



# Mandatory Human Rights Due Diligence Risks and Opportunities for Workers and Unions

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**Mandatory Human Rights Due Diligence:**  
Risks and Opportunities for Workers and Unions

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# Contents

<b>Executive Summary</b>	4
<b>Introduction</b>	6
<b>Where did HRDD come from?</b>	9
Embedding HRDD in national and regional law	11
Are HRDD laws benefiting workers?	12
<b>Securing mHRDD laws that deliver for workers</b>	16
Scope of HRDD laws	16
Scope of application	16
Labour and human rights protected	16
Scope of due diligence requirements	17
Transparency and traceability of supply chains	17
Worker engagement in HRDD	18
Enforceable rights to consultation	18
Promotion of worker-led binding and enforceable agreements	19
Positive and non-delegable duties to respect human rights	20
Civil Liability	21
Monitoring and enforcement	25
State-based complaints and enforcement mechanisms	26
Supervisory authorities	27
<b>How does mHRDD fit with broader worker-centric approaches to improving human rights?</b>	29
Collective Bargaining and Protection for Unions within Supply Chains	29
Sectoral and Multilateral Agreements	29
Worker Driven Social Responsibility Agreements	30
<b>Recommendations for trade unions and worker organisations concerning proposed and existing mHRDD laws</b>	33
Recommendations concerning scope	33
Recommendations concerning transparency	33
Recommendations concerning worker engagement and agreements	33
Recommendations concerning duties and liability	33
Recommendations concerning complaints and enforcement mechanisms	34
Recommendations concerning supervisory authorities	35
<b>Profiles of the authors</b>	36

# Executive Summary

Mandatory human rights due diligence (mHRDD) legislation is now a strategic objective for many activists and organisations concerned with the protection and promotion of workers' rights in the global economy. It is widely presumed that embedding the concept in national, regional and international law will open up new avenues through which workers and trade unions can challenge corporate practices and secure meaningful remedies for rights violations. The concept is seen as particularly valuable in the context of transnational supply chains, where the fragmented nature of production has long presented formidable legal and practical barriers to efforts to secure greater corporate accountability for labour rights violations and poor working conditions.

Campaigns for mHRDD laws are bearing fruit in the Economic North. Human rights due diligence (HRDD) laws are now found in a number of OECD countries and are being debated in others. The EU has also released a proposed Corporate Sustainability Due Diligence Directive. While all these initiatives and proposed initiatives draw on the concept of HRDD found in the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), they differ significantly in their scope, application and the obligations they impose on businesses.

This report considers these developments from the perspective of the risks and opportunities for workers and unions. It has two key aims. The first is to express concern over the current trajectory of HRDD legislation and its capacity to effect meaningful change for workers and trade unions. We recognise there are strategic reasons for supporting HRDD: it has momentum and currently may be the most viable 'win' from a legislative perspective. We also acknowledge that the concept is leading to important normative shifts and has the potential to be a positive development for workers' rights. However, there is little evidence to suggest that HRDD laws, as currently conceived and popularised in OECD countries, are delivering real and tangible improvements for labour. In this report, we identify trends with respect to the design and implementation of HRDD legislation that, we argue, may serve to undermine rather than consolidate efforts to promote workers' rights and interests in the global economy.

The second key aim of this report is to offer guidance on how HRDD *could* be legislated in such a way as to drive meaningful change for workers in transnational supply chains. This guidance is informed by experiences with national labour regulation across multiple jurisdictions, as well as with worker-driven approaches to transnational labour regulation that position workers as active agents of change rather than passive recipients of corporate benevolence. We caution against an exclusive focus on mHRDD legislation at the expense of alternative approaches. This report briefly discusses these alternative approaches and argues that HRDD laws should take into account, and be designed to complement, these alternative mechanisms that have been shown to be effective in improving the conditions of vulnerable workers in transnational supply chains.

The recommendations offered in this report are informed by five key principles.

First, **the scope of HRDD laws should be consistent with the UNGPs and OECD Guidelines.** This includes with respect to the companies to which they apply; the rights they cover; and the reach of the due diligence requirements.

Secondly, HRDD laws should secure greater **transparency and traceability** of corporate supply chains by requiring companies to trace their supply chains and make this information available publicly.

Thirdly, **worker engagement in HRDD should be mandated and enforceable.** Simply exhorting companies to engage in 'meaningful consultation' with stakeholders is inadequate. Inspiration should be taken from national labour law frameworks, and worker and trade union consultation should be

included in HRDD laws as an enforceable right. The establishment of appropriate institutional structures to facilitate this engagement should be required by law. Such institutional structures should empower legitimate worker representatives throughout the supply chain and support multi-level collective bargaining.

Fourthly, HRDD laws should impose **positive and non-delegable duties on entities to respect human rights**. While current HRDD laws place HRDD at the forefront of efforts to combat human rights breaches, we insist on the original positioning of HRDD as a subsidiary operationalising principle to the basic corporate responsibility to respect human rights. Companies should be held to account for the extent to which they achieved this outcome. Failure to discharge the corporate responsibility to respect human rights should, in certain circumstances, give rise to **civil liability**. The report recommends a range of ways mHRDD laws should make claims less costly and more accessible for workers, and result in change in business behaviour as well as compensation.

Finally, the imposition of HRDD obligations must be accompanied by **robust monitoring and enforcement** mechanisms. The absence of accessible and effective state-based oversight and supervisory mechanisms has been a key driver of poor outcomes of HRDD laws to date. Supervisory authorities must be independent, properly funded, and authorised to conduct investigations. They should also be empowered to impose a range of sanctions on companies found to be non-compliant with HRDD laws, including for example, administrative penalties and exclusion from public procurement opportunities. Cross-border human rights breaches are especially complex, requiring high level expertise and sensitivity. Supervisory bodies must be structured and empowered to access expertise in labour-related problems.

# Introduction

Workers suffer grave breaches of human rights producing the goods sold by businesses around the world. For example, major global brands are implicated in forced labour of ethnic minorities in the province of Xinjiang, with around 80,000 Uyghurs transported to factories across other provinces of China making clothes, phones, and goods we use daily.<sup>1</sup> An estimated 40,000 children, some as young as six years, mine cobalt in the Democratic Republic of Congo that is used in batteries in our phones, cars, and solar panels.<sup>2</sup> Three million workers toil in India's sandstone mining industry extracting stone sold in the UK, the US, and across Europe, many under conditions of bonded labour.<sup>3</sup> More than 5,000 workers die around the world every day - and for every fatal accident there are another 500-2,000 injuries.<sup>4</sup> Workers' rights to organise to address these problems are frequently violated. For instance, in Bangladesh, one of the major garment-producing countries of the world, of the 1,104 union registration applications examined between 2010 and 2019, 46 per cent were rejected by the Department of Labour. Indeed, the number of countries which impeded the registration of unions increased from 86 in 2019 to 89 countries in 2020.<sup>5</sup> There is now near consensus that businesses implicated in human rights and labour rights violations in their operations and supply chains bear some responsibility, but no effective legal mechanism exists through which to *attribute such responsibility or to impose obligations* to prevent and remedy workers' rights violations.

Human rights due diligence (HRDD) has emerged as a promising approach through which to conceptualise and extend corporate responsibility for working conditions throughout transnational supply chains. Interest and support for HRDD has proven remarkably broad. This report is animated by concern that HRDD initiatives are not generally benefiting workers from and in the Economic South. Nor are they providing a means for rebalancing the asymmetries of information and power that characterise work in global value chains.

Interest in HRDD is primarily found in the Economic North or Organisation of Economic Cooperation and Development (OECD) countries. It is seen as a way to ensure that companies domiciled in rich countries take responsibility for negative human rights impact in their supply chains, which often extend into the Economic South. Worker movements in the Global South have not been active in calling for HRDD. While support for HRDD has by no means been unanimous or unqualified throughout Europe and Anglo-American countries, it has been remarkably broad-based. Leading brands, international business associations, and financial institutions have all praised HRDD for its capacity to conceptualise and operationalise business responsibility in a practical and meaningful way. Companies increasingly respond to allegations of corporate irresponsibility by pointing to the quality of their due diligence processes. Labour and human rights activists frequently now use the concept when seeking to hold

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1 VICKY XIUZHONG XU, UYGHURS FOR SALE (Australian Strategic Policy Institute, 2020), <https://www.aspi.org.au/report/uyghurs-sale>.

2 Michele Fabiola Lawson, *The DCR Mining Industry: Child Labor and Formalization of Small-Scale Mining*, WILSON CENTER (Sep. 1, 2021), <https://www.wilsoncenter.org/blog-post/drc-mining-industry-child-labor-and-formalization-small-scale-mining#:~:text=Of%20the%20255%2C000%20Congolese%20mining,own%20tools%2C%20primarily%20their%20hands>.

3 AMERICAN BAR ASSOCIATION CENTER FOR HUMAN RIGHTS, TAINTED STONES: BONDED LABOR AND CHILD LABOR IN THE INDIA-U.S. SANDSTONE SUPPLY CHAIN, (2020), [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/justice-defenders/tainted-stones-rajasthan-2020.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/tainted-stones-rajasthan-2020.pdf).

4 WORLD HEALTH ORGANIZATION AND INTERNATIONAL LABOUR ORGANIZATION, WHO/ILO JOINT ESTIMATES OF THE WORK-RELATED BURDEN OF DISEASE AND INJURY, 2000-2016: GLOBAL MONITORING REPORT, (WHO and ILO, 2021), <https://www.who.int/publications/i/item/9789240034945>.

5 INTERNATIONAL TRADE UNION CONFEDERATION, ITUC GLOBAL RIGHTS INDEX 2020 (2020), <https://www.ituc-csi.org/ituc-global-rights-index-2020>.

companies in the Economic North to account for poor working conditions in their operations, subsidiaries, and suppliers. HRDD has strong traction.

OECD member states are embracing HRDD as a practical and politically palatable way to promote more responsible business conduct. While many states are choosing to merely encourage businesses domiciled in their jurisdictions to adopt the practice, an increasing number are imposing HRDD as a legal requirement. HRDD laws have now been adopted in France,<sup>6</sup> Germany,<sup>7</sup> the Netherlands,<sup>8</sup> and Norway,<sup>9</sup> and the EU has released a proposed directive on Corporate Sustainability Due Diligence.<sup>10</sup> Civil society campaigns for HRDD laws are underway in many other jurisdictions, both in the context of efforts to improve existing disclosure-based modern slavery laws<sup>11</sup> or to develop new mechanisms for corporate accountability.<sup>12</sup> These developments reflect and further drive the rise of HRDD as the dominant global normative framework through which to understand responsible business conduct with respect to workers' rights in transnational supply chains.<sup>13</sup>

For many labour activists in the Economic North, HRDD is seen as a way to address the role of lead firms not merely as complicit actors but as contributors to workers' rights violations through their purchasing and sourcing practices. It is seen as offering a powerful corrective to prevailing corporate social responsibility (CSR) approaches in which companies take a voluntary and selective approach to labour rights in their supply chains and are not held accountable for their efforts. Where embedded in law, HRDD is also seen as potentially offering new avenues through which workers and their representatives can access remedy for violations of their rights.

This report challenges the presumption that HRDD, as currently conceived and popularised in OECD countries, is the optimal method to improve workers' rights in transnational supply chains. It also seeks to provide guidance to unions and worker organisations about how HRDD *could* be legislated in such a way as to empower workers as rights bearers. In doing so, it draws on, and seeks to contribute to, important work that has been undertaken by others to consider the concept and its potential legalisation from a workers' rights perspective.<sup>14</sup> We recognise there are strategic reasons for supporting HRDD: it has momentum and currently may be the most viable 'win' from a legislative perspective. We also

6 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on relating to the duty of vigilance of parent companies and ordering companies (1), or Corporate Duty of Vigilance Law] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mars 28, 2017.

7 Gesetz über unternehmerische Sorgfaltspflichten in Lieferketten [Supply Chain Due Diligence Act], Juli 22, 2021, ELEKTRONISCHER BUNDESANZEIGER [eBAnz] at 2959 2021 (Ger.). This law entered into force on 1 January 2023.

8 Wet zorgplicht kinderarbeid van 24 oktober 2019, Stb. 2019. Adopted by Dutch Senate in May 2019.

9 Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven) [Act relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions], (Nor.) adopted by the Norwegian Parliament in June 2021.

10 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 59, at para. 64, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

11 These laws include California Transparency in Supply Chains Act (2012) (Cal. Civ. Code § 1714.43), the UK Modern Slavery Act 2015, c. 30 (Eng.), and Australia's *Modern Slavery Act 2018* (Austl.).

12 For example, a coalition of UK-based NGOs has prepared a draft UK HRDD bill to facilitate their lobbying efforts (2019): [https://corporatejusticecoalition.org/wp-content/uploads/2019/04/190417\\_UK-mHRDD-campaign-statement\\_FINAL-with-logos.pdf](https://corporatejusticecoalition.org/wp-content/uploads/2019/04/190417_UK-mHRDD-campaign-statement_FINAL-with-logos.pdf).

13 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, U.N. Doc. HR/PUB/11/04 (2011); OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011).

14 See, for example, Joseph Wilde-Ramsing, Ben Vanpeperstraete & David Hachfeld, *Respecting Rights and Ticking Boxes: Legislating Human Rights Due Diligence*, SOMO (Jan. 25, 2022), <https://www.somo.nl/respecting-rights-or-ticking-boxes/#:~:text=Momentum%20to%20enact%20mandatory%20human,access%20to%20justice%20and%20remedy>; International Trade Union Confederation (ITUC), *Towards Mandatory Due Diligence in Global Supply Chains*, (June 19, 2020), [https://www.ituc-csi.org/IMG/pdf/duediligence\\_global\\_supplychains\\_en.pdf](https://www.ituc-csi.org/IMG/pdf/duediligence_global_supplychains_en.pdf).

acknowledge that HRDD laws have the potential to be a positive development for workers' rights. However, this outcome is by no means assured: it will only be realised if HRDD laws are appropriately designed and implemented. *To us, this means drawing on labour perspectives and experiences to ensure the concept is institutionalised in a way that is capable of driving meaningful change for workers in transnational supply chains.*

The proposals presented in this report are based on an analysis of workers' human rights breaches as rooted in the exploitation of power disparities in the globalised economy.<sup>15</sup> Such a labour approach to workers' human rights entails the identification of factors that affect exploited workers' bargaining positions and focuses on improving their vulnerability through economic, social, and legal solutions. Furthermore, this approach offers the victims themselves both individual and collective legal means to resist and prevent exploitation that may expose them to breaches, thereby restoring power to their hands. Workers are seen as agents of change - active actors in setting labour standards and enforcing them - rather than merely as passive victims requiring corporate care and due diligence. It relies on the potential for dynamic and ongoing labour relations and change that also comes from below, which can occur only by addressing the structural issues and power disparities. Accordingly, the labour approach also turns to strategies of collective action and collective bargaining (not necessarily in the traditional sense through a recognised trade union, but also through alternative forms of organisation), protective legislation and its enforcement, the establishment of context-specific standards, and the assignment of liability to corporations and large suppliers for exploitation in production and supply chains, in an attempt to redress the unequal power relations in sectors in which workers are particularly vulnerable to breaches of their human rights.

We are intervening in debates around HRDD because of our concern that emerging legal models for HRDD across OECD countries may in effect be further endorsing, and as such legitimising, rather than redressing, unequal power relations between vulnerable workers and big business in the global economy. While these laws are often hailed as important advances in corporate accountability, there is little evidence to date to suggest that they are delivering for workers. Report after report has shown low levels of compliance with existing HRDD laws. Even where laws are complied with, it remains unclear as to whether this compliance is in fact leading entities to more effectively prevent or address labour rights risks in their supply chains, or to engage in remedial efforts.

This report begins with a brief overview of the evolution of HRDD in the Economic North and a brief discussion on the nature and impact of these laws. It next draws out the characteristics of HRDD that can enhance workers' rights. It ends by cautioning against a focus on HRDD at the expense of alternative approaches, briefly discussing viable alternative mechanisms that have been shown to be effective in improving the conditions of vulnerable workers in transnational supply chains. An appendix to this report contains profiles of the expert contributors, who hail from a range of countries considering HRDD laws.

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15 The labour approach was developed by one of the authors of this report in two key articles: Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 *UCLA L. REV.* 76 (2012); Hila Shamir, *A Labor Approach to Human Trafficking: 20 Years of the International Attempt to Address Human Trafficking*, 44 *TEL AVIV U. L. REV.* 377 (2021). See also HILA SHAMIR & MAAYAN NIEZNA ET AL., *AN ALTERNATIVE ANTI-TRAFFICKING ACTION PLAN: A PROPOSED MODEL BASED ON A LABOR APPROACH TO TRAFFICKING* (eds. Hila Shamir and Maayan Niezna, Tel Aviv University: TraffLab Research Group Policy Paper 2022).



## Where did HRDD come from?

First introduced through the UNGPs in 2011, HRDD is a component of the corporate responsibility to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved.<sup>16</sup> HRDD evolved out of earlier processes initiated in the United Nations in the 1970s directed at securing greater transnational accountability for detrimental actions in the Economic South.<sup>17</sup> It is a concept that was formulated by the key architect of the UNGPs, UN Special Rapporteur on Business and Human Rights Professor John Ruggie, as a way of translating corporate responsibility into a conceptual framework and language that was familiar to, and capable of being implemented by, business.<sup>18</sup>

The UNGPs enumerate three measures that a business enterprise should have in place to meet its responsibility to respect human rights. These are: a policy commitment to do so; an HRDD process to identify, prevent, mitigate, and account for actual and potential adverse human rights impacts; and remediation processes to address any such adverse human rights impacts that they cause or to which they contribute.<sup>19</sup> HRDD is the process through which a business enterprise assesses actual and potential human rights impacts; acts to prevent and mitigate these impacts; tracks the effectiveness of responses; and communicates externally on these efforts (see Figure 1).<sup>20</sup> It should cover adverse human rights impacts that the business enterprise “may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.<sup>21</sup>

HRDD is a concept that is informed by, but distinct from, due diligence undertaken by businesses in other commercial contexts. Distinguishing features include the need for a company to focus on risks to rights-holders rather than to the company itself; the need to meaningfully engage with rights-holders and others during the process; and the need to conduct the process on an ongoing rather than on a one-off basis, as is the case with transactional due diligence.<sup>22</sup>

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16 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, Princ. 1, U.N. Doc. HR/PUB/11/04 (2011).

17 United Nations General Assembly, Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), at 5 (May 1, 1974) (its main demands regarding TNCs were non-interference, compliance with domestic law, and benefit-sharing). This was followed by United Nations, Sub-Commission on the Promotion & Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

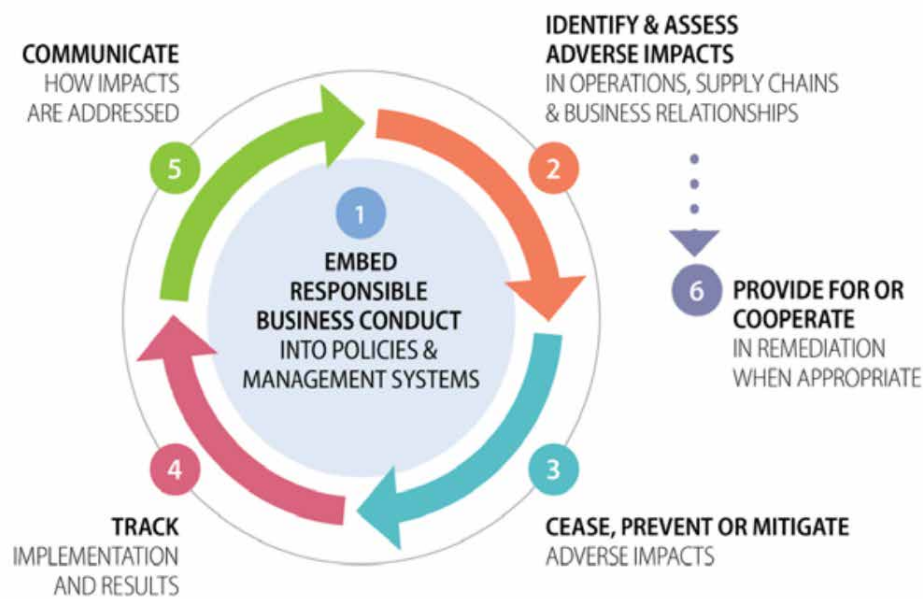
18 See JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* (W. W. Norton & Company, Inc., 1st ed. 2013).

19 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, Princ. 15, U.N. Doc. HR/PUB/11/04 (2011).

20 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, Princ. 11-21, U.N. Doc. HR/PUB/11/04 (2011).

21 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, Princ. 17 and Commentary on Principle 13, U.N. Doc. HR/PUB/11/04 (2011).

22 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, Princ. 17, U.N. Doc. HR/PUB/11/04 (2011).

**Figure 1:** Due diligence process and supporting measures<sup>23</sup>

When introduced through the UNGPs in 2011, HRDD was welcomed by the international labour movement and many civil society organisations. These actors identified the following features of the concept as welcome correctives to prevailing CSR approaches:

- ▶ HRDD is a subsidiary operationalising principle to the basic corporate responsibility to respect human rights: that is, companies would be held to account for the extent to which they achieved this outcome.
- ▶ HRDD requires companies to address their actual and potential adverse impacts on, at a minimum, all internationally recognised human rights, including those in the ILO's Declaration of Fundamental Principles and Rights at Work.<sup>24</sup> There would be no more “picking and choosing” of what rights must be respected.<sup>25</sup> Importantly, the concept compels companies to pay equal attention to process-based labour rights that they had long tended to overlook, such as freedom of association and collective bargaining.
- ▶ HRDD requires companies to identify and address actual and potential impacts on workers' human rights not only in their own operations but also those impacts that they have caused or contributed to in their supply chains. HRDD thus has the potential to secure greater accountability within complex supply chains where many of the most vulnerable workers are engaged indirectly and/or informally.
- ▶ HRDD requires companies to take whatever action necessary to cease causing or contributing to human rights harms, even where this involves changing business operations and purchasing practices.

23 OECD, *DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT* (2018) 21.

24 United Nations Human Rights, *UN Guiding Principles on Business and Human Rights*, Princ. 12, U.N Doc. HR/PUB/11/04 (2011).

25 ITUC, *The United Nations “Protect, Respect, Remedy” Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights: A Guide for Trade Unionists* (May 2012) 3, [https://www.ituc-csi.org/IMG/pdf/12-04-23\\_ruggie\\_background\\_fd.pdf](https://www.ituc-csi.org/IMG/pdf/12-04-23_ruggie_background_fd.pdf).

- ▶ HRDD opens new spaces for engagement and negotiation through requiring companies to engage in meaningful consultation with stakeholders, including workers and trade unions.<sup>26</sup>

When interpreted in this light, HRDD holds considerable potential to advance workers' rights in the global economy. However, following the adoption of the UNGPs by the UN Human Rights Council in 2011, it was by no means assured that this interpretation of HRDD would prevail. Other interest groups understood the concept differently.<sup>27</sup> Moreover, the UNGPs articulate the responsibility of business to respect human rights (including engaging in HRDD) merely as a societal expectation rather than as a legal obligation.<sup>28</sup> It is a broad normative standard that demands subsequent elaboration, legalisation, and interpretation. It is these subsequent processes of negotiation and elaboration of HRDD at the international, regional, and national levels that determine the usefulness of the concept to workers. In short, these processes may result in the emergence of new mechanisms through which workers and unions can challenge prevailing business practices and secure positive change. However, they may also result in standards that lend a veneer of accountability while effectively legitimizing and endorsing unfettered managerial prerogative with respect to the management of labour rights issues in transnational supply chains.

## Embedding HRDD in national and regional law

Over the last decade or so, HRDD has been integrated into major international 'soft law' instruments on corporate accountability, including the *OECD Guidelines for Multinational Enterprises*<sup>29</sup> and the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*.<sup>30</sup> Many multi-stakeholder initiatives (MSIs) and corporate responsible sourcing programs have also been adjusted to align with the concept. HRDD is also increasingly being embedded in law at the regional and national level. These national and regional level law-making processes are critical to the development of the concept as they provide stakeholders with the opportunity to shape the nature and scope of HRDD in very significant ways. Lawmakers must decide, for example, the types of businesses are covered by the law, the obligations are imposed, requirements for transparency of the processes and outcomes of HRDD, responsibility (if any) for monitoring company due diligence processes, stakeholders' rights, and any penalties for non-compliance.

Since the adoption of the UNGPs, a number of countries have adopted laws that draw on the concept of HRDD. However, these laws differ significantly in their scope, application, and the obligations they impose on businesses. These laws can be broadly grouped into three categories (Figure 2).

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26 See, for example, *Letter from Sharan Burrow, General Secretary of the ITUC, to John G Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (May 27, 2011) 1 [https://www.ituc-csi.org/IMG/pdf/Letter\\_to\\_Mr\\_John\\_G\\_Ruggie\\_.pdf](https://www.ituc-csi.org/IMG/pdf/Letter_to_Mr_John_G_Ruggie_.pdf); Global Unions, *Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework: Global Unions' Response* (Jan. 2011) 1, <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/global-unions-response-re-guiding-principles-jan-2011.pdf>; ITUC, *The United Nations 'Protect, Respect, Remedy' Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights: A Guide for Trade Unionists* (May 2012) 12, [https://www.ituc-csi.org/IMG/pdf/12-04-23\\_ruggie\\_background\\_fd.pdf](https://www.ituc-csi.org/IMG/pdf/12-04-23_ruggie_background_fd.pdf).

27 See INGRID LANDAU, *HUMAN RIGHTS DUE DILIGENCE AND LABOUR GOVERNANCE IN THE GLOBAL ECONOMY* (Oxford: Oxford Univ. Press, forthcoming).

28 United Nations Human Rights, *UN Guiding Principles on Business and Human Rights, Commentary on Princ. 11*, U.N. Doc. HR/PUB/11/04 (2011).

29 The OECD has also developed general guidance, *OECD, DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT* (2018), as well as sector-specific due diligence guidance documents. These documents are available at <http://mneguidelines.oecd.org/duediligence/>.

30 ILO, *TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY* (5<sup>th</sup> ed. 2017).

**Figure 2:** Three types of HRDD laws

<b>GROUP 1</b> <b>Mandatory disclosure and transparency laws</b>	<b>GROUP 2</b> <b>Mandatory disclosure with due diligence laws</b>	<b>GROUP 3</b> <b>Due diligence laws with civil liability laws</b>
<p>These laws require companies that meet threshold criteria to disclose due diligence efforts with respect to specified human rights risks in their operations and supply chains. These laws may impose some form of administrative or civil liability for failure to comply with the reporting requirements; however, they are predicated on the assumption that transparency will empower and lead market actors to reward and sanction companies for their human rights performance.</p> <p><b>Examples</b> include the California Transparency in Supply Chains Act (2010), section 54 of the UK’s Modern Slavery Act (2015), and Australia’s Modern Slavery Act (2018). This approach is also found in the European Union’s Non-Financial Reporting Directive (2014/95/EU).</p>	<p>These laws are also disclosure-based; however, they not only mandate disclosure, but also that companies undertake due diligence in certain circumstances. These laws are accompanied by enforcement mechanisms.</p> <p><b>Examples</b> include s.1502 of the US Dodd-Frank Act (2010), the EU’s Conflict Minerals Regulation (2017), the Dutch Child Labour Due Diligence Law (2019), and Germany’s Supply Chain Due Diligence Act (2021).</p>	<p>These laws have a broader scope (in terms of the sectors and types of rights covered), mechanisms in place to promote due diligence and monitor due diligence efforts, and remediation.</p> <p><b>Examples</b> include the French Corporate Duty of Vigilance Law (2017) and the proposed EU Directive (2022).</p>

## Are HRDD laws benefiting workers?


The negotiation, adoption, and implementation of HRDD laws across the OECD has involved the expenditure of significant energy and resources by many different stakeholders. Many of these laws are new, and may not yet have had time to bring about changes in business practice. Based on existing research undertaken in multiple countries, however, it is possible to draw a number of broad observations about the impact of these laws.




HRDD laws are helping drive normative change. Through incorporating aspects of the UNGPs into national law, they are contributing to the socialization of human rights norms among non-state actors and helping shift the conversation from *why* businesses should respect human rights to *how* they should do so.<sup>31</sup> They are prompting many companies to consider, perhaps for the first time, their connections to labour rights violations in domestic and transnational supply chains.<sup>32</sup>


31 Surya Deva, *Business and Human Rights: Alternative Approaches to Transnational Regulation*, 17 ANN. REV. L. & SOC. SCI. 139, 142 (2021).

32 Elsa Savourey & Stéphane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, 6 BUS. & HUM. RTS. J. 141, 147 (2021).

 HRDD laws are prompting companies to take certain actions that they may otherwise not have. Research shows, for example, that the UK Modern Slavery Act has served as a driver for the emergence of various anti-trafficking efforts, including training and other activities to increase awareness of severe labour abuse among workforce and suppliers, establishment of reporting helplines and modern slavery, and human trafficking risk assessments.<sup>33</sup>

Nonetheless, there is growing concern that these laws are proving ineffective in securing widespread and meaningful change in corporate practice.

 **States are failing to put in place adequate mechanisms to ensure compliance with the express requirements of HRDD laws.** While states are increasingly imposing legal obligations on business with respect to HRDD, they are not accompanying these new requirements with appropriate state-based mechanisms for monitoring and enforcement. Many HRDD laws rely heavily on market mechanisms to secure compliance. Others, such as the French Corporate Duty of Vigilance Law, rely exclusively on the courts for enforcement. These approaches are proving inadequate, with studies consistently revealing significant levels of non-compliance with HRDD laws in the UK,<sup>34</sup> Australia,<sup>35</sup> and France.<sup>36</sup> In short, these laws are not being implemented, monitored, or enforced in a way that compels businesses to take their obligations seriously.

 **HRDD laws are privileging process over outcomes.** Many HRDD laws thus far adopted in OECD states fail to anchor requirements to engage in HRDD in a specific outcome or standard (for example, the corporate responsibility to respect human rights). As a result, they are shifting the focus unduly towards internal corporate process at the expense of external accountability outcomes.<sup>37</sup> Where this happens, HRDD risks becoming a ‘box-ticking exercise’ engaged in by companies to gain legitimacy in the eyes of regulators or the broader public.<sup>38</sup> This type of superficial approach to compliance has been found to dominate business responses to the Australian and UK’s Modern

33 Tamar Barkay, Jonathan Davies, Irene Pietropaoli & Hila Shamir, *Anti-trafficking Chains: Analysing the Impact of Transparency Legislation in the UK Construction Industry* (forthcoming).

34 See, for example, LISA HSIN, STEVE NEW, IRENE PIETROPAOLI & LISE SMIT, EFFECTIVENESS OF SECTION 54 OF THE MODERN SLAVERY ACT (London: Modern Slavery & Human Rights and Policy & Evidence Centre, 2021), <https://modernslaverypec.org/assets/downloads/TISC-effectiveness-report.pdf>.


35 AMY SINCLAIR & FREYA DINSHAW, PAPER PROMISES? EVALUATING THE EARLY IMPACT OF AUSTRALIA’S MODERN SLAVERY ACT (2022), [https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6200d3d9db51c63088d0e8e1/1644221419125/Paper+Promises\\_Australia+Modern+\\_Slavery+Act\\_7\\_FEB.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6200d3d9db51c63088d0e8e1/1644221419125/Paper+Promises_Australia+Modern+_Slavery+Act_7_FEB.pdf); ALEXANDER COWARD, MOVING FROM PAPER TO PRACTICE: ASX200 REPORTING UNDER AUSTRALIA’S MODERN SLAVERY ACT (Australian Council of Superannuation Investors, 2021), [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf).


36 See, for example, SWANN BOMMIER AND LUCIE CHALTAÏN, LE RADAR DU DEVOIR DE VIGILANCE: IDENTIFIER LES ENTREPRISES SOUMISES A LA LOI (CCFD: Terre Solidaire & Sherpa, 2019), <https://plan-vigilance.org/wp-content/uploads/2019/06/2019-06-26-Radar-DDV-16-pages-Web.pdf>.

37 Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELB. J. INT’L L. 221, 238-9 (2019); See also Joseph Wilde-Ramsing, Ben Vanpeperstraete & David Hachfeld, *Respecting Rights and Ticking Boxes: Legislating Human Rights Due Diligence*, SOMO (Jan. 25, 2022), <https://www.somo.nl/respecting-rights-or-ticking-boxes/#:~:text=Momentum%20to%20enact%20mandatory%20human,access%20to%20justice%20and%20remedy>.

38 Surya Deva, *Business and Human Rights: Alternative Approaches to Transnational Regulation*, 17 ANN. REV. L. & SOC. SCI. 139, 143 (2021); Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELB. J. INT’L L. 221 (2019); UN Secretary-General, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, at 8,9,19, principles 25(c),28,73(c), U.N. Doc. A/73/163 (July 16, 2018).

Slavery Acts,<sup>39</sup> the California Transparency in Supply Chains Act,<sup>40</sup> and s. 1502 of the US Dodd-Frank Act.<sup>41</sup> It has also been identified as a common business response to the French Corporate Duty of Vigilance Law.<sup>42</sup>

 **Business is retaining significant, if not unfettered, discretion as to the scope and nature of due diligence undertaken and who is involved in the process.** As a result, many companies are simply ‘rebadging’ existing CSR approaches as due diligence. Companies are still focusing on certain rights at the expense of others; limiting their efforts to address abuses further up their supply chain; relying on the private monitoring and standards industry;<sup>43</sup> and failing to address purchasing practices.

 **Businesses are not involving workers or trade unions in HRDD.** Most HRDD laws do not require entities to engage workers in their HRDD processes, despite these actors being the intended beneficiaries of the laws. While laws and non-binding guidance encourage businesses to engage in ‘meaningful consultation’ with stakeholders (including workers), this is not positioned as a legally enforceable obligation or corresponding right. Available evidence suggests entities are failing to engage with workers and their representatives. For example, KnowTheChain’s 2020 Benchmark, which assessed global companies in the apparel and footwear sector on efforts to address forced labour risks in their supply chains, found that only 6 out of 37 companies disclosed involving workers in their risk assessment processes, and just 4 stated that they involved workers in the design and/ or performance of grievance mechanisms.<sup>44</sup> In France, despite the fact that stakeholder engagement is addressed in the Corporate Duty of Vigilance Law, many entities are not mentioning stakeholder engagement in their reports or only doing so by way of vague statements.<sup>45</sup> An important positive feature of the most recent revision of the proposed EU Directive requires involvement of workers and their representatives at all stages of HRDD. However, unless there are consequences for failing to engage workers, the problems found with respect to compliance with the French Corporate Duty of Vigilance Law will be replicated across Europe. There is already a great deal of guidance on stakeholder engagement in HRDD. However, at present, it remains up to management to determine the extent to which such guidance is adhered to, if at all.

39 See, for example, AMY SINCLAIR & FREYA DINSHAW, PAPER PROMISES? EVALUATING THE EARLY IMPACT OF AUSTRALIA’S MODERN SLAVERY ACT (2022), [https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6200d3d9db51c63088d0e8e1/1644221419125/Paper+Promises\\_Australia+Modern+\\_Slavery+Act\\_7\\_FEB.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6200d3d9db51c63088d0e8e1/1644221419125/Paper+Promises_Australia+Modern+_Slavery+Act_7_FEB.pdf); ALEXANDER COWARD, MOVING FROM PAPER TO PRACTICE: ASX200 REPORTING UNDER AUSTRALIA’S MODERN SLAVERY ACT (Australian Council of Superannuation Investors, 2021), [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf).

40 See, for example, Rachel N. Birkey, Ronald P. Guidry, Mohammad Azizul Islam & Dennis M. Patten, *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, 152 J. Bus. ETHICS 827 (2018).

41 Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L. J. 419, 423 (2015); Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129, 131 (2016).

42 See, for example, Elsa Savourey & Stephane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, 6 BUS. & HUM. RTS J. 141, 147-8 (2021), <https://doi.org/10.1017/bhj.2020.30>.

43 There is widespread recognition of the inadequacy of conventional ‘social auditing’ approaches in the context of identifying labour rights violations in supply chains. See for example, *Combating Sexual Harassment in the Garment Industry*, HUM. RTS WATCH (Feb. 12, 2019), [https://www.hrw.org/news/2019/02/12/combating-sexual-harassment-garment-industry#\\_ftn1](https://www.hrw.org/news/2019/02/12/combating-sexual-harassment-garment-industry#_ftn1); GENEVIEVE LEBARON, *COMBATTING MODERN SLAVERY: WHY LABOUR GOVERNANCE IS FAILING AND WHAT WE CAN DO ABOUT IT* (Cambridge, UK: Polity Press, 2020).

44 *2020 Benchmark Ranking of Companies*, KNOWTHECHAIN, [https://knowthechain.org/benchmark/?ranking\\_year=2020&ranking\\_sector=apparel-footwear](https://knowthechain.org/benchmark/?ranking_year=2020&ranking_sector=apparel-footwear).

45 SHIFT, *HUMAN RIGHTS REPORTING IN FRANCE: TWO YEARS IN: HAS THE DUTY OF VIGILANCE LAW LED TO MORE MEANINGFUL DISCLOSURE?* 8 (New York: Shift, 2019), [https://shiftproject.org/wp-content/uploads/2019/11/Shift\\_HumanRightsReportinginFrance\\_Nov27.pdf](https://shiftproject.org/wp-content/uploads/2019/11/Shift_HumanRightsReportinginFrance_Nov27.pdf).



**Laws are failing to establish any new mechanisms** through which workers can meaningfully impact or challenge corporate decision-making or implementation. They are thus perpetuating, rather than challenging, the dominant CSR approach in which workers are treated as passive beneficiaries rather than active agents of workplace standards.

We believe that if these trends continue, there is a real risk that legalising HRDD will not only fail to deliver for workers but may in fact undermine efforts to secure greater legal accountability of multinational enterprises for labour rights violations in transnational supply chains.

# Securing mHRDD laws that deliver for workers

We argue that there are certain components that must be present in mHRDD initiatives if these laws are to constitute effective mechanisms through which to further workers' rights in the global economy.

## Scope of HRDD laws

For HRDD laws to significantly advance workers' rights, their scope of coverage must be detailed and extensive in three complementary aspects: (1) the companies to which they apply; (2) the rights they cover; and (3) the reach of the due diligence requirements.

### Scope of application

The UNGPs recognise that all business entities have a responsibility to respect human rights. They further clarify that the extent and complexity of the due diligence measures businesses undertake should be proportional to their size, industrial sector, operational context, ownership, and structure, and above all to the severity of their human rights impacts.<sup>46</sup> However the vast majority of HRDD laws adopted to date are limited in their application to large entities. The proposed EU Directive, for example, is limited in its application to very large companies (determined by way of employee and turnover thresholds) and to a sub-set of smaller companies operating in high-risk sectors, including apparel, agriculture, and extractives.<sup>47</sup> Excluding smaller entities is inconsistent with UN and OECD standards, and fails to recognise that severe forms of labour exploitation and workers' rights violations are not limited to companies above a defined threshold. It is vital, also, that HRDD laws address public sector entities as well as private entities. The public sector, including government departments, agencies, and state-owned enterprises, is a major procurer of goods and services and should be covered by HRDD laws.<sup>48</sup> Consistent with the UNGPs, mHRDD laws should recognise that all entities have a responsibility to respect human rights, irrespective of size or sector.

### Labour and human rights protected

Recognising that business entities may impact *all* internationally recognised human rights, the UNGPs make clear that the responsibility of business to respect human rights requires businesses to respect at a minimum those rights and principles set out in the *International Bill of Human Rights* and the ILO's *Declaration on Fundamental Principles and Rights at Work*. The UNGPs stress that businesses should consider additional standards defined in international treaties for the protection of the rights of particularly vulnerable groups or individuals such as indigenous people or migrants where relevant.<sup>49</sup> However most HRDD laws enacted to date are highly selective with respect to the human rights they cover. The Australian, US, and UK models are the most restrictive as they are concerned exclusively with conduct that constitutes 'modern slavery'. Even the proposed EU Directive, while covering a far broader range of human rights, still departs from the UNGPs' all-encompassing approach by listing specific articles and provisions of international conventions and agreements that it covers. Indeed, the scope of human rights covered has reduced as the proposal has progressed through the EU system. By

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46 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, Princ. 14, U.N. Doc. HR/PUB/11/04 (2011).

47 See also Jeffery Vogt, Ruwan Subasinghe & Paapa Danquah, *A Missed Opportunity to Improve Workers' Rights in Global Supply Chains*, OPINIO JURIS (Mar. 18, 2022), <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>.

48 We are grateful to Karen Batt, State Secretary, as well as Madeline Hince and Sarah Kopij of the CPSU SPSF Group Victoria Branch, Australia, for raising this point with us, private correspondence, September 2022.

49 United Nations Human Rights, UN Guiding Principles on Business and Human Rights, Princ. 12, U.N. Doc. HR/PUB/11/04 (2011).



so doing, the proposed EU Directive not only leaves out fundamental rights and standards, but also restricts the scope of business-related human rights harms to a limited list that was set in a specific context and time. We, therefore, join other commentators in recommending the adoption of an inclusive and all-encompassing approach regarding the coverage of human rights.<sup>50</sup>

Most importantly from the perspective of this report, labour rights should be a mandatory aspect of HRDD. For instance, there should be no HRDD plan that does not include as salient labour rights risks the International Labour Organisation's five fundamental principles and rights at work.<sup>51</sup> All companies should have a positive duty to, at a minimum, address freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment.<sup>52</sup> Their performance against these fundamental principles and rights at work should also be assessed in statements and monitoring.

### Scope of due diligence requirements

One of the most valuable contributions of HRDD as articulated in the UNGPs is its capacity to compel entities to consider their connections to adverse human rights impacts beyond their own operations, to their subsidiaries and upstream and downstream supply chains. However, many mHRDD laws are significantly curtailing this international standard by limiting the obligation on entities to conduct HRDD on their own operations, subsidiaries, and those with whom they have certain relationships.<sup>53</sup> This approach thus leaves out of the due diligence process all fluctuating, short-term, informal, and home-based subcontracting, common to the lower tiers of supply chains where human rights are often most severely impacted.<sup>54</sup> mHRDD laws should adopt an approach to the scope of due diligence obligations that is consistent with UN and OECD standards.

## Transparency and traceability of supply chains

Experience has shown that one of the most powerful tools in transnational labour organising is the ability of workers in a supply chain to bring claims against companies in that supply chain who wield significant power but may be contractually and geographically distant. Successful campaigns of this type include the public and moral claims made by Indonesian footwear workers against Nike and Adidas, for instance. Generally, however, such claims are not possible because it is not known to whom the goods that workers are producing are being supplied. Organising workers along supply chains requires a systemic look at how and where value chains operate.<sup>55</sup> Given the prominence of branding on footwear, such claims are relatively straight-forward from the perspective of pinpointing the ultimate

50 UN High Commissioner for Human Rights, OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, (May 23, 2022), <https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr.pdf>; EUROPEAN COALITION FOR CORPORATE JUSTICE, EUROPEAN COMMISSION'S PROPOSAL FOR A DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE: A COMPREHENSIVE ANALYSIS, (Brussels: ECCJ, 2022), <https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf> [https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr\\_0.pdf](https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr_0.pdf).

51 We are grateful to Jeff Vogt for stressing the importance of this point: Jeff Vogt, Director for the Solidarity Center's Rule of Law department, private correspondence, September 2022.

52 ILO, INTERNATIONAL LABOUR ORGANISATION DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, <https://www.ilo.org/declaration/lang-en/index.htm>.

53 See, for example, Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 62, art. 1, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

54 See also SHIFT, THE EU COMMISSION'S PROPOSAL FOR A CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE: SHIFT'S ANALYSIS (New York: Shift Project, 2022), available at: <https://shiftproject.org/resource/eu-csddd-proposal/shifts-analysis/>.

55 MICHAEL FICHTER, ORGANISING IN AND ALONG VALUE CHAINS: WHAT DOES IT MEAN FOR TRADE UNIONS? (Berlin: Friedrich-Ebert-Stiftung, 2015), available at: <https://library.fes.de/pdf-files/iez/11560.pdf>.

buyer. Claims of this type are far more difficult in relation to workers picking cotton or children mining cobalt. It is imperative, then, that businesses are transparent about where they source high risk goods and services, even in cases where there are large numbers of entities in their supply chain.<sup>56</sup>

HRDD legislation should require companies to trace their supply chains and make that information available publicly. Companies should be required to make diligent efforts to trace the entirety of the supply chain where the risk of human rights abuse is greatest. For instance, in the diamond industry, it is imperative that companies trace their supply chains to mines rather than to wholesale retailers. Where the job of tracing the supply chain is considerable, companies are advised to select the highest risk aspects of their inputs and trace those first. In recognition of the differences between industries, general HRDD legislation may be drafted to provide scope for subsidiary regulations, or agreements between social partners and the regulator, regarding the required level of transparency in specific industries.

HRDD laws have so far failed to secure adequate corporate transparency regarding supply chains. Companies are tending to report in general terms: for example, on the main countries from which services or goods are supplied. This information is not useful for workers organisations, as it does not allow them to check the validity of claims about the sources of goods and services, or to link worker organisations in the country of production with those in the country in which the lead firm is domiciled.

### **Worker engagement in HRDD**

Proactive and meaningful stakeholder engagement occupies a central and crucial place in human rights due diligence.<sup>57</sup> Yet mHRDD laws tend to pay only lip-service to such engagement and fail to adequately put in place requirements and mechanisms for such engagement to take place on a regular basis. This significant omission risks further privatising human rights due diligence and fuelling an already burgeoning ‘human rights auditing’ industry, despite persisting evidence to the effect that such prevailing models of social auditing are ineffective.<sup>58</sup> This approach also renders workers passive victims of rights abuses.

### **Enforceable rights to consultation**

We propose that far stronger requirements should be put in place in relation to stakeholder consultation and involvement in due diligence. Mandatory HRRDD legislation should facilitate the engagement of workers in all stages of the due diligence process, from identifying and mitigating risks, to monitoring, and to seeking remediation through grievance mechanisms. To be meaningful and effective, the obligation to consult with workers and their representatives must be made explicit and enforceable. It

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56 See also Jeffery Vogt, Ruwan Subasinghe & Paapa Danquah, *A Missed Opportunity to Improve Workers’ Rights in Global Supply Chains*, OPINIO JURIS (Mar. 18, 2022), <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>.

57 The OHCHR defines stakeholder engagement in this context as “an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches”. OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 8, U.N. Doc. HR/PUB/12/02 (2012).

58 Justin Nolan & Nana Frishling, *Human Rights Due Diligence and the (Over) Reliance on Social Auditing in Supply Chains*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 108 (eds. Surya Deva and David Birchall, UK: Edward Elgar Publishing, 2020); Chara De Lacey, *Who Audits the Auditor?: Shaping Legal Accountability Strategies to Redress Social Audit Failings*, BUS. & HUM. RTS. RES. CTR. (Mar. 30, 2021), <https://www.business-humanrights.org/en/blog/who-audits-the-auditor-shaping-legal-accountability-strategies-to-redress-social-audit-failings/>.

should not be a matter of managerial prerogative or discretion.<sup>59</sup> Consultation should be with unions and recognised representative collective organisations from throughout the supply chain, not directly with workers selected by the company. Only in cases of workplaces in which there are no such bodies should alternative worker voice mechanisms be established.<sup>60</sup>

Such a worker-driven approach to HRDD is premised on the recognition that workers have the most relevant knowledge regarding violations of their rights and the effective ways to prevent them. To uncover adequate information regarding systemic human and labour rights breaches throughout the supply chain, companies must undertake independent, robust, and rigorous monitoring and assessment that engages on a regular basis with workers at the lowest tiers of the supply chain, unions, and other informed NGOs. Consultation with unions from levels of the supply chain with the highest risk profile is particularly vital. Workers at all levels of the supply chain must also be provided with processes and mechanisms to enable them to report on conditions they face so that companies can assess and make changes to their practices.<sup>61</sup> This includes avenues through which to challenge the adequacy of company HRDD efforts. We recommend that national legislation mandate collaboration with unions and genuine worker representative organisations throughout supply chains as evidence of HRDD.

## Promotion of worker-led binding and enforceable agreements

In addition to providing meaningful and enforceable avenues for worker engagement in HRDD processes, mHRDD laws should provide for the formation of worker-led binding and enforceable agreements that include consequences for suppliers and brands that violate minimum standards. It is our view that no ideal model for worker engagement across supply chains yet exists. However, there are examples of agreements or initiatives in which workers and worker organisations are the driving force (as creators, monitors, and enforcers) that have had a positive impact on worker wages and working conditions.<sup>62</sup> We discuss this model in more detail later in this report.

Some mHRDD laws recognise a role for multi-stakeholder agreements. The most robust of these models to date is the Netherland's Child Labour Due Diligence Act. This law encourages companies to participate in International Responsible Business Conduct (IRBC) agreements. Sectoral roundtables are set up by the Dutch government to create multi-stakeholder agreements promoting international responsible business in each sector. In the agreement, the parties identify the problems that arise in the sector.

59 The EU proposal refers extensively to workers' engagement at different stages of HRDD but could be strengthened to ensure that such engagement is mandatory. For example, while article 6(4) instructs businesses to consult with workers in the identification stage (where relevant), it still leaves a large room of discretion to the company. Other sections propose the involvement of workers in 7(2)(a) the prevention stage; 8(3)(b) bringing actual adverse impacts to an end; 10(1) monitoring; 12 the Commission adaptation of voluntary model contractual clauses; as well as articles 13 and 26: Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 62, art. 1, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

60 We are indebted to Ami Vaturi, Founder and Co-general Secretary of the Israeli union, Koach La'Ovdim (Power to the Workers), for bringing our attention to the necessity that consultation be with organised bodies, private correspondence, September 2022.

61 *What is Worker-Driven Social Responsibility?*, WSR NETWORK, (April 26, 2017), [https://wsr-network.org/wp-content/uploads/2017/10/What\\_is\\_WSR\\_web.pdf](https://wsr-network.org/wp-content/uploads/2017/10/What_is_WSR_web.pdf).

62 James Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, in TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHALLENGES 351-176 (eds. Joanna Howe and Rosemary Owens, Oxford: Hart Publishing, 2016); Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497 (2017); Juliane Reinecke & Jimmy Donaghey, *Towards Worker-Driven Supply Chain Governance: Developing Decent Work Through Democratic Worker Participation*, 57 J. SUPPLY CHAIN MGMT. 14 (2021); Aaron Gladstone, *Worker Driven Social Responsibility Agreements: A New Future in Labor Rights Protections*, 44 FORDHAM INT'L L. J. 549 (2020); Fabiola Mieres & Siobhan McGrath, *Ripe to be Heard: Worker Voice in the Fair Food Program*, 160 INT'L LAB. REV. 631 (2021).

They then describe how they intend to prevent abuses, for example exploitation, and what each of the parties will do to work towards that aim.<sup>63</sup> The organisations and businesses that sign the agreement commit to complying with these arrangements, with varying enforceability.<sup>64</sup> Perhaps the strongest of these agreements was the Dutch Agreement on Sustainable Garments and Textile that ran for 5.5 years, until the 31st of December 2021.<sup>65</sup> The agreement's supervisory group included representatives from garment companies, civil society, unions, and government, and the agreement was enforceable.

While most European HRDD legislation mandates some form of stakeholder engagement, we recommend engagement that leads to enforceable agreements with legitimate worker organisations. Article 14 of the proposed EU Directive requires the Member States and Commission to provide accompanying measures that involve actors along global value chains that are indirectly impacted by the obligations of the Directive. Such support may include the facilitation of joint stakeholder initiatives. This provision further clarifies that companies may rely on industry schemes and multi-stakeholder initiatives to support the implementation of due diligence and that the Commission, in collaboration with Member States, may issue guidance for assessing the fitness of such schemes. We recommend that the requirements for worker engagement could be strengthened throughout the proposed EU Directive.

Mandated worker engagement might take various forms. For example, it could take the form of works councils, based on the German model. For companies with a global scope, such a works council would include representatives from the country in which the company is domiciled, international union confederations or unions representing workers in key production areas.<sup>66</sup> In other jurisdictions, companies might be part of sector-wide agreements such as those seen in South Africa or Australia.<sup>67</sup> An additional model is the Wage Boards which were prominent features of industrial relations systems in the early 20<sup>th</sup> century, and are still effective regulators of non-standard work in India (as seen in the Mathadi Boards).<sup>68</sup> Such agreements will take different forms depending on the industrial relations traditions of the country. What is vital is that such agreements are enforceable, involve legitimate worker representatives from throughout the relevant value chains, and are responsive to the unique risk profiles of the industry.

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63 Martijn Scheltema, *The Dutch International Responsible Business Conduct Agreements: Effective Initiatives?*, 12 ERASMUS L. REV. 6 (2019); Council of Europe, *International Responsible Business Conduct (IRBC) Agreements*, COUNCIL OF EUROPE (2014), <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/-/international-responsible-business-conduct-agreements-irbc>.

64 *International Responsible Business Conduct: background*, INTERNATIONAL RBC, <https://www.imvoconvenanten.nl/en/why/achtergrond>.

65 The Dutch Agreement on Sustainable Garments and Textile can be found here: *About this Agreement*, INTERNATIONAL RBC, <https://www.imvoconvenanten.nl/en/garments-textile/agreement>.

66 Lone Riisgaard, *Global Value Chains, Labor Organization and Private Social Standards: Lessons from East African Cut Flower Industries*, 37 WORLD DEV. 326 (2009); Lone Riisgaard & Nikolaus Hammer, *Prospects for Labour in Global Value Chains: Labour Standards in the Cut Flower and Banana Industries*, 49 BRIT. J. INDUS. REL. 168 (2011).

67 Alex M. Mashilo, *Collective Bargaining During and After Apartheid: Economic and Social Upgrading in the Automobile Global Value Chains in South Africa*, in ECONOMIC AND SOCIAL UPGRADING IN GLOBAL VALUE CHAINS 227 (eds. Christina Teipen, et al., Cham: Palgrave Macmillan, 2022); Hlalele Matebese & Cookie M. Govender, *Exploring Global Unionism to Inform South African ICT Sector Union Strategy*, 16 AFR. J. BUS. MGMT. 117 (2022); Jim Stanford, *A Turning Point for Labour Market Policy in Australia*, 30 ECON. & LAB. REL. REV. 177 (2019).

68 Shelley Marshall, *How Does Institutional Change Occur? Two Strategies for Reforming the Scope of Labour Law*, 43 INDUS. L. J. 286, 304 (2014); SHELLEY MARSHALL, *LIVING WAGE: REGULATORY SOLUTIONS TO INFORMAL AND PRECARIOUS WORK IN GLOBAL SUPPLY CHAINS* (Oxford: Oxford Univ. Press 2019)

## Positive and non-delegable duties to respect human rights

Mandatory HRDD should place primary duties on entities to respect human rights and establish due diligence as a standard of conduct through which this is to be achieved. Simply requiring entities to fulfil certain procedural due diligence requirements without holding them to account for the quality of due diligence undertaken is insufficient and inadequate. *A company's HRDD must be directed towards, and evaluated against, a clear and objective standard or outcome.*<sup>69</sup> As many have already pointed out, the notion of a law that requires internal processes to be directed at a substantive goal and provides for the assessment of the adequacy of processes adopted is by no means novel.<sup>70</sup> These types of due diligence laws are found in a range of areas of civil and criminal law in multiple jurisdictions.<sup>71</sup> In this regard, we support the wording of the proposed EU Directive where it requires companies to bring actual adverse impacts to an end (Article 8) and recommend that such positive duties be clearly and unequivocally stated in HRDD legislation.

HRDD laws should make clear that entities (as duty holders) cannot contract out of their general responsibility to respect human rights in their own operations and supply chains. Such safeguards are not unfamiliar to business: they are found, for example, in health and safety laws in jurisdictions including Australia.<sup>72</sup> To clarify, such a clause would not prevent entities from 'cascading' responsibilities in a supply chain but would make clear that any contractual term purporting to transfer responsibility from the original entity covered under the law to another is void.

It is important that safeguards be put in place to ensure entities do not unreasonably shift compliance costs to business partners (e.g., by imposing a requirement on contracting entities to pay for audits) as this may only increase cost pressures on suppliers and result in further exploitation of workers. We note that the proposed EU Directive anticipates this problem associated with 'contractual cascading' in the context of companies taking appropriate measures to prevent or minimise adverse human rights impacts, and to bring actual adverse impacts to an end (see Articles 7(2)-(4) and 8(3)-(9)). The proposed EU Directive requires that where relevant contractual assurances are obtained from, or a contract is entered into, with a small or medium-sized enterprise (SME), the terms used shall be fair, reasonable, and non-discriminatory. It further requires that where measures to verify compliance are carried out in relation to SMEs, the company shall bear the cost of the independent third-party verification. We support these measures, but believe stronger safeguards are necessary to ensure responsibility for human rights violations remain with lead firms – the most powerful actors in the supply chain. It is equally important to ensure entities are not able to 'outsource' their HRDD responsibilities to third parties (such as MSIs), as appears to be permitted by the proposed EU Directive (arts. 7, 8, and 14). These types of initiatives may have a role in an entity's HRDD but participation in such an initiative should not of itself absolve an entity of its responsibilities.<sup>73</sup>

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69 See further Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELB. J. INT'L L. 221 (2019)

70 Joseph Wilde-Ramsing, Ben Vanpeperstraete & David Hachfeld, *Respecting Rights and Ticking Boxes: Legislating Human Rights Due Diligence*, SOMO (Jan. 25, 2022), <https://www.somo.nl/respecting-rights-or-ticking-boxes/#:~:text=Momentum%20to%20enact%20mandatory%20human,access%20to%20justice%20and%20remedy>

71 See OLIVIER DE SCHUTTER ET AL., *HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES* (2012), [https://en.frankbold.org/sites/default/files/publikace/human\\_rights\\_due\\_diligence-the\\_role\\_of\\_states.pdf](https://en.frankbold.org/sites/default/files/publikace/human_rights_due_diligence-the_role_of_states.pdf).

72 Safe Work Australia, *Model Work Health and Safety Bill 2022*, s 272 (Austl.).

73 While MSIs may be impactful partners in safeguarding workers' rights in various contexts, research suggests MSIs "employ inadequate methods to detect human rights abuses and uphold standards"; see e.g. MSI INTEGRITY, *NOT FIT-FOR-PURPOSE: THE GRAND EXPERIMENT OF MULTI-STAKEHOLDER INITIATIVES IN CORPORATE ACCOUNTABILITY, HUMAN RIGHTS AND GLOBAL GOVERNANCE: SUMMARY REPORT* (MSI Integrity, 2020), <https://www.msi-integrity.org/not-fit-for-purpose/>.

## Civil Liability

HRDD laws are primarily concerned with preventing harm to workers and others through identifying and addressing risks of adverse human rights impacts. However, they must also facilitate access to remedy where harm has occurred. Mandatory HRDD laws must create clear causes of action—under tort and contract law—for workers and consumers against those responsible for human rights breaches, and impose significant state sanctions for violations. Inspection and enforcement should not be entrusted to corporate-funded private auditing bodies or to the consumers’ ‘power of the purse’ alone.<sup>74</sup> We support the proposed EU Directive where it states that “[i]n order to ensure effective enforcement of national measures implementing this Directive, Member States should provide for dissuasive, proportionate, and effective sanctions for infringements of those measures”.<sup>75</sup> We encourage the development of sanctions that are accessible to workers and proportionate to the severity of breaches. Thus far, very few claims have been brought against companies in jurisdictions where such claims are possible, e.g., under the French Corporate Duty of Vigilance Law. Arguably, a key reason for this is that the burden to prove corporate responsibility is placed on civil society plaintiffs and private entities that often lack resources and do not have sufficient access to information to substantiate their claims. It is imperative, then, that supervisory authorities be empowered to investigate breaches of human rights, request information from corporations and suppliers, and impose administrative sanctions, including pecuniary sanctions.

We argue that the burden of proof should be shared between the plaintiff/claimant and the defendant for claims of liability for breaches of human rights. The burden of proving fault may be ‘relaxed’ or even ‘mitigated’ through the reversal of the burden of proof. There are many instances in which a plaintiff/complainant is required to establish a prima facie case of harm, and then the burden shifts to the respondent/defendant. This reversal of the burden of proof is common, for example, in torts law, especially in cases of liability based on fault, as well as in employment law where it is understood that workers have limited access to information in relation to their employers. For example, under the Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), Dutch courts may use their discretionary powers to reverse the onus of proof.<sup>76</sup> It is also common in particularly grave criminal offenses,<sup>77</sup> and, as noted above, in employment law.<sup>78</sup> Under anti-discrimination law in both Canada and the EU, the complainant must establish a prima facie case of discrimination, and then the burden shifts to the respondent to establish either that discrimination did not occur or that there is a defence.<sup>79</sup> To establish a prima facie case of discrimination, complainants must adduce facts that are adequate and sufficient to raise a suspicion of discrimination. This lower evidentiary threshold for the complainant and subsequent shift in burden of proof to the respondent is justified on the ground that the respondent, and not the complainant, has access to the requisite information and that requiring

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74 Hila Shamir and Tamar Barkay, *Corporate Responsibility, in An ALTERNATIVE ANTI-TRAFFICKING ACTION PLAN: A PROPOSED MODEL BASED ON A LABOR APPROACH TO TRAFFICKING* 113-124 (eds. Hila Shamir and Maayan Niezna, Tel Aviv University: TraffLab Research Group Policy Paper, 2022).

75 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 54, at para. 54, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

76 Ivo Giesen, *The Reversal of the Burden of Proof in the Principles of European Tort Law A Comparison with Dutch Tort Law and Civil Procedure Rules*, 6 *UTRECHT L. REV.* 22 (2010).

77 For example, under the Australian *Criminal Code Act 1995*, the defendant bears a legal burden in relation to certain defences to sexual offences against children outside Australia.

78 For example, s 361 of the Australian *Fair Work Act 2009* contains a provision which reverses the traditional burden of proof in civil cases, by effectively placing the onus of disproving an allegation of a breach of the general protections provisions of the Act (adverse action) upon the entity or person alleged to have breached them.

79 *Moore v British Columbia (Education)*, [2012] 3 S.C.R 360 (Can.); Julie Rengelheim, *The Burden of Proof in Antidiscrimination Proceedings. A Focus on Belgium, France and Ireland*, 2 *EUR. EQUAL. L. REV.* 49 (2019), Available at SSRN: <https://ssrn.com/abstract=3498346>.

the complainant to establish discrimination on a balance of probabilities would be too high of a legal hurdle to address discriminatory practice. In this way, the burden is shared between the parties.

We believe this sharing of the burden of proof is appropriate for a broader range of human rights claims in cases where the complainant lacks access to information or where a pattern of systematic violations has been established.<sup>80</sup> This type of sharing of the burden is also essential if mHRDD legislation is to be effective. Such a provision is justified because both the nature of the breaches of human rights, and the vulnerability of those who suffer human rights breaches, make it very difficult to establish responsibility. Supervisory authorities should provide clear guidance as to what type of evidence is required by claimants to lodge a claim. In particular, the defendant should prove that they do not bear responsibility for the breach. In most cases, and in light of the complexity of supply chain relations, it will be more practical for the defendant to prove this fact than for the claimant to disprove it.

The fact that the entity has an HRDD plan or processes in place should not be sufficient to discharge the entity's general duty to respect human rights. We stress, again, that mHRDD legislation has become overly process-based, rather than rights- and duties-based. Under any viable doctrine of responsibility, contribution to a breach of human rights can only be rebutted by evidence of effective action to stop the breach.

Mandatory HRDD laws must address some of the legal hurdles that have long rendered transnational labour litigation ineffective. The difficulties created by requiring workers to bring action against companies in the territory where the harm occurred are well known: domestic laws are often too lax, local companies (subsidiaries or suppliers) are often unable to compensate the victims, and, most importantly, the role of agents higher up in the global value chain who exert power over those agents down the value chain is ignored. *To date, there is not a single case decided, from beginning to end, on its merits, that holds a lead firm headquartered in the Global North responsible for the labour rights violations committed by its suppliers and subsidiaries located in the Global South.*<sup>81</sup>

Three organizing concepts of private international law – competence (jurisdiction), comity, and convenience – bear little resemblance to the geographies of production and exploitation.<sup>82</sup> Rules, ranging from limitation periods through to substantive formulations of tort doctrines, differ across legal systems. These principles of private international law are structured in ways that benefit lead firms within the supply chain. Since transnational supply chains span multiple legal systems, conflict-of-law rules give dominant firms substantial leeway in picking and choosing among the legal rules of different jurisdictions.<sup>83</sup> Moreover, courts tend to defer to contractual (choice of law) clauses specifying which jurisdiction's rules should govern disputes arising under the contract, a choice that typically favours the party with the most power to set the terms of the contract.

The transnational aspect of litigation brought by workers for harms suffered as a result of their employment in globally supply chains often effectively constitutes a sufficient basis alone upon which to dismiss a

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80 Christopher M. Roberts, *Reversing the Burden of Proof Before Human Rights Bodies*, 25 INTERNATIONAL J. HUM. RTS. 1682 (2022).

81 Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L. Q. 789 (2020); ALEJANDRO GARCÍA ESTEBAN AND CHRISTOPHER PATZ, *Suing Goliath* (Brussels: European Coalition for Corporate Justice, 2021), <https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf>; Judy Fudge and Guy Mundlak, *Peeling the Onion: On Choices Judges Make in Transnational Labour Litigation in SOCIAL JUSTICE AND THE WORLD OF WORK: POSSIBLE GLOBAL FUTURE* 249-260 (eds. Brian Langille and Anne Trebilcock, Oxford: Hart International, 2023).

82 Upendra Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law*, 23 INDIANA J. GLOB. LEGAL STUD. 15 (2016).

83 Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality – Core Themes*, 11 ACCT., ECON., & L.: CONVIVIVUM 1-7, 5-6 (2021).

case, and this result is not a mere coincidence. Lead firms' choice of where to source production often rests, inter alia, on the legal system and its benefits to the lead firm. For this reason, states devise legal rules and processes that accommodate the interests of the lead firms to attract their business. Thus, the effect of respecting comity is to distance the dispute to places where the interests of the host state and the transnational corporation coincide.

To be truly effective, mandatory due diligence legislation must be accompanied by a robust liability regime, with an adequate limitation period, and strong enforcement measures that ensure accountability for failure to perform due diligence, as well as measures to provide access to justice and remedy for victims of human and labour rights abuses. It is critical that victims be provided with access to effective remedies in the state in which the lead firm is domiciled. Collective redress mechanisms, such as class actions, should be available to the claimants. Courts in home states of lead firms should have jurisdiction over legal actions under this law, regardless of whether related proceedings against an entity's subsidiary, supplier or subcontractor are brought in the courts of a third state. A foreign ruling against the liability of a subsidiary, supplier or subcontractor should not prevent home country courts from determining the liability of an entity for the same harm.

We also propose that it ought to be possible to bring joint claims against responsible entities. This might include "big suppliers" who may have "hidden power" in transnational supply chains.<sup>84</sup> It may also include monitoring bodies that inaccurately certify workplaces free of human rights breaches. Here, then, we go further than the proposed EU Directive where it states that "the civil liability of a company for damages arising due to its failure to carry out adequate due diligence should be without prejudice to civil liability of its subsidiaries or the respective civil liability of direct and indirect business partners in the chain of activities".<sup>85</sup>

We therefore argue for the development of joint and vicarious liability, with responsibility being distributed according to contribution to the breach of human rights amongst players in the supply chain. The method found in the Australian Textile Clothing and Footwear (TCF) outworker provisions of the labour code is one technique.<sup>86</sup> Another example is the Californian 'brother's keeper' law that imposes liability for labour code violations on persons who enter "into a contract or agreement for labor or services" . . . "where the contract agreement does not include sufficient funds to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided".<sup>87</sup> The State of New York takes a similar approach, imposing liability in cases in which the manufacturer knew or should have known of the contractor's violations.<sup>88</sup> Under Israeli law, service purchasers may be liable for workers' rights violations down the labour supply chain in certain sectors if they have not put in place contractual and institutional measures to prevent such violations and did not act when informed of them.<sup>89</sup> In several Canadian provinces, client firms have been made jointly and severally liable with recruitment agencies for illegal recruitment fees paid by

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84 Trang (Mae) Nguyen, *Hidden Power in Global Supply Chains*, HARV. INT'L L. J. (forthcoming 2023) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3878596](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3878596).

85 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 57, at para. 59, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

86 *Fair Work Act 2009* (Austl.).

87 CAL. LAB. CODE, § 2810(a).

88 N.Y. LAB. LAW, § 345a(1)). See further Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMPAR. LAB. L. & POL'Y J. 1 (2013).

89 The Act to Enhanced Enforcement of the Labor Law 2011, SH 2326 62 (Isr.), [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_isn=94394&p\\_lang=en](https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=94394&p_lang=en); See also Guy Davidov, *Compliance with and Enforcement of Labour Laws: An Overview and Some Timely Challenges*, SOZIALES RECHT 111 (June 2021).



migrant workers.<sup>90</sup> Moreover, in the province of Ontario, where several actors have caused harm, they are jointly and severally liable to the injured party for the harm caused.<sup>91</sup> These examples show that joint and vicarious liability can be achieved by various means.

More broadly, the expansion that has occurred in the area of torts in a number of jurisdictions points to an increasing willingness of courts to recognise a duty of care where a third party wrongfully harms another person, even absent a special relationship.<sup>92</sup> Under the principle of ‘enabling torts’ an actor who ‘sets the stage’ for a third party’s bad acts with a foreseeable expectation that another person will suffer harm is responsible alongside the primary wrongdoer if that harm in fact occurs.<sup>93</sup>

Mandatory HRDD laws should facilitate access to range of appropriate remedies, including compensation, injunctions, and enforceable undertakings. Guidance should be provided to clarify how compensation is to be calculated in the case of joint contribution.<sup>94</sup> We propose that, in addition to remediation, findings of liability should also require corporations to commit to the implementation of specific changes or outcomes in their HRDD, and these requirements should be monitored by an appropriate supervisory body. Stakeholders, including worker organisations, should be able to bring evidence of failures to implement the due diligence plan to the attention of the supervising body and the court, under time frames provided by the court.

We stress the importance, also, of the addition of provisions regarding individual liability of corporate officeholders in case of violations. Such provisions, often referred to as means of ‘piercing the corporate veil’, are common across the world in relation to breaches of corporate law and labour laws, and there is no reason why mHRDD should be weaker in this regard. In the UK, for example, a corporate director can be found secondarily liable under the *Health and Safety at Work Act* where an offence by a company is committed with their consent or connivance or is attributable to their neglect.<sup>95</sup> Going beyond civil liability, under Israel’s Act to Improve the Enforcement of Labour Laws, corporate officeholders can be found criminally liable when their firm purchases services in certain sectors and provides subcontractors with low per-hour compensation that does not allow them to pay the workers minimum wage and additional rights and make some minimal profit.<sup>96</sup> The Proposed EU Directive places responsibility for due diligence with company directors, and specifies that directors should “adapt the corporate strategy to actual and potential impacts identified and any due diligence measures taken”.<sup>97</sup> However, it stops short of imposing personal liability on corporate officeholders. The prospect of individual liability for corporate officeholders would help ensure that mHRDD laws are taken sufficiently seriously.

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90 FAY FARADAY, *PROFITING FROM THE PRECARIOUS: HOW RECRUITMENT PRACTICES EXPLOIT MIGRANT WORKERS* (Toronto: George Cedric Metcalf Charitable Foundation, 2014) at <https://metcalffoundation.com/wp-content/uploads/2014/04/Profiting-from-the-Precarious.pdf>.

91 Negligence Act, R.S.O. c. N. 1, s.1. 1990 (Can.), The defendant who fully satisfies the judgment has the right of contribution from the other liable parties based on the extent of reasonability for the plaintiff’s loss.

92 For examples from the US, see KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW*, (4th ed. New York, N.Y.: Foundation Press: Thomson Reuters, 2012); Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (2000).

93 Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (2000).

94 We are grateful to Jeff Vogt for stressing the importance of this point: Jeff Vogt, Director for the Solidarity Center’s Rule of Law department, private correspondence, September 2022.

95 Health and Safety at Work etc. Act 1974 § 37 (Eng.).

96 See Guy Davidov, *Indirect Employment: Should Lead Companies be Liable*, 37 COMPAR. LAB. L. & POL’Y J. 5 (2015).

97 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 59, at para. 64, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

## Monitoring and enforcement

Mandatory HRDD legislation should require companies to have effective grievance mechanisms in place, both as a means of identifying labour rights abuses taking place in their supply chains and ensuring workers have access to remedy.<sup>98</sup> Requirements concerning entity-based grievance mechanisms must be drafted to ensure that they do not simply result in ‘more process’ with no meaningful outcomes.<sup>99</sup> Whereas the proposed EU Directive states that “[c]ompanies should establish a fair, accessible, and transparent procedure for dealing with those complaints and inform workers, trade unions, and other workers’ representatives, where relevant, about such procedures”,<sup>100</sup> we argue that it is imperative that workers’ organisations be involved in designing these mechanisms, and in determining how these mechanisms may be accessed, the languages that information is provided in, and the procedures for accepting and determining complaints. Companies should be required to disclose data on the incidence of grievances lodged under such mechanisms, as well as on outcomes of these processes.

### State-based complaints and enforcement mechanisms

Accessible and effective state-based oversight and supervisory mechanisms are critical to ensuring HRDD laws deliver meaningful outcomes for workers. As noted above, the absence of such supporting infrastructure has been a key driver of poor outcomes of these laws to date. HRDD laws should provide for monitoring of entities’ HRDD obligations by a competent and adequately resourced state body. Supervisory authorities must be properly funded and empowered to conduct investigations. Here, we support the requirement in the proposed EU Directive that “Member States should ensure appropriate financing of the competent authority. They should be entitled to carry out investigations, on their own initiative or based on substantiated concerns raised under this Directive”.<sup>101</sup> Supervisory authorities must be empowered to impose a range of sanctions on companies found to be non-compliant with HRDD laws, including for example, administrative penalties and exclusion from public procurement opportunities.

State-based efforts to monitor entity compliance with their obligations under HRDD laws must be complemented by mechanisms through which workers and their representatives can bring complaints concerning non-compliance.

We propose that the types of remediation provided by state-based complaints mechanisms should include both compensation for workers, and agreements for further preventative action to address the causes of harms to workers. The Accord on Fire and Building Safety in Bangladesh provides one possible model on how this type of approach could be implemented.

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98 For a trade union perspective on workplace grievance mechanisms in HRDD, see International Trade Union Confederation (ITUC), *Towards Mandatory Due Diligence in Global Supply Chains*, (June 19, 2020), [https://www.ituc-csi.org/IMG/pdf/duediligence\\_global\\_supplychains\\_en.pdf](https://www.ituc-csi.org/IMG/pdf/duediligence_global_supplychains_en.pdf).

99 Jeffery Vogt, Ruwan Subasinghe & Paapa Danquah, *A Missed Opportunity to Improve Workers’ Rights in Global Supply Chains*, OPINIO JURIS, (Mar. 18, 2022), <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>.

100 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 47, at para. 42, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

101 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 53, at para. 53, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

Complaints mechanisms must be made accessible to workers. Complaints mechanisms must both protect workers from possible retaliation and broadly represent worker experience.<sup>102</sup> Labour laws should be drawn upon when designing appropriate anti-retaliation standards. More importantly, however, effective enforcement typically requires some form of institutional representation for workers. Collective representation through independent unions or workers councils with effective power could provide workers with protection from retaliation. Workers' collective organisation, irrespective of precise form, if governed by democratic norms of representation, accountability, and worker agency, also enables workers to bring complaints. It is critical that HRDD legislation ensure companies respect workers' rights to freedom of association and collective bargaining throughout the supply chain.<sup>103</sup> Over the long term, such mechanisms depend upon collective organisation and, especially, on the ability of workers to organise beyond a single worksite and across sectors and borders, particularly in hyper-competitive, low-margin sectors marked by intense pressure on workers' wages.<sup>104</sup>

In sum, then, complaints mechanisms must be formed in consultation with workers, and be independent, democratic, transparent, legally binding, and enforceable with effective remedies.

## Supervisory authorities

The location of the government body, or supervisory authority, with responsibility for monitoring and enforcing mHRDD legislation influences how seriously the responsibility is taken and the regulatory and administrative approaches adopted.<sup>105</sup> Our research concerning human rights mechanisms shows that the expertise and quality of staff is highly correlated with the likelihood that breaches of human rights will be remediated.<sup>106</sup> Cross-border human rights breaches are especially complex, requiring high-level expertise and sensitivity.

Entities responsible for administering HRDD laws must have expertise in addressing worker-related problems, or they must be structured and empowered to access such expertise where relevant and necessary. Such entities must also be accountable for their own performance in promoting and administering the law. We note that this proposition is not supported by the proposed EU Directive, and is a failing of many existing HRDD laws. For example, assigning responsibility for Australian modern slavery legislation to the department of Home Affairs has greatly influenced investigation and enforcement tactics, leading to approaches involving the criminal sanctioning of human trafficking and smuggling, rather than labour-empowering approaches.

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102 International Trade Union Confederation (ITUC), *Towards Mandatory Due Diligence in Global Supply Chains*, (June 19, 2020), [https://www.ituc-csi.org/IMG/pdf/duediligence\\_global\\_supplychains\\_en.pdf](https://www.ituc-csi.org/IMG/pdf/duediligence_global_supplychains_en.pdf); RE:STRUCTURE LAB, FORCED LABOUR EVIDENCE BRIEF: DUE DILIGENCE AND TRANSPARENCY LEGISLATION (Sheffield: Sheffield, Stanford, and Yale Universities, 2021), [https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d71e46967f033bb694f6e5/1641487943126/ReStructureLab\\_DueDiligence\\_April2021\\_AW.pdf](https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d71e46967f033bb694f6e5/1641487943126/ReStructureLab_DueDiligence_April2021_AW.pdf).

103 It has also been suggested that businesses be encouraged to procure preferentially from countries that enforce freedom of association: Ami Vaturi, Founder and Co-general Secretary of the Israeli union Koach La'Ovdim (Power to the workers), private correspondence, September 2022.

104 RE:STRUCTURE LAB, FORCED LABOUR EVIDENCE BRIEF: LABOUR SHARE AND VALUE DISTRIBUTION (Sheffield: Sheffield, Stanford, and Yale Universities, 2021) at [https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d5d81de83cf8390ca5a915/1641404446025/ReStructureLab\\_LabourShareandValueDistribution\\_December2021.pdf](https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d5d81de83cf8390ca5a915/1641404446025/ReStructureLab_LabourShareandValueDistribution_December2021.pdf).

105 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 100, at art. 17, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>. conceives of a significant role for supervising authorities. "Each Member State shall designate one or more supervisory authorities to supervise compliance with the obligations laid down in national provisions adopted pursuant to Articles 6-11 and Article 15..."

106 See, for example, TIM CONNOR, ANNIE DELANEY, FIONA HAINES, KATE MACDONALD, & SHELLEY MARSHALL, *NON-JUDICIAL INTERVENTIONS IN BUSINESS AND HUMAN RIGHTS STRUGGLES: BEYOND INSTITUTIONAL DESIGN*, (Cambridge, UK: Cambridge University Press, forthcoming).

State supervisory bodies must be independent. We support the explanatory text to the proposed EU Directive, where it states that “supervisory authorities should be of a public nature, independent from the companies falling within the scope of this Directive or other market interests, and free of conflicts of interest”, as well as Articles 17 and 18 that set out the roles of supervisory authorities.<sup>107</sup> Having human rights mechanisms based in government agencies responsible for promoting trade and investment may lead to conflicts of interest and prejudice outcomes.<sup>108</sup> For example, if a complaint is brought against a company that is a government contractor, or the government is pursuing certain foreign policy aims or industry growth, this could lead to a conflict of interest.<sup>109</sup>

Government coordination with respect to the implementation of mHRDD legislation is imperative. Government bodies responsible for mHRDD laws can use their location within government to increase their leverage coordinating their actions across the institutions of trade, human rights, and corporate accountability in that country. For instance, a negative finding for a business in a complaints mechanism could be taken into consideration in relation to decisions concerning public procurement, trade, subsidies, and other types of assistance.

Cross-country coordination and support are also important in addressing breaches of human rights in transnational business activities. We are encouraged by the proposed EU Directive’s proposal for a European Network of Supervisory Authorities to be set up by the Commission, which anticipates that supervisory authorities would assist each other in performing their tasks and provide mutual assistance.<sup>110</sup> We also encourage extensive interaction between the government body responsible for mHRDD legislation and domestic legal institutions (i.e., the courts, human rights commissions, responsible government departments) within the countries in which human rights breaches occur. Distance from the place where the human rights grievance occurred could be overcome in a number of ways. This includes, for example:

- ▶ By requesting evidence from interested parties in the host country;
- ▶ By conducting investigations in the host country;
- ▶ By coordinating with relevant government and non-government agencies in the host country;
- ▶ By communicating determinations to stakeholders in the complaint beyond just those named in the complaint.

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107 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 53, at para. 53, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

108 EarthRights International, *OECD Guidelines Update: Substantive Improvements, Procedural Disappointments*, Press Release, May 25, 2011.

109 OECD Watch, *The OECD Guidelines for MNEs: Are they ‘fit for the job’?* (Media Release, June 2009) 7.

110 Council Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 2022 S.T. (15024) 55, at para. 55, <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf>.

# How does mHRDD fit with broader worker-centric approaches to improving human rights?

HRDD is one mechanism aimed at addressing the problem of poor human rights conditions in the operations and supply chains of businesses domiciled in rich countries. However, HRDD is not the only way to tackle this pressing problem. Indeed, there are many other approaches which can empower workers in supply chains and reduce the incidence of human rights breaches. We argue that, ideally, HRDD laws should be designed in such a way to complement and support these mechanisms. In this section of the report, we briefly discuss three alternative approaches and outline how HRDD laws could support and advance these models.

## Collective Bargaining and Protection for Unions within Supply Chains

In contrast to top-down state regulation, trade union organising combines regulatory capacity (the ability to regulate the labour market through collective agreements) with enforcement capacity (through litigation or collective action). It also facilitates the representation of workers' interests and promotes worker voice, helping to ensure that regulation is tailored and adapted to their needs. The voluntary premise of trade unions and their organisational capacity to represent workers and improve workers' working conditions create a promising prospect for their engagement in policymaking to address harmful employment practices and to improve the status of workers globally.

Regulatory initiatives that are the outcome of bargaining help empower workers in the Economic South and are often most effective in addressing human rights breaches where they occur. The importance of unions in representing workers points to the need for a more robust system of protections for workers' collective rights and for unions within supply chains. Studies show that while nearly all corporate codes of conduct include protections for workers' collective rights and unions, social audits often pay inadequate attention to policies regarding these rights and/or pay little attention to violations of freedom of association and collective bargaining.<sup>111</sup>

A key aspect of HRDD plans created by entities under mHRDD must therefore be to effectively protect the rights of freedom of association and collective bargaining without discrimination, and to require that suppliers permit workers to form and be part of unions. Such an element is absent from the proposed EU directive,<sup>112</sup> as well as other current and proposed HRDD laws.

## Sectoral and Multilateral Agreements

Sectoral and Framework/ Multilateral Agreements are key tools for addressing workers' human rights breaches in transnational supply chains. We recommend that they be connected to HRDD laws where possible.

Earlier in this report we noted the importance of sectoral agreements under the Netherlands' Child Labour Due Diligence Act. The law encourages companies to participate in IRBC agreements. Under this Act, the Dutch Government has established roundtables to facilitate multi-stakeholder agreements

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111 Sarosh Kuruvilla & Chunyun Li, *Freedom of Association and Collective Bargaining in Global Supply Chains: A Research Agenda*, 57 J. SUPPLY CHAIN MGMT. 43 (2021).

112 Jeffery Vogt, Ruwan Subasinghe and Paapa Danquah, *A Missed Opportunity to Improve Workers' Rights in Global Supply Chains*, OPINIO JURIS, (Mar. 18, 2022), <http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/>.

promoting international responsible business on a sectoral basis.<sup>113</sup> Such sectoral roundtables could be expanded to include features of bargaining councils. In South Africa, for example, a system of bargaining councils allows one or more employer organisations and one or more trade unions to form a council that may be regional or national in scope. Councils bargain collective agreements, prevent, and resolve disputes, run training schemes, establish funds, and make submissions on policy and legislation affecting their sector. The Minister of Labour may extend bargaining council agreements to all establishments in the sector covered.<sup>114</sup>

We recommend that such sectoral bodies include representatives of the state, trade unions, employers' organisations, and civil society organisations. Sectoral bodies should be responsible, firstly, for creating a framework for mandatory consultation not only on HRDD but also on other regulatory forces that impact human rights conditions including changes in migration programs, labour migration quotas, and desired policy on labour migration. They should then be charged with developing industry standards and agreements.

Agreements between global unions and transnational firms are also vitally important and can be understood as international corollaries to nation-based sectoral agreements. An excellent contemporary example is the Framework Agreement between IndustriALL Global Union and Inditex, the apparel giant, which was renewed in 2014.<sup>115</sup> This was the first agreement of its kind to cover an international retail supply chain.<sup>116</sup> Under the agreement, both parties undertake to collaborate to ensure the sustainable and long-term observance of all international labour standards across Inditex's operations, including suppliers.

There are opportunities to link sectoral and Framework Agreements to HRDD. Those parts of Framework Agreements that have been found to be particularly effective could be included in the prevention plans that are required of entities under some HRDD laws. Framework Agreements might also be negotiated in the settlement to liability claims under HRDD laws. It is imperative that relevant unions and worker organisations who represent workers in the supply chain are involved in such negotiations.

## Worker Driven Social Responsibility Agreements

A successful alternative to HRDD is Worker Driven Social Responsibility Agreements (referred to herein as WSR). In such agreements, workers, their direct employers (suppliers), and lead firm (purchasers) negotiate contracts or deeds stipulating that lead firms will only contract with suppliers that comply with basic labour standards. WSR creates direct contractual relations between workers or their representatives and lead firms, in a process of multi-party negotiation between lead firms, suppliers, and workers. The labour standards agenda is set by the workers themselves, and standards are strictly monitored and enforced by rigorous inspection bodies that are independent of corporations and suppliers and overseen by workers. Violations of rights lead to economic consequences, including suspension from

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113 MICHAEL J MORLEY ET AL., *GLOBAL INDUSTRIAL RELATIONS* (London: Routledge, 2006).

114 Kristin F. Bucher & Cecilia Elena Rouse, *Wage Effects of Unions and Industrial Councils in South Africa*, 54 *INDUS. & LAB. REL. REV.* 349, 351 (2001); Alex M. Mashilo, *Collective Bargaining During and After Apartheid: Economic and Social Upgrading in the Automobile Global Value Chains in South Africa*, in *ECONOMIC AND SOCIAL UPGRADING IN GLOBAL VALUE CHAINS* 227 (eds. Christina Teipen, et al., Cham: Palgrave Macmillan, 2022).

115 Agreement on the Implementation of International Labour Standards Throughout the Supply Chain of Inditex, signed by IndustriALL Global Union and Inditex, S.A, at July 8, 2014. <https://www.industriall-union.org/industriall-renews-agreement-with-worlds-largest-fashion-retailer>.

116 Frederick Mayer & John Pickles, *Re-embedding the Market: Global Apparel Value Chains, Governance and Decent Work*, in *TOWARDS BETTER WORK. ADVANCES IN LABOUR STUDIES* 17, 27 (eds. Arianna Rossi et al., London: Palgrave Macmillan, 2014).

the programme, and termination of contracts.<sup>117</sup> Some examples of this model are the Coalition of Immokalee Workers led by the Fair Food Program in the tomato fields of Florida (USA), the Accord on Fire and Building Safety in the Bangladeshi garment sector, and the Milk with Dignity programme led by the organisation Migrant Justice in the dairy sector in Vermont (USA). A more recent programme is the 2019 agreement in Lesotho's apparel industry. The latter represents an adaptation of a narrower example of the model because it is geared specifically to address sexual harassment and gender-based violence.<sup>118</sup>

In some ways, WSR is almost a mirror image approach to the one presented by HRDD laws that lack liability provisions. First, WSR is driven by bottom-up grass roots activism of workers and their communities, as well as consumers, and puts workers' voices and needs at its centre.<sup>119</sup> Second, WSR's key feature is an effective enforcement and monitoring mechanism, backed up by market consequences, in contrast with HRDD's soft law approach that lacks stringent enforcement mechanisms or sanctions. Third, WSR creates a clear set of labour rights obligations, that are informed and designed by workers' needs, unlike HRDD that so far makes no specific substantive requirements regarding workers' rights. Indeed, while HRDD has been criticised in the literature as being ineffective, WSR is heralded by many as being a leading solution to the labour governance deficit in transnational supply chains.<sup>120</sup>

Furthermore, WSR overcomes a key problem induced by HRDD that we noted earlier in this report whereby companies outsource responsibility for human rights. The imposition of such requirements, due to their high costs, often meet supplier resistance.<sup>121</sup> WSR's significant innovation in this respect is the introduction of a price premium, which requires corporations to pay suppliers a sum to cover the additional labour costs. Addressing suppliers' price squeeze through both the price premium and exclusive sourcing contracts (or long-term commitments) between lead firms and suppliers who participate in the programme, makes the programme attractive for suppliers as well. These additional layers of stability turn the relationship with suppliers "from confrontation to collaboration".<sup>122</sup>

The task of combating human rights breaches requires the creation of both enforceable compliance mechanisms and institutional environment with leverage to inspire significant transformation in corporate behaviour. In terms of the actual impact on the ground, the WSR model – with power

117 JEREMY BLASI & JENNIFER BAIR, *AN ANALYSIS OF MULTIPARTY BARGAINING MODELS FOR GLOBAL SUPPLY CHAINS* (Geneva: International Labour Organization, 2019).

118 Fabiola Mieres & Siobhan McGrath, *Ripe to be Heard: Worker Voice in the Fair Food Program*, 160 INT'L LAB. REV. 631 (2021).

119 Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497 (2017).

120 Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497 (2017); Juliane Reinecke & Jimmy Donaghey, *Towards Worker-Driven Supply Chain Governance: Developing Decent Work Through Democratic Worker Participation*, 57 J. SUPPLY CHAIN MGMT. 14 (2021); Mark Anner, *Squeezing Workers' Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective*, 27 REV. INT'L POL. ECON. 320 (2019); JEREMY BLASI & JENNIFER BAIR, *AN ANALYSIS OF MULTIPARTY BARGAINING MODELS FOR GLOBAL SUPPLY CHAINS* (Geneva: International Labour Organization, 2019); Manoj Dias-Abey, *A Socio-legal History of the Coalition of Immokalee Workers*, in *THEORIZING LABOUR LAW IN A CHANGING WORLD: TOWARDS AN INCLUSIVE LABOUR LAW* (eds. Alysia Blackham, Miriam Kullmann and Ania Zbyszewska, Oxford: Hart Publishing); Aaron Gladstone, *Worker Driven Social Responsibility Agreements: A New Future in Labor Rights Protections*, 44 FORDHAM INT'L L. J. 549 (2020).

121 Mark Anner, *Squeezing Workers' Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective*, 27 REV. INT'L POL. ECON. 320 (2019); Jennifer Gordon, *The Problem with Corporate Social Responsibility*, (lecture, Fordham University School of Law, Jul. 11, 2017) (An updated and expanded version of "Open Society Foundations" a public talk given by the author on June 11, 2014, at the Open Society Foundations, New York City), <https://wsr-network.org/wp-content/uploads/2017/07/Gordon-CSR-vs-WSR-FINAL-July-2017.pdf>.

122 SUSAN L. MARQUIS, *I AM NOT A TRACTOR! HOW FLORIDA FARMWORKERS TOOK ON THE FAST FOOD GIANTS AND WON* (ILR Press, 2017).

resources in and outside the supply chain - is a more promising governance mechanism than mHRRD. It harnesses new power resources in private law (binding contracts), powerful workers' organisations, solidarity networks, and coalitions with workers.

We propose that WSR agreements be considered as remedial measures where systemic problems are identified in HRDD processes. We note that the success and viability of WSR depends a great deal on the particular supply chain dynamics. As scholars have noted, the WSR model has significant strengths but has proven difficult to replicate and scale-up.<sup>123</sup> Some of the challenges of replicability and scalability may be the result of the lack of a legal framework to support such efforts. Via inclusion of worker participation mechanism and encouraging corporations to collaborate with WSR models (for example, through acknowledging WSR mechanisms in allocating burden of proof or as a defence in case violation is found), mHRDD laws could contribute to the proliferation of this successful model.

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123 James Brudney, *Reflections on Labor Standards in Global Supply Chains: Innovation and Scalability*, in *POWER, PARTICIPATION, AND PRIVATE REGULATORY INITIATIVES* 205-223 (eds. Daniel Brinks, Julia Dehm, Karen Engle and Kate Taylor, Philadelphia: University of Pennsylvania Press, 2021); Kathryn Babineau and Jennifer Bair, *The Art of Using Supply Chains to Defend Worker Rights*, *OPENDEMOCRACY* (Last accessed Mar. 13, 2022), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/art-using-supply-chains-defend-worker-rights/>.



# Recommendations for trade unions and worker organisations concerning proposed and existing mHRDD laws

## Recommendations concerning scope

1. mHRDD laws should hold all business entities responsible for respecting human rights, irrespective of size, structure, sector, or ownership.
2. mHRDD laws should cover all internationally recognised human rights. This means, at a minimum, the rights and principles set out in the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work.
3. The scope of HRDD required should be consistent with UN and OECD standards.

## Recommendations concerning transparency

4. mHRDD laws should require companies to trace their supply chains and make this information publicly available. In recognition of the differences between industries, general HRDD legislation should provide scope for subsidiary regulations, or agreements between social partners and the regulator, regarding required levels of transparency in specific industries.
5. mHRDD laws should require that entities disclose information in a consistent format. This information should include the name and address of the supplier. The supervisory authorities should provide details as to the format in which information should be lodged. Information disclosed, including lists of suppliers, should be lodged with the supervisory authority, in addition to being made available on the website of the reporting entity.
6. mHRDD legislation should provide worker organisations with avenues to challenge the adequacy of the transparency and tracing information lodged by entities.

## Recommendations concerning worker engagement and agreements

7. mHRDD laws should provide rights to consultation for workers, their representative organisations, and other stakeholders. These rights must be enforceable.
8. mHRDD laws should provide for the establishment of appropriate institutional mechanisms for worker engagement to take place. Such mechanisms might take the form of work councils, sectoral agreements, or multi-stakeholder organisations that include legitimate worker representatives from throughout supply chains.
9. mHRDD legislation should recognise, and promote, binding and enforceable agreements between entities and worker organisations.

## Recommendations concerning duties and liability

10. mHRDD legislation should impose a general and non-delegable duty on all entities to respect human rights.

11. While the scope of human rights obligations should be universal, company performance must be measured not just against the procedural obligations of due diligence but against the outputs and outcomes on human and labour rights at issue in the particular instance.
12. mHRDD legislation must be accompanied by a robust liability regime, and strong enforcement measures that ensure accountability for failure to perform due diligence, as well as provide access to justice and remedy for victims of human and labour rights abuses.
13. mHRDD laws must create clear causes of action for workers and consumers against those responsible for human rights breaches, and these causes of action must be capable of reaching up the supply chain tiers beyond direct employers. Collective redress mechanisms, such as class actions, should also be available.
14. The evidentiary burden of proof should be shared between the plaintiff/claimant and the defendant for claims of liability for breaches of human rights. Once the plaintiff/claimant has established a prima facie case of harm, the burden should shift to the respondent/defendant to prove that they do not bear responsibility for the harm caused.
15. Adoption and implementation of HRDD should not of itself be sufficient to discharge an entity's general duty to respect human rights. Contribution to a breach of human rights should only be rebuttable by evidence of effective action to stop the breach.
16. mHRDD legislation must address key legal hurdles to transnational labour litigation. These include, for example, inadequate limitation periods and issues around related proceedings.
17. A doctrine of joint and vicarious liability, with responsibility distributed according to contribution to the breach of human rights amongst actors in the supply chain, should be developed to support the effective implementation of HRDD obligations.
18. In addition to compensation, findings of liability should require entities to make specific changes or outcomes (by way of enforceable undertakings), to be monitored by the supervising body, under time frames set by the court or supervisory authority.
19. Individual liability of corporate officeholders should be possible where entities are found liable of egregious and serious human rights breaches.

## Recommendations concerning complaints and enforcement mechanisms

20. mHRDD legislation should require entities to have effective grievance mechanisms in place, both as a means to identify labour rights abuses taking place in their supply chains and to ensure workers have access to remedy. Workers' organisations must be involved in designing, operating, and evaluating the effectiveness of, these mechanisms.
21. Entities should be required by law to disclose information concerning the design and operation of their grievance mechanisms, including details as to the number and nature of claims brought by workers and actions the company has taken to address the grievances.
22. State supervisory authorities should be empowered to assess HRDD statements, undertake investigations concerning non-compliance with mHRDD legislation on their own initiative or based on complaints or substantiated concerns raised, and impose sanctions for non-compliance.
23. mHRDD laws must include strong anti-victimisation protections to ensure workers and workers' organisations who bring complaints to entity-based and state-based grievance mechanisms do not experience retaliation, or threats of retaliation, for doing so.

## Recommendations concerning supervisory authorities

24. mHRDD legislation must provide for the establishment of independent, accessible, and effective state-based oversight and supervisory mechanisms.
25. The supervisory authority responsible for administering HRDD laws must have expertise in addressing worker-related problems or be structured and empowered to access such expertise where relevant and necessary.
26. Supervisory authorities must be properly funded and authorised to conduct investigations. They must be empowered to impose a range of sanctions on companies found to be non-compliant with HRDD laws, including for example, enforceable undertakings, administrative penalties, and exclusion from public procurement opportunities.
27. Supervisory authorities should undertake cross-country coordination and be part of networks of supervisory authorities and human rights bodies.

## Profiles of the authors

### **Associate Professor Shelley Marshall**

Shelley is the Director of the RMIT University Business and Human Rights Centre, an Australian Research Council DECRA Fellow, and a RMIT Vice Chancellor's Senior Research Fellow. She earned her PhD at RegNet at the Australian National University, a Masters at the London School of Economics and Politics, and a Bachelor of Laws and Arts at the University of Melbourne. She has advised and published on corporate accountability and business and human rights for 25 years, with a focus on the labour conditions of vulnerable workers and modern slavery. Shelley left legal practice in 2001 to join the team setting up Ethical Clothing Australia. Her research has informed labour law reform in several countries and the policies of the International Labour Organisation. For example, over 2018-19 she made frequent trips to Thailand to advise the Thai Ministry of Labour on how to enforce labour laws for home-based workers. Shelley was a co-founder of the Australian Corporate Accountability Network, which has over 100 civil society and academic members from across Australia, and is on its Steering Committee. Her recent book, *Living Wage*, published by Oxford University Press in 2019, proposes new ways to regulate work in transnational supply chains.

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Ingrid is a Senior Lecturer at Monash Business School, Monash University. She holds a PhD in Law from Melbourne University, and Bachelor degrees in Asian Studies and Law from the Australian National University. Her forthcoming book on the rise of human rights due diligence and its implications for transnational labour governance will be published by Oxford University Press in 2023.

Ingrid has undertaken numerous consultancies for the Geneva and Hanoi offices of the International Labour Organisation (ILO). She has also worked as principal researcher on a major research project on collective bargaining under Australia's Fair Work Act 2009, commissioned by the Fair Work Commission. Prior to entering academia in 2015, she was employed at the Australian Council of Trade Unions (ACTU) where she regularly represented Australian trade unions within national and international fora.

### **Professor Judy Fudge**

Judy is the LIUNA Enrico Henry Mancinelli Chair in Global Labour Issues at McMaster University. She first studied philosophy (McGill BA Hons, York MA) and then turned to law (Osgoode Hall Law School, York University; D Phil, University of Oxford). She taught at Osgoode Hall Law School (1987-2006) and Lansdowne Chair in Law at the University of Victoria (2007-2013), before moving to England to teach at the University of Kent (2013-2018). She has held visiting professorships and fellowships at several universities and institutes, including the Institute for Research on Migration, Ethnicity and Society (REMESO) at Linköping University (Sweden), Braudel Fellow at the European University Institute in Florence, the Institute of Advanced Studies in Nantes, France and i Re:Work: IGK Work and Human Lifecycle in Global History Humboldt-Universität zu Berlin. Fudge was elected to the Royal Society of Canada in 2013 and in 2019 received the Boral Laskin Award for contributions to Canadian Labour Law.

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### **Professor Hila Shamir**

Hila Shamir is a Professor of Law at Tel-Aviv University Faculty of Law and the founder of [TraffLab](http://TraffLab.org) (ERC). Shamir earned her S.J.D. and LL.M. from Harvard Law School and LL.B. from Tel-Aviv University. She teaches and researches in the fields of Employment, Labor, Immigration, and Welfare Law with a focus on issues of labor trafficking, and gender equality. Shamir has taught at Toronto University Faculty of

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Tamar is the head of the Sociology and Anthropology Programme in the Multidisciplinary Studies Department at Tel Hai College and a TraffLab Research Fellow. She holds a PhD and MA in Sociology and Anthropology from Tel Aviv University and a BA in Politics and Philosophy also from Tel Aviv University. Her research interests include states, markets and societies relations in recent decades; rating and ranking practices and current modes of subjectivity; and labour governance in transnational supply chains. Her work has explored ethnographically the rise of new forms of non-state governance and in particular the implications of the popularisation of ‘corporate responsibility’. Her current research project together with Hila Shamir seeks to offer an analysis of the structural conditions and dynamics that characterise and impact the effectiveness of different models of anti-trafficking initiatives in supply chains. Barkay is the recipient of a research grant from the Israeli Science Foundation.

### **Auret van Heerden**

Auret founded Equiception in 2014. It provides consulting, mediation, research and training services in all aspects of business and human rights and sustainable value chains, including human resource management, labour relations, and social and environmental standards. Auret has public and private sector clients in the textile, apparel and footwear, electronics, food, and agricultural sectors. Before that Auret served as the President and CEO of the Fair Labor Association in Washington DC from 2001 to 2013. From 1996 to 2001 he was responsible for the Special Action Programme on Social and Labour Issues in Export Processing Zones (EPZs) at the ILO in Geneva, and from 1994 to 1996 he was Labour Attaché in the South African Permanent Mission to the UN.