

# IOE paper on State policy responses on human rights due diligence

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# 1. Executive summary

Human rights due diligence is an important part of a company's responsibility to respect human rights as enumerated in key Government-backed instruments such as the UN Guiding Principles on Business and Human Rights ([UNGPs](#)) and the OECD Guidelines for Multinational Enterprises ([OECD Guidelines](#)).

Today, an ever-increasing number of companies of all sizes, sectors, structures and geographies - and across various functions at different operational levels - are voluntarily carrying out human rights due diligence, either by adopting a specific human rights due diligence process or incorporating this into other processes. Their efforts are supported by a host of industry bodies and other international and national organisations, which have incorporated the human rights due diligence approach into their standards, guidance and practical implementation tools. On top of this, a larger ecosystem of stakeholders are actively engaged in the promotion of human rights due diligence. Parts of the investment community and stock exchanges are calling for greater transparency of companies' human rights risk management, which has triggered the development of many benchmarks<sup>1</sup> that assess large companies' social policies and performance. The International Bar Association, sports bodies such as FIFA, and a vast number of NGOs and trade unions are also using the human rights due diligence approach in their work.

The uptake of human rights due diligence has been swift and deep and business engagement on this topic continues to grow as awareness of global standards spreads and experience develops. Since the UNGPs were introduced in 2011 (and even before), some States have introduced a range of policy and regulatory measures that concern human rights due diligence.

The corporate responsibility to respect human rights does not outweigh the State duty to protect human rights. Furthermore, it is far easier for business to respect human rights when Governments do their job to protect human rights. While some States are fostering business engagement on this topic in ways that seek to bring clarity and predictability, the overall approach to policy making appears patchy, uncoordinated and aimed squarely at business activities. Many States are not meeting their existing human rights obligations or doing enough to address underlying challenges in their jurisdiction - all of which lie at the root of many human rights harms. This includes developing strong national institutions that can implement and enforce domestic laws covering companies within their borders; ensuring victims have access to effective remedy; addressing informality and other systemic issues including child labour, discrimination and corruption; and driving inclusive economic growth.

Instead, efforts suggest that many States, especially those that struggle or are unwilling to implement their international human rights obligations, find it is easier or more expedient to increasingly place the onus on companies and look for foreign-imposed "solutions". There is a growing push in some States to make it mandatory for companies to carry out human rights due diligence (either in full or in the form of public disclosure) on their activities and supply chains. Such laws tend to target those bigger and well-known brands and retailers

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<sup>1</sup> **Examples include:** the [Corporate Human Rights Benchmark](#), the [Know the Chain benchmarks](#), the [Access to Medicine Index](#), [Ranking Digital Rights](#), the [Responsible Mining Index](#), the [Workforce Disclosure Initiative Survey](#), the [Dow Jones Sustainability World Indices](#) and the [RobecoSAM Corporate Sustainability Assessment](#), and the [FTSE4Good Index Series](#). Plans are also afoot for [Corporate SDG Benchmarks](#).

that operate across borders and are headquartered in States, which are - in reality - the few that do take concrete steps to meet their human rights duties vis-à-vis business activities. This development risks unintended consequences for rights-holders, raises many concerns and questions, and it risks overlooking and undermining the positive impact of voluntary and soft-law standards.

#### **Against this backdrop, this paper:**

- Provides a brief explanation of human rights due diligence (under the UNGPs).
- Describes what the UNGPs say about State policy and regulatory measures.
- Examines the growing policy responses to human rights due diligence, especially the applicable laws.
- Highlights twelve areas of concern among business and employers on the legal policy responses\*.
- Explains the importance of voluntary action and soft law standards.
- Offers suggestions for future State policy responses.

#### **\* Summary of the twelve risks, concerns and challenges regarding the move towards mandatory human rights due diligence laws:**

- i.** It is crucial not to blur State duties and business responsibility;
- ii.** Foreign-imposed legal "solutions" are unlikely to address deep-rooted and complex human rights challenges in many States;
- iii.** Laws can represent a de facto embargo, undermine business engagement in regions with developmental challenges, and run counter to the UNGPs' spirit;
- iv.** Laws encourage companies to take a passive, risk-averse approach that limits the potential for creative partnerships and transformative impact;
- v.** It is not easy or necessarily desirable to translate the human rights due diligence process into laws;
- vi.** There are important questions and concerns over judicial interpretation and enforcement;
- vii.** Laws unfairly target a select number of companies and misunderstand the nature of global business;
- viii.** Concerns over how legal compliance measures will impact on different types of companies up and down the value chain, especially SMEs;
- ix.** Laws on specific human rights topics pre-judge company due diligence efforts;
- x.** A spaghetti soup of laws creates confusion and potential misalignment of standards and approaches;
- xi.** Laws often ignore the role of States as an economic actor in their own right; and
- xii.** No evidence that laws have any impact on a critical stakeholder group: end consumers / high-street shoppers.

The paper does not describe how companies are carrying out human rights due diligence in practice<sup>2</sup>, but it provides a business perspective on the policy measures that concern this growing focus area. The paper is intended as a contribution to the ongoing debate on how to encourage widespread implementation of the UNGPs.

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<sup>2</sup> Descriptions of how companies are conducting human rights due diligence can be found at numerous other reports, websites and sources and in person at various fora, such as the UN Forum on Business and Human Rights and the OECD Forum on Responsible Business Conduct.

## 2. About the IOE

The International Organisation of Employers ([IOE](#)) is the largest private sector network in the world, representing different types of businesses across social and labour policy fora such as the ILO, the UN and its various agencies, and the G7/G20.

The IOE attaches great importance to business and human rights and is actively engaged in endorsing, promoting and disseminating the UNGPs, as well as other Government-backed instruments on responsible business conduct, among our members and networks. We help businesses of all sizes to meet their responsibility to respect human rights in line with the UNGPs and to make a positive contribution to the Sustainable Development Goals ([SDGs](#)).

Respecting and advancing human rights is a priority for the international business community and the IOE strongly argues for preserving the approach outlined by the UNGPs.

### 3. What is human rights due diligence?

Under the UNGPs<sup>3</sup>, the corporate responsibility to respect human rights applies to all business enterprises, regardless of their size, sector, location, ownership and structure.

Human rights due diligence is one of three operational parts of the corporate responsibility to respect human rights. UNGP 15 spells out what those three parts are: "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; and
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute."

UNGPs 17 to 21 then provide more information about the four-step human rights due diligence approach that is expected of companies: For example, the process should include:

- i. Assessing actual and potential human rights impacts;
- ii. Integrating and acting upon the findings;
- iii. Tracking the effectiveness of the company's responses; and
- iv. Being prepared to communicate how impacts are addressed.

The UNGPs also set out some parameters for human rights due diligence:

- Human rights due diligence should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

The human rights due diligence process under the UNGPs differs from other forms of business management due diligence. It is about identifying and responding to the human rights risks faced by the rights-holders. It is not about direct risks to the business, although human rights risks can translate into business risks such as legal, financial, reputational and operational risk. It is also not a one-off exercise.

Human rights due diligence also includes two important activities that companies should take, namely engagement with affected groups and relevant stakeholders and exercising leverage where possible:

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<sup>3</sup> Click [here](#) to read the UN Guiding Principles on Business & Human Rights.

- Meaningful stakeholder engagement, appropriate to the size of the company and the nature and context of the operation, is an important process to help a business to identify and respond to human rights risks.
- The UNGPs explain that companies should exercise their "leverage" to prevent and mitigate, to the greatest extent possible, harms in those situations when either a company contributes to an adverse impact or when a harm is directly linked to its operations, products or services by its business relationships.

In addition, measures that are not strictly part of human rights due diligence process can, in turn, help inform and strengthen a company's process to identify and respond to risks. For example, establishing or participating in grievance mechanisms for individuals and communities who are adversely impacted, can help a company to better identify its human rights impacts. Similarly, grievance mechanisms can be a means for a company to track and monitor its human rights due diligence process.

## 4. What the UNGPs recommend about State policy and regulatory measures

UNGP 1 explains that States have the duty to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. UNGP 2 clarifies that “States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.” UNGP 3 then gives recommendations to States on their general regulatory and policy functions. These include:

- (a) Enforcing laws that require business enterprises to respect human rights, and periodically assessing the adequacy of such laws and addressing gaps;
- (b) Ensuring that existing laws and policies that govern the creation and operations of business, such as corporate law, enable business respect for human rights;
- (c) Providing effective guidance to business on how to respect human rights throughout their operations; and
- (d) Encouraging, and where appropriate requiring, companies to communicate how they address their human rights impacts.



## 5. Examples of policy responses

Since the UN Human Rights Council endorsed the UNGPs in 2011, the topic of human rights due diligence has received much attention by policy makers in some countries<sup>4</sup>:

- (a) There has been a drive for international policy coherence to embed the UNGPs and their human rights due diligence blueprint into other applicable standards, initiatives and guidance tools. The expectation that companies should exercise human rights due diligence is reflected in standards such as the [OECD Guidelines](#) and the [ILO MNE Declaration](#). It is also relevant to many other initiatives and tools such as the International Finance Corporation Performance Standards, the UN Global Compact's 10 Principles, the Global Reporting Initiative, ISO 26000 Guidance on Social Responsibility, the Voluntary Principles on Security and Human Rights, the work of the Thun Group of Banks, etc.
- (b) To date, some 19 Governments have produced a national action plan (NAP) on business and human rights with a further 20 or more States reportedly in the process of developing a NAP.<sup>5</sup> These plans, among other things, articulate Government's expectations of companies operating in their jurisdiction to act responsibly with respect for human rights by encouraging them to carry out due diligence vis-à-vis their operations at home and, in some case, abroad.
- (c) At the international level, some States are increasingly urging companies to carry out human rights due diligence especially in relation to their supply chains. For example, the 2015 G7 Leaders' Declaration issued strong support for the UNGPs and said: "To enhance supply chain transparency and accountability, we encourage enterprises active or headquartered in our countries to implement due diligence procedures regarding their supply chains, e.g. voluntary due diligence plans or guides."<sup>6</sup> This was followed by a similar commitment of the wider G20 in 2017 when its leaders pledged to "work towards establishing adequate policy frameworks in our countries such as national action plans on business and human rights and underline the responsibility of businesses to exercise due diligence."<sup>7</sup>
- (d) Furthermore, some Governments have either introduced or are considering laws and other punitive measures that concern the human rights due diligence process (in part or in full).<sup>8</sup> In many instances, these measures expand and extend supply chain responsibility. As such, human rights due diligence requirements are beginning to surface in legal claims.<sup>9</sup> See the "Annex" for examples of legal developments and other policy measures that have regulatory effect.

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<sup>4</sup> WBCSD Analysis on Business and Human Rights Landscape - [Graphic](#)

<sup>5</sup> This information is according to the [webpage](#) of the UN Working Group on Business and Human Rights.

<sup>6</sup> G7 Leaders' [Declaration](#) (2015)

<sup>7</sup> G20 Leaders' [Declaration](#) (2017)

<sup>8</sup> Added to the push for new laws mandating human rights due diligence (in part or in full), there is [a call](#) for business enterprises to have a common law duty of care to exercise due diligence. This could be judicially enforceable in common law countries by tort suits for negligence brought by persons whose potential injuries were reasonably foreseeable. Under one proposal, a parent company's duty of care would extend to the human rights impacts of all entities in the enterprise, including subsidiaries and those under their control. A company would not be liable for breach of duty of care if it proves that it reasonably exercised due diligence as set forth in the UNGPs. However, a company's failure to exercise due diligence would create a rebuttable presumption of causation and hence liability. Common law countries include: UK, Australia, Canada, India, USA, Bangladesh, Ghana, Ireland, Israel, Malaysia, New Zealand, Nigeria Pakistan, Sri Lanka and Uganda.

<sup>9</sup> Click [here](#) for one source of information on legal developments.

## 6. Concerns about some policy responses

### Human rights due diligence is important...

Human rights due diligence - with its focus on risk to people instead of risk to the business - is an important process for companies to avoid involvement in human rights harm throughout their supply chain. Carrying out human rights due diligence allows a company to show that it recognizes and acts upon its human rights risks, and that it is serious about not causing abuses, or contributing and being directly linked to harms caused by others.<sup>10</sup> While there are no guarantees that acting with due diligence will protect a business from legal liability, complicity or public allegations<sup>11</sup>, the process can help protect a company's values and value. It helps a business to gain and retain a social licence to operate; to demonstrate that it complies with regulations<sup>12</sup>; and to respond to benchmarks, codes of conducts, international framework agreements, and other requests for information. It also allows for learning by doing, identifying blind spots and improving over time<sup>13</sup> including avoiding past failures and partnering and collaborating with others to address systemic issues.

### ... However, the move towards mandatory human rights due diligence laws poses a number of risks, concerns and challenges

Despite its importance, human rights due diligence - especially in relation to global supply chains - is neither a simple exercise, nor a silver bullet to the world's business-related human rights problems. The push for policy-makers to create hard laws concerning this process raises many questions and concerns. However well-intentioned these laws may be, taking a top-down, prescriptive and punitive approach risks unintended consequences for rights-holders; it risks driving unhelpful action (or inaction) by some States and businesses; and it risks overlooking and undermining the positive effects of many voluntary and soft-law standards.

We list twelve such concerns and challenges:

#### i. It is crucial not to blur State duties and business responsibility

Firstly, while business is committed to respecting human rights in line with Government-backed standards such as the UNGPs and OECD Guidelines, it is vital that States implement their duty to protect human rights first and foremost. The laws focusing on the corporate human rights due diligence process reflect a general absence of concerted and

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<sup>10</sup> Carrying out human rights due diligence allows a company to "know" and "show" that it respects human rights in line with the UNGPs and other standards. Commentary to UNGP 17: "Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse."

<sup>11</sup> Commentary to UNGP 27 states that "conducting human rights due diligence should not assume that, by itself, this will automatically or fully absolve a company from liability for causing or contributing to human rights abuses."

<sup>12</sup> Certain elements of human rights due diligence - communication channels within management procedures, training, factual circumstances and attributed knowledge - are also the same elements that courts and regulatory bodies take into account to determine whether due diligence has been comprehensive enough and effectively implemented in other areas of law.

<sup>13</sup> Identifying a larger number human rights risks does not necessarily mean that the company is suddenly involved in a greater number of harms. It could equally show that the company is getting better at meeting its responsibility to respect human rights.

widespread State engagement and action to meet their obligations in critical areas such as strengthening national institutions and mechanisms to promote and protect rights, ensuring national laws are enforced, addressing endemic issues such as informality, taking measures to root out corruption, and intensifying diplomatic and capacity-building efforts to improve local governance. They also mirror the general trend to put the onus on companies, especially a select number of highly-visible brands and retailers that operate across borders and are already implementing the responsibility to respect, with little consideration for the wider business community.

One UN initiative - the IGWG for a UN binding instrument on transnational companies (TNCs) and other business enterprises (OBEs) - illustrates this particular concern. The proposal in the Chairperson's draft "elements" paper to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves is deeply misguided. International human rights law binds States, not private entities. Only sovereign States can achieve the protection of human rights while balancing the range of societal and political interests.<sup>14</sup> Companies neither have the mandate nor the capabilities to assume traditional Government functions. They cannot be co-equal duty bearers for the broad spectrum of human rights. As a practical matter, any instrument imposing direct obligations on companies under international human rights law is also bound to fail due to the sheer number of actors involved and it would be an undesirable outcome for rights-holders, who rely on Governments to develop and enforce national policies and regulations.

Furthermore, establishing international human rights obligations directly on business when these duties often do not exist at the national level suggests that States are seeking to pass the buck onto private entities for their own failure or unwillingness to protect their people's rights. It is also disingenuous when some States use multilateral settings to call for hard laws targeting business, including on human rights due diligence, as it deflects attention away from their poor treaty implementation records onto visible companies that are easy to scapegoat even if their involvement in a harm may be minimal.

## **ii. Foreign-imposed legal "solutions" are unlikely to address deep-rooted and complex human rights challenges in many States**

Second, the push for Government regulation that mandates some companies to carry out human rights due diligence in their supply chains is unlikely to result in improvements to underlying human rights challenges in countries with weak public institutions. In the absence of robust national laws/policies, enforcement, and judicial and non-judicial remedy mechanisms at the local level, foreign-imposed legal "solutions" are unlikely to have long-term, sustainable and replicable impact for rights-holders. In fact, the patchwork of laws - often enacted by States in developed countries - risks creating a two-tiered compliance system, whereby individuals, communities or workers that suffer business-related harm that may involve foreign-based companies or exporters have higher standards, but the rest get lesser or diluted protections and remediation.

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<sup>14</sup> In his 2008 report to the Human Rights Council (A/HRC/8/5), John Ruggie explained that "the UN is not a centralized command-and-control system that can impose its will on the world - indeed it has no 'will' apart from that with which Member States endow it."

A narrow approach that targets a select number of companies with global operations fails to recognise that human rights abuses and decent work challenges that occur in global supply chains in the vast majority of cases are not caused by cross-border trade. Instead, they mirror harms that occur in national economies generally. The only way to ensure that affected individuals, communities and workers are equally protected is to develop strong national institutions that can implement and enforce domestic laws covering all companies within its borders, regardless of whether they participate in global supply chains or not. In addition, the problem is not the absence of a binding international instrument on business and human rights, but States' failure or lack of capacity to implement and enforce their own domestic laws and existing international human rights treaties that they have ratified. In many cases, domestic law has not kept pace with changes in the world economy. Therefore, what is needed is for more States to meet their existing obligations required under the UNGPs, and more effective and comprehensive law enforcement in general.

### **iii. Laws can represent a *de facto* embargo, undermine business engagement in regions with developmental challenges, and run counter to the UNGPs' spirit**

Third, making human rights due diligence mandatory, especially on a select number large and of often Western-based companies, would have a chilling effect on foreign direct investment to industrialised, emerging and least developed economies. Furthermore, it would discourage companies from engaging in challenging environments and working with other stakeholders to create sustainable development.

While a rigid and punitive approach may satisfy some policy and legal campaigners, it dampens crucial investment flows to many countries that face significant development challenges and/or are beset with rampant conflict and corruption. Many companies are committed to finding sustainable solutions to complex human rights-related challenges, especially in high-risk environments, through partnerships and stakeholder engagement. However, a punitive approach to due diligence threatens this. It risks encouraging companies to adopt a "cut and run" instead of "stay and improve" approach to a country's complex and endemic issues. Due to a fear of being labelled complicit in abuses or being "named and shamed", supply chain-related due diligence laws incentivise companies to stop sourcing from and operating in countries where the risks are more acute. The threat of a backlash from regulators, investors and civil society drives companies to source or operate in countries that pose a low risk of being involved in an adverse impact and avoid suppliers where harms may be a problem. It also leaves the market open to other companies - not affected by the law - that may have less awareness of or incentive to respect human rights. Incentivising a conservative approach runs counter to the spirit and effectiveness of the UNGPs, which encourages companies to use their "leverage" to mitigate harms to the greatest extent possible and consider "whether terminating the relationship with the entity itself would have adverse human rights consequences."<sup>15</sup>

While a thorough assessment of all the different laws is needed, the findings on the impact of an early disclosure law demonstrates the limitations and concerns around the development of hard law. Analysis of section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act suggests that it has had mixed success at best in

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<sup>15</sup> Commentary to UNGP 19

cutting off funding to armed groups the Democratic Republic of Congo (DRC) and it has generated unintended consequences for rights-holders.

Experts note that while Section 1502 has brought increased transparency to so-called 3T mines<sup>16</sup> (those that produce tin, tantalum and tungsten) and supply chains in the region, the progress achieved in breaking the links between armed groups and mining "is not tied to the paperwork and reporting requirements." Instead, the progress is down to increased governance over 3T mines, such as State control measures, taxes, legal enforcement and monitoring and oversight. Meanwhile, the private sector's main contribution has come not because of the Act's reporting provisions but because of "the commitment of leading companies - in coordination with governments and civil society - to implement programs and systems that enable responsible sourcing from the impacted region."<sup>17</sup> Furthermore, the progress does not extend to the sourcing of gold, which remains subject to rampant smuggling and armed group interference. For example, the International Peace Information Service estimates that 64% of artisanal miners of gold work under the influence of armed groups compared with 21% for tin, tantalum and tungsten as militias, corrupt officials and criminal networks have turned to gold to generate illicit incomes.

In addition, the evidence suggests that Section 1502 has generated negative unintended consequences by hindering rather than helping rights-holders in important instances:

- First, together with the 2010 mining ban instituted by the DRC government, the Act's reporting provision contributed to the *de facto* company embargo of the country. This has had a chilling effect on foreign direct investment and it has prevented companies from working together with other stakeholders under a more holistic approach that takes account of the realities of DRC's mining sector and the complexities of the conflict to gradually improve conditions for workers and communities on the ground. Early on, due to fear of being labelled as a user of conflict minerals, many companies stopped sourcing from the country altogether resulting in dramatic economic losses and hardship for workers and their families who rely on artisanal mining in the Eastern province's so-called "survival economy".

On top of this, there are reports that lenders are withdrawing funding for companies that are involved in any way in conflict minerals without considering the complexity of the firm's involvement and the divestment effects on rights-holders. In an interview, an NGO operating in South Kivu said that "this law (Dodd-Frank) has taken food out of the mouths of the artisanal miner's family." Furthermore, in a 2014 open letter, 70 academics, researchers and journalists described that despite activists' success in shaping policies, such as the those in relation to the Dodd-Frank Act, their campaign "fundamentally misunderstands the relationship between minerals and conflict in the eastern DRC" and resultant initiatives "risk contributing to, rather than alleviating, the very conflicts they set out to address."

- Second, Section 1502 has had a disproportionate impact on SMEs in the USA and elsewhere. While many of these business are not themselves obligated to report to the

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<sup>16</sup> Since 2014, companies registered with the USA Securities and Exchange Commission have been required to disclose whether they are receiving tantalum, tungsten, tin, and gold from the DRC, and whether those minerals are connected to conflict sites.

<sup>17</sup> [Written Testimony](#) of Rick Goss, Senior Vice President of Environment and Sustainability (5 April 2017) - Information Technology Industry Council (ITI) - before the US Senate Committee on Foreign Relations Subcommittee on Africa and Global Health Policy - Hearing on "A Progress Report on Conflict Minerals"



US Securities and Exchange Commission, they are indirectly subject to the requirements through their presence in the supply chain of the regulated companies. The law has created unhelpful burdens and costs on SMEs.

- Third, by focusing almost exclusively on the role of the private sector, Section 1502 has diverted critical attention away from the indispensable role of governments to address endemic political, security and humanitarian crises in the region. The underlying causes of the conflict in the DRC and wider region are political, not economic (other regions rich in natural resources are not plagued by conflict) and are linked to deep-rooted ethnic tensions over political power, land rights and citizenship.

#### **iv. Laws encourage companies to take a passive, risk-averse approach that limits the potential for creative partnerships and transformative impact**

Fourth, laws push companies to take a strict "do no harm" and legal-compliance approach that ultimately would result in one-size-fits-all, passive box-ticking compliance and boiler-plate reporting. It is often said that business understands compliance. They think in terms of risk and tend not to commit to "aspirational" goals that may be hard to deliver in practice, especially when needing to comply with regulation. Laws create the need for legal certainty and companies will naturally focus on situations and consequences of liability. This means human rights considerations will likely be concentrated mostly among lawyers - be it in-house or external counsel, who naturally take a conservative stance on compliance matters.

Driving a strictly legal compliance approach undermines effective risk management systems that are people-centred, embedded across different company functions and integrated into operational and commercial procedures. Human rights due diligence requires a substantive, contextual and ongoing approach that is intuitive, based on open dialogue and leads to quantitative and qualitative data. It also aims at improved company disclosure with more detailed information about human rights risks and impacts. However, laws promote a formulistic tick-box approach by companies for fear of being sanctioned and penalised legally, financially and reputation-wise.

This approach disregards the fact that increasing numbers of companies are voluntarily carrying out due diligence while also trying to go beyond legal compliance and "do good" in a way that allows them to promote respect for human rights across their global footprint with the potential to transform the lives of millions of people. It also runs counter to the UNGPs approach, which encourages critical thinking undertaken by different company functions<sup>18</sup> to put respect for human rights into practice; trust-building partnerships between buyers, suppliers, franchisees, etc.; and creative collaboration and multi-stakeholder engagement to address systemic issues and contribute meaningfully towards the SDGs.

At the same time, laws could, in turn, further spur the creation of voluntary certification models of compliance and audit that would not be viewed as credible or legitimate by many stakeholders in the human rights community. There is a consensus among human rights practitioners not to certify companies' human rights performance as such processes would be seen as a smoke screen behind which businesses could hide behind its processes at

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<sup>18</sup> Relevant company functions may include: the Board, the CEO, sustainability/CSR teams, legal counsel, supply chain management, human resources, procurement, management accountants, communications, investor relations, labour affairs, public affairs, etc.

the expense of better outcomes for people. Furthermore, it is simply not possible for any company to certify that it is clean of any human rights risk. On top of this, Government-backed standards including the UNGPs have rejected a compliance-based approach and instead encourage companies to view human rights from a less-piecemeal risk management perspective.

#### **v. It is not easy or necessarily desirable to translate the human rights due diligence process into law**

Fifth, while laws may help bring visibility to human rights risks, there are important questions about how States should legislate on human rights due diligence when the process and concepts do not necessarily lend themselves to legal certainty<sup>19</sup>; when it is not clear that all parts of the due diligence process help improve human rights performance; and when there is not yet sufficient experience on all parts of the due diligence process by which to establish a law that reflects leading practice and takes note of what is reasonable and/or feasible.

While mandatory disclosure and general due diligence laws are common in a variety of regulatory areas including privacy policies, informed consent in health care and consumer protection in banking, lawmakers should be careful to understand the specific nature of the human rights due diligence process and not assume that all due diligence processes are the same and can be promoted in the same way.

Already, some laws have been criticised for introducing "unlimited liability badly defined" whereby companies are not in a position to know if they would comply with the law in practice, as well as there being huge ambiguities for investors and business partners. In addition, laws that include a requirement for stakeholder engagement disregard the point that companies are best placed to determine for themselves which individuals and organisations to engage with and how. It is often very challenging for companies to identify relevant stakeholders to consult with to help it determine and meaningfully respond to its human rights risks in a way that understands the viability of the business. Equally, there may be few external stakeholders to engage with in some regions or even a lack of credible ones such as where government-organised NGOs and non-independent trade unions that may dominate civic space.

Similarly, mandatory disclosure regimes imply that increased reporting, in and of itself, is necessary to ensure widespread corporate respect for human rights. In reality, companies routinely explain that supply chain mapping and reporting on human rights and broader sustainability issues is a big drain on resources and it fails to turn up actionable information or help them improve their performance. Furthermore, many readers, including investors and civil society organisations, find that company disclosure does not offer useful insights into how well a company is managing its impacts on people.

It also takes time for a company to go through every step of the human rights due diligence process. While all steps are equally important and should be taken as a whole, in reality more attention has been given by all stakeholders to the first and last elements of human rights due diligence, namely identifying/assessing impacts and communicating on these.

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<sup>19</sup> Furthermore, there are reports that some States are misapplying "guidance" tools such as the Voluntary Principles on Security and Human Rights and the OECD's due diligence guidance as more formal standards by which to hold companies accountable for their conduct.

There is, in reality, less publicly-available information and discussion on how companies can best integrate and act upon the findings from their assessments and also tracking the effectiveness of the company's responses. Devising laws that prescribe rules on these processes is risky given that it is not widely understood by policy makers and others how the full due diligence process should be best carried out in various sectors and contexts.

On a related note, current discussions within the Inter-Governmental Working Group on TNCs and OBEs with respect to human rights (IGWG) suggest that policy makers at the UN level are considering re-defining the scope of human rights due diligence. In its draft "elements" paper<sup>20</sup>, published in 2017 as part of the UN Treaty negotiations, the Chair of the IGWG proposed that State parties "require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes... and to identify and address human rights impacts resulting from their activities." While focusing on the "activities of TNCs and OBEs that have a transnational character" avoids the challenge of defining "TNC" and "OBE" in international law, shifting the focus on to a company's "activity" instead of the "entity" risks unintended consequences and creating unhelpful confusion with the UNGPs. It also raises an automatic question: what do "the activities of TNCs and OBEs that have a transnational character" mean in legal and practical terms? Furthermore, it would be extremely difficult, if not impossible, to monitor the vast array of activities that have a "transnational character" and reasonably determine liability for a harm that involves a cross-border transaction.

## **vi. There are important questions and concerns over judicial interpretation and enforcement**

Sixth, there are big questions about how the laws will be interpreted and enforced once created. Already one court has determined that a company increased its liability by carrying human rights due diligence on its supply chain instead of the process offering some protection against legal risk. There are worrying signs that States and courts are starting to misapply voluntary guidance as legal obligations or quasi-legal standards. In addition, there are many questions concerning legal provisions and other soft-law proposals that stipulate that a company may be taken to court if it has not carried out "reasonable" human rights due diligence and/or that a company should have "effective" human rights due diligence processes. For example:

- Is a court or judge able to properly determine what constitutes "reasonable" or "effective" due diligence measures, especially when taking proper consideration of factors such as:
  - The company's size, sector, operational context, ownership and structure and the relationship between these variables and actual human rights outcomes?
  - The complex and constantly changing nature of global supply chains?
  - The three different ways in which a company can be involved in a harm?<sup>21</sup>
  - Systemic human rights issues that may not be unique to one company?
  - Situations where States are not meeting their international obligations to protect against human rights and implement core labour standards?

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<sup>20</sup> 2017 draft "[elements](#)" for a legally-binding instrument on TNCs and OBEs.

<sup>21</sup> For example, under the UNGPs a company may: (1) "Cause" negative human rights impacts; (2) "Contribute" to adverse impacts; or (3) a companies' operations, products or services may be linked to negative impacts by a business relationship.



- Would due diligence laws include safe harbour provisions or would they be outcome based? Is there not a danger that laws would encourage plausible deniability rather than genuine human rights due diligence that seeks to improve human rights situations over time?
- How can regulators, judges and law firms be properly educated on the concepts within standards such as the UNGPs to ensure that companies are not encouraged to follow the limited compliance or "do no harm" approach?
- How can conflicting laws governing business conduct (such as obligations of commercial confidentiality and human rights reporting requirements) be enforced without comprising their core elements, especially when expertise and tools to interpret and implement these laws may be lacking?
- How should laws be devised to avoid disproportionate sanctions and forum shopping with the possibility of contradictory outcomes / verdicts by courts on the same case?

A recent court decision in Canada demonstrates the limitation of creating liability for companies based on concepts of human right due diligence and/or duty of care<sup>22</sup>. In 2017 a judge in Ontario rejected a proposed class-action lawsuit against the retailer Loblaws and its parent company George Weston Ltd, which were accused of vicarious liability for the alleged negligence of their suppliers and sub-suppliers linked to the Rana Plaza garment factory in Bangladesh that collapsed in 2013. In dismissing the case, the judge said: "Loblaws' liability is based on it voluntarily assuming a duty of care by developing and promulgating ethical purchasing practices (CSR standards,) which one would like to think is a good thing. But from an exposure to liability perspective, Loblaws would have been far better off if it had not developed and promulgated its CSR standards. And in the future it and others would be far better off not doing business with Bangladesh rather than relying on CSR standards, which as demonstrated by the case at bar, do not insulate a business from liability but rather attract claims, including allegations that the duty of care was breached because the CSR standards were inadequate to protect a supplier's or sub-supplier's employees."<sup>23</sup>

This verdict highlights the legal and reputational risks facing companies in relation to third parties such as business partners, suppliers and retailers, and other non-state or state entities directly linked to its business operations, products and services. Even where no direct contractual relationship exists between the company and other entities in the value chain, this does not prevent potential liability. Information on third parties' or country-specific human rights risks may not be readily available and business partners further down the chain may withhold or provide false information, which an audit and other methods may not

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<sup>22</sup> Ibid. Para 536 of the Court's decision noted the problem of the plaintiff's claim that the company has a duty of care. "First, there is the prospect of indeterminate liability because there is no principled way to draw a line between those to whom the duty is owed and those to whom it is not. Apart from the Plaintiffs capping their liability by making a claim for around \$2 billion, the amount of the liability is indeterminate, the temporal exposure to liability is indeterminate, and the range of claimants is indeterminate extending beyond those who were on New Wave's payroll. Second, there is the prospect of a massive extension of liability imposed on purchasers who would become responsible for the safety of their supplier's employees in foreign lands. Third, imposing a duty of care would encourage undesirable defensive tactics that would, from a behaviour modification and a social utility perspective, make the situation of the Plaintiffs worse not better."

<sup>23</sup> Das v. George Weston Limited, 2017 ONSC 4129 (Para 456) - <http://www.csrandthelaw.com/wp-content/uploads/sites/2/2017/07/Das-v-George-Weston.compressed-1.pdf>

catch. In some cases, human rights issues are so multi-faceted and complex that a single company cannot provide a solution through the due diligence process, even though the responsibility to respect human rights always applies.

## **vii. Laws unfairly target a select number of companies and misunderstand the nature of global business**

Seventh, many activists and campaigners appear motivated by supply-chain due diligence regimes, especially when imposed by Western States, in part because it would allow them to try and pin liability on:

- a. Parent companies of major corporations for wrongs caused by their subsidiaries in situations where it is not possible to pierce the so-called corporate veil; and on
- b. Buyers and retailers that, in reality, operate in complex, diverse and fragmented global supply chains which constantly change in response to economic factors and market conditions.

This is particularly problematic because it concentrates the responsibility to respect solely on parent companies, buyers and exporters when, in fact, the UNGPs state that *all* business enterprises have a responsibility to respect human rights, "both transnational and others, regardless of their size, sector, location, ownership and structure." It also misunderstands the nature and legal structure of business relationships. For example, a parent company and its subsidiaries are often defined as distinct legal entities, in which the parent company is generally not liable for harms committed by a subsidiary<sup>24</sup>, and each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Similarly, buyers do not control their supply chains and their ability to influence the business conduct of suppliers largely depends on their market position, which varies enormously. Not only do SMEs often have little leverage over their suppliers, but large TNCs may also find themselves similarly constrained when they source only a small amount of the supplier's production, or when the supplier has a monopoly. As is the case with some intermediaries, the supplier may be a much bigger company than the TNC. Furthermore, it is often impossible and impractical - legally, economically and logistically - for companies to control all suppliers and subcontractors, both for SMEs and larger enterprises that have over 100,000 tier-one suppliers and millions of second and third tier suppliers.

Companies cannot and should not be held responsible for the impacts of entities over which they have a business relationship and may have some leverage because this would include cases in which they neither cause, nor contribute to the harm. The commentary to UNGP 22 clarifies that "where adverse impacts have occurred that a business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation." The UNGPs do not intend to shift the responsibility from an entity causing the adverse impact to the enterprise with which it has a business relationship. Equally, if the scope of due diligence is defined solely by control and causation this could imply that companies do not need to consider either the impacts

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<sup>24</sup> This is even the case where the parent company is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as its mere agent.

of suppliers, which they do not legally control, or the situations where their own actions do not directly cause harm but indirectly contribute to abuse.<sup>25</sup>

It is important to note that there are limits to a company's use of leverage over a third party and its engagement in collective action in preventing, mitigating and responding to wrongdoing down the chain, especially for SMEs which often have no market power whatsoever. The extent of leverage a company has over another entity in different tiers of its supply chain varies according to each context and can be severely limited by practical, financial and legal constraints. Companies can have contractual clauses and code of conducts to oblige suppliers to act responsibly and require their suppliers follow suit, and they can undertake audits of suppliers and selected sub-suppliers, as well as other steps to strengthen the relationship to prevent and mitigate harms. However, it is extremely challenging for companies to get beyond the first or second tier, especially when they have tens of thousands of suppliers/subcontractors, limited resources and a weak market position to influence a change of behaviour in those that deliver its products or services. Buyers also face a big challenge in asking suppliers of subcontractors to comply with their standards and in monitoring compliance. Furthermore, a company's leverage is not necessarily equal to the level of shareholding or amounts involved in the transactions between the parties and leverage may be hindered by legal obstacles such as the prohibition of unlawful interference in the management of a subsidiary. It also usually takes time and resources to engage in collective action, and often a compromised approach is required to achieve consensus which may not be a desirable course of action for all parties.

Policy makers need to take careful note of the legal and practical limitations on what level in the supply chain companies can plausibly reach through their due diligence efforts. Even the UNGPs recognise this when it says that "where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all."<sup>26</sup>

#### **viii. Concerns over how legal compliance measures will impact on different types of companies up and down the value chain, especially SMEs**

Eighth, mandatory human rights due diligence laws also raise challenges in terms of how the obligations are cascaded up and down the value chain. While most new laws appear to be aimed directly at publicly-listed companies of a certain size (often determined by its number of employees) and/or turnover, they usually relate to the company's value chain. The trickle-down effect of laws can help incentivize suppliers and partner companies to demonstrate to their buyers that they managing risks. However, there is a risk that the laws may encourage companies that fall directly under their scope to pass on this responsibility to their business partners when they themselves may not have embedded a deep culture of respect for human rights. For example, there are anecdotal reports of situations where franchisee companies relay their responsibility to respect onto the parent company, such as when they share the same logo. Equally, reports suggest that buyers are cascading their due diligence responsibilities and liabilities down the chain. This adds additional administrative burdens and unjustified costs on those companies, especially when they

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<sup>25</sup> John Ruggie (2008): <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-companion-report-15-May-2008.pdf>

<sup>26</sup> Commentary to UNGP 14.

have contracts with multiple buyers that each impose their own (often similar) terms and conditions and reporting rules.

In particular, policy makers need to give more attention to the perspective of SMEs because they form the backbone of national economies and cover many tiers of the supply chains of large companies.<sup>27</sup> SMEs face distinct challenges in meeting their due diligence responsibilities, not least because of their resource constraints. The UNGPs acknowledge that the means through which a company meets its responsibility to respect human rights "will be proportional to, among other factors, its size," adding that SMEs "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."<sup>28</sup> To date, most awareness-raising and capacity-building efforts have focused on the world's largest companies, with SMEs often an afterthought in policy-setting discussions and implementation initiatives on responsible business conduct.

#### **ix. Laws on specific human rights topics pre-judge company due diligence efforts**

Ninth, some States are choosing to develop due diligence laws on specific human rights topics that may reflect their historical priorities and commitments, the effective lobbying of certain campaign groups and the perceived urgency of addressing that issue. However, the risk of issue-based due diligence laws - such as the UK Modern Slavery Act and the potential Dutch child labour law - is that they force companies to focus on those legally-defined issues at the expense going through the important work of addressing *their* own salient human rights issues. This is likely for companies that have limited capacity and resources.

The UNGPs allow for companies to prioritize certain human rights over others provided that priority is given to those risks that are most severe or irremediable.<sup>29</sup> However, the development of rights-specific laws risk incentivising a limited response (compliance) to a pre-determined human rights issue (such as modern slavery) without encouraging companies to engage in a meaningful due diligence process to identify and respond to those human rights risks that involve their actual business.

#### **x. A spaghetti soup of laws creates confusion and potential misalignment of standards and approaches**

Tenth, there is a genuine risk of a "spaghetti soup" of laws and some NAPs being created that are not harmonized or fully consistent with standards such as the UNGPs; that are incoherent with other regulations and principles concerning different areas of corporate activity; and that unfairly target a select number of bigger companies (possibly the same in some jurisdictions) that are already demonstrating respect for human rights, which leaves

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<sup>27</sup> SMEs account for about 90% of all businesses (according to the International Finance Corporation) and contribute up to 45% of total employment (according to the World Bank):

<https://www.globalreporting.org/resourcelibrary/Small%20Business%20Big%20Impact%20Booklet%20Online.pdf>

<sup>28</sup> Commentary to UNGP 14.

<sup>29</sup> UNGP 24

others to continue their operations without facing such obligations and scrutiny. This will do nothing to level the so-called "playing field."

It is often argued that companies want predictability and that they may prefer clearer regulation over uncertainty and inconsistency.<sup>30</sup> However, in reality we are witnessing the creation of different regulations and guidance - national, regional and possibly international - that: (a) reflect different legal systems and political, economic and social conditions; that (b) often cover different human rights topics; that (c) target different companies without sufficiently recognising existing business practice; and that (d) address different parts of the human rights due diligence process.

The development of a hodgepodge of laws without adequate equivalency between them threatens the clarity brought by the UNGPs on the differing roles of States to protect human rights and companies to respect them. It is likely to result in incoherent and divergent reporting and due diligence requirements in terms of scope, content and enforcement. It also creates skewed incentives for business by increasing the costs and burdens of due diligence and reporting on a select number that are, by and large, already demonstrating a genuine commitment to respect human rights. For example, in addition to carrying out expensive social risk/impact assessments, consulting with internal and external stakeholders etc., laws on formal reporting require companies to pay for external assurance providers to verify those disclosures. The laws are, therefore, onerous on a small number of companies and do not incentivize smaller competitors to act responsibly. Furthermore, there is a danger that some laws will be viewed as "model" legislation when they do not fully reflect the principles of agreed-standards such as the UNGPs.

On top of this, new human rights laws can also contradict other laws, principles and incentives governing corporate conduct. For example, reporting obligations may come into conflict with anti-competition practices, data protection laws and other customs, in which partial reporting by companies can be justified by the need to keep certain, sensitive commercial information confidential. For example, in August 2015 the USA Court of Appeals for the District of Columbia decided that the labelling requirement under section 1502 of the Dodd Frank Act was considered "compelled speech", which was in violation of the First Amendment of the US Constitution.<sup>31</sup> In addition, the due diligence process may not be feasible at certain times, such as when contractual relationships pose barriers for tracking clients' actions. Furthermore, there is a risk of a potential misalignment of incentives when considering human rights requirements alongside other existing corporate regulation such as on tax allowances and treatment, investment and trade, corporate purpose, directors' duties and financial reporting.

## **xi. Laws often ignore the role of States as an economic actor in their own right**

Eleventh, States are not just regulators, but economic actors as well. The UNGPs clarify that States are expected to ensure protection of and respect human rights in their role as economic actors. This part of their duty to protect human rights – the "State-business nexus" – covers policy areas such as the management of State-owned enterprises (SOEs). Governments stand accused of hypocrisy if they impose due diligence-related laws upon

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<sup>30</sup> Commentary to UNGP 3 itself says that "States should not assume that businesses invariably prefer, or benefit from, State inaction."

<sup>31</sup> Adam S. Chilton and Galit Sarfaty (2016), "[The Limitations of Supply Chain Disclosure Regimes](#)"

certain private business and ignore the human rights impacts of companies that they own, control and provide financial support to.

The UNGPs themselves suggest that States should "require" companies that are owned or controlled by them to undertake human rights due diligence. The public sector can learn much from the private sector on how to carry out human rights due diligence in these instances.

## **xii. No evidence that laws have any impact on a critical stakeholder group: end consumers / high-street shoppers**

Twelfth and finally, there is little evidence to suggest that existing laws, especially supply chain disclosure regimes, impact on a critical stakeholder group that are needed to help drive responsible business conduct – the end consumer/shopper. A 2016 study on consumer-oriented disclosure laws<sup>32</sup> concluded that they are while customers may care about human rights, supply chain disclosures do not help them make more informed decisions about their purchases. The study concluded that the supply chain disclosure regimes "are frequently unsuccessful" and that "these problems are likely to be exacerbated in the human rights context" due to the fact that:

- Disclosures are unlikely to be read and understood generally;
- Reports do not provide information on actual products characteristics, but production processes;
- Disclosure regimes operate under the assumption that due diligence efforts are reliable indicators of human rights outcomes whereas the information they provide is difficult to interpret because they are instead weak proxies for the probability of human rights abuses; and
- The risks associated with supply chains vary dramatically across industries and because of factors such as the company's size, industry, the country in which it operates, the number of tiers of suppliers in its supply chain, and the total number of suppliers. This greatly complicates efforts to understand and compare disclosure and consumers are typically unaware of the multiple variables that impact a company's risk profile.

**Therefore**, while human rights due diligence provides an important framework for a company to understand and respond to its human rights risks, seeking to legislate on this process is neither a straight-forward proposition nor the panacea that some suggest. In fact, legalising the human rights due diligence process poses many risks and challenges.

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<sup>32</sup> Adam Chilton and Galit Sarfaty (2016), "[The Limitations of Supply Chain Disclosure Regimes](#)"



## 7. The importance of voluntary action and soft-law standards

So-called voluntary and soft-law standards concerning the human rights due diligence process continue to make an important contribution and have a very positive impact on respect for human rights, which should not be undermined.

While some campaigners deride the notion of "voluntarism" and soft-law, such action and standards do not mean a lack of commitment or action on the part of business. On the contrary, the efforts by companies to continuously improve their efforts to identify and respond to human rights risks - including through impact assessments, stakeholder engagement, use of leverage and disclosure - has become a core part of corporate activity.

Companies support the objectives of human rights risk management, meaningful stakeholder engagement and transparency and they accept the moral, legal and increasingly clear business case for taking these actions. They also do not want to conduct business, either directly or indirectly, with suppliers or business partners that may be causing or perpetuating human rights abuses. An incentive-based approach that recognises a company's responsibility alongside others, its relationship to a harm and its position within the supply chain allows for flexible, collaborative and creative solutions in a way that rigid requirements and coercive measures do not.

Business-driven actions, supported by voluntary guidelines and tools, are an effective way to ensure that human rights risks are integrated into core company activities. Under the current approach reflected by the UNGPs, efforts to embed respect for human rights are advancing and improving every year aided by collective experience and greater clarity on how to overcome specific challenges. This creative approach should not be undermined. Neither should the importance of business-driven responses that allow a company to link its efforts to respect human rights to the core business and thereby develop initiatives tailor-made to its specific situations. Doing so can lead to new business ideas and innovations that can advance positive outcomes for people at scale, which is a more effective way to ensure deeper and more widespread respect for human rights. Current company efforts should be better recognised, understood and promoted instead of tying commitments to laws that are rigid, prescriptive and have unintended consequences.

The assumption that there is a market and regulatory failure, which justifies mandating companies to carry out human rights due diligence is not supported by evidence. More and more companies are conducting human rights due diligence and openly communicating their efforts in this regard. Already in 2014, two independent surveys found great momentum behind the business responsibility to respect human rights. A survey of 853 senior corporate executives carried out by the Economist Intelligence Unit in November and December 2014<sup>33</sup> found that 83% of respondents agreed that human rights are a matter for business as well as governments. Similarly, 71% said that their company's responsibility to respect these rights goes beyond simple obedience to local laws, which reflects the UNGPs and its emphasis on undertaking human rights due diligence.

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<sup>33</sup> Click [here](#) to read the report by the Economist Intelligence Unit

Similarly, a December 2014 assessment of company action to implement the UNGPs by the Business and Human Rights Resource Center<sup>34</sup> found that since the endorsement of the UNGPs in 2011, "the most common actions cited by companies are development of human rights policy (ie: 34 of the world's largest companies had a publicly-available policy statement on human rights), increased management capacity (in various forms) to handle human rights issues, and strengthened supply chain management. Some companies also cited human rights impact assessments and grievance mechanisms." The numbers have undoubtedly grown much higher since 2014 as awareness of the UNGPs and other instruments has spread.

Business organisations and industry associations, such as the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC), Business at the OECD (BIAC), which collectively represent millions of companies around the world, as well as voluntary initiatives such as the UN Global Compact, which has some 12,000 signatories in 160 countries, and others including the World Business Council for Sustainable Development (WBCSD), IPIECA, ICMM, Amfori and many national initiatives work actively with their company members to support them in their human rights due diligence efforts.

Furthermore, thousands of companies report against GRI G4 Sustainability Guidelines, the UN Global Compact's Communication on Progress and the UNGPs Reporting Framework<sup>35</sup>, the latter of which is a comprehensive guidance for companies to report on human rights issues in line with their responsibility to respect human rights.

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<sup>34</sup> Click [here](#) to read the BHRRC's key findings from its Action Platforms

<sup>35</sup> UNGPs Reporting Framework: <https://www.ungpreporting.org/about-us/support-and-users/#Companies>



## 8. Suggestions for future policy responses

As this paper demonstrates, it is misguided and short-sighted to assume that in order for States to meet their duty to protect against business-related human rights harms, they need to take a punitive approach and mandate companies to carry out human rights due diligence in part or in full. Instead, State policy efforts should prioritise other measures and activities that focuses on their respective duties and do not undermine the important progress made thus far. For example:

- States should implement their existing Treaty obligations and improve their governance structures and their judicial and non-judicial systems so that rights are protected and victims have access to effective remedy when harms do occur in their jurisdictions.
- Governments should focus on creating an enabling environment that: (a) ensures that *all* businesses respect human rights; and (b) allows them to contribute to sustainable development in the different jurisdictions in which they operate. State measures should carefully balance these twin goals of responsible business conduct whereby companies "do no harm" and they also "do good." Companies need to comply with all applicable national laws and respect human rights in an environment where they can help create formal jobs, generate broad-based wealth, deliver core services and products to market, and innovate and contribute to knowledge-based economies. A narrow punitive approach to State policy making that puts the onus on a select number of visible brands and retailers will not help to achieve both objectives.
- States should resist adding to the groaning international architecture whereby they create new international standards that risk re-defining and causing confusion on universally-accepted concepts, including on human rights due diligence (such as is the case with the IGWG draft "elements" paper). Instead States should focus on achieving policy coherence between existing international standards and their own national laws and policies (ie: focus efforts on specific national contexts). In addition, they should properly enforce national laws. The hive of activity at the international level, as well as the focus on extraterritoriality, is providing many States with a smokescreen to not address underlying challenges in their own national jurisdictions. It is also not helping to raise the tide for all boats or lead to widespread uptake of the UNGPs.
- State policy efforts should focus on those parts of the supply chain where the greatest risks and adverse impacts occur. Most of the world's attention, in terms of awareness-raising, regulations and advocacy, is focused on the policies and practices of the largest global brands and buyers especially those that are headquartered in the West, that operate across borders, that respond to enquiries and requests to engage; and that are sensitive to reputation risks. The bar is getting higher for those companies to respect human rights. Meanwhile, policy efforts are weak, if not non-existent, when it comes to focusing on those regions where the greatest risks and harms occur. The various policy and regulatory efforts taken largely by home States in Western countries will do little to address the fundamental challenges that exist in many host States such as weak governance, public institutions and rule of law; conflict; corruption; informality; and poor infrastructure. Yet it is in those regions that many human rights abuses occur.

- One topic that has received little attention in business and human rights policy discussions is informality. Informality is a major challenge and a systemic issue in many countries. States should focus more on supporting job creation in the formal sector and take concrete steps to address the informal economy. Increased regulation on business limits workers' entry into the formal economy because it harms the ability of companies to create formal employment and bring people out of informality. Governments should examine the underlying conditions that can make their economies more competitive and less bureaucratic for companies to allow them to focus on job creation, their operations and addressing their impacts on people. For example, States should take a more holistic approach by examining how interest rates, the tax code, and procedures to register and run a business affect business' ability to respect rights and do good. Also, skills development and capacity-building are essential for many country's development so they become knowledge-based economies.
- A 2014 survey of some 850 business executives by the Economist Intelligence Unit<sup>36</sup> reported some important concerns (not exhaustive):
  - 30% of respondents said that the biggest barriers facing their company in addressing human rights was a "lack of understanding about what our responsibilities are in the area of human rights;"
  - 25% of respondents cited a "lack of training and education for all company employees"; and
  - 22% referred to the "inconsistency between national law and international standards."

These findings reinforce important areas that States should focus their efforts on. For example, Governments should invest in strengthening their country's foundations to ensure widespread respect for human rights. This means redoubling their dissemination work of standards such as the UNGPs across government departments/agencies and among businesses, the investment community and civil society. Creating a culture of human rights protection and respect takes time but this effort cannot be ignored, especially in situations where different stakeholders are unaccustomed to engaging in group dialogue and where trust between them may be low. States also need to better support companies to act responsibly by providing guidance, training and capacity-building to help them understand and implement international standards such as the UNGPs. Training of staff inside companies (ie: to managerial staff to explain what human rights are and to translate human rights risks to their work) and to third parties that are part of the company's value chain is an ongoing challenge but a critical piece of work. Governments should focus on supporting these efforts and making it easier for business to operate on a level-playing field nationally where the same rules apply domestically to all companies, including proper enforcement of laws.

- States should better acknowledge businesses that act responsibly. It is important to remember that undertaking human rights due diligence takes time and the aim is for companies to improve their performance over time. Governments should explore ways to reward those companies the companies that demonstrate how they are effectively managing their risks. Innovative ideas may include exploring how companies that act responsibly can receive tax credits/relief or easier access to loans.

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<sup>36</sup> Click [here](#) to read the report by the Economist Intelligence Unit

- States should not exacerbate perceived distrust in business or undermine their positive contribution in providing jobs, driving economic growth to create development opportunities, and providing individuals and communities with necessary products and services. States, especially in multilateral policy-setting fora, are currently sending out a contradictory message to business. On the one hand, Governments, the UN and civil society organisations are encouraging business to play an active role in realising the SDGs largely through partnership, innovation and investment. On the other hand, different UN agencies are banning a legal sector (tobacco) from their initiatives; the UN is drawing up a "blacklist" of businesses operating in a complex geography (the Occupied Palestinian Territories) that risks naming/shaming companies that may have only limited involvement in those areas and leading to boycotts; and there are attempts to make MNEs legally liable for their entire global operations in a way that ignores the complex nature of supply chains, the responsibility of all companies to respect human rights and, crucially, the failure of many States to implement and enforce domestic laws. This contradictory message risks undermining progress to achieve widespread respect for human rights and ensure that business can make a positive contribution to the SDGs.
- There is an urgent need for in-depth research and data on the value of each step of the human rights due diligence process and the consequences of laws, such as their impact on company and State behaviour, as well as the impact on rights protection, respect and remediation. Reports suggest that laws do not achieve their intended goal, not least for victims of business-related harms (for example, the USA Dodd-Frank Act was found to have made conditions worse for communities in the DRC). There are also legitimate concerns that carrying out human rights due diligence creates substantial costs for companies without all steps, such as mandatory reporting, necessarily helping the company to meet its responsibility. More research is needed to move away from anecdotal observations and achieve fact-based analysis of the impact of due diligence and disclosure regimes, especially as case law and business practice develops.
- States should "lead by example" by ensuring they protect and respect human rights through their own activities as an economic actor. The UN Working Group on Business and Human Rights said in 2016 that "Governments seem to forget that they are economic actors in their own right." It would, therefore, be hypocritical for a Government to expect more of the private sector than of the companies that it owns or controls. Similarly, Governments should ensure that it causes no human rights harms in their own procurement practices.
- Given the big effort to ensure policy coherence on due diligence among the many international frameworks, standards and guidelines - such as the UNGPs, the OECD's MNE Guidelines and the ILO MNE Declaration - future action should preserve their principled and pragmatic nature and not single out one particular instrument, but allow companies to choose the one(s) most relevant to their circumstances. Linked to this, more should be done to clearly distinguish between instruments and tools that have been developed by public bodies versus those produced by private organisations, which do not have the same legitimacy as Government-backed tools and do not have the representative membership to address human rights issues in a way that balances different stakeholder interests.

## 9. Conclusion

No one disputes the importance of human rights due diligence. It is a fundamental process that provides a principled and practical blueprint for company action to respect human rights. However, it is not a silver bullet and we should not fall into the trap whereby it is assumed that progress rests on some States meeting their duty to protect human rights by requiring a select number of companies to carry out human rights due diligence process in part (through mandatory disclosure) or in full (by developing and publishing due diligence plans).

Instead, more rigorous discussion is needed on how States should support more companies to carry out the process and more thought and evidence is needed when constructing policy measures on what delivers the best outcome for rights-holders, companies and other relevant stakeholders, rather than what is necessarily expedient.

On the one hand, a number of States have so far taken practical steps apropos to the burgeoning understanding and application of the UNGPs to encourage and incentivise corporate human rights due diligence by raising awareness of standards like the UNGPs with their own national constituents and translating the expectations of businesses such as through NAPs. On the other hand, many other States have made far less effort to support awareness and uptake of instruments like the UNGPs or address systemic challenges and institutional weaknesses in their countries. For example, there are still too many regions where informality is rife, where conflict or poverty devastates communities, where there is an absence of government, and/or where weak judiciaries do not enforce national laws. These situations create the conditions for human rights abuses often disproportionately affecting women and vulnerable or marginalised groups such as ethnic and religious minorities, children, persons with disabilities and migrant workers and their families.


Companies operating in such situations, especially when they are part of complex value chains and do not herald from those regions, face legitimate challenges in meeting their responsibility to respect human rights. Carrying out human rights due diligence can help them to identify and respond to human rights risks. However, such human rights due diligence efforts are not the panacea and they cannot substitute for the role that Governments must play in addressing such fundamental challenges.

There is a real risk that State policy measures will follow the pattern of NGO campaigns and create greater responsibility or legal liability on certain companies based on factors such as their size, value, public profile or the location of their headquarters and not on the basis of their actual involvement in a harm (such as whether they cause or contribute to a harm) or taking into consideration underlying conditions such as the use of use third-party suppliers in countries plagued by weak governance.

The twelve concerns listed in this paper highlight the risks and unintended consequences of laws over voluntary, flexible and collaborative efforts. There is a risk that far from creating a global level-playing field, regulating the activities and extending supply chain liability of a relatively small number of companies will encourage a two-tiered system of action and compliance that does not help the majority of workers and communities.

# Annex

## Examples of legal developments and other policy measures that have regulatory effect:

 **France:** The corporate duty of vigilance law in relation to human rights, health and safety and the environment (2017):

- Under the law, parent companies are obliged to draw up and implement a “due diligence plan” to identify and prevent human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their sub-contractors and suppliers with whom they have an “established commercial relationship”. The plan must be publicly-available and updated annually.
- The plan must include: (a) a method for identifying, analysing, and prioritising different risk areas; (b) procedures for regularly evaluating subsidiaries, subcontractors, and suppliers; (c) actions to mitigate identified risks; (d) mechanisms for reporting and receiving alerts about abuses; and (e) methods for tracking the effectiveness of the measures taken under the plan. The Government may add to the required elements.
- The law applies to companies headquartered in France that at the end of two consecutive financial years employ: (a) at least 5,000 employees including in their French subsidiaries that are also headquartered in France; and (b) at least 10,000 employers within the company and its French and foreign-headquartered subsidiaries.



**UK:**

- Modern Slavery Act (2015): Section 54 of the Act (known as the Transparency in Supply Chains clause) requires commercial organisations that operate in the UK and have an annual turnover above £36m to produce an annual statement setting out the steps they are taking to address and prevent the risk of modern slavery in their operations and supply chains. The [Modern Slavery Registry](#) - operated by NGOs - tracks compliance with this law.
- Companies Act (2006): companies listed on the London Stock Exchange have to report on non-financial issues relevant to their business within annual reports.



**Denmark:** The 2008 amendment to the Danish Financial Statements Act obliged all large businesses to disclose CSR information in their annual reports. Businesses must report on three areas: i) CSR policies; ii) how these policies are translated into actions; and iii) what the business has achieved as a result of working with CSR, and any future expectations of the work.



### Sweden:

- State-owned companies, including Swedfund and the Swedish Export Credit Corporation (SEK), must seek to comply with guidelines such as the UNGPs and the OECD Guidelines, and must be transparent and report in accordance with GRI. State-owned companies must also identify CSR areas that are relevant to their business strategy and board of directors must set strategic sustainability targets.
- In 2017, the Swedish Minister for Trade commissioned the Swedish Agency for Public Management to do a baseline assessment on the UNGPs. The Agency released its report in March 2018 in which it recommends, among other things, that the government look into binding human rights due diligence requirements for Swedish companies, as well as address access to remedy obstacles faced by victims of corporate abuse.



### European Union:

- EU Non-Financial Reporting Directive (2014): From 2018 onwards, large public-interest companies with more than 500 employees are required to disclose information on the way they manage non-financial challenges, such as respect for human rights, environmental protection, anti-corruption and bribery, treatment of employees and diversity on boards.
- EU Conflict Minerals Regulation: From 1 January 2021, EU importers of tin, tantalum, tungsten and gold will have to carry out due diligence - using the OECD Guidelines as the basis - on their supply chain to ensure they are not funding armed conflict and that their trade of these minerals is not linked to human rights abuses.
- New EU public procurement rules (2014) stipulate that public authorities may take factors such as sustainable development into account when awarding a contract, as long as they are relevant to the subject matter of the procurement.
- **Proposal:** the European Commission is also examining corporate governance rules "to promote corporate governance that is more conducive to sustainable investments." By quarter two in 2019, the Commission will carry out analytical and consultative work with relevant stakeholders to assess: "(i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest."



## USA:

- The Dodd-Frank Wall Street Reform and Consumer Protection Act (2010): Under section 1502, publicly traded companies must determine whether the raw materials they use to make their products (tin, tungsten, tantalum and gold) have directly or indirectly financed or benefited armed groups in the Democratic Republic of Congo (DRC) and bordering countries, by carrying out due diligence on their mineral supply chain and reporting this to the Securities and Exchange Commission (SEC).
- US Federal Acquisition Regulations and the False Claims Act: following a 2015 revision, the Act was expanded beyond prohibiting activities relating to human trafficking and forced labour to require prime Government contractors to certify implementation of compliance plans to combat human trafficking, and to flow down these certification requirements to subcontractors if a subcontract outside the USA exceeds £500,000, before they may receive a Government contract award. Furthermore, contractors must complete compliance certification annually.
- The California Transparency and Supply Chains Act: Since 2012 retail sellers and manufacturers registered in California with an annual turnover of more than \$100m must disclose their efforts eradicate to slavery and human trafficking from their product supply chains. The law outlines five topics that companies must report on their websites regarding their supply chain due diligence: verification, audits, certification, internal accountability, and training. California represents the world's seventh largest economy and the US' largest consumer base. There has been a proposal for a similar law on the federal level.
- The Federal Acquisition Regulation (FAR): This outlines the procurement rules for US federal agencies. This long and complex regulation covers some human rights issues such as:
  - Prohibiting federal agencies and contractors from purchasing domestic sweatshop goods or discriminating on the basis of race, national origin, etc.
  - Prohibiting the use of forced child labour and reliance on human trafficking in relation to US federal contracts sourced abroad.
  - From 2016, US federal agencies are able to prevent firms from bidding on a contract if it has repeatedly violated certain domestic labour laws.



## Australia:

- The government hopes to introduce its own Modern Slavery Act - similar to the UK Act – in mid-2018 that could require companies with a revenue of around \$75m (approximately 3,000 companies) to prove they are not profiting or gaining a competitive advantage from slavery in their supply chains and file annual reports on modern slavery. Under the proposed law, the federal government would also be forced to publish an annual modern slavery statement in its procurement activities. The statements will be publicly-available on a government website. An earlier blueprint for the new law had suggested the inclusion of compensation for victims and the creation of an Anti-Slavery Commissioner.



- There is also the Illegal Logging Prohibition Act, which requires importers and processors of timber to have verification processes in place to ensure no illegal logging in their supply chains.



**The Netherlands:** the Dutch Parliament and Senate is developing a Child labour due diligence law that would require companies that are both registered in the Netherlands and selling products to Dutch consumers to identify whether child labour is present in their operations or supply chains and – if this is the case – to develop an action plan to combat and remedy the harm.



**Democratic Republic of Congo:** In 2012, the DRC passed a law requiring all mining and mineral trading companies operating in the country to undertake due diligence on all levels of their supply chain in line with the OECD Due Diligence Guidance for Responsible Supply Chains.



**Indonesia:** The government has introduced a legal certification mechanism in the fishing industry. Under the regulation, fishing companies must have in place a human rights policy, as well as mechanisms for human rights due diligence and remediation in order to be allowed to operate in Indonesian waters.



**China:** The China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (which operates under the Chinese Ministry of Commerce) is requiring its member companies to conduct risk-based supply chain due diligence in outbound mining investments to avoid funding or fuelling conflict.



**Canada:** In 2018 the Government established the office of ombudsperson with the authority to investigate alleged corporate harms involving Canadian companies operating abroad, compel witnesses and documentation, mediate disputes, and make recommendations to the Trade Minister for further action where warranted.



**Brazil:** In 2017, the Ministry of Labour published an updated version of a public register (a so-called "dirty list") of companies caught using forced or slaved labour. Under the previous list, firms on this list pay a series of fines and cannot obtain credit from the government or private banks. Companies on the "dirty list" have two years to clean up their supply chains before being given the opportunity to get off the list.

**Other governments** are considering laws on due diligence such as:



**Switzerland:** In late 2017, the Legal Affairs Committee of the Swiss Upper House took a first step towards the possible introduction of mandatory due diligence. Current proposals include requiring large companies and small- and medium-sized enterprises (SMEs) active in risk sectors to conduct human rights and environmental due diligence; the creation of sector-specific control and sanction



mechanisms; the possible introduction of civil liability of parent companies where a subsidiary causes death or serious bodily harm or violations could be included in existing corporate criminal liability regimes for economic crimes.



**Germany:** In its NAP (published in [2016](#)), the Government took a first step towards the possible introduction of mandatory human rights due diligence. Its NAP says: "At least 50% of German companies with more than 500 employees should put policies and processes in place to conduct human rights due diligence in their operations by 2020. If this target is not reached by then, the government will examine the introduction of mandatory due diligence."



**Italy:** In its NAP (also published in [2016](#)), the Government recommends to conduct a comprehensive review of the existing commercial and civil law to assess and evaluate legislative reform introducing provisions such as the 'duty of care' or due diligence for companies." In particular, it includes a proposal to "conduct a comprehensive study of the Law 231/2001 in order to evaluate potential extension of the scope and application of the administrative liability of legal entities."



#### **United Nations:**

- **Inter-Governmental Working Group (IGWG) on a proposed UN binding treaty:** A number of States at the UN are negotiating a legal-binding treaty on transnational corporations and other business enterprises which, in light of the draft [elements paper](#), looks likely to include a focus on human rights due diligence.<sup>37</sup>
- **OPT database:** The UN Human Rights Office (OHCHR) is preparing a new public database, to be updated annually, of business enterprises engaged in certain Israeli settlement activity in the occupied Palestinian territory.<sup>38</sup>

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<sup>37</sup> Click [here](#) to read the international business community's response to the IGWG's draft "elements" paper (October 2017). Click [here](#) to read the IOE's follow-up response to the "elements" (February 2018).

<sup>38</sup> OHCHR's [website](#) on a UN database of all business enterprises engaged in certain Israeli settlement activity in the occupied Palestinian territory