Introduction

Human rights due diligence is a key concept of the UN Guiding Principles on Business and Human Rights (UNGPs). Linking the three pillars articulated by the UNGPs, i.e. respect, protect and remedy, human rights due diligence concerns the responsibility and activities by which business enterprises should identify, prevent, mitigate and account for the harms they cause, contribute to, or to which they are linked. Human rights due diligence is at the core of setting up effective human rights systems and processes, and dealing with human rights impacts of business enterprises.

An international treaty on business and human rights could provide methods of establishing key activities by business enterprises that comprise human rights due diligence. It could also establish mechanisms to check compliance with these activities and to determine the consequences when human rights due diligence is not undertaken appropriately by business enterprises arise. This briefing paper describes the elements of human rights due diligence and suggests some of the processes and procedures that might be included in a treaty. Underlying these proposals is the concern about a lack of any clear definition of human rights due diligence in the Guiding Principles.

The Concept of Human Rights Due Diligence

The concept of human rights due diligence is defined by the UN as follows:

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.1

The use of the term “due diligence” in the Guiding Principles appears to be an integration of the international human rights legal obligation of due diligence in relation to the actions of non-state actors,2 and the general voluntary business practice of due diligence, such as in project finance and mergers and acquisitions.3 These are different concepts, as the former is a standard of conduct in acting to uphold human rights and the latter is a business risk process.

There is also a difference of responsibilities on business enterprises in relation to due diligence for

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their own actions, where they cause or contribute to adverse human rights impacts, and actions of third parties (such as on a supply chain), where they should prevent or mitigate adverse human rights impacts and not be complicit in third party abuses. This difference is important if there is to be a requirement in the treaty for parent companies to have due diligence responsibilities for their subsidiaries, as is suggested by the current French Bill on a duty of “vigilance” and some case law on the duty of care. It would also be relevant in terms of whether it is possible to transfer responsibilities along a value chain, such as through a contractual provision, or if there is a duty of due diligence that remains at all times with a business enterprise. The terminology of a “business enterprise” used in the Guiding Principles hints at the idea that each corporate entity is not seen in isolation, even if the parts of it are incorporated in different states.

Possible Treaty Provisions related to the Concept of Human Rights Due Diligence

In the treaty it could be stated that all human rights due diligence should be conducted according to, at minimum, the international standards of the Guiding Principles. However, options for treaty provisions in this area that link to its concept would include a provision that a corporation retains responsibility for human rights due diligence action at all times, including for its subsidiaries and other parts of a business enterprise. It could also include requirements of due diligence to be included in all business contracts, including along its value chain, as well as active monitoring remaining a responsibility of the contracting party. For the purposes of a treaty, the concept of human rights due diligence might be left open to interpretation through case law and legislation.

There could also be acknowledgement by states in the treaty that a home state of a corporation retains some international legal responsibility for the corporation’s actions across all its business enterprise, no matter where part of that enterprise is incorporated. One means of doing this could be linked to requirements on a home state of international cooperation and capacity building in the host state.

Elements of Human Rights Due Diligence

Guiding Principle 17 sets out the elements of human rights due diligence:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Human rights due diligence:
(a) 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;
(b) 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;
(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.

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4 GP 13.
Thus human rights due diligence has four elements: identify; prevent; mitigate; and account. These elements are clarified in Guiding Principle 17 to have the following components:

- A human rights impact assessment which assesses actual and potential human rights impacts;
- Integrating this assessment into its business and acting upon the findings;
- Monitoring and tracking responses;
- Communicating how impacts are addressed; and
- As an ongoing activity.

Guiding Principle 17 also continues the distinction between human rights due diligence for adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, and human rights due diligence for adverse human rights impacts of third parties. It acknowledges that human rights due diligence 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. The latter issues would seem to require some external body to conduct the human rights impact assessment, as then appropriate comparator examples can be judged, and salient human rights of each operation are considered.

The assessment of actual and potential human rights impacts is usually through periodic human rights impact assessments. This would generally cover all matters “on the ground” for an operation, and include identification of human rights risks to all stakeholders. In order for it to be integrated into the business enterprise, there would be both human rights policies (not just corporate social responsibility policies) and board level agreement, as well as inclusion in all contracts and processes. Guiding Principle 17 makes clear that this alone is not sufficient, as there must be action on the findings of the human rights impact assessment, and monitoring and tracking of the consequences with response to affected stakeholders. This probably requires a business enterprise to embed a human rights strategy within its operations at all levels, and provide training and capacity building for its employees and its contractors (including governments where relevant), as well as communication with all other stakeholders (with consultation a key element), on human rights impacts. This links to reporting requirements.

Effective means of monitoring and reporting are needed to ensure that there is on-going human rights due diligence. Indeed,

because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

This approach is similar to a State’s human rights due diligence as human rights are not a one-off protection.

Human rights due diligence requirements are increasingly finding their way into legislation. Examples include the US Dodd-Frank Act, the US Department of State’s reporting requirements

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7 Commentary to GP 18.
for US firms in Burma, and the EU Directive on the disclosure of non-financial information by certain large companies.

Possible Treaty Provisions related to the Elements of Human Rights Due Diligence

The treaty can set out clear obligations on the state to put in place legislation or other regulation to require business enterprises to identify, prevent, mitigate and account for adverse human rights impacts. It can do this by requiring all business enterprises to undertake a human rights impact assessment at key stages, such as for new or changed activities/operations and changed circumstances, and on an annual basis at least. This would normally include providing evidence of integration, tracking and monitoring, and transparent communication as to how human rights impacts are addressed. It is also important that there is a requirement of free and informed consultation with stakeholders, especially local communities, which is undertaken appropriately, and that the human rights impact assessment and the other elements of human rights due diligence have external supervision. There would need to be a legal consequence where there is failure to comply with all these requirements.

Defences in regard to Human Rights Due Diligence

There is some discussion as to whether a business enterprise can rely on undertaking a human rights due diligence as a defence to a claim regarding it abusing human rights. In some states, proving due diligence affords a defence against liability, provides for a reduction in sentence or provides for a defence where the business enterprise can prove that it had ‘adequate procedures’ in place to prevent an impact.

However, the Special Representative on Human Rights and Business seemed to indicate that he did not support the use of human rights due diligence action as a defence, as least where it concerned a human rights impact by the business enterprise itself. Yet, as seen above, there is a difference in responsibilities on a business enterprise as between the actions of the business enterprise itself where they cause or contribute to adverse human rights impacts, and actions of third parties, where the business enterprise should prevent or mitigate adverse human rights impacts. Thus the best approach may be to allow the defence of having conducting human rights due diligence to be available only where the adverse human rights impact is caused by a third party. So if the business enterprise has conducted human rights due diligence appropriately and there is an unforeseen

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11 See for example section 90 (1) of the UK Financial Services and Markets Act 2000, and section 11(b)(3)(A) of the US Securities Act 1933.
13 UK Bribery Act 2010, Section 7(1). The UK Ministry of Justice has listed due diligence as such an ‘adequate procedure’.
14 Ruggie Report 2010, UN Doc.A/HRC/14/27, para 86: ‘[I] would not support proposals that conducting human rights due diligence, by itself, should automatically and fully absolve a company from Alien Tort Statute or similar liability’.
15 GP 13.
human rights impact by a third party, the business enterprise could be considered to have done all they could to prevent it. This would also be relevant for claims of complicity against a business enterprise.

**Possible Treaty Provisions related to a Defence using Human Rights Due Diligence**

The treaty might include a provision that allowed a business enterprise that had conducted appropriate human rights due diligence to rely on it as a defence to a claim, though only where a third party has caused adverse human rights impacts. The burden of proof would remain on the business enterprise to show that their human rights due diligence complied with Guiding Principle 17.

**Questions for Civil Society**

1. Should a treaty try and define human rights due diligence precisely or should it focus on the elements of what needs to be done by a business enterprise to comply with due diligence?
2. Should the parent company, even if it is in another state, have particular due diligence requirements for its subsidiary based in your own state?
3. What human rights due diligence obligations should pass by contract along a value/supply chain? What should not be passed? What type of monitoring should occur by the original contracting party?
4. Should the home state of the business enterprise have legal obligations about its activities in another state or should the host state have all powers and obligations in relation to these activities?
5. What aspects of a human rights impact assessment are most important to you? Who should conduct it? How would you like to be involved in the assessment?
6. What are the most effective monitoring and reporting mechanisms for you?
7. What is the best method of consultation?
8. What should be the legal consequence of a failure to conduct human rights due diligence?
9. How might a treaty support capacity building of both the host state and local business enterprises in regard to human rights due diligence?
10. Would you want business enterprises to be able to have a defence to a claim if they have conducted appropriate human rights due diligence?
11. Which of these issues seem most important? Should we prioritize the list?
12. Do you have additional suggestions?