1 Introduction: The current state and future trajectories of human rights due diligence laws

Larry Cata Backer
and Claire Methven O'Brien

1 Introduction

1.1 The Concept of "Due Diligence" Before, Within, and Beyond the UN Guiding Principles

If one searches for a thing using its name as a guide (he will discover that) where the name is found the thing is not found also. . . So we know: things are not real, they are just symbols."[1] That insight might apply with equal measure to the technologies of human rights based compliance systems built around the technologies that have come to be identified with the term "due diligence." In this introduction, the core elements that together constitute the conception of "due diligence is considered." That conceptualization of due diligence is then applied to its elaboration as a critical part of the development of systems for the identification, application, and protection of human and sustainability rights within the larger systems of economic production.

"Due diligence" serves as the formative conceptual framework around which the responsibility to respect human rights is to be understood and applied by business entities under the U.N. Guiding Principles for Business and Human Rights.[2] John Ruggie emphasized that point in 2008 when he introduced the concept within the three pillar protect-respect-remedy framework that was to serve as the structure of the UNGPs. "To discharge the responsibility to respect requires due diligence."[3] It has been suggested that the use of the term might well have been meant as "a clever and deliberate tactic" meant somehow to bridge the application gap between "human rights lawyers" and "business people."[4] That, in turn, continues to reflect the unfortunate, and perhaps also deliberate conceptual divide between the principles and premises of business law and norms, and those of human rights/sustainability law and norms; [5] a divide that continues to produce an inability to speak across the gap in mutually comprehensible ways.[6]

---

[1] From the Zhao lun 肇論; Walter Liebenthal (trans), Chao Lun: The Treatises of Seng-chao (Hong Kong University Press, 1968 (AD c374-414)) II.4 (On Sûnyatá); ¶ 21 (The language problem), p. 62.
[2] United Nations Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework (NY and Geneva: United Nations, 2011) (hereafter UNGP).
[3] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (7 April 2008); available [https://undocs.org/en/A/HRC/8/5]; last accessed 25 February 2024, ¶ 56 (hereafter 2008 SRSG Report A/8/5).
[4] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights,' (2017) 28(3) The European Journal of International Law 899-919, 900.
[5] Larry Catá Backer, Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law, (2006) 37 Columbia Human Rights Law Review 287-389 (2006).
[6] See, e.g., Björn Fasterling and Geert Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights,' (2013) 116 Journal of Business Ethics 799-814; Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability,' (2020) 69 ICLQ 789-818.

And yet a closer reading of "due diligence" within the UNGP framework and beyond suggests that due diligence as a concept and in its applications is not merely as a tool for realizing a business entity's responsibility to respect human rights. More than a method or instrument for the realization of human rights, due diligence is also an expression of those human rights to which its diligence behaviors are owed. The application of due diligence, and the assessment of its application, together transform method into normative expression. Due diligence shapes the effective understanding of human rights to which it is applied through its use. *The tool becomes the thing for which is it used*. And not just the tool; due diligence produces the artifacts around which human rights is experienced—not merely as stories, but as the accumulation of facts that in the aggregate produce the stories and narratives that are essential, in turn, for the development of the core premises, expectations and principles around which the structures of human rights may be elaborated, and then again applied. In this sense, due diligence, certainly in the area of human rights related to economic activity, plays a central role in the self-referencing system built to meet the challenge of negative human rights impacts in economic activity. That makes the study of due diligence, not as a technology of human rights, but as an essential element of the normative construction of human rights in the contexts in which it is applied.

It follows that the *concept* of due diligence does not merely exist as an object-tool within the 2nd Pillar but is intricately woven into the fabric of the UNGP as a whole. Due diligence sits at the heart of the role of States in setting expectations for business entitles and others within the scope of UNGP Principle 2.[7] Due diligence lies at the heart of the role of States in the context of conflict affected areas as developed in UNGP Principle 7.[8] Due diligence is also woven into the structures of non-State based nonjudicial remedy within the UNGP's third pillar.[9] Indeed, the Commentary to UNGP 29 embeds these grievance mechanisms into the identification of adverse human rights impacts at the heart of the UNGP's human rights due diligence structure.[10] That weaving, then, both within the conceptual framework of the UNGP, and now increasingly through the UNGP's application in the rules, behaviors and expectations of State, international organizations, business enterprises and other stakeholders, is the subject of the essays in this volume.

Indeed, human rights due diligence occupies a space at the heart of the current state and future trajectories of the business and human rights project. Due diligence lies at the heart of contemporary efforts to develop national and regional regulatory structures built around the legal effects of undertaking economic activity through interlinked global or at least transnational supply and production chains. That has certainly been the European approach as exemplified first in the French Supply Loi de Vigilance[11] and then by the German and Norwegian Supply Chain Due

---

[7] Discussed in Larry Catá Backer, The United Nations Guiding Principles for Business and Human Rights: A Commentary (OUP, 2025 forthcoming), chapter 7.
[8] Ibid., Chapter 10.
[9] See UNGP Principles 28-29.
[10] UNGP Principle 29 Commentary ("By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly").
[11] Guillaume Delalieux, 'La loi sur le devoir de vigilance des sociétés multinationales : parcours d'une loi improbable,' (2020) No. 106 Droit et Société 649-665; Cannelle Lavite, 'The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence,' Verfassungsblog (16 June 2020); available [https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/].

Diligence provisions.[12] Their scope, purpose, and authority remain highly contested, especially outside academic circles.[13] Moreover, their application in the Global South may follow different paths.[14] Equally contested was the extent of the projectability of due diligence beyond the State.[15] Due diligence is also embedded to some extent in the more impact specific and disclosure focused modern slavery acts, for example in the U.K. and Australia.[16] It bears noting that even without a comprehensive regulatory framework, due diligence impulses may be realized in markets driven systems through the evolution of tort principles, for example,[17] or disclosure based rules.[18] Yet it also bears reminding that the existence of both a normative standard with a specific objective and a technology for its realization may be as important for changes in perception as it is for the fulfilment of objectives.[19]

It is possible to read into the concept of "due diligence" a strong alignment with, and the expression of the way in which, both the business enterprise responsibility to respect human rights is *operationalized* and, as well, the forms in which the State duty to protect human rights can be *institutionalized*. Due diligence internalizes the notion of state supervision within structures of state supervision that may be expressed in ways that conform to the contextually based governance orders. These supervisory or compliance governance elements (realized through due diligence) may be undertaken in markets (by enterprises) through an elaboration of the notion expressed by Mr. Ruggie of a social license to operate,[20] which may be overseen by state based administrative or compliance oriented institutions and through disclosure systems.[21] Or supervisory and compliance

---

[12] See, e.g., Markus Krajewski, Kristel Tinstad, and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?,' (2021) 6 Business and Human Rights Journal 550-558.
[13] Maria-Therese Gustafsson, Almut Schilling-Vacaflor, and Andrea Lenschow, 'Foreign corporate accountability: The contested institutionalization of mandatory due diligence in France and Germany,' (2022) 17(4) Regulation & Governance 891-908.
[14] Amy J. Cohen and Jason Jackson, 'Governing Through Markets: Multinational Firms in the Bazaar Economy,' (2022) 16(2) Regulation & Governance 355-617.
[15] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal,' (2018) 3 Business and Human Rights Journal 47-73. See UNGP Principle 2 and discussion in Larry Catá Backer, UNGP Commentary, supra, at Chapter 3.2 and 7.2.
[16] Fiona McGaughey , Hinrich Voss, Holly Cullen, and Matthew C Davis, 'Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom,' (2022) 7 Business and Human Rights Journal 249-270.
[17] Martin Spitzer, 'Human Rights, Global Supply Chains, and the Role of Tort,' (2019) 10(2) Journal of European Tort Law 95-107.
[18] Michael Rogerson, Francesco Scarpa, and Annie Snelson-Powell, 'Accounting for human rights: Evidence of due diligence in EU-listed firms' reporting,' (2024) 99 Critical Perspectives on Accounting 102716; Generally, Larry Catá Backer, 'From moral obligation to international law: disclosure systems, markets and the regulation of multinational corporations,' 39(4) Georgetown Journal International Law 591-653.
[19] David Kinley, The Liberty Paradox: Living with the Responsibilities of Freedom (Baltimore: Johns Hopkins University Press, 2024), pp. 150-154.
[20] 2008 SRSG Report 8/5 ("Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social licence to operate." ¶ 54).
[21] Eva Hämberg, 'Supervision as Control System,' (2013) 17(3) Scandinavian Journal of Public Administration 45-64; Wang Wanjiao and Huang Qilong, 'Study on the Optimization of the Synergy between the Regulatory Body, Social Body, and Market Body in the Transportation Industry,' (2022) Discrete Dynamics in Nature and Society 1-13.

measures may be based on mandatory measures directed or overseen by the administrative apparatus of a State, which requires a distinctive form of collaboration between State and enterprise.[22] This follows a trend in which diligence itself is a part of the internal quality control measures of a State with respect to its own delivery of services, and in this context with respect to appropriate delivery on its duty to protect human rights.[23] To understand these multiple layers of meaning and application, it makes sense to explore briefly and in more depth, the underlying sensibilities and principles that lie beneath the term "due diligence" and that points to the assumptions and practices around its use in both the UNGP and in the discretionary and mandatory measures being built around the concept.

1.2 The Concept of "Due Diligence" and its Manifestations.

To better understand the meaning embedded into the term and concept of due diligence, it is quite useful to start by detaching the term from its human rights context. That exercise serves to more explicitly extract the basic cultural premises deeply embedded in the term and on that basis to better understand the way that the term can be better understood and applied in the specific normative context of international human rights.[24] As a general matter, the term "due diligence" is a protean concept with a long history of usage. To a large, and perhaps overwhelming, extent, the concept of due diligence serves as a reference for, and can be made to contain, a quite broad spectrum of meaning and application.

It might be useful to start by considering the term, its text. To that end, it is useful to consider the meaning of diligence by starting from its linguistic roots. Diligence draws meaning from its roots in *diligentia*—denoting attentiveness and carefulness –and ultimately from the notion of gathering together what was apart.[25] The traditional meaning survived into modern day Spanish. Diligencia, as understood in Spanish, and as used in the Spanish version of the UNGP, has as its contemporary principal meaning "cuidado y actividad en ejecutar una cosa (care or action in executing something;" but also agility, speed and promptness in that execution ("prontitud, agilidad, prisa").[26] In contemporary English it is defined as "the quality of working carefully and with a lot of effort."[27] Its meaning in English has lost its sense of speed which is retained in the Spanish.[28] The inclusion of the term carefulness denotes a quality element in the concept of diligence. It is not enough to be attentive; one must be attentive in a careful manner. Quality is then woven into the meaning of the term.

---

[22] Silvia van der Pligt-Bemito Ruano and Joris Hulstijm, 'Governance and Collaboration in Regulatory Supervision: A Case in the Customs Domain,' (2017) 13(4) International Journal of Electronic Governance Research 34-52.
[23] See generally, Christopher; Hood, James Oliver, Colin Scott, and Tony Travers, *Regulation inside government : waste-watchers, quality police, and sleaze-busters* (OUP 1999). ,
[24] For example around the normative framework described in UNGP Principle 11.
[25] Etymology Online, Diligence, available [https://www.etymonline.com/search?q=diligence], last accessed 13 August 2024.
[26] Real Academia Española, Diccionario de la lengua Española (Madrid: Espasa-Calpe, 1970), p. 478.
[27] Cambridge English Dictionary, diligence, available [https://dictionary.cambridge.org/us/dictionary/english/diligence]
[28] Oxford English Dictionary, diligence , available [https://www.oed.com/dictionary/diligence_n1?tab=meaning_and_use#6801233], last accessed 14 August 2024.

The concept of *what and how much is due* is related from the notion of what is owed. Its etymology suggests a derivation from the Latin *debere*, signifying a thing or action that is owed, or an obligation.[29] The word retains its form and meaning in contemporary Spanish, including that used in the Spanish language version of the UNGP. It connotes not merely a financial obligation, but also a legal, moral or religious one.[30] The Oxford English dictionary notes that with respect to a person and as an adjective, the word denotes "under obligation to do something."[31] The obligation can be both specific (and based on law) or more general, in the later sense more in the form of an expectation that is contextually significant.[32] In either case that object of obligation is understood as a quantity—for example of effort, of objective, or of a thing or value—which is measured by the object to which it is directed.

Due diligence, then, as a general matter, combines an expectation or obligation with respect to a matter or action that combined with a sense that this attentiveness is owed by reference to the nature of the obligation. It incorporates a union of two related but distinct premises. The first, diligence, touches on attentiveness or care with respect to a matter. That includes expectations of attentiveness in all matters requiring attention—objects, care, actions, decisions, and the like. The second, due, touches on the amount of diligence that is expected to be applied to a particular matter, condition, decision, and the like. That is, due diligence touches on the amount and forms of attention that a person ought to apply in a given situation or when faced with a decision or choice in any action necessary or to avoid harm to other persons or to their property, rights, or interests. Indeed, the words due and diligence have been combined to reinforce each other, at least in its English usage. For example, "diligence" emerged in its contemporary English language *legal sense* as an "attention and care due from a person in a given situation" or that expected from the parties from the 1620s.[33] With respect to an obligation, or expectation, then, the fundamental conceptualization of the term "due diligence" has linguistically deep roots in the connection between (1) attentiveness/carefulness, (2) obligation or expectation, and (3) quantity/quality measures.

The nature of that duty is highly contextual--with reference to the person on whom the duty falls, the actions undertaken that produces a risk of harm, the nature of the harm, and the expectations of harm minimizing action that ought to be undertaken. Generally, the concept of due diligence can be broadly understood as a manifestation of a form of, or a structure for, responding to perceived harm. That, in turn, is broadly connected to John Stuart Mill's harm principle,[34] principle at the heart of a liberal theory of political philosophy.[35] From the concept of "harm" or "adverse impact" from that of "due diligence." The former speaks to the normative context; the later speaks both to the *means* (attentiveness) by which that normative context is applied and to the

---

[29] Etymology Online, due, available [https://www.etymonline.com/search?q=due+], last accessed 13 August 2024.
[30] Real Academia Española, Diccionario de la lengua Española (Madrid: Espasa-Calpe, 1970), p. 422.
[31] Oxford English Dictionary, due, available [https://www.oed.com/dictionary/due_adj?tab=meaning_and_use#6087803], last accessed 14 August 2024.
[32] Ibid.
[33]Etymology Online, Diligence, available [https://www.etymonline.com/search?q=diligence], last accessed 13 August 2024. See also
[34] John Stuart Mill, On Liberty See, Piers Norris Turner, '"Harm" and Mill's Harm Principle,' (2014) 124(2) Ethics 299-326.
[35] Joseph Raz , *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

quantum of attentiveness (what is due) that is required to achieve or approach the achievement of the fundamental objective—to do no harm (the normative element). Yet, it is important to distinguish among these meanings, principal among which are of "due diligence" as a tool, as a method, as the expression of the norms it operationalizes, and as a platform for the production and consumption of its objectives and methods. One can gets a sense of the concrete manifestation of these impulses through a brief review of the application of the concept of due diligence as the fulfilment of expectations built around the normative concept of harm aligned with quite specific expectations about risk and risk bearing.

If one starts with the concept of due diligence as a measured means to fulfil an obligation to avoid a specified harm (defined in normative terms) then it is possible to trace due diligence in terms of consumers and producers of diligence, as well as the platform on which such production and consumption of diligence is undertaken. First, one starts with the object of obligation. Due diligence requires an actor to undertake diligence in a form and quantity which is due. Natural and legal persons (but also states) are responsible for the harms they cause, whether that responsibility is denominated as a legal obligation (for example the international legal obligations of States that define the minimum scope of their duty under the UNGP)[36] or a social expectation (for example in markets based behaviours). Second, that responsibility identifies the functionally differentiated field within which the obligation of attentiveness is defined. The *diligence* that is then *due*, the amount of attentiveness and its ends, is a function of that responsibility. For example, under the UNGP, that diligence is directed toward the avoidance of human rights infringement.[37] In this way means are aligned with expectations. Third, the diligence that is "due", then, is one that is required under the circumstances and as a function of the actors affected and the character of the action which may produce harm, or more comprehensively, *a risk of harm*.

The concept and application of due diligence grounded in a no harm principle did not arise with the crafting of the UNGP. The notion in its present form emerges in the 17th century as a set of normative expectations of parties around legal disputes between parties who were expected to take reasonable steps to protect their own interests. By the 19th and early 20th centuries the notion of taking reasonable care in the circumstances had crossed over into international law,[38] embracing a no harm principle.[39] Much of contemporary development emerged after 1945 and under the aegis of the UN International Law Commission.[40] Among the relevant of the principles developed within a public law diligence concept was that it "implies the obligation to act in good faith. It applies to each state when facing its international duties, whether to act or, more significantly, to prevent a given action from taking place."[41] At the same time, international legal obligations respecting diligence can also serve as a framework in which the State might shift expectations of diligence to individuals

[36] UNGP, General Principles.
[37] UNGP Principle 11.
[38] See discussion in Antonio Coco and Talita de Souza Dias, '"Cyber Due Diligence": A Patchwork of Protective Obligations in International Law,' (2021) 32(3) European Journal of International Law 771-805, 775-778.
[39] See Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 20 April 2010, ICJ Reports (2010) 14, paras 101, 187, 197, 204, 223
[40] Robert P. Barnidge Jr., The Due Diligence Principle, Under International Law, (2006) 8 INT'L COMM. L. Rev. 81, 115-116, 124.
[41] Joanna Kulesza, "Human Rights Due Diligence," (2021) 30(2) William & Mary Bill of Rights Journal 265-290, 270.

and consumers.[42] These trajectories of development ultimately informed notions of State duty.[43] It was especially important respecting the core principle in the UNGP to "prevent, investigate, punish and redress [human rights] abuse through effective policies, legislation, regulations and adjudication."[44] This was reflected in the South African experience in the context of human rights related diligence, one which suggests that corporate leadership commitment combined with public regulation and private expectations by institutions such as stick exchanges, developed methods for framing and shaping diligence forms and requirements.[45] And it is reflected in similar ways as well in the experience of State fulfilment of its duty to protect human rights.[46]

The emergence of diligence notions around private transactions took a different route. In private law the advance of due diligence was bound up in notions of risk allocation and has ancient roots. At its base was the commercial contract and the principle of risk shifting among parties to a commercial contract. A critical construction of that risk shifting was built around concepts of *caveat emptor* and *caveat venditor*—that is around the choice between a fundamental premise that the buyer had the obligation of diligence to protect their interests as against the fundamental premise that the seller had the obligation of preventing harm by undertaking diligence built around warranties and guarantees of quality, service and the like. The issue remains a lively one in private law,[47] one with global reach.[48]

The expectations of diligence built around the concept of obligations flowing from risk allocations in transactions expanded to become a baseline practice in business transactions. But the scope of the concept was limited to the understanding of those forms of risk that were then privileged--generally financial risk as it might be evidenced or extracted from the financial reporting of economic actors. The relationship between the diligence that was "due" and the underlying normative framework (to whom or under what circumstances is diligence due) for

---

[42] William Gaviyau, Athenia Bongani Sibindi, 'Anti-money laundering and customer due diligence: empirical evidence from South Africa,' (2023) 26(7) Journal of Money Laundering Control 224-238.
[43] Maame Efua Addadzi-Koom, 'Of the Women's Rights Jurisprudence of the ECOWAS Court: The Role of the Maputo Protocol and the Due Diligence Standard,' (2020) 28(2) Feminist Legal Studies 155-178; Maame Efua Addadzi-Koom, 'He Beat Me, and the State Did Nothing about It: An African Perspective on the Due Diligence Standard and State Responsibility for Domestic Violence in International Law,' (2019) 19(2) African Human Rights Law Journal, 624-652.
[44] UNGP Principle 1.
[45] Ralph Hamann, Paresha Sinha, Farai Kapfudzaruwa, Christoph Schild, 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence,' (2009) 87 Journal of Business Ethics 453-477.
[46] Calire Methven O'Brien, Sumithra Dhanaraja, 'The corporate responsibility to respect human rights: a status review,'(2016) 29(4) Accounting, Auditing, and Accountability Journal 542-567.
[47] Joel G. Breman, 'Eliminating poor quality medicines: 'Caveat emptor, Caveat venditor' (buyer beware, seller beware),' (2018) 10 Int Health 321–323; René Franz Henschel, Conformity of Goods in International Sales Governed By CISG Article 35: Caveat Venditor, Caveat Emptor And Contract Law As Background Law And As A Competing Set Of Rules,' (2004) 1 Nordic Journal of Commercial Law ; Muhammad Hafiz Mohd Shukri, Ismail, Rahmah, Markom, Ruzian, ' The Application of Caveat Emptor and Caveat Venditor Doctrines from Civil and Islamic Perspectives,' (2021) 28 JUUM (Jurnal Undang-undang dan Masyaraka) 92 - 103.
[48] For a perspective from Africa, see, Ohenewaa Boateng Newman & Bobby Banson, The Conundrum of Balance under Ghana's Legal System: The Protection of a Buyer in Good Faith and the Principle of Caveat Emptor,
(2022) 30 African Journal of International & Comparative Law 197-210 (2022).

privileging the scope of actions that merited attentiveness were thus nicely interlocked. Since the financial scandals in the United States after 2001, the notions were internalized into the operations of business, especially with respect to financial reporting.[49] But it has also expanded to include monitoring and diligence obligations with respect to trustworthiness in business management. The risk of trustworthiness has been aligned with the risk of liability to directors and others for breach of their managerial obligations. [50]

In the financial and business sphere, due diligence has long been understood as a process of verification, investigation, or audit connected to an economic transaction.[51] In this context the allocation of risk was shifted from the buyers of securities to the seller though the device of integrated and periodic reporting, the completeness and veracity of which was to be guaranteed, as a matter of law, by the seller. The change then shifted the diligence obligation from the person seeking to buy securities to the person or institution selling them. The quantum or scope of the diligence owed was in this context set by law. That transposition from notions of generalized harm, and the assignment of social expectation of risk mitigation or prevention in the face of socially privileged harm, was most influentially undertaken in the first third of the last century. The concept was embedded in legal requirements for reasonable investigation in the US Securities Act of 1933[52] as a "due diligence" defense, which could be used by broker-dealers when accused of inadequate disclosure to investors.[53] That effectively moved from a *caveat emptor* to a *caveat venditor* regime built around the concept of risk and mitigated by the structures of diligence and disclosure. [54] Labor was treated differently.[55]

The forms and expectations built around the allocation of risk and the imposition of diligence requirements in securities markets were then transposed again to the management of financial systems in the first decades of the 21st century.[56] Then, in the context of a global financial

---

[49] Jeanette M. Franzel, 'A Decade after Sarbanes-Oxley: The Need for Ongoing Vigilance, Monitoring, and Research,' (2014) 28(4) Accounting Horizons 917-930; Hassan R. HassabElnaby, Amal Said, Glenn Wolfe, 'Audit Committees Oversight Responsibilities Post Sarbanes-Oxley Act,'(2007) 22(2) American Journal of Business 19-32; Michelle C. Pautz, 'Sarbanes-Oxley and the Relentless Pursuit of Government Accountability: The Perils of 21st-Century Reform,' (2009) 41(6) Administration & Society 651-779.
[50] Larry Catá Backer, 'Trust platforms: The digitalization of corporate governance and the transformation of trust in polycentric space,' (2024) Regulation & Governance doi:10.1111/rego.12614.
[51]
[52] Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2018) at §77k(b)(3) (§11(b)(3)) (reasonable investigation).
[53] Tony Rodriguez and Karen Petroski, 'The Section 11 Due Diligence Defense for Director Defendants,' (2007 Summer) Securities Law Journal 13-15.
[54] Larry Catá Backer, 'The Corporate Social Responsibilities of Financial Institutions for the Conduct of their Borrowers: The View from International Law and Standards,' (2017) 21 Lewis & Clark Law Review 881-920 (2017).
[55] Olga Matín-Ortega and Claire Methven O'Brien, 'Advancing Respect for Labour Rights Globally through Public Procurement,' (2017) 5(4) Politics and Governance 69-79, Claire Methven O'Brien, Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-National Democracy from Labor Law, (2008) 9 German Law Journal 1007-1041.
[56] Marc Shoffman, 'FSB urges due diligence and capped LTV levels,' Financial Times (3 November 2011); G.A. Walker, 'International Financial Instability and the Financial Stability Board,' (2013) 47(1) International Lawyer 1-42; Larry Catá Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order,' (2011) 18(2) Indiana Journal of Global Legal Studies 751-802.

crisis, the United States enacted due diligence as the foundational concept through which it would order and manage its financial markets.[57]

The concept was embedded in legal requirements for reasonable investigation in the US Securities Act of 1933[58] as a "due diligence" defense, which could be used by broker-dealers when accused of inadequate disclosure to investors.[59] The forms and expectations built around the allocation of risk and the imposition of diligence requirements in securities markets were then transposed again to the management of financial systems in the first decades of the 21st century.[60] In specialized fields of activity, it was especially relevant for the conduct of private equity funds.[61] Due diligence was an essential element of contract law, especially with respect to corporate or business acquisitions and divestments.[62] Due diligence is especially essential in certain forms of sensitive government contracts.[63]

Due diligence—the responsibility to exercise a certain level of attentiveness with respect to an action or decision or situation carried to ascertain and minimize risk--was deeply embedded in the practices and expectations of business,[64] and in the realization of the consequences of due diligence as an expectation with legal effect. [65] It was moving into tech driven new economic sectors and its financing.[66] Its most interesting expression was as an embodiment of conduct expectations around the responsibilities of members of corporate boards of directors to appropriately monitor enterprises especially with respect to legal *compliance* risks (though to a lesser extent business risk). Risk based diligence was expanded to include environmental impacts assessments[67] and ;

---

[57] S. M. Solaiman, 'Revisiting Securities Regulation in the Aftermath of the Global Financial Crisis: Disclosure - Panacea or Pandora's Box,' (2013) 14 J. World Investment & Trade 646-671.
[58] Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2018) at §77k(b)(3) (§11(b)(3)) (reasonable investigation).
[59] Tony Rodriguez and Karen Petroski, 'The Section 11 Due Diligence Defense for Director Defendants,' (2007 Summer) Securities Law Journal 13-15.
[60] Marc Shoffman, 'FSB urges due diligence and capped LTV levels,' Financial Times (3 November 2011); G.A. Walker, 'International Financial Instability and the Financial Stability Board,' (2013) 47(1) International Lawyer 1-42; Larry Catá Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order,' (2011) 18(2) Indiana Journal of Global Legal Studies 751-802.
[61] Jason A. Scharfman, Private Equity Operational Due Diligence : Tools to Evaluate Liquidity, Valuation, and Documentation (Hoboken, NJ: John Wiley & Sones, 2012).
[62] See, e.g., Steven J. Hollander, Guide to Due Diligence of Commercial Contracts, A, 83 N.Y. St. B.A. J. 22 (2011); .
[63] Aaron G. Murphy, Foreign Corrupt Practices Act: A Practical Resource for Managers and Executives (Hoboken, NJ: John Wiley & Sons, 2011) (Chp. 11, 'Are You Buying a Problem?: Due Diligence in Acquisitions and Government Contracts'); Sarah Kim. 'Mind your Due Diligence: Section 889 and an Emerging Minefield of FCA Violations,' (2022) 51(3) Public Contract Law Journal 413-438.
[64] Brendan Dailey, Thomas Greelen, and Brett Green, 'Due Diligence,' (2024) 89(3) The Journal of Finance 2115-2161 (corporate acquisitions and real estate transactions).
[65] See, for example Kinney Shoe Corp. v. Polan, 939 F.2d 209 (4th Cir., 1991) (courts could deny veil piercing where the party seeking damages failed to undertake an investigation).
[66] Douglas J. Cumming , Sofia A. Johan, and Yelin Zhang, 'The Role of Due Diligence in Crowdfunding Platforms,' (2019) 108 Journal of Banking and Finance 105661
[67] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions A/HRC/4/74 (5 February 2007); available [https://undocs.org/en/A/HRC/4/74], last accessed 25 February 2024.See discussion of the literature in Andreea Nita, 'Empowering impact assessments knowledge and

audits.[68] These expectations were embedded in the development of principles of monitoring obligations, for example as part of the director fiduciary duty of care in the United States.[69] In this context that scope of the duty quickly expanded to also bring in notions of good faith and loyalty. At the same time, due diligence notions were also, and to some extent remarkably, brought into public administrative culture as federal prosecutors in the US Department of Justice increasingly developed informal guidance for the exercise of prosecutorial discretion grounded in expectations of the development and operation of compliance systems that met certain minimum requirements.[70]

By the beginning of the 21st century, then, the principles of due diligence had become both deeply engrained in business practice, and increasingly tied to public law sensibilities respecting compliance oriented expectations of institutionalization of due diligence in systems of monitoring based decision making. The practice of due diligence also became enmeshed in the sensibilities and techniques of digitization, digitalized analytics, and detachment from the institution with the primary diligence obligation. Technology made it possible to transpose diligence from an in house and highly contextual operation to a digitized process flow of information to which big data analytic could be applied to assess data and aid in diligence based judgment. When detached form the entities to which primary responsibility was assigned, the operation of due diligence could be rationalized through platforms where consumers and producers of diligence based data and analytics could interact (state, enterprises, and non-governmental entities)[71] especially with respect to digital enterprises.[72]

While this development was originally tightly contained with the arena of legal compliance, it was also clear that the practices and institutions of due diligence in business could also be applied to business risk and market expectations, as well as any expansion in legal compliance regimes. At the same time, the institutionalization of compliance and accountability principles around the concept of due diligence suggested that while some risk might be encouraged, other categories of risk might not be. It is in that context that the debate about the expectations of economic activity

---

international research collaboration - A bibliometric analysis of Environmental Impact Assessment Review journal,' (2019) 78 Environmental Impact Assessment Review 106283.

[68] For a critical discussion on the later point, see, Nikolaus Hammer, 'Searching for institutions: upgrading, private compliance, and due diligence in European apparel value chains,' (2023) 29(3) Transfer: European Review of Labour and Research 371-386; Justine Nolan and Nana Frishling, 'Human rights due diligence and the (over) reliance on social auditing in supply chains. In: Surya Deva and David Birchall (eds) Research handbook on human rights and business (Chelenham: Edward Elgar Publishing, 202), pp 108–129.

[69] Larry Catá Backer, 'Trust platforms: The digitalization of corporate governance and the transformation of trust in polycentric space,' (2024) 34(3) Regulation & Governance https://doi-org.ezaccess.libraries.psu.edu/10.1111/rego.12614.

[70] Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation through Nonprosecution,' (2017) 84(1) The University of Chicago Law Review 323-387; Larry Catá Backer, 'Aligning Emerging Global Strategies to Combat Corporate Corruption: From a "Two Thrust Approach" to a "Two Swords One Thrust Strategy" of Compliance, Prosecutorial Discretion, and Sovereign Investor Oversight in China,' (2019) 52(1) International Lawyer 1-46.

[71] Larry Catá Backer and Matthew B. McQuilla, 'The algorithmic law of business and human rights: constructing private transnational law of ratings, social credit and accountability measures,' (2023) 19(1) International Journal of Law in Context 32-50.

[72] David Wong, and Luciano Floridi, 'Meta's Oversight Board: A Review and Critical Assessment,' (2023) 33 Minds and Machines 261-284.

with negative human rights impacts began to develop in the late 1990s and early 21st century. At the heart of the debate were two issues. The first was the utility of using concepts and practices of due diligence to capture risk and costs beyond financial risks and costs of production. The second was the extent to which such an expansion was better realized through private activity (in and thought markets) or through public regulation (overseen by the administrative bureaucracies of states). It is at this point that the debate converged in the failed Norms project [73] (public international law based mandatory measures) and re-emerged in what became the UNGP (hybrid framework embracing both mandatory public and discretionary private law driven diligence and oversight systems).[74]

This fundamental conception drives the increasingly dense network, some might say patchwork, of human rights, sustainability and other related rights, obligations and expectations to which due diligence is directed and by reference to which it is to be measured and assessed in specific instances of application. The approach to due diligence for public bodies may differ from that of private enterprises or even of non-governmental organizations and religious institutions. But the reflex and structure will not vary in substantial respect. Due diligence touches on the amount and forms of care and attention (the diligence) that a person (natural or institutional) ought to apply in a given situation or when faced with a decision or choice in any action which is sufficient to prevent, mitigate or remedy the risk to which diligence is directed. The appropriate amount of diligence owed (or necessary), and the system of consequences (legal, regulatory, markets based, civil, criminal, compensatory or precautionary) is contextual. The identity of both the person or institution to which the risk to which diligence relates is also contextual and can shift depending on the expectations of the social organizations with the authority to mediate or assign diligence obligations; and these choices are by no means fixed or natural or eternal. What does appear to be fixed, natural, and eternal at least with respect to consequences for the human person and human social relations are variations of the harm principle—the premise that humans and their institutions or collective actions must avoid harm to other persons or to their property, rights, or interests. The nature of that duty is highly contextual--with reference to the person on whom the duty falls, the actions undertaken that produces a risk of harm, the nature of the harm, and the expectations of harm minimizing action that ought to be undertaken. Due diligence, then, cannot be manifested in the absence of normative orders; and normative orders increasingly manifest their allocation of risk and risk avoidance for harms through systems that impose duties of care and attentiveness on specified individuals or classes of human or institutional actors. Once this is understood as the basic premises, usually taken for granted, the application of due diligence in the human rights field becomes clearer—as do the issues around the values advanced, the choices in

---

[73] Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) See, David Weissbrodt and Maria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' *American Journal of International Law* 97 (2003) 901-922; available <https://scholarship.law.umn.edu/faculty_articles/243> accessed 15 February 2024 (hereafter the "Norms"). For commentary, see, David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights,' (2003) 97(4) The American Journal of International Law 901-922. For a critical analysis, see, Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard To Human Rights': A Requiem,' (2012) 17(1) Deakin Law Review 5-41.

[74]

assigning responsibility, and the creation and enforcement of expectations with respect to the forms and quantity of diligence that is owed and the consequences of success or failures of diligence.

1.2 "Due Diligence" the United Nations Guiding Principles for Business and Human Rights and Beyond

In the context of business and human rights,[75] SRSG Ruggie, almost from the start of his mandate aligned the core essence of the harm principle to what became the three pillar (protect-respect-remedy) framework. To that end he drew lessons from environmental and social impact assessments.[76] These were crystalized in his 2008 Report unveiling the Three Pillar Framework in the "do no harm" principle: "To respect rights essentially means not to infringe on the rights of others - put simply, to do no harm."[77] From the first, then, due diligence was understood both as a method with specific objectives, as an operating style for routinized business operation, and as the underlying normative framework against which its effectiveness would be measured.

SRSG Ruggie and his team focused the sensibilities, principles, and operational structures and cultures of due diligence primarily on private sector responsibilities—within and in fulfilment of the expectation of markets.[78] The core of the constitution of due diligence—as process, method, and norm, was to be embedded as part of the norms-based operational systems of business.

> This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts. Comparable processes are typically already embedded in companies because in many countries they are legally required to have information and control systems in place to assess and manage financial and related risks. (Ibid., ¶ 56).

SRSG Ruggie captured the essence of due diligence in its transposition to human rights affecting economic activities of business. That included its character as a prudential principal, one that triggered greater attentiveness on the risks of human rights harms. That attentiveness would be contextually framed and deeply grounded in the social expectations of the international community and its normative principles built around the International Bull of Human Rights. These were to be realized through the development and use of systems built on overarching policy, impact assessments, the integration of diligence into the decision processes and risk assessments of economic activity, and tracking.

---

[75] For a consideration of possible limits of harm theory principles within markets, at least in the context of the sort of risks against which States and other actors ought to be responsible, see Richard Endörfer, 'Should market harms be an exception to the Harm Principle?,' (2022) 38 Economics & Philosophy 221-241.
[76] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions A/HRC/4/74 (5 February 2007); available [https://undocs.org/en/A/HRC/4/74], last accessed 25 February 2024.
[77] 2008 SRSG Report 8/5, ¶ 24.
[78] Larry Catá Backer, 'From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance, (2012) 25(1) Pacific McGeorge Global Business & Development Law Journal 69-171.

To a significant degree, the approach represented a revolution in the way in which business would approach the issue of risk, it represented the coordination of economic and administrative sensibilities around the curation and toleration of risk, --from encouraging business risk to systems of risk aversion grounded in the approach, borrowed from public law and public administrative culture of "prevent, mitigate, and remedy." At the same time, it suggested a core set of principles within which such due diligence could be legitimated. Those principles, and especially control of the narratives of interpretation and application, continues to be an object of debate,[79] as well as the context for control of the narrative subject of the normative responsibility and operational expectation.[80]

In its final form, the essence of the UNGP's responsibility to respect human rights centers on avoiding infringing on the human rights of others and on addressing adverse human rights impacts[81]—both of which together define the core normative concepts against which human rights due diligence systems are measured. Harm and impact measures and assessment are deeply embedded in the UNGP themselves. The Commentary to UNGP Principle 7 speaks, for example, to the way in which responsible businesses seek State guidance "to avoid contributing to human rights harm" in the context of operation in conflict affected areas. Due diligence is offered as a means of reducing the risk of complicity liability triggered by a "contribution to a harm."[82] The essence of an adverse human rights or human rights abuses impact is a harm to another, the prevention, mitigation and remediation of which lie at the heart of the UNGP itself in all three of its pillars. Indeed, the issue of the interactions among a State duty to protect human rights and a corporate responsibility to protect human rights has to some extent touched on the relationship between the State and business around human rights due diligence.[83] The potential spillover effects of the UNGP in general and human rights due diligence in particular was noted from the time of the endorsement of the UNGP.[84]

---

[79] UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Corporate human rights due diligence—emerging practices, challenges and ways forward', A/73/163, (16 July 2018).

[80] OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', UN Doc. HR/PUB/12/02 (2012), available https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected Areas (2016), available https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf; OECD Responsible Business Conduct for Institutional Investors: Key Considerations for due diligence under the OECD Guidelines for MNEs (2016), available https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf.For a recent example from the academic debate, see, Robert McCorquodale & Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses,' (2021) 68 Netherlands International Law Review 455-478.

[81] UNGP Principle 11.

[82] UNGP Principle 17 Commentary.

[83] There is a rich literature; see, e.g., Rachel Chambers and Anil Yilmaz Vastardis, 'Human rights disclosure and due diligence laws: the role of regulatory oversight in ensuring corporate accountability,' (2021) 21(2) Chic J Int Law 323–366.

[84] See, e.g., Peter T. Muchlinski, 'Implementing the new UN Corporate Human Rights Framework: implications, corporate law,' (2012) 22(1) Bus Ethics 145–177.

Due diligence is a central element of the UN Guiding Principles for Business and Human Rights and the UN Framework's Second Pillar, corporate responsibility to respect human rights.[85] Its driving idea has been to align corporate activities with international normative human rights and sustainability standards, hence addressing governance 'gaps' associated with globalization and promoting economic activity that treats all parts of global value chains with equal respect. The specific objectives of human rights due diligence in the UNGPs are to identify, prevent, mitigate, and account for how companies address their adverse human rights impacts. The process includes assessing actual and potential impacts, integrating, and acting on those findings, tracking responses, and communicating with others about how those impacts were addressed. In addition, human rights due diligence would make it easier to adopt appropriate policies of prevention, mitigation, and remediation, by identifying classes of activities with potential for human rights impacts, and the people or institutions the adverse impacts of the rights of which can trigger due diligence.[86]

The essence of the UNGP, and especially in the context of due diligence as an instrument and method, is to encourage a flexible structure around the shifting of risk for human rights harms among States (with a duty to protect), business (with a responsibility to respect), and the systems in pace for the realization of economic activity.[87] That flexibility was bounded at a minimum by the international legal obligations of States,[88] and the international bill of human rights risk and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work for enterprises.[89] Around that, enterprises were to craft a human rights due diligence system, the broader international legal implications of which were to be managed through the development by States of a "smart mix of measures,"[90] the range of which was described in UNGP Principle 3. To those ends a public-private partnership was to be undertaken, currently manifested through national action plans.[91]

At the same time, for many, the decision to focus this due diligence on the private sphere appeared to leave room for improvement. That improvement would focus on the transposition of the concepts and approaches, as well as the principles, of human rights focused due diligence in eco nomic activity, from the private to the public sphere and from the structures of the market to the institutionalized administrative regulatory framework of the state. That ambition, to extend the larger project of legalization of economic activity to the business of human rights effects, and to do it under the risk parameters of the prudential prevent-mitigate.-and remedy principles, has begun to be realized at the State and international levels. That then wraps back to the incorporation of

---

[85] UNGP Principles 16-22.
[86] The issue of the scope of rights holders remains unsettled. Aikaterini-Christina Koula, 'Corporate Responsibility to Respect Human Rights Defenders Under the UNGPs and Steps Towards Mandatory Due Diligence,' (2024) 45 Liverpool Law Review 335-358.
[87] Claire Methven O'Brien, 'Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention,' (2020) 114 AJIL Unbound doi:10.1017/aju.2020.36.
[88] UNGP General Principles.
[89] UNGP Principle 12.
[90] UNGP Principle 3 Commentary.
[91] Claire Methven O'Brien, John Ferguson, Marisa McVey, 'National Action Plans on Business and Human Rights:
an Experimentalist Governance Analysis,' (2022) 23 Human Rights Review 71–99 ; Larry Catá Backer, 'Moving Forward The U.N. Guiding Principles For Business And Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind them All,' (2015) 38(2) Fordham International Law Journal 457-542.

human rights due diligence efforts and structures within traditional legal frameworks for diligence.[92]

States have increasingly sought to legalize some or all of the responsibilities of business to respect human rights. And in many cases States have sought to effectuate that project of legalization through the device of human rights due diligence. The result points to a new sort of public-private partnership. It is one in which public bodies serve as the norm-objectives providers and the auditors of compliance, but in which the operationalization of due diligence regimes and the systems needed to undertake the practices far onto business throughout their global production chains. Since the endorsement of the UNGP in 2011, the issue of human rights due diligence as a matter for State regulation, as part of what UNGP Principle 3's Commentary described as a "smart mix of measures",[93] has extended the regulatory orbit of the UNGP well beyond markets and the 2nd Pillar.[94]

Some influential European States have enacted statutes imposing due diligence requirements for the activities of large enterprises. These include France (*Loi relative au devoir de vigilance*, 2017) and Germany (*Sorgfaltspflichtengesetz*, 2021). Other EU Member States (Belgium, the Netherlands, Luxembourg, and Sweden) are planning to do so in the near future. In addition, other regulatory efforts, like the Non-Financial Reporting Directive (Directive 2014/95/EU) require companies to report on how sustainability issues affect their performance, position, and development, as well as how such issues impact people and the environment. Dur diligence has been built into functionally differentiated reporting efforts, most notably the so-called Modern Slavery provisions of the U.K. and Australia. While these require disclosure and explanation of the form or absence of effective measures to eradicate modern slavery from supply chains, the process effectively encourages a form of due diligence. Disclosure is meant to create incentives to produce and operate systems of modern slavery risk mitigation about which companies are required to report.[95]

At the international level, Until the second decade of the 21st century, many of the most influential efforts were guidance measures which encouraged States to use their authority and private enterprises to invoke private law in responding to normative expectations around risk and diligence measures to be undertaken to minimize that risk. Among the most significant were the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises,[96] now extended to "due diligence expectations on the development, financing, sale, licensing, trade and use of technology, including gathering and using data."[97] The OECD's pioneering

---

[92] Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence,' (2016) 1(2) Business and Human Rights Journal 179-202.
[93] See discussion Backer, UNGP Commentary, chapter 8.
[94] See, e.g., Surya Deva, 'The UN Guiding Principles' orbit and other regulatory regimes,' (2021) 6(2) Bus Human Rights J 336–351.
[95] European Commission, Corporate sustainability due diligence, available [https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en], last accessed 16 August 2024.
[96] Organization for Economic Cooperation and Development (OECD), Guidelines for Multinational Enterprises (Paris: OECD, 2023).
[97] Ibid., Foreword, p. 3.

efforts included more specifically directed guidance around the concept of due diligence.[98] The two worked in tandem. The OECD's due diligence guidance was created "provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises by providing plain language explanations of its due diligence recommendations and associated provision."[99] The universe of adverse impacts with respect to which a human rights due diligence system include workers and industrial relations, environment, bribery and corruption, disclosure, and consumer interests."[100] In the context of the OECD Guidance, due diligence becomes embedded in a self-referencing loop of attentiveness/care obligation owed by the enterprise with respect to harms that can be characterized as touching human rights, the sufficiency of which can be examined and guided through a National Contact Point Specific Instance process.[101] Regional human rights courts have also addressed the issue by reference t their own international instruments, especially in the context of the due diligence obligations of States where non-state actors interfere with rights under international human rights law.[102]

But also of significance were frameworks such as that embedded in the International Organization for Standardization (ISO) Standard 26000 (social responsibility).[103] ISO 26000 was aligned with the normative baselines of the UNGP and were structured to complement human rights due diligence (the "due" part) by providing a framework for enterprise self-assessment (the "diligence" part) of its operations, reflecting an "organization's commitment to the welfare of society and the environment."[104] The guidance reflects the core of the conceptualization of due diligence described in Section 1.2—the imposition of a measure of attentiveness and care which is owed by the enterprise to societal others and the sufficiency and quality of which is measured against the standards and expectations, the principles, described in the ISO 26000 standard.

More formal efforts have also produced some potentially significant developments. Among them, the effort to create a binding international instrument for business and human rights has been an ongoing project since 2014.[105] It is a project that has divided the business and human rights community. And it appears to have taken up, again, the project once thought abandoned with the discarded Norms project.[106] Supra-national efforts have achieved the greatest success within the

---

[98] Organization for Economic Cooperation and Development (OECD), OECD Due Diligence Guidance for Responsible Business Conduct (Guidance for Responsible Business Conduct) (Paris: OECD, 2018).
[99] Ibid., Foreword.
[100] Ibid., p. 38.
[101] OECD Guidelines for Multinational Enterprises, supra, Part II: Implementation Procedures of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, pp. 55-76.
[102] Malaihollo Mendes and Lottie Lane, 'Mapping out due diligence in regional human rights law: Comparing case law of the European Court of Human Rights and the Inter-American Court of Human Rights,' (2024) 37 Leiden Journal of International Law 462-483.
[103] ISO 26000 (Social Responsibility).
[104] International Organization for Standardization, ISO 26000: Guidance on Social Responsibility (Geneva: ISO, 2018)), p. 5.
[105] Claire Methven O'Brien, 'Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention,' (2020) 114 AJIL Unbound doi:10.1017/aju.2020.36; Surya Deva and Claire Methven O'Brien, 'A framework agreement in business and human rights?,' Völkerrechtsblog (24 June 2022) 2022-06-24T19:00:43, available [https://research-management.mq.edu.au/ws/portalfiles/portal/207932073/Publisher_version.pdf], last accessed 14 August 2024..
[106] Larry Catá Backer, 'Moving Forward The U.N. Guiding Principles For Business And Human Rights,' supra.

European Union. On 25 July 2024, the Directive on corporate sustainability due diligence (Directive 2024/1760 (CS3D)) entered into force.[107] Human rights due diligence based on the UNGP framework was a central element in the elaboration of CS3D. In proposing a Directive on Corporate Sustainability Due Diligence, the European Commission explained:

> Using the existing international voluntary standards on responsible business conduct, an increasing number of EU companies are using value chain due diligence as a tool to identify risks in their value chain and build resilience to sudden changes in the value chains, but companies may also face difficulties when considering to use the value chain due diligence for their activities. . . Mostly large companies have been increasingly deploying due diligence processes as it can provide them with a competitive advantage. This also responds to the increasing market pressure on companies to act sustainably as it helps them avoid unwanted reputational risks vis-à-vis consumers and investors that are becoming increasingly aware of sustainability aspects.[108]

When the Corporate Sustainability Due Diligence Directive was approved in 2024, the processes and methods of due diligence served as key instruments in the fashioning and fulfilment of the core objectives of CS3D as explained on the website of the European Commission: "to foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains [and] ensure that companies in scope identify and address adverse human rights and environmental impacts of their actions inside and outside Europe."[109] CS3D specifies the objectives of due diligence targeting adverse impacts both in terms of the effects on rights holders but also for its consequential obligations to conform or transform their business practices—and in the aggregate the expectations of the market—to conform to economic transactions driven by and for the human rights impacts.

> So as to comply with the obligation to bring to an end or minimise the extent of actual adverse impacts provided for in this Directive, companies should be required to take the following appropriate measures, where relevant. * * * To conduct their due diligence in an effective and efficient manner, companies should also make necessary modifications of, or improvements to, their design and distribution practices, to address adverse impacts arising both in the upstream part and the downstream part of their chains of activities, before and after the product has been made. Adopting and adapting such practices, as necessary, could be particularly relevant for the company to avoid an adverse impact in the first instance. Such measures could also be relevant to address adverse impacts that are jointly caused by the company and its business partners "[110]

---

[107] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance) PE/9/2024/REV/1; OJ L, 2024/1760, 5.7.2024,
[108] 2022/0051 (COD).
[109] European Commission, Corporate Sustainability Due Diligence, available [https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en], last accessed 15 August 2024.
[110] CS3D, Preamble ¶ 54.

Interestingly, adverse human rights impacts under CS3D are defined as an abuse of rights specified;[111] abuse, on the other hand "should be interpreted in line with international human rights law."[112] Abuse is then elaborated in part in the CS3D annexes.[113]

One comes full circle here. Due diligence owes its appeal, and its power, to the fundamental principles built into its terms. One speaks here at attentiveness and care attached to an assignment of obligation or expectation with respect to that attentiveness and care. Standing alone all this does is define a method and describes the shape and qualities of an instrument. But also inherent in the fundamental understanding of due diligence is its intimate connection to the measure of attention and the sufficiency of care that is owed. That, in turn, transforms what had been an instrument as an expression or elaboration of a normative framework in action. To that ends due diligence is animated not merely by an attachment to a normative framework (for example human rights), but also by the allocation of risk, and the definition and measurement of the object or consequence of risk to which diligence/care must be applied.

For human rights and sustainability, in turn, that suggests a movement from a caveat emptor principle of allocation—where the risk is allocated to the rights bearer or society—to a *caveat venditor* regime, one in which the producer effectively must not merely warrant action and objective against normative objectives, but must affirmatively undertake positive measures to ensure that such "warranties" are effective.[114] This moves the concept of due diligence a long way from its origins even as it preserves its fundamental character. There is much to learn in that movement at the theoretical and practical level as well as from the perspective of the specific fields in which it is now manifested.[115] In this context experience and theory may produce synergies[116]—and return the consideration of due diligence to its UNGP foundations in principled pragmatism.[117]

Taken together, one acquires a sharper glimpse into the power and uses of due diligence as a *technology of control*. The object is both phenomenological—to transpose abstract rights and obligations into action that reflects the objectives and intent of those normative abstractions. But it is also normative—the application of the tool transforms it into an instrument for the further

---

[111] CS3D Art. 3 §1(b)-(d).
[112] Ibid., Preamble ¶32 (with a reference to impairment), or violation (ibid., ¶ 79 and Art. 3 §1(c)(ii)).
[113] Ibid., Annex Part 1 §1(1) ("The right to life, interpreted in line with Article 6(1) of the International Covenant on Civil and Political Rights. The abuse of that right includes, but is not restricted to, private or public security guards protecting the company's resources, facilities or personnel causing the death of a person due to a lack of instruction or control by the company.")
[114] David Hess, 'The Management and Oversight of Human Rights Due Diligence,' (2021) 58(4) American Business Law Journal 751-798.
[115] Cf., Benjamin Gregg, 'Beyond Due Diligence: The Human Rights Corporation,' (2021) 22(1) Human Rights Review 65-89.
[116] James Harrison, 'Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment,' (2013) 31(2) Impact Assessment and Project Appraisal107-117; ; Kendyl Salcito and Mark Wielga, 'What does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?,' (2013) 31 Impact Assessment and Project Appraisal 107–117.
[117] On principled pragmatism in the UNGP, see discussion in Larry Catá Backer, UNGP Commentary, supra, chapter 3.1.

elaboration of the normative objectives to which it has been put to use.[118] As a tool of perception,[119] due diligence also serves to drive the trajectories of the normative development for which it is meant to be used as a tool. The question of due diligence, especially for States seeking to order the fulfilment of their duty to protect human rights, was not merely to manage and map; it was also one of "organizing the multiple, of providing oneself with an instrument to cover it and to master it; it was a question of imposing upon it an 'order'.[120] As those technologies change, the role of due diligence as the space, the platform, that mediates between application and objective will change as well.[121] To a substantial degree, then, the concept of due diligence does not merely evoke the analytics of the tool; it is also a technology through which the perception of the value and forms of the use of the tool are also crafted. The forms of its application—datafication, analytics, assessment, accountability—suggest a change in the way in which one approaches (and thus manages) the abstractions of normative ordering in physical form.[122] The difference between the human rights impacts attributed to shifts toward a surveillance state or surveillance capitalism[123] may differ only in kind and effect, at least with respect to its technologies, from the state of surveillance that may be in the future for human rights due diligence.[124] That becomes most apparent in the context of State regulation of the normative expectation of business enterprises applied through the mechanisms of mandatory human rights due diligence structures.

2 The content of this volume

The theory and application of due diligence and their manifestation in the field of human rights and environmental sustainability serves as the foundation for the essays in this volume. Important contemporary trends underscore the importance of due diligence as both method and compliance-accountability norm. Due diligence is rapidly becoming a powerful tool in efforts to embed human rights and sustainability norms law in the activities and decision-making processes of economic actors--corporations, financial institutions, and other entities—and their oversight, in one way or another, by the State and through international law and norms.[125] But it is also one the implications

---

[118] Gilbert Simondon, On the Mode of Existence of Technical Objects (Minneapolis, MN: Univocal Publishing, 2016).
[119] Ibid., p. 130.
[120] Michel Foucault, Discipline and Punish: The Birth of the Prison (New York: Vintage Books, 1995), p. 148.
[121] Pierluca D'Amato, 'Simondon and the technologies of control: on the individuation of the dividual,' (2019) 60(3-4) Culture, Theory, and Critique 300-314. Cf Paolo Balboni and Kate Elizabeth Francis, Data Protection as a Corporate Social Responsibility (Cheltenham UK: Edward Elgar, 2023).
[122] Gazi Islam, 'Business Ethics and Quantification: Towards an Ethics of Numbers,' (2022) 176 Journal of Business Ethics 195-211; Colin Burke, 'Digital Sousveillance: A Network Analysis of the US Surveillant Assemblage,' (2020) 18(1) Surveillance and Society 74-89.
[123] Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power (NY: Public Affairs, 2019). Of course this is an old frontier in the fields of social theory and semiotics, just clothed in newer technologies. See, e.g., Maša Galič, Tjerk Timan, & Bert-Jaap Koops, 'Bentham, Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation,' (2017) 30 Philosophy & Technology 9-37.
[124] Roger Clarke, 'Risks inherent in the digital surveillance economy: A research agenda,' (2019) 34(1) Journal of Information Technology 59 –80.
[125] 2008 SRSG Report A/8/5. See David Hess, 'The Management and Oversight of Human Rights Due Diligence,' supra: "The fast-moving trend toward mandatory HRDD . . . necessitates research on the legislative options to ensure success. To date, this research has focused primarily on aspects of corporate accountability and has paid less attention to the organizational governance aspects of HRDD." Ibid., 755).

of which may destabilize substantively powerful frameworks for the organization and operation of the legal regulation of economic activity,[126] as well as theories of sovereign rights.[127]

For all the recent activity, these developments are in their infancy and their interactive complexity are now being explored.[128] These developments point to further revolution not merely in the context of the incorporation of human rights as a cost-value of economic activity, but also in a number of other respects. These include the way in which law is understood and applied, in the role of private law within companies now vested with a legal duty of due diligence, and in the very nature of the concept of the legal as systems of due diligence increasingly become data driven in order to fulfil their function as a means of accountability to both internal and external stakeholders, including the state and its administrative organs. But at the same time they point to the possibility of the need for balancing rights, especially in the context of development.[129] A deeper exploration of the emerging systems of due diligence legalization, especially in the context of human rights and business, then, is both timely and necessary.

It is to that task that this volume is directed. This volume brings together some of the most innovative and forward thinking academics, partitioners, and commentators, from universities, non-governmental organizations, business, and government. Their objective, collectively, was to contribute to a deeper understanding on the emerging *law of due diligence*. More specifically, contributors were asked to explore, from their own perspective on the ways in which due diligence as a legal concept touches on the human rights and sustainability elements of economic activities whether undertaken by public or private organizations. In each case, and from a variety of perspectives, each of the contributors explores the rich possibilities of due diligence within the business and human rights environment. Each explores the level and forms of attentiveness (diligence) as a function of the quantity and focus requires (the diligence that is due) in a variety of context that are defined both by the legal environment in which it is embedded and the normative principles that due diligence is meant to fulfil. The structuring is important—while one cannot ask due diligence to do more than it is capable—conceptually—one can certainly exercise a judgment about the way that one applies values and societal objectives within its somewhat capacious possibilities. With that fundamental understanding of structure, form, character, possibility, and limitation, no really useful understanding of, or effective application of due diligence is possible.[130]

2.1 Organization

---

[126] Barnali Choudhury, 'Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not be Enough,', (2023) 8(2) Business and Human Rights Journal 180-196.
[127] Larry Catá Backer, 'Are Supply Chains Transnational Legal Orders? What We Can Learn From the Rana Plaza Factory Building Collapse,' (2016) 1(1) UC Irvine Journal of International, Transnational, and Comparative Law 11-65.
[128] Charlotte Villiers, 'New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity,' (2022) 13 European Journal of Risk Regulation 548-566.
[129] Ibid., 553 ("regulatory response must therefore recognise and accept some complexity as a necessary by-product of producing something of societal benefit, and at the same time deter complexity that hides dishonesty or harm").
[130] Justine Nolan, 'Chasing the Next Shiny Thing: Can Human Rights Due Diligence Effectively Address Labour Exploitation in Global Fashion Supply Chains?,' (2022) 11(2) International Journal for Crime, Justice and Social Democracy 1-14.

The work is divided into four broad sections. In the first section, the project editors undertake a deeper conceptual study of the phenomenon of the legalization of due diligence and seek the frame the issues and future course of the development of due diligence as a concept, as a process, and as a tool of policy and implementation of this project. Section 2 explores the sources of human rights due diligence in and beyond the UNGPs, with a focus on public international law, international human rights law, international environmental law, and civil law.

Section 3 then shifts the lens to a deep interrogation of contemporary efforts at legalization within domestic legal orders. The focus here is on supply chain due diligence laws (France, Germany, the EU); US measures that embed due diligence measures into trade, sanctions, and foreign relations law; its insertion into contract provisions; its reception in the domain of public economic activity, including state procurement; the role thematic due diligence laws and non-financial reporting laws in promoting due diligence; and how the OECD Guidelines contribute to the legalization of due diligence in domestic legal order and practice.

Section 4 ends the volume with a consideration of tendencies, tensions, opportunities, and challenges in the legalization of corporate human rights due diligence. Human rights due diligence, which started as a way for enterprises to proactively manage potential and actual adverse human rights impacts in a markets-driven compliance environment, has become a quite flexible tool used by states, enterprises, and other actors to both frame the normative structures for corporate compliance and the means for its elaboration as well as the environment in which economic activity is legitimately and responsibly undertaken.

2.2 The Essays

Part I of this volume includes this introduction essay. The object in this initial chapter, was to undertake a deeper conceptual study of the phenomenon of legalization of due diligence. To that end, the issues and future course of the development of due diligence was framed as a concept, as a process and as a tool of policy and implementation of this project. That analysis, in turn, was grounded first on the examination of the underlying normative premises of the concept of due diligence. It ten applied that framework to consider the normative implications of the technologies of due diligence in its applications in private law, international norm making, and mandatory state measures employing due diligence concepts. In the process due diligence was situated within the broader conversations about the governmentalization of private actors, the projection of state power as participants in private markets, the relationship between due diligence, state regulatory authority, and compliance oriented systems, and lastly the development of specific instances of state, international and private measures to apply these concepts on the ground. The contributions in the volume are then synthesized and from then a set of core insights are derived.

Part II, HRDD In & Beyond the UNGPs, considers the sources and frameworks of human rights due diligence and its potential for legalization. It consists of four essays. The first situates human rights due diligence within the UNGP framework. The second considers human rights due diligence in international law more generally. The third, examines HRDD in international environmental, climate, and sustainability law. The last looks to human rights due diligence and its connection to civil and tort law.

In Chapter 2,[131] Larry Catá Backer situates the concept of due diligence from its origins in the UN Guiding Principles for Business and Human Rights. The development of the concept is examined with reference to its development between 2006 and the start of the mandate of John Ruggie as Special Representative to the UN Secretary General to the unanimous endorsement of the UNGP in 2011 by the Human Rights Council. The transformation of the concept from an operational level mechanism at the core of the corporate responsibility to respect human rights in the UNGP 2nd Pillar to its key role as the embodiment of compliance based legality respecting the management of global production is then considered. Due diligence has become more than a method for more efficient operation of markets driven nudging (and thus disciplining) of economic behaviors. Due diligence has assumed a normative role as well. It serves as the means through which economic actors may become embedded in complex webs of interlinked administrative legalities that start with international normative projects, their transposition into domestic (or multilateral) legal orders, and their delegation first to the national administrative apparatus and then in its operational elements to the private actors who are expected to serve as the front line administrators of a global multi-layered system. The relationship between the precisely drawn 2nd Pillar due diligence concept, and the 1st Pillar state duty to protect human rights, along with the 3rd Pillar remedial obligation is considered. The transposition of these mechanisms to other regulatory frameworks is then explore.

In Chapter 3,[132] Maria Monnheimer, considers human rights due diligence in international law frameworks. Due diligence is among the most ambiguous terms employed in international law. While being referred to in a growing number of international legal instruments and proceedings, no overall definition has been agreed upon. Especially in the business and human rights context, "due diligence" is at the heart of many controversial debates and very recent political developments. It is exactly in the business and human rights context, though, that the term "due diligence" is used even more ambiguously than in other areas of international law. This is due to the fact that two different forms of obligations lie at its core: due diligence obligations of states to respect, protect and promote human rights on the one hand; and due diligence obligations of businesses to adequately address human rights risks within their supply chains on the other. Important international and domestic legal instruments invoke both forms of obligations without clarifying their precise content and relation to each other. Such confusion creates uncertainty about the extent of the respective obligations and responsibilities. To ensure the effective implementation of business and human rights instruments, it is, therefore, necessary to explain how due diligence emerged as a standard of conduct in public international law as opposed to its rather procedural understanding in the private business context. Clarifying these different concepts of due diligence will allow us to discuss how they influence and complement each other in the business and human rights context and to determine in a more precise manner what is expected of states and business to ensure effective human rights protection.

In Chapter 4,[133] Sara Seck considers human rights due diligence in international environmental, climate, and sustainability law. The concept of due diligence has a long history in international environmental law. It is often associated with the 'do no harm' principle expressed in 1972 in Principle 21 of the Stockholm Declaration and moderately revised in the 1992 Rio

[131] Human Rights Due Diligence in the UNGPs.
[132] Relationship to Human Rights Due Diligence in International Human Rights Law.
[133] Relationship to Human Rights Due Diligence in International Environmental, Climate, and Sustainability Law.

Declaration on Environment and Development: 'States have … the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' While this principle could be interpreted to impose an obligation of result, it has generally been understood as an obligation of due diligence. It is often described as a norm of customary international law and has been incorporated into many multilateral environmental agreements. The do no harm principle also underlies the influential work of international legal bodies, notably the International Law Commission's Draft Articles on the Prevention of Transboundary Environmental Harm. This chapter will trace the history of due diligence in international environmental law, beginning with the do no harm rule but moving beyond to consider related principles including precaution (Rio Principle 15), environmental impact assessment (Rio Principle 17), and procedural environmental rights to information, participation, and justice (Rio Principle 10). The chapter will then consider the relationship between due diligence and related norms of international environmental law (climate law, biodiversity law, and pollution law – the triple planetary crisis) and the emergence of human rights due diligence laws in the business and human rights context.

In Chapter 5,[134] Carola Glinski looks to human rights due diligence and its connection to civil and tort law. Human rights (and sustainability) due diligence of corporations and other economic actors have for long been discussed in the international arena but has only recently, with national codifications based upon the UN Guiding Principles led to binding legal outcomes, such as in France (2017), Germany (2021) and the EU (draft). At the same time, long-standing attempts to hold companies liable under tort law for damages caused by their subsidiaries or suppliers abroad are now seeing some success, following in particular the English rulings in *Chandler v. Cape* and *Lungowe v Vedanta*. Indeed, the duty of care in the tort of negligence has always provided for a doctrinal basis and for relevant criteria to hold companies liable for not having carried out due care (or due diligence) within their sphere of impact, and thus for a valuable source of law for human rights due diligence. In its first part, the chapter highlights the doctrinal parallels and the mutual impact between human rights due diligence and tort law, as discussed in literature and case law. In its second part, the chapter turns to the new due diligence laws. These take different approaches to the issue of liability, by either codifying liability, excluding liability, or remaining silent on the issue. The chapter analyses the changes caused by these codifications in the relation between human rights due diligence and tort law.

Part III, The Legalization of HRDD In Domestic Legal Orders, turns to an examination of national legislative efforts. It consists of ten essays.

In Chapter 6, Jeremie Gilbert and Cannelle Lavite examine France's Vigilance Law. It will offer an analysis of its contents and mechanisms and adopt an 'in practice' approach by analyzing some of the ongoing cases concerning its implementation and interpretation by the courts. The chapter will focus on issues of enforcement, extraterritoriality, and causation, and examine some of the ongoing cases brought on the basis of this law concerning the action of French companies abroad. It will notably focus on the Unión Hidalgo case against EDF which illustrates many of the challenges faced by individuals affected by corporate misconduct in global supply chains in claiming remedy and rights before the courts.

[134] Relationship of Human Rights Due Diligence to Civil and Tort Law

In Chapter 7, Brigit Spiesshofer considers the Supply Chain Due Diligence Law in Germany. On July 22, 2021, the Act on Corporate Due Diligence Obligations in Supply Chains (Supply Chain Act) was published in the German Federal Law Gazette and will come into force on Jan. 1, 2023. Roma locuta, causa finita? Not at all. The German Supply Chain Act is only a further milestone in the regulatory program laid down in particular in the UN Guiding Principles on Business and Human Rights (UNGP), the OECD Guidelines for Multinational Enterprises, and the National Action Plan for Business and Human Rights (NAP) - international and national soft law - and paves the way for corresponding EU supply chain legislation and its Europe-wide implementation. The Act establishes the responsibility of companies for the implementation of human rights and environmental due diligence in their own organization and group of companies as well as in their supply chains as their own duty of care, the key elements of which are laid down in §§ 3 et seq. Supply Chain Act. The human rights and environmental due diligence introduced by the Supply Chain Act raises many questions, both in principle and in detail. One of the key issues is whether the due diligence obligations are (merely) procedural obligations, in particular, whether they require (only) to undertake best efforts, or, whether at least some of the provisions contain a duty to achieve results. The draft EU Corporate Sustainability Due Diligence Directive takes up the basic conceptual features of the Supply Chain Act. However, it does contain significant deviations that may lead to an adjustment and revision of the Supply Chain Act.

In Chapter 8, Claire Methven O'Brien considers the HRDD portions of the EU's Corporate Sustainability Due Diligence Directive (CS3D). This chapter first presents the background and context for these proposals, both of which anticipate due diligence duties for large companies relating to corporate harms to human rights and the environment, as well as climate change. This part also addresses the process relating to the draft laws in the EU Regulatory Scrutiny Board. Next, the chapter outlines the main features of the HRDD related portions of CS3D, evaluating the Directives' approach on important elements from point of view of human rights standards, including the UNGPs, as well as wider European human rights jurisprudence and tort law. Finally, the chapter identifies key transformations and deformations implicit in the EU's putative approach to the legalization of the corporate human responsibility to respect human rights and due diligence and highlights associated challenges for implementation, remediation, and accountability.

In Chapter 9, Rachel Chambers and the late Eric R. Biel examine US Measures on Human Rights Due Diligence. Much of the examination of emerging legal regimes on human rights due diligence (HRDD) has focused on activities in the European Union (EU), centering on the European Commission's adoption in February 2022 of a draft directive on "corporate sustainability due diligence" – as well as initiatives at the member state level, notably in Germany. This in turn has led to a natural interest in whether the United States might at some point develop a similar HRDD model as a centerpiece of a broader strategy to promote and enforce standards for responsible business conduct. Their analysis of U.S. measures to give legal effect to HRDD concludes that any expectation of a U.S. legal framework similar in structure to that of the EU is unlikely for a variety of reasons. Rather, the U.S. approach to advancing the objectives of HRDD to date has been – and in our view will continue to be – driven by a series of separate initiatives, only loosely and informally coordinated under the ambit of a National Action Plan (NAP) on Responsible Business Conduct due to be finalized by mid-2023. (This will be the second U.S. NAP, following one issued at the very end of the Obama Administration in December 2016.) Key elements of the U.S. approach include trade measures such as enforcement of Section 307 of the Tariff Act of 1930, as amended in 2016; the

Uyghur Forced Labor Prevention Act, signed into law in December 2021; and the novel factory-level "rapid response mechanism" procedure under the US-Mexico-Canada Agreement. Another area currently receiving increased attention – including in the context of the NAP – is public procurement, where there can be both "carrots" and "sticks" to incentivize and/or punish corporate performance. These, of course, differ considerably from an EU-type reporting and disclosure model. In the United States, reporting and disclosure efforts have been led at the state level, notably in California. However, there now is a range of work at the Securities and Exchange Commission (SEC) centered on the different pillars of Environmental Social and Governance (ESG): the criteria used in particular by investors to assess companies' "sustainability" behavior and the attendant risks of investing in them. SEC regulatory activity is much further along to date on the "E" and "G" elements – environmental and governance – with the "S" as a significant laggard. But there is now a heightened focus on what has been termed "human capital" disclosure – which, depending on its scope, could reach beyond a company's own operations to also cover labor rights issues in its supply chains. If sustained advocacy from civil society organizations succeeds in prompting greater interest from both executive and legislative branch officials, and if some businesses see focused human rights/labor measures as in their own interest (as has happened in the EU), we could see an SEC-enforced HRDD disclosure process as a more focused U.S. approach that is most comparable to the EU's regulatory measures.

In Chapter 10, Susan Maslow, David Snyder, and Patrick Miller continue the examination of U.S. measures by considering HRDD in Contract Law. Human rights due diligence norms can be legalized, as well as operationalized, through contractual commitments. The contractual obligation is binding as a matter of contract law regardless of whether any obligation is imposed by legislative act or judicial decision. By entering into contracts requiring HRDD, companies can turn soft law, or even mere norms, into hard-law obligations. To facilitate these contracts, a working group of the American Bar Association Business Law Section published Model Contract Clauses reflecting the UN Guiding Principles and the OECD Guidance on HRDD, enabling companies to make HRDD "legally effective and operationally likely." This chapter will explain the role that contracts can play in providing enforceable HRDD obligations. While in many cases these contractual obligations may be considered self-imposed, several jurisdictions now explicitly or implicitly require the use of HRDD contracts. Even older strict liability laws (like the US import ban for goods made with forced labor) effectively push parties toward HRDD contracts: traditional contractual approaches centered on "representations and warranties" and infamous "tickbox" questionnaires are notoriously ineffective, meaning that import will be prohibited. Moving contracts to the more effective HRDD regime allows for better supply chain control. The greater effectiveness derives in part from the operational as well as the legal role of contracts: HRDD contracts set forth the parties' expectations, telling the supplier what it must do, and often how to do it, in order to be paid. Such contracts and the HRDD reporting requirements they impose increase the likelihood of compliance, successful import, and better human rights outcomes.

In Chapter 11, Justine Nolan and Shelley Marshall turn their attention to sector and thematic due diligence laws. They assess the extent to which HRDD is being institutionalized in such a way to foster robust mechanisms to address human rights abuses in supply chains, particularly in regions human rights are not respected and enforced. They consider the power of HRDD regulation as a stand-alone mechanism or as a complement to other approaches. The emergence and development of HRDD in the business and human rights field in the last ten years has led to some subtle and not-so-subtle shifts in approaches from government, business, civil society, trade unions,

and workers in how they identify and communicate risk and impact around human rights. For some, HRDD might be seen as a transformative concept that can revitalize and formalize corporate accountability for human rights, but for others, it might be viewed more as a risk management tool that will superficially but not substantively address rights abuses in supply chains. What is clear, is that while the concept of HRDD has increased in prominence in recent years, there remains significant ambiguity around its preventative value and potential to address corporate human rights harms in supply chains. The development of HRDD stems from decades of increasing pressure on companies and states to tackle labor rights abuses in supply chains. Business and human rights regulatory approaches have long been dominated by a reliance on self-regulation and broad top-down approaches that often fail to substantively engage rights holders or consider sectoral synergies and dissonance. Will emerging HRDD initiatives be any different? HRDD was first formally articulated in the United Nations Guiding Principles on Business and Human Rights in 2011 as an expected standard of conduct for business, but its form and implementation are open to multiple interpretations. It has since been incorporated into subsequent regional and international documents in the business and human rights field, as well as mandated in national legislation. Several of these initiatives have a sector-specific or thematically focused approach.

Chapter 12, Olga Martin-Ortega turns the volume's attention to HRDD in public procurement. Global supply chains are organized to deliver goods and services in a fast, efficient, and cost-effective way. They are not designed to protect human rights or fulfill decent working conditions and decent lives for those working on them. Complex processes and stages, often with hundreds of companies and entities involved across a number of states and jurisdictions involve millions of workers exposed to hazardous working conditions, excess—and often compulsory—overtime, low wages, discriminatory practices, and abusive and fraudulent labor recruitment, which even lead to bonded labor, forced labor, and human trafficking. To address these issues, which the international human rights and international labor rights regimes have so far failed to resolve, it is essential to devise how to extend human and labor rights protection beyond individual states' borders and how to remedy violations that take place away from where the decision maker sits. Human Rights Due Diligence is currently being relied upon as a regulatory instrument to fulfill corporate responsibilities to protect human rights beyond their direct impacts, including for the actions of their business partners and in their global supply chains. However, there are no similar provisions for states, even if states' supply chains overlap with private supply chains; human rights abuses are linked to the products the private sector buys as much as those that the state purchases. In international law, states' duties to protect human rights from violations caused by third parties, including businesses, continue to be restricted to protecting those under their jurisdiction. Whilst the UNGPs contain a non-committal reference to extraterritoriality, which could be argued has done more harm than good to the development of the role of the state in regulating and monitoring global supply chains, they contain a provision that is often overlooked and, this chapter argues, could hold the key to the use of public procurement as a tool to protect, promote and potentially remedy such abuses. Associating the award of public contracts to the protection of human rights and promotion of decent work in supply chains provides a clear opportunity for states to exercise their duty to protect human rights. The question arises, do states have an obligation to procure goods, services, and works that are delivered under conditions that respect human rights? And if so, what does it entails and how should it be articulated in the framework of a legal system, public procurement law, which prioritizes efficiency, non-discrimination of economic actors, competition, and value for money? This chapter considers whether the state-business nexus can extend to public procurement and how can due diligence in public supply chains be articulated to promote human

rights protection beyond states' borders through purchasing from companies that ensure human rights are respected throughout the whole supply chain contribute to supply chains which do not violate human rights.

In Chapter 13, Rachel Chambers and Anil Yilmaz Vastardis examine HRDD and disclosure regimes. In this chapter, we address the legalization of human rights due diligence (HRDD) via disclosure requirements, the interactions between these areas, and the consequences of their conjunction. Within business and human rights, disclosure and transparency measures were among the first standards to be legalized through legislation, such as Dodd-Frank section 1502 (2010), EU Non-Financial Reporting Directive 2014, and the California Supply Chain Transparency Act 2012. It was expected under these laws that companies would carry out HRDD prior to issuing disclosures. The experience with the legalization of disclosure standards provides valuable lessons for understanding the impact of legalization itself and the effectiveness of various types of legalizations in this area, but also for understanding how far mandatory disclosure requirements can go in indirectly imposing HRDD requirements on companies. In order to analyze the relationship between disclosure rules and HRDD, this chapter will consider this early conjunction between disclosure and HRDD, and the latest iteration, namely disclosure obligations as part of HRDD laws such as the French Law on the Corporate Duty of Vigilance. With the seeming progression of legalization of business and human rights norms from disclosure obligations to process obligations (HRDD), there remains an enduring role of disclosure, for instance in securities laws in the United States. We ask: how can disclosure promote HRDD, and how can HRDD elevate the quality of disclosure?

In Chapter 14, Jernej Letnar Černič examines HRDD in the context of the OECD's system under the Guidelines for Multinational Enterprises (2023). Doing business increasingly requires meeting minimum human rights and environmental standards. In recent years, states have adopted National Action Plans to implement the United Nations Guiding Principles for Business and Human Rights. Rights holders have in the past faced difficulties in enforcing accountability for business-related human rights abuses. Therefore, much effort in business and human rights has been placed into measures preventing human rights violations. In the last decade, human rights due diligence have become an emerging standard of responsible business conduct. Human rights due diligence create an obligation of conduct for companies to identify, manage and respond to human rights risks. OECD Guidelines for Multinational Guidelines are pioneering international documents regulating business conduct in human rights, environment, and anti-corruption. They required corporations based in OECD member states to respect and protect human rights when doing business extraterritorial. In the past decade, OECD Guidelines have propelled the development of sectoral human rights due diligence guides. Also, the OECD Guidelines have established a unique quasi-judicial mechanism to enforce its potential violations in the form of a National Contact Point placed in the public administration of the OECD Member State. This chapter discusses the normative framework of due diligence under the OECD Guidelines. After that, it analyses the recent case law of the selected National Contact Point concerning human rights due diligence. Equipped with the knowledge, the chapter proposes some normative ideas for strengthening human rights due diligence processes in practice.

Lastly, in Chapter 15, Lucas Roorda considers HRDD and foreign liability claims. An increasing number of states are adopting mandatory human rights due diligence (mHRDD) legislation, a development which may gain a significant boost once the European Union adopts its

Directive on Corporate Sustainability Due Diligence. The current proposal for the Directive contains a provision that would allow victims to sue parent or lead companies within the scope of the Directive for harms arising out of insufficient due diligence policies or practices, regardless of where those harms actually took place. The Directive is still under negotiation and its scope and content may be subject to change, but in broad terms, civil liability for failing to do proper human rights due diligence has broad support: not just in the EU, but also globally given its inclusion in drafts of the proposed binding instrument on business and human rights. This contribution maps the potential impact of such provisions on existing litigation against corporate human rights abuses, which mostly consists of 'foreign direct liability' (FDL) lawsuits. Specifically, it discusses how civil liability for violating mHRDD provisions affects procedural obstacles in FDL cases: adjudicative jurisdiction, applicable law, disclosure and access to information, and financing. While none of these obstacles are intentionally or explicitly addressed by the proposed Directive, nor by other domestic mHRDD instrument, the construction of their respective liability provisions can result in indirect impacts on how victims experience and overcome such obstacles. The contribution identifies which parameters determine the effectiveness of these indirect impacts from the perspective of the victims' right of access to court, and closes with a general reflection on the desirability of these indirect results versus more explicit amendments to civil procedure and practice.

The volume concludes with Part IV. In its single essay, Larry Catá Backer and Claire Methven O'Brien look to the future of the project of due diligence legalization. The object here is to take stock of measures and regulatory trajectories that have emerged especially in the second and third decades of this century. That stock taking then serves as the basis for considering where these legalization trajectories may take the project. Here one explores the relationship between due diligence as stand along legislative projects and their attempted embedding in an international instrument for business and human rights. One here considers, as well, the value of a focus on human rights in a context in which human rights itself may be operating within a broader regulatory ecology of sustainability, climate change, and biodiversity. Lastly the relationship between this due diligence legalization project and the transformation of the structures, manifestations, operations, and conceptualizations of globalization must be considered. The old project grounded in the fundamental principle of legalized co vergence, since the start of the second decade of the 21st century appears to be giving way to a more fractured and regionalized set of systems. The issues then are reframed from one seeking a single centre around which due diligence may be conceptualized and applied, to one based on a multi-polar framing and a priority focus on the way these systems may be coordinated.