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INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON BUSINESS AND HUMAN RIGHTS: FROM SOFT TO HARD LAW

Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?

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Abstract

Mandatory human rights due diligence (HRDD) laws in the European Union (EU) – both enacted and in the making – seem to be a promising tool to harden soft international standards in the business and human rights (BHR) field, the most prominent of these being the UN Guiding Principles on Business and Human Rights (UNGPs). This article develops a two-layered critique of mandatory HRDD laws. It problematizes the very concept of HRDD as articulated by the UNGPs. I will argue that due to various conceptual, operational and structural limitations, HRDD alone will not bring the desired changes for rightsholders, because this process does not address various asymmetries of power between corporations and affected communities. The second layer of critique concerns the content of mandatory HRDD laws enacted in France, the Netherlands, Switzerland, Norway and Germany. Assessing these laws vis-à-vis six preconditions required to protect effectively people and the planet from business-related harms, it is clear that these mandatory HRDD laws are half-hearted attempts to tame business-related human rights abuses and hold the relevant corporate actors accountable. In addition to developing more ambitious mandatory HRDD laws in future, states should employ a range of additional regulatory tools that pay greater attention to achieving outcomes, drawing red lines in certain situations, and promoting access to remedy and corporate accountability.

Keywords: access to remedy; imbalance of power; mandatory HRDD laws; red lines; UNGPs

1. Introduction

The UN Guiding Principles on Business and Human Rights (UNGPs)¹ have proved to be highly influential in shaping law, policy, advocacy and scholarship in the business and human rights (BHR) field.² Irrespective of whether human rights due diligence (HRDD) is ‘at the heart’ of the UNGPs or not,³ this has become the new *lingua franca* of discourse around the business

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¹Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (UNGPs), A/HRC/17/31 (21 March 2011).

²See E. George, *Incorporating Rights: Strategies to Advance Corporate Accountability* (2021).

³‘Due diligence is at the heart of the Guiding Principles’: J. Bonnitcha and R. McCorquodale, ‘The Concept of Due Diligence in the UN Guiding Principles on Business and Human Rights’, (2017) 28(3) *European Journal of International Law* 899, at 900. Ruggie and Sherman have contested this characterization: J. Gerard Ruggie and J. F. Sherman III, ‘The Concept of “Due

responsibility to respect human rights.⁴ The language of HRDD is being used by states, international organizations, businesses, industry associations, civil society organizations (CSOs), trade unions, scholars, lawyers, and policy makers. Moreover, the concept of HRDD under the UNGPs is also informing mandatory HRDD laws at national or regional level in Europe⁵ as well as the draft of the proposed international legally binding instrument.⁶

It is therefore timely to interrogate the potential and limitations of mandatory HRDD laws in preventing business-related human rights abuses. As part of this interrogation, this article develops a two-layered critique of mandatory HRDD laws. As part of the first layer, it problematizes the very concept of HRDD as articulated by the UNGPs. I will argue that due to various conceptual, operational and structural limitations, HRDD alone – even if practiced by corporations – will not bring the desired changes for rightsholders. The second layer of critique concerns the content of mandatory HRDD laws that have been enacted so far: leaving aside inherent limitations of HRDD, these laws are merely half-hearted attempts to tame business-related human rights abuses and hold the relevant corporate actors accountable. If not drafted properly, mandatory HRDD laws may in fact prove counter-productive by either encouraging ‘cosmetic compliance’ on the part of corporations⁷ or institutionalizing HRDD as a defence to legal liability. They may also help in covering up existing imbalances of power between states, corporations and communities, instead of addressing them.

Therefore, regulators and policy makers should carefully consider limitations of HRDD in practice and look beyond making HRDD mandatory to make any real difference to the situation of rightsholders on the ground or bring a fundamental shift in how businesses are currently run. They should do so despite calls to preserve, what I would call, the ‘sanctity’ or ‘conceptual purity’ of HRDD under the UNGPs.⁸ (Mandatory) HRDD should not end up becoming the end in itself. Rather, HRDD should be treated merely one of the many means to ensure that businesses respect internationally recognized human rights, and states should use all available regulatory options as part of their duty under Pillar I of the UNGPs instead of focusing solely on enacting mandatory HRDD laws.

I begin in Section 2 by situating my critique in the context of theoretical literature concerning vulnerability of rightsholders and power imbalances between rightsholders and corporations. Because of these reasons, states have an indispensable role in regulating corporate behaviour, including by orchestrating the potential of various market actors towards this goal. Section 3 of the article outlines potential advantages of HRDD and also highlights why HRDD is slowly

Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’, (2017) 28 *European Journal of International Law* 921, at 923.

⁴One of most comprehensive studies on HRRD was commissioned by the European Commission: L. Smit et al., *Study on Due Diligence Requirements Through the Supply Chain* (2020).

⁵ECCJ, ‘Comparative Table: Corporate Due Diligence Laws and Legislative Proposals in Europe’, May 2021, available at corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2/; BHRRC, ‘National & Regional Developments on mHRDD’, available at www.business-humanrights.org/en/big-issues/mandatory-due-diligence/national-regional-developments-on-mhrdd/. See also S. Cossart, J. Chaplier and T. Beau de Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’, (2017) 2 *Business and Human Rights Journal* 317; M. Krajewski, K. Tonstand and F. Wohltmann, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’, (2021) 6 *Business and Human Rights Journal* 550; N. Bueno and C. Kaufmann, ‘The Swiss Human Rights Due Diligence Legislation: Between Law and Politics’, (2021) 6 *Business and Human Rights Journal* 542.

⁶OHCHR, ‘OEIGWG Chairmanship Third Revised Draft 17.08.2021’, Art. 6, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.

⁷I. Landau, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’, (2019) 20 *Melbourne Journal of International Law* 221.

⁸Ruggie and Sherman, for example, assert that ‘the transposition of a state-based legal concept onto the corporate responsibility to respect human rights under the Guiding Principles is fundamentally inappropriate’. See Ruggie and Sherman, *supra* note 3, at 924.

changing its colour from an extra-legal to a legal notion. Section 4 then elaborates various conceptual, operational and structural limitations inherent in the concept of HRDD as articulated under the UNGPs, while Section 5 shows why the conversion of HRDD from a voluntary to a mandatory process in itself will not address many of these limitations. I will argue that mandatory HRDD laws should satisfy, at a minimum, six preconditions in order to be able to protect effectively people and the planet from business-related harms: require holistic HRDD, capture as many businesses as much as feasible, address power imbalances, go beyond process, draw certain ‘red lines’ and provide for effective access to remedy.

Section 6 critically examines the extent to which five mandatory HRDD laws enacted in Europe so far – the French Duty of Vigilance 2017, the Dutch Child Labour Due Diligence Act 2019,⁹ the Swiss Due Diligence Legislation 2021, the German Law on Supply Chain Due Diligence 2021,¹⁰ and the Norwegian Transparency Act 2021¹¹ – meet these six effectiveness preconditions. It will be argued that while these mandatory HRDD laws are a step in the right direction to encourage businesses to take their human rights responsibilities seriously, they might only bring limited positive change in the situation of affected rightsholders. Section 7 offers some concluding thoughts as the regulatory trajectory required to bring more systemic changes to the current relation of business with society.

Due to space constraints, this article will not consider other issues related to Pillar II or HRDD. For example, as other scholars and I have argued,¹² the minimum responsibility of businesses should not be limited to respecting human rights: rather, they should also have a responsibility to protect and fulfil human rights. Pillar II of the UNGPs both under-sells (by not including the responsibility to protect and fulfil human rights as part of social expectation) and over-sells (by including some ‘responsibility to protect’ elements under the ‘responsibility to respect’) the human rights responsibility of businesses. This pragmatic approach is normatively unsound. It is also creating practical challenges in the legalization of Pillar II. Similarly, this article will not consider whether the three-prong recipe proposed by Principle 15 of the UNGPs to meet the responsibility to respect human rights is practicable for micro enterprises or businesses which are part of the informal economy. Finally, as the European Commission’s Corporate Sustainability Due Diligence Directive has not been adopted at the time of writing this article,¹³ I will not analyse it. However, the two-layered critique of mandatory HRDD laws should generally hold even in relation to the proposed Directive.

2. Analytical framework

This article invokes two theoretical strands of literature to critique mandatory HRDD laws. The first is the concept of vulnerability, especially vulnerabilities of affected individuals and communities. The second strand concerns the power enjoyed by corporations in the current free market

⁹An unofficial English version of the law is available at www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies.

¹⁰The full title of the law is: Act on Corporate Due Diligence Obligations in Supply Chains. An official English translation is available at www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf.

¹¹The full title of the Act is: Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions. An unofficial English version is available at www.lovddata.no/dokument/NLE/lov/2021-06-18-99.

¹²D. Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’, (2010) 7(12) *Sur – International Journal of Human Rights* 199, at 204–15; F. Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-governmental Institution* (2009), 305–16. See also S. Deva, ‘Covid-19, Business and Human Rights: A Wake-Up Call to Revisit the “Protect, Respect and Remedy” Framework?’, (2021) 23 *International Community Law Review* 433; D. Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (2021).

¹³European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937’, COM(2022) 71 final (23 February 2022).

economy and the consequent power imbalances between corporations and rightsholders. There is a correlation between these two strands because some vulnerabilities of rightsholders are linked to these power imbalances.

Peroni and Timmer note that ‘harm and suffering feature centrally in most accounts of vulnerability’.¹⁴ Because of their vulnerability, rightsholders are ‘constantly susceptible to harm’.¹⁵ In the context of this article, harm to people and the planet is caused, or contributed to, by business operations.¹⁶ Although all human beings are vulnerable in certain ways, some rightsholders and communities are more vulnerable due to their special circumstances concerning age, colour, caste, class, ethnicity, religion, language, literacy, access to economic resources, marital status, sexual orientation, gender identity, disability, and migration, indigenous or minority status. While this categorization of vulnerability may lead to stigmatization and stereotyping of certain rightsholders or groups,¹⁷ it also opens pathways for substantive equality and need for decision-makers to be responsive to these differences and unique vulnerabilities.¹⁸

The conceptualization of HRDD under the UNGPs is conscious of the vulnerability of rightsholders and therefore requires ‘meaningful consultation with potentially affected groups and other relevant stakeholders’.¹⁹ Moreover, ‘where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society’.²⁰ The UNGPs also encourage business enterprises to ‘pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization’.²¹

The real problem is that these HRDD steps *recognize* but do *not address* adequately various vulnerabilities of communities related to information, expertise, economic dependency, resources and historical injustices that exist on the ground. For example, members of a community consulted about a mining or hydropower project may not fully understand long and complex impact assessment reports solicited by the concerned corporations or may need much more time to digest and discuss internally the viability of a given project. Alternatively, workers trapped in modern slavery in the supply chains of a corporation may not be aware of their rights or may lack the ability to complain about abuses of rights due to their dependency on such exploitative jobs for survival.²²

Although access to remedy is not a part of HRDD, it is an integral component of the corporate responsibility to respect human rights, especially because prevention is never full proof. However, various vulnerabilities also undermine the capability of victims of business-related human rights abuses to seek an effective remedy. Jos, for instance, illustrates how corporations exploit the inequality of bargaining power under legal waivers to deny victims effective remediation for human rights abuses.²³ Principle 31 of the UNGPs outlines several effectiveness criteria for non-judicial grievance mechanisms. However, most of these criteria are again process-related and do not pay adequate attention to achieving effective remedial outcomes. Consequently, the result, as shown by Wielga and Harrison,

¹⁴L. Peroni and A. Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’, (2013) 11(3) *International Journal of Constitutional Law* 1056, at 1058.

¹⁵*Ibid.*

¹⁶See various contributions in J. Martin, K. Bravo and T. Van Ho (eds.), *When Business Harms Human Rights: Affected Communities that are Dying to be Heard* (2020).

¹⁷A. Timmer et al., ‘The Potential and Pitfalls of the Vulnerable Concept for Human Rights’, (2021) 39(3) *Netherlands Quarterly of Human Rights* 190, at 194.

¹⁸M. Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’, (2010) 60 *Emory Law Journal* 251.

¹⁹See UNGPs, *supra* note 1, Principle 18.

²⁰*Ibid.*, Commentary to Principle 18.

²¹*Ibid.*; see also Commentary to Principle 20.

²²See S. Goethals, ‘Exploring Migrant Employees’ “Rights-Talk” in the British Hospitality Sector’, (2019) 4 *Business and Human Rights Journal* 287.

²³J. Jos, ‘Legal Waivers in Settlement Agreements: Implications on Access to Remedies in Business and Human Rights’, (2022) 21(5) *Journal of Human Rights* 639.

often is that even a grievance mechanism designed in line with effectiveness criteria may fail to deliver effective remedy to rightsholders in practice.²⁴ One reason for such an unsatisfactory outcome is that these grievance mechanisms are not responsive to specific vulnerabilities of victims. Nor do they often take affirmative steps to overcome power imbalances.²⁵

Brinks et al. argue that ‘the inequalities and disparities of power and wealth that are a key characteristic of the contemporary global economy’.²⁶ Powers that corporations have come to enjoy in the current economic model is the main reason for such disparities of power. Birchall, for instance, analyses corporate power over human rights in four settings: power over individuals, power over materialities, power over institutions, and power over knowledge.²⁷ Neither the UNGPs nor the mandatory HRDD laws seem to challenge the corporate power in any of these settings. In fact, even human rights experts engaged by corporations to conduct HRDD, who confer a certain level of legitimacy to corporate actions,²⁸ may inadvertently entrench further the power imbalances between rightsholders and corporations.

Addressing these power imbalances would require regulators – whether state-based or market-based – to be responsive to this state of play and take proactive measures. This responsiveness is different from the one articulated by Ayres and Braithwaite as part of responsive regulation:²⁹ while the former focuses on the position of rightsholders vis-à-vis corporations, the latter focuses on the conduct of corporations as regulatees. It is trite that states alone cannot regulate effectively corporations. For example, they often have to harness and facilitate the regulatory potential of other non-state actors. However, this orchestrating role of states³⁰ should not be at the cost of their non-delegable role in effectively regulating corporations and addressing power imbalances. In other words, the reliance on market forces to regulate corporate behaviour too has its limitations.

Within this analytical framing, this article develops a critique of mandatory HRDD laws. The objective of this critique is not to dismiss the value of such laws. Rather, the goal is to show the limitations of the very concept of HRDD and how this has been implemented so far by various laws in Europe. Regulators and policy makers should, therefore, develop more robust mandatory HRDD laws as well as explore other regulatory tools which are outcome-oriented and pay more attention to corporate accountability.

3. Potential of (mandatory) human rights due diligence

Under Pillar II of the UNGPs, all business enterprises have a responsibility to respect all internationally recognized human rights³¹ ‘regardless of their size, sector, operational context, ownership

²⁴M. Wielga and J. Harrison, ‘Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil’, (2021) 6 *Business and Human Rights Journal* 67.

²⁵An exception is the various proactive measures taken by the Dutch National Contact Point in a dispute concerning Heineken. See K. Bhatt and G. Erdem Türkelli, ‘OECD National Contact Points as Sites of Effective Remedy: New Expressions of the Role and Rule of Law within Market Globalization?’, (2021) 6 *Business and Human Rights Journal* 423, at 437–8.

²⁶D. Brinks et al., ‘Private Regulatory Initiatives, Human Rights, and Supply Chain Capitalism’, in D. Brinks et al. (eds.), *Power, Participation, and Private Regulatory Initiatives: Human Rights Under Supply Chain Capitalism* (2021), 1, at 4.

²⁷D. Birchall, ‘Corporate Power over Human Rights: An Analytical Framework’, (2021) 6 *Business and Human Rights Journal* 42.

²⁸M. McVey, ‘Untangling the Authority of External Experts in the Corporate Implementation of the UN Guiding Principles on Business and Human Rights’, (2022) 21(5) *Journal of Human Rights* 620.

²⁹I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

³⁰K. W. Abbott and D. Snidal, ‘Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit’, (2009) 42 *Vanderbilt Law Review* 501.

³¹‘Internationally recognised human rights’ are ‘understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work’. See UNGPs, *supra* note 1, Principle 12.

and structure'.³² Respecting rights means that businesses 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.³³ Businesses have a responsibility, though of a varying degree, if they cause, contribute to, or be directly linked to adverse impacts through their operations, products or services by their business relationships.³⁴ Moreover, if a business enterprise has leverage (or can acquire it) to prevent or mitigate adverse human rights impacts, it should exercise it.³⁵

In addition to making a policy commitment to respect human rights at the most senior level and having processes in place to enable remediation of any adverse impact they cause or contribute to,³⁶ conducting HRDD is the main pathway prescribed by the UNGPs for businesses to discharge their responsibility to respect human rights. The section showcases the potential of HRDD as a process as well as the value addition of this process being made mandatory by laws.

3.1 Potential of the HRDD process

HRDD enables business enterprises 'to identify, prevent, mitigate and account for how they address their adverse human rights impacts'.³⁷ It is an ongoing process entailing four steps: (i) identify and assess any actual or potential adverse human rights impacts; (ii) take appropriate action by integrating the findings from impact assessments; (iii) track the effectiveness of their response; and (iv) communicate externally how adverse impacts are being addressed.³⁸ If it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises 'should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable'.³⁹ While remediation is not part of HRDD, it is built in Pillar II as part of corporate responsibility to respect human rights. Therefore, if a business enterprise identifies that it has 'caused or contributed to adverse impacts', it should 'provide for or cooperate in their remediation through legitimate processes'.⁴⁰

HRDD seeks to shift the narrative around the business responsibility to respect human rights from 'naming and shaming' to 'knowing and showing'. As Ruggie explained: 'To discharge the responsibility to respect human rights requires that companies develop the institutional capacity to *know* and *how* that they do not infringe on others' rights.'⁴¹ Drawing on processes already used by corporations on how 'they are accounting for risks' in other domains, Ruggie introduced HRDD as 'a means for companies to identify, prevent, mitigate, and address adverse impacts on human rights'.⁴² At the same time, as HRDD is aimed at protecting rightsholders rather than managing risks to corporations, it is consciously differentiated from typical corporate due diligence processes in several ways.⁴³ For example, HRDD is not an one-off exercise and requires meaningful consultation with the relevant stakeholders.

HRDD has become the *lingua franca* in the BHR field. This is an impressive achievement in the space of just 11 years. However, the common usage of a terminology does not necessarily denote a common understanding about a given concept. One could draw an analogy with the concept of the rule of law. Even if we leave aside debates about the 'thick' and 'thin' versions of the rule of law,

³²*Ibid.*, Principle 14.

³³*Ibid.*, Principle 11.

³⁴*Ibid.*, Principle 13.

³⁵*Ibid.*, Commentary to Principle 19.

³⁶*Ibid.*, Principle 15.

³⁷*Ibid.*, Principle 17.

³⁸*Ibid.*, Principles 18–21.

³⁹*Ibid.*, Principle 24.

⁴⁰*Ibid.*, Principle 22.

⁴¹J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013), 99 (emphasis in original).

⁴²*Ibid.*

⁴³*Ibid.*, at 99–100.

the term is used very differently in liberal democracies from how this is invoked, for example, by the Chinese government.⁴⁴ We can see the same trend in relation to HRDD. Quijano and Lopez note that there are ‘significant divergences among scholars and stakeholders in their understanding of the concept and, importantly, its relationship, if any, with legal liability’.⁴⁵ Scholars have fiercely debated the origin of HRDD and its relationship with similar concepts in other branches of law.⁴⁶ These divergent understandings about HRDD are also reflected in what mandatory HRDD laws actually mean and entail for businesses. The UN Office of the High Commissioner for Human Rights in an Issues Paper noted that ‘there is not one, single model for mandatory human rights due diligence regimes’ and that ‘when people are discussing mandatory human rights due diligence regimes they are potentially discussing a wide range of legal and regulatory possibilities’.⁴⁷

Despite these divergences in the understanding of HRDD, it has significant potential in at least three ways: socialization, common currency, and prevention. As HRDD offers a business-familiar language and process, this has helped significantly in engaging businesses on human rights issues. Due diligence is something which businesses can relate to, as it has been an established practice of corporations for taking routine commercial decisions – from hiring to investment, takeovers, mergers and acquisitions, taxation and anti-bribery. This familiarity makes corporate embracement of HRDD much easier. As noted below, this advantage has its trade off though. Since old habits die hard,⁴⁸ businesses may continue to focus on managing risks to themselves rather than to rightsholders.

In the BHR field, HRDD provides a common currency as to what is expected of business enterprises to respect human rights. This means that all stakeholders such as states, business enterprises, CSOs, trade unions and lawyers are able to speak the same language when having conversations about the human rights responsibility of business.

HRDD provides a prevention blueprint for businesses by asking them to ‘know and show’ their adverse impacts. HRDD:

is the practice of a company looking for risks to people which are connected to what the company does, including who it relates to, and taking appropriate action to ensure that those risks do not turn into an adverse impact on people’s rights.⁴⁹

Therefore, if done in a meaningful manner and regularly,⁵⁰ HRDD should be able to pre-empt a significant percentage of corporate human rights abuses. HRDD could also play a preventive role in another way: conducting appropriate HRDD ‘should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement

⁴⁴M. Oud, ‘Rule of Law’, in M. Oud and K. Drinhausen (eds.), *The Decoding China Dictionary* (2021), 50–1, available at www.rwi.lu.se/wp-content/uploads/2021/03/Decoding-China-Publication_FINAL.pdf.

⁴⁵G. Quijano and C. Lopez, ‘Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?’, (2021) 6(2) *Business and Human Rights Journal* 241.

⁴⁶See Bonnitca and McCorquodale, *supra* note 3; Ruggie and Sherman, *supra* note 3; J. Bonnitca and R. McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F Sherman, IIP’, (2017) 28 *European Journal of International Law* 929.

⁴⁷OHCHR, ‘UN Human Rights “Issues Paper” on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies’, June 2020, 1.

⁴⁸The shareholder primacy, profit maximization or short-termism are some of such old habits. See B. Sjäffell, ‘How Company Law has Failed Human Rights – and What to Do About It’, (2020) 5 *Business and Human Rights Journal* 179.

⁴⁹M. B. Taylor, ‘Human Rights Due Diligence in Theory and Practice’, in S. Deva and D. Birchall (eds.), *Research Handbook on Human Rights and Business* (2020), 88, at 92.

⁵⁰Chambers and Vastardis rightly argue that for the ‘showing’ to be reliable, ‘there needs to be a reliable system of oversight’. R. Chambers and A. Yilmaz Vastardis, ‘Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability’, (2021) 21(2) *Chicago Journal of International Law* 323, at 333.

with an alleged human rights abuse'.⁵¹ HRDD may though not be a complete or automatic defence to legal liability.

3.2 Value addition of the legalization of HRDD

Human rights are not optional, either for states or businesses. From this normative perspective, the responsibility of businesses to respect internationally recognized human rights should not be voluntary.⁵² Yet, for pragmatic reasons, the UNGPs differentiate the voluntary responsibility of businesses under Pillar II from the obligatory duty of states under Pillar I.⁵³ Pillar II of the UNGPs – which includes the HRDD process – is not grounded in legal norms.⁵⁴ Ruggie and Sherman asserted that 'the corporate responsibility to respect human rights under the Guiding Principles . . . is neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm'.⁵⁵ In other words, instead of being legally binding, Pillar II has been envisaged to operate as a supra-legal norm coexisting with other (legal) norms.

This pragmatic approach has helped in socialization and normalization of the business responsibility to respect human rights. At the same time, the experience of the UNGPs' implementation in first 11 years shows that most businesses are not taking their soft responsibility seriously. The impressive *on-paper* uptake of HRDD as an extra-legal norm (including by many big business enterprises and major industry associations) has not been matched by the *practice* of HRDD. Ruggie claimed that the voluntary corporate responsibility to respect human rights standards under the UNGPs has 'several bites'.⁵⁶ For example, advocacy for HRDD by various stakeholders such as consumers, investors and CSOs may pressurize businesses to take seriously their human rights responsibilities. However, these bites are patchy and unpredictable in practice and do not hurt all types of businesses. Consequently, a great majority of corporations are not yet walking the talk on HRDD.⁵⁷ For example, in the 2020 Corporate Human Rights Benchmark, 46.2 per cent of 229 assessed corporations from five different sectors did not score any points for HRDD.⁵⁸ Moreover, most of the corporations captured in the 2022 Benchmark 'are taking a hands-off approach to human rights in their supply chains',⁵⁹ which is not in line with the UNGPs. The reality is that in 'the absence of a legally binding requirement, only a minority of well-intended companies or those facing consumer scrutiny decide to invest in improving their performance'.⁶⁰ In addition, voluntary frameworks do not often 'provide victims of corporate misconduct with remedy, resulting in a denial of their human right to access justice'.⁶¹

⁵¹See UNGPs, *supra* note 1, Commentary to Principle 17.

⁵²See Bilchitz (2021), *supra* note 12.

⁵³Muchlinski argues that the corporate responsibility to respect human rights under Pillar II should have real legal consequences: P. Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications, Corporate Law', (2012) 22 *Business Ethics Quarterly* 145.

⁵⁴The 'responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate'. Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008), para. 54.

⁵⁵See Ruggie and Sherman, *supra* note 3, 923.

⁵⁶See Ruggie, *supra* note 41, at 101.

⁵⁷'Behind the PR-driven words and empty excuses of well-known companies, people's lives and livelihoods in countries across the world are being devastated, with the scales of justice heavily tipped against them.' Anti-Slavery and ECCJ, *What if? Case Studies of Human Rights Abuses and Environmental Harm Linked to EU Companies, and How EU Due Diligence Laws Could Help Protect People and the Planet* (2020), 36.

⁵⁸World Benchmarking Alliance, 'Corporate Human Rights Benchmark: 2020 Key Findings', at 3, available at www.worldbenchmarkingalliance.org/research/corporate-human-rights-benchmark-2020-key-findings-report/. See also ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Accountability: A Reality Check* (2020), at 5–6.

⁵⁹World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report* (November 2022), at 4.

⁶⁰See ECCJ and CORE, *supra* note 58, at 5.

⁶¹*Ibid.*, at 6.

This led to many CSOs demanding for mandatory HRDD laws⁶² and also supporting the proposed treaty process as part of the Treaty Alliance. The civil society advocacy has started to bear some fruits with France, the Netherlands, Switzerland, Norway and Germany adopting mandatory HRDD laws, and the European Commission releasing a draft of the Corporate Sustainability Due Diligence Directive in February 2022.⁶³ We should see the push for the legalization or hardening of the UNGPs – including HRDD – at the national, regional and international levels in this context.

These attempts to legalize the extra-legal norm of Pillar II are welcome, because the UNGPs recommend states to adopt a ‘smart mix’ of measures to promote business respect for human rights.⁶⁴ The regulatory vision of a smart mix, which envisages a complementary role for voluntary and binding measures at both national and international levels, seeks to ‘take us beyond the stalemate induced by the mandatory-vs.-voluntary divide’.⁶⁵ From this perspective, the legalization of HRDD should add value to the current regulatory ecosystem in several ways. First, it should encourage more enterprises and their business partners to conduct HRDD. Second, mandatory HRDD laws should reduce free riders (i.e., those businesses which see more economic benefits in ignoring human rights standards) and in turn creating a global level playing field for businesses. Third, these laws would also enhance the leverage of market actors over business enterprises in integrating respect for human rights as a new normal of doing business. Fourth, mandatory HRDD law may reduce some imbalances of power between corporations and communities, e.g., by requiring disclosure of information or insisting on the need for meaningful consultations. Fifth, mandatory HRDD laws should open new pathways for access to remedy and corporate accountability due to the conversion of a social expectation into a legal requirement.

At the same time, the legalization of Pillar II to make HRDD mandatory should not erode the independent extra-legal status of the corporate responsibility to respect human rights. As I have argued elsewhere,⁶⁶ Pillar II should not be subsumed by Pillar I: rather, the former should stand independent in parallel to any legalization of the human rights responsibilities of business flowing from Pillar I.⁶⁷ Such an ‘independent but complementary’ status of Pillar II will be especially critical in situations where there is no legalization of HRDD, or legalization under Pillar I does not cover all human rights or all businesses, or mandatory HRDD laws do not provide for remediation.

It is also worth acknowledging that despite the popularity of ‘smart mix’ as a new regulatory mantra, the cleavage between voluntary and mandatory measures remains, as some states and business associations continue to resist the legalization of business responsibility to respect human rights at national, regional and international levels. The support of some businesses and investors for mandatory HRDD laws should also be accepted with caution, as this may be part of a corporate ploy to undermine from the inside the robustness of such laws.⁶⁸ After all, corporate lobbying against such laws including liability provisions or providing for reversal in burden of proof is very much alive. Such lobbying may also have contributed to the delay on the part of the European Commission in releasing its draft Directive.⁶⁹

⁶²See, e.g., Anti-Slavery and ECCJ, *supra* note 57.

⁶³See ECCJ, *supra* note 5; see BHRRC, *supra* note 5.

⁶⁴See UNGPs, *supra* note 1, Principle 3 and the commentary.

⁶⁵See Ruggie, *supra* note 41, at 125.

⁶⁶S. Deva, ‘The UN Guiding Principles’ Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface’, (2021) 6 *Business and Human Rights Journal* 336, at 341.

⁶⁷The business responsibility to respect human rights ‘exists over and above compliance with national laws and regulations protecting human rights’, see UNGPs, *supra* note 1, Commentary to Principle 11.

⁶⁸F. Wettstein, ‘Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights’, (2021) 6 *Business and Human Rights Journal* 312.

⁶⁹Human Rights Law Disappears from Commission Plans’, 1 December 2021, available at www.etuc.org/en/pressrelease/human-rights-law-disappears-commission-plans; ‘Europe Inc. Wins as EU Delays New Business Rules’, 21 May 2021, available at www.politico.eu/article/europe-inc-puts-brussels-new-business-rules-on-ice/.

4. Limitations of human rights due diligence

There are a few studies suggesting that corporations are either not conducting HRDD despite making a commitment to respect human rights or not doing HRDD in line with the UNGPs,⁷⁰ thus casting doubts about its efficacy in preventing and mitigating adverse human rights impacts in practice. More importantly, HRDD under Pillar II of the UNGPs suffers from several conceptual, operational and structural limitations. Because of these limitations, we should not consider HRDD – irrespective of whether voluntary or mandatory – as a ‘fool-proof’ or ‘fix-all’ tool. States enacting mandatory HRDD laws as part of their Pillar I duty should keep this in mind.

4.1 Conceptual limitations

HRDD enables businesses to respect human rights by preventing adverse human rights impacts.⁷¹ It embraces the methodology of ‘knowing and showing’: businesses should first know adverse impacts and then show to their stakeholders the steps taken to prevent or mitigate such impacts. To guide the scope of business responsibility and in turn HRDD, Principle 12 provides a definition of ‘internationally recognized human rights’ which enterprises should respect ‘at a minimum’. However, the relevance of some of these rights – articulated in state-focal international instruments – may not be obvious to many businesses, e.g., right of self-determination, protection against cruel, inhuman or degrading punishment, right to acquire a nationality, right to work, and right to housing. On the other hand, certain issues which may be very real to businesses on the ground are not adequately captured by the ‘moral minimum’ articulated by Principle 12. Environmental rights, climate change considerations or the human rights of women as elaborated in the Convention on the Elimination of All Forms of Discrimination against Women illustrative this limitation. In other words, the conceptual mooring of HRDD is not straight forward. Rather, it requires translation of state-focal human rights standards to non-state actors and if businesses own this translation exercise, this might result in weak or inconsistent adaptation of standards.

Second, as business responsibility to respect human rights under Pillar II is voluntary, conducting HRDD is also non-obligatory for businesses. This is a major limitation because market pressures or courts of public opinion do not always work against all enterprises. Nor are all businesses self-conscious of their human rights responsibilities. This means that only a small number of business enterprises have started doing some kind of HRDD. A 2018 report of the UN Working Group on Business and Human Rights concluded that ‘the majority of business enterprises around the world remain unaware, unable or unwilling to implement human rights due diligence as required of them in order to meet their responsibility to respect human rights’.⁷² This position is confirmed by other studies and indicators.⁷³

Third, HRDD does not contemplate any responsibility to achieve a ‘result’, even in situations where adverse human rights impacts are caused or contributed to by a business enterprise.⁷⁴ The

⁷⁰See R. McCorquodale and J. Nolan, ‘The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses’, (2021) 68 *Netherlands International Law Review* 455; K. Salcito and M. Wielga, ‘What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?’, (2018) 3 *Business and Human Rights Journal* 113; L. J. Obara, ‘“What Does This Mean?”: How UK Companies Make Sense of Human Rights’, (2017) 2 *Business and Human Rights Journal* 249.

⁷¹Ruggie construed HRDD as ‘a comprehensive, proactive attempt to uncover human rights risks, actual and potential . . . with the aim of avoiding and mitigating those risks’. ‘Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework’, A/HRC/11/13 (22 April 2009), para. 71.

⁷²The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/73/163, para. 93.

⁷³See McCorquodale and Nolan, *supra* note 70, at 465–7.

⁷⁴As a process-based form of regulation, HRDD also risks an undue focus on process at the expense of outcomes.’ See Landau, *supra* note 7, at 238.

value of HRDD to achieve outcomes – in the form of non-infringement of human rights and/or effective remediation – from the perspective of rightsholders is still unproven.⁷⁵ One main reason for this limitation is perhaps that HRDD is a business-led process: rightsholders at risk are only expected to be consulted as passive participants, rather than being active agents. Therefore, some form of HRDD *in practice* often ends up becoming a social legitimization tool, because development projects still go ahead even if a significant portion of affected communities are against it. Out of many examples, one may refer to an integrated steel plant in the state of Odisha in India built by Jindal Steel Works (JSW). Despite opposition by thousands of farmers to acquire their land, the JSW's project – at a site abandoned by POSCO after many years of protest by these farmers – is going ahead.⁷⁶ JSW has conducted a public consultation and offered alternative livelihood and employment package,⁷⁷ but these are essentially to ensure that the project goes ahead, rather than to address genuine concerns of farmers.

Fourth, as Pillar II conflates the business responsibility to 'respect' and 'protect' human rights, this has implications for HRDD too. Businesses are expected to conduct HRDD in all variations of the tripartite typology (causation, contribution and direct linkage) envisaged by Principle 13. This however means that the HRDD process does not differentiate much between situations in which adverse human rights impacts are the result of an enterprise's 'own' actions or omissions and where such impacts are the result of their business relationships with other parties.⁷⁸ For obvious reasons, the threshold to discharge the responsibility should be higher for the former set of situations and HRDD mere as a *standard of conduct* should not suffice in such cases.

Fifth, the UNGPs often use 'prevention' and 'mitigation' together. While it is true that not all risks or impacts could be prevented and every business activity would inevitably result in some adverse impact on people or the planet, there is a significant difference between prevention and mitigation from the perspective of rightsholders. However, this clubbing of mitigation with prevention without any clear differentiation or sequencing hierarchy in practice creates the impression that businesses may be justified to cause or contribute to adverse human rights impacts as long as they take certain steps to mitigate such impacts. This may encourage businesses to use the 'cost benefit' analysis to determine whether to prevent (which may require ceasing a business activity) or merely mitigate and later remediate harms.

Sixth, since remediation is not an integral part of HRDD, it often gets ignored or side-lined,⁷⁹ perhaps under the assumption that businesses should be able to prevent or mitigate most of adverse human rights impacts by conducting HRDD. However, prevention is never full proof. Nor should remediation be relegated only to situations where prevention fails.⁸⁰ Remedies could

⁷⁵McCorquodale and Nolan conclude that HRDD's 'potential to act as an effectiveness mechanism to prevent corporate human rights abuses remains only a possibility at present'. See McCorquodale and Nolan, *supra* note 70, at 467.

⁷⁶A. Senapati, 'Coastal Villagers Vow to Oppose JSW Steel Plant in Odisha', *DownToEarth*, 11 November 2021, available at www.downtoearth.org.in/news/environment/coastal-villagers-vow-to-oppose-jsw-steel-plant-in-odisha-80161.

⁷⁷'Public Hearing Held for JSW Project in Odisha', *Economic Times*, 27 November 2021, available at www.economictimes.indiatimes.com/industry/indl-goods/svs/steel/public-hearing-held-for-jsw-project-in-odisha/articleshow/87944049.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst; <https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/public-hearing-held-for-jsw-project-in-odisha/articleshow/87944049.cms>.

⁷⁸It is worth noting that regarding remediation, Principle 22 makes such a differentiation between two types of situations: businesses should provide for or co-operate in their remediation through legitimate processes only when 'they have caused or contributed to adverse impacts'.

⁷⁹In terms of grievance mechanisms, 91% of companies did not disclose that they engage with potential or actual users, such as workers and affected communities, on the design, implementation, performance and improvement of their mechanisms.' See World Benchmarking Alliance, *supra* note 59, at 11.

⁸⁰Commentary to Principle 19 notes: 'Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation.'

be preventive too.⁸¹ Failure of businesses to conduct any HRDD or conduct HRDD in a tick-box manner should also trigger remediation.⁸²

4.2 Operational limitations

There are also operational limitations in the four-step HRDD process. For example, it does not adequately acknowledge or address the problems flowing from the imbalance of power, information and resources between businesses and rightsholders. Principle 18 expects businesses to do ‘meaningful consultation with potentially affected groups and other relevant stakeholders’. However, this does not go far enough in practice when the very consultation process is designed by actors in position of power, that is, an enterprise or an external consultant engaged by such an enterprise.⁸³ There are also asymmetries related to information and resources. In the absence of accessible information about a proposed project or the risk of losing a day’s wage for joining a consultation, affected communities may not be able to participate effectively in the HRDD process.

Another operational limitation arises from the conscious choice of business-friendly terminology built into HRDD.⁸⁴ As I have argued elsewhere, Pillar II’s preferred terminology of ‘adverse impact’ can hardly carry the weight of serious human rights abuses committed by or linked to businesses.⁸⁵ On the other hand, capturing a wider universe of adverse impacts might result in businesses not taking seriously all such impacts. Introduction of HRDD as a ‘risk assessment’ tool provides another example. While businesses are encouraged to consider risks to people (rather than risks to businesses), in practice this has led to corporations focusing mostly on risks to themselves, especially if they rely on traditional due diligence tools.⁸⁶ In other words, HRDD as a risk management tool *in practice* tends to be profit-driven rather than rights-driven.

The responsibility to respect human rights as well as HRDD as the main tool to discharge this responsibility applies to all business enterprises. However, it seems that the articulation of this responsibility as a social expectation in Pillar II was not assessed in relation to a range of informal economy enterprises. Ruggie admitted that ‘for small companies due diligence typically will remain informal’ under the UNGPs⁸⁷ and that the viability of HRDD process was tested mostly in relation to the practice of multinational corporations (MNCs).⁸⁸ This means that HRDD – despite its flexibility and adaptability – may not be an equally suitable tool for all types of business enterprises. For instance, the stakeholders of many of these enterprises might not think of the International Bill of Rights as a reference point to unpack their role in society, or expect them to do more than merely respect human rights.

⁸¹Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/72/162 (18 July 2017), paras. 40, 41, 54, 70.

⁸²Once a due diligence obligation is accepted, failure to use due diligence is evidence of a breach of such a duty as is the careless operation of such a process.’ See Muchlinski, *supra* note 53, at 146. Holly and O’Brien discuss various civil liability options for harms linked to business activities, including those related to HRDD failures: G. Holly and C. Methven O’Brien, *Human Rights Due Diligence Laws: Key Considerations. Briefing on Civil Liability for Due Diligence Failures* (2021).

⁸³Ultimately, it is left to the discretion of the company to decide how much consultation, when this takes place and with whom.’ See Landau, *supra* note 7, at 243.

⁸⁴Landau also highlights risks associated with using ambiguous language. *Ibid.*, at 235–6.

⁸⁵S. Deva, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’, in S. Deva and D. Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013), 78, at 96–8.

⁸⁶Commentary to Principles 17 notes that HRDD ‘can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rightsholders’. See also B. Fasterling, ‘Human Rights Due Diligence as Risk Management: Social Risk versus Human Rights Risk’, (2017) 2 *Business and Human Rights Journal* 225.

⁸⁷See Ruggie, *supra* note 41, at 114.

⁸⁸*Ibid.*, at 152–3.

More importantly, various Pillar II recommendations – including the four-step HRDD process – may not be practical for enterprises part of the informal economy. It is difficult to conceive how could an informal family-run snack shop in a village could meet expectations of Principle 16 of the UNGPs, that is, express its commitment to meet the responsibility to respect human rights through a statement of policy that is ‘approved at the most senior level of the business enterprise’, is ‘informed by relevant internal and/or external expertise’ and is ‘publicly available and communicated internally and externally to all personnel, business partners and other relevant parties’. Similarly, many informal business actors will not be able to relate to the HRDD process as stipulated in Principles 17–21 of the UNGPs. The problem is that since Pillar II is primarily built on the experiences of MNCs and their value chain management expectations, HRDD as the proposed solution to corporate governance challenges is not representative of a wide variety of experiences of different types of business enterprises.

Taking a cue from the fact that ‘[s]eparate legal personality is rarely invoked in relation to enterprise risk management’,⁸⁹ Ruggie proposed (and would have hoped) that HRDD could similarly be operationalized across corporate groups without going into technical legal distinctions of corporations of a group being separate legal persons. In practice however, different subsidiaries in a corporate group may have different decision-making structures, commercial priorities, stakeholder demands and domestic legal regulations shaping the practice of HRDD. Considering that each business enterprise has an independent responsibility to conduct HRDD, in a given situation there could be overlapping HRDD processes done by a parent corporation, its subsidiary and the supplier engaged by the subsidiary about the same factual matrix. These multiple HRDD processes might result in divergent remedial responses to prevent, mitigate or account for actual and potential human rights abuses.⁹⁰

4.3 Structural limitations

HRDD also suffers from certain structural limitations in that this tool may not be able to dismantle business models of irresponsibility or to bring systemic changes to the current model of economic production. The main reason for this seems to be that the UNGPs do not challenge or confront the existing structure of irresponsibility and inequality utilized by businesses to their advantage. Rather, they consciously work around (or ‘put under the carpet’) difficult or contentious issues.⁹¹ Although there may be legitimate reasons for taking this approach grounded in ‘principled pragmatism’, some of the existing as well as future challenges in the BHR field might not be overcome without disrupting current structures employed by businesses to entrench irresponsibility and inequality.

Businesses are good at turning models of innovation into models of irresponsibility.⁹² It is well-documented how parent corporations have employed their relation with subsidiaries to deny, delay or altogether avoid responsibility for human rights abuses.⁹³ While no efficient approach was yet found to hold parent corporations accountable in an effective manner,⁹⁴ corporations

⁸⁹*Ibid.*, at 189.

⁹⁰Polaschek points out that ‘HRDD’s internal regulatory process allows for potentially subjective company decision-making’: R. Polaschek, ‘Responses to the Uyghur Crisis and the Implications for Business and Human Rights Legislation’, (2021) 6 *Business and Human Rights Journal* 567, at 573.

⁹¹See Deva, *supra* note 85, at 86–8.

⁹²Crane et al., for example, identify four innovative business models of modern slavery: risk reduction, asset leveraging, evading legal minimums, and workers as consumers: A. Crane et al., ‘Confronting the Business Models of Modern Slavery’, (2022) 31(3) *Journal of Management Inquiry* 264.

⁹³See R. Meeran, ‘Tort Litigation against Multinational Corporations for Violations of Human Rights: An Overview of the Position Outside the United States’, (2011) 3 *CityU Law Review* 1.

⁹⁴The direct duty of care principle developed by the UK Supreme Court in *Lungowe v. Vedanta Resources Plc* [2019] UKSC 20 and *Okpabi v. Royal Dutch Shell Plc* [2021] UKSC 3 provides a limited solution that may hold parent corporations accountable only in certain circumstances.

started using global supply chains to outsource their risks and responsibilities to independent contractors spread across the globe. The creation and usage of gig platforms is taking the distancing of responsibility to the next level. In future, automation of manufacturing may pose newer challenges. Although automation might eliminate forced and child labour from manufacturing, there might be no jobs for many – consequently, individuals would have the right to work and the availability of decent work standards, but no work in practice.

The UNGPs' response to all these business models has been to recommend that all business enterprises conduct ongoing HRDD to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts'.⁹⁵ This means that there are hardly any 'red lines': all business models and all business practices are acceptable as long as a HRDD process – relational to an enterprise's size, sector, operational context, and severity of risks to human rights – is in place. The UNGPs do not ask whether it is even practicable to respect human rights within certain business models⁹⁶ or in certain situations and places. The case of gig economy workers illustrates this. Even if HRDD conducted by a gig platform corporation finds concerns about workers' rights, those are likely to be addressed within an inherently exploitative business model which seeks to turn employees into autonomous entrepreneurs to maximize profits. Similarly, it is doubtful whether corporations producing products like tobacco could ever respect *all* human rights.⁹⁷ In relation to climate change, similar concerns could be raised about the business model of fossil fuel corporations.

Moreover, there may be situations in which it may not even be feasible to conduct meaningful HRDD or human rights abuses may occur despite conducting HRDD.⁹⁸ For instance, businesses with operations in the Xinjiang province of China may lack the ability to conduct independent HRDD or even do meaningful consultation with all relevant stakeholders to address serious allegations of human rights abuses involving Uyghurs.⁹⁹ Business operations in Myanmar after the 2021 coup pose similar challenges.¹⁰⁰ In situations like these, businesses may not even be able to exercise or increase their leverage to make a positive change in the human rights situation on the ground. In short, HRDD may not really assist businesses to identify, prevent and mitigate adverse human rights impacts in such situations and circumstances.

Supply chains pose serious challenges for MNCs even when not operating in complex environments. Let us take supply chains of major MNCs like Nestlé as an example. Nestlé has 165,000 suppliers and 695,000 farmers.¹⁰¹ In such a scenario, one might wonder whether this model of multi-tiered global sourcing linked to a big brand *in itself* is problematic. Conducting *ongoing* HRDD without any limits on the numbers of tiers in an effective manner should be highly

⁹⁵See UNGPs, *supra* note 1, Principle 17.

⁹⁶Birchall argues that 'ideally, corporations and the structures in which they operate should be designed so as to assist in human rights realization'. See Birchall, *supra* note 27, at 45.

⁹⁷Danish Institute for Human Rights, 'Human Rights Assessment in Philip Morris International', 4 May 2017, available at www.humanrights.dk/news/human-rights-assessment-philip-morris-international.

⁹⁸Polaschek argues that 'HRDD does not provide a full answer to regulating company behaviour in respect of systematic human rights issues'. See Polaschek, *supra* note 90, at 573.

⁹⁹V. Xiuzhong Xu, *Uyghurs for Sale: 'Re-Education', Forced Labour and Surveillance beyond Xinjiang*, Policy Brief Report No. 26/2020 (2020); L. T. Murphy and N. Elimä, *In Broad Daylight: Uyghur Forced Labour and Global Solar Supply Chains* (2021); K. Salcito, *IFC's FPIC and the Cultural Genocide of Uyghurs A Failure to Apply PS7 in Xinjiang Links IFC to Gross Human Rights Violations* (2021).

¹⁰⁰OHCHR, 'Myanmar: Time for Business to Take a Stand against Human Rights Violations – UN Experts', 12 May 2021, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=27087; Investor Alliance for Human Rights, 'Investor Statement on Human Rights and Business Activities in Myanmar', 16 July 2021, available at www.investorsforhumanrights.org/sites/default/files/attachments/2021-07/Investor%20Statement%20on%20Human%20Rights%20in%20Myanmar%2016%20July%202021.pdf.

¹⁰¹Nestle Supplier Portal, available at supplier.nestle.com/.

cumbersome, time-consuming and expansive for Nestlé or any other similarly-placed MNC.¹⁰² Is it even possible to have complex global supply chains free from human rights abuses or will doing so undercut one key purpose (economic efficiency) of having such supply chains in the first place? Moreover, while global supply chains may create jobs in developing countries, they also entrench inequality in incomes, contribute to environmental pollution, or promote unsustainable consumption practices.¹⁰³ In this context, one should consider whether a better and more sustainable business model will be to have smaller corporations sourcing locally and seasonally.

There are also other structural problems with the current economic order. The extent and levels of economic inequality in today's world is staggering. In 2008, the Organization for Economic Cooperation and Development (OECD) found evidence that '[i]nequality of incomes was higher in most OECD countries in the mid-2000s than in the mid-1980s'.¹⁰⁴ More recently, Oxfam estimated that the 'world's richest 1% have more than twice as much wealth as 6.9 billion people'.¹⁰⁵ The COVID-19 pandemic has exposed or exacerbated the existing inequality: the 'pandemic has hurt people living in poverty far harder than the rich, and has had particularly severe impacts on women, Black people, Afro-descendants, Indigenous Peoples, and historically marginalized and oppressed communities around the world'.¹⁰⁶

However, like poverty, inequality is not an accident.¹⁰⁷ Piketty unpacks politics and ideology leading to current levels of inequality.¹⁰⁸ Businesses actively lobby for low tax rates, minimum state regulation, diluted labour laws (including a limited role of trade unions), creation of special economic zones, and faster environmental clearance of projects. They also consciously innovate to create exploitative business models that limit risks and increase rewards. Moreover, businesses encourage states to negotiate trade and investment agreements not only to entrench their rights in such agreements but also create a system of 'privileged justice' in the form of investor-state dispute settlement. All these steps taken together create, sustain or exacerbate economic inequality at different levels in society.

In other words, even if 'respecting rights [becomes] an integral part of business'¹⁰⁹ by conducting regular HRDD, economic inequality may still remain. Is it then the limit of human rights to address economic inequality?¹¹⁰ Or is it more to do with how we have employed and interpreted human rights in relation to business? I will argue that HRDD under the UNGPs provides businesses a tool to make some changes to their business models but only so much to sustain the current economic order by masking its structural and systemic problems. That means that HRDD could coexist with significant levels of economic inequality in a system in which the Chief Executive Officers of MNCs continue to earn more than 350 times the average salary of their typical workers.¹¹¹ In his remarks delivered at the 2008 World Economic Forum, Bill Gates lamented the fact that the 'great advances in the world have often aggravated the inequalities in the world. The least needy see the most improvement, and the most needy see the least'.¹¹²

¹⁰²Ruggie and Sherman note that 'we have found that conducting human rights due diligence can be difficult, especially in complex global value chains'. See Ruggie and Sherman, *supra* note 3, at 925.

¹⁰³See Brinks et al., *supra* note 26.

¹⁰⁴OECD, 'Are We growing Unequal? New Evidence on Changes in Poverty and Incomes over the Past 20 Years', 2008, at 1, available at www.oecd.org/els/soc/41494435.pdf.

¹⁰⁵Oxfam, '5 Shocking Facts About Extreme Global Inequality and How to Even It Up', available at www.oxfam.org/en/5-shocking-facts-about-extreme-global-inequality-and-how-even-it.

¹⁰⁶Oxfam International, *The Inequality Virus* (2021), at 14.

¹⁰⁷The current 'inequality is the product of a flawed and exploitative economic system, which has its roots in neoliberal economics and the capture of politics by elites'. *Ibid.*, at 11.

¹⁰⁸T. Piketty, *Capital and Ideology* (translated by A. Goldhammer, 2020).

¹⁰⁹See Ruggie, *supra* note 41, at xxiv (emphasis in original).

¹¹⁰S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

¹¹¹L. Mishel and J. Kandra, 'CEO Pay Has Skyrocketed 1,322% since 1978', *Economic Policy Institute*, 10 August 2021, available at www.epi.org/publication/ceo-pay-in-2020/.

¹¹²B. Gates, 'A New Approach to Capitalism', in M. Kinsley and C. Clarke (eds.), *Creative Capitalism* (2008), 7, at 9.

Gates himself benefitted from the current economic system which is designed to create such level of inequalities. Therefore, a more fundamental question should be asked: will HRDD be able to address fundamental flaws in the current economic system which allows some to accumulate so much wealth in the first place? Or will HRRD be employed to sustain the current system by making superficial adjustments and masking deep-rooted problems?

5. Preconditions for effective mandatory human rights due diligence laws

There is a vital distinction between HRDD as a *process* in identifying business-related human rights abuses and the *outcome* it seeks to achieve in terms of preventing or mitigating such abuses. Due to this distinction, one should not confuse making obligatory the *process* (HRDD) with making the *outcome* (the responsibility to respect human rights) obligatory. Mandatory HRDD laws are only focusing on the former. Moreover, these laws may not be able to address all the conceptual, operational and structural limitations of HRDD highlighted in Section 4. In other words, mandatory HRDD laws should not be seen as a panacea.

Yet, if designed appropriately, such laws could play a key role in encouraging businesses to take seriously their human rights responsibilities. HRDD laws – in order to be able to make a real difference to people and the planet – should not merely seek to convert currently voluntary HRDD under Pillar II of the UNGPs into a mandatory requirement for all or certain types of businesses.¹¹³ Rather, these laws should also try to address other limitations of HRDD as discussed above. This will be possible only if the mandatory HRDD laws satisfy the following six conditions at a minimum: require holistic HRDD, capture as many businesses as much as feasible, address power imbalances, go beyond process, draw certain ‘red lines’ and provide for effective access to remedy.

These six conditions are derived from the critique of HRDD as a concept, various vulnerabilities and power imbalances experienced by rightsholders, and the ability of mandatory HRDD laws to address systemic challenges inherent in the free market economy.¹¹⁴ For example, if mandatory HRDD laws only applied to a small number of corporations or focused only on certain human rights, this will leave many rightsholders vulnerable to corporate abuses. Similarly, to ensure that HRDD has an intended effect for rightsholders, the new generation of mandatory HRDD laws should insist on achieving outcomes (at least in certain situations or circumstances) and have stronger provisions for access to remedy.

1. *Require holistic HRDD*: Although there are close connections between human rights and the environment and climate change,¹¹⁵ there are separate international norms governing these areas¹¹⁶ and the Pillar II of the UNGPs also does not expressly include environmental rights or climate change. Therefore, mandatory HRDD laws should explicitly require businesses to

¹¹³Landau cautions that ‘greater attention should be paid by lawmakers and civil society to crafting regulatory interventions that seek to influence the *quality* of HRDD undertaken, rather than simply its quantity’. See Landau, *supra* note 7, at 223 (emphasis in original).

¹¹⁴Some of these conditions also feature in the recommendations made by ECCJ, ITUC and Shift. ECCJ, *Key Features of Mandatory Human Rights Due Diligence Legislation* (2018), 2–3; ITUC, *Towards Mandatory Due Diligence in Global Supply Chains* (2020), 11–15; Shift, ‘*Signals of Seriousness*’ for Human Rights Due Diligence (2021), 3–6.

¹¹⁵UN General Assembly, ‘The Human Right to a Clean, Healthy and Sustainable Environment’, A/76/L.75 (26 July 2022); Framework Principles on Human Rights and the Environment, A/HRC/37/59 (24 January 2018); OHCHR, ‘Frequently Asked Questions on Human Rights and Climate Change’, Fact Sheet No. 38 (2021), available at www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf.

¹¹⁶In addition, environmental or climate change due diligence may require different approaches and processes in comparison to HRDD. S. Deva, ‘Climate Change: Looking Beyond Human Rights Due Diligence?’, *Nova Centre on Business, Human Rights and the Environment Blog*, 7 May 2021, available at www.novabhre.novalaw.unl.pt/climate-change-looking-beyond-human-rights-due-diligence/.

conduct holistic HRDD,¹¹⁷ encompassing adverse impacts on human rights, labour rights, environmental rights and climate change. For this reason, any law which focuses only on selected human or labour rights will be problematic. Equally concerning will be to delink environmental rights and climate change from human rights, because doing so will make it difficult for corporations to manage their human rights risks.

2. *Capture as many businesses as much as feasible*: Due to interconnected economies and global supply chains, human rights abuses related to a business many unfold in almost any part of the world. Mandatory HRDD laws should therefore capture both inward and outward abuses, including those related to global supply chains. At the same time, conducting mandatory HRDD regularly may not be practical at this stage for many small and medium size enterprises or enterprises which are part of the informal economy. Some careful cost-benefit calibration may therefore be required. States may, for example, encourage all but require only certain business enterprises to conduct mandatory HRDD. On the other hand, in selected high-risk sectors or settings, all businesses may be required to conduct HRDD. Moreover, states should create incentives in the form of public procurement, tax rebates, preferential loans and responsible labelling for businesses doing HRDD properly.
3. *Address power imbalances*: HRDD under Pillar II of the UNGPs remains a business-centric process. This is so despite HRDD being about managing risks to people (and not merely to businesses)¹¹⁸ and having a requirement for ‘meaningful consultation with potentially affected groups and other relevant stakeholders’.¹¹⁹ The reason is HRDD is done in practice by businesses or by consultants hired by businesses, with potentially affected people only having a passive role of being consulted. Moreover, there is not much quality control or oversight on the part of state agencies. The result is an imbalance in power, information, resources and bargaining position enjoyed by businesses vis-à-vis affected individuals and communities. Mandatory HRDD laws should try to address this asymmetrical power dynamics to ensure that HRDD does not end up becoming a tokenistic or tick-box exercise.¹²⁰ They may do so, for example, by requiring enterprises to ensure effective participation of – not merely consultation with – independent trade unions and CSOs at all stages of the HRDD process. Contemplating a proactive role for state agencies to exercise oversight over HRDD could be another tool to address asymmetries.¹²¹
4. *Go beyond process*: As noted above, HRDD is merely a process which may or may not achieve the expected outcome, the non-infringement of human rights. Landau argues against presuming ‘that the widespread institutionalisation of the concept will necessarily translate into significant improvements in corporate respect for human rights’.¹²² This translation may not happen due to various reasons. Muchlinski, for example, points out that ‘unless a corporate culture of concern for human rights is instilled into the officers, agents and employees of the company due diligence could end up missing the very issues it is set up to discover’.¹²³ Therefore, mandatory HRDD laws should not focus merely on requiring business enterprises to conduct HRDD. Rather, they should also expect businesses to accomplish outcomes in certain situations, otherwise face legal liability. In this context,

¹¹⁷C. Macchi, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of “Climate Due Diligence”’, (2021) 6 *Business and Human Rights Journal* 93.

¹¹⁸See UNGPs, *supra* note 1, Commentary to Principle 17.

¹¹⁹*Ibid.*, Principle 18(b).

¹²⁰In relation to the French law, Savourey and Brabant note that ‘a number of companies still approach the vigilance plan as a tick-box exercise and are wary of transparency and stakeholder engagement’. E. Savourey and S. Brabant, ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption’, (2021) 6 *Business and Human Rights Journal* 141, at 147. See also Muchlinski, *supra* note 53, at 156.

¹²¹See Chambers and Vastardis, *supra* note 50, at 355–65.

¹²²See Landau, *supra* note 7, at 222.

¹²³See Muchlinski, *supra* note 53, at 156.

the distinction between adverse human rights impacts linked to a business's 'own' actions or omissions and impacts linked to the conduct of business partners should become critical.¹²⁴ For the former set of situations, mandatory HRDD laws should require a standard of result rather than merely a standard of conduct.

5. *Draw certain red lines:* Even if businesses conduct HRDD in line with the UNGPs, they may not be able to respect 'all' internationally recognized human rights in certain situations, circumstances or settings. Even heightened or enhanced HRDD¹²⁵ may not be much useful in certain complex environments. Nor would there be a realistic chance of businesses able to exercise or increase leverage over the relevant actors in these environments. It is in this context that mandatory HRDD laws – and/or relevant laws and regulations – should start drawing certain context-specific 'red lines': that is, specific situations, circumstances or settings in which it may not be realistic to respect all human rights. Hence, not conducting certain business activities, not entering certain markets from the outset or disengaging responsibly should be the way forward. Similarly, certain products should fall foul of the red line approach. Tobacco products is a case in point, as tobacco corporations could never fully respect 'all' human rights. We should see the New Zealand's government proposal to ban cigarettes for future generations – that is, prohibiting anyone born after 2008 to buy cigarettes – in this light.¹²⁶ In order to combat climate change effectively, states may need to draw a similar red line for fossil fuel corporations. In the absence of such red lines, corporations manufacturing and selling inherently harmful products may continue to trample basis human rights by creating an impression of mitigating risks, e.g., promoting the use of e-cigarettes as less harmful than normal cigarettes.¹²⁷
6. *Provide for effective access to remedy:* Remediation is not part of the four-step HRDD process, but a vital element of the business responsibility to respect human rights under Pillar II.¹²⁸ Therefore, mandatory HRDD laws should contain adequate provisions to enable access to effective remedy if covered businesses did not conduct HRDD, did it improperly, or human rights abuses occurred despite HRDD. A 'bouquet of remedies' with preventive, redressive and deterrent elements should ideally be available for efficacy purposes.¹²⁹ For these reasons, mandatory HRDD laws should provide for civil, administrative and criminal remedies as they serve different but complementary purposes. They should also include ways to overcome barriers to access to remedy faced by affected individuals and communities in holding businesses accountable. In short, in the absence of strong access to remedy provisions, mandatory HRDD laws may create incentives for businesses to indulge in tick-box compliance.

¹²⁴Bueno and Bright propose a civil liability regime based on 'the existence of control by the company over the entity causing the harm' irrespective whether such an entity is a subsidiary or supplier and argue that 'there is no reason to establish a different liability regime from that for parent companies'. N. Bueno and C. Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability', (2020) 69 *International & Comparative Law Quarterly* 789, at 816. Although corporations exercise control over both subsidiaries and suppliers, the nature and quality of control for these two types of entities is very different and for these reasons, different legal liability regimes may be more suitable.

¹²⁵UN Working Group on Business and Human Rights, 'Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action', A/75/212 (21 July 2020); United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide* (2022).

¹²⁶'New Zealand to Ban Cigarettes for Future Generations', *BBC News*, 9 December 2021, available at www.bbc.com/news/world-asia-59589775.

¹²⁷'E-cigarettes Could be Available on NHS to Tackle Smoking Rates', *BBC News*, 29 October 2021, available at www.bbc.com/news/health-59083491.

¹²⁸'The issues of liability and enforcement are significant as HRDD by itself does not include liability or enforcement.' See McCorquodale and Nolan, *supra* note 70, at 469.

¹²⁹UN Working Group on Business and Human Rights, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/72/162 (18 July 2020).

6. Mandatory HRDD laws in Europe: A half-hearted attempt?

This section will analyse the extent to which mandatory HRDD laws enacted so far in Europe – that is, in France, the Netherlands, Switzerland, Norway and Germany – satisfy six preconditions articulated above: ambit, reach, asymmetries, outcomes, red lines and access to remedy.

6.1 French law

The French law imposes an

obligation of vigilance (*devoir de vigilance*) on companies incorporated or registered in France for two consecutive fiscal years that either employ at least 5,000 people themselves and through their French subsidiaries, or employ at least 10,000 people themselves and through their subsidiaries located in France and abroad.¹³⁰

The covered corporations¹³¹ should elaborate, disclose and implement a vigilance plan that should cover risks and serious harms linked to a corporation, its controlled subsidiaries, and suppliers with which the corporation maintains an established commercial relationship.¹³² The plan shall include ‘reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment’.¹³³ In other words, while reach of the French law is limited to large corporations and their business partners, its ambit is quite wide covering risks not only to human rights but also to occupational health and safety well as the environment.

The vigilance plan, which may be drafted in association with the relevant stakeholders or within multiparty initiatives, shall include the following five measures: a mapping that identifies, analyses and ranks risks; procedures to regularly assess the situation of subsidiaries and suppliers; appropriate action to mitigate risks or prevent serious violations; an alert mechanism that collects reporting of existing or actual risks, developed in partnership with the trade unions; and a monitoring scheme to follow up on the measures implemented and assess their efficiency.¹³⁴ These measures of the vigilance plan are broadly comparable to the four-step HRDD process under the UNGPs.

In terms of enforcement and access to remedy, French law provides for two pathways: any interested party can seek (i) an injunction from the court to order the corporation to comply with the law; and (ii) damages for the corporation’s failure to comply with its vigilance obligation causing a preventable harm.¹³⁵ However, the burden of proof under French law is still on the claimants ‘to prove a fault by the company and a causal link between the fault and the damage they have suffered’.¹³⁶ Moreover, the law merely imposes an obligation of process and not of results.¹³⁷ Therefore, ensuring compliance with the vigilance obligation or holding corporations accountable for breach of this obligation may still be a challenge.¹³⁸ This is partly because the law does not insist on corporations achieving certain outcomes. Not does it draw any red line or try to address the asymmetries in power, information and resources between MNCs and the affected rightsholders.

¹³⁰See Cossart et al., *supra* note 5, at 320.

¹³¹It may not be easy to identify the corporations covered by the law. See Savourey and Brabant, *supra* note 120, at 142–3.

¹³²ECCJ, ‘French Corporate Duty of Vigilance Law: Frequently Asked Questions’, 2017, at 3, available at www.corporatejustice.org/wp-content/uploads/2021/04/french-corporate-duty-of-vigilance-law-faq-1.pdf.

¹³³See Cossart et al., *supra* note 5, at 320.

¹³⁴Loi no. 2017-399 du 27 Mars 2017, Art. 1, paras. 5–9.

¹³⁵See Bueno and Bright, *supra* note 124, at 802.

¹³⁶See ECCJ, *supra* note 132, at 5.

¹³⁷See Cossart et al., *supra* note 5, at 321.

¹³⁸See Savourey and Brabant, *supra* note 120, 149–52.

6.2 Dutch law

The Dutch law is intended to address child labour in supply chains of enterprises selling or supplying goods or services to the end users in the Netherlands.¹³⁹ Section 2 of the law defines ‘child labour’ in line with international standards: the Worst Forms of Child Labour Convention 1999 and the Minimum Age Convention 1973. Although this law is narrow in ambit (i.e., only focuses on child labour), its reach is very extensive in that it applies to all business enterprises selling or supplying goods or services to the end-users in the Netherlands.¹⁴⁰ It is also worth noting that the Dutch government has recently announced its intention to enact a comprehensive mandatory HRDD law.¹⁴¹

The law requires all covered enterprises to adopt and implement a HRDD plan if there is a ‘reasonable suspicion’ that the supplied goods or services have been produced using child labour.¹⁴² It makes a reference to ‘ILO-IOE Child Labor Guidance Tool for Business’, which is developed in line with the UNGPs and the OECD Guidelines. The law also requires the enterprises to make a declaration to the superintendent that they exercise HRDD.¹⁴³

In terms of enforcement of the law and access to remedy, the superintendent has been charged with the supervision of compliance with the provisions of the law: any natural person or legal entity whose interests are affected by the conduct of an enterprise relating to compliance with the provisions of this law may submit a complaint to the superintendent.¹⁴⁴ However, a complaint can only be dealt with by the superintendent ‘after it has been dealt with by the company, or six months after the submission of the complaint to the company without it having been addressed’.¹⁴⁵ The superintendent may impose an administrative fine for breach of HRDD or reporting obligation under the Dutch law.¹⁴⁶ The fine can be up to €8,200 for not submitting the declaration, whereas the fine can be up to ten per cent of the worldwide annual turnover of the enterprise for failing to carry out HRDD.¹⁴⁷ Section 9 of the law also contemplates a criminal liability:

a director may . . . be imprisoned for up to two years if, in the prior five years, a fine previously had been imposed for violating the same requirement of the Act and the new violation is committed under the order or de facto leadership of the same director.¹⁴⁸

The Dutch law contains no provisions to draw any red lines or strict liability even regarding child labour; it focuses on obligating enterprises to follow a process. Nor is there any provision to address asymmetries: in fact, the impacted individuals or entities are first required to approach the enterprise in question to resolve their grievances before lodging a complaint with the government regulator.

¹³⁹Ropes & Gray, ‘Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies’, 5 June 2019, available at www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies.

¹⁴⁰Sec. 1 defines ‘end user’ as ‘the natural person or legal entity using or consuming the good or purchasing the service’.

¹⁴¹Coenraads et al., ‘Dutch Government Moves Ahead with Human Rights Due Diligence Legislation’, 10 December 2021, available at www.dlapiper.com/en/us/insights/publications/2021/12/dutch-government-moves-ahead-with-human-rights-due-diligence-legislation/.

¹⁴²Dutch Law, Sec. 5.

¹⁴³*Ibid.*, Sec. 4.

¹⁴⁴*Ibid.*, Sec. 3(2).

¹⁴⁵*Ibid.*, Sec. 3(4).

¹⁴⁶*Ibid.*, Sec. 7.

¹⁴⁷See Coenraads et al., *supra* note 141.

¹⁴⁸*Ibid.*

6.3 Swiss law

The Swiss law introduces two new obligations.¹⁴⁹ First, selected large Swiss corporations (those with at least 500 employees and a minimum turnover of CHF20 million, or a minimum turnover of CHF40 million) are required to report on ‘environmental, social and labour-related issues as well as on human rights and measures against corruption’.¹⁵⁰ Second, corporations with their registered office, central administration or principal place of business in Switzerland are required to conduct HRDD in two situations: (i) if they import or process above a certain threshold ‘minerals or metals in Switzerland, containing tin, tantalum, tungsten or gold originating from conflict-affected and high-risk areas’; (ii) if they sell goods or services in Switzerland with ‘reasonable grounds to suspect that they were produced with child labour’.¹⁵¹

It is thus clear that the scope of the Swiss law’s HRDD obligation is quite narrow both in terms of its ambit and reach: leaving aside potential situations of child labour,¹⁵² corporations are required to conduct HRDD only if they import or process conflict minerals above a certain threshold. The law is also weak on the question of enforcement of these obligations and the related issues of access to remedy and corporate accountability. A breach of these twin obligation can only result in a criminal fine of up to CHF100,000.¹⁵³ In comparison, the Swiss Responsible Business Initiative – which was narrowly rejected in a public vote – had envisaged stronger HRDD and corporate liability provisions.¹⁵⁴ The Swiss law contains no provisions to draw red lines or bridge asymmetries in power.

6.4 Norwegian law

The Norwegian law seeks to ‘promote enterprises’ respect for fundamental human rights and decent working conditions’ concerning the production of goods and the offering of services.¹⁵⁵ It also aims to ‘ensure the general public access to information regarding how enterprises address adverse impacts on fundamental human rights and decent working conditions’.¹⁵⁶ The definition of ‘fundamental human rights’ is comparable to how the UNGPs define ‘internationally recognised human rights’. Section 3(b) provides that ‘decent working conditions’ means work that safeguards fundamental human rights as well as ‘health, safety and environment in the workplace’ and ‘provides a living wage’. By expressly including a living (not minimum) wage as part of decent work, the Norwegian law sets a higher expectation for businesses, which is line with a public commitment made by certain MNCs.¹⁵⁷ At the same time, the law does not explicitly contemplate HRDD in relation to the environment or climate change.¹⁵⁸

The law applies to larger business enterprises that are resident in Norway and offer goods and services in or outside Norway, as well as to larger foreign enterprises that offer goods and services in Norway and are liable to pay tax to Norway.¹⁵⁹ Section 3 of the law provides that larger enterprises means ‘enterprises that are covered by Section 1-5 of the Accounting Act’ or which satisfies two of the following three conditions: sales revenues of NOK70 million, balance sheet total of

¹⁴⁹See Bueno and Kaufman, *supra* note 5, at 545–7.

¹⁵⁰*Ibid.*, at 545.

¹⁵¹*Ibid.*

¹⁵²Even this obligation is subject to certain exceptions. *Ibid.*, at 545–6.

¹⁵³*Ibid.*, at 545, 547.

¹⁵⁴*Ibid.*, at 542–4.

¹⁵⁵Norwegian Law, Sec. 1.

¹⁵⁶*Ibid.*

¹⁵⁷For example, Unilever is ‘committed to ensure that everyone who directly provides goods and services to Unilever earns at least a living wage or living income by 2030’. Unilever, ‘A Living Wage’, available at www.unilever.com/planet-and-society/raise-living-standards/a-living-wage/.

¹⁵⁸See Krajewski et al., *supra* note 5, at 554.

¹⁵⁹Norwegian Law, Sec. 2.

NOK35 million, and average number of employees in the financial year is 50 full-time equivalent. 'It is estimated that the law will apply to about 8,830 enterprises.'¹⁶⁰ As parent corporations shall be considered larger enterprises 'if the conditions are met for the parent company and subsidiaries as a whole',¹⁶¹ the Norwegian law follows the enterprise principle to satisfy the threshold of law's application. However, it is unclear whether the enterprise principle will also be available to hold parent corporations liable for abuses of their subsidiaries.

In terms of obligations, Section 4 of the Norwegian law requires all covered enterprises to 'carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises'. Because of the alignment of the OECD Guidelines with the UNGPs, HRDD steps proposed by this provision are very similar to the four-steps process outlined in the UNGPs. Moreover, embedding responsible business conduct into the enterprise's policies as well as providing for or co-operating 'in remediation and compensation where this is required' have been included as part of this HRDD obligation. Furthermore, the enterprises are obligated to publish an easily accessible 'account of due diligence pursuant to Section 4'.¹⁶² The HRDD obligation under 'the Norwegian Act extends to the operations of the enterprise, supply chains and business partners'.¹⁶³

A unique aspect of the Norwegian law is the right to information under Section 6: 'any person has the right to information from an enterprise regarding how the enterprise addresses actual and potential adverse impacts pursuant to Section 4'. The information sought under this provision could be general in nature or be related a specific product or service offered by the enterprise. This provision provides a potential tool for affected individuals and communities to seeks relevant information in a time-bound manner and in turn address partially the informational asymmetry that exists between businesses and rightsholders. It is, however, unclear how such a pathway would be accessible to the affected rightsholders abroad and to what extent the enterprises will disclose in good faith the requested information.

In terms of access to remedy and corporate accountability, the Consumer Authority may issue prohibitions and orders to ensure compliance with various provisions related to HRDD and the right to information. Section 13 also provides for enforcement penalties in case of non-compliance with such orders. Beyond these administrative enforcement tools, the Norwegian law contains no express provisions for civil or criminal liability of enterprises for not conducting HRDD at all or conducting it inadequately. Nor are there any provisions concerning red lines or strict liability.

6.5 German law

The German law applies to all business enterprises which have their central administration, principal place of business, administrative headquarters or statutory seat in Germany provided they normally have at least 3,000 employees.¹⁶⁴ It also applies to foreign corporations with a domestic branch if they normally have 3,000 employees. It is estimated that 'the law will apply to approximately 900 companies from 1 January 2023 and to approximately 4,800 companies from 1 January 2024'.¹⁶⁵ In terms of the ambit, the law captures risks to international human rights, labour rights and the environment.¹⁶⁶

The covered enterprises are required to conduct HRDD in relation to risks concerning all listed international human rights and environmental rights.¹⁶⁷ Section 3 provides an inclusive list of

¹⁶⁰See Krajewski et al., *supra* note 5, at 553.

¹⁶¹Norwegian Law, Sec. 3.

¹⁶²*Ibid.*, Sec. 5.

¹⁶³See Krajewski et al., *supra* note 5, at 556.

¹⁶⁴German Law, Sec. 1. The threshold of employees will be lowered to 1,000 from 1 January 2024. For a corporate group, employees of all affiliated enterprises are counted for the purpose of this threshold.

¹⁶⁵See Krajewski et al., *supra* note 5, at 553.

¹⁶⁶German Law, Sec. 2 read with Annexure.

¹⁶⁷*Ibid.*, Sec. 3(1).

HRDD steps, which are mostly in line with the UNGPs and are further elaborated by Sections 4–7 and 10. The HRDD obligations extend to enterprises' own activities as well as the activities of their direct and indirect suppliers necessary to produce or provide services. The covered enterprises are expected to conduct HRDD in an 'appropriate manner' which is determined based on the nature and extent of their activities, their ability to influence the conduct of their business partners, the severity of the violation, and the nature of the causal contribution of the enterprise.¹⁶⁸

In terms of access to remedy, the German law requires the covered enterprises to put in place an 'appropriate internal complaints procedure' to enable affected rightsholders to report risks and violations linked to their business activities as well as of their direct suppliers.¹⁶⁹ The law also provides for financial penalty and administrative fines being imposed by the Federal Office for Economic Affairs and Export Control.¹⁷⁰ At the same time, Section 3(3) provides that a 'violation of obligations under this Act does not give rise to any liability under civil law', though civil liability arising independently of this law remain unaffected. Nor is there any provision for criminal sanctions. On the positive side, Section 22 of the German law provides that enterprises subject to administrative fines shall be excluded from the award of public contracts for a period of maximum three years.

By conferring a legal standing on domestic trade unions and NGOs to bring proceedings on behalf of affected rightsholders, the German law provides an important tool to bridge asymmetry of power between large German corporations and the victims of human rights abuses in seeking access to remedy.¹⁷¹ Section 7(3) of the law expressly contemplates the possibility of terminating a business relationship in certain situations, which is an indication of the German law adopting a somewhat limited red line approach.

Based on the above review of the provisions of five mandatory HRDD laws in Europe, a qualitative assessment could be made vis-à-vis the identified six preconditions for a robust legislation. In Table 1 (below), the points on a scale of 0–3 are allocated as follows: 0 point for the total absence of a precondition, 1 point for low presence of a precondition, 2 points for medium presence of a precondition, and 3 points for high presence of a precondition. As per this scale, maximum possible score for any law will be eighteen points.¹⁷² The German law scores maximum points (8/18), whereas the Swiss law scores the least number of points (3/18). The three other laws have an overall score of 6/18, though there are variations in their respective strengths and weaknesses. For example, the Dutch law is very wide in its reach, whereas the French law is quite wide in terms of its ambit.

It seems that it would be difficult in practice to have a law with both wide ambit and wide reach, that is, covering all human rights, labour rights and environmental rights and capturing all business enterprises and their supply chains. Out of these five laws, the German law is the most ambitious in that it has a wide scope on both counts. On the other hand, the Dutch law has a narrow ambit but very extensive reach.

None of the five laws insist on businesses achieving outcomes and hence obtain a 0 score. Rather, they focus mostly on making mandatory the process of HRDD. With the exception of the German law providing for termination of business relation in certain specific situations, rest of the laws draw no red lines, perhaps under the assumption that HRDD should be able to prevent and mitigate adverse human rights in all situations and circumstances. All laws are also quite weak – with little variations among them – on the issue of access to remedy and corporate accountability. Apart from the Dutch law scoring 2 points, rest score only 1 point (out of

¹⁶⁸*Ibid.*, Sec. 3(2)

¹⁶⁹*Ibid.*, Sec. 8.

¹⁷⁰*Ibid.*, Secs. 23, 24.

¹⁷¹*Ibid.*, Sec. 11.

¹⁷²As pointed out above, a mandatory HRDD law even with 18 points will not be adequate in overcoming some of the conceptual, operational or structural limitations.

Table 1. Qualitative assessment of five mandatory HRDD laws vis-à-vis six preconditions

	<i>Ambit</i>	<i>Reach</i>	<i>Asymmetries</i>	<i>Outcomes</i>	<i>Red lines</i>	<i>Access to remedy</i>	Total score (out of max 18)
French law	Human rights, occupational health and safety, and the environment: 3	Large corporations and their subsidiaries and suppliers: 2	No provision: 0	No provision: 0	No provision: 0	Injunction and damages: 1	6
Dutch law	Only child labour: 1	All enterprises providing goods or services to Dutch end-users: 3	No provision: 0	No provision: 0	No provision: 0	Administrative fine and limited criminal sanctions: 2	6
Swiss law	Conflict minerals and child labour: 1	Various exceptions available to covered corporations: 1	No provision: 0	No provision: 0	No provision: 0	Criminal fine: 1	3
Norwegian law	Fundamental human rights and decent working conditions: 2	Larger enterprises and their supply chains: 2	Right to information: 1	No provision: 0	No provision: 0	Administrative enforcement: 1	6
German law	International human rights, labour rights and the environment: 3	Large enterprises and their supply chains: 2	Trade unions and CSOs have a capacity to start proceedings: 1	No provision: 0	Termination of business relations in certain situations: 1	Administrative enforcement: 1	8

maximum 3 points) for the access to remedy precondition, as they do not provide for a full regime of civil, administrative and criminal liabilities. Nor these laws give adequate attention to overcoming asymmetries of power, information and resources between business enterprises and the affected rightsholders – only the German and Norwegian laws take baby steps in this direction.

7. Conclusion

In a span of just over 11 years, HRDD has become a common currency in the BHR field used by all players as a tool for business enterprises to identify, prevent, mitigate and account for adverse human rights impacts. Although not a prominent component of Pillar I, HRDD has also become a key tool employed by states to discharge their duty to protect human rights. This in itself is a significant achievement for a deeply polarized field historically.

However, as this article has tried to show, we should not accept HRDD as a panacea to either prevent human rights abuses or hold businesses accountable. In fact, because of its popularity and impressive uptake, HRDD – as part of the Pillar II of the UNGPs or of a mandatory regime at the national, regional or international level – has the potential to create a false impression of change, without making any substantial positive impact on the situation of rightsholders on the ground. I have elaborated various conceptual, operational and structural limitations of the concept of HRDD under the UNGPs. Moreover, as a critical review of five mandatory HRDD laws shows, many of these limitations will not be overcome by states simply making HRDD mandatory in line with the UNGPs.

Based on the existing practice of HRDD (including mandatory HRDD laws), one can draw at least four lessons for regulators and policy makers. First, social expectations or market forces alone will not be adequate orchestrators for businesses to take seriously their responsibility to respect human rights. Although it may sound paradoxical, the role of states as regulator, monitor, enforcer, facilitator and co-ordinator will be critical to support the operationalization of the independent responsibility of businesses to respect human rights under Pillar II of the UNGPs.

Second, a key distinction should be made between the *outcome* (the business responsibility to respect human rights) and the *process* (HRDD). The current mandatory HRDD laws are only seeking to make the latter obligatory. While this is a step in the right direction, it will not be sufficient. States and other actors should pay greater attention to achieving outcomes and this should also be reflected in their mandatory regulatory regimes.

Third, the 3.0 version¹⁷³ of laws under Pillar I of the UNGPs, including mandatory HRDD laws, should set much more ambitious goals, some of which are articulated in the six preconditions discussed above. They should, for example, focus on addressing imbalances of power, information and resources between enterprises and rightsholders. Moreover, such laws should combine a variety of carrots and sticks. By providing for incentives for businesses taking their human rights responsibilities seriously, states should both create and facilitate proactively market rewards for responsible business conduct. In addition, there should be effective provisions for access to remedy and corporate accountability.

Fourth, the entire state-based regulatory universe should not be limited to mandatory HRDD laws. Although prevention under Pillars I and II may be ‘inextricably linked’,¹⁷⁴ unlike businesses’ prevention responsibility under Pillar II, states’ prevention duty under Pillar I is not mostly limited to HRDD. Rather, states should employ a range of additional regulatory tools such as obliging the adoption of a precautionary approach, establishing a strict liability regime, imposing

¹⁷³Various transparency, reporting or disclosure legislation (including those related to modern slavery) can be regarded as part of the 1.0 version, while the five mandatory HRDD laws analysed in this article are part of the 2.0 version.

¹⁷⁴See McCorquodale and Nolan, *supra* note 70, at 457.

import-export bans, drawing red lines in certain situations or addressing systemic problems with the free market economy. In other words, mandatory HRDD laws should be part of a wider regulatory menu instead of being the only item on the menu.¹⁷⁵

¹⁷⁵See Deva, *supra* note 66, at 339–42.

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