
FULL REPORT



MAKING HUMAN RIGHTS DUE DILIGENCE WORK FOR SMALL FARMERS AND WORKERS IN GLOBAL SUPPLY CHAINS

V. Nelson, O. Martin-Ortega, M. Flint | June 2020



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Front cover photo: Cocoa processing in Côte d’Ivoire | Photo: Éric St-Pierre

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Acronyms

CSR	Corporate Social Responsibility
DD	Due Diligence
ETI	Ethical Trading Initiative
EU NFR Directive FoE	EU Non-Financial Reporting Directive Friends of the Earth
FPIC	Free, Prior, Informed Consent
GSC/GVC	Global Supply Chain/Global Value Chain
HR	Human Rights
HRDD	Human Rights Due Diligence
HRI	Human Rights Impacts
HRIA	Human Rights Impact Assessments
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IFC	International Finance Corporation
ILO	International Labor Organisation
KII	Key Informant Interviews
LS	Labour Standards
MNE	Multi-National Enterprises
MSA	Modern Slavery Act (UK)
OECD	Organisation of Economic Cooperation and Development
RBC	Responsible Business Conduct
SC	Supply Chain
UNGP	United Nations Guiding Principles on Business and Human Rights
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries

Executive Summary

KEY MESSAGES

- Human rights abuses are an endemic issue in global supply chains and form part of the dominant business model. However, while an insufficient measure on its own, if well-designed and implemented, HRDD could play an important role in ensuring human rights in reformed global supply chains.
- Human Rights Due Diligence (HRDD) frameworks are diverse and fragmented. Implementation is weak, monitoring of compliance inconsistent, and monitoring of impacts on the ground virtually non-existent. When monitoring does occur, this tends to be led by civil society. There is no clear role for stakeholders and those directly impacted by corporate harm; few provisions for liability, either civil and criminal; and many obstacles which prevent victims of harm from accessing justice.
- There are potential unintended or negative effects for workers and small farmers in agricultural and garment supply chains. If poorly implemented, HRDD could lead to companies cutting and running, or passing the additional costs of compliance to suppliers, rather than investing in their suppliers. The other significant risk is that HRDD is implemented partially or poorly, and masks inaction by companies on human rights in supply chains.
- HRDD frameworks, as currently designed and implemented, do not guarantee that issues such as living wages, living incomes, fair purchasing practices will be adequately addressed, nor systemic issues such as unequal power relations, land tenure security and environmental damage.
- Explicit consideration of living wages, living incomes and fair purchasing practices is needed in HRDD, as well as effective oversight of HRDD more generally. This is necessary to ensure that HRDD leads to fairer purchasing practices and business models, enables observance of human rights and reduces environmental damage, so leading to positive outcomes for workers and small farmers.
- Effective design and implementation of HRDD are essential, but they are only part of the solution. More far-reaching, systemic changes need to be instituted in political and economic systems, so that the latter are resilient (i.e. can recover from shocks and stresses) and regenerative (protects and restores environments and communities).

The study

This report explores the potential effectiveness and impact of Human Rights Due Diligence (HRDD) frameworks and instruments, focusing on the agriculture and garment sectors. The study unpacks a theory of change for how HRDD frameworks are anticipated to have an impact, assembles and analyses available empirical evidence to assess effectiveness and impact and identify evidence gaps, and explores the specific risks of unintended, negative impacts for workers and small farmers associated with HRDD implementation. It also provides a legal analysis of living wages and living income within HRDD, because both are fundamental to the fulfilment of other human rights and are not currently part of the mainstream HRDD conversation.

The study is based on a literature review, conceptual work on a theory of change, interviews with a number of key informants and stakeholders, small case studies on garments (Bangalore, India) and horticulture (Kenya), plus further stakeholder consultations. While the limited experience and evidence around HRDD design, implementation and impact has proved to be a limitation, this study is an important first step in identifying and analysing the available evidence and the likely risks. Recommendations focus on improving the design and implementation of HRDD, and the additional measures needed, and are applicable at global, regional or national levels. The report serves as a basis for further discussion and research on how to ensure HRDD frameworks have a positive impact on small farmers and workers.

The challenge

Workers and small farmers, especially women and migrant and child workers, in low and middle income countries who are part of global supply chains – including the garment and agricultural sectors - face systemic human rights challenges. The International Labour Organisation (ILO) estimates that 450 million people currently work in supply chain related jobs globally. The opacity of complex supply chains allows human rights abuses, such as forced and child labour, exploitative and dangerous working conditions, to continue. Whilst occasionally exposed in media stories, the vast majority, and the private suffering involved, remain hidden and unacknowledged.

The response – Human Rights Due Diligence

Due diligence is commonly used by companies to comply with legal obligations. Over the past 20 years it has been taken up in legal frameworks and instruments to address human rights issues in global and national supply chains. Moving beyond a concern with material risks to a company, HRDD addresses the salient risks of corporate practices in terms of impacts on human rights. Most of the frameworks are voluntary, but mandatory requirements have been introduced in France and the Netherlands (regarding child labour), and are under development in other countries, such as Switzerland. Binding measures include either legal reporting requirements, or more stringent examples of regulations requiring companies to implement due diligence processes including mitigation

actions. HRDD is a process-oriented, rather than performance based standard, and comprises the following steps: identify, assess, prevent, mitigate, monitor and remedy negative impacts on human rights in the supply chain, and embed responsible business conduct into company policies and management systems. Voluntary global frameworks such as the United Nations Guiding Principles on Business and Human Rights or OECD Due Diligence Guidance set expectations on business, but do not create new legal requirements, and there are no provisions if there is a failure on the part of companies to comply. In contrast, mandatory HRDD require companies to conduct DD, and can lead to civil or criminal liability for any shortcomings.

The findings

The proliferation of regulatory instrument is not matched with research on impacts. Overall, experience in, and available evidence for evaluating HRDD effectiveness and impact is very limited, and lack of transparency is barrier to assessment. However, drawing upon the available evidence and a wide range of stakeholder perspectives, it is clear that HRDD awareness and momentum are rapidly growing in Europe and the US, especially support for mandatory HRDD. However, the legislation is partial and fragmentary. Evidence suggests that implementation is not well advanced and there are cost and capacity barriers. There are a few cases of concrete and positive action by global companies, but empirical evidence of effectiveness and impact is thin.

Firstly, in terms of HRDD impacts on workers and small farmers, evidence is very limited. This could change as implementation increases and improves.

Secondly, while there is evidence of increased attention to human rights issues by companies, this tends to be selective, with priorities and processes framed more by companies than local communities and workers and their representatives. Thirdly, the wider evidence that human rights abuses continue to bedevil most global supply chains – particularly agricultural and garment supply chains – is very strong.

Potential risks of unintended consequences:

Possible risks for small farmers and workers in agriculture and garment supply chains, if HRDD obligations are imposed without proper analysis of the context and supply chain dynamics, and relating to HRDD instrument design are as follows:

- Not all companies will be willing to invest in making the improvements required to prevent or address human rights abuses. Some will cut and run, (i.e. they may stop buying from one location where risks are perceived to be higher and start buying from other places with fewer perceived human rights violations. Another potential shift is from independent small farmers and their organisations, to large plantations and aggregation and contract growing arrangements. Increasing or changing standards could translate into further burdens on suppliers in terms of costs, and / or lost business as sourcing or business models are changed.

- In the agriculture and garment industries, there are specific issues which require more attention in the design of HRDD, such as risks to food security in the former, and marginalization of women and gender issues and enhanced risks for those working in the informal sectors in both.
- Many small producer and worker representation organisations in global and regional supply chains in general, and across both sectors, lack sufficient capacity to adequately respond to HRDD and any unintended impacts.

While all these risks are real, the greater risk for workers and small farmers, at least in the short-term, is that HRDD continues not to be properly implemented. There is a risk that it remains or becomes a paper exercise for some companies.

Potential issues relating to HRDD implementation:

- Different marginalized social groups amongst workers and small farmers will face greater challenges in terms of their capacity to organize and respond to the demands of HRDD processes. But, for all groups, the common need is for HRDD to be fully and effectively implemented.
- Power relations between multinational buyers/retailers and suppliers/producers in the global South are asymmetric and characterized by downward pressures on prices. These power relations are not significantly altered by HRDD. To the contrary, power imbalances are likely to influence who bears the cost of compliance with HRDD requirements.
- To respond to the capacity challenges of small farmer and worker organisations, there may be a case for less demanding requirements with respect to HRDD for small farmer organisations.
- Engagement of, and support for, producer governments may be required by donors and NGOs.
- The focus of companies, states and civil society must move beyond public reporting by companies to reliably identifying the actual evidence of change (or no change) on the ground.

Current HRDD frameworks do not directly refer to, or address trading practices which maintain power imbalances. Companies exert downward pressures on their suppliers by engaging in diverse forms of unfair purchasing practices. Among the direct consequences of these unfair trading practices are the lack of access of workers and small farmers to living wages or capacity of achieving living incomes. This study has focused on how fair trading practices, living wages and living incomes can be addressed by HRDD frameworks and instruments. There are two main challenges to adequately addressing living wages and living incomes through HRDD frameworks. The first regards the nature and legal force of living income and living wages as international human rights. The second main challenge regards the implementation of HRDD with respect to living wages, living incomes and fair trading practices. The adequacy of

implementation depends on firstly, the extent to which living wages and living incomes are accepted as fundamental to other human rights and as systemic issues within HRDD; secondly, the definition used for a living wage and living income; and thirdly, the prioritisation of living wages and living incomes as human rights risks and their location in the supply chain.

On living wages and living incomes we conclude that:

- Living wages and living incomes are fundamental to respecting internationally recognised human rights – either as rights themselves or as preconditions for other priority rights - and therefore need to be explicitly considered in HRDD.
- Existing laws and regulations are not sufficient to ensure living wages, living incomes in international supply chains.
- HRDD frameworks do not, at present, guarantee that insufficient wages or incomes will be covered and adequately addressed by such frameworks, especially when there is such as strong focus on prioritising salient and severe risks in HRDD. Access to living wages and incomes is seldomly considered salient and severe in company assessments. This will not change without a new approach to the way HRDD frameworks are designed and implemented. In particular, explicit reference to systemic issues, including living wages and living incomes throughout the supply chain is required in HRDD legislation and/or guidance.

HRDD legislation should include criminal liability or civil liability, and provide financial support for victims to claim redress.

1. Mandatory HRDD is essential at global, regional and national levels. EU wide regulation should be established covering all internationally recognized human rights and should also evolve to include environmental risks and damage.
2. Obligations to conduct substantive HRDD should require companies to set targets and to have transparent plans for measuring implementation and reporting on HRDD implementation and its effects
3. HRDD frameworks need to pursue compliance along the supply chain, including all of the affected workers, farmers and communities in the supply chain. DD guidance could potentially include reference to the importance of maintaining long term sourcing relationships with suppliers.
4. All HRDD instruments should explicitly address purchasing practices, recognizing that poor practices lead to human rights abuses.
5. HRDD should consider systemic risks such as land use change, food security, development priorities, and climate change – all of which are interconnected with human rights abuses.

6. HRDD instruments (and accompanying guidance) should explicitly address gender-related issues in a systematic manner. Gender issues should be mainstreamed within HRDD, including priority attention to gender-related issues in risk identification and responses, and in grievance and remedy systems.
7. Public authorities should have sufficient competencies and jurisdiction to implement and enforce HRDD. Non-corporate actors and stakeholders should have a specific role to provide independent compliance monitoring and evaluation of impacts.
8. HRDD legislation should include criminal liability or civil liability, shift the burden of proof on to companies rather than victims, and provide financial support for victims to claim redress.
9. Whilst the main target of the legislation should be multinational corporations, all businesses in the global supply chain should be considered for inclusion. Some tailoring is needed for SMEs, especially small farmer organisations, to avoid unintended impacts on smaller-sized suppliers.

Recommendations for implementation of HRDD regulation (by States and the EU)

To ensure effective implementation of mandatory regulation and related initiatives. HRDD should:

1. Cover all internationally recognised human rights, with clear guidance regarding how to assess salience and severity of risks.
2. Require the implementation of UNGP and the OECD due diligence standards as a minimum.
3. Oblige the transparent and full disclosure of HRDD processes and outputs (the EU legislation should define transparency).
4. Be enforceable by criminal and civil liability.
5. Contain clear obligations and accessible avenues for victim redress which are implementable extra-territorially.
6. Include tailored requirements for SMEs and producer organisations
7. Provide effective oversight of compliance (state-based, judicial and/or non-judicial), with clear mechanisms for stakeholder involvement.
8. Include sector specific guidance with particular guidance on high risk issues, and additional requirements for high risk sectors.
9. Engage producer governments to encourage hybrid, sector-wide binding agreements linked to DD.

10. Include donor funding for capacity-strengthening programmes for producer governments to encourage implementation, support to civil society (NGOs and trade unions, cooperatives) to use due diligence to hold companies to account, including provision of independent worker and farmer driven monitoring. Funding is also needed to raise consumer and public understanding of human rights issues in supply chains.
11. Support accompanying measures and instruments, such as public procurement, trade agreements and donor funding for capacity building.

Recommendations for implementation by companies

Companies should ensure that HRDD implementation:

1. Covers all internationally recognised human rights, with transparent and inclusive processes for judging priorities and salience.
2. Involves sufficient skills and resources to ensure compliance with the UNGP and relevant OECD due diligence standards as a minimum.
3. Explicitly includes and addresses the effects of company business practices, especially pricing and procurement. This should include consideration of how purchasing practices may obstruct suppliers' capacity to exercise HRDD.
4. Provides for the active participation of stakeholders, including workers, small farmers, communities, harvesters and artisans and their representatives in the design and implementation of all due diligence processes.
5. Provides special consideration for the interests of and participation of women and marginalized groups.
6. Requires disclosure of supply chain structures and transparency over trading practices.
7. Covers the entire supply chain and all human rights impacts directly linked to company operations, products or services by business relationships, including access to living wages and living incomes throughout the supply chain.
8. Considers the inter-linkages between sectors and different human rights and systemic issues in the supply chain (e.g. purchasing practices, environmental issues).
9. Includes adequate provision for, or cooperation in, the remediation of any adverse human rights caused or contributed to.
10. Involves full and transparent disclosure of all HRDD processes, outputs and impacts through periodic reporting.

Recommendations for measures to be taken by civil society and other actors

Sufficient financial and technical resources need to be made available to support:

1. The establishment of new collaborative civil society monitoring systems including the agricultural and garment sectors.
2. Engagement on the design and implementation of HRDD frameworks.
3. Independent research on the impacts of HRDD implementation – and how any adverse impacts can be mitigated - for workers and small farmers supply chains.

Support needs to be mobilised for engagement on:

4. Civil and criminal liability claims by those adversely affected
5. Adequate remediation procedures and funding.
6. Research and advocacy for the complementary action required to ensure a more equitable distribution of costs and benefits in global supply chains, such as corporate governance reform, inclusion of HR requirements in trade deals and public procurement, alternative economic systems etc.
7. Passing of supportive legislation and guidance, enforcement of regulation, and monitoring in producer countries.
8. Informing the definition of transparency by the EU in legislation.

Conclusion

Mandatory HRDD has great potential for tackling human rights abuses in global supply chains. However, there is some evidence to suggest that as currently designed and implemented HRDD may entail some risks for workers and small farmers, such as companies deciding to cut and run from situations perceived as higher risk, and of companies passing additional costs onto their suppliers. There is also a risk that current models of HRDD, while beneficial, will not be fully and properly implemented by companies, and so will not benefit workers and small farmers to the extent expected. For this reason, the design and oversight of HRDD instruments needs to be as strong as possible, and the EU has a great opportunity to do so. Greater recognition is also needed that, while effective HRDD is one piece of the puzzle, other measures will need to be considered which address the underlying causes of human rights abuses in global supply chains and to address the systemic issues, such as imbalances of power in supply chains and environmental damage. The latter is intimately interlinked with human rights. HRDD is part of a possible reform process for the global economy, but ultimately more far-reaching changes are needed, such as progress towards economies that are fairer, resilient, and regenerative. This would mean addressing power imbalances in supply chains, integrating externality costs, ensuring transparency, introducing governance measures for global value chains and highly volatile markets, and localising and regionalizing trade wherever possible.



1. Introduction

Picking tea in India | Photo: Giovanna Schmidt

Processes of economic globalisation have been accompanied by the growth of global value chains and production networks of increasing complexity. Production in contexts of weak legislation and enforcement, poor transparency, downward pressures on margins and corporate and consumer lack of information or inaction, is often associated with human rights violations in these value chains. This study explores the role of Human Rights Due Diligence (HRDD) as a mechanism for addressing this major global challenge, and the impacts of its implementation for workers and producers in developing countries, with a specific focus on agriculture and garment supply chains.

Due Diligence is a common process in business practice, enabling companies to meet legal obligations or for practical purposes, helping companies to identify key risks to their business. This mechanism has been taken up in legal frameworks and instruments specifically to address human rights issues in global and national supply chains, shifting Due Diligence from a process to identify material risks for the company to a mechanism to address the salient impact of corporate activities on people and the environment. The emergence of mandatory legal frameworks means that the design and implementation of HRDD processes is not just part of voluntary initiatives, but also now part of binding regulation in some jurisdictions. HRDD typically involves processes to identify, assess, prevent, mitigate, monitor, and remedy negative impacts on human rights in the supply chain, as well as embed responsible business conduct into company policies and management systems (See Box 1).

This study was commissioned by Brot für die Welt and the Fair Trade Advocacy Office. The study was commissioned in two parts. The first part aimed to assess how to ensure that HRDD frameworks impact positively on small farmers and workers in agricultural and textile supply chains. It had three specific objectives:

- i. To assess how the implementation of HRDD frameworks (whether legally binding or voluntary) by companies has affected / could affect the research’s target groups (See below), both in a positive and negative way with a special focus on unintended consequences for the research target groups.
- ii. To draw conclusions for the agricultural and textile sector and highlight potential unintended negative effects on the research target groups.
- iii. To identify recommendations to relevant stakeholders to design or improve HRDD frameworks and their implementation in order to address the identified potential risks and ensure a positive impact on the research target groups.

The second part of the study aimed to provide some insights on the legal aspects of HRDD frameworks with respect to living wages, living incomes and trading practices. The objectives were:

- i. To make recommendations on how to ensure that HRDD legislation leads to a real change in companies’ own buying practices, including the payment of a sustainable price to their suppliers, that enables them to comply with human rights.
- ii. To explore to what extent HRDD frameworks can be used as a tool to encourage companies to better contribute to living incomes and living wages, via the payment of a sustainable price to their suppliers.

This report is structured in four parts:

- ▶ Part I: How Human Rights Due Diligence can impact upon workers and smallholders, delves into the mechanism of due diligence and how it can lead to address human rights impacts. We chart the emergence of Human Rights Due Diligence or HRDD on advancing protection, respect and remedy with respect to human rights, followed by

a comparative analysis of the content of the different frameworks and instruments which have been passed into law, distilling the convergences and divergences. We then present a theory of change for human rights due diligence which unpacks the pathways to impact on workers and smallholders and which guides our analysis of the evidence. Finally, we explore the specific challenges of evaluating private sector responses to Human Rights Due Diligence and the state of the evidence base.

- ▶ **Part II: Evidence on the Impact of HRDD in global supply chains:** We assess how Human Rights Due Diligence is being implemented by companies in practice and how this affects corporate relations with their suppliers. We examine how implementation of HRDD by companies, to the extent that this is occurring, is affecting suppliers themselves. We then explore what HRDD means or may mean in the future for workers and producers at the base of the supply chain in terms of possible impacts and risks – the key purpose of the study.

- ▶ **Part III: Including living wages, living incomes and trading practices into HRDD: a legal analysis.** In this section we provide a legal analysis to better understand the opportunities and limits of HRDD frameworks in terms of promoting improvements in companies' trading practices and contributing to living incomes and living wages. In this section we briefly present the definitions and significance of living wages, living incomes and trading practices. Secondly, we detail the case for living wages and living incomes as human rights. The existing and developing legal context of living wages, living incomes and trading practices is then outlined. Finally, the specific challenges of addressing these issues through HRDD frameworks are discussed. Based on the analysis contained in this section we conclude that HRDD frameworks need to include explicit reference to living wages and living incomes if progress towards these human rights is to be ensured.
- ▶ **Part IV: Conclusions and Recommendations.** The conclusions emerging from the study are set out (Section 10) and recommendations made for key stakeholders (Section 11).



Picking cotton in Senegal | Photo: Stefan Lechner

2. Methodology

The methodology employs theory-based evaluation and is based on qualitative evidence from an analysis of current literature, stakeholder interviews, as well as validation of findings by stakeholders.

Based on the initial comparative analysis of the content of relevant frameworks and instruments and on the desk literature on the impacts of HRDD in supply chains, we developed a conceptual and analytical framework. This is the theory of change which sets out how key stakeholders anticipate that HRDD will make a difference in supply chains and the underlying assumptions. Evidence is then gathered and tested against this guiding framework to test these pathways to impact and associated assumptions:

- A set of stakeholder interviews were conducted: 21 with key informants, mostly drawn from civil society, law firms,

and academia, but not exclusively so, and focused upon the behaviour of businesses headquartered in Western Europe, and 1 in Democratic Republic of Congo (minerals supply chain). Interviews were also held in two empirical case studies – (See Box 1). Checklists were developed to guide these semi-structured interviews. See Annex 1 for the list of those interviewed (anonymized).

- A webinar was held in November 2019 to discuss the findings with 10 participants from European civil society organisations.
- The authors presented the initial findings of this study at a workshop organized by Fair Trade Advocacy Office and Brot für die Welt in Brussels, January 2020, with 40 participants, at which representatives from trade unions, non-governmental and industry associations attended¹

1. Fair Trade movement, trade union, ECCHR, ECCJ, different NGOs, two trade associations, the Latin America Fair Trade Network (CLAC), a think tank, and a donor (GIZ).

and discussed the findings and gave observations and insights based upon their own experience.

- Following the workshop, a wide range of individuals (approximately 15 individuals from trade unions, civil society) working in the field, were then invited to provide written and/or verbal inputs to strengthen the analysis. Finally, two mini-case study industries we conducted to provide new empirical insights from stakeholders in the Kenyan horticulture and Bangalore apparel sectors.

This report presents the findings of the combined analysis of the literature and interviews, using the theory of change as the guide to test the evidence and associated assumptions. There are some limitations to the study.

It is important to note that this research does not purport to be a comprehensive study of all the HRDD frameworks in existence or planned; of all evidence available on the impacts of HRDD frameworks; or of all the legal issues at play when implementing and monitoring HRDD frameworks. The limited time and resources available for this research necessarily meant that the coverage and analysis is inevitably partial. The hope is that this report encourages further discussion and research on this increasingly important topic, and provides recommendations for policy design, regulatory development and implementation and advocacy.

BOX 1

CASE STUDIES

Horticulture, Kenya: Horticulture accounts for 33% of the agricultural GDP and directly employs 6 million people, including large numbers of women and youth. It is the second biggest source of foreign exchange after tourism. Key export crops are flowers, vegetables and fruits. The EU accounts for over 80% of exports². 4 virtual interviews were held with industry stakeholders.

Garments, Bangalore, India: Bangalore is one of five major garment producing cities in India, producing 15% of exported garments by value. Textiles and garments account for 15% of India's merchandise exports and employs 10% of the workforce. A large proportion of the RMG (Ready-Made Garments) workers are first generation industrial workers, many of whom are internal migrants and women³. In the Bangalore garment industry case, 13 individual key informants were interviewed, and a focus group discussion held to explore HRDD.



3. How Human Rights Due Diligence can impact upon workers and smallholders

Coffee farming in Kenya | Photo: David Macharia

3.1 The Emergence of Human Rights Due Diligence

The context for the emergence of HR Due Diligence is the setting of expectations on states and business established through global normative frameworks.

According to the UN Guiding Principles on Business and Human Rights (UNGPR) the responsibility of business enterprises to respect human rights refers to 'internationally recognised human rights.' Internationally recognised human

rights are understood to be, as a minimum, those expressed in the UDHR and the main instruments through which it has been codified (the International Covenant on Economic, Social and Cultural Rights or ICESCR and the International Covenant on Civil Political Rights or ICCPR), and to the principles concerning fundamental rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work⁴. The OECD Guidelines for Multinational Enterprises use the same definition of internationally recognised human rights⁵.

2. PASGR and CABE. Creating Employment in Horticulture Sector in Kenya. Utafiti Sera Policy Brief 002. (2019)
 3. Fashion Focus. India Annex. The Circle (2017, p.111)
 4. UNGPR, 2011, para.12.
 5. OECD, 2011, p.32.

DD is widely used by companies, but in fact it is not fully defined and is process-oriented, rather than a performance-based standard.

Due Diligence (DD) is a way of confirming facts, data and representations in any commercial transaction, to discover the associated value, price and risks involved, including the risks of future litigation. In general, there is an increase in the number of regulatory systems, including legal DD obligations, as well as specifically in relation to human rights. However, Due Diligence is not fully defined, being essentially a process-oriented concept, which focuses on the assessment of risks to the company.

Human Rights Due Diligence (HRDD), which has emerged over the past twenty years, to encapsulate corporate processes to address salient risks to third parties, rather than material risks to the company.

It is now the most widely used standard in efforts to ameliorate business impacts on human rights. Human Rights Due Diligence definitions can be found in the United Nations

Guiding Principles on Business and Human Rights' (UNGPs) (2011) and the OECD Guidelines on Multinational Enterprises (2018), plus associated OECD Due Diligence Guidance for Responsible Business Conduct (2018). Definitions of Human Rights Due Diligence (HRDD) processes, according to these most important overarching frameworks, are set out in Box 2.

The UNGPs do not create new legal requirements; there are no provisions if there is a failure on the part of companies to comply.

The UNGPs mainly offer a normative contribution in setting standards expected by the international community both of corporate responsibilities and of State obligations. They have been quickly endorsed by many private and civic organisations, but their potential impact as a voluntary mechanism is widely debated.

The formality of the HRDD process varies with the scale of the company involved, the level of risk of severe Human Rights impacts occurring, and the nature and context of business operations, activities and relationships.

BOX 2

INSIGHTS FROM A KENYA HORTICULTURE PROJECT

The United Nations Guiding Principles (UNGPs) say that **corporate responsibility to respect** is (UNGP 15):

- have a human rights policy
- develop due diligence
- provide remedy

And **Human Rights Due Diligence** (UNGP 17) is:

The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) should cover adverse human rights impacts that business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relations.
- (b) will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.
- (c) should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

The OECD Guidance on Due Diligence is as follows:

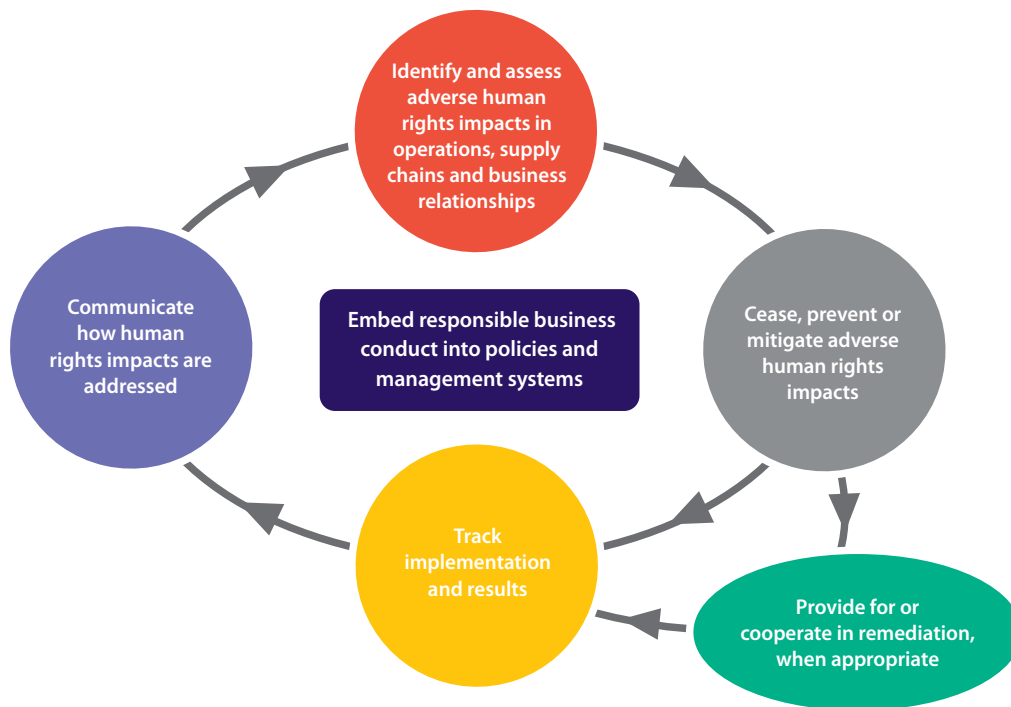
'Due diligence is the process enterprises should carry out to identify, prevent, mitigate and account for how they address these actual and potential adverse impacts in their own operations, their supply chain and other business relationships, as recommended in the OECD Guidelines for MNEs'.

The OECD Guidance finds that the key elements in HRDD are:

1. Embed responsible business conduct into policies and management systems.
2. Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services.
3. Cease, prevent and mitigate adverse impacts.
4. Track implementation and results.
5. Communicate how impacts are addressed.
6. Provide for or cooperate in remediation when appropriate.

There are six key steps to a DD process according to the OECD including risk mapping and mitigation, provision of remediation, monitoring, and communication (reporting and disclosure) and embedding responsible business conduct into policies and management systems.

Figure 1 summarizes these key elements. Current and planned HRDD regulations involve some or all these six measures. Some HRDD frameworks take a more limited approach.



Source: own work

Figure 1. Visualization of the OECD⁶ Human Rights Policy, Due Diligence, and Remedy

The background trend is for more companies to report on sustainability issues, including on social and human rights, and they are reporting more extensively.

This is in response to mandatory requirements, such as new rules from stock exchanges, but also includes voluntary responses to growing external civic and consumer pressure on companies, the availability of more guidelines and standards on how to report, a whole industry of consultants providing auditing and advisory services, and also internal recognition in some global companies of the need to develop more far-reaching responses to sustainability challenges, because of the threat to their business models. However, there remain major weaknesses in the quality (comprehensiveness, transparency comparability etc) of corporate non-financial reporting.

As a voluntary action, increased corporate reporting on human rights issues has been happening for some time, but now legislation is emerging in some jurisdictions which go further.

Specifically, on human rights, according to the UNGP, companies should be transparent about their DD procedures and how they have identified and acted upon Human Rights risks, including through formal public reporting. States should demand companies to report in this way. As a mandatory action, companies should respond to new regulations in many countries to implement social disclosure and non-financial reporting. The European Union in its Non-Financial Reporting Directive is one such requirement covering the entire European

Union. The reporting of steps taken to identify, prevent and mitigate human rights violations in the supply chain has now become central to the efforts to protect and respect human rights from corporate abuses. These legislative instruments are all based on the same core assumption: that corporate disclosure allows stakeholders to hold corporations to account and that they have the capacity to do so. In a few jurisdictions, there are now laws which go further than reporting rules, requiring companies to implement HRDD and become liable when they fail to prevent human rights abuses, such as the French Duty of Vigilance Law. A comparative analysis of different current and planned HRDD frameworks follows in the next section.

In international human rights law, states are obligated to protect individuals from the harmful acts of private persons, including corporations. New regulatory instruments and regulations have been passed to articulate these obligations.

This includes supporting companies to develop HRDD and establishing the appropriate measures, including regulatory frameworks, to regulate harmful business conduct. States have done this through passing of laws which impose human rights related obligations on companies. A series of national and international instruments and regulations have been instituted in recent years to further determine what HRDD means in specific sectors and what is demanded of companies to comply with their legal obligations and global, industry and national social expectations.

Beyond the overarching international legal and normative frameworks, there are a growing number of specific legal instruments mandating either reporting or imposing specific requirements to conduct DD on a single or multiple Human Rights issue(s).

However, this proliferation of regulatory instrument is not matched with research on the impact which they have on the ground and whether their implementation may have unintended consequences. This is what this report aims to do, highlighting elements which need to be considered and recommendations on policy and regulatory design and implementation to ensure the ultimate beneficiaries of these developments are workers, farmers, and their communities.

3.2 Comparative Analysis of Human Rights Due Diligence Frameworks

This section reviews HRDD frameworks, but also DD frameworks that are not focused solely on human rights, because the latter have a longer history and therefore can provide useful insights into issues relating to implementation and impacts (positive and negative, intended, and unintended). There are three broad types of DD frameworks:

1. Voluntary frameworks
2. Mandatory reporting instruments
3. Mandatory due diligence instruments

The concept and main elements of HRDD is established in the voluntary UNGPs and the OECD Guidelines on Multinational Enterprises and developed in detail in the OECD Guidance on Due Diligence for Responsible Business Conduct.

These documents establish HRDD as voluntary frameworks, outlining the corporate responsibility to exercise HRDD to identify, prevent, mitigate, and remedy impacts on human rights by corporate activities and relationships. We have referred to the UNGP and the OECD Guidelines for Multinational Enterprises as voluntary frameworks to distinguish them from normative instruments which establish binding obligations for corporations. They constitute the overarching frameworks, which set the normative expectations on what HRDD is and how to articulate it, but they do not establish legal requirements. Only national and regional instruments establish legal obligations for corporations to carry out some or all HRDD measures.

An increasing number of other international voluntary documents establishing frameworks for responsible business conduct exist.

These also demand the exercise of due diligence from corporations, but we will not focus specifically on them in this report. These include the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Voluntary Guidelines on Land Tenure, and the IFC Performance Standards.

Mandatory reporting instruments include the EU Non-Financial Reporting Directive, UK Modern Slavery Act, California Transparency in the Supply Chain Act, and the Australia Modern Slavery Act.

These frameworks prescribe *what* should be reported and *how*, including what HRDD measures companies take, but do not demand any further corporate action. These frameworks have been both lauded in responsible business circles, but also widely criticised for their limited scope and impact by civil society, because they do not formally require the implementation of a HRDD process, and in some of them reporting on DD is only a suggestion. The extent to which these normative initiatives have spurred corporate action is discussed in the following sections.

By contrast, mandatory HRDD instruments are more stringent and require substantive HRDD action from the company to assess, prevent and mitigate critical human rights risks and, in some cases, remedy actual harms, as well as requiring them to publicly report on their DD.

Examples of existing mandatory DD frameworks include the EU Conflict Minerals Regulation, the EU Timber Regulation, the French Duty of Vigilance Law, and the US Dodd-Frank Act. A Dutch Child Labour Due Diligence Law has also been approved but is not yet in force. Examples of possible future mandatory HRDD instruments include the Swiss Responsible Business Initiative (RBI) and a leaked German draft law on human rights and environmental DD in global value chains drafted by the Federal Ministry for Economic Cooperation and Development.⁷ Other mandatory HRDD regulations are under discussion nationally, and most importantly within the EU.

Existing and planned mandatory reporting and HRDD frameworks and instruments are not homogeneous, which has major implications for assessing their actual and likely impacts.

Significant differences exist (or may exist for possible HRDD frameworks) regarding the nature of the law; the obligations created, either to report on due diligence or to exercise due diligence, as established above; sectoral scope; human rights scope; corporate coverage; supply chain coverage; enforcement; legal liability and remediation. These are discussed in more detail below.

Major differences exist in the sectoral scope of the differing frameworks and instruments.

Some DD frameworks relate to specific sectors (e.g. conflict minerals or timber) and do not focus on specifically on human rights. The EU Timber regulation requires companies to identify whether the timber has been placed in the market illegally, but although illegal timber may be associated with human rights abuses, companies are not directly asked to assess the risk to human rights. Similarly, conflict minerals regulations require company DD regarding the origin of the minerals, to avoid

7. In February 2019 a German newspaper reported that the German Federal Ministry for Economic Cooperation and Development (BMZ) had drafted a law on mandatory human rights due diligence for German companies and their supply chains. The draft text dated 1 February 2019 lays out in detail the human rights responsibilities of German companies with regard to subsidiaries and contractors abroad as well as containing proposed changes to the Commercial Code, see <https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies> (accessed 24.04.2020).

its link to illegal armed groups, not whether their extraction and trade has involved human rights violations. However, in the case of conflict minerals, a very specific link is also made with violent abuses, including gender-based violence, in the context of armed conflict as part of the rationale for instituting these measures.



Picking tea in Vietnam | Photo: Didier Gentilhomme

There is variability in relation to the scope of human rights covered in different frameworks and instruments.

With respect to human rights scope, the Dutch law only covers child labour; the UK MSA and Australian MSA cover slavery, forced labour, child labour and human trafficking; the proposed Swiss and German laws cover human rights and the environment; and the French law covers all of these as well as health and safety. The EU non-financial reporting Directive requires companies to report on their measures regarding environmental protection; social responsibility and treatment of employees; respect for human rights; anti-corruption and bribery and diversity on company boards (in terms of age, gender, educational and professional background). In line with the UNGPs, most HRDD frameworks define human rights as ‘internationally recognised human rights’, which is understood as a minimum as those expressed in the International Bill of Human Rights (Universal Declaration of Human Rights and the International Covenants of Civil and Political Rights and Economic, Social and Cultural Rights), and the fundamental rights as set out in the ILO Declaration on Fundamental Principles and Rights at work. We shall return to these in the discussion on living wages and living income in Part III below.

Even if internationally recognised as a human right, not all human rights violations will necessarily be addressed in HRDD processes.

Both the UNGPs and the OECD Guidelines recognise that it may not always be possible to identify and respond to all adverse human rights impacts immediately. In these

circumstances, businesses are expected to prioritise adverse impacts according to the likely *severity* of impacts or salience. Salience in turn is judged by the *scale* (gravity), *scope* (number of individuals), and *irremediable character* (i.e. the extent to which any harms can be remediated or need to be remediated without delay⁸). Both the French law and the proposed Swiss law follow the risk-based approach outlined in the UNGPs and could exclude adverse impacts that are reasonably judged to be severe or appropriate. This opens the possibility of excluding certain adverse impacts – such as a failure to pay a living wage – that are not judged to be severe enough relative to other adverse impacts.

The corporate coverage of the mandatory instruments varies, but most are aimed at the largest companies registered in the jurisdiction.

The exceptions are the proposed Swiss law termed the Responsible Business Initiative (RBI), which may include SME’s in high-risk sectors, and the Dutch law which covers any company delivering products to Dutch end-users whether domiciled in the Netherlands or elsewhere.

Equally importantly, the extent to which the framework extends down the supply chain and require a company to assess and address their suppliers beyond Tier 1 varies.

The UNGPs envisaged DD as extending to ‘any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships’⁹). With respect to the latter, appropriate action will vary according to whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is ‘directly linked... by a business relationship’¹⁰ and the extent of its *leverage*. It follows from this that an obligation to prevent or mitigate an adverse impact could potentially be viewed as not necessarily extending down the entire supply chain if leverage is lacking and cannot be increased. In the case of apparel, for example, brands are directly linked to tier 1 factories, but are only indirectly linked to spinning factories and cotton farmers. Adverse human rights impacts occurring beyond tier 1 factories, might potentially, but incorrectly, be excluded from a HRDD obligation¹¹.

Mandatory HRDD instruments also differ in the extent to which enterprises linked to the parent company as subsidiaries, subcontractors or suppliers are covered.

The French law covers subsidiaries and subcontractors/suppliers with which there is an ‘established commercial relationship’. The Swiss proposals refer to ‘controlled companies and all business relationships.’ Whether this makes it narrower or wider than the French law depends on how ‘business relationships’ will be interpreted if the initiative is accepted¹². By contrast the Dutch child labour law explicitly covers the entire supply

8. Shift, Salient Human Rights Issues, <https://www.ungpreporting.org/resources/salient-human-rights-issues/>.

9. UNGP, 2011, p.19

10. UNGP, 2011, p.21.

11. The OECD Guidance is clear that ‘directly linked’ is not defined by direct contractual relationships. For example, an enterprise using a product like cotton involving child labour is directly linked to the adverse impact even if the product is sourced through intermediaries (OECD, 2018, p.71).

chain. Different initiatives have proposed methodologies to assess severity of risk. Unpacking the UNGPs concept of salient risk, Shift distinguishes between the social, environmental and economic impacts of business on people (wide-ranging), and the subset of potential human rights impacts and within that, a further smaller subset of salient human rights issues¹³. In Section 8 we will return to the effect that the different measurements of saliency may have on the scope of the rights included in HRDD and how limiting they can result to cover endemic issues in the supply chain and regarding trading practices.

Enforcement provisions vary. Not all the instruments that require Due Diligence impose penalties for non-compliance, neither do most of the ones which only demand reporting.

For example, the EU Conflict Minerals regulation does not impose such penalties, but it foresees the possibility after the regulation is revised from 2023. The instruments which do foresee consequences for non-compliance with the DD duty are the EU Timber regulation (which leaves it to states to decide on the appropriate penalties), the UK Modern Slavery Act (which only includes an injunction to compel reporting), the French Duty of Vigilance Law which establishes civil liability for the human rights impacts which are consequence of lack of DD, the Dutch Child Labour Law and the proposed German law (criminal sanctions). Criminal sanctions were removed from the French law by the Constitutional Court.

The extent and type of legal liability for the parent company that exists (or is created under new regulations) will be a key issue, but it is yet to be tested.

In principle, when instruments establish civil liability for companies failing to exercise HRDD, we can expect that courts would declare the parent company liable for damage caused by in-scope enterprises, unless they can prove that all due care was exercised or if the damage would have occurred anyway. However, except in the case of one of the Swiss RBI proposals (where the burden of proof for adequate DD will rest with the company), the burden of proof will be on the plaintiff. In the case of the French law, breach and causation are likely to be difficult to establish¹⁴, but as cases progress through courts the judiciary will have to address the obstacles victims face when attempting redress.

Provision for remediation within HRDD frameworks is closely related to enforcement and legal liability.

In voluntary frameworks, particularly those that focus narrowly on the DD process, remediation measures are often ignored. In the UNGPs, adverse impacts that are only linked to a company's operation (i.e. it has not 'caused' or 'contributed' to them) do not trigger a requirement that the enterprise itself should provide remediation, although they may choose to be involved.¹⁵ Remediation is also a grey area in some of the mandatory HRDD frameworks. For example, the Dutch child

labour law only requires that the company has done what can reasonably be expected to prevent child labour. The extent to which preventative action plans are required to include adequate remediation is yet to be defined.



Cocoa growing in Ivory Coast | Photo: Éric St-Pierre

3.3 A Theory of Change for Human Rights Due Diligence

Unpacking how any mechanism is anticipated to create change is helpful for understanding its effectiveness and impact on intended actors or institutions. In this section we set out a theory of change for Human Rights Due Diligence as a conceptual and analytical framework. This guides our analysis and can inform others seeking to understand HRDD and to promote the observance of human rights with respect to business impacts. (See Figure 2).

Overall, the theory of change anticipates that the new HRDD frameworks, laws and guidance lead to changes in corporate and supplier practice and eventually impact positively upon workers, producers, communities and environments. The deterrent effect is particularly important with mandatory DD which has associated civil or criminal liabilities.

The global context is one of widespread human rights violations in global supply chains coupled with weak national and international governance. Various overarching Human Rights and Due Diligence frameworks, plus instruments for specific reporting and Due Diligence requirements have been developed as a new mechanism intended to tackle harmful corporate practices. Normative frameworks set the standards for corporate practice. The binding frameworks require companies either to report on or to conduct Human Rights Due Diligence.

The setting of expectations and the binding requirements are anticipated to lead to changes in corporate policies, management systems and operations.

This means that companies must address the risks that their activities and commercial relations pose to the human rights of those in the supply chain, prevent and mitigate such risks and provide remedy for violations when they occur. Corporate

14. ECCJ, September 2019.

15. UNGP, 2011, pp.24-25

16. UN GP 16 establishes the elements of a Human Rights Policy. The OECD Guidance also elaborates on what a policy should look like.

responsibility to respect is established by UNGP 15: companies should develop an appropriate Human Rights Policy¹⁶, conduct due diligence, and establish processes to enable the remediation of adverse human rights impacts they cause or to which they contribute. As per the OECD Guidelines, HRDD key elements are: 1. Embed responsible business conduct into policies and management systems; 2. Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services; 3. Cease, prevent and mitigate adverse impacts; 4. Track implementation and results; 5. Communicate how impacts are addressed; 6. Provide for or cooperate in remediation when appropriate. (See Figure 2). It is important to note that, in terms of how companies communicate how they address human rights, there are evolving expectations and requirements on companies. Companies make changes in their policies and practices in their operations and business relationships with suppliers, subcontractors and subsidiaries in advance of new legislation (deterrent effect) or in response to legislation. These changes, in turn, lead to changes in the policies and practices of suppliers (e.g. in working conditions and labour rights).

Finally, the changes above have a positive impact for workers and smallholder farmers in the supply chain with respect to human rights.

The enjoyment of human rights happens in specific contexts and is affected by multiple factors. The impacts of commercial activities both as direct abuses of human rights and more widely in the context which enables the fulfilment of rights will be mediated by factors such as environmental degradation, access to land tenure and natural resources, presence of armed conflict and involvement of non-state actors, lack of implementation and enforcement of national laws and inspection regimes, widespread corruption, etc. There is a potential effect, whereby, HRDD leads to a broader societal shift in thinking by contributing to wider debates about reform of global supply chains and more transformative approaches.

At each stage of this theory of change there are assumptions, which need to hold true if the anticipated outcomes and impacts are to be realized. (See Table 1).

In summary, the assumptions are as follows:

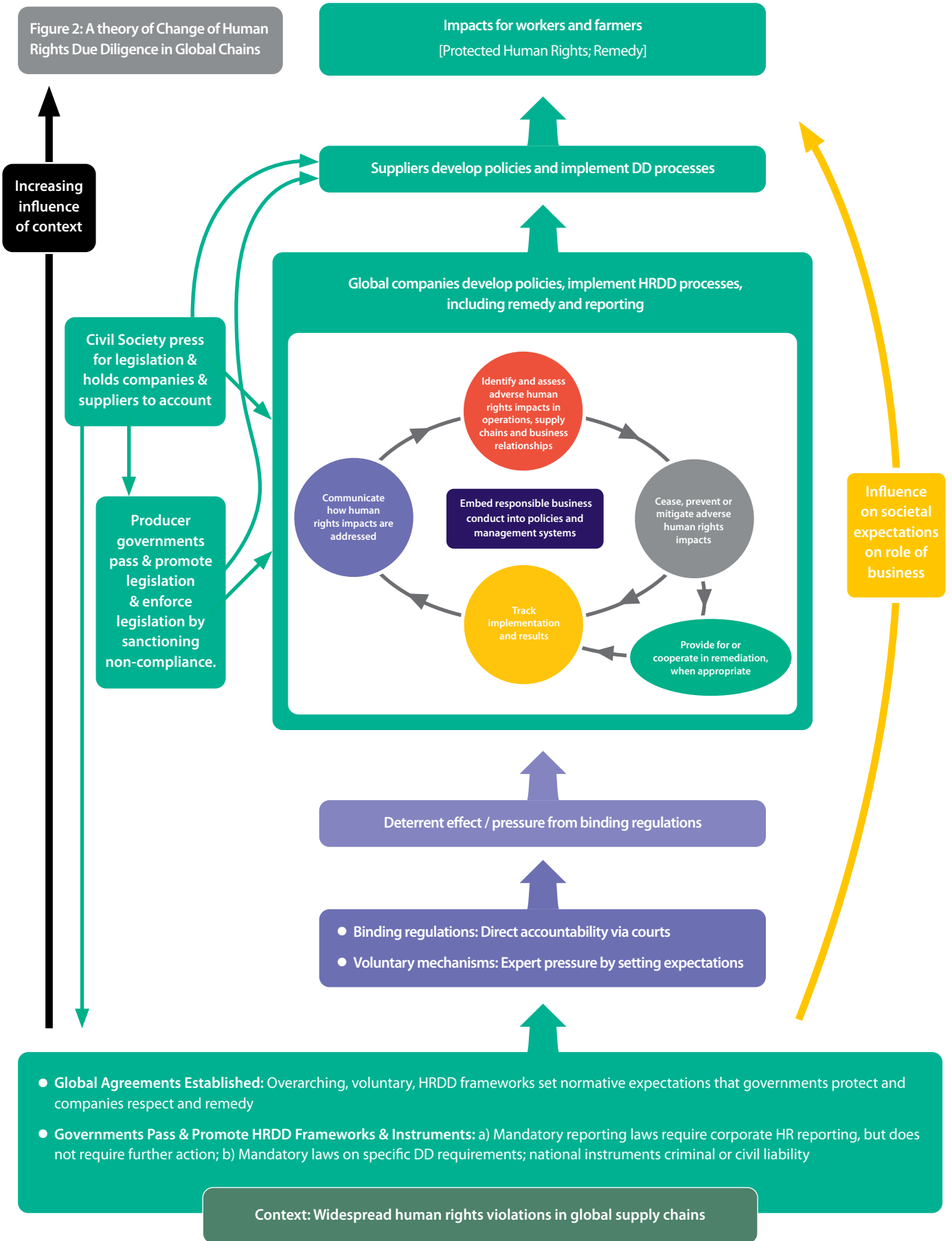
- The design of HRDD is effective:
 - Mandatory HRDD with specific obligations and consequences for non-compliance being clear and enforced.
 - Legal liability and the strength of sanctions creates an effective deterrent effect and brings redress (in a reasonable timescale) to communities.
 - The salience/risk prioritization process are not unduly selective.

- Companies must know their supply chains and understand the critical difference between material and salient risks¹⁷.
- Companies are willing and perceive adequate incentives to act upon the findings of any human rights risk assessment.
- Implementation
 - The quality of corporate response is also important. Are companies willing to fully and comprehensively comply with guiding frameworks and specific instruments in the spirit of, as well the letter of the law? A first step in this 'willing' implementation is conducting a prioritization process that takes account of all the relevant human rights risks and the context in which they are present. A key assumption is that companies will share the costs of HRDD with suppliers – because otherwise suppliers will bear additional costs and may not perceive enough incentives to make changes themselves – especially in the spirit of the HRDD.
 - The issue of national laws is also a critical assumption, in terms of the adequacy of the content of the laws and regulations, but also the capacity and extent of monitoring and compliance systems. A critical part of the theory of change is that home and host governments pass HRDD legislation and are willing and capable of enforcing it.
 - Adequate transparency is critically important: Will companies properly disclose relevant information in a way that can be easily analysed and compared? Further, civil society actors need to be able to use the disclosed information and have enough capacity to do so to hold companies to account.
 - Contextual factors have an increasing influence moving along theory of change – so the extent to which suppliers can address Human Rights issues will also be shaped by the country context with respect to Human Rights' protection and promotion as well as other systemic issues, such as environmental factors, commercial dynamics and governance of specific commodities and value chains. Governments need to have policy coherence – i.e. their policies, such as public procurement, export and import regimes, including credits and incentives, tax systems, and anti-corruption regimes should match the demands they place directly on companies.

This report assesses whether these assumptions hold true based on available evidence and the findings are reporting in part IV.

17. Essentially, material risks are those that affect a business. Salient risks relate to risks to peoples and environments affected by business activities.

Figure 2: Theory of Change for Human Rights Due Diligence



Source: own work

Table 1: Theory of Change Causal Steps and Assumptions

Rationale / Relevance of Design
Reform of global supply chains is possible via voluntary and / or mandatory measures.
Business models exist which eliminate Human Rights abuses and outcompete unsustainable ones.
Incorporation of smallholders into global value chains rather than territorial markets is inevitable / has preferable outcomes.
Assumptions for HRDD regulation to translate into enough pressure on companies
Consumer governments willing to pass + enforce effective DD / disclosure legislation (including adequate corporate coverage, effective sanctions, strong enforcement).
Producer governments willing and able to pass and enforce supportive national legislation.
Civil society have sufficient capacity and resources to hold companies to account for general action on HR and specifically on HRDD reporting or implementation.
Pre-condition of supply chain disclosure enabling assessment of corporate performance.
Consumers in extra-territorial and territorial markets are aware of, care about and purchase ethically and sustainably.
Citizens and social movements exert pressure on companies to produce ethical products meeting regulations. Independent trade unions enable workers to organize.
Assumptions for company HRDD commitments & policies to translate into sufficient pressure on and collaboration with suppliers
HRDD is fully, properly implemented, including addressing own purchasing practices. Not just a tick box exercise.
Salience / prioritization process does not exclude specific HR risks
Companies willing to invest in what is required in HRDD and actions (i.e. the business case is accepted) and cost-share with suppliers as required.
Companies willing to invest/engage in high risk contexts / suppliers, rather than to cut and run.
Civil society have sufficient information, capacity and resources to hold companies to account for their actions with suppliers and their business practices.
Consumer governments exhibit policy coherence, requiring DD in investment facilities and public procurement.
Assumptions for changes in supplier behaviour to translate into positive impacts for workers & small farmers
HRDD is fully, properly implemented down the supply chain. Not tick box exercise.
Suppliers able and willing to invest what is required and receive sufficient support/compensation from buyers for actions/ investments for (a) own workers, and (b) in lower tiers.
Suppliers willing to invest/engage in high risk contexts/worker categories/lower tier suppliers, rather than cut and run under pressure from buyers.
Lower tier suppliers (incl. small farmers) able and willing to invest what is required and receive sufficient support/compensation from the value chain for actions/investments.
Remedy systems are accessible to claimants.
Civil society have sufficient information, capacity and resources to hold companies and suppliers to account for their actions with workers, farmers and lower tier suppliers.
Suppliers do not pass on additional costs of HRDD compliance to workers (e.g. lower wages) and lower tier suppliers and farmers, without appropriate increases in prices to cover the costs.

3.4 Evaluation Challenges in Assessing the Evidence

There are some fundamental challenges in assessing the impact of HRDD frameworks and instruments, relating to other factors shaping corporate practice, the relatively newness of the instruments, and the lack of evidence moving along the theory of change.

Separating the impact of HRDD frameworks from other, ongoing pressures for more responsible supply chains, including human rights, is difficult. It is thus difficult to attribute change to the development and implementation of specific frameworks and instruments. It is difficult to establish linkages between HRDD and specific costs and benefits, because although costs can be assigned to related activities, it is not easy to assign specific benefits – many of the benefits work at an intermediary stage in corporate practices and systems, and can be multiple in nature themselves. These are then reinforced by other human rights or responsible business measures and so isolating specific impacts of an individual measure is likely to be challenging (see OECD, University of Colombia, 2016). Most of the HRDD instruments are relatively new, so the corporate response is very early and evolving. Most benchmarks and analyses rely on public corporate documents and statements, with very little attention to, or the ability to verify, what is happening on the ground. All the impact reports identified so far cover the changes to company policies and practices, not supply chain impacts, let alone specific impacts on workers and farmers. Equally important, much of the current analysis focuses on regulatory designs and their feasibility to be implemented, including reactions from companies and suppliers, rather than considering the potential impacts on workers and farmers or to measure them, still less providing any empirical evidence of the impacts on the ground. In general, there is a huge lack of evidence on effectiveness and impact.

3.5 State of the Current Evidence Base

Global supply chains are ever more complex. Their opacity allows for continuing human rights abuses and environmental harms.

The context in which Human Rights Due Diligence frameworks and instruments are being developed is marked by a growing complexity of global supply chains and an associated opaqueness which masks human rights abuses and environmental harms¹⁸.

Voluntary initiatives have been the main focus of attention over recent decades but have inherent, systemic constraints.

An analysis of responsible business initiatives in terms of the mechanisms employed and the evidence of their effectiveness and impact, focused upon an array of well-known initiatives

receiving donor support, recently concluded that, despite positive individual cases of corporate change (often qualitative success stories, rather than robust qualitative or quantitative evidence), there is a dearth of evidence to demonstrate positive effectiveness and impact at wider scales (e.g. company-wide, sector, industry) and wider trends suggest that voluntary measures alone are insufficient at best, and at worse, enabling abuses and environmental damage to continue¹⁹.



Apparel factory in Bangladesh | Photo: Maaik Hartog

Human rights abuses may be hidden from public view, but even when there are documented abuses in supply chains, a deficit in consumer awareness, concern and acceptance of moral responsibility occurs.

Consumers of goods produced in global supply chains often lack information and do not so easily relate to human rights issues on a personal level, compared with specific environmental ones with a personal dimension²⁰. Good intentions also are not matched in ethical purchasing practices, and a recent study suggests that some buyers actively avoid difficult information or focus on one ethical attribute and ignore others – with human rights issues often garnering less attention than other ethical and environmental issues²¹. Ultimately, however, the question is how far is it for consumers and citizens to act on all the ethical and moral challenges reported to them? Product labels can be confusing: it is challenging for individual consumers to make such complex judgements over the trade-offs in what to buy and this confusion is, arguably, part of the market economy approach.

Corporate awareness of, public commitments on human rights and HRDD are clearly increasing.

There is clear evidence that, in general, global companies have more awareness of human rights issues, although this does not necessarily mean that they have full understanding of their

18. Know The Chain - <https://knowthechain.org/the-issue/>; New, S. (2010) The transparent supply chain. Harvard Business Review. October 2010.

19. Nelson and Flint, (2019a and 2019b).

20. One recent study found that consumers may choose a product based on one ethical dimension e.g. organic production of foods, which then gives themselves a moral licence to ignore other ethical dimensions, such as documentation of poor working practices, an effect which companies can exploit (Engel and Szech, 2020).

21. Consumers often express concerns over the environmental and ethical conditions of production, but then demonstrate limited unwillingness to pay higher prices for them. Other market research indicates that some 'ethical' buyers can avoid information on ethical abuses so that they do not have to change their purchasing practices – a phenomenon known as 'implicatory denial' (Cohen, 2000).

own responsibilities towards human rights or commitment to implement HRDD effectively. Whilst awareness is increasing at large companies' level -according to the latest Corporate Human Rights Benchmark, the average score of the largest listed companies has increased from 18% in 2017 to 31% in 2019-²² it remains restricted. There is also an overall growth in attention to sustainability and responsible business practices in supply chain management by global companies²³.

HRDD reports focus largely on framework and instrument design; impacts, including who and how they will be measured, received limited attention. Empirical evidence is scant, despite some regulatory measures being of longer standing.

The DD frameworks and instruments are of varying ages, but some are relatively recent. Therefore a large evidence base is not to be expected, but nor does there appear to be specific discussion of how to generate the evidence (e.g. among governments, donors, companies or NGOs), yet knowing what works is crucial if the international community is aiming to replicate schemes or create new ones. We have not found literature and studies which specifically measure the empirical, actual impacts of HRDD as a mechanism especially analyses that are comprehensive in nature.

Available benchmarks and analytical meta-reviews of the Human Rights performance of groups of companies rely upon self-reported corporate disclosure and hence are unlikely to be a true reflection of the reality on the ground, i.e. actual impact, especially beyond individual companies to entire sectors and industries.

Available benchmarks have utility to pressure and reward companies, but also present partial evidence: while useful in shining a light on relative corporate performance based primarily on corporate reporting and for rewarding those that make proactive changes, as they are based only upon corporate self-reporting, rather than empirical evidence of actual practices in supply chains. They are therefore highly limited in nature. Meta-reviews tend to rely on self-reporting by companies: Such analyses consider the extent to which companies have developed a human rights policy and how they are approaching the Due Diligence process, especially the identification and prioritization of risks, are similarly based on the published information disclosed by companies. Examples include the assessments on corporate reporting based upon the French Duty of Law of Vigilance by the organisation Shift²⁴. There is very little evidence provided on the measures taken, monitoring systems and the remedy provided, which affect suppliers, workers, and farmers. There is a lack of independent, empirical, evidence, on individual companies or on entire supply chains and industries, to allow for a broader understanding of trajectories of change.

Company reporting shows that HRDD processes are currently inadequate.

There is clear evidence to suggest that current DD processes in response to specific reporting requirements are inadequate. For example, most companies are not demonstrating practices that meet UNGP requirements and are still acting reactively, rather than proactively. Almost half the companies scored zero against every HRDD indicator in the 2019 Corporate Human Rights Benchmark report²⁵. This indicates that the risks of human rights abuses to workers and communities are not being adequately assessed and managed – something that is consistent with the limited evidence available regarding the implementation of new national laws (KII; Shift, 2018; 2019; Foe, France, 2019). This is despite growing the awareness amongst and public commitments by companies (Nelson and Flint, 2019).

More stringent reporting, such as the UK Modern Slavery Act, or DD requirements, such as the French Duty of Law of Vigilance, have emerged, but evidence suggests patchy and partial corporate responses and a possible perverse effect of companies 'clamming up' for fear of drawing attention to serious Human Rights risks.

More recent instruments which require reporting and/or specific due diligence requirements are associated with limited evidence of impact on corporate practice. Early evidence from the UK Modern Slavery Act²⁶ and the even more demanding, but recently established, French Duty of Vigilance, also points to partial and patchy implementation²⁷. There is the possibility that some companies may be doing more than they are reporting, fearing the legal ramifications if they admit to having identified severe risks and are open about the measures taken (or not yet taken). It is also feasible that change is not happening and that the publicly shared information is an accurate representation of the real situation i.e. inadequate action.

In practice, there will be differences between companies, in terms of their size and the nature of their business in terms of their response.

Companies face differing levels of scrutiny depending upon the Human Rights related issues arising in their supply chains and the type of public scrutiny and pressure the sector is under, including different legal obligations to report or develop DD depending in size or volume of business. What is clear is that there remain substantial gaps between policy commitments and measures taken to assess and manage risks in the supply chain, and that the evidence available is very thin.

Impact will be critically dependent on full and correct identification of the Human Rights Risks, and not focusing on risks to business.

22. Corporate Human Rights Benchmark (2019) – 2019 Key Findings.

23. Nelson and Flint, (2019).24. Shift (2018; 2019).

25. CHRB (2019).

26. CORE (2016), CORE (2017), BHRRC (2018), Ergon (2018).

27. FoE, France (2019); Shift, (2018/19).

Analysis of the first year of corporate responses to the French Duty of Vigilance Law conclude that companies need to do a lot more on HRDD.²⁸ Companies continue to focus on risks to business, rather than risks to third parties and the environment, and their risk assessments are insufficiently proactive, do not prioritize the most severe risks or involve action on these, and instead focus on easier to address issues (ibid). Further, the reporting is far from consistent and clear as to the measures taken. In a review by the organisation Shift of the second year of the Duty of Law of Vigilance, 75% of companies (of the 25 they studied) still map risks from a business perspective, and as a result are likely to be overlooking key issues for Human Rights risk management and for which resources are required²⁹.

Very little of the literature reviewed provides insights into supplier perspectives on HRDD. There is insufficient empirical evidence on whether supply chain relations are being changed for the better.

A key issue for suppliers is how they will pay for the changes required of them by buyers. This is a repeat of the corporate codes of practice roll-out by global companies, who generally required suppliers to pay for the costs. How suppliers are faring in terms of absorbing the costs of compliance is under-reported. There is generally a lack of data that validates if trading practices of companies are changing and how or what difference this makes for workers and farmers. Some studies that look at the local level document continuing evidence of abuses but find it difficult to link to specific buyers and such studies are few in nature.

Following this review of what is known so far regarding the impact of the development and implementation of Human Rights Due Diligence frameworks and instruments and the specific changes to corporate practice and their effects on suppliers, workers and farmers, the next section presents our own findings.



4. Evidence of Human Rights Due Diligence supply chain impacts

Pepper growing in Kerala, India | Photo: Francois Guenet

4.1 Changes in Corporate Policy and Practice

This section presents the evidence available in the grey literature and obtained from our interviews, including those in Kenya and India.

Our review indicates that there is a gap in evidence, and the available evidence is disproportionately focused upon the changes by companies.

Most of the evidence available in the grey literature and from interviews is focused on this causal step in the theory of change i.e. on the changes by companies in response to DD frameworks and instruments. A majority of studies reviewed focus upon the extent to which companies are responding to the new Human Rights DD frameworks, reporting requirements or specific due diligence requirements. However, the evidence is quite limited and has only recently become focused on

specific new regulations (KIIIs³⁰; Comparative studies on the implementation of these instruments are also lacking so far.

Most companies are not demonstrating practices to meet the UNGPs requirements. However, pushed by the recent legislation, some companies have started to become more transparent and to integrate responsibility for human rights into corporate practice.

This indicates that risks of human rights abuses to workers and communities are not being adequately assessed and managed – something that is consistent with the limited evidence available regarding the implementation of new national laws. This is despite growing awareness amongst, and public commitments by, companies (KIIIs³¹). However, most are still very much focused on formulating policies rather than taking substantive action regarding assessment,

28. FoE, France, 2019.

29. Shift (2019)

30. Business and Human Rights Resource Centre, (2017); FOE France, (2019); Shift, (2018; 2019).

prevention, mitigation and remediation of human rights risks and violations (6). The literature regarding the French Duty of Vigilance Law and the UK Modern Slavery Act supports this conclusion, as discussed below. French companies are now legally obliged to exercise their vigilance and have an obligation to be transparent. However, there has only been a very limited period of implementation of these norms, especially the French Duty of Vigilance Law, and therefore is difficult to judge their impact beyond the initial reactions of companies.

Evidence suggests that mandatory HRDD legislation is needed to address human rights abuses in supply chains.

Prior to the new Duty of Vigilance Law in France, most companies were found to not meet the expectations of the UNGP and deemed unlikely to meet the requirements of the imminent legislation. Prior to the new law in France coming into force in 2017, the analysis of 20 largest French companies found that on average, despite more mature reporting and a general commitment to meet Human Rights, the companies analysed (as represented through their reporting) do not meet the expectations of the UNGP and may not meet the requirements of the Law³². Most companies do not provide information on all aspects of the responsibility to protect Human Rights, do not provide complete information or use unclear language, do not identify their salient risks as required by the law, and do not explain the challenges involved when trying to implement their responsibility to respect Human Rights. The two companies providing the strongest reporting, specifically address the company’s responsibility to address Human Rights, and provide concrete examples that demonstrate how the company manages Human Rights issues in practice, especially the most severe risks. There had been some improvement by 2019, according to Shift, but most disclosure continued to be on policy commitments.

There is limited evidence available on company policy and practice changes, as a result of specific HRDD disclosure and substantive requirements, because the legislation is relatively new, and implementation is still patchy. Most companies are reporting on the Due Diligence methods and not the results.

Regarding the French Duty of Vigilance law, one early consultancy report (2018)³³ paints a positive picture of companies beginning to act, with some implementing new practices, but the report finds that more action is needed especially on alert mechanisms. Overall, the companies need more time for implementation. However, more recent NGO

studies, particularly a Friends of the Earth study³⁴, find many weaknesses in the implementation in the first year and argue that companies and governments must do better. Further, the report finds that most companies whose French Duty of Vigilance law reporting was analysed, are just reporting on the DD methods, not the DD results³⁵. For example, the UK MSA has served as a catalyst for corporate awareness regarding abuses in supply chains and several companies have responded positively by developing policies and procedures to address risks. However, these are still very much at a superficial level, addressing mostly tier one suppliers and focusing on process rather than results of due diligence³⁶.



Growing organic jasmine rice in Thailand | Photo: Tobias Thiele

Although covering a small number of companies, an analysis of corporate response to the French Duty of Vigilance Law provides some insights, indicating continuing cause for concern and some areas of improvement.

By 2019, Shift found that in a reassessment of the 20 top companies listed on the CAC 40³⁷, beyond policy commitment reporting, governance reporting has improved somewhat

31. Business and Human Rights Resource Centre, (2017); FOE France, (2019); Shift, (2018; 2019).

32. Shift, (2018).

33. B&L and EDH (2018)

34. FoE, France et al (2019).

35. FoE, France et al (2019).

36. CORE (2017), Anti-Slavery International, UNICEF and Business and Human Rights Resource Centre, Modern Slavery Reporting: Weak and Notable Practice. Business and Human Rights Resource Centre (2017), FTSE 100 at the Starting Line. An analysis of company statements under the UK Modern Slavery Act. Ergon (2017) and 2018

37. Benchmark French stock market index.

with more than half now identifying whose responsibility it is within the company to address Human Rights risks. Improvements in governance correlate with improvements in reporting on either or both risk identification and actions. The most significant improvement had occurred in relation to reporting on risk identification, assessment and prioritization, but most companies are still providing weak reporting of risk mappings³⁸, with a lack of information shared on how identified issues and responses play out in the specific company's operations and supply chains and risk management systems, falling short of UNGPs and French Law. Importantly, reporting on how companies have addressed risks in practice lacks specifics, is not clearly linked to the risks identified in risk mapping and not illustrated by any concrete examples³⁹. In terms of how companies are monitoring their own effectiveness in managing salient Human Rights risks, the reported is one of the weakest areas, with a continued use of conventional indicators, such as numbers of audits and proportion of women in the workforce, rather than more specific indicators on Human Rights issues, such as slavery related indicators. The weakest area of reporting is on grievance mechanisms and remediation, although a slight improvement is noted⁴⁰. The French Duty of Vigilance law does not adequately specify how alert mechanisms should be made available to. An area in which reporting has worsened, is that on stakeholder engagement – few vigilance plans and implementation reports provide any detail of stakeholder engagement at all. Where it is provided, the information is vague and specifically, reporting on engagement with trade unions is provided elsewhere in corporate disclosures, not as an integral part of the vigilance plans. There may, therefore, be a kind of perverse effect occurring with respect to stakeholder engagement, meaning that it is given less attention rather than the intended improvement⁴¹.

The incentive for effective Human Rights Due Diligence is diminished by the fact that for companies supply chains are conveniently opaque.

Transparency and traceability in many supply chains is limited, and there are strong incentives to minimise costs, reputational and legal risks by not doing effective HRDD. Despite much rhetoric about radical transparency within responsible business circles, the comments from some interviewees suggest that there are strong incentives for companies not to dig too deeply into their supply chains: 'Nobody wants to open a can of worms.' and 'If you don't look – you don't worry about what you don't see' (KII). Given these incentives, and the context of the downward pressure in global supply chains as a

result of the competitive dynamics involved⁴², while there are actions by some leading companies, many global companies have responded to voluntary HRDD frameworks by taking a minimal, tick-box approach⁴³. Mandatory HRDD frameworks – particularly those with civil liability – may also encourage companies to do the bare legal minimum, and to publish as little as possible, i.e. there are potential perverse effects from the more rigorous legislation⁴⁴. In the main, according to a majority of interviews, HRDD exists more on paper than in practice; is more 'tick-box than meaningful'; conceals as much as it reveals; and falls well short of UNGP expectations.⁴⁵ Shift's (2019) recent analysis of 20 large French companies, points to some improvements in areas of reporting, but the poor reporting on actions and grievance systems, would also suggest that there is limited, systematic change in practice within companies to date.



Harvesting pineapples in Ghana | Photo: Nathalie Bertrams

38. 25% of companies reviewed now conduct their human rights risk mapping based on the severity of risks to people, which should be judged by their scale, scope, and remediable character.

39. Shift, (2019).

40. Half the companies reviewed describe a generic hotline available to employees only.

41. Shift, (2019).

42. Yeung and Cole, (2014).

43. France, FoE, (2019).

44. Interviews 1, 5, 12 and 16.

45. Interviews 5, 10, 12, 13 and 15.

Despite their limitations, voluntary and mandatory reporting frameworks have had some positive impacts on corporate policy and practice.

More human rights impact assessments (HRIA), and some improved practice, have resulted from frameworks such as the UNGP. In our interviews, several interviewees were able to describe real world examples of meaningful and positive actions, in response to HRIA and HRDD, but all said that this is not mainstream practice. Although weak, the UK Modern Slavery Act has 'galvanised HRDD' by some companies, even if not requiring it, and has contributed to some positive evolution in company awareness and practice. However, impacts vary by company size and sector, with larger consumer-facing companies doing more, and with more change in EU supply chains than internationally.

Overall, the available (limited) evidence strongly suggests that there are a very small number of lead companies demonstrating good HRDD practice, an increasing number doing something, and a large mass of companies doing very little. The type of value chains and business models shape incentives for companies to act.

According to KIIs, some companies are serious and have invested in effective Due Diligence, tried to address the root causes of Human Rights abuses, and have helped suppliers meet international standards. These tend to be leading international companies, especially those in consumer-facing or sensitive sectors (e.g. extractives), or those where investments in product and processing require long-term investments (e.g. beauty and personal care). The latter cannot 'cut and run' as some sectors can (e.g. apparel). Smaller companies without an international profile, and without internally motivated management, also face lower incentives to act⁴⁶. The home location of multinational companies also makes a difference. HRDD momentum tends to be lower in US-based companies (KIIs). Most are still in compliance and audit mode, reticent about being too transparent, and careful about what they publish because of legal concerns (KIIs). In general, EU and Australian companies tend to be more open (KIIs). Companies also focus more on the legislative frameworks that apply in their home locations or major markets. For example, the Californian Transparency in Supply Chains Act are more relevant for Mexican companies selling into the USA than is the UK MSA⁴⁷. Equally, all the impact on the Democratic Republic of Congo comes from companies' reaction to the US Dodd Frank Act⁴⁸. The EC 'Study on due diligence requirements through the supply chain'⁴⁹ finds that impacts of poorly designed mandatory DD may not be positive, e.g. if only imposed on certain geographical regions as the Dodd-Frank Act has been.

Corporate responses tend to be reactive rather than proactive and strategic, with a selective response to Human Rights issues.

Most companies are still reacting to adverse events or critical reports, rather than being proactive as required by HRDD (KIIs⁵⁰). There is a tendency to focus on, first, the most serious, high-profile, or topical issues only, and second, issues in immediate tier one suppliers. There is zero-tolerance of some Human Rights abuses, and more tolerance of others, depending on their location in the supply chain. Less visible or more difficult issues tend to be overlooked or partially addressed. For example, child labour is now a zero-tolerance issue in tier 1 suppliers. Child labour further down the supply chain is partly ignored and partly addressed. Human rights considered as less salient and/or more difficult to address – such as living wages – receive lower priority. While not unreasonable given the finite resources made available within companies to address human rights issues, a reactive and partial approach to HRDD is far from ideal⁵¹.

Investment by companies in addressing human rights problems, especially harder to tackle issues, in their supply chains is limited and insufficient and they also have capacity gaps. Realistically, some entrenched Human Rights problems have no simple fixes and will take decades to solve.

Due to a lack of will and/or funding, there is little engagement in harder-to-tackle Human Rights issues (child labour in lower tiers, living wages, migrant workers, etc.) (India and Kenya case studies; KIIs). Addressing challenging Human Rights issues such as these and associated systemic issues such as land tenure security and environmental protection, requires companies to invest in skilled people, long-term programmes, and monitoring. At minimum, companies need to invest in mitigation and remediation, not just in assessment and codes of conduct. But the implication of HRDD may be having to fundamentally rethink and revamp changing corporate business models entirely. But this costs money – at a time of intense competition from other, less scrutinised companies who are not making such investments. Realistically, some entrenched Human Rights problems have no simple fixes and will take decades to solve. HRDD will not, by itself, remove all adverse human rights impacts from supply chains. This will take time and money, and this is not a welcome message for companies. The predictable response is 'don't look too hard', 'do the minimum', and 'avoid responsibility'. In one case in Kenya, despite being part of a joint project with a supplier, a major and relatively progressive UK retailer did not see that they had any role or responsibility to discuss or address the issue of low wages paid by that supplier⁵².

46. Interviews 1, 5, 6, 11, 12, and 13.

47. Interviews 1, 8, 14 and 15.

48. Interview 19.

49. EC, (2020).

50. FoE France, (2019).

51. Interviews 1, 5, 9, 11 and 13.

52. Interviews 1, 4, 12, 15 and 16

Many important issues fundamental to delivering human rights continue to be overlooked; power imbalances in value chain relations impact upon suppliers' capacity to tackle Human Rights issues, but this issue is not addressed by HRDD.

Foremost amongst these are systemic business practices that contribute to adverse human rights impacts in supply chains, such as purchasing practices. Unless and until the implications of practices such as low prices, short-notice changes in volumes, designs and delivery schedules, and unfavourable payment terms, are explicitly covered by HRDD processes, many human and workers' rights issues will remain unaddressed. Best practice Human Rights Due Diligence requires companies to look at their own business practices, and the implications of these for human rights, not just at practices within their suppliers. We return to this issue in the next section⁵³.

Awareness of Human Rights tends to be greater at Headquarters than in local offices and indicates that more investment is required in capacity strengthening.

The level of Human Rights understanding, awareness and capacity to address in country offices varies and according to our interviews there is a drop off between headquarters and local offices (India case study).

To mainstream corporate action on HRDD will require an enabling environment, including a level playing. Currently, weak government leadership is a key challenge according to the UN Working Group on Business and Human Rights.

High income country governments are not demonstrating policy coherence and addressing their 'own roles as economic actors', for example with respect to public procurement policy.⁵⁴ There may also be risks associated with the use of overseas development aid funds to enable companies to comply with HRDD frameworks and regulations amongst the public in terms of the accountability of aid funding.

4.2 Impacts on Suppliers

There is very limited information available on the impact of HRDD frameworks on suppliers or empirical evidence that explores supplier perspectives.

Most of the focus is on global company practice, although this includes, to a limited extent, how they manage their relationships with suppliers. Therefore, there is implicit information, but not explicit analysis or concrete evidence⁵⁵. Very little can be found that explores changes from the perspective of suppliers or provides empirical evidence to verify that corporate practices have changed and in a meaningful way, with changes in their purchasing practices requiring and/or enabling suppliers to make necessary

changes. This indicates that critical assumptions in the theory of change may be at risk, and it is uncertain whether HRDD frameworks can be effective mechanisms, in the absence of meaningful home and host government action.



Sewing garments in a factory, Dhaka, Bangladesh | Photo: Maaïke Hartog

Many companies find it a challenge to map and act upon their complex supply chains, not least because it is expensive to do so and because of what such a mapping may reveal and imply. The implication for many industries would be far-reaching – potential requiring a thorough transformation in business models.

It is also important to recognize that although companies may be incentivized to do so, mapping supply chains can be expensive. But even more so – and the main issue – is that addressing all of the human rights issues in the supply chain, including more systemic and contextual issues, in the spirit of HRDD, is quite likely in many cases to significantly undermine the business model of company in question. The responsible business literature does not adequately address this issue⁵⁶.

There are cases of positive change, especially where civil society actors and donors work with companies to support the change process. However, there are scaling challenges to such approaches. Independent evaluation is also lacking.

An example is the work by Traidcraft with Kenyan horticulture companies, in which improvements have been achieved in company purchasing practices leading to benefits for smallholder farmers and the retailer, although the magnitude of the benefits is limited. (See Box 4). Other donor initiatives seek to operationalize due diligence normative frameworks and guidance on land tenure⁵⁷. Independent evaluation of such initiatives tends to be lacking and resources for scaling are uncertain.

53. Interviews 1, 5, and 13.

54. Methven O'Brien, C.M., and Martin Ortega, O. (2017). 'The SDGs, human rights and procurement: An urgent need for policy coherence', in UNOPs, Thematic Supplement to the 2016 Annual Statistical Report on United Nations Procurement: Procurement and the 2030 Agenda.

55. FoE France, 2019; Shift, (2018/19).

56. Nelson and Flint, (2019b).

57. <https://landportal.org/partners/legend>

BOX 3**INSIGHTS FROM A KENYA HORTICULTURE PROJECT**

Prior to the project, ordering patterns created challenges for supplier, smallholders, and workers, sometimes conflicting with the UK company's labour standards commitments. Short-notice changes in purchase orders sometimes led to the loss of payments to smallholders and forced overtime for packing house workers. The project improved communication through the supply chain, and increased order lead times. It benefited smallholder farmers (e.g. minimum volume and price guarantees), workers in packing houses (e.g. reduced unplanned overtime), and the UK retailer (e.g. improved quality and reliability of supply). Challenges remain. For example, workers' wages remain below a living wage level; rejected produce is not returned to smallholders; and the project did not address the conditions and financial security of the daily workers on smallholder farms⁵⁸.

The following sub-sections summarise the findings from the interviews in India (apparel) and Kenya (horticulture), as well as general interviews.

Overall knowledge among suppliers about HRDD frameworks is extremely limited.

To most suppliers, HRDD frameworks are largely invisible. All they notice are additions to audits and corporate codes of conduct; more elements added to 'zero-tolerance' lists; and pressure from buyers to attend training. Further, much of the human rights language is euro-centric, and there is limited understanding on human rights within factories (India apparel and Kenya horticulture case studies; KIIs).

There are gaps in training provision by buyers for suppliers on HRDD.

Some apparel brands do provide some training for their suppliers, but smaller companies have less access and there are limitations in the nature of the training provided. Training is provided by some apparel brands in Tamil Nadu, (India case study), but this is usually for large, tier 1 suppliers only. The training is provided in conference form to a limited number of managers from each factory; and focuses on a limited range of issues (e.g. modern slavery). Brands decide on the issues to be covered, which tend to be the topical issues (e.g. climate

change) (India case study). Suppliers are not fully consulted, and lower tier suppliers are generally overlooked. The same is true of buying agents, which many brands use to source their apparel. Human Rights capacity amongst agents is low, and no training is provided for them by brands⁵⁹.

There is some evidence of a more collaborative approach of global companies with their suppliers emerging, but this is not clearly attributable to HRDD. Some companies have moved beyond compliance to collaboration, and there are multi-stakeholder initiatives across industry clusters and sectors. But monitoring and continuous pressure remains key to improving standards.

A more collaborative approach of companies to suppliers is reported in some of the literature and in the case study sectors covered by this study. However, where there is more collaboration this is related to responsible business initiatives more widely, rather than specifically being related to HRDD. Many companies have moved away from a purely compliance-based approach, although continuous pressure and monitoring of suppliers is still seen as essential for maintaining and improving standards (Workshop participant). Although not part of a HRDD process as such, the Bangladesh ACCORD did lead to benefits for suppliers in terms of longer relationships and longer order books.⁶⁰ The recent EC study on DD⁶¹ finds that 'Results seem to suggest that both stakeholders and companies foresee mandatory due diligence as a legal duty of care to be more likely to have positive human rights impacts than any other mechanism.'⁶² At the same time, these benefits are dependent upon proper monitoring and enforcement: 'as long as robust risk assessment (based on those affected), transparency, monitoring and compliance systems are enforced, and if the mechanism is designed to avoid unintended consequences, such as through wide standardisation to avoid circumvention, rights-holders can expect opportunities for protection'⁶³ There are some big 'ifs' in this statement which require attention.

Most companies continue to depend on codes of conduct and audits, but these are widely seen as being ineffective.

While there is a growing understanding among companies that HRDD requires going beyond audits, most continue to rely on audits and codes of conduct for reassurance that adverse human rights impacts are not present in their supply chains. Suppliers are increasingly asked about Human Rights, and the UNGP are increasingly referenced in codes of conduct. To the extent that suppliers know about HRDD, most see it as just another type of audit.⁶⁴ Audits are widely seen by the majority of stakeholders as being ineffective, flawed, and cosmetic. Not much happens beyond them, and there is high

58. Traidcraft (2019) Adapting commercial practices and enhancing lives of smallholders and workers in Kenya.

59. Interviews 1, 2, 12 and 14.

60. Interviews 1, 9 and 16.

61. EC, (2020)

62. EC, (2020, p550).

63. EC, (2020, p525).

64. Interview 1 (Apparel case study).

degree of manipulation and ‘window-dressing’. Human Rights capacity and understanding among auditors is questionable; limited time is spent during audits with suppliers and workers; coverage of lower tiers in the supply chain is limited; and there is limited action except on extreme breaches. Most audits are largely ‘tick-box exercises.’ The partial picture that results from audits does nothing to reduce the opaqueness of supply chains.⁶⁵ One leading human rights investigator suggests that there is still a place for audits (workshop participation). Improved regulatory oversight of such auditing processes is needed to be effective though (workshop participant).

While enforcement of monitoring and compliance systems are seen as important, there is insufficient detail on how this should be achieved.



Weighing picked tea leaves in India | Photo Valerie Nelson

The recent EC report (EC, 2020, p258-259) suggests that mandatory due diligence regulations could be accompanied by judicial or non-judicial remedies for those affected by a company’s failure to exercise due diligence. An alternative is a state-based oversight body and sanctions for non-compliance, which are commonly known as administrative bodies. These could be established at EU and/or Member State level in Europe (either in existing departments or specially established bodies). Different enforcement measures and levers exist of varying potency, e.g. fines, appointment of monitors, withdrawal of licences or trade concessions, or even the dissolution of companies. Absent within this list of mechanisms is the remedy to the victim, but this could be incorporated within state-based oversight. In a comparative study of the UK Bribery Act (state-based oversight and sanctions for enforcement) and the UK Modern Slavery Act (reporting requirements only), the former, which also is linked

to criminal liabilities, is much more effective than the latter in driving corporate practice change⁶⁶.

Although there may be changes in corporate policies, new empirical evidence from the Bangalore apparel case study indicates a lack of will from most companies to engage proactively with human rights issues in their supply chains.

There is a perception among suppliers that protecting brand reputation is the major motivation. Corporate headquarters remain disconnected from the realities on the ground, and most headquarters staff have never visited their suppliers. Intentionally or unintentionally, brands do not go deep enough to properly understand the human rights issues in their supply chains or to properly listen to and respond to their suppliers. According to suppliers interviewed, they perceive that their buyers are happy with the illusion that their policies and practices are enough to address Human Rights abuses.

Poor implementation of HRDD is due to the complexity of supply chains are highly complex and the costs involved, which suggests that cost-sharing is critically important.

It would be very challenging, and arguably impractical, to extend HRDD to all levels and all products. A large UK superstore might have 40,000 product lines. Comprehensive and effective Human Rights Impact Assessment (HRIA) and wider HRDD processes can be done, but such assessments are costly and rare. Good HRDD requires physical meetings with all stakeholders, especially workers and communities. The resources for these processes are rarely made available⁶⁷. Cost sharing, incentives and investment from governments will be needed to mainstream and improve HRDD implementation. If mainstreaming were to be achieved, then the costs would reduce for all concerned.

Unchanged power relations between companies and suppliers mean that most costs fall on suppliers. There is a risk that larger suppliers may improve their standards and expand their market share at the expense of smaller farmer and smaller supplier organisations, amplifying trends towards market concentration.

Human Rights Due Diligence is likely to increase the pressure on suppliers, including the potential exclusion of smaller suppliers, such as Small and Medium Sized Enterprises (e.g. smallholder cooperatives), as the latter have less capacity to assume the increased cost of compliance proliferating standards and procedures. To the extent that HRDD frameworks lead to changes in supplier behaviour - for which there is only some evidence at present - it is the suppliers who are likely to carry the costs of mitigation. The UK MSA and the California Transparency in Supply Chains Act have increased the pressure on suppliers, and in most cases, it is suppliers, not the brands, who pay for audits and extra interventions. Buyers

65. Interviews 1 and 16.

66. LeBaron and Rühmkorf (2017).

67. Interviews 1, 5, 12, 14 and 16.

insist on codes of conduct, but the costs of complying with the codes are largely borne by suppliers. Suppliers are told to *'just make sure it happens'*. Additional compliance costs are not reflected in prices paid, which leads to strained relationships with buyers and, knock-on effects for workers and small farmer organisation suppliers⁶⁸.

BOX 4

APPAREL IN TAMIL NADU, INDIA

- Knowledge and awareness of HRDD is very limited amongst different stakeholders.
- There is considerable doubt about the will of companies to know, engage and invest.
- Supply chains are very complex, which makes HRDD challenging and potentially costly.
- There is little perception that much has changed on the ground beyond corporate policies.
- The greatest human rights risks exist in the national supply chain, and beyond Tier 1 international factories.

Source: R. Singh (2019) Commissioned Case Study on Bangalore Apparel and HRDD.

HRDD will not be effective unless it explicitly considers the effect of pricing (and other purchasing practices) on suppliers, but there are risks to including such requirements in HRDD legislation.

There are two reasons for this. First, low prices and unchanged purchasing practices (e.g. payment terms, short-term contracts) contribute to adverse Human Rights risks and impacts. Pricing pressure on suppliers gets pushed down to workers. Second, higher Human Rights standards mean increased costs, but buyers do not increase the prices paid to suppliers to allow for these higher standards. Just as with the introduction of corporate codes of practice and sustainability standards, suppliers are squeezed between low prices on the one hand and demands for higher standards on the other, with companies not sharing the burden. For as long as suppliers are still squeezed, the incentive to *'do as little as possible but still keep the contract'* will remain. The combination of insecure, short-term contract relationships and relentless price pressures reduces the incentive for suppliers to invest in long-term improvements⁶⁹. However, if trying to address such systemic challenges through modifications to HRDD

legislation, may mean that ultimately the legislation becomes ineffective and unimplementable (workshop participant).

HRDD does nothing to address the structural asymmetry in company-supplier power relations and may exacerbate cut and run tendencies unless the requirements can be mainstreamed.

Suppliers are almost always in the weaker position and know that they can and will be replaced by other companies if serious Human Rights abuses are found and reported. Value chain relations vary by company and there are also many cases of larger Asian apparel suppliers having more power than their buyers. However, most suppliers do not want to lose business to international buyers, and so are nervous about reporting Human Rights issues. Perversely, stricter codes and zero-tolerance approaches may encourage more false and non-reporting unless suppliers have more secure and trusting business relationship with buyers.

Mandatory HRDD also increases the risk of companies *'cutting and running'* when faced with problematic issues, suppliers or countries. This may be an easier, cheaper and less risky option for companies than staying, engaging, and investing in mitigation and remediation. Several of those interviewed viewed this as a real risk. However, one interviewee stated that sourcing decisions were primarily driven by tariff/cost considerations rather than by human rights issues. This might change as and when HRDD becomes more widespread and effective⁷⁰. The character of the commodity in question also shapes the extent to which companies can cut and run. For example, in the cocoa industry, the biophysical boundaries of the production area constrain companies from cutting and running. Similarly, natural products sourced for the cosmetic industry, involve longer-term relationships with buyers, because of the investment required in developing the supply chain. The geographical location of certain minerals, such as cassiterite, columbite-tantalite, wolframite or gold, shapes the extent to which companies can cut and run and how far they have to stay and invest. The recent EC report on due diligence report a case of cutting and running: 'Companies found it simpler to withdraw from the area rather than to justify business associations with conflict⁷¹. This sudden change caused the demand to drop by 90%, placing the economic burden on a vast population of civilians that depended on the income for their livelihood. According to the study, this has had negative impacts relating to the right to food, the right to education, and the right to health⁷². Such effects are less likely to occur if the due diligence requirements are imposed on a 'wider group of business operating globally⁷³.' In the apparel industry buyers are switching between countries in a race to the bottom, seeking lower prices and unionization

68. Interviews 1, 2, 3, 4, 9 and 11.

69. Interviews 1, 2, 3, 8, 9, 11 and 12.

70. Interviews 1, 3, 12, 14, 15 and 16.

71. EC (2020).

72. Owen, (2013).

73. EC, (2020, p525).

– the answer would be agreement on a regional living wage, but this would require regional governmental cooperation in trade negotiations and diplomacy (workshop participant).

The potential impacts of HRDD will vary with the type of supplier and their existing relationship with buyers (established or more precarious), as well as with the type of mandatory framework applied.

Most attention is on first tier suppliers with whom the company has a direct business relationship. Lower tier suppliers are often overlooked. In the case of apparel supply chains, spinning mills and cotton farms can be worse places for human rights abuses than clothing factories. Larger suppliers tend to be more aware of Human Rights issues, have more capacity, receive training and support from buyers, and are more able to bear the costs of compliance and mitigation. Implementing HRDD is far from a costless process. Smaller suppliers receive no Human Rights support and training, and they find it harder to meet the additional costs. The type of mandatory HRDD framework will also affect the type of supplier affected. For example, the French law on the Duty of Vigilance covers suppliers with whom the company maintains an *'established commercial relationship'*. This is likely to exclude suppliers that do not have a stable and regular relationship with the company⁷⁴. Establishing an authority within the importer country that could report cut and run practices is recommended (workshop participant).

Trends in global trade patterns are changing, and while HRDD may change practices in some international supply chains, many domestic and regional markets will likely be unaffected for the foreseeable future.

As already mentioned, almost all the Human Rights scrutiny to date has focused on the large, tier 1 suppliers to large, relatively progressive international companies. Mandatory HRDD frameworks also apply to a subset of larger companies. Coverage of all the suppliers to all the other companies, of lower tiers in the supply chain, and of suppliers to rapidly expanding domestic and regional markets are likely to be unaffected. Domestic and regional supply chains are likely to contain more Human Rights abuses than international supply chains⁷⁵. Note that there is growing South-South trade, which may be unaffected in the near term by HRDD frameworks and instruments. One interviewee noted that 'clean' suppliers will supply international brands in global supply chains, while others will remain in the local or regional economy.

There may be a risk of a backlash from developing country governments to perceived, imposed requirements on HRDD. There may be a risk that increasing stringency in regulations may lead to a backlash in lower income country governments in response, especially where vested interests in industries are closely tied with government officials (workshop participant).

The current response of the Bangladesh government with respect to the ACCORD and seeking to replace this with a national monitoring system, which will be weaker in enforcement is an example (workshop participant).

The validity and risks of using public funds to help companies to implement HRDD are uncertain.



Sewing garments | Photo: iStock - Greenaperture

4.3 Impacts on Workers and Smallholders

The evidence gap is most marked at this level.

There is very little literature providing comprehensive or concrete evidence of how changes in corporate practice are improving supplier practices and ensuring that human rights are respected, and remedy provided for victims. The literature that exists focuses on specific projects or sites and its assessment tends to vary according to who has developed the evaluation.

For example, in its 2018 article, Salcito and Wielga describe several positive outcomes of the impact of two human rights risk assessments (HRIA) which they (through their organisation NomoGaia) undertook pertaining to two projects in Myanmar and Liberia, respectively. According to the authors the human rights risks were addressed as part of the assessment and whilst problems remained, workers and affected communities saw their conditions improve. Electronics Watch has also monitored several factories producing components of consumer electronics for Western brands, and whilst not specifically assessing the impact of due diligence practices, it has documented the changes in suppliers' practices after violations are made public and brands engage with suppliers to address specific violations, including forced student labour, discrimination against migrant workers and exposure to chemicals⁷⁶.

⁷⁴. Interviews 1, 2, 3, and 12.

⁷⁵. Interview 1 (Apparel case study)

⁷⁶. Electronics Watch has made public some of the positive impacts which its monitoring activities and engagement with brands and factories have resulted on. These include improving working conditions of migrant workers in Central Europe, ending forced student labour in a server factory in Southern China and compensating migrant workers in Thailand and reducing risks of debt bondage, see http://electronicswatch.org/en/stories-of-change_2548113

Most of the studies conclude that companies are not yet doing enough to address the risks to workers and farmers to bring a change to their working conditions.

One recent empirical study finds continuing HR abuses in supermarket supply chains⁷⁷. Another report that does include empirical research at the local level and along the supply chain, finds continuing human rights abuses in seafood supply chains originating in SouthEast Asia – despite supermarket commitments to act and their responsibilities under the UNGP⁷⁸. This underlines the continued existence of Human Rights violations in global supply chains, and the limited progress made under the voluntary and mandatory reporting frameworks to date. The EC due diligence study reported ‘well-documented human rights and environmental harms related to business operations’, and ‘the lack of implementation of due diligence by companies despite existing voluntary and legally binding transparency and reporting requirements’⁷⁹.

Limited evidence exists on how companies are engaging with workers and worker representatives in HRDD processes.

Whilst there is an increasing body of academic and grey literature exploring the benefits of including stakeholders in HRDD, in particular workers and worker representatives, in the design, implementation and monitoring of human rights due diligence policies and practices, the evidence regarding the engagement of companies with these third parties is very limited.

Most of the work has focused on discrete instruments which include workers in their governing and monitoring bodies such as the Bangladesh Accord and the Indonesia Agreement. Several interviewees stated that companies can do much more in this regard. Oxfam, for example, has been developing an approach to Human Rights Impact Assessment that is led by communities (community-based HRIA), alongside studies commissioned by companies in order to provide a better balance to the assessment of risks. There is currently insufficient stakeholder engagement in HRDD processes, particularly workers and smallholder farmers. A recent report from Shift, which analysed the second year of implementation of the French Duty of Law of Vigilance (2019) found that stakeholder engagement performance for the 20 companies assessed had declined, because it allows companies to treat it as a formality⁸⁰.

If the literature and information on the impacts of HRDD on suppliers is limited, that for the impact on workers, farmers and communities is virtually non-existent.

This is partly because HRDD frameworks – and particularly mandatory frameworks – are relatively recent; partly because most of the assessments of change have focused on corporate

policy change and to a lesser extent corporate practices, with virtually none at supplier level and beyond. Unintended impacts are not being measured at all at the local level. In the case of suppliers, it is difficult to distinguish the impact of HRDD frameworks *per se* from other pressures for improvement⁸¹.

There are specific challenges in the agriculture sector, which has implications for how due diligence is operationalized.

Key challenges in agriculture can be identified with respect to workers and smallholder farmers (International NGO written input): Market concentration (domination of food supply chains, especially commodities traded on international markets), non-application of domestic labour laws in farming, prevalence of informality in the agricultural sector, and weak unionisation in the global South.

The gender dimensions of agriculture and social relations mean that gender-responsive HRDD design and implementation is needed.

Women are disproportionately represented in the informal sector and have a high participation in agricultural production in a context of policies which are not sufficiently gender sensitive. The impacts of business are gendered, because of pre-existing social norms and patriarchal relations, which also make accessing redress more difficult for women who face additional barriers. The OECD (2018)⁸² states that ‘*business should recognize the ‘different risks that may be faced by women and men’ and ‘be aware of gender issues and women’s human rights in situations where women may be disproportionately impacted’*. Drawing upon evidence from work in global supply chains and communities, ActionAid (March 2020, p14-



Coffee farming in Uganda | Photo: Oliver Scheel

77. Oxfam International (2019) – Workers’ rights in supermarket supply chains

78. Oxfam and the Sustainable Seafood Alliance (2018)

79. EC, (2020, pp. 214-218)

80. Shift (2019).

81. Interview 3.

82. OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p.27

15⁸³), argue that companies and governments can do more to advance gender equality through their accountability processes.

- States should incorporate a gender analysis in National Action Plans on Business and Human Rights, integrate a gender perspective in the drafting and negotiations for the UN binding treaty on business and human rights, include strong human rights safeguards and a requirement for gender-responsive impact assessments, and ratify ILO Convention No. 190 on Violence and Harassment. ActionAid (ibid, p15) state that gender-responsive due diligence means: *'Integrating a gender lens to due diligence means putting the concerns of rightsholders at the centre, recognising that they are not a homogenous group. Because of intersecting and multiple forms of discrimination, different women may be affected differently by business activities depending on their age, caste, class, ethnicity, religion, language, literacy, access to economic resources, marital status, sexual orientation, gender identity, disability, geographical location or migration, indigenous or minority status, and other forms of identity'*.
- Companies should: conduct gender-sensitive risk and impact assessments, through meaningful consultations, take a range of gender-responsive measures to prevent and mitigate impacts, assess the risk of sexual harassment and gender based violence in their supply chains, communicate adequate and easily accessible information, track the effectiveness of their responses by using sex-disaggregated data, ensure remedies are effective, timely and gender-transformative, assess the risks posed to women's human rights through their tax strategies and structures, ensure that suppliers have the financial capacity to comply with human rights and gender equality standards, go beyond a 'do no harm' approach and encourage gender transformative measures.

If implemented according to the spirit of the legislation and with appropriate enforcement, HRDD should have positive impacts for workers, farmers, and communities. However, there are risks of partial and poor implementation, leading to mixed impacts. There are significant risks to workers and small farmers, because of the disadvantaged position of small farmer and worker organisations and marginal groups of workers and smallholders which should be taken into consideration.

HR outcomes are likely to be variable and company/context specific. One interviewee expressed the view that HRDD frameworks have only had positive impacts. They have encouraged transparency and the responsibility to exercise

leverage. They have definitely helped to promote labour rights in supplier countries⁸⁴. The experience of one project in Kenya also shows that it is possible to make some progress in terms of rebalancing power relations in the supply chain, and improving conditions for workers and farmers, although this takes time, commitment and resources⁸⁵.

Displacement of human rights abuses is a potential result of HRDD.

In the DRC, the conflict minerals regulation had brought significant improvements to conditions in several mines, due to their demilitarisation. However, our interviews showed that there is evidence that illegal armed groups have moved to the exploitation of other sectors, particularly the agricultural one, which is less exposed to international attention and is more localised. This has moved the risks to human rights from one economic sector to another without necessarily addressing them and providing remedy for current harms. The EC Study on Due Diligence Requirements through the Supply Chain finds in a survey of company and other stakeholders that 'very few respondents (0-2%) expect a negative rather than a positive or neutral human rights impact'⁸⁶. However, the impacts of poorly designed and implemented mandatory DD may not be positive, and positive social and HR impacts are conditional on proper monitoring and enforcement⁸⁷.

Insights from the garment case study in India – is that HRDD has changed little on the ground and is likely to change little on the ground unless it improves in several respects, especially as regards purchasing practices.

The policies of apparel brands and suppliers have changed more than the practices. It is not clear to workers how HRDD will improve their lives. Low pay remains a major issue: 'money is what is missing'⁸⁸. There are several possible explanations for the neutral impact observed. As already mentioned, it could be that the positive impacts of HRDD are indistinguishable from other factors and trends, and/or that HRDD has yet to be properly implemented. Specifically, HRDD to date has not considered or addressed the effects of pricing and other purchasing practices, or to include enough investment for stakeholder engagement, mitigation, and remediation.

HRDD could potentially have unintended negative impacts for workers and farmers in some circumstances, but evidence is thin.

There is little hard evidence for unintended, negative impacts or HRDD has been identified by this study, mainly because HRDD is not yet fully being implemented and because where companies do act, it is not necessarily clear how far all human rights risks have been addressed due to the lack of independent evidence.

83. ActionAid (2020) 'We mean business: Protecting women's rights in global supply chains.'

84. Interview 8.

85. Interview 16.

86. EC, (2020, p527).

87. EC, (2020, p 550).

88. Interview 1 (India case study).

The current reality is that suppliers are squeezed by low pricing and unpredictable supply schedules.

The case studies in both India (apparel) and Kenya (horticulture) suggest that these pressures can be passed down to the poorest and least powerful part of the supply chain: workers and small farmers. In one Kenyan case, small farmers were not paid for vegetables that they had supplied, and packers were forced to work overtime to meet last minute orders⁸⁹. If HRDD leads to increased costs for suppliers, but not to increased prices to cover those costs, there is a risk that workers and farmers will be further disadvantaged. Small suppliers and small farmers are least able to meet the costs of compliance.

If perceived Human Rights risks, or the costs of mitigation or remediation, lead some companies or suppliers to relocate or reduce production, then unemployment and lower incomes could result.

In one mining case in the DRC where companies rapidly withdrew with major negative consequences for the local population and their livelihoods⁹⁰.



Cocoa farming in Ghana | Photo: Kate Fishpool

Unpalatable as it may be, HRDD could lead to difficult trade-offs between employment and human rights, unless appropriate protective provisions are included in DD legislation with respect to the weakest suppliers and the impacts on vulnerable groups.

Some companies have management systems in place ensuring that there is investment after risk analysis, but to ensure that actions do follow risk assessment, more detailed guidance is urgently needed in an Implementation Act on the nature of the actions required. The most marginal and vulnerable groups - small farmers, women, migrants, informal workers – may be the most affected by a consolidation and formalisation of supply chains.

Stakeholder participation in DD processes is insufficient, although it is supposed to be part of every step of the DD process and is critical to its success.

More guidance is needed to establish what is good quality stakeholder participation in DD in general and through the development of specific sector requirements. The identification of stakeholders is conducted by business and as such is framed in a corporate management manner, but often this misses vulnerable groups and also views the latter as passive victims rather than as rights holders with agency (workshop participants). The lack of information and public participation in decision-making on environmental matters is already recognized as a contributor to human rights abuses: The Aarhus Convention⁹¹ recognizes this and empowers people with rights to access to information, participation in decision-making on environmental matters and to seek justice, but more implementation is needed (workshop participant).

Current legislation does not set obligations for results, but this is where the burden should lie, not only on developing good plans.

Currently, even the most far-reaching mandatory DD requirements in place, i.e. the French Duty of Law of Vigilance, do not set obligations for results. Other participants noted that the existence of a DD plan can ‘disperse liabilities, but if there is not a sufficiently good [vigilance] plan, then specific corporate leaders can be held legally to account’ (workshop participant). Concerns exist that NGOs may invest a lot in pressuring for and collaborating on relevant DD processes, and a good plan is developed, but there will be insufficient action and results (workshop). So, the burden should be on the company to prove that it has a sufficiently good plan and has taken appropriate action with good results. A major challenge exists with this proposed approach, however, if there are situations, as in the apparel sector, where one company may be just one buyer among twenty others, who are purchasing from the same supplier, and in such contexts it is not possible to hold the one buyer responsible for what the other nineteen companies have done.

89. EC (2020, p525).

90. Owen (2013)

91. The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – the Aarhus Convention – was signed on 25 June 1998 in the Danish city of Aarhus. It entered into force on 30 October 2001. As of March 2014, it has 47 parties—46 states and the European Union.

There are capacity issues for NGOs and trade unions in terms of holding companies to account with respect to the nature of transparency and disclosure by companies.

NGOs and trade unions have limited capacity: If companies disclose large volumes of information which is not easily

comparable or accessible, then NGOs will not have sufficient capacity to analyse and use it. Under the Duty of Care in the Netherlands, companies have to upload their plans to a database, and a similar system could be used in relation to all DD plans (workshop participant).

BOX 2

HRDD PERSPECTIVE FROM THE LATIN AMERICAN AND CARIBBEAN NETWORK OF FAIRTRADE SMALL PRODUCERS AND WORKERS

Key issues identified by Coordinadora Latinoamericana y del Caribe de Pequeños (as) Productores(as) y Trabajadores(as) de Comercio Justo (CLAC) Small Producer Organisation Leader.

- Most producer organisations have a very limited understanding of what is HRDD.
- Producer organizations operate in the context of lack of fulfilment of many other human rights. And that makes difficult to comply with those HR included in HRDD.
- There are certain social norms, and labour practices that have different perceptions in Latin America. The Zero Tolerance approach to child labour does not necessarily work in Latin America. Even if we embedded child labour in the due diligence schemes, we have to expect buffer times and moderate the immediate expectations.
- Agricultural production takes place mainly in the informal sector, which makes HRDD more difficult to implement. Key question: how could HRDD be applied in the informal sector?
- External capacity and expertise are needed for small producer organizations to comply.
- Importance of addressing the fundamental causes behind HRDD non-compliance.
- Risk: only the bigger and better placed companies might be able to respond to the requirements, while the smallest ones would not be able to.

It is important to understand that inter-related risks and systemic conditions which increase vulnerability to harm are not addressed by HRDD frameworks.

Human rights abuses in the supply chain do not happen in a vacuum. Human rights violations are facilitated by context specific circumstances - such as poor infrastructure, an absence of national regulation, or lack of implementation, monitoring and evaluation, and corruption - as well as more systemic deficiencies. In terms of the latter, systemic or root

cause issues, these are closely interconnected with human rights. For example, extreme poverty, a lack of access to secure land tenure, environmental degradation impacts, and business models which rely on purchasing practices that transfer risks from buyers to suppliers and on to workers and farmers, perpetuate insecurity at the lower tiers of the supply chain and widen profit margins at the higher tiers. HRDD frameworks do not adequately take these systemic issues into account and may therefore be missing a key part of the picture.



5. Including living wages and living incomes within Human Rights Due Diligence Frameworks – A legal analysis

Garment factory | Photo: Anand Parmar

As part of the work on HRDD frameworks, a legal analysis is set out to enable a better understanding of the opportunities and limits of HRDD frameworks in terms of promoting improvements in companies' trading practices and contributing to living incomes and living wages. In this section we briefly present the definitions and significance of living wages, living incomes and trading practices. Secondly, we detail the case for living wages and living incomes as human rights. The existing and developing legal context of living wages, living incomes and trading practices is then outlined. Finally, the specific challenges of addressing these issues through HRDD frameworks are discussed. Based on the analysis contained in this section we conclude that HRDD frameworks need to include explicit reference to living wages and living incomes if progress towards these rights is to be ensured.

5.1 Living wages, living incomes and trading practices: definitions and significance

Whilst living wages and living incomes are different concepts, they refer to the same basic aim: to receive sufficient remuneration from work to live a decent and dignified life.

Most of the literature and practice tends to distinguish between living wages and living income according to whether the income is received as salary, dependent on an employment relationship, or generated independently. Living wages relate to employees and workers (including farm workers) whilst living income tends to be used to refer to what independent people earn through the sale of their products or services. Both sectors covered by this study have wage workers and independent workers. There are self-employed workers in the textile industry due to the prevalence of informality in the sector in certain countries, who do not receive a regular wage.

These include homeworkers, which are prevalently women, whose work is irregular and insecure, with no social security and no health and safety protection⁹². In the agricultural sector the workforce is constituted of both farm workers who receive salaries and farmers who independently generate income. In this sector the community of practice tends to refer to living income for farmers and small holders. Being paid less than a living wage in exchange of work or receiving less than a living income for their garments, crops and animals is not simply a 'risk' for most workers and smallholder farmers. It is, in fact, a certainty for the vast majority of workers and farmers in international garment and agricultural supply chains, as most do not earn either a living wage or a living income⁹³.

There are no internationally recognised definitions for a living wage or a living income.

While this has been and is used as an excuse for inaction by some, we argue that the lack of internationally established definition does not remove the need for HRDD frameworks to address the gap between prevailing remuneration and any reasonable estimation of a wage or income which guarantees a dignified life, as will be explained below.

Terminology and definitions are not always used consistently in the literature and practice, and they overlap with other concepts which are advocated at international level. Calls to establish a basic income have proliferated in recent years⁹⁴. For example, the UN Special Representative for Extreme Poverty and Human Rights has called for a *full basic income*⁹⁵ and several governments are exploring the idea of establishing such basic income (referred to for example as a *minimum vital income*)⁹⁶.

In the context of the garment and agricultural sectors a large community of practice exists which has worked to try to

93. See for example, Clean Clothes Campaign, <https://cleanclothes.org/living-wages> and The Living Income Community of Practice, <https://www.living-income.com/>.

93. See for example, Clean Clothes Campaign, <https://cleanclothes.org/living-wages> and The Living Income Community of Practice, <https://www.living-income.com/>.

94. Standing (2019).

95. Special Representative on Human Rights and Extreme Poverty, Report, 22 March 2017, A/HRC/35/26, p. 6.

96. In April 2020, the Spanish government announced that a "minimum vital income" will be approved in May to which nearly 100,000 vulnerable single-parent households would have access to, as a permanent measure. See El País (2020).

establish and calculate what workers and farmers and their families need to earn to have such dignified life for many years. The specific definitions on living wages and living incomes which we rely in their work, in particular the definitions which serve the basis of this study are outlined in Box 6.

BOX 6

DEFINITIONS OF A LIVING WAGE AND A LIVING INCOME

Living wage: *The remuneration received for a standard workweek by a worker in a particular place sufficient to afford a decent standard of living for the worker and her or his family. Elements of a decent standard of living include food, water, housing, education, health care, transportation, clothing, and other essential needs including provision for unexpected events⁹⁷.*

Living income: *The net annual income required for a household in a particular place to afford a decent standard of living for all members of that household. Elements of a decent standard of living include the following: food, water, housing, education, healthcare, transport, clothing and other essential needs including provisions for unexpected events⁹⁸.*

Trading practices cover the method of competition, operating policy, or business procedure common to a business or industry⁹⁹.

Trading practices comprise purchasing practices, pricing, delivery requirements, and other terms and conditions. They are negotiated between purchasers and suppliers. However, in today's supply chain structure the buyer has strong leverage and the capacity to impose terms and conditions on its suppliers. In many occasions these trading practices place most of the risk on suppliers and even amount to unfair trading practices.

Unfair trading practices in global supply chains can be problematic from a human rights perspective.

When buyers impose terms and conditions which place most of the risk on suppliers or demand suppliers provide goods at very low cost or at very short lead times, guaranteeing no security over payments or delivery times, they are abusing their position in the supply chain. This can negatively impact workers and small farmers if suppliers transfer the risk to the next level in the chain, leading to workers facing increased work

pressure and/or reduced incomes. In the garment industry the poor sourcing and purchasing practices of brands and retailers are a prevalent root cause that incentivise workplace abuses in supplier factories and heighten brands' exposure to human rights risks¹⁰⁰. As recognised by the EU Directive on the matter, unfair trading practices are especially problematic in the food supply chain where they can threaten the survival of smaller food producers¹⁰¹.



Garment factory in Bangladesh | Photo: Maaïke Hartog

5.1.1 Living wages and living incomes as human rights

The case for considering living wages and living incomes to be internationally recognised human rights depends on the content and interpretation of relevant conventions which define human rights.

According to the UN Guiding Principles on Business and Human Rights (UNGPR) the responsibility of business enterprises to respect human rights refers to 'internationally recognised human rights.' Internationally recognised human rights are understood to be, as a minimum, those expressed in the UDHR and the main instruments through which it has been codified (the ICESCR and ICCPR), and to core labour standards, this is, the fundamental rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work¹⁰². The OECD Guidelines for Multinational Enterprises use the same definition of internationally recognised human rights¹⁰³. The case for considering living wages and living incomes to be internationally recognised human rights depends on the content and interpretation of these conventions. International legal instruments establish that everyone has the right to a just and fair remuneration for their work that ensures a dignified life for him and his family and that everyone has the right to

97. Global Living Wage Coalition, <https://www.globallivingwage.org/>.

98. The Living Income Community of Practice, <https://www.living-income.com/>.

99. www.merriam-webster.com

100. Human Rights Watch (2019, p.53). Clean Clothes Campaign (2019).

101. European Parliament. Unfair Trading Practices in the Business-to-Business Food Supply Chain. Briefing. 2015

102. UNGP (2011, para.12)

103. OECD (2011, p.32).

an adequate standard of living, also defined as a standard of a dignified life. The main provisions are contained in the UDHR (articles 23 and 25) and the ICESCR (articles 7 and 11).

BOX 7

INTERNATIONAL LEGAL INSTRUMENTS

Universal Declaration of Human Rights (1948):

Article 23: 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. [...] 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Article 25: 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. [...]

International Covenant on Economic Social and Cultural Rights (1966):

Article 7: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with:

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.*
- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; [...]*

Article 11: 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right [...].

There is a good case for considering a living wage to be protected by international human rights as part of the content of the right to work and to the right to an adequate standard of living.

This is clear both from the provisions reproduced above and from the practice of major human rights bodies in charge of the interpretation of human rights instruments addressing this topic¹⁰⁴, all of which state that a right to work includes a right to remuneration that must provide for a decent living¹⁰⁵. In General Comment No. 23 on the right to just and favourable conditions of work (Article 7 ICESCR) – in which agricultural workers are granted special consideration due to their vulnerable labour conditions – ¹⁰⁶ the Committee on Economic, Social and Cultural Rights (CESCR) states that all workers have the right to a fair wage¹⁰⁷ and the remuneration must guarantee a decent living¹⁰⁸. A similar approach is taken by the European Committee of Social Rights (ECSR). While arguing that a minimum wage must satisfy a decent standard of living the ECSR states that such a standard ‘goes beyond merely material basic necessities such as food, clothing and housing, and includes resources necessary to participate in cultural, educational and social activities¹⁰⁹.’

ILO Declarations and Conventions provide some further grounding for the definition of a living wage as part of these internationally recognised rights.

The preamble 1919 Constitution of the ILO mentions the provision of an ‘adequate living wage’, as do a number of other later ILO Declarations. The 1944 Declaration on the aims and purposes of the ILO refers to ‘a minimum living wage’; a 1945 Resolution provided that all necessary measures be taken to assure ‘the provision of a living wage for all persons sufficient to maintain a family at an adequate standard of living’; and the ILO Declaration on Social Justice for a Fair Globalization (2008) reaffirmed the objective of a ‘minimum living wage’. However, a living wage is not mentioned in the ILO Declaration on Fundamental Principles and Rights at Work (1988) nor in the ILO Centenary Declaration (2019); it is not covered by the eight ‘fundamental’ Conventions; and it is not guaranteed by Conventions 131 and 135 on minimum wages (See Page 38).

A case for a living income to be considered an international human right can also be made through an interpretation of the right to an adequate standard of living enshrined in UDHR, ICESCR, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

Article 25 of the UDHR and article 11 of the ICESCR recognise the right to an adequate standard of living, (See Box 7).

104. The right to fair remuneration and minimum wage is contained within core human rights instruments UDHR, ICESCR and European Social Charter, the American Declaration, and the San Salvador Protocol. See also the report The Circle ‘Fashion Focus: The Fundamental Right to a Living Wage’ 2017 27-30.

105. UDHR Article 23 ‘existence worthy of human dignity’ ICESCR Article 7 ‘decent living’; American Declaration on the Rights and Duties of Men Article 7 ‘standard of living’; Salvador Protocol Article 7 ‘decent living conditions’ European Social Charter Article 4.1 ‘decent standard of living’.

106. CESCR, General Comment No. 23 on the right to just and favourable conditions of work (Article 7 ICESCR) E/C.12/GC/23 para. 47(h); See also Annex 1(g).

107. Ibid. para. 10.

108. Ibid. para. 18.

109. European Committee of Social Rights ‘Digest of the Case Law of the European Committee of Social Rights’ (2018) 85.

CEDAW refers to the duty of states to provide adequate living conditions for rural women (art. 14), whilst CRC's article 27.1 establishes that "*States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*" Depending on the location a certain level of income is required for an adequate standard of living. If this level of income is defined as a 'living income', the failure to ensure such an income can therefore be considered as a failure to respect the right to an adequate standard of living¹¹⁰.

In the agricultural sector there is important support for the right to a decent remuneration and standard of living and agricultural workers are recognised as having particularly vulnerable labour conditions.

As mentioned above, General Comment No. 23 of the CESCR grants special consideration to agricultural workers due to their vulnerable labour conditions when considering the article 7, the right to just and favourable conditions of work. The ILO Rural Workers' Organisations Convention, 1975 (No. 141) equates rural workers who are wage earners and those who are self-employed with regard to their right to organise. Based on this the UN Special Rapporteur on the Right to Food has called upon states to ensure that their legislations set a minimum wage corresponding to at least a "living wage" in order to guarantee a living wage, adequate health and safe conditions of employment to those working on farms can be guaranteed¹¹¹. Further support of the right to a decent level of remuneration in the context of agricultural workers is provided by the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas¹¹². Article 4. 2 (i) recognises the right "to decent employment, equal remuneration and social protection benefits, and to have access to income-generating activities;" whilst article 13. 3 establishes that *States shall create an enabling environment with opportunities for work for peasants and other people working in rural areas and their families that provide remuneration allowing for an adequate standard of living.* Fountain and Hütz-Adams use these and other international conventions to argue that a decent living for smallholder cocoa farmers is a human right¹¹³.

The debate over whether living wages and living incomes are autonomous human rights may not be settled. However, it can be argued that living wage and living income are instrumental for the realisation of the right to an adequate standard of living (including food, housing, and health) and therefore a pre-condition to such right.

The next section elaborates on this.

5.1.2 Living wages and living incomes as a pre-condition to the realisation of the right to an adequate standard of living

This report argues that the fact that the debate over the nature of living wages and living incomes as autonomous rights is not settled should not affect their potential to be included in the design and implementation of HRDD frameworks as they are instrumental for the realisation of other rights, in particular the right to an adequate standard of living.

The lack of decent remuneration is an enabler for the violation of other internationally recognised human rights.

Being paid less than a living wage, or receiving very low prices for products, means that workers and farmers are unable to cover their basic needs and suffer from inadequate nutrition, health services, housing, social security and education¹¹⁴. Low wages and prices can also force a worker or farmer to work excessive hours to supplement his or her income, and even make their children work, potentially exposing them to worst form of child labour, and in any case, denying them an education¹¹⁵, including right to food, health, education, and the prohibition of forced and child labour. The latter two have in fact been prioritised in existing and planned national legislation and international conventions, supporting the argument that they are among the risks which HRDD should prevent, mitigate, and remedy¹¹⁶.

The link between poverty and the enjoyment of human rights is also relevant, and the lack of access to a living wage and living income is therefore directly relevant when considering poverty.

Extreme poverty can be a cause of specific human rights violations, for instance, conditions of extreme poverty have been associated with workers needing to accept jobs in environments that are unsafe and unhealthy¹¹⁷. At the same time, poverty can also be a consequence of human rights violations, for instance when children are unable to escape poverty because the State does not provide adequate access to education.

5.1.3 Living wages, living incomes and trading practices in other law

In addition to respecting internationally recognised human rights, HRDD frameworks such as the UNGPs and OECD Guidelines on MNE require adherence with applicable laws: 'obeying domestic laws is the first obligation of enterprises'¹¹⁸. The extent to which existing and developing law requires living wages, living incomes and/or fair trading practices is therefore relevant.

110. It is accepted that there are alternative definitions for a 'living income', as there are for living wages. We return to the issue of definitions in the discussion of HRDD.

111. Report of the Special Rapporteur on the right to food, Olivier De Schutter 'Final report: The transformative potential of the right to food' A/HRC/25/57 (24 January 2014) 24.

112. Human Rights Council Resolution, 28 September 2018, UN Doc. A/HRC/RES/39/12.

113. Fountain, A.C. and Hütz-Adams, F. (2014): Defining a Decent Living. Living Income for Smallholder Cocoa Farmers in West Africa. On calculations of living wages in the cocoa sector see too Duncan Brack, Towards sustainable cocoa supply chains: Regulatory options for the EU (Fern, 2020), <https://www.fern.org/fileadmin/uploads/fern/Documents/2019/Fern-sustainable-cocoa-supply-chains-report.pdf>.

114. Clean Clothes Campaign, 2014

115. Interviews and Fountain, A.C. and Hütz-Adams, F. (2019): Necessary Farm Gate Prices for a Living Income.

116. UK Modern Slavery Act. Dutch Child Labour Due Diligence Law. ILO Worst Forms of Child Labour Convention No. 182 (1999). ILO Forced Labour Convention No. 29 (1930)

117. See UN Special Rapporteur on Extreme Poverty, <https://www.ohchr.org/en/issues/poverty/pages/sr-extremepovertyindex.aspx>; and Report, A/HRC/35/26, 22 March 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/073/27/PDF/G1707327.pdf?OpenElement>

118. OECD Guidelines for Multinational Enterprises (2011, p.17)

Existing national laws provide little or no support for living wages or living incomes, either domestically or in international supply chains. Whilst most countries have minimum wage laws, these cannot, in general, be used to achieve the payment of a living wage nor a living income.

According to ILO Convention 131, the needs of workers and their families is only one of the two factors that should be considered in the setting of the minimum wage. Economic factors also need to be considered, and as a consequence minimum wages are set as part of a political process reflecting the relative power of employers and workers¹¹⁹. This results in minimum wages being set at levels generally significantly below any research-determined living wage level. Legal enforcement of any national or sub-national minimum wage will not, in general, therefore achieve a living wage¹²⁰. No national laws have been identified relating to living incomes, even if some countries have developed pilots to establish basic incomes either focused on certain population, like the unemployed in Finland, or geographically, such as certain cities in the Netherlands and villages in Madhya Pradesh, India¹²¹. In April 2020, Spain declared that it will institute a basic income referred to a “minimum vital income” for vulnerable single parent household¹²².

Existing regulation of unfair trading practices is not enough to guarantee access to living wages and living incomes for workers and farmers, which consequently means that current laws do not adequately establish the responsibility of businesses for trading conditions and practices with direct impacts on working conditions, and specially income, for those in supply chains.

Of particular importance is the EU Directive on Unfair Trading Practices in the agricultural and food supply chain (2019), which contains new rules that ban certain unfair trading practices (UTPs) imposed unilaterally by one trading partner on another, arising out of the major imbalances in the bargaining power between suppliers and buyers of the agricultural products¹²³. The Directive recognises that the current situation negatively impacts the living standard of the agricultural community¹²⁴ and therefore prohibits practices such as late payments, short notice cancellation or orders, changes to agreed contract terms unilaterally, unjustified charges to the supplier and the refusal to sign written contracts¹²⁵. The Directive is a welcome step towards addressing the imbalances in the bargaining power between European companies and suppliers, and specifically states that unfair practices affect the enjoyment of

a decent living in the agriculture community. However, there are no specific references or requirement to pay living wages or to provide an adequate standard of living for those working in the supply chain.

The EU Directive is very new¹²⁶ and it is therefore still unclear whether it could be used to address cases of excessive low prices based on unjust trading conditions between buyers and their suppliers and directly result in lack of access to living wages and living incomes.

The Directive is specifically connected with competition law and policy, but not to the human rights or labour rights of farmers and workers¹²⁷. Therefore, even if having better negotiating positions and more reliability in the commercial relationship between buyers and suppliers should have an impact on workers’ conditions and human rights, (including living wages and living incomes for workers and small farmers), this is not directly guaranteed and therefore should not be assumed as an inevitable outcome.

Other EU sectoral regulations, such as the EU regulation on conflict minerals¹²⁸ and timber products¹²⁹ make no reference to labour.

These focus on the requirement of the due diligence system along the supply chain in order to prevent products coming from unlawful sources. As with the UTPs regulation, whilst avoiding illegal practices and relationships with conflict which makes workers vulnerable to human rights abuses could have a positive impact on their rights and living conditions, this does not mean that it would actually happen in practice.

Case law establishing the responsibilities of companies to their overseas subsidiaries and supply chains is at an early stage and has so far showed inadequacy concerning the access to remedy by victims of human rights violations in the supply chain.

Examples of recent lawsuits against corporations for actions of their subsidiaries and along the supply chain have been limited and even in limited cases in which courts have allowed cases to proceed the prospect for access to remedy by victims is quite limited. Two examples in the UK are illustrative, the Vedanta and the British American Tobacco (BAT) cases. The UK Supreme Court case involving Vedanta Resources, a British mining company, has ruled that English courts can take jurisdiction over a claim brought by Zambian citizens alleging injury and damage from pollution and environmental

119. Anker (2017) p.11

120. One exception was the ruling in 2017 by the European Committee of Social Rights that Greece had violated its obligations under the European Social Charter (1961) by establishing a minimum wage that did not amount to a fair remuneration. European Committee of Social Rights ‘Digest of the Case Law of the European Committee of Social Rights’ (2018) 85.

121. See Standley 2019, pp. 60-70.

122. (El País, 2020).

123. Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relation (1)

124. Ibid (7).

125. Ibid, paras. 17, 21, 22 and 23. See also Circle 2019, p. 12.

126. EU Member States must transpose the Directive by 1 May 2021 (art. 13).

127. European Commission, Directorate General for Agriculture and Rural Development, The Directive on Unfair Trading Practices in the Agricultural and Food Supply Chain Brochure, 2019.

128. Regulation EU 2017/821 European Parliament and Council 17 May 2017.

129. Regulation EU 995/2010 European Parliament and Council 20 October 2010.

damage caused by its Zambian subsidiary¹³⁰. Whilst this is a significant step it only means that victims may proceed with their claims, which they first brought in 2015, and therefore face many more years until there is any prospect of remedy. In another case, Leigh Day, UK human rights lawyers announced they were preparing a case against British American Tobacco (BAT) on behalf of tenant farmers and their children in Malawi who are claiming compensation for the low prices paid by the BAT supplier. Human Rights Watch commented that, “the case could force BAT to pay workers and farmers fairly and finally eradicate child labour in its supply chain,” but admits that it may take years¹³¹, leaving victims without redress.

The inadequacy of existing laws, regulations and case law explains why some have concluded that new law is required.

Based on a review of eleven areas of EU regulation with extra-territorial effect, The Circle have recently argued that there are precedents for EU legislation on living wages in its garment supply chains. It proposed a new EU regulation that would require due diligence to ensure that all reasonable steps had been taken by an importer to ensure that the garments had been produced by workers paid a living wage, where the garments were imported from a country where either there is no minimum wage or the minimum wage does not meet the requirements of a living wage¹³². A longer-term solution in the form of a Global Living Wage instrument has also been proposed¹³³.

5.2 Living wages, living incomes and trading practices within HRDD frameworks: challenges of current approaches and how to address them

As established above living wage and living income are instrumental for the realisation of several rights, and in particular the right to an adequate standard of living (including food, housing, and health) and therefore a pre-condition to such right. However, even assuming that this approach is recognised by HRDD frameworks if they are not explicitly included within the design and implementation of such frameworks living wages and living incomes will continue to be excluded of the overall efforts to prevent and mitigate human rights in supply chains.

A major obstacle to addressing living wages and living income through HRDD is the way risks are being assessed and prioritised in such frameworks, through the concepts of location and severity.

The location of the workers not receiving a living wage, or the farmers not receiving a living income, may fall outside the scope of the framework. For example, if the workers do not work for a supplier that is ‘directly linked’ in a business relationship¹³⁴ to the company concerned, their wages may

not be considered relevant to any HRDD. The same would apply to, for example, the incomes of cotton farmers further down the supply chain. Third, even if directly linked, the HRIA might conclude that, because the company is only buying a small part of the supplier’s output, the low prices paid by the company do not contribute to or cause the sub-living wages paid by the supplier. In this case, and if leverage is not judged to be significant, the company is not required to provide remediation, but should only ‘be able to demonstrate its ongoing efforts to mitigate impacts’ (UNGP, para. 19). All these assessments and judgements will depend on the skills, resources and methods deployed, and on the commitment of the company concerned to a thorough and far-reaching HRDD process. With regards to severity, as argued above, HRDD frameworks recognise that it may not always be possible to identify and respond to all adverse human rights impacts immediately and businesses are expected to prioritise adverse impacts according to the likely severity of impacts or salience. One of the elements of salience is gravity, which places living wages and living incomes in a lower level of priority to be addressed than other human rights risks which pose an immediate threat to life and health. For example, when faced with multiple abuses such as forced labour, child labour, toxic exposure, or sexual exploitation the fact that workers and farmers do not earn enough to have a decent life may not be deemed as urgent or severe.



Cocoa farming in Nicaragua | Photo: Sean Hawkey

130. Vedanta Resources PLC and another v Lungowe and others (2019) UKSC 20. This is one of three recent jurisdictional cases to pass through the UK Court of Appeal addressing the issue of whether parent companies may face liability for the actions of their overseas subsidiary companies, <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf> <https://www.dlapiper.com/en/uk/insights/publications/2019/04/supreme-court-rules-vedanta-case-on-parent-company-liability/>

131. <https://www.hrw.org/news/2019/12/04/case-against-tobacco-giant-could-protect-children>

132. Ibid p.9

133. Marshall, S. (2019). Living Wage – regulatory solutions to informal and precarious work in global supply chains. Oxford University Press.

134. UNGP para. 17.

HRDD includes the need and requirement to assess, prevent, mitigate and remedy not just direct risks (and immediate harm), but also systemic, root cause issues.

The OECD Guidance describes systemic issues as problems or challenges that are prevalent within a context and are driven by root causes outside of the enterprise's immediate control, but that nonetheless increase the risk of adverse impacts within the enterprise's own operations or supply chain. HRDD should address such systemic issues: this is very clear in the OECD Guidance on DD and is at the core of the definition of HRDD. An assessment of the risks and a design of procedures to address them cannot be established in isolation of the context, including systemic risks. The dynamics that the commercial relations establish and how they impact on the workers as a systemic cause of human rights abuses, but this is not currently being addressed by HRDD frameworks. The lack of payment of a wage or receiving an income which guarantees a decent life is a systemic issue in the supply chain and as such it should be addressed by HRDD; it currently is not.

5.2.1 Improving HRDD with respect to living wages, living incomes and trading practice

To sum up the previous analysis this section first highlights the main conclusions drawn:

- First, living wages and living incomes are fundamental to respecting internationally recognised human rights – whether as rights themselves or as preconditions for other priority rights (which this report relies upon)- and therefore need to be explicitly considered in HRDD.
- Second, existing laws and regulations are not sufficient to ensure living wages, living incomes or fair trading practices in international supply chains.
- Third, HRDD frameworks do not, at present, guarantee that insufficient wages or incomes (i.e. those judged to be below the level of a living wage or living income) will be covered and adequately addressed by such frameworks.

The centrality of the lack of living wages and living incomes as systemic issues in the supply chain and pre-conditions for the realisation of human rights should ensure that they are addressed by existing and planned HRDD.

Realistically, this will not happen without changes in the way HRDD frameworks are designed and implemented.

Therefore, HRDD frameworks needs to: make explicit reference to trading practices and systemic issues in HRDD legislation and/or guidance, and in particular make explicit reference to living wages and living incomes throughout the supply chain.

Existing HRDD guidance, in particular the OECD general and sectoral guidance¹³⁵, already contains mention of responsible purchasing practices and systemic risks. However, without explicit references that responsible trading practices need to consider and guarantee living wages and living incomes for workers and farmers this would not be enough. Experience by some leading companies suggests that better purchasing practices are a necessary rather than sufficient condition. The coexistence of both commitments to¹³⁶, and some evidence of, better purchasing practices with the continued payment of wages that are not living wages¹³⁷, and low prices that do not provide a living income, suggests that an indirect approach to living wages and living incomes via purchasing practices will be insufficient¹³⁸. Better purchasing practices may help, but they are unlikely to be effective by themselves in leading to living wages or living incomes.



Workers in ready-made garments, Bangladesh | Photo: Maaïke Hartog

For HRDD to be effective to address systemic risks, including lack of access to living wages and living incomes, responsible trading practices must include practices that guarantee them.

The conclusion reached here is that the only way to guarantee consideration of living wages and living incomes within HRDD is by making explicit reference to both in HRDD guidance and legislation. Guidance and legislation need to include a definition of living wages and living incomes that refers to a decent standard of living, not merely basic needs; and needs to require explicit consideration of living wages and living incomes throughout the supply chain, regardless of prioritisation and salience, which fall within the scope of HRDD and as such must be addressed.

135. OECD Due Diligence Guidance for Responsible Business Conduct (2018); OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2018) and OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016).

136. For example, ACT (Action, Collaboration, Transformation) <https://actonlivingwages.com/>

137. SPERI (2019). Corporate Commitments to Living Wages in the Garment Industry. Labour Behind the Label. A supply chain investigation into living wage commitments from M&S and H&M.

138. For example, H&M recognise that 'all textile workers have the right to a fair living wage', ensures that it maintains 'good purchasing practices', and is implementing a 'fair living wage strategy' <https://hmgroupp.com/sustainability/people/wages.html>. The Clean Clothes Campaign has commented that the 2017 H&M Sustainability Report included no data on wages at supplier factories or on progress towards its earlier commitment that its strategic suppliers would have pay structures in place to pay a fair living wage by 2018. <https://cleanclothes.org/news/2018/04/12/h-m-is-trying-to-cover-up-its-unfulfilled-commitment-on-living-wage>. A separate study found that H&M's initiatives were translating into improved economic conditions for workers in their supplier factories in Bangladesh, but that in half the pay periods covered workers in H&M supplier factories earned an hourly rate that was not consistent with Bangladesh's labour laws and regulations. Impact of H&M's Fair Living Wage Initiatives, Microfinance Opportunities, 2018



6. Discussion, Conclusions and Recommendations

Processing cocoa in Ivory Coast | Photo: Éric St-Pierre

6.1 Discussion

In this section we present the identified evidence which has been assembled and analysed with respect to the theory of change and its associated assumptions and validated through feedback from stakeholders. We then present key findings on the impacts on target groups and the specific considerations in agriculture and textile sectors.

6.1.1 Evidence on the Theory of Change

A synthesis of findings is presented in Table 1 below, based on our assembling and review of the evidence, and validation with stakeholders.

Table 2: Theory of Change Assumptions	Findings
<p>Reform of global supply chains possible via voluntary / mandatory measures.</p> <p>Competitive business models exist eliminating HR abuses and systemic drivers and issues.</p>	<p>Efforts of governments, donors, and responsible business actors tend to focus on voluntary measures and reforming supply chains. Momentum growing for mandatory HRDD, but, arguably transformative approaches may be needed e.g. more focus on territorial markets and local economic systems.</p> <p>HRDD not able to address systemic issues necessarily – requires other forms of intervention beyond HRDD.</p> <p>In advance of regulation, pre-emptive action by some companies occurs, but action may still be limited in scope. Quite often initiatives by companies are seeking to avoid regulation. Potential perverse effects of regulatory strengthening.</p> <p>Broader trends towards market concentration & rural-urban outmigration. Agriculture some large-scale export-oriented investments can affect rights to food, water, clean environment, and standard of living (realization of this depends upon observance of customary land rights). Allocation of productive lands to export commodities in countries and regions suffering from food and nutrition insecurity is questionable.</p> <p>Requires more transformative approaches.</p>

Assumptions for HRDD regulation to translate into enough pressure on companies	
Consumer governments willing to pass + enforce effective DD / disclosure legislation (including adequate corporate coverage, effective sanctions, strong enforcement).	<p>Legislation is being passed in some jurisdictions, but the landscape is currently fragmented and with gaps. Thresholds set which excludes many companies. Need for more comprehensive approach at regional levels (e.g. European, Asian etc)</p> <p>State-based oversight or judicial or non-judicial mechanisms for non-compliance needed but not yet in place.</p>
Producer governments willing and able to pass and enforce supportive national legislation.	<p>Continuing challenges in producer countries: gaps in legislation, weak law enforcement, capacity gaps such as in monitoring systems, corruption.</p> <p>Risks of a backlash from producer governments to international covenants and binding agreements, shifting to national initiatives that are less effective.</p> <p>Some HRDD aspects already in some national laws (e.g. Health & Safety Regulations, environmental legislations, privacy laws, and in some cases, corporate reporting regimes).</p> <p>Increasing territorial markets and south-south trade not yet covered: lack of comprehensive mandatory HRDD requirements globally.</p> <p>National laws or regulations may restrict or limit trade union rights and are often weakly enforced. Companies not assessing sufficiently how far laws align with international standards.</p> <p>Capacity gaps indicate need for resources for producer governments and domestic stakeholders.</p> <p>State-based oversight or judicial or non-judicial mechanisms for non-compliance needed but not yet in place.</p>
Civil society have sufficient capacity and resources to hold companies to account for general action on HR and specifically on HRDD reporting or implementation. Pre-condition of supply chain disclosure enabling assessment of corporate performance.	<p>A major and growing imbalance between the capacity and resources of global companies and elites compared with civil society. Civic space is closing in many developing countries; HR and environmental defenders increasingly under threat or killed.</p> <p>Continuing lack of transparency: Some cases where companies have disclosed their supply chains, but many remain undisclosed, especially at lower levels, undermining scrutiny by civil society of individual corporate performance, still less assessment of progress at sector / industry level.</p>
Consumers in extra-territorial and territorial markets are aware of, care about and purchase ethically and sustainably; Citizens and social movements exert pressure on companies to produce ethical products meeting regulations. Trade unions enable workers to organize.	<p>Lack of / too much / unclear or misleading information for individual consumers on multiple sustainability issues creating confusion.</p> <p>Worker and community human rights abuses less relatable to some consumers compared with some environmental issues. Some consumers lack resources to act; others state willingness to buy ethical products, but do not implement ethical purchasing practices. Some consumers actively avoid ethical information. Some brand loyalty relating to ethical performance drives company concerns on reputational risks.</p> <p>Negative attitudes on unionization, freedom of speech cultural barriers and legal restrictions exist in some countries. Trade unions lack capacity and resources to organize and effectively represent workers. Embedded discrimination against marginalized social groups undermine their organisation.</p>

Assumptions for company HRDD policies and commitments to translate into sufficient pressure on / collaboration with suppliers

HRDD is fully, properly implemented, including addressing own purchasing practices. Not just a tick box exercise.

HRDD frameworks and instruments are relatively new (including some not being fully tested in courts) and so implementation still patchy, and legislation not yet tested in the courts. Many companies report only on methods, not results. Some companies still focusing upon risks to business rather to human rights. Still often reactive, rather than proactive responses. New liabilities associated with HRDD may change the equation for companies in terms of action, but recent evidence of reduced reporting on stakeholder participation by companies under French Duty of Vigilance law and limited reporting on actual mitigation of risks and disconnect of actions to risks identified in risk mapping. A lack of clarity on who grievance mechanisms should be accessible to.

Cases of positive progress, but also evidence of continuing opacity of supply chains means that HR abuses can be ignored or covered up. Evidence that many global companies do not interrogate their supply chains sufficiently, so they can avoid HR challenges, but still present illusion of progress. Where positive change does occur, it is possible that this will stimulate new business model development, but more evidence is needed of what can stimulate such changes.

HRDD frameworks and instruments do not stipulate changes to purchasing practices, yet evidence indicates clear linkage to HR abuses.

Global value chain governance and business models influence business case for action. Drop off in capacity between HQ and local offices.

Reporting on grievance mechanisms remains quite weak.

Stricter requirements may encourage more or false reporting unless supplier has a trusted relationship with buyer. Increased risk of 'cutting and running' with mandatory reporting and HRDD requirements.

Stakeholder engagement may also be treated more as a formal requirement and implemented less effective

Most companies continue to depend on audits and supplier codes of conduct which are of poor quality rather than investment in suppliers in continuous improvement and wider HRDD processes. Need for independent monitoring and oversight of compliance.

Salience / prioritization process does not exclude specific HR risks

More immediate focus is on tier 1 and high profile / topical issues. Fundamental enabling rights and living wages less covered.

Systemic issue of purchasing practices is overlooked, despite known link to HR abuses. Suppliers are squeezed by downward pressure on prices and rising standard requirements. Likely that the mechanism will amplify market concentration trends.

Companies willing to invest in what is required in HRDD and actions (i.e. the business case is accepted) and cost-share with suppliers as required.

Buyers generally not demonstrating willingness to invest in suppliers, although there are cases of collaborative action and investment, with cost sharing on DD process and actions.

<p>Companies willing to invest/engage in high risk contexts / suppliers, rather than to cut and run.</p>	<p>Good HRDD is at the beginning costly, potentially implies wholesale changes in business models and / or potential shift to less risky sourcing locations and groups (some examples already of cutting and running).</p> <p>Over-reliance on Global Framework Agreements or promoting worker voice or worker committees, but only on paper at HQ and not implemented in subsidiaries or in sourcing markets. Variable commitment, capacity and understanding at HQ level on respect for trade unions.</p> <p>Rhetoric on radical transparency and new technologies available for traceability and communicating provenance. Some cases of supply chain disclosure, but a) lack of visibility in supply chain, especially beyond tier 1. Quality / extent of disclosure varies by company and sector, and not yet mainstream. If costs of transparency pushed onto suppliers, risk of exacerbating HR abuses.</p> <p>Some companies engaging in collaborative approaches. Some rely upon on sustainability certification schemes for DD implementation. Action on social standards tends to be weaker than environmental provisions.</p> <p>Companies employ worker voice mechanisms and worker committees in contexts where trade union rights are poorly realized, as a way to advance, but this may inhibit more far-reaching corporate action.</p>
<p>Civil society have sufficient information, capacity and resources to hold companies to account for their actions with suppliers and their business practices.</p>	<p>Limited capacity and resources, especially if disclosure is of poor quality (e.g. reporting should coherently and clearly link actions to identified risks).</p>
<p>Consumer governments exhibit policy coherence, requiring DD in investment facilities and public procurement.</p>	<p>Weak government leadership in producer countries.</p> <p>Consumer governments insufficient coherence in policies on investment, trade and public procurement, although examples of progress.</p>
<p>Assumptions for changes in supplier behaviour to translate into positive impacts for workers and farmers</p>	
<p>HRDD is fully, properly implemented down the supply chain. Not tick box exercise.</p>	<p>Very limited evidence and information available on supplier impacts for workers and farmers, impact of HRDD and access to remedy. Fragmented evidence base; mainly qualitative studies on individual sectors or issues.</p> <p>Limited consistent and effective engagement of local communities and workers in DD processes. New methodologies being developed. Unclear incentives for companies to engage at the local level as it requires investment and may be easier to avoid identifying risks.</p>

<p>Suppliers able and willing to invest what is required and receive sufficient support/compensation from buyers for actions/investments for (a) own workers, and (b) in lower tiers.</p>	<p>Very limited knowledge and understanding of HRDD in developing countries amongst suppliers, workers and their representative organisations and honest broker NGOs.</p> <p>Potential negative impacts for local communities and workers of HRDD processes: If HRDD leads to increased costs for suppliers, these are usually passed on. Small suppliers and farmer organisations are often least able to meet compliance costs, and most likely to face exclusionary effects of the consolidation and formalisation of supply chains</p> <p>Buyers generally not sharing costs of HRDD and because purchasing practices not aligned with HRDD this exacerbates HR abuses and means suppliers less likely or able to invest. Leverage of buying companies can be limited in some contexts (e.g. multiple buyers purchase from one powerful supplier). If buyers were to address HR systemically, it is possible that some business models would become unsustainable and higher risk locations or types of suppliers will be excluded (some examples emerging).</p>
<p>Suppliers willing to invest/engage in high risk contexts/worker categories/ lower tier suppliers, rather than cut and run under pressure from buyers.</p>	<p>Limited evidence, but potential risk of exclusionary effects with overall increased market concentration and formalization.</p> <p>Risk that companies will choose less risky contexts and larger suppliers.</p> <p>Specific risks for disadvantaged groups such as women, migrant workers, youth, informal economy workers – suggests measures needed to address gender and diversity issues.</p> <p>Need for more gender- and social difference-responsive DD approaches.</p>
<p>Lower tier suppliers (incl. small farmers) able and willing to invest what is required and receive sufficient support/compensation from the value chain for actions/investments.</p>	<p>Larger suppliers have greater capacity to respond than SMEs and are more likely to receive investment from buyers. Lower tier or smaller enterprises more likely to be overlooked. Domestic and regional supply chains most likely to contain HR abuses than international ones. Suggests need for safeguarding measures in DD legislation and guidance on thresholds should be set for small and medium sized enterprises.</p> <p>Trends in many markets for increased outsourcing and use of contract labour.</p>
<p>Remedy systems are accessible to claimants.</p>	<p>Some evidence that remedy systems still inaccessible to claimants. Indicates clearer specification of who grievance mechanisms should be accessible to.</p>
<p>Civil society have sufficient information, capacity, and resources to hold companies and suppliers to account for their actions with workers, farmers, and lower tier suppliers.</p>	<p>Some evidence that civil society has limited capacity to hold companies and suppliers to account. Capacity strengthening requirements and investment.</p>
<p>Suppliers do not pass on additional costs of HRDD compliance to workers or lower tier suppliers.</p>	<p>Limited evidence, but possible risk that costs are passed on.</p>

The theory of change analysis in Table 2 shows that there is limited evidence available to assess progress and effectiveness of HRDD, but the available evidence shows that many assumptions are not yet currently met. For example, due diligence in relation to conflict minerals has had some positive impacts. There are also some examples of good human rights impacts assessments. However, for most global business, there is very little empirical evidence on the extent and quality of HRDD processes, and the number of companies implementing HRDD effectively remains small.

Overall, drawing upon the available evidence found and the perspectives of a wide range of European stakeholders and those in the Indian apparel and Kenya horticulture sectors, the following is clear:

Awareness and momentum are rapidly growing on Human Rights Due Diligence (HRDD), mainly in Europe and the US, especially support for mandatory HRDD.

Mandatory HRDD is increasingly seen as a fundamental step to addressing the human rights abuses that characterise current global supply chains and may be applicable as additional measure for addressing environmental harms. However, there is still a general lack of awareness, understanding and capacity in emerging and developing economies on HRDD in terms of how it relates to other efforts to address human rights issues in supply chains, its implications for corporate practice, the elements of HRDD, and what constitutes a good quality process. So far, the frameworks and instruments is encouraging some leading companies to report more on HRDD, e.g. through Modern Slavery or vigilance plans. However, it is not very clear how good the quality of the HRDD processes are – and many reasons to believe that they fall short of what is anticipated in the relevant frameworks and instruments. Mandatory frameworks clearly have more teeth, because they are associated with specific liabilities, but need to be applied across larger numbers of companies and jurisdictions – ideally at European and global scales – and have potential perverse effects (e.g. on corporate transparency).

Legislation is partial and fragmentary. Evidence suggests that implementation is not well advanced and there are cost and capacity barriers.

Company coverage is limited by the inherent thresholds set within the different reporting and HRDD requirements. EU and global legislation are urgently needed to provide a comprehensive approach which can create a level playing field for companies and help to drive improved practice. Capacity challenges exist along the chain, including within private companies and suppliers on HRDD, and especially in developing countries, but also amongst civil society and trade unions.

Many of the theory of change assumptions are not met – especially moving along the theory of change. Thus, HRDD is not a silver bullet.

Improvements are needed in the DD governance system, especially in stakeholder participation in risk mapping and mitigation, independent oversight and monitoring, and remedy. Additional measures are needed for reform of global supply chains. Consideration of more transformative approaches are needed.

It requires many other preconditions to be in place to achieve desired goals, some of which can be written into legislation and guidance, but some of which cannot. The evidence suggests that some of the assumptions are at risk and require attention: a) improvements can be made in the design of the legislative frameworks and instruments, b) many flanking measures are needed to achieve reform of current global value chains; c) There is also an argument to consider more transformative approaches, because many systemic issues are unlikely to be achieved through legislative measures on supply chains. Full implementation of HRDD would essentially mean a change of business model for entire companies and even for prevailing models in entire industries.

The next section considers the risks specifically to the intended target groups – smallholders and workers, and then sets out some of the specific issues for agriculture and textiles.

6.1.2 Impacts on target groups

Evidence on the impacts of HRDD frameworks is very limited, particularly at the level of workers and small farmers, because of a combination of factors.

These factors include limited HRDD implementation, limited corporate transparency, and limited independent research. To the extent that HRDD frameworks have had some impact, this has been more discernible at the level of corporate policies and, to a lesser extent, corporate practices. However, while increasing, adoption at even this level has tended to be limited to a relatively small number of leading companies in sensitive sectors. Impacts become progressively less, and/or less discernible, further down the supply chain. HRDD frameworks per se, are effectively invisible in supplier countries.

While there is evidence of increased attention to human rights issues by companies, this tends to be selective, with priorities and processes framed more by companies than local communities and workers and their representatives.

In terms of which issues are addressed, the responses are generally quite selected, focusing upon more topical or scrutinized issues (e.g. on forced and child labour). There is not a clear link to community and smallholder priorities; is difficult to attribute to HRDD frameworks in general

or particular; and appears to have made relatively little difference in the two mini-case studies to date: horticulture in Kenya and apparel in India. More improvement was noted in the former than the latter, albeit on the basis of a limited number of interviews.

In sum, the wider evidence that human rights abuses continue to bedevil most global supply chains – particularly agricultural and apparel supply chains – is very strong. Evidence of impacts of HRDD frameworks on target groups is very limited, but this could change in the future if there is more implementation.

In summary, evidence on the impacts of HRDD frameworks on the research target group is very limited. While examples of good practice are increasing, implementation of HRDD by companies remains limited and patchy. Examples of effective HRDD implementation are even more limited. If there is implementation, poor implementation could be characterized as ‘shadow DD processes’ in which a company pretends to act, but nothing happens on the ground (workshop participant).

6.1.3 Potential risks and responses in agriculture and apparel for smallholders and workers.

There are various risks for producers and smallholders in agricultural and apparel supply chains as a result of companies attempting to implement HRDD frameworks. If they are not implemented, then the ‘business as usual’ risks continues e.g. of HRs harms, environmental damage affecting environmental services and people etc.

Many small producer and worker representation organisations in global and regional supply chains in general, across both sectors, have capacity strengthening needs.

Such groups often lack skills and resources to invest in processes which can sustain their access to international markets. The introduction of codes of practice and sustainability standards has been challenging for many smaller suppliers in the past, with some evidence of exclusionary effects for smaller organisations in some contexts, because the costs of compliance are rarely shared by international buyers. Instead, the costs are passed onto the suppliers, who have varying capacity to absorb such demands.

Different social groups amongst workers and smallholder who are already discriminated against will face more challenges in terms of their capacity to organize and respond to the demands of HRDD processes, but they are the most in need of its intended effects.

There are particular groups of workers and producers who are most ‘at risk’ both from non-implementation or from unintended negative effects of implementation or poor implementation are as follows: women, migrants, informal

workers, youth, minority groups etc. These groups tend to face specific discriminations in daily life and are not homogeneous categories. The intersecting discriminations they face, which vary by cultural and political contexts, also undermines their capacity to organise. Hence HRDD mechanisms should ensure they support an equitable approach – i.e. guidance is tailored to recognize these discriminations and respond to them.

Not all companies will be willing to invest in making the improvements required to prevent or address human rights abuses. There are some examples emerging of ‘cut and run’ responses.

Changes in sourcing strategy could lead to negative impacts for smallholders and workers in those supply chains, if companies shift their operations between sectors or even countries. Perceived Human Rights risks, or the costs of mitigation or remediation, may lead some companies or suppliers to relocate or reduce production, with consequent costs for workers and small farmers. In this case, the most marginal and vulnerable groups are likely to be the most affected.

Power relations between multinational buyers/retailers and suppliers/producers in the global South are asymmetric and characterized by downward pressures.

These asymmetric power relations in agricultural and apparel value chains mean that suppliers are squeezed on price and pressured by unfair business practices. These pressures, and associated business risks, are often passed down the



Coffee farming in Ecuador | Photo: Didier Gentilhomme

supply chain to the weakest participants: workers and small farmers. While HRDD should encompass and address unfair business practices, there is no guarantee that, as currently implemented, corporate practice will change to address such unfair practices. There is little sign that companies are willing to address these systemic issues and that their HRDD implementation is changing this.

Increasing or changing standards could translate in further burden on suppliers in terms of costs, and / or lost business as sourcing or business models are changed.

To the extent that HRDD entails additional costs (monitoring, audits, compliance, mitigation, etc.), there are indications that many of these costs will be borne by suppliers rather than multinational companies, and that the prices paid are not increased to compensate the former. Interview evidence and the case studies suggest that cost sharing is not happening. Companies are pushing the costs on to suppliers in emerging economies and developing countries, which will further exacerbate the pressures which lead to human rights abuses. The significant costs of properly designing and implementing HRDD processes, and the costs of amending supply chains and business practices in order to address the human rights issues revealed, could have major implications for business strategy, with consequent implications for employment and livelihoods if significant changes result.

While all these risks are real, the greater risk for workers, small farmers and artisans, at least in the short-term, is that HRDD continues not to be properly implemented and is a paper exercise.

If properly implemented, HRDD frameworks should, in the short term identify actual and immediate harm; in the mid-term remedy it and over time, transform international supply chains for the benefits of the target groups. But best practice HRDD will be costly for companies and suppliers, both in terms of the processes themselves and the changes required to global supply chains. Many of the human rights issues are entrenched and will take considerable time and resources to resolve. The costs and changes implied mean that there are powerful business incentives not to properly implement HRDD processes, which in turn explains the partial and limited implementation of voluntary HRDD frameworks to date. It also means that the design of effective and comprehensive HRDD legislation, and the implementation of such frameworks once enacted, is likely to be resisted and avoided where these involve significant costs or changes to existing supply chains and business practices. All of this means that the case for mandatory regulation, and for the effective and independent oversight through monitoring of compliance, and evaluation of impact of that regulation, is urgent and necessary. Oversight of compliance could be state-based or judicial / non-judicial.

To respond to the capacity challenges of smallholder and worker organisations, there may be a case for a different level of threshold requirement for smallholder farmers or a progressive approach, focusing on improvement.

While still following human rights and labour standards and for public investment in SME training. However, more research is needed to understand how this might work, (See Box 8).

BOX 8

SPECIFIC THRESHOLDS FOR FAMILY FARMING?

Smallholder and worker organisations in developing countries tend to have very limited capacity and this may affect their ability to respond to due diligence requirements effectively while still delivering services to members. It may be possible to design specific interpretations for family farming in recognition of these capacity challenges. An existing example is in the ILO standards on child labour, which include specific interpretation as far as family farming is concerned. For example, it states: *“Especially in the context of family farming, small-scale fisheries and livestock husbandry, some participation of children in non-hazardous activities can be positive as it contributes to the inter-generational transfer of skills and children’s food security.”* However, this should always and exclusively be based on existing international human rights and labour standards.

Source: International NGO (written input)

Specifically, in the agriculture sector and land-based assessments, there are particular issues which require more consideration, such as food security, gender issues and informality.

In land-based, agri-investments, voluntary guidance currently requires Free, Prior and Informed Consent (FPIC) to apply to all affected communities, but voluntary standards are not sufficient and there is evidence that communities are disenfranchised (ActionAid, March 2020¹³⁹). Many companies follow the voluntary IFC Performance Standards, but these business standards are insufficient. In recent years, the VGGT - a global normative framework - has been established for states and companies. Operationalizing the VGGT is far from straightforward, but observance of FPIC should be considered a critical aspect of good due diligence by any company, yet public and private companies are falling short. Making FPIC a requirement of all public and private companies through new HRDD legislation would be an important step forward.

139. ActionAid (2020) ‘We mean business: Protecting women’s rights in global supply chains.’

BOX 9

THE ROLE OF FPIC IN LAND-BASED INVESTMENTS

Where tenure and land use rights of local communities may be affected by certain projects, FPIC should unequivocally apply. Without meaningful procedures to engage, consult and allow free consent or dissent of affected populations, projects and investments may result in negative impacts for local communities, women in particular, and trigger conflicts. The principle of FPIC is an essential prerequisite in order to ensure that affected communities are meaningfully involved in key decisions that impact their lives and livelihoods. FPIC can also address power imbalances that lie at the core of such projects bringing together large companies and local communities who often do not have access to decision-making processes. Failing to guarantee FPIC for affected communities increases the risk of violations of their rights to food, water, housing or their cultural and labour rights. FPIC is an essential tool to protect the human, environmental, land and customary rights of all affected communities. It should be applicable to all affected communities for land and natural resource-based projects, with a particular focus on the most vulnerable communities with intrinsicities to the land and natural environment. There is increased consensus that the principle of FPIC should be extended to communities who do not identify themselves as indigenous peoples. In Africa, for example, regional institutions, civil society organizations, and others have recently begun to call for FPIC processes when natural resource projects have the potential to impact local communities regardless of whether affected communities identify themselves as indigenous peoples.

Source: International NGO (written input)

It is also the case that large-scale, land based agri-investments often have more negative effects for local communities than positive ones and can have serious food security implications.

Further, evidence is also growing that agroecological production is preferable to monocultural production, not only for environmental reasons, but also because of the role that

such production systems play in delivering vital ecosystem services upon which local communities depend. Ideally, DD would include guidance on sourcing of commodities from high diversity agroecological production systems that are more able to cater for multiple requirements including local food and agricultural demands (ActionAid). Emerging evidence suggests that territorial markets (local, national, regional markets) are often the best way forward for small-scale food producers, forest dwelling communities and marginalised communities¹⁴⁰, and that food systems need to be localised¹⁴¹.

DD guidance could potentially include reference to the importance of maintaining long term sourcing relationships with suppliers, as a way to effectively support them to improve compliance as a collaborative effort, adopting a beyond compliance approach which focuses on investment in suppliers.

Para 23 of the Bangladesh Accord offers an interesting precedent in that regard, that could provide inspiration: *“Signatory companies to this agreement are committed to maintaining long-term sourcing relationships with Bangladesh, as is demonstrated by their commitment to this five-year programme. Signatory companies shall continue business at order volumes comparable to or greater than those that existed in the year preceding the inception of this Agreement with Tier 1 and Tier 2 factories at least through the first two years of the term of this Agreement, provided that (a) such business is commercially viable for each company and (b) the factory continues to substantially meet the company’s terms and comply with the company’s requirements of its supplier factories under this agreement.”* DD guidance should encourage such longer-term and fairer relationships and can encourage these through tailored statements.

Engagement of and support for producer governments may be part of the solution.

The Dutch government is planning to work with local governments in apparel manufacturing countries, to require companies to develop binding regulations, e.g. strengthening labour and factory inspections¹⁴². These efforts are laudable, but it is not clear how far producer governments will be willing to participate. Some producer governments will resist collaborative binding initiatives, when economic consequences become too great, as has occurred in the recent Bangladesh Government respond to the ACCORD on fire building and safety. Following the Accord’s announcement that 500 factories could not receive further orders as their remediation efforts have been unsatisfactory, the government is taking monitoring into a national initiative instead. Unfortunately, such an approach is likely to have much lower completion rates of mandatory safety renovations, leading to increased risks for workers, factories, and buyers. The government has

140. See the World Committee on Food Security policy recommendations on ‘Investing in Smallholder Agriculture’ and ‘Connecting Smallholders to Markets’: <http://www.fao.org/3/a-bq853e.pdf>; IFAD (2015), Territorial approaches, rural-urban linkages and inclusive rural transformation; CIRAD (2019), Fostering territorial perspective for development; FAO, OECD, UNCDF (2016), Adopting a territorial approach to food security and nutrition.

141. Global Justice Now. ‘The Six Pillars of Food Sovereignty.’ <https://www.globaljustice.org.uk/six-pillars-food-sovereignty>

142. <https://fashionunited.uk/news/fashion/55-fashion-companies-sign-milestone-sustainability-covenant/2016070420984>

established the Ready-Made Garment Sustainability Council (RSC) as the permanent national monitoring safety compliance system for the Bangladesh RMG industry.

Overall, it is important that the focus of companies, states and civil society moves beyond solely considering public reporting by companies and pays more attention to the actual evidence of change (or no change) on the ground. Consideration is required of how such evidence on positive and any unintended consequences will be collected.

Establishment of a governance system is needed which includes independent monitoring of compliance, including independent worker driven monitoring. Current corporate reporting on HRDD processes and outcomes is weak and inadequate. It is insufficiently transparent, and there is a lack of independent monitoring and research. As practice is developing there is a real risk that corporate practice focuses on reporting rather than exercising meaningful and effective due diligence to change practices, address risks and provide remediation. Ensuring the proper implementation of HRDD frameworks is fundamentally important but challenging. Proper implementation of existing HRDD frameworks would go a long way towards ensuring that adverse human rights impacts are avoided, mitigated, and/or remediated. Currently, most frameworks are voluntary, are not fully inclusive, are only partially applied by a minority of companies, and tend to omit remediation. Thus, there is a real need for governance systems which include proper state oversight.

6.2. Conclusions and Recommendations

6.2.1 Overall Conclusions

HRDD frameworks are diverse and the field is fragmented; more coherence is needed to create a level playing field for companies.

Existing and planned national frameworks vary significantly in terms of the nature of the law, the obligations created, the scope (sectoral and human rights), coverage (corporate and supply chain), enforcement, legal liability, and remediation. This diversity will lead to some uncertainty about what is and is not covered and required, as well as considerable variation in the coverage and standard of HRDD in practice. A mandatory EU law on HRDD, building upon national precedents and with clear accountability – and eventually a global binding standard – would provide greater homogeneity and less wriggle room for companies seeking to avoid addressing human rights issues in a comprehensive manner.

Implementation is weak, monitoring of compliance inconsistent and impact monitoring is virtually non-existent. Any monitoring to date is led by civil society. There is no clear role of stakeholders and those directly impacted by corporate harm within monitoring process.

Current frameworks vary significantly in terms of their implementation and monitoring of non-compliance; a lack of

monitoring makes them less likely to be effective. None of the frameworks establish clear competencies for enforcement by public authorities, especially regarding assessment of impact on the ground. This role is left mostly to civil society, who have limited resources. There is also a lack of a formal role for third parties and stakeholders, including workers, farmers, and affected communities, in monitoring and remediation processes.

Few schemes contain specific provisions for liability (civil and criminal); those that do have not foreseen ways in which victims of harm can overcome the obstacles of accessing justice through courts.

Even if some schemes foresee liability (civil for the French law and even criminal for the Dutch one) there are still insurmountable obstacles to access courts in these countries, including the cost of the procedure, the burden of proof, the need to individualise harm and the difficulty of accessing evidence. We can predict that court cases against corporations for lack of HRDD and the harm associated will be lengthy, costly and relatively few in number.

Human rights abuses are an endemic issue in global supply chains and form part of the business model.

Current HRDD frameworks do not address the systemic issues associated with global supply chains, including the lack of payment of living wages and living incomes, which in themselves lead to further human rights violations. In agriculture, there are risks associated with large-scale, export-oriented agriculture, with land use conversions in agri-land investments often creating social and environmental challenges, such as deforestation, loss of access to natural resources upon which local livelihoods depend and food security issues.

Explicit reference to living wages and living incomes in HRDD legislation and guidance is required. Living wages and living incomes are fundamental to respecting internationally recognised human rights, whether as rights themselves or a precondition for other priority human rights. However, existing laws and regulations, and existing HRDD frameworks, do not guarantee that insufficient wages or incomes will be adequately addressed. This will require changes in the way HRDD frameworks are designed and implemented.

HRDD cannot solve human rights abuses and environmental damage caused by global supply chains on its own.

All kinds of other policy changes and political economy shifts are likely to be needed. We thus emphasize that HRDD cannot be viewed as silver bullet for solving the human rights challenges associated with global supply chains and indeed more far reaching changes in the nature of economic systems is likely to be required.

However, while an insufficient measure on its own, if well designed and implemented, then HRDD has the potential to play an important role in securing human rights.

The main objective of this research is to ensure that HRDD frameworks have positive impacts for workers and small farmers in agricultural and apparel supply chains. However, while voluntary HRDD frameworks have been around for some time, mandatory HRDD frameworks are either new or still to come into force. Consequently, the evidence base necessary for making recommendations is largely lacking. The recommendations that follow are therefore necessarily indicative. More implementation experience, and better evidence, will allow more specific recommendations for improving the impact of HRDD to be developed.

6.2.2 Recommendations for HRDD Frameworks and Instruments

1. **Mandatory obligations to conduct substantive HRDD are essential. International and EU wide regulation should be established covering all internationally recognized human rights – including living wages and living incomes - and systemic environmental and development issues.**
2. **All of the affected workers, farmers and communities in the supply chain need to be covered by an appropriate HRDD framework.** Judgements on the salience of human rights and relevant business practices need to be transparent, and the prioritization process needs to involve stakeholder consultation. If the quality of the risk identification and mapping is insufficient –intentionally or unintentionally – and/or if the funding and measures for mitigation or remediation is inadequate, adverse human rights impacts will not be properly addressed. If the framework is voluntary, or if the business relationship falls outside the scope of a mandatory framework, coverage is not guaranteed. This is particularly important when addressing remediation for actual violations, which are generally forgotten when designing and implementing HRDD processes.
3. **Living wages and living incomes should be explicitly mentioned in HRDD legislation, and in any HRDD guidance, as internationally recognised human rights and as fundamental to the achievement of other priority human rights.**
4. **HRDD must be defined and implemented to include corporate purchasing practices which have a direct and indirect effect on workers and farmers’ access to living wages and living incomes, as well as prohibiting practices which prevent suppliers from paying living wages or from paying prices guaranteeing living incomes.**
5. **DD requires consideration of systemic issues such as land use change, food security and climate risks – all of these issues are interconnected to human rights abuses.** In terms of the right to food, allocation of land use should prioritize agroecological production in biodiverse landscapes. Fertile land and clean water should not be allocated to export commodities such as cut flowers, green beans etc. in countries and regions suffering from hunger and malnutrition.
6. **Obligations to conduct substantive HRDD should require companies to set targets and transparent plans on measuring implementation and reporting on such implementation and its effects.** DD should require companies to set out clearly what their targets are for all risks, especially the most severe, and to detail how they will measure progress and evaluate impacts as part of their transparent plans. Reporting should be public, frequent, and accessible.
7. **Clear provisions for implementation and public competences for enforcement are essential. Non-corporate actors and stakeholders should have a specific role to provide independent compliance monitoring and evaluation of impacts.** This requires upgrading regulation and guidance to address the jurisdiction and competence of public bodies in charge of enforcement, the scope and quality of stakeholder engagement, including by workers and their representatives, local communities, smallholders.
8. **HRDD legislation should include not only civil liability but also criminal liability and provide financial support for victims to claim redress.** While civil liability is a step forwards, criminal liability goes further, but is not included in most of the HRDD legislation to date. The current Dutch Law on child labour and proposed German and Swiss laws are the exceptions. The burden of proof lies with the victims, but this creates major challenges for resource-strapped claimants in developing countries especially. Shifting the burden of proof and providing for adequate financial support for victims is essential if the implementation of HRDD frameworks is to result in effective redress for victims.
9. **Whilst the main target of the legislation should be multinational corporations, all businesses in the global supply chain should be considered for inclusion. Tailoring is needed to cover SMEs both in consumer and producer countries.** In consumer countries HRDD processes for SMEs should be tailored to their capacity and their leverage. In producer countries compliance with HRDD for smallholder organisations and small suppliers would require a progressive approach, accompanied by investment from buyers, sharing of compliance costs and long-term commitments.

10. Gender issues should be mainstreamed within HRDD, including priority attention to gender-related issues in risk identification and responses, and in grievance and remedy systems. Guidance should explicitly address gender-related issues in a systematic manner.

6.2.3 Recommendations for Specific Actors

Recommendations for the design and implementation of HRDD frameworks on the state level

1. Pass mandatory regulation that:
 - i. Covers all internationally recognised human rights and systemic environmental and development issues.
 - ii. Specifically covers systemic issues in the supply chain and trading practices which sustain them, with explicit references to living wages and living incomes.
 - iii. Requires the implementation of OECD due diligence standards as a minimum.
 - iv. Obliges the transparent and full disclosure of HRDD processes and outputs (the EU legislation should define transparency).
 - v. Is enforceable by criminal and civil liability.
 - vi. Contains clear obligations and accessible avenues for victim redress and should be implementable extra-territorially.
 - vii. Include a set of tailored safeguarding measures to ensure cost sharing with small producers and workers
 - viii. Include tailored approaches for SMEs both in producer and consumer countries.
 - ix. Provides an effective system for oversight of compliance (state-based or non-judicial).
 - x. Sector specific guidance is required, with particular guidance on high risk issues. Additional requirements for high risk sectors should be set.
 - xi. Engage producer governments to encourage hybrid, sector-wide binding agreements linked to DD.
 - xii. Donors should fund capacity-strengthening programmes for producer governments to encourage implementation, support to civil society (NGOs and trade unions) to use due diligence to hold companies to account, including provision of independent worker driven monitoring. Funding is also needed to raise consumer and public understanding of human rights issues in supply chains, taking account of the need to overcome implicative denial barriers.

Recommendations for implementation by companies

2. Companies should ensure that HRDD implementation is based upon the following:
 - i. Covers all internationally recognised human rights, with transparent and inclusive processes for judging priorities or salience.
 - ii. Specifically covers systemic issues in the supply chain and trading practices which sustain them, with explicit references to living wages and living incomes.
 - iii. Involves sufficient skills and resources to ensure compliance with the UNGP and relevant OECD due diligence standards as a minimum.
 - iv. Explicitly includes and addresses the effects of company business practices, especially pricing and procurement.
 - v. Provides for the active participation of workers, small farmers, communities, and their representatives in the design and implementation of all due diligence processes.
 - vi. Provides special consideration for the interests of and participation of women and marginalized groups.
 - vii. Better disclosure of supply chain structures.
 - viii. Covers the entire supply chain and all human rights impacts directly linked to company operations, products, or services by business relationships.
 - ix. Specifically addresses trading practices: aims to sharing costs of compliance with suppliers, do not cut and run but invest in suppliers, commit to long-term partnerships with suppliers, consider their own trading practices and make sure they provide the adequate conditions for suppliers to comply, including prices with allow access to living wages and living incomes.
 - x. Considers the inter-linkages between sectors and different human rights and systemic issues in the supply chain (purchasing practices, environmental issues).
 - xi. Includes adequate provision for, or cooperation in, the remediation of any adverse human rights caused or contributed to.
 - xii. Involves full and transparent disclosure of all HRDD processes, outputs, and impacts.
 - xiii. When planning and exercising HRDD, companies consider how their own purchasing practices may obstruct suppliers' own capacity to exercise HRDD.

Recommendations for measures to be taken by civil society and other actors

3. Sufficient financial and technical resources need to be made available to support:
 - i. Monitoring the design and implementation of HRDD frameworks.
 - ii. Independent research on the impacts of HRDD implementation – and how any adverse impacts can be mitigated - for workers, small farmers in international and EU supply chains.
4. Mobilize support/engage on:
 - iii. Civil and criminal liability claims by those adversely affected
 - iv. Adequate remediation procedures and funding.
 - v. Research and advocacy for the complementary action required to ensure a more equitable distribution of costs and benefits in global supply chains, such as corporate governance reform, inclusion of HR requirements in trade deals and public procurement, alternative economic systems etc.
 - vi. Passing of supportive legislation, enforcement of regulation, and monitoring in producer countries.
 - vii. Drive the definition of transparency by the EU in legislation.

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Annex 1: List of those consulted

#	Type	Location	Date
1	Various (13)	India	Nov 2019
1	Auditors (2)	India	Nov 2019
1	Brands/buyers (2)	India	Nov 2019
1	Suppliers (2)	India	Nov 2019
1	Experts (2)	India	Nov 2019
1	Civil Society (5)	India	Nov 2019
2	Consultant	Kenya	9/10/19
3	Civil Society	Kenya	30/10/19
4	Civil Society	Latin America	8/10/19
5	Civil Society	UK	30/10/19
6	Civil Society	Switzerland	29/10/19
7	Civil Society	France	4/10/19
8	Academic/Civil Society	Mexico	30/10/19
9	Civil Society	Netherlands	11/10/19
10	Academic	Portugal	18/10/19
11	NGO	Belgium	9/10/19
12	Consultant	UK	3/10/19
13	Company	UK	4/10/19
14	Consultant	US	3/10/19
15	Consultant	UK	20/9/19
16	State Body	Kenya	11/11/19
17	Civil Society	USA	12/10/19
18	Civil Society/Researcher	DRC	15/11/19
19	Civil Society	Hong Kong	06/12/19
20	Civil Society	UK/NL	Nov. & Dec. 2019



Picking cotton in India | Photo: Florie Marion

Exploring the impacts of human rights due diligence for workers and smallholders in global supply chains

This report explores the potential effectiveness and impact of Human Rights Due Diligence (HRDD) frameworks and instruments, focusing on the agriculture and garment sectors. The study unpacks a theory of change for how HRDD frameworks are anticipated to have an impact, assembles and analyses available empirical evidence to assess effectiveness and impact and identify evidence gaps, and explores the specific risks of unintended, negative impacts for workers and small farmers associated with HRDD implementation. It also provides a legal analysis of living wages and living income within HRDD, because both are fundamental to the fulfilment of other human rights and are not currently part of the mainstream HRDD conversation.



Coffee farming in Kenya | Photo: David Macharia

For more information, please contact the study authors from the University of Greenwich:

Professor Valerie Nelson: V.J.Nelson@gre.ac.uk or Professor Olga Martin Ortega: O.Martin-Ortega@gre.ac.uk

For the commissioning organisations, Brot für die Welt and Fair Trade Advocacy Office, please contact:

Fabienne Yver: yver@fairtrade-advocacy.org and Teresa Hoffmann: Teresa.Hoffmann@brot-fuer-die-welt.de

Production coordinator: Gillian Summers, Natural Resources Institute, University of Greenwich.

Art direction: Simon Pointer, GDA Creative Design.

