

# Fulfilling the State Duty to Protect: A statement on the role of mandatory measures in a “smart mix” when implementing the UNGPs

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There is a growing number of national and international debates around mandatory measures to ensure business respect for human rights, and specifically a) a binding international instrument on business and human rights and b) national legislation on mandatory human rights due diligence (HRDD). In these debates, the UN Guiding Principles’ expectation of a “smart mix” of implementation measures is often cited. As a contribution to these discussions, Shift has developed the following statement on the role of mandatory measures in a “smart mix”.

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## The State Duty to Protect is not a passive duty, but a proactive one.

Under **UN Guiding Principle 1**, all states “**must** protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”. This “requires taking appropriate steps to prevent, investigate, punish and redress human rights abuse through effective **policies, legislation, regulations and adjudication**”.

This should be understood as a **proactive** duty. States should actively assess the effectiveness of what is currently in place, understand what gaps there are, and identify ways to address them. Yet most “National Action Plans” on the UNGPs to date reflect a more passive approach; they are a catalogue of existing measures rather than robust assessments of what more is needed.

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## The State Duty to Protect is fulfilled through a smart mix of measures.

To fulfil their duty to protect, states will need to use a range of approaches. The commentary to **UN Guiding Principle 3** elaborates on this when it says that states “should consider a **smart mix of measures** – national and international, mandatory and voluntary – to foster business respect for human rights.” States should go beyond enforcing existing laws to “periodically assess the adequacy of such laws and address any gaps” in light of evolving circumstances.

A truly **“smart mix”** means looking at **all four aspects**

	National	International
Mandatory	National <b>Mandatory</b>	International <b>Mandatory</b>
Voluntary	National <b>Voluntary</b>	International <b>Voluntary</b>

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### A Smart Mix of measures necessarily involves legislative and regulatory measures.

A truly “smart mix” means looking at **all four aspects** (national, international, mandatory and voluntary), not just the one or two that are most convenient or already in place. It follows, therefore, that the State Duty to Protect necessarily involves **legislative and regulatory measures** at the national level, and the supportive infrastructure (such as enforcement, incentives and guidance) needed to make them meaningful in practice. Without these, the UNGPs will never fulfill their true potential.

The UNGPs also clearly contemplate **mandatory international measures** as a natural part of this “smart mix”. Shift follows with interest the current discussion of a new treaty in this area.

## Measures that require Mandatory Human Rights Due Diligence are in line with the UNGPs, and there are strong reasons for states to consider them.

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While the UNGPs do not demand that states adopt legislation requiring companies to carry out **mandatory HRDD**, clearly such legislation **is entirely in line with the UNGPs**.

Some elements of HRDD are already embedded in national laws, such as in health and safety regulations, environmental legislation, privacy laws or in some corporate reporting regimes. However, there are often strong reasons for states to also consider more comprehensive mandatory HRDD legislation.

In Shift's experience, practical reasons to consider mandatory HRDD can include:

- The powerful effect it can have in driving top-level attention to human rights in companies, as well as engaging functions across the business;
- Leveling the playing field across companies and sectors, including through engagement with business partners in a company's value chain;
- Obliging companies to consider the interests of stakeholders other than shareholders;
- Incentivizing collaborative approaches to address systemic human rights risks;
- Enabling (where civil liability is included) a clear cause of action for individuals who are harmed to pursue remedy.

To be effective, such legislation should take account of critical aspects of the responsibility to respect. These include that:

- It should not undermine the scope of the responsibility to respect, which extends throughout the value chain, even if liability is attached to a narrower set of relationships;
- HRDD is a standard of conduct not result, meaning that mandatory measures should allow consideration of the quality of a company's efforts to respect human rights; and
- Meeting the responsibility to respect in practice will always involve going beyond compliance alone as good practice continues to evolve.