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# Human rights fitness of auditors and certifi- ers?

## A position paper

### **CERTIFICATIONS AND HUMAN RIGHTS DUE DILIGENCE**

Corporate responsibility is currently on the political agenda of many countries in Europe and the EU. The question at stake is: what should legislation on mandatory human rights due diligence (mHRDD) look like?

The UN Guiding Principles on Business and Human Rights (UNGPs) define human rights due diligence as an approach for companies “to identify, prevent, mitigate and account for their adverse human rights impacts” (UNGP 17). This includes the adverse impacts that a company itself causes, contributes to, and is associated with as a result of its business relationships. The UNGPs are the international standard by which both the German government and the EU are guided in their consideration of mHRDD legislation.

Some of the companies addressed may hope to be able to outsource these new tasks to the increasingly numerous and diverse providers of auditing and certification services. An enormous market could grow here.

In recent years, it has become evident that the development of standards and regulations for human rights due diligence has also brought with it increased development and diversification of the auditing and certification industry.

However, the auditing and certification industry itself has remained virtually unregulated and free from government oversight. If due diligence certification remains unregulated, and due diligence standards unprotected, mHRDD could become an elastic, potentially empty concept. As the competition within the industry increases there is a risk that the

only surviving model in use will be that of “quick and dirty” checklist solutions.

Auditing and certification companies – as they currently function – are not capable of respecting human rights themselves on the one hand, and auditing and certifying them on the other. On the contrary, they may increase the risk of human rights violations.

This position paper is based on four case studies, RINA, TÜV SÜD, TÜV Rheinland and RSPO, which show that substandard audits or certifications are not an exception. Rather, they are a consequence of the structural deficits in the regulation and governance of the audit and certification sector. The question is: what would it take for the auditing and certification industry to become human rights compliant?

One important human rights area in which audit companies are already active is that of working conditions, where, among other instruments, social audits, labor audits or occupational health and safety audits, are used. In addition, there are sector-specific auditing and certification systems, e.g. for the supply chains of conflict minerals, the private security sector and the agro-industrial sector. These certification schemes cover various criteria with more or less human rights relevance, such as environmental, sustainable, ethical trade and social standards. Some certification companies also offer services that cover human rights management that is not sector-specific (such as Human Rights & Social Compliance).

Human rights-related auditing services such as external audits, certifications or membership in compliance initiatives are offered by a variety of actors. These range from individual consultants or auditors to NGOs, multi-stakeholder initiatives, industry initiatives, technical certification companies, and financial auditors. Some are also active in developing standards, auditing auditors, and lobbying on regulation and oversight.

In the process of human rights due diligence, (external) audits and certifications could play a limited role at certain points in the process. However, they cannot replace human rights due diligence management. At best, they can serve as a selective diagnostic tool. However, taking adequate measures will always be the responsibility of a company itself, including with regard to its suppliers.

More concerning than the question of audits and certificates as instruments within a due diligence process is the potential for audits and certificates to contribute to breaches of human rights. Whenever audits and certificates are used in human rights risk areas, such as product safety or building security, they can increase or even trigger risks to human rights if they do not themselves meet the highest standards of quality and integrity.

### When certifications go wrong

“Verification” through audits or certificates can go terribly wrong, as a number of tragic events in recent years have shown:

- (1) The factory fire at Ali Enterprises (2012) in Karachi killed 258 workers: **Social audits** in the textile processing industry (RINA certification body, SA 8000, Pakistan).
- (2) The Brumadinho dam failure (2019) killed 272 people and contaminated a river: **Technical audits** in the mining industry (TÜV SÜD auditor, certificate according to national mining regulations, Brazil).
- (3) Defective breast implants manufactured between 2001 and 2010 caused serious health problems for thousands of patients: **Product safety audits** for medical devices (certifier TÜV Rheinland, certificate according to EU regulation, France/Germany).

(4) Local communities in Indonesia have complained about land grabbing and displacement, pesticide poisoning and violence for over ten years for at least ten years: **sustainability certificates for palm oil plantations** (several international and local certifiers, certification according to RSPO scheme, Indonesia).

There is no doubt that in all these cases the respective operating company bears the main responsibility. Nevertheless, it is clear that the issuance of defective, fraudulent or false certificates concealed risks and consequently made it difficult to take the necessary measures to protect those affected.

### **Dealing with human rights risks: A cross-sector analysis**

The selected cases show that all these certification sectors inherently carry human rights risks that auditors and certifiers must deal with through their own human rights policies and due diligence processes. This is true regardless of whether the issue is building or product safety, social compliance or environmental management. It is not only the production processes themselves, but also the associated auditing and certification activities that harbor human rights risks. Audit and certification bodies need to address this with a human rights due diligence process: they must identify the extent to which their own activities pose risks of contributing to or being directly linked to human rights abuses by their client companies and they must prevent or mitigate such risks. If audits and certificates cannot be relied upon, their role as “verifiers” of human rights due diligence is put into question.

The case studies reveal several structural vulnerabilities in the current human rights-relevant auditing and certification

systems. These include all those that are factually relevant to human rights, for example in the areas of plant safety, accessibility, environmental management or product safety:

(1) The **lack of integration of human rights due diligence** as a corporate policy and management principle.

This could be improved if auditing and certification companies, were also bound by due diligence legislation, especially if they operate in high-risk sectors such as textile or agricultural production, mining or medical products.

(2) Deficiencies in the **quality assurance of auditing and certification activities**, including for standard setting and monitoring, and lack of human rights competencies at the levels of auditing and certification and accreditation and oversight levels.

(3) The lack of a **human rights-specific methodology** for audits, certifications and accreditations. As a result, there is often a lack of a rights-based approach, transparency, stakeholder involvement, and consideration of not only process but also impact-related criteria.

(4) Lack of or inadequate **integrity management**, largely due to lack of regulation and oversight, which increases vulnerability to corruption and can impair the reliability and impartiality of audits, certificates and certification bodies.

(5) Finally, **deregulation and a lack of governance and oversight** opens **liability gaps and the lack of access to legal remedies** opens gaps in the fulfillment of the state's duties to protect.

The following table details some of the results of the studies.

<b>Criteria for auditing and certification in areas relevant to human rights (results of the case studies)</b>	<b>Case 1: Social audit</b>	<b>Case 2: Tech- nical audit</b>	<b>Case 3: Product safety</b>	<b>Case 4: Sustaina- bility certificate</b>
<b>HUMAN RIGHTS DUE DILIGENCE</b>				
Does the audit firm have a human rights due diligence policy and processes in place?	No	No	No	No
Are such policies and processes accreditation criteria?	No	No	No	No
Are the auditors and certifiers qualified in human rights?	N/A	N/A	N/A	N/A
Do stakeholders have access to whistleblower protection and grievance mechanisms in line with the UN Guiding Principles?	No	No	No	No
<b>QUALITY ASSURANCE</b>				
Is there state or state-authorized accreditation and oversight?	No	partly	partly	No
Does the applicable standard include transparency, stakeholder engagement, and public participation?	No	partly	partly	No
<b>METHODOLOGICAL ISSUES</b>				
Are the scope and methods used transparent?	Yes	No	No	No
Are human rights-specific methods used or required?	No	No	No	N/A
Does the standard include process and impact criteria and indicators?	N/A	N/A	No	Not suitable
Are trade unions, civil society and (potentially) affected parties actively involved?	No	N/A	N/A	No
<b>INTEGRITY MANAGEMENT</b>				
Are audit firms selected, hired and paid independently of the interested party?	No	No	No	No
Are parallel engagements prohibited and disclosure of business or financial relationships required?	N/A	No	No	No
Are there termination protection and rotation rules in place?	N/A	N/A	No	No
<b>STATE GOVERNANCE, PUBLIC PARTICIPATION AND ACCESS TO REMEDY</b>				
Does the state play an active role through standard-setting, accreditation, regulation, oversight, sanctions, support?	No	minimal	Yes	No

Are there robust liability rules and procedural safeguards in place?	No	No	No	No
Are audit reports/corrective action plans publicly accessible through public records or disclosure?	No	No	No	No

The following proposals are the result of a cross-sectoral analysis based on applying existing solutions (e.g. from the areas of financial, product safety and environmental audits) to all human rights-related audits and certifications, while integrating a human rights perspective.

### HUMAN RIGHTS DUE DILIGENCE AND LIABILITY

The core message of the UNGPs to audit and certification companies is: every audit and certification company is required to establish a human rights policy and effective human rights due diligence management. Therefore, comprehensive human rights due diligence, as provided by the UNGPs, should be mandatory for audit and certification bodies as it is for other business enterprises, and should be a prerequisite for accreditations. The new due diligence laws must also apply to the audit sector.

Good liability rules should safeguard this. This includes: 1) liability of auditors and certifiers to injured third parties, 2) procedural improvements to allow access to justice for plaintiffs from the Global South, such as an expansion of rules for legal standing, new rules to ease the burden of proof, e.g. through public access to information and rights to disclosure, as well as rebuttable presumptions of proof, and 3), financial support for plaintiffs where needed.

There should be no blanket exemptions from liability (“safe harbors”) for companies that outsource their human rights due diligence obligations to auditors and certifiers.

### STATE ACCREDITATION AND PUBLIC OVERSIGHT

Deregulation of state responsibilities and replacement by private services in the area of corporate responsibility have reduced the state's ability to respond to serious human rights risks. However, the state has a duty to protect human rights from third-party interference.

State or state-authorized accreditation and oversight should ensure the quality, reliability, integrity, and accountability of external audit services improve.

Accreditation criteria should include proof of human rights qualifications as well as compliance with human rights methodological standards, such as the demonstrable active involvement of trade unions, civil society groups and rights holders, the demonstrable protection of whistleblowers and a complaints system in accordance with UNGP standards (UNGP 31).

Public oversight needs a robust mandate and adequate resourcing, as well as public access to information, such as audit reports, so that civil society can also exercise its monitoring role.

### REQUIREMENTS FOR STANDARDS

Standards – whether governmental, inter-governmental or private – should be guided by international human rights norms. Standard-setting processes should meet minimum criteria in terms of legitimacy, transparency and stakeholder involvement. Standards should provide meaningful and verifiable impact and process indicators and guidance on human rights-specific methodology. These include: a focus on rights holders, stakeholder engagement, assessment of

risks to and violations of rights rather than just economic damages, consideration of irreparability risks rather than compensation cost risks, and contextual analysis and a multi-actor perspective, as well as transparency about methods used and results to allow conclusions about the interpretation and reliability of audit performance and to enable public scrutiny.

Where possible, trade union and employee representatives should be actively involved in the review, the development of remedial actions and the review of impact: they are constantly on the ground and have access to informal sources of information to which an external auditor would hardly have access. This can also apply to civil society organizations and (potentially) affected individuals. All these actors must also be specially protected from any form of retaliation.

A good practical example of a non-governmental initiative is the Bangladesh Accord, a binding industry agreement that includes an independent grievance mechanism and the possibility of arbitration, but also access to audit reports and clear liability rules.

In addition, there are human rights risk areas that are complex and therefore not amenable to auditing and certification. These include, for example: child labor, sexual harassment, illegal deductions from wages or the suppression of workers' organizations, forced labor, land and land use rights, indigenous consultation rights.

Finally, standards should include guidelines for appropriate compensation and should be regularly reviewed and updated.

Accreditations and standards should be internationally uniform or mutually recognized.

In addition, liability and access to redress are also necessary elements of a robust oversight system. In this way, stakeholders and organized civil society, as well as trade

unions, can play an important role in ensuring effective oversight of audit and certification bodies.

## INTEGRITY ASSURANCE

Integrity assurance refers to: conflicts of interest, anti-corruption and avoidance of favoritism.

If clients hire, supervise, and pay the audit firms, they are exposed to a structural risk of conflict of interest, which may lead to a lower level of control. Alternatives to this would be contracts brokered by the state or by an independent fund.

At the very least, however, protection against dismissal and rotation rules should safeguard the independence of auditors and certifiers and be laid down as accreditation criteria.

The same applies to the prohibition of parallel commissioning (provision of non-audit services) of audit companies, their employees and agents.

Compliance officers and departments in audit and certification firms should be trained to add human rights analysis to their best practices in integrity and corruption risk management.

Beyond that, insofar as industry-specific issues of quality and integrity assurance in the audit and certification industry are concerned, legislators and regulators can look to models that have already been developed at the national and international level in the areas of auditing, environmental protection or product safety.

## Conclusion

States have a duty to protect human rights from interference by third parties. If the control of human rights compliance is outsourced to private certification bodies, the state must exercise effective control and supervision over the private actors (UNGP 5).

An unregulated audit and certification market for questions of human rights due

diligence, but also for other areas relevant to human rights, could lead to unreliable audits no longer being distinguished from reliable ones, and to competition without rules setting in motion a race to underbid (as can already be observed in the area of social audits) which could ultimately empty the content of the subject of the audit - human rights due diligence - at will.

Therefore, the “outsourcing” of human rights due diligence to auditing service providers and liability exemptions or even the mandatory introduction of audits and certificates must be rejected; they are not in line with the international requirements of the UNGPs.

Human rights due diligence cannot be outsourced. Companies should internalize human rights due diligence and embed it

“from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights” (UNGP 16), which in turn would be a risk factor for liability.

Liability to those affected by violations is a key element that increases the accountability of auditors and certification bodies and, as a means of prevention, can also trigger an improvement in the quality and integrity of certification.

The already fierce competition in the auditing and certification market is likely to become even tougher if human rights due diligence becomes legally binding. Here, states have an urgent duty to ensure that auditing and certification bodies are made “fit” in human rights issues.

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## IMPRESSUM

THIS POSITION PAPER IS THE BRIEF SUMMARY OF A STUDY BY ECCHR, BROT FÜR DIE WELT, TITLED *HUMAN RIGHTS FITNESS OF AUDITORS AND CERTIFIERS? A CROSS-SECTORAL ANALYSIS OF CURRENT CHALLENGES AND POSSIBLE RESPONSES*.

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