

LABOUR AND SOCIAL JUSTICE

TRANSNATIONAL LEGAL TACTICS FOR LABOUR

How to make use of Corporate
Accountability Mechanisms

Michael Bader & Miriam Saage-Maaß
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The endorsement of the UNGPs in 2011 and the initiatives following the industrial disasters across South Asia in 2012 and 2013 created a shift from voluntary forms of corporate social responsibility towards binding corporate human rights standards.



The new mandatory human rights due diligence (mHRDD) laws in Europe are an opportunity to make the voices of workers from production countries better heard and more relevant in decision at the European corporate headquarters.



mHRDD laws must be gradually expanded. Beyond fundamental rights, structurally redistributive rights, such as the right to freedom of association and to social security, have to be advanced in the debates.

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**EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS**

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Foreword

The Covid-19 pandemic has sharply exposed the vulnerability of workers in global value chains. Around the world, local and global labor movements struggle under immense pressures to uphold and advance labor and human rights. In doing so, these movements have developed various strategies in the past decades to address inhumane working and living conditions of workers. Next to union organizing and advocacy for law reform on the local and national level in production countries, the transnational legal toolbox now available ranges from multi-stakeholder initiatives, global framework agreements, enforceable brand agreements, workers' compensation funds and transnational litigation to mandatory human rights due diligence.

Since the UN Guiding Principles on Business and Human Rights went into force in 2011, labor organisations have joined hands to create an increasing number of legally binding mechanisms to hold multinational enterprises responsible for workers' rights violations. Recently, within the context of the European Union, the debate on mandatory human rights due diligence legislation has gained significant traction. There are hence new and exciting opportunities to make the voices of workers from production countries heard and to protect their rights.

This report offers a toolbox of legal strategies and approaches taken by the labor movement and contextualizes key lessons learned. It furthermore outlines current legal developments with regard to the responsibilities of multinational enterprises. We hope that such an overview helps the movement to align strategically when employing legal tools.

For many years, the Friedrich-Ebert-Stiftung (FES) has been working on the topic of mandatory human rights due diligence and on how to shape and ensure a fair globalisation, which puts human rights at its heart. FES is represented in over 100 countries worldwide. We are active in many production countries of German and European companies. Issues such as ending child labor, living wages and ensuring freedom of association are and will remain a key focus of our work.

We are therefore immensely thankful to build on a long partnership with our cooperation partner, the European Center for Constitutional and Human Rights (ECCHR). This

study is a continuation of our enriching discussions with ECCHR, which have been significantly shaped by the exchanges with the authors of this study, Michael Bader and Miriam Saage-Maaß, to whom we extend our gratitude.

We hope that you enjoy unpacking this legal toolbox – and that it stimulates further critical and creative thinking in the field of transnational legal strategies for labor movements.

*Frederike Boll-von Galen and Tina Blohm
Global and European Policy
Friedrich-Ebert-Stiftung*

Introduction

When the study *Labour Conditions in the Global Supply Chain: What Is the Extent and Implications of German Corporate Responsibility?* was written in 2011, the question of the legal responsibility of German businesses for human and labour rights violations in their global value chains (GVCs) was fairly new.¹ The study concluded that civil actions against German companies before German courts for violations of human and labour rights along GVCs were possible in theory, but had not yet materialized successfully in practice.

The publication of the study was followed by a decade of both tragic events and tremendous shifts in the corporate accountability landscape. In the same year the report was published, the United Nations Guiding Principles on Business and Human Rights (UNGPs) were unanimously endorsed by the UN Human Rights Council. Among other developments, the UNGPs established a coherent and detailed standard for the human rights responsibilities of multinational enterprises (MNEs) within their GVCs. This led to a major acceleration in the international engagement with corporate accountability. In the years that followed, three factory disasters shocked South Asia, causing death and injury to thousands of workers: in 2012, the Ali Enterprises factory in Pakistan and the Tazreen Fashion production site in Bangladesh burned to the ground and, in 2013, the Rana Plaza building in Bangladesh collapsed. Since all three factories were primarily producing for European and North American brands and retailers, the question of the legal responsibilities of lead firms for their suppliers captured more universal attention. The horrendous conditions under which production for Western markets occurs became undeniable, not only for workers and labour movements of the global South or the business community, but also for a wider public and policy-makers in Europe at the national and international level. This gave momentum to a broad variety of initiatives that aim to create legally binding obligations of lead firms and accountability mechanisms for workers in supplying factories.

Following the Ali Enterprises factory fire, the first supply-chain case was brought before German courts: the litigation against KiK in the Ali Enterprises case amounted to a procedural test of one of the potential legal pathways outlined in the 2011 study. It relied on a German court to determine the (shared) legal responsibility of a lead firm, the German retailer KiK, for health and safety conditions in a supplying factory. While the case was never decided on its merits, it certainly accelerated the debate concerning MNE responsibility and liability for rights violations in their production networks. Currently, new legislation is being fiercely debated and will hopefully be introduced on the EU level and domestically in various European countries in the shape of mandatory human rights due diligence (mHRDD) laws. These laws formulate human and labour rights obligations of companies and a legal duty of care towards workers in their GVCs.

Our aim in this report is to contextualise both the lessons from the aftermath of the South Asian garment factory disasters as well as the current legal developments in regard to MNE responsibility in their home jurisdictions. We are certain that no law or transnational legal proceeding can by any means replace trade union struggle, movement building, transnational campaigning and the collective organising of workers in their quest for change. Still, we believe that laws can serve as an important tool for change: litigation and legal proceedings have the potential to amplify workers' voices and throw light on particular struggles. Targeted lawsuits can increase pressure on states in the South and North as well as MNEs and local factory owners to bring about reform. Moreover, such lawsuits can help to secure much needed financial compensation, whether through the litigation itself or the pressure it generates. Therefore, we aim to present the various transnational legal tactics that were developed by workers, trade unions and labour movements in their struggle to pursue accountability and change at the factory level following the South Asian factory disasters. In this way, we hope to make them accessible to labour movements and trade unions that are struggling for improvements in the working and living conditions of workers within and outside of the garment industry and beyond South Asia. We hope that this mapping will provide them with tactical assistance in their current and future struggles.

¹ Miriam Saage-Maaß, *Labour Conditions in the Global Supply Chain: What is the extent and implications of German responsibility* (Friedrich Ebert Stiftung, 2011), <http://library.fes.de/pdf-files/iez/08822.pdf>.

1

LIMITS OF TRADITIONAL WORKERS' STRUGGLE: THE EXAMPLE OF PAKISTAN

Since the 19th century, workers have achieved improvements in working conditions through collective struggles, protests, campaigning and direct action, self-organisation and collaboration. Strong trade union movements have been crucial in this regard. Many of these struggles had two common addressees, namely the state and the employers within a given national territory. Once sufficient pressure had been exerted, reforms often materialised, followed by power gains through bargaining and institutionalised participation of workers in the governance of corporations. Workers in Pakistan, as in any other country in the world today, are doing exactly this: they protest, march, formulate demands and struggle for reforms. Traditionally, the primary addressee of workers' reformism has been the state as the main regulating entity. But as production was globalised and became increasingly organised through GVCs in the second half of the 20th century, the struggle for better working and living conditions of workers became more difficult to achieve. For instance, workers in Pakistan have made gains such as the 2017 Sindh Occupational Safety and Health Act,² and the 2018 Sindh Home-Based Workers Act,³ following the disastrous Ali Enterprises factory fire of 2012. Yet, the regulating entities, the provincial and federal governments of Pakistan, are »encased« by the institutional set-up of the current global economy.⁴ This means that while Pakistan has jurisdiction over the business entities operating within its own territory and could, in theory, implement laws and regulations that improve the working and living conditions of their workforce, the corresponding political will is strongly discouraged by the country's need to participate in the global economy. Within this system, inward investment and hosting production facilities for international brands is not only desired by »developing« nations such as Pakistan; rather, the country is dependent on such investment from the EU, North America or the rising economic superpower China in order to increase its Gross Domestic Product (GDP) and accelerate its »development«.

While workers in these GVCs are exploited, the textile industry in Western countries is in constant need of growth in consumer demand.⁵ In recent decades, wage growth in Europe has lagged behind the increase in the profits of corporations, but the need for economic growth requires a constant increase in consumption of the broader population, which is only possible by ensuring decreasing prices. Low prices for consumer goods are achieved by externalising and cutting costs, which are pushed down the GVC onto workers in the producing countries. As MNEs are seeking the highest profits for their shareholders and are under pressure to reduce production costs, they strategically choose production locations with cheap labour, lax legal implementation and weak judicial infrastructure in order to avoid accountability.⁶

The direct result of this is the suffering of workers. The textile and garment industry accounts for over 60 per cent of Pakistan's exports and the industry accounts for 8.5 per cent of Pakistan's GDP.⁷ For Pakistani workers, as for many workers elsewhere in the world today, wages are not sufficient to ensure their basic needs, welfare mechanisms are absent, working hours are long and labour is demanding. In a 2015 report, the Clean Clothes Campaign identifies the deprivation of workers' rights under constitutional law, labour laws and international law, dangerous working conditions in factories and discrimination against female workers as the biggest issues in the Pakistani garment industry.⁸ In spite of small legislative gains, child labour is still rampant.⁹ The widespread fragmentation of trade unions renders them powerless.¹⁰ Even though various conventions

2 NO.PAS/LEGIS-B-27/2017- The Sindh Occupational Safety and Health Bill, 2017, http://sindhlaws.gov.pk/setup/publications_Sindh-Code/PUB-NEW-19-000060.pdf.

3 NO.PAS/LEGIS-B-25/2018- The Sindh Home-Based Workers Bill, 2018, <http://www.pas.gov.pk/uploads/acts/Sindh%20Act%20No.XXXVII%20of%202018.pdf>.

4 Slobodian, Globalists. *The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).

5 Stephan Lessenich, *Neben uns die Sintflut* (Piper 2018).

6 James Chen, Race to the Bottom, Investopedia (30 December 2020) [https://www.investopedia.com/terms/r/race-bottom.asp#:~:text=What%20is%20the%20Race%20to,\)%2C%20or%20reducing%20labor%20costs](https://www.investopedia.com/terms/r/race-bottom.asp#:~:text=What%20is%20the%20Race%20to,)%2C%20or%20reducing%20labor%20costs).

7 Government of Pakistan, Board of Investment, Textile Sector Brief, <https://invest.gov.pk/textile>.

8 Lina Stolz, Fact Sheet Pakistan (Clean Clothes Campaign 2015) <https://cleanclothes.org/file-repository/resources-publications-factsheets-pakistan-factsheet-2-2015.pdf/view>.

9 US Department of Labour, Child Labour and Forced Labour Reports. Pakistan (2019) <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/pakistan>.

10 Human Rights Watch, No Room to Bargain. Unfair and Abusive Labor Practices in Pakistan (23 January 2019) <https://www.hrw.org/report/2019/01/23/no-room-bargain/unfair-and-abusive-labor-practices-pakistan>.

have been signed and most labour issues are covered in formal laws, the main problem remains their implementation.¹¹ Over half of Pakistan's workforce remains in the informal economy, and is therefore virtually untouched by formal legality, making social security institutions unavailable and job security a distant dream.¹² Home-based workers in Pakistan's informal economy bare the biggest burden: located at the bottom end of the informality continuum, these workers are chronically and significantly underpaid. On average, the home-based workers surveyed (and their helpers) work 12.3 hours per day, six days a week and earn a monthly income of 4,342 Pakistani rupees (PKR) (roughly equivalent to 41.5 US dollars).¹³ While a clear-cut distinction cannot be made between workers employed in the informal versus the formal economy,¹⁴ the International Labour Organization (ILO) concludes that »[i]n Pakistan, labour participation in the informal economy vastly outstrips that in the formal economy: 72.6 per cent of all labour participation is informal.«¹⁵

The problem for conventional forms of struggle for better working and living conditions is that the two actors that play a pivotal role in determining the conditions of workers in most production countries – the MNE at the top of the GVC and the state in which it is headquartered – are beyond the workers' reach. This disconnect, among other things, has led to the widely described and lamented regulatory gap regarding MNEs and the resulting accountability vacuum. Since the 1970s in particular, regulatory attempts have been made to address this problem at the level of the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD); yet most of the attempts to regulate MNEs have been unsuccessful.¹⁶ In recent years, however, a debate revolving around and derived from the UNGPs has been gaining steam highlighting the urgent need for mHRDD legislation and remedy pathways for those affected. At the same time, local and global trade unions and labour movements have been addressing this gap for years, by negotiating private or labour law mechanisms and multi-stakeholder initiatives (MSIs) with all of the relevant actors. These range from international framework agreements to enforceable brands agreements, such as the Accord on Fire and Building Safety in Bangladesh or the agreement on the prevention of gender-based vio-

lence in Lesotho,¹⁷ as well as MSIs such as the ACT initiative on living wages. There have also been examples of legal proceedings brought against lead firms and auditing companies in the MNE's home countries. The potentials of these different initiatives will be examined in the following.

¹¹ International Labour Organization, Profile: Islamic Republic of Pakistan (2014) https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158916/lang-en/index.htm.

¹² M. Zhou, Pakistan's hidden workers. Wages and conditions of home-based workers and the informal economy (International Labour Organization, 2017) www.ilo.org/wcmsp5/groups/public/-/asia/-/ro-bangkok/-/ilo-islamabad/documents/publication/wcms_554877.pdf.

¹³ Ibid., p. x.

¹⁴ Ibid., p. 7.

¹⁵ Ibid., p. 8.

¹⁶ Sundhya Pahuja and Anna Saunders, Rival Worlds and the Place of the Corporation in International Law; in Philipp Dann and Jochen von Bernstorff (eds), *Decolonisation and the Battle for International Law* (OUP, 2018).

¹⁷ Worker-driven Social Responsibility Network, Factsheet: Gender Justice in Lesotho Apparel (15 August 2019) https://wsr-network.org/wp-content/uploads/2020/01/FactSheet_GenderJusticeInLesotho.pdf.

2

LABOUR AND HUMAN RIGHTS IN THE GLOBAL ECONOMY

The current global economic set-up provides governments of producing countries incentives to neglect their international obligations to protect workers from exploitation. This has been flagged as an issue at the international level since the 1970s and attempts have been made since then to regulate MNEs. The main language used to counteract the harmful behaviour of states and, more recently, businesses on the international level has become that of human and labour rights and standards.

2.1 HUMAN RIGHTS AND LABOUR STANDARDS

Rights of workers in the workplace are protected both through international human rights law as well as labour rights and standards. Many labour rights are enshrined explicitly or implicitly in international human rights law. For instance, the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) covers a broad range of fundamental rights of workers, such as the right to work including the right to freely choose one's work (Article 6 ICESCR), the right to organise and form unions (Article 8 ICESCR/Art. 22 ICCPR) and the right to social security (Article 9 ICESCR). While human rights and labour rights are often perceived as separate bodies of law, they are not clearly distinct.¹⁸

A key feature of both the human rights treaties and the ILO conventions is that they primarily oblige states to ensure that the human and labour rights of workers are respected within their territories, and to some extent also extraterritorially.¹⁹ Business entities are not (yet) directly bound by international law. Therefore, the enforcement procedures in international human rights and labour law and their respective mechanisms can only indirectly address the harms caused by business entities: the duty of the state to protect can be invoked, because states have a duty to prevent third

parties, such as corporate actors, from engaging in harmful activities on their territories.²⁰

2.2 THE OUTSOURCING OF CORPORATE RESPONSIBILITY IN GLOBAL VALUE CHAINS

While international human rights law does not recognise business entities as its subjects, and therefore does not directly oblige them to adhere to human rights norms, it is clear that corporations, in their transnational operations, constantly violate human rights and labour standards.²¹ At the same time, the power of globally operating business entities and their influence over regulatory regimes at the national, supranational and international level has become unprecedented in recent decades. MNEs make use of (international) economic law very effectively to expand their business activities, to secure profits, to evade regulation aimed at protecting the human and labour rights of workers and to shield themselves against resulting liabilities.²²

The dogmatic figure of the so-called separation principle – i.e. limited liability within a corporate group – is one of the most prominent ways to achieve the externalisation of liability for labour and human rights violations, and thereby the externalisation of costs. The separation principle exists in almost all legal systems and qualifies all subsidiaries within a corporate group as legally independent entities. This means that, under company law, the parent company does not bear responsibility for human and labour rights violations committed by its subsidiary or supplier.²³ This limitation of responsibility within the corporate group is often a legal fiction, since the actual corporate governance structure can allow for a tight, hierarchical organisation (vertical integration) within the corporate group.

¹⁸ Virginia Mantouvalou, (2012) Are Labour Rights Human Rights?, 3(2) European Labour Law Journal, p. 151 doi: 10.1177/201395251200300204; and Philipp Alston, *Labour Rights as Human Rights* (OUP, 2015).

¹⁹ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, https://www.eto-consortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

²⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, UN Doc E/C.12/2002/11.

²¹ See for instance the vast data gathered on human rights violations by business entities by the Business and Human Rights Resource Centre: <https://www.business-humanrights.org/>.

²² Katharina Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).

²³ A comprehensive description of the problem can be found at: Gerhard Wagner, *Haftung für Menschenrechtsverletzungen* (2016) 80 *Rabels Zeitschrift*, 717.

Still, this explains why trade unions, non-governmental organisations (NGOs), grassroots organisations and other civil society actors have to make great efforts to establish clear-cut avenues of redress in situations of corporate abuse: legal separation hinders liability of the entities where decisions are taken and control is located, namely at the parent companies or lead firms in the GVC.

In the textile and garment industry, the responsibility of lead firms is even more implicit, since it is generally one of contractual relationships that connect a buyer with a supplier. While the MNE or lead firm is often in a position to dictate the conditions of the entire business relationship and process, it can easily exculpate itself in cases of rights violations at the production site. Both national and international contract law are based on the legal fiction that the parties involved in a given transaction are equal contractual partners and bear no responsibility for the other side's internal affairs, such as workers' rights at the production site.²⁴ The supplier is entirely responsible for ensuring workers' rights to appropriate remuneration, social security and job security, as well as other concerns, such as the implementation of environmental protections; by contrast, workers' rights have no legal relevance in the contractual relationship between lead firms and suppliers.²⁵

The most recent manifestation of the implications of the disparities between formally equal contracting parties in GVCs occurred in March and April 2020, when consumer demand dropped drastically due to worldwide lockdowns. In the wake of this, international buyers were quick to unilaterally cancel orders and refuse payment for already produced goods.²⁶ Research has shown that contracts between US-American retailers and their Bangladeshi suppliers were in some instances shockingly unbalanced, giving enormous flexibility to the retailer while tightly binding the supplier. In other instances, the cancellations had no legal backing at all – either by contract or by the frequently invoked force majeure principle.²⁷ Still, international brands and retailers were able to cancel the orders without payment despite the lack of a legal basis because suppliers will rarely object to even the harshest of measures: suppliers in production countries are dependent on the next order once the crisis is over. As a result, within weeks, millions of workers across Asia lost their jobs and were left with no savings or social protection schemes. Even if factory owners were willing, their tight profit margins prevented proper payments to their workers, espe-

cially after international brands and retailers had refused to pay for goods that had already been produced. This most recent development showed once again that, while international buyers increase their profit margins, little is left for the producing entity and, in turn, their workers that unexpected frictions in market demand can easily lead to social disaster.

²⁴ Katharina Pistor, Fn 22, 212.

²⁵ James Gathii and Ibrionke T. Odumosu-Ayanu, *The Turn to Contractual Responsibility in the Global Extractive Industry* (2016) 1 *Business and Human Rights Journal* 69.

²⁶ Mark Anner, *Squeezing Workers' Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective*. (2020) 27 *Review of International Political Economy* 320.

²⁷ Jeffrey Vogt et al., *Force Majeure. How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers*, ECCHR and WRC Position Paper (Berlin, July 2020) https://www.ecchr.eu/fileadmin/ECCHR_PP_FARCE_MAJEURE.pdf.

3

LESSONS FROM SOUTH ASIA: EXPANDING THE TOOLBOX

Over the past decades, workers, unions and labour movements across South Asia have developed a variety of transnational legal tactics for addressing the regulatory gap that MNEs exploit to the detriment of workers and communities. These tactics range from MSI's, global framework agreements, OECD Guidelines and their procedures, Enforceable Brand Agreements (EBAs) and special compensation funds, as well as transnational litigations in the home jurisdictions of lead firms. In our view, the factory disasters in Bangladesh and Pakistan and the lack of accountability in their wake have given tremendous momentum to certain initiatives aimed at legally binding agreements between MNEs and unions and have accelerated efforts to establish mHRDD legislation.

3.1 GLOBAL FRAMEWORK AGREEMENTS

The widespread critique of voluntary corporate codes of conduct and Corporate Social Responsibility (CSR) initiatives has led labour movements and trade unions to pressure MNEs into engaging in alternative forms of private transnational regulation in order to attribute trade unions a more central role as negotiation partners at a global level. This has opened paths for global union federations to establish themselves as central actors in the development of global labour relations.²⁸ As a result, and particularly since the beginning of the 2000s, European Framework Agreements, followed by Global Framework Agreements (GFAs),²⁹ have emerged as new tools in transnational private regulation.³⁰ A GFA is an instrument negotiated between a global union federation and a MNE to establish an ongoing relationship between the parties and ensure that the MNE respects the same standards in all the countries in which it operates. Sectoral trade unions from the home country of the MNE participate in negotiating the agreement.

Over the past 20 years, GFAs have increased in number and scope, with a total of 119 GFAs existing by the end of 2017.³¹ Today, GFAs not only assert that international labour standards have to be implemented, but have become more concrete and comprehensive in wording, often referring to other standards such as the OECD Guidelines for MNEs or the UNGPs. In addition, an increasing number of GFAs provide detailed instructions regarding implementation, monitoring and, to a lesser extent, dispute resolution. While these GFAs directly concern only the corporate group, about 80 per cent of GFAs refer to direct suppliers of the respective MNE and their subcontractors. The prescribed activities vary from encouraging suppliers' compliance with international labour standards to the possibility of termination of contracts as a measure of last resort if international labour standards are not adhered to.

Criticism has been voiced that GFAs do only very little to empower unions and workers in producing countries because they leave negotiations to the sectoral union in the global North.³² In industries with strong union power in the MNE's home state, such as the automotive industry, GFAs seem to be more effective than in industries such as the textile and garment industry. Especially in the latter, GFAs have hardly been an effective tool for local unions and workers to hold MNE-lead firms to account for their influence on working conditions in the producing country. In concrete cases of labour rights abuses at the factory level in a production country, it is difficult for a local trade union to make use of the mechanism set up by a GFA. The local union needs to inform and coordinate its actions closely with the international union and the union at the MNE's headquarters. The international union and unions in the global North need to react within an adequate time frame and exert pressure invoking the GFA. Given that unions at all levels are chronically under-resourced, it has often proven difficult for local unions to secure the support needed within the time frame required to serve the needs on the local factory level.

²⁸ Michael Fichter and Jamie K. McCallum, *Implementing global framework agreements: the limits of social partnership* (2015) 15 (1) *Global Networks*, 65, 71.

²⁹ Often also referred to as International Framework Agreements (IFAs).

³⁰ Mark P. Thomas, *Global Industrial Relations? Framework Agreements and the Regulation of International Labor Standards* (2011) 36 (2) *Labor Studies Journal*, 269.

³¹ International Labour Office, *International Framework Agreements in the food retail, garment and chemicals sectors: Lessons learned from three case studies* (ILO 2018) 16.

³² Michael Fütterer and Tatiana Lopez Ayala, *Challenges for the Organizing along the Garment Value Chain. Experiences from the Union Network TIE Exchains* (Rosa Luxemburg Stiftung, 2018) 24 https://www.rosalux.de/fileadmin/rls_uploads/pdfs/Ausland/Asien/Studien_2-18_Challenges_web.pdf.

3.2 MULTI-STAKEHOLDER INITIATIVES

Due to campaigning pressure exerted by labour movements and trade unions, MNEs have become open in recent decades to joining MSIs to monitor labour standards along their GVCs. MSIs are »collaborations between businesses, civil society and other stakeholders that seek to address issues of mutual concern, including human rights and sustainability«.³³ To this end, these initiatives facilitate dialogue across stakeholder groups, foster cross-sector engagement or develop and apply standards for responsible corporate or government conduct. Usually, the stakeholders representing the interests of workers on the governance boards of MSIs are unions and civil society organisations from the global North, while unions from the producing countries are not normally involved in the policy-making and strategy-building processes.³⁴ Companies participating in MSIs can gain greater legitimacy vis-à-vis consumers, because they can claim that the respective standards and mechanisms are not designed and implemented exclusively in corporate interests.³⁵ They are not voluntary corporate social responsibility codes of conduct that a company unilaterally gives itself.

Some studies have demonstrated that certain procedures and mechanisms of MSIs can allow for more equal participation especially by trade unions than others. Authors such as Mark Anner point out, that MNEs nevertheless strongly influence the set-up and working of MSIs.³⁶ Even if trade unions can procedurally participate, they often have limited possibilities to make substantial contributions.³⁷ In sum, MSIs are said to have brought about some improvements in some concrete instances in terms of minimum wages, child labour, working hours and health and safety; but they have been unable to improve important rights such as freedom of association or the right to collective bargaining.³⁸ A recent report by the organisation MSI Integrity concluded that the experiment of MSIs has failed to establish accountability of companies and redress for those affected by corporate abuse.³⁹

³³ MSI Integrity, Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance (2020) 21, https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf.

³⁴ Michael Fütterer und Tatiana Lopez Ayala, Fn. 32, 16. MSI Integrity, Fn 33, 26.

³⁵ Mark Anner, Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains (2012) 49(4) *Politics & Society* 606, 613.

³⁶ Mark Anner, Fn 36, 615; Niklas Egels-Zandén and Henrik Lindholm, Do codes of conduct improve worker rights in supply chains? A study of Fair Wear Foundation (2015) 107 *Journal of Cleaner Production*, 31.

³⁷ Deborah Martens et al., Trade Unions in Multi-Stakeholder Initiatives: What Shapes Their Participation? (2018) *Sustainability*, 2, 19 https://res.mdpi.com/d_attachment/sustainability/sustainability-10-04295/article_deploy/sustainability-10-04295.pdf.

³⁸ Mark Anner, Fn 36.

³⁹ MSI Integrity, Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance (Summary Report, July 2020), 2 www.msi-integrity.org/wp-content/uploads/2020/07/MSI_SUMMARY_REPORT.FORWEBSITE.FINAL_.pdf.

Unions and worker representatives should see these initiatives at best as venues for learning, dialogue and trust building between corporations and other stakeholders that may help them achieve certain improvements; but on their own they cannot protect and enforce labour and human rights. Every labour organisation and workers' representative will therefore have to consider very strategically whether joining a MSI will help them advance their cause. Since any initiative binds resources on the side of labour, they will need to consider what concrete results can be expected from engagement in a MSI. Moreover, they will have to consider at what point, or under what conditions, it will be necessary to leave in order to invest time and energy elsewhere. One, if not the most, ambitious MSIs is the ACT alliance, which has learnt from previous MSIs insofar as it emphasizes a bottom-up »workers driven« approach. ACT aims to achieve living wages for workers in the global garment industry through collective bargaining at the industry level between workers and employers.⁴⁰ Over time it will have to be assessed whether setting up an MSI can change the power dynamics of GVCs so that living wages are eventually paid.

3.3 ENFORCEABLE BRAND AGREEMENTS: THE BANGLADESH ACCORD

The three factory disasters in Pakistan and Bangladesh caused a tremendous international public outcry. This created pressure, which resulted at least temporarily in a relative change in the power dynamic between workers and lead firms. The international labour movement used this moment wisely to advance alternative, more worker-driven governance mechanisms, in order to create rules that are binding for MNEs in global supply chains.⁴¹

In the aftermath of the 2013 Rana Plaza collapse in Bangladesh, over 200 lead firms entered into a legally binding agreement with two global trade unions, UNI Global Union and IndustriALL Global Union, along with eight Bangladeshi trade unions⁴² and four NGOs that functioned in a witness capacity.⁴³ Building on the content of the earlier Memorandum of Understanding on Fire and Building Safety in Bangladesh,⁴⁴ the final agreement – the Bangladesh

⁴⁰ ACT on living wages, <https://actonlivingwages.com/what-we-do/>.

⁴¹ Ben Vanpeperstraete The Rana Plaza Collapse and the Case for Enforceable Agreements with Apparel Brands, in Miriam Saage-Maaß, Peer Zumbansen, Michael Bader, Palvasha Shahab (eds) *Transnational Legal Activism in Global Value Chains. Interdisciplinary Studies in Human Rights*, (Springer 2021) https://doi.org/10.1007/978-3-030-73835-8_9.

⁴² Bangladesh Textile and Garments Workers League, Bangladesh Independent Garments Workers Union Federation, Bangladesh Garments, Textile & Leather Workers Federation, Bangladesh Garment & Industrial Workers Federation, IndustriALL Bangladesh Council, Bangladesh Revolutionary Garments Workers Federation, National Garments Workers Federation and United Federation of Garments Workers.

⁴³ Clean Clothes Campaign, Workers Rights Consortium, Maquila Solidarity Network and International Labor Rights Forum.

⁴⁴ First discussions on the Memorandum of Understanding started after the 2010. See: Clean Clothes Campaign, Maquila Solidarity Network, The History behind the Bangladesh Fire and Safety Accord (2013).

Accord on Fire and Building Safety – contains not only unprecedented lead firm participation, but also unprecedented commitments and enforceability. Under the original five-year agreement, lead firm signatories committed »to the goal of a safe and sustainable Bangladeshi »Ready Made Garment« (RMG) industry in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures.«⁴⁵

The success of the Bangladesh Accord was due to various characteristics. First, its governance structure ensured equal participation for local unions and employees. Despite structurally limited capacities, trade unions were able to participate substantially in all work related to the Bangladesh Accord. There were measures to ensure worker representation within the local factories. Also, the accord was financially independent, as it could manage the money provided by the member companies independently. The effective implementation of the health and safety standards was facilitated by a variety of factors. Highly qualified individuals, who were solely accountable to the accord, conducted the inspections. In addition, it was empowered to demand implementation of improvements and to apply penalties for non-implementation, including the closure of factories. Furthermore, a high degree of transparency was one of the Bangladesh Accord's key hallmarks. Information on all corporate members of the Bangladesh Accord was publicly accessible, as well as a list of all factories covered. The accord published the audit reports for each factory on its website. Workers in factories could make use of a complaints mechanism, which allowed complaints about shortcomings in the workplace resulting in timely and tangible improvements for workers. As a legally binding agreement between participating MNEs and unions, the Bangladesh Accord had a formalised dispute resolution mechanism, including an arbitration process for disputes concerning the companies' obligations.

Experts in principle confirm that the Bangladesh Accord is transferable to other areas of labour and human rights protection.⁴⁶ However, it should be noted that such a standard will always relate to a specific industry sector and be limited to a specific regional context. It is currently difficult to imagine an industry standard that would encompass a complete GVC in the light of all conceivable human rights and environmental considerations.⁴⁷ Similar examples of legally binding agreements, which significantly improved working conditions, are the Fair Food Program,⁴⁸ Milk with

Dignity Program⁴⁹ or the Lesotho garment worker program.⁵⁰ For future EBAs, the criticism of the Bangladesh Accord as being too much driven by Western and international actors, and not by workers and their representatives on the factory level in producing countries, needs to be taken seriously. Further, particularly for transnational agreements, it is indispensable that workers at the factory level play a central role in the setting up and governance of such agreements, as well as in the debates on their improvements. That way, workers also have the chance to co-shape the debates in the home countries of MNEs, where currently legally binding laws are negotiated on their behalf but mostly in their absence and without their direct input.

3.4 INTERNATIONAL COMPENSATIONS FUNDS

While the Rana Plaza collapse was a key event leading to the establishment of the Bangladesh Accord that brought new levels of commitment and enforceability to negotiated agreements with apparel brands, a similar impact was achieved on international compensation fund agreements.⁵¹ Following lethal disasters, a significant share of international campaign energy has focused on developing such international compensation fund agreements to provide for the longer-term financial needs of survivors and the families of the deceased. These agreements differ from unilaterally defined contributions offered by lead firms as compensation under their own terms for accidents in their GVC. Instead, they foresee a mechanism in which worker representatives and lead firms (sometimes together with other stakeholders) reach an agreement over the parameters of the compensation and its implementation.

In the wake of the Rana Plaza collapse, the Rana Plaza Arrangement was established to provide compensation for victims of the disaster and their dependents. In November 2013, all stakeholders, namely the Bangladeshi government, the Bangladesh Garment Manufacturers and Exporters Association, IndustriALL Global Union and the IndustriALL Bangladesh Council, the Clean Clothes Campaign and the Bangladesh Institute of Labour Studies, signed a framework agreement. The agreement foresaw a single process overseen by a coordinating committee comprising the signatories' representatives and chaired by the ILO. Among other steps, the committee defined a formula for victim compensation and administering the collection and disbursement of funds.⁵² After a final determination that 30 million US dollars would

⁴⁵ Preamble, Accord on Fire and Building Safety in Bangladesh, <https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf>.

⁴⁶ Reingard Zimmer, Unternehmensverantwortung im Bangladesh Accord (Friedrich Ebert Foundation, 2015) <https://library.fes.de/pdf-files/id-moe/13040.pdf>.

⁴⁷ Miriam Saage-Maaß, Franziska Korn, Lessons Learnt from the Bangladesh ACCORD. Lessons learnt for the Mandatory Human Rights Due Diligence Debate (Friedrich Ebert Foundation, April 2021) <http://library.fes.de/pdf-files/iez/17769.pdf>.

⁴⁸ About the fair food program, <https://www.fairfoodprogram.org/about-the-fair-food-program/>.

⁴⁹ Migrant Justice. Organising for economic justice and human rights, <https://migrantjustice.net/about-the-milk-with-dignity-program>.

⁵⁰ Carolyn Butler, Lesotho Garment Workers Program to Combat Gender-Based Violence Begins (8 February 2021) <https://www.solidaritycenter.org/now-live-lesotho-garment-worker-program-to-combat-gender-based-violence/>.

⁵¹ Ben Vanpeperstraete, Fn 41.

⁵² Understanding for a Practical Arrangement on Payments to the Victims of the Rana Plaza Accident and their Families and Dependents for their Losses (as amended 20 November 2013), www.ranaplaza-arrangement.org/mou/full-text/MOU_Practical_Arrangement_FINAL-RanaPlaza.pdf.

be needed to satisfy all expected claims, it took significant public domain pressure, including by governments,⁵³ for the ILO to announce in June 2015 that the Rana Plaza Trust Fund had gathered the funds required to enable full payments to all victims.⁵⁴ Final disbursements were carried out in the following months.

The international mobilisation around these compensations funds following the three factory disasters Rana Plaza, Tazreen and Ali Enterprises has been criticized as a »financialisation of suffering« on the grounds that it diverted public attention from local and international efforts to hold state and business actors to account for the respective disasters. While this criticism is legitimate from a structural perspective, it is important to acknowledge the achievement of these funds in practical terms. These three funds were established on the basis and within the parameters of ILO Convention 121 (Employment Injury Benefits Convention, 1964). It is a remarkable step that the calculation of the compensation to be paid for loss of income and medical costs was based on international labour law. Similarly remarkable is the fact that the majority of brands and retailers sourcing from the respective factories felt pressured to contribute to the funds, despite the fact they had no legal obligation to do so.

With this being repeated three times, a precedent has been set to which unions, workers and other labour organisations can appeal in the future. The campaign »Pay Your Workers« is quite successfully building on exactly this achievement, demanding that brands and retailers make up for the sudden loss of income when Western companies cancelled their orders in spring and summer 2020 due to the COVID-19 pandemic and ensuing lockdowns.⁵⁵ For workers and unions from other economic sectors, it should become part of their repertoire to appeal to the precedents set here to argue that MNEs need to pay for losses suffered by workers, which can be traced back to failures of MNEs.

3.5 NATIONAL CONTACT POINTS AND THE OECD GUIDELINES

The OECD Guidelines for MNEs were first adopted in 1976 by the OECD Council of Ministers and the member countries. The introduction of the OECD Guidelines can be un-

derstood as an attempt by the OECD countries to counter the efforts to establish the United Nations Centre on Transnational Corporations, since these were viewed as over-regulatory and as inhibiting international trade. The OECD Guidelines have been revised several times since 1976.⁵⁶

In the revision of the OECD Guidelines of 2000, a complaint mechanism was introduced which enables unions, civil society organisations and individuals to file complaints against individual companies in the event of suspected violations of the guidelines. Since then, the currently 37 OECD member countries, as well as other states that have acceded to the agreement, have been obliged to set up national contact points (NCPs). The purpose of the NCPs is to institutionalise a complaint and mediation procedure. This is explicitly geared towards mediation and hardly provides for any sanctions and rarely for the remedy of harms.⁵⁷ The composition of the NCPs and the design of the procedures are left to individual states. In practice, this led to incoherent implementation among the various NCPs. The revised OECD Guidelines adopted in May 2011 introduced a comprehensive chapter on human rights. The guidelines are applicable to any type of company with headquarters in one of the signatory states, regardless of its size. Moreover, the OECD Guidelines cover all business practices, which means that companies must also meet their responsibilities with regard to their supply chain.

While trade and labour unions have at times been successful in reaching results, complaints brought by affected communities and civil-society organisations have rarely led to meaningful outcomes.⁵⁸ In cases where unions used the procedure as a tool to enable bargaining over issues such as unlawful dismissals of employees in the Democratic Republic of Congo in the OECD complaint against Heineken,⁵⁹ it was possible to reach agreements that were satisfactory to both sides. In cases in which the companies is asked to more fundamentally change its business activities, e.g. to stop buying cotton from Uzbekistan (produced by forced child labour), or aim to reach compensation for injuries such as loss of life, OECD complaint procedures do not provide for a satisfactory remedy. In the OECD procedures against social auditing companies TÜV Rheinland (regarding the Rana Plaza collapse) before the German NCP, and RINA (regarding the Ali Enterprises fire) before the Italian NPC, the companies simply left the proceedings after long

⁵³ Trade Union Advisory Committee, 7 OECD Government Ministers call on brands to compensate Rana Plaza victims after strong Trade Union and NGO push (Paris, 27 June 2014), members.tuac.org/en/public/e-docs/00/00/0E/D8/document_news.phtml.

⁵⁴ Tansy Hoskins, After two years, the Rana Plaza fund finally reaches its \$30m target, *The Guardian* (London, 10 June 2015).

⁵⁵ »Garment workers are owed between \$3.2 and \$5.8 Billion (USD) for the first three months of the pandemic by conservative estimates. The #PayUp campaign has helped suppliers recoup around \$22 Billion in cancelled orders. But agreeing to #PayUp gives no guarantee that the workers will be paid for the clothes they've made. As the primary profit makers in the value chain, brands must take responsibility and ensure garment workers get paid.« Clean Clothes Campaign, Pay your Workers, <https://cleanclothes.org/campaigns/pay-your-workers>.

⁵⁶ Sander van 't Foort, The History of National Contact Points and the OECD Guidelines for Multinational Enterprises (2017) 25 Rechtsgeschichte – Legal History, 195.

⁵⁷ Caitlin Daniel et al, Remedy Remains Rare. An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct (OECD Watch 2015).

⁵⁸ Marian G. Ingrams and Joseph Wilde-Ramsing, OECD Watch's, NCP Evaluations, show NCP system underperforming on criteria that are critical for civil society (Amsterdam, 14 December 2020) <https://www.oecdwatch.org/oecd-watches-ncp-evaluations-show-ncp-system-underperforming-on-criteria-that-are-critical-for-civil-society/>.

⁵⁹ OECD Watch, Former Employees vs Heineken (2015), <https://www.oecdwatch.org/complaint/former-employees-vs-heineken/>.

and intense negotiations. This left the complainants, as well as all survivors and victims of the disasters, without any form of redress from their side.⁶⁰

While the NCPs in both cases have issued strong final statements on the human rights responsibilities of the respective companies, they were unable to ensure a successful closure of these complaints. Furthermore, NCPs have no executive power to ensure the enforcement of agreements reached between the parties in the OECD procedure. The OECD Guidelines nonetheless have served an important normative function in defining the expectations of the OECD member states concerning responsible business conduct.⁶¹ The OECD Guidelines, as well as the rightfully criticized NCP complaint procedures, have therefore – despite all their shortcomings in practice – contributed to the current debate about »hard law« mHRDD obligations of companies.

For unions, workers and affected communities and their representatives, OECD procedures cannot be seen as an effective remedy in cases of corporate human rights abuses. Nevertheless, given the lack of meaningful legal recourse or other means of redress, the OECD procedures at least offer proceedings in which an abusive situation can be framed as a violation of human and labour rights and environmental standards. This, in turn, allows responsibility to be attributed to the MNE in an authoritative manner. Despite the manifest weaknesses of the procedure, there can be strategic value in framing corporate abuse as a violation of human rights and as a violation of corporate obligations under an internationally agreed standard.

3.6 TRANSNATIONAL LITIGATION FROM SOUTH ASIA

Especially since the late 1980s and early 1990s, workers and others harmed by the business practices of MNEs have begun to use national courts in MNEs' home jurisdictions as fora to seek redress and justice. In the aftermath of the Ali Enterprises factory fire, as well as the Rana Plaza collapse, legal procedures before Pakistani and Bangladeshi courts, but also before the courts of the MNEs' home countries, were initiated.

The case against retailer KiK for the fire in the Ali Enterprises factory in Pakistan in particular gained attention in Germany and Europe, because it built on existing case law developed in the UK and other common law jurisdictions which declared that parent companies are liable under cer-

tain circumstances for damage to the health of workers caused by their foreign subsidiaries. The four Pakistani claimants and their lawyers argued that the main buyer from the Ali Enterprises factory, the German retailer KiK, had a similar duty of care towards the workers of its supplier and should have mitigated the serious deficiencies in fire safety.⁶² In Canada, a similar argument was brought against the retailer Loblaw's and the social auditing firm Bureau Veritas for its involvement in social audits shortly before the collapse of the Rana Plaza building.⁶³

By no means, however, is it easy to develop such a transnational case. For instance, in the aftermath of the Ali Enterprises factory fire, the connection between the German discounter KiK and the Ali Enterprises factory in Pakistan only came to the attention of an international audience due to two occurrences: first, because Pakistani journalist and labour activist Zehra Khan discovered KiK's »OK!«-Label on clothes of the Ali Enterprises factory after the fire. This proved that KiK was a customer of the Ali Enterprises factory. However, this did not show that KiK was the controlling entity in the network. Rather, it necessitated in addition a public statement by KiK's then Managing Director for Sustainability Management and Corporate Communications, who explained the economic interdependence of Ali Enterprises and KiK in a 2012 interview with the German news magazine »Der Spiegel«. He claimed that the German retailer bought about 75 per cent of the production output of its Pakistani supplier over the course of five years.⁶⁴ This information made it possible not only to establish a connection between KiK and Ali Enterprises but also to denote KiK as the controlling entity: the Pakistani supplier was economically dependent on the German retailer.⁶⁵ Despite a trend towards more transparency in GVCs,⁶⁶ this information is rarely easily accessible. This is especially problematic, as in civil litigation the burden of proof is usually on those bringing the claim – the affected persons. While transparency has therefore become a priority when drafting mHRDD laws, a reversal of the burden of proof, as desired by many legislative initiatives, has yet to materialise in the available legislative proposals.

The strategic considerations that workers, affected communities and unions should make when assessing the opportunities and risks of engaging in similar transnational litigation will be elaborated on further below.

⁶⁰ Business & Human Rights Resource Center, Italy: NCP recommends auditor RINA make a »humanitarian gesture« to families affected by Ali Enterprises fire; RINA's refusal to sign mediation agreement disregarded harmed families, says NGO (London, 11 December 2020) <https://www.business-humanrights.org/en/latest-news/italy-ncp-recommends-auditor-rina-make-a-humanitarian-gesture-to-families-affected-by-ali-enterprises-fire-rinas-refusal-to-sign-mediation-agreement-disregarded-harmed-families-says-ngo/>.

⁶¹ Miriam Saage-Maaß and Yvonne Veith, Keine usbekische Baumwolle aus Kinderhand auf dem europäischen Markt – Mit Soft Law gegen Kinderzwangsarbeit? (2011) 3 Juridikum 352.

⁶² Miriam Saage-Maaß, Against all odds – options for workers' transnational litigation against rights violations in global value chains (forth coming 2021) 2 ILAW Journal.

⁶³ Das v. George Weston Limited, 2018 ONCA 1053, 20 December 2018, C64146 & C64679 (M48391).

⁶⁴ Hasnain Kazim and Nils Klawitter, Zuverlässiger Lieferant, *Der Spiegel* (Hamburg, 22 October 2012).

⁶⁵ Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis und Jane Wright, Supply Chain Liability: Pushing the Boundaries of the Common Law? (2017) 8(3) Journal of European Tort Law 8, 261.

⁶⁶ Human Rights Watch, Report, Follow the Thread – The Need for Supply Chain Transparency in the Garment and Footwear Industry, (20 April 2017); H&M, for example, makes its supply chain transparent: <http://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-list.html>.

3.7 MANDATORY HUMAN RIGHTS DUE DILIGENCE

With the endorsement of the UNGPs by the United Nations Human Rights Council (UNHRC) in 2011, an important step has been taken away from voluntary CSR-commitments of MNEs. The UNGPs comprise three pillars: the state duty to protect against human rights abuses by third parties, the obligation of businesses to respect human rights and the right of access of affected persons to appropriate remedies. The obligation of businesses to respect human rights, i.e. not to violate human rights, is further specified as the obligation to exercise due diligence with regards to the company's whole GVC. Following UNGP 15(b), 17, 18 and 21, companies are obliged to undergo a due diligence process on a regular basis:

»Human rights due diligence is a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved. It involves four core components:

(a) Identifying and assessing actual or potential adverse human rights impacts that the 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 relationships;

(b) Integrating findings from impact assessments across relevant company processes and taking appropriate action according to its involvement in the impact;

(c) Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working;

(d) Communicating on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.«⁶⁷

3.7.1 The evolving legal landscape

After decades of transnational movement building and advocacy against the widely-described accountability gap of the transnational operations of MNEs, there is a growing momentum towards turning the soft-law due diligence obligations under the UNGPs into mHRDD laws on the national and regional levels. The idea of these legislative developments and proposals is that the soft-law norms set out in the UNGPs and other non-binding mechanisms should now be transformed into concrete »hard law.«⁶⁸

⁶⁷ United Nations Office of the High Commissioner on Human Rights, Corporate human rights due diligence – identifying and leveraging emerging practice, <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

⁶⁸ Claire Bright, Mapping human rights due diligence regulations and evaluating their contribution in upholding labour standards in global supply chains, in G. Delautre, E. Echeverría Manrique and C. Fenwick (eds.), *Decent work in globalised economy: Lessons from public and private initiatives* (ILO 2021).

Many of these mHRDD laws have several kinds of extraterritorial effects.⁶⁹ In some cases, they apply to foreign companies that do business in another state, maintain a branch or are listed on the stock exchange, while application can be limited to companies of a certain size or to certain corporate forms.⁷⁰ Moreover, the obligation to engage in mHRDD itself extends beyond national borders, since it usually covers a part of or, in the best-case scenario, the whole GVC. Typical elements are the obligations to conduct a risk assessment, to issue periodic reports and to implement adequate preventative measures. Some of the newly evolving laws address only certain kinds of rights violations, such as human trafficking (UK Modern Slavery Act of 2015) or child labour (Dutch Wet zorgplicht kinderarbeid of 2019). Others, like the EU Timber Regulation⁷¹ or the EU Regulation on Conflict Minerals,⁷² establish a due diligence obligation for a particular kind of product or commodity to be imported (timber and minerals from certain regions).

Most of these laws are limited in that they only require MNEs to report on the human rights implications of their operations, without any further obligation to address and remediate these potential harms. Furthermore, there is usually no obligation to establish a grievance mechanism for persons directly affected by rights violations, hence no remediation or compensation procedure. Because these types of regulation do not afford workers and others affected by corporate abuse the ability to assert their rights against the MNE, they are to date of little direct practical relevance for workers' struggles. However, examining the steady developments over the past decade, the normative framework that these regulations foregrounded is already mirrored in more comprehensive »hard law« regulatory frameworks.

One such comprehensive hard law framework that was passed in 2017 as the first of its kind is the French *Loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre* (LdV). Legislative initiatives similar to the LdV are in the making in parliaments across Europe, and have been debated in Austria, the Netherlands and Italy.⁷³ In Switzerland, the Responsible Business Initiative was rejected in November 2020 and a much weaker counterproposal centring on reporting without liability will now

⁶⁹ Robert Grabosch, *Companies and Human Rights. A Global Comparison of Legal Due Diligence Obligations* (Friedrich Ebert Stiftung, 2020), <http://library.fes.de/pdf-files/iez/15675.pdf>, 4.

⁷⁰ Stéphane Brabant and Elsa Savourey, *Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations* (2017) Dossier Thématique Duty of Vigilance, 92.

⁷¹ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010.

⁷² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017.

⁷³ Robert Grabosch, Fn 69, 49, 54 on Switzerland and Austria; on the Dutch initiative: Joseph Wilde-Ramsing, *The Next Step for Corporate Accountability in the Netherlands*, (Amsterdam, 18 March 2021) <https://www.somo.nl/the-next-step-for-corporate-accountability-in-the-netherlands/>.

automatically enter into force in 2021.⁷⁴ In Germany, the *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* (SPG) was approved by the German parliament in June 2021 and will enter into force in 2023.

3.7.2 mHRDD evolution at the EU and UN level

There is further significant movement taking place at the international level and the EU level. At the international level, on 26 June 2014, the UNHRC established the Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG).⁷⁵ This working group aims to create a »legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises«. ⁷⁶ The OEIGWG has been facing strong opposition by the business community and leading economies and investor countries present at the UNHRC at the time.⁷⁷ Contrary to the UN Norms of 2003, the first version of the Draft Treaty in 2018, as well as the two further revised drafts do not aim to create direct obligations of companies under international law.⁷⁸ Rather, they follow the logic of the UNGPs and formulate responsibilities of national governments to regulate corporate human rights due diligence obligations and to ensure access to justice for affected persons.

Recently, also at the EU level the topic of mandatory human rights due diligence obligations for European companies further than the sectoral and reporting approaches described above gained momentum. In April 2020, the Commissioner for Justice Didier Reynders declared to take up a legislative process at the Commission to create companies' human rights due diligence obligations as well as directors' duties of care. In December 2020, the Council approved conclusions calling on Member States and the Commission to promote human rights in GVCs and decent work worldwide.⁷⁹ The Council asked the Commission to

launch an EU Action Plan that is focusing on shaping global supply chains sustainably, promoting human rights, social and environmental due diligence standards and transparency by 2021. This includes a call for a proposal from the Commission for an EU legal framework on sustainable corporate governance, including cross-sector corporate due diligence obligations along global supply chains. On 10 March 2021, the European Parliament adopted with a large majority of its Legal Affairs Committee's (JURI) legislative own-initiative report on corporate accountability and due diligence.⁸⁰ The report gives concrete recommendations to the European Commission, which has announced its proposal for an EU-wide due diligence regulation for fall 2021.

3.7.3 What to make of the current mHRDD laws?

Both the adoption of mHRDD laws described above and the developing international debate on the responsibility of MNEs for human and labour rights abuses in GVCs is remarkable. It marks a clear shift away from voluntary, self-regulatory approaches with regard to the human and labour rights impact of MNEs via corporate CSR measures towards hard law obligations imposed by the state that has jurisdiction over the MNE. At the same time, many of these laws fall short in various aspects in their quest to close the corporate accountability gap. For instance, they stipulate an obligation of means rather than an obligation of result and often cover only certain violations, only certain tiers of the GVC or do not clearly or unsatisfactorily address the questions of sanction and remedy. At the same time, they represent commitments by the home states to oblige MNEs by law to adhere to human rights, labour rights and environmental standards along their GVCs and to create some sort of enforcement mechanism.

3.8 TOWARDS COMPREHENSIVE MHRDD LEGISLATION: OPPORTUNITIES AND CHALLENGES

While the newly evolving regulations that have developed so far all differ to some extent, their main feature is the concept of human rights due diligence as introduced by the UNGPs. Another feature is that they often do not give workers and other affected persons the clear-cut possibility to claim preventative and interim measures or remediation and compensation.

From the perspective of rights holder, the French *Loi de Vigilance* of 2017 is the strongest law to date to enforce human rights due diligence.⁸¹ The *LdV* is the result of a remarkable mobilisation of trade unions, civil society or-

⁷⁴ After five years of campaigning for a law, the Responsible Business Initiative was narrowly rejected on 29 November 2020. While the initiative received 50.7 per cent of the popular vote, it only gained 8.5 of the required 12 regional majorities across Switzerland's cantons (so-called *Ständemehr*) to pass the law.

⁷⁵ UNHRC Resolution 26/9 (26 June 2014), UN Doc A/HRC/RES/26/9, 2.

⁷⁶ Zero Draft Treaty, Legally Binding Instrument to Regulate in international human rights law, the activities of transnational corporations and other business enterprises (16 July 2018).

⁷⁷ Only recently, after great efforts by civil society actors, has the EU made commitments to finally join the OEIGWG for its next session, signalling a hopeful shift in its engagement with the topic. Further opposing: Czech Republic, Estonia, Ireland, Montenegro, South Korea, Romania and Macedonia; Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates. See: Lydia de Leeuw, Re-cap: negotiations over the Zero Draft of a binding treaty on business and human rights (22 October 2018), <https://www.somo.nl/reflections-on-the-first-round-of-negotiations-for-a-united-nations-treaty-on-business-and-human-rights/>.

⁷⁸ Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017).

⁷⁹ Council of Europe, Council Conclusions on Human Rights and Decent Work in Global Supply Chains, 13512/20 (Brussels, 1 December 2020).

⁸⁰ EP Report 11.2.2021, (2020/2129(INL)).

⁸¹ Cannelle Lavite, The French *Loi de Vigilance*: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence (VerfBlog, 16 June 2020) <https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/>.

ganisations and parliamentarians. It introduces an unprecedented corporate duty of vigilance in French tort law. Its adoption in February 2017 marked a blueprint for mHRDD in France and in Europe. The LdV is structured around two mechanisms. First, it introduces a civil duty of vigilance, seeking the prevention of risks and serious abuses to fundamental rights, health, safety of persons and the environment resulting from a company's business activities and from those of its controlled subsidiaries, subcontractors and suppliers. Secondly, it foresees a reparation and liability mechanism for breaches of the obligation by companies. Central to the LdV is the obligation on companies of more than 5,000 employees in France or 10,000 in France and abroad to establish, publish and effectively implement a vigilance plan covering its own activities and those of its directly or indirectly controlled subsidiaries, subcontractors and suppliers.

Despite being a remarkable pioneering step, the LdV involves a number of uncertainties concerning its implementation and also the risk that companies can get away with a simple box-ticking approach. Therefore, its applications by French courts will be crucial to determining whether it can serve as a meaningful tool for protecting individuals and the environment against human rights abuses related to businesses activities.⁸²

While it is too early to determine the effectiveness of the law, it obviously opens a legal procedure that communities and workers can use to bring claims against French companies for violations of human rights and environmental standards that would not be possible to bring under regular French civil law. In that sense, the LdV does improve access to courts. But the challenges are manifest.⁸³ The burden to prove the company's failure to fulfil its vigilance obligation is borne by the claimants. Claimants also have to demonstrate a direct link between an insufficient plan and the damage they have suffered. Lastly, claimants need to prove that a hypothetical sufficient plan could have prevented the harm from occurring. These requirements are even more challenging for rights holders, because the LdV places an emphasis on the duty of companies to develop a vigilance plan as their main legal obligation; only as a secondary step does liability come into play. Therefore, the legal arguments also tend to focus on the question of whether the vigilance plan fulfils the legal compliance criteria and less on rights violations by the company. In addition, the law does not create much leeway for unions to address labour and human rights concerns, since it makes consultation of stakeholders (including unions) only an option for companies, but not an obligation. While no lawsuit has been brought under the LdV to date alleging violations of workers' rights in a corporate GVC, a formal notice was sent in 2019 by Sherpa and UNI Global to Teleperformance pointing to viola-

tions of workers' rights in Colombia, Mexico and the Philippines, and calling on Teleperformance to modify its *plan de vigilance* accordingly.⁸⁴

The negotiations at both the EU and the UN level currently aim to provide legal remedies for those who suffered rights violations in a similar way as the LdV. This is also the intent of the recently adopted German SPG. Social and labour movements, trade unions and civil society organisations should see these legislative proposals to introduce comprehensive mHRDD as an opportunity to work towards a more comprehensive corporate accountability framework.

3.8.1 Definition of comprehensive mHRDD obligations

Comprehensive mHRDD laws create a normative framework that covers the whole GVC and aim to protect workers and other stakeholders from harm caused by corporate operations. The assumption is that once this framework has been developed and effectively implemented, corporate practices will improve through effective mHRDD processes that compel corporations to safeguard human rights and environmental standards in all of their business activities.⁸⁵ The overarching objective of these new laws, following the UNGPs, is to create incentives for a shift in corporate culture; therefore, mHRDD obligations are mainly process-rather than results-oriented.⁸⁶ In this regard, they are not meant to create strict liabilities, such as those familiar from anti-corruption legislation, but rather to oblige companies to oversee and positively influence their GVC.⁸⁷ The question of liability comes into play once the obligation to exercise corporate human rights due diligence was neglected by a MNE and workers or other rights-holders claim a rights violation. This is how the French LdV as well as the German SPG are structured. While the French law provides for civil litigation as a remedy, the German law primarily foresees a course of action in administrative courts, leaving other options of (tort-based) civil litigation open, but outside the explicit scope of the law.

3.8.2 Risks of ineffective interpretation

The business community contests that mHRDD obligations should legally cover the whole GVC.⁸⁸ This was apparent in the German parliamentary process and is mirrored to some extent in the law adopted in June 2021. The visible pressure from business associations and the German Federal

⁸² Elsa Savourey and Stéphane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption* (2021) 6 *Business and Human Rights Journal* 141.

⁸³ Cannelle Lavite, Fn 81.

⁸⁴ Sherpa, Sherpa and UNI Global Union send formal notice to Teleperformance – calling on the world leader in call centers to strengthen workers' rights (Paris, 18 July 2019) <https://www.asso-sherpa.org/sherpa-and-uni-global-union-send-formal-notice-to-teleperformance-calling-on-the-world-leader-in-call-centers-to-strengthen-workers-rights-2>.

⁸⁵ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012)

⁸⁶ Although especially in the debate around an EU mHRDD directive this is still debated.

⁸⁷ Claire Bright, Fn, 68.

⁸⁸ Initiative Lieferkettengesetz, Wirtschaftslobby: Mit Falschmeldungen gegen das Lieferkettengesetz (Berlin, October 2020) https://lieferkettengesetz.de/wp-content/uploads/2020/10/Initiative-Lieferkettengesetz_Briefing-Okt-2020_Falschmeldungen-Wirtschaftslobby.pdf.

Ministry of Economics and Technology resulted in a two-step process for obligations of German parent companies. As a general rule, human rights due diligence obligations of companies are restricted to the business enterprise and its first-tier suppliers. Only if the company is notified regarding concrete human rights violations along its GVC can the duties set out in the SPG extend to the whole GVC. While the French LdV does not foresee such a limitation in the law itself, it will be equally difficult in practice to extend protection to all workers within the whole GVC of French MNEs. In the case of textile and garment production in Pakistan, for instance, the likelihood of overall protection being extended to those employed in a GVC is diminished by the fact that only some 30 per cent of workers are employed in the formal economy. Workers in the informal economy are often outside the domestic legal system's reach, let alone the reach of a foreign jurisdiction.⁸⁹

A further risk is that mHRDD laws insufficiently specify the process which companies must undertake in order to discharge their human rights due diligence obligations. The French LdV keeps these criteria of »vigilance« rather general. The German SPG, by contrast, is more precise in setting out clear parameters concerning what form a risk analysis must take, what criteria determine appropriate mitigation and remediation and which criteria apply in the reporting requirement. The downside of this is that the German law largely neglects the risk-based approach of the UNGPs: the duties under the SPG mainly unfold in cases of concrete violations of human rights, labour and environmental standards. At the same time, the SPG accords workers' councils (*Betriebsräte*) in companies that fall under the scope of the law certain rights to question how the management fulfils its human rights due diligence obligations.

Incomplete, vague or weak legal criteria for a human rights due diligence processes run the risk of resulting in a box-ticking exercise, whereby companies formally comply with their due diligence obligations but do not substantially change their business practices regarding human and labour rights or environmental standards.⁹⁰ Some authors attribute this risk of cosmetic compliance⁹¹ to conceptual flaws in the design of mHRDD laws in general, and to their focus on procedure rather than substantial results in particular. If mHRDD laws do not entail a corporate obligation to guarantee that rights are not violated, but »only« an

obligation for a diligently implemented corporate procedure, they would result in another regulatory smokescreen for MNEs' transnational operations that represents only a limited departure from corporate self-regulation through CSR.⁹²

With weak or unclear legal definitions of mHRDD, a problematic practice of corporate human rights monitoring may become even more important, namely social auditing. MNEs will probably try to outsource their human rights risk assessment to third party auditing firms to safeguard the procedural requirements. In all three disasters (Rana Plaza, Tazreen, Ali Enterprises), the local production facilities had undergone social and fire safety audits.⁹³ This confirms the conclusion of research on this topic that certification and auditing schemes are at best very limited in scope and are prone to flaws, falsification and corruption.⁹⁴ There is also a risk that an MNE could push the additional costs of mHRDD compliance onto their suppliers, which, in turn, would externalise the cost to their workers, therefore leading to the exact opposite of the stated intent of the evolving laws.⁹⁵ MNEs and their transnational operation of GVCs would instead gain legitimacy through the mHRDD process, while the positive impact on workers and other stakeholders would be marginal. Audits and certificates could therefore further shield MNEs against claims brought by workers in the GVC by shifting responsibility to the certifier employed to secure compliance with mHRDD standards.

3.8.3 Public enforcement

Laws and legal definitions are inevitably abstract and need to be interpreted and applied to real-life cases. To avoid »cosmetic compliance« with any mHRDD law, the question of enforcement is crucial – both public enforcement as well as private enforcement initiated by rights holders. Despite its weaknesses, the German SPG obliges an administrative authority to monitor and enforce compliance with the law and it provides for German unions and NGOs to represent rights holders in civil litigation under regular tort law.

In a first step, the administrative authority is supposed to inspect the mandated corporate annual reporting. Further-

⁸⁹ The ILO Labour Force Survey 2017-18 states that the informal sector accounts for 71.7 per cent of the employment in main jobs outside agriculture, more in rural areas (75.6 per cent) than in urban areas (68.1 per cent), see: Informal economy in Pakistan, <https://www.ilo.org/islamabad/areasofwork/informal-economy/lang--en/index.htm>.

⁹⁰ Ingrid Landau, Human Rights Due Diligence And The Risk Of Cosmetic Compliance (2019) 21 Melbourne Journal of International Law, 221, 222.

⁹¹ Valerie Nelson and Olga Martin-Ortega, Making Human Rights Due Diligence work for small farmers and workers in global supply chains, University of Greenwich Report Commissioned by the Fair Trade Advocacy Office and Brot für die Welt (Chatham, 2020) https://www.nachhaltige-agrarlieferketten.org/fileadmin/media/Studien/Making_human_rights_due_diligence_work_for_small_farmers_and_workers_in_global_supply_chains.pdf.

⁹² Ingrid Landau, Fn. 90, 235.

⁹³ In the Ali Enterprises case, the buyer KiK had contracted the Pakistani subsidiary of the Italian social certification company RINA. RINA had issued a SA8000 certificate, declaring the Ali Enterprises Factory in Pakistan fire-safe, only three weeks prior to the fire that killed over 255 workers. According to a digital reconstruction by Forensic Architecture, not a single person would have died if all fire-safety measures, as certified, had been observed in the local factory. <https://www.ecchr.eu/en/case/the-kikpakistan-case-in-germany-3d-simulation-as-architectural-analysis-for/>.

⁹⁴ Claudia Müller-Hoff, The human rights fitness of audits and certifiers, in: European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt, MISEREOR (eds), Policy Papers, 2020; Carolijn Terwindt and Miriam Saage-Maß, *Liability of Social Auditors in the Textile Industry* (Friedrich Ebert Foundation, 2016).

⁹⁵ Mark Anner, Squeezing Workers' Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective. (2020) 27 Review of International Political Economy, 320.

more, the authority has substantive competence to investigate in cases of potential non-compliance. Once a rights holder formally notifies this authority of a potential or actual rights violation, the authority is obliged by law to investigate and sanction the implicated company. Foreseen sanctions range from exclusion from public procurement to fines up to two per cent of the annual turnover.

If the authority uses the full arsenal of available tools, it can lend the SPG effectiveness and would probably prevent empty HRDD procedures at the company level. The internal guidelines for the authority will be laid down by the Federal Ministry of Labour, while the authoritative body will be housed in the Agency for Export Control, (Bundesamt für Ausfuhrkontrolle, BAFA), which is part of the Ministry of Economics and has a problematic track record in the area of arms exports control. Given that the law will only come into force in 2023, the efficacy of this agency can only be assessed in the coming years.

3.8.4 Next steps: Mobilising labour movements for the struggles of implementation and legal enforcement

Legal norms, once passed, do not lead to just outcomes simply because they exist. As evolving mHRDD legislation is developed within the complex power dynamics of the global economy, the interpretation of the legal provisions will determine the effectiveness of their implementation and enforcement. Implementation and enforcement in turn will be crucial factors in making them effective in changing social realities in production countries.

Any mHRDD regime will make a meaningful contribution to improving the working and living conditions of workers only if these norms are implemented and enforced in a way that is driven by the interests of workers, and not by a corporate agenda. The struggle for implementation and enforcement commences after the legislative process. The most important way for workers and other rights holders in production countries to shape the implementation of mHRDD laws is to bring legal claims for remediation, as well as for compensation for harms, before courts at the headquarters of the MNE. Litigation and legal procedures initiated and led by workers and other rights holders must play a central role. This is how workers can influence the interpretation of existing comprehensive mHRDD laws to their benefit. Therefore, it is important that the labour movement engages strategically, creatively and, most importantly, in collaboration with workers themselves, in such legal cases to generate the best legal arguments. The challenges for workers to claim their rights under mHRDD legislation also highlight the need to campaign for additional investigative and enforcement mechanisms in the home states in cases of insufficient execution of mHRDD obligations.

Through legal procedures, businesses can be forced to include the perspective of workers, unions and other rights holders in their human and labour rights risk analyses and their mitigation plans. The best way for workers to influence business practices through litigation is through civil lawsuits,

as foreseen in the French LdV. The LdV has clearly opened up a civil space to contest structural violations and to shape transnational debates by bringing claims of rights violations. While civil litigation is not directly foreseen by the German SPG, it creates an opportunity for rights holders to take the government authority to court if it fails to ensure that the claimants' rights are sufficiently protected or rights violations are not appropriately remediated. This creates a more indirect way of demanding that the government authority ensures compliance and remediation by the company, but equally opens up space for contestation and for workers to be heard.

While comprehensive mHRDD laws include a variety of opportunities for changing the corporate accountability landscape, they face an array of challenges and obstacles. Firstly, transnational legal proceedings, which workers and other affected persons can pursue by using comprehensive mHRDD legislation, remain complicated. They not only require exclusive legal expertise, but also contain a variety of obstacles, which will remain a great burden on workers.⁹⁶ For instance, workers will need to prove what human and labour rights violations have been committed and, in a second step, to identify the MNE that controls the operations on the factory level. Although thorough documentation of rights violations has been a part of conventional human rights work for decades, it nonetheless remains a challenge to document the realities of human rights abuses suffered by workers. In addition, it will be necessary to produce reliable information that connects the operating entity where the abuse took place with the controlling entity, the MNE. Comprehensive mHRDD legislation is likely to improve the availability of information about business ties between MNEs and the suppliers and subsidiaries within their GVCs. Still, the technical requirements of courts remain unfavourable to the capacities of workers to present the harms they experience and the business ties between different corporate entities. Moreover, the availability of legal procedures will remain a question of financial means. MNEs' financial means for funding lawyers and legal teams are much larger than the resources of affected persons. Consequently, affected workers, in their quest for transnational corporate accountability, will have to rely on international trade unions and other solidarity networks to organise and finance litigation under mHRDD laws.

⁹⁶ Miriam Saage-Maaß, Peer Zumbansen, Michael Bader, Palvasha Shahab, *Transnational Legal Activism in Global Value Chains. The Ali Enterprises Factory Fire and the Struggle for Justice* (Springer 2021) <https://link.springer.com/book/10.1007/978-3-030-73835-8>; Michael Bader, Carolijn Terwindt, Miriam Saage-Maaß, *Strategic Litigation against the Misconduct of Multinational Enterprises: An anatomy of Jabir and Others v KiK* (2019) 52 *Verfassung und Recht in Übersee*, 156, 161 ff.

4

REFLECTIONS FOR FUTURE STRATEGIES

The international recognition of corporate human rights and environmental obligations, with the endorsement of the UNGPs in 2011 and the initiatives following the industrial disasters across South Asia in 2012 and 2013, have created a transnational momentum which has resulted in a shift from voluntary forms of corporate social responsibility towards binding corporate human rights standards. This first materialised in the form of a variety of private or semi-private governance mechanisms. In the last few years, this trend led to a growing number of regulations at the national and the EU levels which oblige MNEs to exercise mHRDD at least to some extent. Most recently, it seems that European courts also accept quite far-reaching parent company duties of care to their foreign subsidiaries, which can potentially also extend to suppliers.⁹⁷

At the very least, comprehensive mHRDD laws provide an opportunity to improve access of workers and other affected persons to legal avenues to contest corporate behaviour that caused, contributed to or was linked to harm done. Once the obligation to exercise mHRDD is passed and implemented, there are more legal opportunities for workers to make such claims. It will become increasingly plausible to argue that the MNE at the top of a GVC has a legal obligation to prevent the harm throughout its network. The hope is that, eventually, a combination of exemplary court cases brought against MNEs under mHRDD laws and effective government oversight and control will lead to more effective enforcement of labour and human rights standards in GVCs.

mHRDD laws can also contribute to a shift from the prevailing corporate shareholder model to a more inclusive stakeholder model. The process of mHRDD points to a corporate *modus operandi* that includes

other stakeholders and »external risk factors« such as human and labour rights. However, it does not accord them central importance. Further, there is no reason to be overly optimistic: compared to the MNEs steering the world economy, the labour movement, nationally as well as internationally, is dispersed and remains weak. To stabilise and further accelerate the momentum gained from the resistance and transnational movement building following the disastrous events in South Asia as well as the international normative developments, substantial regulation and corporate accountability mechanisms require concerted efforts on the part of a united transnational labour movement.

Moving forward, it is important to recognise that we have not seen a proliferation of Bangladesh Accord-like instruments or other types of EBAs,⁹⁸ with the notable exception of an agreement in Lesotho combatting sexual harassment in the workplace.⁹⁹ Developing and establishing more such agreements, as well as monitoring them, enforcing them and managing relations with the governments of producing countries, will require significant resources and the coordination of labour organisations across continents. Any agreement with far-reaching implications on purchasing practices will therefore require a significant amount of sustainable and coordinated pressure to establish such mechanisms with a decent number of lead firm participants, sufficient depth in terms of company obligations and robust legal enforceability. Here, comprehensive and effectively implemented mHRDD laws have the potential to create the pressure that drives companies to engage in meaningful initiatives such as EBAs. As companies are required to effectively prevent human and labour rights risks in their GVCs, EBAs should be a primary way to engage workers and other rights holders in the process of risk analyses, risk mitigation

⁹⁷ Daniel Leader, Matthew Renshaw, Stephen Bilko, Supreme Court: *Okpabi v Royal Dutch Shell*: What does the judgment mean? Analysis of the landmark judgment given by the Supreme Court that Nigerian communities affected by oil pollution can bring their claim against UK based Royal Dutch Shell in the English Courts (Leigh&Day, 12 February 2021) <https://www.leighday.co.uk/latest-updates/blog/2021-blogs/supreme-court-okpabi-v-royal-dutch-shell-what-does-the-judgment-mean/>.

⁹⁸ Ben Vanpeperstraete, Fn 41.

⁹⁹ Worker Rights Consortium, Landmark Agreements to Combat Gender-based Violence and Harassment in Lesotho's Garment Industry (19 August 2019) www.workersrights.org/commentary/landmark-agreements-to-combat-gender-based-violence-and-harassment-in-lesothos-garment-industry/.

and remediation. The fact that these agreements are robust in their set-up and implementation means that they are an efficient way for companies to discharge their duties under comprehensive mHRDD legislation in their respective home countries.

As more and more comprehensive mHRDD laws are legislated across Europe, it remains important to influence their implementation and interpretation by according central importance to the experiences and interests of workers and other rights holders. This means that unions, labour organisations and other civil society actors will need to engage critically in every step of the process, from drafting to implementation to the interpretation of norms, by making use of the legal procedures – be it civil litigation in case of the French LdV or administrative procedures as foreseen in the German SPG. Further, the meaning and scope of mHRDD must be gradually expanded. Beyond fundamental rights, such as the right to life and safe working conditions, structurally redistributive rights, such as the right to freedom of association, to a living wage and to social security, have to be advanced in the debates. More structural and systematic changes can occur by developing the normative framework further in this way. Eventually, mHRDD and the accompanying enforcement procedures could contribute to the representation of workers' redistributive interest in the home countries of MNEs.

Independently of which items in the toolbox described above workers, labour movements and trade unions choose to employ, it is important to consider the synergies between the different tools and the need for transnational alliances and practical solidarity. The formation of transnational solidarity, such as in the aftermath of the catastrophes of Ali Enterprises and Rana Plana, as well as in the aftermath of massive cancellations of orders due to the COVID-19 pandemic in 2020, show that the labour movement and an array of other actors are ready, willing and able to generate transnational pressure that forces MNEs, as well as governments, into accepting even legally binding agreements.

Exemplary cases such as the civil litigation in Germany against the retailer KiK show how local unions and labour organisations can collaborate meaningfully with international human rights and labour rights organisations. This collaboration enabled workers from Pakistan to »bring the struggle back« to Europe, where the MNEs are located, and as a result gain strength in political struggles for labour reforms in Pakistan. The work around the Rana Plaza and the Ali Enterprises catastrophes exemplifies how powerful transnational collaboration can become if it forges connections between the different struggles and actors. Law and legal procedure then can play a decisive role in the global struggle for workers' rights. Therefore, the newly developing mHRDD laws in Europe should be seen as an opportunity to make the voices of workers from production countries better heard and more relevant in decisions at the European corporate headquarters. Workers, unions and labour rights organisations should use these new

mHRDD laws to hold companies to account for rights violations in GVCs and to change the exploitive dynamics of GVCs.

LIST OF ABBREVIATIONS

BAFA	Bundesamt für Ausfuhrkontrolle
CSR	Corporate Social Responsibility
EBA	Enforceable Brand Agreements
GDP	Gross Domestic Product
GFA	Global Framework Agreements
GVC	Global Value Chains
HRDD	Human Rights Due Diligence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organization
LdV	Loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre (Loi de Vigilance)
mHRDD	Mandatory Human Rights Due Diligence
MNE	Multinational Enterprise
MSI	Multi-Stakeholder Initiative
NCP	National Contact Point
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights
PKR	Pakistani Rupees
RMG	Ready Made Garment
SPG	Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten
UNGP's	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council

ABOUT THE AUTHORS

Michael Bader studied law at Humboldt Universität zu Berlin and holds an LL.M. in Law, Development and Globalisation from SOAS, University of London. He joined ECCHR in September 2019 as a research fellow in the Business and Human Rights program with a focus on corporate exploitation in global supply chains. Since September 2020, he is Bertha Justice Fellow in ECCHR's Institute for Legal Intervention.

Miriam Saage-Maaß is a lawyer and vice legal director at ECCHR, where she developed and since several years leads the Business and Human Rights program. She worked on various cases against corporations, including civil litigation against German retailer KiK with regards to labour exploitation in South Asia. Furthermore, she is engaged in criminal proceedings against high-ranking managers for their involvement in international crimes, e. g. arms exports from Europe to Saudi Arabia.

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President: Martin Schulz
Secretary General: Dr Sabine Fandrych

Responsible for content:
Frederike Boll-von Galen, Policy Analyst for Business and Human Rights

Contact:
Christiane.Heun@fes.de

Editing: Dr. Ciaran Cronin

Design: Stefanie Brendle

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The Department of Global and European Policy provides advice on key European and international policy issues to policy-makers, trade unions and civil society organizations in Germany, Brussels and at the UN offices in Geneva and New York. We identify areas of transformation, formulate concrete alternatives and support our partners in forging alliances to implement them. In doing so, we reflect on national as well as European and international policy. The 2030 Agenda for Sustainable Development with its far-reaching political claim to promote a social-ecological transformation provides a clear orienting framework for pursuing our work.

Coordinator responsible for the publication:
Frederike Boll-von Galen, frederike.boll@fes.de



TRANSNATIONAL LEGAL TACTICS FOR LABOUR

How to make use of Corporate Accountability Mechanisms



The international recognition of human rights and environmental obligations of European companies has increased greatly with the endorsement of the UNGPs in 2011 and the initiatives following the industrial disasters across South Asia in 2012 and 2013. They created a transnational momentum which has resulted in a shift from voluntary forms of corporate social responsibility towards binding corporate human rights standards. This report assesses the legal tactics developed by various actors in the aftermath of South Asian factory disasters in 2012 and 2013 – the collapse of Rana Plaza and the fires in Ali Enterprises and Tazreen Fashions to make European companies accountable.



This trend towards more binding rules for companies has led to a growing number of regulations at the national and the EU levels which oblige multinational enterprises to exercise mandatory human rights due diligence (mHRDD). Unions and labour organisations will need to engage critically in every step of the process, from drafting to implementation to the interpretation of norms, by making use of the legal procedures – be it civil litigation in case of the French law or administrative procedures as foreseen in the German legislation.

The newly developing mHRDD laws in Europe should be seen as an opportunity to make the voices of workers



from production countries better heard and more relevant in decisions at the European corporate headquarters. Using individual court cases will be crucial in this respect.

Further, the meaning and scope of mHRDD must be gradually expanded. Beyond fundamental rights, such as the right to life and safe working conditions, structurally redistributive rights, such as the right to freedom of association, to a living wage and to social security, have to be advanced in the debates. Eventually, mHRDD and the accompanying enforcement procedures could contribute to the representation of workers' redistributive interest in the home countries of MNEs.

Further information on the topic can be found here:
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