



**British Institute of
International and
Comparative Law**

Due Diligence: Rhetoric to Practice

Event Report

Date: 16 June 2014

Venue: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- Robin Brooks, Norton Rose Fulbright, London
- Dr James Harrison, Co-Director of Centre for Human Rights in Practice, University of Warwick
- Rae Lindsay, Clifford Chance
- Andrea Shemberg, Former Adviser to John Ruggie, London School of Economics Investment and Human Rights Project
- Mark Taylor, Fafo Institute of Applied International Studies
- Dr Margaret Wachenfeld, Institute of Human Rights and Business
- Rachel Wilshaw, Oxfam

Chairs:

- Professor Robert McCorquodale, British Institute of International and Comparative Law
- Dr Michael Addo, UN Working Group on Business and Human Rights

Background

The conference was introduced by Professor Robert McCorquodale, who noted that this particular area of international law is gaining global attention as the international community's demands for corporate liability for human rights violations, wherever they occur, have entered mainstream discourse. The potential for developing this area is tremendous despite the conceptual challenges faced in defining 'human rights due diligence'. The panellists draw on their rich experience from a variety of backgrounds – including legal practice, academia and international civil society organisations – to help to clarify due diligence in the context of human rights.

PANEL 1: The meaning of due diligence

Andrea Shemberg

Andrea Shemberg described human rights due diligence as 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'.

The rationale of business enterprises conducting human rights due diligence is embedded in the UN Guiding Principles on Business and Human Rights (Guiding Principles). The Guiding Principles comprise three pillars: (i) the State duty to protect human rights, (ii) corporate responsibility to respect human rights and (iii) remedies for victims of human rights violations.

As contrasted with States, the conceptual challenge for corporations rests in the fact that there are generally no legal obligations on the part of businesses in adhering to international human rights law. States, on the other hand, are under a duty to ensure that, as part of their legal obligations under international human rights law, violations of those human rights by public and private actors are prevented, mitigated and remedied when they occur within the States' respective jurisdiction.

The corporate trend prior to the Guiding Principles had been one of affirming a business's commitment to respect human rights only, as seen in various corporate social responsibility programs. The introduction by the Guiding Principles of 'human rights due diligence' addresses the gap in corporate responsibility to respect human rights from policy commitment to the adoption of concrete practices which consider human rights risks in corporate activities.

Ms Shemberg cited three main reasons why the Guiding Principles developed human rights due diligence:

First, it has been acknowledged that there was a mismatch between enterprises taking up public commitments to respect human rights and the internal processes in place to ensure that the commitments were being followed through. Despite a high number of corporate social responsibility programs, there were only a fraction of internal processes to materialise the commitment effectively in order for businesses to measure human rights risks.

Second, business enterprises have established practices of transactional due diligence and risk management in other areas such as environmental risk and corruption. The notion of human rights due diligence draws on existing practices and enhances their scope to include human rights risks. This is key to the success of the UN mandate on Business and Human Rights.

The third reason for framing human rights risks in the notion of due diligence is that it facilitates uptake of the Guiding Principles by corporate actors as it uses language which businesses can understand. This enables business enterprises to incorporate human rights risks in their existing systems of internal communications. In this respect, Ms Shemberg discussed her involvement with the Global Business Initiative – which includes multinational corporations such as GE, Coca-Cola, Total, Chevron and Shell – in the alignment of the Guiding Principles into their projects. Prior to the Guiding Principles, most corporate enterprises would not necessarily have understood how to approach human rights risks.

In order to understand how human rights due diligence applies practically to business enterprises, Ms Shemberg referred to the shift in focus in corporate risk from the business's interests to the interests of the people. Traditionally, business due diligence analyses material risk to the business itself. Human rights due diligence enhances the scope of risk to include actual and potential risks of rights-bearing

individuals and communities that may be impacted adversely by the business's activities. Engagement with rights-bearers is essential in addressing the human rights risks a corporate body may have. In this respect, human rights due diligence would be a continuous process of engagement and monitoring.

Further, Ms Shemberg explained that companies should satisfy themselves internally and others externally in identifying and addressing human rights risks through a 'Know and Show' system of risk management for human rights. If risk identification processes are documented, businesses would be able to show external stakeholders of the extent of risk identification when enquiries are made on behalf of impacted groups.

The responsibility to respect human rights is not limited to the activities of the principal business enterprise concerned. It goes further to include the activities of those in a supply chain, for example, a sugar farm proprietor who is contracted to supply sugar to a beverage manufacturer may breach child labour laws in the farm. In the context of human rights due diligence, the principal business would need to tackle this sort of human rights violation when it seeks to engage the services of the sugar farm proprietor and be able to document the steps taken to show external stakeholders that it addressed the actual or potential human rights risks.

Finally, Ms Shemberg reminded the conference that the three pillars of the Guiding Principles are linked. Although businesses might not have international legal liability for human rights violations arising from their activities, their products and services may become linked to the violations that occur. The corporate responsibility to respect human rights acknowledges this link and the Guiding Principles can be used to exercise leverage over businesses in meeting their responsibility in this regard.

Robin Brooks

Robin Brooks provided insight from his experience advising corporate clients on due diligence in the context of mergers and acquisitions, citing as an example the acquisition of a mine in central Africa.

Mr Brooks described 'transactional due diligence' as a process in which a purchasing person or entity looks at a target enterprise before acquiring it. To achieve the stated aim, the due diligence exercise would examine the business and financial information, and then analyse the data before forming an opinion on the material risks involved.

Due diligence in this respect is circumstantial as the scope of the exercise depends on the acquiring entity, the target entity and the nature of the business. Mr Brooks explained that such due diligence is a value-based exercise which has a reputational angle. When such transactional due diligence is conducted in the context of mergers and acquisitions, it is established practice to identify 'high risk jurisdictions'. This can include the United States, for example, which has relatively low standards of labour laws and collective bargaining.

Mr Brooks shed light on some differences between transactional due diligence and human rights due diligence. The principal difference between transactional due diligence and human rights due diligence is that the outcomes differ for the latter, in that its scope goes beyond ascertaining the value-based risks to a business. Further, transactional due diligence is conducted once at the outset of a merger or acquisition whereas human rights due diligence is an ongoing exercise.

Another difference between transactional and human rights due diligence is the factors to which consideration is given. In the transactional setting, a purchasing body would identify the jurisdiction of the target business, the specifics of the target business, the technical risks involved and how the cash flow of the target operates, especially if money is to be taken out of the target business to bank accounts

held in other countries. Mr Brooks acknowledged that there is no 'right way' to conduct transactional due diligence but cited these factors as key considerations.

In the context of human rights due diligence, Mr Brooks emphasised that the focus should be on anything which may affect the value of the business. As with transactional due diligence, this would be related to the nature of the business, jurisdiction and size, among others. Particular consideration must be given to the environment, property, human resources and commercial setting of the target business.

In order for human rights due diligence to be sufficiently astute, Mr Brooks explained that the scope of the due diligence exercise must be clearly defined at the outset in accordance with the overall aims of the business in the transaction or acquisition.

Finally, the scope for the work of lawyers in this regard should not be underestimated. At present, Mr Brooks stated that human rights, environmental and social impact work by businesses has been contracted out by corporate social responsibility teams. In transactional due diligence lawyers are usually at the helm of the exercise and this should not change in human rights due diligence. This would require adequately training lawyers in international human rights law in order for them to have the competence to advise corporate clients appropriately.

Mark Taylor

Mark Taylor discussed how the Guiding Principles have for the first time in the broad realm of corporate social responsibility defined what it means for business to be responsible for human rights. Companies used to be unclear as to what acting responsibly entails. The Guiding Principles provide that definition, which is a minimum standard of 'do no harm', whereby one must not impinge on the rights of others.

More importantly, the Guiding Principles provide an operational tool and a conceptual approach as to how this corporate responsibility is met, namely due diligence. Due diligence is not just a business tool exclusively as it is also used in various forms of government regulation.

Mr Taylor explained that due diligence is a standard of conduct or performance, not a standard of results. In the Guiding Principles framework, the standard of results is achieved by respecting human rights and the risk of not doing is a use of the concept of risk with reference to the interests of the rights holders, as opposed to shareholders or even external stakeholders. The purpose of due diligence is to understand the specific impact on specific people in a specific context. In this sense, Mr Taylor explained that due diligence is not just an investigation but also steps taken to address the risks identified by that investigation... Examining risks also entails identifying the nature of business responsibility. For example, a business may be linked to human rights violations in three ways: (i) direct causation, (ii) contribution, and (iii) business relationships.

The manner of the link to human rights violations sheds light on the nature of the responsibility of the business and the different actions that ought to be taken accordingly. Human rights due diligence goes beyond identifying the risks to include the responses to mitigate and accounting for the violations through, for example, reporting or judicial and non-judicial remedies.

Mr Taylor also discussed the link between the state duty to protect human rights and the corporate responsibility to respect human rights. Due diligence is commonly used in legal systems around the world in various legal traditions. States use due diligence as a means to measure compliance by business with a standard of behaviour. Due diligence procedures were also consistent with the description entailed in the Guiding Principles: namely, the responsibility to identify risks, prevent and mitigate the adverse impacts, and to account for the impact.

In the diverse legal systems across the world, there is consistency in the manner in which States view due diligence, particularly by:

- i. Imposing due diligence as a means of regulatory compliance - either as a legal obligation or by offering businesses to use due diligence as a defence (as seen in United States environmental law and anti-corruption);
- ii. Providing businesses with incentives for being able to show they are conducting due diligence (as seen in US federal procurement laws, and in Norway where the ability to show human rights due diligence is a requirement to obtain export credit);
- iii. Encouraging due diligence through transparency and disclosure mechanisms (as seen in consumer protection laws in Germany and France and in transparency requirements of CSR reporting in Denmark, Norway and Spain, the Dodd-Frank Act of the United States, the OECD Guidance on Responsible Supply Chains in Conflict Affected Minerals,);
- iv. A combination of all of the above, for example using the existence of a due diligence system within a company as a requirement in order to grant licences to operate, due diligence practice as the basis for state support, such as export insurance, or evidence of due diligence as the basis for a defence in a complaints mechanism or a court of law.

A challenge in moving forward is that, despite the use of due diligence by States in various jurisdictions, they do not make any specific mention of 'human rights' in conducting due diligence exercises, although the examples cited above deal with issues pertaining to aspects of human rights. In order to overcome this challenge, Mr Taylor suggested that a successful strategy would be one based on the convergence of human rights due diligence with existing requirements of business due diligence through a combination of law, social pressure and market incentives as part of the internal and external governance or regulation of business behaviour. Solutions would need to consider how various forms of constraint on business can be applied to encourage them to conduct human rights due diligence.

Dr James Harrison

James Harrison provided an overview of a range of human rights reporting and investigation processes in order to better understand the potential and limitations of the Guiding Principles. Dr Harrison's work has focused on the economic sphere. He has worked with human rights reporting mechanisms in the context of international trade agreements, multinational corporations and government spending cuts. Using this experience, he provided critical insight into opportunities and limitations of human rights due diligence. Dr Harrison argued that a common measure of success is the extent of usage of the Guiding Principles framework, for example, how widely it has been welcomed and adopted by corporations around the world; incorporated into sustainability indices; or adopted by governments in granting e.g. export credit guarantees. However, in Dr Harrison's view, the focus should be on how effective the framework is. In other words, do the human rights due diligence principles lead to better human rights protection by corporations on the ground?

Human rights due diligence operates in a very different way from how we see human rights traditionally operate i.e. in courts where it is used by judges and lawyers. There are two key ways in which HRDD has a very different dynamic:

- i. There is a move upstream, whereby human rights law is being used outside court processes and being brought into the preventative realm of business risk where it is used by a wide range of actors who do not necessarily have legal backgrounds.
- ii. The reflective aspect, whereby businesses are being asked to report on their own human rights performance.

Dr Harrison explained how both the move upstream and the reflective shift present challenges. He explained that it is a complex process to move from addressing human rights violations exclusively in courts to asking and engaging non-legal actors to examine and monitor their own potential human rights impacts. For Human rights due diligence to have a chance of being transformative, there are a number of key issues to consider. First, HRDD needs to take place with regards to a focused set of issues. Dr Harrison argues that there are examples of good practice with regard to individual corporate footprint projects (e.g. a specific mining operation). He is more sceptical about whether HRDD of an entire multinational corporation's human rights performance can be done robustly and properly at this stage.

He was also concerned about lack of transparency in relation to HRDD. This impacts upon the ability of external stakeholders to engage with human rights due diligence processes as well as preventing corporations from learning from each other. Transparency is an absolutely vital building block of future HRDD efforts.

Dr Harrison also suggested that the internal processes of corporations need to be taken seriously. A human rights or CSR officer may report to executives higher up in the organisation on the corporation's human rights performance, but the interests of the executives may not be the same as those of the human rights officer. So there is a need to think seriously about what will give the human rights officer traction.

If external incentives - for example, obtaining export credit from government by conducting sufficient human rights due diligence - are expected to drive the development of human rights due diligence, then those policy makers will need to be well versed in human rights law and the practice of HRDD in order to be able to distinguish good and bad practice. At the moment, that expertise is not present in the relevant organisations.

Finally, Dr Harrison acknowledged that the challenge faced by businesses is great and that is precisely why businesses should not be expected to navigate the challenge alone. Interaction with UN actors, States and civil society will be vital, and in particular collaborative efforts to develop models of good practice for human rights due diligence.

PANEL 2: The application of human rights due diligence

Rachel Wilshaw

Rachel Wilshaw described how Oxfam engaged with Unilever in a collaborative project to identify labour rights issues arising from Unilever's supply chains, in particular in Vietnam. The collaboration between Oxfam and Unilever included Unilever opening up its business and providing of information about policies and processes in place to identify and prevent human rights violations in the context of labour standards. An [independent Oxfam report](#) was published with Unilever checking the draft text for accuracy

Oxfam's approach was based on the four main aspects of the Guiding Principles, namely (i) commitment; (ii) integration; (iii) tools and processes for due diligence; and (iv) remediation.

Unilever was keen on having a 'gap analysis' conducted in order to make their supply chain 'Ruggie proof'. The project also focused on four labour issues which are important to workers but which present

challenges to companies in their assessment and management: (i) working hours; (ii) contract labour; (iii) freedom of association; and (iv) living wages.

Top level findings in the gap analysis concluded that Unilever had good commitment and accompanying policies in place to respect human rights and that the staff was confident in the company's commitment and general approach to human rights. Nevertheless gaps were found between the company's policies and the actual living standards of workers on the ground.

Unilever was found to have commendable levels of transparency and stakeholder engagement at a global level. However, the same was not witnessed at a local level as Unilever employees were less accustomed to engaging with civil society organisations. Oxfam conducted interviews with workers on and off site in order to give workers the opportunity to discuss their concerns openly. The general sentiment from workers within the factory was that they did not report any concerns as they did not feel confident that they had a voice, and grievance mechanisms were not used.

The most significant negative impact was found in the gap between Unilever's policy commitments to maintain good working conditions and decent wages, and the reality that the workers were unable to sustain themselves from their remuneration. Some workers reported taking on other jobs despite Unilever's commitment to paying well above minimum wages.

As to supply chains, only half of Unilever's suppliers were found to be aware of the requirements of the company's supplier code. Unilever wrote to suppliers ahead of the Oxfam research to put their minds at rest that findings would be anonymised and that suppliers would not be removed from the supply chain and lose out on the business opportunity as a consequence. This was extremely helpful to prepare the ground for the research by Oxfam.

Ms Wilshaw cited two specific concerns of workers from suppliers. One was that workers needed to work long hours beyond legal limits. The second was a supplier, after having engaged with Unilever contractually, downsized its workforce drastically which led to the use of precarious employee contracts to meet the fluctuating demands for the products. Ms Wilshaw explained that these gaps revealed the need for improvement in particular with regard to tracking suppliers' compliance with codes after Unilever had signed a contract.

In response to the findings from the study, Unilever incorporated labour rights into the Enhancing Livelihoods pillar of its corporate [Sustainable Living Plan](#) and changed its sourcing policy from a compliance-based code to a [Responsible Sourcing Policy](#) with mandatory entry requirements they must meet and good practice and best practice standards to progress through over time. This is an example of how Unilever exercised leverage over suppliers to encourage the latter's progress in meeting their requirements. Ms Wilshaw described this as an enhanced and structured approach moving from the principle of 'do no harm' to 'do more good' hereby the suppliers are encouraged and rewarded in meeting Unilever's requirements over time

Ms Wilshaw gave an example of a research by Dutch NGO SOMO of grievance mechanisms in the electronics sector, where workers were asked their views on grievance mechanisms. Generally employees knew of the grievance mechanism but not its full scope. They also lacked confidence in invoking grievance mechanisms out of mistrust and fear of being made redundant. Workers also remained unaware once a complaint is filed whether they were dealt with

Despite these challenges, grievance mechanisms are helpful when legal action is not possible.

In the discussions, Ms Wilshaw shed light on cultural factors that may prevent workers from invoking grievance mechanisms, including issues of trusting employers with personal matters such as sexual harassment, as well as differing attitudes between genders in approaching grievance mechanisms. To

this end, Ms Wilshaw suggested that it would be helpful to conduct a comparative analysis of grievance mechanisms that work for women and men.

Dr Margaret Wachenfeld

Margaret Wachenfeld addressed certain myths surrounding human rights due diligence. **Myth 1: This is all about what companies decide to do.** She cited a general view that corporate social responsibility is voluntary and it is at the company's discretion what it chooses to do. The Guiding Principles go beyond voluntarism and impose a responsibility on businesses to respect human rights.

Myth 2: Human rights due diligence is just about initial, transactional due diligence. The term "due diligence" invokes the process of analysis conducted at an initial stage of a transaction. Echoing Andrea Shemberg and Robin Brooks, Dr Wachenfeld described human rights due diligence as a process to assess and monitor the entire spectrum of a business's activities on an on-going basis. Dr Wachenfeld suggested that businesses should remember that 'risks do not go away, nor do [human] rights'. Even if a business undergoes change in operations, the risks and human rights will remain.

Myth 3: It is just about the company.

However, as the first panel illustrated, human rights due diligence is a broader concept whereby a company may become linked to human rights impacts caused by business partners, for example in the supply chain or through joint ventures.

Myth 4: Under the Guiding Principles, companies must do a human rights impact assessment.

Looking at human rights due diligence in practice, Dr Wachenfeld explained that 'human rights impact assessments' is a popular phrase but it is not the exclusive mechanism by which human rights due diligence ought to be conducted. It is a useful technique which was first used in environmental assessments of corporate activity. In this sense, human rights impact assessments may be beneficial for companies in the extractive sector or with large environmental footprints whereas businesses in other sectors would benefit from different forms of human rights due diligence.

Angels - How many angels can dance on the head of a pin?

Dr Wachenfeld then discussed the propensity for discussions to distract from the stated aims of the Guiding Principles, by disproportionate debates over differences between defining 'social impact' and 'human rights impact' or differences between 'contributing to' and 'directly linked to' adverse impacts. Although some consideration does need to be given to these intricate points, parties should be careful that these discussions on human rights due diligence under the Guiding Principles go not side tracked the agenda. Businesses should remain steadfast in their commitment to preventing and mitigating human rights violations. They should identify effective areas to explore such as leverage over third parties rather than being endlessly caught up in whether an impact may be contributed to or only directly linked as there is often more of a continuum than a clear demarcation between these situations.

In order for businesses to proceed with human rights due diligence, Dr Wachenfeld explained it would be helpful to view due diligence in sectoral terms and that this is the path human rights due diligence appears to be adopting already. A sector-based approach facilitates sharing information across companies within the same sector. Human rights concerns are context specific and the types of human rights issues arising in the oil and gas sector would be markedly different to those in the employment and recruitment sector. However, businesses would be ill-advised to follow only their sector-specific 'checklist' for human rights due diligence as this would limit the scope of their due diligence. The

process of learning across various sectors would assist businesses and governments in approaching human rights due diligence. Human rights should be a collaborative task and not a competitive one.

Finally, as a legal standard, human rights due diligence may develop into a 'duty of care' in some areas but businesses will not set the standard in isolation. Some elements of human rights due diligence are found in the realm of compliance with hard law. At the same time, it would be ineffective to place human rights due diligence entirely within the scope of lawyers or a company's legal department. The sustainable development department may be better suited to assess the human rights risks externally and then collaborate with the legal department to discuss the full spectrum of human rights risks.

Rae Lindsay

Rae Lindsay discussed that attitudes to human rights due diligence differs across companies. When Clifford Chance commissioned the Economist Intelligence Unit to discuss the risks lying ahead following the recent global financial crisis with board members of 350 companies, Ms Lindsay ensured that human rights risks were included. Generally, the EIU's report concluded that reputational risk was more important to board members than financial and regulatory risks. However, the particularities of risk management differ across companies as their perceptions of risk and human rights risks are unique.

Companies have also received the Guiding Principles differently in that some have taken the Guiding Principles seriously at the governance level while the board members in others are unaware of how the company is addressing the Guiding Principles. The challenge for companies in the governance area is to ensure that they are implementing mechanisms to identify and address human rights risks. This requires companies to identify risks to rights holders as well as themselves in an appropriate manner. This process of developing suitable human rights due diligence mechanisms is an ongoing one.

Insofar as Ms Lindsay advises clients on human rights due diligence, she explained that there are no standardised procedures for due diligence but rather context specific human rights impact assessments or human rights due diligence in the transactional context of proposed investments.

Ms Lindsay also shed light on the role of lawyers. She suggested that lawyers must help corporate clients understand their policy commitments to respecting human rights so that they are able to meet their commitments. As for identifying, preventing and mitigating human rights risks and violations, lawyers should collaborate with the corporate client and not dictate it.

Echoing Dr Wachenfeld, Ms Lindsay expressed concern at the disproportionate emphasis being given to identifying risks to human rights issues at the expense of the practical steps to address those risks and discharge the corporate responsibility. Ms Lindsay suggested that lawyers have a role to play in order to assist companies in this regard, including advising clients on using their leverage during contractual negotiations with third parties.

Finally, Ms Lindsay reminded the conference that the responsibility to respect human rights, unlike other commercial responsibilities, cannot be delegated in a supply chain or through an agency relationship. Companies must include provisions in contracts to ensure that their responsibility is discharged in the manner appropriate to them despite acting through a third party or an agent who is taking the practical steps on the company's behalf.