



HUMAN RIGHTS DUE DILIGENCE Challenges of Method, Power and Competition

POLICY BRIEF
May 2023

KEY MESSAGES

Human rights due diligence (HRDD) is set to become a mandatory obligation imposed on many larger businesses by a variety of governments globally.

[This briefing reports on the first detailed empirical research into HRDD](#), based on interviews with leading practitioners in the field.

The findings of this research identify three key challenges to making HRDD effective:



1 **methodological uncertainty** about key aspects of the process;



2 **power dynamics between critical actors** who are charged with undertaking vital aspects of HRDD;



3 **the nature of the competition** which takes place between HRDD practitioners.

It therefore provides recommendations for how mandatory HRDD (mHRDD) laws can empower key actors to effectively hold companies accountable for the HRDD they produce. If these laws are ineffective, it argues for the setting up of an independent body to have lead responsibility for overseeing the HRDD process internationally.

1. WHY IS HUMAN RIGHTS DUE DILIGENCE IMPORTANT?

There are two key problems with holding transnational corporations (TNCs) accountable for their human rights performance.



1. THE KNOWLEDGE PROBLEM

The difficulty in finding out where human rights abuses will happen/are happening and who is responsible for them in a world of complex production processes and value chains.



2. THE ACTION PROBLEM

How to effectively address human rights abuses, provide remedies to affected rightsholders and prevent future abuses occurring.

HRDD is a four-stage process which requires companies to assess their actual and potential human rights impacts, take action in relation to the adverse impacts they identify, track the effectiveness of their responses, and communicate how their impacts have been addressed.¹

It therefore has the potential to address both the knowledge and action problems.

HRDD was first introduced through the UN Guiding Principles (UNGPs) on Business and Human Rights more than a decade ago. HRDD has been taken up on a voluntary basis by a number of leading transnational corporations as a way of demonstrating their respect for human rights in accordance with the UNGPs.

Mandatory HRDD legislation has now been introduced in Germany, France and Norway and there is also a draft EU Directive. Other governments considering legislative proposals include Austria, Brazil, Colombia, the Netherlands, Spain and Switzerland² (Figure 1). As a result, over the coming years, HRDD will be transformed from a process undertaken voluntarily by a few self-selecting companies to a process which is required of many thousands of companies globally.



2. RESEARCH METHODS

There is a lack of detailed research into the practice of HRDD. Such research is difficult to undertake because public reporting on HRDD by companies is very limited. This study is based on interviews with twenty-two of the leading ‘practitioners’ of HRDD; individuals who have undertaken HRDD for companies. Practitioners were asked about their own practice of HRDD and how they saw practice in the field more generally.



3. KEY RESEARCH FINDINGS

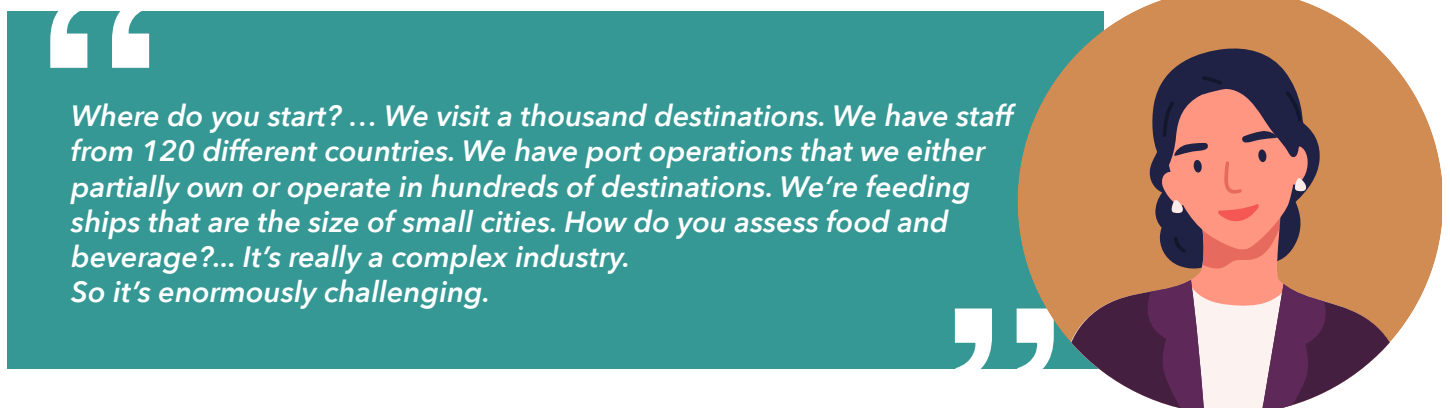
Interviews demonstrated that HRDD is a complex and multifaceted process and that leading practitioners are working hard to help companies enact HRDD that improves the performance of TNCs. But there are three key challenges which undermine HRDD’s current and future prospects. Some examples of each of the challenges are provided below (for more detail see [paper](#)).

1. METHODOLOGY

On critical aspects of the HRDD process, there are a number of important methodological issues where there is either uncertainty or there are differences of opinion between leading practitioners in the field. This casts doubt over whether HRDD is currently on a secure methodological footing.

HRDD looks very different across different sectors. For instance, HRDD of a technology company is markedly different from a mining company. In some sectors, the number of human rights issues and/or the volume and dispersal of rightsholders make decisions about what to assess very difficult.

For instance, in the cruise-line sector one practitioner commented:



Even in sectors where it was easier to identify priority sites for assessment – at locations such as mines, factories or farms – many practitioners emphasised the difficulty of obtaining a full understanding of critical human rights issues. There were also significant differences of approach between practitioners in terms of e.g. the number of site visits, how many human rights issues they assessed and how definitive

¹ UN Guiding Principles on Business and Human Rights, Principles 17-21.

² Comparing a number of the European proposals, see [Corporate Justice, Corporate due diligence laws and legislative proposals in Europe Comparative table \(March 2022\)](#). On Brazil’s human rights due diligence Bill see [Camara Dos Deputados, Projeto de Lei, 572/22](#). Information about the Spanish proposal can be found at [Congress of Deputies, Legislative National Context Regarding Due Diligence \(April 2022\)](#). Information about the Colombian draft proposal was provided by one of the interviewees to this article - The Ombudsman office in Colombia is working on draft law. There are also a range of other ‘due diligence’ laws which more indirectly or partially embed HRDD into domestic legislation.

they thought they could be in their findings.

When human rights issues had been identified and action was needed to address them, vital procedural safeguards were sometimes not in place to ensure actions were properly recorded and acted upon:

“

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

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2. POWER DYNAMICS

Power dynamics between critical actors who are charged with undertaking vital aspects of the HRDD process can significantly undermine the capacity of HRDD processes to produce valuable results for rightsholders.

For instance a number of practitioners identified constraints imposed upon them that affected what they could assess by companies:

“

[The company said] we will look at workers' rights, but not at land.

”

“

Senior management is not really comfortable with this topic.

”

The relationship between the corporate HQ and local management in sites where assessments were taking place could also seriously affect the assessment process. As one practitioner commented:

“

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

”



When action was required to address human rights issues identified, it could be that the focus was on “lower hanging fruit”; issues that were easier and less costly to address. Practitioners sometimes reported that some of the more complex impacts, like resettlement issues, “basically never changed”.

Practitioners would also sometimes find that the company would push the responsibility onto the suppliers. But suppliers would then ask who was going to pay for the cost of making changes. One practitioner gave the following example:



Many companies just don't listen to their suppliers or they don't engage with them. So they can tell them you have to do this and that. But then have they paid them enough actually for them to offer good conditions? So sometimes that's part of the problem that leads to the human rights issues happening.





3. COMPETITION

Consultants often compete for HRDD work with other providers and therefore have to be competitive in terms of the price, timing etc. of the work they deliver. These competitive pressures risk creating a 'race to the bottom' in terms of the robustness of HRDD processes.

A number of consultants reported losing out on business to other consultants who had undercut them on price. Sometimes they were able to find out that this was because those consultants had a less rigorous assessment process. One practitioner went as far as saying that "lots of companies are essentially, I think, doing the human rights due diligence by plugging in the country and sector to RepRisk³ and seeing what comes out."

With the massive expansion of HRDD which is now occurring as a result of mHRDD laws and the small number of higher quality practitioners in the field, the dangers of a race to the bottom in terms of the quality of future practice are very high.

Limitations in Current HRDD Practice in Addressing the Knowledge and Action Problems







	METHODOLOGICAL CHANGES	POWER DYNAMICS	COMMERCIAL COMPETITION
 KNOWLEDGE PROBLEM	Complexity of assessing human rights impacts and uncertainty about appropriate methods undermines reliability of knowledge obtained.	Limits placed on the scope of assessment and refusals to co-operate during the assessment process threaten capacity to discover human rights abuses.	Dangers of race to the bottom in terms of assessment methods risks widespread failure to understand risks and impacts 'on the ground'.
 ACTION PROBLEM	Corporate management systems misaligned with HRDD processes. Vital procedural safeguards not in place to ensure actions properly recorded and acted upon.	Hostility to findings of assessment, resistance to implementation of findings and efforts to shift responsibility onto other actors undermines efforts to address impacts.	Reluctance by consultants to push for action on most difficult and resource-intensive issues risks those issues being marginalised. If widespread this will also cause a race to bottom.

³ See RepRisk at <https://www.reprisk.com/>

4. RECOMMENDATIONS FOR STRENGTHENING mHRDD LAWS AND THEIR IMPLEMENTATION

mHRDD laws must empower key actors to effectively hold companies accountable for the HRDD they produce. At the moment they generally fail to do this.

Key ways in which laws can be strengthened and/or implemented more effectively include:

-  **1 Providing detailed sector-specific guidance** that creates a minimum core set of expectations about how HRDD should be conducted.
-  **2 Demanding sufficient disclosure of companies' HRDD** so that supervisory authorities and civil society organisations are then capable of conducting meaningful scrutiny.
-  **3 Staffing supervisory authorities with sufficient numbers** of expert personnel to allow for detailed scrutiny of reports.
-  **4 Creating effective mechanisms for rightsholders and their representatives** to raise human rights concerns and for those to be properly investigated.
-  **5 Crafting civil and criminal liability** in a way that acts as an incentive to companies to take HRDD seriously.
-  **6 Equipping supervisory authorities with powers and a willingness to use them** to ensure that companies take action where human rights issues are identified and that costs are borne equitably between companies, suppliers and contractors.

In the absence of effective mHRDD laws, national authorities should consider setting up an independent body to have lead responsibility for overseeing the HRDD process internationally (iHRDD). iHRDD would be the professional home of HRDD practitioners, be responsible for their training and accreditation and be involved in the commissioning of HRDD studies.

This would change the power dynamics of the relationship between company and practitioner and ensure significant independence to the HRDD process.

Get in touch for more information



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