



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 global example of a legislative scheme for fostering 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 risks enhancing the legitimacy of techniques such as social auditing to serve as inadequate proxies for due diligence. Without mechanisms to incorporate the views of rights holders in its design and implementation and ensure access to remedies for rights holders, it is perhaps more accurately depicted (for now) as the next shiny thing that may be more a distraction than a substantive mechanism for pursuing 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.

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Introduction

On 25 March 1911, 146 workers, most of them immigrant women and girls, died in the Triangle Shirtwaist Factory fire in New York; it is remembered as one of the United States (US) deadliest workplace disasters (Marsico 2010). The Triangle Factory fire catalysed reforms in New York that spread throughout the US, including occupational health and safety reforms (e.g., 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.¹ The horror and outrage were such that cries of ‘never again’ resonated throughout the garment industry (Von Drehle, 2018).

On 24 April 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 Fashion factory on the outskirts of Dhaka (Nolan, 2016). Reform proposals were hastily assembled that focused on building safety, and the *2013 Accord on Fire and Building Safety in Bangladesh*, along with the Alliance for Bangladesh Worker Safety, were established. The ensuing outrage concerning the Rana Plaza tragedy was focused not only on ensuring that such a disaster could never happen again but also on trying to understand why it did—more than 100 years after the Triangle Shirtwaist Factory fire. Was the garment industry in Bangladesh in 2013 the practical equivalence of New York in 1911?²

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 continue) sourcing cotton through a state-sponsored system of forced labour (Davidson 2020; Kriebitz and Max 2020). It is alleged that one in five ‘cotton garments in the global apparel market is tainted by forced labour’ from this region (End Uyghur Forced Labour 2022). China is the largest cotton producer in the world, with ‘84% of its cotton coming from the Xinjiang region’ (Kelly 2020). Global supply chains are a central feature of today’s globalised 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 (Kelly, Miedema, Vanpeperstraete and Winterstein 2019). The greater the demands placed on industries, such as the apparel sector, for more products and faster production times, the higher the likelihood that the workers making these products may experience exploitation (Bader and Saage-Maaß 2021; LeBaron et al. 2018). The upwards trajectory of the global production of goods seems to stand in contrast to the downwards pressure (most recently exacerbated by the COVID-19 pandemic) on achieving respect for workers’ rights (International Labour Organization [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 ILO has been established and 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; however, enforcement is too often inconsistent or non-existent (Deva and Bilchitz 2013). The ILO, Organisation for Economic Co-operation and Development (OECD) and United Nations (UN) have developed guidelines, laws and recommendations to address this governance gap that provide guidance on how businesses 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 catchphrases 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 (Krajewski, Tonstad and Wohltmann (2021); Narine 2015).

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 UN Guiding Principles on Business and Human Rights 2011 (UNGPR) (Human Rights Council 2011) as the method by which businesses (and states) can prevent adverse human rights impacts. HRDD also addresses mitigation and, where relevant, remediation for 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 UNGPR, 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: 7).

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. First, this article discusses the background and context in which HRDD is both emerging and is being framed. It briefly canvasses the diversity of regulatory approaches that have been or are being trialled in this field, spanning from reliance on self-regulation (which typically sidelines the state) to mandatory HRDD (which is now recentering the state as a critical player in supply chain regulation).

Second, 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 businesses as a principal risk management tool under the guise of HRDD and at the expense of engaging those most affected 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 [that] can reduce visibility and control' in the chain (OECD 2018b: 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 businesses are multi-jurisdictional, (legal) regulation often stops at the border (Narine, 2015). 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 the labour market have led to the development of a regulatory framework that can best be described as inconsistent and lacking coherence (Nolan and Boersma 2019).

A plethora of tactics have been adopted (with varying levels of success) to attempt to regulate the effects 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 (Kinley and Tadaki 2004; Ratner 2001; Utting 2014). More recent developments, including national legislation (mandating corporate social disclosures³ and HRDD⁴) and the (longer-term) prospect of a UN-led business and human rights treaty, are changing these dynamic and hardening human rights requirements for businesses (Deva and Bilchitz 2017). The principal challenge is to ensure that the standards espoused in the laws, codes or guidelines directed at business are consistent, comprehensive and, most importantly, implemented. Multiple motives (including reputation protection) and pressure points (e.g., governments, media, trade unions, non-government organisations, consumers, workers and 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 UNGP, for example, is 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 and 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 UNGP, the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (ILO 2017) and the *OECD Guidelines for Multinational Enterprises* (OECD 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 (Nolan 2005). Codes (often accompanied by social audits) are widely used in supply chain production as a mechanism for monitoring corporate compliance with human rights standards (Utting 2014). 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 about the content, legitimacy and accountability of such codes and an over-reliance on corporate self-regulation and voluntarism have led to 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 (Finnegan 2013). However, this does not or, more accurately, should not abdicate business from responsibility in addressing supply chain workplace conditions because, as aptly noted by Bader and Saage-Maaß, 'while the MNE[multinational enterprise] 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 UNGP and reflected in other international and emerging national instruments, is noted as a shared responsibility of both the state and business. However, it is not yet clearly defined how this complementary relationship can and should operate. The role of the state is critical in providing clarity regarding 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 and to its enforcement. The emergence of regional and national initiatives since 2011 that references HRDD is solidifying its status as a potential regulatory mechanism. However, to date, there remains an absence of specificity and consistency in these various approaches.

The *OECD Guidelines for Multinational Enterprises*, the ILO's *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, the International Finance Corporation's *Performance Standards* (International Finance Corporation 2012) and the *Equator Principles* (2003) have all been revised to incorporate HRDD (consistent with the framework set out in the UNGP). The OECD has also developed more detailed, specific due diligence sector guidance, including those for the garment and footwear industry (OECD 2018b). 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 has 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 to HRDD include *LOI n° 2017-339 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Law number 2017-399 of March 27, 2017, relating to the duty of vigilance of parent companies and ordering companies, France) (the *Corporate Duty of Vigilance Law 2017*), the Netherlands *Child Labour Due Diligence Law* (2019), the German *Act on 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 Kaufmann 2021: 544).

Additionally, there are other pieces of national and sub-national legislation that are relevant to HRDD, such as the *California Transparency in Supply Chains Act* (2010), the *Modern Slavery Act 2015* (UK) and the Australian *Modern Slavery Act 2018* (Cth),⁵ 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 (2022) published a proposed directive on corporate sustainability due diligence. The proposed directive would impose legally enforceable duties on large European companies and large non-European Union (EU) companies doing business in Europe with respect to the human rights and environmental impacts of their operations and supply chains.⁶ The directive requires companies to follow the HRDD steps identified in the *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD 2018a), 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 businesses to provide for remediation, including appropriate procedures for complaints by affected persons, trade unions and civil society organisations.

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 (Senate Bill 62, effective from 2022). While the Fashion Act is sector-specific, it is similar to California's 2010 Transparency in Supply Chain Act because it focuses primarily on disclosure. However, in contrast to the Transparency in Supply Chain Act, 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 is also targeted at the apparel sector; however, it is narrowly focused on the proper payment of employees and the 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 the payment of piece work wages in this sector (Borino 2018). 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 to ensuring workers avoid this exploitation continuum.

Combined, these existing and emerging laws provide evidence of the increasing momentum towards establishing greater protection for apparel workers in supply chains. However, while each of these legislative approaches is distinctive (see, e.g., Krajewski et al. 2021), none provides 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: (1) clearly defining HRDD to acknowledge the limited utility of the social audit as a proxy for due diligence; and (2) the need to ensure rights holders are engaged in the HRDD process, including having access to remedies.

Human Rights Due Diligence: Form over Substance?

The Limited Utility of the Social Audit

HRDD, as set out in the UNGP, 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 preventive 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 General Assembly 2018: 4]) through which businesses can address actual and potential adverse human rights impacts.

The UNGP’s 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: 13), the UNGP also refers to the role of the state in providing guidance on appropriate methods, including HRDD (UNGP: 8), to ensure respect for human rights. These are complementary responsibilities in the 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 2008; Braithwaite and Drahos 2000)—is not necessarily illegitimate or ill-conceived. Its basic premise is that other actors, in addition to governments, can address human rights issues, and, therefore, it may be effective to engage businesses in the promotion and protection of the human rights that their activities affect (Annan 1999). Governments still lead, but they do 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 (Ford and Nolan 2020). Social auditing is a burgeoning USD50 billion industry estimated to account for up to 80% of ethical sourcing budgets (Ethical Trading Initiative 2018; Secretary of State for the Home Department 2019). The precise nature of a social audit varies depending on the sector and the entity undertaking it. It generally involves the physical inspection of a facility (e.g., a factory, farm, mine or vessel), combined with a documentary review (to the extent that records are kept) and interviews with management and perhaps employees. The UNGP contemplates social auditing as part of HRDD, but it is ascribed a reasonably limited role. The UNGP refers 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. However, the apparel factories in the Rana Plaza building and the Tazreen Fashion factory

did undergo social audits prior to their deadly fires. The audits had each certified the workplaces as compliant (Kelly et al. 2019; LeBaron and Lister 2015; Reinecke and Donaghey 2015). Laws that 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 a 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 (Kelly et al. 2019; LeBaron et al. 2017; O'Rourke 2003).

A significant body of research provides evidence for the reasons why the social audit should not be used as a proxy for HRDD (Barrientos and Smith 2006; Egels-Zandén and Lindholm 2015; Locke et al. 2007). The research highlights the inherent limitations of the social audit, including but not limited to its superficial 'snapshot' approach to assessing working conditions (LeBaron and Lister 2015), the evidence of audit fraud or fatigue that relies on incomplete or inaccurate information (Baumann-Pauly et al. 2017; Locke et al. 2009) and its focus not on the root causes (why labour violations persist) but on the problem's symptoms (wage discrepancies and forced overtime) and, thus, often conveniently overlooks 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; however, given their often-limited engagement with workers, their utility, even for this, may be useful but not sufficient. As noted by Ford and Nolan, a 'Big 4 audit firm has warned of a checklist approach to social compliance. In its view, clerical and Y/N audit approaches are 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 quoted in Ford and Nolan 2020).

With weak or unclear legal definitions of HRDD and a focus on compliance over substance, there is a real danger that businesses will outsource their human rights risk assessments to third-party auditing firms to meet procedural requirements. A reliance on social audits as a primary mechanism to address HRDD will likely lead to a result that prioritises processes over outcomes, is inconsistent with the approach set out in the UNGP and does little to prevent or remedy workplace abuses. The social audit is not in 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 from developments in other sectors. For example, Australia's *Illegal Logging Prohibition Act 2012* (Cth), which criminalises the importation of illegally logged timber (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 that the product has been illegally logged, mitigate any associated risks, and keep a written record of the process undertaken (Department of Agriculture, Water and Environment n.d.). Similar laws exist in the US, Europe, China, Korea and Japan (Department of Agriculture and Water Resources 2018).

Substantive, not Symbolic, Engagement with Rights Holders

According to the UNGP, the due diligence process should involve effective consultation with potentially affected groups and other relevant stakeholders (Human Rights Council 2017). The OECD has also stressed that HRDD is an ongoing process, and a one-off consultation is insufficient (OECD 2018a). Engaging rights holders in the design, development and implementation of HRDD—including workers, worker representatives, Indigenous Peoples and 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 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.

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); however, 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 has argued that the best auditors are ‘the workers themselves since they are continually present at the production site’ (Pruett 2005: 79). A 2017 OECD report stated that ‘enterprises should involve workers and trade unions and representative organisations of the workers’ own choosing’ in HRDD to enhance its potential (OECD 2018b: 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 (WSR) initiatives that have emerged in the last decade. WSR posits workers as the key drivers behind creating, monitoring and enforcing workplace standards. The *2013 Accord on Fire and Building Safety in Bangladesh*, a worker-driven initiative established in direct response to the Rana Plaza incident, has sought to directly incorporate workers into monitoring building inspection processes. The Lesotho agreements to prevent gender-based violence and harassment in Lesotho’s garment sector (Ford and Nolan 2020; Worker Rights Consortium 2019) and the Action, Collaboration, Transformation (Barendrecht and Korhonen 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 for 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, they 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 prioritises process over outcomes, then it will be a less effective mechanism for preventing corporate human rights impacts and instead be a ‘legitimization exercise for corporate operations’ (2021: 349). Box-ticking processes will not catalyse operational changes to business models that are needed to address substantive human rights risks in supply chains.

While the UNGP encourages the participation of rights holders in HRDD and asks both states and businesses to (under certain circumstances) provide access to remedies, the recent emergence of mandatory HRDD laws now offers an opportunity to harden this requirement and ensure that substantive engagement with rights holders is a legislative requirement. For example, while the French *Corporate Duty of Vigilance Law 2017* requires consultation with worker representatives when businesses are developing a process to identify risks and undertake consultation with stakeholders in implementing their vigilance plans, it lacks clarity concerning 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,⁷ which stands in contrast to the reporting focus of the modern slavery laws from the UK and Australia, which implicitly encourage but do not explicitly require consultation with rights holders. The concept of HRDD suggests that, where auditing activities identify problems, the results of those audits be used to inform concrete solutions. Workers should be engaged regarding what the remedies should comprise, which 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 (Business & Human Rights Resource Centre et al. 2021).

Crystal Ball Gazing: The Future of Human Rights Due Diligence

HRDD is now at a crossroads as it begins to become part of legislation. How it is designed and implemented—by states, businesses, 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 developing a process that 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 in 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 when they occur. HRDD is currently the next shiny thing in business and human rights, and it faces 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 refers to its inclusion, participation, transparency and efficacy. .

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 businesses 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 to discharge their’ HRDD obligations (Bader and Saage-Maaß 2021: 16), rely too heavily on social audits to identify risks and/or fail to engage rights holders is real. How HRDD and the global fashion industry respond to this challenge will be indicative of whether the sector is undergoing substantive change or simply showing overt signs of moving forward with 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 businesses) and bottom-up approaches (that adapt WSR learnings) 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). Thus, the challenge of adding human rights to this mix is ensuring that the human rights of rights holders are central to the framework. In doing so, it is helpful to consider the words of Nobel laureate Robert Solow, who stated that ‘the 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’ (as quoted in Hutchens 2021). To move beyond cosmetic compliance, HRDD must involve those most in danger of being affected 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 relying 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 long been criticised (Baccaro and Mele 2011), and the UNGP’s polycentric governance or co-governance approach to regulation also has limitations. These shortcomings are 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

businesses 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 European Commission's (2022) proposed directive does take steps to provide rights holders with an ability to seek to hold a business accountable for wrongdoing; however, 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 Factory, Rana Plaza, or Tazreen Fashion 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 whether HRDD initiatives offer meaningful rights to participation. Do they challenge what we know to be the limitations of the existing social auditing approach? How will they 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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¹ *People of the State of New York v Isaac Harris and Max Blanck*, New York November 20th, 1911, Court of General Session of the Peace (see transcript <https://www.ca-nvlaw.com/Triangle%20Fire%20Transcript.pdf>)

² Since 2013, at least '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 n.d.).

³ For example, the *Modern Slavery Act 2015* (UK) and *Modern Slavery Act 2018* (Cth).

⁴ For example, the French *Corporate Duty of Vigilance Law 2017*, the Netherlands *Child Labour Due Diligence Law* (2019), the German *Act on Corporate Due Diligence in Supply Chains Act* (2021) and the Norwegian *Transparency Act* (2021).

⁵ The 2010 Transparency in Supply Chains Act (California) was passed before the UNGP.

⁶ The proposed directive would initially apply to all EU companies with more than 500 employees and EUR150 million in annual turnover (revenues) worldwide and non-EU companies active in the EU with turnovers generated in the EU of EUR150 million. Two years later, it would also apply to EU companies with 250 employees and EUR40 million annual turnovers, and non-EU companies with turnovers of EUR40 million generated in the EU, in defined 'high impact sectors', such as extractive industries, agriculture and textiles. The European Commission estimated that the directive would cover about 13,000 EU and 4,000 non-EU companies.

⁷ 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 Cossart et al. 2017; Triponel Consulting 2020).

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