



Business & Human Rights
Resource Centre

Social audit liability

**HARD LAW STRATEGIES TO REDRESS
WEAK SOCIAL ASSURANCES**

CORPORATE LEGAL ACCOUNTABILITY BRIEFING

SEPTEMBER 2021

Contents

Executive summary	3
Introduction	5
Part I Background	6
The limitations of social audits	6
Social audits do not equate to human rights due diligence	6
Why does social audit firm liability matter?	6
Part II Legal accountability strategies	7
Claims by workers	7
Tort law / Law of delict	7
Contract law	10
Forced labour legislation	11
Criminal law claims	12
Claims by consumers	12
Prospects for legal claims under existing legal frameworks	13
Part III Legal and contractual reform to facilitate access to remedy	14
Access to evidence and legal protection from reprisals	14
Third-party rights in the social audit contract	14
Mandatory corporate human rights due diligence and accountability	15
Part IV Conclusion and recommendations	16
Conclusion	16
Recommendations	16
Glossary	17
References	18
About this report	19
Acknowledgments	19

Executive summary

The worldwide impact of the COVID-19 pandemic has been catastrophic for workers and communities. We now have a pivotal opportunity to rebalance deep inequalities of power and wealth in global supply chains and forge a path towards a [just recovery](#). This demands transformative action by states and companies to put human rights firmly at the heart of business.

Crucially, this requires robust corporate human rights due diligence¹ and effective access to remedy for victims of corporate abuse. The inadequate model of [social audits](#) that companies have increasingly deployed to manage human rights issues in their supply chains is not a substitute for human rights due diligence. Reasons include that social audits do not ensure [meaningful](#) company engagement with rights-holders—the bedrock of human rights due diligence—and the [well-documented](#) failure of social audits to detect human rights abuse.

The social audit industry has rightly come under increasing scrutiny for its role in sustaining tolerance of abuse in company supply chains. It is time the social audit industry is held to account for false or negligent claims which hide the truth of abuse against workers. This report outlines legal strategies to seek accountability and remedy when a social audit firm harms human rights and highlights that new laws and regulations must not equate social audits with human rights due diligence, or see them as a plausible substitute.

Dangerous factory conditions and widespread abuse have been exposed in numerous workplaces with compliance statements from social audit firms. Cases include:

- | The repeated failure of social audit firms to report on forced labour risks at rubber glove factories in Malaysia, subsequently exposed by [investigative journalists](#) in 2018 and, at another factory, by [state labour inspections](#) in 2020.
- | The 2013 collapse of the [Rana Plaza building](#) in Bangladesh, which killed 1,132 people and injured thousands more; multiple social audit firms failed to report on structural defects.
- | The 2012 disaster at [Ali Enterprises factory](#) in Pakistan, which was declared safe by a social audit firm just weeks before a factory fire killed over 250 workers trapped behind barred windows in a building with only one useable fire exit.

“ While RINA certified the factory as safe, in reality it was a death trap that cost the life of my son and over 250 others,”

[Saeeda Khatoon](#), Chairperson of the Ali Enterprises Factory Fire Affectees Association

Bringing legal claims against social audit firms is, so far, a barely-tested strategy to create legal accountability for the industry. To date, only two legal claims have been brought:

- | A [criminal complaint](#) filed in 2014 in Italy against the Italian firm, RINA,² that issued social certification to Ali Enterprises factory in 2012; and
- | A tort [lawsuit](#) filed in 2015 in Ontario, Canada, against a French firm, Bureau Veritas, for its alleged negligent audits of factories in the Rana Plaza building.

Neither claim resulted in a finding of liability. However, social auditors do not operate in a legal vacuum. This report outlines innovative approaches for [social auditor liability](#), offering an avenue for victims to access legal remedy. As examples, French law appears to provide a favourable strategy in tort for those affected to sue a social audit firm under the social audit contract. German law offers a way to argue that a social auditor has a delegated legal duty to safeguard workers. Certain common law tort theories provide a basis for establishing a social auditor's duty of care to affected workers, from which negligence liability can follow. The United States (US) Trafficking Victims Protection Reauthorization Act is a potential route for victims of forced labour to sue a social auditor for benefitting from labour exploitation.

Another possible area of litigation is a consumer claim against a certification scheme. A [lawsuit](#) in Washington State in the US against Rainforest Alliance indicates the viability of legal claims, although such claims would not result in remedy for affected workers and communities.

Nonetheless, efforts to secure the legal accountability of social audit firms face limitations in existing legal frameworks and systemic [barriers to access remedy](#). These include:

- | the dangers and difficulties those affected face when collecting evidence;
- | difficulties in establishing the causal link between the audit and harm suffered; and
- | sub-contracted audits and challenges specific to transnational litigation.

Addressing these challenges requires contractual and legal reform, in addition to safeguards against reprisals for victims taking legal action. Negotiations around [mandatory Human Rights and Environmental Due Diligence](#) (mHREDD) laws and a [Legally Binding Treaty](#) on business and human rights offer vital opportunities to ensure victims of abuse have effective access to legal remedy, including for claims against social audit firms and where claims have a transnational component.

States should establish robust civil and criminal corporate liability regimes and reject social audits and certifications as proof of human rights due diligence. In turn, social audit firms, in their capacity as companies, must be subject to mHREDD laws and corresponding liability regimes.

At the same time, securing social auditor liability should not deflect from efforts to hold brands and suppliers accountable for human rights abuses. Companies should not solely rely on social audits and certifications. Instead, they should adopt a transformative approach to human rights due diligence which goes beyond social auditing.

Recommendations

- | **Lawyers and legal advocates** are encouraged to build on our research and support efforts to hold social audit firms to account for human rights harm.
- | **Governments** should address the barriers to justice which sustain corporate impunity. At a minimum, they should enact mHREDD legislation and robust civil and criminal liability regimes, including a reversed burden of proof for civil claims, to ensure victims' access to legal remedy. Governments should ensure all companies, including social audit firms, are subject to these laws and held liable for human rights abuse. Governments should stipulate in mHREDD legislation that social audits and certifications do not equate to human rights due diligence. Finally, governments must ensure those challenging corporate abuse are protected against reprisals.
- | **Companies including social audit firms** should respect human rights in accordance with the United Nations Guiding Principles on Business and Human Rights (UNGPs), ensuring effective human rights due diligence through the meaningful engagement of rights-holders. Companies should protect those reporting on corporate abuse, and taking legal action, against reprisals. Companies should introduce contractual reform to grant affected rights-holders third-party rights and remove confidentiality restrictions to disclosing audit reports and contracts.

Introduction

Global buyers often rely on social audits to assess and verify whether a company or product conforms with specified voluntary standards. Social audits are mainly carried out by companies (“social audit firms”³) and social auditing has become a booming global industry, estimated to exceed a value of [USD 300 million](#).⁴

Despite [many thousands](#) of social audits conducted annually, social auditing has systemically [failed](#) to improve labour conditions in supply chains. In 2019, Clean Clothes Campaign reported it has tracked over [200 cases](#) of social audit failings,⁵ evidencing how misleading audits perpetuate dangerous working conditions and provide a smokescreen for sustained human rights abuse.

Industrial disasters and labour exploitation in workplaces reportedly cleared by social audit firms spotlight the suffering linked to the system’s failings. Some of the many cases include:

- | In 2020, a social audit firm reportedly concluded there was no forced labour at [Brightway Holdings](#) rubber glove factory in Malaysia; an inspection 19 months later by Malaysia state labour inspectors found migrant workers living in squalid “modern slavery” conditions.⁶
- | A [2018 investigation](#) by journalists into working conditions at [major rubber glove factories](#), including in Malaysia, found workers subjected to illegal withholding of pay and restricted freedom of movement among other abuses; one company (Top Glove) reported it had undergone [28 separate social audits](#) and received social certifications.⁷
- | The 2013 collapse of the [Rana Plaza building](#) in Bangladesh, which killed 1,132 people and left thousands more seriously injured.
- | The 2012 fire at [Ali Enterprises](#) factory in Pakistan, which killed and injured over 250 workers who were trapped behind barred windows in a building with only one useable fire exit.

Efforts to hold social audit firms to account have, so far, exposed glaring [accountability gaps](#) and lack of effective remedy for victims. Formulating strategies for legal accountability as one mechanism for remedy is an emerging focus of corporate legal accountability. Theories for [social auditor liability](#) are still being shaped and the outcome of such claims is uncertain. However, robust liability regimes to hold social audit firms legally accountable for harm are vital to provide redress for abuse and prevent social audit failings.

“ Auditor liability should lead to changes in the relationship between retailers, factories, workers, and auditors. However, this will only be the case if auditor liability is not only a theoretical possibility on paper, but also demanded in practice.”

[Carolijn Terwindt & Miriam Saage-Maaf](#), European Centre for Constitutional and Human Rights (ECCHR)⁸

Looking forward, securing the legal accountability of social audit firms should complement efforts to hold global buyers and suppliers accountable for human rights abuses and demand effective approaches to human rights due diligence which go beyond social auditing.

DEFINITIONS (FOR THE PURPOSE OF THIS BRIEFING):

Social audits are a voluntary process carried out to assess and verify a company’s compliance with specified labour and/or environmental standards. This briefing is concerned with third-party audits carried out by social audit firms.

Certification schemes are private standard-setting organisations which have developed an audit framework or protocol comprising a set of standards and methodology for assessing conformity against these standards. For the purpose of this briefing, a certification scheme is any standard-setting organisation that relies on third-party audits to verify conformity with these standards, regardless of whether a certification, label or seal may be issued.

Part I

Background

The limitations of social audits

Social auditing began as a corporate response to labour exploitation revealed by anti-sweatshop campaigning.⁹ Initially conducted in-house by global buyers to [check and improve labour conditions](#) at their production sites, social audits are now commonly carried out externally (a “third party” audit) by social audit firms.

In theory, third-party social audits (the focus of this briefing) provide [independent verification](#) of compliance. The results of the audit process (e.g., the audit report, certification or membership of a multi-stakeholder initiative [MSI]) offer assurance to global buyers and consumers that the products they buy are rights-respecting. In turn, social auditors arguably (similar to financial auditors) act as “[gatekeepers](#)” by giving companies access to consumers and global markets.¹⁰

In practice, however, the independence of a social auditor is potentially compromised. Social auditors are often hired by the audited company, presenting a [problematic incentive](#) to provide overly favourable reports to secure future business and related conflict of interest. Advocates also point to the [inherent limitations](#) of social auditing, such as the “[snapshot](#)” and “[check-box approach](#)” of audit processes, the exclusion of workers in setting audit standards and the [structural inability](#) of social audits to ensure workers can file complaints without fear of reprisal.^{11, 12}

Social audits do not equate to human rights due diligence

Human rights due diligence differs fundamentally from social auditing in its approach, scope, and ambition. Standard social auditing is about ensuring lists are ticked to gain compliance statements, often limited to Tier 1 suppliers. Human rights due diligence demands companies identify and assess [salient human rights risks](#) across their operations and value chain and take systemic measures to prevent and address adverse impacts. This goes beyond mere control measures and requires a company to make adjustments to its business model and practices if they prove a root cause of supply chain abuse. Crucially, a company’s human rights due diligence must be informed by [meaningful](#) engagement with rights-holders at all stages, a requirement the social audit model falls short of.

Why does social audit firm liability matter?

Social audit firms, as companies, must be held to account where they cause, contribute or are directly linked to adverse human rights impacts and redress harm. Mechanisms for auditor liability are vital to ensure those harmed by failed social audits have effective access to legal remedy, including compensation, and to [prevent the recurrence](#) of audit failings. The call for social auditor liability is therefore part of the broader goal to end impunity for corporate abuse.

In addition, experts [highlight](#) the need for auditor liability to third parties (i.e., individuals other than the auditor’s client) to address conflicts of interest and to incentivise due diligence equally toward all those affected by the audit process. Holding social audit firms liable for harm thus sits within wider strategies to ensure responsible business practices and equal access to remedy.

Under some legal theories, a legal claim against a social audit firm would be premised on the firm’s shared responsibility, and potential [joint and several liability](#), for human rights harms that arise from auditing and certification activities. In some cases, legal action against the audit firm may be victims’ only option for redress.¹³

Part II

Legal accountability strategies

Only two legal claims have been brought against a social audit firm to date, so there is little specific case law to draw on. This section outlines potential strategies for legal accountability in a small number of jurisdictions.¹⁴

Our primary focus is on the potential liability of social audit firms. However, we also consider potential litigation against certification schemes (typically non-profit organisations) as a strategy to challenge disingenuous assurances of rights-respecting conditions.

While we focus on theories of auditor liability for social audits (a voluntary process), we also consider legal claims where an auditor undertook a mandatory audit (one required by law) as such claims could help clarify auditors' duties to third parties and so shape legal strategies.

Claims by workers

This section assumes that workers are the prospective plaintiffs. We use “workers” as a general term, while recognising that a mechanism for class action lawsuits (a lawsuit filed against a defendant by more than one plaintiff) is not available in many jurisdictions.

Tort law / Law of delict

One potential basis for liability in tort is negligence (fault-based) liability. In general terms, workers would need to establish that the social audit firm or social auditor: (1) acted or failed to act (an omission) in such a way that, (2) breached a legal duty (in some jurisdictions termed “a duty of care”) and, (3) the breach caused or contributed to the harm suffered. This legal duty will be established by statute, case law, customary law or social norms, depending on the jurisdiction.

Site of the Rana Plaza building, Bangladesh



The question of whether a social audit firm owes a duty of care to workers in an audited factory was considered by the Canadian courts in *Das v. George Weston Limited*.¹⁵ This [lawsuit](#) concerned the alleged joint liability of the French firm Bureau Veritas and the Canadian retailer Loblaws for harm from the Rana Plaza collapse. The case was brought in Ontario and assessed under the law of Bangladesh.¹⁶ The plaintiffs argued that Bureau Veritas owed them a duty of care, and had breached this duty by failing to conduct reasonable audits and report back to Loblaws on the building's structural defects. The Court of Appeal, however, [held](#) that Bureau Veritas did not owe the plaintiffs a duty of care because the firm's contract: (1) did not include an obligation to inspect building structure and, (2) was terminated before cracks in the building appeared. In this case, therefore, any duty of care Bureau Veritas might have owed was held to be limited to the scope of the audit contract. The [lower court](#) reached a similar conclusion under the law of Ontario.

Establishing the social auditor's legal duty to workers

At the time of writing, *Das v. George Weston Limited* is the only negligence action brought against a social audit firm. A future legal claim may therefore engage novel or unprecedented arguments for establishing a social auditor's legal duty and corresponding liability.

Under English law, for example, a professional who provides advice or services (e.g., an audit process or report) which are likely to be relied on by a third party may owe the third party a duty of care. Liability can follow if the third party suffers harm as a result of relying on the advice/services. While scholars [highlight](#) that workers may struggle to establish they relied on the audit report (given they rarely have access to such reports), they [argue](#) it would be just and reasonable for English law to impose a duty of care on social auditors because workers depend on social audits for their safety (implied reliance) and because of the likelihood of physical injury from a negligent audit.¹⁷

Another potential basis for a duty of care in English law draws on principles set in *Vedanta v Lungowe*.¹⁸ In this [lawsuit](#), the Supreme Court [held](#) that a parent company may owe a duty of care to individuals affected by its foreign subsidiary's activities if the parent commits to maintaining safety standards in public materials.¹⁹ An argument could follow that a social audit firm assumes a duty of care to workers (for their safety) by: (1) setting relevant health and safety policies that, (2) the audited company relies on and, (3) there is a sufficient level of intervention (e.g., through auditing).

Under US law, for a claim in negligence, workers would need to establish that the social auditor had a duty of care towards them. This duty of care could be established on the basis of different tort law theories, namely under: (1) common-law negligence, if the worker was foreseeably endangered by the social auditor's unreasonable actions and, (2) the Restatement (Second) of Torts at section 324A "Liability to Third Person for Negligent Performance of Undertaking",²⁰ if the auditor's client relied on the audit report and, as a result of that reliance, the worker suffered physical harm.

Under French law, the general provision which creates a cause of action for negligence is article 1240 of the French Civil Code. French law also provides a specific basis of liability in tort, established in a landmark 2006 judicial ruling that a third party to a contract may invoke a breach of contract to bring a claim, if that breach resulted in harm.²¹ The French Supreme Court recently clarified that a simple breach of contract could trigger liability. More precisely, this means it is not necessary for plaintiffs to establish that the contractual breach amounted to a tort or a separate unlawful act.²² However, it is feared this favourable approach to third-party liability will not remain available for long, as scholars have [criticised](#) it for putting third parties in a better position than the contracting parties themselves.

In addition, under French law, a worker could bring a legal claim based on a social audit firm's failure to comply with France's 2017 law on the corporate [duty of vigilance](#),²³ which places a statutory duty on large companies registered or operating in France. The legal claim would be brought under article 1240 of the French Civil Code (the general tort regime).²⁴

Under German law, scholars [find](#) it would be difficult to establish that a social audit firm has a legal duty to workers because social auditors do not normally control the source of the harm.²⁵ However, they argue it may be possible to establish that a social auditor has a delegated legal duty to safeguard workers. This theory is based on the argument that a person “[comes to rely on the delegate](#)” and therefore lowers their attention. This theory would require first establishing that the party hiring the social auditor has its own legal duty to workers, which may be easier to establish if the audited company is the hiring party.

Finally, although the case concerns a mandatory audit, an ongoing [lawsuit](#) brought **under Brazilian law** in Germany against the parent company of German audit firm TÜV SÜD could help clarify the legal duties of auditing firms where the audit is carried out by a foreign subsidiary. In this case, TÜV SÜD is being sued on the basis of its alleged negligent safety certification of the Brumadinho dam in Brazil, which collapsed in 2019 killing over 270 people, among other claims. The German courts have accepted jurisdiction and the trial will take place in September 2021. TÜV SÜD [denies liability](#).

Establishing the social auditor’s fault

In all jurisdictions, workers would need to demonstrate the social auditor’s breach of duty (the fault). This would likely be that the auditor’s conduct was unreasonable (i.e., did not meet the expected [standard of care](#)).²⁶ For professional negligence claims, courts may look to professional codes of conduct to assess this standard. Notably, the [Association of Professional Social Compliance Auditors](#) has a [code of conduct](#) for its social auditor membership.

It could be difficult to establish that the audit was carried out incorrectly, particularly where the audit framework is weak. However, the UNGPs create a new standard of care, which is increasingly given binding force through judicial rulings (e.g., in a 2021 [ruling](#) by a Dutch court) and [due diligence laws](#), which could inform assessments of corporate civil liability.

Establishing causation

Workers must also establish the causal link between the breach and the harm (causation). This is generally the “but for” test (i.e., the injuries would not have occurred had the social auditor properly detected the danger). In general terms, this means establishing the breach caused or facilitated the harm, made the harm possible, or made a situation worse, depending on the jurisdiction. As outlined above, some legal theories would require workers to show that either they or the audited company relied or depended on the audit process.

Ruins of Baldia garment factory, site of the Ali Enterprises factory fire, Pakistan



If courts apply a strict application of the “but for” test, it may be difficult for workers to establish causation. However, courts are [adopting flexibility](#) in finding causation in cases where legal responsibility is attributable to multiple parties to ensure plaintiffs’ access to relief. This illustrates the dynamic nature of the law and the opportunity to shape it.

In the European Union (EU), the European Parliament’s [report on corporate due diligence and corporate accountability](#) (which endorses the need for civil liability for corporate abuse) defines, at paragraph 10, “contribution” to mean activities which “facilitate or incentivise another entity to cause an adverse impact” should the activity “substantially increase the risk of adverse impact”. Given misleading audit reports facilitate the persistence of rights violations, thus [arguably](#) substantially increasing the risk of harm to workers, this could provide a basis for social audit firm liability.

The challenge of sub-contracted social audits

Workers would likely seek to sue the social audit firm, rather than an individual auditor, on the basis of the firm’s vicarious liability for its employees. However, [reports](#) indicate sub-contracting audits is common and that social auditors are often [freelancers](#). This presents a challenge for bringing legal claims against the social audit firm as the audit is technically carried out by an independent company or individual (a “sub-contractee”).

Nonetheless, depending on the jurisdiction, certain legal theories could be used to argue the originally contracted social audit firm (e.g., the parent company) is vicariously or jointly liable for harm. For example, the social audit firm: (1) negligently hired or supervised the sub-contractee, (2) had a [non-delegable duty of care](#)²⁷ (a duty to ensure that care is taken by whoever carries out the activity), (3) failed to properly oversee a delegated legal duty and/or, that (4) the sub-contractee acted as [an agent](#) of the firm.

In addition, it may be possible to bring a claim against a social audit firm’s parent company under France’s [duty of vigilance](#) law in case of (1) a social audit firm domiciled or operating in France and, (2) where the audit process is sub-contracted to a foreign subsidiary or contractor.

Contract law

The contracting parties to a social audit contract are likely to be: (1) the social audit firm or certification body (if the social audit is undertaken by a different entity or individual) and, (2) the hiring party (i.e., a global buyer or, in case of a certification audit, the audited company itself).

The social audit contract is unlikely to grant workers, as third parties to the contract, an express right to enforce a contractual term(s), but this does not mean they cannot enforce the contract to seek remedy. Workers could establish they have *implied* third-party beneficiary rights.

Courts in some jurisdictions are willing to imply third-party rights if they find the contracting parties intended the performance of the contract or a certain term(s) to benefit or protect the third party. Scholars [highlight](#), for example, the German law principle of “contracts with protective effect” where a German court may interpret third party rights if the third party is the “real” beneficiary of the contractual duty.²⁸ In some jurisdictions, however, the third party must be identified in the contract by name, class or description.²⁹

In addition, even if contracting parties exclude third-party rights as a clause in the contract, in some jurisdictions this exclusion can be overcome. As examples: in certain US states if the audit report was produced for the express benefit of the worker;³⁰ in Germany, if the contract is assumed to have protective effect on the third party. Generally speaking, contracting parties cannot limit or exclude their liability where their negligence causes death or injury.

Social audits are clearly intended for workers’ benefit since they are pitched as a way to [protect workers from unsafe working conditions](#). Indeed, many [certifying MSIs](#) refer to the protection or benefit they provide rights-holders.³¹ As such, workers could, in principle, sue the social auditor under the social audit contract to seek remedy for breach of contract in the courts of the country whose law governs the contract.

The viability of this strategy, however, hinges on how the court interprets the purpose of the social audit contract. For example, a [study](#) by ECCHR points to a lawsuit³² in Germany against the German auditing firm TÜV Rheinland to illustrate a court may hold that the purpose of an audit contract is a compliance exercise, and not to protect third parties.³³ In this case, the court acknowledged that the purpose of the law under which the audit was conducted is to protect end-users of the audited product (here, breast implants).³⁴ However, it held that the purpose of the audit contract was only to assure the product's compliance with EU standards.³⁵ The court was, however, open to a claim in tort.³⁶

Conversely, on similar facts, a court in France held TÜV Rheinland liable under France's general tort regime, in addition to grounds specific to medical device legislation, for failing to properly audit the quality of the breast implants.³⁷

Forced labour legislation

Few countries have an [effective legal framework](#) to provide relief for victims of forced labour. However, there are avenues for litigation. For example, the US Trafficking Victims Protection Reauthorization Act (TVPRA), 2008,³⁸ provides an avenue for victims to sue traffickers and those who “knowingly benefit” from human trafficking for trafficking offences that occur in the US or abroad.³⁹ The TVPRA covers offences committed by US citizens and anyone “[present](#)” in the US.

A worker whose employer subjects them to exploitative labour conditions could establish they are a victim of forced labour. [Indicators of forced labour](#) include restriction of movement, debt bondage, and withholding identity documents and wages. The worker could potentially bring a civil suit against a social auditor under the TVPRA on the basis the social auditor knowingly benefited from the forced labour.

To bring a claim, the worker must prove: (1) they provided labour procured through a manner prohibited under the TVPRA, (2) the auditor knowingly benefitted from participating in this venture, and (3) the auditor knew or should have known the venture used forced labour. A worker could likely establish the auditor's knowledge about the trafficking given the auditor's role, background awareness of exploitative conditions, and the presence of warning signs. The likelihood of success for this legal action will vary by the circuit (i.e., US state jurisdiction) where the case is filed, as a result of different binding decisions by different courts of appeal.

TVPRA lawsuits are a new strategy for supply chain liability. For example, a US [lawsuit](#)⁴⁰ filed in February 2021 alleges major chocolate companies are complicit in the trafficking and forced labour of the plaintiffs, who were trafficked as children and forced to harvest cocoa in Côte d'Ivoire. It is time to test the power of the TVPRA to secure social auditor liability.



Criminal law claims

If a social auditor's conduct during the audit amounts to a criminal offence, charges could be brought against an individual auditor and/or the social audit firm, depending on the jurisdiction.

At the time of writing, only one criminal complaint has been filed against a social audit firm alleging social audit failings. Following the Ali Enterprises factory fire, the Ali Enterprises Factory Fire Affectees Association and lawyers working with ECCHR filed a [criminal complaint](#) against the Italian audit firm RINA in Turin, Italy. In early 2016, the case was [transferred](#) to Genoa, where RINA is headquartered, for reasons of jurisdiction. The criminal proceedings were, however, dismissed in December 2018 by the Judge for Preliminary Investigations who held, among other things, that it was [difficult to find a causal link](#) between the issuance of the social certification and the fire.

On the other hand, the alleged defective safety certification of the Brumadinho dam (following a mandatory audit) led to criminal investigations against the German audit firm, TÜV SÜD, in [Brazil and Germany](#). In February 2021, a Brazilian judge allowed [criminal charges of homicide](#) to proceed against TÜV SÜD employees for their alleged cover-up of the dam's structural instability.

Claims by consumers

A consumer who purchases a product because of its ethical or sustainability certification, and who subsequently discovers it was produced through harmful practices, could sue the licensor of the certification (i.e., the certification scheme) for loss or distress. While consumer actions could drive publicity for a certification scheme's "fair washing", crucially, they would not provide legal remedy for affected workers or communities.

Such claims would be brought under consumer protection laws, such as those prohibiting misrepresentations and/or false or deceptive advertising claims. Jurisdictions [differ](#) as to whether claims would initiate criminal or civil proceedings. If a civil claim, an ongoing consumer [lawsuit](#)⁴¹ in California against chocolate retailers indicates that, in some jurisdictions, an actionable representation must be affirmative (i.e., a statement made, rather than a statement that should have been made).

At the time of writing, one lawsuit has been filed against a certification scheme. In 2015, Water and Sanitation Health (WASH), a Seattle-based non-profit organisation, sued Rainforest Alliance in Washington State, in the US. The [lawsuit](#)⁴² alleged negligent misrepresentation and the use of an "unfair or deceptive act or practice" in violation of the Washington Consumer Protection Act. WASH had purchased Rainforest Alliance-certified bananas but discovered multiple violations of Rainforest Alliance certification requirements, including the use of dangerous pesticides and deforestation, when it later visited some of the Guatemalan plantations supplying these bananas. The court allowed the case to proceed, rejecting Rainforest Alliance's argument that it was not engaged in trade or commerce, noting Rainforest Alliance "licensed its trademark certification seal" and that "the statements those marks are intended to convey are relied upon by consumers in commercial decisions."⁴³ The parties reportedly reached a pre-trial settlement.

Also in the US, Washington, D.C. has a strong consumer protection statute which could be used to bring a claim against certification schemes. The D.C. Consumer Protection Procedures Act (CPPA) prohibits false or misleading advertising and labelling, regardless of whether consumers have, in fact, been harmed or misled. Moreover, it grants legal standing (i.e., the right to bring a claim) to "public interest organizations." Organisational standing allows non-profit organisations to bring complaints on behalf of the general public and consumers against trade practices that violate the CPPA.

Additionally, organisations or individuals can file petitions with the US Federal Trade Commission (FTC) requesting they open an investigation into false marketing practices. Under Section 5(a) of the Federal Trade Commission Act (FTCA), the FTC can investigate and prevent unfair methods of competition and unfair or deceptive acts or practices affecting commerce by any person, partnership or corporation. However, the FTC has discretion as to which investigations they open.

Prospects for legal claims under existing legal frameworks

Although any successful claim will be highly fact-specific, our research has identified potential strategies for workers to bring a claim. French law appears to provide a favourable avenue for workers to hold social auditors liable in tort. German law provides a way to argue that a social auditor has a delegated legal duty to safeguard workers. That social auditors have a duty of care to workers (and potential negligence liability) is arguable under several common law tort theories. Arguing that workers have third-party beneficiary rights under a social audit contract, on the other hand, is more challenging if the purpose of a social audit contract is interpreted narrowly. All these legal theories additionally require workers to prove the causal link.

The TVPRA offers an innovative potential route for victims of forced labour to claim relief, including against social auditors. Claims against certification schemes under consumer protection laws offer a different tactic to challenge misleading assurances and do not require workers to bring the claim.

Courts have a critical role to play in ensuring workers can claim their rights. As state authorities, courts must live up to their human rights obligations and ensure their decisions do not restrict access to remedy. Courts should interpret future claims in line with the overarching goal of social auditing: to protect workers from unsafe conditions and give workers enforceable rights under the audit contract. Future tort claims in common law jurisdictions are an opportunity for courts to interpret a social audit firm's duty of care with reference to human rights expectations, rather than being limited to the social audit contract, and adopt flexible approaches to finding causation.

However, current legal frameworks present limitations. For example, tort law is unlikely to provide redress for violations of rights such as unionisation, living wage and non-discrimination. The confidentiality of social audit contracts (in addition to audit reports) is a key barrier to claims based on the contract. Criminal law claims against a social audit firm are limited to jurisdictions with a regime for [corporate criminal liability](#). We therefore need transformative regulatory and contractual reform to ensure victims' effective access to remedy.



Part III

Legal and contractual reform to facilitate access to remedy

Against a backdrop of multiple [barriers to remedy](#) faced by victims of corporate abuse, our research has identified specific legal and contractual challenges to legal action against social audit firms. The growing appetite of forward-thinking governments to introduce [mHREDD](#) legislation offers a vital opportunity to address legal barriers to justice for victims of corporate abuse. Nevertheless, a more comprehensive solution will require other key actions including a transformation of social auditing contracts and procedures. The [Legally Binding Treaty](#) on Business and Human Rights would also strengthen access to justice, though this appears to be a longer-term prospect.

Access to evidence and legal protection from reprisals

In civil litigation, the requirement to substantiate a claim (the burden of proof) usually falls on the plaintiff. This requires plaintiffs having access to relevant evidence, such as social audit reports and contracts. While [some MSIs](#) publish audit reports, in many cases audit reports and contracts are kept [confidential](#). This creates an evidentiary barrier to litigation.

Moreover, collecting evidence (e.g., by taking photos) puts workers in danger. Taking legal action against a company brings significant risk of reprisal and intimidation for workers. Our own [research](#) on human rights defenders highlights just how dangerous it is for victims of corporate abuse and their representatives to raise the alarm.

Proposed reforms

To ensure victims have access to relevant evidence, parties to the social audit contract should [remove contractual barriers](#) to disclosing audit reports. Rights-holders and their representatives should have access to audit reports so they can [verify](#) whether they accurately reflect conditions at the audited site and assess options to redress audit failings.

Civil liability regimes should reverse the burden of proof for all evidentiary elements in corporate human rights abuse cases.

States and companies must have in place robust safeguards to protect those reporting on corporate abuse and taking legal action from threats and reprisals.

Third-party rights in the social audit contract

Workers should be able to bring a claim under a social audit contract where the audit is not properly performed. However, as outlined above, establishing implied third-party rights is a challenge.

Proposed reforms

Social audit contracts should [explicitly grant third-party rights](#) to workers at an audited site to give them a direct right to sue contracting parties in case of breach causing harm. Corporate Accountability Lab has, for example, [developed](#) a template third-party beneficiary clause which several companies now include in certain supply contracts.

Mandatory corporate human rights due diligence and accountability

As *Das v. George Weston Limited* indicates, social audit firms can face claims for liability. However, establishing the firm's duty of care (where required by law) is currently a significant challenge.

In addition, suing a social audit firm is likely to lead to transnational proceedings (i.e., the legal claim is filed in a different country from where the harm occurred). This is because social audit firms are often headquartered in the Global North (with audits outsourced to local subsidiaries or other firms), whereas supply chain rights violations overwhelmingly take place in countries in the Global South. Although plaintiffs will not always sue in a foreign court, it may be their [only option](#) to access justice.

Transnational litigation brings [specific challenges](#) including the complexity of proceedings, limited access to legal representation, and the risk that the court will rule it lacks jurisdiction over the claim.

The law applicable to a claim could also provide a barrier to remedy if, for example, it stipulates a short limitation period (barring claims filed after this period), as was the case in *Jabir and Others v Kik*. In *Das v. George Weston Limited*, the Canadian court held that only claims brought by minors were not [time-barred](#) under Bangladesh's statute of limitations.

Proposed reforms

Mandatory corporate due diligence laws are a key opportunity to impose on companies a statutory obligation to identify, prevent, mitigate and account for their adverse impacts. This due diligence duty could constitute a basis for liability, even if national law does not establish a specific liability regime. For example, while the recent German [Act on Corporate Due Diligence Obligations in Supply Chains](#) does not establish civil liability, lawyers argue that the new statutory due diligence duty could provide a [basis for liability](#) in tort under the German Civil Code (specifically, under section 823 paragraph 1).

Mandatory environmental and human rights due diligence laws should establish robust [corporate civil and criminal liability regimes](#) to give victims of corporate abuse access to legal remedy, including compensation. An expansive civil liability regime should also address the limitations of current liability regimes to provide redress for the full spectrum of human rights harm resulting from, in the context of this report, social audit failings.

Mandatory human rights and environmental due diligence should grant victims of corporate abuse a right to bring a claim in the court in which the defendant company is domiciled (in this case, a social audit firm), if declining jurisdiction would lead to a denial of access to justice. Legal reform should ensure [reasonable time limitations](#) for transnational claims concerning human rights disputes.

Social audit firms, in their capacity as companies, must be [subject to mHREDD laws](#) and corresponding liability regimes.

Companies must be held to account for human rights abuse *despite* their use of social audits and certifications. Securing victims' right to effective remedy for corporate abuse will be undermined if a company is able to defend claims of human rights abuse in a court of law through its use of social audits and certifications.

Part IV

Conclusion and recommendations

Conclusion

In its current form, social auditing is a broken system. Too much of the social audit industry contributes to persistent corporate abuse. This report has identified strategies for holding social audit firms legally accountable which should now be tested in the courts. Law is dynamic, and lawyers and legal advocates have an opportunity to shape it. Courts also have a critical role to play in ensuring victims of abuse can claim their rights. As a state authority, courts must live up to their human rights obligations and ensure their decisions do not restrict access to remedy.

At the same time, ensuring a just recovery from the COVID-19 pandemic provides a clarion call for transformative legal reform to address barriers to justice and guarantee access to legal remedy for victims of corporate abuse. We need clear legal responsibilities for social audit firms, and other companies, delivered through robust mandatory human rights and environmental due diligence and corporate accountability laws. These need to incentivise a transformative approach to human rights due diligence, beyond social auditing, and ensure rights-holders can challenge corporate abuse without fear of reprisals.

Recommendations

Lawyers and legal advocates are encouraged to:

- | Build on our research and support efforts to hold social audit firms to account when they harm human rights.
- | Collect data and evidence to strengthen arguments for social auditor liability.

Governments should address the barriers to justice that sustain corporate impunity. At a minimum, they should:

- | Enact mandatory Human Rights and Environmental Due Diligence legislation (mHREDD) and robust corporate civil and criminal liability regimes, including a reversed burden of proof in civil regimes, to ensure victims of abuse have effective access to legal remedy.
- | Ensure all companies, including social audit firms, are subject to these laws and held liable for human rights harm.
- | Reject social audits and certifications as proof of human rights due diligence. Stipulate in mHREDD legislation that social audits and certifications do not equate to human rights due diligence.
- | Enact robust legal safeguards for rights-holders and whistle-blowers who challenge corporate abuse, and take legal action, and ensure rights-holders are protected against reprisals.

Companies, including social audit firms, should respect human rights in accordance with the UNGPs. At a minimum, they should:

- | Undertake human rights due diligence to identify, prevent, mitigate and account for their adverse human rights impacts, ensuring meaningful engagement with rights-holders at all stages.
- | Introduce contractual reform to remove confidentiality restrictions to disclosing social audit contracts and reports (in such a way that protects the anonymity and safety of workers and other interviewees) and grant affected rights-holders express third-party rights.
- | With the rise of attacks on human rights defenders, ensure those reporting on and taking legal action on corporate abuse are protected against reprisals.

Glossary

- | **Auditing:** An examination of data and procedures to evaluate compliance with a certain standard and/or accepted practices at a certain time period. Auditing can be distinguished from monitoring, which is, according to some reports, an ongoing process.⁴⁴
- | **Certification audit:** An audit that results in the issuance of a certificate, label or seal if audit standards are met.
- | **Certification body:** The term used by some audit frameworks to describe a social audit firm that carries out a certification audit, or ultimately issues the certification if the audit is carried out by a separate entity or individual.
- | **Certification schemes:** Organisations (usually non-profit) which have developed a voluntary set of standards covering labour and environmental conditions and have an accompanying audit methodology to assess conformity with these standards. Some schemes issue the company or product with a certificate, label or seal if the audit standards are met. For the purpose of this briefing, schemes stating that audits do not result in certification but do rely on third-party verification audits are included in this definition.
- | **Global buyers:** Companies which source and sell goods. These companies are usually in the upper levels of global supply chains and can also be termed “lead companies” or, in some contexts, “brands”.
- | **Mandatory audit:** An audit required by law before a company can place certain products on the market or commence potentially dangerous activities. Our definition excludes financial audits.
- | **Multi-Stakeholder Initiatives (MSIs):** Standard-setting collaborations between companies, governments and civil society. Some groups define “genuine MSIs” as those where trade unions or other rights organisations have decision-making powers (e.g., through the Board) rather than a mere advisory function, or none at all.⁴⁵
- | **Social audit:** A voluntary process carried out to assess and verify a company’s compliance with specified labour and/or environmental standards. This briefing is concerned with third-party social audits carried out by companies (“social audit firms”).
- | **Social audit firm:** A company (as opposed to a non-profit organisation) which carries out social audits in line with a specific audit framework.
- | **Social auditor:** An individual auditor or social audit firm which carries out the social audit. This may be a different firm from the entity which issues the certification (the “certification body”).
- | **Suppliers:** Companies involved in the production of goods or supply of services.
- | **Third-party audit:** An audit carried by an auditor external to the audited company and its clients.

References

- 1 Under the United Nations [Guiding Principles on Business and Human Rights](#) (UNGPs) at Principle 17, human rights due diligence is the process by which companies identify, prevent, mitigate and account for their adverse human rights impacts. According to the UNGPs, human rights due diligence should cover adverse impacts that a business “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”. Principle 18 calls on companies to undertake meaningful consultation with potentially affected stakeholders, at regular intervals. Under Principle 22, companies should remediate the adverse impacts they cause or contribute to.
- 2 RINA’s response to these allegations is accessible [here](#).
- 3 For a list of some of the largest social audit firms, see Harvard Business School “[Social Audit Firms](#)”.
- 4 Estimates vary from the conservative figure cited in this report to multiple billions of USD, see Clean Clothes Campaign (2019), “[Fig Leaf for Fashion: How Social Auditing Protects Brands and Fails Workers](#)”.
- 5 *Ibid*.
- 6 Brightway Holdings [denies](#) the allegations. Business & Human Rights Resource Centre requested responses from the companies reported to source gloves from Brightway Holdings. According to one company, Ansell, the company ordered a third-party audit of Brightway Holdings in May 2019, which “[did not reveal these unacceptable living conditions](#).” The company did not state which firm conducted the audit. The May 2021 [article](#) by Reuters, which reported the story, states, “There is no evidence of any impropriety by the auditor Brightway hired, British firm Intertek Group (ITRK.L), which declined to comment on Brightway. Intertek said its audits meet stringent operational procedures with rigorous standards, and are themselves subject to regular and thorough independent audits. It did not say by whom.”
- 7 See [statement](#) by the Managing Director of Top Glove Corporation Berhad, 28 November, 2018.
- 8 Carolijn Terwindt and Miriam Saage-Maas (2016), “[Liability of Social Auditors in the Textile Industry](#)”, ECCHR.
- 9 For detail on the social audit process, see Clean Clothes Campaign (2005) “[Looking for a Quick Fix – How Weak Social Auditing is Keeping Workers in Sweatshops](#)”.
- 10 See Elena Corcione (2019), “[Human Rights Violations Committed by Certified Companies: Assessing the Accountability of Third-Party Certifiers](#)”.
- 11 Genevieve LeBaron, Jane Lister & Peter Dauvergne (2017), “[Governing Global Supply Chain Sustainability through the Ethical Audit Regime, Globalizations](#)”, 14:6, 958-975.
- 12 For example, the social audit firm Intertek was reportedly sued in the US for allegedly exposing a whistle-blower’s identity. See China Labor Watch (2011), “[Auditing Giant Intertek Sued in Relation to Auditor Bribery](#)”.
- 13 For example, where the audited company becomes insolvent, as in the case of litigation against the audit firm TÜV Rheinland in Germany. See ECCHR, Brot für die Welt, Bischöfliches Hilfswerk MISEREOR (2021), “[Human Rights Fitness of the Auditing and Certification Industry?](#)”, page 51.
- 14 While the legal arguments presented in this report may be persuasive in other jurisdictions, our research is ongoing, and the law applied to a prospective claim depends on the law in the country where the harm occurred and where the claim is filed. We welcome contributions to enhance our research.
- 15 *Das v. George Weston Limited*, 2017 ONSC 4129 (CanLII).
- 16 Under *Tolofson v. Jensen*, 1994 CanLII 44 (SCC). The courts accepted jurisdiction over the claims brought by minors at the time of the collapse, in line with Bangladesh’s statute of limitations, see, *Das v. George Weston Limited*, 2018 ONCA 1053 (CanLII) at paragraph 47. Expert witnesses agreed that a social auditor’s liability in negligence would be a novel claim in Bangladesh and that a Bangladesh court would consider case law from India and England.
- 17 See Carolijn Terwindt and Tara Van Ho (2019), “[Assessing the Duty of Care for Social Auditors](#)” European Review of Private Law, Issue 2.
- 18 *Vedanta Resources Plc & Anor v Lungowe & Ors* [2019] UKSC 10.
- 19 *Ibid* at paragraph 49. The Supreme Court held, “Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations ... of the subsidiary”.
- 20 Restatement (Second) of Torts (Am. Law Inst. 1965).
- 21 Cass, Ass. Plén., October 6, 2006, Boot Shop, no. 05-13.255.
- 22 Cass, Ass. Plén., January 13, 2020, no. A 17-19.963.
- 23 Law n° 2017-399, 27 March 2017, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.
- 24 Article 225-102-5 of the French Commercial Code resulting from this law provides that a breach of vigilance triggers civil liability “under the conditions set out in Articles 1240 and 1241 of the Civil Code”.
- 25 Carola Glinski and Peter Rott (2018), “[The Role and Liability of Certification Organisations in Transnational Value Chains](#)” CEVIA Working Paper Series, Issue 4/2019 Deakin Law Review Volume 23. Liability would be assessed under the German Civil Code section 823 paragraph 1.
- 26 Cees van Dam (2011), “[Tort Law and Human Rights: Brothers in Arms. On the Role of Tort Law in the Area of Business and Human Rights](#)”, Journal of European Tort Law 2 (2011), p. 221-254.
- 27 For discussion on this legal theory under English law, see *supra* 17, paragraphs 46–47.
- 28 Scholars explain that a German court may interpret the contract to have protective effect (Verträge mit Schutzwirkung für Dritte) where the third party legitimately trusts the expertise of a contracting party or is the ‘real’ beneficiary of the contract, particularly in cases where the contracting party is responsible for the well-being of the third party. See *supra* 25, page 89.
- 29 For example, under the UK’s Contract (Rights of Third Parties) Act 1999 c.31 and Hong Kong’s Contracts (Rights of Third Parties) Ordinance (Cap. 623).
- 30 See Bettina Braun, Avery Kelly and Charity Ryerson (2021), “Worker-Enforceable Supplier Codes of Conduct As a Tool for Access to Justice in Global Supply Chains” in ILAW Network, The Global Labour Rights Reporter Vol 1, Issue 1, “[Access to Labour Justice](#)”.
- 31 See, in general, MSI Integrity (2020), “[Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance](#)”.
- 32 German Federal Court judgement of 27 February 2020, VII ZR 151/18.
- 33 See *supra* 13, page 21.
- 34 Under Directive 93/42/EEC of the European Union, the “EU Medical Devices Directive”.
- 35 See *supra* 33.
- 36 German Federal Court judgement of 27 February 2020, VII ZR 151/18 paragraph 31.
- 37 Court of Cassation, 1st Civil Division, 10 October 2018 – no. 15-26.093.
- 38 Trafficking Victims Protection Reauthorization Act 18 U.S.C. 1589.
- 39 *Ibid*, Section 1595.
- 40 *Coubaly et al. v. Cargill, Inc. et al.*, 1:21-CV-00386 (D.C. Cir. filed Feb. 12, 2021).
- 41 *Myers v. Starbucks*, C.D. Cal., No. 5:20-cv-00335, 5/6/2.
- 42 *Water and Sanitation Health, Inc. v. Rainforest Alliance, Inc.* No. C15-75RA), 2015 WL 12657110 (W.D. Wash. Dec. 29, 2015) at paragraphs 1–2.
- 43 *Ibid* at paragraph 5.
- 44 See Peter Hunter and Michael Urminsky (ILO: 2012), “[Social Auditing, Freedom of Association and the Right to Collective Bargaining](#)”, page 48.
- 45 See Clean Clothes Campaign (2021), “[Fashioning Justice](#)”, page 24.



About this report

As an organisation dedicated to advancing human rights in business, Business & Human Rights Resource Centre seeks to end corporate impunity for human rights abuses. Our Corporate Legal Accountability (CLA) programme, which highlights significant lawsuits related to business and human rights across the world, is one of our tools for achieving this goal. We view lawsuits both as a means through which communities and workers assert their power and as a key driver of positive change in corporate behaviour. A vital part of our corporate legal accountability work is tracking lawsuits that challenge companies' human rights abuses.

Every year, we publish an Annual Briefing highlighting the work of our allies in the legal practice. By analysing their experiences and findings, we aim to spark discussion, debate and, ultimately, further action by other advocates and practitioners.

This year's briefing explores opportunities and challenges for holding social audit firms legally to account where they harm human rights. The findings presented in this briefing are based on our research into potential legal strategies for social auditor liability. This briefing provides legal analysis on civil and criminal claims brought to date against social audit firms, and associated certification schemes, to explore potential theories of liability. It outlines the legal and contractual reform required to enable victims of abuse to seek access to remedy against social audit firms where social audit failings result in harm.

Acknowledgments

- | **Author:** Chara de Lacey (*Social Audit Accountability Project Manager*)
- | **Research contributions:** We are grateful to Clean Clothes Campaign International Office, Clean Clothes Campaign Italy, Corporate Accountability Lab, the European Centre for Constitutional and Human Rights, Leigh Day and Sherpa for their expert contributions to our research and this briefing. We also extend our gratitude to the lawyers, legal scholars and advocates who shared their expertise and insights on liability strategies and provided comments on earlier drafts.
- | **Guidance and peer review:** Special thanks to Maysa Zorob (Corporate Legal Accountability Programme Manager) for her guidance throughout the drafting process and to the Resource Centre Global Team for invaluable feedback, including Golda Benjamin, Johannes Blankenbach, Evie Clarke, Rosie Monaghan, Shikha Sethia, Saskia Wilks, Tom Wills, Harriet Wood and Pippa Woolnough.
- | **Partner:** Business & Human Rights Resource Centre is grateful for the generous support from Laudes Foundation for our project on advancing corporate legal accountability for social audits.

