

HUMAN RIGHTS DUE DILIGENCE AS A TOOL TO PREVENT BUSINESS HUMAN RIGHTS ABUSES - A CRITICAL ANALYSIS

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ABSTRACT

Human rights due diligence is considered to be an essential component of international, regional, and national discussions about corporate accountability for human rights violations. It is a process in which corporations evaluate existing and potential human rights impacts, integrate and act on the results, track responses, and explain how those impacts are addressed. However, due to lack of research in this area to evaluate how effective human rights due diligence is and whether its purpose of preventing corporate activities that harm human rights has been realized in state and business practices. The components of human rights due diligence are outlined in the United Nations Guiding Principles on Business and Human Rights. The UNGPs, provides for primary parameters for examining corporate accountability for human rights violations on a worldwide scale, and place a strong emphasis on due diligence. Recognizing the distinctive features of human rights due diligence is critical to the effective identification and management of human rights impacts associated with a business's operations, supply chains, or value chains. Despite the fact that there has been a lot published on human rights due diligence, many businesses are still unsure of what is necessary. Further guidance is needed to help businesses grasp the scope, meaning, and consequences of the Guiding Principles' human rights due diligence. This paper will look at prevention from the perspective of the business and human rights regulatory framework. This will be accomplished by defining important HRDD terms. The aim of

the paper is to clarify what the UNGPs say about due diligence while stressing on the critical elements that businesses should be aware of.

Keywords: Human rights due diligence, business, United Nations Guiding Principle, accountability, implementation.

1. Introduction

The United Nations Human Rights Council¹ accepted the United Nations Guiding Principles (UNGPs) in its resolution 17/4 on 16 June 2011.² They define States' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; the role of businesses in complying with all applicable laws and respecting human rights; and the need for matching of the rights and obligations with appropriate and effective remedies when they are violated. The United Nations Human Rights Council unanimously endorsed the Guiding Principles on Corporate and Human Rights in 2011, marking a turning point in efforts to address the negative effects of globalization and business activities in all sectors on people. For the first time, the roles and responsibilities of the businesses and government to prevent and mitigate such effects with the help of a globally recognized and authoritative framework. The Guiding Principles state that all businesses have an independent obligation to protect human rights and that in order to do so, they must do human rights due diligence to detect, prevent, mitigate, and account for human rights consequences. Companies are required by the UN Guiding Principles for Business and Human Rights (UNGPs) to prevent and respond to any negative operational consequences on human rights. These concepts have recently been converted into legislation requiring businesses to implement due diligence methods to identify, prevent, and remedy human rights abuses.³

Over the last decade, human rights due diligence have emerged as a critical mechanism for addressing business-related human rights violations, but its effectiveness in preventing such violations remains debatable. In the rapidly evolving field of business and human rights, the concept of prevention is critical, and it refers to preventing the activities of businesses all over the world from causing, contributing to, or being linked to negative human rights impacts.

¹ OHCHR, <https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx> (last visited Feb. 7, 2022).

² UNDOCS, <https://undocs.org/en/A/HRC/RES/17/4> (last visited Feb. 7, 2022).

³ United Nations Human Rights, *Guiding principles on business and human rights*, ohchr (Feb. 12, 2022, 11:12 AM).

Business-related human rights violations can take many forms, and significant attention is frequently focused on global supply chains, where low-cost and fast production are often prioritized over basic labor rights. However, no industry is immune, and businesses can be directly or indirectly involved in human rights violations, both intentionally and unintentionally. In this context, applicable international standards require both states and businesses to implement effective methods for preventing actual and potential adverse human rights impacts, as well as providing effective remedies to those harmed.

However, no industry is immune, and businesses can be directly or indirectly involved in human rights violations, both intentionally and unintentionally. In this context, applicable international standards require both states and businesses to implement effective methods for preventing actual and potential adverse human rights impacts, as well as providing effective remedies to those harmed.

These standards establish that states have an international legal obligation to protect human rights in this regard, while businesses have a responsibility to do so. If there is no regulatory requirement, the business's responsibility to respect human rights is regarded as a socially-expected responsibility, and it remains largely voluntary. The 'UNGPs' is an important international document on business and human rights, and it incorporates HRDD into its framework. Although it is not legally binding, it is regarded as the authoritative global standard on business and human rights and has influenced other international standards as well as national courts.⁴

The first Guiding Principle outlines a state's international legal obligations in relation to business activities: Responsibility to protect against human rights violations committed by third parties, including commercial enterprises, within their territory and jurisdiction is imposed on the states. This necessitates effective policies, legislation, regulations, and adjudication to prevent, investigate, punish, and redress such abuse.⁵

No matter their size, sector, location, ownership, or structure, all businesses have a corporate responsibility to respect human rights. Numerous legislative developments relating to business

⁴ UNGP Reporting Framework, <https://www.ungpreporting.org/resources/the-ungps/> (last visited Feb. 13, 2022).

⁵ NAPs on Business and Human Rights, <https://globalnaps.org/ungp/guiding-principle-1/> (last visited Feb. 11, 2022).

and human rights have occurred in recent years; most recently, the German and Norwegian parliaments adopted a new law on corporate due diligence in supply chains in 2021.⁶

HUMAN RIGHTS DUE DILIGENCE AND ITS IMPACT ON BUSINESS HUMAN RIGHTS

'Since the endorsement of the Human Rights Council the Guiding Principles in 2011, corporate human rights due diligence has become the standard of anticipated action,' -Working Group on Business and Human Rights at the United Nations⁷

Businesses are operating in an environment that is becoming increasingly complex. Human rights are a relatively new aspect of corporate due diligence, necessitating new policies and practices in operations and supply chains. The UNGPs and new legislation on modern slavery and human rights reporting are driving this trend.

Human rights due diligence refer to the steps taken by a business to identify and address actual and potential human rights risks affecting workers in its operations, supply chains, and third-party services. The majority of due diligence systems in use today focus on identifying and comprehending risks but not on taking action or preventing them.

Human rights due diligence (HRDD) was crafted in the UNGPs as a mechanism for corporations to avoid adverse human rights impacts and reduce and, when appropriate, rectify these consequences. This strategy aimed to ensure that corporations acted so that their operations did not have adverse human rights consequences for rights holders as a result of their due diligence. HRDD is defined as "a comprehensive, proactive endeavor to discover human rights hazards, actual and potential, over the whole life cycle of a project or commercial activity, to avoid and manage those risks," according to John Ruggie,⁸ a key drafter of the UNGPs. The OECD's Guidelines for Multinational Enterprises 2011,⁹ and the International Finance Corporation's

⁶WBCSD, <https://humanrights.wbcsd.org/project/key-developments-in-mandatory-human-rights-due-diligence-and-supply-chain-law-considerations-for-employers/> (last visited Feb. 11, 2022).

⁷ Business and human rights resource centre <https://www.business-humanrights.org/en/big-issues/un-working-group/> (last visited Feb. 11, 2022).

⁸ IHRB, <https://www.ihrb.org/about/patron/john-ruggie>, (last visited Feb. 11, 2022).

⁹ OECD, <https://www.oecd.org/corporate/mne/48004323.pdf> (last visited Feb. 11, 2022).

Performance Standards 2012,¹⁰ , were a few of the international documents that have adopted HRDD since the UNGPs (as well as most of the other core elements of the UNGPs). In this field, these are the most important international standards.

John Ruggie argues that due diligence in human rights can be a 'game-changer' for businesses. It can potentially transform a company's relationship with human rights from one centered on external actors' naming and shaming companies for failing to respect human rights to one centered on companies' knowing and demonstrating' their human rights performance. This 'knowing and showing' approach may have several potential benefits.¹¹ As a result, businesses may develop a stronger sense of ownership over their human rights performance as they consider human rights issues during policy development and reflection on current practice, rather than engaging with human rights exclusively when confronted with external pressure. Human rights due diligence may also positively affect overall corporate culture by facilitating the mainstreaming of human rights into corporate thinking and decision-making. It can potentially change managerial attitudes so that managers begin to incorporate human rights considerations into their decision-making processes regularly. HRDD may also result in developing policies that protect the human rights of all groups and individuals potentially impacted by a company's activities, rather than just those with the financial resources to challenge and litigate. Thus, HRDD can have a significant impact on corporate human rights performance.¹²

As Ruggie put it, 'to fulfill the Corporate responsibility to respect human rights, due diligence is required. This concept outlines the steps that a business must take to become aware of, prevent, and address adverse human rights consequences. Five of the 31 Guiding Principles are labeled 'Human Rights Due Diligence,' emphasizing the concept's centrality in Ruggie's scheme. Two additional Guiding Principles 4 and 15, as well as the Commentary to several additional Guiding Principles, make reference to due diligence.

The Guiding Principles are best understood as the imposition of distinct responsibilities for a business enterprise's own adverse human rights impacts and those caused by third parties with

¹⁰IFC, https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards (last visited Feb. 11, 2022).

¹¹ John Ruggie, *The Corporate Responsibility to Respect Human Rights*, Harvard law school forum on corporate governance (Feb. 12, 2022, 5:22 PM).

¹² Robert McCorquodale & Justine Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, Dpringer, 2021.

whom the business enterprise has relationships. Businesses bear a strict – or no-fault – responsibility for their adverse human rights consequences. This means that businesses are obligated to provide redress whenever they violate human rights; due diligence is irrelevant as a code of conduct. However, due diligence as a code of conduct is relevant in determining the extent to which businesses are liable for the violation of third-party human rights. Due diligence procedures are the means by which businesses can ensure that they are fulfilling these obligations.

The UNGPs' Guiding Principle 17 gives the best explanation of what HRDD is: Assessing actual and potential human rights impacts, integrating and acting on findings, documenting responses, and communicating how impacts are addressed should all be part of the HRDD process.

Human rights due diligence:

- (a) Should cover any negative human rights impacts that the business enterprise may cause or contribute to through its own activities, or that its business relationships may directly link to its operations, products, or services;
- (b) Will vary in complexity according to the scale of the business enterprise, the risk of serious human rights consequences, and the type and context of the business firm's operations;
- (c) Should be ongoing, recognizing that human rights¹³

This demonstrates that HRDD is a process, or rather a 'bundle of interconnected processes, that enables enterprises to identify, prevent, mitigate, and account for existing and prospective harmful human rights impacts. The adoption of HRDD in the UNGPs appears to be a novel and deliberate strategy by the drafters, as 'due diligence' is a phrase that is recognizable to businesspeople, human rights activists, and states, though with slightly different interpretations. Indeed, while the term 'due diligence' had been used in some national instruments prior to the UNGPs and resonates with established standards of duty of care in tort law and comparable concepts in civil law, it had not been used in relation to human rights impacts and business activities until the UNGPs.

Additionally, a business must respect human rights at all times throughout all of its activities, including those conducted by its own employees, subsidiaries, and business relationships. This

¹³ OHCHR., https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf (last visited Feb. 11, 2022).

distinguishes HRDD from being a one-off procedure or being primarily concerned with the business's operations. Thus, this obligation on businesses extends throughout supply chains, regardless of whether the relationship is contractual, and to all rights holders, including workers, consumers, and local communities. Additionally, the OECD has published a series of Responsible Business Conduct Guidance documents for specific sectors, which apply HRDD to human rights impacts associated with confidentiality, labor rights, bribery and corruption, disclosure, and consumer interests, as well as in the supply chain more broadly. The UNGPs state unequivocally that 'since business operations have an effect on nearly all internationally recognized human rights, their obligation to respect human rights applies to all such rights.'

CORPORATE HUMAN RIGHTS DUE DILIGENCE: AN ANALYSIS

Human rights due diligence is a method for businesses to manage potential and actual negative human rights impacts in which they are involved. It consists of four major components:

- (a) Identification and assessment of adverse human rights impact that businesses may cause through its activities or that may be linked directly to its operations, products, or services through business activities;
- (b) incorporating findings from impact assessments across relevant company processes and taking appropriate action based on its involvement in the impact.
- (c) Monitoring the effectiveness of measures and processes to address negative human rights impacts in order to determine whether they are effective; and
- (d) Communicating how impacts are being addressed and demonstrating to stakeholders, particularly affected stakeholders, that adequate policies and processes are in place.

Businesses should identify and assess risks based on geographic context, sector, and business relationships throughout their own activities and the value chain.¹⁴

The primary goal of human rights due diligence is to prevent negative consequences for people. It is about risks to people, not risks to businesses. It should be ongoing, as human rights threats change over time, and should be informed by meaningful stakeholder engagement, particularly with affected stakeholders, human rights defenders, trade unions, and grassroots organizations.

¹⁴ Ethical Trading Initiative, <https://www.ethicaltrade.org/issues/human-rights-due-diligence> (last visited Feb. 10, 2022).

The Working Group on Business and Human Rights, in its report to the 2018 UN General Assembly,¹⁵ highlights key features of human rights due diligence and why it matters; gaps and challenges in current business and government practice; emerging good practices; and how important stakeholders can contribute to scaling-up of effective human rights due diligence.

Effective due diligence benefits businesses by improving visibility and intelligence on supply chains, reducing the risk of disruption due to labor unrest, and implementing systems that improve supplier performance, increasing productivity, reducing staff turnover, improving hiring and training, and enhancing reputation and credibility.

ISSUES AND CHALLENGES IN IMPLEMENTATION OF HUMAN RIGHTS DUE DILIGENCE

Businesses today are operating in an environment that is becoming increasingly complex. This has a profound effect on how decisions about the allocation of resources, time, and people are made in a business. Due diligence has always been an integral part of corporate practice in order to ensure a business's quality, profitability, and reputation. However, corporate due diligence policies and practices in their own operations and supply chains are relatively new. These are being pushed forward by the United Nations' Guiding Principles on Business and Human Rights. Effective corporate HRDD is not only required by law but also beneficial to business: there is ample evidence that responsible businesses increase the visibility of their supply chains; they have a more secure supply of goods and services due to lower labor unrest, staff turnover, and hiring and training costs; they are more productive due to higher levels of employee engagement, training, and happiness at work; and their reputation and credibility.

Governments are critical in fostering an enabling environment for businesses to thrive. Where national and local governments demonstrate a lack of political will, capacity, or responsibility for human rights protection, it becomes more difficult for businesses to act responsibly and prevent human rights violations.¹⁶ This raises questions about the investments and sourcing decisions made by businesses, whether their suppliers are capable of meeting their expectations, and whether suppliers are able or willing to comply with risk management systems. Civil society,

¹⁵OHCHR, <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx> (last visited Feb. 9, 2022).

¹⁶Equality and HRC <https://www.equalityhumanrights.com/en/advice-and-guidance/human-rights-and-business> (last visited Feb. 9, 2022).

consumers, investors, and labor unions are increasingly pressing businesses and governments to account for their responsibilities and actions in preventing, managing, and mitigating labor rights violations.

The majority of businesses continue to rely on audits and compliance-based approaches to manage and mitigate human rights risks, even when they are aware of their limitations. They simply cannot conceive of another way – all the more so given limited resources, skills, and increasingly competitive markets. This means they outsource and delegate risk management to suppliers, auditors, and other expert organizations who have this responsibility to inform them of what they need to know and do. This deteriorates businesses' relationships with their suppliers and can erode their sense of ownership and accountability for potential human rights risks.

Due diligence on human rights is an integral part of a company's obligation to respect human rights. It is not, however, a straightforward exercise or a panacea for the world's business-related human rights problems. A significant challenge is addressing the pervasive and complex human rights issues that businesses face in a number of states. A single company will be unable to address systemic issues deep within the supply chain on its own. According to the UN Working Group's report to the UN General Assembly, "one of the primary challenges is the lack of government leadership in addressing governance gaps." An important issue is that host governments are failing to protect human rights by failing to pass legislation that complies with international human rights and labor standards, passing legislation that is inconsistent with international standards, or failing to enforce legislation that would protect workers and affected communities." This statement echoes Alliance 8.7's report on child labor and forced labor in global supply chains. As per the report,¹⁷ the majority of child and forced labor is solely domestic in nature and has no link to global supply chains. Indeed, 91 percent of child labor in North Africa, for example, is exclusively domestic.¹⁸ Thus, much more holistic approaches are required to address all workers, not just the small fraction associated with global supply chains.

Any due diligence regulation may be only one component of a much larger puzzle in which assistance is provided to address weak governance, informality, lack of access to basic services, corruption, and insufficient judicial systems at the local level. Additionally, experience has

¹⁷Ilo.org,https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_450718.pdf (last visited Feb. 9, 2022).

¹⁸IOE,<https://www.ioe-emp.org/news/details/1582278399-employers-supporting-decent-work-in-domestic-and-global-supply-chains> (last visited Feb. 10, 2022)

demonstrated that due diligence regulations can create a de facto embargo, undermine business engagement in developing regions, and run counter to the spirit of the UNGPs.¹⁹

GAPS AND CHALLENGES IN BUSINESS

Assessments by benchmarking and ranking initiatives reveal that the vast majority of businesses do not adhere to the Guiding Principles' requirements. This could indicate that despite growing awareness and commitments, risks to workers and communities are not being managed adequately. The Working Group notes gaps in current practice regarding corporate disclosure of human rights due diligence processes, as well as the human rights due diligence components of "taking action" and "tracking responses." Similarly, no connection is made between human rights due diligence and actual impact remediation in practice. Apart from a small group of "early adopters" – mostly large corporations headquartered primarily, but not exclusively, in certain Western markets – there is a widespread lack of awareness and understanding of corporate responsibility to respect human rights. Corporate policies are difficult to translate into local contexts across sectors.

GAPS AND CHALLENGES IN GOVERNMENT PRACTICE

The primary impediment to addressing governance gaps continues to be a lack of government leadership. An important issue is that host governments are failing to protect human rights by failing to enact legislation that complies with international human rights and labor standards, by enacting legislation that contradicts international standards, or by failing to enforce legislation that would protect workers and affected communities. While some domestic governments have enacted due diligence or disclosure legislation, these efforts remain fragmented or uncoordinated. Governments do not provide sufficient guidance and support on human rights due diligence to national business audiences, including small and medium-sized enterprises. A lack of policy coherence in government practice is part of the picture, as are governments' failures to set an example in their own economic roles.

¹⁹AHK, <https://indien.ahk.de/news/news-details/human-rights-and-environmental-due-diligence-legislation-in-europe-implications-for-global-supply-chains-and-in-india-and-south-asia> (last visited Feb. 8, 2022)

INITIATIVES TAKEN BY STATES TO PREVENT HUMAN RIGHTS ABUSE BY BUSINESS

These cases demonstrate that a parent company does have a duty of care concerning the activities of their foreign subsidiaries that have a negative impact on human rights and the environment (e.g., **Vedanta v Lungowe** in the UK²⁰), for which they must provide a remedy and that companies can have a duty of care where it is clearly foreseeable that a third party will commit a human rights violation.

In **Nevsun Resources Ltd v Araya**,²¹ the Canadian Supreme Court held that the prohibitions against slavery, forced labor, crimes against humanity, and cruel, inhuman, and degrading treatment and punishment could be directly applied to a business.

Domestic courts have gone beyond the UNGPs to impose duties on businesses in relation to their human rights impacts, emphasizing the importance of prevention and drawing on international standards to bolster such arguments. They concluded in **Milieudefensie v Royal Dutch Shell**²² before the Dutch courts that 'the UNGP constitute an authoritative and internationally endorsed "soft law" instrument' and are thus suitable as a guideline in interpreting the unwritten standard of care.

What these developments indicate is that there is a strong trend toward additional national and regional legislation requiring mandatory HRDD, at least in parts of the Global North. At the moment, this is somewhat piecemeal in terms of the human rights and business sectors covered, as well as the consequences. Nonetheless, it demonstrates that some states are taking steps to ensure that businesses do not have a negative impact on human rights. Similarly, there is a growing recognition in some states' courts that businesses bear certain obligations in relation to their activities that have an impact on human rights, the environment, and climate change.

EFFECTIVENESS OF HUMAN RIGHTS DUE DILIGENCE

While the term 'human rights due diligence' was coined in 2011, companies have been conducting voluntary due diligence in several industries, including the garment industry, for 20 years using tools such as codes of conduct, factory audit, etc.

²⁰ Vedanta Resources v Lungowe [2019] UKSC 20

²¹ Nevsun Resources Ltd. v Araya, 2020 SCC 5.

²² Milieudefensie v Royal Dutch Shell ECLI:NL:RBDHA:2021:5337

Stakeholders have long reported anecdotal evidence of these voluntary efforts' shortcomings, and new research demonstrates that commonly used due diligence tools are ineffective at improving respect for rights.

When states take actions to ensure that business activities do not violate human rights, research on the efficacy of such legislation indicates that—while there is a spectrum of views—it appears to have three main aspects: first, the law's efficacy in achieving compliance with the law's express requirements; second, the law's efficacy in resulting in changes in corporate behavior; and third, the law's efficacy in achieving compliance with the law's express requirements.

When evaluating the efficacy, it is necessary to keep in mind that HRDD was only adopted into the business and human rights framework in 2011, and implementation has been patchy, so any examination of efficacy must take that very short timeline into account.

Due Diligence as a Business Process

Due diligence is typically understood in a business context to refer to an investigation which is conducted by a business to identify and manage commercial risks: 'The primary objective of due diligence is to verify the facts, data, and representations underlying a commercial transaction to ascertain the transaction's value, price, and risk, including the risk of future litigation.'

Due diligence concerning human rights is a critical component of a corporation's responsibility to respect human rights. UNGP 15 states that to fulfill their obligation to respect human rights, business enterprises are required to incorporate human rights due diligence processes for the identification, prevention, and mitigation, for their human rights impacts."²³

When exercising due diligence concerning human rights, businesses should take four critical steps:

- Identification and assessing actual or potential adverse human rights impacts caused by their activities or business relationships.
 - Integrate the assessment findings across relevant internal functions and processes and take appropriate action.
 - Monitor their response's effectiveness (e.g., risk management and mitigation efforts); and

²³ Business and human rights resource centre, <https://www.business-humanrights.org/en/latest-news/companion-note-2-corporate-human-rights-due-diligence-getting-started-emerging-practices-tools-and-resources/> (last visited Feb. 10, 2022)

- Account for their human rights impacts (e.g., through reporting externally).

Additionally, the UNGPs establish some parameters:

- HRDD should deal with negative human rights impacts that a business enterprise may cause or contribute to through its own activities or that are directly related to its operations, products, or services through business relationships.
- The complexity of HRDD varies according to the size of the business enterprise, the risk of severe human rights consequences, and the nature and context of the business enterprise's operations. Human rights due diligence should be continuous, taking into account the fact that human rights risks may evolve over time as the business' operations and operating environment change.

Implementation of human rights due diligence by businesses has been swift and widespread.

Businesses have been swift and widespread in their implementation of human rights due diligence. Since the UNGPs were endorsed, human rights due diligence have been steadily improving. Ten years later, an increasing number of businesses of all sizes, sectors, organizational structures, and geographies conduct human rights due diligence. Their efforts are backed up by a slew of industry associations and other international and national organizations that have incorporated human rights due diligence into their standards, guidance, and practical implementation tools. As we can see, business engagement is extremely dynamic, and businesses are constantly learning how to improve and enhance their due diligence processes.

Due diligence with regard to human rights

A broader ecosystem of stakeholders is actively engaged in promoting due diligence in human rights. Non-governmental organizations (NGOs), labor unions, numerous policymakers, and other societal groups are calling for legislative frameworks requiring companies to exercise due diligence with respect to human rights. Many stakeholders, for example, view corporate liability for adverse effects in global supply chains as a necessary component of any legislative approach to human rights due diligence."Business enterprises must bear responsibility for adverse human rights and environmental impacts that occur throughout their global value chains, operations, and

business relationships."In September 2020, a coalition of non-governmental organizations emphasized in a joint statement the key elements of the EU's upcoming due diligence legislation.²⁴

UNGP principles 15 and 22 require redress in instances where an enterprise has caused or contributed to a violation of human rights. Thus, the UNGPs do not require companies to provide remedies for adverse supply chain impacts automatically, but only where the company caused or contributed to the violation. Thus, these provisions reflect the fundamental legal premise shared by the majority of countries, namely that liability should be imposed only when a direct and foreseeable link exists between the victim's harm and the business held accountable.

Recommendations of the UNGPs: State Policy and Regulatory Measures

According to UNGP 1, States have a responsibility to protect human rights within their territory and jurisdiction from third parties, including business enterprises. UNGP 2 states unequivocally that "States are not generally required by international human rights law to regulate the extraterritorial activities of businesses headquartered in their territory and jurisdiction." UNGP 3 then makes recommendations to States regarding their broad regulatory and policymaking responsibilities.

These recommendations include enforcing laws requiring businesses to respect human rights and conducting periodic assessments of the laws' adequacy, and addressing any gaps. Assuring that existing laws and policies governing the establishment and operation of businesses, such as corporate law, enable businesses to adhere to human rights standards.

Advising businesses on how to respect human rights throughout their operations effectively. Encouraging, and where necessary, requiring businesses to communicate their approach to human rights impacts.

A growing number of investors are inquiring about how businesses manage their human rights risks. Increasing policy acceptance Since 2011, corporate due diligence on human rights has become a de facto standard of conduct. It has been incorporated into other policy frameworks for responsible business, such as the OECD Due Diligence Guidance for Responsible Business Conduct, which deals with concrete guidance on practicing due diligence. Human rights due

²⁴ BSR, <https://www.bsr.org/en/our-insights/blog-view/four-features-of-effective-human-rights-due-diligence> (last visited Feb. 10, 2022).

diligence standards are increasingly being incorporated into the frameworks and legislation of government policy, including mandatory disclosure of risks of modern slavery in supply chains. Governments have reaffirmed their expectation that businesses exercise due diligence with respect to human rights in the twenty national action plans on business and human rights that have been published to date.

A growing number of large corporations, though few in numbers, across a range of sectors, have issued policy statements committing to human rights compliance with the Guiding Principles. Numerous businesses of this type are developing practices that incorporate ongoing learning and innovation around the various components of human rights due diligence in order to prevent and address adverse consequences across operations and relationships, including supply chains. Additionally, there is a growing recognition among business lawyers that they should advise corporate clients to exercise human rights due diligence.²⁵

CONCLUSION AND RECOMMENDATIONS

We are currently entering a critical phase for the Guiding Principles' effectiveness. States must move to clarify the expectation that businesses will respect human rights throughout their operations and take steps to prevent human rights abuse through effective legislation and regulation. In this context, the role of states in enforcing due diligence on human rights is critical. Effective human rights due diligence will necessitate stringent domestic regulation, with adequate enforcement, including sanctions against companies that fail to perform required human rights due diligence. The same is true for host state regulation, where sufficient resources must be invested in implementation and compliance to ensure that businesses cannot ignore or violate regulatory measures without the rule of law. Local civil society organizations will need to continue their struggles, aided by international partners, to exert pressure on corporations to change their behavior. States will have to take adequate measures to ensure human rights due diligence, which will result in long-lasting change and prevent human rights violations.

Recommendations to business

(a) Enterprises that have not yet implemented human rights due diligence should begin by assessing their potential and actual impacts on human rights, identifying gaps in existing

²⁵ Business and human rights resource centre, <https://www.business-humanrights.org/en/blog/mandatory-human-rights-due-diligence-a-business-perspective/> (last visited Feb. 9, 2022).

processes and developing an action plan for implementing human rights due diligence procedures for their own activities and value chains in accordance with the Guiding Principles, including by learning from emerging best practices in their own industry and elsewhere.

(b) If enterprises have already implemented human rights due diligence policies and processes in accordance with the Guiding Principles, they should continue on their journey and seek to continuously improve approaches through engagement with affected stakeholders, civil society organizations, human rights defenders, and labor unions, as well as through transparency regarding the management of potential and actual impacts.

Recommendations to investment community:

Investors are increasingly inquiring about companies' human rights policies and due diligence in this area. This practice has expanded beyond the realm of socially responsible investors to become part of a broader trend toward mainstream investment decision-making that incorporates environmental, social, and governance considerations. There is growing recognition of investors' and financial institutions' responsibilities, as well as the fact that conducting proper human rights due diligence improves risk management in general, benefiting both people and investments.

Entities in the investment community should conduct human rights due diligence as part of their own obligations under the Guiding Principles, more systematically requiring companies they invest in to conduct effective HRDD and coordinate with other organizations and platforms to ensure alignment and meaningful engagement with companies.

Recommendation to Government

States have an obligation to safeguard citizens against business-related human rights violations. They have a variety of levers at their disposal, including policy tools and frameworks, such as national action plans, to promote overall policy coherence; legislation, regulation, and adjudication; economic incentives in "economic diplomacy" and public procurement; leading by example in their role as economic actors; guidance and promotion of multi-stakeholder dialogue. It is recommended that States use all available levers to address market failures and governance gaps in order to advance corporate human rights due diligence as a standard business practice, while also adhering to the Guiding Principles, including by:

(a) Using legislation to incentivize due diligence, including through mandatory requirements, while also taking into account elements that promote effective implementation by businesses and a level playing field.

(b) Utilizing their economic power to advance human rights due diligence, incorporating HRDD into the operations of State-owned enterprises that promote trade and investment, as well as public procurement;

(c) Increasing policy coherence within governments, including through the adoption or strengthening of national action plans on business and human rights; d) Providing tailored guidance to business enterprises, including small and medium-sized enterprises, on human rights due diligence;

(d) Providing tailored guidance to business enterprises, including small and medium-sized enterprises, on human rights due diligence; and

(e) Facilitating multi-stakeholder platforms for discussion of business-related human rights risks, strategies for mitigating them, and ways to strengthen monitoring.

Therefore, Corporate due diligence and human rights' are unquestionably a growing field. Due diligence can significantly contribute to corporate social responsibility and, consequently, the protection, respect, and realization of individual human rights.

