

## Making sense of managing human rights issues in supply chains\* 2018 report and analysis

**Beyond compliance and audit:** A deeply embedded governance: Our interviews demonstrate that companies are increasingly noting the shortcomings of traditional code of conduct and audit processes and are exploring more innovative approaches.

*“We know our supply chain better than anyone else.” – Interviewee*

**Finding solutions beyond the first tier:** It is apparent that there are limited practices in place for HRDD beyond the first tier. Any leverage exercised tends to be through the first tier supplier or collective engagement with peers or other stakeholders.

**Overview of affected rights:** Whilst the interviewees highlighted a range of human rights which are at risk of adverse impacts in supply chains, forced labour and child labour came up most frequently across sectors.

**Small and medium-sized enterprises:** SMEs can find implementing HRDD challenging, but they can nonetheless have an impact through their own processes, and larger businesses can help by engaging in capacity building.

**The role of collective action initiatives:** Collective action, including through sectoral, cross-sectoral and multi-stakeholder initiatives, is particularly beneficial where the nature of the supply chain is more opaque, and when seeking to exercise leverage beyond the first tier.

*“It is important for the whole industry to develop something that really works” - Interviewee*

**The supplier’s perspective:** Without effective collaboration between industry peers in carrying out HRDD, and alignment of purchasing practices with human rights expectations, suppliers may be subject to unnecessary cost and time burdens in connection with their efforts to comply with audits, training and screening exercises carried out by their customers.

**The role of states and regulation:** Interviewees were generally supportive of clear regulation, given a desire for legal certainty. There is also a broad expectation that regulations incorporating HRDD elements will evolve in terms of scope of application and rigour of requirements.

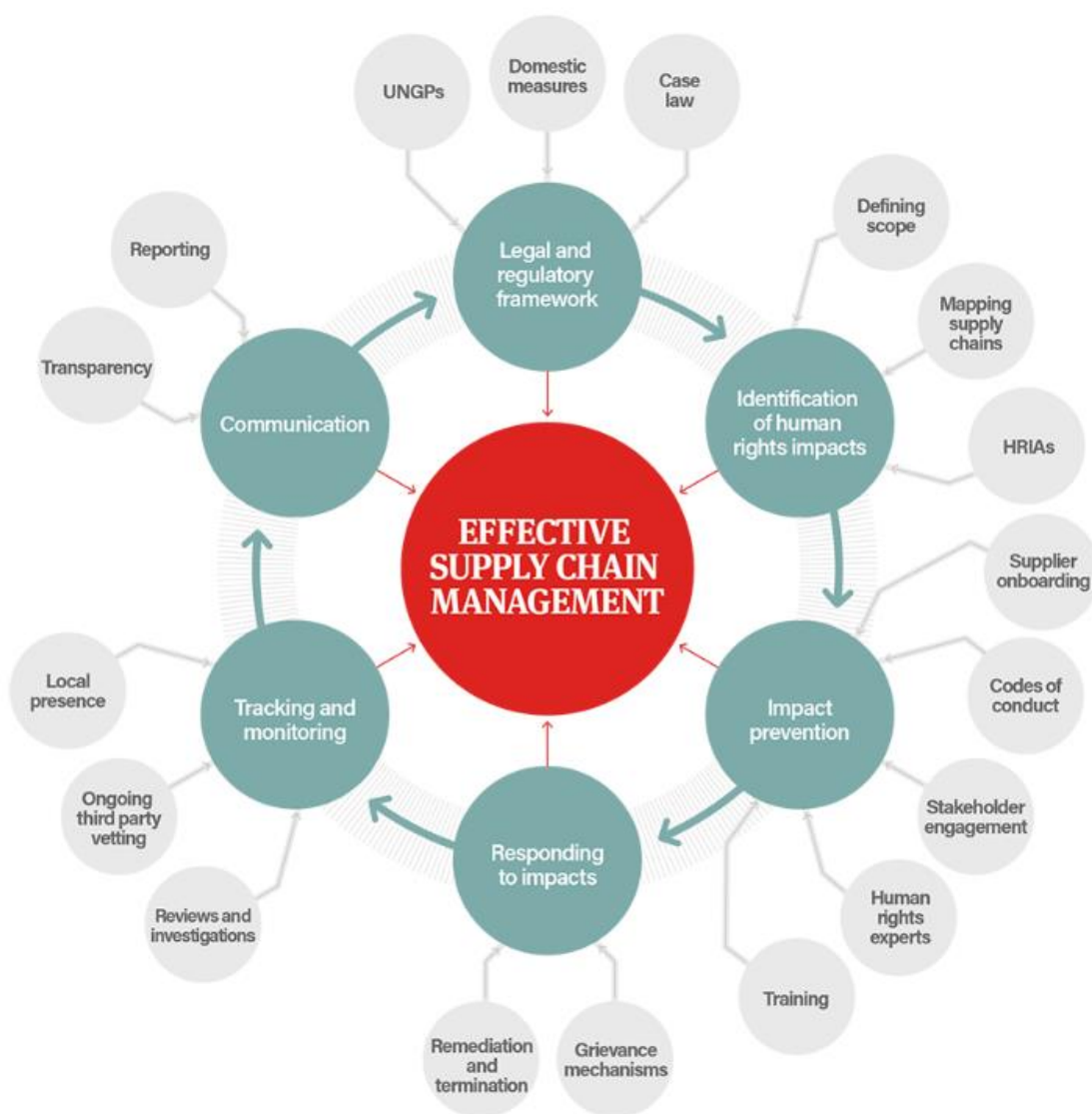
*“We would like to see more regulation. It would force our tier two, three and four suppliers to improve their processes – and our competitors. We rely on the whole industry” – Interviewee*

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**Remedy to impacted people:** In addition to the developing case law around the recognition of a legal duty of care based on principles of control, other mechanisms for financial and non-compensatory redress continue to develop. Examples include state-based procedures (e.g. OECD National Contact Points) and industry initiatives (e.g. the Bangladesh Accord on Fire and Building Safety arbitral procedure).

**The drivers for supply chain-related HRDD:** Interviewees confirmed the avoidance of legal risks and reputational risks as two of the key incentives for conducting HRDD. Other notable drivers included meeting investor expectations and the need to achieve sustainable supply chains – a commercial necessity.

**Internal challenges and opportunities:** A number of organisational challenges and opportunities were observed. In particular, interviewees reported efforts to simplify internal rules and processes, in part through the development of new and centralised tools, and the need for ever closer inter-departmental coordination between key functions such as procurement, legal and CSR.



# I INTRODUCTION

## 1. Background

The UN Guiding Principles on Business and Human Rights (“the UNGPs”) set out globally accepted standards around the human rights impacts of business. They introduced the concept of human rights due diligence (“HRDD”) to “identify, prevent, mitigate and account for”<sup>1</sup> actual or potential adverse human rights impacts a company may be involved in through its own activities or business relationships, including those in the supply chain.

HRDD as defined by the UNGPs is a broader process than simply the initial screening of human rights impacts of a supplier, as could be understood under the ordinary transactional meaning of “due diligence”. Instead, it is seen as an ongoing, dynamic and context-specific approach.

Norton Rose Fulbright (NRF) and the British Institute of International and Comparative Law (BIICL) previously conducted a study on the law and practice of HRDD. It highlighted that HRDD is a comprehensive, contextual and ongoing system which should enable the company to address its actual and potential human rights impacts, even where corporate human rights obligations are not (yet) contained in regulation. It also showed that companies which use dedicated HRDD processes are more likely to identify human rights impacts than companies which use existing processes which do not use a human rights lens, such as those for health and safety.<sup>2</sup>

One of the key themes which emerged during the previous study was the challenges in implementing HRDD in the supply chain. Many companies struggled with the question as to “how far is far enough” when undertaking HRDD in the supply chain. Common practical challenges were highlighted such as how to engage beyond the first tier, where no contractual relationships exist, and how to undertake HRDD when information about human rights risks is not readily available.

Our previous study highlighted the need for further research into the management of human rights issues in the supply chain. This study was accordingly undertaken as a follow-up to our previous project, with a specific focus on supply chain.

## 2. Methodology

Our methodology consisted of a combination of desk-based legal, policy and literature research - including a consideration of legal and other developments at international and domestic level – and empirical insights gained through semi-structured interviews with ten company representatives, as well as a roundtable. Interviews took place between August 2017 and January 2018. Interviewees were selected based on their experience with supply chain HRDD globally and in various sectors, such as electronics, finance, agriculture, extractives, manufacturing, and retail including food, consumer goods and fashion. Following the interviews, a closed roundtable attended by company representatives from various sectors was held in February 2018. For ease of reference, roundtable participants will be referred to herein as interviewees.

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<sup>1</sup> Guiding Principle 15.

<sup>2</sup> Robert McCorquodale, Lise Smit, Robin Brooks and Stuart Neely “Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises” 2(2) *Business and Human Rights Journal* 195

## II LEGAL AND REGULATORY FRAMEWORK

### 1. The UN Guiding Principles and the international framework

The UN Guiding Principles on Business and Human Rights (the “UNGPs”) provide an authoritative framework for efforts to address the human rights impacts of business.

The UNGPs are structured around three pillars: first, the State duty to protect against human rights abuses by business enterprises, second, the corporate responsibility to respect human rights, and third, the right of access to effective remedy, both judicial and non-judicial, for victims of human rights abuses.

Fundamental to the second pillar of the UNGPs, the corporate responsibility to respect, is the concept of human rights due diligence (“HRDD”). A business enterprise is expected to carry out “a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.”<sup>3</sup> The UNGPs identify four essential components of HRDD: 1) assessing actual and potential human rights impacts; 2) integrating and acting upon the findings; 3) tracking responses; and 4) communicating how impacts are addressed.<sup>4</sup>

The UNGPs highlight that HRDD should cover not only the company’s own adverse human rights impacts, but those which may be directly linked to its operations, products or services by its business relationships, including its suppliers. HRDD is an ongoing process which will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.<sup>5</sup>

The commentary to UNGP 19 acknowledges that extending responsibility throughout business relationships, including supply chains, is not without complexity, stating that:

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.<sup>6</sup>

The corporate responsibility to respect requires that a company avoid causing or contributing to any adverse human rights impact through its own activities, and address any impact when it does occur; and seek to mitigate or prevent any impact that is directly linked to its operations, products and services through its business relationships. The actions that a company is required to take will depend on the kind of involvement that a company has. As UN Guidance notes:

“If a company causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. If it contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the

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<sup>3</sup> Guiding Principle 15.

<sup>4</sup> Guiding Principle 17.

<sup>5</sup> Guiding Principle 17.

<sup>6</sup> Commentary to UNGP 19.

greatest extent possible. If a human rights impact is directly linked to its operations, products or services through a business relationship, it should seek to prevent or mitigate such an impact even if it has not contributed to it.

The term “direct link” refers to the linkage between the harm and the company’s products, services and operations through another company (the business relationship). Causality between the activities of a company and the adverse impact is not a factor in determining the scope of application of this part of the Guiding Principles.”<sup>7</sup>

It should not be assumed that a company’s involvement with its suppliers will be limited to being “directly linked”. Depending on the nature of the relationship with its suppliers and the particular circumstances, a company may, through its actions, cause or contribute to an adverse human rights impact in its supply chain.<sup>8</sup>

Other international frameworks also contain expectations and guidance around HRDD in supply chains. The Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises<sup>9</sup> (the “OECD Guidelines”) have been updated to incorporate a similar standard of HRDD as that set out in the UNGPs,<sup>10</sup> which applies to entities in the supply chain.<sup>11</sup> The OECD Guidelines also require participating states to establish National Contact Points (“NCPs”), to which complaints may be submitted where a company is in breach of the OECD Guidelines.<sup>12</sup> The OECD is currently developing a general due diligence guidance for responsible business conduct, focused on implementing the OECD Guidelines,<sup>13</sup> and has developed more detailed supply chain HRDD guidance for certain sectors, such as industries that may deal in conflict minerals<sup>14</sup>, the agricultural sector,<sup>15</sup> the garment and

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<sup>7</sup> Frequently Asked Questions About the Guiding Principles on Business And Human Rights, HR/PUB/14/3, 2014 at pp31-32.

<sup>8</sup> For example, there have been a number of developments in the doctrine of parent company liability discussed below in section 3 which may extend direct liability of a company for harms suffered those affected by its suppliers, see *Lungowe and others v. Vedanta and KCM* [2017] EWCA (Civ) 1528. In addition, cases in other jurisdictions have sought to impose direct liability for acts of suppliers, see *Jabir v KiK Textilien und Non-Food GmbH* 7 O 95/15.

<sup>9</sup> OECD, *Guidelines on Multinational Enterprises*, 2011.

<sup>10</sup> The HRDD was incorporated into the OECD Guidelines as part of the 2011 revision in the General Policies chapter, (*OECD Guidelines on Multinational Enterprises*, 2011) and into a new chapter on human rights introduced as part of the revision (Holly Cullen, “The Irresistible Rise of Human Rights Due Diligence” 48 *George Washington International Law Review* 743 at p753). See also Olga Martin Ortega, “Human Rights Due Diligence for Corporations” 32 *Netherlands Quarterly of Human Rights* 44 at p58; and Olga Martin Ortega, “Human Rights Due Diligence for Corporations” 32 *Netherlands Quarterly of Human Rights* 44 at p58.

<sup>11</sup> OECD *Guidelines on Multinational Enterprises*, 2011 at paragraph 14, “Commentary on General Policies”, p21.

<sup>12</sup> Any individual or organisation with a legitimate interest in the matter can submit a case to an NCP regarding a company operating in or from the country of the NCP which has not observed the Guidelines. NCPs provide a mediation and conciliation platform to resolve such disputes concerning the OECD Guidelines.

<sup>13</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1): Implementing the due diligence recommendations of the OECD Guidelines for Multinational Enterprises*; OECD, *Due Diligence Companion (Draft): Additional tips and explanations for implementing the Due Diligence Guidance for Responsible Business Conduct*

<sup>14</sup> OECD *Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected Areas*, 2016.

<sup>15</sup> OECD-FAO *Guidance for Responsible Agricultural Supply Chains*, 2016

footwear sector,<sup>16</sup> and institutional investors.<sup>17</sup> It has also developed HRDD guidance for multi-stakeholder engagement in the extractive sector,<sup>18</sup> and export credit agencies.<sup>19</sup>

The UN Global Compact (the “UNGC”) provides a set of ten principles for companies to adhere to, which include human rights and labour.<sup>20</sup> It is not legally binding, but aspires to be a “learning platform”.<sup>21</sup> The UNGC has issued guidance with respect to prioritising human rights impacts in the supply chain.<sup>22</sup>

The International Labour Organisation (“ILO”) is a tripartite UN agency consisting of governments, employers and workers which sets out labour standards. The ILO has engaged with labour issues in supply chains through a number of initiatives, including the ILO’s Committee on Decent Work in Supply Chains,<sup>23</sup> and the Better Work Program,<sup>24</sup> a collaboration between the ILO and the International Finance Corporation (IFC) to promote better labour conditions in the garment industry.

Standards around supply chain HRDD are also being set at regional level. For example, the EU has instituted a number of initiatives imposing certain HRDD obligations, such as the EU Non-Financial Reporting Directive,<sup>25</sup> EU Timber Regulation,<sup>26</sup> and the EU Conflict Minerals Regulation.<sup>27</sup> There have also been some motions adopted by the European Parliament and

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<sup>16</sup> OECD *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, 2017

<sup>17</sup> OECD *Responsible Business Conduct for Institutional Investors: Key Considerations for due diligence under the OECD Guidelines for MNEs*, 2016

<sup>18</sup> OECD *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 2017

<sup>19</sup> OECD Working Party on Export Credits and Credit Guarantees Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, April 2016

<sup>20</sup> UNGC Principles 1 and 2. Over 9000 companies have signed the Global Compact, in addition to over 4000 non-business signatories See <https://www.unglobalcompact.org/what-is-gc/participants>.

<sup>21</sup> Radu Mares, “The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments” 79 *Nordic Journal of International Law* 193 at p204.

<sup>22</sup> See UN Global Compact Good Practice Note A *Structured Process to Prioritise Supply Chain Human Rights Risks*, 9 July 2015,

<sup>23</sup> Including its most recent report, ILO, *Report IV: Decent Work in Global Supply Chains*, International Labour Conference, 105<sup>th</sup> Session, 2016

<sup>24</sup> See <https://betterwork.org/>.

<sup>25</sup> Directive 2014/95/EU. The EU Non-Financial Reporting Directive requires large companies of over 500 employees to publish reports on the policies they implement around, amongst other non-financial issues, respect for human rights. The Directive gives companies significant flexibility to disclose relevant information in the way they consider most useful. Companies may use international, European or national guidelines to produce their statements including the UN Global Compact, the OECD guidelines for multinational enterprises or ISO 26000.

<sup>26</sup> The EU Timber Regulation (EU) no. 995/2010 of the European Parliament and of the Council of 20 October 2010, requires operators who place timber and timber products on the EU market to develop or use a due diligence system to assess the risk that timber has been logged or traded illegally, which involves gathering information on timber they want to import, evaluating the probability that it is legal, and taking steps to mitigate the risk of importing illegal timber. A failure to carry out proper due diligence is an offence, even if the wood itself is not shown to be illegal.

<sup>27</sup> The EU Conflict Minerals Regulation requires EU importers of tin, tantalum, tungsten and gold to follow a five-step framework, as set out in the OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas, to: 1) establish strong company management systems; 2) identify and assess risk in the supply chain; 3) design and implement a strategy to respond to identified risks; 4) carry out an independent third-party audit of supply chain due diligence; and 5)

groups of EU member states around issues such as mandatory HRDD and corporate human rights accountability.<sup>28</sup> These developments are still ongoing and may suggest an increased trend for regulation of corporate human rights impacts at EU level.

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report annually on supply chain due diligence. Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas. COM/2014/0111 final - 2014/0059 (COD).

<sup>28</sup> On 29 April 2015, the second anniversary of the Rana Plaza building collapse, the European Parliament adopted a motion calling for a resolution for mandatory human rights due diligence for corporations. The motion 2015/2589(RSP) considered that “new EU legislation is necessary to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency, in line with the UN Guiding Principles on Business and Human Rights and the OECD MNE Guidelines” See <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2015-0363&language=EN>. This proposal has not been adopted to date. On 12 September 2017, the European Parliament adopted a motion calling for a resolution “on the impact of international trade and the EU policies on global value chains”. See [http://www.votewatch.eu/en/term8-impact-of-international-trade-and-eu-s-trade-policies-on-global-value-chains-motion-for-resolution-v.html?utm\\_source=&utm\\_medium=click\\_vote&utm\\_campaign=widget\\_2](http://www.votewatch.eu/en/term8-impact-of-international-trade-and-eu-s-trade-policies-on-global-value-chains-motion-for-resolution-v.html?utm_source=&utm_medium=click_vote&utm_campaign=widget_2). The motion was based on a report by the European Parliament’s Committee on International Trade calling for the Commission to step up initiatives relating to corporate social responsibility and due diligence across the whole supply chain (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0269+0+DOC+XML+V0//EN#title2>). On 18 May 2016, eight national parliaments launched a “green card” initiative at EU level to ensure corporate accountability for human rights abuses. The “green card” is a form of enhanced political dialogue through which EU national parliaments can jointly propose to the European Commission new legislative or non-legislative initiatives, or changes to existing legislation. The initiative proposed that EU-based companies operate under a duty of care towards individuals whose human rights and local environment are affected by a company’s activities.

## 2. Domestic measures regulating HRDD in supply chains

Various domestic legislative measures address human rights impacts of business in the supply chain, although these take a variety of forms and are not always phrased in human rights language.<sup>29</sup>

Recent legislative reforms and proposals follow a trend requiring general HRDD of certain companies. For example, the French Duty of Vigilance law<sup>30</sup> imposes a duty of care on certain French companies. This duty of care extends to harms deriving from the parent company and subcontracting companies' activities, the activities of companies controlled directly or down the supply chain, and the activities of subcontractors and suppliers "with which the company maintains an established commercial relationship".<sup>31</sup> In order to discharge the duty of care, companies need to implement a "vigilance plan" which should include reasonable measures to adequately identify risks and prevent serious violations of human rights.<sup>32</sup> Measures which seek similar versions of mandatory HRDD across all sectors have been proposed in Switzerland,<sup>33</sup> the EU<sup>34</sup> and Germany.<sup>35</sup> The UK Joint Committee in Human Rights has also proposed that a "failure to prevent adverse human rights impacts" mechanisms be considered.<sup>36</sup>

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<sup>29</sup> We do not include an analysis of legislation that are aimed at broader issues but which may touch on human rights indirectly, such as corruption or climate change, for example the US Foreign Corrupt Practices Act, 15 USC 78dd-1 (1977) or the UK Bribery Act 2010.

<sup>30</sup> Law No. 2017-399 of March 27, 2017 on the "Duty of Care of Parent Companies and Ordering Companies"

<sup>31</sup> S Cossart, J Chaplier, T Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" 2(2) *Business and Human Rights Law Journal* 317 at p320.

<sup>32</sup> S Cossart, J Chaplier, T Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" 2(2) *Business and Human Rights Law Journal* 317 at p320.

<sup>33</sup> The Swiss Responsible Business Initiative seeks to require Swiss multinationals to carry out appropriate due diligence to identify human rights risks in all their business relationships and activities; take effective measures to address these impacts, and report on violations and mitigation measures. It would enable victims to bring civil actions in Swiss courts against Swiss companies for abuses allegedly committed abroad by companies they control. In November 2017 the Legal Affairs Committee of the Swiss Parliament issued a statement recognizing the need for binding measures against human rights violations perpetrated by Swiss-based multinationals. RBI press release "Parliamentarian Committee recognizes the necessity to act and calls for an indirect counter-proposal", 11 November 2017, available at: <http://konzern-initiative.ch/parliamentarian-committee-recognizes-the-necessity-to-act-and-calls-for-an-indirect-counter-proposal/?lang=en>.

<sup>34</sup> EU Parliament Motion 2015/2589(RSP) above.

<sup>35</sup> In Germany, a group of NGOs have proposed a Human Rights Due Diligence Act, which would oblige companies to undertake HRDD in their own company and in the supply chain. Amnesty International, Brot für die Welt, Germanwatch and Oxfam "Legislative Proposal: Corporate Responsibility and Human Rights: Questions and Answers on the Human Rights Due Diligence Act proposed by German NGOs" 15 June 2017. In its National Action Plan (NAP), the German Government expects all enterprises to introduce HRDD processes commensurate with their size, sector and their position in supply and value chains. The NAP set a goal that at least 50% of German business enterprises with more than 500 employees would have HRDD incorporated into their corporate processes by 2020, failing which the government would consider implementation measures to incentivize German businesses to do so, including legislation. German Federal Foreign Office, "National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020", December 2016.

<sup>36</sup> UK Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017 available at: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>



Some legislative measures require supply chain due diligence with respect to certain human rights only. For example, various recent legislative developments seek to regulate modern slavery in global supply chains. These were spearheaded by the California Transparency in Supply Chains Act (the “California Act”),<sup>37</sup> which requires certain companies to report on their specific actions to eradicate slavery and human trafficking in their supply chains.<sup>38</sup> However, there have been doubts raised about the effectiveness of the Act with a 2015 Report finding that only 15% of companies required to report under the Act were fully compliant.<sup>39</sup>

The California Act was followed by the UK Modern Slavery Act 2015 (the “UK MSA”), which requires companies with a certain turnover to make report on the steps the company has taken to ensure that slavery and human trafficking has not taken place in its supply chains or in its own business (or to report if no steps have been taken).<sup>40</sup> The UK Modern Slavery Act contains a stronger reporting obligation than the California Act, by requiring that modern slavery statements be approved by the board of a company and be signed by a director. However, it falls short of prescribing a positive obligation to undertake HRDD or to report on human rights impacts beyond slavery, forced labour and human trafficking. Companies required to report under both the California Act and the UK MSA sometimes produce one statement which addresses the requirements of each,<sup>41</sup> effectively importing the more stringent requirements of the UK Modern Slavery Act into their reporting under the California Act.

The Australian Government has proposed introducing legislation which mirrors the UK Modern Slavery Act. The proposed definition of “supply chain” in the Australian Modern Slavery Act extends beyond first tier suppliers.<sup>42</sup> The current proposal does not include punitive sanctions, but will instead rely on public criticism as a safeguard against non-compliance. Similar legislation regulating modern slavery in supply chains have been proposed in New Zealand<sup>43</sup> and Hong Kong.<sup>44</sup>

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<sup>37</sup> California Transparency in Supply Chains Act of 2010.

<sup>38</sup> The stated purpose of the Act is “to educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, to improve the lives of victims of slavery and human trafficking.”

<sup>39</sup> Development International, Corporate Compliance with the California Transparency in Supply Chains Act of 2010, 2 November 2015. See also <https://www.theguardian.com/sustainable-business/2016/jan/22/california-anti-slavery-law-development-international-sun-maid-asia-human-trafficking>.

<sup>40</sup> Section 54 of the UK Modern Slavery Act 2015.

<sup>41</sup> See for example, Johnson & Johnson (<https://www.jnj.com/about-jnj/company-statements/california-transparency-in-supply-chains-act-united-kingdom-modern-slavery-act-statement>) and Pfizer ([https://www.pfizer.com/files/responsibility/workplace\\_responsibility/California-Transparency-UK-MSA-2017.pdf](https://www.pfizer.com/files/responsibility/workplace_responsibility/California-Transparency-UK-MSA-2017.pdf))

<sup>42</sup> Attorney-General’s Department (AGD), *Modern Slavery in Supply Chains Reporting Requirement – Public Consultation*, 16 August 2017, <https://www.ag.gov.au/Consultations/Pages/modern-slavery-in-supply-chains-reporting-requirement-public-consultation.aspx> at p15.

<sup>43</sup> In New Zealand, a Transparency in Supply Chains Bill was tabled in December 2017, available at: [https://www.parliament.nz/en/pb/bills-and-laws/proposed-members-bills/document/52HOH\\_MEMBILL048\\_1/transparency-in-supply-chains-bill](https://www.parliament.nz/en/pb/bills-and-laws/proposed-members-bills/document/52HOH_MEMBILL048_1/transparency-in-supply-chains-bill)

<sup>44</sup> Hong Kong is considering its own Modern Slavery Bill 2017, see Norton Rose Fulbright Briefing “Modern slavery and human trafficking – a comparative analysis of existing and emerging legislation in the United Kingdom, Australia, Hong Kong and Singapore”, March 2018 <http://www.nortonrosefulbright.com/knowledge/publications/165269/modern-slavery-and-human-trafficking-a-comparative-analysis-of-existing-and-emerging-legislation-in-the-unit>

Other legislative measures which require supply chain due diligence focus on other human rights issues, frequently labour-related. For example, the US Trade Facilitation Act allows US Customs to seize imported goods if an importer is unable to provide a certificate proving which measures were taken ensure that the goods were not produced using forced labour.<sup>45</sup> Under the proposed Dutch Child Labour Bill, companies would be required to issue a statement declaring that they have exercised due diligence to prevent their goods and services being made using child labour.<sup>46</sup>

In addition to legislative HRDD measures limited to certain issues, such as modern slavery, some supply chain due diligence requirements are limited to specific sectors such as the timber sector,<sup>47</sup> industries which extract and use potential conflict minerals,<sup>48</sup> and food safety.<sup>49</sup>

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<sup>45</sup> To date, US Customs have issued four orders preventing goods from entering the US. Business and Human Rights Resource Centre, *Modern Slavery in Company Operations and Supply Chains: Mandatory transparency, mandatory due diligence and public procurement due diligence*, September 2017 at p18. In the US, customs information with respect to foreign imports is gathered by Customs and Border Protection (see 19 US Code § 1434) goods imported between federal states are tracked, and these records are subject to the US Freedom of Information Act. By contrast, in the EU, once goods are imported into the EU, they is not tracked further between states. Customs data collected by states is not able to be accessed through the laws imposing transparency requirements on EU institutions. Further, the Uniform Customs Code, a new customs regime which will come into full force in 2020 contains an exemption from freedom of information on these goods.

<sup>46</sup> The Bill would require companies to describe clearly the steps that have been taken. A company will be considered to have exercised due diligence if it has carried out an investigation to assess whether there is a reasonable suspicion that a product or service involves child labour. If so, the company must develop and carry out an action plan in line with the standards of the UNGPs and the OECD Guidelines. See Business and Human Rights Resource Centre, *Modern Slavery in Company Operations and Supply Chains: Mandatory Transparency, Mandatory Due Diligence and Public Procurement*, September 2017 at p18.

<sup>47</sup> In the US, the Lacey Act of 190, 16 USC s3372(a)(2)(A) (2006) requires US manufacturers to implement supply chain due diligence procedures to ensure that their wood products were not produced using illegal timber. In Australia, the Illegal Logging and Prohibition Act 2012 (Cth) prohibits the importation of items made from illegally logged timber and imposes due diligence requirements for certain classes of regulated timber products. See Second reading Speech, Illegal Logging and Prohibition Act 2012, Commonwealth, Parliamentary Debates, House of Representatives, 23 November 2011, 13 570-1 (Mike Kelly).

<sup>48</sup> For example, section 1502 of the US Dodd-Frank Act requires companies to report to the Securities and Exchange Commission ("SEC") on whether the sourcing of minerals occurred in the Democratic Republic of Congo (the "DRC") and bordering states and if so, a company must submit a report on the due diligence measures taken to determine whether the sourcing of conflict minerals directly or indirectly financed armed groups. A recent study of the first wave of Conflict Minerals Reports required to be filed with the SEC pursuant to s1502 of the US Dodd-Frank Act in 2014 found that there is a due diligence gap among companies required to report under the measure, with only 7% of firms reporting strong due diligence measures.<sup>48</sup> It has been argued that home states need to play a larger role in implementation of the Act by investing in local capacity building, coordinating in-region sourcing initiatives and certification standards and providing support for businesses struggling with compliance: Galit A Safarty "Shining A Light on Global Supply Chains" 56 Harvard International Law Journal 419 at p423. Similar conflict mineral regulation has been proposed in the EU, above.

<sup>49</sup> Article 18 of the EU General Food Law Regulation (EC) No. 178/2002 incorporates a traceability provision to enable targeted and accurate withdrawals and information to officials in the event of food safety problems. Separate legislation specific to particular food sectors contain additional requirements around labelling, product registration and consumer information. These include mandatory labelling requirements at the point of sale for fresh and frozen beef, the mandatory cattle identification and

Some domestic measures aimed at addressing human rights impacts in supply chains are not regulatory. For example, the newly created Canadian Ombudsperson for Responsible Enterprise (CORE) has a mandate to investigate allegations of human rights abuses linked to Canadian corporate activity abroad.<sup>50</sup>

Another example of non-regulatory domestic efforts arise where governments use their purchasing power<sup>51</sup> to effect change in the private sector by integrating human rights and labour standards into the public procurement process. This is often done by way of social clauses,<sup>52</sup> mandatory exclusions,<sup>53</sup> and HRDD standards.<sup>54</sup> For example, the EU rules on public procurement and concession contracts directly addresses the use of subcontractors by suppliers.<sup>55</sup> Public procurement requirements may also be limited to specific sectors, such as

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registration scheme, and the rules relating to consumer information for fish and fish products sold at retail. See UK Guidance notes "Food safety, traceability, product withdraw and recall: General Food Law Regulation guidance for food businesses - Guidance Notes on Articles 14, 16, 18 and 19 of the General Food Law Regulation (EC) No. 178/2002, laying down general principles and requirements of food law and food safety procedures, and established the European Food Safety Authority" 20 July 2007 at p12, available at:

[<https://www.food.gov.uk/sites/default/files/multimedia/pdfs/fsa1782002guidance.pdf>]; and EU Guidance "Guidance on the Implementation of Articles 11, 12, 16, 17, 18, 19 And 20 Of Regulation (Ec) 178/2002 on General Food Law", 20 December 2004, available at:

[<https://www.food.gov.uk/sites/default/files/multimedia/pdfs/1782002euguidance.pdf>]. In the US, the Food Safety Modernisation Act, Pub L No 111-353, 124 Stat 3885 (2011) requires food importers to undertake a risk-based foreign supplier verification to confirm that imported food products are safe.

<sup>50</sup> The CORE will seek to assist in the resolution of disputes between impacted communities and Canadian companies. It will be empowered to investigate, report, recommend a remedy and monitor its implementation. The CORE will initially focus on the mining, oil and gas, and garment sectors, with the expectation to expand to other business sectors within a year. Global Affairs Canada, News Release "The Government of Canada brings leadership to responsible business conduct abroad", 17 January 2018, available at: [https://www.canada.ca/en/global-affairs/news/2018/01/the\\_government\\_ofcanadabringingleadershiptoresponsiblebusinesscond.html](https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringingleadershiptoresponsiblebusinesscond.html).

<sup>51</sup> Public procurement represents a significant share of the total global economy, accounting for 12% of GDP on average across OECD countries. House of Lords and House of Commons Joint Committee on Human Rights *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, 5 April 2017 at p30.

<sup>52</sup> See for example the EU Procurement Directive of 2015/24/EC and the Spanish *Ley de Contratos del Sector Publico*.

<sup>53</sup> See for example the UK Public Contracts Regulations which implement the EU Procurement Directive and exclude a bidder from further participation in procurement if it has been found guilty of any offence under the Modern Slavery Act 2015.

<sup>54</sup> See for example US Executive Order 13627 "Strengthening Protections Against trafficking in Persons in Federal Contracts"; the US Federal Acquisition Regulation **above n**; the US Walsh-Healey Public Contracts Act; the Swiss Federal Act of Public Procurement; the Swedish County Councils procurement rules; and the Danish SKI Framework Agreement. See International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, July 2016.

<sup>55</sup> Directive 2014/24/EU draws links directly to sustainable development both in its recitals and provisions. EU Member States were obliged to transpose the new Directives into national law by April 2016. So far, seven Member States have notified relevant measures for all of the Directives. Olga Martin-Ortega, Opi Outhwaite and Willam Rook "Buying Power and Human Rights in the Supply Chain: legal options for socially responsible public procurement of electronic goods" 19(3) *The International Journal of Human Rights* 341 at pp352-3 and 347.

the private security sector,<sup>56</sup> or human rights issues, such as human trafficking<sup>57</sup> or working conditions.<sup>58</sup> A 2016 survey of the public procurement practices in 20 jurisdictions suggests that the power of public procurement has been largely underutilised for the purposes of HRDD by most states to date.<sup>59</sup>

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<sup>56</sup> Member states of the International Code of Conduct for Private Security Providers' Association ("ICoCA"), a multi-stakeholder initiative which sets out a code of conduct for private security companies, require any private security firms wishing to contract with them to abide by the standards set out in the Code.

<sup>57</sup> For example, the U.S. Federal Acquisition Regulation requires all US Government contractors to take detailed actions to eliminate human trafficking at all levels of their supply chains, and requires the development and implementation of compliance plans, with significant sanctions for non-compliance. FAR Subpart 22.17 and Part 52 (2012). See Hogan Lovells, "Contractors and Companies in the federal supply chain have an opportunity to prepare for the impending, significant explosion of the government's anti-human trafficking rules", 6 March 2014 <https://www.lexology.com/library/detail.aspx?g=ccb6302b-03ff-4744-9a0e-fbb1c65dff39>

<sup>58</sup> The Danish central purchasing body (SKI) requires suppliers to undertake HRDD in accordance with the OECD Guidelines, and comply with a framework agreement. However, the obligations under the framework agreement are limited to wages and working conditions. International Learning Lab on Public Procurement and Human Rights, Public Procurement and Human Rights: A Survey of Twenty Jurisdictions, July 2016 at p42.

<sup>59</sup> The report noted that existing public procurement standards generally fail to refer to state responsibilities to avoid human rights abuses, and in the few examples where they do, specific issues are identified, such as child labour, rather than referring to the broader spectrum of possible abuses. A comprehensive approach as described in the report would require clear legal requirements and policies at international and national levels on the responsibilities of public bodies in connection with purchasing activities, which are currently lacking. In particular, the report found that monitoring of conditions in government supply chains is an extremely rare occurrence and access to remedy for victims of human rights abuses in government supply chains are lacking. Ultimately, it finds that there is a clear need for guidance and training for public buyers on techniques and tools that they can lawfully deploy to avoid or reduce the incidence of human rights abuses in government supply chains. International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, July 2016.

### 3. Case law

The case law in various jurisdictions has developed an array of possible avenues to bring claims based on violations of human rights including under consumer law, misleading and deceptive conduct, tort and specialist statutory claims.

Many of the cases to date are brought in tort. These cases are often brought against a parent company for harms which took place through the activities of its subsidiary, and raise questions of parent company liability and duty of care. Courts in Canada,<sup>60</sup> the Netherlands<sup>61</sup> and the UK<sup>62</sup> have been willing to assume jurisdiction over cases where harms have occurred outside the home state by subsidiaries of the defendant parent company.

This line of authority is important as it enables rights-holders to hold a company liable for actions of third parties, and allows claimants to seek a remedy in one jurisdiction for actions which took place in another jurisdictions.

Recent interlocutory judgments in UK tort claims have suggested that the principle of the corporate veil will not shield a parent company from liability for the acts of a subsidiary where it can be shown that the parent company owed a duty of care to those harmed by the actions of the subsidiary. Such claims are based on the principles established in *Caparo Industries v Dickman*,<sup>63</sup> whereby a duty of care may arise where three conditions are met: firstly, that damage suffered may be foreseeable as a result of the defendant's conduct; second, that the parties were in a relationship of proximity; and third, that it is fair just and reasonable to impose a duty.

Applying the *Caparo* principles, there have been a number of UK cases<sup>64</sup> which established that a parent company may owe a duty of care to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary. Such a duty may arise if it can be shown that a parent company has assumed a requisite degree of responsibility sufficient to give rise to a relationship of proximity, for example by devising a material health and safety policy, or controlling the operations which give rise to the claim.<sup>65</sup>

This trend in the jurisprudence could potentially extend beyond the corporate group and into the supply chain. In the UK, where many of the tort claims to date have been brought, establishing liability in the supply chain context under tort principles is by no means straightforward.<sup>66</sup> However, the emerging doctrine of parent company liability established in

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<sup>60</sup> *Choc v Highbay Minerals Inc* [2013] ONSC 1414; *Garcia v Tahoe Resources* (2017 BCCA 39); *Hill v Hamilton- Wentworth Regional Police Services Board* 2007 SCC 41 at [20].

<sup>61</sup> *Akpan v Royal Dutch Shell PLC* Arrondissementsrechtbank Den Haag, 30 January 2013 Case No C/09/337050/HA ZA 09-1580.

<sup>62</sup> *AAA and anor v Unilever PLC and anor* [2017] EWHC 371.

<sup>63</sup> *Caparo Industries v Dickman* [1990] 2 AC 605.

<sup>64</sup> *Chandler v Cape Plc* [2012] EWCA Civ 525; *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635; *Lungowe and others v. Vedanta and KCM* [2017] EWCA (Civ) 1528 and *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2018] EWCA Civ 191.

<sup>65</sup> See *Chandler v Cape Plc* [2012] EWCA Civ 525, *Lungowe and others v. Vedanta and KCM* [2017] EWCA (Civ) 1528 at [83] and *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2018] EWCA Civ 191 at [23].

<sup>66</sup> For an in depth analysis of the requirements under UK tort law, see Essex Business and Human Rights Project, University of Essex *Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains: A Legal Guide*, December 2017.

*Chandler v Cape Plc*<sup>67</sup> and *Thompson v The Renwick Group Plc*<sup>68</sup> could provide a potential means of attaching tort liability through the supply chain.<sup>69</sup>

Although this form of claim has not yet been used with respect to a UK company's liability for harms caused by a foreign supplier, such a duty could conceivably arise where a company exercises a requisite degree of control over a supplier. The UK Court of Appeal has indicated receptiveness to a potential duty of care owed by a parent company not only to the employees of a subsidiary, but also to those affected by its operations in analogous situations.<sup>70</sup> By extension, this could potentially include those rights-holders affected by the company's suppliers.

Although examples are rare to date, some tort cases have been brought in other jurisdictions by claimants who were harmed by the defendant company's suppliers. For example, in the US, the case of *Doe v Wal-Mart*<sup>71</sup> considered whether a parent company may be liable for harms done to the employees of its foreign suppliers. The plaintiffs in the case were employed by Wal-Mart's suppliers in a number of countries including Bangladesh, China, Indonesia, Swaziland and Nicaragua. Wal-Mart's contracts with the suppliers included a code of conduct requiring the suppliers to comply with labour and industry standards, and provided that Wal-Mart would undertake measures, such as on-site inspections, to monitor those standards. Failure to implement the standards could result in termination.<sup>72</sup> The Court considered whether Wal-Mart had "assumed responsibility" for the workers of their suppliers. It held that although Wal-Mart had reserved the *right* to inspect, in doing so had not adopted a *duty* to inspect, and that the Wal-Mart supply contracts were not intended to protect the workers of the suppliers.<sup>73</sup>

In Canada, the case of *Das v George Weston Ltd*<sup>74</sup> was brought by a group of garment workers and family members of those injured or killed in the the Rana Plaza factory collapse in Bangladesh.<sup>75</sup> The plaintiffs sought to certify a class action in Ontario against Loblaws, a

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<sup>67</sup> *Chandler v Cape Plc* [2012] EWCA Civ 525.

<sup>68</sup> *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635.

<sup>69</sup> Other cases currently before the UK courts such as *AAA and Anor v Unilever PLC and Anor*, [2017] EWHC 371 (presently under appeal), *Vilca and ors v Xstrata and anor* [2016] EWHC 1824 (QB) and *Okpabi and ors v Royal Dutch Shell and anor*, [2017] EWHC 89 (presently under appeal) each include claims modelled on *Chandler v Cape* parent company liability and may provide further guidance on the extent of a parent company's duty of care.

<sup>70</sup> See *Lungowe and others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528 at [83] and [88].

<sup>71</sup> *Doe v Wal-Mart Stores Inc* 572 F.3d 677 (9<sup>th</sup> Cir. 2009).

<sup>72</sup> The plaintiffs advanced four arguments based in contract and tort: first, that the plaintiffs were third party beneficiaries of the standards contained in Wal-Mart's supply contracts; second, that Wal-Mart was the plaintiff's joint employer; third, that Wal-Mart negligently breached a duty to monitor the suppliers and protect the plaintiffs from the suppliers working conditions; and fourth Wal-Mart was unjustly enriched by the plaintiffs' mistreatment: *Doe v Wal-Mart Stores Inc* 572 F.3d 677 (9<sup>th</sup> Cir. 2009) at p681.

<sup>73</sup> The decision in *Doe* predates the UNGPs. It has been noted that the UNGPs do not contain such a threshold question as to whether a defendant had "assumed responsibility" for a plaintiff. Instead, recent case law turns on whether there is sufficient proximity to give rise to a duty of care. Accordingly, it has been suggested that the *Doe* case turned on a particular quirk of US law, and may have led to a different result in another jurisdiction, such as Canada. See Madeline Conway "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" 40 *Queens Law Journal* 741 at p776.

<sup>74</sup> *Das v George Weston Ltd* 2017 ONSC 4129, under appeal.

<sup>75</sup> *Das v George Weston Ltd* 2017 ONSC 4129 at [3]

purchaser of garments made in the factory, and against Bureau Veritas, a consulting service engaged to conduct a “social audit” of factories in Bangladesh.<sup>76</sup> In seeking to prove the existence of a duty of care, the plaintiffs emphasized that the garment company was aware of the “notoriously dangerous” nature of garment manufacturing in Bangladesh, and responded by promulgating CSR standards.<sup>77</sup> The Ontario Court Superior Court of Justice refused to certify the class on the basis that the plaintiff’s complaint did not disclose an actionable claim.<sup>78</sup> In this case, neither Loblaws nor Bureau Veritas owned or constructed the Rana Plaza factory, nor did they cause its collapse. The workers in the Plaza were not employees of Loblaws’ subsidiaries; instead, they were suppliers to a supplier of one of Loblaws’ subsidiaries. The relationship between Loblaws and the workers at Rana Plaza was thus held to be insufficiently proximate to give rise to a duty of care.<sup>79</sup> The *Das* appeal was heard on 24 April 2018; the decision was pending at the time of publishing this report.

In Germany, the case of *Jabir v KiK Textilien und Non-Food GmbH*,<sup>80</sup> filed in March 2015, is the first transnational tort claim alleging that a German company owed a duty of care to employees of its foreign supplier. The claim was filed following a fire at the Baldia textile factory in Karachi, Pakistan.

The claimants alleged that a German clothing retailer, KiK, owed a duty of care to factory workers employed by its Pakistani textile supplier, and was therefore liable in negligence for failing to ensure adequate fire safety precautions in the factory. It was alleged that the duty of care arose on the basis that KiK was the factory’s only customer,<sup>81</sup> and that KiK regularly intervened in the factory’s operations. The defendant company had also incorporated a code of conduct in its supplier contracts which entitled the company to monitor safe working conditions.<sup>82</sup> Unlike in the *Wal-Mart* case, where the existence of contractual monitoring rights were found not to give rise to a duty of care, the German court in August 2016 accepted jurisdiction over the *Kik* case and granted legal aid to the claimants.<sup>83</sup> The matter is pending.

Although the defendant companies in cases such as *Kik* and *Das v George Weston* had carried out auditing processes, this was insufficient to shield them from legal liability. These cases demonstrate that it is important to distinguish between social audits or assurance

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<sup>76</sup> *Das v George Weston Ltd* 2017 ONSC 4129 at [3]

<sup>77</sup> *Das v George Weston Ltd* 2017 ONSC 4129 at [58] and [525]

<sup>78</sup> The court noted that mere foreseeability of harm is insufficient to create a duty of care and that Ontario law does not impose a positive duty on a person to rescue others or to prevent a person from being harmed by a third party’s criminal acts, outside of narrow circumstances. *Das v George Weston Ltd* 2017 ONSC 4129 at [654]

<sup>79</sup> *Das v George Weston Ltd* 2017 ONSC 4129 at [537]

<sup>80</sup> *Jabir v KiK Textilien und Non-Food GmbH* 7 O 95/15. The claim was heard in a German Court applying Pakistani tort law.

<sup>81</sup> Kik initially agreed to pay compensation to the victims’ families as part of an agreement with the Pakistan Institute of Labour Education and Research, but resiled following an investigation suggesting that the fire was caused by an arson attack. Shamil Shams “German retailer Kik compensates Pakistan’s ‘industrial 9/11’ families” DW 9 February 2017, <http://www.dw.com/en/german-retailer-kik-compensates-pakistans-industrial-9-11-families/a-37470138>

<sup>82</sup> Caroljin Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis, Jane Wright “Supply Chain Liability: Pushing the Boundaries of the Common Law? 8(3) Journal of European Tort Law

<sup>83</sup> Dispute Resolution in Germany, “Dortmund Court Grants Pakistani Workers Legal Aid to Pursue Tort Claims Against German Textile Importer” 30 August 2016, <http://www.disputeresolutiongermany.com/2016/08/dortmund-court-grants-pakistani-workers-legal-aid-to-pursue-tort-claims-against-german-textile-importer/>

processes, on the one hand, and HRDD, which requires the application of a human rights lens.<sup>84</sup> Without the holistic human rights identification process required by HRDD, the use of standard auditing processes based around identifying specific risks such as those concerning health and safety or labour, runs the risk of failing to identify adverse impacts,<sup>85</sup> and will thus be an inadequate defence to potential liability.

In contrast to the above development of tort claims, which are being brought by those affected by the impacts of suppliers such as workers and their families, those on the other end of the supply chain, namely consumers, have also been pursuing claims based on supply chain human rights impacts.

In the US, the first consumer claims began with *Nike, Inc et al v Marc Kasky*,<sup>86</sup> which was brought for alleged unfair and deceptive practices under California's Unfair Competition Law,<sup>87</sup> and False Advertising Law.<sup>88</sup> The plaintiff claimed that "in order to maintain and/or increase its sales," the defendant company made a number of "false statements and/or material omissions of fact" concerning the working conditions in its supply chains. The company claimed its statements were commercial speech protected under the First Amendment to the US Constitution.<sup>89</sup> The case advanced to the Supreme Court but ultimately settled.<sup>90</sup>

The California Supply Chains Transparency Act took effect after *Nike v Kasky*, and formed the basis of several consumer actions based on companies' disclosures under the Act.<sup>91</sup> In these cases it was claimed that the companies' failure to disclose potential abuses in the supply chain were allegedly likely to deceive a reasonable consumer, and that the true facts would allegedly be material to a reasonable consumer.<sup>92</sup>

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<sup>84</sup> See Robert McCorquodale, Lise Smit, Robin Brooks and Stuart Neely "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Journal* at p207.

<sup>85</sup> Previous research has found that nearly 80% of companies that used dedicated HRDD processes do identify adverse impacts, whereas 80 of companies using non-specific HRDD do not identify adverse impacts: Robert McCorquodale, Lise Smit, Robin Brooks and Stuart Neely "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Journal* at p207.

<sup>86</sup> *Nike, Inc et al v Marc Kasky* 539 U.S. 654 (2003)

<sup>87</sup> Cal. Bus. & Prof. Code Ann. §17200 et seq. (West 1997)

<sup>88</sup> Cal. Bus. & Prof. Code Ann. §17500 et seq

<sup>89</sup> *Nike, Inc et al v Marc Kasky* 539 U.S. 654 (2003) at p656

<sup>90</sup> As part of the settlement, Nike agreed to make workplace program investments in the order of USD1.5million for programs facilitated by the Fair Labour Association focused on education and economic opportunity. See Sandy Brown, "Nike, Kasky Reach Settlement", *Adweek*, 12 September 2003, available at: <http://www.adweek.com/brand-marketing/nike-kasky-reach-settlement-67001/>

<sup>91</sup> These cases alleged violations of various California consumer codes. Actions have been brought under the California Business & Professions Code §§ 17200, et seq. (the Unfair Competition Law or "UCL") which prohibits any "unlawful, unfair, or fraudulent business act or practice." California Civil Code §§ 1750, et seq. (the Consumers Legal Remedies Act or "CLRA"): prohibits misrepresentation of goods.. California's Business & Professions Code §§ 17500, et seq. (the False Advertising Law or "FAL"): unlawful for corporations to make untrue or misleading statements regarding products for sale. Sellers also have a duty to disclose material facts about a product.

<sup>92</sup> Numerous corporate statements indicate that the companies in question do not tolerate the use of forced labour by their suppliers. See for example, Nestle, *Modern Slavery and Human Trafficking Report 2016* at p 3 International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, July 2016



The first of these cases was *Barber v Nestlé*,<sup>93</sup> in which the plaintiff alleged that Nestlé had breached the relevant Californian Consumer Codes<sup>94</sup> for failing to disclose that some ingredients in its cat food products might have been sourced using forced labour.<sup>95</sup> In dismissing the claim,<sup>96</sup> the Californian Court held that the California Act had created a “safe harbour” whereby a company would be shielded from civil liability where they truthfully and accurately complied with the requirements of the Act.<sup>97</sup> Similar claims were made in subsequent cases such as *McCoy v Nestlé*,<sup>98</sup> *Wirth v Mars*,<sup>99</sup> *Hodson v Mars*,<sup>100</sup> *Dana v Hershey*<sup>101</sup> and *Sud v Costco*<sup>102</sup>. Each was dismissed, contributing to the development of the “safe harbor” doctrine in the jurisprudence.<sup>103</sup> A further claim was brought against Nestlé,<sup>104</sup> in February 2018 alleging that Nestlé had failed to disclose the existence of child labour and forced labour in its supply chain in Ghana and Cote d’Ivoire.

Cases with similar fact patterns to those noted above have been attempted in Germany and France in the form of false advertising claims.<sup>105</sup>

Apart from the tort and consumer claims outlined above, plaintiffs have attempted to use other statutory provisions to seek redress for victims of slavery and human trafficking along the supply chain. The US has a number of powerful legislative tools which have immense, if currently underutilised, potential as a means for holding companies to account for actions throughout their supply chain.<sup>106</sup>

For example, in *Keo Ratha et al v Phattsana Seafood Co et al*<sup>107</sup>, a group of Cambodian villagers who worked in Thailand producing shrimp for export to the US brought suit in California alleging that Thai and US firms had violated the US Trafficking Victims Protection

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<sup>93</sup> *Barber v Nestlé USA Inc* No. 8:2015cv01364 (C.D. Cal. December 14, 2015)

<sup>94</sup> Here the claim alleged breaches of each of the UCL, the CLRA and the FAL.

<sup>95</sup> It was accepted by all parties that seafood used to make the Nestlé product Fancy Feast is caught in the waters between Thailand and Indonesia, but the extent of the reliance on forced labour was unclear. *Barber v Nestlé USA Inc* No. 8:2015cv01364 (C.D. Cal. December 14, 2015) at p775.

<sup>96</sup> The claim was dismissed on the basis that the California Act had set out what disclosures companies were required to make to customers about potential forced labour in their supply chains and as such, companies were only required to make disclosures the extent provided for in the California Act and no further. The disclosures which the plaintiffs sought exceeded those required under the provisions of California Act and for that reason the claim failed. *Barber v Nestlé USA Inc* No. 8:2015cv01364 (C.D. Cal. December 14, 2015) at pp774 and 787.

<sup>97</sup> *Barber v Nestlé USA Inc* No. 8:2015cv01364 (C.D. Cal. December 14, 2015) at p787.

<sup>98</sup> *McCoy v Nestlé USA* No 3:2015cv04451 (N.D. Cal. March 29, 2016). We note that this “safe harbour” doctrine would not be capable of shielding a reporting company from criminal liability for contraventions of relevant modern slavery and trafficking offences.

<sup>99</sup> *Wirth v Mars, Inc* No 8:2015cv01470 (C.D. Cal, February 5, 2016).

<sup>100</sup> *Hodson v Mars, Inc* No 4:2015cv04450 (N.D. Cal, February 17, 2016).

<sup>101</sup> *Dana v The Hershey Company* No 3:2015cv04453 (N.D. Cal. March 29, 2016).

<sup>102</sup> *Sud v Costco Wholesale Corporation* No 3:2015cv03783 (N.D. Cal, January 24, 2016).

<sup>103</sup> Each of these cases are under appeal s at 8 November 2017.

<sup>104</sup> *Tomasella v Nestle USA Inc* Case No 1:18-cv-10269, US District Court for the District of Massachusetts

<sup>105</sup> Lara Blecher “Codes of Conduct: The Trojan Horse of International Human Rights Law?” 38 *Comparative Labor Law and Policy Journal* 437 at pp462-464

<sup>106</sup> Including the Alien Tort Statute 28 US Code §1350, the Trafficking Victims Protection Act of 2000 discussed below and the US Trade Facilitation Act and the Dodd-Frank Act noted above.

<sup>107</sup> *Yem Ban, Sophea Bun, Sem Kosal, Nol Nakry, Keo Ratha, Sok Sang and Phan Sophea v Doe Corporations, Phatthana Seafood Co., Ltd., Rubicon Resources, LLC, S.S. Frozen Food Co., Ltd. and Wales and Co. Universe Ltd.* No 2:16-cv-04271, (C.D. Cal, 15 June 2016)

Act<sup>108</sup>, . This Act authorises victims of human trafficking to pursue a remedy against whoever knowingly benefits financially, or by receiving anything of value, from participation in a venture which that person knew or should have known has engaged in an act of trafficking or forced labor. It is alleged that the claimants had each paid recruitment fees to obtain jobs in Thailand, where they fell into debt bondage, had their passports withheld and were forced to work in harsh conditions for lower wages than promised. The case is ongoing.

Although the future of corporate liability under the Alien Tort Statute (the “ATS”)<sup>109</sup> in the US remains uncertain pending the outcome of the Supreme Court’s decision in *Jesner at al v Arab Bank Plc*,<sup>110</sup> there have been previous attempts to use the ATS to attach liability to US firms for acts occurring in their global supply chain.<sup>111</sup>

For example, the case of *Doe v Nestlé*<sup>112</sup> was brought under the ATS by a group of child slaves in Mali against a number of US cocoa importers. The Court referred to the presumption against extraterritoriality set out in *Kiobel v Royal Dutch Petroleum*,<sup>113</sup> and found that the plaintiffs’ claims did not “touch and concern” the US with sufficient force to rebut this presumption. This decision is presently under appeal. The plaintiffs argue that “[t]he broad and amorphous *Kiobel* test should not be used to shield with legal immunity major U.S. companies that have purposefully facilitated and profited from child slavery for years,” and that “this is not an extraterritorial case: it is a violation of the law of nations to aid and abet child slavery, which defendants did from the United States.”<sup>114</sup>

Although they are not judicial bodies, OECD National Contact Points (“NCPs”) are bodies to which complaints may be submitted where a company is in breach of the MNE Guidelines.<sup>115</sup> NCPs in various jurisdictions have had cause to consider the HRDD obligations of companies

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<sup>108</sup> The US Trafficking Victims Protection Act of 2000.

<sup>109</sup> The ATS enables non-US citizens to bring suit in US courts based on certain violations of international law: Alien Tort Statute 28 US Code §1350.

<sup>110</sup> *Jesner at al v Arab Bank Plc* No 16-499

<sup>111</sup> For example, claims were brought against a group of US retailers alleging that they enabled poor labour conditions in garment factories in Saipan, China. These claims essentially merged and were brought as anti-peonage and forced labour claims, an ATS claim and a Racketeer Influenced and Corrupt Organisation Act (“RICO”) claim. The Court held that the contractual arrangements which the individual retailers had with the manufacturers and the use of an industry code of conduct were sufficient to show a “structure” for directing the affairs of an “association-in-fact” enterprise of retailers and manufacturers. The Court also drew an inference from the code of conduct that the retailers knew or were aware of conditions at the garment factories. See Lara Blecher “Codes of Conduct: The Trojan Horse of International Human Rights Law?” 38 *Comparative Labor Law and Policy Journal* 437 at pp457-458.

<sup>112</sup> *John Doe v Nestle SA et al* No 17-55435 (CoA, 9<sup>th</sup> Circ, 31 March 2017)

<sup>113</sup> *Kiobel v Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013)

<sup>114</sup> RJ Vogt, “Nestlé, Cargill Funded Child Slavery, 9<sup>th</sup> Circ. Told” Law360, available at <https://www.law360.com/articles/983016>.

<sup>115</sup> The MNE Guidelines require participating states to establish National Contact Points. Any individual or organisation with a legitimate interest in the matter can submit a case to an NCP regarding a company operating in or from the country of the NCP which has not observed the Guidelines. NCPs provide a mediation and conciliation platform to resolve such disputes concerning the MNE Guidelines. Although the MNE Guidelines detailed requirements with respect to supply chains, it has been shown that NCPs very infrequently refer to their own OECD Standards in their statements. See Robert McCorquodale and Arianne Griffith, “The Soft Law Nature of the OECD Guidelines: An Impediment for Access to Remedy?” in Nicolas Bonucci and Catherine Kessedjian (eds) *40 Years of the OECD Guidelines* (Pedone, 2018).

with respect to their supply chains. The Danish,<sup>116</sup> Swiss,<sup>117</sup> French<sup>118</sup>, Dutch<sup>119</sup> and UK NCPs<sup>120</sup> have expressed the importance of HRDD in the supply chain, and these findings are informative of the wider developments of case law on supply chain HRDD. For example, the UK NCP has stated:

[T]he reliance on oral assurances from the suppliers and the subsequent written statements amount to insufficient due diligence for a company sourcing minerals in the conflict zone in Eastern DRC. The NCP is concerned that these assurances lack substance and are not underpinned by any checks. Afrimex readily admitted to the NCP that it did not know the source of the minerals and put forward the view that as the NCP could not prove that its minerals were sourced from a mine that uses child or forced labour then the NCP could not determine that Afrimex failed to meet the requirements of the Guidelines. The NCP disagrees with this view and asserts that this in fact, supports its view that Afrimex practiced insufficient due diligence on the supply chain.<sup>121</sup>

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<sup>116</sup> In 2016 the Danish NCP considered the activities of a company in relation to a supplier which was based in the Rana Plaza building in Dhaka, Bangladesh, which collapsed on 24 April 2013. The NCP found that the company did not apply adequate due diligence processes to meet the standards of the OECD Guidelines. In particular, the company failed to demand that its supplier ensures its employees' basic human and labour rights, including by taking adequate steps to ensure occupational health and safety in their operations. Final Statement, Specific instance notified by Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group, 17 October 2016.

<sup>117</sup> In May 2017, the Swiss NCP made its final statement in a claim based on human rights violations of migrant workers in the construction of facilities for the 2022 FIFA World Cup. Following mediation, FIFA accepted responsibility to ensure, including through the use of its leverage, that a due diligence process is implemented in the operations of its subcontractors. Final Statement Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by the Building and Wood Workers' International (BWI), 2 May 2017.

<sup>118</sup> For example, in 2010, the French NCP received a complaints alleging that a French multinational textile enterprise was breaching the Guidelines by purchasing cotton allegedly produced through the systematic use of child labour in Uzbekistan. In its final statement in 2012,<sup>118</sup> the French NCP invited Devcot to carry out due diligence and implement the Guidelines recommendations vis-a-vis its business partners. DEVCOT: Communiqué of the French National Contact Point for the OECD Guidelines for Multinational Enterprises, 21 September 2012.

<sup>119</sup> A group of former employees of a Congolese subsidiary of Heineken brought a complaint to the Dutch NCP for a series of alleged unfair dismissals. The complaint alleged that Heineken closely cooperated with the subsidiary at the time of the dismissals, and therefore knew or ought to have known of the matters the subject of the complaint. After mediation by the Dutch NCP a settlement was reached. Ministry of Foreign Affairs, National Contact Point, *Final Statement, Former Employees of Bralima vs Bralima and Heineken*, 18 August 2017. It was subsequently reported that the settlement was in the amount of EUR1.1million. See OECD Watch Summary, available at [https://www.oecdwatch.org/cases/Case\\_446](https://www.oecdwatch.org/cases/Case_446).

<sup>120</sup> The UK NCP has considered two complaints considering non-observance of the OECD Guidelines provisions on HRDD. A complaint brought against Afrimex UK (Ltd) in 2007 was considered by the UK NCP alleging, inter alia, that Afrimex had practiced insufficient due diligence sourcing minerals from mines that use child and forced labour or were working under unacceptable health and safety practices. Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (Uk) Ltd, 28 August 2008. In a similar case, in 2009 the UK NCP found that Vedanta Resources had failed to exercise adequate HRDD in respect of its operations in India. Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc, 25 September 2009.

<sup>121</sup> Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (Uk) Ltd, 28 August 2008 at [57].

More recently, the UK NCP has considered a referral against the security contractor G4S alleging involvement in Israeli abuses against Palestinians, finding that G4S has failed to meet the obligation to address the impacts of its business relationships with the Israeli government.<sup>122</sup>

In addition to courts and NCPs, arbitration tribunals may also increasingly contribute to the body of case law on supply chain HRDD requirements. In September 2017, a tribunal administered by the Permanent Court of Arbitration held that two parallel claims brought in terms of the Accord on Fire and Building Safety in Bangladesh (the “Accord”) were admissible.<sup>123</sup> The claimants alleged that the respondent companies had breached the Accord, by failing to require their suppliers to remediate facilities within predetermined mandatory deadlines,<sup>124</sup> and by failing to negotiate commercial terms that would make it financially feasible for suppliers to cover the cost of such remediation.<sup>125</sup> A settlement was reached in December 2017 which included a financial settlement and a requirement that supplier factories for one of the respondents be remediated.<sup>126</sup> Specialist arbitral procedures have been proposed as a potential means of resolving business and human rights disputes,<sup>127</sup> and it has been suggested that the progress of the Accord arbitrations may encourage such efforts.<sup>128</sup>

In the supply chain context, it has been argued that where a firm decides to subcontract production and other business functions while structuring and funding its contracts in such a way that functionally sets terms and conditions for its suppliers, some form of liability should follow.<sup>129</sup> Issues around joint liability have been ventilated in the US in the context of employment law. Some academics, litigators and policymakers have suggested broadening the definition of “employer” to cover a wider range of work relationships and expand the “joint employer” doctrine which allows claims to proceed against two or more enterprises in some circumstances.<sup>130</sup> The US Department of Labor and the National Labor Review Board

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<sup>122</sup> See Final statement from the UK National Contact Point (NCP) on a complaint by Lawyers for Palestinian Human Rights (LPHR) against G4S, 9 June 2015 and UK NCP follow-up statement: complaint by Lawyers for Palestinian Human Rights against G4S: An update on implementation of recommendations made by the UK National Contact Point (UK NCP) in its final statement on this complaint, 7 July 2016.

<sup>123</sup> The Accord is an extremely significant example of successful collective action involving industry and civil society that has resulted in a legally binding instrument capable of being enforced through an arbitration process.

<sup>124</sup> Article 12 of the Accord.

<sup>125</sup> Article 22 of the Accord.

<sup>126</sup> <http://www.industrialunion.org/settlement-reached-with-global-fashion-brand-in-bangladesh-accord-arbitration>

<sup>127</sup> See for example the proposal by Claes Cronstedt, Jan Eijsbouts and Robert C Thompson ‘International Business and Human Rights Arbitration’, 13 February 2017 available at <<http://www.l4bb.org/news/TribunalV6.pdf>>.

<sup>128</sup> See Volterra Fietta “Arbitral tribunal finds claims by labour unions against global brands admissible and within its jurisdiction”, 31 Oct 2017, available at: <http://www.volterrafieta.com/arbitral-tribunal-finds-claims-by-labour-unions-against-global-brands-admissible-and-within-its-jurisdiction/>.

<sup>129</sup> See, for example, Alan Hyde, “Legal Responsibility for Labour Conditions down the Production Chain” in Judy Fudge et al eds, *Challenging the Legal Boundaries of Work Regulation*, 2012 at pp83, 92-97.

<sup>130</sup> Jennifer Gordon “Regulating the Human Supply Chain” 102 *Iowa Law Review* 445 at p481; see also Justine Nolan “Supply Chain Liability for Human Rights”, NYU Stern Centre for Business and Human Rights Research Brief, 21 September 2015.

("NRLB") have moved toward a more expansive standard that permits a finding of joint employment where indirect control is demonstrated.<sup>131</sup>

This summary of legislative developments shows that there are now a wide range of tools available to people whose human rights have been affected by supply chain activities. This is an area where the law has developed and continues to be developed.

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<sup>131</sup> See also the case of *Browning-Ferris Industries of California Inc* 362 NRLB at 9 in which the NRLB expanded the joint employment standard to include indirect control. While this approach goes part of the way toward apportioning liability for labour conditions along the supply chain, the US labour and employment law regime generally does not apply transnationally, meaning that legal liability would not extend to suppliers outside the US.

### III COMPONENTS OF HRDD IN SUPPLY CHAINS

#### 1. Identification of human rights impacts in the supply chain

##### 1.1 Defining the scope and nature of supply chain HRDD

**“Everybody is part of everybody’s supply chain.” - Interviewee**

The definition of the scope and nature of a company’s supply chain is crucial to its implementation of HRDD. The Commentary to UNGP 17 notes:

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.<sup>132</sup>

The UNGPs do not specify how far up the supply chain a business’s responsibility extends, acknowledging that the action a company should take will be context-specific and “depends on what a proper human rights due diligence process reveals about the prevailing country and sector conditions, and about the potential business partners and their sourcing practices”.<sup>133</sup>

This can be the subject of conflicting expectations. For example, with respect to the cobalt supply chain, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas<sup>134</sup> sets out different due diligence responsibilities according to a company’s location in the supply chain.<sup>135</sup> Upstream companies are expected to trace minerals back to mining sites,<sup>136</sup> whereas downstream companies are expected to review, to the best of their efforts, the due diligence process of the smelters/refiners in their supply chain.<sup>137</sup>

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<sup>132</sup> Commentary to UNGP 17.

<sup>133</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Towards operationalizing the “protect, respect and remedy” framework*, A/HRC/11/13, 22 April 2009, at [75].

<sup>134</sup> OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3<sup>rd</sup> edition, 2016. We note that the current OECD Guidelines cover only four minerals, Tin, Tantalum, Tungsten and Gold, however initiatives such as the Responsible Cobalt Initiative (“RCI”) aim to have companies in the cobalt supply chain align their due diligence processes with this guidance. The RCI includes companies such as Apple, Huawei and Samsung. See Responsible Cobalt Initiative “Facing challenges, sharing responsibility, joining hands and achieving win-win” 14 November 2016, <http://www.cccmc.org.cn/docs/2016-11/20161121141502674021.pdf>

<sup>135</sup> Under the Guidance, “downstream” means the minerals supply chain from smelters/refiners to retailers and “upstream” means the mineral supply chain from the mine to smelters/refiners, see OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3<sup>rd</sup> edition, 2016 pp32-33.

<sup>136</sup> Amnesty International, *Time to Recharge: Corporate action and inaction to tackle abuses in the cobalt supply chain*, November 2017, p34.

<sup>137</sup> OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3<sup>rd</sup> edition, 2016, p33

However, a recent Amnesty International report suggests that in order to be UNGP compliant:

“If a company at any place in the supply chain discovers that it has either caused or contributed to human rights abuses through its business operations, the responsibility to respect human rights requires it to take an active part in remediation efforts, either by itself or in cooperation with other actors ... A company must itself take steps based on the situation, in cooperation with other relevant actors, to ensure that the harm suffered by workers and others affected by abuses are remediated ... This responsibility to remediate continues even when a company suspends or discontinues a trading relationship with a supplier”<sup>138</sup>

Companies such as Apple and BMW are undertaking pilot programs which seek to source cobalt from miners directly, which extends their HRDD beyond the requirements of the OECD Guidance.<sup>139</sup>

Consistent with the UNGPs, the OECD Guidelines state that the nature and extent of due diligence depend on the size, nature and context of a company’s operations.<sup>140</sup> The obligations of MNEs extend to the prevention or mitigation of adverse impacts directly linked to their operations, products or services by a business relationship.<sup>141</sup> Our interviews showed that the nature of supply chains vary widely. Some multinational companies’ main suppliers are themselves multinationals. On the other side of the spectrum, some supply chains consist mostly of SMEs or small local suppliers. The structure of the supply chain may differ depending on the sector and the business model of the entities involved. The same entity may act as both supplier and purchaser with differing degrees of leverage in each relationship, and there is often a high degree of dynamism in the make-up of supply chains.

One of the key challenges for many companies is the definition of their supply chain for the purposes of HRDD. One interviewee from a global extractives company indicated that even though they are “at the top end of the stream” as they “dig rocks out of the ground and sell it to people”, they still have a supply chain of over 14 000 suppliers. Whereas the bulk of their suppliers are for equipment and construction services, they also have a variety of other suppliers for everything from coffee and janitorial services to clothing and boots for their workers. Another extractives interviewee highlighted that the supply chain includes everything from the ships they charter to carry their products, to value-adding services such as diamond-polishing. They added that they have encountered adverse human rights impacts in both of these kinds of suppliers.

Other companies we interviewed indicated that they focus their HRDD efforts mainly on suppliers of their own branded goods or products that carry their own label. This is frequently

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<sup>138</sup> Amnesty International, *Time to Recharge: Corporate action and inaction to tackle abuses in the cobalt supply chain*, November 2017, p34.

<sup>139</sup> See Thomas Wilson, “Apple Cobalt Supplier Seeking Ethical Supply With Industry Pilot” Bloomberg, 26 March 2018 <https://www.bloomberg.com/news/articles/2018-03-26/apple-cobalt-supplier-seeking-ethical-supply-with-industry-pilot>. See also Mark Thompson, “CNN Investigation: Daimler promises to audit cobalt supply 'to the mine'” CNN, 2 May 2018, <http://money.cnn.com/2018/05/02/investing/daimler-cobalt-supply-chain/index.html>

<sup>140</sup> OECD *Guidelines on Multinational Enterprises*, 2011 at paragraph 10 of Chapter IIA, p20 and Chapter IV p31

<sup>141</sup> OECD *Guidelines on Multinational Enterprises*, 2011 at paragraph 12 of Chapter IIA, p20

accompanied by an assumption that the well-known brands from which they source will have their own supply chain HRDD processes in place.

Interviewees indicated that the level of scrutiny applied to a supplier will depend on its previous human rights record, its country of operation and its sector. For example, suppliers such as security services providers are frequently subject to robust systems, based on the severity of the risk. One interviewee indicated that they are careful about prioritisation of certain “high risks” over others in the due diligence process. Their initial instinct was that they should “check everything” as “something could always happen” and be an exception to the rule. However, they added that “when you have so many [suppliers] it is fairly impossible to do the same amount of due diligence on everybody”. They have therefore developed a comprehensive supplier screening procedure which provides for escalated HRDD in the case of high risk countries or activities. A “prioritisation” approach is consistent with the UNGPs,<sup>142</sup> the OECD Guidelines<sup>143</sup> and guidance from the UNGC.<sup>144</sup>

Our interviews highlight that companies have less developed HRDD mechanisms for their downstream supply chain, in other words with those companies which buy the company’s goods and services. One interviewee referred to the challenges of implementing HRDD on retailers which sell the company’s products to consumers, indicating:

We are a long way from saying we will not sell to this [retailer] because of a complaint we received. That would be a hard sell for me internally.

Our interviewees also indicate that the transportation and distribution services which link supply chains are not yet receiving the same attention as others in the supply chain. Supply chain HRDD practices discussed below, such as codes of conducts for suppliers and training, often seem to exclude transport services. One interviewee highlighted that shipping suppliers are often still seen as “peripheral suppliers” and that when mentioning supply chains they are “often not thought about in the same way as the farmer”. It was indicated that for the purposes of supply chain HRDD, “distribution is only now coming onto the agenda”.

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<sup>142</sup> Commentary to UNGP 17.

<sup>143</sup> OECD *Guidelines on Multinational Enterprises*, 2011 at paragraph 10 of Chapter IIA, p20 and Chapter IV p31

<sup>144</sup> See UN Global Compact Good Practice Note A *Structured Process to Prioritise Supply Chain Human Rights Risks* 9 July 2015



## 1.2 Mapping the Supply Chain and Traceability

For companies starting on their human rights journey, HRDD in the supply chain frequently begins with a mapping exercise to identify suppliers and trace the supply chain. This includes an identification of those nodes or points beyond which detailed HRDD becomes difficult, such as smelters.

Interviewees have indicated that this is often not a straightforward exercise: modern supply chains are vast, complex and dynamic, and one of the most common challenges for companies undertaking HRDD is a lack of transparency in the supply chain. One interviewee accordingly referred to this exercise as “decoding the chain”. Companies frequently do not have end-to-end visibility over which entities are in their supply chain and under what circumstances they are operating. The volatile nature of supply chains, stemming from their susceptibility to political instability, technological change and legal developments, means that it can be challenging for a company to maintain a complete and current list of suppliers.<sup>145</sup> An interviewee stated:

We have absolutely no control or full oversight of our whole supply chain. No company has that. The supply chain is so complex and so dynamic and changes on a weekly basis. Production lines stop, certain components are not produced anymore, there is continued movement. It is an impossible task to keep the total as a blueprint. However, that is not what will really add to driving impact. We choose to focus on those suppliers where we think we can make progressive steps with good practices to improve on social and environmental impacts.

This company, which uses minerals in its products, set up what it calls a “controlled supply chain”. It approached certain smelters and, through partnership with local civil society organisations, selected mines which it felt the company “could work with”. Of course, once the minerals enter the smelter they are combined with minerals from other sources which may not be as sustainable. The interviewee indicated that the company “does not need to know for sure” that the minerals used in their products are from selected mine, as the company is “generating the demand at the fair mine.” They indicated as long as the demand for fairly sourced minerals is there, it is “not important” whether it flows from the smelter into their products or a competitor’s products.

Interviewees indicated that first tier suppliers may not wish to disclose information about their own suppliers and often “protect their own supply chain fiercely”. One interviewee indicated that their main challenge for their supply chain HRDD was obtaining the requisite information, and stated that suppliers “don’t want to answer the questions; that is the biggest issue”. This is particularly prominent where the first tier supplier is itself an agent or consolidator of raw materials, such as when small-scale farmers supply to a large company through a third party co-operative. An interviewee indicated that they are frequently asked by first tier suppliers, “why should they tell me where their mills are, or where their cotton is coming from.” It was stated that this can be a “touchy subject” particularly where labour brokers are used. One interviewee indicated that their company has recently switched to a different first tier supplier of a prominent component, based on the former supplier’s unwillingness to share information about its supply chain.

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<sup>145</sup> Galit A Safarty “Shining A Light on Global Supply Chains” 56 Harvard International Law Journal 419 at p433.

Some interviewees indicated that for this reason, the HRDD questionnaires which they send to their first tier suppliers contain questions about their second and third tier suppliers. It was indicated that the purpose of these questions is “just to assess how far our supply chain we would have visibility”.

However, these challenges have been less of an impediment in other contexts. In the US and the EU, there are stringent obligations on certain sectors with respect to the traceability of raw materials in the context of food safety and logging. In these sectors, the relevant regulation essentially requires traceability of the entire supply chain for a relevant item.<sup>146</sup> The effectiveness of the traceability efforts in these contexts is demonstrated every time a food contamination or product safety concern is raised. Frequently, consumers are reassured that all items which originated from the contaminated region or the unsafe “batch” have been immediately withdrawn from the market.<sup>147</sup> These products are often agricultural produce, electronics, household goods, vehicles or otherwise manufactured products with long complex supply chains. Indeed, these are some of the same sectors about which it is commonly argued that their supply chains are too complex to trace human rights impacts effectively.

Tracing the supply chain has been greatly assisted by technological advances such as radio-frequency identification (“RFID”) tags, quick response (“QR”) code tags and scanning devices which enable raw materials to be traced back to a farm or fishing vessel. For example, a pilot project is currently being trialled by the World Wildlife Fund that will use a combination of these technologies to collect data about the journey of tuna at various points along the supply chain. Tracking would start as soon as the tuna is caught, and the data recorded using blockchain technology uploaded to RFID tags. This technology has the capacity to trace downstream products such as fillets and cans back to the original tuna fish. It is envisioned that the data collected will include information about the working conditions of those involved in the supply chain.<sup>148</sup> Other initiatives such as Project Provenance are working on using blockchain technology to track a range of other physical items including cotton, fashion, coffee and organically farmed food products.<sup>149</sup>

One interviewee highlighted that there is a difference in tracing the origin of goods as opposed to the human rights conditions which were used when they were manufactured. However, they highlighted the possibilities which technology and apps such as Ulula offers to gather information about the human rights of workers and communities, as communicated by the rights-holders themselves. The interviewee suggested that, over time, blockchain technology may be used to monitor labour practices by recording a certification that human rights of workers have not been violated at each stage of the supply chain.

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<sup>146</sup> See above at fn48 for a summary of these legislative requirements in the context of food safety and logging.

<sup>147</sup> See Oliver Ralph “Product recalls in food and car industries hit five-year peak” *Financial Times*, 11 February 2018 <https://www.ft.com/content/e02969fc-0dc0-11e8-8eb7-42f857ea9f09> [Insert further examples where unsafe food and goods were withdrawn.]

<sup>148</sup> See Candice Visser and Quentin Hanich “How blockchain is strengthening tuna traceability to combat illegal fishing”, *The Conversation*, 21 January 2018, available at: <https://theconversation.com/how-blockchain-is-strengthening-tuna-traceability-to-combat-illegal-fishing-89965>

<sup>149</sup> See Provenance White Paper, *Blockchain: the solution for transparency in product supply chains*, <https://www.provenance.org/whitepaper>

The ability to trace human rights along the supply chain through technology, coupled with growing regulatory priority around HRDD in supply chains, may evolve human rights impact tracing to a level seen in other contexts, such as consumer safety. Indeed, some companies have started to develop particular traceability mechanisms for human rights impacts. Adidas has established strict responsible sourcing guidelines to trace risks of forced labour to the raw materials used in its supply chains.<sup>150</sup> Other leaders in the garment industry include H&M, Cotton On, and Esprit which each publically disclose details of their whole supply chain.<sup>151</sup> There have also been promising initiatives in tracing raw materials such as seafood and palm oil: Nestlé reports that as at 2017 it has achieved 99% traceability of wild caught tuna back to the vessel used and 99% of farmed shrimp back to the farm,<sup>152</sup> and recently Unilever has disclosed its entire palm oil supply chain including all suppliers and mills it sources from.<sup>153</sup>

Although it is undoubtedly challenging, fuller mapping of human rights in supply chains is possible where there are incentives to do so, assisted by advances in technology.

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<sup>150</sup> Monique Villa, "Why business is the best partner in the fight against modern slavery", Thomson Reuters Foundation, 23 January 2018 : <http://news.trust.org/item/20180123102249-d6c9j/>

<sup>151</sup> For further detail see Human Rights Watch, *Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry*, 20 April 2017 available at <https://www.hrw.org/report/2017/04/20/follow-thread/need-supply-chain-transparency-garment-and-footwear-industry>

<sup>152</sup> See Responsible Sourcing of Seafood at Nestle: Thailand Action Plan Update, 2017 <https://www.nestle.com/asset-library/documents/creating-shared-value/responsible-sourcing/seafood-responsible-sourcing-update-2017.pdf>,

<sup>153</sup> <http://www.eco-business.com/news/unilever-lays-bare-palm-oil-supply-chain-in-rare-industry-move/>

### 1.3 Human rights impact assessments

Human rights impact assessments (HRIAs) provide an overview of all actual or potential human rights aspects relevant to a company's business activities both at the operations and supply chain level. HRIAs are frequently used before certain human rights risks can be prioritised over others. The UNGPs highlight the importance of undertaking regular HRIA, as human rights impacts may change over time. One interviewee confirmed this risk, and indicated that one of the sectors with which it engages through its supply chain "was not initially indicated with a lot of risk, but now we realised there is a lot of risk".

Companies interviewed have varying approaches to HRIAs. One company is in the process of undertaking comprehensive up- and down-stream HRIAs in each jurisdiction where it operates. This choice is based on the nature of its market, where the entire supply chain, from raw materials to consumer retail, predominantly takes place locally. Another interviewee indicated that their company undertook an internal HRIA as part of its human rights reporting process. They organised workshops with all the relevant teams and "asked them to identify their own salient human rights issues", after which they "came up with a list".

HRIAs may be integrated into existing risk management processes and can assist in mainstreaming human rights into existing corporate practices and structures. One interviewee indicated that they ask human rights questions as part of their annual materiality process for risk management, for which they engage with certain stakeholders such as customers, suppliers, governments and shareholders. The materiality process covers all issues that are material to the company, and by expressly incorporating human rights, they have identified various actual or potential human rights impacts in their supply chain, including child labour, forced labour and underpayment of wages.

However, other companies have different views on the usefulness of traditional HRIAs. One interviewee indicated that their company had previously undertaken HRIAs for all its operating units in all its geographies. It indicated that this was "not information that is useful" as there were "low risk markets". It has since adopted the approach of focusing on its "highest priority human rights issues". The interviewee stated that "this does not mean we ignore the rest, but as we have limited resources and time, we place more eggs in the basket of the highest priority." Another interviewee indicated:

We don't talk about risks, we talk about facts. We know there are human rights abuses everywhere. We don't want to spend money on risk assessments, we assume that there are risks everywhere. Instead, we ask how we are going to address this.

Our previous HRDD study<sup>154</sup> indicated that companies which assume that their risks are limited to those which are prevalent in the sector, may thereby miss other adverse human rights impacts. Similar limitations apply when assumptions are made based on region.<sup>155</sup> One interviewee indicated that they had previously assumed that any human rights of their supply chain would be located overseas, but through their HRIA they recognised that there are similar

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<sup>154</sup> Robert McCorquodale, Lise Smit, Robin Brooks and Stuart Neely "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Journal* 195.

<sup>155</sup> Robert McCorquodale, Lise Smit, Robin Brooks and Stuart Neely "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Journal* 195 at p202

supply chain risks in their own home state jurisdiction. They now undertake HRDD for their local suppliers as well, indicating that they “treat it the same”.

Companies such as Nestlé have identified HRIAs as an invaluable tool fundamental to their human rights commitments.<sup>156</sup> Nestlé has acknowledged that HRIAs are more complex and resource intensive than audits, due to the nature of human rights which cut across a number of different issues and functions throughout the value chain.<sup>157</sup> However, the company argues that HRIAs serve a different function to audits, by uncovering areas for improvement rather than identifying non-compliance,<sup>158</sup> and by building capacity and raising awareness at the country level.<sup>159</sup>

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<sup>156</sup> Nestlé’s approach uses a four step process consisting of: 1) a scoping exercise at the country level to identify rights-holders to be interviewed, facilities and sourcing areas to be visited and external stakeholders to be engaged with; 2) an assessment of actual and potential human rights impacts through interviews based on self-assessment questionnaires undertaken by local management, rights-holders and external stakeholders; 3) integration and action upon findings through internal reporting and recommendations where remediation is required; and 4) tracking and communicating how impacts are addressed through the creation of an action plan including a timeline. During the HRIA the assessment team will assess both Nestlé’s operations and its supply chain. Nestlé also includes an assessment of one raw material of Nestlé’s supply chain in the scope of each HRIA. Nestlé and the Danish Institute for Human Rights, *Talking the Human Rights Walk: Nestlé’s experience assessing human rights impacts in its business activities*, 2013 at p8.

<sup>157</sup> Nestlé and the Danish Institute for Human Rights, *Talking the Human Rights Walk: Nestlé’s experience assessing human rights impacts in its business activities*, 2013 at pp 9 and 14.

<sup>158</sup> Nestlé and the Danish Institute for Human Rights, *Talking the Human Rights Walk: Nestlé’s experience assessing human rights impacts in its business activities*, 2013 at p14.

<sup>159</sup> Nestlé and the Danish Institute for Human Rights, *Talking the Human Rights Walk: Nestlé’s experience assessing human rights impacts in its business activities*, 2013 at p9.

## 2. Actions to address: Prevention of potential impacts

### 2.1 Supplier on-boarding

Most companies indicate that their leverage is strongest at the point before entering into a relationship with a supplier, also known as “supplier on-boarding”.<sup>160</sup> At the “pre-onboarding” stage, companies frequently use questionnaires, database searches and other forms of desktop research to gain more knowledge about the supplier’s actual or potential human rights impacts. Where a certain supplier or a country, region or sector poses particularly high human rights risks, this screening will be escalated into more thorough investigations.

As part of this initial process, the supplier is frequently expected to do most of the information-gathering. Interviewees noted that small suppliers frequently do not have a web presence, and do not have their past activities documented online. This requires the company to ask more questions of the supplier, including through self-assessment, and of others who have knowledge about their practices. In order to receive answers which reflect reality, questions frequently avoid the use of broader human rights language. Instead, specific questions are asked, such as whether recruitment agencies are used, or there is a request to see specific documents, such as a written child labour policy. One interviewee had recently started asking questions of a supplier after potential human rights impacts were highlighted during the initial screening process. They indicated that the supplier was “fairly defensive”, adding that one can “pretty quickly start to see from the responses that there are issues you should look into.”

One interviewee highlighted the usefulness of integration of human rights into tender documents. They included a human rights annex in two recent calls for tenders. The companies which submitted tenders accordingly had to show how they were going to undertake HRDD in their own operations and in their relationships with further business partners.

Interviewees indicated that they have refused to engage with suppliers based on human rights concerns which showed up during their pre-onboarding screening. One interviewee indicated that such refusal would be based on “situations where we likely cannot find mitigation for the human rights impacts, or the potential impacts are egregious, or the management capacity of the [supplier] or their [suppliers] to deal with the impacts are weak.” In other instances, a company may enter into a contract with the relevant supplier, but insist that various human rights standards be included in the contract and embedded into operations.

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<sup>160</sup> Interviewees reported that once a company has entered into a contractual relationship with a supplier, its leverage diminishes.

## 2.2 Codes of conduct and contractual clauses

Codes of conduct have traditionally been viewed as voluntary standards,<sup>161</sup> but are increasingly being given contractual force by being incorporated into binding contractual standards.<sup>162</sup>

For example, Ikea requires contractors to sign a legally binding document containing human rights provisions prior to being accepted as a supplier. Once they have been accepted, a supplier is required to uphold Ikea's code of conduct and also ensure that sub-contractors sign a commitment to do so. The language used in Ikea's code of conduct is mandatory, indicating a legally binding obligation.<sup>163</sup>

Many interviewees mentioned that using human rights provisions in a contract or an accompanying code of conduct is useful for communicating the human rights standards required or to "start a conversation about human rights". Such contractual expectations are often coupled with penalty clauses, termination rights and investigatory rights. Interviewees indicated that it is important to include such control mechanisms in the contract, to ensure that the company's HRDD standards are clearly part of the supplier's ongoing performance requirements. One interviewee indicated that contractual clauses help to "set the tone", in that it is "one thing to give someone a hand-out [but] different if they sign it." In this way it "underscores the significance of the message."

Our interviews showed a few examples of where contractual human rights provisions were enforced, such as through termination of a contract or requirement of action plan implementation. In some cases, interviewees indicated that the option for enforcement exists, although they have not yet needed to exercise this option. In some cases, the contract does provide for termination based on human rights violations. In these cases the company usually exercises what leverage it has for the duration of the contract, and refuses to renew the contract or place any new orders going forward.

On the whole our evidence also suggests that contractual provisions have less impact on suppliers when used on their own than if they are complemented by the entire package of HRDD components, including ongoing monitoring of compliance with the code of conduct, human rights policies and action plans embedded in the suppliers' operations, human rights

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<sup>161</sup> Lara Blecher "Codes of Conduct: The Trojan Horse of International Human Rights Law?" 38 *Comparative Labor Law and Policy Journal* 437.

<sup>162</sup> Lara Blecher "Codes of Conduct: The Trojan Horse of International Human Rights Law?" 38 *Comparative Labor Law and Policy Journal* 437. A code of conduct may also take the form of an international framework agreement ("IFA") for a particular industry or sector. IFAs are agreements negotiated between multinational companies and global union federations that deal with core labour rights. Such agreements are typically grounded in international labour law, such as the ILO conventions, but often also cite other international human rights standards and other initiatives such as the OECD Guidelines or the Global Compact. IFAs differ from codes of conduct in that they are not imposed unilaterally but rather are the product of negotiation. IFAs are often regarded as non-legally binding, but they can be enforced through a range of mechanisms such as information sharing, sourcing requirements and termination of contracts. Lara Blecher "Codes of Conduct: The Trojan Horse of International Human Rights Law?" 38 *Comparative Labor Law and Policy Journal* 437 at pp.455-456.

<sup>163</sup> Lara Blecher "Codes of Conduct: The Trojan Horse of International Human Rights Law?" 38 *Comparative Labor Law and Policy Journal* 437 at pp.449-451.

training, and active and open engagement with the supplier on the realities of improving conditions.

In order to be effective, codes of conduct also need to be complemented by purchasing practices such as prices and lead times. A recent study found that “[w]hile many companies require suppliers to respect their codes of conduct...and monitor suppliers’ labour rights performance, their buying practices often sit at odds with these initiatives.”<sup>164</sup> Codes of conduct place burdens on suppliers but are not always accompanied by resource allocation, financial support and buying practices to enable compliance. The report highlighted that 48% of suppliers receive “no help at all” in implementing the buyer’s code of conduct, and there is very little reward for improvements made in terms of the code of conduct.<sup>165</sup>

The study similarly found that companies with increased code of conduct requirements are not always willing to increase prices accordingly. For example, “buyers are hesitant to pay a price that covers minimum wages increases,” and in 2015, 39% of suppliers accepted orders below production cost.<sup>166</sup> This leads to payment below the minimum wage, increased overtime and lack of social security contributions.<sup>167</sup> Suppliers may also be provided training for which they are required to pay “a hefty amount” themselves.<sup>168</sup> In summary, the study found that “the low value [suppliers] see from the product sits at odds with funding the cost of audits and improvements.”<sup>169</sup> This is exacerbated by the fact that one supplier might often be subject to multiple parallel or even inconsistent codes of conduct, processes or procedures from their various buyers.

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<sup>164</sup> The Joint Ethical Trading Initiatives’ ‘Guide to buying responsibly’, September 2017, available at <https://www.ethicaltrade.org/resources/guide-buying-responsibly>, p. 7.

<sup>165</sup> Ibid at 7.

<sup>166</sup> Ibid at 8.

<sup>167</sup> Ibid at 9.

<sup>168</sup> Ibid at 7.

<sup>169</sup> Ibid at 8.



### **2.3 Stakeholder engagement**

Interviewees have stressed the importance of rights-holder engagement in identifying and adequately addressing human rights impacts. As one interviewee put it “you have to find a way to ask rights-holders about how they are impacted, rather than asking companies if they are impacting human rights”. Some companies are exploring worker voice programmes, assisted by technology. For example, some use the smartphone-based app Ulula,<sup>170</sup> which allows workforces or communities to communicate with a company and facilitates the aggregation and analysis of data.

However, stakeholder engagement is extremely limited with respect to human rights impacts of suppliers. Existing stakeholder consultations, such as around free, prior and informed consent for land use, frequently focus predominantly on the relevant company’s own operations, as opposed to the activities of a supplier. One interviewee indicated that “there is a need to take a degree of control” to ensure that “relevant stakeholders can be identified and heard, which can only be done in partnership with suppliers”.

However, interviewees suggested that this expectation is frequently not reflected in the company’s screening and monitoring of the supplier’s HRDD processes. In many cases, stakeholder engagement by suppliers may simply not be given consideration as a priority for the purposes of supply chain HRDD.

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<sup>170</sup> <http://ulula.com/product/>

## **2.4 External and internal human rights experts**

Interviewees often use external human rights experts in their supply chain HRDD. One interviewee indicated that such experts “are realistic and they challenge us. This has helped us to create synergies internally.”

Another interviewee highlighted that it is important for internal operationalisation that individual managers across the various teams know that they “do not have to become human rights experts” themselves, but that the human rights team within the company will support them. In turn, teams across the companies are provided with a “cheat sheet” of one page, to indicate what they “should be looking out for” during various stages of a transaction. In this way, managers in teams across the company are encouraged to “call the expert” when they notice a red flag.

One example documented publically is Nestlé partnership with the Fair Labor Association (FLA) to address child labour issues in its cocoa supply chain. Nestlé had found that without additional support for farmers, certification alone tended to drive the issue underground.<sup>171</sup> Nestlé worked with the FLA to develop a Child Labour Monitoring and Remediation System which worked with local communities in order to tackle the root causes of child labour.<sup>172</sup>

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<sup>171</sup> Nestle Cocoa Plan Report, *Tackling Child Labour*, 2017.

<sup>172</sup> Nestle Cocoa Plan Report, *Tackling Child Labour*, 2017.

## **2.5 Human rights training**

Many of those interviewed offer human rights training for their own procurement teams who engage with suppliers, and some companies interviewed provide human rights training for suppliers. This may be limited to crucial or high risk suppliers. One interviewee indicated that they provide the same training for security personnel regardless of whether they are employees or external service providers.

In many cases, human rights training uses human rights language and is often called “human rights training”. Human rights training sometimes takes the form of standalone modules but is also frequently offered as a component of other training sessions. For example, training may focus on compliance with the code of conduct, other contractual human rights requirements, or on procurement practices. One interviewee indicated that they train their own employees responsible for sourcing on the human rights risks involved, such as the implications on workers in their supply chain of rushing an order.

Training frequently uses a combination of techniques, including desktop modules, webinars or in-person training. Training often takes place on a routine basis, but may also take place on an ad hoc basis, such as where an actual or potential human rights impact has been identified. For example, one interviewee indicated that they are rolling out four different training sessions, in different time zones, for employees working in compliance, labour and employment, sourcing and projects. They also just finished development of a new online training video for suppliers. All suppliers will be required to complete the training, which is called an “integrity” module and covers what they have identified as their key supply chain human rights issues, including forced labour.

Depending on the circumstances, trainers could be internal experts or independent third parties. Trainers are sometimes based locally, such as the legal managers in the relevant jurisdiction, or otherwise brought in from elsewhere, such as from the corporate group legal team or a civil society organisation specialising in human rights training. One interviewee indicated that they view training as important for the company’s “off the shelf set of materials [to be] tailored for the specific context.”

Another interviewee added that in addition to formal training, audits also allow for some form of training as “the auditors go through the human rights questionnaire and explain the importance of the issues it raises to suppliers.” One interviewee provided an example of having worked with a supplier where child labour was discovered by organising a week-long workshop with different departments to “educate, raise awareness and having a common approach.” They built a local roadmap together with the supplier, for which compliance is audited by local auditors. They indicated that “it’s a very long process, and it seems to be working, but it’s fragile, and we have to continue training.”

A developing practice is that of training the trainers, where local trainers are equipped with HRDD expertise as well as guided on training methods, in order to continue the training in the future.

### 3 Actions to Address: Responding to existing impacts

#### 3.1 Leverage, remediation and termination

The UNGPs expect companies to exercise leverage over third party business partners to “effect change in the wrongful practices of an entity that causes a harm.”<sup>173</sup> The Commentary to Guiding Principle 19 states:

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

The UNGPs acknowledge that companies may have varied levels of leverage with different third parties. This was confirmed by interviews, with one company indicating that they do not “have as much leverage as we would like.” To increase leverage, they have regular discussions with relevant third parties, in which they include senior people, in order to establish a relationship conducive to a proactive approach. They also “keep the communication channels open” with people on the ground, in order to “not hear it first from the media” if an impact should arise. They also highlight the importance of engaging from the start of the life cycle of the business relationship, to be clear with suppliers about what is expected from the outset.

The Commentary to Guiding Principle 19 further provides:

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.

The approach of the UNGPs is accordingly to exercise and increase existing leverage first, and only if leverage fails to consider terminating the relationship, taking into account the human rights impacts of termination. Companies involved in this study confirmed that this approach is broadly followed. Interviewees indicated that they try to exercise leverage to improve practices before, or instead of, turning to termination of the business relationship. One interviewee described this approach as that their “first choice is to work with suppliers”, and only terminate when the supplier refuses to conform with the company’s human rights standards.

Before deciding to terminate a relationship, companies often choose to engage with the supplier to put in place action plans for remediating issues and improving policies and conditions. One company which uses this approach indicated that it undertakes return checks to monitor that the supplier adheres to the action plan, and includes this in the follow-up audit. Each action plan has to be completed within a certain period of time, which is usually within six months.

Interviewees indicated that the decision whether to terminate a relationship with a supplier depends on various factors, such as the nature of the violation and the likelihood of improving supplier conditions. Some companies take a risk-averse strict internal position on the decision to terminate, whereas others use a more dynamic ad hoc approach.

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<sup>173</sup> Commentary to Guiding Principle 19.

For example, some companies have a list of very severe human rights impacts which they will not tolerate in their suppliers, based on the unlikelihood of them being able to improve conditions through leverage. One interviewee indicated that child labour is on their list of “things [that are] absolutely not acceptable to us.” If they detect child labour, they cease working with the supplier “immediately” by simply placing no further orders. It is also highly unlikely that they would work with that supplier again in the future, even if the supplier demonstrates remediation and improvement of practices.

It should be noted that this is a company with comprehensive initial screening processes, human rights provisions incorporated into contractual requirements and regular human rights auditing. They indicated that the company’s strict adherence to their human rights standards is intended to signal to suppliers that these requirements are to be taken seriously, and are not simply “guidelines” contained in contractual form.

The same company indicated that, on the other hand, if it is not “a critical breach” but a more minor failure “that can be remedied through education”, such as a lack of fire extinguishers or a failure to keep proper records, the company would make the effort to engage with the supplier. Interviewees from companies which take the engagement approach indicated that some suppliers in certain regions, where there is no enforcement of these kinds of regulations, are on a “continuous learning journey”. In such cases, the company is well-placed to improve conditions through leverage, for example by providing training and roll out a compliance action plan. Sometimes a company freezes a relationship pending improvement. One interviewee indicated that if the issue is not remediated or conditions are not improved within a few weeks, they will terminate.

Other interviewees take a directly contrasting approach to the decision to terminate. They indicated that their companies choose to make ad hoc decisions in each individual case as to how to address the human rights impact. For example, one interviewee described this as “avoiding the legal reflex of terminating a contract because we have a child here” and instead aiming to have a “balanced approach.” They described this as a “kind of grey area in procurement”. Another interviewee stated that they “try to engage rather than walk away from suppliers”, indicating that “it encourages more transparency if they think we will work through issues with them”. However, they will terminate if they find “similar ongoing problems” after having worked with a supplier to change policies and improve conditions. One interviewee indicated:

If you found child labour, you could delist the farm, sure. But it may be happening on the next farm as well, and you have not helped the farmer.

Other factors which influence the decision to terminate is the sector, the nature of the activity being undertaken, and the significance of the relevant supplier. For example, an interviewee indicated that once a large and longer-term construction project has started, it is less feasible to simply walk away than it would have been before entering into the relationship. In one instance, they were informed that a construction supplier’s plans failed to respect the cultural heritage of an affected indigenous community. The company took this “extremely seriously”. They instructed the supplier not to build in a particular place, and worked with the supplier to put in place mechanisms for remediation and prevention of similar failures in the future.

On the other hand, if the supplier provides non-essential products with a short order time that could easily be sourced elsewhere, such as stationary or commodities such as bricks,

companies frequently decide to simply not place any further orders, and instead switch to a supplier with a better human rights record. A company's approach regarding termination, as opposed to remediation, often depends on whether the product is "hard to source from other places".

Interviewees mentioned that even the threat of termination may improve leverage. In one example, a "very important" large supplier, which was producing the company's private brand, was being audited every six months "without any progress". The company's vice president of sourcing visited the supplier and indicated that unless these human rights issues are "fixed", the company would cancel its orders. Thereafter, the issues were remediated "within months".

### 3.2 Operational-level grievance mechanisms

The UNGPs provide for the use of operational-level grievance mechanisms to identify and remediate a company's human rights impacts.<sup>174</sup>

In general, the use of operational-level human rights grievance mechanisms for HRDD by suppliers appears to be limited, particularly beyond the first tier. Where they are available, they most commonly take the form of the company's own human rights grievance mechanisms being available to those whose rights are affected by its supply chain. In most cases, these mechanisms would be advertised only to those working in the supply chain, although the grievance mechanism may theoretically be open to other affected rights-holders. Some companies also expect their suppliers to put in place such grievance mechanisms, but companies have less scrutiny over the effectiveness of these supplier grievance mechanisms than they have over their own.

One interviewee stated that suppliers are required to have human rights grievance mechanisms in place, outside the scope of the direct manager where necessary, and these grievance mechanisms are verified by audits. Auditors are required to find out "how issues are raised". Suppliers also have access to the company's own grievance mechanism, which takes the form of an ombudsman.

In contrast, another interviewee indicated that they do require their suppliers to have in place human rights grievance mechanisms, but the interviewee did not know whether these were human rights-specific grievance mechanisms – i.e. "channels that did not exist previously" – or whether the suppliers follow-up on grievances. They added that their own internal company hotlines often flag up supply chain human rights issues.

Another interviewee indicated that suppliers are expected to have grievance mechanisms, but that this could be "clearer in the contract". The company itself also has a call-in line which is available to anyone affected, including in supply chains. A further interviewee highlighted the challenges of raising awareness about a grievance mechanisms in supply chains. For example, they highlighted that a worker in a factory which supplies to several retail brands may not have information on which company's grievance mechanism to utilise.

The method by which rights-holders are made aware of the availability of grievance mechanisms differs widely and is challenging. Some grievance mechanisms are promoted actively, including by emphasising that a caller will be speaking to a real person on the other end of the line. Frequently, grievances may be raised by anyone through a dedicated email address. However, one interviewee highlighted that this channel is "very corporate" and its usefulness is limited for "someone who cannot read and write". Posters are commonly used, although one interviewee highlighted that those working on their premises, where the posters are displayed, are much more likely to know about the grievance mechanisms than those working for, or otherwise affected by, a supplier elsewhere. Suppliers are, however, encouraged to put up the posters and use the grievance mechanism.

In order to address the limitations of such centralised complaints mechanisms, local or community grievance mechanisms are often available for persons affected by the supply chain. These grievance mechanisms are frequently established on site for the purposes of addressing issues around land rights, cultural heritage or discrimination. Grievances are

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<sup>174</sup> Commentary to Guiding Principle 22.

mostly dealt with at a local or community level, unless the issues are so serious that they need to be escalated to the company's legal or human rights team. One interviewee highlighted that it is often practically more effective to address grievance mechanisms locally. However, they added that it is "harder in terms of reporting", as reporting requires centralised knowledge on how grievances were resolved. If grievances are effectively dealt with at local level, there is no need to escalate them to a centralised level, where reporting usually takes place.

The challenges of limited information about suppliers beyond the first tier often inhibit the potential of grievance mechanisms. One interviewee provided an example where a "tip" about an alleged human rights violation in their supply chain was flagged through their anonymous human rights grievance mechanism. However, with no further information or evidence, their investigations were unable to establish where in their vast supply chain the alleged impact was taking place.

Some companies are using innovative methods for their human rights grievance mechanisms. For example, one interviewee mentioned the use of smartphone apps which link with worker voice programmes. They are partnering with a local civil society organisation in a region where the company has many suppliers, also beyond the first tier. The programme educates members of the community on human rights, and provides each participant with a smartphone containing an app which records data. For example, around forced labour issues, the app may ask such questions as whether the smartphone holder can leave their job when they want or whether they have to pay their employer. The results are collated and provided to the company as independent and anonymous data from the community.

Another example where smartphone apps are used to record grievances is where one supplier agreed to roll out a worker voice programme in its workforce. The company is able to view the grievances which the supplier's employees raise anonymously through the platform. The company can also send messages and reply through the app, with information on employee rights and "how to get help". The company is "not involved in fixing the issue – that is between the worker and the supplier – but it is a way to monitor". The company states that "it is a challenge to get suppliers on board and get workers comfortable with making complaints", but describes worker voice and education programmes as "the next great development".



## 4 Tracking and Monitoring Effectiveness of Actions

### 4.2 Audits, Investigations and Compliance Measuring Tools

#### *'Auditing does not solve human rights issues in a factory' - Interviewee*

Studies have found that traditional auditing processes are insufficient to detect human rights impacts.<sup>175</sup> One interviewee confirmed this by indicating that the large auditing firm they use for other purposes, including their communications, "do not have the expertise for human rights."

Presumably as a result of these limitations of traditional auditing, interviewees referred to the use of a new kind of audit, specifically aimed at human rights, to monitor compliance with their human rights provisions and codes of conduct. In other cases, interviewees mentioned audits which are specifically aimed at labour rights, including the health and safety of workers, particularly where the company had identified labour as its main supply chain human rights risk. Where such specialist audits are used, the auditors are experts on human rights (or labour rights, as the case may be). In general, however, studies have highlighted that auditing practices for human rights impacts remain inconsistent and standards are implemented in an ad hoc fashion.<sup>176</sup>

Audits for the purposes of HRDD typically take place at one or both of two stages. Firstly, audits may be used before a company enters into a contractual relationship with a supplier. Secondly, once an ongoing relationship with a supplier is established, regular audits are commonly used for monitoring compliance with human rights standards. Many companies use a combination of these two auditing approaches.

For example, one interviewee indicated that they require an initial audit of all suppliers in high risk countries, in order to qualify as suppliers. Thereafter suppliers are audited at one to four years intervals, depending on such factors as their risk profile, how they fared on the initial audit, what has been communicated during interim follow-ups, and customer visits. One interviewee from the retail sector indicated that they audit those suppliers who supply the products carrying their own label. They indicated that the company does not ordinarily audit the supply chains of the well-known brands, but instead tends to "focus on the brands [of which] we are unsure whether they have done the appropriate level" of HRDD.

Auditors may be internal or external. One interviewee indicated that they have an internal auditing program with internal auditors who are specialists in three areas: environment, health and safety, human rights, and security. These auditors attend the premises for one to three days, depending on the size of the site, and meet with management, engage with workers, and ask various questions. Some interviewees use the same third party auditing services. One interviewee indicated that "there is a need to get external and internal human rights experts involved" and if this is done one does not need "hundreds of auditors, but can do it in a small team".

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<sup>175</sup> Genevieve LeBaron and Jane Lister, 'Ethical Audits and the Supply Chains of Global Corporations', Sheffield Political Economy Research Institute (2016) Global Political Economy Brief No. 1, 1

<sup>176</sup> Galit A Safarty "Shining A Light on Global Supply Chains" 56 *Harvard International Law Journal* 419 at p420.

One interviewee indicated that, in certain operating environments, such as China, the company is using local auditors to work together with the supplier on a “long term process to accompany them step by step.” They indicated that particularly when working with national companies, “working with local Chinese auditors helped because they are Chinese. If we had internal [people], it would not have worked.”

When asked about the reaction of suppliers to human rights audits, one interviewee stated that large suppliers “are used to being audited, so they were not surprised.” With smaller suppliers, they found that it is often “better to accompany” the small supplier through the auditing process and subsequent implementation of HRDD into its processes. Indeed, one interviewee stated that “auditing does not solve human rights issues in a factory”. Instead, “education, training, and working with locals, creates a positive impact.”

Some companies ask suppliers to do investigations of their human rights impacts, and ask to see the results of these investigations. This may be done in addition to, or instead of audits, depending on the circumstances. These investigations are often issue-specific and more ad hoc than routine audits. The nature of investigations vary widely, from “sometimes simply asking questions, on the phone or in writing”, to asking a third party, including a government, to do a formal investigation, or sending a company person to do the investigation themselves.

One interviewee indicated that in some cases they “may not have contractual rights to do an investigation that gets into human rights. This underscores the importance and usefulness of having contractual mechanisms put in place from the outset.

In addition, many interviewees indicated that they have recently, or are currently in the process of, updating their internal compliance measuring mechanisms to incorporate sophisticated human rights standards for suppliers. Frequently, this refining process is facilitated by more sophisticated technology such as interactive compliance measuring tools, along with the development of additional indicators for sourcing. The aim is for the technology to be able to alert them when high risks countries or sectors are triggered. Interviewees indicated that they are using some lessons from anti-corruption compliance tools, which have been in circulation for longer and are therefore more established.

### 4.3 *Third party vetting and collective action*

Suppliers are subject to auditing requests from multiple buyers, often across different sectors. Various initiatives have been established in order to align auditing practices and address the phenomenon of “audit fatigue”. Some interviewees indicated that they will accept auditing certificates where a supplier has been audited for human rights for the purposes of supplying to another company. If a supplier has not yet been audited for any of these trusted peers, the company will undertake its own audits of the supplier. The Supplier Ethical Data Exchange (“Sedex”) is a membership organisation which maintains a collaborative platform for sharing responsible sourcing data on supply chains. Similarly, AIM-Progress, an industry organisation of consumer goods manufacturers and suppliers, facilitates mutual recognition of audits. This is done through the benchmarking of members’ audit protocols against a joint set of common criteria, and an agreement to recognise other members’ audits.

Third party vetting is often undertaken via multi-stakeholder initiatives (“MSIs”) and industry associations. Some focus on particular industry sectors, such as the International Code of Conduct Association (“ICoCA”) in the private security sector, and some on a particular range of human rights impacts, such as the Fair Labor Association.<sup>177</sup> Many interviewees expressed the need for third party vetting mechanisms to become more centralised and evolved for HRDD. One interviewee referred to ICoCA as being “still in its infancy”, and argued that there is a considerable need for a cross-sectoral industry body with its own vetting mechanism. Similarly, interviewees indicated that there are emerging calls in various industries for a HRDD-specialised certification scheme.

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<sup>177</sup> The Fair Labor Association (“FLA”) is an MSI of companies, academics and civil society organisations which accredits the management systems of participants and verifies remedial efforts of suppliers. See <http://www.fairlabor.org/our-work>.

#### 4.4 Local presence

##### **'You have to go locally to find out what is really happening' - Interviewee**

Interviewees indicated the importance of having local experts on the ground, to monitor supplier compliance and to provide information and insights on the local environment to the centralised company decision-makers.<sup>178</sup> Interviewees also confirmed that local experts can be very helpful in building relationships with suppliers, which enables more effective leverage. Engagement with civil society and local experts could be undertaken by the company individually, or collectively, for example through MSIs.

Nestlé's efforts with respect to their cocoa supply chain provides a useful example. The company engaged with local contacts in communities which were susceptible to child labour.<sup>179</sup> This approach reassured farmers and encouraged candour from stakeholders, which allowed Nestlé to more readily identify and remediate the root causes of child labour in the relevant communities.<sup>180</sup>

Interviews highlighted that local expertise need not be external to the company. One company has a sourcing team of over 600 people based in the relevant jurisdictions. The sourcing team members' local presence enables them to provide detailed feedback around the relevant conditions, and to build up strong relationships with suppliers on a daily basis. Another interviewee indicated that in countries where they have high risks with respect to their supply chain HRDD, they have established local working groups consisting of legal, compliance and ethics, and human resources people. The interviewee stated that these local team members "know better than we do what the risks are, and they know their suppliers." It was stated that "you have to go locally to find out what is really happening."

One interviewee from the agriculture sector noted that there was a need to take a "top down, bottom up" approach, which requires action at board level, but also understanding of the origins of supply. They stated:

A company needs to ask what the real world situation is on the ground: what motivates a smallholder farmer? What issues lead to child labour? What direct and indirect approaches can be taken to tackle the problem? It is only through understanding motivational drivers such as the role of poverty for smallholder farmers, the pressures it creates, the challenges for parents to take care of and educate children in circumstances of poverty that you can think about solutions.

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<sup>178</sup> For example, through reports such as those undertaken by Amnesty International with respect to the cobalt supply chain, (*Amnesty, Time to Recharge: Corporate action and inaction to tackle abuses in the cobalt supply chain*, November 2017) and Human Rights Watch with respect to the jewellery industry (*Human rights Watch, The Hidden Cost of Jewelry: Human Rights in Supply Chains and the Responsibility of Jewelry Companies*, February 2018).

<sup>179</sup> Nestle Cocoa Plan, *Tackling Child Labour 2017 Report* at p24.

<sup>180</sup> Nestle Cocoa Plan, *Tackling Child Labour 2017 Report* at p24.

## 5 Communication and reporting

### *“People were happy to see we were honest” - Interviewee*

The UNGPs expect companies to communicate externally how they address their human rights impacts.<sup>181</sup> Guiding Principle 21 provides that communications should:

- (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;
- (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

In addition to internal mapping of supply chains, a rising trend to combat a lack of supply chain transparency is to publish the details of suppliers. One company interviewed is publishing the names of the factories in their supply chain. They indicated that this “decision was not done lightly, but now that we have done it, we realised it can only have beneficial impacts on our business”. Whereas “in many ways it has been very positive”, in other ways it was “just accepted that we have done it; that we are doing what is in line with stakeholder expectations”. They added that the decision did not lead to any negative media attention.

Another interviewee confirmed the benefits of publically reporting on the human rights issues identified in their supply chain. They indicated that this decision was “counterintuitive” and “took us a long time to sell internally”. However, they found that “no-one reacted negatively. People were happy to see we were honest”. This positive reaction, in turn, helped them to “educate people internally”. They concluded that “in fact, there is no taboo, in the end, to communicate”.

However, concerns remain that disclosures relating to a company’s supply chain may expose the company to litigation risk. As noted above, US courts have recognised a “safe harbour” for disclosures made under the California Act, based on the consideration that “the Legislature has permitted certain conduct or considered a situation and concluded no action should lie.”<sup>182</sup>

In many contexts, due diligence is a satisfactory defence where a company or corporate official may defend itself against a criminal charge where it can show that it took all reasonable steps or exercised necessary due diligence in a particular context.<sup>183</sup> Our previous

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<sup>181</sup> Guiding Principle 21.

<sup>182</sup> See *Barber v Nestlé USA Inc* No. 8:2015cv01364 (C.D. Cal. December 14, 2015) at 778.

<sup>183</sup> Due diligence as a defence may apply in the context of: misrepresentation or failure to disclose financial matters (Sec 73 of the Australia Corporations Act 2001 (Cth); Sec 11(b)(3)(A) of the US Federal Securities Act of 1933; Sec 499 of the New Zealand Financial Markets Conduct Act 2013; Art 94(8) of the Italian Consolidated Financial Services Act); bribery and corruption (Sec 7(2) of the UK Bribery Act 2010; Ch III Art 7 of the Brazil Clean Corporations Act); environmental offences (Sec 66B(1A)(c) and (c) of the Victoria Environmental Protection Act 1970; Sec 72 of the Canada Forest and Range Practices Act 2014); safety offences (Sec 27 of the New South Wales Work Health and Safety Act 2011; Section 21 of the UK Food Safety Act 1993; Art 1.2 of the Netherlands Aviation Act); and other corporate criminal activities (Art 33 of the Spanish Criminal Code, Law no. 190 (2012); Art 6 of the Italian Criminal Corporate Law Legislative Decree No. 231 of 2001) Canada and the Netherlands both have a common law due diligence defence available for strict liability crimes. *R v Sault Ste. Marie* [1978], 2 S.C.R. 1299. See also Bram Meyer, Tessa van Roomen and Eelke Sikkema, “Corporate

research on HRDD showed that companies which are undertaking sophisticated, dedicated and transparent HRDD processes feel significantly more confident about dealing with potential legal claims.<sup>184</sup>

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Criminal Liability for Corruption Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Frameworks" (2014) 10 *Utrecht Law Review* 47); Robert McCorquodale, Lise Smit, Robin Brooks and Stuart Neely "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Journal* at p204; Robert McCorquodale and Lise Smit "Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty" in Deva and Bilchitz *Building a Treaty on Business and Human Rights: Context and Contours* (October 2017), Cambridge University Press.

<sup>184</sup> Robert McCorquodale, Lise Smit, Robin Brooks and Stuart Neely "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" 2(2) *Business and Human Rights Journal* at p222.

## IV KEY THEMES AND OBSERVATIONS

### 1. Beyond compliance and audit: A deeply embedded governance

*“We know our supply chain better than anyone else.” - Interviewee*

**Box:** Our interviews demonstrate that companies are increasingly noting the shortcomings of traditional code of conduct and audit processes and are exploring more innovative approaches.<sup>185</sup>

It has been suggested that, due to the influence of the UNGPs, companies are beginning to change their approach to managing adverse human rights impacts from reliance on codes of conduct and social auditing towards more comprehensive and embedded governance of HRDD, including proactive stakeholder partnerships.<sup>186</sup> One interview described this as a “change in the mind set”.

Another interviewee argued that companies should always “have a blend of activity”, including the compliance approach, based on audits and certifications, as well as a more “interdependent approach”, which recognises the realities of supply chain relationships and encourages open dialogues. They added that “we cannot do any of this very quickly”.

Interviewees also noted that by ensuring that human rights impacts within the supply chain were addressed, the company is able to improve the sustainability of the supply chain. One interviewee highlighted that HRDD ensures that the company “has the right supply chain to get the quality and quantity to deliver for the goals of the business”. Another interviewee stated that “if you stop scoring suppliers on symptoms and look at root causes, you will deliver better outcomes for people and product quality, which helps to deliver a better business.”

Those companies which have done the most work on their supply chain HRDD indicated that this is a deeply embedded and comprehensive approach. One interviewee stated: “We know our supply chain better than anyone else.” Another interviewee stated:

To drive real impact does not happen from one day to another. It requires commitment and money, financing to pay for protection and better working conditions, new schools that prevent child labour, and mines that are better built.

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<sup>185</sup> Shift, “From Audit to Innovation: Advancing Human Rights in Global Supply Chains” Report, August 2013.

<sup>186</sup> Martin Boersma “Changing approaches to child labour in global supply chains: Exploring the influence of multi-stakeholder partnerships and the United Nations Guiding Principles on Business and Human Rights” 40(3) *University of New South Wales Law Journal* 1249 at p1251.

## 2. Overview of affected rights

**Box:** Whilst the interviewees highlighted a range of human rights which are at risk of adverse impacts in supply chains, forced labour and child labour came up most frequently across sectors.

The UNGPs highlight that companies “can have an impact on virtually the entire spectrum of internationally recognized human rights”.<sup>187</sup> Interviewees highlighted a range of human rights which are at risk of adverse impacts in supply chains. Some issues which have been encountered by companies we interviewed include migrant rights, the right to life, the right to physical integrity (such as through violations by security services), freedom of religion, land rights, cultural heritage, and the right to health. However, most of our interviewees drew attention to labour rights risks in their supply chains, including forced labour, child labour and slavery.

In several instances where labour issues were the focus of supply chain HRDD, companies had undertaken HRIAs in order to identify what their salient supply chain human rights risks are. This approach should be distinguished from one where it is simply assumed that labour-related risks are the only human rights risks present in the supply chain.<sup>188</sup> One interviewee even indicated that through their HRIA they are “actively looking” for other human rights impacts not restricted to labour rights, such as land rights, “but they just don’t come up”. Another interviewee indicated in order to “demystify human rights in procurement” they “have to start somewhere”, and “forced labour is easy to sell” internally as an issue worthy of attention.

Forced labour and child labour were particular issues that came up most frequently across sectors. Many references were made to the risks involved with labour recruiters, particularly with outsourced low-skilled services such as cleaning, catering and construction. One interviewee remarked that whereas “most companies have policies in place” against using labour brokers, the practice is “so embedded culturally [that] rooting it out is a huge challenge”. In some instances, local laws or practices conflict with the companies’ global commitment to international human rights standards, such as regarding withholding of passports and requiring permission to exit the country. These practices pose risks to freedom of movement of migrant workers, and are often red flags for forced labour or slavery conditions.

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<sup>187</sup> Commentary to Guiding Principle 12.

<sup>188</sup> Our previous study on HRDD, above, suggested that companies which tend to focus only on labour rights are likely to miss other human rights impacts.



### 3. Small and medium-sized enterprises

**Box:** Small and medium-sized enterprises can find implementing HRDD challenging, but they can nonetheless have an impact through their own processes, and larger businesses can help by engaging in capacity building.

Although most of our interviewees were from large multinational companies, their supply chains comprise of many small- and medium-sized companies. Moreover, our interviewees were selected based on their knowledge and experience in developing supply chain HRDD, and accordingly represent those who are leading in this area. Interviewees highlighted the lack of knowledge about the UNGPs within companies which do not form part of the handful of leaders, particularly smaller companies in the supply chain.

One interviewee noted the challenges accompanied by “local content” requirements, which require transnational companies to work with local business partners which may be less familiar with human rights standards. This requires the company to have “a capacity-building approach”, which involves ongoing engagement, including training and improvement of operating conditions. Another interviewee indicated that HRDD in supply chains is “really important work, but 99.9% of people in companies have no idea what we are talking about”. They added: “Forget about US companies, try local companies where they don’t have electricity.”

SMEs can find the complexity, extent and resource intensive nature of HRDD quite overwhelming, but as yet there is little guidance dedicated to how SMEs address these issues.<sup>189</sup> Some interviewees from large multinational companies recognised that they bear some responsibility with respect to suppliers who are SMEs, with whom they either contract directly or who are present in their supply chains beyond tier one. Interviewees have expressed the view that their companies are, to a degree, responsible for “bringing along” their suppliers on the journey to responsible sourcing and working with them to gradually improve. For example, one interviewee from the retail sector highlighted that small suppliers often face huge costs to implement improvements in their infrastructure, such as sprinkler systems and new fire safety doors. The interviewee referred to the usefulness of collective efforts such as the Bangladesh Accord on Fire and Building Safety,<sup>190</sup> to address these challenges, by providing suppliers with “some sort of financial support” to improve conditions on the ground.

It was highlighted by several interviews that with some suppliers with limited knowledge, capacity and infrastructure for HRDD, it is more effective to engage openly and honestly than introducing and monitoring code of conduct compliance. One interviewee stated:

Our dilemma is that in order to prove that things are improving, you need to set up certain monitoring systems, which cost a lot of money. So far, we have chosen the impact side, spending the only budget that we have on equipment and improving the [suppliers’ facilities].

One interviewee from a small company highlighted that SMEs can have “real impact through changing the behaviour of big players.” Their small company has developed a model of

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<sup>189</sup> Outside the human rights context, the International Chamber of Commerce has prepared third party due diligence guidance for SMEs with respect to anti-corruption. International Chamber of Commerce, *Anti-Corruption Third Party Due Diligence: A guide for small to medium size enterprises*, 2015.

<sup>190</sup> Bangladesh Accord on Fire and Building Safety, see <http://bangladeshaccord.org/>.

“controlled supply chains” to source raw materials from selected sustainable suppliers, and is actively engaging with large peers with the aim of leading by example.

#### 4. Solutions beyond the first tier

**Box:** It is apparent that there are limited practices in place for HRDD beyond the first tier. Any leverage exercised tends to be through the first tier supplier or collective engagement with peers or other stakeholders.

All interviewees highlighted the challenges of undertaking HRDD beyond the first tier. Most (though not all) interviewees currently focus their supply chain HRDD on first tier suppliers, and indicated that they currently have limited practices in place for HRDD beyond the first tier. One interviewee indicated that it has “taken us a while to figure out how we are going to deal with [our first tier suppliers] in a meaningful way”.

However, many interviewees recognised the importance of going beyond the first tier, and highlighted this as their next priority. One interviewee from the retail sector has indicated that their tier two, three and further suppliers are “certainly an area that we are starting to focus on” and that they are currently “doing quite a lot of work in that space”. However, they added that there is “a lot more work that the retail industry has to do on this; we are certainly not at a level where we are comfortable”.

In contrast, an interviewee from the extractives sector stated that when it comes to engagement beyond the first tier, the extractives industry has “done far less than other industries” and that they were following the developments undertaken beyond the first tier in other sectors, such as the garment and retail sectors. However, this approach is not borne out by the steps which have been taken by some companies with respect to their extractive supply chains. For example, Apple has introduced a pilot program which seeks to buy cobalt directly from artisanal miners. By extending their supply chain HRDD to beyond the smelter points, they are exceeding the expectations set out in the relevant OECD Guidelines.<sup>191</sup>

In cases where leverage is exercised beyond the first tier, it is usually done in one of two ways: either indirectly through the first tier supplier, for example through codes of conduct which require a first tier supplier to impose similar standards on those in the next tier and so on,<sup>192</sup> or through collective engagement with peers or other stakeholders. Other mechanisms used with first tier suppliers, such as training or grievance mechanisms, are very rarely used beyond the first tier.

The approach of engaging with further suppliers indirectly requires the first tier supplier to undertake ongoing and effective HRDD for its own supply chain. One interviewee described this commonly used approach as: “When we do our own HRDD, understanding how our [suppliers] manage their supply chain risks would be part of our due diligence.” Another explained that: “We have not mapped our second tier suppliers, [but] we encourage our [first tier] suppliers to engage with their own business partners.” Some interviewees indicated that inadequate supply chain HRDD mechanisms implemented by a potential first tier supplier has led to a refusal to contract with that supplier. One interviewee indicated that their first tier suppliers are contractually expected to train their own suppliers on human rights. Another

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<sup>191</sup> See Thomas Wilson, “Apple Cobalt Supplier Seeking Ethical Supply With Industry Pilot” Bloomberg, 26 March 2018 <https://www.bloomberg.com/news/articles/2018-03-26/apple-cobalt-supplier-seeking-ethical-supply-with-industry-pilot> See above at [ ] for a discussion of the OECD Guidelines which require that downstream companies undertake HRDD to the smelter level.

<sup>192</sup> Galit A Safarty “Shining A Light on Global Supply Chains” 56 Harvard International Law Journal 419 at p434.

interviewee recalled that they have in the past approached a second tier supplier responsible for a human rights impact together with the first tier supplier in question.

In theory, this “passing forward” of HRDD obligations should create a trickle-down effect through the entire supply chain. Interviewees indicated that where a company has a high degree of control over direct suppliers, and the power to switch suppliers, it can more easily influence behaviour and apply pressure down the chain. This enables the “multiplier effect” whereby the influence on a supplier can influence the behaviour of sub-suppliers.<sup>193</sup> A few interviewees indicated that first tier suppliers are indeed scrutinised and monitored with respect to their own supply chain HRDD. One interviewee indicated that these checks are mostly done through “soft engagement” rather than formal audits: “We sit down with [our first tier suppliers] and ask them to show their version of supplier human rights policies.”

In contrast, some interviewees acknowledged that this kind of leverage is rarely used. One interviewee indicated that they expect that their suppliers are “probably not as strong” on monitoring these clauses, and that they are “not sure” whether their first tier suppliers’ contractual provisions on human rights are enforceable in practice. An interviewee from a company which uses agricultural sourcing agents indicated that in reality it is “optimistic to ask them to do HRDD in their suppliers.” Another interviewee indicated that whereas they have mapped their further suppliers, they only audit tier one suppliers for HRDD. Particularly, if a company is “locked in” to a supplier arrangement or lacks purchasing power, the company has less leverage to influence sub-supplier behaviours.<sup>194</sup>

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<sup>193</sup> Galit A Safarty “Shining A Light on Global Supply Chains” 56 Harvard International Law Journal 419 at p432.

<sup>194</sup> Galit A Safarty “Shining A Light on Global Supply Chains” 56 Harvard International Law Journal 419 at p433.

## 5. Collective action

**Box:** Collective action, including through sectoral, cross-sectoral and multi-stakeholder initiatives, is particularly beneficial where the nature of the supply chain is more opaque, and when seeking to exercise leverage beyond the first tier.

### *'It is important for the whole industry to develop something that really works' - Interviewee*

When dealing with the challenging context of opaque supply chains which stretch over multiple jurisdictions with widely different legal environments, companies often find that they need to act collectively. Our interviews consistently suggested that collaboration offers the potential for increased leverage,<sup>195</sup> particularly with respect to challenges which a single company is unable to address. One interviewee indicated:

It is not for you to solve on your own. The fact that we know about it means we can start to create coalitions to address it. This is our solution. If we can get half a dozen others, including NGOs, government departments and the UN, then we can have the conversation.

Another interviewee indicated that they find "the best way to [engage successfully with governments on supply chain issues] are through organisations", adding that "organisations have the power of hundreds of members behind them." An interviewee highlighted that they are able to exercise considerably more leverage if they "go as the face of the member organisation". This is particularly important when engaging with governments in jurisdictions where the individual company may not have a large market share, but many suppliers. It was also indicated that "the further down the supply chain you are seeking to exercise leverage, the more you need to work with other actors."

Collective engagement takes many forms, and could include industry or cross-sectoral business initiatives, as well as multi-stakeholder initiatives with governmental bodies, civil society organisations, trade unions and international organisations. Forms of intervention range from initiatives on the softer end which provide a platform for dialogue among stakeholders,<sup>196</sup> to those which intervene with more force, whether through auditing and certification,<sup>197</sup> mediation,<sup>198</sup> standard setting and sanction,<sup>199</sup> and those which a specific focus on governance.<sup>200</sup> One interviewee highlighted that collective engagement is also

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<sup>195</sup> Martin Boersma "Changing approaches to child labour in global supply chains: Exploring the influence of multi-stakeholder partnerships and the United Nations Guiding Principles on Business and Human Rights" 40(3) *University of New South Wales Law Journal* 1249 at p1254.

<sup>196</sup> Such as the Global Business Initiative on Human Rights ("GBI"), a cross-sectoral initiative aimed at providing a forum for business to share information and learning, including around supply chain relationships. See: <https://gbih.org/>.

<sup>197</sup> See for example, the Responsible Business Alliance (formerly the Electronic Industry Citizenship Coalition) ("RBA") which requires that RBA members commit and are held accountable to a common Code of Conduct which sets standards on social, environmental and ethical issues in the electronics industry supply chain. See: <http://www.responsiblebusiness.org/>.

<sup>198</sup> See for example, the Ethical Trading Initiative ("ETI") which requires its members to adopt a Code of Practice and has developed a HRDD framework as guidance. It does not itself sanction members for non-compliance, but has intervened as a third party to create a "safe space" in which workers, trade unions, firms and NGOs may mediate violations of worker rights in the supply chain. For example, see <https://www.ethicaltrade.org/about-eti/what-we-do/resolving-violations>.

<sup>199</sup> Such as ICoCA above.

<sup>200</sup> Such as the Global Network Initiative (GNI) which sets standards, engages in independent assessments of compliance and collectively lobbies governments in the telecommunications sector, and

important for business to “show the public and governments what you are doing” and that sometimes government initiatives “can be misguided as they don’t know what industry is already doing.”

Some argue that industry-specific MSIs are more effective at implementing and enforcing human rights standards than cross-sectoral or non-industry specific collective initiatives.<sup>201</sup> Non-sectoral initiatives often focus on dialogue and sharing of information and good practice,<sup>202</sup> but frequently lack accompanying accountability mechanisms.<sup>203</sup> One interviewee emphasised that “it is important for the whole industry to develop something that really works.” Another interviewee from the extractives sector indicated that, through IPIECA, an oil and gas sector initiative, they are connecting with peers working on the same issues. They stated that are “happy to have human rights counterparts in other companies, and have a safe place to talk”, adding that it is “very effective, and helps me internally, to learn, but also to see if others are doing better.”

Even so, the benefits of engaging collectively across sectors were highlighted by more than one interviewee. For example, an interviewee from the extractive sector highlighted that other sectors are more advanced on supply chain HRDD than the extractive sector, but that other sectors could learn from extractives on health, safety and environment issues. Another interviewee stated: “I do believe that big business have to engage collectively across industry segments.”

Another benefit of collective engagement which was repeatedly mentioned is the development of third party vetting mechanisms. One interviewee from the extractive sector indicated that their CEO is impressed by the IT sector’s “creation of their own clubs for sharing audits.” There is a concern about supplier fatigue as a result of being audited on the same human rights standards by each company for which they supply. The interviewee indicated that such a “club” for third party vetting would be cost efficient and “avoid the fatigue effect”.

Even when no official collective organisation exists, interviewees highlighted the benefits of approaching suppliers together with peers which are also sourcing from that supplier. One interviewee in the retail sector indicated that it was helpful to “visit the factory and have the meeting together” with two other well-known brands, in order for the supplier to “see that we work together”.

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the FLA (above) which accredits the management systems of participants and verifies remedial efforts of suppliers. See also Steven Bernstein and Benjamin Cashore “Can non-state global governance be legitimate? An analytical framework” 1 *Regulation and Government* 347 at 348.

<sup>201</sup> Dorothee Baumann-Pauly, Justine Nolan, Auret van Heerden and Michael Samway “Industry Specific Multi-Stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative” 143 *Journal of Business Ethics* 771.

<sup>202</sup> Dorothee Baumann-Pauly, Justine Nolan, Auret van Heerden and Michael Samway “Industry Specific Multi-Stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative” 143 *Journal of Business Ethics* 771 at 773.

<sup>203</sup> Justine Nolan “The United Nations’ compact with business: Hindering or helping the protection of human rights?” 24 *University of Queensland Law Journal* 445; Surya Deva “The UN Global Compact for responsible corporate citizenship: Is it still too compact to be global? 145(2) *Corporate Governance Law Review* 145.

It has been argued that most issues faced by companies today are no longer owned nor solved by individual stakeholders,<sup>204</sup> and that “[w]ith growing interdependence comes a growing need to search for collaborative approaches.”<sup>205</sup> However, in doing so, MSIs serve a global governance function by seeking to regulate what governments have left unregulated.<sup>206</sup> This raises questions around whether private initiatives should be required and expected to discharge a public function.<sup>207</sup>

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<sup>204</sup> Dorothee Baumann-Pauly, Justine Nolan, Aret van Heerden and Michael Samway “Industry Specific Multi-Stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative” 143 *Journal of Business Ethics* 771 at p772.

<sup>205</sup> Rob Van Tulder, “Foreword – The necessity of multi-stakeholder initiatives” in Mariette van Huijstee (Ed) *Multi-stakeholder initiatives: A strategic guide for civil society organisations*, SOMO, March 2012 at p8.

<sup>206</sup> Justine Nolan and Aret van Herdeen “Engaging business in the business of human rights” in Morten B Pedersen and David Kinley (Eds) *Principled Engagement: Negotiating human rights in repressive states*, 2013, Farnham, UK: Ashgate. Some describe MSIs as embodying a kind of “networked governance” that places the activity of a business under the scrutiny of multiple actors. Lucio Baccaro and Valentina Mele “For Lack of Anything Better? International Organizations and Global Corporate Codes” 89(2) *Public Administration* 451.

<sup>207</sup> MSIs frequently lack transparency with respect to their accountability mechanisms, which makes assessing their effectiveness difficult to ascertain. MSI Integrity and Duke Human Rights Center at the Kenan Institute for Ethics, *The New Regulators? Assessing the Landscape of Multi-stakeholder Initiatives: Findings from a database of transnational standard-setting multi-stakeholder initiatives*, June 2017.

## 6. The supplier's perspective

**Box:** Without effective collaboration between industry peers in carrying out HRDD, and alignment of purchasing practices with human rights expectations, suppliers may be subject to unnecessary cost and time burdens to comply with multiple audits, training and screening requirements of their customers.

Suppliers are often subject to HRDD requirements from several companies which buy from them. This can lead to a proliferation of efforts, particularly where each buyer requires its own audit. Suppliers are also usually expected to pay for their own audits, as well as for human rights training and other supply chain code of conduct requirements.<sup>208</sup>

Collaboration between industry peers, or across industries, which allow suppliers to streamline these processes and share information, potentially enables a more efficient process for everyone. One interviewee referred to the Sedex and AIM-progress models discussed above, asking “why should suppliers pay for multiple auditors?” and argued that with these models “one audit works for everybody.” They indicated that their company “insists our tier ones use Sedex, and they push it down to their suppliers.” They added that for HRDD purposes these models have evolved, but have to evolve further.

However, evidence shows that buyer companies should also ensure that their purchasing practices are aligned with their human rights expectations. A recent survey of over 1500 suppliers suggests that buyers often contradict their own HRDD requirements with their purchasing practices, such as lead times, prices and technical specifications.<sup>209</sup> It showed that suppliers frequently accept orders below production costs, which in turns leaves them unable to pay living wages, or even minimum wages. Where suppliers are required to spend money on compliance with human rights codes of conduct, such as participating in training or increasing wages, then these commitments need to be reflected in buyers’ prices. An interviewee from the retail sector confirmed this, indicating that purchasers often “buy wine one week and trousers the next”, and always incentivise price without an “understanding of what they are buying and what is feasible”.

There are a few examples of HRDD which includes financial and resources support for suppliers. One company interviewed, which sources raw materials from the agricultural sector, provides mechanisation support to smallholder farmers within its supply chain. Using the company’s leverage as a large multinational, it negotiated a preferential rental rate with a farming equipment and services provider. This helps farmers to increase their turnover substantially through access to seeds and state of the art equipment most suitable to their crops at reduced rates. In one example, this mechanisation support increased the crops of a farmer whose children formerly worked on the farm to a level which enabled her to send her children to school. Another example of resource allocation to enable HRDD is the Bangladesh Accord, which provides for financial support for the improvement of facilities.<sup>210</sup>

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<sup>208</sup> The Joint Ethical Trading Initiatives’ *Guide to buying responsibly*, September 2017, available at <https://www.ethicaltrade.org/resources/guide-buying-responsibly>, p. 7.

<sup>209</sup> The Joint Ethical Trading Initiatives’ *Guide to buying responsibly*, September 2017, available at <https://www.ethicaltrade.org/resources/guide-buying-responsibly>.

<sup>210</sup> The Accord on Fire and Building Safety in Bangladesh, 13 May 2013



## 7. The role of states and regulation

***'We would like to see more regulation. It would force our tier two, three and four suppliers to improve their processes – and our competitors. We rely on the whole industry' - Interviewee***

**Box:** Interviewees were generally supportive of clear regulation, given a desire for legal certainty. There is also a broad expectation that regulations incorporating HRDD elements will evolve in terms of scope of application and rigour of requirements.

Pillar I of the UNGPs confirms the international law obligations of states to protect the human rights of those within their territory and jurisdiction, including against abuses by business enterprises. This includes the state duty to take steps to prevent and redress corporate human rights violations.<sup>211</sup> However, there is currently an increasingly well-documented lack of adequate state-level accountability and enforcement mechanisms for corporate human rights impacts.<sup>212</sup> This is not only a developing world problem: a recent study which examined labour standards in the US found that “an employer would have to operate for 1,000 years to have even a 1 percent chance of being audited by Department of Labor inspectors”.<sup>213</sup> An interviewee indicated:

We are all doing this which is not traditionally done by business. If governments would implement labour policies, we [in corporate HRDD-related roles] would all be out of a job.

Domestic and international law has been slow to catch up with the realities of global business activities and their human rights impacts. Where it has done so, it has taken a piecemeal and fragmented approach. While efforts to address particular issues such as modern slavery, conflict minerals or illegal logging have resulted in the development of some legislative and regulatory measures, there remains a lack of mandatory regulation with respect to a company's obligations over its supply chain.<sup>214</sup> Those legislative measures which incorporate

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<sup>211</sup> For example, in its *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* the UN Committee on Economic Social and Cultural Rights' accepts that there is a duty on states to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control: “Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located.” See Committee on Economic Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* at [33].

<sup>212</sup> See, for example, Robert McCorquodale, Gwynne Skinner and Olivier De Schutter *The Third Pillar: Access to Judicial Remedies for Human Rights by Transnational Business*, 6 May 2016; Jennifer Zerk, “Corporate Liability for Gross Human Rights Abuses: Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights” 2012; Jennifer Zerk, “Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas.” Corporate Social Responsibility Initiative Working Paper No. 59. Cambridge, MA: John F. Kennedy School of Government, Harvard University 2010; Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, POL 30/001/2014, 7 March 2014.

<sup>213</sup> G. Lafer (2013) “The Legislative Attack on American Wages and Labor Standards, 2011-2012”, Washington DC: *Economic Policy Institute*, 29.

<sup>214</sup> Galit A Safarty “Shining A Light on Global Supply Chains” 56 *Harvard International Law Journal* 419 at pp419-420.

HRDD take a range of forms, ranging from the imposition of reporting requirements, positive due diligence obligations, import restrictions and public procurement measures.

There has been the most movement in the area of modern slavery. However, the UK MSA and similar proposed legislation currently contain few consequences for failure to comply with this requirement, beyond pressure from civil society. Other jurisdictions have looked to impose more stringent positive due diligence requirements, such as those included in the French Duty of Vigilance Law<sup>215</sup> and a similar proposal in Switzerland,<sup>216</sup> as well as stronger sanctions for non-compliance, including causes of action available to those impacted by a company's failure to comply.<sup>217</sup>

In many cases, the absence of regulation has been a significant challenge for companies, particularly for those with operations and supply chains spanning multiple jurisdictions.<sup>218</sup> The above-mentioned proliferation of regulatory approaches has resulted in a patchwork of regulation across jurisdictions. The partial and targeted nature of existing and proposed regulatory measures, their difference in scope, sanction and jurisdictional reach has created not only a mosaic of obligations that a company may be required to adhere to, but also significant governance gaps. John Ruggie has confirmed that:

Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.<sup>219</sup>

The general approach of interviewees is that clear regulation would be welcomed, as it would provide legal certainty. With reference to the example of labour brokers, one interviewee stated that "states are not regulating as much as they should." Another interviewee stated:

We would like to see more regulation. It would force our tier two, three and four suppliers to improve their processes – and our competitors. We rely on the whole industry.

They added that for this purpose, regulation should not just be directed at large organisations. In their supply chains, one of the main challenges relates to labour recruitment brokers, which are not covered by legislation which only applies to large multinationals. They emphasised that "there is no reason why it has to be limited to large companies; there are risks in all companies."

One interviewee indicated that the reason why companies need to pay so much attention to HRDD is because "of a lack of confidence in state institutions: all of these things are substitutes for Pillar I" of the UN Guiding Principles. In this context, another interviewee indicated that a business and human rights treaty would be welcomed as it would provide a

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<sup>215</sup> Above.

<sup>216</sup> Above.

<sup>217</sup> Above.

<sup>218</sup> Dorothee Baumann-Pauly, Justine Nolan, Auret van Heerden and Michael Samway "Industry Specific Multi-Stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative" 143 *Journal of Business Ethics* 771 at p771.

<sup>219</sup> UNHRC, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie (2008) UN Doc A/HRC/8/5 at para 22.

“level playing field and base standard for all companies”. They stated that a treaty would benefit companies like theirs which are “already trying to take the high road in this space”, and added that “companies who are advanced on the issue don’t want others getting a cost advantage from taking the low road”.

Whilst emphasising the need for regulation, interviewees also noted that there are different types of regulatory approaches, and expressed views on what kind of legislation is effective. One interviewee highlighted the significance of regulation, such as the French law requiring HRDD, which goes further than mere reporting obligations, such as those contained in the UK Modern Slavery Act. Another interviewee described the UK Modern Slavery Act requirement that a board member (or, as is often seen as good practice, the CEO) should sign the company’s modern slavery statement as “a good aspect of that law” as it “brings these issues before the board”. More than one interviewee referred favourably to the approach taken by Canada allows the Canadian government and export credit agency to take into account a company’s compliance with international standards and its participation in the OECD NCP process.<sup>220</sup> It was highlighted that these kinds of procurement rules, as well as those being used in the US around forced labour, are “more modern”.

One interviewee emphasised that “a standard is helpful” but that legislation should be “logical and flexible” and based on the recognition that “there is no one size fits all solution”. Moreover, it should provide for the reality that the company does not have sole responsibility for these issues. They used the example of forced labour to explain that human rights issues in supply chains are “not just business’ problem”, in that there needs to be cooperation between business, NGOs and states to effectively tackle these issues.

There seems to be an acknowledgement amongst companies that regulation in this area is expected to evolve, both in terms of scope of application as well as rigour of requirements. For example, one interviewee indicated that there is currently “not a lot of helpful guidance” on the specific components of the French law on mandatory diligence, but that this will become clearer once the legislation is interpreted and enforced. They also added that the court’s limitation of the civil penalty applicable is helpful as it “gives companies more time to understand what they need to do”.

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<sup>220</sup> *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

## 8. Remedy to impacted people

**Box:** In addition to the developing case law around the recognition of a legal duty of care based on principles of control, other mechanisms for financial and non-compensatory redress continue to develop. Examples include state-based procedures (e.g. OECD National Contact Points) and industry initiatives (e.g. the Bangladesh Accord arbitral procedure).

The UNGPs describe remedy as mechanisms “to counteract or make good any human rights harms that have occurred.”<sup>221</sup> Remedies may take many forms, such as:

[A]pologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.<sup>222</sup>

Acceptance of the corporate responsibility to respect human rights enshrined in Pillar II of the UNGPs and the need for access to effective remedy in Pillar III have developed alongside an escalating trend in case law toward the recognition of a legal duty of care based on control. Claimants in different jurisdictions have attempted, with varied success, to explore avenues for remedy for corporate violations of human rights, including under tort, consumer law, misleading and deceptive conduct, and specialist statutory claims.<sup>223</sup> Further, the use of international law standards in domestic courts<sup>224</sup> mean that legal sanction against a company as a result of activities in its supply chain is no longer a remote possibility.

In addition to judicial mechanisms, other complementary processes have developed by which aggrieved parties may seek redress from companies for actions arising from their supply chain activities. The OECD NCP process has facilitated settlements and made findings with respect to failures to exercise HRDD over supply chains. Arbitral processes such as the Bangladesh Accord arbitrations at the Permanent Court of Arbitration have also enabled substantial settlements to be made which include not only financial damages, but non-compensatory remedies such as agreements to provide safer working conditions.

There is growing evidence that prolonged civil litigation which ends in monetary damages is not seen as the most effective form of remedy by either human rights victims or companies. Instead, companies indicate that operational-level grievance mechanisms implemented in terms of the UNGPs “are actually effective”. One company interviewed indicated that it is important to have “principles at headquarters that are as high-level as possible, so that they can be tailor-fit for the local context”. Local teams need to be supported by group level teams in adapting and fitting solutions to the local context. Examples of remedies which victims sought instead of monetary compensation include return of access to land, cleaning up of pollution, and restitution of property. These remedies frequently require preventative measures similar to traditional injunctions, in that companies are expected to cease from continuing with the harmful activity in question. It was, however, highlighted that “money sometimes is the right remedy”, such as when wages need to be back paid.

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<sup>221</sup> Commentary to Guiding Principle 25.

<sup>222</sup> Commentary to Guiding Principle 25.

<sup>223</sup> Such as the US Trafficking Victims Protection Act or the Alien Tort Statute.

<sup>224</sup> See for example, *Araya v. Nevsun Resources Ltd.* 2017 BCCA 401.

Access to remedy remains a challenge for those whose human rights have been adversely affected within the supply chain. However, the developments in global jurisprudence and complementary processes mean that a company with active control over its suppliers is increasingly less likely to be in a position to exclude liability through complex corporate structures and reliance on separate corporate personality.

## 9. The drivers for supply chain-related HRDD

**Box:** Interviewees confirmed the avoidance of legal risks and reputational risks as two of the key incentives for conducting HRDD. Other notable drivers included meeting investor expectations and the need to achieve sustainable supply chains – a commercial necessity.

Our previous study on HRDD highlighted that legal-related drivers were three out of the four top incentives for undertaking HRDD; the other top incentive being “reputation”.

Interviewees again confirmed the importance of reputational risks as a driver for supply chain HRDD. One interviewee indicated that they started to introduce human rights in their auditing process in response to “publicity around issues in supply chains” well before there was any legislation which required it. They stated that this was “part of a growing push towards business responsibility for supply chains”, including by the UN Global Compact of which they are a signatory. They added that “all of this came together to make [the company] realise it should act”. Another interviewee indicated that although their company was not implicated in the Rana Plaza factory collapse, this was a “big wake-up call” for them. It drove them to adopt an ethical sourcing policy, in and to take steps towards more transparency in their supply chains.

Similarly, our interviews again confirmed that legal requirements, and in particular reporting requirements, are an important driver of supply chain HRDD. However, one interviewee noted that “having the law there is helpful, but it is still a baseline. If you only do it because the law says so, you approach it in a certain way”. However, it was highlighted that states are currently providing very little incentive for HRDD through procurement requirements and other mechanisms. An interviewee indicated that with respect to legal developments “there is very little carrot along with that stick.”

The powerful influence of investors was highlighted as a strong motivator which is currently underutilised. One interviewee indicated that they are being “kept accountable by investors and shareholders”. On the other hand, another interviewee indicated that “investors are not asking us about it” indicating that investors have the ability to exercise “a pressure which we are not feeling.” One interviewee from the financial sector confirmed this by indicating that “the questions may end at: do you have a human rights policy.” It was highlighted that an analogy could be drawn to how banks treat financial crime risks, both with respect to new customers as well as reviewing existing customers.

Interviewees frequently referred to the importance of sustainable supply chains as a driver for supply chain HRDD. One interviewee indicated that supply chain HRDD is core to the concept of “good business” as it is “just about knowing your suppliers.” Another interviewee indicated that it is helpful to communicate the importance of supply chain HRDD internally if one emphasises that it is important for “greater continuity of supply and reduced failure of products.” An interviewee from the agriculture sector highlighted that “the delivery of a contract on time and in full” has an impact on the business. Accordingly, the importance of supply chain HRDD can be conveyed internally with such questions as:

Who is going to grow our products? Do they have the right conditions to grow it? Can they get it to the airport in time?

They demonstrated the unhelpfulness of the compliance approach of “if we have signed a contract and they don’t comply, it’s their problem not ours”, by pointing out that “we don’t have to contract with them, but do need to make sure they can produce.”

## 10. Internal challenges and opportunities

**Box:** A number of organisational challenges and opportunities were observed. In particular, interviewees reported efforts to simplify internal rules and processes, in part through the development of new and centralised tools, and the need for ever closer inter-departmental coordination between key functions such as procurement, legal and CSR.

Interviewees highlighted a few internal challenges to the implementation of supply chain HRDD. One interviewee mentioned the need to simplify internal rules. Supply chain HRDD should be integrated into relevant operating systems, such as procurement processes. In their company, they are building “new and centralised tools” for this purpose. Before they centralised their process, escalation of human rights impacts identified with suppliers could have taken place randomly through various channels. The interviewee stated that “it could have been through compliance, security or HSE. It was a mess.”

Most of our interviewees referred at some point to the role of the procurement team or specialist in their supply chain HRDD. Other functions, such as the legal team and the ethics and compliance team, frequently work alongside the procurement team for the purposes of supply chain HRDD. One interviewee from the legal department referred to a two-week long conversation they had with a potential supplier about a human rights issue which was flagged during an initial screening process. They indicated that they had to satisfy themselves that the supplier had the necessary procedures in place before entering into a relationship with the supplier, but that their colleagues in the procurement team was “not very happy” about the delay. In other instances, the procurement teams are referred to as “very engaged and supportive” of HRDD. Other functions which are often involved include security and community teams at the site, for example if there is a resettlement.

The prominent role of the procurement specialist in supply chain HRDD is unsurprising, as it is indeed their role to engage directly with suppliers in most companies. However, our previous study showed that other functions, such as compliance, CSR, human resources and legal and often taking the lead on the company’s HRDD for its own operations. Companies should ensure that these functions are in communication, preferably through a cross-functional steering committee of working group with ties to the Board. This is important to avoid a duplication of efforts where knowledge and processes around HRDD for the company’s own operations develop in parallel and in isolation from its supply chain HRDD.

Moreover, an interviewee from a corporate group which provides retail and consumer services indicated that those with experience in sectors of the business with more sophisticated supply chain management processes, such as the food sector, can transfer knowledge to other sectors of the business which may not be as well developed. Learnings can thus be “transmitted across the group”. On the other hand, an interviewee highlighted that “people do not want to use cross-sectoral toolkits, but something on: this is what you do in this sector”. As a result, there is “not a lot of shared learning”, which is a missed opportunity.



### 1. Recommendations

#### *“It is important to keep on improving” - Interviewee*

HRDD in supply chains is a new and developing area, and companies are at different stages in terms of the maturity of their programmes. None of the interviewees indicated that they have accomplished everything they would still like to do.

An analysis of those organisations which are perceived as having the most advanced HRDD processes reveals that not all started in the same place. Some companies with established programmes, for example, began by first addressing specific risk areas such as occupational health and safety, before adapting those processes to other human rights issues. By contrast, an organisation which is just beginning its journey may be best advised to follow a strategy which reflects the methodology in the UNGPs, beginning with an assessment of actual or potential human rights impacts in the supply chain. In all cases, it is important to have a coherent strategy which informs a credible, defensible methodology implemented by individuals with appropriate expertise and resources.

In light of our research, the following recommendations are made.

- HRDD has to be a robust, substantive and ongoing process. It should take into account all human rights which the company may possibly impact, and not just those covered by limited regulatory reporting requirements, or human rights risks which are frequently associated with a specific sector.
- Companies should use a unified and cross-functional internal approach. For example, a company which spends extensive resources on addressing human rights impacts through HRDD in one business area should ensure these efforts are not contradicted by its buying practices in another (where the occurrence of human rights issues may be less well understood).
- Comprehensive HRDD requires governance commitments at the most senior level of the company, including board and CEO engagement. These commitments ought to be underpinned by coherent governance structures which ensure decisions that engage human rights issues are taken by personnel and committees with appropriate authority, experience and appreciation of the issues and associated risks.
- Internal translation of the importance of HRDD is more likely to be successful if supply chain HRDD is understood as a key component of the company’s commercial goals which include ensuring a quality, stable and sustainable supply chain.
- All companies engaged in the movement of materials and products should ensure that their supply chain HRDD includes transportation and distribution suppliers. This appears to be an area which has received limited attention from companies to date, whereas the potential for human rights issues associated with the shipping sector (for example) has been well documented by NGOs.

- Those charged with designing and carrying out auditing processes to test adherence to existing human rights standards and policies by suppliers should have appropriate human rights-related experience, working with external experts as appropriate.
- Companies should proactively involve local stakeholders, including rights-holders and local civil society organisations, in information-gathering and decision-making processes.
- Companies should partake in industry and other multi-stakeholder initiatives in the form of collective action, including those which facilitate the vetting and training of suppliers, in part to assist suppliers in managing the resource demands of participating in customer HRDD exercises.
- The use of technology should be explored for the purposes of traceability, identification of human rights impacts, stakeholder engagements, grievance mechanisms and certification. Technology used for HRDD should be developed in consultation with human rights experts to ensure that the technology does not inadvertently infringe human rights.
- Companies should explore ways of ensuring effective HRDD beyond the first tier, including through industry collective action, partnerships with local civil society organisations and human rights experts, operational-level grievance mechanisms for those affected by supply chains, and by encouraging open and honest dialogue with first tier suppliers to increase supply chain transparency.
- Companies should participate in consultative processes for regulatory reforms, in order to add to the process' legitimacy and to ensure that enacted laws are realistic and effective. This could be done individually or through industry bodies or other representatives.
- Recognising that supply chain HRDD is a new and developing area, those companies with less-advanced processes, particularly SMEs, should not to be daunted (e.g. when engaging with "leading" companies). It is important to "start somewhere".

As one interviewee commented: "Let's just start asking the questions. These are the kind of questions that we started asking in health and safety years ago."

## 2. Conclusion

The UNGPs provide for supply chain HRDD which extends beyond the company to third parties with whom the company has a business relationship. This approach is an evolution of the traditional approach whereby corporate responsibilities were limited to the separate corporate entity and could be excluded through contractual provisions.

The UNGPs' vision of supply chain HRDD has caused a shift in social expectations, regulatory reforms and corporate behaviour. Recent legal developments include mandatory HRDD and reporting requirements, as well as legal claims brought against large companies for impacts which occurred in their supply chains. Companies are responding to this changing landscape by evolving contractual provisions, codes of conduct, audits, investigations, training and grievance mechanisms for HRDD.

However, the concept of supply chain HRDD is new, and even the leading companies are only beginning with their supply chain "human rights journey". In many companies, efforts are currently still confined to first tier suppliers. The UNGPs recognise the complexities of global supply chains and allows companies to prioritise areas of the supply chain based on considerations of severity and irremediability.<sup>225</sup> With the use of technology it is envisioned that supply chain human rights monitoring and traceability may improve to a similar level as seen in other contexts such as food and product safety.

One particular challenging aspect of supply chain HRDD is the lack of control which individual companies have over the activities of suppliers as separate legal entities. Often, suppliers are based in different jurisdictions and operational contexts, where the company may have a small share of the market and limited leverage. For this purpose, companies identify the usefulness of collective engagement with peers and other stakeholders, which may take various forms.

A prominent and recurring theme is the current underperformance of states in this area. Our research has showed that legal developments are currently important drivers of supply chain HRDD in companies. However, as long as there is a lack of monitoring, enforcement and adequate remedy at state level, legal developments are effectively outsourcing enforcement of human rights to companies themselves, through self-regulation, and to civil society. In complex international environments, with structural issues embedded in regions and national economies, there are limits to what an individual company can achieve through supply chain due diligence.

As we continue to see an increase in legal developments around HRDD, the new frontiers will include evolving mechanisms for HRDD beyond the first tier, traceability of human rights impacts through improvements in technology, the further development of human rights-specific audits and compliance mechanisms, more formalised and comprehensive collective engagement, development of effective operational-level grievance mechanisms, as well as more state action.

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<sup>225</sup> Guiding Principle 24.