Short Course
Business and Human Rights

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INTRODUCTION TO BUSINESS AND HUMAN RIGHTS
Introduction

- What do you associate with the phrase ‘business and human right’?  
  - Which business?  
  - Which human rights?  
  - What is the link?

- What do you think are the most serious (negative) impacts on human rights by business?  
  - What about positive impacts?
History

- Transatlantic slave trade between XVI and XIX century
- Colonisation and self-determination of post-colonial states
- Industrial revolution
- War World II and Nuremberg trials
- Changes in corporate regulation, consume and production since 1800

- Emblematic modern cases
  - Bophal disaster in India 1984
  - Niger Delta
  - Collapse of Rana Plaza in Bangladesh 2013
  - Brumadinho dam disaster 2019
Origin and Development

- 1948 UN Declaration of Human Rights: “every organ of society”
- From 1960s – Academic debate and CSOs campaigns
- 1970s Attempt to UN Code of Conduct
- 2003 UN Draft Norms
- 2005 Appointment of UN Special Representative on business and human rights
- 2011 Endorsement of UN Guiding Principles on business and human rights
- 2011 Creation of UN Working Group on business and human rights
- 2013 Calls for UN treaty on business and human rights
- 2014 Establishment of intergovernmental working group and beginning of negotiations at the UN towards a binding treaty
Case Study: Supply Chain

**Context:**
- Sweet Chocolate co., a UK chocolate company receives some of its cacao beans from one of its subsidiaries, Chocolate Dulce co., which is domiciled in Ecuador, and the rest of its supplies from one supplier in Ivory Coast, Chocolat Sucré co., which only supplies its products to Sweet Chocolate co. There is a verified allegation of the use of child labour in each of Chocolate Dulce co. and Chocolat Sucré co.’s operations. Sweet Chocolate co. has a human rights policy, which includes a prohibition on child and forced labour but claims that it does not control the employment practices of any of its subsidiaries or suppliers.

**Issues:**
- Is there a responsibility by the company in relation to its subsidiary?
- Is there a responsibility by the company in relation to its main supplier?
- What are the responsibility of the home state and the host states?
- What type of remedies are available to child labour victims?
- What additional corporate responsibility avenues are available – including for consumers?
Short Course: Business and Human Rights
3 February 2020

11:15 – 11:30   BREAK
Short Course:
Business and Human Rights

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Short Course: Business and Human Rights
3 February 2020

www.youtube.com/watch?v=BCoL6JVZHrA
UN Guiding Principles on Business and Human Rights (UNGPs) Framework

• 2011, John Ruggie, UN Special Representative on Human Rights and Transnational Corporations
• Unanimously adopted by UN Human Rights Council
• Not legally binding, but authoritative (“soft law”)
• Increasingly being incorporated into “hard law”
• Three Pillars:
  I: State responsibility to protect human rights
  II: Corporate responsibility to respect human rights
  III: Effective access to remedies
UN Guiding Principles on Business and Human Rights (UNGPs) Framework

Overview:

- “Business enterprises” v companies
- “Human rights impacts” v violations
- Companies can violate all “internationally recognized” human rights (civil, political, economic, social, cultural, labour and collective rights)
- Applies to all companies, regardless of size
- Applies wherever company operates, over and above local laws
Pillar I: State Duty to Protect Human Rights

**GP 1:** “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”

**GP 2:** “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operation.”
Pillar I: State Duty to Protect Human Rights

- State agents and non-state actors
- Conflict-affected areas:
  
  “Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses…”
- Regulate and control corporations: home state, host state, transnational:
  
  “…domiciled in their territory and/or jurisdiction respect human rights throughout their operations”
- Export credit and public procurement
- Examples of incorporation into national & EU law
- National Action Plans (UNGP 8: policy coherence)
Pillar I: State Duty to Protect Human Rights

GP 3: In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.
Pillar II: Corporate Responsibility to Respect Human Rights

GP 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.”

- Responsibility: own impacts v. third parties - “leverage”
- Value chain & supply chain
- CSR v Human Rights
Corporate Responsibility to Respect Human Rights

GP 15:

“In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”
Corporate Responsibility to Respect Human Rights

GP 17: ‘In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.’

The process should include

• assessing actual and potential human rights impacts
• integrating and acting upon the findings
• tracking responses
• and communicating how impacts are addressed.
Corporate Responsibility to Respect Human Rights

Human rights due diligence

Should cover:
• adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or
• which may be directly linked to its operations, products or services by its business relationships

Will vary in complexity with
• the size of the business enterprise
• the risk of severe human rights impacts
• and the nature and context of its operations

HRDD should:
• Be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.
• Take into account all human rights
• Beyond the risks to the company; risks to the rights-holder
• Prioritisation based on severity ("salient" risks)
BIICL and NRF HRDD project I: key findings

Methodology

- Survey – 150+ businesses worldwide
- Interviews – qualitative
- Roundtables

Results

- Identified adverse impacts linked to their operations
  - 19% of Survey Respondents
  - 77% of Survey Respondents

- Identified adverse impacts linked to third parties
  - 29%
  - 74%

- Monitor effectiveness of actions taken related to impacts
  - 33%
  - 74%

% of Survey Respondents

- Companies who have not undertaken an express human rights due diligence process
- Companies who have undertaken express human rights due diligence process
HRDD in Supply Chains

Key Themes & Observations

• Beyond compliance & audit: a deeply embedded process
• Overview of affected rights
• Small and medium-sized enterprises
• Solutions beyond the first tier
• Collective action
• The supplier’s perspective
• The role of states & regulation
• Remedy to impacted people
• The drivers for supply chain-related HRDD
• Internal challenges and opportunities
HRDD in Supply Chains

Recommendations

• HRDD robust, substantive & ongoing process
• Unified & cross-functional internal approach
• Governance commitments at most senior level
• Internal translation
• Include transportation & distribution services
• Auditors should have human rights experience
• Collective action (industry / multi-stakeholder)
• Explore technology for traceability (but ensure that not infringing human rights)
• Explore HRDD beyond first tier
• Participate in consultation processes for regulatory reforms
UNGP 23: Conflicts with national law

Guiding Principle 23

In all contexts, business enterprises should:

(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;

(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;

(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.
UNGP 23: Conflicts with national law

Commentary to Guiding Principle 23

‘…all business enterprises have the same responsibility to respect human rights wherever they operate.

Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.’

• Ties in with UNGP’s description of human rights due diligence (HRDD):
  • Context-specific
  • Demonstrate efforts
UNGP 23: Conflicts with national law

Interpretive Guide on the Corporate Responsibility to Respect Human Rights (OHCHR)

- ‘Enterprises need to be prepared with a basic “compass” for when they find themselves in such situations, since, by definition, there will be no easy or standard answers.’

- HRDD process:
  - First step: understand exact nature, scope and implications of the conflict
  - Reveal where it may be faced with this kind of dilemma and what measures could prevent or mitigate the risk.
  - Embed respect for human rights & prepare personnel for ethical dilemmas

- No blueprint
UNGP 23: Conflicts with national law
Pillar III: Access to Remedy

GP 25: States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

GP 29: Business…should establish or participate in effective operational level grievance mechanisms for individuals and communities who may be adversely impacted

GP 31: Effectiveness criteria: legitimate; accessible; predictable; equitable; transparent; rights-compatible; source of continuous learning

International remedies

- OECD Guidelines on Multinational Enterprises 2011
  - National Contact Points
  - Committee on the Rights of the Child, General Comment 16, paras 66-67: ‘Children often find it difficult to access the justice system to seek effective remedies for abuse or violations of their rights when business enterprises are involved…. There are particular difficulties in obtaining remedy for abuses that occur in the context of businesses’ global operations’.
Access to a Remedy - National

Case law

- US, UK, Netherlands, Canada, France, Germany, South Africa, etc.

Legal barriers

- No binding obligations / cause of action
- Use of tort / consumer rights / criminal procedure / creative other avenues

Procedural barriers

- Location / forum non convenience (home / host state)
- Costs, legal aid
- Legal standing / collective claims
- Expert evidence, discovery of documents
- Type of claim (human rights?)
Access to a Remedy - International

International remedies

• OECD Guidelines on Multinational Enterprises 2011

  • National Contact Points

  • Committee on the Rights of the Child, General Comment 16, paras 66-67: ‘Children often find it difficult to access the justice system to seek effective remedies for abuse or violations of their rights when business enterprises are involved… There are particular difficulties in obtaining remedy for abuses that occur in the context of businesses’ global operations’.
Access to a Remedy – Grievance Mechanism

Operational-level grievance mechanisms

• Suitable for early stage / less severe harms?
• Factors: Legitimate; accessible; predictable; equitable; transparent; rights-compatible; source of continuous learning
Key Concepts introduced by UNGPs

- Corporate responsibility for human rights
- HRDD ongoing
- Risks to rights-holders v company risks
- Suspension of “corporate veil”
  - Responsibilities for supply chain & beyond
- Corporate buy-in
- Nike CEO:
  “[We do not like the fact that] the Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse”
- Central role of state & regulation
  - Business welcoming regulation, legal certainty
  - John Ruggie: “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.”
Short Course: Business and Human Rights
3 February 2020

13:00 – 14:00
LUNCH
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Business and Human Rights in National Law
Current developments

• Incremental development of national case-law:
  • The notion of parent company liability has gained traction
  • Developments also in relation to supply chain liability

• Legislative developments on mandatory human rights due diligence laws (HRDD)
Case-law

• Vedanta case in the UK,
  • Filed by 1,826 Zambian villagers in the UK against parent company, Vedanta, and its Zambian subsidiary, KCM
  • Toxic effluent discharged from the Nchanga mine into the waterways over many years
Case-law

- Vedanta case:
  - Claimants relied on Article 4 of the Brussels I Recast Regulation to establish the jurisdiction of the UK courts over the parent company.

  **CHAPTER II**
  **JURISDICTION**
  **SECTION 1**
  **General provisions**

  **Article 4**

  1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

  - Possibility to use the *forum non conveniens* doctrine excluded by the ECJ in *Owusu v Jackson* (2015).
Case-law

- Vedanta case:

  - Scope of application of Brussels I Recast Regulation limited to EU domiciled defendants
  - Jurisdiction over third states defendants governed by the PIL rules of the forum

    - Claimants relied on English PIL rules to establish jurisdiction of the English courts against Zambian subsidiary: paragraph 3.1 of CPR Practice Direction 6B

Service out of the jurisdiction where permission is required

3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where —

General Grounds

(1) A claim is made for a remedy against a person domiciled within the jurisdiction.

(2) A claim is made for an injunction(GL) ordering the defendant to do or refrain from doing an act within the jurisdiction.

(3) A claim is made against a person (the defendant) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and —

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
Case-law

- Vedanta case:
  - Defendants challenged the jurisdiction of English courts:
    - abuse of EU law: use of Vedanta as an anchor defendant, "purely as a vehicle for attracting English jurisdiction against their real target defendant, KCM, by means of the necessary or proper party gateway"
    - no real triable issue against Vedanta as the parent company did not owe the claimants a duty of care under English law.
Case-law

- Vedanta case:
  - Critical question summarized by Lord Briggs:

  "Whether Vedanta sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants'.
Case-law

• **Vedanta case:**
  
  • The Supreme Court identified **three situations** in which a parent company may incur a duty of care in respect of the activities of a subsidiary:
  
  • Disseminating **defective or inadequate group-wide polices and guidelines**
  
  • **Taking active steps**, by training supervision and enforcement, to implement group-wide policies; and
  
  • **Holding itself out**, in published materials, as exercising a certain degree of supervision and control of its subsidiaries, even if it does not in fact do so.
Question for debate: does the decision create perverse incentives whereby parent companies may decide to distance themselves from their subsidiaries and not to devise policies and commitments for fear of exposing themselves to risks of legal liability?
Case-law

• **Question for debate:** does the decision create perverse incentives whereby parent companies may decide to distance themselves from their subsidiaries and not to devise policies and commitments for fear of exposing themselves to risks of legal liability?

**Practical considerations**

The Vedanta case may be of concern for multinational companies as demonstrating a widening of the circumstances in which the English Courts are prepared to find a good arguable case that a UK parent company may owe a duty of care for the activities of its overseas subsidiaries. While the risks were highlighted in *Shell* and *Unilever*, Vedanta shows greater scope for a duty of care to be imposed.

In light of this, it is now even more important for commercial groups to maintain (as far as practicable) a clear operational division between the activities of a parent company and its subsidiaries. There are a number of ways in which the risk of a successful claim can be reduced:

- it is still possible for groups to apply risk policies across its whole group. However the parent company should take care not to administer those policies on behalf of the subsidiaries;
- public statements by a parent company as to group-wide policies and standards should be considered carefully so as to not constitute an assertion of responsibility for their implementation; and
- decision-making revolving around a particular subsidiary should be taken by that subsidiary’s board, independently of the parent company.
Case-law

• Vedanta case:
  • In April 2019, the Supreme Court allowed the claims against both parent company and subsidiary to proceed in English courts
  • real risk that claimants would not have access to substantive justice in Zambia.
    - Lack of access to funding to bring a group claim
    - Lack of legal teams with the necessary experience
  • Foum necessitatis
Case-law

• **Question for debate**: does this decision increase the risk to see the reintroduction of the doctrine of *forum non conveniens* post-Brexit?
Case-law

- **Question for debate**: does this decision increase the risk to see the reintroduction of the doctrine of *forum non conveniens* post-Brexit?

87. In conclusion, it is sensible to stand back and look at the matter in the round. This case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants’ choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia. For those reasons I would have concluded that the claimants had failed to demonstrate that England is the proper place for the trial of their claims against these defendants, having regard to the interests of the parties and the ends of justice.
Case-law

- **Shell case in the Netherlands:**
- Filed by 4 Nigerian farmers in the Netherlands against parent company Shell and its Nigerian subsidiary, SPDC.
- **Oil spills** which resulted in environmental damage affecting the health and livelihood of local communities in the Niger Delta.
Case-law

• **Shell case:**

• On 18 December 2015, the Court of Appeal of The Hague allowed the claims against both parent company and subsidiary to **proceed in Dutch courts**.

‘*it cannot be ruled out in advance that a parent company may, in certain circumstances, be liable for damages resulting from acts or omissions of a (sub)subsidiary.*’

‘*the more so if it has made the prevention of environmental damage by the activities of group companies a spearhead and is, to a certain degree, actively involved in and managing the business operations of such companies*.‘
6.9 The assertion by Shell that the parent company did not know about the spillage and the condition and maintenance of the pipeline locally does not seem to be an adequate defence in all cases, particularly not if sabotage ceases to be a cause of damage. Considering, inter alia, (i) that Shell sets itself goals and ambitions with regard to, for instance, the environment, and has defined a group policy to achieve these goals and ambitions in a coordinated and uniform way, and (ii) that RDS (like the former parent company) monitors compliance with these group standards and this group policy, such questions arise as: (a) which (maintenance) standards applied to an old pipeline whose insides were no longer monitored like the one in question; (b) were these maintenance standards complied with; (c) if so, what is this evidenced by, and if not, shouldn’t this have been noted within the context of the supervision performed by the parent company (the audits); (d) shouldn’t it have been noted with an adequate reporting system in place and (e) why was it not. Another question is (f) whether the parent company -considering the autonomy and individual responsibility of (the management of) SPDC- was sufficiently equipped (as far as knowledge, possibilities and means are concerned) to intervene adequately in case of evident negligence by SPDC.
Case-law

• Parent company liability cases:
  • international standards on human rights due diligence are increasingly relevant in determining the degree of control and supervision that a parent company should have exercised over its subsidiary.
  • The *de facto* control exercised by a lead company over its business partners might also be relevant for cases of supply chain liability.
Case-law

- **KiK case in Germany**

  - Filed in Germany by four Pakistani victims and relatives of victims of a textile factory fire that occurred in Pakistan against German retailer KiK.
Case-law

• KiK case in Germany

- Claimants argued that KiK owed them a duty of care to ensure a healthy and safe working environment
  • Breached that duty by failing to do its share to prevent the harm.
  • Kik = main buyer, purchased 75% of the factory output
  • Had established its own Suppliers’ Code of Conduct
  • Appointed auditors to inspect the factory
Case-law

- KiK case in Germany
  - Claims rejected on the basis that there were time-barred under the applicable Pakistani law.
Case-law

- **Boliden case in Sweden**
  - Claims filed in Sweden by the association Arica Victims KB, representing 707 Chilean residents against Swedish mining company Boliden.
  - Dumping of 20,000 tons of mining waste (untreated and unprocessed) in Chile by Boliden’s contractor.
Case-law

• Boliden case in Sweden
  - Claimants argued that Boliden owed them a duty of care.
  - Breached that duty by failing to ensure that the sludge was appropriately processed by its Chilean contractor.
Case-law

- **Boliden case in Sweden**

  - At first instance, the court found it:

    ‘remarkable and negligent of Boliden to have continued the contractual relationship with Promel after realizing any exported waste would end up in an uncovered pile in close proximity to already populated areas, despite knowing such storage conditions would not be accepted at their plant in Sweden.’

  - On appeal, the claims were rejected for being time-barred.
Case-law

- Lack of decision on the merits to clarify the conditions of supply chain liability.
  - Legal uncertainty
- Progressive defragmentation of the liability of parent companies likely to be extended into supply chains settings.
Mini conclusion

• Limitations of case-law to ensure corporate accountability despite recent developments
  • Risk of legal liability for companies remains limited.

• Recent study for the European Parliament – mapped out the relevant legal proceedings brought in Europe against EU-based companies accused of human rights and environmental abuses in third countries over the past decade.
  - 35 cases in total, out of which
    - 13 cases dismissed
    - 4 cases settled out-of-court
    - 17 still ongoing
    - Only 1 led to a positive judicial outcome for the claimants.
Companies’ practices

- Limitations of the voluntary approaches
- In practice, implementation by business has been very poor.
  - 2019 Corporate Human Rights Benchmark assessment of 200 of the largest companies in the world

1. 2019 Results: Overall

This section looks at the overall picture and takes the 2019 results as a snapshot in time of the corporate human rights performance of 200 of the largest global companies in four high risk sectors (agricultural products, apparel, extractives and ICT manufacturing). The CHRB observe constantly low scores across all measurement themes, contributing to a disappointingly low overall score of 24.3%.

![Graph showing 2019 results overall](image)

A number of companies score zero on all the indicators across a whole measurement theme, which means that the CHRB couldn’t find enough publicly available information to give even a half mark on any of the indicators relating to:

- A.1 Commitments to respect human rights - 8 companies score 0 on all indicators across this theme
- A.2 Board level accountability for human rights - 63 companies score 0 on all indicators across this theme
- A.3 Embedding respect for human rights in company management systems - 29 companies score 0 on all indicators across this theme
- B.2 Human rights due diligence - 95 companies score 0 on all indicators across this theme
- C.5 Remedy and grievance mechanisms - 19 companies score 0 on all indicators across this theme
- D. Performance: Dealing with key risks and enabling factors for human rights - 19 companies score 0 on all indicators across this theme
- E. Performance: Responses to serious allegations - 2 companies score 0 on all indicators across this theme
- F. Transparency - 4 companies score 0 on all indicators across this theme
Legislative Landscape

- In the UNGPs, the corporate responsibility to respect is also a moral (not legal) obligation which is grounded in social expectations.
Legislative Landscape

• Legislative initiatives and campaigns *spurring across Europe and beyond.*

• Dedicated portal launched by the Business and Human Rights Resource Centre in May 2019:

  - **13 countries** where such initiatives have been discussed or adopted in Europe: Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.
Legislative Landscape

• Letter from John Ruggie clarifying the role of legislative measures:

Therefore, contrary to the letter’s assertion, there is no inconsistency in states adopting measures that require businesses to meet their responsibility to respect human rights through legislation. States similarly may adopt legislative measures to encourage, support or incentivize businesses to do so. Indeed, Guiding Principle 3 and its extensive commentary emphasize that states are expected to adopt a mix of measures – voluntary and mandatory, national and international – to foster business respect for human rights in practice. By doing so they are not “imposing direct liability [on] companies for states obligations,” as the letter claims. They are doing what we expect governments to do: to govern, and to govern in the public interest.
Legislative Landscape

• Growing support from certain large multinational corporations and investors

Author: Business & Human Rights Resource Centre, Published on: 6 June 2019

Large businesses (>1 bn € turnover) and associations with public statements and endorsements in support of mandatory human rights due diligence (non-comprehensive list), last updated 23 January 2020

This chart is part of our Mandatory Due Diligence portal.

<table>
<thead>
<tr>
<th>Company (Country)</th>
<th>Employees</th>
<th>Annual turnover (bn €)</th>
<th>Recent source</th>
<th>Refers to discussions in…</th>
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</thead>
<tbody>
<tr>
<td>Joint company letter</td>
<td>29 Dutch companies</td>
<td>Letter of support, 03/10/17</td>
<td>Netherlands</td>
<td></td>
</tr>
<tr>
<td>Joint company and NGO campaign</td>
<td>&gt;100 Finnish companies, NGOs and trade unions</td>
<td>Campaign support, 24/09/2018 (ongoing)</td>
<td>Finland</td>
<td></td>
</tr>
<tr>
<td>Joint company statement</td>
<td>3 of the world’s largest cocoa companies plus Fairtrade, Rainforest Alliance and VOICE</td>
<td>Joint statement, 02/12/2019</td>
<td>EU</td>
<td></td>
</tr>
<tr>
<td>Joint company statement</td>
<td>50 companies from with business in Germany plus 1 investor working group</td>
<td>Joint statement, 09/12/2019 (ongoing)</td>
<td>Germany, EU</td>
<td></td>
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</tbody>
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The Investor Case for Mandatory Human Rights Due Diligence

When done responsibly, business activities can be a driving force for prosperity and inclusive economic development, helping to achieve the urgent vision laid out by the 2030 Sustainable Development Agenda. Yet, far too often, businesses of all sectors and sizes may harm human rights wherever they operate, fuelling a global environment where people’s fundamental welfare and dignity remain under threat.

The undersigned 71 investors, representing US$Xbn in assets under management, believe that all business actors have a responsibility to respect human rights and that the process of continuously conducting human rights due diligence is a core requirement for all companies – regardless of size, sector, or location – in fulfilling that responsibility. We also believe that governments have a duty to protect against human rights abuse by business through effective regulatory measures, particularly where voluntary corporate measures continue to leave significant gaps in human rights protections.

We therefore call on all governments to develop, implement, and enforce mandatory human rights due diligence requirements for all companies headquartered or operating within their own jurisdictions or, where appropriate, to further strengthen these regulatory regimes where they already exist.

This article is part of our special report Upping the ante on human rights due diligence.

Companies will support EU law on human rights due diligence, but want assurances that it will not expose them to increased risk of lawsuits, argues Virginie Mahin.

Virginie Mahin is the global social sustainability & human rights lead for Mondelēz International.

She spoke with EURACTIV’s Benjamin Fox.

What particular elements of a human rights due diligence (HRDD) law are most important to reaching your aim of eradicating forced labour and deforestation from supply chains?

Many companies like ours are already implementing due diligence measures and we want to avoid a patchwork of legislation at national level…It’s important to have a level playing field.

It’s important to have an HRDD law that from the beginning recognises that those issues need collective and pre-competitive action…and need to involve local officials and civil society.

But there is no quick and easy fix. Due diligence is about finding about what is going on in supply chains. Finding about it doesn’t necessarily mean that we can quickly fix it.

But it’s not only governments of consuming countries but also producing country governments that have a duty to protect human rights. That is laid down in the UN guiding principles on business and human rights.
Legislative landscape

- **Broad spectrum of initiatives** implementing the UNGP’s HRDD requirements in Europe:
  - **Reporting regulation**: focus on one part of the HRDD process which is the communication element;
  - **Mandatory human rights due diligence regulation**: focusing on a specific human rights issue;
  - **Overarching mandatory human rights and environmental due diligence** for business-related human rights and environmental harms.
### Reporting Regulation

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Scope</th>
<th>Prescribed Duties</th>
<th>Enforcement</th>
<th>Implementation</th>
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</thead>
</table>
| **The UK Modern Slavery Act, s. 54**     | Large companies whose total turnover is at least £36 million, and which carry on 'a business, or part or a business in any part of the United Kingdom' | Publish an annual statement of the steps that the organisation has taken 'to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, and (ii) in any part of its own business', or, alternatively 'a statement that the organisation has taken no such steps'. Includes a non-exhaustive list of information that may be included, which encompass 'its due diligence processes in relation to slavery and human trafficking'. | The Secretary of State may seek an injunction through the high court in case of non-compliance (never used in practice) | Approximately 12 000 companies subjected to the law according to estimates  
Contributed to raising awareness of these issues  
But widespread issues of non compliance in practice (40% of companies)  
Many companies approaching it as a mere tick-box exercise |
## Issue-specific mHRDD

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Scope</th>
<th>Prescribed Duties</th>
<th>Enforcement</th>
<th>Implementation</th>
</tr>
</thead>
</table>
| **Dutch Child Labour Due Diligence Act (Wet Zorgplicht Kinderarbeid)** adopted on 14 May 2019 | Companies that sell goods or provide services to Dutch end-users. | Exercise due diligence in relations to the risks of child labour being used in their supply chains  
1) Companies are required to investigate whether there is a reasonable suspicion that their goods or services have been produced using child labour  
2) Should such a suspicion arise, the company should put in place and implement an action plan in order to address it  
3) Companies are required to issue a statement declaring that it exercised due diligence | Public supervising authority charged with the supervision of compliance with the law.  
Any third parties affected by a company’s failure to comply can submit a complaint to that authority (after having first submitted it to the company)  
The supervising authority may impose an administrative fine in case of non-compliance, and repeat offenders can incur criminal sanctions. | Not yet in force  
General Administrative Orders to be issued |
### Overarching mHRDD

<table>
<thead>
<tr>
<th>Legislation</th>
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<th>Prescribed Duties</th>
<th>Enforcement</th>
<th>Implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>French Duty of Vigilance Law</strong></td>
<td>Large French companies with at least 5,000 employees in France or 10,000 employees worldwide.</td>
<td><strong>Duty of vigilance</strong> on large companies requiring them to effectively implement and publish a ‘vigilance plan’ setting out the due diligence measures taken in relation to the companies’ own activities, the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship.</td>
<td>Interested parties can seek an injunction with the French court to order the company to comply, with periodic penalty payments in case of non-compliance.</td>
<td>Higher percentage of companies have dedicated human rights policies. But, in practice a majority of the vigilance plans tend to focus on the risks to the business itself rather than the risks to third parties or the environment.</td>
</tr>
</tbody>
</table>
| **adopted in 2017**                     |                                                                       | The vigilance plan must include 5 elements:  
  - a mapping of the risks involved,  
  - procedures to regularly assess risks associated with the activities of subsidiaries, subcontractors or suppliers with whom the company has an established business relationship;  
  - actions to mitigate risks and prevent serious harm  
  - a whistleblowing mechanism  
  - mechanism to monitor measures that have been implemented and evaluate their effectiveness. |                                                                                                                                                                                                               |                                                                                                                                                                                                           |
Concluding Remarks

• **Growing momentum** in support for mandatory human rights due diligence legislation both at the domestic and at the EU level.

• **Draft legislations** on overriding mandatory due diligence legislation currently in discussions in Germany, Norway, and Switzerland.

• BIICL study for the European Commission on Due Diligence Requirements Through the Supply Chains exploring the regulatory options at the EU-level.
Short Course: Business and Human Rights
3 February 2020

15:30 – 15:45  BREAK
4

BUSINESS AND HUMAN RIGHTS IN INTERNATIONAL LAW
International Regulation

**UNGPs**
- Framework for regulation; State duty to protect; corporate responsibility to respect; access to remedies; National Action Plans

**OECD**
- Guidance on responsible business conduct
- National Contact Points: complaints; external review; mediation; report

**Sector**
- Best practices; expectations of standards; membership consequences
- Equator Principles; IFC Performance Standards; ILO

**Treaty**
- UN level; drafts produced; negotiations; State obligations to regulate corporations
International treaty on business and human rights

- 2013 Calls for UN treaty on business and human rights
- 2014 Establishment of intergovernmental working group and beginning of negotiations at the UN towards a binding treaty
Business and human rights treaty – timeline

• 2013 Calls for UN treaty on business and human rights
• June 2014 resolution and establishment of intergovernmental working group
• July 2015 to October 2019 four sessions of negotiations at the UN
• Sept 2018 Elements of treaty
• July 2019 Revised draft treaty
Revised Draft

• ** Purpose **
  
  ➢ To “strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities”, “prevent the occurrence of such violations”, “ensure effective access to justice and remedy for victims of human rights violations”, and to “promote and strengthen international cooperation to prevent human rights violations.” (Art 2)

• ** Scope and Adjudicative Jurisdiction **
  
  ➢ The Treaty covers “all human rights” and applies to “all business activities, including but not limited to those of transnational character”. (Art 3)

  ➢ Jurisdiction vests in the courts of the State where the violations occurred, the victims are domiciled, or the natural or legal persons alleged to have committed the violations are domiciled.
• Rights and Definitions of Victims

- Victims are defined as “any person or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violations or abuse” (Art. 1).

- State parties shall (Art 4):
  - Provide their domestic judicial authorities with jurisdiction to fulfill victims’ right to submit claims and access remedies
  - Investigate all human rights violations and take action against perpetrators
  - Provide mechanisms for the enforcement of remedies
  - Require courts to reverse the burden of proof to fulfill victims’ access to justice and remedy
• Prevention and Due Diligence

➤ States shall ensure that their domestic legislation requires “all persons conducting business activities, including those of transnational character, in their territory or jurisdiction, to respect human rights and prevent violations or abuses” (Art. 5 (1)).

➤ States shall adopt measures to ensure that all persons conducting business activities undertake human rights due diligence (Art. 5(2)). Due diligence includes: (a) identifying and assessing actual and potential violations; (b) taking appropriate actions to prevent violations; (c) monitoring the human rights impact of business activities; (d) communicating to stakeholders and accounting for the policies and measures adopted to identify, assess, prevent and monitor actual or potential human rights violations. Each due diligence obligation applies to a business’s activities and contractual relationships.

➤ States shall adopt and implement enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas…” (Art. 5 (3) (e)).
Legal Liability

- States shall “ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities”. (Art 6)

- States shall ensure that their domestic jurisdiction provides for sanctions and reparations where business activities have caused harm to victims (Art. 6(4)) and provide for liability of persons conducting business activities for its failure to prevent another person with whom it has a contractual relationship from causing harm to third parties when there is sufficient control over the party causing the harm, or risks of human rights violations were foreseeable (Art. 6(6)).

- States shall “ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons” for specific criminal offences enumerated in Art. 6 (7) (a – k).
OECD Guidelines

- **The OECD Guidelines for Multinational Enterprises** are an annex to the OECD Declaration on International Investment and Multinational Enterprises

- Adopted in 1976, most recently revised in 2011.

- Recommendations providing principles and standards for responsible business conduct for multinational corporations operating in or from countries adhering to the Declaration.

- All 36 OECD countries (including the UK) and 12 non-OECD countries.

- Guidelines cover business ethics on a range of issues, including: employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, taxation.
OECD Guidelines - NCPs

- **National Contact Points (NCPs)**
  - Each adhering country has to set up a NCP, an entity responsible for the promotion of the Guidelines on a national level.
  - It handles all enquiries and matters related to the Guidelines in that specific country, including investigating complaints ("specific instances") about a company operating in, or headquartered in that country.
  - Some are based in a relevant government department; some are independent structures comprising government officials, trade unions, employers unions and sometimes NGOs.
  - In the UK, UK NCP is part of the government’s Department for International Trade
ING case (Netherlands)

- April 2019 Dutch NCP issues first ever final statement in case related to climate change; specifies responsibilities of ING & other banks

- Nov 2017, the Dutch NCP accepted OECD guidelines complaint brought by Greenpeace Netherlands, Oxfam Novib, BankTrack and Milieudefensie, in relation to ING’s investments in fossil fuels.

- First time an NCP has accepted a complaint relating to climate change. Greenpeace notes this could be a landmark decision paving a new route to holding corporations accountable for their impact on the climate.

- NCP commenced an initial investigation regarding the alleged lack of planning to report or reduce the greenhouse gas emissions from its operation.

- Dec 2017, ING published its decision to almost completely phase out their investments in the coal industry by the year 2025. ING also stated that it would refrain from investing in new coal-fired power stations.

- April 2019, the Dutch NCP issued its final statement, demanding that ING Bank sets concrete climate goals for its financial services that are in line with the Paris Climate Agreement.

- While the statement does not establish whether or not the ING violated the OECD Guidelines in 2017, this is the first time the OECD NCP has taken a clear position on climate goals, and ING has now agreed to bring its portfolio in line with the Paris Agreement.
International Criminal Court (ICC)

- ICC jurisdiction covers only genocide, war crimes, crimes against humanity
- Does not have jurisdiction over corporations
- Proposals during negotiations of Rome Statute to include corporations
- None of the ad hoc tribunals have jurisdictions over corporations
- ICC may use jurisdiction over businesspeople
- Communications regarding corporate activities
  - e.g. Chiquita, Chevron
- OTP thematic prosecutions
  - focus on crimes related to environmental destruction, plundering of natural resources
Since 2015, thousands of civilians have been killed in the armed conflict in Yemen.

One of the main causes of civilian casualties are airstrikes by the Saudi/UAE-led military coalition, which launched its intervention in Yemen in March 2015.

Ample and reliable evidence that European arms (Eurofighter, Tornados, MK 80 series bombs) are used in the war in Yemen.

Transnational companies based in Europe continue to supply Saudi Arabia and the UAE with weapons, ammunition and logistical support. European government officials authorized the exports by granting licenses.

Are European arms companies therefore aiding and abetting alleged war crimes committed by the military coalition led by Saudi Arabia and the UAE in Yemen?

Dec 2019 communication to ICC by ECCHR

Details 26 airstrikes conducted by the Saudi/UAE-led coalition, which may amount to war crimes.

Calls upon the ICC to investigate the legal responsibility of corporate and political actors from Germany, France, Italy, Spain and the UK.

5

BUSINESS AND HUMAN RIGHTS IN PRACTICE