Seeking Corporate Accountability: Progress and Pitfalls of Mandatory Due Diligence

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From collapsed dams and factories to deforestation, displacement and oil spills, it is no secret that transnational economic activities have been at the center of numerous and serious violations of human rights and adverse impacts on the environment. While businesses' role in contributing to these risks has long been recognized, persistent gaps in the regulation of transnational business activity have led to many instances of corporate impunity. Complex supply chains and (at times deliberately) opaque business relationships have made it challenging to attribute responsibility for violations. Victims rarely see remedy.

Recognizing this, the United Nations Human Rights Council commissioned and unanimously adopted the United Nations Guiding Principles (UNGP) in 2011. The UNGP represents the first universally applicable human rights guidelines that directly addressed both states and businesses, and quickly became the definitive reference point for the duties of governments and responsibilities of businesses with regard to the respect and protection of human rights at risk of being impacted by business activity.

Though the Guiding Principles comprise a set of voluntary guidelines and cannot be enforced as such, their adoption built a new normative foundation for responsible business conduct. In addition to affirming governments' obligation to ensure access to remedy, the UNGP elucidated the concept of 'human rights due diligence', which business should carry out to identify, prevent, mitigate and account for how they address human rights impacts resulting from the way they operate, including their interactions with suppliers.

What does due diligence entail?

The OECD Guidelines for Multinational Enterprises describe due diligence as an on-going, proactive and reactive process through which companies can identify and address actual or potential risks in order to prevent or mitigate risks of contributing to adverse impacts associated with their activities or sourcing decisions.

According to the UNGP, human rights due diligence consists of four components: (1) companies should identify and assess actual or potential adverse human rights impacts that may directly be linked to its operations, products or services (i.e. impact assessment); (2) integrate the findings of the impact assessment in company processes and procedures and take action to prevent or rectify the impact; (3) track the effectiveness of the measures and (4) communicate how the adverse human rights impacts are addressed and show that adequate processes and policies are in place.

From voluntary to mandatory

In little over a decade since the Guiding Principles were adopted, the concept of human rights due diligence has permeated discourse at a variety of levels, from the international to the hyperlocal, evening making its way into the parlance of the company boardroom. It is no longer a niche call for action from business and human rights activists and scholars – it is being taken seriously by politicians, business leaders and the rights-holders themselves.

Nowhere is this more in evidence than in the wave of mandatory due diligence legislative proposals that have emerged from legislative bodies across the globe. A number of these have already been adopted into law. Beginning with the 'devoir de vigilance' law adopted by France in 2017, similar legislation has been adopted in the Netherlands (2019), Germany (2021), Norway (2022), Canada (2023), and the United States (2023). Further proposals for mandatory due diligence legislation are being negotiated in several other states including Belgium, Switzerland, Hong Kong, and others, including regional and international bodies

such as the EU and the UN. In June 2023, the European Parliament voted in favour of the European Commission's proposed Corporate Sustainability Due Diligence Directive (CSDDD) that would oblige large companies to carry out mandatory due diligence. Negotiations on the draft directive are currently being carried out in the Council. This Directive would add on to existing supply chain regulation in the domain of minerals, wood, and batteries. At the international level, the UN has been negotiating since 2017 a binding treaty on business and human rights that incorporates due diligence and would likely require state parties to set mandatory due diligence legislation for the companies headquartered in their state.

An end to corporate impunity?

The legislative wave of mandatory due diligence has been driven forward by civil society movements seeking to pierce the so-called "corporate veil", which has shielded businesses from being held responsible for preventable human rights violations within their supply chains and business partnerships, and ensure remedy for victims. But even as momentum grows and more legislative proposals are drafted, the potential for mandatory due diligence to put an end to corporate impunity, provide access to remedy for rights-holders, or reduce negative consequences of transnational economic activities is uncertain.

Recent scholarship has focused on three primary topics: the suitability of due diligence as an approach to mitigating corporate human rights abuse, the institutional design of legislation, and the early and potential impacts of mandatory due diligence legislation.

The due diligence approach

Some discussion surrounds whether the due diligence approach is fundamentally appropriate for corporate accountability and remedy. This debate extends from those surrounding the UNGP's use of due diligence, which is based on a theory of embedded liberalism (see Leite 2023) and attempts to strike a compromise between economic and social interests, rather than prioritizing social interests first (see Deva 2013 and Deva 2023). Krajewski (2023) argues that due diligence upholds the public-private legal division by only imposing due diligence obligations on companies, rather than human rights obligations. As such, if a human rights violation occurs within a company's supply chain, rights-holders may not be able to make a claim against the company for the violation itself, but rather only for failing to carry out due diligence. In fact, the due diligence approach may even offer protection against liability if a company can demonstrate it carried out due diligence. Additionally, Deva (2023) has pointed out that significant power asymmetries persist in mandatory due diligence. Moreover, a number of scholars have argued that human rights due diligence represents a procedural approach, and as such prioritizes the process of conducting due diligence over actual outcomes, with serious risks for 'cosmetic compliance' or a 'tick-box' approach (see especially Landau 2019 and Leite 2023).

Institutional design of legislation

Despite the common invocation of the concept of 'due diligence', these (proposed) legislative instruments vary considerably in terms of institutional design. Studies by Lafarre and Rombouts (2022) and Deva (2023) have taken stock of the significant variations in terms of issue areas covered, supply chain coverage, enforcement, and company size. Some laws, such as France's devoir de vigilance law and Germany's Lieferkettensorgfaltspflichtengesetz, apply to a broad range of issue areas and sectors, whereas others focus on a particular issue area, such as the Netherlands' Wet Zorgplicht Kinderarbeid which only concerns

child labour, or only on a particular sector, such as the European Union's Conflict Minerals Regulation. In terms of supply chain coverage, some laws cover the full supply chain (such as the Norwegian Transparency Act) whereas others – like the French devoir de vigilance law and the proposed CSDDD restrict the scope to 'established' business/commercial relationships. Additionally, the laws establish very different enforcement mechanisms, from the possibility of civil or criminal liability to only the imposition of administrative fines (see also Quijano and Lopez 2021). Moreover the laws differ as to the size of business to which they apply. Though most are first focusing on larger multinationals (determined by a certain turnover or number of employees or both), some, such as the German law, include a phase-in for smaller companies in the future. Quijano and Lopez (2021) argue that such differences can have a major impact on whether the law produces positive effects for rights-holders, maintains the status quo, or even worsens the situation.

Most of the enacted legislation shares a reliance on private governance measures, for example by accepting corporate reports, private certification, and auditing as evidence of companies' compliance. As Nolan 2022 argues, an over-reliance on social audits carries considerable risks since research has demonstrated social audits often fail to detect significant labour abuses in supply chains and have failed to result in lasting improvements in the protection of labour rights. Additionally, in the face of limited or non-existent monitoring mechanisms set out by the different laws, Nolan (2022) explains that there is a heavy burden on civil society to fulfill this function.

Moreover, the laws appear to offer little in terms of improving access to remedy for rights holders (see Leite 2023). Most laws do not even allow the possibility of bringing a civil claim, and even when civil claims are allowed, claims can only be made indirectly through reference to failure to conduct due diligence (Krajewski 2023). Moreover, the laws fail to do anything to address existing and well-known legal hurdles for victims of transnational business-related human rights abuse (see Lafarre and Rombouts 2022 and Nolan 2022), such as lack of access to legal counsel, high costs, high burden of proof, lack of access to evidence, and others.

Impact of legislation

Lastly, the (potential) contribution of mandatory due diligence legislation to preventing and remedying corporate human rights abuse is uncertain. Research has presented a mixed record. In two case studies carried out in Malaysia and Myanmar, Salcito and Wielga (2017) found that human rights due diligence did not lead to any major effects "on the ground". However, Lafarre and Rombouts' 2022 analysis of French companies covered by the 'devoir de vigilance' law showed significant improvements in human rights scores for companies that had lower scores prior to the law. They argue that since the French law, French companies outperform companies from other EU countries on human rights scores and conclude that overall 'a mandatory duty of care can incentivise corporate decision-makers to internalise the social costs of their business operation' (p. 583). Further research will be necessary as mandatory due diligence legislation goes into effect in different jurisdictions.

Conclusion

After decades of relying on private and voluntary forms of governance to prevent and remedy corporate abuses of human rights and the environment, the recent wave of mandatory due diligence legislation is finally carving out a place for the state. Nevertheless, the laws present considerable and important differences that are likely to impact their effectiveness in addition to creating confusion for both the businesses that need to comply and the rights holders themselves. Fundamentally, the due diligence

approach has several shortcomings that may dampen its contribution toward reducing corporate abuse of human rights and the environment. While it's generally too early to determine the actual impacts of these laws, initial research in this area presents conflicting results. Ultimately, it is clear that mandatory due diligence is not a panacea. What remains to be seen is whether this recent wave will be understood as a step in the right direction by opening the door for more effective regulation or whether it will pre-empt or delay further progress toward ending corporate impunity.

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