

FORUMCIV.

TIME TO ACT

The need for legislation on
business and human rights

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Introduction

Frequent violations of human rights

Child labour, dangerous workplaces, violations of trade union rights, forced evictions, threats to indigenous people, water pollution and health hazards – these are common violations of human rights in relation to business operations in many countries across the world. Many Swedish companies have their own operations or suppliers in countries where human rights violations are frequent, labour law protection is poor and governance systems are weak.

Today, companies are integrated in the global market and often established in a range of countries, including low-cost countries. Corporations have constructed complex supply chains with many tiers of production. Products and input factors are produced and sold in supply chains that extend to multiple countries, involving a number of wholesalers, agents and contract partners. The race for ever cheaper products and production methods means higher risks for human rights violations and deteriorating working conditions. The dark side of global value chains is exploitation of workers and destruction of the environment.

Worse situation following Covid-19

The Covid-19 pandemic has aggravated the situation for many workers worldwide with strict lockdowns, massive job losses and millions of people pushed into unemployment and increasing poverty. Factories across the world have been forced to close due to reduced orders, shortages of raw materials and public health concerns. Particularly vulnerable are the millions of workers lower down the supply chain, often women. They already face low wages, dangerous and unsafe working conditions and no or minimal social protection. Migrant workers are another vulnerable group. They often find themselves in bad and crowded living conditions and discriminated against. Following the pandemic, migrant workers became stuck in different parts of the world due to disrupted international travel and closed borders.

Many migrant workers are now left in limbo without jobs, income and access to health. Where factories and workplaces have remained in operation during the pandemic, there are reports that workers have been forced to work without adequate protection, exposing them and their families to risk of infection. In countries with strict lockdowns, millions of people who are engaged in the informal sector have not been able to work and have lost their means for sustaining their livelihoods.

Business enterprises have a responsibility to respect human rights throughout the whole value chain. It means that they have a responsibility for their own activities and also for human rights impacts that are directly linked to their operations, products or services by their suppliers and other business relationships. This becomes even more relevant when companies are operating in high-risk contexts. Corporate responsibility is clearly stated in the UN guiding principles on business and human rights (UNGPs)⁹. These guidelines are the internationally recognised standard of reference when it comes to business and human rights. They are, however, not legally binding in the domestic, regional or international contexts.

The issue of legal obligations for business to respect human rights in all their operations, value chains and business relationships has moved to the centre in the debate on business and human rights. This issue has now gained important political momentum. In the last few years, there have been initiatives on national levels as well as internationally and in the European Union (EU). Many actors, including companies themselves, are no longer talking about if there will be mandatory measures, but rather when and what these measures will look like. This is a very positive development and it has been welcomed by civil society organisations, which have been advocating for this for a long time already.

Need for mandatory regulation

It is evident that voluntary guidelines are not enough, as is shown in several studies. The Corporate Human Rights Benchmark for 2019 shows that over half of major companies in apparel, extractive, food and beverage industries as well as tech manufacture are failing on human rights, particularly on due diligence¹⁰. The Corporate Human Rights Benchmark measures how companies perform across one hundred indicators based on the UN guiding principles on business and human rights, such as forced labour, protecting human rights activists and a living wage.

An analysis of the sustainability reports of 1 000 European companies within the framework of the EU Non-financial reporting directive, published in February 2020, shows that only 20 per cent of the companies report on how they act to secure that no negative impact on human rights is occurring in their supply chains¹¹. Still, more than 80 per cent of the companies state that they have a policy for human rights.

There is a need for effective and mandatory regulations so that violations of human rights related to business operations can be prevented and so that companies can be held accountable in case they cause or contribute to negative impact. Binding regulations on Human rights due diligence (HRDD) would create a level playing field for business. Today, those companies that make efforts to respect human rights have to compete on uneven terms with companies that do not consider human rights. When companies require that their suppliers respect human rights, they have more leverage if they can refer to a legislation.

Content of the report

This report provides input into the current debate around mandatory human rights due diligence legislation for business. It discusses why such a legislation is needed in Sweden and why voluntary guidelines are not enough. The report reviews existing legislation in France and the United Kingdom (UK) as well as a law proposal in Germany and highlights what can be learned from these legislations. Representatives from leading Swedish companies are interviewed and give their views on challenges in high-risk areas and on a Swedish law. The



Child labour in a small garment factory in Bangladesh. Photographer: Sk Hasan Ali/Shutterstock.com.

report contains a proposal on how a Swedish mandatory human rights due diligence legislation could look like. The proposal contains the main elements of such a legislation in order for it to be effective and ensure that businesses respect human rights throughout their operations. The report also contains examples from three sectors with high risks for human rights violations; the extractive industry, agribusiness and the textile industry. The report concludes with recommendations for the Swedish government on how to act in order to ensure that Swedish companies respect human rights.

Leading Swedish companies consider a legally binding regulation useful in order to create a level playing field. Other European countries have already adopted legislation or are discussing legislative proposals and the European Commission is moving quickly with a proposal for an EU-wide law. Now the Swedish government needs to act. With the proposal in this report for a Swedish legislation we hope to bring the debate forward and start a discussion around the content of a law that requires companies to respect human rights.

“ We are no longer discussing whether we are in favour of or against a law, like we did some years ago. Now we are expecting that there will be a legislation.”

Representative of a Swedish company interviewed for this report



Mining under difficult conditions in The Democratic Republic of Congo.
Photographer: Roland Brockmann/MISEREOR.

Extraction of natural resources

The extractive industry is one of the worst sectors when it comes to violations of human rights. The sector accounts for almost a third of all human rights abuses by companies across the world.

Land conflicts are common

The extractive sector includes mining, oil and gas. Extractive industries, particularly mining operations, usually require large amounts of land, making land conflicts one of the sector's most pressing challenges. In countries characterised by weak governance structures and widespread corruption, administrative structures related to the granting of concession rights to extractive industries are often shadowy. Expansion of extractive projects has in many cases meant that local people have lost land that they had been using for generations.

Forced relocations of villagers or entire villages have often taken place during the expansion of mining operations or other extraction projects. Several of these forced relocations are characterised by violence, inadequate compensation, relocation to new areas with poor housing and difficulties to sustain the family.

Threats to indigenous people

Extraction of minerals, oil, and gas frequently threatens indigenous people and their traditional ways of life. Many mining companies actively seek to access isolated and unexploited areas that are rich in natural resources. Such areas often overlap with indigenous peoples' land. The UN Declaration on the Rights of Indigenous Peoples states that indigenous people cannot be forcibly removed from their land. No relocation is permitted unless those affected give their consent

in advance and based on all available information, according to the principles of Free Prior and Informed Consent (FPIC). These principles are also included in the International Labour Organization (ILO) convention 169, which many countries have ratified. Despite this, governments in some countries ignore these rights and grant concessions to extractive companies, often after dubious processes and without prior consent of affected indigenous people.

Free, Prior and Informed Consent

Free, Prior and Informed Consent (FPIC) is a specific right that relates to indigenous peoples and is recognised in the UN Declaration on the rights of indigenous peoples and the International Labour Organisation Convention 169. It allows indigenous peoples to give or withhold consent to a project that may affect them or their territories. The principle implies that:

- Their consent shall be given voluntarily and without coercion, intimidation or manipulation.
- Their consent shall be sought sufficiently in advance of any authorisation or commencement of activities.
- They shall be provided with all information relating to the activity, and the information shall be objective and accurate.



Colombia's largest coal mine Cerrejón.
Photographer: Catalina Caro.

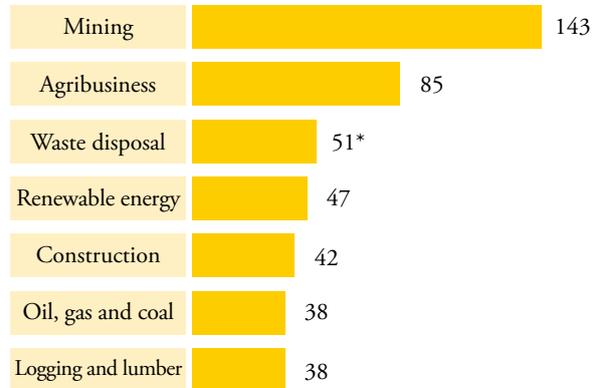
Violence against human rights defenders

Threats and violence against people who defend human rights and the environment are escalating in many places around the world. The extractive industry is the worst sector in terms of business-related violence towards human rights and environmental defenders. The Business & Human Rights Resource Centre tracked 570 attacks against defenders focused on business-related activities in 2019. Among them, 143 attacks were found to be related to mining¹. Mining is linked to most of the killings within the sector, with 50 defenders killed in 2019. More than half of them were from communities in Latin America. When it comes to individual countries, the Philippines was the country with most mining-related killings (16 deaths).²

Indigenous people have been particularly targeted when they defend their rights. People active in trade unions and those who are standing up for workers' rights and protesting against a poor working environment is another vulnerable group. Brazil, Mexico, Colombia, Honduras, Guatemala, the Philippines and South Africa are some of the countries that have seen most attacks on people who defend their rights in relation to corporate activity. Many extraction activities engage private security forces and sometimes

SECTORS WITH MOST ATTACKS ON HUMAN RIGHTS DEFENDERS

(2019)



*Attacks related to waste disposal were mostly connected to large protests against open-air landfills and waste processing plants in Russia.

Source: Business & Human Rights Resource Centre.

companies enter into special agreements with police and the military to protect sites. Tension with local people is caused by increased presence of weapons and security personnel at the extraction sites.

“ Extractive activities within indigenous peoples' lands and territories undertaken without adequate consultation or consent are the main source of serious violations of their human rights, including violence, criminalisation and forced displacement.”

Victoria Tauli-Corpuz, Special Rapporteur on the rights of indigenous peoples, in a statement to the Human Rights Council, 18 September 2019³.

Minerals finance armed conflict

The extraction of minerals can be used as means to fuel armed conflict. Four minerals (tin, tantalum, tungsten and gold) have played a critical role in financing one of the world's longest and bloodiest conflicts in the Democratic Republic of Congo. The civilian population has been severely affected by the conflict, many have been forced to flee from their homes and the armed groups have used sexual violence as a means to consolidate control. The UN has assigned these minerals

a special status as “conflict minerals”. These minerals and metals are found in mobile phones, computers, cars and jewellery.

In 2017, the EU passed the Conflict Minerals Regulation⁴, which will come into force as a law across the union on 1 January 2021. The aim with the regulation is to stop conflict minerals and metals from being exported to the EU, ensure that EU smelters and refiners are not using conflict minerals and stop mine workers from being abused. EU importers of these minerals must check what they are buying to ensure it has not been produced in a way that funds conflict or other related illegal practices.

Deadly accidents

In many countries, mines remain the deadliest type of workplace with a high rate of accidents, despite modernisation and technical advances made. Collapses, landslides and dam accidents claim thousands of miners’ lives every year. Several severe accidents have occurred when mine tailings dams have collapsed. In January 2019, a tailings dam collapsed at an iron ore mine in Brumadinho in Brazil causing the deaths of

more than 250 people⁵. A vast river of mud containing toxic mining waste flooded the area and washed away people, buildings, roads and bridges. It was the deadliest mining accident in Brazil’s history. Internal documents show that Vale, the Brazilian company which operates the mine, knew that the dam was flawed. In 2015, one of the company’s tailings dams at another mine in the same state collapsed, resulting in the deaths of 19 people.

In February 2019, a landslide hit an illegal gold mine on the island of Sulawesi in Indonesia. Wooden structures in the mine collapsed due to movable earth and the large number of mine shafts, which resulted in many people being buried in debris. At least eight people died, and many other miners were reported missing. Over 160 people lost their lives in a landslide at a jade mining site in Kachin state in northern Myanmar in July 2020.⁶ A wave of mud and rock triggered by heavy rain flooded over the miners. Myanmar is the world’s biggest producer of jade, and its mines have seen numerous accidents. In 2019 alone, more than 100 people died at mining sites.



Mine workers in The Democratic Republic of Congo. Photographer: Jeppe Schilder.

Slave-like conditions

Forced labour most often occurs in regions with limited insight from the outside world. Forced labour includes people who are not free to leave their work without the risk of reprisal, people who have entered into employment under uninformed circumstances, and people who automatically become trapped in debts or who are not paid a salary as promised. As mines and other extractive sites are often isolated from larger communities, extractive industries account for a considerable proportion of the total of around 25 million people that are currently trapped in forced labour.⁷

The extractive industries are overwhelmingly male-dominated workplaces. Women who work in or nearby mining and extraction sites can be particularly vulnerable, especially for sexual abuse. In many countries, large-scale mining operations are often linked to a variety of negative health-related impacts for workers and among local people near the sites. For example, open-pit mining can cause lung diseases, respiratory problems, skin diseases and other health problems.

Environmental destruction

Mining activities are highly water-intensive and require powerful cleaning systems to manage the large number of chemicals that are used. Mining applications in many places have transformed wide rivers into small streams. Mining waste and chemicals often pollute lakes and rivers and thereby contaminate the water used by nearby villages.

Mining, particularly open-pit mining and mountain-top removal, frequently causes long-term and sometimes irreversible impact on ecosystems and biodiversity. Spills involving heavy metals, acids, and toxic chemicals can continue for many years after mining operations have ceased. In many places, forests are cut down in order to make way for extractive activities.

The Niger Delta in Nigeria is heavily polluted by repeated oil spills. The large international oil companies have been criticised for not taking adequate steps to prevent oil spills and for reacting too slowly when pipelines are leaking.⁸



Workers in a mine in Ukraine at 800 meters below the ground. Photographer: DmyTo/Shutterstock.com.

Agribusiness

The increasing global demand for food, animal feed and agrofuels means that there is an escalating pressure on land from agri-food industries.

Land grabbing destroys livelihoods

Nearly half of the world's cultivated land is found in Africa and Asia, supplying about 60 per cent of the global agricultural production. Large-scale, commercially driven agriculture includes production of palm oil, fruit plantations and cattle ranching. Most companies in the agri-food sector depend on land and water resources to carry out their activities, which means that land and water grabbing is a serious threat. Many small holders have lost their land to large plantations for the agri-food industry and find themselves without means to sustain their families. It is not uncommon that small holders are forced to leave their land with little or no compensation and without proper consultations being carried out. Large-scale cultivations often deprive the nearby communities of water resources. The management of water resources requires coordination at local level between the different actors in the area in order to avoid water scarcity in the communities.

Dangerous for human rights defenders

After the extractive industry, agribusiness is the second most dangerous sector for human rights and environmental defenders. Land conflicts is a major driver of this. The Business & Human Rights Resource Centre tracked 85 attacks on human rights defenders in the agribusiness sector during 2019¹². According to Global Witness, 34 defenders linked to agribusiness were killed in 2019, which is an increase of over 60 per cent from the previous year¹³. The majority of the reported attacks took place in Asia, with 90 per cent in the Philippines. On the Philippine island of Negros, there have been massacres of small-scale farmers on sugar plantations. Land conflicts are common and peasant labourers and farmers' groups have campaigned for

land reform for a long time. Indigenous people are a particularly vulnerable group. Big agribusiness brands in the country have spoken out and acknowledged the need for clear and concrete internal policies to address the violence against environmental defenders and indigenous people¹⁴.

Increasing attacks against human rights defender

Attacks against human rights defenders linked to business operations have escalated. Business & Human Rights Resource Centre reported 572 attacks in 2019, up from 492 in 2018. Honduras was the country with the largest number of attacks. Other countries with many business related attacks were Colombia, Mexico, Russia, India, the Philippines, Brazil, Peru and Guatemala.

People defending land and the environment are the hardest hit. The attacks on women human rights defenders related to business have increased during the last five years, with 137 attacks in 2019. 40 per cent of the killings of environmental defenders in 2019 were indigenous people.

Source: Business & Human Rights Resource Centre, Global Witness

Severe impact from palm oil and soy

Large scale plantations of oil palm and soy have had severe negative impact on local small holders, indigenous people and forests in different parts of the world. Indonesia is the world's leading producer of palm oil. Several organisations have documented serious human

rights abuses on oil palm plantations in the country. These abuses include forced labour, gender discrimination, child labour and dangerous working practices¹⁵. Low wages and a system where workers are paid based on tasks completed rather than hours worked combined with different kinds of penalties are common. Workers, particularly women, are vulnerable to abuses since many are hired as casual daily labourers. Women are often forced to work long hours and find themselves in insecure employment without health insurance and pensions. Even cases of forced labour have been documented.

Child labour is frequent. Children, often as young as eight, have to help their parents on the plantations, which means that they might drop out of school. They are forced to carry out hazardous and hard physical work without safety equipment. The workers risk their health from the use of toxic chemicals, that are common on the plantations despite being prohibited in the EU. More than 90 per cent of the pesticides marketed today are for agricultural use¹⁶. Workers do not

often have adequate safety equipment to protect them from the pesticides.

Major driver of deforestation

The plantation sector is one of the main drivers of deforestation worldwide. The expansion of oil palm plantations and soy cultivations have turned unique ecosystems and forests into agricultural land. Important habitats for different animals, such as the endangered orangutan, and areas rich in biodiversity are threatened by deforestation. The soy boom in South America is threatening the rain forest, grassland and the savanna, particularly the Brazilian Cerrado. The Cerrado is home to around five per cent of the world's biodiversity and constitutes an important water source for the whole continent.

The Amazon under threat

The Amazon, being the largest rainforest in the world, is home to ten per cent of the world's biodiversity and is crucial for the global climate. It is an important carbon sink and absorbs two billion tons of carbon



Hard work on an oil palm plantation in Indonesia. Photographer: Wandee007/Shutterstock.com.



Fires in the Amazon rain forest on a scale never seen before. Photographer: Toa55/Shutterstock.com.

dioxide per year. But the Brazilian Amazon as well as the indigenous people living in the forest are under serious threat. Deforestation is escalating and the widespread fires in the Amazon in 2019 caught the world's attention. That year, the destruction of the Amazon rose to its highest level in more than a decade.¹⁷ The main drivers of deforestation in the Amazon and the Cerrado, both legal and illegal, are cattle ranching and soy industries. These two sectors account for 80 per cent of the Amazon's deforestation¹⁸.

Brazil's president Jair Bolsonaro, supported by agribusiness and the mining lobby, has announced his plans to open up indigenous territories in the Amazon to industrial agriculture and mining. This would seriously threaten the indigenous communities and their traditional way of living as well as escalate the deforestation and climate change. Indigenous territories occupy around 13 per cent of the country. Indigenous people living in the Brazilian Amazon are already under serious threat because of the deforestation.

Initiative for sustainable cocoa production

In September 2020, the European Commission launched an initiative to improve sustainability in the cocoa sector. A new multi-stakeholder dialogue brings together representatives of Côte d'Ivoire and Ghana, the European Parliament, EU Member States, cocoa growers and civil society.

Côte d'Ivoire and Ghana are the world's main cocoa producing countries, accounting for around 70 per cent of the global production. Here, cocoa is the main source of livelihood for up to six million farmers. But the revenue for local farmers is generally low, child labour is frequent and the production causes deforestation and forest degradation.

Source: The European Commission¹⁹

Textiles and clothing

Western countries have relocated most of their textile and clothing production to low-wage countries in order to cut production costs.

Race to the bottom

We have seen a "race to the bottom" towards the current production model with serious social and environmental impact, and where labour rights are violated. Wages are low, often below the living wage, and working hours are long. The textile and clothing industry is labour-intensive. Most of the clothes we buy in Sweden are produced in countries such as Bangladesh, Cambodia, Vietnam and China. New regions are being explored, for example in Africa, particularly Ethiopia. The clothing industry is characterised by tight production time-frames and the suppliers must be able to accommodate complex orders and deliver quality goods at short notice.

Poor working conditions

Many of the workers are women and the expansion of the textile industry in low-income countries have provided women with an opportunity for work and an income. But the working conditions are poor and they often have to work six or seven days a week with working hours of over 70 hours per week. Overtime is often required but not always paid. Many of the workers do not have a regular contract. Child labour is rife in the industry. Millions of children around the world are working in different parts of the production chain. They work in fields harvesting cotton, small and informal factories sewing pockets and buttons or cutting threads, and in their homes carrying out fine needle and embroidery work.

Job losses in the wake of the pandemic

The Covid-19 pandemic has led to massive job losses in the textile industries in producer countries, when the buyers cancelled orders, reduced order volumes or extended payment terms. Many suppliers were forced to dismiss or suspend workers, pushing millions of already vulnerable workers, many of them women, into increased poverty and insecurity. It is practice for



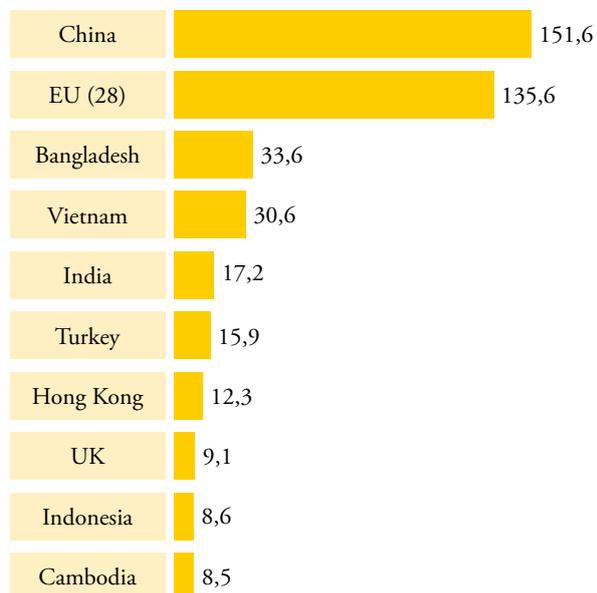
Workers in a garment factory in China.
Photographer: Frame China/Shutterstock.com.

buyers to pay for products only when they have been shipped. This means that when an order is put on hold or cancelled, payments are also put on hold or cancelled. When buyers have cancelled upcoming orders, they have often refused to pay the cost of raw materials that the suppliers have already purchased for the order. The pandemic exposes the fragility of a system where buyers have been pushing down the prices paid to suppliers and cutting production costs for decades.

Business & Human Rights Resource Center estimates that as many as 60 million low paid and mainly female workers in the textile industry supply chain will have difficulties to sustain their livelihoods.²⁰ In garment-producing countries, such as Bangladesh, workers have demonstrated in protest of buyers' business practices in response to the pandemic. More than two million textile workers in the country have lost their jobs or been temporarily suspended from work without pay.²¹ Over 20 000 garment workers have lost their jobs in Myanmar. In Cambodia, 200 000 workers risk losing their jobs while the figure for Pakistan could be as many as one million.²² These countries lack social

TOP TEN EXPORTERS OF CLOTHING

(2019 - Billion USD)



Source: World Trade Organisation (WTO).

protection systems and the workers rely on the clothing industry to take responsibility. Particularly vulnerable are the workers, mainly women, who work from their homes and being the ones at the bottom of the global garment supply chains.

In Bangladesh, reports show that thousands of workers affiliated to a union were laid off while workers who were not members of a union to a greater extent could keep their jobs. Organisations such as the Workers' rights consortium and the Clean clothes campaign are convinced that the pandemic has been used as an excuse to get rid of workers affiliated to and active in trade unions.²³

Hidden violations in sub-contracting

An average garment company may spread its orders over hundreds of changing suppliers. A sector-specific risk of violations of fundamental labour rights is posed by hidden sub-contracting.²⁴ Large companies structure their production in complex and vast chains of sub-contracting. The sub-contracted units can be stitching centres, small workshops or home-based workshops operating in the informal sector. These centres and workshops are often not visible and not inspected by the foreign buyers. Hence,

traceability becomes difficult and violations of human rights and unaccepted working conditions might prevail undetected.

Disastrous accidents

The textile industry is characterised by an unsafe work environment with a high incidence of work-related accidents and deaths as well as occupational diseases. Many factories do not meet the safety standards required by building and construction legislation. Deaths in fires and building collapses are common. The temperature in the factories is often high with no ventilation and cases where workers are fainting have been reported.

The collapse of the Rana Plaza building in Dhaka in Bangladesh in 2013, where five garment factories were housed, is the worst accident in the history of the textile industry. Over 1 100 people were killed and more than 2 500 were injured. Only five months earlier, there had been another serious accident when a fire broke out in Tazreen Fashions factory on the outskirts of Dhaka. That time over 100 workers lost their lives.²⁵

Major polluter

The textile industry is one of the major polluting industries in the world. The production and distribution of the crops, fibres and garments all contribute to various forms of environmental pollution, including water, air and soil pollution. The fashion industry produces 20 per cent of all the wastewater in the world and 10 per cent of global carbon emissions. Textile dyeing is the second largest polluter of water globally.²⁶



A young boy working in a textile factory in India. Photographer: Paul Prescott/Shutterstock.com.

UN guiding principles

The UN guiding principles on business and human rights are the main guidelines that define the responsibility of states and companies in relation to human rights. They are voluntary and it is evident that this is not enough.

The UN guiding principles on business and human rights (UNGP) define what is expected of states and companies respectively as regards human rights and how businesses should work to respect human rights throughout their value chains.²⁷ The UN Human Rights Council endorsed the principles in 2011. These guidelines are the internationally recognised standard of reference in relation to business and human rights and have been unanimously endorsed by the international community and integrated into other standards. They are, however, not legally binding. Recently, it has been acknowledged by decision makers in some countries as well as some companies and investors that voluntary guidelines are not enough. They need to be complemented by mandatory measures. The legislations on Human rights due diligence (HRDD), that are currently being developed in different countries in Europe, are largely based on the UN guiding principles.

The UN guiding principles reiterates the obligation under public international law that states have a duty to protect against human rights abuses committed by third parties, including by companies. States shall take necessary steps to prevent, investigate, punish and redress abuses through policy instruments, legal frameworks and regulations. States must make it clear that they expect all companies established in their territory and/or their jurisdiction to respect human rights across their operations.

The UN guiding principles state that the corporate responsibility to respect human rights requires that companies:

- Avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur.
- Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

According to the UN guiding principles, states should use a “smart mix” of measures – national and international, mandatory and voluntary - to ensure that companies respect human rights. The UN principles state that the failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in states’ practice. According to the principles, it is important for states to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

“ There is more and more understanding that the smart mix prescribed by the UN Guiding Principles on Business and Human Rights means that there needs to be legislation in order to reach the stated aims.”

Heidi Hautala, Vice-President of the European Parliament²⁸

OECD guidelines

The OECD guidelines for multinational enterprises are adhered to by around fifty countries and are an important tool to promote responsible business conduct.

The Organisation for Economic Co-operation and Development (OECD) has developed voluntary guidelines on corporate responsibility for multinational companies²⁹. These are supported by OECD member states and other states that have opted to comply with the guidelines. The guidelines are recommendations from states and what they expect of companies, and include human rights, working and employment conditions as well as relationships between labour market actors, the environment, corruption, competition, taxation and consumer interests. Governments that adhere to the guidelines commit to implement and promote them. The guidelines were most recently revised in 2011.

National contact points

National contact points (NCP) are established by governments to promote the guidelines and to handle cases against companies when the guidelines are not observed as a non-judicial grievance mechanism. With the contact points, the OECD aims at strengthening access to remedy. The Swedish National contact point is a tripartite collaboration between the state,

the business sector and trade unions. The Ministry for Foreign Affairs is the NCP chair and convener.³⁰

Due diligence guidance

The OECD has developed a Due diligence guidance for responsible business conduct, which was adopted in June 2018³¹. The guidance aims at helping businesses to understand and implement Human rights due diligence as well as promoting a common understanding amongst governments and stakeholders on due diligence. Enterprises can use this guidance as a framework for developing and strengthening their own tailored due diligence systems and processes.

The guidance covers multinational enterprises of all sizes and in all sectors operating or based in countries adhering to the OECD Guidelines. It covers human rights, employment and industrial relations, environment, combating bribery, consumer interests and disclosure. The OECD has also developed sector-specific guidance for minerals, extractives, garment and footwear, agriculture and financial sectors³².



Burmese migrant workers stitching leather shoes in a factory in Thailand. Photographer: catastrophe_OL/Shutterstock.com.

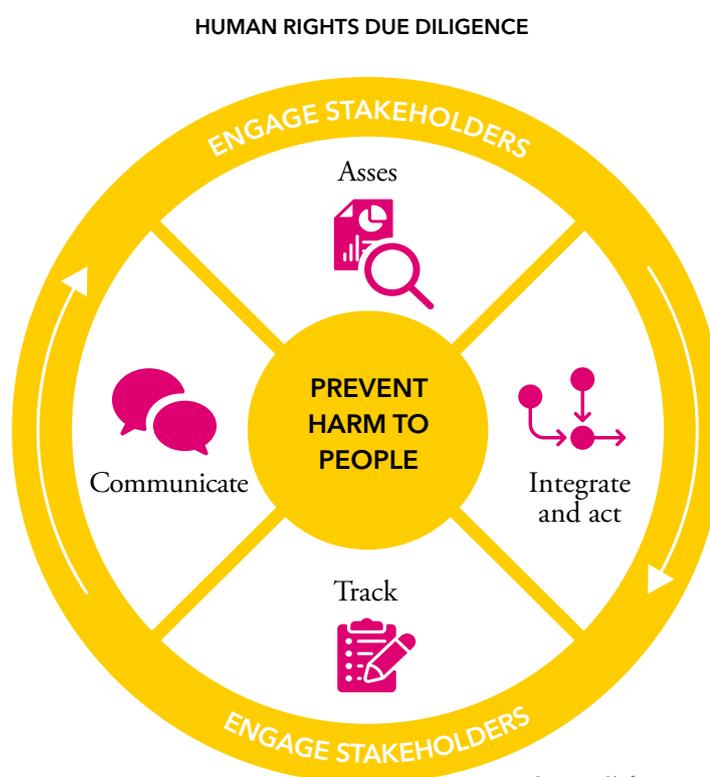
Human rights due diligence

The process of Human rights due diligence is a key part of fulfilling companies' responsibility to respect human rights and is outlined in the UN guiding principles on business and human rights.

Human rights due diligence (HRDD) consists of a process that companies use in order to become aware of and manage their actual and potential impacts on human rights. The process enables businesses to identify, prevent, mitigate, redress and evaluate how they manage their negative impact on human rights. It is an on-going process with four steps, which involves meaningful consultation with potentially affected groups and other relevant stakeholders. The steps that a Human rights due diligence should entail are:

- **Assess:** identify and assess its actual and potential negative impact on human rights that might happen as a result of business activities or through business relationships. This should be based on meaningful consultation with stakeholders. Such stakeholders include people who are, or potentially will be, impacted by the company's operations.
- **Integrate and act:** undertake relevant measures to address, counteract and prevent negative impact or risk of such impact. Provide remedy where negative impacts have occurred.
- **Track:** follow-up and assess the effectiveness of the measures in practice.
- **Communicate:** openly communicate about how the company addresses impacts and risks and share information externally with stakeholders. Communication with affected stakeholders need to take place continuously throughout the HRDD process.

To begin, the company should have a policy commitment that includes a commitment to do no harm vis-à-vis all universally recognised human rights. The policy statement should be adopted at the highest level of the organisation and communicated throughout the company as well as to customers, suppliers and other business relationships. In those cases where the company identifies risks or negative impact and the company must prioritise, then priority should be given to action on the most severe risks and/or cases.





Woman harvesting cotton in India.
Photographer: CRS Photo/Shutterstock.com.

The EU initiative

The European Commission has initiated the process for an EU-wide legislation on human rights and environmental due diligence for business. The European Parliament has stressed the need for stronger requirements for companies in relation to business and human rights.

Initiative by the European Commission

In the European Commission, the Directorate General (DG) for Justice has begun work on a new legislative initiative on sustainable corporate governance. Following the announcement in April 2020 by the European Commissioner for Justice, Didier Reynders, things have moved quickly and on July 30th, the European Commission published an Inception impact assessment for the initiative.³³ When announcing the initiative, Commissioner Reynders said that the Commission will push for a mandatory mechanism with an inter-sectoral approach and the possibility of sanctions for companies who do not live up to the regulation. The Commissioner has also stated that the proposed legislation will include both corporate due diligence and directors' duties to incorporate human rights.

“ It is important that we have the possibility to sanction. A regulation without sanctions is not a regulation.”

The European Commissioner for Justice, Didier Reynders, 29 April 2020

The Commission plans to present a proposal for the legislation during the first quarter of 2021. The legislative initiative is included in the European Green Deal³⁴ as well as in the communication on the EU's post covid-19 recovery "Europe's moment: Repair and prepare for the next generation"³⁵. The initiative by Commissioner Reynders and the fast action by DG Justice on this has been welcomed by civil society across Europe. Companies have also expressed support for the legislative initiative. In September 2020, 26 companies and

business associations released a joint statement calling for an EU-wide and cross-sectoral mandatory human rights and environmental due diligence legislation³⁶.

“ We welcome the European Union and its member states' efforts to introduce new mandatory human rights and environmental due diligence legislation, as an integral part of the move to build back a more resilient economy that works for all.”

26 companies, business associations and initiatives in a public statement, 2 September 2020³⁷

Need to prioritise sustainability

According to the European Commission, the pressure for companies to focus on short-term financial performance reduces companies' ability to properly integrate sustainability considerations into business strategies. Companies do not identify and address social and human rights, climate change and environmental risks and impacts adequately in their operations and supply chains. Many European companies are sourcing goods from entities based in countries with lower standards on human rights and environment, and with weak governance systems. Often, the company interest and directors' duties are favouring maximisation of short-term financial value at the expense of long-term sustainability. The Commission also acknowledges the fact that companies who are frontrunners in sustainability are losing out when there is not a level playing field.³⁸

With this initiative, the Commission wants to improve the EU regulatory framework on company law and corporate governance. The aim is to enable companies to focus on long-term sustainable value creation rather than short-term benefits. The Commission states that the legal framework lags behind the development of global value chains and complex corporate structures when it comes to a company's responsibility to identify and prevent negative human rights impacts. The international standards that exist for responsible business practises are voluntary. An EU-wide legislation would create legal certainty and leverage and enable building a global level playing field for EU companies to operate on sustainable terms, according to the Commission.

Key features of a legislation

The Commission has drawn up possible obligations for companies and directors that could be included in an EU-level legislative initiative:

- Obligation for companies to carry out due diligence in order to identify and prevent relevant human rights, climate change and environmental risks and mitigate negative impacts in their own operations and value chains. This should build on existing authoritative guidelines and use well-established definitions such as those developed by the UN and the OECD. The EU initiative should be in line with relevant international conventions and EU goals, such as those on human rights, climate and environment including biodiversity.
- Obligation on the company directors to take into account all stakeholders' interests which are relevant for the long-term sustainability of the firm or for those affected by it (such as employees, environment, other stakeholders affected by the business). Company directors should define and integrate stakeholders' interests and corporate sustainability risks, impacts and opportunities into the corporate strategy and set measurable and science-based targets, including climate targets aligned to the Paris agreement, biodiversity and deforestation targets.
- An enforcement and implementation mechanism accompanying these duties, including possible remediation where necessary.



Workers at a salt field in Vietnam. Photographer: Phuong D. Nguyen/Shutterstock.com.

Studies show need for a law

The legislative initiative is based on the findings of a study in two parts by the Commission. The first part was on due diligence requirements in the supply chain and was published in February 2020³⁹. The conclusions were based on different options for possible regulatory intervention at the EU level. The study comes to the conclusion that a binding regulation with requirements on Human rights due diligence would have the largest positive impact related to violations of human rights linked to business operations. This option would involve a new mandatory due diligence requirement at the EU level which would require companies to carry out due diligence to identify, prevent, mitigate and account for actual or potential human rights and environmental impacts in their own operations and supply or value chain, as a legal duty or standard of care.

The second part of the study on directors' duties and corporate governance, published in July 2020, found a clear trend of short-termism in the focus of EU companies⁴⁰. According to the study, key drivers include the narrow interpretation of directors' duties and the company's interest, the tendency to favour short-term maximisation of financial value, growing pressure from investors, the lack of a strategic perspective on sustainability as well as the limited enforcement of the directors' duty to act in the long-term interest of the company.

Active work by the European Parliament

The European Parliament has at several occasions underlined the need for stronger European requirements for companies to prevent human rights abuses and environmental harm as well as to provide access to remedies for victims. In June 2020, the Parliament published a set of two briefings on options for HRDD legislations for the EU⁴¹. In September 2020, the Parliament published a report⁴² with recommendations to the Commission on corporate due diligence and corporate accountability and a proposal for the content of a legislation. The Parliament states that the European Union should urgently adopt requirements for companies to carry out human rights due diligence in their entire value chain. The legislation should be broad, cross-sectoral and cover all companies, both

private and publicly owned, regardless of size, including those providing financial products and services. Member States should designate national authorities to supervise and impose sanctions, including criminal sanctions in severe cases. If a company causes or contributes to an adverse impact it should provide for remedy. The Parliament considers that the jurisdiction of EU courts should be extended to business-related civil claims brought against European companies.



We know what we have to do. It is now time to do it. Companies must take action to address adverse human rights impact through an on-going human rights due diligence process. And it is for that reason that the UN Global Compact wholeheartedly supports all on-going efforts to present legislative proposals on mandatory human rights and environmental due diligence."

Sanda Ojiambo, Executive Director, UN Global Compact at the Danish conference Realising responsible business conduct, September 2020⁴³.

Welcome action by the EU

The legislative initiative by the European Commission and the fast speed with which they have moved ahead is very positive. It is critical that the EU lives up to its objectives of a mandatory legislation with requirements on companies to conduct Human rights due diligence. According to the Commission, an impact assessment will define which issues will be included in the legislation itself and which issues will be placed in a complementary guidance. It is crucial that the main features, such as mandatory due diligence, civil and criminal liability, possibilities of sanctions and a clear enforcement mechanism, possible remediation as well as directors' duties, are included in the legislation and not in a complementary guidance. An EU-wide cross-sectoral legislation with these elements, applicable to all business enterprises domiciled or based in the EU or active on the EU market, would create a level playing field within the EU and a coherent legal framework.



Worker throwing oil palm fruits on a truck in Thailand.
Photographer: Think4photo/Shutterstock.com

National legislations

Several countries in the EU have already introduced HRDD-laws or are in the process of drafting proposals and reviewing possibilities for a legislation. Sweden has not taken any steps for this and is lagging behind.

Legislations adopted or discussed

There is growing momentum among governments across the world to require companies to conduct Human rights due diligence. Major investors and companies are also expressing their support for this. Legislations with requirements on companies to respect human rights have already been adopted in several European countries. For example, the Modern Slavery Act (2016) in the UK, the Duty of vigilance law (2017) in France and the Child labour due diligence law in the Netherlands (2019). The French law covers all kinds of human rights impacts and violations in all business sectors while the applications of the British

and Dutch laws are limited to a certain type of human rights abuse. The UK Modern Slavery Act imposes only a reporting requirement for companies to disclose whether or not they address modern slavery and trafficking issues, it does not require companies to conduct Human rights due diligence. Even though civil society would have preferred an even more ambitious law, the French Duty of vigilance law is a ground-breaking law, the first law with a wide-ranging scope ensuring that companies respect human rights and the environment.



A young girl working in a brick factory in Nepal. Photographer: Stanislav Beloglazov/Shutterstock.com.

The lower house of the Swiss parliament approved in June 2018 a legislative proposal requiring large companies to conduct human rights and environmental due diligence. The proposal also establishes civil liability for parent companies for impact caused by their subsidiaries. In 2019, the draft prepared by two federal ministries of a German law on human rights and environmental due diligence in global value chains was leaked. The key provisions of the proposed law are currently under discussion with the different departments of the German government. It is expected that a draft law will be submitted to parliament in autumn 2020.

In 2018, the Norwegian government appointed an expert committee, the Ethics Information Committee, to explore regulation for responsible business and supply chains. In November 2019, the committee published a draft act on transparency regarding supply chains, the duty to know and due diligence. In Finland, the Ministry of Employment and Economy commissioned a review of possible national regulatory options with due diligence obligation on business. As a background to the review, corporate responsibility regulations introduced in other countries were analysed. The review was presented by the Finnish government in June 2020. The review concludes that it could be possible to impose an environmental and human rights duty of care/due diligence on companies within the national legal system.

“Next year I will introduce an initiative on sustainable corporate governance. This will include a proposal for new rules on due diligence for companies as part of the European Green Deal. We will also take on board lessons learnt from national contexts, for example the current law on due diligence in France and on-going reflections in Denmark and Germany etc.”

Didier Reynders, European Commissioner for Justice at the Danish conference Realising responsible business conduct, 30 September 2020⁴⁴

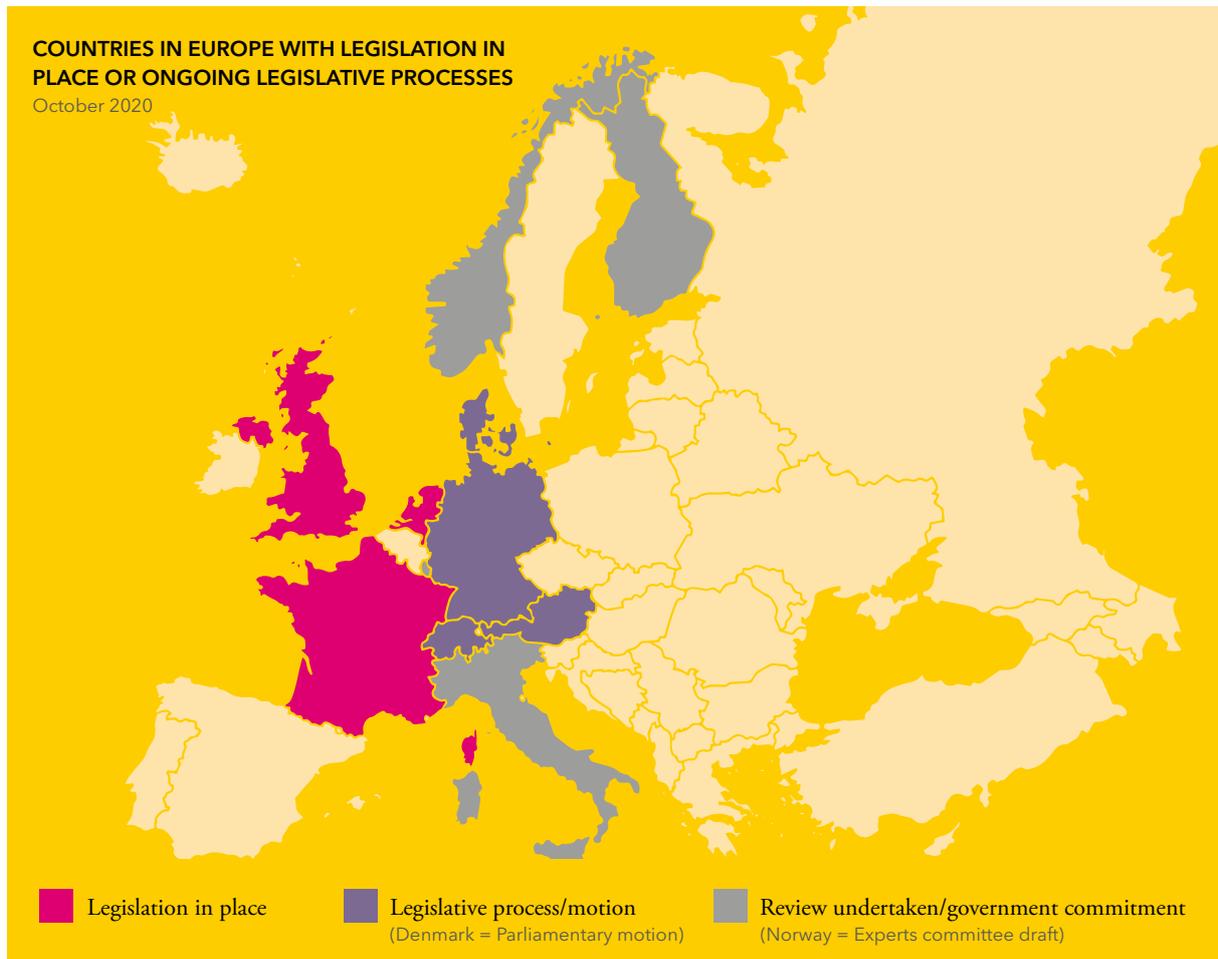


Dangerous construction work, Costa Rica.
Photographer: Josue Isai Ramos Figueroa.

Sweden is lagging behind

The Swedish government has so far not taken any steps to review the possibilities for a national HRDD legislation or how such a law could be integrated in the Swedish legal system, despite several recommendations to do so. In a 2018 investigation on Sweden's implementation of the UN guiding principles commissioned by the government, the Swedish Agency for public management (Statskontoret) recommended that the government reviews the possibility of drafting a law with requirements on companies to conduct Human rights due diligence.⁴⁵ The agency recommended that the law should have extraterritorial reach, i.e. to give Swedish courts jurisdiction over (make it possible to try in court) human rights violations by Swedish companies that have occurred in other countries. The 2030 Agenda Delegation also recommended that the government conduct a review on reinforced national legislation for business and human rights in its final report to the government in 2019.⁴⁶

In the Platform for international sustainable business from December 2019, the government states that “it wishes to wait with this because it could have far-reaching consequences that are difficult to analyse”⁴⁷. The government says that it first wants to follow up whether the provisions regarding sustainability reporting in the Annual Accounts Act have influenced the actions of companies, particularly on high-risk markets. The government also wants to get a clearer picture of how these issues will be addressed in the European Union.



While presenting the Platform for international sustainable business at a public meeting in January 2020, the Swedish minister for foreign trade, Anna Hallberg, said in reply to a question that the government is not closing the door for a Swedish legislation with requirements on companies that they respect human rights. The minister has also publicly said that it is positive that there is now an initiative on the EU-level and that Sweden will support this and be active in the process⁴⁸.

Sweden prefers EU legislation

In an interpellation debate in the Parliament on 20th August 2020, Anna Hallberg said that a number of very important initiatives on business and human rights is currently under way, in which Sweden is involved⁴⁹. Mentioning that the Commission has announced a proposal for an EU-wide legislation on mandatory human rights and environmental due diligence for business, the minister said that “Sweden

welcomes the Commission’s proposal. We have a close dialogue with the EU Member States where we see an increased commitment. This applies in particular to Finland and Germany, both of which have given priority to the issue in their EU Presidencies.”

From the interpellation debate it becomes clear that the Swedish government would prefer an EU-wide legislation and does not see the need for further steps towards a national legislation at this stage. “Our view is that it is by influencing through the EU that we get a greater impact from our efforts. This does not mean that Sweden should be passive - far from it. But that we as an individual country introduce legislation that does not go hand in hand with EU legislation, is in our view not an effective measure to achieve the goal that Swedish companies should be even more active in a positive direction”, said the minister.

Challenges in high-risk areas

Swedish companies interviewed agree that it is difficult to exercise control further down in the supply chain and to operate in complex markets where legal frameworks, political systems and expectations on foreign investors vary.

Introduction

For this report, five interviews with representatives of Swedish companies were conducted in order to understand the human rights issues that companies are facing and their viewpoints on a potentially forthcoming Swedish HRDD legislation. In order to obtain a broad perspective on the question, companies from different sectors were selected. Among the companies, one is a public owned company. The interviews were conducted by Enact Sustainable Strategies on behalf of ForumCiv.

The companies interviewed are:

- Ericsson
- H&M Group
- Scania
- Stora Enso
- Vattenfall

Control beyond first tier is difficult

Four out of five company representatives that were interviewed expressed that they experience difficulties in exercising control over their supply chains below the first tier of suppliers. Many described that they have established control systems in relation to their first-tier suppliers, and that they attempt engaging with lower tier suppliers through the first-tier supplier. For

example, one company representative described that first-tier suppliers have engaged second tier suppliers in capacity-building workshops. Another company representative described how the second-tier supplier is asked to sign a sustainability commitment, to conduct a self-assessment questionnaire and to approve the possibility of an auditor checking on their work. Most companies interviewed expressed that the further down in the supply chain, the more difficult it is to have control over or even knowledge of the potential human rights impacts.

Impacts downstream and upstream

All company representatives interviewed recognise that there are human rights risks in the supply chain/production chain. Most company representatives, but not all, also recognise that there are challenges relating to the use of their products and services.

One company representative described that it is more challenging to deal with human rights challenges in relation to customers than suppliers.

“We have to recognise that we have more leverage with our suppliers than with our customers.”



Woman sewing and producing for the informal market in Kenya. Photographer: Jenny Engdahl.

Another company representative described that there is a difference in how much you can work with customers, depending on whether you are a customer-facing, brand-sensitive company or a business-to-business company. They stated that there is a need to see the whole value chain.

Complexities

Many companies described how different conditions in the global market create challenges for their human rights work. It is difficult to operate in complex markets where legal frameworks, political systems and expectations on foreign investors vary. Hence, the companies' human rights work depends not only on their own corporate frameworks but on many external factors that the companies do not control.

“We have to act ‘glocal’ in a meaningful way.”

A few companies mentioned that a big challenge is how to measure progress on human rights risks and impact management.

“Human rights are difficult to measure, partially because the manifestations of impacts on the ground are complex.”

Informal sector

One company mentioned that a particular challenge relating to human rights management in the supply chain pertains to the informal sector. Where the informal sector conducts services in the supply chain, it is difficult to address and engage around labour standards and human rights in the same way as when dealing with a formalised supplier.

Addressing human rights risks

According to the companies interviewed, implementation of human rights due diligence depends on the structure and maturity of the organisation. They also recognised the importance of interaction with stakeholders.

The representatives of all the interviewed companies stated that they have processes for addressing human rights risks in their supply chains. However, many companies expressed that the level of human rights integration into and across the company varies.

“We have islands of excellence within the company, for example in the purchasing division.”

“I wish we could say that the whole company is doing due diligence, but some parts of the organisation are way ahead of other departments... It really depends on how important they think it is.”

Many company representatives interviewed described that they interact, engage or collaborate with stakeholders in the human rights due diligence process and that they are an important source of expertise and information.

Many companies shared the view that a decentralised organisation is a challenge for ensuring human rights due diligence across the company, for example this could be due to lack of ability to push in one joint direction or lacking coordination of efforts.

“It is only when the organisation is striving to centralize on certain issues that we are having leverage on the human rights requirements internally.”

Many companies also shared the view that raising awareness inside the organisation of why and how human rights are relevant is crucial for effective

human rights due diligence implementation. Addressing human rights risks and conducting human rights due diligence is a long journey requiring continuous improvement and training.

“To increase knowledge levels amongst those decision-makers in the company who are supposed to be accountable for the work, is something we need to work with continuously.”

Some of the companies expressed concern for human rights and the social aspects of sustainability in the shift to green and fossil free energy.

Corporate responsibility in UNGP

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:

- A policy commitment to meet their responsibility to respect human rights.
- A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.
- Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The UN guiding principles on business and human rights, Principle 15

“There is a lot of pressure in the development of batteries where we are trying to find solutions, but time is short from a climate change perspective. We are seeing that there is tension between social and environmental dimensions of sustainability here. We want to shift, but I fear that some may be missing the social risks.”

Many companies interviewed also described how successful implementation of human rights due diligence will depend on the structure of the organisation, the maturity to manage sustainability overall and the size of the company.

“Being a leader in our industry, we are expected to take a front-running role, which includes influencing the industry as a whole.”

“We are part of a larger group, and so we have to organise internal responsibilities accordingly. It makes sense to divide responsibilities in that way.”

Some representatives also mentioned the need for companies to work together on human rights challenges. Where human rights challenges are systematic and abuse pervasive, it is hard for foreign companies to enter into the market and deal with widespread challenges alone.

“ We need strategic, conscious work with human rights. And in particular, we need to act jointly and take collective responsibility for human rights in our industry.”



Digging for minerals in The Democratic Republic of Congo. Photographer: Jeppe Schilder.

Views on a Swedish law

The companies stated that a regulation would be useful to create a level playing field. The majority preferred a legislation on the European level compared to a Swedish regulation.

Useful and expected

All companies acknowledged the usefulness of regulation in general to create a level playing field. Some mentioned that this would be particularly important for small and medium sized companies. It was stated that legislation would have a symbolic value and that legislation would create a level playing field for all. One company stated that legislation will make it easier for them to push the responsibility in the supply chain as well as towards customers. Another company representative said that legislation will allow them to engage in dialogue with suppliers and help them raise the topic of a shared responsibility for human rights impacts.

“We see that in high-risk countries, even if the business partners themselves are not so keen on respecting human rights, they understand when we refer to legislation in our home country or on a European level. No one can expect us to disregard our legislation, in fact, not having legislation creates an imbalance - they refer to their domestic legislation but we just refer to voluntary principles - the UNGPs or our company code of conduct. Would we have legislation, it would make the dialogue in high-risk countries easier. It would be easier for us to negotiate contracts and raise the bar.”

“ We think that a legislation is a natural next step. We think it is inevitable that we will have a law. We want to be part of the constructive dialogue with the Swedish government on what the law will look like.”

Hesitation

A majority of the company representatives that were interviewed also expressed some form of reluctant viewpoints regarding a potentially forthcoming law, in

particular relating to a law on a national level. One reason that was highlighted is the many different requirements that companies would have to follow. It was mentioned that a legislation will complicate things for big companies.

“There are some things in this conversation that may cause complications for companies, for example the extraterritorial reach of the law and the idea that some are mentioning of reversed burden of proof.”

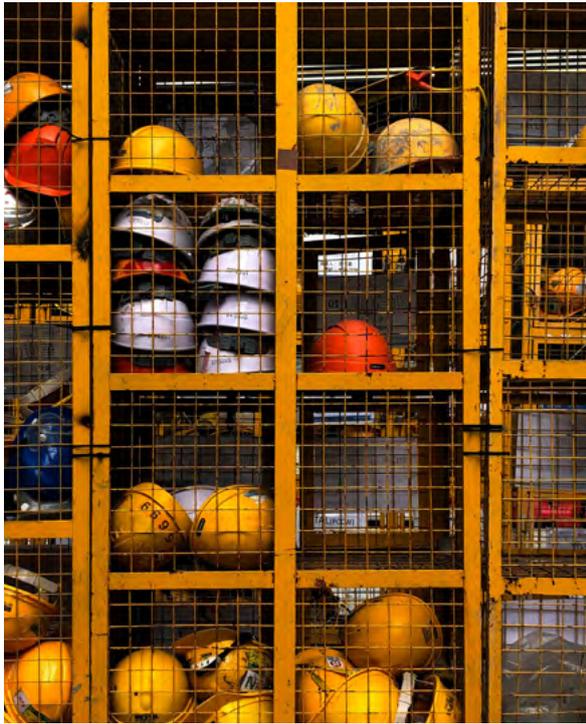
“Legislation is good for those that are not yet in the game (of respecting human rights). But it may distract those big companies, like us, that are ahead of the curve because I am afraid we will have to deal with formalities instead of actually working with the real issues, conducting the real dialogues with the stakeholders, essentially using our resources in the right way.”

European or Swedish law?

Four out of five company representatives expressed that a regulation on a European level would be preferred over Swedish regulation. The main argument is that a European law would mean the same content requirements across Europe, rather than many countries adopting different laws with different content. All companies that were interviewed operate across many jurisdictions and have many differing legal standards to comply with. Having one legal framework to comply with will facilitate the internal compliance work. It was mentioned that harmonisation is important and that is why they prefer an EU legislation. One company representative said that an EU legislation will contribute to uniformity across jurisdictions and stability in the human rights work of the company. Another representative pointed out that if there is a European legislation, they will be able to report consistently, as-

Farmer spraying pesticide without protection.
Photographer: Tingnong Stly/Shutterstock.com.





Construction helmets behind bars.
Photographer: Pop & Zebra.

suming that it includes reporting requirements.

“What I turn against is that right now we seem to be in this exercise of a global patchwork of laws, all slightly different. Germany has its thing, UK is slightly different... I would much rather prefer that we have ONE framework on an EU level – in fact, that would be absolutely great.”

“Having to comply with various legal standards would lead to a heavy administrative burden. This, in turn, will distract from the internal focus on managing human rights impacts. Internal efforts will go to compliance and reporting requirements. That would make us lose focus on what is really important – the doing.”

Content of the legislation

Some company representatives had views on the content of the envisioned law, others did not. There is uncertainty as to what the content of the law should be, but many companies expressed that it needs to be pragmatic.

“It all depends on how it will look. It may take some time

before we can decide whether it is good enough. There is so much in the detail we need to understand... First we need to see what the components of the law are.”

“Right now, we are quite impacted by various buyer standards initiatives that dictate us and become laws... There are different laws that increasingly are focusing on human rights. But it is such a diffused bunch of standards and these requirements are becoming really complicated to fulfil. A separate HRDD law would take a lot of that pressure off. We would be able to see, here is what we need to do, here are the requirements you need to fulfil. At the end of the day, I believe that would be useful.”

“ I would be very surprised if a Swedish law on HRDD does not happen. The question is really what it will look like, and I think this is where the friction will come in. I hope for a pragmatic one.”

“There are some that are calling for the law to have extra-territorial reach or a reversed burden of proof for human rights impacts claims, and I see that very challenging from a company risk and liability point of view.”

A common view of many was that more reporting obligations are not needed. In fact, more reporting requirements may lead to the wrong implications. One company representative expressed concern that they will end up just reporting and reporting.

“We do not know what we think about the content, except for one thing. We do not want more reporting requirements; we want a focus on the human rights due diligence process obligations.”

“Rarely does a new reporting requirement come that adds something new... It will be an additional burden.”

“Reporting on what you are doing takes time away from actually doing what you need to do.”

COMPARISON OF LEGISLATIONS

In this chapter, two existing legislations and one law proposal are analysed and some positive and negative aspects are highlighted.

French Duty of vigilance

Summary of the law

The French law on Duty of vigilance was adopted in 2017. The law applies to French companies with more than 5 000 employees in France or 10 000 employees in the world (within the companies and their direct and indirect subsidiaries). The law is not limited to a specific human rights' impact or area, but it includes risks and severe impacts to all human rights and fundamental freedoms, health and safety as well as the environment in all business sectors. According to civil society, the majority of the plans drafted so far under the French Duty of vigilance law are insufficient in terms of accuracy, often containing gaps.⁵⁰

Coverage

The French law creates a duty of vigilance and disclosure of due diligence procedures for companies. Companies must draft and publish a vigilance plan in their annual report as well as a report on the plan's effective implementation. The plan should include reasonable vigilance measures that can identify and prevent severe risks on human rights and fundamental freedoms, on the health and safety of individuals and on the environment. The plan should also include how these measures are established and effectively implemented. Some examples of vigilance measures are the following: risk mapping, value chain assessment processes, mitigation and preventive actions, alert mechanisms and monitoring systems.⁵¹

Application

The French law states⁵² that it includes severe impacts “resulting from the activities of the company and of those companies it controls directly or indirectly as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship”.⁵³

Format

The vigilance plan should be public and in the annual report.⁵⁴

Sanctions

In the event of non-conformity and damages occurred due to lack of vigilance, the law refers to general civil liability provisions in the French legislation.⁵⁵

Positive aspects

During the three years that the law has existed, it is now possible to evaluate some positive and negative aspects from its application.

Vigilance duty: First of all, it is good that there is a vigilance duty – and not just a reporting duty. In other words, there is an obligation to act on risks, adopt measures and follow up on their effective implementation and effectiveness, not merely to report after risks have materialised. It also provides for civil liability in case damages occur due to lack of vigilance. Class



Workers in India live with their families in inhumane conditions within the brick factory where they work.
Photographer: Zvonimir Athletic/Shutterstock.com

actions are also generally available in the French legal system⁵⁶ and they can facilitate legal action for claimants. That means that parties with similar claims against the same entity can merge their claims, thus making the procedure more accessible for claimants. For example, six CSOs took legal action in 2019 against the oil and gas company Total for human rights and environmental violations in Uganda based on the Duty of Vigilance law.⁵⁷

Extraterritoriality: The law's application is extraterritorial. That means that companies should report activities they, their subsidiaries, affiliate companies, subcontractors and business partners in general, undertake not only in France, but also in their international operations. The law is thus not limited to a reporting obligation on domestic actions, but it is wider, including a need to report activities outside domestic borders. This is important because the activities of many companies take place in countries outside of France.

Scope: The French legislation includes companies in all sectors. It covers all serious human rights, fundamental freedoms, health, safety and environmental violations and is hence not limited to specific violations, for example slavery or child labour. The law extends to

activities of the company and to activities of those companies it controls and to subcontractors and suppliers.

Civil liability: A case can be referred to court even before damages have occurred.

Negative aspects

Burden of proof: A negative aspect of the law is that the burden of proof falls on the claimant. That means that the person complaining against the company has to present evidence on the company's violation of the Vigilance law, which could be difficult based on the nature of the case. This can cause impediments in access to justice and effective remedy.

Legal aid: Legal aid is in practice very limited in France.⁵⁸ This could also impose difficulties in a claimant's access to justice and effective remedy.

Application: The size of companies that the law applies to excludes small or medium-sized enterprises and also many large companies in practice. The operations of these companies could have serious impacts on human rights when taking place in risk industries and regions. As such, many French companies that operate in high-risk areas are not covered.

UK Modern slavery act

Summary of the law

The UK Modern Slavery Act was enacted in 2015. The law includes a reporting obligation in relation to modern slavery and trafficking in supply chains. The Act applies to “commercial organisations” in any sector, including organisations with charitable or educational aims or public functions, with an annual turnover of at least 36 million pounds and who do business in the UK. The Act is limited to reporting of modern slavery and trafficking.

Coverage

The UK Modern Slavery Act creates a duty to disclose which steps companies are taking to address modern slavery in their business and supply chains. This is done through an annual Slavery and Human Trafficking Statement. More specifically the statement may include: ⁵⁹

- The organisation’s structure, its business and its supply chains.
- Its policies in relation to slavery and human trafficking.
- Its due diligence processes in relation to slavery and human trafficking in its business and supply chains.
- The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.
- Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, and measures against such performance indicators when considered appropriate
- Training about slavery and human trafficking available to its staff.

These points are not obligatory, but a company may report under these. If a company has not done anything with regards to the points above, it should state so.

Application

Subsidiaries of a company do not have to prepare their own statements but can use the parent company’s statement. The parent company must include its subsidiaries in its statement regardless of whether they operate in the UK.

Scope

The Act is not limited to one sector but applies to companies in all sectors. It has also no geographical limitations, apart from the company in question supplying goods or services within the UK. This means that a company does not have to be registered in the UK for the law to apply to it as long as it provides goods or services in the UK.

Format

A company should publish its slavery and human trafficking statement on its website and include a link to the statement in a prominent place on the homepage⁶⁰. If the company does not have a website, it should provide a written copy of the statement to anyone who has requested it in writing within 30 days.

Sanctions

The Modern slavery act is mainly “enforced” through pressure from investors, civil society as well as consumers.

Positive aspects

Increases transparency: It is the first law expressly directed to modern slavery and it contributes to an increased transparency in relation to modern slavery and trafficking in global supply chains. It is commendable that it aims to close the gap between companies with extensive work on human rights and companies lagging behind, but whether that will actually happen remains to be seen.

Extraterritoriality: The Act can be said to have extraterritorial application, at least from two perspectives. First, the Act applies to companies operating in the UK, whether registered or not. Secondly, the Act requires companies to report modern slavery in relation to their supply chains expanding outside of the UK.

Negative aspects

Sanctions and enforcement: The Act provides for civil proceedings initiated by the State of Secretary but the main “enforcement mechanism” of the law appears to be pressure by consumers, investors and CSOs. Even though “naming and shaming” can have a considerable positive effect in a company’s adherence to international human rights, a legally enforceable obligation will also be effective in the application of a law. A law imposing obligations without sanctions is in many ways toothless.

Reporting: The Act imposes only a reporting requirement for companies to disclose what steps they are taking to address modern slavery and trafficking issues. However, there is no obligation for companies to actually address modern slavery issues under this Act as long as they report that they do not have any measures in place.

Unclear requirements: According to an independent review, over one third of the companies that fall under the law, lack in their compliance. This is a result of many factors, including the lack of clear requirements on which companies fall under the Act.⁶¹

Scope: The law’s scope is limited only to modern slavery and trafficking issues and therefore does not cover all universally recognised human rights.



Workers in a tannery in Morocco with round stone wells filled with dye. Photographer: Alexey Pevnev/Shutterstock.com.

German draft law

Background to the law

The German National Action Plan (NAP) from 2016 contains a voluntary provision that companies should declare that human rights and environmental violations do not occur within their supply chains. These voluntary actions are monitored through a review mechanism, known as 'NAP-Monitoring'. According to the NAP, the aim is that at least fifty per cent of all enterprises based in Germany with more than 500 employees will have incorporated the elements of Human rights due diligence into their corporate processes by 2020. If this aim is not achieved, the German Government may consider introducing legislative measures.⁶² So far, around 20 per cent of the defined companies have lived up to this.⁶³

Hence, the German Minister for Labour and Social Affairs and the Minister for Economic Cooperation and Development concluded that a binding law is necessary and they announced their plans to pass a Due Diligence Act to ensure corporate compliance with human rights and environmental standards. In 2019, the draft of a German Human Rights and Environmental Due Diligence law was leaked.⁶⁴ The draft law provides for obligatory human rights due diligence in global value chains. The draft suggests that the law should apply only to large companies.

Key features of the law

In July 2020, key features of the planned law were presented. It appears that some of the obligations for companies have been modified compared to the earlier draft.⁶⁵ Following criticism raised by the business community, the ministers clarified that risk management should be proportionate and reasonable. There will be different benchmarks depending on business activity, the probability and severity of adverse impacts, the company's effective control over risk management and influence within the supply chain. There will be higher compliance standards for companies that have a close relationship or strong leverage in relation to their supplier. Violations of human rights or environmental

standards need to have been foreseeable and avoidable if companies should be liable.

Companies shall also be able to live up to the due diligence obligations by adhering to officially approved industry standards. This has, however, been criticised by German civil society organisations. According to them, this can be a possible loophole and a way to circumvent envisaged liability. Industry initiatives sometimes lack credibility and transparency and do not necessarily demand human rights due diligence.⁶⁶

The key provisions of the proposed Due Diligence Act are currently under discussion with the different departments of the German government. It is expected that a draft law will be submitted to parliament in autumn 2020. It is possible that further changes will be made to the draft, for example, regarding the definition of companies that will be subject to it. The application could, for instance, be extended to also cover foreign companies and companies with less than 500 employees.

This is an analysis of the draft from 2019.

Coverage

As part of their due diligence obligation, companies must carry out risk analyses to identify, evaluate, and if necessary, prioritise risks contributing to human rights violations. If there are indications that a company is contributing to a risk, an in-depth analysis of that risk has to be carried out. Persons affected by the risk have to be included in this assessment. A company could be considered as contributing to a violation even through third parties (companies in the value chain, governmental agencies), or products and services of the company that contribute to the violation through the company's business activities. In case the company identifies a risk of contributing to a human rights violation, it has to take adequate preventive measures in its business policy, integrate them into its business processes and evaluate and monitor their effectiveness.



Indonesian workers at an event with the Minister of public works and housing. Photographer: Fauzan.

This should be part of the company’s contractual relations and strategic business decisions. In case the violation has already occurred or is imminent, the company should take adequate measures to prevent or mitigate. The company should also appoint a compliance officer to monitor compliance with the company’s due diligence procedures, establish a complaints mechanism and an appropriate system for whistle-blowers.

Application

The draft law’s suggestion is that it applies only to large companies. That means companies that exceed two of the following three criteria:

- Balance sheet of total 20 000 000 EUR.
- Net turn-over of 40 000 000 EUR.
- An average of 250 employees during the financial year.

Additionally, the draft law applies to controlled companies, meaning a subsidiary of a parent company to which it exercises dominant influence.

Scope

The draft law applies to:

- A) large companies regardless of whether they operate in high-risk sectors/areas.
- B) medium sized companies that operate in high-risk sectors/areas.

Small companies do not have to apply to the law at all. The law defines what a high-risk sector and area is.

Format

Under the draft law, companies are obliged to exercise due diligence and set an effective mechanism for its enforcement and monitoring. The draft law requires public reporting on compliance.



Union members demanding better working conditions in Cambodia. Photographer: LICADHO, Cambodia.

Sanctions

The law proposes a wide range of sanctions, including administrative sanctions and criminal responsibility:

- Administrative fines are suggested for cases when the company is not able to show that the due diligence steps (note, not an assessment of the quality of these steps) or other procedural steps (for example having a compliance officer or a complaint mechanism) have been carried out.
- Criminal sanctions in the form of imprisonment can be applied to the Compliance Officer in case of deliberate misinformation of the documentation and reporting obligations under the law, for persons that have deliberately caused the death of or damage to the health of other persons (a common criminal offence). Such sanctions are also applied to the Compliance Officer, Executive and Managing Director in case they deliberately fail to take preventive or remedial actions after a risk is identified or a violation has been found.
- Civil liability that includes legal responsibility as a consequence not of contract breach or criminal law, but of failing to live up to duty of care, in accordance with the law.
- Exclusion from public contracts that is already possible in public procurement laws, based on the EU directives in case of for example child labour and forced labour.

Positive aspects

Due diligence obligation: The draft law goes beyond a reporting obligation and sets a due diligence obligation. Commendably, the due diligence measures increase with the seriousness of the potential risks. The requirements to have a Compliance officer and an internal complaints mechanism also demonstrates that the law is seeking measurable effect.

Scope: The draft law would also apply to controlled companies, meaning subsidiaries of the parent company. The draft law furthermore extends to activities that are linked to the company's business activities in the value chain.

Extraterritorial application: The draft law has extraterritorial application since it extends into global value chains outside the borders of Germany.

Clarity: The draft law defines high-risk sectors so that medium sized companies understand what is expected of them.

Sanctions: The draft law proposes a wide range of sanctions, including administrative fines in case of violation as well as criminal responsibility for certain roles in the company. Companies violating the law are also excluded from public procurement.

Negative aspects

Scope: The law does not apply to small companies. Yet, companies irrespective of size can have negative impacts on human rights.

Scope: Even though the draft law is very clear on which sectors are considered as "high-risk", certain sectors/activities that could be seen as high risk, are excluded, for example automotive. Furthermore, the list of high-risk sectors is exhaustive and hence static since it is limited to the sectors mentioned there.

Access to justice: Class actions cannot be facilitated for victims.



A boy working in unsafe and hazardous conditions in Bangladesh. Photographer: Jahangir Alam Onuchcha/Shutterstock.com.

Conclusions

Based on the two laws and one draft law reviewed in this chapter, we can conclude that a potential Swedish HRDD legislation should take into consideration the following aspects:

- The law should not only have a reporting obligation but should impose an obligation for the effective implementation of Human rights due diligence.
- The law should not include just domiciled or companies registered in Sweden but any company doing business in Sweden and include the whole value chain, including all business relationships.
- The law should have extraterritorial reach, i.e. reach outside of Swedish borders. This means that it should enable Swedish courts to try business related human rights violations that Swedish companies have caused or contributed to abroad.
- The law should not be limited to a specific sector as human rights abuses can occur in all sectors.
- The law should not just focus on one human rights issue but should include all human rights.
- Non-compliance with the law should lead to different forms of liability.
- The law should not consider the size of Swedish companies. Importantly, it should not exclude smaller companies that could potentially have big impacts.
- The law should provide for sanctions and have a clear enforcement mechanism and an effective oversight body.
- Access to justice and effective remedies should be facilitated through victim-centred rules regarding burden of proof and allow for possibility for class action and legal aid.

Areas identified by the UN

According to the UN, Human rights due diligence plays a key role in the corporate responsibility to respect human rights and is an important tool in companies' response to the Covid-19 pandemic.

The UN Office of the High Commissioner for Human Rights has presented some key considerations on mandatory Human rights due diligence regimes⁶⁷. They state that Human rights due diligence is a critical part of fulfilling companies' responsibility to respect human rights as defined in the UN guiding principles on business and human rights. According to them, it is also a key tool in the work following the Covid-19 pandemic since it helps companies to focus on the most severe human rights risks and identify and assess what impact their response to the pandemic has on human rights.

The UN Office of the High Commissioner for Human Rights identifies the following areas where decisions need to be made, when developing mandatory HRDD legislations:

- The types of companies to which the HRDD obligations will apply.
 - The nature of the legal obligations which will apply (e.g. whether companies will be judged by standards of conduct, standards of outcome, or both; whether liability will be automatic, or based on proof of fault).
 - The scope of these obligations (e.g. the entities and activities to which the due diligence obligations extend).
 - Subject-matter coverage (e.g. whether comprehensive or prioritising specific sectors).
- The human rights themes and risks targeted (i.e. some may focus on a narrower range of issues and impacts, such as child labour, modern slavery, or sourcing from conflict zones).
 - The way in which, and the mechanisms through which, compliance with legal obligations are to be scrutinised, monitored and enforced.
 - The types of liability that will result from non-compliance (e.g. civil and/or criminal liability), the sanctions that may be imposed, and/or the remedial steps that may be required in the event of non-compliance.
 - The supporting regulatory architecture and services that may be needed (e.g. guidance, consultations, regulatory effectiveness reviews, education).

The UN High Commissioner also states that policy makers will need a thorough understanding of the regulatory system in which the mandatory HRDD regime will be placed. Policy makers and legislators should therefore conduct a thorough review of existing legislation and policy initiatives in order to identify the amendments or adjustments that may be needed to ensure a smooth, mutually reinforcing interface between the mandatory human rights due diligence regime and other legal regimes. It is also important to secure that the new regime is capable of meeting its regulatory objectives. The HRDD legislation can also take advantage of opportunities that might be available by regulation in other areas.⁶⁸

Content of a Swedish law

A mandatory Human rights due diligence legislation needs to be effective and ensure that Swedish companies respect human rights in their operations and in all their business relationships.

There are several gaps in the Swedish legal system in relation to the UN guiding principles on business and human rights, particularly regarding operations abroad by Swedish companies. This becomes obvious in the implementation of the UN guiding principles and has been analysed by Enact Sustainable Strategies in a report commissioned by the Swedish Agency for public management⁶⁹.

Enact stresses the fact that the legal system lacks specific extraterritorial jurisdiction, i.e. legislation that enables Swedish courts to try business related human rights violations that Swedish companies have caused or contributed to abroad. Hence, this kind of human rights abuses are not followed up, affected people do not get redress and companies who are violating human rights are not held accountable. The risk is particularly high

in countries where protection of human rights is weak or where the state is responsible for violations.

In the elaboration of a proposed draft for a Swedish law on mandatory Human rights due diligence, this report has taken as a starting point the recommendations by Enact Sustainable Strategies in its report to the Swedish Agency for public management. The law should build on the UN guiding principles for business and human rights as well as the OECD guidelines for multinational enterprises. The focus of the law is the requirement on business to conduct a Human rights due diligence. The law shall be effective, practically applicable and with the aim to ensure that Swedish companies respect human rights. The draft proposal for a law has been developed by Enact Sustainable Strategies and can be found in the Annex (in Swedish).



Cow skins are prepared for leather products in a tannery in Morocco. Photographer: Hamza Makhchoune/Shutterstock.com.

The following are important elements that need to be included in a Swedish forthcoming law.

A law should:

- 1) Cover all companies, regardless of size. Specifically, it should not exclude smaller companies that could potentially have big impacts.
- 2) Apply to both public and private companies, including financial institutions, and across all sectors.
- 3) Apply to companies domiciled, based in or operating in Sweden.
- 4) Apply to goods and services alike.
- 5) Require companies to respect human rights and conduct Human rights due diligence. The law should not only have a reporting obligation but should impose an obligation for the effective implementation of Human rights due diligence.
- 6) Apply to a company's activities and the entire value chain. This means activities of the parent company itself, companies it controls directly or indirectly (subsidiaries etc), subcontractors and suppliers, customers and other business relationships throughout the value chain.
- 7) Focus on human rights. Environmental impact is included in the proposed due diligence requirements when it represents a violation of human rights.
- 8) Have extraterritorial reach, i.e. reach outside of Swedish borders. This means a legislation that enables Swedish courts to try business related human rights violations that Swedish companies have caused or contributed to abroad.
- 9) Include criminal and civil liabilities, with criminal, civil and administrative sanctions. Business enterprises must be liable for harm that they have, by acts or omissions, caused or contributed to. One sanction may, for example, be that a company is excluded from the possibility of participating in any public procurements for a period of time.
- 10) Include Board responsibility for acts and omissions. When a company has a board as the highest body, affected persons have the right to bring a claim also against board members in the company. Board members are jointly liable for any negative impact incurred by the company with a possibility of deriving individual responsibility.
- 11) Allow for victims inside and outside of Sweden to easily have access to remedy (availing class action).
- 12) Contain requirements for transparency disclosures and reporting obligations.
- 13) Ensure a fair distribution of the burden of proof, which businesses must bear when claimants have provided relevant evidence to support their claim.
- 14) As regards the supervision of the implementation of the law, there are different possibilities. One option is to use the Swedish National Contact Point (NCP) with the OECD. Another option, perhaps wiser and stronger, is to put in place a new regulatory authority to supervise the companies' implementation of the law and examine the reports and documentation from the companies on Human rights due diligence. If the National Contact Point is chosen for the supervision, it will need to be substantially strengthened (possibly even reformed) and provided with resources to be able to fulfil this task.

See Annex, for the proposal for a Swedish law on mandatory Human rights due diligence (in Swedish).



Hard work at stone collection site in Bangladesh.
Photographer: Insight-Photography/Shutterstock.com.

Conclusion

This report highlights the need for legislation that requires companies to conduct Human rights due diligence. Examples from across the world show that business related human rights violations are frequent in all kinds of sectors. It is evident that voluntary guidelines are not enough. The Covid-19 pandemic has made the need for legislation even more urgent.

The European Commission is rapidly moving forward with its proposal for a mandatory HRDD-legislation. Several countries in the EU have adopted national legislation demanding that companies respect human rights or are discussing proposals for such laws. So far, Sweden has not taken any steps in this direction. An EU-wide legislation is important in order to create a harmonised legal framework and a level playing field. There is, however, no contradiction between a legislation on the EU-level and initiatives on the national

level. On the contrary, lessons learnt from national initiatives can feed into the work towards an EU-law and specifically into the discussions on components of the law. Examples from national laws can strengthen an EU legislation. Didier Reynders, the European Commissioner for Justice, as well as Heidi Hautala, Member of the European Parliament, have both stressed the importance of national initiatives. According to them, lessons learnt from national contexts can support the EU-level and help finding answers to outstanding issues.

The Swedish government now needs to step up its work for mandatory HRDD-legislation, if Sweden wants to continue to play a leading role as a defender of human rights. The Swedish government needs to engage actively in the work in the EU towards a mandatory HRDD-legislation. Sweden can contribute to



Garment workers demanding minimum wage in Bangladesh. Photographer: Sk Hasan Ali/Shutterstock.com.

ensure that the main components that will make the law effective is placed in the legislation itself and not in a voluntary guidance.

At the same time, Sweden should prepare for a forthcoming legislation on the national level. An EU directive must be implemented and incorporated by the EU member states into their national legislation. Naturally, it is much better to be prepared and having done the investigative work beforehand.

Time has now come to discuss the content of a law - be it on the EU-level or nationally - and what the main components should be in order to make the law effective and ensure that it achieves its objectives. Sweden should take an active role in this work in the EU. It is important to ensure that the law builds on the UN guiding principles for business and human rights. This report highlights the main elements that need to be included in a law in order for it to be effective and

practically applicable and ensure that Swedish companies respect human rights. These elements apply to the national context as well as the EU-level. The report also contains a proposal on how a Swedish mandatory human rights due diligence legislation could look like concretely.

Sweden should move to the forefront in the work ensuring that companies respect human rights in their operations and in all their business relationships.

It is time to act!

“We would expect no less from Sweden than to enact a HRDD-requirement, as a front-running country in the world on human rights.”

Representative of a Swedish company interviewed for this report



Recommendations:

The overall recommendation to the Swedish government is to:

- **Introduce a legislation with mandatory obligations on business to conduct Human rights due diligence.**

In this process, the government should:

- Conduct a review of the main elements needed in a mandatory HRDD-legislation and investigate how such a law can be integrated in the Swedish legal system.
- Actively engage in the work for an EU-wide mandatory HRDD-legislation.
- Hold regular consultations with relevant stakeholders including civil society, trade unions, companies and investors.

Annex

Förslag till en svensk lag om obligatoriskt ansvar för företag att genomföra människorätts due diligence (Human rights due diligence).

(Notera att fotnötter i detta kapitel inte är avsedda att inkluderas i själva lagförslaget utan endast utgör förklaringar för läsaren av detta förslag.)

Kapitel 1. Lagens ändamål

§ 1 Denna lag instiftas för att främja svenska företags kontinuerliga arbete för att respektera mänskliga rättigheter och därmed motverka negativ påverkan av mänskliga rättigheter. Svenska företag har en skyldighet att i alla avseenden respektera de mänskliga rättigheterna, i detta inbegrips att aktivt arbeta med förebyggande åtgärder samt att hantera, kompensera och återställa skador som orsakats. Dessa principer gäller oaktat om svenska företag genom egen orsakan, medverkan eller direkt koppling, givit upphov till den negativa påverkan på de mänskliga rättigheterna.

Lagen syftar även till att skapa förutsättningar för enskilda vars mänskliga rättigheter påverkats negativt, att få upprättelse.

§ 2 Med de mänskliga rättigheterna avses i denna lag den standard som vid vart tillfälle kommer till uttryck inom folkrätten eller sådana mänskliga rättigheter som framgår av svensk lag eller praxis.⁷⁰

Kapitel 2. Lagens tillämpningsområde

§ 1 Denna lag omfattar all svensk företagsverksamhet, oaktat i vilken bolagsform verksamheten är organiserad, härfter ”Företag”.⁷¹

§ 2 Med svensk företagsverksamhet avses även utländsk entitets verksamhet, vilken direkt eller indirekt ägs eller kontrolleras av svenskt företag, samt utländsk entitets verksamhet i Sverige.

§ 3 Lagen omfattar all form av företagsverksamhet och är således inte begränsad till den enskilda entitetens egen produktion eller verksamhet. Företagens ansvar att respektera de mänskliga rättigheterna innebär att de ska:

a) undvika att orsaka eller bidra till en negativ påverkan på de mänskliga rättigheterna genom sin egen verksamhet och åtgärda sådan påverkan om den uppstår; och

b) försöka förhindra eller begränsa en negativ påverkan på de mänskliga rättigheterna som genom affärsförbindelserna står i direkt samband med Företagets verksamhet, produkter eller tjänster, även om Företaget inte själv direkt har bidragit till denna negativa påverkan.⁷²

Kapitel 3. Företags obligatoriska skyldigheter avseende åtgärder och egengranskning - Human rights due diligence

§ 1 Ett Företag är skyldigt att, genom egengranskning, identifiera, aktivt kartlägga och ta reda på vilka pågående och potentiella risker för negativ påverkan av de mänskliga rättigheterna som dess verksamhet medför och kan komma att medföra. Ett Företag har en skyldighet att fortlöpande analysera identifierade risker.

§ 2 Ett Företag är skyldigt att vidta aktiva åtgärder mot pågående negativ påverkan och potentiella risker som identifierats i § 1 i syfte att motverka och adressera negativ påverkan av de mänskliga rättigheterna. Åtgärderna som vidtas måste – såväl i form av skyndsamt som i omfattning – vara proportionerligt anpassade efter grad och konsekvens av negativ påverkan i det enskilda fallet.

§ 2 a Ett Företag är skyldigt att löpande utvärdera de åtgärder man vidtagit i enlighet med 2 § ovan och i förekommande fall anpassa dessa i syfte att uppnå resultat.

§ 2 b Ett Företag är skyldigt att konsultera riskgrupper och andra intressenter i sitt arbete enligt §§ 1,2 och 2 a ovan. Företaget är vidare skyldigt att löpande tillhandahålla och aktivt informera samma grupper om sakomständigheter som är av betydelse för riskgrupper och andra intressenter.

§ 2 c Individer, eller dess ombud, vars mänskliga rättigheter har påverkats eller riskerar att påverkas negativt, har en rätt till delfående av uppgifter från Företag av betydelse för dem. Om Företag inte uppfyller sin informationsplikt kan NKP (se kap 4) förelägga Företaget, vid äventyr av vite, att utge materialet.

§ 3 Företag är skyldiga att upprätta och tillämpa policydokument för sin verksamhet vilka klargör under vilka ramar Företagets verksamhet ska bedrivas, till motverkande av negativ påverkan på mänskliga rättigheter. Policydokument ska i så stor omfattning som möjligt vara avfattade på sådant sätt att dess tillämpning instruerar och ger vägledning för drivande av den faktiska verksamheten. Policydokumenten ska kunna tillämpas effektivt på alla nivåer inom Företagets organisation.

§ 4 Företag som omfattas av skyldighet att upprätta årsredovisning ska åtminstone i samband med upprättande av denna även avge en rapport gällande dess egengranskning för 1, vilket arbete som utförts för att kartlägga potentiella risker för negativ påverkan på mänskliga rättigheter inom ramen för Företagets verksamhet; 2, Företagets åtgärder för att motverka de identifierade riskerna ; 3, Företagets organisationsstruktur i förhållande till förebyggande och aktivt arbete mot risker för negativ påverkan av mänskliga rättigheter; 4, Företagets utvärdering av pågående arbete med insatser mot negativ påverkan av mänskliga rättigheter och det föregående räkenskapsårets tidigare prognostiserade utveckling och arbete; samt 5, en redogörelse för hur Företaget avser förebygga, fånga upp, motverka och i förekommande fall återställa effekter av negativ påverkan av mänskliga rättigheter under kommande räkenskapsår. Rapporten ska tecknas av Företagets styrelse vari dess innehålls riktighet bekräftas. Rapporten ska tillställas NKP (se kap 4).

§ 5 Företag som inte omfattas av skyldigheten att upprätta årsredovisning ska ändå upprätta rapport enligt § 4 om det genom dess verksamhet föreligger en inte obetydlig risk för att verksamheten kan komma att påverka mänskliga rättigheter negativt. För det fall ett Företag vid sin analys är av uppfattning att verksamheten inte är förenad med någon risk för negativ påverkan av mänskliga rättigheter eller att sådan risk i vart fall är obetydlig så ska ett sådant ställningstagande undertecknas av Företagets styrelse (eller huvudmän i förekommande fall) och tillställas NKP. I ställningstagandet ska framgå: 1, En fullständig verksamhetsbeskrivning; 2, vilka undersökningar som vidtagits i syfte att klarlägga eventuella risker för negativ påverkan av mänskliga rättigheter; och 3, en analys enligt vilken Företagets verksamhet bedömts att inte rimligen riskera negativ påverkan av mänskliga rättigheter.

§ 6 Omfattningen av det obligatoriska arbetet för Företag enligt §§ 3-5 ovan, ska stå i rimlig proportion till den aktuella verksamhetens risk att påverka mänskliga rättigheter negativt. Ett Företag vars verksamhet löper en större risk att negativt påverka mänskliga rättigheter, behöver utföra en mer genomgående kartläggning samt planering för motverkande strukturer och åtgärder än vad ett Företag vars verksamhet är mindre trolig att komma att påverka mänskliga rättigheter negativt. Ett högriskföretag åläggs härigenom en utökad skyldighet att identifiera, förebygga, hantera och följa upp även mer svårförutsägbara risker.

§ 7 Företag vars verksamheter orsakat, möjliggjort, medverkat eller haft anknytning till verksamhet med en negativ påverkan av mänskliga rättigheter är alltid fullt ut ansvariga för den skada enskilda lidit som följd härav, såvida Företaget känt till eller borde känt till att mänskliga rättigheter påverkades, eller riskerade att påverkas negativt av verksamheten. Företag är fullt ut skyldiga att återställa vad som skadats jämte i förekommande fall kompensera skadelidande. Ett Företag kan aldrig friskrivs från ansvar enligt denna § på den grund att man vare sig känt till den negativa påverkan eller förutsett densamma – om det kunnat förväntas att en fullgod egengranskning samt organisering av arbete enligt §§ 3-6 ovan skulle medfört sådan insikt.

Kapitel 4. Tillsyn

§ 1 Företags efterlevnad av denna Lag ska granskas av den svenska Nationella Kontaktpunkten för OECD ("NKP").⁷³

§ 2 Företag ska till NKP inkomma med dokumentationen enligt kap 3. §§ 3-6, för granskning av NKP.

§ 3 Om Företag underlåter att inkomma med obligatorisk dokumentation, skall NKP förelägga Företag att inom viss tid inge densamma. Försitter Företag att efterkomma föreläggandet ska NKP förelägga Företaget ånyo samt förena sådant föreläggande med vite om det inte efterlevs. Nytt föreläggande med förhöjda viten skall utfärdas intill dess att dokumentationen ingivits till NKP.

§ 4 NKP äger rätt att förelägga Företag om komplettering av ingiven dokumentation, om NKP finner att det ur materialet inte går att bedöma innehållets riktighet, om det ingivna inte är komplett eller om det ingivna uppenbarligen innehåller felaktigheter. Ett föreläggande om komplettering kan i likhet med vad som angivits ovan under § 3 förenas med viten.

§ 5 För det fall ett Företag ingivit rapport enligt kap 3 § 5 i denna lag, ska NKP på basis av de uppgifter Företaget lämnat samt allmänt tillgänglig information göra en bedömning om verksamheten är av den art som medför undantag från skyldighet att avge dokumentation enligt kap 3 §§ 3-4 denna lag. För det fall NKP anser att det föreligger en inte obetydlig risk att Företagets verksamhet i något led kan komma att påverka mänskliga rättigheter negativt, ska NKP förelägga Företaget att inom 6 månader från beslutsdagen inkomma med fullständig dokumentation enligt kap 3 §§ 3-4 denna lag.

§ 6 Beslutet att ett Företags verksamhet har ansetts undantagen från skyldighet att tillämpa kap 3 §§ 3-4 denna lag, ska omprövas vart 5 år – vid vilket tillfälle Företaget har en skyldighet att upprätta och inge rapport om den då aktuella verksamheten enligt kap 3 § 5 denna lag.

§ 7 Företag som varit årligen rapporteringsskyldiga

enligt kap 3 §§ 3-4 denna lag kan, om förändringar i verksamheten motiverar detta, i samband med ingivande av årlig rapport anhålla om att för nästföljande period undantas denna skyldighet.

§ 8 Om NKP bedömer att det är nödvändigt för att kunna utföra sitt granskningsuppdrag att Företaget utger sådana detaljer om sin verksamhet som utgör företagshemligheter, så är Företag skyldig att utge vad som efterfrågas. Sådant material ska sekretessmarkeras.

§ 9 Beslut från NKP kan överklagas hos förvaltningsrätt.

Kapitel 5. Granskningskommitté

§ 1 Företag som omfattas av skyldigheten att upprätta årsredovisning har en skyldighet att tillsätta en intern granskningskommitté till vilken enskilda eller sammanslutningar av enskilda ska ha möjlighet att anmäla att Företaget negativt påverkat deras mänskliga rättigheter, eller att risk för detta föreligger. Enskilda ska även ha rätt att via granskningskommittén begära ut underlag vilka är av relevans för den enskilde eller sammanslutning av enskilda.

§ 2 Granskningskommittén har att ofördröjligen granska huruvida Företaget genom sitt agerande påverkat eller riskerar att negativt påverka mänskliga rättigheter. Granskningskommittén är skyldig att avge skälen för sina ställningstaganden. Om granskningskommittén finner att mänskliga rättigheter påverkats eller riskerar att påverkas negativt, ska granskningskommittén ofördröjligt förelägga Företaget att vidta åtgärder för att hindra, mildra, kompensera för samt återställa de skador som förorsakats eller riskerar att förorsakas. Det föreligger en obligatorisk skyldighet för Företag att inbjuda berörda enskilda eller sammanslutningar att inkomma med synpunkter, vilka måste beaktas.

§ 3 Företag ska anses ha uppfyllt sin skyldighet enligt 1 – 2 §§ ovan genom att ansluta sig till en gemenskap av företag vilka sammansatt en gemensam granskningskommitté.

§ 4 Företag är skyldiga att tillhandahålla information om möjligheten att företa anmälan till granskningskommittén allmänt tillgänglig. Kontaktpuppgifter

till granskningskommittén ska, tillsammans med en beskrivning av granskningskommitténs arbete förefinnas åtminstone på Företagets hemsida samt i den obligatoriska rapporten som ska upprättas enligt kap 3 § 4.

Kapitel 6. Gottgörelse

§ 1 Reglerna om gottgörelse enligt denna lag är subsidiärt tillämpliga i de fall där inte annan lagstiftning erbjuder den enskilde bättre eller likvärdig gottgörelse, som således i första hand äger tillämpning.

§ 2 Enskilda som lidit allvarlig skada till följd av Företags negativa påverkan av mänskliga rättigheter äger rätt till gottgörelse. Talan härom kan tas upp i svensk domstol oaktat var och genom vems försorg den negativa påverkan uppkommit. Företagets hemvist är forumgrundande.

§ 3 För det fall en allvarlig skada som uppkommit till följd av negativ påverkan av mänskliga rättigheter rimligen har eller borde ha kunnat förutses genom ett Företags obligatoriska skyldigheter enligt kap 3 denna lag, ska detta utgöra grund för en presumtion av Företagets skadeståndsskyldighet. Det ankommer i ett sådant fall på det enskilda Företaget att bevisa varför Företaget inte ska behöva ansvara för uppkommen skada.

§ 4 För det fall ett Företags verksamhet givit upphov eller bidragit till allvarlig skada genom negativ påverkan av mänskliga rättigheter ankommer det på Företaget att bevisa varför Företaget inte ska behöva ansvara för uppkommen skada.

§ 5 För det fall ett Företag indirekt genom affärs- eller andra förbindelser, underlättat för tredje mans negativa påverkan av mänskliga rättigheter, svarar Företaget endast för uppkomna skador såvida Företaget varit vårdslös i sin relation med tredje man och inte gjort vad som ankommer på Företaget för att förbjuda tredje man att i sin verksamhet undvika negativ påverkan på mänskliga rättigheter.

§ 6 Om ett Företag bär ansvar för uppkommen skada på grund av vårdslös relation med tredje man enligt § 5, äger ett Företag inte rätt att friskriva sig från ansvar till upprättelse gentemot enskild utan det är under

sådana förhållanden upp till Företaget att i förekommande fall föra eventuell regresstalan vidare mot sådan tredje part. I förhållande till den enskilde är Företaget fullt ansvarig.

§ 7 En skadelidande har rätt att rikta sitt anspråk mot vilken svensk entitet inom Företagets koncernstruktur som man finner lämplig, oaktad delaktighetsgrad kring den negativa påverkan på mänskliga rättigheter som entiteten i fråga kan anses ha haft själv.

§ 8 En skadelidande ska ha samma rätt till rättshjälp enligt rättshjälpslagen som en svensk medborgare, boendes i Sverige. Vid tillämpningen av rättshjälpslagen ska beaktas att en process gällande skador uppkomna till följd av negativ påverkan av mänskliga rättigheter till sin natur är sådan att rättshjälpsbiträdesarbete endast undantagsvis kan förväntas kunna utföras inom ramen för 100 timmar och att rättshjälpen därför i dessa fall regelmässigt kommer behöva flerfaldigas.

Lag (2002:599) om grupprättegång äger tillämpning i fråga om anspråk med anledning av Företags negativa påverkan på mänskliga rättigheter.

§ 9 I de fall ett Företag, som innehar en styrelse som högsta organ, grovt åsidosätter sina skyldigheter enligt denna lag och det därmed kan konstateras att Företagets verksamhet leds bristfälligt, äger enskilda rätt att väcka talan även mot styrelsemedlemmar i Företaget som var aktiva vid tidpunkten för skadans uppkomst. Styrelsemedlemmar svarar solidariskt för uppkommen skada med Företaget. Domstol äger rätt att avgöra i vilken utsträckning enskilda styrelsemedlemmar ska anses bära ett solidariskt ansvar för vållande eller oaktsam underlåtelse.

§ 10 Arbetstagare till Företag som slår larm om överhängande risker för eller pågående förhållanden varigenom mänskliga rättigheter påverkas negativt ska åtnjuta samma skydd som en arbetstagare som slår larm om allvarliga missförhållanden enligt Lag (2016:749) om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden åtnjuter.

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70) Med de mänskliga rättigheterna avses i denna lag den standard som vid vart tillfälle kommer till uttryck inom folkrätten med särskild beaktande av följande:

- FN:s konvention om medborgerliga och politiska rättigheter, 1966
- FN:s konvention om ekonomiska, sociala och kulturella rättigheter, 1966
- FN:s allmänna förklaring om de mänskliga rättigheterna, 1948
- ILO:s konvention (nr 29) förslag till konvention angående tvångs- eller obligatoriskt arbete, 1930
- ILO:s konvention (nr 105) angående avskaffande av tvångsarbete, 1957
- ILO:s konvention (nr 87) angående föreningsfrihet och skydd för organisationsrätten, 1948
- ILO:s konvention (nr 98) angående tillämpningen av principerna för organisationsrätten och den kollektiva förhandlingsrätten, 1949

- ILO:s konvention (nr 100) angående lika lön för män och kvinnor för arbete av lika värde, 1951
- ILO:s konvention (nr 111) angående diskriminering i fråga om anställning och yrkesutövning, 1958
- ILO:s konvention (nr 138) om minimiålder för tillträde till arbete, 1973
- ILO:s konvention (nr 182) om förbud mot och omedelbara åtgärder för att avskaffa de värsta formerna av barnarbete, 1999
- FN:s konvention om avskaffande av all slags diskriminering av kvinnor, 1979
- FN:s konvention om barnets rättigheter, 1989
- FN:s konvention om rättigheter för personer med funktionsnedsättning och fakultativt protokoll, 2006
- FN:s förklaring om rättigheter för personer som tillhör nationella eller etniska, religiösa och språkliga minoriteter, 1992
- FN:s konvention om avskaffandet av alla former av rasdiskriminering, 1966
- FN:s konvention för skydd av migrantarbetare och deras familjers rättigheter, 1990
- Genèvekonventionerna om skydd för krigens offer, 1949
- FN:s deklaration om ursprungsfolkens rättigheter, 2007
- ILO:s konvention (nr 169) om ursprungsfolk och stamfolk i självstyrande länder, 1989

I övrigt tillkommer sådana mänskliga rättigheter som framgår av svensk lag eller praxis.

71) All svensk företagsverksamhet innefattar företag som tillhandahåller både varor och tjänster.

72) Affärsförbindelser inkluderar såväl leverantörsled som kundled.

73) Det är även tänkbart att inrätta en helt ny tillsynsmyndighet.

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