

## UN Forum on Business and Human Rights, Geneva, 18 November 2015

### Human Rights Due Diligence in Law and Practice

**Robert McCorquodale** (BIICL) introduced the session and explained the importance of human rights due diligence as part of all pillars of the UN Guiding Principles, as well as its importance in law and practice. Recommended the need for applied research in this area (and referred to the project being conducted by BIICL and Norton Rose Fulbright).

**Sandra Cossart** (Sherpa) indicated that relying on corporate goodwill without regulation was not effective for anyone. She discussed the process of the French bill on a duty of vigilance before the Senate. This required companies to establish a plan and implement it and, if they do not do so, then there is a civil procedure. She made clear that it was not an NGO proposal and it was not really on human rights due diligence.

**Richard Howitt** (MEP) made clear that a smart mix of legislation and consistent action by governments is needed. This had cross-party support in European Parliament, as the benefits outweigh the costs of proliferation of standards.

**Robin Brooks** (Norton Rose Fulbright) examined the role of the lawyer (as a professional adviser) being a strategic adviser and not just a document drafter. While the scope of an adviser's mandate can differ (and also will change if they are part of a large chain of advisers, where the leverage will decrease), if there is a significant business and human rights risk then the need to report on it outweighs the limits of the mandate. In situations of potential serious abuse of rights the adviser should consider withdrawing from the mandate unless they are satisfied that the human rights due process, and potential response, is adequate. Human rights due diligence should adopt a risk based methodology very similar to that used in some areas of compliance, such as anti-corruption, and should always be followed up by a remediation plan, of which the implementation should be checked.

**Sophio Tabatadze** (TeliaSonera): set out the value of undertaking human rights due diligence for a company, as it enables it to explore the risks, impacts and possible opportunities involved. Moreover, undertaking human rights due diligence has proved to be a useful tool not only in on-going business operations, but in the process of divestment as well. She showed that it is crucial to have a strong human rights commitment from the top of a company, as well as a policy framework, human rights impact assessment, grievance mechanism and training. Leverage of the companies to implement the recommendations and mitigation measures to manage the human rights risks are low in countries with low record of human rights protection, rule of law and high corruption levels.

**Martijn Scheltema** (for the International Bar Association): explained how to date human rights protection in supply chains is mainly shaped through codes of conduct implemented in various ways. This seems insufficient due to diverging corporate culture, poor implementation and enforcement, lack of information on the human rights situation and an unbalanced disbursement of risks. He recommended that to improve human rights due diligence in the supply chain, there is a need to build constructive dialogue with suppliers, implement thorough operation level grievance mechanisms with a feedback loop to the buyer, and to balance risks in supply chains.

**Gwynne Skinner** (Willamette University): discussed holding parent companies liable for acts of their foreign subsidiaries in certain situations, advocating (as set out in her publication on Parent Company Liability (ICAR)) for the doctrine of limited liability not to apply in these situations. She

questioned the approach of the “due diligence” of parent companies being used by them to discharge a presumption of liability. She noted that, with that approach, corporations might easily be able to “check a box”; that the requirements for due diligence are not clear; and that if a parent company is able to succeed in meeting its obligation, victims may still be left without a remedy. She advocated moving to an approach of company liability that focuses on parent liability – strict liability in a way – for foreign subsidiary’s violations of international human rights and gross environmental crimes, in order to ensure that non-consenting victims of such abuses are entitled to a remedy.

### **Suggested Actions:**

- Relying on corporate goodwill without regulation was not effective.
- A smart mix of legislation and consistent action by governments is needed.
- Professional advisers, such as lawyers, should report on human rights risks and support human rights due diligence, as being part of a company’s compliance requirements (and not just a tick-box process), and which should include a remediation plan, and review of implementation.
- There is a positive value for companies in undertaking human rights due diligence on an on-going basis, including for divestment, though it requires commitment from the top of a company, as well as a policy framework, human rights impact assessment, grievance mechanism and training.
- To improve human rights due diligence in the supply chain, there is a need to build constructive dialogue with suppliers, implement thorough operation level grievance mechanisms with a feedback loop to the buyer, and to balance risks in supply chains.
- There is a limit to human rights due diligence while the doctrine of limited liability is applied without regard to victims, so there could be strict liability on parent companies for their foreign subsidiary’s violations of human rights in order to ensure that victims of abuses are able to have a remedy.
- Further research on human rights due diligence with practical application for governments and companies is needed, including remedies for victims, and should be supported.