

Human Rights Due Diligence: The Role of States



2013 Progress Report

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About the Human Rights Due Diligence Project

This brief report is an update of the report released in December 2012 entitled “Human Rights Due Diligence: The Role of States.” That report was authored by an Expert Group consisting of Professor Olivier De Schutter, Professor Anita Ramasastry, Mark B. Taylor and Robert C. Thompson.

The report and the work of the Expert Group was the outcome of the Human Rights Due Diligence (HRDD) Project, launched in 2012 by the International Corporate Accountability Roundtable (ICAR),¹ the European Coalition for Corporate Justice (ECCJ),² and the Canadian Network on Corporate Accountability (CNCA).³ The project sought to establish the extent to which the legal systems of States already make use of due diligence regulations to ensure that businesses respect established standards. Further, the project sought to describe a range of regulatory options building on or inspired by existing regulations that policymakers might use to take the next steps in ensuring businesses respect human rights.

At the request of the coalitions that launched the project, the Expert Group came together to receive input and author a final report. Throughout most of 2012, the Group attended consultations with legal experts and with civil society from Africa, Asia, Europe, and the Americas, listening to practitioners and scholars from a variety of jurisdictions about how due diligence regulation works in their own countries and how it does not. The objective of seeking multi-jurisdictional examples was to take into account differences among legal systems and cultures, and varying levels of economic development. The idea was both to see where commonalities lay, but also to show legal diversity, to allow contributors to point out distinguishing characteristics of particular regulatory systems in their areas of expertise.

The Project ultimately obtained more than 100 examples of due diligence regimes in more than 20 States, drawn from a wide variety of regulatory sectors, in business and commercial law, human rights law, national and international criminal law, and environmental law. The report and those examples are available online at <http://accountabilityroundtable.org/initiatives/human-rights-due-diligence/>.

About the Author

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About the International Corporate Accountability Roundtable (ICAR)

The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes and defends legal frameworks to ensure corporations respect human rights in their global operations. For more information, visit us online at www.accountabilityroundtable.org.

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I. The Responsibility to Respect: Independent, Not Isolated

The United Nations Guiding Principles on Business and Human Rights (2011) clarified in international norms what it means for a business to respect human rights. The responsibility to respect, as defined by the Guiding Principles, is based on the principle that a business should do no harm. The Guiding Principles state that in order to meet its responsibility to respect human rights, a business should act with due diligence to ensure that it does not infringe on the rights of others.

In other words, a business' responsibility arises from its activities and relationships, and a business should take steps—due diligence—to ensure that its activities and relationships do not infringe on human rights. The Guiding Principles make clear that this responsibility extends throughout a business's operations and relationships globally, and that it is an independent responsibility of business, that is, a responsibility that exists independent of what States do or do not do.

Independent, but not isolated.

A business's responsibility to respect human rights is independent of the State's duty to protect human rights, but it is not isolated from it. In fact, Guiding Principle 1 describes the duty of States to protect against abuses by businesses as including "appropriate steps to prevent, investigate, punish and redress" human rights abuse "through effective policies, legislation, regulations and adjudication."⁴

In 2012, the Human Rights Due Diligence project found that due diligence is used by the legal systems of States around the world, including in a variety of legal traditions: from the U.S. to China, from Australia to Nigeria, from Argentina to the EU and its member states, from common law countries to civil law countries. In those legal systems, the due diligence procedures are consistent with the due diligence process described in the Guiding Principles; so much so, that the report "Human Rights Due Diligence: The Role of States"⁵ (HRDD Report) concluded it is possible to describe the components of due diligence as constituting an emerging standard of due diligence procedure that is familiar in many jurisdictions and internationally: identify the risks to human rights, take action to prevent or mitigate those risks, and be transparent about both the risks and what is being done to address them (see Appendix I "Human Rights Due Diligence Procedure").

Around the world, due diligence is commonly used to assess business compliance with standards set in law, including in some cases to protect human rights, such as labor rights, or to respond to related risks, such as consumer or environmental protection. Yet, the project found little in the form of explicit reference to human rights *per se* in the variety of due diligence regimes which exist. Nor do the Guiding Principles specify the options in policy and law that might be available to States to ensure the implementation of business due diligence for human rights. The project's Group of Experts also heard repeatedly from the experts and lawyers we consulted that in many cases existing laws are poorly enforced.

II. Regulatory Options for States

In the twelve months since the HRDD Report, there have been signs of progress. As described in that report, the evidence indicates that due diligence is not a foreign legal or regulatory concept in most countries. However, there remain significant gaps in State practice. States could make far greater use of legal tools to ensure business respects human rights in general, and that companies implement due diligence for human rights in particular.

The HRDD report (2012) found four main regulatory approaches through which States can ensure human rights due diligence activities by business:

- Due diligence as a matter of legal/regulatory compliance
- Regulation that creates incentives or benefits for companies that can demonstrate due diligence practice
- Encouraging or requiring due diligence through transparency and disclosure rules
- A combination of one or more of the above

Below are examples of new measures in 2013 in each of these categories of regulation, briefly summarized and placed in the context of examples from the HRDD Report (2012).

1. Due Diligence as Compliance

Most countries have legal provisions which impose due diligence requirements as a matter of regulatory compliance. As described in the HRDD Report (2012), rules requiring business enterprises to conduct due diligence are implemented either as a direct legal obligation formulated in a rule or indirectly by offering companies the opportunity to use due diligence as a defense against charges of criminal, civil or administrative violations.

For example, regulatory agencies in India, Germany, and Ghana regularly require business to conduct due diligence as the basis upon which to grant approvals and licenses for business activities that might impact the environment or worker safety in the construction sector. The courts in the United States permit business to raise due diligence as a defense against charges of environmental negligence or bribery and corruption.⁶ Similarly, anti-money laundering laws in most countries—from the OECD to China—require financial institutions to conduct customer due diligence (CDD), otherwise known as Know-Your-Customer (KYC) measures.⁷ China requires its businesses to conduct due diligence with respect to workplace safety of Chinese workers abroad.⁸

In November 2013, French MPs introduced proposed legislation to the National Assembly that would create a requirement for French companies to demonstrate they have put in place due diligence systems to avoid causing or contributing to harm in the framework of their economic activity.⁹ The proposed bill references both the UN Guiding Principles and the OECD Guidelines, and, in essence, establishes a legal responsibility to respect human rights under French penal

and civil law along the lines defined by those two international instruments. In doing so, the law provides companies with a due diligence defense:

The bill proposes to amend the Civil Code and the Penal Code by creating a regime of liability for damage occurring in the context of economic or commercial activities of a business which infringe fundamental rights.

The presumption of liability is not conclusive and the company may be exempt from liability if it proves that it was not aware of any activity that may have a potential impact on fundamental rights or if it proves that it made every effort to avoid it.¹⁰

The bill would also amend the French Commercial Code by adding a section that would encourage companies to monitor all activities they undertake that could have an impact on fundamental rights.¹¹ The bill explicitly allows for such monitoring to be undertaken according to the means available to the company, in effect permitting small and medium size companies to implement measures adjusted to their potential impacts on human rights.¹²

i. Criminal Liability

The possibility of criminal liability for a company is provided for in many jurisdictions, including for crimes that constitute gross human rights violations.¹³ As described in the HRDD Report (2012)¹⁴, States may impose criminal responsibility on a business entity for failure act with due diligence to prevent certain crimes. In some cases, a company may avoid being charged with crimes committed by their agents (employees, sub-contractors) by demonstrating that they have had in place effective programs of due diligence. Even in those jurisdictions where criminal responsibility of legal persons is not provided for under the country's penal code, individual business people may find themselves defendants in similar criminal proceedings.

On 25 April 2013, the Public Prosecutor in Tübingen, Germany received a criminal complaint from NGOs requesting that the prosecutor open an investigation against Olof von Gagern, a senior manager of Danzer Group, a Swiss and German timber company. The complaint alleges von Gagern failed to act to prevent human rights abuses committed by Congolese security forces during an operation in the village of Bongulu in Yalisika in northern Democratic Republic of Congo (DRC) on 2 May 2011.¹⁵ The complaint claims that the security forces caused grave bodily harm, committed rape, damaged property and arbitrarily detained villagers during the operation.¹⁶ The complaint alleges that the Congolese security forces received logistical help from Siforco, at the time a Danzer subsidiary, including transportation to the village, transportation of detainees from the village and financial payment.¹⁷ The complaint alleges von Gagern failed to take proper action in light of the likely risk to villagers from a security force operation.¹⁸ Danzer and Siforco deny the accusations, arguing that they did not facilitate violence and that the security forces were beyond their control and responsibility.¹⁹

ii. Civil Liability

The legal systems of most countries provide for civil liability for a business enterprise that causes a victim to suffer harm or prejudice, including by failing to act with due diligence. As described in the HRDD Report (2012), such a failure is usually defined as not taking all the precautionary measures that could reasonably have been taken in order to reduce the risk of the harm occurring.²⁰

In 2013, there were several examples in which judicial decisions involving civil actions strengthened due diligence as a requirement for business:

In January, a court in The Netherlands found a Nigerian subsidiary of Royal Dutch Shell liable for damages from pipeline oil spills suffered by a Nigerian farmer.²¹ Applying Nigerian law, the Dutch court found the subsidiary had been negligent, in particular the company failed to take the precautionary measures that could reasonably have been taken in order to reduce the risk to local people of sabotage by third parties:

. . . [the company] created a particularly dangerous situation at the IBIBIO-I well and allowed this situation to continue . . . [the company] should have foreseen this obvious risk of sabotage and should have taken more and better preventive measures against this risk . . . In particular the people living in the vicinity who, like [the plaintiff] Akpan, generated income from land and fish ponds ran a significant risk of damage by sabotage . . . which was easy to commit.²²

Plaintiffs asked the court to rule on the existence of a violation of their human rights, specifically a violation of their physical integrity.²³ The court refused to do so on the grounds that, while there was precedent in Nigerian law for doing so in cases where a direct harm had been perpetrated by the defendant company, there was no precedent for a case in which the harm had been committed by a third party, facilitated only by the negligence of the company.²⁴

In March, the High Court in Kampala, Uganda found in favour of land tenants who were violently evicted by government forces in order to make way for a coffee plantation.²⁵ In its ruling, the court found the Ugandan Investment Authority (UIA) failed to act with due diligence regarding the transfer of the land from customary tenants to the Kaweri Coffee Plantation Inc., and the relocation of between 2,000 and 4,000 people from the land.²⁶ The court found the UIA failed to check the activities of its lawyers, and the result was ultimately the violent eviction of the tenants by security forces acting on the basis of a fraudulent land transfer.²⁷ In particular, the UIA failed

. . . to carry out due diligence, supervision and checks and balances. Slight prudence would have been enough to have detected that the whole transaction was suspicious. UIA failed to check land values and the compensation amounts payable as well as obtaining signed compensation agreements with the title deeds and other documents . . .²⁸

The court placed primary responsibility on the lawyers hired by the UIA, but had harsh words for the role of German investors behind Kaweri Coffee, saying the “investors had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and ...should have satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them. But instead they were quiet spectators....”²⁹ The German company has rejected the allegations concerning their role, describing them as based on a misrepresentation of the facts.³⁰

2. Due Diligence Incentives

Most countries have rules which leverage the State’s role as a consumer (procurement), investor, or other market-based actor in order to encourage or require due diligence by business. These approaches use policy and law to provide incentives and benefits to companies in return for their being able to demonstrate due diligence practice.

Japan, Korea, and Taiwan all have so-called “green procurement” provisions which, for example, give preferential treatment to suppliers who can certify environmentally friendly practices.³¹ The U.S. Federal Acquisition Regulation (FAR) requires Federal government suppliers to certify they have conducted due diligence with respect to child labor in countries where their products are produced.³² Similarly, U.S. Davis-Bacon Act combats social dumping in the U.S. by contractors working on federal construction contracts.³³ Norway’s State Pension Fund – Global, is screened for a range of human rights violations, and companies can be excluded from the investment universe or put under observation if they cannot show adequate due diligence.³⁴

In 2013, the EU took steps to enable due diligence with respect to goods produced in Israeli settlements.³⁵ Catherine Ashton, the EU High Representative for Foreign Affairs, sent a letter to the senior officials in the European Commission, instructing them to take all necessary legal and administrative steps to ensure products of Israeli settlements in the occupied Palestinian territories are labelled as such.³⁶ In her letter, she affirmed the link between the EU’s position opposing the construction of Israeli settlements, and prevention of the possibility that products from the Israeli settlements could be exported to the EU as Israeli products.³⁷ EU legislation already exists that would allow States require such labelling.³⁸ Ashton’s actions came after thirteen EU foreign ministers wrote to her in April 2013, expressing their support for her efforts to formulate guidelines for all EU countries regarding labeling requirements for products from Israeli settlements imported by the EU countries and sold in European market.³⁹

Also in 2013, the EU moved to amend the incentive structure for businesses operating in Israel in a manner intended to ensure that EU funds do not go to settlements.⁴⁰ The EU issued a directive excluding Israeli settlements from EU financial donations.⁴¹ To ensure the respect of EU positions and its commitments in conformity with international law, any Israeli entity residing or operating in the occupied territories is ineligible to receive “grants, prizes, [or] financial instruments” funded by the EU.⁴² These guidelines apply to any Israeli public or private company, non-governmental organization, including non-profits, whose place of establishment

or operations—in whole or in part—are within the occupied territories. To enforce the agreement, the guidelines require Israeli entities applying for grants, prizes, or financial instruments to declare they are eligible under the requirements set forth above. If, however, the information in the declaration is incorrect, it may be considered a serious misrepresentation for which the entity may be excluded or the grant cancelled.⁴³

Norway's export credit agency, GIEK, undertook in 2013 a revision of its policies and procedures concerning social and environmental requirements for its clients in order to align with the updated Common Approaches of the OECD (2012) and the UNGPs.⁴⁴ GIEK's new policy goes beyond the minimum requirement of the OECD, as it covers all GIEK's transactions, including mobile units (ships), projects under 10 million SDR, and short-term transactions.⁴⁵ In practice, GIEK draws heavily on the International Finance Corporation's Performance Standards (IFC-PS) and uses a set of questionnaires which applicants for export credit or insurance must fill out.⁴⁶ These then form the basis for GIEK's engagement with the company and GIEK's own due diligence with respect to the potential social (human rights) and environmental impacts.⁴⁷ In addition to this, GIEK takes various measures to identify risks in its transactions, including conducting site visits, utilizing services of independent third party expert consultants, and using on-line data screening tools.⁴⁸ GIEK raises potential problems prior to project approval or start-up with both the implementing companies as well as with the banks providing the project financing.⁴⁹ Benchmarks for social and environmental performance are set and during implementation of the project, and GIEK works to ensure that these become legally binding obligations through integration of these to the loan agreements set down by the banks.⁵⁰ The clients are expected to reports on a regular basis against those benchmarks. Impact information provided to GIEK in medium and high risk projects is made on GIEK's website.⁵¹

3. Due Diligence Disclosure

A third approach to encouraging or requiring due diligence is through transparency and disclosure mechanisms. As described in the HRDD Report (2012), States implement rules that require business enterprises to disclose due diligence with the intention that markets and society will attempt to constrain any identified harms.⁵²

For example, securities laws in most countries require some form of company reporting, and laws can also create reporting requirements for corporate social responsibility, such as in Denmark, Norway, Spain, and Malaysia. In some countries consumer protection laws require forms of disclosure, such as in France, Argentina, Germany, the US, and the EU, on the logic that information serves the interests and will prompt action by investors, regulators, and people who might be adversely affected by a business activity.

In 2013, the U.S. Department of State established Reporting Requirements for newly authorized investment in Myanmar(Burma) after the U.S. eased sanctions in response to the reforms that have taken place in that country. Under the new requirements, any U.S. person investing in Myanmar(Burma)'s Oil and Gas Enterprise (MOGE), or whose aggregate investment in Myanmar(Burma) exceeds \$500,000 must report an overview of its operations in Myanmar(Burma) and what, if any, policies or procedures it has covering human rights, workers'

rights, anti-corruption, the environment, property acquisition, arrangements with security providers, and financial transparency.⁵³

The State Department expects the disclosures and the information companies share to be used to encourage and assist businesses to develop policies and procedures to address the host of impacts business operations have in Burma. For example, “if the business enterprise has leverage to prevent or mitigate the adverse impact” the Department encourages businesses to conduct itself in accordance with the UN Guiding Principles, and “exercise its [leverage].”⁵⁴ Where the enterprise is unable to increase its leverage, “the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.”⁵⁵ Investors who fail to submit required reports are not in compliance and are subject to civil and criminal penalties for violation of the International Emergency Economic Powers Act.⁵⁶

In July 2013, a U.S. court rejected the argument of the National Association of Manufacturers, the US Chamber of Commerce, and the Business Roundtable in a law suit filed against disclosure requirements relating to conflict minerals. The suit⁵⁷ was filed in 2012 challenging the Section 1502 Dodd-Frank Wall Street Reform and Consumer Protection Act.⁵⁸ Section 1502 of Dodd-Frank requires companies with securities registered with the Securities and Exchange Commission (SEC) to assess and report annually on any conflict minerals “necessary to the functionality or production of a product” manufactured (or contracted to be manufactured) by the company.⁵⁹ Companies must conduct a good faith country-of-origin inquiry and where tin, tantalum, tungsten or gold appear to be sourced from the DRC or neighbouring countries, the company must conduct due diligence and file a public conflict minerals report.⁶⁰ The final rule requires that an issuer's due diligence follow a nationally or internationally recognized due diligence framework.⁶¹ The SEC has indicated the OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" satisfies the Commission's criteria.

In their lawsuit, the plaintiffs argued that in issuing the Rule, the SEC disregarded its statutory obligations under the Exchange Act, that the rulemaking proceeding was arbitrary and capricious in multiple other respects, and that the public disclosures required by both the Rule and Section 1502 of Dodd-Frank compelled speech in violation of the First Amendment.⁶² The United States District Court for the District of Columbia rejected their argument. The District Court found the SEC pursued the rulemaking in a manner consistent with the intent of Congress, namely

[t]o accomplish the goal of helping end the human rights abuses in the Democratic Republic of the Congo caused by conflict, Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of companies' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains.⁶³

The court found the SEC's rules to be neither arbitrary nor capricious⁶⁴, and that nothing about the Rule or the underlying statute infringed on industries' First Amendment rights.⁶⁵

4. The Due Diligence Regulatory ‘Mix’

A fourth category of regulatory options for encouraging or requiring due diligence involves a combination of one or more of the approaches outlined above. States regularly combine aspects of these approaches in order to construct an incentive structure that promotes respect by business for the standards set down in the rules, and ensures that compliance can be assessed in an efficient and effective manner. For example, administrative rules governing environmental protection, labor rights, consumer protection, or anti-corruption may require business due diligence as the bases for a license or approval, and may also require regular reporting disclosure of due diligence activities by business. Enforcement of such rules can combine administrative penalty (fines), criminal law sanctions, and the possibility of civil action, in which due diligence can be a defense.

In March 2013, the U.S. reauthorized the Trafficking Victims Protection Reauthorization Act (TVPRA), which includes provisions to requiring government agencies to work with corporations to ensure their supply chains are free of materials produced with the use of trafficked labor and that businesses do not contribute to trafficking in human beings for the purpose of sexual exploitation.⁶⁶ The Act also amends the Racketeer Influenced and Corrupt Organizations Act (RICO), a criminal statute, to include fraud in foreign labor contracting as a predicate offense, alongside such crimes as slavery.⁶⁷

The TVPRA of 2013 is only the latest in a series of measures in the U.S. to strengthen rules governing the risk of business participation in trafficking and related offences. In September 2012, President Obama issued Executive Order, 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts,”⁶⁸ (EO) which prohibits federal contractors from conducting specific trafficking-related activities⁶⁹ and establishes affirmative duties for contractors and subcontractors, including several due diligence incentives that bear substantial similarity to the rules governing other public procurement schemes.⁷⁰

To ensure compliance, contractors and their subcontractors must agree by contract to cooperate fully with contracting agency audits and investigations, and, for contracts above \$500,000, contractors and subcontractors are required to maintain a compliance plan, including concrete due diligence measures.⁷¹ The Executive Order (EO) covers all federal contracts for services or goods whether performed in the U.S. or abroad and failure to comply with any of these provisions may result in suspension or termination of the contract and possible debarment.⁷² The EO does not create a private right of action⁷³ although such right of action does exist under the Trafficking Victims Protection Act (2003): in August 2013, the U.S. based defense contractor KBR, and its Jordanian subsidiary, were order to stand trial by a U.S. Federal Court in one of the first cases against a corporation under this statute.⁷⁴

This combination of State engagement with business, procurement requirements, disclosure rules, and criminal and civil remedies is typical of what the UN Guiding Principles has called a “smart mix” of measures to promote business respect for human rights.⁷⁵ The Guiding Principles

themselves describe such a mixed approach in relation to business involvement in zones of armed conflict. Under Principle 7 “Supporting Business Respect for Human Rights in Conflict Areas”, the Guiding Principles suggest that States should engage early and assist business to help them “identify, prevent and mitigate” human rights risks in a particular context of violent conflict. This engagement should be combined with the possibility to withdraw public support where a business enterprise refuses to cooperate, and “enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.”⁷⁶

An example of this approach to business in conflict occurred in 2013 in relation to Dutch investments in the Israeli-occupied West Bank. In September, a Dutch engineering company, Royal Haskoning DHV, announced it was withdrawing from a sewage treatment plant in occupied East Jerusalem.

The announcement came after advice from the Dutch government, which as a matter of policy discourages investments by Dutch companies in settlements in the West Bank because the government views such settlements as illegal under international law. A Dutch official told campaigners, “we informed Royal Haskoning DHV of the obligation the Dutch government has set itself to actively inform businesses. It is not prohibited for Dutch companies to engage in such economic relationships. The responsibility rests with the companies themselves.”⁷⁷

Royal Haskoning DHV stated it withdrew “after due consultation with various stakeholders, the company came to understand that future involvement in the project could be in violation of international law.”⁷⁸ The Dutch public prosecutor has in the past made it clear that it considers business activity in settlements a potential war crime, and has suggested that companies doing business in or with settlements should take concrete steps to end such activities.⁷⁹ In October, Professor Richard Falk, the Special Rapporteur on human rights in the occupied Palestinian territories, indicated his office has sought to inform companies that their practices in the territories could be “problematic,” and could result in them being held criminally liable.⁸⁰

III. Due Diligence in 2014

How States formulate rules and policies to encourage and require human rights due diligence will be a function of their legal tradition, the way due diligence is commonly used under existing law, the nature of the business activity to be regulated, and the particular human rights contexts involved. However, based on recent developments, there are a number of priorities which can be identified for policy advocacy and legal development in 2014 and beyond.

1. Prioritize State Responses to Business in Conflict Zones

The first is in the area of violent conflict abroad. This is where the human rights abuses are greatest, and State inaction with regards to harms occurring abroad is harder to justify. There are at least five areas of action that should be a priority in 2014 and beyond:

- Globalize and broaden rules governing responsible supply chain management, in particular with respect to conflict minerals. International companies are exposed to U.S. SEC regulations (Section 1502 of Dodd-Frank), and the EU is considering similar rules. The effectiveness of the due diligence approach developed at the OECD for the Great Lakes region of Africa should be assessed, and the lessons applied to the design of policy and law governing all commodities that help to sustain human rights abuse in armed conflict.
- Integrate human rights due diligence into export licensing regimes. In the wake of agreement of the Arms Trade Treaty (2013), there is a sound basis for policy coordination by States on licensing regimes for the export of weapons. Today, some export licensing regimes do have human rights provisions, but none appear to require weapons exporters to show they have effective human rights due diligence systems in place. In advance of the Treaty coming into force, States should take steps to ensure that that human rights due diligence by applicants for export licenses for weapons exports be made an integral part of the application process.
- Advise and support companies caught up in war and dictatorship. As described above the Guiding Principles (GP 7) and its attached report⁸¹ create a sliding scale of State responses to business in conflict zones, from engagement with those businesses concerned to do the right thing, to disengagement from those who are uncooperative. States should take steps to ensure their policies and practices are consistent with this approach.
- Ensure that judicial remedies are available for the prosecution of businesses that commit or contribute to grave human rights abuses. For example, in November 2013, Swiss federal prosecutors confirmed they had initiated an investigation of Argor-Heraeus SA, in response to a criminal complaint filed by the NGO, TRIAL,⁸² alleging the company knew gold it handled in 2004 and 2005 had been pillaged from Democratic Republic of the Congo (DRC) during an armed conflict.⁸³ The company firmly rejected the allegations.⁸⁴

- Ensure consistency in state approaches through international policy coordination. In his *Recommendations on Follow-Up to the Mandate*,⁸⁵ UN SRSG Professor John Ruggie found that “national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes” and suggested that clarity was required, perhaps through an international instrument. State should begin multilateral dialogue towards the of lowering obstacles to justice for victims of grave human rights abuses.

2. Integrate Due Diligence to the State Relations with Business

The second area that seems an obvious candidate for State action is in those business relationships in which the State is a vital economic actor. Requiring due diligence as a minimum threshold to do business with the State sends a powerful signal to the market, and helps raise standards of business social responsibility. It is also a duty of the State to do so under its international human rights treaty obligations. States should require business to conduct human rights due diligence as part of their commercial relationships with State bodies. This applies to State-owned enterprises (SOEs), investment funds (pensions) the disbursement of overseas development assistance (ODA), export credit / insurance, and public procurement.

3. Consolidate the Reach of Due Diligence

States should ensure that where they encourage or require due diligence by business they do not undermine the established norms governing the reach of due diligence. The letter and intent of the Guiding Principles, and national and international instruments which are based on the Guiding Principles, is to prevent business enterprises from escaping responsibility through the outsourcing of potentially harmful activities to others through their business relationships.

One of the central problems facing the corporate social responsibility agenda is the undermining of accountability and respect for legal standards, such as environmental protection or labor rights, by the creative use of business relationships, the various forms of business entities, and the organization or structure of corporate groups across jurisdictions. The approach of the Guiding Principles and related instruments, is to define business responsibility in a way that recognizes the formal limits of the legal entity established under corporate law in most jurisdictions, while at the same time preventing the choice of organizational form to act as an obstacle to addressing the potential harms or violations arising from the business activities of that entity or its partners

The analysis conducted for the HRDD report (2012) suggests due diligence is used by different legal regimes in a similar manner. Due diligence in national jurisdictions is used to overcome the obstacles to effective regulation posed by complex corporate structures or trans-jurisdictional activities. In national legal systems, the responsibility of business enterprises to conduct due

diligence does not end at the legal boundary of the individual company. Due diligence extends throughout the corporate group, and in some cases to all business relationships globally. This is true in the national and international laws governing of anti-corruption (UK), workplace safety (China), conflict minerals (US), anti-discrimination against people with disabilities (US), and with respect to civil actions (the EU Brussels I Regulation).

The purpose of the due diligence concept is to require a business to identify, prevent or mitigate, and account for, a harm or violation. By doing so across a firm's business relationships globally, the scope of due diligence is designed to overcome other legal boundaries, such as the reality of separate legal entities, or separate jurisdictions. Its scope is, therefore, often determined first and foremost by the nature of the harm to be avoided.

4. Disclosure of Due Diligence

A fourth and final area which is in need of a public policy solution is in the area of disclosure of due diligence by business. It is in the nature of due diligence to look for risks which the business should avoid and human rights due diligence is looking for risks of harms to people. Few businesses are going to willingly disclose or publish information that identifies such risks.

Public policy and law need to create an environment in which due diligence information—risks and what has been done to address them—can be published. General CSR reporting laws are part of the answer, but they as of yet do not require sufficient disclosure. Multistakeholder processes can help, but the extent to which they are able to facilitate transparency of due diligence depends in part on the nature of the legal framework applicable to a particular industry or protecting a particular set of rights. Some combination of reporting and disclosure requirements, including mandatory requirements along the lines of conflict minerals reporting, will be necessary.

Appendix I: Human Rights Due Diligence Procedures

The HRDD report from 2012 suggested that “while there is coherence in due diligence procedure, there is unlikely to be a single form of due diligence regulation that will be appropriate for every jurisdiction.... the regulations—the appropriate and effective “smart mix” of law and policy—that implement them in national law will be different.” However, the report also found a significant coherence in due diligence procedure across the different legal traditions and concluded that “due diligence practice does look familiar wherever you go, and it will continue to do so when applied to human rights.”⁸⁶ What follows is an excerpt from the HRDD report.⁸⁷

The experience of States with regulating due diligence suggests there is no single due diligence procedure to satisfy all regulatory challenges, but it is possible to describe core elements of due diligence procedures. This section describes the core elements of due diligence processes found in the regulatory regimes of States, and finds that these are consistent with the description of human rights due diligence described in the Guiding Principles.

Under the Guiding Principles, the business responsibility to conduct human rights due diligence includes the responsibility to (i) identify actual or potential impacts; (ii) prevent and mitigate impacts thus identified; and (iii) account for impacts and responses to them. These components are common to the various due diligence regimes established under national systems. Such regimes exhibit common procedural elements, operationalizing each of these components, based on what is often referred to as “reasonable steps” that would be expected of a responsible business under various legal regimes in different countries.

This Section of the Report does not detail every conceivable due diligence framework available to policymakers. However, it is possible to summarize the key elements common to a variety of due diligence regimes. States should integrate these key elements into the design of their own regulatory measures focused on corporate human rights due diligence.

1. The Responsibility to Identify Actual or Potential Impacts

States should ensure business enterprises seek information about the actual or potential impacts of their activities. The existing due diligence regimes in different national jurisdictions all require a business enterprise to investigate its activities and relationships for actual or potential violations of standards described in law. Human rights due diligence requires a business enterprise to actively seek information about the negative human rights impacts of its activities, as well as about the risk that negative human rights impacts may occur in the future. Once a company identifies such impacts, this triggers a responsibility to prevent and mitigate potential or existing violations, and to remediate any violations that have previously occurred. Seeking information requires an ongoing, continuous process of information gathering, monitoring, and analysis, ideally performed prior to the start of an activity and at regular intervals during the course of an ongoing activity.

The existing due diligence regimes are based on the notion that the size and nature of a particular commercial activity, in combination with the characteristics of a particular operating context, will significantly influence the kinds of harms or violations that are likely to arise. The

interaction of the business activity with a particular human rights context gives rise to potential or actual human rights violations, and helps to define the focus of human rights due diligence by a business enterprise.

Due diligence rules require a business entity to take a systematic approach to its investigation. In practice, due diligence regimes require a company to assign investigative responsibility within its organization to specific individuals or units, committing resources to the tasks of detection and investigation, and ensuring that the people responsible for investigation have access to the levels of the organization where decisions are made. In addition, a company is normally required to actively investigate, which includes identifying and communicating with stakeholders in order to identify human rights risks. Reporting mechanisms, grievance mechanisms, and protections for whistleblowers are integral to an organizational culture that has a proactive and systematic approach to seeking information and provide needed feedback from within and outside the business enterprise.

2. The Responsibility to Prevent and Mitigate

States should ensure business enterprises take appropriate action to prevent potential negative impacts. The existing due diligence regimes in different national jurisdictions all require a business enterprise to prevent potential negative impacts of their activities and relationships. These rules require companies to give a high priority to risks with severe and possibly irreparable impact. In practice, a company's options for appropriate preventive action with respect to human rights will depend on the particular activity involved, the risks it poses, and the rights at issue.

Some risks arise from conditions beyond the power of one business enterprise alone to resolve through its own due diligence. Where this is the case, regulators in the past have taken into consideration industry-wide efforts to deal with those risks. States or intergovernmental organizations have used their convening power to initiate collective business efforts to improve ethical performance in value chains.⁸⁸ However, most due diligence rules do not permit such efforts to obviate the basic requirement that a company take preventive and mitigating measures with respect to an identified violation. Such measures include cutting ties with a known source of risk, for example by divesting from a business enterprise, or ending a contractual agreement with a supplier.

States regulate to ensure business enterprises create a culture of prevention. Rules concerning due diligence often seek to promote an organizational culture in business enterprises that prevents violations. This usually includes a consistent record of adopting policies designed to prevent violations. Companies are required to elaborate, approve, and disseminate, internally and externally, a policy explaining the business enterprise's commitment to respect a standard set down in law. This should be accompanied by standards and procedures for employees or those acting on behalf of the business enterprise to follow. Specific individuals or units within a business enterprise should have clearly delineated responsibility for preventing specific harms or violations. These individuals or business units should be provided with the necessary access to decision makers and resources adequate to the task of prevention. There should be consistent enforcement of internal disciplinary measures, where applicable. In addition,

awareness of particular risks can be raised within the business enterprise through general training of employees and the internal dissemination of information specific to certain operational contexts.

States should ensure business enterprises inform the affected stakeholders of potential risks. Due diligence rules usually include prevention and mitigation measures that require companies to inform affected stakeholders of identified risks. This is the first step to developing measures to mitigate or remedy those harms or violations. Companies are required to provide such information in a timely manner, preferably early in a decision-making process concerning business activities that present a risk. They are required to provide information in a manner that is easily accessible to affected stakeholders and other non-experts, to describe the activity at issue, and include all the key elements of an action that might have an impact on the stakeholders. In addition, a company is required to provide information relevant to stakeholders in their consideration of how they might respond to the risks, such as how and when a decision will be taken by the company, what other organizations are involved, what government agencies have jurisdiction, and how people can find out more.

States regulate to ensure business enterprises take appropriate action to mitigate harms or violations that have already occurred. Due diligence regimes in all jurisdictions are based on the idea that once a risk or harm has been identified, a business enterprise should develop options for appropriate mitigation. As in the case of preventive action, a business will have to consider the particular activity involved, the risks it poses, and the rights at issue. Once a harm or violation has occurred, a business is required to implement mitigation measures to reduce the severity of impact of the harm or violation, or to remediate the harm or violation. Wherever possible, remediation should involve repairing the damage done (*restitutio in integrum*). Where there is irreparable damage, remediation may involve various forms of compensation, both monetary and non-monetary, for victims. In every case, companies should conduct remediation through processes that are transparent and perceived as legitimate by affected stakeholders. Internal or informal redress mechanisms should not foreclose stakeholder access to judicial remedies.

3. The Responsibility to Account

States should ensure business enterprises report on their due diligence procedures. Due diligence rules usually require business enterprises to report to stakeholders. One of the functions of due diligence reporting requirements is to assure stakeholders, including investors and regulators, that a business has the proper procedures in place to manage certain risks. Due diligence rules normally specify the detail necessary for reporting, and require such reporting on a regular basis (e.g. annually). In principle, a company's due diligence reporting should be as detailed and transparent as possible, including the company's policies pertaining to human rights, a description of the due diligence procedures implemented within the firm, the identification of risks, and the substance and process of mitigation measures implemented. However, there is at present significant variation in the rules concerning reporting, the

mechanisms through which companies are required to report, and the criteria as to what constitutes effective disclosure for the purposes of human rights due diligence.

Endnotes

¹ The International Corporate Accountability Roundtable (ICAR) is coalition of leading human rights, environmental, development and labor groups. ICAR works to build frameworks of corporate accountability, strengthen current measures and defend existing laws, policies and legal precedents.

² The European Coalition for Corporate Justice (ECCJ) promotes corporate accountability (CA) by bringing together national platforms of civil society organizations (CSOs) including NGOs, trade unions, consumer advocacy groups and academic institutions from all over Europe. ECCJ represents over 250 CSOs present in fifteen European countries such as FIDH and national chapters of Oxfam, Greenpeace, Amnesty International and Friends of the Earth.

³ The Canadian Network on Corporate Accountability (CNCA) unites environmental and human rights NGOs, faith groups, labor unions, and research and solidarity groups across Canada, including the Halifax Initiative. CNCA members seek the adoption of federal legislation that establishes mandatory corporate accountability standards for Canadian extractive companies that operate abroad. CNCA maintains that the provision of government support to Canadian corporations should be conditional on compliance with these standards. The network aims to enhance the effectiveness of its members' activities through information sharing, policy analysis and research, and to coordinate joint advocacy for legal and policy reform. The CNCA also seeks to promote public awareness of these issues.

⁴ Special Representative on Business and Human Rights, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, princ. 1., adopted by the United Nations Human Rights Council, UN Doc. A/HRC/17/L.17/31 (June 2011), (hereinafter *Guiding Principles*)

⁵ OLIVIER DE SCHUTTER, ANITA RAMASASTRY, MARK B. TAYLOR AND ROBERT C. THOMPSON, HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES (2012), *available at* <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf> [hereinafter HRDD REPORT].

⁶ 15 U.S.C. § 78dd-1(d) (1998).

⁷ The Reserve Bank of India (RBI) introduced Know Your Customer (KYC) guidelines for all banks in 2002. The Prevention of Money Laundering Act, 2002, No. 15, Acts of Parliament 2003 (India), *available at* <http://fiuindia.gov.in/pmla2002.htm>. In 2004, RBI directed that all banks ensure that they are fully compliant with the KYC provisions before December 31, 2005. The purpose was to prevent money laundering, terrorist financing, and theft. *Id.* South Africa enacted the Financial Intelligence Centre Act 38 of 2001 (S.Afr.)/ The United States, pursuant to the USA Patriot Act of 2001, the Secretary of the Treasury was required to finalize regulations before October 26, 2002, so KYC is now mandatory for all U.S. banks. 31 U.S.C. § 5318(l) (2012). New Zealand updated their KYC laws in late 2009, and the rules entered into force in 2010. Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (N.Z.), *available at* <http://www.legislation.govt.nz/act/public/2009/0035/latest/DLM2140720.html.%20T>. THE KYC is mandatory for all registered banks and financial institutions (the latter being given an extremely wide meaning). *Id.*

⁸ In 2012, China's Ministry of Commerce (MOFCOM) estimated that the government's policy of promoting overseas direct investment by Chinese businesses, known as "Going Global," had resulted in a

total of 18,000 Chinese enterprises investing overseas, and a total of approximately 1.2 million Chinese people working overseas for either Chinese or foreign firms. Transcript of News Conference, MOFCOM, (March 14, 2012) available at <http://english.mofcom.gov.cn/aarticle/newsrelease/press/201203/20120308015346.html>.

⁹ N° 1524 - Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Enregistré à la Présidence de l'Assemblée nationale (Nov. 6, 2013), L'ASSEMBLÉE NATIONALE, <http://www.assemblee-nationale.fr/14/propositions/pion1524.asp>.

¹⁰ *Id.* at tit. 2.

¹¹ *Id.* at tit. 1

¹² *Id.*

¹³ See Kiobel, 133 S.Ct. at 1676 (Breyer, J., concurring) (citing Robert C. Thompson, Anita Ramasastry, and Mark Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40(4) GEO. WASH. INT'L L. REV. (2009).

¹⁴ HRDD REPORT, *supra* note 5, at 11-16.

¹⁵ EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, *Criminal Complaint Filed Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses against Congolese Community*, Apr. 25, 2013, <http://www.ecchr.de/index.php/danzer-en.html>.

¹⁶ Karine Jacquemart, *Fighting for the (human) rights of DRC's forests communities*, GREENPEACE (Apr. 25, 2013), http://www.greenpeace.org/international/en/news/Blogs/makingwaves/fighting-for-the-human-rights-of-drcs-forests/blog/44942/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Greenpeace+News+%28Greenpeace+News%29.

¹⁷ GLOBAL WITNESS, *Criminal complaint accuses senior manager of Danzer Group of responsibility over human rights abuses against Congolese community* (Apr. 25, 2013), <http://www.globalwitness.org/library/criminal-complaint-accuses-senior-manager-danzer-group-responsibility-over-human-rights>.

¹⁸ BUS. & HUM. RTS. RESOURCE CENTRE, *Case profile: Danzer group lawsuit (re Dem. Rep. Congo)*, http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/DanzerGrouplawsuiteDemRepCongo?sort_on=sortable_title (last visited Nov. 21, 2013).

¹⁹ Press Release, Danzer, Statement of Danzer regarding the occurrences at Yalisika in 2011, Apr. 26, 2013, available at http://www.danzer.com/Press-Releases-Detail.87.0.html?&L=%2522%2520onf&tx_ttnews%5btt_news%5d=482&tx_ttnews%5bbackPid%5d=80&cHash=998a21c3507adb7c3bf025fae3e8816a.

²⁰ HRDD REPORT, *supra* note 5, at 16-18.

²¹ Alfred Akpan v. Shell ¶ 3.1, District Court of The Hague, Netherlands, January 30, 2013, available at http://www.business-humanrights.org/Links/Repository/1017009/link_page_view.

²² *Id.* ¶ 4.43.

²³ *Id.* ¶ 4.56.

²⁴ *Id.*

²⁵ Baleke v. Kaweri Coffee: Baleke & Four Ors. v. Att'y Gen. & 2 Ors., Civil Suit No 179 of 2002, [2013] UGHC 52 ¶ 47 (Mar. 28, 2013), available at <http://www.ulii.org/ug/judgment/high-court/2013/52>.

²⁶ *Id.* ¶ 36.

²⁷ *Id.* ¶ 100.

²⁸ *Id.* ¶ 106.

²⁹ *Id.* ¶ 107.

³⁰ NEUMANN KAFFEE GRUPPE, *NKG in Uganda* (Nov. 20, 2013), <http://www.nkg.net/newsroom/nkginuganda>.

³¹ See Kankyō buppin'nado no chōtatsu no suishin-tō ni kansuru hōritsu Kuni-tō ni yoru [Gurīn kōnyū][Green Procurement], Law No. 100 of 2000, art. 3, 12, and 13 (Japan), *available at* <http://www.env.go.jp/en/laws/policy/green/index.html>; Hwangyeong Chinhwajeog in Jepum-ui Gumae ui Gyeonglyeo e Ttala Haengdong [Act to Promote the Purchase of Environmentally-Friendly Products], Act no. 10030, Feb. 4, 2010 (S. Kor.); Zhèngfǔ cǎigòu fǎ [Government Procurement Act] 1999 (Taiwan).

³² Pursuant to 48 C.F.R. § 22.1503 (2012) (“Absent any actual knowledge that the certification is false, the contracting officer must rely on the offerors’ certifications in making award decisions.”).

³³ 40 U.S.C.A. § 3141 (West 2012).

³⁴ Lov Statens pensjonsfond [Government Pension Fund Act] No. 123 (Dec. 21, 2005) (Nor.).

³⁵ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/23/21* (June 3, 2013), *available at* <http://unispal.un.org/UNISPAL.NSF/0/E4965C3A265268F885257B800065DD55> [hereinafter Faulk Report].

³⁶ The full text of Catherine Ashton letter was published by the Times of Israel. Stuart Winer, *Full text of EU foreign policy chief's letter on settlement labeling*, TIMES OF ISRAEL (July 23, 2013), *available at* <http://www.timesofisrael.com/full-text-of-eu-foreign-policy-chiefs-letter-on-settlement-labeling/> [hereinafter Ashton letter].

³⁷ *Id.*

³⁸ Faulk Report, *supra* note 35, at ¶ 54.

³⁹ Ashton Letter, *supra* note 36.

⁴⁰ *Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards*, at 9-11, COM (2013) (205) (July 19, 2013).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Commission Delegated Regulation 1268/2012, arts. 211, 221 2012 OJ (L 362) 1.

⁴⁴ Mark B. Taylor, *Kartlegging Og Avviksanalyse: Statens Plikt Til Å Beskytte; Kartlegging Og Avviksanalyse Som Grunnlag for Nasjonal Handlingsplan for Oppfølging Av FNs Guiding Principles on Business and Human Rights*, FAFO-NOTAT (2013), *available at* <http://www.fafo.no/pub/rapp/10178/index.html>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² HRDD REPORT, *supra* note 5, at 43-47.

⁵³ U.S. DEP'T. OF STATE, *Reporting Requirements on Responsible Investment in Burma 3*, available at <http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf>.

⁵⁴ U.S. DEP'T OF STATE *Responsible Investment Reporting Requirements Frequently Asked Questions* (Sept. 23, 2013), <http://www.humanrights.gov/2013/09/23/responsible-investment-reporting-requirements-frequently-asked-questions/#Question2>.

⁵⁵ *Id.* (citing the Commentary to UN Guiding Principles (2011), Principle 19).

⁵⁶ Office of Foreign Assets Control's Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593 (Nov. 9, 2009).

⁵⁷ Nat'l Assoc. of Mfrs. v. S.E.C., 13-CV-635 RLW, 2013 WL 3803918, at 1 (D.D.C. Jul. 23, 2013).

⁵⁸ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁵⁹ Disclosing Use of Conflict Minerals 1, 17 C.F.R. §§ 240-249b (2012), available at <http://www.sec.gov/rules/final/2012/34-67716.pdf>.

⁶⁰ *Id.* at 10. Companies must disclose whether the products originated in the Democratic Republic of the Congo (DRC) or an adjoining country (collectively "covered countries") or whether they were found to be conflict free. If a company's conflict minerals originated in one of the covered countries, it must submit a report detailing the due diligence measures it took to determine the source and chain of custody of the conflict minerals. For those minerals that are not "conflict free", such measures must include an independent private sector audit and a description of the products manufactured or contracted to be manufactured, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin, including whether those minerals directly or indirectly financed or benefited armed groups in the Covered Countries.

⁶¹ *Id.* at 27.

⁶² Nat'l Assoc. of Mfrs. v. S.E.C., at 1.

⁶³ Disclosing Use of Conflict Minerals, *supra* note 59, at 8.

⁶⁴ Nat'l Assoc. of Mfrs. v. S.E.C., at 21.

⁶⁵ *Id.* at 31.

⁶⁶ Violence Against Women Reauthorization Act of 2013 (Pub.L. 113-5) § 105A. (The TVPRA was reauthorized as an amendment to VAWA).

⁶⁷ Pub.L. 113-5 § 1211.

⁶⁸ Exec. Order No. 13627, 77 Fed. Reg. 60029 (Oct. 2, 2012).

⁶⁹ *Id.* The Executive Order prohibits contractors and their subcontractors from engaging in a broad array of trafficking-related activities, such as providing misleading information about work conditions, requiring employers to pay recruitment fees, confiscating employees' identity papers, or failing to pay return transportation costs for employees brought to a locale to work on a government contract. *Id.*

⁷⁰ See generally Davis-Bacon Act, 40 U.S.C.A. § 3141 (West 2009); 29 C.F.R. 5.5; Walsh-Healey Public Contract Act, 41 U.S.C.A. §§ 6501-6511 (West 2012); 48 C.F.R. 22.602; McNamara-O'Hara Service Contract Act, 41 U.S.C.A. §§ 6701-6707 (West 2012); 29 C.F.R. 4.110.

⁷¹ Such plans must be posted at work sites. The plans must include: An awareness plan that details the prohibited trafficking-related activities listed above; A recruitment and wage plan that prohibits recruitment fees and complies with minimum wage laws where they are operating; A housing plan that meets host country safety standards, if the contractor or its subcontractors are providing or arranging housing; and procedures to prevent subcontractors at any tier from engaging in trafficking in persons or trafficking-related activities listed above, and to monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such activities.

⁷² 48 U.S.C. 52.222-50.

⁷³ Exec. Order No. 13627, Sec. 5(c), 77 Fed. Reg. 60029 (Oct. 2, 2012).

⁷⁴ For a case summary and links to plaintiff and defendant claims, see BUS. & HUM. RTS. RESOURCE CENTRE, *KBR Lawsuit (re Human Trafficking in Iraq)*, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/KBRlawsuitrehumantraffickinginIraq> (last visited Nov. 21, 2013).

⁷⁵ Guiding Principles, *supra* note 4, at princ. 3 & commentary.

⁷⁶ *Id.* at princ. 7 and commentary; see also Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/17/32* (May 27, 2011), <http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf> [hereinafter Ruggie Report].

⁷⁷ Adri Nieuwhof, "Dutch Government Advises Firm to Pull out of East Jerusalem Sewage Plant | The Electronic Intifada," August 27, 2013, <http://electronicintifada.net/blogs/adri-nieuwhof/dutch-government-advises-firm-pull-out-east-jerusalem-sewage-plant>.

⁷⁸ ROYAL HASKONINGDHV, *Royal HaskoningDHV Terminates Its Involvement in the Wastewater Treatment Plant in East Jerusalem* (Sept. 6, 2013), <http://www.royalhaskoningdhv.com/en-gb/news/royal-haskoningdhv-terminates-its-involvement-in-the-wastewater-treatment-plant-in-east-jerusalem/727>.

⁷⁹ OPENBAAR MINISTERIE, Q&A CONCERNING INVESTIGATION INTO INVOLVEMENT IN CONSTRUCTION OF ISRAELI BARRIER AND SETTLEMENT, <http://www.om.nl/onderwerpen/internationale/map/concerning/> (last visited Nov. 21, 2013).

⁸⁰ UNITED NATIONS NEWS CENTRE, *Deals linked to settlements in Occupied territories could be 'criminal,' UN Expert Warns* (Oct. 30, 2013), <http://www.un.org/apps/news/story.asp?realfile/html/story.asp?NewsID=46379&Cr=palestin&Cr1=#.Uo48QMRP9zs>.

⁸¹ Ruggie Report, *supra* note 48.

⁸² TRACK IMPUNITY ALWAYS, *TRIAL Files a Criminal Denunciation to the Swiss Federal Prosecutor against a Swiss Refinery Company Suspected of Laundering Looted Gold from the Democratic Republic of the Congo* (Nov. 4, 2013), http://www.trial-ch.org/en/about-trial/trial-acts/details/article/trial-denonce-au-ministere-public-de-la-confederation-une-entreprise-suspectee-de-blanchiment-dor-p.html?tx_ttnews%5BbackPid%5D=1188&cHash=fc4c226a928ed245b4c54617df675c4e.

⁸³ *Id.* The specific charge alleged by TRIAL is “aggravated laundering” under article 305bis of the Swiss Penal Code, which essentially involves laundering (i.e. transacting in a manner designed to frustrate identification of origin) assets which originate from a felony. The complaint alleges the company knew or should have known that the DRC gold it was refining had been obtained through pillage, which is a war crime. The company stated it is an active participant in responsible supply chain management standards developed under the aegis of the OECD in 2011, which also deploy due diligence procedures.

⁸⁴ Press Release, Argor-Heraeus, Argor-Heraeus Firmly Refuses Any Accusation, Nov. 4, 2013, *available at* http://www.argor.com/var/ezwebin_site/storage/original/application/ba149dafb34503613d1a688ccaa89cab.pdf.

⁸⁵ John Ruggie, Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Recommendations on Follow-Up to the Mandate* (Feb. 11, 2011), *available at* http://www.globalgovernancewatch.org/docLib/20110218_GGW_-_Ruggie.pdf

⁸⁶ HRDD REPORT, *supra* note 5, at 59.

⁸⁷ *Id.* at 55.

⁸⁸ Examples of such efforts include the Fair Labor Association (textiles), the Voluntary Principles on Security and Human Rights (extractive industries) and the process that led to the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (also extractive industries).