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Due Diligence and Secondary Liability for Companies in Case of Causing or Contributing to Human Rights Violations

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Blog

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Göran Sluiter

Due Diligence and Secondary Liability for Companies in Case of Causing or Contributing to Human Rights Violations

The [Forum on Business and Human Rights](#) was held at the end of November 2018 in Geneva. Numerous sessions were organized for around 2500 participants, dealing with many aspects concerning the protection of human rights in the context of business operations.

The focus of this year's forum was on due diligence. According to the [Guiding Principles on Business and Human Rights](#), companies must have due diligence in place as stipulated in Principle 15 (b):

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

The [2018 report of the Working Group on Business and Human Rights](#) provided the following description of due diligence in the context of business and human rights:

Human rights due diligence provides the backbone of the day-to-day activities of a business enterprise in translating into practice its responsibility to respect human rights. It is a way for the enterprise to proactively manage the potential and actual risks of adverse impacts on the

rights and dignity of people. While often referred to as the human rights due diligence process, in reality it involves a bundle of interrelated processes, which should include the following four core components:

- (a) Identifying and assessing actual or potential adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Integrating findings from impact assessments across relevant functions and company processes and taking appropriate action according to its involvement in the impact. More specifically, if the enterprise is causing the impact, it should take steps to cease or prevent it; if it is contributing to the impact, it should take steps to cease or prevent its contribution and use leverage to mitigate the remaining impact; if it has not contributed to the impact, but that impact is directly linked to its operations, products or services by its business relationships, it should take steps to gain and use leverage to prevent and mitigate the impact, to the greatest extent possible;
- (c) Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working;
- (d) Communicating on how impacts are being addressed and showing stakeholders — in particular affected stakeholders — that there are adequate policies and processes in place to implement respect for human rights in practice.

What precisely is expected from companies in terms of due diligence cannot be said with certainty. It will depend on a number of facts and circumstances, including the size of the corporation and the scope of its business-operations. Clearly, more measures in terms of due diligence are required in case of large, multinational corporations which engage in commercial activities in conflict areas or countries with a bad human rights record.

In terms of the legal aspects of due diligence, it is important to assess what role it can play in the determination of liability for companies which are accused of having caused or contributed to human rights violations.

In his commentary on the Guiding Principles, its founding father, Prof. John Ruggie, has explicitly linked the issue of due diligence with the risk of being held legally accountable:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

But this does not answer the question of where due diligence comes into play when determining legal liability. For criminal liability, in the form of, for example, aiding and abetting human rights violations that amount to (international) crimes, a criminal conviction will hinge on three pillars:

- a. Actus reus, i.e. a sufficient degree of assistance in the crime committed
- b. Mens rea, i.e. sufficient degree of intent or knowledge in respect of the assistance in the crime

committed

- c. The absence of any defense which might either justify the criminal assistance or excuse the suspect for its acts.

In the context of corporate criminal liability, the issue of due diligence is relevant for all three pillars of criminal liability, thereby putting it at the very heart of corporate accountability for human rights violations.

In justice systems which provide for corporate criminal liability, the liability of the company, as a legal person, is first and foremost a question of whether or not the acts of assistance by a natural person -or persons- within or related to the company can be attributed to the corporation. In the Netherlands, a test has been developed in case law that says that whether or not attribution to the company is reasonable will depend on, among other things, the care that has been taken to prevent such criminal assistance to occur in the first place. Obviously, the existence of an adequate due diligence policy and practice will be key to determining the attribution of unlawful acts to the company.

In addition to this issue of attribution, the mens rea of the company will need to be satisfied, meaning that assistance is provided with the required intent and/or knowledge. The determination of whether national mens rea standards have been fulfilled may in some justice systems already be subsumed under the aforementioned question of attribution of the acts of assistance as a whole. But it is also possible that the company's mens rea has to be inferred from, or is derivative of, the mens rea of the individual(s) who have provided the criminal assistance within the company to the committed human rights violations. Whatever the approach may be, the existence of an adequate due diligence policy and practice also appears essential in the determination of the required mens rea for the criminal assistance.

The two options in this regard appear to be that absence of proper due diligence may result in individual company members having acted without the required criminal intent or knowledge; but, it can be argued that this should not benefit the company concerned and failure of having adequate due diligence in place should result in attribution of mens rea to the company. Conversely, if adequate due diligence is in place, a situation may arise in which individuals within the company have knowingly provided criminal assistance in violation of the policy and practices in place. This is likely to substantiate the determination that these individuals possessed the required mens rea, but in such circumstances, also depending on the level of authority of these individuals, it may no longer be reasonable to attribute a similar mens rea to the company as a legal person.

Finally, the matter of due diligence may also be essential in determining whether or not certain defenses raised by a company can be successful in avoiding legal liability. One such defense can be the defense of mistake of law. A company could claim that it did not intend or did not know that it acted in criminal assistance of human rights violations committed elsewhere. Whether or not there can be successful reliance on mistake of law-related defenses will depend to a significant degree on the existence of adequate due diligence. Without this, a company cannot credibly maintain that it has acted in the firm belief of being in compliance with human rights law.

In conclusion, it can safely be said that due diligence is key for the determination of legal accountability of companies for human rights violations. The Guiding Principles and the continuing

discussions and activities of the Working Group on Business and Human Rights can provide essential and persuasive guidance as to what an adequate policy and practice of due diligence should look like. However, national legislative developments and relevant case law will in due course provide further specification as to the due diligence requirements.

Due diligence

Corporate criminal liability

Domestic law

Guiding principles

