forum, to that on the business to have the burden of showing that it is serious about its implementation of effective HRDD for its own activities.
4. If this duty to prevent on business extends beyond subsidiaries and those under the control of a business to those in a business relationship, it would go beyond the UNGPs. There is, though, some national legislation, such as the French Duty of Vigilance Act and the UK’s Modern Slavery Act, which does extend this duty to suppliers.[[10]](#footnote-10)

**Defence of HRDD**

1. My last point raises one matter that is absent: a defence of effective HRDD.
2. I consider that to include a defence of effective HRDD would be a powerful incentive for businesses to undertake HRDD and to act to prevent human rights abuses. It may also encourage States to bring in regulation, with the support of business.
3. A defence may also enable those companies who are committed to preventing human rights abuses to show their real action taken and to give more than “lip-service”[[11]](#footnote-11) in their implementation of their obligations. There have been a few instances of national courts recognising such a defence of HRDD, such in *Barber v Nestle* in California.[[12]](#footnote-12)
4. Such a defence could be added simply by inserting a new sentence in Article 9.4: *“This liability may not arise if the business enterprise/legal person or association of legal persons can prove that it took all reasonable precautions within the circumstances, had an effective policy and procedure in place, and exercised all human rights due diligence to prevent the adverse impact”.*
5. I have added “within the circumstances” to this defence as there may be circumstances, such as in conflict zones, where States may wish to have a strict liability for businesses.
6. I hope that these brief comments are of assistance. Thank you.
1. Professor Robert McCorquodale is an academic, a barrister and the founder of Inclusive Law ([www.inclusivelaw.com](http://www.inclusivelaw.com)), which brings together business, law and human rights. [↑](#footnote-ref-1)
2. See the discussion in the *European Journal of International Law* (2017, Volume 28, from page 899) between John Ruggie and John Sherman with Jonathan Bonnitcha and Robert McCorquodale. [↑](#footnote-ref-2)
3. The amount of HRDD will vary in complexity with the size of the business, the risk of severe human rights impacts, and the nature and context of the business operation, as is set out in Guiding Principle 17 (b). [↑](#footnote-ref-3)
4. See Guiding Principle 17. [↑](#footnote-ref-4)
5. Mandatory HRDD, as provided for in Article 9, has been widely supported by governments, NGOs and trade unions - See European Coalition for Corporate Justice, [file:///C:/Users/Office/Documents/BHR/Reports/policy-evidence-mhrdd-september-2018-final%20(2).pdf](file:///C%3A/Users/Office/Documents/BHR/Reports/policy-evidence-mhrdd-september-2018-final%20%282%29.pdf). some businesses support it - See Mulberry statement before UK Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 188: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>. [↑](#footnote-ref-5)
6. Australian OECD National Contact Point Final Statement, 27 June, 2018: file:///C:/Users/Office/Documents/BHR/Cases/11\_AusNCP\_Final\_Statement%20ANZ%20Cambodia%2018.pdf [↑](#footnote-ref-6)
7. Commentary to GP 14: ‘The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size.’ [↑](#footnote-ref-7)
8. UN Working Group on Business and Human Rights, *Challenges and opportunities: Small and medium-sized enterprises (SMEs) and human rights* [file:///C:/Users/Office/Documents/BHR/Reports/WGBHR-SMEs%20and%20BHR%202017.pdf](file:///C%3A/Users/Office/Documents/BHR/Reports/WGBHR-SMEs%20and%20BHR%202017.pdf). [↑](#footnote-ref-8)
9. Also neither GP 15 nor GP 17 refers to “seeking to prevent” but only to “prevent”. [↑](#footnote-ref-9)
10. This extended duty to prevent has also been recommended by the United Kingdom Parliament’s Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 186-194: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> [↑](#footnote-ref-10)
11. See *Vilca v Xstrata Limited and Compania Minera Antapaccay S.A* [2016] EWHC 389 (UK), para 25. [↑](#footnote-ref-11)
12. *Barber v Nestle USA Inc*, 15-cv-01364, US District Court, Central District of California (Los Angeles). [↑](#footnote-ref-12)