HUMAN RIGHTS DUE DILIGENCE AND THE RISK OF COSMETIC COMPLIANCE

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The concept of human rights due diligence is now embedded in many transnational regulatory instruments and is finding its way into national regulatory frameworks. As a means of conceptualising and operationalising responsible business conduct in a global economy, human rights due diligence is new, shiny and compelling. This article argues, however, that institutionalisation, even legalisation, of the concept may not necessarily bring about widespread, significant improvements in corporate behaviour. This is because companies may adopt internal policies and compliance structures that have all the formal hallmarks of human rights due diligence, but that fail to lead to genuine and substantial improvements in practice.

This article argues that, in light of this susceptibility to cosmetic compliance, it is important for international and national lawmakers to engage not only with the question of how to encourage or mandate human rights due diligence, but also with the question of how regulatory initiatives should be designed to minimise the risk of companies performing human rights due diligence cosmetically. Drawing on the normative concept of 'meta-regulation', the article identifies a number of principles that may help ensure due diligence regulation is crafted to enable businesses to implement respect for human rights in a way that is adapted to their unique circumstances, while ensuring the steps they take are meaningful and that they are held accountable for their self-regulatory systems.

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I INTRODUCTION

Human rights due diligence ('HRDD') is emerging as a new global orthodoxy for responsible corporate behaviour. In an area of transnational governance long characterised by seemingly intractable stalemates and fragmentation, the concept has been widely embraced as offering the international community a way forward that is capable of effectively both conceptualising and operationalising responsible business conduct in a globalised economy. HRDD is recognised by many as a tool through which states may promote and secure greater corporate responsibility and accountability for human rights harms that arise from their business activities and relationships at home and abroad. With its origins in public policy responses to managing the risks arising from transnational corporate activity in areas such as anti-corruption and private security provision, the approach is now being institutionalised in a range of forms and at a range of levels of government.

Paralleling HRDD's 'irresistible rise'[1] is a growing academic literature on the subject. Human rights scholars have considered the suitability of the due diligence concept to human rights and debated what the concept's development and institutionalisation mean for the quest to secure greater accountability of corporate actors for human rights abuses.[2] Legal scholars have examined how states could use their regulatory authority to encourage or mandate business to engage in the practice,[3] and the relationship between the concept and tort law.[4] Initial steps have been taken to document and evaluate company practice in various jurisdictions, although empirical studies remain very limited.[5]

This article seeks to contribute to understandings of the role of international and national law in shaping corporate HRDD practices. It argues that HRDD is emerging globally as a dominant, if not *the* dominant, conceptual frame through which business responsibility for human rights impacts is understood and operationalised. The concept is now found in many 'soft law' instruments and there is a trend towards a 'hardening' of HRDD-related obligations at both international and national levels. It should not be presumed, however, that the widespread institutionalisation of the concept will necessarily translate into significant improvements in corporate respect for human rights. There is a significant risk that these regulatory interventions will result in companies

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1 Holly Cullen, 'The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond' (2016) 48(4) *George Washington International Law Review* 743.

2 See, eg, Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 78; Christian Scheper, '"From Naming and Shaming to Knowing and Showing": Human Rights and the Power of Corporate Practice' (2015) 19(6) *International Journal of Human Rights* 737.

3 See the report prepared for the International Corporate Accountability Roundtable, the European Coalition for Corporate Justice and the Canadian Network on Corporate Accountability: Olivier De Schutter et al, *Human Rights Due Diligence: The Role of States* (Report, December 2012) 11–47.

4 Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1(2) *Business and Human Rights Journal* 179.

5 Robert McCorquodale et al, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2(2) *Business and Human Rights Journal* 195, 195–6.

adopting policies and implementing internal compliance structures that exhibit some or all of the formal elements of HRDD — and have the purpose of conveying the appearance of taking action — but ultimately fail to achieve the public goal they are designed to achieve: that is, the reduction or elimination of adverse human rights impacts. In short, they will achieve what Kimberly Krawiec has described as 'cosmetic compliance'.[6] Drawing on insights from regulatory studies, I argue that greater attention should be paid by lawmakers and civil society to crafting regulatory interventions that seek to influence the *quality* of HRDD undertaken, rather than simply its quantity. Relevant 'lawmakers' here include not only national legislatures but also international organisations and United Nations treaty bodies that are increasingly calling on states to take steps to implement HRDD-related regulation.

This article is structured as follows. Part II briefly traces the emergence of HRDD as a regulatory response to business and human rights challenges. It provides an overview of the origin of the concept and its institutionalisation in international and national regulatory frameworks. Part III introduces a regulatory perspective. It argues that there are a number of features of HRDD that render it susceptible to cosmetic compliance. Drawing on Christine Parker's theory of 'meta-regulation',[7] Part IV considers how regulatory approaches may be crafted to minimise this risk. Concluding observations are offered in Part V.

II HUMAN RIGHTS DUE DILIGENCE AS A REGULATORY RESPONSE TO THE BUSINESS AND HUMAN RIGHTS CHALLENGE

A *Emergence of the Concept*

The concept of HRDD was introduced into global governance through the UN *Protect, Respect and Remedy: A Framework for Business and Human Rights* ('*Framework*')[8] and the UN *Guiding Principles on Business and Human Rights* ('*UNGPs*').[9] These instruments were developed by John Ruggie during his mandate as UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises ('SRSG')

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6 Kimberly D Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81(2) *Washington University Law Quarterly* 487. Other similar formulations of this phenomenon, though with slightly different nuances, include superficial compliance, creative compliance and paper compliance.

7 Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 207, 210–13 ('Meta-Regulation'); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) ch 9 ('*The Open Corporation*').

8 John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008) 17–19 [56]–[64] ('*Framework*').

9 John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex ('*UNGPs*').

and endorsed by the UN Human Rights Council in 2008 and 2011 respectively.[10] The *Framework* consists of three distinct but interrelated pillars: the state's duty under international law to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication; the corporate responsibility to respect human rights, which means that businesses should act with due diligence to avoid infringing on the human rights of others and to address adverse impacts with which they are involved; and the need for greater access by victims to effective remedy, judicial and non-judicial. The *UNGPs* elaborate on the *Framework*. Neither the *Framework* nor the *UNGPs* were intended to create new international law obligations but rather to act as an 'authoritative focal point' as to what human rights compliance systems should look like within states and within companies.[11]

The *Framework*'s first pillar recognises the well-established obligation on states under international human rights law to respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction.[12] This includes the duty to take all measures that could reasonably be taken, in accordance with international law, to prevent private actors from engaging in conduct that would lead to human rights violations, and to provide access to remedies where such violations take place.[13] This state duty to protect is a standard of conduct: that is, states may breach their obligations where such abuse can be attributed to them or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.[14]

Under the second pillar, business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.[15] The *UNGPs* enumerate three measures that businesses should have in place in order to meet their responsibility to respect human rights. These are a policy commitment to do so; a HRDD process 'to identify, prevent, mitigate and account for' how they manage their potential adverse human rights impacts; and remediation processes to address any such adverse human rights impacts that they cause or to which they contribute.[16]

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10 Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 8/7, 8th sess, 28th mtg, UN Doc A/HRC/RES/8/7 (18 June 2008); Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, 17th sess, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011).

11 *Framework*, UN Doc A/HRC/8/5 (n 8) 4 [5].

12 Ibid 9–14 [27]–[50].

13 Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3–4 [8]. See generally Olivier De Schutter, *International Human Rights Law: Cases, Material, Commentary* (Cambridge University Press, 2nd ed, 2014) ch 4. The obligation to provide access to a remedy is also covered by the third pillar of the *Framework: Framework*, UN Doc A/HRC/8/5 (n 8) 22–7 [82]–[103].

14 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 6 (Guiding Principle 1). As Olivier De Schutter has pointed out, there is one aspect of this duty in which the *UNGPs* adopt a significantly weaker position than is established in international human rights law — the extent to which states are obliged to control the extraterritorial operations of home-state companies: Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1(1) *Business and Human Rights Journal* 41, 45–6.

15 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 13 (Guiding Principle 11).

16 Ibid 15 (Guiding Principle 15).

Under the *UNGPs*, HRDD is the process through which a business enterprise assesses actual and potential human rights impacts; acts to prevent and mitigate these impacts; tracks the effectiveness of responses; and communicates externally on these efforts.[17] It should cover adverse human rights impacts that the business enterprise 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'.[18] It is a concept that is informed by, but distinct from, due diligence undertaken by businesses in other commercial contexts.[19] Such distinguishing features include the need for a company to focus on risks to rights-holders rather than to the company itself; the need to meaningfully engage with rights-holders and others during the process;[20] and the need to conduct the process on an ongoing rather than on a one-off basis, as is the case with transactional due diligence.[21] According to John Ruggie and John Sherman, the concept is unrelated to the due diligence doctrine most familiar to international human rights lawyers: that is, a standard of conduct defining states' obligations to prevent and respond to infringements on human rights by non-state actors within its territory or jurisdiction.[22]

While the *UNGPs* characterise the responsibility of business enterprises to respect human rights (including engaging in HRDD) as a social rather than a legal obligation,[23] HRDD is linked to the first pillar of the *Framework* in a number of ways. The *UNGPs* do not suggest that states are required under international law to mandate HRDD in all circumstances. However, nor do they foreclose the possibility of states doing so. They recommend that the state clearly convey the expectation that companies domiciled in its territory respect human rights and provide guidance on how to do so, including through encouraging

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17 Ibid 13–20 (Guiding Principles 11–21).

18 Ibid 16 (Guiding Principle 17(a)). '[A] business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services': at 14 (Commentary on Guiding Principle 13).

19 John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton, 2013) 99–100 ('*Just Business*').

20 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 17 (Guiding Principle 18(b)).

21 Ibid 16 (Guiding Principle 17(c)).

22 Under this doctrine, a failure by the state to prevent and punish a violation of a human right by a non-state entity may trigger a state's legal responsibility: Timo Koivurova, 'Due Diligence' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2010) [33] <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?prd=EPIL>, archived at <https://perma.cc/TTY6-C4GD>. On the question of human rights due diligence ('HRDD') as a process of business risk management or standard of conduct, see the exchange between Jonathan Bonnitcha and Robert McCorquodale, and John Gerard Ruggie and John F Sherman, III: Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899; John Gerard Ruggie and John F Sherman, III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28(3) *European Journal of International Law* 921; Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F Sherman, III' (2017) 28(3) *European Journal of International Law* 929.

23 See *UNGPs*, UN Doc A/HRC/17/31 (n 9) 13 (Commentary on Guiding Principle 11). See also *Framework*, UN Doc A/HRC/8/5 (n 8) 16–17 [54].

them to engage in HRDD.[24] States should take 'additional steps' to protect against human rights abuses by business enterprises that are linked to the state (owned, controlled or that receive substantial support or services), including 'where appropriate' through requiring businesses to engage in HRDD.[25]

B *Human Rights Due Diligence in International Law*

According to the *UNGPs*, states are under no specific duty under international law to require business enterprises within their territory and/or jurisdiction to undertake HRDD, and companies are under no legal obligation to engage in such an exercise.[26] Since the adoption of the *UNGPs* in 2011, however, there has been broad and rapid institutionalisation of the HRDD concept in national and international law.[27] In particular, it is possible to discern an emerging expectation internationally that states — in fulfilling their positive duties under international law to prevent infringements of human rights by private actors — impose HRDD-related obligations on private enterprises within their territory or jurisdiction. The proliferation of HRDD-related regulation at the national level is further reinforcing this trend. These developments are certainly not of a scale or nature to suggest that a customary international law rule that states require business enterprises within their territory or jurisdiction to engage in HRDD exists.[28] However, the broad and swift adoption of the practice does suggest that the status (legal or otherwise) of the state obligation to require HRDD continues to evolve, and that such a development should not be precluded as a future possibility.

Since the adoption by the Human Rights Council of the *UNGPs* in 2011, the concept of HRDD has been integrated into major international public 'soft law' business and human rights instruments.[29] These include the UN *Global*

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24 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 7–8 (Guiding Principles 2 and 3).

25 Ibid 9 (Guiding Principle 4).

26 This section — and this article more broadly — focuses on duties and responsibilities of the state with respect to requiring businesses to undertake HRDD. It does not discuss the important but distinct question of the extent to which business enterprises do and should have direct human rights obligations under international law. On this question, see, eg, David Weissbrodt and Muria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 315; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); Eric De Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4(1) *Human Rights and International Legal Discourse* 66.

27 Indeed, the concept was finding its way into national and international regulatory instruments even prior to the adoption of the Guiding Principles ('*UNGPs*') in 2011: Mark B Taylor, 'The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility' (2011) 5(1) *Nordic Journal of Applied Ethics* 9, 23–4.

28 The classic two necessary elements defining a customary law rule include widespread state practice and an acceptance that the practice is rendered obligatory: *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 44 [77].

29 The term 'soft law' instrument is used here to refer to 'any international instrument other than a treaty that contains principles, norms, standards, or other statements of expected behavior': Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) *American Journal of International Law* 291, 319. See also Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 138.

Compact[30] and the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* of the International Labour Organization ('ILO').[31] The concept is also found (though with a narrower scope) in the ILO's *Protocol of 2014 to the Forced Labour Convention, 1930*.[32]

HRDD has also been integrated into the Organisation for Economic Co-operation and Development ('OECD')'s *Guidelines for Multinational Enterprises* ('*Guidelines*'),[33] which while non-binding on businesses themselves are binding for the 36 OECD member-states and 12 non-OECD countries that adhere to them.[34] The OECD has also produced a general due diligence guidance document, intended to provide practical support to business enterprises on the implementation of these *Guidelines*, which 48 countries have committed to supporting and monitoring implementation in their respective jurisdictions.[35]

HRDD has also found its way into UN treaty body commentary. This has occurred within the context of a broader trend within the work of such bodies towards directly addressing the obligations of states to protect against human

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30 'The Ten Principles of the UN Global Compact', *United Nations Global Compact* (Web Page) <https://www.unglobalcompact.org/what-is-gc/mission/principles>, archived at <https://perma.cc/WN8W-AE2K>.

31 International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (International Labour Organization, 5th ed, 2017). The 'due diligence' concept is also found in the conclusions attached to the *Resolution concerning Decent Work in Global Supply Chains*: International Labour Organization, *Reports of the Committee on Decent Work in Global Supply Chains: Resolution and Conclusions Submitted for Adoption by the Conference* (Resolution adopted at the International Labour Conference, 105th sess, 10 June 2016) para 16(d)–(f).

32 International Labour Organization, *Protocol of 2014 to the Forced Labour Convention, 1930* (Protocol adopted at the International Labour Conference, 103rd sess, 11 June 2014) art 2(e).

33 Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises* (OECD Publishing, 2011) 31, 34 ('*OECD Guidelines*').

34 'OECD Declaration and Decisions on International Investment and Multinational Enterprises', *OECD* (Web Page, 2019) <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm>, archived at <https://perma.cc/47UM-SEZ3>. The Organisation for Economic Co-operation and Development ('OECD') *Guidelines for Multinational Enterprises* ('*OECD Guidelines*'), forming an annex to the OECD *Declaration on International Investment and Multinational Enterprises*, are recommendations on responsible business conduct addressed by governments to multinational enterprises ('MNEs'): see Organisation for Economic Co-operation and Development, *The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts* (25 May 2011) pt I annex 1. The *OECD Guidelines* are also set apart from other soft law intergovernmental instruments by their implementation mechanism, a network of National Contact Points ('NCPs') assigned with the task of promoting the *OECD Guidelines* and helping resolve complaints lodged under the specific instances procedures. See also Ashley L Santner, 'A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future' (2011) 43(2) *George Washington International Law Review* 375.

35 See Organisation for Economic Co-operation and Development, *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD Publishing, 2018) <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>, archived at <https://perma.cc/8V82-2ZGU>. For a discussion of this guidance, see Catie Shavin, 'Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct' (2019) 4(1) *Business and Human Rights Journal* 139, 139.

rights abuses arising from corporate activities.[36] In 2013, the Committee on the Rights of the Child expressed the view that, in order to meet their obligations to adopt measures to ensure business enterprises respect children's rights,

> States should require businesses to undertake child-rights due diligence. This will ensure that business enterprises identify, prevent and mitigate their impact on children's rights including across their business relationships and within global operations.[37]

The Committee further notes that states should encourage and, where appropriate, require large business enterprises to be transparent regarding efforts to address child-rights impacts. Any such information published by business should be 'comparable across enterprises and address measures taken by business to mitigate potential and actual adverse impacts for children caused by their activities'.[38] The Committee further notes that '[w]here reporting is mandatory, States should put in place verification and enforcement mechanisms to ensure compliance'.[39]

In 2017, the Committee on Economic, Social and Cultural Rights expressed the view that the state obligation to effectively prevent infringements of the *International Covenant on Economic, Social and Cultural Rights* requires states to

> adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies.[40]

It proceeded to observe:

> The [state] obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.[41]

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36 Paula Gerber, Joanna Kyriakakis and Katie O'Byrne, '*General Comment 16* on State Obligations regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect?' (2013) 14(1) *Melbourne Journal of International Law* 93, 113.

37 Committee on the Rights of the Child, *General Comment No 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights*, 62nd sess, UN Doc CRC/C/GC/16 (17 April 2013) [62].

38 Ibid [65].

39 Ibid.

40 Committee on Economic, Social and Cultural Rights, *General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 61st sess, UN Doc E/C.12/GC/24 (10 August 2017) 5 [14] ('*General Comment No 24*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

41 *General Comment No 24*, UN Doc E/C.12/GC/24 (n 40) [16].

Such general comments are not legally binding on states; however, they nonetheless enjoy an important status in international law, constituting authoritative guidance,[42] and carrying 'considerable legal weight'.[43]

Potential for further 'hardening' of the obligation on states to require business enterprises in their jurisdiction or territory to undertake HRDD may be found in the so-called 'Zero Draft' of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*.[44] This draft, the work of the open-ended intergovernmental working group established following a resolution drafted by Ecuador and South Africa in 2014,[45] was presented in July 2018.[46] Article 9(1) of this draft instrument sets out an obligation on states party to

> ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties' territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities.[47]

Paragraph two proceeds to elaborate on the meaning of due diligence, which largely corresponds to HRDD as articulated in the *UNGPs*. States party are also obliged to ensure effective national procedures to enforce compliance with these obligations.[48] The draft treaty also imposes obligations on states party to implement appropriate legal liability regimes to hold businesses to account for violations of human rights. This includes civil penalty regimes for businesses that have violated human rights in the context of their business activities, where such risks may or should have been foreseen and subject to certain requirements of control or proximity.[49]

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42 *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, UN Doc HRI/MC/2006/2 (22 March 2006) 6 [11].

43 Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press, 1998) 91. See generally Gerber, Kyriakakis and O'Byrne (n 36); Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 116, 127.

44 Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (16 July 2018) ('*Zero Draft*'). See also Human Rights Council, *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*', 40th sess, Agenda Item 3, UN Doc A/HRC/40/48 (2 January 2019).

45 Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, HRC Res 26/9, 26th sess, Agenda Item 3, UN Doc A/HRC/RES/26/9 (14 July 2014).

46 *Zero Draft* (n 44). For a compilation of position statements and commentaries on the Intergovernmental Working Group and the Zero Draft, see the Business and Human Rights Resource Centre's 'Binding Treaty' web page: 'Binding Treaty', *Business & Human Rights Resource Centre* (Web Page) <https://www.business-humanrights.org/en/binding-treaty>, archived at <https://perma.cc/6YT3-E3YX>.

47 *Zero Draft* (n 44) art 9(1). States 'may elect to exempt certain small and medium-sized undertakings' from this obligation: at art 9(5).

48 Ibid art 9(3).

49 Ibid art 10.

C *Human Rights Due Diligence in National Law*

Consistent with the iterative and recursive nature of international law-making,[50] states are also employing the concept of due diligence to promote greater corporate responsibility for adverse human rights impacts. For national regulators, many who have 'been as perplexed in the past by business and human rights challenges as business itself',[51] HRDD offers a clear and practical way forward. These various national initiatives differ in purpose, scope and legal status. Many are 'soft' in nature, encouraging or incentivising rather than mandating business enterprises to engage in HRDD, or conveying the state's expectation that they will.[52] In some jurisdictions, however, HRDD is 'hardening' into legal obligation and it is widely anticipated that this legalisation trend will continue.[53]

National HRDD-related regulatory initiatives can be broadly grouped into two categories. The first, commonly but not exclusively found in Anglo-Saxon liberal economies such as the United States, the United Kingdom and Australia, requires companies to report specific non-financial risks (eg modern slavery) in their operations and supply chains. Examples include s 54 of the UK's *Modern Slavery Act 2015*,[54] California's *Transparency in Supply Chains Act*[55] and Australia's *Modern Slavery Act 2018* (Cth). This approach is also found in the European Union's *Non-Financial Reporting Directive*[56] and the provision addressing conflict minerals in the US *Dodd-Frank Wall Street Reform and Consumer Protection Act* ('*Dodd-Frank Act*').[57] While these measures may impose some form of administrative or civil liability for failure to comply with the reporting requirements, they are predicated on the assumption that transparency will empower and lead market actors to reward and sanction companies for their human rights performance.[58]

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50 Terence C Halliday, 'Recursivity of Global Normmaking: A Sociolegal Agenda' (2009) 5 *Annual Review of Law and Social Science* 263; Olga Malets and Sigrid Quack, 'Varieties of Recursivity in Transnational Governance' (2017) 8(3) *Global Policy* 333.

51 Interview with John Ruggie (Michael Connor, Business Ethics: The Magazine of Corporate Responsibility, 30 October 2011) <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>, archived at <https://perma.cc/6DTZ-VUKH>.

52 At least 20 national action plans on business and human rights articulate expectations that business enterprises within the state's territory or jurisdiction exercise HRDD: see Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 73rd sess, Agenda Item 74(b), UN Doc A/73/163 (16 July 2018) 7 [21] ('*Report of the Working Group*').

53 Shavin (n 35) 4.

54 *Modern Slavery Act 2015* (UK) s 54.

55 Cal Civ Code § 1714.43 (Deering 2019).

56 *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups* [2014] OJ L 330/1.

57 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 USC § 1502 (2010) ('*Dodd-Frank Act*'). This provision was the subject of threatened suspension by the Trump administration in February 2017, however at the time of writing it remains in force.

58 For a critique of this approach, see Marcia Narine, 'Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts' (2015) 47(1) *Columbia Human Rights Law Review* 84, 94.

A second recent set of initiatives is found in continental Europe. These initiatives are broader in their scope (that is, with respect to the rights covered) and impose civil liability on companies that fail to act with due diligence. Examples include the French *Devoir de Vigilance* law[59] and the Swiss Responsible Business Initiative ('RBI')'s legislative proposal.[60] Under the French law adopted in March 2017, companies of a certain size are required to adopt, publish and implement a 'vigilance plan' including reasonable vigilance measures to adequately identify risk and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment.[61] The French law is particularly noteworthy as it establishes mechanisms to ensure compliance, as well as a civil liability regime in the case of actual harm to human rights.[62] The Swiss RBI (a coalition of Swiss non-governmental organisations) has proposed a constitutional amendment which would effectively require Swiss companies to undertake HRDD in their own operations and in relation to companies under their control, as well as liability on corporations that fail to take due care to avoid human rights harms. The Swiss Parliament has offered a Counter-Proposal which would also include these elements, but adopts a narrower scope.[63] The Dutch Parliament has recently approved a Bill which requires companies to engage in due diligence with respect to child labour, and to submit a statement to regulatory authorities declaring they have carried out due diligence on child labour in their supply

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59 *Loi n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)* [Law No 2017–399 of 27 March 2017] (France) JO, 27 March 2017 ('*Loi n° 2017–399*'). For discussion of this law, see Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All' (2017) 2(2) *Business and Human Rights Journal* 317; Stéphane Brabant and Elsa Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' [2017] (50) *Revue internationale de la compliance et de l'éthique des affaires: Supplément à la semaine juridique entreprise et affaires* 1.

60 See 'Details about the Initiative', *Swiss Coalition for Corporate Justice* (Web Page, 2018) <https://corporatejustice.ch/about-the-initiative/>, archived at <https://perma.cc/2SBK-WYNC>.

61 *Loi n° 2017–399* (n 59) art 1 [tr author]. This plan is to cover risks that derive from the parent and subcontracting companies' activities, the activities of companies it controls directly or indirectly, and the activities of subcontractors and suppliers with which the company has 'an established commercial relationship': at art 1 [tr author].

62 See Cossart, Chaplier and Beau de Lomenie (n 59) 321.

63 For a comparison of the Proposal and the Counter-Proposal, see Nicolas Bueno, 'The Swiss Responsible Business Initiative and its Counter-Proposal: Texts and Current Developments', *Cambridge Core Blog* (Blog Post, 7 December 2018) <http://blog.journals.cambridge.org/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/>, archived at <https://perma.cc/36AP-E5EY>. As Bueno explains, if the two chambers of the Swiss Parliament are unable to agree on a text or if the proponents of the Responsible Business Initiative are dissatisfied with the agreed text, the initiative will go to a vote by the Swiss citizenry by 2020 at the latest.

chains, and publish this statement online.[64] The German Government has threatened to introduce HRDD legislation if the majority of German enterprises with more than 500 employees do not voluntarily adopt HRDD by 2020.[65]

III HUMAN RIGHTS DUE DILIGENCE, LAW AND THE RISK OF COSMETIC COMPLIANCE

This Part of the article considers what the rise of HRDD in national and international law frameworks means for the pursuit of improved corporate performance with respect to human rights. Specifically, it seeks to challenge the presumption that incorporation of HRDD requirements in national and international law per se will lead to improved corporate performance on human rights matters. Drawing on insights from regulatory studies, I identify a number of features of HRDD that render it susceptible to cosmetic forms of compliance, and five measures that may help minimise this risk and help ensure state regulation on HRDD achieves its policy purpose.

Regulatory scholars recognise that effective business regulation is much more complex than a simple dichotomy between absolute discretion and absolute control, and that regulatory influences and capacities are exercised in diverse ways.[66] They also recognise the complexity of regulatory regimes and regulatory spaces, and draw attention to the multiplicity of actors, acting alone and in various combinations or networks that shape business behaviour.[67] A significant strand of regulatory studies scholarship has theorised and empirically explored the advantages and disadvantages of corporate self-regulation and the various ways in which the regulatory capacities of the state and other actors such as non-governmental organisations ('NGOs'), investors and so on can be harnessed and deployed, with a view to maximising the impact of public regulatory interventions.

Traditionally, the fields of regulation and human rights have had little to do with each other, and have even been seen in opposition.[68] As Eve Darian-Smith and Colin Scott point out, while this estrangement may be explained in part by their different logics and methods, there is much that can be gained from bringing the two fields together.[69] Similarly, Hilary Charlesworth notes the

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64 See Anya Marcelis, 'Dutch Take the Lead on Child Labour with New Due Diligence Law', *Ergon* (Blog Post, 17 May 2019) <https://ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/>, archived at <https://perma.cc/2S7L-8G9F>; Sarah A Altschuller and Amy K Lehr, 'Proposed Dutch Legislation on Child Labor Due Diligence: What You Need to Know', *Corporate Social Responsibility and the Law* (Blog Post, 24 August 2017) <https://www.csrandthelaw.com/2017/08/24/proposed-dutch-legislation-on-child-labor-due-diligence-what-you-need-to-know/>, archived at <https://perma.cc/V6GU-J7GJ>.

65 *Report of the Working Group*, UN Doc A/73/163 (n 52) 17 [69].

66 Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146, 146–7.

67 Peter Drahos and Martin Krygier, 'Regulation, Institutions and Networks' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 1, 7.

68 Bronwen Morgan, 'The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship' in Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate, 2007) 1, 1.

69 Eve Darian-Smith and Colin Scott, 'Regulation and Human Rights in Socio-Legal Scholarship' (2009) 31(3) *Law and Policy* 271, 275–6.

potential for regulatory theory to enrich understandings of how public international human rights law works, particularly given the latter's ongoing concern with issues of compliance and implementation.[70] Scholars working within the younger field of business and human rights are engaging somewhat more with regulatory scholarship, prompted by their focus on influencing and securing compliance among corporate actors.[71] There is also an important strand of international law scholarship which has drawn on regulatory theories to make sense of and evaluate the effectiveness of transnational private regulatory initiatives.[72] This has included consideration of the role of the state in 'orchestrating' or 'facilitating' transnational private regulatory initiatives.[73] Nonetheless, it remains the case that engagement between the fields is limited and, most pertinently, there remains much scope for greater consideration of the interplay between public international law, national law and business compliance.

A *Human Rights Due Diligence as Business Regulation*

It is trite but important to point out that HRDD is a form of business regulation. It seeks to influence business behaviour for the 'social and economic good'.[74] As elaborated upon in the *UNGPs*, it is a form of voluntary self-regulation: 'voluntary' in that there is no legal obligation on the individual business enterprise to undertake the exercise,[75] and 'self-regulation' in that it 'turns [companies] into regulators through their own internal management systems and via contracts with suppliers and service providers'.[76] However, as argued above, international and national developments subsequent to the adoption of the *UNGPs* in 2011 are leading HRDD to take on a different regulatory hue. More precisely, HRDD is emerging as a form of public process-based regulation, through which improved management of specific risks is sought in order to meet public goals or objectives.

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70 Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights System' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 357.

71 See, eg, Karin Buhmann, 'Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action' (2018) 3(1) *Business and Human Rights Journal* 23; Shuangge Wen, 'The Cogs and Wheels of Reflexive Law: Business Disclosure under the Modern Slavery Act' (2016) 43(3) *Journal of Law and Society* 327.

72 See, eg, Fabrizio Cafaggi, 'Transnational Private Regulation and the Production of Global Public Goods and Private "Bads"' (2012) 23(3) *European Journal of International Law* 695.

73 Cedric Ryngaert, 'Transnational Private Regulation and Human Rights: The Limitations of Stateless Law and the Re-Entry of the State' in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers, 2015) 99, 103.

74 Christine Parker and Vibeke Lehmann Nielsen, 'Introduction' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 1, 1.

75 Of course, companies may be pressured into engaging in the practice by various external pressures such as consumer activism, investor pressure or other forms of economic incentives, but violators face social and market penalties rather than legal sanction: David Vogel, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) 49(1) *Business and Society* 68, 69.

76 Ruggie, *Just Business* (n 19) 125.

Regulatory scholars have identified and evaluated a range of different forms of process-based or process-oriented regulation.[77] Broadly speaking, process-based regulation seeks to both mandate and monitor organisations' first-tier operations (eg, adverse human rights impacts) and their second-tier governance and controls (eg, management of actual and adverse potential human rights impacts). It involves a deliberate process by which, as described by Michael Power, internal management systems become the 'critical interface between regulatory and business values, and hence between society and organizational operations'.[78] Process-based regulation is common in advanced industrialised economies, and found in public policy areas such as occupational health and safety, employment discrimination and food safety.[79] It offers a number of benefits to regulators. It capitalises on a company's inherent capacity to regulate itself and its superior access to company-specific information. It is considered particularly useful in contexts where more prescriptive or outcome-based forms of regulation are unlikely to be successful. This includes where industries are heterogeneous and complex; where there is a lack of commitment or capacity for compliance among large parts of the business community; and/or where regulators and regulated organisations have only limited understanding of what outcomes they are seeking or what a good self-regulatory system looks like.[80]

B *The Risk of Cosmetic Compliance*

Process-based regulation also carries risks. One of the greatest of these is the potential for cosmetic or 'tick the box' approaches to compliance.[81] Many have already identified this as a danger inherent in HRDD, but until recently, these concerns were theoretical, based on extrapolations from other areas of corporate or regulatory life.[82] There is mounting evidence, however, to suggest these concerns are well-founded. A high level of superficial compliance has been

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77 These include, for example, systems-based regulation, enforced self-regulation, management-based regulation and meta-regulation. See Sharon Gilad, 'It Runs in the Family: Meta-Regulation and Its Siblings' (2010) 4(4) *Regulation and Governance* 485, 485.

78 Michael Power, *Organized Uncertainty: Designing a World of Risk Management* (Oxford University Press, 2007) 41–2.

79 For a global survey and discussion of the different ways in which states use the concept of due diligence in national regulatory frameworks, see De Schutter et al (n 3).

80 Gilad (n 77) 486–7.

81 Ibid 497; Krawiec (n 6).

82 See, eg, Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 273, 275; Tara J Melish and Errol Meidinger, 'Protect, Respect, Remedy *and Participate*: "New Governance" Lessons for the Ruggie Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 303; James Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31(2) *Impact Assessment and Project Appraisal* 107; Björn Fasterling and Geert Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116(4) *Journal of Business Ethics* 799, 808; Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145, 152.

observed among business responses to the UK *Modern Slavery Act*,[83] the California *Transparency in Supply Chains Act*[84] and the US *Dodd-Frank Act*.[85] It is also a concern widely voiced with respect to HRDD more broadly, as demonstrated by a recent report by the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises ('Working Group').[86] In this brief report on evolving practices and issues associated with HRDD, produced on the basis of written submissions, interviews with experts and regional consultations, the Working Group thrice observes with concern the tendency towards 'tick the box' approaches to HRDD.[87] It also calls for more 'meaningful' approaches to the task, observing that business performance 'seems to be particularly weak on the "taking action" and "tracking of responses" components of human rights due diligence'.[88] It could be argued that the tendency towards cosmetic or superficial forms of HRDD is a function of the unfamiliarity of the concept to business; however, I argue below that it is features of the concept itself that render such cosmetic approaches not only possible but likely. These features include a high level of ambiguity; a proliferation of guidance to companies on what the concept requires of them; a lack of any requirement for companies to be transparent as to how they go about the process; and a potential for the process (HRDD) to become disembedded from the standard or outcome (the responsibility to respect human rights).[89]

1 *Ambiguity*

The first feature of HRDD that renders it prone to cosmetic compliance is its use of ambiguous and imprecise language. Drawing on Julia Black's work on the linguistic structure of rules,[90] it is possible to see how the wording of the *UNGPs* — and of international and national laws that replicate this language — creates

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83 See, eg, Lis Cunha and Stuart Bell, *Modern Slavery Statements: One Year On* (Report, April 2017) <https://ergonassociates.net/wp-content/uploads/2016/03/MSA_One_year_on_April_2017.pdf?x74739>, archived at <https://perma.cc/5YX3-JL5G>.

84 See Jonathan Todres, 'The Private Sector's Pivotal Role in Combating Human Trafficking' (2012) 3 *California Law Review Circuit* 80, 95.

85 Galit A Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56(2) *Harvard International Law Journal* 419, 423; Jeff Schwartz, 'The Conflict Minerals Experiment' (2016) 6(1) *Harvard Business Law Review* 129, 131.

86 This Working Group was established by the Human Rights Council in 2011 with a mandate that includes promoting the UN *Guiding Principles on Business and Human Rights* ('*UNGPs*') and good practices and lessons learnt on the *UNGPs*' implementation: 'Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', *United Nations Human Rights Office of the High Commissioner* (Web Page, 2019) <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx>, archived at <https://perma.cc/5QLN-N257>.

87 *Report of the Working Group*, UN Doc A/73/163 (n 52) 8 [25(c)], 9 [28], 19 [73(c)].

88 Ibid 8–9 [25]–[26].

89 It should be emphasised that the presence of these factors does not mean that the process is always engaged in cosmetically or that it has no potential to effect meaningful change. The extent to which companies will engage in self-regulatory measures that entail substantive rather than cosmetic change depends on a range of factors, including why they adopted it in the first place and the nature and levels of accountability (internal and external) they face: Vogel (n 75) 81–2; Parker, *The Open Corporation* (n 7) 44–9.

90 Julia Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3(4) *Capital Markets Law Journal* 425, 436.

considerable scope for corporate discretion. Vague terms are used, in the sense that they require interpretation or lack specification as to the manner in which an action is to be performed. For example, it may be 'unreasonably difficult' for enterprises with large numbers of entities in their value chains to conduct due diligence for adverse human rights impacts across them all,[91] and due diligence should '[i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.'[92]

On the one hand, this language facilitates the 'context-sensitivity' of the corporate responsibility to respect human rights.[93] It helps ensure that 'demands placed on business are both reasonable and feasible given prevailing conditions', and through doing so, the legitimacy of the regulatory standard among business may be enforced.[94] On the other hand, the same sensitivity to context means that in practice there is considerable ambiguity in what is expected of business.[95] Of course, ambiguity in national and international law is not uncommon.[96] Nonetheless, from a regulatory perspective, it may be problematic. Scope for interpretation would not seem problematic so long as the standard is subject to subsequent clarification and there are regulatory processes or a regulatory architecture through which competing interpretations of the concept can be contested and ultimately resolved.[97] Without such refinement or dispute resolution mechanisms, however, there remains extensive scope for business to interpret the concept as it sees fit and for inconsistent interpretations and applications of the concept to thrive. As Krawiec observes, ambiguous or incomplete law creates 'an opening for opportunistic behavior that may appropriate any social gains created by new legal standards and frustrate the normative goals of law'.[98] The lack of clarity over what constitutes adequate due diligence and the absence of any regulatory process through which to achieve this clarity renders it difficult if not impossible for those external to a company to challenge the adequacy of its HRDD processes.

2 *Proliferation of Guidance*

A second and related risk stems from the volume and diversity of guidance that has been produced on HRDD in the wake of the UN Human Rights Council's adoption of the *UNGPs*. Such elaboration of the concept by various actors and at various levels of governance was anticipated, and indeed seen as

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91 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 16 (Commentary on Guiding Principle 17).

92 Ibid 17 (Guiding Principle 18(b)).

93 Fiona Haines, Kate Macdonald and Samantha Balaton-Chrimes, 'Contextualising the Business Responsibility to Respect: How Much Is Lost in Translation?' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 107, 114.

94 Ibid 108.

95 Ibid 114; Parker and Howe (n 82).

96 See, eg, Christine Bell and Kathleen Cavanaugh, '"Constructive Ambiguity" or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement' (1999) 22(4) *Fordham International Law Journal* 1345; John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1.

97 Parker and Howe (n 82); Melish and Meidinger (n 82).

98 Krawiec (n 6) 494.

necessary, by the SRSG.[99] Regulatory scholarship recognises that guidance is an important means through which, in the context of broad rules, sufficient certainty may be provided to regulated organisations as to what is expected of them. Depending on the nature and level of the regulation, this guidance may include formal guidance issued by a regulator, practical examples of good and bad practice, industry guidance, public enforcement actions and various forms of formal and informal dialogue between regulators and regulated organisations.[100] However, as Black, Martyn Hopper and Christa Band note, such guidance risks hindering rather than helping compliance where it is produced in a multitude of settings and by a multitude of different actors.[101] There is a real risk of inconsistency and 'mixed messages', which may undermine the potential for guidance to clarify standards. In the case of HRDD, it would appear also to be the case that often processes for elaboration of the concept — such as is occurring on a sectoral-basis through the OECD — are hamstrung by the need to maintain broad consensus. As a result, existing ambiguities tend to be side-stepped or looked over in favour of gentler, less contentious 'best practice' scenarios. Ultimately, and again, this leaves business with considerable discretion to determine what constitutes adequate HRDD.

3 *Lack of Transparency*

The danger of HRDD being employed cosmetically also arises because of the absence of any requirement on business to be transparent about the process. The *UNGPs* make clear that businesses should communicate how they go about addressing their human rights impacts. However, formal disclosure to the public is only 'expected' for business enterprises whose operations or operating contexts pose risks of severe human rights impacts.[102] This lack of transparency — and the lack of accountability that attaches to it — makes it significantly more likely that businesses will engage in the process superficially. If the only incentive for adopting HRDD is to look like one is doing something (that is, as 'a form of insurance against public opprobrium'),[103] it suffices to design and adopt measures that indicate due diligence is being done, without any need to invest much money or effort in it. This approach may not be tenable for reputation-conscious firms, but it may be for many others. The lack of transparency renders it very difficult if not impossible for external stakeholders and/or quasi-regulators to verify whether the information provided is accurate, let alone to assess whether a business is implementing processes that are capable of effecting real change. This challenge is exacerbated given the fact that the business will often be reporting on activities that cross multiple jurisdictions.[104]

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99 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 15 (Guiding Principle 15).

100 Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 197.

101 Ibid.

102 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 20 (Commentary on Guiding Principle 21).

103 Vogel (n 75) 81.

104 Wen (n 71) 355.

4 *A Focus on Process Not Outcomes*

The process-based nature of HRDD is one of its strengths, but it is also one of its weaknesses. A key feature of process-based regulation is that it seeks to require business to internalise public policy goals into its own internal systems and processes. Yet, as Black points out, these processes are inherently directed towards the firm's own objectives: that is, the production of profit and market share.[105] The two may sometimes coincide but do not always.[106] There is always the danger that, where there is considerable scope for managerial discretion and insufficient regulatory oversight, commercial objectives will prevail. By way of a simple example, in principle HRDD requires the business to assess, prioritise and act on risks to rights-holders rather than to the business. In practice, however, the business' commercial objectives may be accorded equal if not greater weight in the prioritisation process. Risks that are easier or cheaper to manage, or that have the potential to inflict the most reputational damage, may be prioritised over those that are deemed the most severe.[107]

As a process-based form of regulation, HRDD also risks an undue focus on process at the expense of outcomes. As others have also noted, there appears to be a discernible trend by which the 'the centre of gravity' has moved from recognising the corporate *responsibility to respect human rights* as the standard, to the use of HRDD as the standard itself.[108] In other words, there would seem to be an increasing tendency for the regulatory standard to be understood as the adoption of HRDD, *not* respect for human rights.

This focus on process rather than outcome reflects a risk inherent in process-based regulation more broadly. As Parker argues:

> To the extent that law focuses on companies' *internal responsibility processes* rather than *external accountability outcomes*, law runs the risk of becoming a substanceless sham, to the delight of corporate power-mongers who can bend it to their interests. Law might be hollowed out into a focus on process that fails to recognise and protect substantive and procedural rights.[109]

In the case of HRDD, the risk of process trumping outcomes would appear particularly significant given that the absence of any liability incentive to undertake the process substantively. In many other areas of law, due diligence requirements are imposed as a matter of regulatory compliance: that is, there is a direct obligation on companies to undertake due diligence, or it is made available as a defence against, or as a means of mitigating, civil or criminal liability. In these cases, there is the potential for the due diligence process to be scrutinised by a relevant regulatory authority. In many cases, these processes of scrutiny or

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105 Black, 'Forms and Paradoxes of Principles-Based Regulation' (n 90) 444.

106 Ibid.

107 The *UNGPs* recognise that companies may need to prioritise actions to address actual and potential adverse human rights impacts. Where this is necessary, companies should 'first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable': *UNGPs*, UN Doc A/HRC/17/31 (n 9) 21 (Guiding Principle 24). Severity is described as 'not an absolute concept', but relative to other human rights impacts the business has identified: at 22 (Commentary on Guiding Principle 24).

108 Radu Mares, '"Respect" Human Rights: Concept and Convergence' in Robert C Bird, Daniel R Cahoy and Jamie Darin Prekert (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar, 2014) 3, 43.

109 Parker, 'Meta-Regulation' (n 7) 209 (emphasis in original).

review involve consideration of the extent to which these policies are not just on paper but are adequately implemented. In the case of HRDD, however, there is little prospect of this scrutiny occurring.[110] As a result, companies are likely to face insufficient motivation to adopt processes that are congruent with, and capable of achieving, regulatory goals.[111]

IV TOWARDS BETTER QUALITY HUMAN RIGHTS DUE DILIGENCE THROUGH META-REGULATION

Having explained the risks inherent in HRDD for cosmetic compliance, this Part considers how regulatory frameworks could be crafted so as to mitigate some of these risks.[112] It introduces the normative concept of meta-regulation, as a useful lens through which to consider regulatory approaches to HRDD. It identifies five regulatory design features which may help shape corporate HRDD practice in a way that is more likely to achieve the public policy outcomes for which it is implemented.

In regulatory literature, the term 'meta-regulation' is used both descriptively and normatively. Descriptively, it is used to refer to various ways in which one form of regulation can be used to regulate another form of regulation (eg legal regulation of self-regulation). In this sense, the term reflects the shift towards regulatory governance, the changing nature of the state as regulator, and a recognition of the diversity of actors that play a role in influencing corporate behaviour.[113] Meta-regulation has also been used by Australian regulatory scholar Parker to describe a normative conception of regulation in which law is used to shape not just corporate outputs but corporate conscience.[114] Parker describes the concept as a 'marriage between management, democracy and law'.[115] A meta-regulatory approach uses regulatory levers and techniques to internalise public values or policy goals that 'transcend narrow self-interest'[116] within corporate structures and practices. It recognises, however, that while a company is being required to carry out its activities in a way that is consistent with specific public values or policy objectives, these are not the primary objectives of the company. Meta-regulation 'should allow space for the company itself to take responsibility for working out how to meet its main goals' so long as these can be achieved within the framework of values established by

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110 An exception to this lies with the potential for the OECD NCPs established within countries that adhere to the *OECD Guidelines* for MNEs to receive and consider complaints concerning a company's non-adherence to the *OECD Guidelines* for MNEs. These guidelines now contain due diligence obligations that are consistent with, and go beyond, those in the *UNGPs*: *OECD Guidelines* (n 33) 68. It is highly questionable however whether many NCPs, as currently constituted, are capable of, or prepared to, pass judgement on the adequacy of corporate HRDD processes.

111 Gilad (n 77) 493.

112 For an alternative approach which draws on lessons learnt from corporate human rights impact assessments, but which reaches similar conclusions on the elements necessary to ensure meaningful due diligence, see Harrison (n 82).

113 Coglianese and Mendelson (n 66); Parker, 'Meta-Regulation' (n 7) 210.

114 In using meta-regulation this way, this paper is inspired by Christine Parker's suggestion of meta-regulation as a 'useful tool' for evaluating corporate social responsibility ('CSR') regulatory proposals: Parker 'Meta-Regulation' (n 7) 208–9.

115 Parker, *The Open Corporation* (n 7) 301.

116 Philip Selznick, *The Communitarian Persuasion* (Woodrow Wilson Center Press, 2002) 101, quoted in Parker, 'Meta-Regulation' (n 7) 214.

regulation.[117] It seeks to shape a company's approach to self-regulation and hold it to account for its self-regulatory system through 'opening up' the company to external scrutiny and through the use of appropriate liability incentives. In this context, it recognises that the state has a critical role to play in evaluating corporate self-regulation, 'both to hold industry accountable and to make itself accountable to its own stakeholders (citizens who need to know whether government policy is accomplishing its objectives)'.[118]

An important feature of meta-regulation is its focus on incremental learning by organisations and regulators. While recognising and seeking to integrate the benefits of process-oriented regulation, meta-regulation adds another regulatory 'loop' or layer. As Sharon Gilad explains, most process-based forms of regulation involve double-loop learning: an organisation identifying risks and devising internal control systems, *and* continuously evaluating the efficacy of these internal systems and incrementally improving them in light of this evaluation. Meta-regulation introduces a third loop, which entails regulators (those responsible for holding organisations accountable for their self-regulatory systems) consciously engaging in learning about the problems they are trying to manage and the industries on which they are focusing, and assessing and improving their regulatory strategies.[119]

Meta-regulation does not prescribe particular regulatory tools, but rather offers principles for the design of a regulatory framework. It recognises that regulators have at their disposal a range of possible regulatory options, and that regulators should choose a suitable approach (or approaches) based on the evidence of what may work and being committed to regularly reviewing this approach in light of its capacity to achieve the goal of holding companies accountable for their internal compliance systems.[120] This focus on incremental learning renders meta-regulation particularly useful where regulators know the result they are trying to achieve but where there is still a high level of uncertainty (among both regulators and business) as to the precise nature of the risks to regulatory goals and the appropriate and most effective means of achieving these goals.[121]

From a meta-regulatory perspective, there are at least five elements which are essential to the design and implementation of state regulatory frameworks directed at encouraging businesses to undertake HRDD in a way that is substantive and meaningful. These are outlined briefly below.

A *Anchoring Human Rights Due Diligence in the Corporate Responsibility to Respect Human Rights*

First, a meta-regulatory approach underscores the importance of directing a company's HRDD towards, and evaluating it against, a clear standard or outcome. This would most obviously be corporate respect for human rights, although it may be a narrower sub-set of rights. As Parker has emphasised, 'meta-regulation is about setting a process. *But* it must be a process that is "going

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117 Parker, 'Meta-Regulation' (n 7) 217.
118 Parker, *The Open Corporation* (n 7) 275.
119 Ibid 301; Gilad (n 77) 488.
120 Parker, *The Open Corporation* (n 7) 247.
121 Gilad (n 77) 489.

somewhere"'.[122] It must involve the articulation of *substantive goals* at which the internal processes are to be directed. While this may seem self-evident, it is important given the trend (as outlined above) towards the acceptance of HRDD as the expected standard of behaviour in its own right. It also discourages companies from continuously describing their efforts at internalising and operationalising respect for human rights as a 'journey', which while not objectionable in itself may operate to shield the company from any accountability for outcomes. It is also an important reminder that HRDD cannot be reduced to a single set of detailed and clear-cut rules to which a business can readily and easily 'comply'. Rather, it is about how a company institutionalises its responsibility to respect human rights and how it reports on, and is accountable for, the processes it has put in place to achieve this outcome.

B *Detailed Disclosure*

Disclosure on human rights due diligence may be seen as meta-regulatory in that it implicitly requires management to collect information about the risks that the company's activities pose and, by introducing new risk factors into management deliberation processes, encouraging the company to engage in self-reflection and to adjust its behaviour in response to social externalities.[123] From a regulatory perspective, there are a number of important conditions which must be met to ensure the success of this transparency-based regulation: that is, to ensure that it helps induce changes in company behaviour. Critical among these is that a company discloses detailed and material information on the specific issue. Only through having to meet detailed requirements will companies engage in the type of 'self-referential fact-finding' and collection of relevant information necessary.[124] It also helps ensure accountability and to provide information that allows stakeholders such as civil society, potential business partners, investors and the public to evaluate company performance and identify best practice.[125] Detailed information is also necessary to help regulators evaluate whether self-regulation on an issue is working or if some other approach is required.

Information must also be produced in a manner that is broadly comparable in quality, detail and vocabulary. Research from a variety of regulatory disclosure regimes has shown that where regulators provide organisations with a broad discretion to determine the content and extent of disclosure, there is less likelihood of such a regulatory measure altering business incentives or performance.[126] Disclosure of detailed information is necessary to enable and facilitate meaningful analysis and comparison by NGOs, consumers, investors and other interested parties. These parties are also less likely to use information provided where there is a high cost associated with collecting and understanding it.

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122 Parker, 'Meta-Regulation' (n 7) 230 (emphasis in original) (citations omitted).

123 See ibid 233.

124 David J Doorey, 'Who Made That?: Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation' (2005) 43(4) *Osgoode Hall Law Journal* 362, 374–5.

125 Parker, *The Open Corporation* (n 7) 279.

126 See David Weil et al, 'The Effectiveness of Regulatory Disclosure Policies' (2006) 25(1) *Journal of Policy Analysis and Management* 155, 172.

The provision of clear and detailed standards or criteria for company reporting are also important to eliminate potential competitive disadvantages that may arise for companies who do genuinely and in good faith take, and report in detail on, efforts to address adverse human rights impacts in their supply chains. In this context, a 'prisoner's dilemma' problem may arise because a firm may be reluctant to voluntarily disclose information for fear of being compared negatively to its rivals and possibly tainting the whole industry.[127] In theory, mandatory disclosure requirements resolve this dilemma by forcing all enterprises to report. However, this does not occur where companies enjoy a great deal of latitude in what detail to report, as those who report in good faith may still find themselves disadvantaged. Finally, a degree of standardisation of details required is necessary to ensure that regulators can identify and sanction inadequate information disclosure.[128] The limited effectiveness of existing disclosure-related initiatives discussed above, it is suggested, is attributable partly to their failure to meet these conditions.

There are already detailed reporting frameworks available that provide guidance on HRDD reporting. These include, for example, the UN Guiding Principles Reporting Framework[129] and the Global Reporting Initiative Sustainability Reporting Standards.[130] These can help ensure companies report in a manner that is substantive and comparable. However, the diversity and voluntary nature of adherence to these reporting frameworks pose problems of inconsistency. Moreover, the risk of an over-emphasis on reporting process rather than outcomes remains.[131] Finally, an important feature of meta-regulation is that it entails businesses not only adopting policies and processes, but continuously being required to evaluate the efficacy of these internal systems and to use this evaluation to incrementally improve them.[132] This suggests there is merit in also requiring companies to disclose information on adverse human rights impacts that are identified, as well as how these have been corrected and more general efforts at continuous improvement of due diligence processes.

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127 Wen (n 71) 349.

128 Ibid 355.

129 Shift and Mazars, *UN Guiding Principles Reporting Framework* (Report, 2015) <https://www.ungpreporting.org/wp-content/uploads/UNGPReportingFramework_2017.pdf>, archived at <https://perma.cc/BJV2-G6NM>. See also 'UN Guiding Principles Assurance Guidance', *UN Guiding Principles Reporting Framework* (Web Page, 2019) <www.ungpreporting.org/assurance>, archived at <https://perma.cc/9QKQ-EM6T>.

130 See 'GRI Standards', *GRI: Empowering Sustainable Decisions* (Web Page) <www.globalreporting.org/standards>, archived at <https://perma.cc/K8VD-CNHK>.

131 See Casey O'Connor and Sarah Labowitz, NYU Stern Center for Business and Human Rights, *Putting the 'S' in ESG: Measuring Human Rights Performance for Investors* (Report, March 2017) 3 <https://cms.qz.com/wp-content/uploads/2017/03/0a5ac-metrics-report-final-1.pdf>, archived at <https://perma.cc/G5S4-KQYL>.

132 Gilad (n 77) 488; Parker, *The Open Corporation* (n 7) 277; Sepideh Parsa et al, 'Have Labour Practices and Human Rights Disclosures Enhanced Corporate Accountability? The Case of the GRI Framework' (2018) 42(1) *Accounting Forum* 47, 52. See also Damiano de Felice, 'Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities' (2015) 37(2) *Human Rights Quarterly* 511.

C *Rights to Consultation and Participation*

From a meta-regulatory perspective, the absence of rights for those external to the business to participate in corporate HRDD processes is problematic. The *UNGPs* recommend that, in conducting HRDD, a company engage in 'meaningful consultation with potentially affected groups and other relevant stakeholders'.[133] However, this recommendation appears to be confined to the initial stage of identifying and assessing actual or potential adverse human rights impacts, and is recognised as being contingent on 'the size of the business enterprise and the nature and context of the operation'.[134] Ultimately, it is left to the discretion of the company to decide how much consultation, when this takes place and with whom.

There is a long line of regulatory scholarship on the importance of participatory rights for stakeholders to the effectiveness of self-regulation.[135] In the context of labour regulation, Cynthia Estlund emphasises:

> An effective system of regulated self-regulation depends on building safeguards against cosmetic compliance into self-regulatory systems — that is, into the corporate compliance regimes themselves. The single most important safeguard is effective participation by stakeholders, those for whose benefit the relevant laws or social norms were chiefly enacted.[136]

For Parker, without external stakeholders consistently making compliance a 'strategic issue' for companies, '[t]he institutionalization of self-regulation will lack dynamism and "grip" on real life'.[137] Rights to consultation and participation may not only be normatively justified, but they perform important instrumental functions. They act as important incentives for companies to make sure their systems are effective: that is, that they are achieving the results that they are claiming to be achieving.[138] In the context of HRDD, such rights help ensure that the corporate priorities and approaches used correspond to those priorities identified by communities and stakeholders.[139] They can also perform a similar function to disclosure, outlined above, in constituting important mechanisms for corporate learning and improvement of their due diligence processes through enabling outside stakeholders to monitor corporate behaviour and transmit information about potential problems and improvements.[140]

D *Regulatory Consequences*

Meta-regulation not only requires companies to adopt internal compliance processes, but holds them accountable for the quality of these processes. This

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133 *UNGPs*, UN Doc A/HRC/17/31 (n 9) 17 (Guiding Principle 18).

134 Ibid.

135 See, eg, Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go beyond Compliance' (2004) 29(2) *Law and Social Inquiry* 307.

136 Cynthia Estlund, 'Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace' (2008) 12(3) *Lewis and Clark Law Review* 671, 684.

137 Parker, *The Open Corporation* (n 7) 214.

138 Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1988) 247.

139 Melish and Meidinger (n 82) 322.

140 Ibid 323.

emphasis on accountability reflects, and is informed by, an extensive body of research emphasising the importance of maintaining a significant background threat of external enforcement to deter and punish those who defect from a self-regulatory regime.[141] Two basic implications stem from this emphasis on accountability. First, there must be real (regulatory) consequences for companies that do not adopt HRDD processes. These consequences may be in the form of civil or criminal penalties, but they may also take the form of administrative sanctions such as exclusion from eligibility for government trade and investment support or procurement opportunities.[142] Secondly, a meta-regulatory approach suggests that these consequences must be designed in such a way as to motivate companies to adopt *effective* HRDD (not simply to adopt it or to adopt it in a way that seeks to minimise the scope of their responsibility).

Scholars and activists have already put forward a range of proposals for attaching legal liability to HRDD. This could involve, for example, sanctioning companies that fail to engage in HRDD. However, this alone would not seem to provide any safeguards against cosmetic compliance — indeed it would seem to encourage it. Such potential could be reduced by the regulator specifying minimum standards that a due diligence process must meet, as well as requiring companies to report on their implementation of these processes, and their outcomes. Parker suggests that this type of approach is particularly suited to situations where compliance within an industry is 'young', but difficult to implement successfully where the regulator has limited knowledge or expertise in how to steer and evaluate corporate self-regulation.[143]

Another possibility is to impose a legal duty on companies to respect human rights, with penalties for non-compliance. This could involve companies being required to ensure, as far as practicable, that they do not cause or contribute to adverse human rights impacts through their own activities (including their supply chains). A company would not be liable where they can prove they have put in place due diligence policies and processes that are reasonably calculated to prevent and remedy adverse human rights impacts. Here, due diligence has the potential to create the right kind of liability avoidance, as it provides 'incentives for managers to invest in improving their internal systems and controls, as they will be given recognition in enforcement actions'.[144] This type of approach has been adopted in the French *Devoir de Vigilance* law and the Swiss RBI proposal, and has been advanced in the context of the common law duty of care by Doug Cassel.[145]

In the Australian context, Ryan Turner has argued that inspiration for how this type of duty-based statutory regime may work in a transnational context is found

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141 See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). See also Jodi L Short and Michael W Toffel, 'Coerced Confessions: Self-Policing in the Shadow of the Regulator' (2008) 24(1) *Journal of Law, Economics, and Organization* 45.

142 See *International Learning Lab on Public Procurement and Human Rights* (Website) <www.hrprocurementlab.org>.

143 Parker, *The Open Corporation* (n 7) 276–7.

144 Black, 'Forms and Paradoxes of Principles-Based Regulation' (n 90) 202.

145 Cassel (n 4).

in the *Illegal Logging Prohibition Act 2012* (Cth).[146] This Act criminalises a number of activities in relation to 'illegally logged' and 'regulated' timber, including importing things made from or including illegally logged timber,[147] and importing a 'regulated timber product'[148] without complying with the due diligence requirements set out in regulations.[149] The statutory regime provides incentives for companies to put in place robust self-regulatory systems directed at ensuring that their timber products and activities are not associated with illegal logging. This type of duty-based liability regime requires a regulatory authority capable and prepared to make an effort to calibrate the stringency of the company's duty and the adequacy of the policies and measures they have put in place to meet this duty.

E *An Engaged Regulator*

A fifth criterion of an effective regulatory framework for HRDD is the designation of an appropriate authority responsible for promoting, and securing compliance with, the regulatory requirements. This authority would presumably be a public one, though there are of course a range of possibilities as to its institutional location and configuration. A meta-regulatory perspective suggests that this regulator must be an engaged one. At its most basic, this suggests that whatever body be assigned with the task of providing independent oversight and powers to monitor and enforce the law, be 'a body that empathizes with the social goals instead of one that begrudgingly takes on the duties'.[150] Advocates of meta-regulation and other regulatory scholars have emphasised the importance of organisations and regulators engaging in incremental learning.[151] Given the infancy of the HRDD concept, the unfamiliarity of the concept to many companies and the heterogeneous nature of the companies and sectors in which it must be implemented, a regulator must be prepared to engage in dialogue with regulated firms and other stakeholders so as to develop shared understandings of what conduct is required. As Black, Hopper and Band note, these types of 'extensive regulatory conversations' are critical to clarifying among the various

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146 See Ryan J Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17(1) *Melbourne Journal of International Law* 188.

147 *Illegal Logging Prohibition Act 2012* (Cth) ss 8, 9.

148 Ibid s 14.

149 See ibid ss 12–14; *Illegal Logging Prohibition Regulation 2012* (Cth) pt 2 div 2. Non-compliance with the enumerated due diligence steps may result in civil penalties: at ss 9(3), 11(3), 12(3), 13(4), 14(4), 15(4), 16(2). In 2018, an attempt by the Federal Government to reduce the regulatory burden associated with these due diligence requirements by way of introducing a 'deemed to comply' arrangement was disallowed in the Australian Senate: Department of Agriculture and Water Resources, Australian Government, *Statutory Review of the Illegal Logging Prohibition Act 2012* (Review Report, November 2018) 17.

150 Schwartz (n 85) 182. In the United States, Jeff Schwartz argues that the high level of non-compliance with the US *Dodd-Frank Act* supply chain reporting requirements is attributable in part to the widespread belief that the Securities and Exchange Commission ('SEC') will not pursue the remedies currently at its disposal, a belief that has been reinforced by public comments by various senior individuals within the SEC to the effect that they regret their mandated involvement with the rules. It has been argued that such statements send a signal to companies that compliance with the conflict minerals rules is low on the agency's radar and that non-compliance will be tolerated: at 162–3.

151 Gilad (n 77) 488.

participants as to the objectives of the regulatory regime, respective roles and responsibilities, and the meaning of any regulatory requirements.[152]

Meta-regulation also requires the regulator itself to be accountable for its activities. As noted above, it is this 'triple-loop' that distinguishes meta-regulation from other forms of process regulation. It places responsibility on the regulators to collect data, analyse and report on the impacts of their activity and on patterns of corporate self-regulation so that both companies and regulators are accountable.[153] In the context of HRDD, this principle of regulator accountability is particularly relevant not only with respect to national (or sub-national) regulators, but also arguably with respect to the state's duty under international law to take all reasonable steps to prevent and respond to infringements on human rights by non-state actors within its territory or jurisdiction.[154]

V CONCLUSION

HRDD is firmly entrenched in global governance. It is found in a raft of international 'soft law' instruments, as well as in the jurisprudence of UN human rights committees and the draft treaty on business and human rights. It is also being embraced by national regulators, and in some jurisdictions forming the basis of legally-binding obligations on business enterprises. All signs suggest that this momentum will continue. This article has cautioned that one should not presume that the institutionalisation of HRDD — even its legalisation — will bring significant and positive change in corporate behaviour. This is because there is a significant risk of HRDD being engaged in cosmetically.

For many, the concept of HRDD is still novel and unfamiliar. National and international lawmakers appear unsure of themselves and of what they can legitimately and feasibly demand of business with respect to the process. Perhaps because of this, and with a few important exceptions, policy and lawmaking bodies at international and national levels have preferred to reiterate rather than elaborate on the *UNGPs* and to focus on identifying corporate 'best practice' rather than formulating minimum standards or considering necessary regulatory infrastructure. The concept's novelty, however, does not justify wilful blindness with respect to its limitations and weaknesses. This article has argued that those concerned with the task of promoting or mandating corporate uptake of HRDD should engage with the question not only of how to increase the number of companies undertaking HRDD, but also the question of how to regulate for meaningful HRDD that is capable of achieving the public policy goals to which it is directed. Business regulation and compliance scholarship offers valuable insights into how such regulatory interventions may be crafted so as to maximise the benefits and advantages of HRDD, while accounting for and minimising the weaknesses associated with such process-based regulation. Meta-regulatory

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152 Black, Hopper and Band (n 100) 204. Regulatory conversations are defined by Black as 'dialogic, iterative and reflexive' communications between regulator, regulated and others as to the rule's purpose and application: Black, 'Forms and Paradoxes of Principles-Based Regulation' (n 90) 439. On the importance of regulatory conversations: see also Julia Black, 'Regulatory Conversations' (2002) 29(1) *Journal of Law and Society* 163.

153 Parker, *The Open Corporation* (n 7) 251.

154 See Koivurova (n 22) [33].

theory suggests it is possible to chart a way forward in which self-regulatory processes are located within a broader framework of accountability, underpinned and strengthened by substantive and procedural rights, and where there is an engaged and committed regulator. To date, such features are absent from most HRDD-related regulatory initiatives. But they are found in other areas of regulatory life and provide inspiration and guidance as to future possibilities.