The Current State and Future Trajectories of Human Rights Due Diligence Laws

This volume brings together some of the most innovative and forward- thinking academics, partitioners, and commentators, from universities, non-governmental organizations, business, and government to collectively contribute to a deeper understanding on of the emerging law of due diligence. The specific focus is on the way that the concept has been transposed and applied in novel and important ways to the expression of emerging norms and expectations around the responsibility of business enterprises to respect human rights.

Since its first authoritative transposition into the regulatory context of business and human rights, the concept of due diligence has proven to be a remarkably resilient and versatile instrument. It has provided the structuring for the process of embedding human rights and then sustainability issues (including climate change) into the compliance and accountability regimes of business. It has also become the most important means for states, international actors, and others to develop a basis for a normative component to of due diligence, one that aggregates the forms of due diligence with its purpose. The concept of due diligence also bridges a number of regulatory gaps--between public and private law systems; between market-s driven societal behaviour management and regulatory and publicly administered systems of compliance and accountability; and between international hard and soft rule making and the constitutional systems of states.

The essays are divided into four broad sections, The first focuses on the elaboration of a conceptual framework. The second explores the operationalization of this conceptual foundation in and beyond the UN Guiding Principles for Business and Human Rights. Section three then shifts the lens to a deeper exploration of contemporary efforts to legalize due diligence. The volume ends with a consideration of tendencies, tensions, opportunities, and challenges in the legalizsation of corporate human rights due diligence.

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Globalization: Law & Policy

Globalization: Law and Policy builds an integrated body of scholarship that critically addresses key issues and theoretical debates in comparative and transnational law. Volumes in the series focus on the consequential effects of globalization, including emerging frameworks and processes for the internationalization, legal harmonization, juridification, and democratization of law among increasingly connected political, economic, religious, cultural, ethnic, and other functionally differentiated governance communities. Legal systems, their harmonization and incorporation in other governance orders, and their relationship to globalization are taking on new importance within a coordinated network of domestic legal orders, the legal orders of groups of states, and the governance frameworks of non-state actors. These legal orders engage a number of important actors, sources, principles, and tribunals--including multinational corporations as governance entities, contract and surveillance as forms of governance that substitute for traditional law, sovereign wealth funds and other new forms of state activity, hybrid supra national entities like the World Bank and the International Monetary Fund, and international tribunals with autonomous jurisdiction, including the International Criminal Court, the World Trade Organization, and regional human rights courts. The effects have been profound, especially with respect to the role of states, and especially of the United States as its long time position in global affairs undergoes significant change. Comparative and transnational law serve as natural nexus points for vigorous and sometimes interdisciplinary approaches to the study of state and non-state law systems, along with their linkages and interactions. The series is intended as a resource for scholars, students, policy makers, and civil society actors, and includes a balance of theoretical and policy studies in single-authored volumes and collections of original essays.

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Dedication

The work is dedicated to the memory of our friend and colleague **Eric Roger Biel** (1959-2023)- Senior Advisor at Fair Labor Association and Georgetown Law.

"Eric's life was one of purpose, dedicated to advancing human rights and workers' rights. As a U.S. Government official, labor rights advocate and law professor, his legacy is reflected in government policies and corporate practices that have improved workers' lives around the world."

[Eric R. Biel Obituary; https://www.legacy.com/us/obituaries/washingtonpost/name/eric-biel-obituary?id=53714615]

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Foreword

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Preface

Caveat emptor!, buyer beware; *Caveat venditor!* Seller be wary—these are terms rich in legal, social, economic, and political overtones. They are also the background noise around which the rich elaboration of what has become systems of human rights due diligence are being built. These constructions of rights (and their associated norm narratives) are no longer primarily creatures of private law. They have become expressions of the role of international institutions in the crafting of rules allocating obligations among societal actors (including States, business enterprises, individuals and social collectives), and of States in overseeing the allocation of obligations and conduct expectations around economic activity.

These transformations have also produced something of a revolution in the technologies of rights protection—especially in the field of economic production. Generally marginalized in the consideration of these normative changes are the tools, methods, and structures developed to apply these expectations and realize these objectives. The problem is especially acute in the quite recent movement—swift and increasingly elaborate—to develop these tools and methods within the regulatory structures of the State and as part of the realization of their duty to protect human rights. The study of the normative framework (and consequential objectives) within which that these technologies are developed and deployed to fulfill tends to take center stage. Yet that focus misses an important element in the development of business and human rights regimes. *We wanted to shift the focus to the technologies of human rights based compliance and operations within public regulatory structures—mandatory human rights due diligence measures*. That shift in analytic perspective, we thought, would shed substantially new and important light on the normative shaping of the business and human rights field, and on the challenges and possibilities of regulatory approaches now being debated or implemented.

At its broadest, social and economic aspects, the concept of due diligence speaks to risk. Any action or inaction carries with it consequences. Risk is the term used to value some element of the spectrum of consequences that are either unanticipated or neglected, and which are to be avoided, mitigated or remedied if unavoidable. Risk, of course, can point in the other direction—of value enhancement, but fear of loss tends to drive the term in many contexts. More specifically the term speaks to the allocation of the burden of risk. In this case the burden of inaction or neglect falls on the party that failed to act or whose acts failed to be effective. At the same time it points to the complementary duty of those with obligation to beware. In that aspect it also carries with it the obligation of the party without that burden to honestly and completely make the transaction transparent—that party has no obligation to act but may not deceive or hide. It speaks, in other words both to a core principle of information symmetry among parties to a transaction (of whatever sort) as a basic social and cultural expectation of social interaction. It also speaks to the allocation of the burden of achieving information parity among actors to transactions. Lastly, it suggests penalties for those who impede the attainment of information parity and

those and consequences for those who fail to undertake actions that move parties closer to a state of information parity

It is at this point that managerialism enters—and the mechanisms of politics and law are inserted. These have taken the form, at least in Europe, of aligning emerging theories and practices of regulatory supervision in the specific context of economic activity, human rights, and sustainability. The result is at least a partial transformation of the societal consequences of caveat emptor into frameworks of legal risk. In its broadest sense, political ideology and the expectations of society deemed important enough to be codified and expressed as law, can substantially reconstruct the meaning of caveat emptor itself. In its narrower sense, politics expressed through law can shift the burden of informational parity from one party to another. It can set penalties for impeding access to information or for deception. And law constitutes the institutional system for asserting or avoiding consequences for action or inaction—for example by limiting the liability of those who had no obligation to disclose or by limiting recovery for those who failed to seek information. Likewise parties can themselves shift burdens and risks through legally constructed devices—warranties for example, whether they arise in contract, statute or judicial doctrine.

Caveat emptor and caveat venditor, the "caveats," however, are not manifested in a vacuum. The equity or fairness of either, each representing the allocation of risk for harm, is possible only in the shadow of its complementary principle–due diligence, the expectation of attentiveness and carefulness in the avoidance of that harm. Like the "caveats," due diligence is another term rich in legal, social, economic, and political overtones. At its narrowest it described the appropriate level of investigation—of actions meant to produce information parity above a minimum baseline—when deciding to engage or not engage in an action. At its broadest, it suggests the social and cultural expectation of care and attention to oneself and oneself within the web of collective interactions. It references the set of societally derives expectations borne by an individual as an expression of social solidarity in action. One exercises attentiveness to ensure the integrity of a social system (including its cultural, economic, and political aspects) that safeguards its stability by a distribution of the burdens of carefulness that aligns with cultural values and the performance of societal interactions.

Like the "caveats," expectations of attentiveness and care (of due diligence) is molded not merely by socio-cultural expectations (realized in markets)– it is also managed and shepherded by politics and expressed in law. Both shape the circumstances triggering expectations of diligence; both define the character of what sort of diligence is "due." Beyond social expectations, political organs have increasingly turned to those mechanisms that impose on one or another party an obligation to be attentive at least to a certain minimum level. These then have attached to them the same consequences as caveat emptor but in a complementary way. Law can prescribe the consequences for failing to undertake a defined degree of attentiveness; law can define the context in which such attentiveness is required as well as the characteristics of the systems developed to ensure the proper execution of care and attentiveness obligations. And it can frame the obligations both to be attentive, and to provide the information necessary for those seeking it as a matter of the

regulation of relations between private actors, or as a matter of obligation to the state administered through its administrative organs—functionally differentiated agencies charged with the task of overseeing compliance grounded in law and regulation. In the latter sense, due diligence and due diligence systems have been tightly woven into the laws of securities regulation, and increasingly in virtually all aspects of corporate governance and in the economic relations among actors

This, then, constituted the bulk of the quite rich, but limited, universe in which caveat emptor and due diligence were interlinked and were expressed in practices and the legal frameworks designed to support them. Ina sense the structures of due diligence in those contexts spoke to the development of systems of trust and trust worthiness—of the integrity—of the markers essential for the operation of non-state directed economic activity. The greater the trust, the more robust the system. And trust, in this case required confidence building measures revolving around the provision of robust information that could be relied on in private decision making, and the role of the state as guarantor of integrity through law. The onus was on the producers of information (and activity) to provide it, including assessments of risk. Yet the normative element was substantially limited to legality, and as John Ruggie noted in his Reports to the Human Rights Council in the first half of his mandate as the Special Representative of the Secretary General for Business and Human Rights, the policy and normative elements were left in some measure to the market itself. The development was particularly potent first in the heartlands of the Anglo-European world and then elsewhere with distinct national and cultural characteristics.

Since the commencement of the construction of the institutions (and behavior rule-expectations) that have come to be understood as economic globalization, and especially after the 1990s, important transformations began to appear, three of which have had an important influence on the idea and manifestation and shaping of due diligence in economic activity.

The first was something of a shift in the expectations of the diligence obligations implied in caveat emptor—from consumers to producers of items and services offered in markets. That shift was both simple and profoundly transformative. The shift from the ordering premise that the expectation of care (and the positive obligations of diligence) ought to be exercised by the producer rather than by the consumer. Did not just touch on the relationship between these principal actors; it also made it possible to expand the risk-responsibility parameters from the consumer of goods and services to all people. Communities and environments potentially affected by the activities necessary to arrive at a point where a product or service is offered to a consumer. It also opened the door to broadening the concept of responsibility, and the issues of assigning responsibility, past the point of initial producer-consumer transaction, to cover the life cycle f such products or services. In this process of expectation shifting, due diligence acquired a deeper societal and institutional character.

That produced the second transformation—the broadening of the objects with respect to which expectations of attentiveness and care were to be exercised through

public regulation, including the authority of public officials, clothed in legal directives, to oversee the appropriate fulfillment of legal compliance. In the 21st century, the most transformative element of this shift was involved the objectification of "rights" in markets with respect to the protection of which those who engaged in economic activity were required to be mindful. The protection of those rights were increasingly assigned to public bodies, bodies whose technically proficient officials would be best placed to administer a system of compliance and its arsenal of punishments and rewards elaborated in binding national and international instruments. This critical broadening of the applicability of due diligence and its conceptual (and instrumental) manifestations was also aligned with the regulatory project of legal-policy compliance within other spheres of societal normative practice. This change is now most acutely felt in the aligning of human rights and sustainability rights with the mechanics and sensibilities of due diligence, and also with the mechanisms of emerging international criminal law and sanctions regimes, such as human trafficking, quality assurance mechanisms, and the utilization of certain products and services to facilitate unsanctioned war and conflicts.

The third transformation is now following—the shifting of the management of those diligence expectations from the market to a more supervisory regime. In a sense, the third transformation follows seamlessly from the second. It is grounded in the necessity of coherence in regulatory structures, purposes, and methods, and a coordination among those public and private institutions who play a role in those tasks. This, it might be argued, manifests a possibility already built into the UNGP and its invitation toward the elaboration of contextually rich smart mixes of measures aimed at preventing and mitigating, and where neither of those is possible then remedying, adverse human rights impacts from economic activity. At its simplest, this supervisory regime posits generalized norm and rights elaborations at the international level, administrative supervision and refinement at the level of the State, and operational responsibility and compliance at the level of the enterprise. transformation of the expectations of the role of caveat emptor in the intermeshing of societal, economic and market activities with the human rights and sustainability expectations of society—now increasingly written into law as well as embedded in societal expectations markets effects.

Transformations, of course, also produce reaction. This is more likely the more profound the transformation. The elaboration of a diligence framework for human rights impacts of economic activity have not avoided reaction. The UNGP anticipated this as as well, embedding in its ordering premise of principled pragmatism toward the achievement of its singular fundamental objective (prevention, mitigation and remedy of adverse human rights impacts) a flexibility in the way that this objective might be reached. The essays in this volume speak both to the nature and direction of a trajectory towards mandatory human rights due diligence, and also of the flexibility in approaches to effective due diligence systems in political-ideological contexts in which public supervision may not be practicable.

It follows—and follows with increasing intensity—that no consideration of human (societal) economic activity can be comprehensively undertaken, or societal relations understood in this context, in the absence of a thorough encounter with the insinuation of

the techniques, sensibilities, and normative ideologies of due diligence (and its shadow relationship to caveat emptor). As important, the intermeshing of societal, legal, cultural and political drivers crafting public and private legalities around due diligence expectations, especially in the context of business and their human rights and sustainability expectations, now merits serious study.

The questions and challenges brought together some of the most innovative and forward thinking academics, practitioners, and commentators, from universities, non-governmental organizations, business, and government to collectively contribute to a deeper understanding of the emerging law of due diligence, especially as it touches on the human rights and sustainability elements of economic activities whether undertaken by public or private organizations.

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30 May 2025

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[TO BE ADDED]

Acronyms and Abbreviations

[TO BE ADDED]