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Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?

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Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?

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Abstract

Mandatory human rights due diligence is the latest example globally of a legislative scheme intended to foster corporate action on human rights risks within business supply chains. Such proposals stem from more than 30 years of increased pressure on companies to tackle labour rights abuses. If not clearly defined and implemented, human rights due diligence runs the risk of enhancing the legitimacy of techniques such as social auditing to serve as an inadequate proxy for due diligence. Without mechanisms to incorporate the views of rights holders in its design and implementation and ensure access to remedy for rights holders, it is perhaps more accurately depicted (for now) as the next shiny thing that may be more of a distraction, than a substantive mechanism with which to pursue real change and redress for labour exploitation in global supply chains.

Keywords

Human rights due diligence, supply chain, worker social responsibility, labour rights, social audit.

Bio

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Introduction

On March 25, 1911, 146 workers, most of them immigrant women and girls, died in the Triangle Shirtwaist Factory fire in New York, and it is remembered as one of the United States' (US) deadliest workplace disasters (Marsico 2010). The Triangle Shirtwaist Factory fire catalysed reforms in New York that spread throughout the US including occupational health and safety reforms (such as, outward-swinging exit doors and sprinklers in high-rise buildings) and greater outreach to garment workers by local unions. Accountability was sought via a criminal trial for the factory owners which was ultimately unsuccessful. The horror and outrage were such, that the cries of 'never again' resonated throughout the garment industry.

On April 24, 2013, the collapse of the Rana Plaza building in Dhaka, Bangladesh, which housed five garment factories, killed at least 1,134 people and injured more than 2,500. Only five months earlier, at least 112 workers had died inside the burning Tazreen Fashions factory on the outskirts of Dhaka. Reform proposals were hastily assembled that focused on building safety and the Bangladesh Accord on Fire and Building Safety, along with the Alliance for Bangladesh Worker Safety, were established. The ensuing outrage around the Rana Plaza tragedy was focused not only on ensuring that such a disaster could never happen again, but also in trying to understand why it did - more than 100 years after the Triangle Shirtwaist Factory. Was the garment industry in Bangladesh in 2013, the practical equivalence of New York in 1911?[i]

In 2020, attention on working conditions in the apparel industry turned to Xinjiang, China where many of the world's leading clothing brands were (and many are continuing to) source

cotton through a state sponsored system of forced labour (Kriebitz and Max, 2020, The Guardian 2020a). It is alleged that one in five "cotton garments in the global apparel market are tainted by forced labour" from this region (End Uyghur Forced Labour in China Now). China is the largest cotton producer in the world, with "84% of its cotton coming from the Xinjiang region" (The Guardian 2020b). Global supply chains are a central feature of today's globalized economy and the backbone of the fashion industry. The global fashion industry is estimated to employ more than 60 million workers globally, many of whom are labouring at the bottom of these complex and often opaque supply chains (Better Work 2019).

Beyond this tragic tally of lost lives and forced labour, are countless stories of exploitative working conditions, including unpaid overtime wages, long hours, unsafe working conditions and harassment and discrimination in factories and fields around the world producing global fashion. The greater the demands placed on industries, such as the apparel sector, for more products and faster production times, the higher the likelihood that that the workers making these products may experience exploitation (Bader and Saage- Maaß 2021, Le Baron et al, 2018). The upward trajectory of the global production of goods seems to stand in contrast to the downward pressure (most recently exacerbated by the Covid-19 pandemic) on achieving respect for workers' rights (ILO 2021). The public and private regulatory labour initiatives that have developed in abundance from 1911 to the present day, have failed to prevent not only a massive industrial disaster but also consistent ongoing workplace violations. This failure cannot be easily attributed to any one factor.

In the more than 100 years since the Triangle Shirtwaist Factory fire, the International Labour Organisation (ILO) was established, and it has developed and disseminated hundreds of workplace laws and standards aimed at ensuring decent work for all. Many countries, both

developed and developing, have built an extensive domestic web of local labour laws, but enforcement is too often inconsistent or non-existent (Deva and Bilchitz 2013). The ILO, the Organisation for Economic and Cooperative Development (OECD) and the United Nations (UN) have developed guidelines, laws and recommendations to address this governance gap that provide guidance on how business can better respect labour and human rights wherever they operate (Deva and Bilchitz 2013). Private regulatory initiatives have also sprouted and seek to fill the enforcement gap between policy and practice by developing codes of conduct to guide corporate behaviour (Utting 2005, Vogel 2008). Corporate social responsibility and sustainability have become key catch phrases but are not always matched by results (Ramasastry 2015). More recently, requirements, including a focus on corporate reporting on 'social' issues such as modern slavery are being placed on companies to ensure greater transparency about working conditions.

Human rights due diligence (HRDD) is the latest concept to garner attention as a potential regulatory mechanism to address working conditions in global supply chains. HRDD was crafted in the United Nations Guiding Principles on Business and Human Rights 2011 (UNGPs) as the method by which businesses (and States) are to prevent adverse human rights impacts. HRDD also address mitigation, and where relevant, remediation of adverse impacts on human rights (Human Rights Council 2011, Principle 17). HRDD differs from conventional corporate due diligence because its focus is not risks to the business but risks to people affected by the business's activities (Human Rights Council (2011), Principle 17(a)). HRDD has since been incorporated into subsequent international documents in the business and human rights field, as well as in national legislation (McCorquodale and Nolan 2021). The key drafter of the UNGPs, John Ruggie, defined HRDD as "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a

project or business activity, with the aim of avoiding and mitigating those risks" (Human Rights Council 2009 [71], UN Working Group 2018 [10], OECD 2018).

This article examines the challenges and opportunities that HRDD presents to the global fashion industry as a mechanism to address human rights abuses in supply chains. The development of the HRDD framework stems from decades of increasing pressure on companies to tackle labour rights abuses in their supply chains. This article first discusses the background and context in which HRDD is both emerging and is being framed. It briefly canvasses the diversity of regulatory approaches which have been or are being trialled in this field spanning from reliance on self-regulation (that typically sidelines the State), to mandatory HRDD (which is now recentering the State as a critical player in supply chain regulation). Next, the article examines the need for HRDD to prioritise substance over form and discusses the limited utility of relying on the social audit as a proxy for HRDD and instead emphasises the need to substantively involve rights holders in the process. With weak or unclear legal definitions of HRDD, social auditing may be utilised by business as a principal risk management tool under the guise of HRDD and at the expense of engaging those most impacted by negative corporate practices. Finally, this article glances forward to assess the opportunities that HRDD might offer to improve respect for human rights in fashion supply chains. While it is acknowledged that HRDD has significant potential to be an effective tool to mitigate human rights abuses, without mechanisms to incorporate the views of rights holders and to ensure the centrality of the State in its enforcement, it is perhaps more accurately depicted (for now) as the next shiny thing that may be more of a distraction than a substantive mechanism with which to pursue real change and redress for labour exploitation in global supply chains.

The context in which human rights due diligence is emerging

Allegations of human rights and labour abuses are not new to the apparel sector. Production processes are spread across diverse countries utilising complex supply chains and are difficult to regulate. Apparel supply chains are noteworthy for a lack of transparency and "short lead times and short-term buyer-supplier relationships [which] can reduce visibility and control" in the chain (OECD 2017, 17). It is clear not only that substandard working conditions are a global problem, but that regulating and improving working conditions in global supply chains is a work in progress. While the global activities of business are multi-jurisdictional, (legal) regulation, often stops at the border. The governance of business conduct is characterised by a mix of jurisdictions, norms and actors, and approaches that differ depending on international, national, industry and company specific factors. Increases in cross-border sourcing and production, trade liberalisation and the deregulation of labour market has led to the development of a regulatory framework that can best be described as inconsistent and lacking coherence.

A plethora of tactics have been adopted (with varying levels of success) to attempt to regulate the impact of business on human rights in supply chains. To date the dominant paradigm has relied on the slow and steady evolution of voluntary initiatives which largely depend on self-regulation by business, alongside the coercive voice of civil society (Ratner 2001, Kinley and Tadaki 2004, Utting 2014). More recent developments including national legislation (mandating corporate social disclosures[ii] and human rights due diligence[iii]) and the (longer-term) prospect of a UN led business and human rights treaty are changing this dynamic and hardening human rights requirements for business (Deva and Bilchitz 2017). The principal challenge is to ensure that the standards espoused in laws, codes or guidelines directed at

business are consistent, comprehensive and, most importantly, implemented. Multiple motives (including reputation protection) and pressure points (governments, media, trade unions, non-governmental organizations (NGOs), consumers, workers, investors) and internal leadership within some companies have influenced, and continue to influence, corporate approaches to improving compliance with human rights standards. What remains is disagreement about the most effective means of advancing respect for and compliance with international human rights standards in global supply chains.

The existing ad hoc regulatory framework in the apparel sector includes a combination of soft and hard law mechanisms aimed at influencing corporate behaviour (Locke 2013, Sobczak 2006). Regulation in this context "goes beyond legal rules and mechanisms and also comprises political, social, economic and psychological pressures" (Charlesworth 2017, 361). The UNGPs, for example, are a top-down initiative based on a complementary "synthesis of hard and soft law – the soft law mandates pick up on the space left by voids in hard law, and support and amplify the tents of hard law where they do overlap" (Stevelman 2011, 116). While addressing human rights abuses associated with global supply chains is the primary duty of States, the fragmented nature of supply chains, along with the ability and willingness of both home and host States to tackle these issues, can make cross-border regulation challenging. As such, institutional initiatives such as the UNGPs, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO Tripartite Declaration 1977) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines 2011) provide a useful, albeit broad, basis for articulating how human rights apply to business. These developments have built on years of self-regulatory techniques that aim to leverage the power of business to identify, prevent and redress conditions that may lead to unsafe working conditions.

Beginning in the 1990s, many apparel companies began to adopt codes of conduct to guide responsible business practices. Levi Strauss & Co was the first company in the apparel industry to introduce a code. Codes (often accompanied by social audits) are widely used in supply chain production as a mechanism for monitoring corporate compliance with human rights standards. Such codes rely on corporate engagement, but both the credibility and the potential longevity of the code are dependent on how business engages with other stakeholders, such as trade unions, civil society and workers, in the development and enforcement of these codes (Utting 2014). Over time, concerns around the content, legitimacy, and accountability of such codes and an overreliance on corporate self-regulation and voluntarism, has seen a more recent 'trend' toward the development of national legislative schemes that recentre and reaffirm (at least in theory) the State as a critical player in supply chain regulation (AFL-CIO 2013). However, this does not or more accurately should not abdicate business from responsibility in addressing supply chain workplace conditions, for as aptly noted by Bader and Saage-Maaß "[w]hile 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" (2021, 25).

HRDD, as articulated in the UNGPs and reflected in other international and emerging national instruments, is noted as a shared responsibility of both the State and business but it is not yet clearly defined how this complementary relationship can and should operate. The role of the State is critical in providing clarity around the design, development and implementation of HRDD, and business, along with other stakeholders such as rights holders, will continue to have a clear role to play in contributing to these aspects along with its enforcement. The emergence of regional and national initiatives since 2011 that reference

HRDD are solidifying its status as a potential regulatory mechanism but to date, there remains an absence of specificity and consistency in these various approaches.
. The OECD's Guidelines, the ILO's Tripartite Declaration, the International Finance Corporation's Performance Standards (IFC 2012) and the Equator Principles 2013, have all been revised to incorporate HRDD (consistent with the framework set out in the UNGPs) . The OECD has also developed more detailed specific due diligence sector guidance, including for the garment and footwear industry (OECD 2017). This consolidation of broad international consensus on HRDD has subsequently been supported by the explicit or implicit reference to HRDD in some national laws aimed at preventing and redressing human rights abuses in supply chains.

Since 2011, several laws have been developed that specifically seek to apply aspects of HRDD. While none of these HRDD laws specifically focused on the apparel sector, they remain relevant to it within the broader context of supply chain regulation. Examples of this emerging legislative response on HRDD include: the French Duty of Vigilance Act 2017 (*Devoir de Vigilance Loi*); the Netherlands Child Labour Due Diligence Act 2019; the German Corporate Due Diligence in Supply Chains Act 2021 and the Norwegian Transparency Act 2021. New Swiss due diligence obligations, operative from 2022, take "the form of a modification of the Swiss Code of Obligations and of the Swiss Criminal Code" and introduce reporting and narrowly targeted due diligence obligations (Bueno and Kaufman 2021, 544).

In addition, there are other pieces of national and sub-national legislation which are relevant to HRDD, such as the California Transparency in Supply Chains Act (201), the UK Modern Slavery Act (2015) and the Australian Modern Slavery Act (2018)[iv] which focus on reporting

as the primary means to address worker exploitation in supply chains. These three social disclosure laws implicitly, rather than explicitly encourage HRDD practices, but do not mandate them.

In 2022 the European Commission published a proposed Directive on Corporate Sustainability Due Diligence (European Commission, 2022). The proposed Directive would impose legally enforceable duties on large European companies, and on large non-EU companies doing business in Europe, with respect to the human rights and environmental impacts of their operations and supply chains.[v] The Directive requires companies to follow the HRDD steps identified in the OECD Due Diligence Guidance for Responsible Business Conduct (OECD 2018), including integrating due diligence into policies and management systems; identifying, assessing, preventing and/or mitigating actual or potential adverse human rights and environmental impacts and publicly communicating such efforts. It also requires business to provide for remediation, including appropriate procedures for complaints by affected persons, trade unions and civil society organizations.

Two US based recent regulatory initiatives that are specifically focused on regulating the apparel sector (but do not include mandatory HRDD) are New York's proposed Fashion Sustainability and Social Accountability Act (the Fashion Act) and California's Garment Worker Protection Act (effective from 2022). While the Fashion Act is sector specific, it is similar to California's 2010 Transparency in Supply Chain Act, in that it focuses primarily on disclosure. However, in contrast to the earlier law, the Fashion Act does propose some form of sanction for noncompliance with disclosure requirements and includes both a monetary penalty and a right of action for consumers. It does not mandate HRDD and brands will only be held accountable for failures to report, not failures to actively identify, prevent, mitigate

and account for adverse human rights impacts. Further, it does not provide a remedy to affected individuals. California's Garment Worker Protection Act (Senate Bill 62) is also targeted at the apparel sector but is narrowly focused on the proper payment of employees and potential liability of companies in the supply chain to be jointly and severally liable for wages. This is an important law given the often precarious nature of garment work and the traditional preponderance for payment of piece work wages in this sector (ILO 2019). The law does not provide a HRDD mandate, such as the European laws noted above, but its focus on compensation is important. Laws, such as some of the national and sub-national laws noted above, that only focus on the most severe forms of labour exploitation - modern slavery - overlook the view that such crimes exist on a continuum of exploitation and the reality that 'people can be exposed to working conditions that gradually worsen, sometimes leading to slavery' (Nolan and Boersma, 2019, 10). Monitoring the proper payment of wages is critical in ensuring workers avoid this exploitation continuum.

Taken together, these existing and emerging laws provide evidence of the increasing momentum toward establishing greater protection for apparel workers in supply chains. However, while each of these legislative approaches is distinctive (for example, see Krajewski et al, 2021), , none of them provide a comprehensive and clear framework for HRDD. Meaningful human rights regulation should provide clarity on what actions are required to constitute HRDD and engage with and give rights to affected individuals and communities so that remedy is victim-centric rather than prioritising consumer awareness and business reporting processes. This article does not attempt to provide a detailed analysis of

the differences between each of these legislative approaches but rather focuses on two principal issues to consider if mandatory HRDD is to be effective: clearly defining HRDD so as to acknowledge the limited utility of the social audit as a proxy for due diligence and the need to ensure rights holders are engaged in the HRDD process including having access to remedy.

Human rights due diligence: form over substance?

The limited utility of the social audit

Human rights due diligence, as set out in the UNGPs, is comprised of four key elements. Businesses are expected to: (1) assess their actual and potential adverse human rights impacts; (2) integrate these findings internally and take appropriate preventative and mitigating action; (3) track the effectiveness of their response; and (4) publicly communicate how they are addressing their human rights impacts (Human Rights Council 2011, Principle 15(b)). This indicates that HRDD is a process, or rather a "bundle of interrelated processes" (UN Working Group 2018 [10]) through which businesses can address actual and potential adverse human rights impacts. The UNGPs polycentric governance or co-governance approach to regulation is evident in its framing of HRDD. While HRDD is articulated as a mechanism by which business can fulfil its responsibility to respect human rights (and "avoid infringing on the rights of others") (Human Rights Council, 2011, 3), the UNGPs also refer to the role of the State in providing guidance on "appropriate methods, including human rights due diligence" (UNGPs p8) to ensure respect for human rights. These are complementary responsibilities in design, development and implementation of HRDD. The co-governance rationale on which this concept rests—that the regulatory power of business can be deliberately harnessed (Braithwaite

and Drahos 2000; Braithwaite 2008)—is not necessarily illegitimate or ill-conceived. Its basic premise is that other actors, in addition to governments, can address human rights issues, and it may be effective therefore to engage business in the promotion and protection of the human rights that their activities affect (Annan 1999). Government still leads, but it does so by, among other things, mandating due diligence on risk management processes.

The social audit is one mechanism commonly used by companies to verify supplier compliance with human rights standards, typically contained in a code of conduct. Social auditing is a burgeoning US$50 billion industry estimated to account for up to 80% of ethical sourcing budgets (ETI Auditing Working Conditions; UK Government, 2019). The precise nature of a social audit varies depending on the sector and the entity undertaking it. It generally involves physical inspection of a facility (e.g., a factory, farm, mine or vessel), combined with documentary review (to the extent that records are kept) and interviews with management and perhaps employees. The UNGPs contemplate social auditing as part of HRDD but it is ascribed a reasonably limited role. The UNGPs refer to it solely in the context of tracking, listing it as one of an array of tools to assess the effectiveness of a company's attempts to identify and address adverse human rights impacts.

Evidence does not indicate whether the Triangle Shirtwaist Factory was the recipient of a formal social audit in 1911, but the apparel factories in the Rana Plaza building and the Tazreen site did undergo social audits prior to their deadly fires. The audits had each certified the workplaces as compliant (Clean Clothes Campaign, 2019, Reinecke & Donaghey 2015; LeBaron & Lister 2015). Laws which encourage or mandate the use of HRDD, but do not provide clear guidance on its content or a mechanism to enforce compliance, run the risk of inadvertently being used to enhance the legitimacy of social auditing as tool to regulate labour rights abuses. Despite more than two decades of evidence that illustrates that audit

programs generally fail to detect significant labour abuses in supply chains they are still being used as a principal compliance tool and there is little evidence that they have led to sustained improvements in many social performance issues, such as working hours, overtime, wage levels, freedom of association and modern slavery (O'Rourke 2003; LeBaron et al. 2017; Clean Clothes Campaign 2019).

A significant body of research provides evidence for the reasons why the social audit should not be used as a proxy for HRDD (Locke et al. 2007, Barrientos & Smith 2007, Egels-Zandén & Lindholm 2015). The research highlights the inherent limitations of the social audit including but not limited to: its superficial 'snapshot' approach to assessing working conditions (Le Baron and Lister 2015); the evidence of audit fraud or fatigue that relies on incomplete or inaccurate information (Locke et al. 2009; Baumann-Pauly et al. 2017); and its focus not on the root causes (why labour violations persist) but on the problem's symptoms (wage discrepancies, forced overtime) and thus often conveniently overlook the role of a lead firm's own business model and purchasing practices in contributing to exploitative work practices further down the supply chain (Anner et al 2013). Social audits can contribute to the identification pillar of HRDD, to highlight specific workplace issues, but given their often-limited engagement with workers, their utility even for this, may be useful but not sufficient. As noted by Ford and Nolan, "one 'Big 4' audit firm has warned of a checklist approach to social compliance with clerical and Y/N audit approaches unsuited to detecting the underlying causes of problems. Labour violations in the apparel sector, for example, are not simply 'a factory-level problem fixable by improved compliance monitoring' but instead are a 'pervasive and predictable outcome' of the overall business model'" (Anner et al 2013, 1).

With weak or unclear legal definitions of HRDD and a focus on compliance over substance, there is a real danger that business will outsource their human rights risk assessment to third party auditing firms to meet procedural requirements. A reliance on social audit as a primary mechanism to address HRDD will likely lead to a result which prioritises process over outcomes and is inconsistent with the approach set out in the UNGPs and does little to prevent or remedy workplace abuses. The social audit is not of itself a mechanism that provides a holistic approach to preventing and redressing workplace abuse.. What is required is clarity and consistency from States on the mandated components of HRDD and an acknowledgement that social auditing should not be used as a proxy for HRDD. Guidance can be obtained for developments in other sectors. For example, Australia's *Illegal Logging Prohibition Act 2012* (Cth) ('ILPA'), which criminalises the importation of illegally logged timber (ILPA, s7) provides specific mandates on due diligence requirements including, the obligation on importers to have a documented system that explains how the (due-diligence) requirements will be met; gather information about the products being imported and their supply chain; assess the risk the product has been illegally logged; mitigate any associated risks; and keep a written record of the process undertaken (DAWE 2020). Similar laws exist in the United States, Europe and in China, Korea and Japan (DAWR 2018).

Substantive not symbolic engagement with rights holders

According to the UNGPs, the due diligence process should involve effective consultation with potentially affected groups and other relevant stakeholders (Human Rights Council, 2017). The OECD also stresses that HRDD is an ongoing process and a one-off consultation is insufficient (OECD 2018). Engaging rights holders in the design, development and

implementation of HRDD – including workers, worker representatives, Indigenous Peoples, civil society – is critical to moving HRDD away from being a top down 'box ticking' exercise (McCorquodale and Nolan, 2021). Substantive engagement with rights holders would indicate that HRDD is based on a genuine dialogue with stakeholders and is not designed purely as a management exercise that is overly deferential to business in providing it with the flexibility to determine both how it identifies and addresses social risk. Engaging with rights holders disrupts this deferential framework and establishes it more as a substantive process that involves workers and other critical stakeholders in the process.

The need and means for workers to be given a more significant role in supply chain monitoring is not new (Claeson, 2019, Outhwaite and Martin-Ortega, 2019) but mandated HRDD offers an opportunity to harden this requirement. Recognising the failure of social auditing to fully capture issues at particular worksites, the Clean Clothes Campaign argues that the best auditors are 'the workers themselves since they are continually present at the production site' (Clean Clothes Campaign 2005, 79). A 2017 OECD report states that 'enterprises should involve workers and trade unions and representative organisations of the workers' own choosing' in HRDD in order to enhance its potential (OECD 2017, 29). In designing a HRDD process that places rights holders at the centre it can and should draw from some of the worker-driven social responsibility initiatives (WSR) that have emerged in the last decade. WSR posits workers as the key drivers behind creating, monitoring and enforcing workplace standards. The Bangladesh Accord on Fire and Building Safety in Bangladesh, a worker-driven initiative established in direct response to Rana Plaza, has sought to directly incorporate workers into monitoring building inspection processes (Bangladesh Accord 2013). The Lesotho agreements to prevent gender-based violence and harassment in Lesotho's garment sector. (WRC 2019, Ford and Nolan, 2020) and the Action

Collaboration Transformation (ACT 2019) program are also examples of this worker-driven approach that have emerged in the apparel sector. WSR initiatives are characterised by several key elements that are useful to apply in further developing the concept of HRDD. First, they involve workers directly in the design and implementation of the process thus recognising the 'bottom-up' expertise of workers to monitor workplace rights. Second, they demand a binding commitment from companies to engage in the process and third, include consequences for noncompliance that leverage the market power of lead firms to influence buying practices. The genesis of this WSR model was the long-term campaign by tomato workers (the Coalition of Immokalee Workers) in Florida which ultimately resulted in the establishment of the Fair Food Program in 2011 (Ford and Nolan 2020).

In assessing the effectiveness of HRDD, an important aspect is whether it institutionalises new mechanisms by which rights holders (who are likely to be workers, local communities and others) may meaningfully challenge corporate practices. As noted by Deva, if HRDD prioritizes process over outcomes, then it will be a less effective mechanism for preventing corporate human right impacts and instead be a "legitimization exercise for corporate operations" (Deva 2021, 349). Box-ticking processes will not catalyse operational changes to business models that are needed to address substantive rights human rights risks in supply chains. While the UNGPs encourage the participation of rights holders in HRDD and asks both States and business to (under certain circumstances) provide access to remedy, the recent emergence of mandatory HRDD laws now offer an opportunity to harden this requirement and ensure substantive engagement with rights holders be a legislative requirement. For example, while the French Duty of Vigilance Act requires consultation with worker representatives when business is developing a process to identify risks and undertake consultation with stakeholders in implementing their vigilance plans, it lacks clarity around that consultation process (Cossart

et al. 2017). The French law also includes compliance mechanisms that incorporate potential regulatory roles for both public and private actors[vi] which stands in contrast to the reporting only focus of the modern slavery laws from the UK and Australia, which implicitly encourage, but do not explicitly require, consultation with rights holders. HRDD requires that, where auditing activities identify problems, the results of those audits be used to inform concrete solutions. Workers should be engaged on what any remedy should comprise and may include restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, and other preventive measures.

Developing a process that substantively engages rights holders in HRDD and provides mechanisms to challenge the process can lead to the development of a framework that is holistic and usefully informs business processes from the outset including risk identification and analysis, reporting, developing measures to prevent harm and the provision of remediation alternatives if adverse impacts occur. It is a process that is proactive not reactive and can be an effective part of corporate decision-making. In developing HRDD frameworks, it is also important to safeguard the stakeholders who are participating in HRDD to ensure they are not the victims of retaliation for such engagement (BHRRC 2021).

Crystal ball gazing: the future of HRDD

HRDD is now at the crossroads as it begins to become part of legislation. How it is designed and implemented – by states, business, workers and other stakeholders - will firmly test its potential to contribute substantively to the prevention and remediation of corporate human rights abuses. This article argues that if the legislation contains incomplete, vague or weak legal criteria for HRDD, it will run the risk of resulting of developing a process which prizes

box-ticking, whereby companies formally comply with their due diligence obligations but do not substantially change their business practices. (Landau 2019). The apparel industry and its implementation of HRDD provides a useful litmus test for the process. The global fashion industry has adopted a plethora of approaches as it has attempted to improve working conditions its supply chain. These range from soft to hard laws to WSR initiatives but it has not yet managed to develop holistic and consistent practices that could guide both the prevention and remediation of issues where they occur. HRDD is currently the next shiny thing in business and human rights and it faces a 'a struggle over the power of definition and legitimacy' (Hamm 2021 110). Definition in this context refers to its content and implementation (which at this point remains somewhat vague and amorphous even as it is referenced in emerging laws) and legitimacy, which will be determined over time but will assesses its impact.

In assessing progress towards achieving greater respect for workplace rights, and despite the emerging legislative initiatives acknowledging a role for HRDD, it is clear that there is still a reluctance by States to bind business to legal standards that have substance and teeth. This is the story more generally of the business and human rights movement, exemplified by the tragic examples of corporate and state irresponsibility in fashion supply chains set out at the beginning of this article. The risk that mandatory HRDD laws will "insufficiently specify the process which companies must undertake in order to discharge their human rights due diligence obligation" (Bader and Saage-Maaß 2021, 16), rely too heavily on the social audit to identify risk, and/or fail to engage rights holders is real and how HRDD and the global fashion industry responds to this challenge will be indicative of whether the sector is undergoing substantive change or simply showing overt signs of moving forward but no real progress.

If we are to learn from prior experience, it is clear that HRDD must incorporate both top down (from the State and business) and bottom up approaches (that adapt WSR learnings) in order to disrupt traditional business practices and integrate HRDD as part of a business as usual approach to managing risk. At its core due diligence (as opposed to HRDD) is a mechanism to control risk (Van Buren et al 2021) so the challenge in adding human rights to this mix is ensuring that human rights of rights holders are central to the framework. Is doing so, it is helpful to consider the words of Nobel laureate Robert Solow who stated, "[t]he labour market is a social as well as an economic institution and the interaction between human beings cannot be interpreted in the same way as the supply and demand for dead fish" (Hutchens 2021). To move beyond cosmetic compliance, HRDD must involve those most in danger of being impacted by adverse corporate practices in the process rather than treat them as commodities to be managed.

HRDD offers an opportunity to recentre the state in supply chain regulation. It will likely involve both public and private enforcement to ensure HRDD moves beyond policy to practice and a reliance purely on the market for enforcement will be insufficient (Harris and Nolan 2021) The reliance on self-regulation in the business and human rights field has been long been criticised (Baccaro and Mele 2011) and the UNGPs polycentric governance or co-governance approach to regulation also has limitations. These shortcomings are also apparent in some of the new social disclosure laws that have been more recently developed to deal with issues such as modern slavery (, Mares 2018, Narine 2015). This means that, without state supported enforcement, there is a heavy burden on civil society to act on the limited information provided by business reporting on their human rights impacts. Reliance by the state on enforcement actors such as civil society groups to ensure HRDD implementation will

be insufficient given their limited resources. The proposed EU Directive does take steps to provide rights holders with an ability to seek to hold a business accountable for wrong doing but the burden of proof is borne by the victim. It is important to balance corporate social disclosures and the regulatory participation of non-state based actors such as workers and civil society, with complementary State backed enforcement mechanisms that place rights holders at the centre for effective HRDD implementation.

How HRDD is ultimately judged in terms of its legitimacy will depend on all these factors. If it is not clearly defined, lacks inclusivity and does not provide for an effective enforcement mechanism, it will more likely be perceived and applied as a risk management tool rather than a substantive mechanism for preventing and remedying corporate human rights abuses. As the global fashion industry looks forward and examines how it can progress labour rights to avoid another Triangle Shirtwaist, Rana Plaza, or Tazreen factory disaster, it should use this emerging opportunity to apply HRDD in a meaningful way. In assessing and applying HRDD as it becomes more common in both soft and hard law initiatives, we should be asking if HRDD initiatives offer meaningful rights to participation? Does it challenge what we know to be the limitations of the existing social auditing approach? How will it be enforced? Mandatory HRDD will not magically cure all ills in global fashion supply chains, but it can, if effectively designed and implemented, provide a platform from which to set standards, shape implementation and provide an enforceable mechanism to improve actions to prevent and redress business human rights abuses.

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[i] Since 2013, 'no fewer than 109 accidents have occurred. Among these, at least 35 were textile factory incidents in which 491 workers were injured and 27 lost their lives' (ILO 2018).
[ii] For example, the UK *Modern Slavery Act* (2015) and the Australian *Modern Slavery Act* (2019).
[iii] For example, the French Loi de Vigilance No. 2017-339 of 2017, the Netherlands - Child Labour Due Diligence Act (2019), the German Corporate Due Diligence in Supply Chains Act (2021) and the Norwegian Transparency Act (2021).
[iv] The California Transparency in Supply Chains Act 2010 was passed before the UNGPs.
[v] The Proposed Directive would initially apply to all EU companies with more than 500 employees and €150 million in annual turnover (revenues) worldwide and non-EU companies active in the EU with turnover generated in the EU of €150 million. Two years later, it would also apply to EU companies with 250 employees and €40 million annual turnover, and non-EU companies with turnover of €40 million generated in the EU, in defined "high impact sectors," such as extractive industries, agriculture and textiles. The Commission estimates that the Proposed Directive would cover about 13,000 EU companies and about 4,000 non-EU companies.

[vi] This law is currently being tested before the French courts where the adequacy and consultative nature of the HRDD employed by several companies is coming under scrutiny: See, Triponel Consulting (2020) and Cossart et al. (2017).