DUE DILIGENCE AND RIGHTS AT WORK – BRIGHT LIGHT ON THE HORIZON OR MIRAGE?

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Due diligence and rights at work – bright light on the horizon or mirage?

The human rights due diligence framework for companies, embraced in the UN Guiding Principles on Business and Human Rights of 2011, places rights at work in a new operational context. Is the risk management concept of due diligence a good choice for reinforcing corporate social responsibility? How can the due diligence construct be put into practice meaningfully by firms when it comes to rights at work? Which factors are important to make due diligence more than just an exercise in going through the motions? How can a company's engaging in due diligence be effectively monitored? These are the main questions are posed in this paper after a brief review of the background. The due diligence issue forms part of a much wider debate, addressed here only incidentally, about corporate social responsibility and its place in transnational labour law.

Background

The term "due diligence" arose in the wake of the 1929 stock market crash, with enactment of the United States Securities Act 1933 to improve investor protection. In a claim arising out of issuance of a false securities registration statement, anyone who has made a reasonable investigation into matters in the relevant prospectus and who believes the statement to be true can raise this as a defence. The notion has since been taken up to apply to other types of business transactions and operational activities of firms, known as engaging in due diligence.[1] Often employed in relation to a transaction, the focus of due diligence is on minimizing commercial risk by investigation and assessment of risk to the company.

In general international law, due diligence was used to describe "the legal obligation of states to exercise all reasonable efforts to protect aliens and their property in the host state."[2] Later, in human rights law, "due diligence" came to be used in relation to a State's positive duty in relation to the actions of non-state actors such as corporations, requiring a state to engage in fact-finding and possibly criminal investigation, accompanied by redress. [3] The emphasis is placed on a State engaging in actions that are intended to affect the behavior of others. As McCorquodale has correctly observed, the business model and the human rights model of due diligence operate fundamentally differently."[4] While the duties on States are in relation to internationally defined norms, the procedural process of due diligence to reduce risk in relation to corporation's own interests has no clear underlying standard. We will return to this issue further on.

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[1] LINDA S. SPEDDING, DUE DILIGENCE HANDBOOK. CORPORA.TE GOVERNANCE; RISK MANAGEMENT AND BUSINESS PLANNING 3 (2009).

[22] ELIZABET A. MARTIN and JONATHAN LAW, eds., A Dictionary of Law, 6th ed. (2006), p. 181.

[3] Robert McCorquodale, Corporate Social Responsibility and International Human Rights Law, 87 JOURNAL OF BUSINESS ETHICS (2009) 385, 392. As an example, he cites Vélásquez Rodríguez v. Honduras, Inter-American Court of Human Rights, 28 INTERNATIONAL LEGAL MATERIALS 294, paras. 172, 176 (cited by McCorquodale at 392.)

[4] McCorquodale, 392-393.

Furthermore, due diligence has more than one meaning in legal and business contexts,[5] and its use in different ways complicates its examination. It is sometimes referred to as a "standard" and more often as a way of acting or a process.[6] Does it imply an obligation of means or an obligation of results? The former seems more likely, although a commentator from the financial services industry for instance refers to "due diligence information,"[7] suggesting a tangible end product.

The context

How to make business operate in line with human rights is a question that has bedeviled the international community since at least the 1970s. One problem has been theoretical, with the difficulty of meshing a State-based Westphalian system of international standards with entities that lack full legal personality in public international law.[8] Another has been practical, occasioned by a skewed distribution of power in which the resources of some multinational corporations can outstrip those of the sovereign states in which they operate. Added to the practical aspects are the variety that businesses display in terms of size, legal form, sector of activity and place along the value chain they occupy. Means of production of goods and services over numerous jurisdictions have altered markedly since the adoption in the 1970s of the OECD and ILO Declarations on Multinationals.[9] The UN Global Compact adopted in 1999 added the new dimension of direct involvement of enterprises. Its development also involved categorization of differing degrees of complicity by companies in human rights violatons, an idea later reflected in the UN Guidelines on Business and Human Rights.[10] Each of these documents contains references to labour issues, although with somewhat varying extent and in distinct contexts.

Unsurprisingly, in light of the different interests of businesses and those affected by its operations, the debate has often generated controversy. An ambitious effort to develop "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" ended in stalemate.[11] The next step was appointment by the United Nations Secretary-General in 2005 of a Special Representative on human rights and transnational corporations and other business enterprises. The tendentious background surrounding the issues probably helps account for the broad welcome of a consensus shepherded by Professor John Ruggie of Harvard Business School between 2005 and 2011.

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[5] BRYAN HORRIGAN, CORPORATE SOCIAL RESPONSIBILITY IN THE "!ST CENTURY.DEBATES; MODELS AND PRACTICES ACROSS GOVERNMENTS; LAW AND BUSINESS (2010), 330.

[6] See Robert C. Blitt, Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance, 48 TEXAS INTERNATIONAL LAW JOURNAL 33 (2012), 43. He uses it in both ways.

[7] Martin Ainsworth, Compleat Compliance: Due diligence on companies and individuals, 24 BUSINESS INFORMATION REVIEW, 245, 250-251 (2007)

[8] As Clapham explains, however, this is a somewhat simplistic view. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006), 78-79.

[9] The OECD Guidelines on Multinationals were adopted in 1976, and were most recently updated in 2011. The text appears at www.oecd.org/daf/inv/mne/48004323.pdf. The ILO Governing Body followed suit by adopting the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977, with several subsequent amendments. The text is available at www.ilo.org/empent/Publications/WCMS_094386.

[10] See e.g. Clapham, op. cit., 221-222.

[11] For a concise description of this exercise, see for instance Scott Jerbi, Business and Human Rights at the UN: What Might Happen Next? 31 HUMAN RIGHTS QUARTERLY 299, 304-306.

Learning from earlier efforts while ploughing new ground,[12] Special Representative Ruggie conducted extensive consultations and research that led to unanimous welcoming by the Human Council of the "Protect, Respect and Remedy" Framework.[13] His later report on its implementation received a similar reception.[14] The Special Representative's 2011 report annexed the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. In spite of criticism,[15] particularly for its lack of legal rigor in its use of the term "responsibility,"[16] the Framework has won wide support among governments, business and NGOs. The OECD has incorporated the due diligence approach of the Guiding Principles in its Guidelines for Multinational Enterprises. [17] It looks like the Framework will be the dominant paradigm for at least the next few years.

Following expiry of the Special Representative's mandate, the General Assembly endorsed the Human Rights Council's recommendation to establish the Working Group on the issue of human rights and transnational corporations and other business enterprises. [18] This keeps the Guiding Principles actively on the agenda. The essentially promotional nature of the Working Group's mandate drew criticism from major civil society groups, which complained that it focuses "almost exclusively on the dissemination and implementation of the proposed Guiding Principles, which are incomplete in important respects…" [19] The Working Group's first report suggests that its ambitions may be a somewhat higher, since it seeks "to increase convergence between the Guiding Principles and other global governance frameworks", through "alignment" of the latter to the Guiding Principles.[20] With its additional calls relating to state reporting on implementation of the Guiding Principles and further development of effectiveness criteria for grievance mechanisms, one can get the impression of a mini-industry in the making.

Like earlier initiatives in this field, the Guiding Principles are non-binding and not directly justiciable. One cannot exclude, however, reliance on them in attempts to hold firms accountable for failing in

[12] Ruggie himself provides a fascinating account of the process in JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, 2013.

[13] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and Human Rights: Towards operationalizing the "protect, respect and remedy" framework, U/11/13 (22 Apr. 2009). The Council welcomed the Framework at its Eleventh Session.

[14] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 (21 Mar. 2011) (referred to as "SRSG Report (2011)"). This was endorsed by the Human Rights Council in Res. 17/4 on 16 June 2011.

[15] See e.g. David Bilchitz, The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations? 7 SUR International Journal on Human Rights 199 (2010). Bilchitz sees the Framework as narrowing corporate obligations (see ibid., 204-207) and criticizes its ambiguity (217-218).

[16] See for instance McCorquodale, 391.

[17] OECD, Guidelines on Multinational Enterprises (2011), op. cit., p. 22.

[18] The Working Group's mandate was set out in Res. 17/4, op. cit.

[19] International Federation of Human Rights, International Commission of Jurists, Human Rights Watch, International Network for Economic, Social and Cultural Rights, Rights and Accountability in Development, Joint Civil Society Statement on Business and Human Rights to the 17th Session of the UN Human Rights Council, available at www.escr-net.org/docs (17 May 2013).

[20] Working Group 2013, 12 and 23.

their duties as defined under national or international law. These may differ depending on which obligations States in which the enterprise operates have undertaken. [21]

A brief look at the Framework and the Guiding Principles and their scope in relation to labour issues

The consensus that emerged around the scope of human rights encompassed by the Guidelines has led to some criticism concerning what is omitted. However, the Guidelines clearly state that "internationally recognized human rights" which business enterprises are to respect are "understood, at a minimum" as those of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights (referred to together as the International Bill of Human Rights), and to the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work (Principle 12). We will return to what this implies in the context of labour issues. As a broader issue, it involved reductionism of the richer body of human rights law, which risks being further narrowed through the use of indictors, as explored further below. And in light of the industry of consultants that has emerged alongside the development of corporate social responsibility initiatives, trade unions in particular have feared that expectations of society are being redefined instead of responded to.[22]

But before getting into these and other issues, it is necessary to understand the Framework itself. As described in the 2011 Special Representative's report,

"The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures…." [23]

The Guiding Principles consist of "general principles," "foundational principles" and "operational principles." Among the general principles, it is noted that business enterprises are required to comply with all applicable laws and to respect human rights, and that the General Principles apply to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership or structure.[24] Yet under the foundational principles in relation to the corporate responsibility to respect human rights, this statement is accompanied by a qualifier: "Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."[25] This differentiation comes into play in relation to a human rights due diligence process, since business enterprises are to have such a process in place "appropriate to their size and

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[21] For instance, the OECD Guidelines are voluntary, but countries adhering to them make binding commitments to implement them. See OECD, op. cit., p. 13.
[22] Dwight W. Justice, The international trade union movement and the new codes of conduct," in JENKINS, PEARSON and SEYFANG [title] (2002), 99, cited in CLAPHAM, op. cit., 197.
[23] SRSG Report (2011) 4.
[24] SRSG Report (2011) 6.
[25] SRSG Report (2011) 14.

circumstances." (principle 15).[26] While the term "circumstances" is not defined in this connection, references elsewhere in the text suggest that this might refer to being in a conflict situation, or involving specific groups or populations that require special attention (commentary under principle 12).

Under the foundational principles, the responsibility placed on business enterprises to respect human rights "means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (principle 11). It further requires them to "(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." (Principle 13).[27] Importantly, the commentary specifies that "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products and services."[28]

In order to meet their responsibility to respect human rights, business enterprises should have "(a) A policy commitment … (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." (Principle 15).[29] The operational principles elaborate on each element, with Principles 17 to 21 expanding upon human rights due diligence.

What the due diligence process entails

Although the principles cited sometimes use slightly different terms, the due diligence process should contain these aspects:

Identify the enterprise's possible adverse human rights impacts (drawing on internal and/or independent external human rights expertise and involving meaningful consultation with potentially affected groups and other relevant stakeholders) (see Principles 17 and 18)

Assess actual and potential actual adverse human rights impacts (Principles 17 and 18)

Prevent or mitigate such impacts (Principles 17 and 19). (Actual impacts that have occurred should be a subject for remediation (Principle 22; commentary to Principle 17).

Account for how the enterprise addresses its adverse human rights impacts (Principle 17)

Integrate the findings from impact assessments across relevant internal functions and processes (Principles 17 and 19) and act upon the findings/take appropriate action (Principles 17 and 19)

Verify whether adverse human rights impacts are being addressed (Principle 20)/track responses (Principle 17)

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[26] SRSG Report (2011) 15. The size of the enterprise and nature and context of the operation are also mentioned under Principle 18 in relation to meaningful consultation with potentially affected grops and other relevant stakeholders. Ibid. 17.
[27] SRSG Report (2011) 14.
[28] SRSG Report (2011) 14.
[29] SRSG Report (2011) 15.

Track the effectiveness of their response (based upon "appropriate qualitative and quantitative indicators" and drawing on feedback from internal and external sources, including stakeholders) (Principles 20)

Communicate how impacts are addressed (Principle 17. Communication to whom is not specified but would appear to be to shareholders in the first instance and to the public at large.

The idea of the process, as noted in the Special Representative's 2010 interim report, is to move from "naming and shaming" (or rather being named and shamed) to "knowing and showing" by internalizing the respect for human rights through due diligence.[30] Human rights due diligence is to be ongoing, and can be included within broader risk-management systems, "provided it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders."[31] This is a major proviso, not one that is easily met.

The substantive scope of due diligence in relation to labour issues

Taking the minimum definition of which rights business enterprises are to respect, i.e. those expressed in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, the substantive scope of a due diligence process would already need to be quite extensive. Before returning to the ILO Declaration, the labour rights mentioned directly in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights include a number of rights in which business plays a key role.

In the UDHR, we find freedom of association and the right to form and join trade unions; freedom from slavery and servitude, with free choice of employment; just and favourable conditions of work; equal pay and just and favourable remuneration; and the right to rest and leisure (with reasonable limitation of working hours and periodic holidays with pay).[32] The ICESCR expands upon certain of these in its Arts. 7 and 8 and adds explicitly "safe and healthy working conditions," (Art. 7(b) as well as protection of trade union rights and of the right to strike (Art. 8), as well as provision of paid leave or leave with adequate social security benefits for working mothers (Art. 10(2)). The ICCPR also guarantees freedom of association (Art. 22, which refers in turn to the ILO Convention on Freedom of Association and Protection of the Right to Organize, 1948 (No. 87). In addition, the article on slavery and servitude (Art. 8) adds reference to forced or compulsory labour, which could be relevant to business enterprises in certain circumstances. Moreover, across all the three instruments the enjoyment of rights and freedoms is to be without distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [33]

The ILO Declaration on Fundamental Principles and Rights at Work reinforces the human rights relating to freedom from discrimination in the context of employment and occupation, freedom from all forms of forced or compulsory labour and freedom of association. It adds the effective right to collective bargaining and the abolition of child labour. Each of these represent rather complex areas

[30] SRSG, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: further steps toward the operationalization of the "protection, respect and remedy" framework, UN Doc. A/HRC/14/27 (9 Aprl. 2010), 16.

[31] SRSG Report (2011) 16.

[32] UDHR, Arts. 4, 20, 23, and 24.

[33] UDHR, Art. 2, ICESC, Art. 2 and ICCPR, Art. 2.

of international law, as illustrated for instance by the various Global Reports prepared under the Follow-up to the Declaration.

As a whole, this minimum foundation of ILO principles and the International Bill of Rights would imply an extensive due diligence exercise in relation to the responsibility of business to respect human rights. And it is only part of what would be a larger exercise relating to other rights, with special attention to certain groups such as indigenous peoples or minorities. Moreover, in countries that have ratified other international human rights instruments, whether of the UN or the ILO, businesses operating in these States should be held to a higher standard of their scope of inquiry, since they are expected to respect the law of the land, including the international obligations accepted by that State. Such instruments will also provide a clearer idea of the obligation involved, since they are more detailed than the documents cited in the Guidelines. Since most countries have ratified a number of such instruments, the due diligence exercise in relation to labour issues becomes all that more complex. How realistic is it that firms will devote the resources necessary to do this seriously?

The internal and external dimension

Principle 13 of the Guiding Principles distinguishes between what it sets out as two types of responsibility. Business responsibility requires that the enterprise: "(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (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." This is a significant factor, since change in a firm's own behavior could eliminate the risk of direct impacts of non-respect of human rights, whereas when indirect impacts are involved, the primary firm can only withdraw from or sever the relationship with the other business entity, or try to influence its behavior. However, the phrase "directly linked to their operations, products or services by their business relationships" offers wiggle room that could end up defeating the purpose of this stipulation.

In addition, trying to influence behavior is usually more difficult (since it may entail higher cost) than cutting off the relationship with the other entity, what happens to the workers affected by this loss of business? Their poor conditions of work may resulted in the termination of the relationship through a due diligence exercise, yet they will end up worse off at the end of the day. Here the remediation elements of the Framework need to become more closely aligned with the due diligence process.

The pluses and minuses of relying on due diligence for labour issues

The perspective of due diligence is very much one of risk management, with the twist that the harm may occur outside the company, but then rebound to it in terms of reputational loss. The major advantage of human rights due diligence is that its outcomes can be fed into the existing system of corporate risk control.[34] It becomes embedded, rather than an "add on" that can be quickly put to one side.

[34]Mark B. Taylor, Luc Zandvliet and MitraForoouhar, Due Diligence for Human Rights: A Risk-Based Approach, Corporate Social Responsibility Working Paper, No. 53 (Oct. 2009) 4.

However, as Muchlinski has noted, "the human rights due diligence assessment may not sit easily with the corporate aim of profit maximization," particularly since the basis of corporate law remains "rooted in the prioritization of enhancing shareholder value."[35] Or as Horrigan puts it, "some key ways of placing rights-elated elements on the corporate radar (e.g. socio-ethical risk assessment) involve mindsets and skills that are still non-conventional in many board rooms…".[36]

In addition, due diligence in relation to labour rights remains quite a blunt instrument that has not fully thought through what it means in relation to the enterprise's own workers or workers of enterprises linked to it in the supply chains, as contrasted to other individuals, groups or communities affected by their operations. Workers are not "stakeholders" in the same way as persons or groups external to the enterprise's production of value added. The issue of occupational health and safety illustrates this. A worker may be under possibly conflicting directions, to follow health and safety procedures and to meet a certain production quota within a set time. Under the *respondeat superior* principle, the company could be liable if an accident occurs, but the worker may be blamed and lose his or her job even though his or her own rights to a safe working environment were not respected because of the production pressures. In addition, the collective and representational rights issues in labour law pose issues that go beyond questions of individual human rights. There is an unsettling lack of fit with a broad brush human rights due diligence process when it comes to labour issues.

How to do it?

It will therefore be quite important to see how due diligence processes will be carried out in relation to labour issues. These need to take into account the structure of firms and their business relationships, the information relied upon, and the broader culture within an enterprise.

As a general matter, the *Guide for integrating Human Rights into Business Management,* developed by BLIHR, the Office of the UN High Commissioner for Human Rights and the UN Global Compact, sets out a series of processes for situating human rights considerations within standard business practices, from strategy to measuring impact and auditing and reporting. The due diligence process itself identifies the steps to be taken in carrying it out. However, other factors will need to be taken into account. One is better identification along the supply chain as well as in the company of who is responsible for what. This would link to what Henry Shue's has, according to Bilchiltz, proposed for criteria to determine who should be the bearers of positive obligations: establishing what needs to be done in order for a right to be fulfilled and, in light of this, determining who can best perform those tasks, and then allocating duties depending upon what burdens are reasonable and fair to place upon specific agents.[37] This concept could be useful in refining the due diligence framework.

Another step would be setting out some criteria for assessing the reliability of information relied upon and the transparency about its sources. When businesses carry out due diligence in relation to other types of risks, they rely on internal and external sources. In the now more regulated financial services sector, due diligence is reported as being regularly undertaken in relation to prospective

[35] Muchlinski, 157.
[36] Horrigan, 330.
[37] Bilchitz, op. cit., 210.

clients, prospective employees and prospective investors.[38] Information comes from public and private sources, and pose the challenges of verification, timeliness, multiplicity of sources, and cost, particularly from commercial databases.[39]

The commentary to Principle 21 suggests that business reporting should include "indicators concerning how enterprises identify and address adverse impacts on human rights." The most likely scenario is that they will seek out existing indicators. Here we find a number of competing sources, of variable quality and accessibility of data. Multiple, non-transparent and non-comparable firm-based indicators would not be particularly helpful. But more importantly, there is always the risk of reductionism, that the indicator becomes not a proxy for the right, but a reduced notion of the right itself. Context and nuances that can be critical in the enjoyment of human rights in the context of labour risk being lost through an over-reliance on indicators. As Rittich has observed, "targets and indicators may be reductively defined in relation to the overall goal or objective to which they are linked." Furthermore, "indicators may be misleading, particularly when they are compared across jurisdictions… Sometimes indicators are also simply wrong in the most basic of ways about the facts they purport to measure."[40]

To where can business turn to gain reliable, up-to-date information in relation to labour rights in a particular country or sector? This is an issue that the Working Group or the Human Rights Council itself could perhaps usefully address by highlighting good practices. Otherwise firms risk going through a forest of information from public and private sources, not all of it readily accessible, and not all of it reliable.

"Do it yourself" due diligence exercises can look to information on the websites of various organizations. The Danish Institute for Human Rights suggests Amnesty International, Freedom House, Human Rights Watch and the United States State Department as sources of human rights information.[41] Its Human Rights Compliance Assessment Quick Check, however, contains suggested indicators derived from the International Bill of Rights and relevant ILO Conventions, and the complete version of the HRCA goes into greater detail. While the approach is a serious effort, it also reveals the pitfalls of reliance on indicators alone for a due diligence exercise. A quick look at its occupational safety and health indicators, for instance, show that a due diligence exercise using them would not have revealed the shortcomings that led to the deaths in the Rana Plaza building collapse in Bangladesh. It is against situations such as that tragedy that the robustness of due diligence and its indicators needs to be tested.

Last but certainly not least, the overall environment in which human rights due diligence is carried out also matters. Muchlinski has warned, "unless a corporate culture of concern for human rights in instilled into the officers, agents and employees of the company due diligence could end up missing the very issues it is set up to discover. At worst it could degenerate into a 'tick-box' exercise designed

[38] See for example the recent publication of the Institute for Human Rights and Business, Calvert Investment Services and the Interfaith Center on Corporate Responsibility, INVESTING THE RIGHTS WAY: A GUIDE FOR INVESTORS ON BUSINESS AND HUMAN RIGHTS (2013).
[39] Ainsworth, 250-251.
[40] Kerry Rittich, Governing by Measuring: The Millennium Development Goals as in Global Governance, in SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW, Vol. 2 2008 (Hélène Ruiz Fabri, Rüdiger Wolfrum and Jana Goglin, eds., 2010) 475-76.
[41] Danish Institute for Human Rights, Doing Business in High-Risk Human Rights Environments: Decision Map (undated) 16.

for public relations purposes rather than a serious integral part of corporate decision-making. It is here that the ethical duty to respect human rights is key. The acceptance of such a duty may be said to 'constitutionalise' concern over human rights impacts in the corporate psyche and culture. The due diligence process then allows this concern to be put into operation."[42] A South African study has found that a key predictor of human rights due diligence appears to be explicit leadership commitment within a firm, with important roles also being played by government regulation and stock exchange rules.[43] More studies along the lines of this research would help to inform the debate, particularly if they included a focus on labour rights.

The Guiding Principles as a shield against legal action?

The Guiding Principles are only recommendatory, due diligence is a voluntary process, and the general principles contain the caveat that "Nothing in these Guiding Principles should be read as creating new international law obligations…."[44] At the same time, a concern about possible legal consequences relating to non-respect for human rights surfaces from time to time in the SRSG's reports and are certainly on firms' radar screens. Principle 23, in the context of remediation, states that in all contexts, business enterprises should "treat the risk of causing or contributing to gross human rights abuses as a legal compliance issues wherever they operate."[45]

Indeed, the commentary to Principle 17 closes with this remark: "Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, 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 abuses." [46] With proper documentation, however, evidence of having engaged in human rights due diligence could certainly help a business entity make its case in some circumstances.

While an examination of the various legal possibilities for finding an enterprise and/or its managers or owners liable under civil law or responsible under national or international criminal law goes beyond the scope of this paper, the potential of such liability or responsibility certainly looms in the background of a due diligence exercise. In terms of international criminal law, probably only resort to activity that would fall under the rubric of forced or compulsory labour of adults or children would come within its scope. National penal law might be invoked for instance in case of murder of trade union organizers, criminal negligence resulting in bodily harm or death of workers, resort to child labour, and in some jurisdictions certain acts of discrimination. Given the need to demonstrate *mens rea* for criminal acts, however, getting beyond the individual perpetrator to the business enterprise will remain difficult under criminal law.

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[42] Muchlinksi, 156, citing Linda K. Trevi^no and Katherine A. Nelson, 2011, Managing Business Ethics: Straight Talk about How to Do it Right, chap. 5.

[43] Ralph Hamann, Paresha Sinha, Farai Kapfuwaruwa and Christoph Schild, Business and HumanRights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence, 87 JOURNAL OF BUSINESS ETHICS 453 (2009). See also. Marc T. Jones, The institutional determinants of social responsibility, 20 JOURNAL OF BUSINESS ETHICS (1999) 163.

[44] SRSG Report (2011) 6.

[45] SRSG Report (2011) 21.

[46] SRSG Report (2011) 17.

Civil law offers far greater potential for human rights activists, even following the recent dampening effect of the Supreme Court decision in *Kiobel v. Royal Dutch Shell* under the United States Alien Tort Claims Act. Some involves creative use of existing law, as suggested by Vytopil in relation to the Netherlands law of contract and the use of general terms and conditions to strengthen labour-related norms in the supply chain.[47] Attention has also been given recently to various methods of trying to make codes of conduct create binding obligations, domestically and extraterritorially, with mixed results.[48]

Suggestions have also been made by Muchlinski for changing company law, for instance, by extending the circumstances in which a judge can lift the corporate veil to cover a company's human rights violations.[49] According to him, in Canada due diligence has already "developed beyond a simple commercial risk assessment process into a basic element of complying with a wide range of environmental, health, safety and other regulations involving strict liability offences," becoming "analogous to the 'reasonableness' element in civil tort cases."[50] Indeed, the Special Representative's 2010 interim report pointed to examples of national legislation from the Netherlands, Singapore and the United States that he saw as widening the responsibilities of directors when considering the duties owed to their firms.[51] Overall, however, both Clapham and Muchlinski hold out greater hope for the duty of care owing under tort law.[52] Such an approach would be of more limited use to workers than to other groups. Under much of the national legislation, a tort law approach to remediation of injury or disease related to the working environment was abandoned in favour of a workers' compensation system where doctrines such as contributory negligence become inapplicable, but where amounts of compensation are often relatively low, if not ludicrous. Pursuit of torts for injury to other labour rights might be more promising. It seems that new or rediscovered causes of action and remedies still need to be sought. And, finally, where corporate reputation may ultimately be at stake, litigation will form only part of a broader strategy for activists seeking greater accountability for respect for human rights.[53]

Conclusion

On the positive side is the fact that due diligence is a process familiar to business, and one that is embedded in normal operations. There is thus a high likelihood of its systematic up-take by business. On the negative side, there is an inherent tension of using a system that was devised essentially with the idea of avoiding liability and risk as one that is supposed to reinforce respect for human rights. This is particularly so in relation to labour rights, where some workers may have the double role of rights-holders and duty-bearers, and where supply chains deliberately blur issues of responsibility.

The early stages of follow-up to the Guiding Principles suggest that the task of applying them effectively will not be easy. Among the "common challenges" identified so far are "translating policy

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[47] Louise Vytopil, Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices, 8 UTRECHT LAW REVIEW 155 (2012).
[48] See various articles in International Comparative Labour Law and Policy Journal, vol. xx, no. ss (date).
[49] Peter Muchlinksi, Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation, 22 BUSINESS ETHICS 145, 152 (2012).
[50] Mchlinksi,157.
[51] SRSG, "Corporate Law Project: Overarching Trends and Observations, 14. (to check at www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010)
[52] Muchlinski, 161; Clapham, 265.
[53] See Clapham, 268-269, citing S. R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111YALE LAW JOURNAl (2001) 443, 451.

commitments into relevant operational procedures, ensuring their alignment with international human rights and ILO standards."[54] Industry groups are urged to identify key specific challenges, including in carrying out human rights due diligence.[55] While it is doubtful that due diligence alone will effect significant change, it will remain one tool among many to try to improve respect for individual and collective labour rights. For this to happen, more analysis is needed about the particularities of labour rights in the context of the Guiding Principles and especially its reliance on due diligence. Further refinement will be necessary for this approach to move from being a mirage to becoming a bright light on the horizon.

[54] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises [„Working Group 2013"], UN Doc. A/HRC/23/32 (14 Mar. 2013) 22.
[55] Working Group 2013, 22.See also 12.