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To the Distinguished Members of the Working Group,

Submission to Working Group Consultations on Corporate Human Rights Due Diligence

We welcome the opportunity to provide a submission to the Working Group with respect to its consultations on corporate human rights due diligence. This brief submission is informed by our experience researching and teaching in the area of business and human rights.

This submission does not focus on whether human rights due diligence can be undertaken effectively or on what constitutes best practice, although these are important questions. Rather, this submission seeks to draw the Working Group's attention to the importance of ensuring that the concept of human rights due diligence is interpreted, operationalised, and regulated for in such a way as to lead to meaningful and positive improvement in business respect for human rights. As such, it responds to the invitation, as proffered in the Background Note, for submissions concerning the obstacles, challenges and pitfalls associated with the effective implementation of human rights due diligence.

In this brief submission, we make five points.

1. Human rights due diligence has the potential to make a significant and positive contribution to the protection and promotion of human rights in the global economy, but this contribution is by no means assured.

Human rights due diligence is a significant element of the *UN Guiding Principles on Business and Human Rights* (the *Guiding Principles*), and enjoys the authoritative weight that the UN Human Rights Council's endorsement of the Guiding Principles carries. It is also a concept that has enjoyed a remarkable ascension in global governance in recent years, and has been embraced and promoted by a wide range of actors, including intergovernmental organisations, business, States, and civil society. This is no doubt in part because it is an innovative concept that offers the international community a promising way forward in terms of conceptualising and operationalizing responsible business conduct. But, as an evolving transnational norm, it is also a concept that is the subject of considerable contestation between actors with respect to what it demands of business.

The relative novelty of the human rights due diligence concept, and its increasing institutionalisation in national and international regulatory frameworks, means that producing guidance to companies on what constitutes best practice is important. However, proving that human rights due diligence *can* be operationalised in a way that significantly reduces or eliminates a business' negative impacts on human rights should not be confused with proving that it generally *will* be. In this respect, we encourage the Working Group to consider not only what constitutes good practice with respect to human rights due diligence, but what does or should constitute minimum standards necessary to ensure that due diligence is undertaken in a way that is capable of effecting positive and meaningful change. We believe minimum standards, and a regulatory infrastructure capable of holding companies accountable with respect to their adherence to these standards, is an essential element of any effective and legitimate public human rights due diligence regulatory initiative. Such standards will most useful if they are industry or sector specific and thus concretely address industry-specific human rights challenges. Industry-specific minimum

standards may be set by the state, but they may also be usefully developed by way of multi-stakeholder initiatives (MSIs).

The development of minimum standards to define due diligence limits the ability of each company to selectively interpret and apply human rights standards. Any approach that is overly individualistic makes measuring and comparing the human rights performance of companies (even within the same industry sector) impossible. As a consequence, consumers or investors cannot reward or punish companies based on their human right performance against a commonly accepted standard, and it renders human rights irrelevant for consumers' purchasing and investors' investment decisions.

2. There are a number of features of human rights due diligence which render it susceptible to 'cosmetic' forms of compliance¹

The due diligence concept sets incentives for companies to potentially approach the implementation of their commitment to respect human rights merely through procedural measures. Companies may adopt policies and implement internal compliance structures that exhibit some or all of the formal elements of human rights due diligence with the purpose of conveying the appearance of taking action, while effecting little if any real and meaningful change in their activities. Without further constructive intervention by the State (and by MSIs that impose clear standards of accountability on participating companies), we believe, there is a strong prospect of human rights due diligence evolving into practices which resemble (if not reproduce) the types of superficial and/or selective corporate social responsibility practices which were the subject of considerable critique by the former Special Representative for Business and Human Rights, and which the concept of human rights due diligence was intended to redress.

The following features of human rights due diligence render it susceptible to cosmetic forms of compliance:

- **A high level of ambiguity.** It is well-established that the *Guiding Principles* articulate human rights due diligence at a high-level of abstraction. It employs ambiguous and imprecise language, and anticipates that human rights due diligence will be further elaborated upon through negotiated standard-setting processes at a more concrete level (e.g. on an industry basis).² Regulation and governance scholarship tells us that this scope for interpretation is not problematic so long as the standard is subject to subsequent clarification and there are regulatory processes or a regulatory architecture through which competing interpretations of the concept can be contested and ultimately resolved.³

To date, while there has been a proliferation of guidance and elaboration on what the concept requires, this interpretative material has overwhelmingly tended to replicate rather than resolve

¹ The term 'cosmetic compliance' is drawn from K. D. Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 *Washington University Law Quarterly* 487. Human rights due diligence and cosmetic compliance is elaborated upon in an unpublished paper by Ingrid Landau. This paper can be made available to the UN Working Group on request. In drawing attention to the risk of human rights due diligence being implemented cosmetically, the paper builds on observations made by J. Howe and C. Parker, 'Ruggie's Diplomatic Project and Its Missing Regulatory Architecture' in R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Koninklijke Brill, 2012) 278.

² The Guiding Principles use terms that are vague in the sense that they require evaluation: for example, it may be "unreasonably difficult" for enterprises with large numbers of entities in their value chains to conduct due diligence for adverse human rights impacts across them all and due diligence should "involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.". It also includes terms that lack specification as to the manner in which an action is to be performed: for example, human rights due diligence should be "ongoing"; businesses should "draw on internal and/or independent external human rights expertise" and businesses should, in order to account for how they address their human rights impacts, be prepared to "communicate this externally," with this communication capable of taking "a variety of forms."

³ Howe and Parker, above n 1.

ambiguities in the concept. This, in combination with the lack of any oversight mechanism, is very problematic as it leaves extensive scope for business to interpret the concept as it sees fit and for inconsistent interpretations and applications of the concept to thrive. As a 2015 survey of the Economist's Intelligence Unit has shown, while many corporate executives accept that business have human rights responsibilities, they remain unclear as to the scope of these obligations. The proliferation of guidance on human rights due diligence has not been sufficiently targeted or concise to clearly convey to companies as to what is demanded of them with respect to avoiding and managing adverse human rights impacts.⁴

- **A lack of transparency.** While the Guiding Principles recommend that businesses communicate how they go about addressing their human rights impacts, formal disclosure to the public is only 'expected' for business enterprises whose operations or operating contexts pose risks of severe human rights impacts.⁵ This lack of transparency makes it significantly more likely that businesses will engage in the process superficially. If the only incentive for adopting human rights due diligence is to look like one is doing something (that is, as 'a form of insurance against public opprobrium'),⁶ it would seem sufficient to design and adopt measures that indicate due diligence is being done, without any need to invest much money or effort in it. This approach may not only be tenable for reputation-conscious firms, but it may be for many others.
- **A focus on process, not outcome.** The process-based nature of human rights due diligence is one of its strengths. It helps ensure that the demands placed on business are both reasonable and feasible in the circumstances.⁷ Process-based regulation is also recognised as being particularly useful where there is a lack of commitment or capacity for compliance among large parts of the business community; and/or where regulators and regulated organisations have only limited understanding of what outcomes they are seeking or what a good self-regulatory system look like.⁸

But the process-oriented nature of the concept is also one of its weaknesses. Human rights due diligence seeks to integrate public policy goals into a firm's internal processes – processes that are inherently directed towards the firm's own objectives. These objectives are generally directed at the production of profit and market share, rather than public goals. The two may sometimes coincide but not always.⁹ Where there is considerable scope for managerial discretion and insufficient regulatory oversight, there is considerable danger that commercial objectives will prevail. By way of a simple example, in principle human rights due diligence requires the business to assess, prioritise and act on risks to rights-holders rather than to the business. In practice, however, the business' commercial objectives may be accorded equal if not greater weight in the prioritisation process. Risks that are easier or cheaper to manage, or that have the potential to inflict the most reputational damage, may be prioritised over those that are deemed the most severe. Here, increased transparency about the due diligence process may partly address this concern.

- **The subsequent proliferation of guidance.** As noted in the Background Note for these consultations, there is already an array of practical guidance available to companies on human

⁴ The Economist Intelligence Unit, *The Road from Principles to Practice: Today's Challenges for Business in Respecting Human Rights*, 2015. For further discussion of these findings, see <https://bhr.stern.nyu.edu/blogs/implementing-human-rights>.

⁵ Guiding Principle 21.

⁶ D. Vogel, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) 49 *Business & Society* 68, 81.

⁷ F. Haines, K. MacDonald and S. Balaton-Chrimes, 'Contextualizing the Business Responsibility to Respect: How Much is Lost in Translation?' in R. Mares (ed.) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Koninklijke Brill, 2012) 108, 114.

⁸ S. Gilad, 'It Runs in the Family: Meta-Regulation and Its Siblings' (2010) 4 *Regulation & Governance* 485, 504.

⁹ J. Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3 *Capital Markets Law Journal* 425, 444.

rights due diligence, produced by a variety of actors. Such guidance is an important means through which sufficient certainty may be provided to business as to what is expected of them. The OECD due diligence guidelines are a useful example of ‘big picture’ sector-specific guidance that can be provided to business. Guidance needs to be developed collaboratively and should focus on defining common standards that concretely define what is expected of companies that operate in the same industry setting.

However, such guidance risks hindering rather than helping compliance where it is produced in a multitude of settings and by a multitude of different actors. There is a real risk of inconsistency and ‘mixed messages,’ which may undermine the potential for guidance to clarify standards.¹⁰ It also leaves extensive scope for managerial discretion to ‘pick and choose’ which guidance to follow and at what point to depart from it. Some guidance also fails to fully understand the nature of challenges peculiar to specific sectors.

3. There is evidence to suggest that human rights due diligence is being operationalised by business in a way that significantly limits its capacity to effect positive change.

These risks are not just theoretical. There are a number of ways through which businesses are distancing themselves from an effective and robust form of human rights due diligence.¹¹ These include (but are not limited to):

- The positioning of the human rights due diligence process itself as the measure of responsible business conduct, rather than as a means through which companies may meet their overarching responsibility to respect human rights as articulated in the *Guiding Principles*.
- An over-emphasis on the act of prioritising risk and responses. The *Guiding Principles* recognise that prioritisation is legitimate at the stage of assessing risk (where companies should prioritise those areas for human rights due diligence where the risk of adverse human rights impacts is most significant, whether because of certain suppliers’ operating context, operations, products or services involved or other relevant considerations)¹² and ‘where necessary’ at the stage of mitigating and preventing actual and potential adverse impacts (where businesses should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable).¹³ However, business sees the prioritisation process as key to rendering the process manageable and affordable. Through an emphasis on prioritisation (without any time-bound sequencing of actions), some actors are significantly curtailing the nature of the obligation on the company to respect human rights by narrowing the scale and scope of human rights due diligence.
- The tendency for business actors implementing human rights due diligence (and advising on its implementation) to ‘slip’ at key points of decision-making in the human rights due diligence process from a focus on risks to rights-holders (as required under the *Guiding Principles*) to a focus on the business itself. For example, it is not unusual for businesses to supplement a ‘human rights’ risk assessment (focusing on the risk to rights-holders), with a ‘materiality assessment’ (focusing on the risks to the business) and then to draw on both to inform how decisions are prioritized.
- The outsourcing of discrete stages of human rights due diligence or indeed the entire process to intermediaries such as business advisory or (less commonly) law firms. While drawing on external expertise to undertake human rights due diligence is not of itself problematic and indeed is

¹⁰ J. Black, M. Hopper and C. Band, ‘Making a Success of Principles-Based Regulation’ (2007) 1 *Law and Financial Markets Review*, 91, 197.

¹¹ Here, we draw on doctoral research conducted by Ingrid Landau, which has involved 32 semi-structured interviews conducted between June 2016 and September 2017, in Paris, Geneva, New York and Washington. This interview data was supplemented by extensive analysis of documents provided by the interviewees, and publicly available material.

¹² Commentary to Guiding Principle 17.

¹³ Guiding Principle 24.

recommended in the Guiding Principles for certain stages of the process, over-reliance on the outsourcing of human rights due diligence can be. This is because it tends to exacerbate the slippage between primary and secondary risk (that is risk to rights-holders and risk to the company), and because it is leading to a managerialisation and professionalization of the practice of human rights due diligence in a way that extends rather than contracts the distance between the company and its stakeholders. Human rights due diligence should involve a variety of external stakeholders and include consultation with worker representatives.

4. If States are to take a leading role with respect to corporate human rights due diligence, this role must go beyond simply encouraging or mandating that companies undertake human rights due diligence. States should do more to regulate the quality of due diligence undertaken.

In light of the dynamics outlined above, it is not sufficient or desirable for States to offer simply even more guidance to companies on how to undertake human rights due diligence effectively. Nor is it sufficient for States to mandate that companies undertake human rights due diligence. If this is the case (as it is to date, including with respect to most relevant regulatory initiatives to date), we will only see more evidence of the dynamics above. We will no doubt see a rise in the incidence of companies purporting to engage in human rights due diligence (that is, in the *quantity* of human rights due diligence being undertaken). And some of these companies will be engaging in effective and robust human rights due diligence. But many will not. This point is particularly relevant in light of recent legislative efforts in France, the Netherlands and Switzerland that use due diligence as the central demand to regulate a corporation's human rights practice.

5. Measures can and should be taken by States to ensure that human rights due diligence is promoted and regulated in a way that minimises the risks of cosmetic forms of compliance.

There are many examples from different regulatory areas of States using the concept of 'due diligence' effectively: that is, in a way that encourages *and obliges* companies to take responsibility for certain negative impacts, whilst also being sensitive to the complexity and diversity of business operations in the modern economy. Drawing on these experiences, we recommend that any state-based human rights due diligence regulatory initiative, at a minimum:

- Ensure that human rights due diligence is directed towards, and evaluated against, a clear standard or outcome. Human rights due diligence is about setting a process, but it must be about a process that is going somewhere (that is, directed at substantive goals).¹⁴
- Include detailed disclosure requirements. Detailed reporting requirements helps ensure accountability and to provide information that allows stakeholders such as civil society, potential business partners, investors and the public to evaluate company performance and identify best practice.¹⁵ It also ensures those businesses that do disclose in some detail are not punished in the market-place for doing so. Detailed information is also necessary to help regulators evaluate whether self-regulation on an issue is working or if some other approach is required. These disclosure requirements must include *outcomes*, not just processes.¹⁶

¹⁴ Here, we are paraphrasing Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility'. In D. McBarnet, A. Voiculescu and T. Campbell (Eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), 207, p. 230.

¹⁵ Christine Parker, (2002). *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002, p. 279); David J. Doorey, 'Who Made That? Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation' (2005) 43 *Osgoode Hall Law Journal* 353.

¹⁶ Further evidence of the increasingly pre-occupation with process at the expense of outcomes is found in Australia's proposed modern slavery reporting requirements, which include requiring companies to report, among other things, on *how* they measure the effectiveness of their due diligence processes (rather than on the effectiveness of the measures).

- Provide rights to consultation and participation. At present, it is ultimately left to the discretion of the company undertaking human rights due diligence to decide how much consultation should take place, at what stages in the due diligence process, and whom should be consulted. There is a long line of regulatory scholarship on the importance of participatory rights for stakeholders to the effectiveness of self-regulation. Rights to consultation and participation are not only normatively justifiable, they also perform important instrumental functions. They act as important incentives for companies to make sure their systems are effective.
- Ensure there is some prospect of companies being held to account for their human rights due diligence process. Without any prospect of having their decisions reviewed and scrutinised by a regulatory body, there is little incentive for companies (particularly those that are not consumer-facing) to engage seriously in the process.

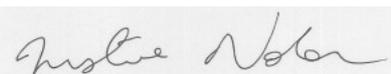
In conclusion, we encourage the Working Group to consider and engage further with States and other stakeholders with respect to how best to regulate not simply for human rights due diligence but to establish robust human rights due diligence standards, including on an industry-specific basis, that are capable of effecting real and positive change.

We hope these comments are useful, and we would welcome the opportunity to elaborate on anything in this submission if this would be of assistance.

Yours sincerely,



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