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SCHOLARLY ARTICLE

Mandatory Human Rights Due Diligence (mHRDD) Laws Caught Between Rituals and Ritualism: The Forms and Limits of Business Authority in the Global Governance of Business and Human Rights

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Abstract

This article utilizes a 'rituals-ritualism' framework to assess the perils and potentials of relying upon mandatory human rights due diligence (mHRDD) laws to regulate the behaviour of transnational corporations (TNCs). This framework offers a socio-legal perspective that seeks to show how law is both influenced by and influences the social context within which it operates, i.e., the socially embedded operation of law.[1] It has been advanced as a useful rubric for assessing whether and how states comply with human rights treaties,[2] but can be extended to an assessment of mHRDD laws. Ultimately, this article hypothesizes that the potential regulatory effectiveness of mHRDD laws hinges on the extent to which HRDD obligations are transformed into rituals akin to cultural norms. In the absence of such a transformation, ritualism in HRDD will only further entrench a problematic status quo that has allowed TNCs to externalize the human rights and environmental impacts of their activities.

Keywords: Global governance; Mandatory human rights due diligence (mHRDD); Rituals and ritualism; Transnational corporations (TNCs)

I. Background: A Rituals-Ritualism Lens and the Global Governance Landscape of Business and Human Rights

Pursuant to the numerous mandatory human rights due diligence (mHRDD) laws now sweeping across Europe,[3] covered companies are expected to comply with certain due diligence requirements geared towards enhancing corporate accountability for violations of human rights and environmental norms within their operations as well as value chains. This concept of due diligence is a catch-all phrase that encompasses all 'the steps that a company

[1] Hilary Charlesworth et al, 'The Rituals of Human Rights', Introduction to 'The Rituals of Human Rights' Workshop, Centre for International Governance and Justice, RegNet, Australian National University, Canberra, (25–27 June 2014), https://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-08/01%20Introduction%20The%20Rituals%20of%20Human%20Rights.pdf (accessed 18 September 2022), 1.

[2] Ibid, 7.

[3] Markus Krajewski et al, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding in the Same Direction?' (2021) 6:3 *Business and Human Rights Journal* 550.

must take to become aware of, prevent and address adverse human rights impacts'[4] and, at least since the 2011 adoption of the UN Guiding Principles on Business and Human Rights (UNGPs), has arguably become the normative scaffolding upon which a significant part of the BHR architecture is being built. Given the saliency of HRDD in BHR discourse generally, and within the specific context of mHRDD laws, the rituals-ritualism framework can offer useful insights into the socio-legal processes that are an implicit part of the implementation of mHRDD laws.

The rituals-ritualism framework offers a useful way to understand the law's interaction with the world of which it is a part, by juxtaposing rituals with ritualism. Rituals are publicly mandated and structured processes and procedures that require the ritual participants to periodically perform certain identified duties, and which consequently have the potential to generate solidarity by encouraging 'common understandings of social, moral or political questions'.[5] Over time, rituals have the capacity to become akin to cultural norms, by constituting and reconstituting certain norms and values while simultaneously foreclosing and de-legitimating others.[6] In contrast, ritualism implies the surface acceptance of human rights norms and ideals, without a deeper commitment to their realization.

What does a rituals-ritualism lens portend for the implementation of mHRDD laws? Firstly, due diligence obligations imposed upon covered companies could be conceptualized as rituals geared towards enhancing corporate respect for human rights and the environment, and preventing, reducing or all-together eliminating violations. Simultaneously, however, whereas due diligence rituals have the ability to 'instigate and entrench new social relations',[7] they are also capable of deflecting attention away from the status quo, thus shielding from view the broader structural problem of extractive corporate activity countenanced by a neo-liberal and neo-colonial global economy.[8] Secondly, the risk of ritualism arises because companies may comply only superficially with mHRDD laws, in order to mitigate the legal and reputational consequences of non-compliance, even while failing or wanting to significantly alter the way they do business, in the interest of human rights and environmental protection. As Hilary Charlesworth astutely observes, such ritualism is problematic because it 'entails embracing the language of human rights precisely to deflect human rights scrutiny and to avoid accountability for human rights abuses, while at the same time gaining the positive reputational benefits or legitimacy associated with human rights commitments'.[9] Foreseeably, due diligence ritualism could have the same impact, allowing companies that engage in it to embrace the due diligence language and accompanying processes in order to deflect scrutiny while concurrently avoiding accountability for violations.

The global regulation of transnational corporations (TNCs) and other business enterprises remains one of the enduring challenges of our time.[10] Numerous attempts are

[4] Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/8/5 (7 April 2008), para 56.

[5] Hilary Charlesworth, 'Rituals and Ritualism in the International Human Rights System' in Nehal Bhuta et al (eds.), *The Struggle for Human Rights: Essays in Honour of Philip Alston* (Oxford: Oxford University Press, 2021) 18.

[6] Emma Larking, 'Human Rights Rituals and Contending World Views: Inequality, Economic and Social Rights, and La Vía Campesina', paper presented at the workshop on 'The Rituals of Human Rights', organized by the Centre for International Governance and Justice, Regnet, Australia National University Canberra, 25–27 June 2014.

[7] Ibid.

[8] Marianna Leite, 'Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights Based Approach to Business Models' (2023) *Business and Human Rights Journal* 5.

[9] Charlesworth, note 5, 18.

[10] César Rodríguez-Garavito, 'Business and Human Rights: Beyond the End of the Beginning' in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017), 1.

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concurrently underway at the international, regional and national levels to (begin to) close this regulatory gap in order to hold TNCs accountable for human rights and environmental violations within their supply chains, primarily in Global South countries. Internationally, pursuant to a resolution adopted by the Human Rights Council in 2014,[11] the Open Ended Inter-Governmental Working Group (OEIGWG) on TNCs and Other Business Enterprises (OBEs) with respect to Business and Human Rights (BHR), is currently in the process of drafting an international treaty, with its ninth session held from the 23 to 27 October 2023.[12] The discussions at this session continued to work on the text of the Third Revised Draft of a legally binding instrument and considered the proposals made by States and other stakeholders in the seventh and eighth sessions.[13] Regionally, 2022 was a momentous year for progress towards a European Union Corporate Sustainability Due Diligence Directive (EU CSDDD). The European Commission adopted a proposed Directive in February 2022,[14] the European Council adopted its negotiating position (General Approach) on 1 December 2022,[15] and the European Parliament adopted its position in June 2023.[16] The future of the Directive remains unsure, as it is currently going through the 'trilogue process',[17] and, if all goes well the final draft will thereafter be adopted in 2024.[18] Nationally, France,[19] Germany[20] and Norway[21] stand out for their enactment of mHRDD laws

[11] Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights', A/HRC/RES/26/9 (14 July 2014).

[12] Human Rights Council, 'Ninth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', United Nations Human Rights Council (2023), https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session9 (accessed 7 December 2023).

[13] Human Rights Council, 'Text of the Third Revised Draft of a Legally Binding Instrument With the Textual Proposals Submitted by States During the Seventh and Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights', A/HRC/49/65/Add.1 (23 January 2023).

[14] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf (accessed 25 January 2023).

[15] Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf (accessed 25 January 2023).

[16] European Parliament, 'Corporate Sustainability Due Diligence Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))' < https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.pdf> (accessed 30 June 2023).

[17] Eur-Lex, 'Trilogue', https://eur-lex.europa.eu/EN/legal-content/glossary/trilogue.html (accessed 25 January 2023), which defines trilogue as follows: 'In the context of the European Union's ordinary legislative procedure, a trilogue is an informal interinstitutional negotiation bringing together representatives of the European Parliament, the Council of the European Union and the European Commission. The aim of a trilogue is to reach a provisional agreement on a legislative proposal that is acceptable to both the Parliament and the Council, the co-legislators. This provisional agreement must then be adopted by each of those institutions' formal procedures'.

[18] Christoph H Seibt et al, 'Supply Chain Compliance: Update on the EU Corporate Sustainability Due Diligence Directive', *Freshfields Bruckhaus Deringer* (16 December 2022), https://sustainability.freshfields.com/post/102i3p0/supply-chain-compliance-update-on-the-eu-corporate-sustainability-due-diligence (accessed 25 January 2023).

[19] Loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017 (France).

[20] Act on Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, 2959 (Germany), https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile#linkicon (accessed 9 November 2023).

[21] Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), LOV-2021-06-18-99 (Norway).

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that incorporate the due diligence requirement into domestic laws. Whereas the French law came into force on 1 January 2018, the Norwegian Transparency Act came into force on 1 July 2022, and the German Act only came into force on 1 January 2023. As is evident, these mHRDD laws are still in their infancy and any sober assessment of their regulatory effectiveness must be necessarily tempered.

This article seeks to understand the forms of and limits to the governance authority of TNCs, within the framework of mHRDD laws in order to achieve three inter-related goals. Firstly, I highlight how mHRDD rituals are capable of changing corporate (mis)behaviour even without significantly changing the underlying structural conditions that have contributed to such behavior. Secondly, I reiterate the susceptibility of corporate obligations flowing from mHRDD laws devolving into mere ritualism. Thirdly, I interrogate the type of authority exercised by TNCs in these situations so as to illustrate that even where due diligence rituals promise to be transformative, concerns still linger about the nature and exercise of business authority in the global governance of BHRs. To wit, the authority exercised by TNCs within the context of mHRDD laws could be referred to as business authority given its difference from public and private authority, as well as its inclusion of a societal role. Crucially, however, the complexities of this business authority especially as this relates to its triadic components of power, legitimacy and public interest mean that in the translation of HRDD obligations from abstract legal principles to a practical corporate reality there is a fine line between rituals and ritualism.

Following this introduction, the article proceeds in five subsequent parts. Part II contrasts rituals and ritualism in human rights practice generally, and in the implementation of mHRDD laws more particularly. Part III thereafter utilizes the EU CSDDD as well as the French, German and Norwegian Laws to illustrate how these laws mandate the performance of certain due diligence rituals. The choice of these laws is deliberate, given their similarity in terms of the horizontal due diligence frameworks created by each of them as well as their relative 'newness'. Part IV will elaborate upon the ritual participants implicated by mHRDD laws, paying special attention to the question of the level of discretion awarded to covered companies. This section also highlights how the authority conferred and duties imposed upon TNCs in this regard defy neat categorization into either public or private authority, which may be problematic given the tendency of companies to pursue private interests even as they undertake public roles. Part V thereafter critically interrogates the ability and willingness of businesses to deploy their so-called business authority in a normatively attractive and defensible fashion and reflects upon a number of ways through which ritualism both manifests itself in mHRDD discourse as well as how it may be mitigated or transcended. Part VI will conclude.

II. Rituals and Ritualism in mHRDD: Mapping the Contours

A research project carried out by Hilary Charlesworth and others (2010–2015),[22] is credited with illuminating how rituals and ritualism co-exist within human rights law.[23] This research transferred the concept of regulatory ritualism from domestic regulatory settings to the human rights treaty context, with a particular emphasis on the Universal

[22] For the research project homepage, Australian National University, 'Strengthening the International Human Rights System: Rights, Regulation and Ritualism', https://regnet.anu.edu.au/research/research-projects/details/535/strengthening-international-human-rights-system-rights (accessed 18 January 2023).

[23] Charlesworth et al, note 1, 7.

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Periodic Review (UPR) process.[24] The insights from this research draw attention to the international human rights system in order to show how whereas rituals can be productive, ritualism indicates hollow practices that can mask inaction.[25] Ultimately, however, by focusing on the social life of the law, such ritual-ritualism scholars reveal how it may be possible to 'harness the transformative potential of human rights rituals to undermine human rights ritualism'.[26] Building on this rich body of work, scholars such as Claire Methven O'Brien and Jolyon Ford have used this rituals-ritualism framework to critically analyse the move towards a legally binding instrument in BHR.[27] For them, the intention was to offer an assessment of potential BHR treaty designs with reference to the key criteria of regulatory ritualism. Essentially, for any new BHR instrument to be effective, it should not embody or promote formalistic, perfunctory and superficial state compliance.[28] This article differs from and expands upon previous rituals-ritualism scholarship by novelly applying this framework to an interrogation of mHRDD laws.

It is possible to speak of the Janus-faced nature of human rights rituals, i.e., there are two sharply contrasting levels inherent in the performance of such rituals. The first level is superficial and concerned with the ritualistic process itself. Here, a ritual would 'constitute a social performance that is historically and socially located and that involves a modality of acting that is formal, reiterated and, for most participants in the ritual, externally dictated'.[29] As Section III will show, certain obligations imposed by mHRDD laws can be understood as rituals in this sense. The second level delves deeper beyond the ritual act itself, and into the pre-suppositions and political paradigms that are concealed within it. In this regard, mHRDD rituals could be said to obscure the relationship between HRDD and the privileging (or even embedding) of a very particular neo-liberal model of organizing the global economic system. Consequently, the performance of due diligence rituals is capable of simultaneously engendering corporate responsiveness to human rights values over time,[30] even as it entrenches a problematic status quo that has allowed TNCs to engage in extractive models of operations to the detriment of rights-holders around the globe. This latter impact follows from the fact that mHRDD could very well function as a smokescreen that legitimizes such extractive business, by allowing TNCs to shield themselves behind an air of compliance with due diligence obligations.

To be clear, the term ritual is not synonymous with law. It is in the transformation of legal obligations from the abstract to a practical reality that rituals are born. Thus, where mHRDD laws require periodic performance of certain identified due diligence duties with the intention of encouraging covered companies to respect human rights and the environment, these obligations become ritualistic at the point of implementation by companies. For such rituals to be effective, they should be able to influence the internal motivations and change the viewpoints of the ritual participants in order to secure their compliance with the law for

[24] Jolyon Ford, 'The Risk of Regulatory Ritualism: Proposals for a Treaty on Business and Human Rights', Global Economic Governance Programme University of Oxford, Working Paper 118 (April 2016), https://www.geg.ox.ac.uk/sites/default/files/GEG%20WP_118%20The%20risk%20of%20regulatory%20ritualism%20proposals%20for%20a%20treaty%20on%20business%20and%20human%20rights%20-%20Jolyon%20Ford.pdf.

[25] Hilary Charlesworth, 'Rituals and Ritualism in the International Human Rights System' in Nehal Bhuta and others (eds.), *The Struggle for Human Rights: Essays in Honour of Philip Alston* (Oxford: Oxford University Press, 2021) 19–20.

[26] Ibid, 29.

[27] Jolyon Ford and Claire Methven O'Brien, 'Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty' (2017) 40:3 *University of New South Wales Law Journal* 1223–1248; University of Groningen Faculty of Law Research Paper Series No. 20/2018 (2017).

[28] Ibid, 1225.

[29] Charlesworth et al, note 1, 2.

[30] Ibid, 2.

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normative reasons deeper than the law itself. Companies may start out performing due diligence rituals simply because they have been legally forced to do so, but there is a chance that along the way the reasons for complying with these due diligence obligations may metamorphose into something deeper. Understood in this way, the true essence of mHRDD rituals lies in their ability to act as the Trojan horse through which business respect for human rights and environmental norms can be achieved in reality. By creating and structuring the normative obligations of TNCs, mHRDD laws create a 'could be' world that has the latent potential to inspire the participants, both individually as well as collectively, to act in a manner consistent with its construction.[31] However, as the use of the term 'could be' foreshadows, rituals may not always achieve what they set out to, *ergo*, ritualism necessarily co-exists side by side with rituals. Such ritualism signifies 'an acceptance of institutionalized means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves'[32] and may arise where 'excessive attention is paid, whether by states or other actors, to ... formalities ...'.[33] Where compliance with the law through the performance of rituals fails to change the internal motivations of such ritual participants, these processes degenerate into ritualism.

A rituals-ritualism lens equips us with both descriptive as well as normative tools to assess not only the nature, but more importantly, the likely socio-legal consequences of imposing obligations upon covered TNCs by mHRDD laws. This makes it possible to shift the terms of the discussion surrounding mHRDD laws away from their current pre-occupation with what duties follow from such laws, to the less frequently addressed question of whether these laws are or can be an effective regulatory tool in the BHR landscape. Nevertheless, despite the utility of the rituals-ritualism framework for this purpose, one blindspot persists. That is, the question of the authority implicitly granted to companies by virtue of mHRDD laws. I propose to add to the rituals-ritualism framework a third analytic category, i.e., authority. As Part IV will highlight, this sets the stage for an analysis of how corporate authority, or business authority, in mHRDD can either contribute to or detract from the creation of rituals of respecting human rights.

III. Due Diligence Rituals: Assessing the Duties Imposed by Selected mHRDD Laws

The term due diligence has been argued to be 'a clever and deliberate tactic, as it is familiar to business people, human rights lawyers and states'.[34] With regard to businesses, this concept is not unfamiliar, relating as it does to long-held ideas in the business context of the 'process of investigation of facts and data to identify and manage commercial risks, including the potential for legal liability, ahead of a given commercial transaction or activity'.[35] It is the late Professor John Ruggie who is credited with extending the idea of due diligence to human rights. As he explained, at its simplest, '[t]his concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.[36] Generally speaking, all mHRDD laws impose a number of separately identifiable but interlinked obligations within the rubric of the due diligence process. Although there are textual variations in the various laws under consideration here, a number of similar due

[31] Ibid, 3.

[32] John Braithwaite et al, *Regulating Aged Care: Ritualism and the New Pyramid* (Cheltenham: Edward Edgar Publishing, 2007) 7.

[33] Ford and O'Brien, note 27, 1229.

[34] 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* 900.

[35] Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) 6 *Business and Human Rights Journal* 242.

[36] Human Rights Council, note 4, para 56.

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diligence rituals can nevertheless be gleaned from an analysis of the French, German, Norwegian and EU (Council draft) mHRDD laws.

The key criterion that transforms a legal obligation into a ritual is the structured requirement of repetitiveness.[37] Where due diligence obligations are iterative, ongoing and repetitive such obligations can be conceptualized as rituals. This can be deciphered from the repetitive vocabulary used in the various mHRDD laws, as well as the 'routine yet carefully managed processes and performances'[38] in which covered companies are expected to engage in with respect to complying with their due diligence obligations. Consequently, this contribution posits that, generally speaking, there are six discernible rituals that may be argued to flow from mHRDD laws. These rituals will be summarized in turn.

Ritual 1: Incorporating Responsible Business Conduct into the Company's Operations

Article 1 of the French Duty of Vigilance Law requires covered companies to come up with a Vigilance Plan that includes reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of individuals and the environment resulting from the activities of the company and those of the companies it controls directly or indirectly, as well as from the activities of subcontractors or suppliers with which it has an established business relationship, when these activities are related to that relationship.[39] Arguably, this Vigilance Plan can be seen as an attempt to plan for and incorporate responsible business conduct into the company's operations. In comparison, whereas the German Due Diligence Act does not require covered companies to come up with a vigilance plan, it does require them to establish an appropriate and effective risk management system to comply with the due diligence obligations, and to issue policy statements on their human rights strategy, which must be adopted by senior management.[40] Such risk management must be enshrined in all relevant business processes through appropriate measures.[41] Similarly, the Norwegian Transparency Act also imposes an obligation on covered companies to embed responsible conduct into the enterprise's policies.[42] Finally, the draft EU Directive requires companies to integrate due diligence into all their policies and risk management systems, and to come up with and implement a due diligence policy.[43]

As can be seen from these illustrations, the first and perhaps most important due diligence ritual is to take the necessary steps to ensure that due diligence becomes a normal part of the company's operations. Given the nature of due diligence as a continuing process, rather than a one-off requirement, this obligation to incorporate due diligence into the company's operations can be considered to be continuous, repetitive, and ritualistic in nature.

Ritual 2: Identifying and Assessing Actual and Potential Adverse Impacts Associated with the Company's Operations

Covered companies are required to investigate any actual and potential adverse impacts of their operations. The French Act provides that the Vigilance Plan should include a risk map to identify, analyse and prioritize risks, as well as a procedure for regular assessment of the

[37] Larking, note 6, 2.
[38] Ford and O'Brien, note 27, 1228.
[39] Loi no. 2017-399 du 27 mars, note 19, Article 1.
[40] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 6(2).
[41] Ibid, Section 4(1).
[42] Transparency Act, LOV-2021-06-18-99, note 21, Section 4 (a).
[43] EU CSDDD, note 15, Article 5 (1).

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situation of subsidiaries, subcontractors or suppliers with whom an established business relationship is maintained, with regard to risk mapping.[44] The German Act requires covered companies to conduct an appropriate risk analysis in order to identify any human rights and environment related risks that it, and its direct suppliers, may face.[45] The identified human rights and environment-related risks must be prioritized according to their weight.[46] In terms of frequency, the risk analysis ritual must be carried out once a year or on an *ad hoc* basis depending on the occurrence of events that have the capacity to alter the company's risk structure.[47] The Norwegian Act requires the identification and assessment of actual and potential adverse impacts that the covered company either caused or contributed to, or which are directly linked to the company's operations through its supply chain or business partners.[48] The EU CSDDD imposes a comparable obligation on covered companies, requiring them to take appropriate measures to identify actual and potential adverse impacts arising out of their own operations, subsidiaries and business partners.[49]

Ritual 3: Taking Necessary Actions to Stop, Prevent and Mitigate Adverse Impacts

In one form or another, each of the canvassed laws requires the covered companies to continuously put in place measures to either prevent adverse human rights and environmental impacts before they occur or mitigate and stop them if they have already occurred. The French law requires covered companies to put in place appropriate mechanisms to mitigate risks or prevent serious harm.[50] The German Act requires companies to take appropriate preventive measures without delay, if they identify a risk in the course of the risk analysis.[51] Importantly, the effectiveness of such preventive measures must be reviewed once a year and on an *ad hoc* basis as dictated by the exigencies of the case.[52] If the situation warrants, such preventive measures must be updated without undue delay. Under the Norwegian Act covered companies are expected to implement suitable measures to cease, prevent or mitigate adverse impacts.[53] Finally, the EU CSDDD also imposes prevention and related requirements on covered companies. Specifically, such companies are expected to 'take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse impacts that have been, or should have been, identified'.[54] In addition, covered companies also have an obligation to bring any identified actual adverse impacts to an end,[55] or minimize the extent of such impacts where it is impossible to bring them to an end.[56]

Given the fact that this is a recurring obligation whose performance depends on the availability of information on actual or potential adverse impacts, this requirement to take suitable preventive and mitigation measures can be considered to be a due diligence ritual.

[44] Loi no. 2017-399 du 27 mars, note 19, Article 1.
[45] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 5(1).
[46] Ibid, Section 5(2).
[47] Ibid, Section 5(4).
[48] Transparency Act, LOV-2021-06-18-99, note 21, Section 4 (b).
[49] EU CSDDD, note 15, Article 6 (1).
[50] Loi no. 2017-399 du 27 mars, note 19, Article 1.
[51] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 6(1).
[52] Ibid, Section 6(5).
[53] Transparency Act, LOV-2021-06-18-99, note 21, Section 4(c).
[54] EU CSDDD, note 15, Article 7(1).
[55] Ibid, Section 8(1).
[56] Ibid, Section 8(2).

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Ritual 4: Assessing Implementation and Outcomes

Another due diligence ritual imposed upon the covered companies is an obligation to assess the measures implemented as well as the outcomes that follow. The French Act requires covered companies to put in place a system for monitoring the measures implemented and evaluating their effectiveness.[57] In comparison, the German Act does not have a singular dedicated section requiring companies to assess implementation and outcomes. However, the various provisions include references to the need to carry out such assessments. In this regard, Section 6 requires an analysis of the effectiveness of preventive measures,[58] Section 7 requires a review of the effectiveness of remedial action at least once a year or on an *ad hoc* basis,[59] and Section 8 mandates a review of the effectiveness of the complaints procedure both annually as well as on an *ad hoc* basis.[60] The Norwegian Act requires companies to track the implementation and results of measures.[61] The EU CSDDD imposes an obligation on covered companies to monitor the effectiveness of their due diligence policy and measures. More specifically, companies are expected to carry out periodic assessments of their own operations and measures, those of subsidiaries as well as business partners in order to monitor the effectiveness of due diligence measures.[62] These assessments must be carried out at least every 24 months or on a needs basis.

Ritual 5: Communicate on How Impacts are Addressed

Covered companies are required to participate in a communication ritual. Under the French Act, the Vigilance Plan and the report on its effective implementation are to be made public and included in the company's report.[63] The German Act imposes a similar reporting requirement mandating the preparation of an annual report by covered companies on the fulfilment of their due diligence obligations in the previous financial year. This report must be publicly available on the company's website no later than four months after the end of the financial year, for a period of seven years.[64] The Norwegian Act requires communication with affected stakeholders and rights-holders regarding how adverse impacts are addressed.[65] Covered enterprises are required to publish an account of their due diligence activities on their website.[66] The EU CSDDD requires covered companies to report on the performance of their obligations under the Directive by publishing an annual statement on their website.[67]

Ritual 6: Remediation of Adverse Impacts

The final due diligence ritual imposed on covered companies by mHRDD laws is the obligation to remediate adverse impacts. Remediation may take the form of a non-state-based remedy such as a complaints procedure, a state-based non-judicial remedy such as the substantiated concerns procedure and a state-based judicial remedy such as a civil

[57] Loi no. 2017-399 du 27 mars, note 19, Article 1.
[58] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 6(5).
[59] Ibid, Section 7(4).
[60] Ibid, Section 8(5).
[61] Transparency Act, LOV-2021-06-18-99, note 21, Section 4(d).
[62] EU CSDDD, note 15, Article 10 (1).
[63] Loi no. 2017-399 du 27 mars, note 19, Article 1
[64] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 10(2).
[65] Transparency Act, LOV-2021-06-18-99, note 21, Section 4(e).
[66] Ibid, Section 5.
[67] EU CSDDD, note 15, Article 11(1).

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liability regime.[68] The French Act creates a civil liability regime.[69] The German Act requires covered companies to implement remedial actions where violations have occurred or are imminent.[70] The Act also requires the setting up of an internal complaints mechanism to enable persons to report on human rights and environmental violations.[71] The Norwegian Act requires companies to provide for or cooperate in remediation and compensation where this is required.[72] The EU CSDDD creates a number of possibilities for remediation. Firstly, the Directive requires covered companies to set up a complaints procedure, so that pertinent stakeholders with legitimate concerns regarding the actual or potential adverse impacts of companies' activities can be able to raise complaints.[73] Secondly, there is the possibility of natural and legal persons submitting substantiated concerns to any supervisory authority when there is reason to believe that a company is failing to comply with its obligations.[74] Thirdly, the Directive also creates a civil liability regime that requires companies to be held liable for damages where such companies intentionally or negligently failed to comply with pertinent obligations,[75] resulting in damage to the protected interests of the natural or legal person in question.[76]

IV. Covered Companies as Ritual Participants: On the Questions of Corporate Discretion and Business Authority

Exclusion and Inclusion in Due Diligence Rituals: Granting Companies too Much Discretion?

The performance of due diligence rituals involves a number of parties. For the purpose of the discussion here the focus will be limited to the state, the covered companies, and stakeholders, particularly rights-holders.

To begin with, it is obvious that the state plays a major role in both the structuring of due diligence rituals as well as monitoring their performance by companies. It is the various national governments that have enacted mHRDD laws imposing HRDD obligations on in-scope companies. In complying with these obligations such companies can be said to participate in due diligence rituals geared towards 'enacting a social consensus'[77] on the normative imperative for corporate accountability. Additionally, through the national supervisory authorities, such as the Federal Office for Economic Affairs and Export Control, or *Bundesamt für Wirtschaft und Ausfuhrkontrolle* (BAFA), in the German context, the government is responsible for assessing the performance of these due diligence rituals. Where the companies' performance is found wanting, numerous

[68] Emma Baldi, 'Redressing Business-Related Human Rights and Environmental Harm, and Doing it the Right Way: A Critical (Snapshot) Assessment of the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive in Light of International Standards on the Right to Effective Remedy and Reparation' *Nova Business, Human Rights and the Environment Blog* (16 February 2023), https://novabhre.novalaw.unl.pt/redressing-business-related-human-rights-and-environmental-harm-and-doing-it-the-right-way/ (accessed 1 February 2023).

[69] Loi no. 2017-399 du 27 mars, note 19, Article 2.

[70] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 7.

[71] Ibid, Section 8.

[72] Transparency Act, LOV-2021-06-18-99, note 21, Section 4(f).

[73] EU CSDDD, note 15, Article 9.

[74] Ibid, Article 19.

[75] Ibid, Article 22(1)(a)

[76] Ibid, Article 22(1)(b).

[77] Hilary Charlesworth and Emma Larking, 'Introduction: The Regulatory Power of the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds.), *Human Rights and the Universal Periodic Review: Rights and Ritualism* (Cambridge, Cambridge University Press, 2014) 8.

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consequences could follow, including administrative sanctions, civil liability and even exclusion from government procurement contracts. In addition, errant companies expose themselves to the reputational costs of non-compliance, which in the era of the conscious consumer and the court of public opinion may have serious repercussions for whether or not consumers continue to associate with the company.[78]

As Charlesworth and Larking note, rituals 'can be markers of success, indicating that a way of thinking or of being has achieved some degree of permanence and importance: enshrining a practice as ritual reduces contestation'.[79] This may very well be one of the eventual outcomes of the implementation of mHRDD laws, at least to some extent. However, despite this optimism about the utility of rituals, this contribution urges caution. Arguably, these mHRDD laws aspire to reduce contestation about the importance of corporate accountability for human rights and the environment by mandating due diligence rituals and contributing to the creation of a social consensus (at least on the part of companies where such a consensus is yet to be reached). However, most versions of these laws fail in one regard; they allow companies to be the key ritual participant, without giving due regard to the importance of fully and meaningfully involving other stakeholders, and particularly rights-holders, in due diligence rituals. This is problematic given the realities of profit motivation that underpin the activities of most companies, and their likely (superficial or cosmetic) performance of due diligence rituals in order to mitigate their compliance risk, rather than because they actually want to positively change human rights and environmental outcomes within the context of their operations.

In order for compliance rituals to have regulatory or transformative power,[80] this contribution posits that a necessary and indispensable background condition is for due diligence rituals to be jointly performed by a multiplicity of participants, the most important of which are potentially affected rights-holders. In this regard, the United Nations Guiding Principles (UNGPs) on BHR as well as the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance)[81] require the involvement of a myriad of stakeholders in due diligence processes, including: communities; workers and employees as well as their representative bodies; human rights defenders; community-based organizations, non-governmental organizations (NGOs); civil society. Both the UNGPs and the OECD Guidance emphasize the particular need to understand the perspectives of potentially affected individuals and groups,[82] given the fact that 'not all interests are of equal importance and it is not necessary to treat all stakeholders in the same way'.[83] However, none of the mHRDD laws discussed in this contribution put in place robust specifically targeted measures to ensure that covered companies under the various laws will ensure the meaningful participation of potentially affected stakeholders in due diligence rituals. Although there are occasional references to the need to consult stakeholders in the French Law,[84] the German Law,[85] the Norwegian Law[86] as well as the

[78] Mathew Amengual, Rita Mota and Alexander Rustler, 'The "Court of Public Opinion": Public Perceptions of Business Involvement in Human Rights Violations' (2022) 185 *Journal of Business Ethics* 49.

[79] Charlesworth and Larking, note 77, 9.

[80] Ford and O'Brien, note 27, 1229.

[81] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (Paris: OECD, 2018)

[82] Human Rights Council, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', HR/PUB/12/02 (February 2012), 33; OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018), 48.

[83] OECD (2018), note 81, 48.

[84] Loi no. 2017-399 du 27 mars, note 19, Article 1.

[85] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 4(4).

[86] Transparency Act, LOV-2021-06-18-99, note 21, Section 4(e).

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EU CSDDD,[87] these scattered references are inadequate given their awarding of significant discretion to covered companies, as to whether and how they will involve affected rights-holders in due diligence processes. For instance, the French Law rather weakly provides that 'the plan is intended to be drawn up in association with society's stakeholders' without clarifying what this means in practice.[88] Similarly, the German Act requires covered companies to give 'due consideration' to stakeholder interests.[89] Paradoxically, whereas the Norwegian Act provides for a right to information about how the enterprise addresses actual and potential impacts,[90] it fails to give affected rights-holders such a strong right against the company, only requiring companies to 'communicate with affected stakeholders and rights-holders regarding how adverse impacts are addressed'.[91] It is troubling that there is no explicit requirement for companies to involve stakeholders in any of the other due diligence rituals. Finally, the EU CSDDD also fails to adequately ensure the participation of affected rights-holders in due diligence rituals, for instance, by requiring covered companies to only consult 'where relevant'.[92]

Consequently, this contribution argues that where mHRDD laws fail to categorically ensure the full and meaningful participation of potentially affected stakeholders in due diligence processes, instead awarding in scope companies a wide margin of discretion in the performance of due diligence obligations, these processes run the risk of being mere empty rituals with little to no transformative power on the lived realities of affected stakeholders. In addition, the normatively desirable metamorphosis of such rituals into internalized cultural norms reflecting a social consensus on the imperative for corporate accountability is only likely to follow where companies perform these rituals together with societal stakeholders such as rights-holders.

There are numerous possible ways to strengthen the ritualistic power of due diligence obligations as relates to the participation of rights-holders in due diligence procedures.[93] Firstly, mHRDD laws should utilize clear terms to explicitly oblige companies to meaningfully engage with rights-holders during the due diligence process. Ambiguous terms such as 'where relevant' and 'due consideration' give companies too much wiggle-room which jeopardizes the possibilities of truly meaningful engagement with rights-holders. Secondly, because it would be impractical to expect companies to be able to engage with all rights-holders in their value chains, the laws could grant companies a measure of discretion to prioritize a certain minimum number of rights-holders and/or their legitimate representatives in these engagement processes. Thirdly, companies should be obliged to document their meaningful engagement, indicating the number of stakeholders consulted, the form of consultation as well as whether and how the input of such stakeholders was factored into the due diligence rituals of the company. Such documentation requirements would play an important role in placing pressure on

[87] EU CSDDD, note 15, Articles 6(4), 7(2)(a), 8(3)(b), 9(2), 10(1); Caroline Omari Lichuma, 'More than Meets the Eye: Participatory (In)justice and the EU Corporate Sustainability Due Diligence Directive (CSDDD)', *NOVA Business Human Rights and the Environment Blog* (7 February 2023), https://novabhre.novalaw.unl.pt/more-than-meets-the-eye/ (accessed 8 February 2023).

[88] Loi no. 2017-399 du 27 mars, note 19, Article 1.

[89] Act on Corporate Due Diligence Obligations in Supply Chains, note 20, Section 4(4).

[90] Transparency Act, LOV-2021-06-18-99, note 21, Section 6.

[91] Ibid, Section 4(e).

[92] EU CSDDD, note 15, Article 6(4).

[93] Global Justice Clinic at Erfurt University, the University of Luxembourg and the German Institute for Human Rights, 'Strengthening Stakeholder Engagement in the EU Corporate Sustainability Directive' Policy Briefing Paper (June 2023), https://www.uni-erfurt.de/fileadmin/fakultaet/staatswissenschaften/6.2023_Policy_Briefing_Paper_Strengthening_Stakeholder_Engagement_in_the_EU_Corporate_Sustainability_Due_Diligence_Directive.pdf> (accessed 10 September 2023).

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companies to systematically manage their stakeholder engagement processes and ensure they are ready to provide evidence on the same. Fourthly, in order for rights-holders to be able to participate in due diligence rituals actively and fully they should be provided with all necessary information on the activities of the company. This means that companies should be obliged to share information with such rights-holders well in advance, and to meet any requests for other or further information from rights-holders. Fifthly, companies should be required to put in place measures to mitigate barriers to participation that make it difficult for rights-holders to be part of due diligence processes. These could include cultural barriers, financial barriers, and logistical barriers. Finally, companies should ensure that where necessary it is possible for rights-holders to participate confidentially or anonymously, in order to avoid retaliation.

Ultimately, where companies meaningfully engage with rights-holders in the ways contemplated above, it is possible to rebalance power away from companies and towards such rights-holders (and other stakeholders), significantly empowering them to work 'in the belly of the beast' by harnessing the transformative potential of HRDD rituals.

Due Diligence Rituals and the Regulatory Authority of Companies: Can Corporate Authority Through mHRDD Laws Create Rituals of Respecting Human Rights?

Due diligence rituals convert covered companies from regulated entities into co-regulators,[94] allowed to exercise a form of governance authority that may be classified as business authority given its divergence from both public and private authority.[95] Covered companies may be viewed as co-regulators given the expectation by the various mHRDD laws that such companies will ensure that their suppliers in the various tiers of the value chains also comply with HRDD obligations. Such co-regulation can be effected through the use of shared-responsibility contracts,[96] which allow covered companies to cascade HRDD obligations down their supply chains. This converts covered companies into co-regulators and widens the scope of mHRDD laws by bringing more companies within the HRDD net.

In this context, regulation may be defined as 'the sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behavior-modification'.[97] Given the expectation by the various mHRDD laws that covered companies will ensure compliance with due diligence obligations not just within the context of their operations, but also within their subsidiaries and business partners where applicable, this contribution argues that these laws deliberately allow companies to become co-regulators in the area of BHR. The legislative intention is to use covered companies to modify the behaviours of their subsidiaries and business partners in order to secure compliance with human rights and environmental norms throughout the value or supply chain. Thus, due diligence rituals make it possible for the regulation of BHR to move

[94] Caroline Omari Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' (2021) 81:2 *Heidelberg Journal of International Law* 528–530.

[95] Janne Mende, 'Business Authority in Global Governance: Companies Beyond Public and Private Roles' (2023) 19:2 *Journal of International Political Theory* 209.

[96] Sarah Dadush, Daniel Schönfelder and Bettina Braun, 'Complying with Mandatory Human Rights Due Diligence Legislation through Shared-Responsibility Contracting: The Example of Germany's Supply Chain Act (LkSG)', Rutgers Law School Research Paper (March 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389817 (accessed 10 September 2023).

[97] Charlesworth and Larking, note 77, 7.

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beyond the 'traditional "command and control" models that characterize the state as the major regulatory authority'.[98] This is a note-worthy consequence of how the addition of authority as an analytical category to the rituals-ritualism framework makes it possible to see how business authority in the context of HRDD rituals can be used to embed HRDD rituals throughout the global economy.

Governance authority means 'the power to become involved in regulating oneself and others, which is legitimated by an assumed contribution to public interests'.[99] Thus, an important normative assumption underpinning the existence of a legitimate governance actor is the idea of contributing to the public interest. For covered companies to be legitimate governance authorities in the context of BHR, there is an expectation that such companies will, ideally speaking, contribute to the public interest inherent in preventing, mitigating and stopping adverse human rights and environmental impacts within the context of their activities. However, as the next section will highlight, the governance authority exercised by covered companies may in certain instances prevent HRDD rituals from overcoming the threat of ritualism.

V. Ritualism in mHRDD Laws: The Limits of Business Authority

Constituting Business Authority

The term 'business authority' has been proffered as a useful analytical category to explain the role that businesses play as governance actors. Such business authority merges both public and private authority, and adds an additional role, namely, societal, in the analysis of what kind of authority businesses exercise. This societal role 'does not dissolve the public and private sides but interacts with them'.[100] Whereas public authority classically deals with the authority wielded by states, private authority expounds upon the authority exercised by non-state actors. In this regard, under the former 'the state is endowed with the power and legitimacy to safeguard public interests',[101] while the latter captures 'situations in which private actors regulate public matters'.[102] In juxtaposition, business authority explains how 'companies perform public and private as well as societal roles to such an extent that they cannot be sufficiently described as private actors exerting private authority'.[103]

Borrowing from Janne Mende's triadic concept of governance authority,[104] this contribution argues that depending on the weight and forms of the three components of governance authority in the specific context of business authority, it is possible for due diligence rituals to degenerate into problematic ritualism.

Underpinning this triadic concept is a definition of 'governance authority as the *power* to participate in governance (i.e. to regulate matters that affect public interests) that strives or appears to be *legitimate* by a connection to *public interests*'.[105] Thus, governance authority is understood in reference to power, legitimacy and connection to public interests. Power is concerned with material resources, ability to shape decision-making as well as the potential to form and shape the perception of ideas and interests even before they become a part of

[98] Ibid, 8.

[99] Janne Mende and Anneloes Hoff, 'The Governance Authority of Non-State Actors in the Business and Human Rights Regime' (2022) 21:5 *Journal of Human Rights* 596.

[100] Mende, note 99, 203.

[101] Ibid.

[102] Ibid.

[103] Ibid, 205.

[104] Ibid.

[105] Ibid, 207.

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the political agenda.[106] On the other hand, legitimacy deals with the minimum moral acceptability of a particular actor[107] and denotes the normative belief that such an actor or rules made by them ought to be obeyed.[108] Finally, the connection to public interests characterizes how governance power relates to public interest. As Mende explains, 'global governance builds upon the assumption that regulation can no longer be undertaken only at the domestic level; cooperation and regulation beyond the state are necessary to solve common problems and contribute to public interests'.[109]

Applying these ideas to the business authority that follows from the imposition of due diligence obligations allows us to draw some tentative conclusions about the nature of and limits to the exercise of business authority, that may further enrich the understanding of ritualism. Firstly, it is obvious that the public interest undergirding due diligence laws is the desire to close the corporate accountability gap as relates to human rights and environmental violations. Due diligence rituals make it possible to simultaneously assess how companies claim to contribute to public interests, as well as how they actually affect the public interest, whether negatively or positively. Secondly, the interaction of the three components does not fully explain business authority, which implies that it may be difficult to predict the behaviour of businesses in reality. That is to say, the imposition of business authority on covered companies within the rubric of due diligence laws may not always contribute to the public interest, given lingering questions about the power and legitimacy of such actors. Thus, as Mende observes, 'more power does not necessarily equal greater legitimacy and hence stronger authority'[110] and 'some companies wield power without legitimacy – especially those that are less visible to the public, such as that those that operate in the folds and gaps of global governance, in informal sectors and the lower tiers of supply chains'.[111] Finally, there is likely to be considerable variation in how businesses perform their due diligence duties, depending on the different weight that can be given to the three components of authority in each company's unique situation.

Ultimately, this contribution argues that when mHRDD laws require covered companies to contribute to the public interest but fail to put into place adequate mechanisms to ensure that there are real incentives for meeting these public interests, there is a high likelihood that private interests such as profit-making and shareholder satisfaction will prevail. This could result in due diligence rituals being empty proxies for human rights outcomes, *ergo* ritualism. In this regard, compelling companies to meaningfully engage with stakeholders could be one such way to ensure that due primacy is given to public interests. Also, ensuring that companies face consequences for any failures to contribute to the achievement of the public interest inherent in respecting the environment and human rights would go a long way towards tilting the balance away from private interests being pursued at the expense of public interests. This could be through the implementation of civil liability regimes and the imposition of administrative and other sanctions.

In addition, where the power enjoyed by such covered companies is unconstrained or poorly constrained, despite any real or imaginary legitimacy enjoyed by such companies, there is a higher risk of ritualism in the implementation of due diligence obligations. This follows from the sheer scope of the power enjoyed by certain (especially large) companies that could even allow them to capture the BHR agenda for their own interests.

[106] Doris Fuchs, *Business Power in Global Governance* (Boulder, CO: Lynne Rienner Publishers, 2007), 159–180.

[107] Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20:4 *Ethics and International Affairs* 405.

[108] Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53:2 *International Organization* 381.

[109] Mende, note 99, 208.

[110] Ibid, 210.

[111] Ibid.

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Finally, on the question of legitimacy, it is necessary to highlight that business legitimacy may 'not necessarily involve a direct relationship with the affected'[112] especially where such legitimacy rests upon the recognition of the states imposing due diligence obligations but not that of affected stakeholders. Here, again, a lack of legitimacy could translate into ritualism where other due diligence actors are left out of due diligence rituals. On the flip side, legitimacy could also be a useful tool through which to constrain or even restrict business power, given the very real desire by companies to avoid the reputational costs that accompany a loss of legitimacy. Thus, 'legitimacy in global governance is therefore a double-edged sword for companies: they have access to public legitimacy and they are pressured to publicly legitimize their behavior'.[113] Where such pressure is successful, the risk of ritualism could be significantly attenuated.

Transcending Ritualism in the Exercise of Business Authority

Rather than outrightly reject due diligence rituals, this contribution argues that it is more likely for covered companies to mask their resistance behind ritualism. This may involve embracing due diligence processes in order to deflect serious scrutiny, while continuing to avoid full accountability for human rights and environmental abuses within their operations. Ritualism in due diligence processes may arise either as a result of structural reasons, i.e., poorly designed or elaborated upon due diligence obligations, or as a consequence of calculated design, where companies are either deliberately indifferent or highly resistant to fully complying with due diligence norms.[114]

Symptoms of ritualism in the context of the mHRDD laws canvassed above could manifest themselves in the following ways:

Ritualism in the Gap Between Due Diligence Policies and Their Implementation in Reality

Cosmetic compliance by companies could be manifested by such companies coming up with due diligence policies as required by the various laws, without fully embedding and implementing such policies within the context of the company's operations, its subsidiaries as well as business partners. Embedding can be described as the creation of 'the right macro-level environment for the company's human rights policies to be effective in practice through training, performance, and accountability structures, the tone at the top from the board and senior management and a sense of shared responsibility for meeting the company's human rights commitments'.[115] This process of embedding is one continual process, generally driven from the top of the company, throughout all its constitutive parts.[116] Where due diligence rituals are superficially followed without being embedded into the company such rituals are likely to devolve into ritualism. As Professor Ruggie articulated, this embedding process requires 'making respect for human rights part of the company's DNA'.[117]

[112] Mende, note 99, 212.

[113] Ibid, 213.

[114] Ford and O'Brien, note 27, 1229.

[115] Alan S Gutterman, 'Embedding Your Business' Human Rights Commitment', *American Business Association Law Business Law Section Blog* (17 May 2021), https://businesslawtoday.org/2021/05/embedding-your-business-human-rights-commitment/?utm_source=newsletter&utm_medium=email&utm_campaign=may21_articles#_ftn2 (accessed 31 January 2023).

[116] United Nations Office of the High Commissioner of Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', HR/PUB/12/02 (2012), 46–47.

[117] Shift, 'Embedding Respect for Human Rights Within a Company's Operations' Shift Workshop Report No. 1 (June 2012), https://shiftproject.org/wp-content/uploads/2020/05/Shift_embedding2012.pdf (accessed 31 January 2023), 2.

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One way to transcend the kind of ritualistic compliance that results from a failure to embed human rights into the company is to begin to change the corporate culture. All companies have their own unique corporate or organizational culture. This may be defined as the shared beliefs, customs and practices that define an organization and distinguish it from others.[118] Such corporate culture represents behaviours that new employees are encouraged to follow, creates norms for acceptable behaviour within the company, reinforces ideas and behaviours that are consistent with the corporation's beliefs, influences both the external and internal relations of the company and its stakeholders, and impacts how the company operates.[119] In order for due diligence rituals to be truly transformative, companies must embed due diligence obligations into their corporate culture,[120] and ensure that such corporate culture fosters respect for human rights and the environment at all levels of the organization. Unless – and until – this happens the risk of ritualism is unlikely to be averted.

Ritualism as a Consequence of Ambiguity of Legal Terms

Where a company fails, either wittingly or unwittingly, to take all possible steps to identify potential and actual adverse impacts that it has caused, contributed to or that are directly linked with its operations and supply chains, this may precipitate ritualism. However, a valid question may be raised about how common due diligence terms such as *cause*, *contribute* or *directly linked* should be interpreted by companies in practice. Arguably, where mHRDD laws impose due diligence obligations but fail to clarify certain terms, such ambiguity and the attendant difficulties inherent in translating the law into reality may result in companies only superficially complying with such unclear provisions.[121] Given the importance of these critical parameters, shaping as they do the scope of due diligence obligations as well as any remedies that should follow violation, it is important to offer critical guidance to companies and stakeholders alike on terminological meanings. This would help to bring a level of certainty in understanding these terms and diminish the risk of empty ritualism in the process of compliance with due diligence rituals. As one study has found, none of the terms commonly found in mHRDD laws, to wit, cause, contribution and directly linked, are 'as clear as many presume'.[122] In fact:

> Even *cause*, the term considered most obvious, has been subject to extensive debate in the natural sciences, social sciences, and the law. In each discipline, experts have found that it is often impossible to say definitively that a particular event results from a particular act or omission. The consensus is thus that the probability of an event should determine whether an act or omission is the event's cause – both prospectively and retroactively. In practice, contribution becomes much harder to separate out from cause, as both fundamentally bear on risk. The analytical challenge is even more

[118] Keith R Molenaar, Hyman M Brown, Shreve Caile and Roger Smith, 'Corporate Culture: A Study of Firms With Outstanding Construction Safety' (2002) 47:7 *ASSE Journal of Professional Safety* 19.

[119] Ibid.

[120] Rick Relinger, 'Embedding the Corporate Responsibility to Respect Human Rights Within Company Culture', Commissioned Research Report Series (May 2014), https://shiftproject.org/wp-content/uploads/2020/05/Shift_EmbeddingUNGPs_2014.pdf (accessed 31 January 2023), 7.

[121] Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20:1 *Melbourne Journal of International Law* 235.

[122] Debevoise and Plimpton, *Practical Definitions of Cause, Contribute, and Directly Linked to Inform Business Respect for Human Rights* (Debevoise Business Integrity Group & Enodo Rights, 2017), https://media.business-humanrights.org/media/documents/files/documents/Debevoise-Enodo-Practical-Meaning-of-Involvement-Draft-2017-02-09.pdf (accessed 31 January 2023), 6.

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> difficult with directly linked, which has no clear antecedents in the disciplines we considered.[123]

The supervisory bodies responsible for issuing guidance within the various national jurisdictions should clarify as much as possible, and with the help of stakeholders, including companies, what these terms mean within the due diligence framework, so as to make it easier for in scope companies to comply fully rather than only superficially.

Ritualism as a Result of Company Failure to Meaningfully Engage with Stakeholders Throughout the Due Diligence Process

As already elaborated upon in Section IV above, where in scope companies are not required to mandatorily consult with or meaningfully integrate the input of affected stakeholders in due diligence rituals, there is a high likelihood that ritualism will creep into the performance of due diligence obligations. Meaningful stakeholder engagement is a core requirement under the UNGPS, which clearly state that due diligence should 'involve meaningful consultation with potentially affected groups and other relevant stakeholders'.[124] The OECD Guidance describes meaningful stakeholder engagement as a key component of the due diligence process 'characterized by two-way communication and … the good faith of participants on both sides. It is also responsive and on-going and includes in many cases engaging with relevant stakeholders before decisions have been made'.[125]

This contribution argues that meaningful stakeholder engagement is essential for due diligence rituals to achieve their transformative regulatory aims. 'In fact, one would even go as far as arguing that there is no effective human rights due diligence without meaningful stakeholder engagement.'[126] Where mHRDD laws, such as the ones analysed here, fail to properly incorporate the requirement of meaningful stakeholder engagement within the due diligence obligations imposed upon companies, they disproportionately empower covered companies to be the key actors in due diligence processes. This runs the risk of allowing due diligence rituals to degenerate into superficial ritualism that does not do enough to consider the perspectives of stakeholders and affected rights-holders, which in turn converts the due diligence process into a perverse theatre of sorts, where companies perform and rights-holders watch from the sidelines.

Ritualism as a Result of Focusing on Processes Rather than Outcomes

Where due diligence laws emphasize compliance with processes rather than a change in outcomes, it is possible for covered companies to lose sight of the overall goal of enhancing the protection of human rights and the environment and minimizing business-related risk in this regard.[127] As they stand, the canvassed mHRDD laws seem to place an excessive focus on due diligence processes rather than human rights outcomes. Such an 'excessive focus on HRDD as a process risks detracting from its central objective: to enable business to respect human rights'.[128] As one scholar has pointed out, 'to the extent that the law focuses on

[123] Ibid.

[124] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), principle 18.

[125] OECD Guidance, note 81, 49.

[126] UN Global Compact Network Germany, *What Makes Stakeholder Engagement Meaningful? 5 Insights From Practice* (UN Global Compact Network Germany, 2022), https://www.globalcompact.de/fileadmin/user_upload/Dokumente_PDFs/UN_GCD_Insights_Series_HR_Due_Diligence_Stakeholderengagement_english.pdf (accessed 1 February 2023), 4.

[127] Landau, note 121, 238.

[128] Quijano and Lopez, note 35, 248–249.

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companies' internal responsibility processes rather than external accountability outcomes ... [it] runs the risk of becoming a substance less sham...'.[129]

In order to prevent ritualism in the performance of due diligence rituals, it is necessary for companies not to lose sight of the desired normative outcomes of due diligence processes, i.e., better protection of human rights and the environment. As highlighted in the previous section, one way to achieve this objective is to ensure the meaningful consultation and participation of affected rights-holders in due diligence processes. By bringing companies face to face with potentially affected persons, in all steps and stages of the due diligence process, it may be possible to prevent a situation where the use of HRDD mistakenly becomes the key standard, thus replacing the business responsibility to respect human rights as the normative ideal.[130]

VI. Conclusion: mHRDD Laws Between Rituals and Ritualism

Despite its limited deployment in BHR thus far, the 'ritual-ritualism' framework is a useful lens through which to analyse the actions and omissions of covered companies within the context of mHRDD laws and their implementation. The proper performance of due diligence rituals has the potential to convert corporate respect for human rights and the environment into a cultural norm, thus enhancing the likelihood of mHRDD laws achieving their purpose of reducing the corporate accountability gap. Significantly, however, given the Janus-faced nature of such rituals, it is also equally plausible to argue that due diligence rituals can simultaneously contribute to the entrenching of a problematic status quo that has allowed TNCs to be able to engage in extractive business practices to the detriment of rights-holders. This is so because the performance of due diligence rituals could imbue companies with an air of compliance, even while doing little to change the structural conditions of a neo-liberal and neo-colonial global order that have played massive roles in allowing TNCs to be what they are today.

In addition, rituals and ritualism may be said to be two sides of the same coin. '[I]t is a fine line, since ritualism is never far from rituals.'[131] Thus, there is always the likelihood that as a consequence of factors such as ambiguity in legal terms, lack of stakeholder engagement and over-focusing on due diligence processes rather than human rights outcomes, due diligence obligations may degenerate into meaningless ritualism. Such ritualism darkens the potential of mHRDD laws, given the possibilities and likelihood of perfunctory, superficial and cosmetic corporate compliance with due diligence obligations.

At the end of the day, the exercise of business authority within the ambit of mHRDD laws creates the possibilities for covered companies to contribute towards the realization of the public interest inherent in preventing violations of human rights and the environment. However, this is not always a given. The interaction between rituals and ritualism in the implementation of due diligence obligations makes it clear that things could change even as they continue to remain the same.

While this contribution has sought to illuminate the potential of the rituals-ritualism framework in the analysis of mHRDD laws, it is necessary to end with a caveat. Underpinning this framework is an assumption that it is possible for mHRDD laws and norms to contribute

[129] 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: Cambridge University Press, 2007) 209.

[130] Landau, note 121, 238. Radu Mares, 'Respect Human Rights: Concept and Convergence' in Robert C Bird, Daniel R Cahoy and Jamie D Prenkert (eds.), *Law, Business and Human Rights: Bridging the Gap* (Cheltenham: Edward Elgar Publishing, 2014) 43.

[131] Ford and O'Brien, note 27, 1246.

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to the development of positive cultures within companies. While this may be possible, at least theoretically, the nuanced reality of how and why companies exercise business authority points to a need for caution. Given the power exercised by many covered companies, as well as the tension between the maximization of corporate profit/shareholders' interests and realization of the public interest inherent in better protection of human rights and the environment, there are clear disincentives for such companies to act fully in line with the expectations of mHRDD laws. Consequently, future research in this area could analyse how mHRDD laws can better create new incentives to ensure that covered companies use their power and legitimacy to advance the public interest. Using the law to change the balance of authority within the company, away from shareholders and towards stakeholders or mandating that directors perform specific tasks – through the creation of new directors' duties for example, may be necessary steps to actually change corporate culture. This suggests a need for far more intrusive legal changes than what is currently contemplated by the canvassed mHRDD laws.

Competing interest. The author declares none.

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