

## HUMAN RIGHTS DUE DILIGENCE IN LAW AND PRACTICE: GOOD PRACTICES AND CHALLENGES FOR BUSINESS ENTERPRISES

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### I INTRODUCTION

Human rights due diligence is a key concept of the UN Guiding Principles on Business and Human Rights ('the Guiding Principles')<sup>1</sup> as '[t]o discharge the [corporate] responsibility to respect [human rights] requires due diligence... [which] describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.<sup>2</sup> However, there is limited information available as to how companies<sup>3</sup> are actually conducting human rights due diligence consistent with their responsibility to respect human rights under the Guiding Principles. This article provides much needed detail, based on empirical research through surveys and interviews, as to what a widespread range of companies are doing in this area, and innovatively analyses it in the context of current legal developments.

In adopting this approach, this article considers to what extent, if at all, companies are currently undertaking human rights due diligence, with a focus on four broad and diverse sectors: mining and energy; financial services; health sciences and pharmaceuticals; and technology. It examines the extent to which there are different consequences in terms of human rights impacts as to whether a company adopts a specific human rights due diligence process or uses processes that are part of, for example, existing labour and/or health and safety procedures. We do this by using a three-fold analytical framework (which is based on Guiding Principle 17): identifying actual or potential human rights impacts; taking action to address these impacts; and tracking or monitoring the effectiveness of these actions.<sup>4</sup> This research has enabled us to clarify when human rights impacts of both the

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<sup>1</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (Guiding Principles), A/HRC/17/31 (21 March 2011).

<sup>2</sup> Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (Framework) A/HRC/8/5 (7 April 2008), para 56. This is restated in Principle 15.

<sup>3</sup> The Guiding Principles refer to 'business enterprises' to include all forms of business enterprise, regardless of its legal format; for example, a corporation, an unincorporated entity, partnership, group, small business or joint venture, and whether or not transnational in its operations. For ease of reference, this article will use 'company/companies' unless the context requires otherwise.

<sup>4</sup> Principle 17 provides: '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

company itself and its business partners are more likely to be identified, and when actions affecting human rights are more likely to be tracked and communicated. It also provides some exploration of the understanding by companies of what 'human rights due diligence' means for them, which builds on some of the specific company or single sector<sup>5</sup> research in this area, and applies it to a wide range of companies and sectors.

This research is integrated with a consideration of the current legal and other developments in regulation in the area of business and human rights. This enables us to compare whether the matters that courts and regulatory bodies take into account in other areas of law to determine whether due diligence has been effectively implemented, are useful guidelines for this area. Accordingly, this research enables us to establish some practical guidance to companies on the implementation of human rights due diligence in accordance with the Guiding Principles. In so doing, we aim to assist companies by improving their processes to identify their activities that have impacts on human rights and thus assist in long-term human rights protections worldwide. Prior to the analysis of the actual practice currently undertaken by companies, we explain the methodology taken, clarify the meaning and scope of human rights due diligence and examine the legal developments and regulations and industry approaches in this area.

## II METHODOLOGY

The methodology adopted for this article combined desk-based literature, policy and legal research – including consideration of international and regional legal documents, national laws and jurisprudence - with qualitative insights obtained empirically through surveys and interviews. The primary form of data collection was through a web-based survey with questions about companies' human rights due diligence practices. The survey was sent to about 1,500 contacts through a combination of direct emailing to legal counsel and other company representatives on the database of the British Institute of International and Comparative Law (BIICL) and distribution through Norton Rose Fulbright's worldwide contacts. It was completed by 152 respondents during June and July 2015. The responses were anonymous.

Operations of the survey respondents were spread relatively evenly across all regions of the world.<sup>6</sup> Respondents were primarily based or headquartered in the following regions: Western Europe; Asia (including China and India); and the US and Canada;<sup>7</sup> with others in Australia, New Zealand and the

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include *assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed*' (our emphasis).

<sup>5</sup> See, for example, Hannes Hofmann, Martin Schleper and Constantin Blome, 'Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-tier Supply Chains', (2016) *Journal of Business Ethics* 1, Danish Institute of Human Rights, *Talking the Human Rights Walk: Nestlé's Experience* (2014) available at [http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate\\_Social\\_Responsibility/Nestle-HRIA-White-Paper.PDF](http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate_Social_Responsibility/Nestle-HRIA-White-Paper.PDF), and Liselotte Arni, Yann Kermode, Christian Leitz and Alexander Seidler, 'UBS and the Integration of Human Rights Due Diligence Under the United Nations (UN) Protect, Respect and Remedy Framework for Business and Human Rights' in Karen Wendt (ed) *Responsible Investment Banking* (Springer, 2015) 205.

<sup>6</sup> Respondents operate in the following regions: 70.95% Western Europe, 66.22% Asia, 60.81% US and Canada, 56.76% China, 55.41% Australia, New Zealand and Pacific, 50.68% India, 47.3% Latin America (including Mexico), 45.95% Middle East and North Africa, 44.59% Eastern Europe (including Russia), 43.92% Sub-Saharan Africa.

<sup>7</sup> Western Europe: 54.05%; Asia: 25.68% (4.73% based in China, 0.68% in India and 20.27% in the rest of Asia); and USA and Canada: 24.32%.

Pacific; Sub-Saharan Africa; Latin America (including Mexico); and the Middle East and North Africa.<sup>8</sup> 63.95% of respondents self-identified as 'multinational', followed by 'large national',<sup>9</sup> 'medium'<sup>10</sup> and 'small'.<sup>11</sup> 66.67% of respondents had public shareholding ownership, or were listed on a stock exchange and 19.44% had private shareholding. 90.91% of survey respondents do not, or had not received in the past, finance from multilateral lending agencies such as the International Finance Corporation, state lending agencies or regional development banks.

In 28.79% of survey responses, the main activity of the person who completed the survey was within the company's legal department. There were 19.7% in corporate social responsibility, 12.12% in compliance, and 10.61% in human rights. It should be noted that the responses to the survey may not be representative of the level of awareness of human rights due diligence issues, as the respondents were self-selecting. Also, as it was anonymous, the companies in which the respondents were employed were not identified, and so it was not possible to clarify if more than one individual from the same company responded.

Following the survey, semi-structured interviews were conducted with 14 people (being about 10% of the survey responses) working in companies at a senior level and with knowledge of human rights due diligence practices within their company and sector across the world. Every interview was conducted by [BIICL Research Fellow, Lise Smit](#), between October 2015 and January 2016. Interviewees were selected based on their known expertise ~~or from hearing them speak on related issues at high profile conferences~~. The interviews explored how human rights due diligence was conducted in their company (and related companies), sector/s and region/s. Discussions also included their policies, functions, training and best practices. The persons who agreed to be interviewed did so on the basis that their responses would not be attributed to them personally and that their affiliations would not be identified.

In addition to the interviews, an invitation-only roundtable on human rights due diligence was convened, at which seven companies from various sectors spoke and many others from other sectors were represented. The insights highlighted at this roundtable further informed our research findings.

Accordingly, this article considers to what extent, if at all, companies are currently undertaking human rights due diligence, by analysing the information provided by a global cross-section survey of companies, and through interviews. Where relevant, the analysis focuses on four sectors: mining and energy ('extractives'); financial services; health sciences and pharmaceuticals ('pharmaceuticals'); and technology.<sup>12</sup>

### III DEFINITION OF HUMAN RIGHTS DUE DILIGENCE

#### A. Meaning of Human Rights Due Diligence

<sup>8</sup> Australia, New Zealand and the Pacific: 6.76%; Sub-Saharan Africa: 5.41%; Latin America (including Mexico): 2.03% and the Middle East and North Africa: 0.68%.

<sup>9</sup> 13.61%.

<sup>10</sup> 12.24%.

<sup>11</sup> 10.20%. These terms were not defined in the survey as it was left to the respondents to self-identify.

<sup>12</sup> These sectors were represented as follows in the survey: 32.24% extractives (16.45% energy and 15.79% mining, mining infrastructure and mining commodities); 28.29% financial services; 5.92% technology; and 5.26% pharmaceuticals and healthcare. There were a few respondents from other sectors.

Despite its centrality to the Guiding Principles, the term ‘human rights due diligence’ in relation to the responsibilities of companies to respect human rights is not defined there. Principle 15 only provides that ‘[i]n order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes... including... (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights’.

Subsequently, the Office of the High Commissioner for Human Rights (OHCHR) sought to define the term as:

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.<sup>13</sup>

This is helpful in one respect: it situates the term within the general legal approach to due diligence.

The general legal approach across most jurisdictions is to see due diligence within the tort law [standard of care language](#) of a reasonable or prudent person.<sup>14</sup> For example, during mergers, acquisitions or other large investment transactions, most prudent companies undertake due diligence as a risk management process, in order to [avoid-manage](#) business risks such as fines, legal claims, and operational complications.<sup>15</sup> In the United States, the phrase has developed to describe the process whereby public statements are checked before a company is publicly listed, where the company aims to protect itself from legal liability in the case of material misstatements.<sup>16</sup> For anti-corruption purposes, the scope of the due diligence required of each company is expected to be proportionate and commensurate with its relevant risks, including the extent of its international operations.<sup>17</sup> It is of note that in all contexts where due diligence is either required by law or conducted in order to meet a legal requirement, the company will not be able to protect itself from liability by showing that it has gone through a ‘tick-box exercise’ of due diligence.<sup>18</sup>

However, the definition of ‘human rights due diligence’ given by the OHCHR leaves uncertain how this standard is to be applied to human rights impacts of companies. There is some discussion in the limited literature on this area, especially as to how the terminologies of human rights due diligence differ across various international instruments,<sup>19</sup> their operation in relation to different parts of a

<sup>13</sup> Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (OHCHR, 2012), at 4.

<sup>14</sup> See Cees Van Dam ‘Tort Law and Human Rights: Brothers in Arms – On the Role of Tort Law in the Area of Business and Human Rights’ (2011) *Journal of European Tort Law* 221. The term originally arises from Roman law: see Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996), 1008-9.

<sup>15</sup> See Olga Martin-Ortega ‘Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?’ (2013) 31 *Netherlands Quarterly of Human Rights* 44.

<sup>16</sup> For example, see William Sjoström, ‘The Due Diligence Defense Under Section 11 of the Securities Act of 1933’ (2005) 44 *Brandeis Law Journal* 549.

<sup>17</sup> UK Ministry of Justice, *The UK Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with Them from Bribing* (2010) 2.

<sup>18</sup> See *London Borough of Croydon v Pinch A Pound UK Ltd* [2010] EWHC 3283 (Admin) [‘Croydon’], para 19; *R. (on the application of Tesco Stores Ltd) v City of London Corp* [2010] EWHC 2920 (Admin); *Tesco Supermarkets Ltd v Natrass*, UK House of Lords, [1972] AC 153.

<sup>19</sup> See, for example, Peter Muchlinski, ‘Operationalising the UN Business and Human Rights Framework: The Corporate Responsibility to Respect Human Rights and Due Diligence’ in Sarianna Lundan (ed.), *Transnational Corporations and Transnational Governance* (Palgrave, 2014), 325.

business enterprise,<sup>20</sup> and in relation to national law concepts,<sup>21</sup> though there is no international consensus on a definition. Indeed, the OECD, in its attempt to provide guidance to companies simply defines it as follows: “Due diligence” combines both the notion of “due” – i.e. that it is commensurate with the risks to be covered and “diligence” – i.e. acting with prudence and perseverance to address risks in light of the circumstances. It is a process for enterprises to “know and show” what they are doing about their adverse impacts’.<sup>22</sup>

If human rights due diligence is a process about adverse human rights impacts, rather than about business risks (see below), then it is [necessary-helpful](#) to have a distinct definition in order to assist companies worldwide. While ‘human rights impacts’ is not defined in the Guiding Principles, it does seem to be equated there with human rights violations under international law. This is seen by the Commentary to Principle 12, which makes clear that ‘[b]ecause business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights’, with the examples given of these rights being the major global human rights treaties and instruments,<sup>23</sup> including the rights of particularly vulnerable groups.<sup>24</sup> Thus the Guiding Principles do seem to establish that ‘human rights impacts’ of companies should be interpreted in the same way as ‘human rights violations’.<sup>25</sup> However, while the Guiding Principles do not equate ‘impacts’ with legal liability for companies,<sup>26</sup> they emphasise that simply having a human rights due diligence process does not mean that there is no consequent legal liability.<sup>27</sup> Yet, as with the general legal obligation of due diligence, where a company has identified

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<sup>20</sup> See, for example, Radu Mares, Responsibility to Respect: Why the Core Company Should Act When Affiliate Infringe Human Rights, in Radu Mares (ed.), *Siege or Cavalry Charge? The UN Mandate on Business and Human Rights* (Martinus Nijhoff, 2012), and Ken McPhail and Carol Adams, ‘Corporate Respect for Human Rights: Meaning, Scope, and the Shifting Order of Discourse’ (2016) 29 *Accounting, Auditing & Accountability Journal* 650.

<sup>21</sup> See, for example, Doug Cassel, ‘Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence’ (2016) 1 *Business and Human Rights Journal* 179.

<sup>22</sup> Organization for Economic Cooperation and Development (OECD), *Due Diligence Guidance for Responsible Business Conduct* (draft, June 2016), DAF/INV/RBC (2016) 6.

<sup>23</sup> The Commentary to Principle 12 states: ‘An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises’.

<sup>24</sup> The Commentary to Principle 12 also states: ‘Depending on circumstances, business enterprises may need to standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law’.

<sup>25</sup> On using the term ‘violations’ for actions by companies rather than ‘abuses’, see Andrew Clapham, ‘Human Rights Obligations for Non-State-Actors: Where Are We Now?’ in Fannie Lafontaine and François Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia, 2015).

<sup>26</sup> Commentary to Principle 12: ‘The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions’.

<sup>27</sup> Commentary to Principle 17: ‘business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights

its human rights impacts and has put in place sophisticated human rights due diligence systems and processes, it is more likely to be able to show to any external regulator or court that it has done everything that it could have done, should an adverse impact occur.

In our view, the standard of due diligence required to be performed by companies is results or effects based, and accordingly is initially defined by a process of risk (or impact) assessment. It needs to be sufficient to enable a company to identify and address its human rights impacts in the sense described above. Whilst the process will commence with that assessment, it needs to be modified in the lights of its findings.

## B. Scope of Human Rights Due Diligence

As with other applications of due diligence, the scope of the human rights due diligence expected of a company will always be context-specific. It will depend on various factors, including, as listed in the Guiding Principles, the company's size, the risk of severe<sup>28</sup> human rights impacts, and the nature and operating context.<sup>29</sup> The scope may change over time as the circumstances in which the business operates evolve.<sup>30</sup>

Human rights due diligence differs from business management due diligence in a few prominent ways. The first important aspect of the definition of human rights due diligence is that it is about human rights impacts and not solely about enterprise related business risk. Principles 13 and 15 reinforce this by consistently referring to business enterprises' *impacts*.<sup>31</sup> Thus merely considering risks to the company without its broader human rights impacts would not be within the definition addressing the required target or objective of human rights due diligence. In this way, human rights due diligence differs from other applications of due diligence, where the risk management process is primarily aimed at preventing risks to the business itself or its officers. Of course, human rights risks also translate into business risks but the focus of human rights due diligence should be on the prevention of the risks to impact on the rights-holder.

Further Most importantly, human rights due diligence is not company - or even corporate group - specific. It expects, as seen in Principle 13, every business to consider the human rights impacts not only of its own operations but also of third parties with which whom it has is linked in its business relationships.<sup>32</sup> These may include suppliers and other entities in its value chain, such as consumers

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abuses.' See also Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or No Law?' in Surya Deva and David Bilchitz (eds.) *Human Rights Obligations of Business: Beyond a Corporate Responsibility to Respect?* (Cambridge University Press, 2013).

<sup>28</sup> Commentary to Principle 14: '[the] severity of impacts will be judged by their scale, scope and irremediable character.'

<sup>29</sup> Principle 17(b): '[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'.

<sup>30</sup> Principle 17(c): '[Human rights due diligence] should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve'.

<sup>31</sup> See generally, Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017, forthcoming) *European Journal of International Law*.

<sup>32</sup> Principle 13: 'The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse *human rights impacts* through their own activities, and address such *impacts* when they occur; (b) Seek to prevent or mitigate adverse *human rights impacts* that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those *impacts*' (our emphasis).

and distributors, and other third parties with which it has relationships, including state and non-state entities.<sup>33</sup>

The Guiding Principles acknowledge that a company with a large number of business relationships may find that it is unreasonably difficult to undertake human rights due diligence for all the entities across its entire value chain. In such cases, the Guiding Principles allow for the prioritisation of certain rights over others, provided that priority is given to those risks that are most severe or irremediable,<sup>34</sup> though severity is 'not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.'<sup>35</sup> Some have called this prioritisation, a reflection of what are the 'salient' human rights for a company (being those human rights most at risk from the company's activities).<sup>36</sup> However, 'salience' and 'severity' are not the same concept, though the latter should determine the priorities between the human rights identified by the former, as 'salience is not a cut-off line, but a principled basis for sequencing how [company] resources [initially] get applied'.<sup>37</sup> Hence, a company must first determine its human rights impacts before it prioritises its human rights due diligence related remedial actions. As with other forms of due diligence, the rigour of the process must be commensurate to the severity of the risk.

This wide responsibility for the impacts of all third parties indicates that a company would be prudent to consider carefully the scope of their human rights due diligence. A determinative factor is whether the company is aware, or should be aware, of certain human rights issues or high risk areas or contexts within its operations or value chain.<sup>38</sup> An additional relevant aspect may include whether a company is aware that industry peers are causing or contributing to adverse human rights impacts.<sup>39</sup>

A third way in which human rights due diligence is unique is that it must take place on a continuing basis. Other forms of due diligence frequently consist of a once-off process which takes place before a specific transaction and is completed once the transaction takes place. Instead, the Guiding Principles provide that human rights due diligence 'should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve'.<sup>40</sup>

<sup>33</sup> Commentary to Principle 13.

<sup>34</sup> Principle 24.

<sup>35</sup> Commentary to Principle 24. In *Lloyds Bank Ltd v Railway Executive* (1952) 1 All ER 1248, 1253, Lord Denning explained that '[a]s the danger increases, so must the precautions increase'.

<sup>36</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (OHCHR, 2012), 9: 'The most salient human rights for a business enterprise are those that stand out as being most at risk. This will typically vary according to its sector and operating context. The Guiding Principles make clear that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise. But the most salient rights will logically be the ones on which it concentrates its primary efforts'.

<sup>37</sup> Caroline Rees and Rachel Davis, 'Salient Human Rights Issues: When Severe Risks to People Intersect with Risks to Business' in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Routledge, 2016), 103, 104. See also Mazars and Shift 'The UN Guiding Principles Reporting Framework' (2015), available at <http://www.unPrinciplereporting.org/>.

<sup>38</sup> Van Dam, note 14, 244 notes that companies are likely to be responsible for those human rights impacts of which they had knowledge, as well as for those they 'ought to have known', had they been diligent, such as use of relevant information on the internet and from international and human rights organisations and government bodies.

<sup>39</sup> See OHCHR Response to the Request from the Chair of the OECD Working Party on Responsible Business Conduct, 27 November 2013, available at <http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf>, paras 13-14.

<sup>40</sup> Principle 17(c).

By being context-dependent, human rights due diligence lends itself towards being used to discharge a legal standard in the same way as other due diligence processes. Accordingly, legal advisers are in a unique position to advise companies on the scope of their human rights due diligence. As case law and business practice develops, the content of what kind of human rights due diligence is necessary under different circumstances will be clarified.

### C. Industry Standards and Law

Within various sectors, industry bodies have developed standards requiring human rights due diligence. These standards often take the form of soft law instruments, by binding (albeit not through a legally enforceable mechanism) those companies which are members of the relevant group or trade body. In other instances, they may be tools or guidance documents, which may become norm-forming through integration into standard industry practice.<sup>41</sup>

Our four focus sectors have diverse industry standards, which vary in nature, focus, application and level of enforcement. For example, many extractives companies have signed the Voluntary Principles on Security and Human Rights,<sup>42</sup> aimed at the protection of human rights in contexts where protective security is required, and increased guidance on the implementation of the Guiding Principles.<sup>43</sup> In the financial sector, human rights due diligence is required in terms of the Equator Principles and the International Finance Corporation's Performance Standards, which apply to certain types of project and asset finance and investment,<sup>44</sup> and has some force of sanction through inclusion in contractual relationships. The UN Principles for Responsible Investment are a set of principles aimed at guiding institutional investors in regard to responsible investment through environmental, social and governance tools and guidelines, which contain human rights components.<sup>45</sup> The UN Guiding Principles on Foreign Debt and Human Rights also refer to the obligation of financial corporations to 'refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of

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<sup>41</sup> The industry peer comparisons are confirmed by Liselotte Arni, Yann Kermode, Christian Leitz and Alexander Seidler, 'UBS and the Integration of Human Rights Due Diligence Under the United Nations (UN) Protect, Respect and Remedy Framework for Business and Human Rights' in Karen Wendt (ed) *Responsible Investment Banking* (Springer, 2015) 205. See also the ideas behind the World Economic Forum's 'Shared Responsibility' approach: Thomas Hemphill and George White, 'The World Economic Forum and Nike: Emerging 'Shared Responsibility' and Institutional Control Models for Achieving a Socially Responsible Global Supply Chain' (2016) 1 *Business and Human Rights Journal* 307.

<sup>42</sup> Voluntary Principles on Security and Human Rights, available at [http://www.voluntaryprinciples.org/files/voluntary\\_principles\\_english.pdf](http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf). Note also the Extractive Industry Transparency Initiative Principles (available at <https://eiti.org/eiti/principles>), which are aimed at transparency around payments to governments.

<sup>43</sup> For example, the International Council on Mining and Metals (ICMM) adopted ten principles on sustainable development of mining: available at <http://www.icmm.com/our-work/sustainable-development-framework/10-principles>. See also Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitza, Antony Crockett and Audley Sheppard 'Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles' (2013) 6 *Journal of World Energy Law and Business* 2.

<sup>44</sup> Norton Rose Fulbright 'Equator Principles III: An introduction and practical guide' available at <http://www.nortonrosefulbright.com/files/equator-principles-iii-pdf-17mb-111048.pdf>, 5. The third edition of the Equator Principles or EP III is available at <http://www.equator-principles.com/index.php/ep3>.

<sup>45</sup> UN Guiding Principles on Foreign Debt and Human Rights, available at <http://www.unpri.org/about-pri/about-pri/>.



human rights<sup>46</sup> and the relevant UN Independent Expert has released a draft commentary, emphasising the role due diligence should play in considering human rights impacts with respect to foreign debt lending.<sup>47</sup>

Within the information and communication technology sector, the focus is often on the rights to privacy and freedom of expression. For example, the Telecommunications Industry Dialogue has published a set of Guiding Principles<sup>48</sup> referring to human rights impact assessment and due diligence requirements. The Cyber Growth Partnership Industry,<sup>49</sup> which is a coalition between business, government and academia, as well as the Electronic Frontier Foundation, a not-for-profit organisation,<sup>50</sup> both aim to set out practices aimed at preventing human rights violations occurring through the use of technology.

The OECD has incorporated human rights due diligence elements into its Guidelines for Multinational Enterprises.<sup>51</sup> It has also developed guidance for responsible supply chains of minerals from conflict-affected and high risk areas,<sup>52</sup> and is currently in varying stages of drafting detailed sector-specific guidance for the agricultural, extractive, financial, and textile and garment sectors.

[It is too early to assess the effect of these industry standards on the legal position of companies, but it is to be expected that courts will have regard to them in assessing the conduct of corporates that are subject to relevant rights related litigation.](#)

## IV LEGAL FRAMEWORK

### A. Introduction

Corporate behaviour is heavily regulated, with over 90 domestic laws across various states that regulate environmental, social and governance issues, such as health and safety regulations, labour laws, non-discrimination laws, and environmental protection laws.<sup>53</sup> While there are many laws discussed in this section which require due diligence by companies for activities which have human

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<sup>46</sup> Human Rights Council 'The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights', A/HRC20/23 (10 April 2012), para 9.

<sup>47</sup> Cephas Lumina, 'Draft Commentary to the Guiding Principles on foreign debt and human rights' (Advanced unedited version), A/HRC/25/51 (10 March 2014).

<sup>48</sup> Telecommunications Industry Dialogue on Freedom of Expression and Privacy 'Guiding Principles' (March 2013), available at <https://www.telecomindustrydialogue.org/about/guiding-principles/>.

<sup>49</sup> Cyber Growth Partnership Industry Guidance, 'Assessing Cyber Security Export Risk' (2014), available at [https://www.techuk.org/images/CGPDocs/Assessing\\_Cyber\\_Security\\_Export\\_Risks\\_website\\_FINAL\\_3.pdf](https://www.techuk.org/images/CGPDocs/Assessing_Cyber_Security_Export_Risks_website_FINAL_3.pdf)

<sup>50</sup> Cindy Cohn, Trevor Timm and Jillian York, 'Human Rights and Technology Sales: How Corporations Can Avoid Assisting Repressive Regimes' (April 2012), available at <https://www.eff.org/document/human-rights-and-technology-sales>.

<sup>51</sup> OECD, 'OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment'; annexed to the 'Declaration on International Investment and Multinational Enterprises', adopted on 25 May 2011 by OECD Members, as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania, available at: <http://oecd.org/daf/inv/mne/48004323.pdf>.

<sup>52</sup> OECD 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (2<sup>nd</sup> Edition, 2013), available at <http://dx.doi.org/10.1787/9789264185050-en>.

<sup>53</sup> KPMG, Centre for Corporate Governance in Africa, GRI and UNEP, 'Sustainability reporting policies worldwide – today's best practice, tomorrow's trends' (2013), available at <https://www.globalreporting.org/resourcelibrary/carrots-and-sticks.pdf>.

rights impacts, most of these are not phrased in human rights language.<sup>54</sup> Further, most of this legislation and regulation generally requires *reporting* by companies of their activities and does not expressly require companies to address and remediate their human rights impacts. While reporting can lead to companies undertaking human rights due diligence (with remediation), it does not automatically do so. Yet, as discussed below, legal claims are currently arising based on public statements and codes of conduct which have represented the company as being compliant with certain human rights standards, and inadequate or inaccurate reporting, as well as incorrect statements (such as those made during the process of listing a company regarding the manner in which human rights risks are addressed) may give rise to legal claims.<sup>55</sup> [A company's "reported position" in relation to its human rights effects and processes may also find its way into its contractual relations with its business counterparts by way of a representation or warranty.](#) Hence a discussion of the developments in this law, and the apparent move to increasing prescription of reporting and dealing with specific human rights impacts, is necessary and our survey indicates that the legal framework will affect corporate action.

Indeed, our survey respondents attached significance to legal risks. The two main incentives stated by survey respondents (each being selected by 66% of respondents) for undertaking human rights due diligence now or in the future are avoidance of legal risk and reputation. In addition, compliance with regulatory reporting requirements, and compliance with relevant and local laws, excluding reporting requirements, were chosen as incentives by more than 60% of respondents.<sup>56</sup> So there is an important role which the legal framework plays in driving human rights due diligence, whether through regulation, risks of potential legal claims or potential breach of reporting requirements. Accordingly, a few examples of laws which already require some form of due diligence for impacts that relate to human rights will be considered.

## **B. Regulation of Corporate Impacts of Human Rights**

One category of laws relevant to human rights due diligence is statutory corporate social responsibility (CSR) requirements. For example, in Brazil every financial institution has to adopt a CSR policy, and incorporate a social management system.<sup>57</sup> In Denmark<sup>58</sup> and Norway,<sup>59</sup> CSR reporting is statutorily required, including about the steps the company is taking to integrate human rights into their operations, and what procedures are used as well as an assessment of the achievements. In India, the 2013 Company Act not only requires CSR reporting,<sup>60</sup> it compels companies with a certain profit level to spend at least two percent of their profits on community

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<sup>54</sup> See Swiss Commission des Affaires Extérieures du Conseil National, 'Rapport de Droit Comparé - Mécanismes de Diligence en Matière de Droits de l'Homme et d'Environnement en Rapport Avec les Activités d'Entreprises Suisses à l'Étranger: Rapport Rédigé en Exécution du Postulat 12.3980', 30 Octobre 2012 available at <<http://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2014/2014-05-28/ber-apk-nr-f.pdf>>

<sup>55</sup> For example, the EU Prospectus Directive 2003/71/EC as updated by Directive 2010/73/EU requires a prospectus to be published when securities are publically offered.

<sup>56</sup> Also chosen frequently were, in order, 'the right thing to do' (54.5 5%), good corporate governance (53.03%) and avoidance of operational risk (46.97%).

<sup>57</sup> CMN Resolution No. 4327, of April 25, 2014.

<sup>58</sup> Årsregnskabsloven [Financial Statements Act], Act no. 1403, 27 December 2008, para 99a.

<sup>59</sup> Lov om endringer i regnskapsloven og enkelte andre lover [Law on the amendments in the Accounting Act and several other laws], LOV-2013-04-19-15, I 2013 hefte 6 s 992, 2013-0288 (19 April 2013), § 3-3c.

<sup>60</sup> Section 134 of the India Companies Act 2013.

development projects.<sup>61</sup> Yet the approach set out in the Indian Act has been criticised on the basis that it allows companies to be ‘running village schools even as they pollute local water sources’.<sup>62</sup>

A different example is in the area of slavery and trafficking. The UK Modern Slavery Act requires companies to report on the steps they are taking to eradicate slavery and human trafficking in their own operations and in their supply chains.<sup>63</sup> It applies to all companies supplying goods or services with an annual turnover of £36 million and which carry on business, or a part of their business, in the UK.<sup>64</sup> This Act shares similarities with the California Supply Chain Transparency Act, which was adopted in 2010 and requires certain companies to disclose how they sought to eradicate slavery and human trafficking from their supply chains.<sup>65</sup>

Another example is the US Federal Acquisition Regulations, which require companies which sell goods and services to the US government to have a compliance plan in place to show how they will adhere to a list of detailed requirements.<sup>66</sup> Requirements include provisions regarding employees’ access to identification documents, return travel arrangements, housing, and the prohibition of recruitment fees.<sup>67</sup> The Regulations are given additional enforcement procedures by the False Claims Act,<sup>68</sup> which criminalises false statements or certifications made in the context of government procurement. A few instances exist of corporate laws which require directors to take into account human rights considerations as a component of their duty of care. For example, section 172(1) of the UK Companies Act,<sup>69</sup> requires directors to consider human rights considerations and for a report to be prepared to assess directors’ performance in this regard. Some jurisdictions also have provisions which make it possible, under certain circumstances, to hold individual company directors liable for misleading information contained in public reports.<sup>70</sup>

Within various sectors, specific regulation often requires due diligence for activities which may implicitly have human rights impacts. For example, the European Union (EU) Transparency Directive applies to large extractive and logging companies, and requires country by country reporting on material payments made to governments.<sup>71</sup> Section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>72</sup> requires companies to disclose annually whether certain minerals

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<sup>61</sup> Ibid, section 135.

<sup>62</sup> Rama Lakshmi, ‘India mandates increase in charitable giving by corporations; critics fear government control’ *Washington Post*, 11 September 2013.

<sup>63</sup> Section 54 of the UK Modern Slavery Act 2015. [Section 2 of the Modern Slavery \(Transparency in Supply Chains\) Bill \(HL Bill 6\), which is pending a third reading in the House of Lords, would amend the Public Contracts Regulations 2015 to require contracting authorities to exclude an economic operator from participation in a procurement procedure where they have established that that operator has not produced a slavery and human trafficking statement pursuant to Section 54.](#)

<sup>64</sup> Section 54(2)(b) read with Regulation 2 of the Modern Slavery Act (Transparency in Supply Chains) Regulations 2015.

<sup>65</sup> Senate Bill No. 657, Chapter 556, 30 September 2010.

<sup>66</sup> Section 2(2)(A) of Executive Order 13627, in terms of Executive Order 13627, which came into effect in March 2015.

<sup>67</sup> Sections 2(1) (A) and 2(2)(A).

<sup>68</sup> 31 U.S.C. §§ 3729–3733

<sup>69</sup> UK Companies Act 2006.

<sup>70</sup> For example, s 463 UK Companies Act 2006 and s90A UK Financial Services and Markets Act 2000. Both permit investors who have suffered loss to take action against the company in the event of some form of misleading statement or omission of material facts. See also the arguments made on the fiduciary duties of directors who had the benefit of books, records and due diligence in *Sharp v Blank* [2015] EWHC 3220 (Ch).

<sup>71</sup> EU Directive 2013/50/EU.

<sup>72</sup> US Dodd–Frank Wall Street Reform and Consumer Protection Act (2010) 12 USC 5301.

are sourced from the Democratic Republic of Congo (DRC) or adjoining countries, and describe the measures of supply chain due diligence that were taken. In Australia, the Illegal Logging Prohibition Act<sup>73</sup> requires importers and processors of timber to have verification processes in place to ensure that no illegal logging took place in its supply chains.

The exploration and mining licencing requirements of many national jurisdictions also contain provisions on environmental impact assessments, and land acquisition consent procedures. For example, the DRC has issued a regulatory notice requiring mining companies to conduct human rights due diligence at various levels in the mineral supply chain,<sup>74</sup> which has already resulted in fines for companies failing to undertake due diligence.<sup>75</sup> The Economic Community of West African States (ECOWAS) Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector,<sup>76</sup> and the US Burma Responsible Investment Reporting Requirements,<sup>77</sup> are also relevant.

Although these regulatory requirements are useful to inform the human rights due diligence process, key aspects of human rights due diligence are missing. For example, compliance with this type of regulation will not be aimed at identifying or addressing any other human rights impacts outside of those occurring with the relevant context, sector or geographical region. Similarly, whereas transparency around payments made to governments may improve human rights conditions on the ground indirectly, this type of regulation does not require the identification or addressing of human rights impacts within the company's own operations or within its value chain – including the human rights impacts of the governments to whom the disclosed payments were made. Further, as already noted, most of this legislation and regulation is not in express terms of human rights and generally requires reporting by companies of their activities without expressly requiring companies to address and remediate their human rights impacts. Nevertheless, proof of compliance with these legal requirements by a company may assist towards indicating the creation of a robust human rights due diligence system.

On an international law level, the UN Human Rights Council on 23 June 2014 adopted a resolution appointing an inter-governmental working group to explore the possibilities around a legally binding

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<sup>73</sup> Illegal Logging Prohibition Act 2012 (Australia).

<sup>74</sup> Note Circulaire No. 002/CAB.MIN/MINES/01/2011 du 06 Septembre relative a l'application obligatoire des directives de recommandations du Guide de Devoir de Diligence de l'OCDE et de la résolution 1952 (2010) du Conseil de Sécurité de l'ONU dans le secteur minier Congolais), [Circular Note No. 002/CAB.MIN/MINES/01/2011 of 06 September on the mandatory application of the OECD Due Diligence Guidelines and UN resolution 1952 in the Congolese mining sector].

<sup>75</sup> In May 2012 Congo Minerals and Metals (trading as TTT Mining) and Huaying Trading Company were suspended for failing to undertake due diligence: available at <https://www.globalwitness.org/en/archive/congo-government-enforces-law-curb-conflict-mineral-trade/>; UN Security Council 'Letter dated 29 November 2011 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council' S/2011/738, available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2011/738](http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738).

<sup>76</sup> ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector, available at <http://documentation.ecowas.int/download/en/publications/Ecowas%20Directive%20and%20policies%20in%20the%20minning%20sector.pdf>. It binds member states and does not create any direct rights and obligations at the corporate or individual level.

<sup>77</sup> US Department of State, Reporting Requirements on Responsible Investment in Burma, February 2013 available at <http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf>. See also <http://www.state.gov/r/pa/prs/ps/2013/05/209869.htm>

treaty on business and human rights.<sup>78</sup> Any such treaty is likely to may follow the concepts set out in the Guiding Principles and could accordingly contain human rights due diligence obligations.<sup>79</sup> In addition, some courts are beginning to refer to the Guiding Principles in their decision-making.<sup>80</sup>

### C. Legal Claims for Human Rights Due Diligence Failures

Human rights due diligence requirements are beginning to surface in legal claims. For example, the Canadian case of *Choc v Hudbay* is based on claims that the Canadian parent company failed to prevent abuses by the subsidiary over which it had 'on-the-ground management and control',<sup>81</sup> and in relation to which it had made public statements committing to detailed standards of conduct.<sup>82</sup> The earlier UK case of *Chandler v Cape PLC*<sup>83</sup> demonstrated that, depending on the level of knowledge and control, a parent company may owe a duty of care to employees of a subsidiary for health and safety standards.<sup>84</sup> As with due diligence enquiries in other contexts discussed above, the Court based the company's liability on its knowledge, equated with attributed knowledge: the parent company 'knew, or ought to have known, that the subsidiary's system of work was unsafe' and similarly, it 'it knew, or ought to have foreseen, that the subsidiary or its employees would rely on [the parent company's] superior knowledge for the employees' protection'.<sup>85</sup>

**Comment [1]:** Robert, should we include in the footnotes some of the more recent cases, if you think it appropriate – e.g. Vedanta and Nevsun? I am not sure they move the law forward, per se, but might be worth adding.

In keeping with the Guiding Principles, this duty extends beyond the corporate group into value/supply chains. For example, two cases brought in California concerned allegations that companies failed to take adequate steps to address human rights abuses in their supply chains.<sup>86</sup> These actions were brought in terms of consumer protection laws, the California Transparency and Supply Chains Act<sup>87</sup> and unfair competition laws respectively.<sup>88</sup> These cases demonstrate that even where human rights due diligence is not expressly required by legislation, claims for failing to conduct such due diligence may be brought on the basis of other legal requirements, including those protecting consumers' expectations not to be misled. The findings by various OECD National Contact

<sup>78</sup>Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,' A/HRC/26/L.22/Rev.1 (24 June 2014).

<sup>79</sup> See Robert McCorquodale and Lise Smit, 'Human Rights Due Diligence: A Responsibility, A Defence or A Mirage?' in Surya Deva and David Bilchitz (eds) *A Treaty on Business and Human Rights? Exploring its Contours* (forthcoming, 2016).

<sup>80</sup> See, for example, *Kaliña and Lokono Peoples v Suriname*, Inter-American Court of Human Rights (2015) No. 134, 224.

<sup>81</sup> *Choc v Hudbay Inc*, (2013) ONSC 1414, para 27.

<sup>82</sup> *Ibid*, para 26.

<sup>83</sup> *Chandler v Cape PLC* [2012] EWCA (Civ) 525.

<sup>84</sup> Norton Rose Fulbright 'Recent Trends Related to Human Rights Statements' (10 February 2016) available at <http://www.nortonrosefulbright.com/knowledge/publications/136366/recent-trends-related-to-human-rights-statements>.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Sud v Costco Wholesale Corp* 15-cv-03783, US District Court, Northern District of California (San Francisco); *Barber v Nestle USA Inc*, 15-cv-01364, US District Court, Central District of California (Los Angeles)

<sup>87</sup> California Transparency Supply Chains Act of 2010.

<sup>88</sup> Similarly, cases are being brought in Canada and France against multinational garment companies for losses suffered in the collapse of the Rana Plaza factory in 2013: see Norton Rose Fulbright 'Recent Trends Related to Human Rights Statements', note 84, and Business and Human Rights Resource Centre 'Auchan lawsuit (re garment factories in Bangladesh)' available at <http://business-humanrights.org/en/auchan-lawsuit-re-garment-factories-in-bangladesh>.

Points are also gradually contributing to an understanding of what human rights due diligence is needed in legal terms.<sup>89</sup>

**Comment [2]:** Robert, Robin has written "verify" by this text in his mark up. Having read it, I am confident that this is sufficiently verified. I thought I'd raise it though, in case you agree with Robin.

In some areas of law, due diligence is often provided for as a statutory defence. The company or corporate official is able to defend itself against a civil claim or a criminal charge if it can show that it took all reasonable steps or exercised the necessary due diligence. Examples include misrepresentation or failure to disclose financial matters,<sup>90</sup> bribery and corruption,<sup>91</sup> environmental offences,<sup>92</sup> safety offences<sup>93</sup> and other corporate criminal activities.<sup>94</sup> Where human rights due diligence is legally required, it may take the form of either direct mandatory requirements, a statutory or common law defence to a claim, or a reporting requirement.

#### D. Industry Standards and Law

As seen above, industry standards and guidance are becoming an increasing factor in companies' responses to undertaking human rights due diligence. They are, though, generally not likely to lead to any direct legal liability. However, in addition to the Guiding Principles, the standards and practices of industry peers are likely to inform the level of human rights due diligence expected of each individual company as a form of best industry practices.<sup>95</sup> In this way, industry standards could have the ability to become norm-forming and turn from soft law into hard law through the prism of what would be expected of a reasonable company in the circumstances.

**Comment [3]:** Robin has suggested this sentence may be slightly too strong, but we would defer to you. I think the addition of the word "direct" helps. What do you think?

Voluntary industry standards could also have a norm-forming nature. For example, a court has taken into account a company's adoption of the Voluntary Principles on Security and Human Rights as part of the standard to which the company should be held, as 'something more than lip-service to those Principles is demanded'.<sup>96</sup> Accordingly, it ordered the company to disclose many of the documents

<sup>89</sup> For example, see the Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum For Environment And Development vs. Posco (South Korea), Abp/Apg (Netherlands) And Nhim (Norway), Final Statement*, 27 May 2013; and UK OECD National Contact Point Review Committee 'Separate Policy Note on Due Diligence' in *Specific Instance under the OECD Guidelines for Multi-national Enterprises: Application for Review of the Initial Assessment – Recommendation of the Review Committee*, January 2014, against the Initial Assessment entitled *Complaint from a UK NGO against a UK Telecommunications Company* available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/282467/bis-14-609-review-of-the-uk-national-contact-points-procedure-in-its-initial-assessment-of-the-complaint-from-reprieve-against-british-telecommunications-plc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/282467/bis-14-609-review-of-the-uk-national-contact-points-procedure-in-its-initial-assessment-of-the-complaint-from-reprieve-against-british-telecommunications-plc.pdf), 6-7.

<sup>90</sup> Corporations Act 2001 (Australia) s 731; Federal Securities Act of 1933 s 11(b)(3)(A); Financial Markets Conduct Act 2013 (NZ) s 499; Consolidated Financial Services Act (Italy) art 94(8).

<sup>91</sup> UK Bribery Act 2010 (UK) s 7(2); Clean Companies Act (Brazil) Ch III art 7.

<sup>92</sup> Environment Protection Act 1970 (Vic) s 66B(1A)(b) and (c); Forest and Range Practices Act 2014 (Canada) s 72.

<sup>93</sup> Work Health and Safety Act 2011 (NSW) s 27; Food Safety Act 1993 (UK) s 21; Aviation Act (Wet Luchtvaart, NL), art 1.3.

<sup>94</sup> Spanish Criminal Code, art 33; Law no. 190 (2012) Italian Criminal Corporate Law (Legislative Decree No. 231 of 2001, 'Law 231') art 6. Canada and the Netherlands both have a common law due diligence defence available for strict liability crimes (*R v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; see also Bram Meyer, Tessa van Roomen, Eelke Sikkema, 'Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Frameworks' (2014) 10 *Utrecht Law Review* 47.

<sup>95</sup> See Van Dam, note 14, 238.

<sup>96</sup> *Vilca and 21 Others v Xstrata Limited and Compania Minera Antapaccay S.A* [2016] EWHC 389 (UK), para 25.

requested by the claimants, including searches of the company's annual reviews of its implementation of the Voluntary Principles.<sup>97</sup>

Therefore, companies, particularly multinational corporations, are subject to an array of regulations which directly or indirectly regulate their human rights impacts. A comprehensive human rights due diligence process should enable a company to comply with the diverse range of regulations applicable to its operations, and assist the company to address its other actual and potential human rights impacts which are not (yet) addressed by any regulation.

## V RESULTS OF EMPIRICAL RESEARCH AND ANALYSIS

### A. INTRODUCTION

In order to understand what companies are currently doing in relation to human rights due diligence, our survey and interviews sought to clarify the existing practices. To analyse and evaluate these in accordance with the Guiding Principles, the three primary elements of implementing due diligence set out in Principle 17 will be examined in turn:

- 1) Identifying actual or potential human rights impacts;
- 2) Taking action to address these impacts; and
- 3) Tracking or monitoring the effectiveness of these actions.

In our survey, we asked respondents whether their companies had ever undertaken any human rights due diligence process or a human rights impact assessment. Almost half<sup>98</sup> of respondents had not. These latter respondents, who had not expressly conducted human rights due diligence or a human rights impact assessment, were then asked whether they had considered human rights impacts as an integrated part of other due diligence processes (not expressly referred to as human rights). 72.34% of these remaining respondents indicated that they had considered human rights as part of other processes, predominantly workplace health and safety, labour rights, equality and non-discrimination, and community, indigenous or land rights.

There were accordingly two groups of the survey respondents: those who had conducted express human rights due diligence; and those who had not, but considered human rights as part of other due diligence processes. We have segregated these two groups for the purposes of comparing the outcomes when a company does express human rights due diligence ('express human rights due diligence'), as opposed to using existing non-human rights specific processes which nevertheless directly or indirectly consider certain human rights ('non-human rights specific due diligence'). Where relevant we refer to these different groups below.

We identified diverse practices from both these groups. In our analysis we ~~therefore~~ combined the results from the two groups where the contrast between those who had done express human rights due diligence and those who had not was irrelevant. Particularly with results analysed according to sector, we took into account the responses from all survey respondents within that sector who had undertaken either express or non-human rights specific due diligence. Accordingly, where no specific distinction is drawn between the two groups, we refer to the outcomes of the composite group, being both those respondents who had undertaken express human rights due diligence and those who had considered human rights as part of other processes.

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<sup>97</sup> Ibid, paras 90-91.

<sup>98</sup> 49.12%.

## B. IDENTIFICATION OF HUMAN RIGHTS IMPACTS

### 1. Introduction

The first aspect of human rights due diligence ordinarily includes the identification of actual or potential human rights impacts. This often takes place through a human rights impact assessment. For the purpose of this article, we refer to ‘human rights impact assessments’ as processes specifically aimed at identifying and monitoring human rights impacts, and to ‘human rights due diligence’ as a broader concept encompassing the process of identifying human rights impacts, taking actions to prevent, mitigate and account for any such impacts and monitoring the effectiveness of actions taken. As such, human rights impact assessments may [and indeed ought to](#) form part of human rights due diligence but they are not the same process.

### 2. Results: Using Human Rights Due Diligence

Almost half<sup>99</sup> of the over 150 respondents to our survey had never undertaken human rights due diligence or a human rights impact assessment. Many of these had conducted processes which included human rights, such as with workplace health and safety,<sup>100</sup> labour rights,<sup>101</sup> equality and non-discrimination,<sup>102</sup> and forced labour rights in the supply chain. Few other human rights were considered by these respondents, other than some mention of indigenous or land rights.<sup>103</sup> Some of the respondents had considered human rights as part of other due diligence processes, such as with mergers and acquisitions, engaging a new market or client, investment decisions or providing finance, or environmental impact assessments, though in all cases the process taken would usually not use human rights language or even refer to human rights as such. Interviews confirmed that where companies do not use a human rights lens, it is often because they believe their human rights risks are adequately covered by other processes, such as health and safety or human resources procedures.

The survey results show a significant difference between the various sectors as to whether they had ever undertaken a human rights due diligence process. Over 70% of companies in the mining,<sup>104</sup> and pharmaceutical<sup>105</sup> sectors had done so. In contrast, around half of respondents in the energy<sup>106</sup> and technology sectors and 57.15% in the financial sector have never conducted such a process. Of those who had undertaken express human rights due diligence, 81.08% had conducted the process with reference to the UN Guiding Principles on Business and Human Rights. This is not surprising, as the Guiding Principles indeed introduced the concept of human rights due diligence. Of the same group, 75.68% referred to the Universal Declaration of Human Rights and 64.86% to the ILO Core Conventions, both of which are instruments referred to in the Guiding Principles.

Of respondents which considered human rights only as part of other processes, 79.41% had done so in terms of workplace health and safety rights, while 70.59% had considered human rights as part of labour rights due diligence, including prison or forced labour in supply chains, and 52.94% as part of equality and non-discrimination (sometimes phrased as diversity and inclusion). The other category

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<sup>99</sup> 49.12%

<sup>100</sup> 57.45% of the group that had not done express human rights due diligence.

<sup>101</sup> 51.06% of this group.

<sup>102</sup> 38.30% of this group.

<sup>103</sup> 29.79% of this group.

<sup>104</sup> 72.23%.

<sup>105</sup> 71.43%.

<sup>106</sup> 47.37%.



of human rights considered by respondents which considered human rights only as part of other due diligence processes were community, indigenous or land rights. At 41.18%, this was the rights category that received the lowest level of attention from this group. None of the respondents which included human rights only as part of other processes listed any other human rights which they had considered.

Of those survey respondents which have undertaken human rights due diligence or human rights impacts, 77.14% indicated that they identified actual or potential human rights impact during the process. In contrast, only 19.23% of the group which considered human rights as part of non-human rights processes identified any adverse impacts during the process. In other words, 77.14% of companies using express human rights due diligence identify adverse impacts; whereas 80.77% of companies using non-human rights specific due diligence, *do not* identify adverse impacts. This gap in human rights analysis in the absence of express human rights due diligence was confirmed during the interviews. For example, one large multinational company indicated that if operating mechanisms are examined through a human rights lens it significantly assists its operational decisions in countries with high human rights risks.

Of those survey respondents which had undertaken express human rights due diligence, 58.62% indicated that their company had in the past been connected to allegations of human rights impacts. Furthermore, 62.07% indicated that their company has had concerns about its own risks after allegations of human rights impacts regarding other companies in the same sector, country or context. In contrast, 80% of those companies who had only considered human rights as part of non-human rights specific due diligence, indicated that they had never been connected to allegations of human rights impacts, nor concerned about their own risks based on such allegations relating to peers.

The reliability of these [conclusions from the](#) survey results were confirmed during the interviews. Interviewees from a few large multinational companies indicated that, before they used a human rights lens, they were confident that their various processes covered all relevant human rights impacts. However, after they undertook intensive human rights impacts assessments, gap analyses, or conducted the process of adopting a human rights policy over periods of up to 18 months, which included engaging extensively with stakeholders, they realised that there were human rights impacts which they had been missing. Certain risks would not have been covered by piecemeal existing processes. These companies now use human rights due diligence processes to identify and address human rights impacts across their operations globally. One interviewee stated that 'internally something happens when you start using the human rights phrasing.'

Only 34.62% of those survey respondents who had considered human rights as part of other processes made reference to the Guiding Principles. Instead, the instruments most often referred to in this group's due diligence processes were national legislation and the ILO Core Conventions. Notably, these are the two types of legal instruments where the majority of labour and employment regulation can be found. These findings again correspond with this group's indication that they predominantly considered human rights as part of employment-rights related processes.

### **3. Analysis: Using Human Rights Due Diligence**

The survey results strongly suggest that where express human rights due diligence is undertaken, human rights are more likely to be detected than during non-specific human rights processes. Where human rights are indirectly taken into consideration through other due diligence processes, such as for labour, health and safety issues, adverse human rights impacts are significantly less likely to be

identified. This shows that the risks of such a limited approach are high. Survey results are starkly contrasted between the two groups: those that have done express human rights due diligence and those that only considered human rights in other due diligence processes. Nearly 80% of companies using express human rights due diligence *do identify* adverse impacts; whereas over 80% of companies using non-human rights specific due diligence, *do not identify* adverse impacts.

It is also of note that most of the non-specific human rights processes were focused exclusively on the rights of employees, which are also areas which are highly regulated in most jurisdictions.<sup>107</sup> Accordingly, all the other internationally recognised human rights were predominantly considered only by those companies who had undertaken express human rights due diligence

The link between allegations of human rights violations against a company or another company in their sector and their likelihood of conducting express human rights due diligence, appears to demonstrate a correlation between knowledge about allegations of human rights risks, and undertaking comprehensive or express human rights due diligence. Where companies are aware of the existence of human rights risks within a certain operating context, there seems to be a tendency to undertake human rights due diligence in terms of the Guiding Principles. This correlates with the understanding of due diligence as a method whereby certain business risks can be avoided. It may also reflect the awareness that where well-known human rights risks exist in the industry, country or contexts, a company may be held liable even for what it had not known but ought to have known about its own impacts, as knowledge, or attributed knowledge, has been the basis of claims for human rights claims against companies.<sup>108</sup> This may indicate a move away from the assumption by a company that less knowledge protects against liability, towards an approach of proactive identification and prevention.

As human rights is an over-arching concept encompassing many different individual rights, interviewees frequently referred to the importance of operationalising or translation of human rights for internal company persons who may not have a human rights background. This frequently requires training on what human rights are and how they work. Many interviewees have found it helpful to break down references to human rights as a whole, and on a day-to-day basis refer instead to specific rights, such as child labour or land rights, with which operational managers have a more direct connection. This breakdown of concepts in order to operationalise them should not, however, be confused with an exclusive focus at company level on these individual rights. Indeed, many of the companies which follow this approach towards 'translation' of human rights have also stressed the importance of regular human rights impact assessments, to identify and address other human rights risk which may arise.

#### **4. Results: Identification of Human Rights Impacts**

The method most commonly used by respondents across sectors for identifying human rights impacts were desktop research and studies, including internet searches, sanctions lists and other database searches, media and NGO reports and high risk country research. It also included a review of company policies and training records, legislation, industry guidance and best practice documents.

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<sup>107</sup> The only other category of human rights considered that was external to the employees was in relation to indigenous people, which in certain jurisdictions or sectors (such as mining) are also an area of some regulation.

<sup>108</sup> See above, especially *Chandler v Cape*, note 83.

The second most prominent method employed to identify human rights impacts was an audit, whether internal or external. Auditing standards named by survey respondents include health and safety audits, land rights audits, project-basis audits conducted by technical personnel with specialist expertise, and internal audits on compliance with company policies. Interviewees indicated that internal audits are increasingly incorporating compliance with internal human rights standards, action plans or codes of conduct. Further methods respondents indicated for the identification of human rights impacts were investigations, independent expert reports and grievance mechanisms. Investigations were conducted by internal or external investigators. Survey respondents referred to the use of investigations on human resources, sexual harassment and sustainability, none of which, it is noted, are human rights-focused processes.

Both energy and mining survey respondents indicated local communities as the top most consulted stakeholders during the identification process, showing this is a key area of concern for extractive companies. Financial services sector respondents indicated that local communities and employees were the most frequently consulted stakeholders. All survey respondents from the pharmaceutical and technology sectors identified employees as the stakeholders most often consulted towards the identification of adverse human rights impacts, and suppliers as the second-most consulted group. Technology respondents additionally consulted with trade unions, but apart from these three groups, no other stakeholders were selected as having been consulted by technology survey respondents.<sup>109</sup>

In relation to third parties, our survey indicated that across all sectors, where respondents conducted express human rights due diligence, 72.73% identified actual or potential adverse human rights impacts linked to the activities of third parties. However, where human rights were only indirectly considered as part of other processes, this figure dropped to 29.17%. Links to impacts of third parties were perceived differently within our focus sectors. In the mining sector, the difference between those companies which conducted express human rights due diligence and those which only considered human rights indirectly was dramatic: where express human rights due diligence was undertaken 55.56% identified adverse impacts of third parties, but where non-human rights specific due diligence was conducted, no mining respondents at all identified third party impacts.

Further, only 41.67% of financial sector companies indicated that their due diligence processes had identified human rights impacts of third parties. It is noted that third parties in this context include the financial company's clients. The likelihood of financial sector companies identifying third party human rights impacts increases to 60% where express human rights due diligence is done.

In regard to prioritising, of all the survey respondents which had done some form of human rights due diligence (whether express or non-human rights specific), 90.32% indicated that their identification process found certain rights to be more severely at risk than others. Of these, 82.14% prioritised these rights identified as most severe.<sup>110</sup>

Our survey shows that where companies have undertaken express human rights due diligence, the department or function most often responsible for the identification of human rights impacts is

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<sup>109</sup> One telecommunications company representative interviewed stated that the company undertakes analyses with its external stakeholders every two years. Engagement consists of an online survey and follow-up interviews. The purpose of the engagement is to test whether the human rights issues on which they focus are still relevant and whether any new issues have arisen.

<sup>110</sup> Principle 17(c).

CSR.<sup>111</sup> In contrast, where human rights was considered as part of non-human rights processes, the function most often responsible for identification was human resources.<sup>112</sup>

These findings were confirmed during the interviews. Where human rights are only considered as part of labour rights or health and safety, human rights often fall within the exclusive ambit of the human resources function, to such an extent that some interviewees used the abbreviation 'HR' to refer interchangeably to both 'human rights' and 'human resources'. Interviewees indicated that, in order for due diligence to be adequate, staff at all managerial levels should be trained on human rights identification. One interviewee indicated that the importance of having these human rights identification assessments regularly, as the difference in how issues have evolved was 'really obvious' and one could clearly see the 'major progress' that the company is making. It was stated that the ultimate monitoring tool is another human rights impact assessment. Another large multinational confirmed this, as it was stated that they could clearly see the difference in the countries where it has conducted human rights impact assessments.

## **5. Analysis: Identification of Human Rights Impacts**

The high frequency of human rights responsibilities located within the human resources department in the group that did not undertake specific human rights due diligence reflects the findings that, where human rights are taken into account only through other existing processes, this is predominantly done as part of employment rights processes. It also confirms the likelihood that non-employment related human rights will be overlooked where due diligence is confined to employment-related processes. Indeed, 80.77% of this group of companies indicated that their process failed to pick up adverse human rights impacts. The survey results suggest that where identification duties are located within the CSR department, this may result in a human rights due diligence process which is more effective than human resources departments in identifying human rights impacts. While widely varied tasks fall under the CSR label in different companies, the CSR function is ordinarily focused on a broader range of issues than the human resources function, and CSR portfolios increasingly include many aspects of human rights.

In fact, as human rights is an over-arching concept encompassing many different individual rights, interviewees frequently referred to the importance of operationalising or translation of human rights for internal company persons who may not have a human rights background. This frequently requires training on what human rights are and how they work. Many interviewees have found it helpful to break down references to human rights as a whole, and on a day-to-day basis refer instead to specific rights, such as child labour or land rights, with which operational managers have a more direct connection. This breakdown of concepts in order to operationalise them should not, however, be confused with an exclusive focus at company level on these individual rights. Indeed, many of the companies which follow this approach towards 'translation' of human rights have also stressed the importance of regular human rights impact assessments, to identify and address other human rights risk which may arise.

The Guiding Principles use the concept of 'stakeholders' to refer to a wide group of affected individuals. Stakeholders in this context potentially include employees and their representatives, suppliers, retailers, consumers and end users, transportation and shipping providers, local communities, non-governmental organisations (NGOs) representing affected individuals, governmental and intergovernmental bodies, investors and shareholders, and industry bodies. In our

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<sup>111</sup> 60% of survey respondents in the 'express human rights due diligence' group.

<sup>112</sup> 51.72% of survey respondents in the 'non-human rights due diligence' group.

survey it is clear that some sectors only considered a few stakeholders. In particular, the technology sector had a very limited view of its stakeholders. This confirms a concern that ‘many (though not all) ICT companies consistently undervalue [stakeholders]’.<sup>113</sup> Engagement with rights-holders may be particularly challenging in the ICT sector because there may be ‘hundreds of millions (or even billions) of users spread across the world using diverse products, services, technologies, and applications in vastly different human rights environments’.<sup>114</sup> However, unless relevant human rights are identified in this sector, as in others, then many actual or potential human rights impacts might not be discerned. In order to be most effective, a company should pay close attention to identifying its relevant stakeholders, as well as the methods by which they can most appropriately be consulted.

The Guiding Principles provide that, even where a company did not itself contribute to adverse human rights impacts, it should seek to prevent such impacts by third parties with whom it has business relationships. Such third parties may include business partners, entities in the company's value chain, and other non-State or State entities directly linked to its business operations, products or services. Thus it is crucial that companies engage with third parties in order to identify human rights impacts. Indeed, there are some national legislation, such as the UK Modern Slavery Act, that require this. Yet our findings indicate that, if human rights due diligence is not undertaken expressly – i.e. not using a human rights lens - then a company is significantly less likely to identify adverse human rights impacts by third parties than if it does so expressly. While our survey results and interviews demonstrate that companies in the financial sector recognise the importance of human rights impacts located in their value chain, such as those of the investments and projects they are financing, it also shows that existing non-human rights procedures within the sector may not be adequate for discovering third party impacts.<sup>115</sup>

As noted above, where companies have large numbers of entities in their value chains, the Guiding Principles allow for the prioritisation of certain rights over others, provided that priority is given to those risks that are most severe or irremediable.<sup>116</sup> The high number of respondents which found certain rights to be more severely at risk is perhaps not surprising, given that it is unlikely for any one company to have an equally severe impact on all the human rights which it affects. However, it is interesting to note that only 82.14% of respondents prioritised the more severely impacted rights. This implies that 17.86% of companies which had identified certain rights to be more severely impacted did not prioritise such rights. Therefore there is a real risk that companies will neither identify the human rights impacts it or a third party makes nor will they prioritise those human rights impacts which are most severe. This could also be a difficulty if ‘salience’ of human rights issues to a company is determined prior to the undertaking of a human rights due diligence process.

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<sup>113</sup> BSR ‘Applying the Guiding Principles on Business and Human Rights to the ICT industry, Version 2.0: Ten Lessons Learned’ (September 2012) available at [http://www.bsr.org/reports/BSR\\_Guiding\\_Principles\\_and\\_ICT\\_2.0.pdf](http://www.bsr.org/reports/BSR_Guiding_Principles_and_ICT_2.0.pdf), 5 and 14.

<sup>114</sup> BSR and Centre for Democracy and Technology (CDT) ‘Legitimate and Meaningful, Stakeholder Engagement in Human Rights Due Diligence: Challenges and Solutions for ICT Companies’ (September 2014) available at [http://www.bsr.org/reports/BSR\\_Rights\\_Holder\\_Engagement.pdf](http://www.bsr.org/reports/BSR_Rights_Holder_Engagement.pdf), 5.

<sup>115</sup> See also OHCHR Response to OECD, note 39; Mary Dowell-Jones ‘Financial institutions and human rights’ (2013) 13 *Human Rights Law Review* 423; Damiano de Felice ‘Banks and Human Rights Due Diligence: A critical analysis of the Thun Group’s discussion paper on the UN Guiding Principles on Business and Human Rights’ (2015) *International Journal of Human Rights* 8; and Amnesty International, ‘Obstacle Course: How the UK’s National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises’ (March 2016), available at [https://www.amnesty.org.uk/sites/default/files/uk\\_ncp\\_complaints\\_handling\\_full\\_report\\_lores\\_0.pdf](https://www.amnesty.org.uk/sites/default/files/uk_ncp_complaints_handling_full_report_lores_0.pdf).

<sup>116</sup> Principle 24.

One means of engagement with stakeholders is through grievance mechanisms. The grievance mechanisms used by survey respondents for the identification of human rights impacts were predominantly limited to whistleblowing channels, such as emails and hotlines, and human resources or workplace complaints systems. Most grievance mechanisms used by interviewees were either employment and/or anti-corruption focused. The lack of grievance mechanisms available to rights-holders outside of the company suggest that this is one aspect of human rights due diligence which is currently under-utilised by companies towards the identification of their human rights impacts. It is also relevant that, while audits were used by some companies to identify human rights impacts, auditing and certification in and of themselves have been found to be 'ineffective tools for detecting, reporting, or correcting environmental and labour problems in supply chains' and human rights impacts in the absence of a wider, ongoing process.<sup>117</sup>

Most of those interviewed used risk-based methodologies. These processes of risk analysis typically categorised suppliers, customers, or other third party business partners into high, medium or low risk. This was often done through an initial questionnaire. For some geographies, countries or third party relationships, such as joint ventures with state-owned enterprises, the company may automatically require an enhanced due diligence, regardless of whether red flags are raised in the initial questionnaire. Human rights risks were integrated into existing risk assessment questionnaires and processes rather than separately considered. Whereas integration allows for longer-term and mainstreamed identification, unconsidered integration could result in human rights being evaluated as business risks and not as human rights impacts on others. This is contrary to the approach of the Guiding Principles.

A recurrent theme was the importance of the role of the board in overseeing and managing risks. The US *Caremark* case<sup>118</sup> has demonstrated that the board has the responsibility to demand information to be placed before it, which due to the complex structures typical in multinational corporations, is often most effectively done through delegation to a dedicated function.<sup>119</sup> The lack of board engagement in human rights issues has been confirmed by a report based on the views of 200 senior corporate executives.<sup>120</sup> Our survey indicates that many boards are still not taking overall responsibility for the policies, identification and implementation of human rights due diligence.<sup>121</sup>

## C. RESPONSES AND ACTIONS TAKEN

### 1. Introduction

The second principal element of implementing human rights due diligence under the Guiding Principles is that a company should take action to address actual or potential human rights impacts and to 'integrate the findings from their impact assessments across relevant internal functions and

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<sup>117</sup> Genevieve LeBaron and Jane Lister 'Ethical Audits and the Supply Chains of Global Corporations' Sheffield Political Economy Research Institute, (2016) *Global Political Economy Brief No. 1*, 1.

<sup>118</sup> *Re Caremark International Inc. Derivative Litigation* 698 A.2d 959 (Del.1996).

<sup>119</sup> Norton Rose Fulbright 'The board's role in managing business ethics risks' *Business ethics and anti-corruption world*, Issue 1 / August 2013, available at <http://www.nortonrosefulbright.com/files/business-ethics-and-anti-corruption-world-issue-1-102968.pdf>, 6.

<sup>120</sup> Eversheds 'On the Rights Path: Human Rights at Work' (May 2016), available at [http://new.eversheds.com/global/en/where/europe/uk/services/employment-law/business-human-rights-zmag.page?utm\\_source=website&utm\\_medium=bhr-banner&utm\\_campaign=BHR%2520report%2520zmag](http://new.eversheds.com/global/en/where/europe/uk/services/employment-law/business-human-rights-zmag.page?utm_source=website&utm_medium=bhr-banner&utm_campaign=BHR%2520report%2520zmag).

<sup>121</sup> In the 'express human rights due diligence' group, only 15.56% selected the CEO and only 13.33% selected the board or non-executive directors as being responsible for the identification of human rights impacts.

processes, and take appropriate action.<sup>122</sup> They also state that effective integration means ensuring that ‘responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise’.<sup>123</sup> Accordingly, our survey and interviews explored how companies are responding and which actions they are taking to prevent, mitigate and account for actual or potential human rights impacts.

## 2. Results: Who Takes Action

Survey respondents which had done express human rights due diligence indicated that the function most frequently responsible for implementation of actions are CSR,<sup>124</sup> followed by operations management<sup>125</sup> and procurement or supply chain management.<sup>126</sup> In contrast, the group which considers human rights only as part of other due diligence processes, indicated that human resources and operations management are the primary functions<sup>127</sup> assigned responsibility for implementation.<sup>128</sup>

Many of those interviewed highlighted the importance of translating and applying human rights as it relates to the individual function in question. In more than one interview this was referred to as ‘making human rights operational’. Yet one interviewee indicated that at their company they do not want to create ‘human rights departments’. One interviewee explained that if procedures are aimed at sustainability functions only, they have to ‘argue with their business colleagues at every step’, whereas if human rights are successfully integrated into operational and commercial procedures, such as how to win a licence, then ‘all of a sudden it is on a project leader’s checklist, not on the support team members’ list’. Survey respondents and interviewees mentioned a few mechanisms which are used to ensure that internal decision-making enables relevant actions to be implemented. The interviews indicated that in some companies, budgets for the required implementation was allocated centrally by senior leadership, while in others, they were absorbed into the budgets of the various functions responsible for the necessary actions.

Survey respondents were asked whether they had used internal or external human rights experts to advise on, conduct or evaluate the due diligence process. Our survey shows a significant contrast in the use of human rights experts between those survey respondents who had undertaken express human rights due diligence and those who had considered human rights only as part of other processes. 93.15% of those who had undertaken express human rights due diligence had used human rights experts (whether internal or external); whereas 75.86% of the other group used no human rights experts. Of our four focus sectors, the sector which made the most use of human rights experts was mining, in which 80% of respondents used either internal or external human rights experts or both. Many of interviewees had made use of external advisers to guide, advise on, coordinate or conduct their human rights due diligence process. These external parties range from lawyers, auditors, specialised consultants, NGOs and business organisations to international organisations such as UNICEF.

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<sup>122</sup> Principle 19.

<sup>123</sup> Principle 19(a)(i).

<sup>124</sup> 47.06%.

<sup>125</sup> 32.35%.

<sup>126</sup> 29.41%. In the ‘express human rights due diligence’ group, only 5.88% selected the CEO and only 2.94% selected the board or non-executive directors as being responsible for the implementation of actions aimed at human rights impacts.

<sup>127</sup> 37.50% each.

<sup>128</sup> 20.83%.

Many companies indicated that a collective approach assists significantly where individual company action is unlikely to result in change. Some companies found it productive and appropriate to engage with competitors on human rights issues in a collective forum such as industry associations. One example used was the Voluntary Principles on Security and Human Rights, which brings together companies, governments and NGOs around the topic of security and human rights.<sup>129</sup> One interviewee demonstrated the advantage of collective action through an example of a large country where it only had a small market share. Approaching the relevant authorities and suppliers on behalf of a collective industry body was considered likely to be more effective than if it was a single company.

Training was another prominent mechanism selected for implementation by 58.06% of all survey respondents. In the mining sector, this figure increases to 100%. Current training was seen as ordinarily limited to either the company's own employees or the employees of business partners within the value chain, such as contractors or supply chains. Some respondents and interviewees indicated that their training is aimed at the implementation of other policies, such as those relating to health and safety, corruption, sexual harassment, non-discrimination or supply chain management. A few interviewees indicated that these other types of training do include reference to human rights, including the various international treaties and human rights instruments such as the Universal Declaration of Human Rights.

Some companies have specific training on their human rights policies, and how these are to be implemented. These training sessions are sometimes complemented by guidelines, instructions and other materials being available internally, for example on the intranet, to provide more detailed guidance on the implementation of the policy. A few companies of those we interviewed had internal training aimed specifically at human rights education, where the questions of what human rights are, and how to identify them, were included.

### **3. Analysis: Actions Taken**

The Guiding Principles indicate that 'internal decision-making, budget allocations and oversight processes enable effective responses to [actual or potential human rights] impacts'.<sup>130</sup> The survey indicated that this is currently done in a piecemeal way, with few examples of coherent approaches across all the company's departments. The lack of coherence is likely to limit the ability of a company to undertake effective responses to information obtained when identifying human rights impacts.

The lack of coherence was also seen in the different approaches on whether to have a distinct human rights department or to include human rights as part of the responsibilities of many departments. The former approach can create a clearer identity for human rights, including in relation to reporting (see below). The latter, or 'mainstreaming approach', can enable the issues to be managed effectively, and create awareness of human rights throughout all operational areas. For example, an interviewee indicated that part of implementation is to ensure that those persons who deal with suppliers and rights-holders understand human rights, which does not simply entail dissemination of the relevant policies and translating them into local languages, but requires reinforcing the message as to how they apply at the relevant functional level. At the same time, it is important, with the developments in legal regulation in this area that, as the risks might be legal in nature, the legal teams are involved in the process.

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<sup>129</sup> Voluntary Principles, note 42.

<sup>130</sup> Principle 19(a)(ii).



Whichever approach is adopted, it is evident that training in identification, implementation and responding to human rights impacts is required across all companies. This would include training as to what are human rights and how companies can have impacts on them. Despite the frequent emphasis which survey respondents and interviewees placed on the importance of training, few companies presently provide training specifically around human rights. Instead, training is frequently limited to non-human rights specific topics such as health and safety or other regulated areas. Given the ease with which training can be rolled out within a company which already has training sessions in place then, relative to the potential preventative and comprehensive impact of training, it appears that companies are not currently capitalising on the full advantage of human rights training.

Further, companies which had undertaken express human rights due diligence had a significantly higher rate of using human rights experts. Insofar as our survey results show that this group also had a higher rate of identifying human rights impacts, both within their own operations as within their value chain, it seems that there is a correlation between the use of human rights experts and the identification of human rights impacts.

It was evident from our research that, in certain circumstances, human rights issues are so prominent and complex that a single company could not be expected to provide a solution through due diligence, though the individual company still has a responsibility to respect human rights in terms of the Guiding Principles. Many companies have indicated that a collective approach assists significantly where individual company action is unlikely to result in change. This not only facilitates engagement, but also enables the company to address the issues not only at its own factories but within the country's industry as a whole. However, more than one company highlighted that collective action also has its disadvantages. It usually takes time and resources to engage, and often a compromised approach is required in order to achieve consensus.

#### **4. Results: Use of Contractual Conditions**

Contractual conditions were the primary method identified in the survey for preventing or addressing human rights impacts: 77.42% of respondents across all sectors selected contractual conditions. This figure rises to 100% in the mining and technology sectors, and 83.33% in the energy sector. Other forms of contractual protection which were identified by interviewees include conditions precedent, indemnities, warranties or undertakings.

Interviewees indicated that where their contracts contain human rights clauses, they are able to authorise more in-depth human rights due diligence, both internally and in third party relationships. The nature and terms of the contractual provisions used towards this purpose differ widely depending on the sector, context and the nature of the leverage. Termination rights may be specifically negotiated before the contract is entered into.

Codes of conduct was the second most important tool selected by survey respondents for addressing human rights impacts – at 64.54% of all respondents.<sup>131</sup> In the mining sector, this figure rises to 100%. Codes of conduct can also interrelate to operational policies. Codes of conduct are

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<sup>131</sup> See BIICL Investment Treaty Forum, Bingham Centre for the Rule of Law, and Hogan Lovells 'Risk and Return: Foreign Direct Investment and the Rule of Law' (May 2015), in which 88% percent of senior executives surveyed regarded corporate codes of conduct on human rights and labour as either 'very effective' (40% of survey respondents) or 'somewhat effective' (48% of survey respondents) in 'improving the legal environment in host countries.' available at [http://www.biicl.org/documents/625\\_d4\\_fdi\\_main\\_report.pdf](http://www.biicl.org/documents/625_d4_fdi_main_report.pdf), 11.

often shorter in format, less detailed and set at a more global level within the company than operational policies, which are aimed at certain particular functions or operational areas.

Interviewees indicated that codes of conduct are particularly useful within supply chains. Codes of conduct would often form part of a contractual obligation, in which case a breach would result in a contractual remedy such as a refusal to renew a contract, termination, compensation or implementation of enforcement mechanisms. A few interviewees referred to these mechanisms as being accompanied by capacity-building efforts to promote compliance.

Another key mechanism for the implementation of human rights due diligence which was highlighted by survey respondents is engagement with external partners outside the strict terms of a contract. External engagement may be done by various methods such as through inspections or training, and could be understood as the exercising of leverage of third parties within a company's value chain.

Our survey showed that leverage – being the ability to effect change in the wrongful practices of an entity that causes harm<sup>132</sup>– and the perception of leverage, varies widely even within sectors, depending on the type of third party in question. This is demonstrated by survey responses from within the technology sector: 100% of technology respondents who answered a question about levels of leverage<sup>133</sup> indicated that they have no leverage whatsoever over purchasers, and 100% indicated that they had reasonable leverage over retailers/distributors. They also indicated that they had either no leverage whatsoever or very little leverage over government entities. They had enough leverage or significant leverage over small suppliers but very little leverage or some leverage over large suppliers.

Other interesting outcomes were that, whereas all financial sector respondents who replied to the question referred to having enough leverage over clients, half indicated that they had 'no leverage whatsoever' over governments. Two thirds of energy sectors respondents indicated that they had significant leverage over small suppliers and 42.86% that they have reasonable leverage over large suppliers. In the energy sector, two thirds of respondents to the question held themselves to have reasonable leverage over business entities in joint ventures or partnerships. Similarly, two thirds of energy respondents indicated that they had significant leverage over small suppliers; contrasted to less than a third who has significant leverage over large suppliers.

In the mining sector, more than half of respondents who answered this question indicated that they had significant leverage over small suppliers, and 45.45% that they have reasonable leverage over large suppliers. 40% indicated that they have some leverage over government entities. Similarly, in the pharmaceutical sector, half of the relevant respondents indicated that they had total control over manufacturer/producers, purchasers and/or retail distributors. In contrast, 66.67% indicated that they have very little leverage over government entities. It was indicated that much depends on individual circumstances, including whether the supplier is dependent on the company for revenue.

## **6. Analysis: Contractual Conditions**

It is evident that contractual provisions can facilitate some of the other methods for implementation of those human rights impacts that are identified. This includes inspections and training,

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<sup>132</sup> Commentary to Principle 19.

<sup>133</sup> This question (being shown as a graph about levels of leverage) was optional and was not completed by all survey respondents from the relevant sector.

engagement with business partners, and termination of business relationships. In this way, many of the most frequently utilised methods of implementation are interlinked through contractual clauses.

Where human rights issues arise during the duration of the contract, and termination is not feasible, the contract will most often not be renewed. It was highlighted by one interviewee that where these clauses are included, it is important they are utilised, in order to reinforce the message that they are binding. For example, where monitoring and inspection rights are provided for, they should be exercised. In this way, these clauses drive the obligation to monitor. Most interviewees indicated that termination of a business relationship would be considered as a last resort option, only to be utilised when other reasonable methods of engagement have failed or are patently futile. More than one interviewee referred to the obligation to undertake due diligence around the human rights impacts of the termination itself, particularly where the business is providing an essential good or service to vulnerable customers or clients.

It was clear that the extent of leverage which a company has over a third party will differ according to the circumstances, and that leverage is not necessarily equal to the level of shareholding or amounts involved in the transactions between the parties. For example, in the financial sector, the finance companies may have the maximum amount of leverage before entering into the particular transaction, though options still exist once the agreement has entered into force, and even minority shareholders may have certain levels of leverage.<sup>134</sup> It seems that leverage is generally perceived by our respondents to be higher with suppliers and retailers/distributors, and seems to be generally lower with governmental entities, except in the mining sector where 40% seemed to have some leverage. This is presumably due to the nature of mining, which usually requires large geographically-specific investments of considerable value to both the government and company. Nevertheless, our survey indicates that companies largely underestimate their power of leverage.

#### **D. MONITORING EFFECTIVENESS OF ACTIONS TAKEN**

##### **1. Introduction**

The third principal element of implementing human rights due diligence under the Guiding Principles is that a company should monitor any adverse human rights impacts through tracking and feedback. Principle 20 provides:

- In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:
- (a) Be based on appropriate qualitative and quantitative indicators;
  - (b) Draw on feedback from both internal and external sources, including affected stakeholders.<sup>135</sup>

These issues were considered in our research.

##### **2. Results: Tracking and Monitoring**

There was a difference in tracking or monitoring between survey respondents which have undertaken express human rights due diligence and those which have considered human rights only through other processes. Of the express human rights group, 74.19% indicate that they monitor or track the effectiveness of actions taken. Of the non-human rights specific group, 66.16% *do not* do such tracking or monitoring. Interestingly, those survey respondents who had only considered

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<sup>134</sup> See OHCHR Response, note 39, para 28.

<sup>135</sup> Principle 20.

human rights as part of other processes showed a higher rate of consulting stakeholders towards tracking or monitoring (72.73%) than those who had done express human rights due diligence (68.97%).

Our survey has shown that tracking or monitoring is done in varying ways, depending on sector. Monitoring is particularly complex in the financial sector. Only 16.67% of financial sector survey respondents track, audit or monitor the actions taken as a result of a human rights due diligence process. One respondent indicated that contractual relationships in investment banking pose barriers for such tracking of clients' actions.

Many respondents referred to the use of benchmarking tools and indicators in relation to human rights. These included the Global Reporting Initiative<sup>136</sup> and the Danish Institute for Human Rights Compliance Assessment Tool.<sup>137</sup> Indicators which do not refer to human rights expressly but are utilised towards compliance with regulated areas, such as labour rights or health and safety, were stated to be commonly used. Several of the interviewees are either in the process of developing, or have recently completed and activated, human rights scoring as part of their internal compliance mechanisms, yet one interviewee referred to the difficulty of measuring quantitatively a qualitative issue such as human rights. One interviewee at a financial company has recently developed a sophisticated rating tool with intelligent questionnaires that adapt depending on the relevant sector. Customers are required to complete the questionnaire annually. In this way, it is possible to determine whether the customer's impacts are above or below average, relative to others, through the use of standardised data.

The department or function responsible for tracking or monitoring differs between the groups which have done express human rights due diligence and non-human rights specific due diligence. In the former group, CSR<sup>138</sup> is most frequently responsible for tracking or monitoring, followed by legal.<sup>139</sup> In the latter group, operations management<sup>140</sup> is the most frequently responsible for tracking or monitoring, followed by human resources. In the express human rights due diligence group, only 12.9% selected the board or non-executive directors, and only 3.23% selected the CEO, as being responsible for the monitoring of the effectiveness of actions taken.<sup>141</sup>

### 3. Analysis: Tracking and Monitoring

It seems from our research that there is a correlation between undertaking human rights due diligence expressly in terms of the Guiding Principles, the likelihood of identifying actual impacts, and the prevalence of tracking or monitoring the effectiveness of any actions taken in response to identified impacts. It is noted that in the group which has undertaken express human rights due diligence, the CSR functions consistently comes out as the most used for identification, implementation and monitoring. In the non-human rights specific group, which has mainly focused on employment rights, human resources was most frequently responsible for identification and implementation, whereas operations management is most frequently responsible for the monitoring of what is presumed to be mostly employment rights-focused actions.

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<sup>136</sup> Global Reporting Initiative, available at <https://www.globalreporting.org>.

<sup>137</sup> Danish Institute for Human Rights, Compliance Assessment Tool: available at <https://hrca2.humanrightsbusiness.org/>.

<sup>138</sup> 32.26%.

<sup>139</sup> 22.58%.

<sup>140</sup> 33.33%.

<sup>141</sup> 29.17%.

As indicated previously, the process of identifying relevant groups of stakeholders is essential to the effectiveness of any human rights due diligence process. Our survey shows that consultation with employees is fairly routine in most sectors, presumably as a result of commonly being required by regulation. Similarly, in certain sectors such as extractives, consultations with local communities are fairly commonplace, presumably because of the operational risks connected to community dissent. However, other stakeholder groups, such as end users or transportation providers, may be entirely overlooked, which in turn may result in a company missing valuable information regarding the effectiveness of its human rights due diligence.

While there are sophisticated processes on the part of the non-human rights specific group, it is clear that the stakeholders so consulted by this group were predominantly employees, trade unions or employee representatives and consumers – with the exception that those respondents which previously indicated that they had considered human rights as part of community, indigenous or land rights due diligence also indicated that they consulted with communities. This is consistent with the non-human rights specific group's indication that they considered human rights predominantly as part of employment rights-related processes.

The Guiding Principles refer to the use of appropriate qualitative and quantitative indicators or measurements to track and monitor the effectiveness of actions taken.<sup>142</sup> No consistent pattern of benchmarking or indicators was given by our respondents. This is an area that would benefit companies in their decisions about human rights due diligence. There are some developments of benchmarks and indicators by which company policies and procedures can be measured for human rights compliance, such as the Human Rights Indicators for Business platform<sup>143</sup> and the Corporate Human Rights Benchmark, which exclusively and comprehensively ranks implementation of the Guiding Principles.<sup>144</sup> As these are fairly new, none of our survey respondents or interviewees had used it. Similarly, within sectors, human rights benchmarking systems are developing. For example, the Access to Medicines Index ranks pharmaceutical companies' efforts to improve access to medicine,<sup>145</sup> and the Higg Index enables companies within the apparel industry to score and benchmark their social, environmental and labour impacts.<sup>146</sup> It is evident that companies would value clearer benchmarking and indicators, not least as they acknowledge the difficulty of measuring human rights by themselves.

#### **4. Results: Means to Track and Monitor**

The survey included questions about grievance mechanisms, as they can be a means to track and monitor the human rights due diligence processes of a company. A number of the companies had grievance mechanisms which often included complaints mechanisms geared at employees, which are typically used to raise disputes about payment or sexual harassment incidents. Other mechanisms included whistleblowing channels, aimed at the identification of labour issues or corruption.

One method often used by survey respondents and interviewee companies was a free and anonymous telephone hotline, available in local languages. Other mechanisms used by the

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<sup>142</sup> Principle 20(a).

<sup>143</sup> Danish Institute for Human Rights, Human Rights Indicators for Business platform, available at <http://business-humanrights.org/en/platform-for-human-rights-indicators-for-business-hrib>.

<sup>144</sup> Corporate Human Rights Benchmark, available at <http://business-humanrights.org/en/corporate-human-rights-benchmark>.

<sup>145</sup> Access to Medicines Index, available at <http://www.accesstomedicineindex.org/what-index>.

<sup>146</sup> Higg Index, available at <http://apparelcoalition.org/the-higg-index/>.

companies we interviewed include a website, email address and fax number, an ombudsman for complaints with the relevant manager, human resources or compliance officer. One interviewee is making use of social media channels for its grievance mechanism.

The other issue relevant to tracking and monitoring is the reporting of findings. Over half<sup>147</sup> of all sector survey respondents indicated that they communicated the findings of their human rights due diligence process internally, and 28.57% did so externally. Companies which undertake express human rights due diligence are considerably more likely to report their findings internally,<sup>148</sup> and externally,<sup>149</sup> than companies who consider human rights only as part of other non-human rights processes.

Survey responses show that where reporting does take place externally, 81.25% of cross-sectoral respondents indicated that only portions of the findings were communicated. The main reason cited for partial reporting across all sectors is confidentiality. Reporting most frequently takes place in CSR reports, followed by standalone human rights reports, annual reports, community meetings and financial reports and websites or social media respectively.

One interviewee stated that they use the UN Guiding Principles Reporting Framework<sup>150</sup> not only for reporting purposes but as a management tool. By identifying the issues on which they need to report in terms of the Framework, they are able to engage at operational and country level in order to come up with an action plan to address these issues. Another company interviewee indicated that in addition to reporting, successful communication can often take place through in-person consultations with relevant stakeholders, as well as through online chats and robust questions and answers.

## 5. Analysis: Means to Track and Monitor

The Guiding Principles expect companies to establish or participate in effective operational-level grievance mechanisms accessible to affected individuals and communities.<sup>151</sup> Grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.<sup>152</sup> The Guiding Principles state that '[a] grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it.'<sup>153</sup>

What was seen from our survey was that most of the grievance mechanisms were aimed at internal stakeholders only. Companies using only confidential internal monitoring processes with no human rights focus may not benefit from information held by external stakeholders, and may find that their due diligence is inadequate as a result. Similarly, where the grievance mechanism is available by phone or internet it will limit responses from those communities who do not have this access. Indeed, direct personal engagement was highlighted by one interviewee as one of the most effective ways of dealing with complaints, and good practice was described by one interviewee as a 'collection' of grievance mechanism processes.

<sup>147</sup> 56%.

<sup>148</sup> 68.97% compared with 38.10% in the non-specific human rights due diligence group.

<sup>149</sup> 44.83% as compared with 5.00% in the non-specific human rights due diligence group.

<sup>150</sup> Mazars and Shift 'The UN Guiding Principles Reporting Framework' (2015) available at <http://www.unPrinciplereporting.org/>.

<sup>151</sup> Principle 29.

<sup>152</sup> Principle 31.

<sup>153</sup> Commentary to Principle 31.

While it is understandable that many companies may not wish to publish all their reports on human rights due diligence, the lack of publication can affect confidence in the process. It may also raise concerns as to whether human rights due diligence has occurred to any significant extent. With increasing legal requirements for reporting – as well as possible legal consequences – the demand for greater transparency of these reports will increase. Indeed, companies interviewed indicated that one important benefit of using a human rights lens was that it enables the company to present its information in a way that is increasingly expected and demanded by external stakeholders. This was confirmed by our roundtable discussions. This also includes the increasing litigation and other regulatory action which is taking place in the area of human rights due diligence. Using human rights as a framework helps the company to ensure that it is viewing its activities in terms of the standards (including legal standards) used by its external audience.

## VIII CONCLUSIONS

Our research has captured a considerable practice of human rights due diligence by companies across the world. This was enhanced by the in-depth interviews to give a picture of how many (mainly reasonably well-informed) companies are trying - and often struggling - to conduct human rights due diligence that is consistent with the Guiding Principles. Our analysis focussed on examining the responses by reference to the core elements of implementing due diligence as set out in Principles 15 and 17, being: identifying actual or potential human rights impacts; taking action to address these impacts; and tracking or monitoring the effectiveness of these actions.

Our research demonstrates clearly that a company which undertakes human rights due diligence expressly, with a human rights lens, is much more likely to identify adverse human rights impacts than through its ordinary non-specific human rights processes (such as labour procedures or health and safety processes). It also showed that existing non-specific human rights procedures may not be adequate for raising awareness of third party impacts. There is a stark contrast between those companies which have undertaken express human rights due diligence and those which only considered human rights in other due diligence processes: with nearly 80% of companies using express human rights due diligence do identify adverse impacts; whereas over 80% of companies using non-human rights specific due diligence, *do not* identify adverse impacts. Similarly, over 70% of the express human rights group identified adverse impacts linked to the activities of third part business relationships; whereas 70% of the non-human rights specific group had not done so.

Our research strongly suggests that where human rights due diligence is done expressly, human rights impacts of both the company itself and its business partners are significantly more likely to be identified, effectiveness of actions are significantly more likely to be tracked, human rights experts are more likely to be consulted, and a wider range of human rights are likely to be considered. Further, whereas more severe rights may be prioritised in terms of the Guiding Principles, prioritisation should not be based solely on assumptions about ‘salience’ of certain rights to the company or reactions to allegations in the industry, but on ongoing and comprehensive identification and human rights due diligence processes which expressly take into account the entire spectrum of human rights. Our research shows that a failure to undertake such an express human rights due diligence process could result in other human rights risks being overlooked. Thus the correlation between the use of an express human rights lens and a more effective process for the identification of human rights impacts is an important finding which emerges repeatedly in the results of our empirical research.

Some companies have indicated that human rights terminology has significantly assisted them in external engagement, depending on the audience. One company stated that before they had a human rights policy, engagements on 'fluffy concepts' such as social issues were seen as 'nice to have, but not essential'. However, once human rights language was prompted by the company's human rights policy, issues were recognised as being more important: 'Everyone knows you do not fool around with human rights'. This is especially relevant as, whereas business incentives to respect human rights may be driven by the perceived risks *to the business*, the human rights due diligence process is aimed at identifying and preventing the human rights risks faced by *rights-holders*.

The survey also showed that certain common elements feature in all the discussions about human rights due diligence. Many of these, including communication channels within management procedures, training, expertise of trainers, factual circumstances and attributed knowledge, are the same elements which courts and regulatory bodies take into account to determine whether due diligence was comprehensive enough and effectively implemented in other areas of law. The widespread use of these elements amongst those that are aiming to undertake human rights due diligence demonstrate an increasing understanding on the part of business that human rights due diligence requires a substantive, contextual and ongoing approach, as opposed to a mere formalistic tick-box exercise. It also raises the issue as to whether a CSR department is best placed to deal with human rights due diligence and indicates that both compliance and operational departments, including the legal department, need to be involved and appropriately trained in human rights due diligence.

The research indicated a number of the challenges faced by companies at this time. A key one was in relation to third parties. Even where no contractual relationship exists with, for example, second tier suppliers, legal and reputational risks may still arise.<sup>154</sup> Many companies struggle to satisfy themselves as to 'how far is far enough' into a supply chain. In addition, information on third parties' or country-specific human rights risks may not be readily available, and there may be withholding of information, which an audit may not find. Another key challenge highlighted was of changing the focus from risks to the business to impacts on rights-holders, in accordance with the approach of the Guiding Principles. One interviewee indicated that when risk is expressed as being a risk to business, it does not represent the seriousness of the issues and the severity with which they affect, and impact upon, rights-holders. This also indicates the challenges of incorporating risks to rights-holders into risk management processes which have thus far been aimed exclusively at identifying risks to the business. Nevertheless, our research demonstrates that by preventing adverse human rights impacts, human rights due diligence can offer protection against various risks to the business, including legal, financial, reputational and operational.

It is evident that developments in the law and other regulation are an important factor in how companies respond to human rights due diligence. Human rights due diligence is similar to due diligence in other legal contexts in that it is an objective standard by which a defendant can show compliance with a certain duty of care, and it is a contextual enquiry, which takes into account what the reasonable or prudent company knew or ought to have known in the circumstances. However, human rights due diligence is different from other due diligence in that it focusses on the human

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<sup>154</sup> Genevieve LeBaron and Jane Lister 'Ethical Audits and the Supply Chains of Global Corporations' Sheffield Political Economy Research Institute, (2016) *Global Political Economy Brief No. 1*, 3, comment that one of the reasons for the ineffectiveness of audits for the detecting and addressing of environmental and labour concerns states is that most audits tend to focus on tier 1 suppliers, which excludes 'labour agencies and subcontractors further down the supply chain in low-value activities such as harvesting, processing, dying and mining' and other human rights violations which are often found in 'sites with complex subcontracting arrangements.'



rights impact of the company's activities and not just on the business risk. Our research indicated that companies which are undertaking sophisticated human rights due diligence processes feel significantly more confident about dealing with possible legal claims, as they will be able to show the extent of steps they have taken. For example, an interviewee from a large multinational indicated that there is a move away from the past concerns that more reporting leads to more liabilities, with their legal counsel being keen for more transparency of their human rights processes. Another company indicated that if a company has internal initiatives in place, sets up policies, activates multifunctional teams, and discloses those activities publically, it was felt that the public would not really blame them for not doing anything, because they were doing something within their control.

Interestingly, our research confirmed that companies would generally prefer clearer regulation over uncertainty and inconsistency,<sup>155</sup> as it was indicated that where adherence to certain rights forms part of regulation, it is much easier to obtain support internally in a company. For example, it has been shown that those human rights which are generally regulated, such as health and safety and labour rights, have a higher likelihood of being considered as part of due diligence processes, most notably by companies which are not undertaking comprehensive or express human rights due diligence.<sup>156</sup> One interviewee stated that whereas they previously wanted to 'think positively', they had changed their mind and now believed that legislative change is needed, as 'sometimes you just need the forceful push.' Another interviewee stated that regulation tends to 'mainstream' the issues and referred to the example of statutory requirements regarding the percentage of women on the board, which resulted in the issue swiftly being 'fixed' after the legislation was adopted.

One new and vital aspect uncovered by our research was that, although individual companies and sectors do differ, the approach to human rights due diligence is overwhelmingly similar across sectors and corporate structures. The following steps were the most prominent components of human rights due diligence as established by our research:

- Initial identification through human rights impact assessment, desktop research or gap analysis, perhaps followed or complemented by interviews;
- Risk assessment of human rights risks, including risks to rights-holders;
- Prioritisation of human rights issues;
- Development of action plans;
- Strategic direction at the board level;
- Cross-functionality: steering groups, working groups, interaction between relevant functions;
- Integration of human rights into internal compliance mechanisms, scoring and tools;
- Translation and application of human rights to apply to each function;
- Inclusion in contractual provisions;
- Having codes of conduct and operational policies;
- Providing training; and
- Ensuring that there are effective grievance mechanisms.

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<sup>155</sup> Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (Framework) A/HRC/8/5 (7 April 2008), para 22: 'Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business'.

<sup>156</sup> The correlation between higher rates of due diligence and regulation has been evidenced in South Africa in relation to black economic empowerment: Ralph Hamman, Paresha Sinha, Farai Kapfudzaruwa and Christoph Schild, 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence' (2009) 87 *Journal of Business Ethics* 453.

These components are applied differently within each company. In some companies, compliance with human rights standards will take place centrally (at headquarters level), in other companies where operations are decentralised according to country, region, or individual business operations, compliance may be overseen at those levels.<sup>157</sup> Those interviewed were all at various stages in undertaking these steps. Most interviewees are currently at the beginning phases of at least one or two of the components, and identified finalising and rolling these out as part of their main mandate for the next year or two. Many have moved further on some components than on others. None of those interviewed viewed themselves as having already completed all the work that they intend to do on all the components

One or more of these components are being undertaken to varying degrees within all the companies we interviewed, although in many companies they are not expressly referred to as steps within a human rights due diligence process. Many of the interviewees emphasised their intention – and often express mandate – to spend the next year or more focussing on reviewing, updating or implementing specific components. There is, accordingly, a forward-looking, ongoing process of learning by doing. As our research makes clear, this process of human rights due diligence requires detailed knowledge of company practices to ensure that any developments in regulation assists both the companies and those affected by their human rights impacts.

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<sup>157</sup> One interviewee at a large conglomerate indicated that one of its businesses has 150 people working in compliance, which enables human rights oversight to be introduced at a level closer to the actual business activities.