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# CHRiP

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**Human Rights Due Diligence: Challenges of Method,  
Power and Competition**

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Warwick

CHRiP Working Paper 2/2023

# Human Rights Due Diligence: Challenges of Method, Power and Competition

Professor James Harrison, School of Law, University of Warwick, March 2023

## Executive Summary

*Human rights due diligence (HRDD) looks set to become a mandatory obligation imposed on many larger businesses by a variety of governments globally. But our understanding of the future potential of HRDD is currently constrained by lack of research into how it is operationalised in practice. This paper fills that gap by providing the first detailed empirical analysis of HRDD on the basis of interviews with practitioners who undertake HRDD, or aspects thereof, for companies. It argues that HRDD has the potential to address both a knowledge problem and an action problem with regard to the human rights performance of transnational corporations (TNCs). But the findings of this research identify three key challenges to making HRDD effective; (1) methodological uncertainty about key aspects of the process (2) power dynamics between critical actors who are charged with undertaking vital aspects of HRDD and (3) the nature of the competition which takes place between HRDD practitioners. Mandatory HRDD laws must empower key actors to effectively hold companies accountable for the HRDD they produce, otherwise more radical regulatory interventions need to be considered.*

## 1. Introduction

It is widely recognised that companies and their value chains can cause a wide variety of adverse human rights impacts on workers, communities in which their operations take place, and even consumers of their products.<sup>1</sup> The international community has struggled to create effective mechanisms for identifying and addressing these human rights impacts. It is in this context that human rights due diligence (HRDD) is now at the forefront of international efforts to hold transnational corporations accountable for their human rights performance.

HRDD was first introduced through the UN Guiding Principles (UNGPs) on Business and Human Rights more than a decade ago. The UNGPs have become the most significant international instrument on business and human rights and HRDD is the most important commitment which the UNGPs create for the business community. HRDD is defined in the UNGPs as a four stage process which requires companies to assess their actual and potential human rights impacts, take action in relation to the adverse impacts they identify, track the effectiveness of their responses, and communicate how their impacts have been addressed.<sup>2</sup> Over the decade which has followed its inception, HRDD has been taken up on a voluntary basis by a number of leading transnational corporations as a way of demonstrating their respect for human rights in accordance with the UNGPs. It has also been incorporated into a

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<sup>1</sup> E.g. UN Human Rights Council, *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse* (23 May 2008) A/HRC/8/5/Add.2.

<sup>2</sup> UN Guiding Principles on Business and Human Rights, Principles 17-21.

wide range of international 'soft law' instruments. ethical investment indices and international corporate performance standards, which has further promoted its adoption.<sup>3</sup>

For a number of years, academic commentators as well as campaigning organisations have called for the imposition of legal obligations on companies to undertake human rights due diligence.<sup>4</sup> So called 'mandatory HRDD' (mHRDD), imposed by states through national legal initiatives, has been viewed by many commentators as a critical step in increasing corporate accountability. Mandatory HRDD legislation has now been introduced in Germany, France and Norway and there is also a draft EU Directive. Other governments considering legislative proposals include Austria, Brazil, Colombia, the Netherlands, Spain and Switzerland.<sup>5</sup> As a result, over the coming years, HRDD will be transformed from a process undertaken voluntarily by a few self-selecting companies to a process which is required of many thousands of companies globally.

This paper considers the potential of HRDD to improve the lives of its key intended beneficiaries – rightsholders who are affected by business activity. It argues that HRDD appears to be constructed so as to address two key problems which have undermined efforts to hold TNCs accountable for their human rights performance; a knowledge problem and an action problem. In seeking to understand whether it is in fact successful in this regard, the paper reviews the burgeoning academic scholarship which has discussed HRDD and finds that academic debates have so far been conducted without detailed consideration of the actual practice of HRDD by and for companies. This paper seeks to fill that gap and explore that practice on the basis of interviews with consultants or 'practitioners' who undertake HRDD for corporations. As a result, the paper shifts the focus away from HRDD as a quasi-legal process which

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<sup>3</sup> Ruggie, John, Rees, Caroline and Davis, Rachel "Ten Years After: From UN Guiding Principles To Multi-Fiduciary Obligations" (2021) *Business and Human Rights Journal* 179-197 Landau, Ingrid. "Human rights due diligence and the risk of cosmetic compliance." *Melb. J. Int'l L.* 20 (2019): 221-247.

<sup>4</sup> Martin-Ortega, Olga 'Human rights due diligence for corporations: from voluntary standards to hard law at last?' 32 *Netherlands Quarterly of Human Rights* (2014): 44-74; Ruggie, Rees and Davis, Above...

<sup>5</sup> Comparing a number of the European proposals, see Corporate Justice, *Corporate due diligence laws and legislative proposals in Europe Comparative table* (March 2022)

<https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2/>. On Brazil's human rights due diligence Bill see Camara Dos

Deputados, Projeto de Lei, 572/22

<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2317904>. Information about the Spanish proposal can be found at Congress of Deputies, Legislative National Context Regarding Due Diligence (April 2022) available at

<https://www.europarl.europa.eu/cmsdata/247306/Spain%20CD.pdf>. Information about the Colombian draft proposal was provided by one of the interviewees to this article - The Ombudsman office in Colombia is working on draft law. There are also a range of other 'due diligence' laws which more indirectly or partially embed HRDD into domestic legislation. For a discussion of some of these initiatives see Macchi, Chiara, and Claire Bright. "Hardening soft law: the implementation of human rights due diligence requirements in domestic legislation." *Legal Sources in Business and Human Rights*. Brill Nijhoff, (2020) 218-247; Nolan, Justine. "Hardening soft law: are the emerging corporate social disclosure laws capable of generating substantive compliance with human rights?." *Braz. J. Int'l L.* 15 (2018): 65-84. McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* 68.3 (2021): 455-478.

can be understood by reference to the commitments which it creates on paper and onto the people and processes which are vital to its implementation in practice. It argues that the current practice and future potential of HRDD is not properly understood without exploring its strengths and limitations in empowering and constraining a range of actors who are critical to its effectiveness.

The interviews undertaken demonstrate that HRDD is a complex and multifaceted process. There are a group of thoughtful and dedicated practitioners who are working hard to develop and enact meaningful HRDD that improves the human rights performance of corporations. But there are many challenges which beset the field and cast doubt on whether HRDD processes are (and will in future) routinely uncover and address the most serious human rights issues as they affect rightsholders.

Three key types of challenges are identified in this article. The first challenge is in relation to methods; on critical aspects of the HRDD process, there are a number of important methodological issues where there is either uncertainty or there are differences of opinion between leading practitioners in the field. This casts doubt over whether HRDD is currently on a secure methodological footing. Second there are the challenges caused by the power dynamics of the inter-relationships between critical actors who are charged with undertaking vital aspects of the HRDD process; between consultants and companies, companies and suppliers as well as relationships within companies themselves. These power dynamics often undermine the capacity of HRDD processes to produce valuable results for rightsholders. The final challenge relates to the commercial basis on which HRDD is delivered: consultants often compete for HRDD work in competition with other providers and therefore have to be competitive in terms of the price, timing etc. of the work they deliver. These competitive pressures risk creating a 'race to the bottom' in terms of the robustness of HRDD processes.

All of these dynamics create problems which potentially undermine the chances of HRDD being transformative from a rightsholder perspective. These risks are exacerbated by the adoption of mandatory HRDD laws in countries globally because of the increase in scale of HRDD which will take place as a result, and the lack of skilled practitioners who can undertake this process. It is in this context that this paper therefore considers whether the legal obligations contained in mHRDD laws have the potential to address the current challenges and ensure that HRDD processes do actively improve the situation of rightsholders around the world who are affected by business activity. It also considers alternative strategies towards more effective HRDD.

Section 2 reviews the current literature on HRDD and explores the difficulties which exist for scholars who seek to explore how HRDD has been implemented in practice. Section 3 explains the research methods utilised in conducting this study. Section 4 explores three key challenges of HRDD which are currently undermining practice in the field. Section 5 explores how that practice might be improved in the future. Section 6 briefly concludes.

## 2. The Context: Our Current Understanding of HRDD

Efforts to hold transnational corporations accountable for their human rights performance have historically struggled to be effective. While the reasons for this are numerous and complex, two key issues are at the crux of the problem. First, there is a knowledge problem; the difficulty in finding out where human rights abuses are happening (and are at risk of happening in the future) and who is responsible for those abuses in a world of complex production processes and value chains. Traditional internal corporate processes for investigating labour issues in supply chains, such as audits, have well-recognised failings.<sup>6</sup> There have been other investigatory processes tied to specific sustainability initiatives which have sometimes had more success in identifying labour and broader human rights abuses in particular value chains.<sup>7</sup> But such initiatives have remained relatively niche and have not been utilised effectively by mainstream TNCs to enable more widespread knowledge about where abuses are (at risk of) occurring. Meanwhile, civil society efforts to investigate and then name and shame for a broader range of human rights abuses have only ever been capable of identifying a few high-profile culprits, leaving the vast majority of corporate human rights abuses undiscovered.

If the knowledge problem can be overcome, there is then an action problem; how to effectively address human rights abuses, provide remedies to affected rightsholders and prevent future abuses occurring. Companies who are made aware of abuses do not always take voluntary action across their operations and those of their suppliers, particularly where the costs of action outweigh the benefits.<sup>8</sup> Enforcement against recalcitrant TNCs, particularly those who operate across multiple jurisdictions, is fraught with difficulty. Regulatory frameworks in many jurisdictions are widely perceived as inadequate for holding TNCs and their subsidiaries and suppliers accountable for their human rights conduct.<sup>9</sup> At the same time the patchwork of transnational accountability mechanisms (e.g. cross-border litigation, multistakeholder initiatives, international soft law frameworks) have only been able to have a limited impact.<sup>10</sup>

HRDD has the potential to address at least some of the problems with existing approaches to corporate accountability by creating new processes for investigating

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<sup>6</sup> LeBaron, Genevieve, and Jane Lister, "Benchmarking Global Supply Chains" *Review of International Studies* 41:5 (2015) 905-924; Sarfaty, Galit, *Global Supply Chain Auditing* (January 15, 2021). *Cambridge Handbook of Compliance* (D. Daniel Sokol & Benjamin van Rooij eds., Cambridge University Press, 2021), Available at SSRN: <https://ssrn.com/abstract=4105928>.

<sup>7</sup> E.g. discussing the work of Electronics Watch see Martin-Ortega, Olga. "Public procurement as a tool for the protection and promotion of human rights: A study of collaboration, due diligence and leverage in the electronics industry." *Business and Human Rights Journal* 3.1 (2018): 75-95.

<sup>8</sup> See e.g. Stephens, Beth. "The amorality of profit: Transnational corporations and human rights." *Human rights and corporations*. Routledge, 2017. 21-66.

<sup>9</sup> See e.g. Chambers, Rachel, and Gerlinde Berger-Walliser. "The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison." *American Business Law Journal* 58.3 (2021): 579-642.

<sup>10</sup> For an overview of the failings of traditional accountability mechanisms see Harrison, James 'Human rights and transnational corporations: establishing meaningful international obligations' in Faúndez, Julio, and Celine Tan, eds. *International economic law, globalization and developing countries*. Edward Elgar Publishing, 2010.

human rights issues in a company's operations and supply chains and then endeavouring to ensure that action is taken when abuses are identified.<sup>11</sup> The UNGPs set out a process for undertaking HRDD involving a number of key steps which relate to knowledge acquisition about human rights abuses on the one hand and action which must be taken as a result on the other.

In terms of knowledge acquisition, companies must first assess their potential and actual human rights impacts. This assessment should include a prioritization process so that companies undertake assessments where human rights risks are greatest (Principle 17). Assessment should include consultation with rightsholders and otherwise gathering of evidence of potential or actual impacts (Principle 18). Analysis of impacts should then be undertaken in relation to recognized international human rights standards (Principle 18). In terms of action taken in relation to human rights issues identified, companies should prevent or mitigate any adverse impacts that have been identified (Principle 19). This should be followed by monitoring or tracking of the effectiveness of their response to impacts identified (Principle 20) and communication with relevant rightsholders about how human rights impacts are being addressed (Principle 21). Where companies find that they have caused or contributed to adverse impacts, they should provide for, or cooperate in, processes of remediation (Principle 22). HRDD therefore places a series of obligations on companies themselves to investigate and take action with regard to their own human rights impacts, while communicating the action they have taken to outsiders to allow some form of external accountability to take place in relation to the internal action which they have undertaken.

There is now growing momentum worldwide among governments, particularly in Europe, requiring companies to undertake human rights due diligence. While each legislative initiative at the national level is different, there are some general characteristics which can be identified.<sup>12</sup> The obligations are generally imposed on the largest companies and extend to their subsidiaries and suppliers and require those companies to create some form of strategic plan for HRDD, a process for identifying and assessing impacts and measures for addressing impacts identified. Companies must publish information such as annual reports on the action they have taken and/or strategic plans in relation to their HRDD processes. Substantively, due diligence obligations generally cover human rights and labour rights issues, often alongside environmental due diligence.<sup>13</sup> In most systems, third parties can make complaints or request information about violations of human rights which are then investigated either by the company itself or by national supervisory authorities. Those authorities can also sometimes investigate on their own initiative and can take appropriate action to address abuses identified, including measures such as

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<sup>11</sup> European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI))

<sup>12</sup> Highlight some of these see Corporate Justice, *Corporate due diligence laws and legislative proposals in Europe Comparative table* (March 2022). Identifying some of the key differences see Deva, Surya. "Mandatory human rights due diligence laws in Europe: a mirage for rights holders?" *Leiden Journal of International Law* (2023) 1-26. doi:10.1017/S0922156522000802.

<sup>13</sup> Some laws are more specific and require due diligence with regard to a small subset of human rights issues such as child labour (e.g. the Netherlands) or modern slavery (e.g. the UK). Here we are considering those laws which have a more general ambit.

injunctive action, remedial orders and fines. Some legislative models also envisage some form of civil or criminal law liability in relation to HRDD.

As HRDD has grown in prominence, a burgeoning academic literature has sought to investigate it. This literature includes discussion about HRDD as a concept; how HRDD might then be operationalised by corporations and the pitfalls of that operationalisation process; and how mHRDD laws are likely to affect the practice of HRDD in the future.

The most high-profile debate in the academic literature about HRDD concerns its conceptual clarity, particularly in relation to the issue of liability. Critics contend that there is confusion over the concept of human rights due diligence and what obligations it imposes on corporations.<sup>14</sup> On the one hand HRDD creates a process by which businesses should discharge their responsibilities and on the other hand a substantive standard of conduct required of them and these two aspects are conflated. This has created uncertainty, it is argued, about the extent of business responsibility to respect human rights and the consequences that will occur as a result of violations.<sup>15</sup> In defence of the concept, it is suggested that the obligation to comprehensively assess human rights risks should lead to businesses understanding their human rights impact on rightsholders and taking action to address the issues identified.<sup>16</sup> It is therefore a procedural commitment that gives rise to substantive outcomes in terms of identifying and acting upon the adverse human rights impacts for which businesses bear responsibility. The issue of what consequences should occur as a result of any human rights violations for which the company bears responsibility is a separate question which is dealt with elsewhere in the UNGPs.<sup>17</sup>

When it comes to the implementation of HRDD, more optimistic scholarship has focused on the progress that has been made in terms of the adoption of HRDD by companies who are leading the field in human rights terms.<sup>18</sup> The data underpinning this approach is what firms say about their own practice in relation to HRDD, through surveys and/or semi-structured interviews with key personnel.<sup>19</sup> Such self-reporting has obvious limitations as companies are unlikely to fully report on their own deficiencies. But this evidence has allowed arguments to be made that leading firms have changed their practices in significant ways through incorporation of the HRDD process, although the ultimate impact of these changes on rightsholders remains

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<sup>14</sup> Bonnitcha and McCorquodale, 'The concept of 'due diligence' in the UN guiding principles on business and human rights' 28 *European Journal of International Law* (EJIL) (2017) 899; Deva, *supra*, note 16.

<sup>15</sup> Bonnitcha and McCorquodale, *Above*. See also Bueno, Nicolas, and Claire Bright. "Implementing human rights due diligence through corporate civil liability." *International & Comparative Law Quarterly* 69.4 (2020): 789-818.

<sup>16</sup> Ruggie, John Gerard, and John F. Sherman III. "The concept of 'Due Diligence' in the UN Guiding principles on business and human rights: a reply to Jonathan Bonnitcha and Robert McCorquodale." *European Journal of International Law* 28.3 (2017): 921-928.

<sup>17</sup> This issue is the subject of the third pillar of Ruggie's Framework – The Remedy Pillar.

<sup>18</sup> Ruggie, Rees and Davis, *Above*. For a more nuanced account see Robert McCorquodale et al, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises', 2:2 *Business and Human Rights Journal* (2017): 195–224.

<sup>19</sup> *Ibid*.



unexplored.<sup>20</sup> mHRDD laws are then seen as the key development which will require ‘the laggards’ to improve their practices and follow the leaders; businesses will have to address and report on their human rights impacts because of “potential legal consequences or administrative penalties for non-compliance.”<sup>21</sup>

But more sceptical scholarship has raised doubts about whether the adoption of HRDD by companies is necessarily a progressive move. Concerns have been raised that HRDD may promote superficial ‘tick box’ exercises which allow companies to claim that they are undertaking their human rights responsibilities while failing in practice to take meaningful action.<sup>22</sup> There are a number of reasons identified for these risks including the failure to sufficiently ground the HRDD process in the corporate responsibility to respect human rights,<sup>23</sup> the failure to challenge existing corporate risk management processes which are likely to marginalise human rights issues,<sup>24</sup> the incompatibility of current corporate forms with the performance of meaningful HRDD,<sup>25</sup> ambiguity in the UNGPs that create significant corporate discretion in how to interpret HRDD,<sup>26</sup> the complexity and breadth of the human rights obligations which companies are required to assess;<sup>27</sup> reliance on social auditing as the primary mechanism for gathering information to inform HRDD processes,<sup>28</sup> the marginalisation of rightsholders within the HRDD process;<sup>29</sup> the failure to demand sufficient disclosure from corporate actors who undertaken HRDD;<sup>30</sup> and the failure of HRDD to focus on outcomes that must be achieved for rightsholders.<sup>31</sup>

Building on these concerns, scholars also then argue that mHRDD laws may not necessarily be progressive steps. If they mandate the same processes as are contained within the UNGPs they may simply create more widespread adherence to superficial HRDD processes. Ideas for making HRDD laws more effective include more specific requirements around the nature of the obligations which businesses

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<sup>20</sup> Ruggie, Rees and Davis, Above, 189; McCorquodale et al, Above.

<sup>21</sup> Ruggie, Rees and Davis, Above, 195.

<sup>22</sup> Landau, Ingrid. "Human rights due diligence and the risk of cosmetic compliance." *Melb. J. Int'l L.* 20 (2019): 221. Fasterling and Demuijnck, ‘Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights’, 116 *Journal for Business Ethics* (2013) 799; Fasterling, Björn. "Human rights due diligence as risk management: social risk versus human rights risk." *Business and Human Rights Journal* 2.2 (2017): 225-247.

<sup>23</sup> Fasterling and Demuijnck, ‘Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights’, 116 *Journal for Business Ethics* (2013) 799

<sup>24</sup> Fasterling, Björn. "Human rights due diligence as risk management: social risk versus human rights risk." *Business and Human Rights Journal* 2.2 (2017): 225-247.

<sup>25</sup> Muchlinski, Peter. "Implementing the new UN corporate human rights framework: Implications for corporate law, governance, and regulation." *Business Ethics Quarterly* 22.1 (2012): 145-177.

<sup>26</sup> Landau, Ingrid, Above.

<sup>27</sup> Deva (2023) above, 10.

<sup>28</sup> McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* 68.3 (2021): 455-478.

<sup>29</sup> McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* 68.3 (2021): 455-478. Landau, Above 243. Deva (2023) Above.

<sup>30</sup> Landau,, Above.

<sup>31</sup> Deva (2023) Above, at 10-11.

have as a result of HRDD;<sup>32</sup> strong and detailed obligations on companies to report on their HRDD process;<sup>33</sup> requirements that rightsholders are central to how HRDD is carried out;<sup>34</sup> independent and well-resourced bodies which monitor corporate performance on HRDD;<sup>35</sup> and, most importantly for most commentators, an appropriate enforcement mechanism to ensure compliance alongside effective remedies for rightsholders.<sup>36</sup>

However, this debate about the potential and pitfalls of HRDD has been largely uninformed by detailed investigation of the practice which has occurred in terms of the implementation of HRDD by and for companies. As a result, there is limited evidence to support or undermine more optimistic or pessimistic views about HRDD and the impact mHRDD may have. At the same time, there is also a dearth of analysis of the root causes of any deficiencies in current practice and how they should be addressed. Recommendations for strengthening mHRDD laws therefore tend to be set out briefly or at a high level of abstraction and are generally not grounded in any detailed understanding of how HRDD actually is and should be carried out.<sup>37</sup>

One of the key impediments to undertaking analysis of HRDD practice is the lack of publicly available reports which chart the HRDD processes which companies have undertaken.<sup>38</sup> There are only a handful of reports published by companies which could be said to offer a fulsome description of their HRDD processes and its findings.<sup>39</sup> Other companies sometimes produce a synopsis of the HRDD process, rather than an unabridged report by those who actually undertook the HRDD process themselves.<sup>40</sup> More often companies provide overviews of the HRDD which was undertaken, folded into broader corporate sustainability reporting processes. The inadequacies of these broader sustainability reporting processes from a human rights perspective have been well catalogued. These include selective disclosure and a focus on the data most easily collected, rather than that most relevant to human rights protection.<sup>41</sup>

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<sup>32</sup> McCorquodale and Nolan, Above 475; Landau 240. Focusing on the requirement that HRDD should be holistic, see also Deva (2023) 16.

<sup>33</sup> Quijano and Lopez, Above, 253; Landau Above, 241.

<sup>34</sup> Landau 243; McCorquodale and Nolan, 475; Deva (2023) 17.

<sup>35</sup> Quijano and Lopez, 253-254, Landau, 245.

<sup>36</sup> Quijano and Lopez, McCorquodale and Nolan 475; Landau 243; Deva (2023) 17-18.

<sup>37</sup> Some more detailed proposals are identified as a result of engagement with more theoretically-orientated literature on self-regulation and these identify a number of recommendations some of which accord with those made in this article (see Landau, Ingrid. "Human rights due diligence and the risk of cosmetic compliance." *Melb. J. Int'l L.* 20 (2019): 221). But this article is able to offer more depth and precision about the specific action required through mHRDD laws, or alternative regulatory models because of its detailed focus on the specific problems of the HRDD process, rather than the problems of self-regulatory regimes more generally.

<sup>38</sup> McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* 68.3 (2021): 455-478, 467.

<sup>39</sup> See Nomogaia, *Corporate HRIAs*, <https://nomogaia.org/corporate-hriAs/>

<sup>40</sup> Harrison, 'Human rights impact assessment: the role of governmental and inter-governmental actors' in Nora Gotzmann (ed.) *Research Handbook on Human Rights Impact Assessment*, (Edward Elgar, 2019) 424-440 at 427.

<sup>41</sup> David Hess, 'The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights' 56 *American Business Law Journal* (2019) 5.

From the limited amount of information which is publicly available there are admissions from those who carried out the assessments about a range of problems including limited consultation processes and difficulties engaging with key stakeholders and limitations in their ability to gather data because of language issues and restrictions on the scope of studies due to the limited timeframe of the assessments.<sup>42</sup> There are also concerns from commentators about systematic failures to identify and address specific rights abuses against particular groups (e.g. women, children, indigenous peoples and resettled communities), attributed in part to the lack of adequate guidance in the UNGPs in relation to relevant rights and how they should be analysed.<sup>43</sup>

But these studies are only able to offer a very limited picture of practice because of the paucity of publicly available information. They also are unable to explore the dynamics of how HRDD is actually performed by the people tasked with its implementation. As a result, they are unable to explore the root causes of deficiencies in practice and how those issues might be addressed, including through mHRDD, and as a result whether HRDD is capable of creating significantly better human rights outcomes for rightsholders. This has to be the most important question for scholarship to address. The UNGPs are not an abstract academic endeavour, but rather a practical policy initiative of the United Nations which is explicitly aimed at ‘the effective prevention of, and remedy for, business-related human rights harm.’ It is therefore appropriate to evaluate them primarily by reference to their capacity to improve the lives of their key intended beneficiaries.

### 3. Research Methods

This study seeks to understand how HRDD is actually performed by the people tasked with its implementation. While companies can and do undertake HRDD through their own internal resources, they often lack the expertise to do so and it is therefore common for them to hire external consultants to undertake this work, as is recommended by the UNGPs.<sup>44</sup> The use of external experts can also give autonomy and credibility to the process. Interviews were therefore undertaken with individuals who have undertaken paid work for companies in relation to human rights due diligence, or some aspect thereof (henceforth known as “the practitioners”).

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<sup>42</sup> Harrison, Above, at 428; Harrison, James and Sekalala, Sharifah ‘Addressing the compliance gap? UN initiatives to benchmark the human rights performance of states and corporations’ *Review of International Studies* Vol. 41 December 2015, pp 925 - 945, at 941.

<sup>43</sup> On the marginalisation of sexual violence against women and girls see Tobalagba, ‘Corporate human rights due diligence and assessing risks of sexual violence in large-scale mining operations’ 26 *Australian Journal of Human Rights*, 347; N. Gotzman, *Handbook on Human Rights Impact Assessment* (2019) includes a number of chapters which explore the marginalisation of particular groups including Tara Collins, ‘Children’s rights in HRIA: Marginalized or mainstreamed?’, 119; Cathal Doyle, ‘Indigenous peoples’ rights in HRIA: an enabler for free, prior and informed consent?’, 135; Bonita Meyerfeld, ‘The rights of women and girls in HRIA: The importance of gendered impact assessment’, 154; See also van der Ploeg and Vanclay, ‘Challenges in implementing the corporate responsibility to respect human rights in the context of project induced displacement and resettlement’, 55 *Resources Policy* (2018) 210.

<sup>44</sup> UNGP Number 18 states that companies should “[d]raw on internal and/or independent external human rights expertise” in identifying and assessing human rights impacts.

Interviewees were sought who could be considered to be leading practitioners in the field. Interviewees were initially identified via two sources. First, a search was undertaken for the authors of published corporate human rights due diligence processes and human rights impact assessments. It was assumed that corporations would only be willing to publish assessments that were of the highest quality and so this would allow consultants who were leaders in their field to be identified. A google search was therefore undertaken utilising a range of key search terms and public lists of reports were also utilised.<sup>45</sup> Second, an email was circulated to a listserv dedicated to corporate social performance practitioners requesting specialists in human rights due diligence processes who would be willing to be interviewed for the project.<sup>46</sup> A snowballing method was then utilised, whereby each interviewee was asked to recommend any other practitioner they considered to be a leading practitioner in the field. Interviewees were therefore all specialists in human rights due diligence and related activities who had been paid by corporate clients to give advice and provide services in relation to that specialism.

It is worth noting that a number of practitioners had particular expertise in human rights impact assessment (HRIA) processes. As explained in section 2 above, the assessment of human rights impacts is a critical step in the HRDD process. While the UNGPs never expressly use the term ‘human rights impact assessment’, HRIA is a methodology that is widely utilised to assess and address impacts, most commonly “at the individual project or activity level” (e.g. at a mine or plantation).<sup>47</sup> Such HRIAs can be taken entirely independently of HRDD as standalone assessments.<sup>48</sup> But HRIA methods can also be deployed to assess human rights impacts in accordance with Principles 18 of the UNGPs.

Thirty-five potential interviewees were identified and contacted. Twenty-two individuals agreed to be interviewed. They come from diverse backgrounds and have extensive and wide-ranging experience of HRDD and HRIA. Consultants were based in Africa, Asia, Australasia, Europe, and North and South America and had experience of HRDD processes across many different countries across all of those six continents. Interviewees included individuals who had worked on hundreds of HRDD processes and scores of impact assessments. At the other end of the spectrum, some interviewees had only been involved in a very small number of HRDD processes or HRIAs, but had relevant expertise from working extensively in related fields (e.g. on social and environmental impact assessment or on business and human rights more generally). The organisations where individuals worked also ranged from large commercial firms and other large consultancies, some of whom employed up to forty

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<sup>45</sup> Google searches included “human rights due diligence” and “report”; “human rights impact assessment” and “human rights assessment”.

<sup>46</sup> The Social Practice Forum, available at <https://socialpracticeforum.org/>. “Social Performance” is the conceptual underpinning of a range of community-facing and labor-facing activities undertaken by companies to complement “technical performance” of an operation. It brings the social considerations to bear in corporate and project decision making.

<sup>47</sup> See Danish Institute for Human Rights, Human Rights Impact Assessment Guidance and Toolbox, [https://www.humanrights.dk/files/media/document/DIHR%20HRIA%20Toolbox\\_Welcome\\_and\\_Introduction\\_ENG\\_2020.pdf](https://www.humanrights.dk/files/media/document/DIHR%20HRIA%20Toolbox_Welcome_and_Introduction_ENG_2020.pdf) accessed on 13 March 2023.

<sup>48</sup> Practice of corporate HRIAs actually pre-dates HRDD, see e.g. Harrison, James. "Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment." *Impact Assessment and Project Appraisal* 31.2 (2013): 107-117.

individuals working on HRDD, through smaller bespoke consultancies, to specialist human rights organisations and think tanks. Some of the interviewees were sole practitioners.

Initial interviews also identified a sub-group of consultants; so-called 'in-country' or 'local' consultants who were sub-contracted by lead consultants, or sometimes directly hired by the company, to do field work in particular locations where the human rights impact of the company's operations were being assessed. It was found to be relatively common for lead consultants based in Europe or North America to use local consultants in this way, a practice that increased with Covid restrictions.<sup>49</sup> So efforts were made to interview a number of these 'local' consultants to gain their perspective on the HRDD process.<sup>50</sup>

Interviewees had undertaken due diligence and assessment processes across many different sectors including, oil and gas, mining, renewable energy, a wide variety of agricultural products (e.g. coffee, bananas etc.), a wide variety of manufactured products (e.g. cars' electronics etc.), shipping, technology and tourism. Interviewees also had a wide variety of different backgrounds. Some had professional backgrounds in human rights, having worked on business and human rights issues for a number of years before becoming involved in HRDD work specifically. Others had started out in other corporate jobs from manufacturing work on the factory floor to corporate social responsibility roles before transitioning into the human rights and business field. A third group had worked in broader social research roles, including on social and environmental impact assessment processes, and had undertaken HRDD work often alongside ongoing work on other research projects. Finally, there were interviewees who came from a civil society background doing work with communities in the field and had come into contact with corporate activity through their engagement with those communities.

Interviews were semi-structured. Interviewees were asked about their understanding of key terms utilised (e.g. HRDD, impact assessment, risk assessment etc.). They were then asked to describe their own practice in the field. Questions included how and why they first engaged with companies, how work was identified and scoped out, how they assessed human rights impacts (with a particular focus on engagement with rightsholders), how findings were communicated to the company and to other key stakeholders, and the extent to which they were involved in, or knew about, any action to address adverse human rights impacts and then to track the effectiveness of those responses. Interviewees were also asked about the state of practice in the field in terms of strengths and weaknesses and what they saw as the main opportunities and challenges for the future. Thematic analysis was subsequently used to analyse interviews undertaken.

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<sup>49</sup> Interview 7, 9 February 2022.

<sup>50</sup> Four local consultants were interviewed in total. Lead consultants who were also based in a variety of locations including in South America, Africa and Asia.

## 4. Key Challenges for HRDD

The interviews undertaken generally demonstrated that HRDD is a complex and multifaceted process. They also demonstrated how leading practitioners are spending considerable time and effort working out how to enact meaningful HRDD processes that improve the human rights performance of corporations. But there are a number of challenges which beset the field and cast doubt on whether HRDD processes are (and will in future) routinely uncover and address the most serious human rights issues as they affect rightsholders. Three key types of challenges are identified; (1) the methods by which HRDD is and should be carried out (2) the power dynamics of the inter-relationships between critical actors who are charged with undertaking vital aspects of the HRDD process and (3) the commercial basis on which HRDD is delivered. These are discussed in turn below.

### A. Methodological Challenges

It became clear from interviews with practitioners that devising and implementing methods for undertaking HRDD is a very complex and resource-intensive process, and there were a number of issues where practitioners had significant differences of opinion about the appropriate approach. There were also critical differences in approach depending on the sector where the HRDD was being undertaken.

For some practitioners, the focus of their work was already pre-determined by the company (e.g. assessing human rights impacts at a particular site or in relation to a specific supply chain). But most practitioners talked about starting their work with some kind of risk assessment or prioritization process which allowed them to hone in on the most significant human rights issues. They would then undertake a detailed assessment of the issues identified, a process often (but not always) described as a human rights impact assessment. For most practitioners, the assessment of actual human rights issues ‘on the ground’ and engagement with rightsholders was an essential element of HRDD<sup>51</sup>:

“If you haven't engaged with rightsholders and you're not hearing from impacted people directly, you can be working on human rights issues, but you wouldn't have done kind of a full due diligence program.”<sup>52</sup>

But some practitioners suggested that while risk assessment was a necessary part of HRDD, impact assessment processes which involved rightsholders were not always necessary or else sometimes needed to be delayed until the client had a better understanding of human rights and was sufficiently ‘mature’ to cope with external rightsholder input.<sup>53</sup>

The complexity or even viability of the initial prioritisation process and subsequent engagement with rightsholders also varied by sector. In some sectors there was a clear potential ‘site’ for an assessment, and this made the focus of the detailed study easier to decide. As one practitioner commented “The classic impact assessment

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<sup>51</sup> Interview 8, 14 February 2022; Interview 12, 17 February 2022. Interview 14, 23 February 2022, Interview 15, 23 February 2022.

<sup>52</sup> Interview 8, 14 February 2022.

<sup>53</sup> Interview 13, 22 February 2022; Interview 16, 24 February 2022.

methodology is either mining or infrastructure, or at a push agriculture. But it's about a fixed footprint place.”<sup>54</sup> But the identification of a particular ‘site’ for an assessment was not always an easy task, for instance in an industry involving complex supply chains or in one which does not always involve physical products such as telecommunications or informational technology. The process of assessment was also highly differentiated depending on the type of sector and process where impacts are being assessed.

Assessments are more complex when considering a product whose impacts are diffuse and have a potentially global impact. For instance, in a sector such as technology, practitioners found that the primary focus is on the consumers of that product, rather than the producers.<sup>55</sup> Big technology firms might have customers dispersed over many countries all over the world, making assessment of impacts incredibly difficult and complex. As one practitioner who had undertaken many HRDD processes in the technology sector commented:

“human rights assessments of products, especially a product that might be used by 3 billion people, it's just inherently different than, for example, a mining site.”<sup>56</sup>

This made identifying consultation with a representative sample of rightsholders across so many different locations unviable. Confidentiality issues before the launch of a new product also mitigated against such an approach. One practitioner said they often spoke to experts who were knowledgeable about issues such as the effects of technology on particular vulnerable groups (e.g. children, women) rather than attempting to speak directly to those constituencies.<sup>57</sup>

In the technology sector, the practitioners interviewed appeared confident that they had developed methodologies that allowed them to prioritise issues and then assess risks, albeit often without any direct engagement with rightsholders. But in other sectors, consultants were struggling with appropriate methods. For instance one practitioner who had undertaken HRDD in the finance sector talked about the enormous difficulties of robustly assessing human rights impacts when the client had many thousands of customers all over the country and their contact details are protected by confidentiality laws.<sup>58</sup> Identifying priority human rights issues for detailed assessment can also be extremely challenging when many aspects of the business’ operations have potential human rights impacts. For instance, in the cruise-line sector one practitioner commented

“Where do you start? You know, it's not like a mine, ... we visit a thousand destinations. We have staff from 120 different countries. We have port operations that we either partially own or operate in hundreds of destinations. We're feeding ships that are the size of small cities. How do you address food and beverage?... It's really a complex industry. So it's enormously challenging.”<sup>59</sup>

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<sup>54</sup> Interview 15, 23 February 2022.

<sup>55</sup> Interview 13, 22 February 2022; Interview 21, 6 May 2022.

<sup>56</sup> Interview 13, 22 February 2022.

<sup>57</sup> Interview 13, 22 February 2022.

<sup>58</sup> Interview 21, 6 May 2022

<sup>59</sup> Interview 5, 7 February 2022.

There are therefore many sectors where the number of human rights issues and/or the volume and dispersal of rightsholders makes prioritization decisions and subsequent engagement with rightsholders extremely complex and it is clear that practitioners are sometimes struggling to design feasible and robust methods in these types of scenarios.

But even when considering the most focused type of assessment – at locations such as mines, factories or farms - obtaining a full and nuanced picture is fraught with difficulty. Many practitioners stressed the difficulty of doing such studies well. Most practitioners focused on the difficulties of fulsome rightsholder engagement. They talked about the sheer volume of interviews they felt they had to do in order to get a full picture of the impacts of a company's operations and the difficulty of getting through the full range of potential human rights issues in time-constrained interviews.<sup>60</sup> Where a site was large, or involved a number of different locations (e.g. multiple small farms) there could be hundreds of rightsholder interviews. This was accompanied by obtaining the perspectives of various expert organisations and individuals including national and local NGOs, trade unions, government officials, doctors and teachers.

The interview process was made all the more complex by ensuring that interviewees could speak freely (e.g. workers away from the gaze of management, female members of the community away from their male counterparts). It was also often difficult to understand 'the community' in all its complexity. Often this meant unpicking different views of different constituencies. As one practitioner commented:

"It's never a homogeneous group of people who share exactly the same views. So I did some work ... in the context of a proposed mine. Some communities wanted it, some didn't. We divided our time equally ... between the two sides. The two sides would not sit in the same vehicle. So one day with proponents, and one day we would be with opponents to work through the area and all the issues. And people were utterly, utterly divided. I eventually worked out what's happening is the indigenous communities closest to the mine wanted it – "better than nothing". The indigenous groups in the wider area, including the wider area leadership said we decide on [free prior and informed consent], not you [the community closest to the mine]."<sup>61</sup>

While many interviewees therefore focused on meaningful rightsholder engagement as the most difficult part of the process, there was also a perspective that rightsholder engagement could become too dominant in the assessment process. There was often lots of physical evidence that could be uncovered through methods such as studies of satellite imagery or measurement of physical change at a site. Because some human rights experts sometimes were so focused on going in and talking to communities as their primary form of gathering evidence, there were concerns that they could miss opportunities to gather other forms of information.<sup>62</sup>

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<sup>60</sup> Interview 12, 17 February 2022.

<sup>61</sup> Interview 1, 24 January 2022.

<sup>62</sup> Interview 10, 16 February 2022.



There was therefore a risk that the human rights lens could marginalise important forms of evidence beyond that provided by rightsholders.

Consistently across this diversity of approaches, practitioners reported that the impact assessment part of the process, including desk-based research, fieldwork, analysis of results and writing up of reports would take a number of months.<sup>63</sup> The length of time spent on the fieldwork would depend on the size and complexity of the site(s) being studied. But practitioners generally spoke in terms of weeks spent on location. There were then differences between practitioners about what constituted a full impact assessment. For instance, while many practitioners would often only conduct one site visit because of logistical and cost restraints, one practitioner would only call something an impact assessment if he had done two serious rounds of fieldwork and so a single round of fieldwork he would refer to as a 'risk assessment'.<sup>64</sup>

How to deal with the range of human rights issues likely to be uncovered through a site visit was another issue of disparity. At one end of the spectrum, one practitioner thought that the general all-encompassing human rights study was never a full assessment. Instead the initial fieldwork might identify ten or more different human rights issues (e.g. resettlement needs of a community, sexual violence against workers, water pollution etc.) and separate studies would then subsequently be needed by experts on each of those issues.<sup>65</sup> At the other end of the spectrum, other practitioners favoured a more restrictive approach focusing on a limited number of human rights issues, warning that the more fulsome approach "is extremely costly or overwhelms the client with recommendations."<sup>66</sup>

As well as all these methodological challenges in the assessment process, practitioners also faced a number of technical challenges in ensuring action was then taken to address adverse human rights impacts. If the company was then going to act on the issues identified as priorities, a number of practitioners emphasised the importance of ensuring that recommendations were translated across into the management systems of the company.<sup>67</sup> This was not seen as a simple task. As one practitioner commented: "I think that was a huge gap; between our results and how they integrate those results on their methodologies or on their systems to be able to manage them."<sup>68</sup> There was also uncertainty in terms of public reporting on the HRDD process undertaken. While the extent of reporting might be covered in the contract between companies and practitioners, often this was not the case, and practitioners could not refer to a generally agreed standard about what should be reported.<sup>69</sup> In terms of acting and reporting on findings, power relations then played a very significant role in the outcomes that were achieved, as discussed in the next section.

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<sup>63</sup> Interview 21, 6 May 2022.

<sup>64</sup> Interview 4, 1 February 2022.

<sup>65</sup> Interview 2, 26 January 2022.

<sup>66</sup> Interview 16, 24 February 2022. Also making a similar point Interview 1, 24 January 2022.

<sup>67</sup> Interview 4, 1 February 2022, Interview 16, 24 February 2022, Interview 21, 6 May 2022.

<sup>68</sup> Interview 4, 1 February 2022; Interview 21, 6 May 2022.

<sup>69</sup> Interview 21, 6 May 2022

Some consultants were involved in follow up from assessments. This tended to be with clients with whom there was a longstanding relationship. Several cited the helpfulness of HRDD as a process which encouraged such ongoing engagement.<sup>70</sup> But most practitioners were not involved in any subsequent follow up and tracking to find out if action taken by the company had been successful in addressing the problems identified. They did sometimes hear about action the company had taken, and sometimes this could be a pleasant surprise.<sup>71</sup> But there were also stories of problematic follow up and lack of clarity about requisite standards. For instance, one practitioner commented:

“There were like some procedural challenges - companies that didn't really register their actions. They didn't have documents, have photographs, have any sort of evidence that tell you that they actually did something. ... Very, very commonly, we found that for the company the impact had been managed. ... They said OK we did all the management measures we're closing this. ... But they didn't ask the right holders if they were satisfied.”<sup>72</sup>

Overall, these leading practitioners appeared to have put serious thought and attention into creating meaningful and robust assessment processes that could uncover the impacts of corporate activity on rightsholders. But they were also open and honest about the complexities of many aspects of their work and the methodological challenges they faced on a wide range of key issues in the initial prioritisation, assessment and reporting process. On some issues, such as rightsholder engagement, they adopted highly differentiated approaches. What is clear is that navigating between fulsome engagement with rightsholders and investigation of an appropriate range of human rights issues on the one hand and creating an assessment process which is navigable for the company on the other is a complex task where a range of different approaches are possible. None of the guidance provided by the UNGPs or other sectoral guides that had been produced left practitioners feeling confident that there was a generally accepted approach. The practitioner's task throughout this process was then further complicated by the nature of their interactions with other key actors involved in the HRDD process and the dynamics of power and control these interactions often involved.

## **B. The Challenge of Relationships: Power and Control**

A number of practitioners described good working relationships with clients whereby they felt they were able to undertake meaningful HRDD processes and then discuss with clients the action that was required in a constructive way. Many practitioners also felt they could be robust with potential clients about the terms and conditions of work they might undertake, particularly if they had long-term working relationships. But a significant majority of practitioners interviewed also described at

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<sup>70</sup> Interview 13, 22 February 2022.

<sup>71</sup> “There this was one case when we supported with the action plan where we finally found out that they ended up doing all this training and that they were bringing in this expert. And that was so positive because I really thought they were just going throw it in the trash. The report.” Interview 14, 23 February 2022. Also, Interview 6, 8 February 2022, making the point that successful implementation often depended on the quality of the person who commissioned the assessment or was ‘on the ground’ in charge of follow up.

<sup>72</sup> Interview 22, 12 May 2022

least some instances where the relationship between themselves and the company, intra-company relationships and relationships between the company and its suppliers posed significant difficulties throughout the HRDD process. This in turn created challenges for producing HRDD which would materially affect the situation of rightsholders.

One key issue identified by a number of practitioners was that their ability to assess a companies' human rights impacts was undermined by clients and the constraints they imposed. There were multiple occasions when such issues were mentioned by practitioners:

"[The company said] we will look at worker rights, but not at land"<sup>73</sup>

"They excluded anything related to a union organizing because they didn't want to have like trouble with the Union at that time"<sup>74</sup>

"They only let us talk to certain workers. You can't talk to certain contractors. They kind of want to decide where we're going. Everything from the management interviews feel staged."<sup>75</sup>

"Senior management is not really comfortable with this topic"<sup>76</sup>

Practitioners were then left in difficult situations to decide on whether to continue with work when such constraints were imposed that restricted their ability to assess what could potentially have been the most troubling human rights issues.

As well as the practitioner's relationship with the company, the relationship between the corporate HQ and local management in sites where assessments were taking place could also seriously affect the assessment process.<sup>77</sup> As one practitioner commented

"So we tend to be forced onto sites to do these assessments because corporate head office [send us]. So we are never invited by sites. So in terms of how seriously people take it, it comes down to the relationship that they have with that corporate head office."<sup>78</sup>

Sometimes, when sites realized what an assessment involved, they would refuse to cooperate.<sup>79</sup> In one case a practitioner reported that they had to stop the assessment because the local site would not co-operate, even though the consultant had a good relationship with headquarters.<sup>80</sup>

While practitioners gave examples of how power dynamics could affect the whole HRDD process, it was when it came to reporting and acting upon findings that some of the most significant issues were identified. On the positive side, practitioners identified how the increasing power and purchase of the human rights discourse meant that practitioners were reporting to people higher and higher up the company.<sup>81</sup> Comments were made such as "I find myself sitting with chairs of boards

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<sup>73</sup> Interview 7, 9 February 2022.

<sup>74</sup> Interview 21, 6 May 2022.

<sup>75</sup> Interview 14, 23 February 2022.

<sup>76</sup> Interview 7, 9 February 2022.

<sup>77</sup> Interview 2, 26 January 2022; Interview 7, 9 February 2022; Interview 12, 17 February 2022; Interview 14, 23 February 2022.

<sup>78</sup> Interview 2, 26 January 2022.

<sup>79</sup> Interview 14, 23 February 2022.

<sup>80</sup> Interview 14, 23 February 2022.

<sup>81</sup> Interview 4, 1 February 2022; Interview 10, 16 February 2022; Interview 16, 24 February 2022.

more often than I used to”<sup>82</sup> and “definitely human rights gets attention of senior executives now”<sup>83</sup> and “what's really exciting is that we're increasingly seeing the audience for these get more and more senior, including up to the board in C-Suite level”.<sup>84</sup> While some practitioners found this did create increased leverage, others questioned its usefulness. Often they were reporting only a very brief synopsis: “you write a 100 page report and what you present to the board is 2 slides”<sup>85</sup>, and they were unsure of the effect such an intervention had.

At the same time, a number of practitioners also described hostility to their findings.<sup>86</sup> As one practitioner commented:

“They normally hated us. The first reaction is defending myself, defending my company, defending what I've been doing for years. So usually that's like the first position with the company officials”<sup>87</sup>

Because findings of negative impact were often based on the testimony of rightsholders these could be the subject of serious pushback from company representatives. These officials were often used to hard numbers and data “They don't want a story”.<sup>88</sup> As one practitioner commented “oftentimes, working with companies they almost try to discredit our findings a little bit because they use the word perceptions a lot. [They say] “These aren't real impacts” so it's a fight.”<sup>89</sup>

A number of practitioners therefore emphasised the importance of sensitising people across multiple different aspects of the business who would be engaging with the findings produced.<sup>90</sup> Generally, practitioners reported that they were then robust about their findings. But one practitioner did give an example of where he reworded an assessment report in the interests of having an impact on other human rights issues:

“I was just looking at language [in the report]: “bullying is pervasive from the leadership team”. It might be. But if we assert that, I'm not sure we're going to get past that, because we need them to engage with the rest of it... From an ethics or integrity point of view, you could absolutely challenge and say, well, that's the finding. It should be in there. But that's the difference between an academic piece of research and a piece of research that's looking to catalyse change within a business....And I think they've had significant experience of human rights work that's not understood business enough in terms of how it's presented, its findings.”<sup>91</sup>

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<sup>82</sup> Interview 16, 24 February 2022.

<sup>83</sup> Interview 10, 16 February 2022.

<sup>84</sup> Interview 4, 1 February 2022.

<sup>85</sup> Interview 8, 14 February 2022.

<sup>86</sup> Interview 2, 26 January 2022; Interview 11, 16 February 2022; Interview 14, 23 February 2022, Interview 17, 11 March 2022; Interview 19, 26 April 2022; Interview 20, 26 April 2022; Interview 21, 6 May 2022.

<sup>87</sup> Interview 21, 6 May 2022.

<sup>88</sup> Interview 17, 11 March 2022.

<sup>89</sup> Interview 14, 23 February 2022.

<sup>90</sup> Interview 4, 1 February 2022; Interview 22, 12 May 2022; Interview 14, 23 February 2022; Interview 21, 6 May 2022.

<sup>91</sup> Interview 16, 24 February 2022.

Most practitioners said they would work with companies to do some form of “showing” (communication of findings to external stakeholders) as the UNGPs demand. Some practitioners saw this as of limited importance compared to their internal efforts to work with the company to bring about change.<sup>92</sup> For those who were more concerned about public disclosure, the substance of what was published was important.<sup>93</sup> A number of practitioners commented that neither the UNGPs nor other guidance that had been produced helped practitioners to push for fulsome and meaningful disclosure.<sup>94</sup> The companies’ own summarising of results of assessments in their sustainability reports were not felt by a number of practitioners to be particularly valuable as they “really skew the story most of the time”.<sup>95</sup> Some pushed for more transparency, but said that their clients did not want to publish the results of assessments undertaken for them and that they had relatively little power to influence this.<sup>96</sup> Even those clients who were initially open to publishing the results of assessments could change their minds when the results came in.

“Some of them just said we’re going to make this public. That is something which we do. But then when they got the results they said. OK, maybe we can just do like a statement and work with this internally. And no one published them. No one published.”<sup>97</sup>

Often practitioners did not know what happened in terms of the degree to which their findings were then acted upon as businesses tackled these actions by themselves. But where practitioners were involved in the implementation of findings, many reported that there were a variety of different challenges. One challenge was a common misapprehension that impact assessment or due diligence was an end in itself rather than a process that identifies issues which the company had to address.<sup>98</sup> In other situations, those who commissioned the HRDD process within the company lacked the power and influence to get critical actors in the company engaged.<sup>99</sup> More prosaically, it was sometimes difficult to identify who was responsible for taking the required action.<sup>100</sup>

Where action was taken, it could be that the focus was on “lower hanging fruit”; issues that were easier and less costly to address. Practitioners sometimes reported that some of the more complex impacts, like resettlement issues, “basically never changed”.<sup>101</sup> Particularly when change was costly, there could be deep intransigence. As one practitioner said “Many companies would straightforwardly tell us that they won’t do anything about it.”<sup>102</sup> Practitioners also reported tensions between head office and the rest of the business about who paid for any action that was required.

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<sup>92</sup> Interview 13, 22 February 2022

<sup>93</sup> Interview 6, 8 February 2022; Interview 13, 22 February 2022.

<sup>94</sup> Interview 13, 22 February 2022

<sup>95</sup> Interview 14, 23 February 2022.

<sup>96</sup> Interview 2, 26 January 2022; Interview 3, 31 January 2022; Interview 7, 9 February 2022; Interview 10, 16 February 2022; Interview 14, 23 February 2022;:

<sup>97</sup> Interview 22, 12 May 2022.

<sup>98</sup> Interview 7, 9 February 2022.

<sup>99</sup> Interview 4, 1 February 2022; Interview 7, 9 February 2022.

<sup>100</sup> Interview 1, 24 January.

<sup>101</sup> Interview 22, 12 May 2022.

<sup>102</sup> Interview 17, 11 March 2022.

More powerful local sites and subsidiaries might resist taking action.<sup>103</sup> Even where practitioners did work to try to implement recommendations themselves with local teams, “when we go away and somebody else pulls them up on [another part of] their performance. They shift attention.”<sup>104</sup>

When human rights issues were identified in the company’s value chain, it was even more difficult. Sometimes practitioners would find that the company would push the responsibility onto the suppliers. But suppliers would then ask who was going to pay for the cost of making changes. One practitioner gave the following example:

“Wages sometimes can get tricky or painful because then it can really affect business. Hearing the feedback from suppliers, many companies just don't listen to their suppliers or they don't engage with them. So they can tell them you have to do this and that. But then have they paid them enough actually for them to offer good conditions? So sometimes that's part of the problem that leads to the human rights issues happening.”<sup>105</sup>

It is well recognised that, in many sectors, it is pressure from lead firms for cheap products and/or quick turn-around times which leads suppliers to reduce costs and timescales of production and in so doing violate the rights of workers.<sup>106</sup> There is a danger that HRDD may add to the pressures on suppliers to take action to address human rights issues identified, but without addressing the question of how the costs of this social upgrading should be distributed through the value chain.

When considering the overall picture of how practitioners spoke about the power dynamics discussed above, some practitioners reported how they were able to successfully leverage their position as external expert to convince companies to investigate and act upon some serious human rights issues.<sup>107</sup> But most practitioners also identified how the HRDD process involves multiple pressure points throughout the assessment of impacts and then communicating and acting upon findings where the power exercised by more dominant actors could be unduly influential. As a result there were dangers that issues could be excluded from assessments and findings, or more troublesome findings could be ignored by the company or pushed onto unwilling or incapable suppliers or subsidiaries to address. The conundrums of how and where to take a stand on these issues was identified by one practitioner as follows:

“Will I still be able to have an impact and create some level of change if I give in on this, and how far do you give in before you've actually, you know, tainted your own professional standard?...And with every consultant that I speak with, you know we might draw the line slightly differently.”<sup>108</sup>

The different standards according to which different consultants operate, and their competition with each other for HRDD business, creates a further challenge to meaningful HRDD processes that will actually benefit rightsholders.

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<sup>103</sup> Interview 17, 11 March 2022.

<sup>104</sup> Interview 11, 16 February 2022.

<sup>105</sup> Interview 11, 16 February 2022, Interview 12, 17 February 2022, Interview 14, 23 February 2022; Interview 17, 11 March 2022.

<sup>106</sup> See e.g. Stefano Ponte, *Business, Power and Sustainability in a World of Global Value Chains*. (London: Zed Books Ltd., 2019)

<sup>107</sup> Interview 13, 22 February 2022; Interview 16, 24 February 2022.

<sup>108</sup> Interview 7, 9 February 2022; Interview 14, 23 February 2022; Interview 16, 24 February 2022.

### C. The Challenge of Competition

Most of the practitioners interviewed were very aware of broader practice in their field. While most practitioners identified other experts who produced excellent due diligence and impact assessment work, the vast majority of practitioners were concerned about how the practice of other practitioners was undermining standards generally and their own work specifically. There was some concern from more commercially-orientated practitioners about the capacity of those from a professional human rights background to understand corporate culture and to be able to communicate effectively with companies. Some practitioners complained about having to convince company officials about the value of human rights when they followed in the footsteps of another practitioner who had produced findings that the company could not understand or act upon. As one practitioner commented:

“I've just heard so many people just trash human rights assessments that have come in and been abstract and extreme and legal and totally unhelpful which really surprised me.”<sup>109</sup>

But it was far more common for practitioners to be concerned about superficial practice by other consultants. For some, this was an intrinsic problem with the company-consultant relationship. One practitioner even argued “when you're talking mostly about private consultants, well of course they want to keep their client for a very long time. So they will do whatever is necessary to keep them happy.”<sup>110</sup> Many others were very aware of the fact that there were an increasing number of other providers who they were competing with them to offer services to companies. While some had ongoing long-term engagement with the same clients and so felt relatively secure in these relationships, many others were tendering for contracts to undertake human rights due diligence or impact assessments on a regular basis. Concerns about competitors were particularly pronounced with regard to the bigger more commercially minded providers getting involved in the industry.<sup>111</sup> As one practitioner put it:

“I think we're getting to a place where this kind of more and more commodification of human rights ... and increasingly big players, recognizing that there's a market here. And so I definitely have a worry about kind of a McKinsey or PwC or Deloitte going in and doing these assessments having not recruited human rights experts, but just taking a methodology and implementing it in a cookie cutter way.”<sup>112</sup>

A number of consultants reported losing out on business to other consultants who had undercut them on price. Sometimes they were able to find out that this was because those consultants had a less rigorous assessment process, often involving considerably less or even no time in the field.<sup>113</sup> A number of practitioners even saw

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<sup>109</sup> Interview 3, 31 January 2022. See also Interview 16, 24 February 2022

<sup>110</sup> Interview 22, 12 May 2022.

<sup>111</sup> Interview 1, 24 January 2022; Interview 3, 31 January 2022; Interview 8, 14 February 2022; Interview 15, 23 February 2022;; Interview 16, 24 February 2022.

<sup>112</sup> Interview 8, 14 February 2022

<sup>113</sup> Interview 11, 16 February 2022; Interview 22, 12 May 2022.

risk assessments being sold to companies as processes by which they could actually assess the *impacts* of their operations.<sup>114</sup> One practitioner went as far as saying that “lots of companies are essentially, I think, doing the human rights due diligence by plugging in the country and sector to RepRisk<sup>115</sup> and seeing what comes out.”<sup>116</sup> Another said “it will be like with the Maplecroft maps.<sup>117</sup> There you are. There's your map. You can see where your issues are.”<sup>118</sup> Another had seen in-person engagement replaced by troubling online methods: “a very large [consulting] company just did an impact assessment on the ground by doing an online survey with farmers.”<sup>119</sup> Even in situations where such methods were able to identify significant human rights risks or impacts, concerns were also raised about whether more commercially-orientated operators always highlighted the most troubling findings and most complex and resource-intensive action required as a result.<sup>120</sup> Concerns were raised by one practitioner about practice even among others who were seen as leading practitioners in the field:

“We did some recent work looking at pioneering companies in human rights due diligence and even the pioneers don't really engage properly with rightsholders and listen properly.”<sup>121</sup>

One practitioner gave an example of the problems caused by poor practice from other consultants. The practitioner had undertaken a human rights impact assessment for a company which had identified that the suppliers of that company were implicated in the sexual exploitation of children. That company then approached another company in the region with the same suppliers with a view to collective action. But because nothing had come up in the second company's assessments, company management denied that the problem existed. It turned out the other consultant who had undertaken the assessment for the second company had only interviewed senior staff of the company itself and some of the employees but ignored local communities and suppliers.<sup>122</sup>

The general feeling was that these problems with general standards of practice are widespread. As one practitioner commented “I'd say half of the practice at the moment it's probably not worth what's done.”<sup>123</sup> But attempting to address these problems is not easy because there is generally not a consensus on what the standards of practice are which are necessary for meaningful assessment of human rights impacts. As one practitioner put it “There's no consent on the minimums.”<sup>124</sup> Another used a metaphor to describe how practice was a lot less defined and settled

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<sup>114</sup> Interview 1, 24 January 2022, Interview 4, 1 February 2022, Interview 6, 8 February 2022; Interview 15, 23 February 2022, Interview 16, 24 February 2022, Interview 17, 11 March 2022, Interview 21, 6 May 2022; Interview 22, 12 May 2022.

<sup>115</sup> See RepRisk at <https://www.reprisk.com/> accessed on 13 March 2023

<sup>116</sup> Interview 1, 24 January 2022.

<sup>117</sup> See Verisk Maplecroft ‘Country Risk Intelligence’ at <https://www.maplecroft.com/services/country-risk-intelligence/> accessed on 23 March 2023.

<sup>118</sup> Interview 15, 23 February 2022.

<sup>119</sup> Interview 17, 11 March 2022.

<sup>120</sup> Interview 11, 16 February 2022

<sup>121</sup> Interview 11, 16 February 2022.

<sup>122</sup> Interview 22, 12 May 2022.

<sup>123</sup> Interview 16, 24 February 2022.

<sup>124</sup> Interview 21, 6 May 2022.



than it seemed: “I think it's all a great big wobbly jelly.”<sup>125</sup> The problems of poor practice could even have serious impacts on practitioners themselves. As one practitioner commented:

“Competition among organizations and sometimes companies choosing the cheapest option, makes some experts offer lower prices and shorter times than what they can actually do. This imposes work dynamics for people doing HRDD - long working hours, work overload, and uncontrolled pressure- that honestly violate their labour and human rights.”<sup>126</sup>

It is onto this uncertain and troubled world that mandatory human rights due diligence initiatives are seeking to make an impression. The new wave of mandatory human rights due diligence laws will have one clear and certain effect on this world of practice. Even though mHRDD laws are generally limited to the largest companies and their suppliers, those laws will still massively increase the overall number of companies undertaking HRDD. The proposed EU Directive on corporate sustainability due diligence alone will see approximately 15,000 companies directly required to undertake HRDD and the obligation will also affect those companies’ supply chains.<sup>127</sup> For some practitioners, this was a positive development in terms of prompting far more companies to think about their human rights concerns and the need to engage with rightsholders than ever before. But in terms of creating meaningful due diligence processes, even maintaining the standards that currently exist looks extremely difficult. As one of the interviewees put it:

“There are so many companies and there aren’t that many practitioners, it’s a small community of people who are really dedicated and committed to this work.”<sup>128</sup>

That challenge is exacerbated if there is an aspiration to build up capacity in countries where key human rights challenges often appear. At the moment this capacity-building is beginning to happen among the small community of leading international practitioners who increasingly work with and support local practitioners, particularly in Africa and Asia. But this will be difficult to replicate as the scale of HRDD dramatically increases. As one practitioner commented

“I would say one of the weaknesses is westerners or white northerners doing impact assessments on the ground and not enough local capability and capacity ... I think there's a question about that local capacity and how you train and develop it.”<sup>129</sup>

Practitioners identified how there were already a rush of new more commercially-orientated consultants joining the field. With the exponential increase in practice that will result from mandatory due diligence laws, practitioners were concerned that the most likely outcome was more “low cost, low standards” consultants.<sup>130</sup> This

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<sup>125</sup> Interview 1, 24 January 2022.

<sup>126</sup> Interview 22, 12 May 2022.

<sup>127</sup> See European Commission, Corporate sustainability due diligence, Fostering sustainability in corporate governance and management systems (no date) [https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en) accessed on 13 March 2023.

<sup>128</sup> Interview 8, 14 February 2022.

<sup>129</sup> Interview 11, 16 February 2022.

<sup>130</sup> Interview 8, 14 February 2022; Interview 17, 11 March 2022.

creates a serious danger of a race to the bottom rather than a race to the top in terms of the rigour with which HRDD is carried out in the future. Can the obligations which are contained in mHRDD laws drive up standards in a way that avoids this race to the bottom? This is a question considered in the discussion section below.

## 5. Discussion: Responding to the Challenges

Two key problems were identified in section 2 with holding TNCs accountable for their human rights performance. First, there is a knowledge problem; the difficulty in finding out where human rights abuses are occurring (and are at risk of occurring in the future) and who is responsible for those abuses in a world of complex production processes and global value chains. Second, there is an action problem; how to effectively put a stop to human rights violations, mitigate their impacts, provide remedies to affected rightsholders and prevent future abuses occurring. HRDD purports to tackle the knowledge problem by requiring companies to identify and assess their actual or potential adverse human rights impacts. It then purports to address the action problem by requiring companies to prevent or mitigate any adverse impacts, monitor the effectiveness of their responses, and provide for, or cooperate in processes of remediation. These are all internal responsibilities of the business itself. External accountability is created by the requirement that they communicate the actions they have taken to outsiders.

The very best HRDD processes, which involve the most thoughtful and diligent practitioners, commissioned by corporate actors who are willing and able to take action with regard to human rights issues identified, can lead to significant outcomes that benefit rightsholders. But key challenges to effective HRDD are making such practice a rarity and mean that both the knowledge and action problems are left unsolved, as demonstrated by the analysis in section 3. First, the complexity of HRDD processes undertaken across a wide range of sectors leads to high levels of uncertainty about appropriate methodological approaches on key aspects of HRDD. Second, the power exercise by more dominant actors in inter-relationships between key actors involved in HRDD (e.g. practitioners and corporate head office; head office officials and officials in other parts of the company; company officials and their suppliers) creates serious risks of undermining the assessment of impacts and the action taken to address adverse impacts identified. Third, lower quality practitioners whose work is cheaper are less likely to uncover human rights abuses and to challenge companies with the results of assessments. These practitioners are already undertaking a significant amount of HRDD work. With the massive expansion of HRDD which is now occurring as a result of mHRDD laws and the small number of higher quality practitioners in the field, the dangers of a race to the bottom in terms of the quality of future practice are very high. Ironically, civil society calls for mHRDD laws to be extended to cover more companies would further exacerbate the problems.<sup>131</sup>

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<sup>131</sup> See e.g. European Coalition for Corporate Justice, Dangerous gaps undermine EU Commission's new legislation on sustainable supply chains (23 February 2022) <https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/>

Table 1 below presents these key challenges and their impact on the ability of HRDD to address the knowledge problem and action problem. Seen collectively, these challenges raise serious concerns about the ability of HRDD, in its current form, to improve corporate human rights performance and human rights outcomes for rightsholders.

**Table 1: Limitations in Current HRDD Practice in Addressing the Knowledge and Action Problems**

	<b>Methodological Challenges</b>	<b>Power Dynamics</b>	<b>Commercial Competition</b>
<b>The Knowledge Problem</b>	Complexity of assessing human rights impacts and uncertainty about appropriate methods undermines reliability of knowledge obtained.	Limits placed on the scope of assessment and refusals to co-operate during the assessment process threaten capacity to discover human rights abuses.	Dangers of race to the bottom in terms of assessment methods risks widespread failure to understand risks and impacts 'on the ground'.
<b>The Action Problem</b>	Corporate management systems misaligned with HRDD processes. Vital procedural safeguards not in place to ensure actions properly recorded and acted upon.	Hostility to findings of assessment, resistance to implementation of findings and efforts to shift responsibility onto other actors undermines efforts to address impacts.	Reluctance by consultants to push for action on most difficult and resource-intensive issues risks those issues being marginalised. If widespread this will also cause a race to the bottom dynamic.

Can the limitations identified in this paper be overcome? One immediate way in which this might happen is through the legal obligations contained in mHRDD laws. None of the current wave of mHRDD laws change the core dynamics of the due diligence process as specified in the UNGPs; HRDD will still involve companies working with practitioners to assess impacts and then taking action to address adverse impacts identified, track the effectiveness of their responses, and communicate how their impacts have been addressed. Generally speaking, the laws concentrate on (1) specifying key elements of the HRDD process that must be undertaken, (2) creating supervisory authorities which monitor HRDD practice, (3) creating mechanisms for third parties to make complaints and/or obtain information from companies (4) ensuring companies publish information about the process, and (5) taking action with regard to non-compliance.<sup>132</sup> Will these regulatory efforts mean that HRDD processes are able to address the knowledge and action problems on a more regular basis? Only if they effectively empower practitioners, government

<sup>132</sup> See Corporate Justice, *Corporate due diligence laws and legislative proposals in Europe Comparative table* (March 2022) <https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2/> accessed on 13 March 2023.

officials, campaigning organisations and rightsholders themselves to hold corporations accountable for the HRDD that is produced. Some ways in which this might be achieved are suggested below.

In terms of the knowledge problem, mHRDD laws can play an important role in strengthening HRDD processes so that they are more likely to regularly uncover the most serious human rights issues affecting rightsholders. First, mHRDD laws can play an important role in specifying key elements of the HRDD process. Key elements must be identified at the sectoral level because, as the discussion in section 4a shows, HRDD in different sectors will be a very different enterprise. But if a sectoral specification process can create a minimum core set of expectations about HRDD, this can help practitioners to take decisions about difficult methodological issues and strengthen their position vis-à-vis company officials in the initial prioritisation, assessment and reporting processes. For instance, such guidance could clarify expectations around the prioritisation process for HRDD and make clear where it is illegitimate for companies to seek to limit the scope of assessment. Such guidance could also create minimum expectations that could empower rightsholders by specifying the forms and depth of engagement they should expect throughout the assessment process and how they will be consulted in relation to the draft findings that are produced. At the moment, mHRDD laws do not appear to be specifying key elements of the HRDD process in anything like this level of detail.<sup>133</sup>

Detailed sector-specific guidance will be less determinative of the practice that ensues than in many other self-reporting processes. This is partly because of the multifaceted nature of human rights themselves as well as the complexity of larger companies' operations to which they are being applied.<sup>134</sup> As a result, choices will have to be made by companies and practitioners about a range of different issues (e.g. where to prioritise assessments, how to assess impacts etc.). Detailed scrutiny of those choices and the findings to which they give rise is then vital. This will not be possible if reporting obligations allow companies significant discretion about what they disclose to regulators and publish for public consumption. mHRDD laws currently tend to allow companies that discretion.<sup>135</sup> Where companies can create their own synopsis of the reporting process, existing practice demonstrates the likelihood that this will lead to obfuscation and omission of key details. Instead, complete disclosure of companies' HRDD is required so that supervisory authorities and campaigning organisations are then capable of conducting meaningful scrutiny.

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<sup>133</sup> For instance, the EU Proposal on Corporate Sustainability Due Diligence sets out only very briefly in one article (Article 6), the process of assessing human rights impacts. See EU Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

<sup>134</sup> Even when comparing with other forms of social and environmental due diligence, HRDD is a more multi-faceted and complex process. Due diligence processes set up to ensure e.g. deforestation free products, conflict-free minerals, or the absence of forced labour in supply chains are focusing on a much more narrow range of human rights issues and/or products. HRDD covers, at a minimum the civil and political and economic, social and cultural rights of the International Bill of Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (UN Guiding Principle 12).

<sup>135</sup> For instance, the German Act on Corporate Due Diligence Obligations in Supply Chains only requires companies to produce an Annual Report with some basic information about the due diligence process and its findings (section 10).

Commercial confidentiality of the information contained within HRDD is often utilised to defend non-disclosure. But existing practice demonstrates how comprehensive reports of human rights impacts of a company's operations can be published in potentially sensitive areas of business such as the extractives sector.<sup>136</sup>

Supervisory authorities must then be staffed with sufficient numbers of expert personnel to allow for detailed scrutiny of reports. These staff must have sufficient human rights, sectoral and country-based knowledge to be able to identify gaps and inaccuracies in reports and then to assess the adequacy of companies' responses to those issues. This must be complemented by mechanisms for third parties to make complaints and obtain information which empower rightsholders and their representatives to themselves identify (potential) human rights issues and for those to be properly investigated.<sup>137</sup> The deficiencies of many existing complaints mechanisms are well-documented.<sup>138</sup> mHRDD laws therefore need to ensure that complaints mechanisms introduced in relation to mHRDD are effective including by ensuring such mechanisms are well-publicised and made accessible for all rightsholders who wish to utilise them, that they undertake independent and timely investigations that are not unduly burdensome on rightsholders, and that they produce meaningful results at the end of the process.<sup>139</sup>

When it comes to the action problem, mHRDD laws can create strong incentives for companies to address human rights issues for which they bear (some) responsibility. Most of the focus has been on whether and how mHRDD laws could lead to civil or criminal cases against companies and their directors. Such action can act as an important incentive, if companies fear that failure to take HRDD seriously could lead to successful cases being brought against them.<sup>140</sup> As important is the work of supervisory authorities. They must have sufficient powers (fines, injunctions etc.) and a demonstrable willingness to use them to incentivise companies to take action where their own investigations or investigations of rightsholder complaints lead to the identification of human rights violations which the company has not addressed. But verifying that human rights issues have been addressed is not sufficient. Supervisory authorities also need to be concerned with *who* is taking action to address human rights issues identified. They need to ensure that lead firms in global value chains and other large companies do not simply push responsibility for taking action onto their suppliers and contactors, but rather that the costs of compliance

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<sup>136</sup> Harrison, Above, at 428.

<sup>137</sup> There are a variety of different models. E.g. Norway's Transparency Act permits any person to file a request for information about a company's due diligence process to the company directly and also request the Consumer Authority to investigate potential breaches (sections 6-7 and 9). The German Corporate Due Diligence in Supply Chains Act requires companies to establish internal or participate in external complaints procedures (section 8).

<sup>138</sup> Harrison, James and Wielga, Mark "Grievance Mechanisms in Multi-Stakeholder Initiatives: Providing Effective Remedy for Human Rights Violations?" (2023) *Business and Human Rights Journal*, 1-23. doi:10.1017/bhj.2022.37.

<sup>139</sup> Making such recommendation see James Harrison, Margarita Parejo, Mark Wielga "The value of complaints mechanisms in private labour regulation of GVCs: A case study of the Fair Labor Association" *Under Review, International Labour Review*.

<sup>140</sup> A number of cases have been brought under the French Duty of Vigilance Law See <https://vigilance-plan.org/court-cases-under-the-duty-of-vigilance-law/> accessed on 23 March 2023. We wait to see what outcomes such cases achieve.

are distributed equitably between relevant actors. At the moment mHRDD laws say little on this aspect of the HRDD process.<sup>141</sup> They therefore risk exacerbating existing power dynamics in global value chains which generally benefit lead firms, often in the global north, at the expense of other companies in the value chain, particularly those in the global south.<sup>142</sup>

Enhancing mHRDD laws and their implementation in the ways suggested above will not be an easy task. Governments will need to extend and strengthen existing obligations and put serious resources into monitoring and enforcement in the face of likely opposition from some of the largest and most powerful companies in the world. Such companies will resist measures which empower practitioners, supervisory authorities and rightsholders to more effectively identify and take requisite action to address human rights issues for which they bear responsibility. But if mHRDD laws remain weak, they will entrench existing problems identified in this paper and leave discretion and therefore power in the hands of companies about how to investigate their own human rights impacts, what to disclose about those investigations, and how to distribute the costs of compliance with regard to any action they take. There will undoubtedly continue to be enterprising and committed practitioners who will work with enlightened companies to make change happen, but this will be the exception rather than the rule. The vast majority of the greatly expanded practice which will occur will be the kind of tick-box responses from companies which many commentators and campaigning organisations currently fear.

As more and more countries bring in mHRDD laws, the effectiveness of those laws needs to be carefully scrutinised. The key question which must be asked is whether mHRDD laws are leading to HRDD practice which is actually having a widespread positive impact on both the knowledge and action problems which they seek to address. If this is not happening, then consideration should be given to a regulatory model which does actually change the core dynamics of the HRDD process. Such a model could be created if national authorities from across the different countries who are proposing HRDD laws collectively set up an independent body to have lead responsibility for overseeing the HRDD process (iHRDD). iHRDD would be the professional home of HRDD practitioners and be responsible for their training and accreditation, funded by contributions from the companies who are subject to HRDD laws. It could commission those practitioners to map out key human rights issues by sector and by country (e.g. the tea industry in Kenya). This would then create an evidence base about the key human rights issues which any company operating in that sector and country must consider.<sup>143</sup> iHRDD could also then be responsible for

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<sup>141</sup> For instance, the EU Draft Directive at Article 7(d) says only that companies should “provide targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the prevention action plan would jeopardise the viability of the SME.” European Commission, on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (23.2.2022).

<sup>142</sup> Stefano Ponte, *Business, Power and Sustainability in a World of Global Value Chains*. (London: Zed Books Ltd., 2019)

<sup>143</sup> Interviewees identified a number of arguments to support sector-wide assessments. It would allow more individual company assessments do be done more cost effectively and in shorter time scales utilising the sector wide assessment as the first stage (Interview 8, 14 February 2022). Practitioners

the appointment and payment of practitioners to undertake individual HRDD processes for companies. This would change the power dynamics of the relationship between company and practitioner and ensure significant independence to the HRDD process. iHRDD would also be in a much stronger position to ensure effective and equitable responses from companies, given that it would have direct control over the practitioners who were producing HRDD reports. It could also coordinate collective responses where this might be more effective than each company acting individually in silos to address an issue which was endemic in a particular country and/or sector.<sup>144</sup>

The creation of iHRDD would be no small task. Being given responsibility for commissioning HRDD processes globally would mean that iHRDD would need to be endowed with very significant powers and resources. But the human rights knowledge and action problems associated with the activities of the world's largest corporations might justify exactly such a response. The threat of iHRDD might also encourage all involved in implementing the current wave of mHRDD laws to take the action required to make them function effectively so that they demonstrably improve the human rights performance of corporations.

## 6. Conclusion

What can HRDD achieve in terms of widespread changes to corporate behaviour and improvements to the lives of workers, communities and consumers who are adversely impacted by corporate activities? At the moment, the outlook is gloomy. Key challenges cast serious doubt on whether HRDD processes are (and will in future) routinely uncover and address the most serious human rights issues as they affect rightsholders. Those challenges include complex and uncertain methods for undertaking HRDD, troubling power dynamics between key actors who are tasked with various aspects of the HRDD process, and dangers of a race to the bottom from the growing field of HRDD practitioners. The plethora of mHRDD laws currently coming into force across the world risk exacerbating the problems of HRDD rather than enhancing its practice. Those laws must be significantly strengthened, properly resourced and focus on empowering and constraining key actors who are vital to the HRDD process if HRDD is to significantly improve the situation of rightsholders globally. Otherwise more radical regulatory interventions, such as iHRDD, need to be seriously considered.

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would have a stronger voice if they could point to patterns of human rights issues affecting whole regions and/or industries rather than having to point the finger only at one individual company (Interview 9, 17 February 2022). It would also address some the stakeholder fatigue in some sectors where “we found up to 20 different consultants who have been before us.” (Interview 16, 24 February 2022.)

<sup>144</sup> One practitioner gave the following example: “It is not possible to only eradicate child labour in a cocoa supply chain when children are working in similar conditions across all agricultural sectors in the same region. The only difference when seen from a supply chain perspective is that cocoa is produced for the international chocolate market and other agricultural commodities may not be exported. But from a child-centred perspective the issue of child labour, its causes and detrimental impact on children and families is the same and not unique to one supply chain. This is why the way to eradicate child labour from any supply chain effectively requires a developmental approach to lifting children and families out of relative and structural poverty.” (Interview 18, 14 March 2022).