Corporate human rights due diligence – emerging practices, challenges and ways forward

UN Working Group on Business and Human Rights Report to the 2018 UN General Assembly (A/73/163)
Background

- Unanimous endorsement of the Guiding Principles on Business and Human Rights (UNGPs) by the Human Rights Council in 2011
- For the first time, a globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address business-related human rights impacts
- Key clarification: all business enterprises have an independent responsibility to respect human rights – this requires human rights due diligence
- Identify, prevent, mitigate and account for how they address impacts on human rights
- WG mandate: promote implementation of the UNGPs
WG report

• **Key features of human rights due diligence and why it matters**
• **Gaps and challenges in current business and Government practice**
• **Emerging good practices**
• **How key stakeholders — States and the investment community, in particular — can contribute to scaling up**
What is corporate human rights due diligence?

- Processes to manage potential and adverse human rights impacts
- Four key components
  - **Identifying and assessing actual or potential adverse human rights impacts** that the enterprise may cause or contribute through its own activities, or which may be directly linked to its operations, products or services by its business relationship.
  - **Integrating findings** from impact assessments across relevant company processes and taking appropriate action according to its involvement in the impact.
  - **Tracking the effectiveness of measures** and processes to address adverse human rights impacts in order to know if they are working.
  - **Communicating** on how impacts are being addressed.
Key features of human rights due diligence

• *Prevention of adverse impacts on people* is the main purpose
• *Risks to people*, not risks to business
• *Commensurate with the severity and likelihood* of the adverse impact
• Should be *ongoing*, as the risks to human rights may change over time
• Should be *informed by meaningful stakeholder engagement*, in particular with affected stakeholders, human rights defenders, trade unions and grassroots organizations
• *UNGPs due diligence concept in full alignment with OECD Due Diligence Guidance* (2018)
Other key features (cont.) – GPs/OECD DD in alignment

- Not carried out or required as a way to shift responsibilities
- Conducted in accordance with the principles of internationally recognized human rights
- Proportionate to the size of the enterprise, the risk of the severe impacts, and the nature and context of the business operations
- Adapted to the challenges of managing business relationships
- Involves ongoing communication on identified potential and actual impacts and how they are being addressed
Why it matters

- Fundamental way of informing what any business enterprise should do to meet its responsibility to respect
- Prevention of adverse impacts on people is the main purpose
- Requires proactive steps to prevent and address harmful impacts
- Lack of human rights due diligence may undermine sustainable development
- Lack of / inadequate due diligence will also come back to haunt the company (but should be done regardless of «business case»)
Increasing uptake at policy level

- A norm of expected conduct
- Integrated in global frameworks for responsible business (OECD, ILO)
- OECD Due Diligence Guidance – a key development
- Increasingly reflected in government policy frameworks and legislation
- Investors asking enterprises how they manage their risks to human rights
- Recognition of business lawyers’ role in advising on human rights due diligence
- Part of mega sporting events selection processes
- Corporate policies and innovation around due diligence, including in supply chains
Business practice: gaps

- Beyond a small group of early adopters, the majority of companies do not demonstrate practices that meet the UNGPs requirements.
- Reiterated in recent assessments: Corporate Human Rights Benchmark, RobecoSam.
- Too many tick-box approaches.
- Too many still being mostly reactive, instead of proactively trying to identify risks.
- Gaps in:
  - corporate disclosure of risk assessments and human rights due diligence processes.
  - the “taking action” and “tracking of responses” components.
  - connections between human rights due diligence and remediation.
- Corporate engagement on SDGs – too much focus on opportunities, rather than due diligence.
- Consequence: Risks to workers and communities not managed adequately in spite of growing awareness and commitments?
Business practice: key challenges

• Translating corporate policies into local contexts is a challenge across sectors
• Tailoring knowledge on human rights risks and processes to specific functions
• Due diligence beyond tier one
Government practice: gaps and challenges

- A lack of government leadership in addressing governance gaps remains the biggest challenge
- Host Governments are not fulfilling their duty to protect human rights – failing to pass legislation that meets international standards, inconsistent legislation, or lack of enforcement
- Some home Governments have introduced due diligence or disclosure legislation – French duty of vigilance a ground-breaking example
- Overall efforts are patchy or uncoordinated
- Too little guidance, including for SMEs
- Lack of policy coherence
- Not leading by example in their own roles as economic actors.
Overall picture

- A small group of early adopters are showing the way and good practices are building up
- But considerable efforts are still needed
- Majority of business remain unaware, unable or unwilling
- Fundamental challenge: scale up the good practices that are emerging and address remaining gaps and challenges
- Concerted efforts by all actors needed
- Strongest drivers: government and investor pressure
- For Governments in particular, addressing and closing market and governance failures is an inherent part of their duties.
Business: just get started

• The good news is that effective due diligence can be done
• Good practice and tools building up - business can no longer cite a lack of knowledge as an excuse for not getting started.
• Companies should just get started.
• The first step is identification of specific actual or potential adverse impacts
• Each potential impact identified will have to be assessed for its likelihood and severity and to be addressed
• In terms of process, getting started requires leadership from the top to turn human rights policy commitments into reality.
Investors: use leverage

- Increasingly, investors are asking questions to companies about human rights policies and human rights due diligence
- Part of a wider trend of integrating ESG considerations into mainstream investment decision-making
- Increasing recognition of the responsibility of investors and financial institutions, and that proper human rights due diligence improves risk management
- Good for both people and investments.
- More investors and financial institutions need to move in this direction and more consistent approaches needed
- Greater alignment also needed for benchmarks, ratings, ESG analysis
- Nov 5: EU Parliament calls for stronger due diligence regime for investors
Governments: use all available levers

• States must implement their duty to protect
• A range of levers that they can and should use:
  – Policy tools and frameworks, including NAPs and strengthened policy coherence overall
  – Legislation, regulation and adjudication
  – Incentives through “economic diplomacy” and public procurement
  – Lead by example – SOEs, SWFs, procurement, development finance
  – Provide guidance
  – Facilitate multi-stakeholder dialogue – including in sector context
• Recent developments show that action is possible in all these areas
• Political leadership is a critical factor.
Companion paper: lessons from practice

• Lessons from “early adopters” compiled in a companion note:
  – how to get started
  – journey of implementing the process
  – key milestones

• Identifies good practice elements in relation to a number of aspects of human rights due diligence:
  – meaningful stakeholder engagement,
  – transparency and meaningful reporting on human rights
  – integrating human rights in supply chain management beyond tier one
  – exercising leverage
  – addressing systemic issues
  – corporate engagement on the SDGs
  – role of business lawyers
Links

Full report (available in Arabic, Chinese, English, French, Spanish and Russian):

Companion paper I – Corporate human rights due diligence: Background note and elaborating on key aspects:

Companion paper II – Corporate human rights due diligence – Getting started, emerging practices, tools and resources:

Working Group’s thematic page on human rights due diligence:
www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx

The Corporate Responsibility to Respect: An Interpretive Guide (Office of the UN High Commissioner for Human Rights):