
MOVING TOWARDS PROTECTING HUMAN RIGHTS IN GLOBAL BUSINESS SUPPLY CHAINS

Jernej Letnar Čerňič*

ABSTRACT

Global economy has been the driving force behind socio-economic development in all parts of the world. Yet in certain segments, it can negatively affect the dignity of ordinary workers, particularly in developing countries. Global business production nowadays functions through various levels of global supply chains with producers based in the various corners of the world. However, corporate human rights obligations in the global supply chains are often unclear or non-existent. This Article first explores the normative framework for protecting human rights in the global supply chains by examining existing and potential sources of corporate human rights obligations in international law, domestic systems, and internal policies of corporations. It discusses potential alternatives to move forward and strengthen the supervision of global supply chains in order to prevent future human rights abuses.

I.	INTRODUCTION.....	101
II.	NORMATIVE FRAMEWORK FOR PROTECTING HUMAN RIGHTS IN THE GLOBAL SUPPLY CHAINS.....	104
III.	THE NATURE AND SCOPE OF GUARANTEEING HUMANS RIGHTS WITHIN THE GLOBAL SUPPLY CHAINS.....	110
IV.	HOW TO MOVE FORWARD?.....	113

I. INTRODUCTION

Modern global business environments function within extremely complex frameworks, both domestically and internationally. They are extremely multi-layered and interconnected. Transnational corporations conduct business on many operational levels and throughout several different

* Associate Professor of Human Rights Law at the Graduate School of Government and European Studies, Kranj and Ljubljana, Slovenia, and Senior Research Fellow at the University Institute of European Studies in Turin, Italy.

countries,¹ and maintain business relationships with hundreds of suppliers, contractors, distributors, and other business partners worldwide.² A majority of business dealings operate through interwoven global supply chains.³ Managing supply chains is often extremely complex, as the chains stretch over several tiers with different corporations acting as suppliers, contractors, sub-suppliers, subcontractors, or other business partners.⁴ International corporations have in this way maintained business relationships across many different countries and industries.⁵ For instance, Volkswagen Group, a global automobile corporation, operates in 23 countries and in 39 locations.⁶ Similarly, IKEA, an international retail corporation, had 1,026 suppliers in 53 countries in 2011.⁷ Meanwhile, H&M, an international textile corporation, sources garments “from around 800 independent suppliers, mainly in Europe and Asia.”⁸

The International Labor Organization (“ILO”) noted in 2015 that “[o]ut of 40 countries with available data to which the methodology could be applied, 453 million people were employed in GSCs in 2013, compared with 296 million in 1995.”⁹ It further observed that “[m]ost of the overall increase is driven by emerging economies, where GSC-related jobs grew by an estimated 116 million. Overall, GSC-related jobs represent 20.6 percent of total employment among the countries analyzed, compared with 16.4 percent in 1995.”¹⁰ Several hundred million people are engaged on a daily basis in

¹ See RHYS JENKINS, TRANSNATIONAL CORPORATIONS AND UNEVEN DEVELOPMENT: THE INTERNATIONALIZATION OF CAPITAL AND THE THIRD WORLD 1-3 (2013).

² See generally ALESSANDRO NICITA ET AL., GLOBAL SUPPLY CHAINS: TRADE AND ECONOMIC POLICIES FOR DEVELOPING COUNTRIES - POLICY ISSUES IN INTERNATIONAL TRADE AND COMMODITIES STUDY SERIES NO. 55 (Victor Ognivtsev ed., 2013) (examining state policies in global supply chains).

³ Int’l Labor Organization [ILO], *Purchasing Practices and Working Conditions in Global Supply Chains: Global Survey Results*, INWORK ISSUE BRIEF NO.10 (June 9, 2017).

⁴ *Id.* at 1.

⁵ See generally Anna Chou, *A Case in Supply Chain and Business Sustainability: Samsung’s Management of Human Rights in Consumer Electronics Manufacturing*, in RESEARCH HANDBOOK ON TRANSNATIONAL CORPORATIONS 255, 255-57 (Alice De Jonge & Roman Tomasic eds., 2017).

⁶ *Sustainability Report 2016: Supplier Management*, VOLKSWAGEN, <http://sustainabilityreport2016.volkswagenag.com/economy/supplier-management.html> [<https://perma.cc/3ATN-Y7KR>].

⁷ Institute for Industrial Productivity, *IKEA*, SUPPLY CHAIN INITIATIVES DATABASE, <http://www.iipnetwork.org/databases/supply-chain/ikea> [<https://perma.cc/892U-CG69>].

⁸ *Production*, H&M, https://career.hm.com/content/hmcareer/en_se/workingathm/what-can-you-do-here/corporate/production.html [<https://perma.cc/MY9V-4Y5L>].

⁹ Int’l Labour Organization [ILO], *World Employment and Social Outlook 2015: The Changing Nature of Jobs*, at 132 (2015) (footnote omitted).

¹⁰ *Id.* (footnote omitted) (citation omitted).

global supply chains that provide fuel for global business transactions.¹¹ On the other hand, several allegations have been made regarding the lack of respect and protection for human rights in global supply chains due to the absence of any supervisory mechanism to ensure compliance.¹² Similarly shocking are reports of alleged violations in global garment industry.¹³ Is it therefore realistic to expect and ask corporations to protect human rights across every level of their supply chains?

It is now taken for granted that corporations have obligations, mostly deriving from domestic law, to respect human rights, i.e., negative obligations not to interfere with individual human rights, stemming primarily from domestic legislation.¹⁴ However, existing and potential positive obligations of corporations in their supply chains is uncharted territory.¹⁵ What obligations do corporations have, if any, to control their supply chains, including the conduct of suppliers, contractors, and other business partners relating to respect of human rights? Is the obligation to protect human rights in the supply chain an obligation of conduct or result? How far does the obligation to control supply chain extend?

This short Article will address these issues. Section II first examines the existing normative framework for protecting human rights in the global supply chains at the local, international, and internal corporate levels. Section III deals with the legal nature and scope of guaranteeing human rights through the global supply chains. Section IV proposes how to enhance the protection of human rights in global supply chains and how to improve access to justice. This Article submits that there is an apparent lack of binding obligation at the domestic and international levels in terms of a corporation's responsibility to protect human rights within its global supply chains. A proposed solution is to enhance the protection of human rights primarily at the domestic levels.

¹¹ *Id.*

¹² See, e.g., *Seafood From Slaves - An AP investigation Helps Free Slaves in the 21st Century*, ASSOCIATED PRESS, <https://www.ap.org/explore/seafood-from-slaves/> [<https://perma.cc/BPS6-U3YP>] (reporting abusive practices in fishing industry in South-East Asia).

¹³ Tansy Hoskins, *Reliving the Rana Plaza Factory Collapse: A History of Cities in 50 Buildings, Day 22*, THE GUARDIAN (Apr. 23, 2015), <https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings> [<https://perma.cc/7PPY-HHAE>]. For a detailed discussion see also, Larry Catá Backer, *Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 11, 11 (2016).

¹⁴ See generally HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 162-88 (Surya Deva & David Bilchitz eds., 2013) [hereinafter HUMAN RIGHTS OBLIGATIONS OF BUSINESS].

¹⁵ See, e.g., Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. & HUM. RTS. J., 195, 198-201 (2017).

II. NORMATIVE FRAMEWORK FOR PROTECTING HUMAN RIGHTS IN THE GLOBAL SUPPLY CHAINS

Do corporations have an obligation to ensure that minimum standards of human rights are protected within their global chains? What level of diligence should they adopt? Where do such obligations derive from? At the international level, there are currently only soft law documents concerning corporate human rights obligations,¹⁶ but there are no binding obligations to protect human rights in global markets.¹⁷ At best, these types of international legal obligations have been scattered across different quasi-legal documents.¹⁸

For instance, The United Nations Guiding Principles on Business and Human Rights (“UN Guiding Principles”), an authoritative United Nations (“UN”) document on corporations’ human rights obligations, states in Principle 13 that:

The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹⁹

Principle 13 first establishes a negative obligation for businesses not to cause human rights abuses. It also establishes positive obligations for corporations to strive towards ensuring that their business partners are not involved in

¹⁶ See Nicola Jägers, *UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?*, 29 NETH. Q. HUM. RTS. 159, 160-62 (2011). See also, Damiano de Felice & Andreas Graf, *The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights*, 7 J. HUM. RTS. PRAC. 40, 40-41 (2015); Claire Methven O’Brien et al., *National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool*, 1 BUS. & HUM. RTS. J. 117, 117 (2016).

¹⁷ See generally BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE (Dorothee Baumann-Pauly & Justine Nolan eds., 2016); Carlos Lopez, *Struggling to Take Off?: The Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights*, 2 BUS. & HUM. RTS. J. 365 (2017).

¹⁸ Lopez, *supra* note 17. See generally, Nicolás Carrillo-Santarelli, *Corporate Human Rights Obligations: Controversial but Necessary*, BUS. HUM. RTS. RESOURCE CTR., <http://www.business-humanrights.org/en/corporate-human-rights-obligations-controversial-but-necessary> [https://perma.cc/9NM6-LKWZ].

¹⁹ John Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises - Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 13, U.N. DOC. A/HRC/17/31, annex (Mar. 21, 2011).

human rights abuses. Corporations are able to ensure that their business partners do not abuse human rights by including provisions addressing human rights in the contracts with business partners, employing preventative measures, conducting regular inspections, and providing remedies to potential victims. Furthermore, Principle 17 of the UN Guiding Principles provides for human rights due diligence by requiring corporations to take active steps to avoid human rights violations both directly and indirectly.²⁰ However, by using the verb “should” instead of “shall,”²¹ Principle 17 fails to unequivocally create binding obligations. That said, it remains questionable whether the UN Guiding Principles can be described as a binding source of law, as they were not adopted in the form of an international treaty, and accordingly were not opened for state ratification.²² In other words, if binding corporate obligations could be derived from the UN Guiding Principles, they could perhaps be described as quasi-legal UN documents that reflect existing and potential obligations of corporations.

The ILO Resolution concerning decent work in global supply chains outlines a business’s responsibility to respect labor rights, and a government’s duty to implement and enforce the laws and regulations according to the UN Guiding Principles.²³ It further encourages governments to “(i) [s]et out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations, and the fundamental principles and rights at work for all workers, including migrant workers, homeworkers, workers in non-standard forms of employment and workers in EPZs.”²⁴ However, the ILO Resolution does not specifically state what is expected from corporations, once again making it difficult to argue that corporations have a binding obligation to conduct due diligence across their supply chains. The question arises as to whether this document possesses any legal force or potential added value, because it is

²⁰ “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking responses as well as communicating how impacts are addressed.” *Id.* ¶ 17.

²¹ *See id.*

²² Sara Blackwell & Nicole Vander Meulen, *Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights*, 6 NOTRE DAME J. INT’L & COMP. L. 51, 54-57 (2016). *See also*, Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41, 56-57 (2016).

²³ *See* ILO, General Conference §10, *Resolution Concerning Decent Work in Global Supply Chains*, (June 10, 2016), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_497555.pdf [<https://perma.cc/N8AM-N9YY>].

²⁴ *Id.* at § 16 (i).

accepted that the ILO Resolution does not have a binding nature,²⁵ but rather only provides recommendations and possible evidence of potential emerging obligations for businesses.²⁶

Furthermore, sectorial guides exist to ensure the protection of human rights within global supply chains.²⁷ Most of these protections have been developed by the Organization for Economic Co-operation and Development (“OECD”) after disasters in the southern hemisphere caused the loss of many lives, while others have been developed with the assistance of the ILO.²⁸ For instance, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provides different tools that companies may use to assess the risk of human rights violations.²⁹ The OECD thereafter developed a supervisory tool to implement the guidance, and regularly updates this tool.³⁰ In 2017, the OECD published the Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector.³¹ It advises businesses to “strengthen management systems in order to conduct due diligence on risks of harm in the enterprise’s own

²⁵ See Alfred Wisskirchen, *The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience*, 144 INT’L LAB. REV. 253, 269 (2005).

²⁶ See Justine Nolan, *The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 138, 157-58 (Surya Deva & David Bilchitz eds., 2013); Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850, 864-66 (1989).

²⁷ See, e.g., Justine Nolan, *Human Rights and Global Corporate Supply Chains: Is Effective Supply Chain Accountability Possible?*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 238, 262-63 (Surya Deva & David Bilchitz ed., 2017) [hereinafter Nolan, *Human Rights and Global Supply Chains*].

²⁸ *Id.*

²⁸ See, e.g., Motoko Aizawa & Salil Tripathi, *Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers*, 1 BUS. & HUM. RTS. J. 145, 148 (2016).

²⁹ “A company assesses risk by identifying the factual circumstances of its activities and relationships and evaluating those facts against relevant standards provided under national and international law, recommendations on responsible business conduct by international organisations, government-backed tools, private sector voluntary initiatives and a company’s internal policies and systems.” OECD, DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 13 (3rd ed. 2016).

³⁰ See OECD, *Implementing the OECD Due Diligence Guidance* (2011), <http://www.oecd.org/corporate/mne/implementingtheguidance.htm> [<https://perma.cc/8NDD-49UW>].

³¹ OECD, *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (2017), <http://mneguidelines.oecd.org/oecd-due-diligence-guidance-garment-footwear.pdf> [<https://perma.cc/N7HM-QBTM>] [hereinafter OECD, *Due Diligence Guidance*].

operations and in its supply chain,”³² and to take active measures to prevent risk, supervise supply chains, and provide remedy.³³ Both OECD documents on due diligence serve as an implementation tool of the OECD Guidelines for Multinational Enterprises,³⁴ a quasi-legal document stating that multinational enterprises should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”³⁵ It remains to be seen if those documents will be able to position themselves as authoritative documents for the protection of human rights within supply chains.

The domestic law of most states does not provide that corporations have an extra-territorial obligation to engage in any degree of diligence to ensure that their suppliers comply with certain minimum standards.³⁶ However some exceptions require subsidiaries—but not suppliers or operators—to exercise their duty of care in ensuring that human rights are protected.³⁷ In this way, several domestic sources provide a legal basis for corporations to control their supply chains with respect to human rights.³⁸ For instance, the French statute on the duty of care of a parent corporation and its subcontracting companies³⁹ obliges corporations to use reasonable care in conducting due diligence throughout their supply chains.⁴⁰ Additionally, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) obliges corporations in the United States to submit

³² *Id.* at 24.

³³ *Id.*

³⁴ See generally SECRETARY-GENERAL OF THE OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (1st ed., 2011), <http://www.oecd.org/corporate/mne/48004323.pdf> [<https://perma.cc/V3TN-6YQP>].

³⁵ OECD, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, at 11, DAF/IME/WPG(2000)15/FINAL (Oct. 31, 2001).

³⁶ GLOBAL JUSTICE AND STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 112-13, 148 (Malcolm Langford, et al. eds., 2013).

³⁷ See generally 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 O.J. (L 330/1) (providing binding legislation for corporate non-financial reporting).

³⁸ See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 2213 (2010).

³⁹ Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of the Parent Companies and the Companies Giving Orders], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 27, 2017.

⁴⁰ See Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, ¶ 204 (2010). Richard Meeran, *Tort Litigation Against Multinationals for Violations of Human Rights: An Overview of the Position Outside the US*, 3 CITY U. H.K. L. REV. 1, 23-24 (2011).

annual disclosures to the Securities and Exchange Commission stating whether any minerals sourced by the corporations originated from the Democratic Republic of Congo.⁴¹ More specifically, section 1504 requires extractive companies to

issue final rules that require each resource extraction issuer to include in an annual report . . . information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.⁴²

Similarly, the Transparency in Supply Chains Act (2015) enacted in California provides for some corporate obligations to control human rights compliance within supply chains.⁴³ All in all, domestic systems provide some evidence that corporations are obliged to respect human rights in their supply chains.

Several transnational corporations have put in place codes of conduct as well as internal supervisory and auditing systems to control their supply chains.⁴⁴ IKEA, for example, has developed its own code of conduct called IWAY,⁴⁵ and has asked some of its suppliers to share the requirements of IWAY with their sub-suppliers and to ensure IWAY is being complied with.⁴⁶ Further, it has asked that “[a]ll suppliers conduct biannual self-assessments on IWAY and industry-specific requirements for pulp, paper,

⁴¹ Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502.

⁴² *Id.* § 1504 (2)(A).

⁴³ California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West, 2010).

⁴⁴ ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW 13-14 (Hugh Collins et al. eds., 2015). *See generally* NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY – BRIDGING THE ACCOUNTABILITY GAP 209-25 (1st ed. 2017).

⁴⁵ *See* IKEA, IWAY STANDARD – MINIMUM REQUIREMENTS FOR ENVIRONMENT AND SOCIAL & WORKING CONDITIONS WHEN PURCHASING PRODUCTS, MATERIALS, AND SERVICES (Apr. 29, 2016), http://www.ikea.com/ms/en_AU/media/pdf/global/IWAY_Standard_Ed_5.2.pdf [<https://perma.cc/PB6X-ZKFM>].

⁴⁶ “We ask our tier 1 suppliers to communicate IWAY Must requirements with their own suppliers, and to register them on our sub-supplier tracking system. It is the responsibility of our tier 1 suppliers to audit their critical sub-suppliers and ensure IWAY Must compliance.” IKEA GROUP, SUSTAINABILITY REPORT FY16 72 (2016) (footnote omitted), http://www.ikea.com/ms/en_US/img/ad_content/IKEA_Group_Sustainability_Report_FY16.pdf.

print, and digital.”⁴⁷

Finally, due to insufficient regulation, a large burden lies with the international civil society which, in various ways, monitors the functionality of transnational corporations.⁴⁸ The international non-governmental organization “Ethical Corporation,” for instance, publishes a “Global Fashion Index,” which ranks global textile transnational corporations according to the amount of information they publish on their global supply chains and with respect to their implementation of minimum standards in the field of human rights protection in supply chains.⁴⁹ The results are not surprising as one can find well-known international corporations at the top, such as Adidas, Levi Strauss, H&M, Marks & Spencer, Puma, Banana Republic, Gap, and Old Navy.⁵⁰ Global corporations usually do not monitor the conditions in the textile factories of local suppliers on a daily basis.⁵¹ In most cases, precise locations of suppliers’ factories are carefully concealed.⁵² Only a few corporations publish information regarding suppliers on their website.⁵³ H&M, for example, publishes such information every three months, explaining where they maintain supplier relationships with local factories.⁵⁴ The majority of corporations still prefer to keep their list of suppliers secret.⁵⁵ For instance, in Cambodia, ILO runs the “Better Factories Cambodia” initiative, which aims to “improve working conditions in Cambodia’s export garment factories. It combines independent monitoring with finding solutions (through suggestions to management), training, advice

⁴⁷ *Id.* at 67 (footnotes omitted).

⁴⁸ *Id.* at 7, 10. See also Surya Deva, *Defining the Scope of the Proposed Treaty on Business and Human Rights, Submission to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (2016), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/SuryaDeva.doc>.

⁴⁹ Ethical Consumer, FASHION TRANSPARENCY INDEX 2017 23, https://issuu.com/fashionrevolution/docs/fr_fashiontransparencyindex2017?e=25766662/47726047.

⁵⁰ *Id.*

⁵¹ See *id.* at 50.

⁵² *Id.*

⁵³ See ANDRÉ CAMPOS ET AL., FROM MORAL RESPONSIBILITY TO LEGAL LIABILITY? MODERN DAY SLAVERY CONDITIONS IN THE GLOBAL GARMENT SUPPLY CHAIN AND THE NEED TO STRENGTHEN REGULATORY FRAMEWORKS: THE CASE OF INDITEX-ZARA IN BRAZIL 45 (2015), <http://reporterbrasil.org.br/wp-content/uploads/2016/08/From-moral-responsibility-to-legal-liability.pdf> [<https://perma.cc/5ZNE-GTZ5>].

⁵⁴ *Id.*

⁵⁵ Rebecca Ley, *#whomademyclothes: Transparency poor in garment supply chain, study finds*, ETHICAL CORPORATION, (Apr. 25, 2017), <http://www.ethicalcorp.com/whomademyclothes-transparency-poor-garment-supply-chain-study-finds> [<https://perma.cc/W8QE-UNXR>].

and information.”⁵⁶

All three levels of sources, international level, domestic level, and voluntary commitments and policies of corporations support the argument that corporations should be accountable for the protection of human rights through their global supply chains.⁵⁷ However, these sources do not equivocally provide binding obligations for corporations,⁵⁸ but rather that corporations must strive to ensure that their business partners comply with human rights guarantees.⁵⁹ It is also important to note that home states of suppliers of international corporations do have positive obligations to ensure that corporations based and operating in their territory do not infringe their rights.⁶⁰ However, home states are often incapable of guaranteeing human rights within their territory due to the deficiencies in the exercise of the rule of law.⁶¹

III. THE NATURE AND SCOPE OF GUARANTEEING HUMANS RIGHTS WITHIN THE GLOBAL SUPPLY CHAINS

International human rights law provides for positive obligations for states to ensure that private organizations respect human rights in their horizontal relationships.⁶² The UN Human Rights Committee confirmed this in General Comment no. 31, where it stated that

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not

⁵⁶ ILO, *Better Factories Cambodia*, http://www.ilo.org/asia/projects/WCMS_099340/lang-en/index.htm.

⁵⁷ Radu Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 NORDIC J. INT’L L. 193, 243-44 (2010).

⁵⁸ *Id.* at 256-60. See also, LOUISE VYTOPIL, CONTRACTUAL CONTROL IN THE SUPPLY CHAIN. ON CORPORATE SOCIAL RESPONSIBILITY, CODES OF CONDUCT, CONTRACTS AND (AVOIDING) LIABILITY 257-60 (2015).

⁵⁹ ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 266-68 (2006).

⁶⁰ Sara Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL L.J. 565, 569-72 (2008). See generally PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS AND THE HOME STATE ADVANTAGE (2014).

⁶¹ See, e.g., Tara Van Ho, *Is it Already Too Late for Colombia’s Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives*, 5 INT’L HUM. RTS. L. REV. 60, 81-84 (2016).

⁶² Andrew Clapham, *Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to protect the Right of Access to the Civil Courts, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 717-18 (Craig Scott ed., 2001). See also, Angus I. L. Campbell, *Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors*, 10 EDINBURGH L. REV. 399, 399-400 (2006).

just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.⁶³

Such state obligations are focused on the state's conduct, not the result.⁶⁴ Do corporations have similar positive obligations to control their contractors, suppliers, and subsidiaries? It has been accepted that corporations should take positive steps to prevent violations of human rights within their supply chains.⁶⁵ However, unlike the broad state obligations, corporate obligations should be much narrower in scope. Multiple questions remain: to which tier of supply chain should a corporation's obligation to control its suppliers and sub-suppliers be applied? How far down the supply chain should the obligation to ensure human rights compliance extend—the first tier, second tier, or further? Where and how can one draw a line?

It would be erroneous to argue that corporations should control their global supply chains only to a certain tier or level. What is essential is not just a tier or a number, but rather how a corporation manages its supply chain and whether it strives, through its best available means, to ensure that human rights are protected. One can argue that corporate obligations to ensure the respect of human rights throughout their supply chains is an obligation of conduct, not an obligation of result. An obligation of conduct refers to a corporation's obligation to take certain measures. These measures include educating suppliers and other business partners—including auditing and supervising—in order to prevent human rights violations from occurring; conducting transparent, efficient, independent, and diligent investigations into the alleged violations; and providing effective remedies.⁶⁶ Neither corporations nor states are obliged to prevent every single violation from occurring, as this would be impossible.⁶⁷ However, the respect for human

⁶³ See, U.N. Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

⁶⁴ See MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 187-92 (2003).

⁶⁵ See U.N. Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, U.N. Doc. E/C.12/GC/24 (2017); Justine Nolan, *Business and Human Rights: The Challenge of Putting Principles into Practice and Regulating Global Supply Chains*, 42 *ALT. L. J.* 42, 44 (2017).

⁶⁶ See, e.g., Nolan, *Human Rights and Global Supply Chains*, *supra* note 27, at 249-50; Holly Cullen, *The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond*, 48 *GEO. WASH. INT'L. L. REV.* 743, 759-60 (2016).

⁶⁷ For a detailed discussion, see SURYA DEVA, *REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS* 208-11 (2012) (arguing for more effective regulation of corporations in domestic legal systems).

rights in global supply chains often falls outside the control of corporations, and depends more on the general rule-of-law situation of the countries where suppliers operate.⁶⁸ Therefore, the primary obligation of transnational corporations is to demonstrate the proper management of their supply chains.

Parent corporations have straightforward obligations within larger corporate groups towards their subsidiaries. In *Chandler v. Cape plc*, the English Court of Appeal developed a test of potential positive corporate obligations and stated that

in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.⁶⁹

Such obligations could be, with some changes, extended to relationships of corporations with suppliers or business partners. Protecting human rights in global business supply chains requires active steps from corporations and a certain amount of positive obligations to ensure that their business partners, both within and outside the same corporate group, respect human rights. Further, the Office of the UN High Commissioner for Human Rights has observed that

Due Diligence has been defined as 'such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the

⁶⁸ Lelia Mooney, *Promoting the Rule of Law in the Intersection of Business, Human Rights, and Sustainability*, 46 GEO. J. INT'L. L. 1135, 1138-39 (2015).

⁶⁹ *Chandler v. Cape plc* [2012] EWCA (Civ) 525, para. 80. For a detailed discussion, see Gabrielle Holly, *Access to Remedy Under the UNGPs: Vedanta and the Expansion of Parent Company Liability*, EJIL TALK! (Oct. 31, 2017), <https://www.ejiltalk.org/if-the-pleading-represents-the-actuality-vedanta-access-to-remedy-and-the-prospect-of-a-duty-of-care-owed-by-a-parent-company-to-those-affected-by-acts-of-subsidiaries/> [https://perma.cc/Y35M-36QV].

particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.⁷⁰ In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.⁷⁰

All in all, corporations have a two-fold obligation in their global supply chains. First, they are asked not to actively infringe upon human rights through their conduct.⁷¹ Second, they are to take measures to prevent suppliers and other business partners from violating human rights.⁷² Positive obligations of due diligence require corporations to strive at all times to manage and supervise their supply chains, and to prevent violations from occurring. In the case of violations, corporations are asked to ensure transparent, independent, impartial, and efficient investigations, and thereafter to provide access to an effective remedy.⁷³

IV. HOW TO MOVE FORWARD?

In the absence of binding regulations for corporate conduct in the supply chain, one clear suggestion would be to adopt binding rules imposing on corporations an obligation to conduct due diligence and to perform a human rights impact assessment. The elements of the proposed UN Treaty on Business and Human Rights also refer to the due diligence obligations. They provide that

State Parties shall adopt legislative and other measures to require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes, including codes of conduct, and to identify and

⁷⁰ Office of the U.N. High Comm'r for Hum. Rts. [OHCHR], *THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 6* (2012) (quoting BLACK'S LAW DICTIONARY (6th ed. 1990)). See also OECD, *Due Diligence Guidelines for Responsible Business Conduct (Draft 2.1)*, at 16-19, DAF/INV/RBC(2016)6, June 2016.

⁷¹ Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9 EUR. COMPANY L. 101 (2012) (quoting Rep. of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 54, A/HRC/8/5 (Apr. 7, 2008)).

⁷² Human Rights Obligations of Business, *supra* note 14, at 15.

⁷³ OHCHR, *Discussion Paper, Accountability and Remedy Project Part II: State-based non-judicial mechanisms, State-based non-judicial mechanisms for accountability and remedy for business-related human rights abuses: Supporting actors or lead players?* (Nov. 2, 2017) (outlining state-based non-judicial mechanisms for accountability and remedy for business-related human rights abuses).

address human rights impacts resulting from their activities. Such measures shall apply to all the TNCs and OBEs in their territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain.⁷⁴

The elements are framed too broadly, as they do not provide detailed rules on how such corporate obligations would function on a daily basis. Further, due to several obstacles,⁷⁵ it is speculative whether the Treaty will ever be adopted or ratified.

Several individual mechanisms on how to control supply chains have been developed, particularly following recent disasters.⁷⁶ For instance, after the Rana Plaza disaster in 2013, stakeholders signed the Bangladesh Accord (the “Accord”) in order to ensure “a safe and sustainable Bangladeshi Ready-Made Garment (“RMG”) industry in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures.”⁷⁷ The Accord provides for “safety inspections, remediation and fire safety training at facilities representing, in the aggregate, not less than 30%, approximately, of each signatory company’s annual production in Bangladesh by volume (‘Tier 1 factories’)”⁷⁸ and “[i]nspection and remediation at any remaining major or long-term suppliers to each company (‘Tier 2 factories’). Together, Tier 1 and Tier 2 factories shall represent not less than 65%, approximately, of each signatory company’s production in Bangladesh by volume”.⁷⁹ It is interesting that the Accord provides a right to a remedy; there are currently two cases pending against “two global fashion brands” before the Permanent Court of Arbitration.⁸⁰ However, these individual approaches are few and scattered,⁸¹ whereas

⁷⁴ Chairmanship of the Open-Ended Intergovernmental Working Group, *Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 7 (Sept. 29, 2017).

⁷⁵ Obstacles include, for example, difficulties in imposing direct human rights obligations on corporations, and political opposition by some developed states and by influential business associations. See David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 1 BUS. & HUM. RTS. J. 203, 203-04 (2014); Olivier de Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41, 47-54 (2016).

⁷⁶ Baskut Tuncak, *Lessons from the Samarco Disaster*, 2 BUS. & HUM. RTS. J. 157, 157-62 (2017).

⁷⁷ Accord on Fire and Building Safety in Bangladesh (Mar. 13, 2013), http://bangladeshaccord.org/wp-content/uploads/the_accord.pdf [<https://perma.cc/JMC2-S2MQ>].

⁷⁸ *Id.* § 1.

⁷⁹ *Id.* § 2.

⁸⁰ See Permanent Court of Arbitration, *Bangladesh Accord Arbitrations*, <https://pca-cpa.org/en/cases/152/>.

⁸¹ See Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶ 18-25, U.N. Doc. A/72/162 (July 18, 2017).

systematic and general approaches have been lacking.⁸² Access to justice remains one of the most difficult challenges in the field of business and human rights.⁸³

The most feasible approach would be to follow the example of the recent French law⁸⁴ and of the recent OECD Guidance in making due diligence processes binding in domestic law.⁸⁵ The Guidance is of particular importance, as it recommends six steps that corporations should take in order to observe human rights in their supply chains:

[1] Embed responsible business conduct in enterprise policy and management systems . . . [2] Identify actual and potential harms in the enterprise's own operations and in its supply chain . . . [3] Cease, prevent or mitigate harm in the enterprise's own operations and in its supply chain . . . [4] Track . . . [5] Communicate . . . [and] [6] Provide for or co-operate in remediation when appropriate.⁸⁶

These steps are required for corporations to meet their obligation of conduct to observe human rights throughout their global supply chains.⁸⁷

However, it would be futile to wait for binding international regulations on human rights in supply chains, as this could take several decades. Extraterritorial legislation similar to France's law is more likely to work with a combination of both a voluntary and binding approach from bottom-up and top-down, including internal auditing mechanisms from corporations themselves. Even though such initiatives may be scattered or piecemeal,⁸⁸ together they generate a movement towards binding corporate obligations whereby corporations proceed with due diligence before, during, and after the exercise of business operations.⁸⁹ However, the first step for every corporation is to condition existing and new business relationships on the

⁸² *Id.* ¶¶ 75-78, 86.

⁸³ Surya Deva, *Access to Effective Remedy: Taking Human Rights and Rights Holders Seriously*, CAMBRIDGE CORE BLOG (Nov. 14, 2017), <http://blog.journals.cambridge.org/2017/11/14/access-to-effective-remedy-taking-human-rights-and-rights-holders-seriously/> [<https://perma.cc/UVE9-ML48>].

⁸⁴ *See* Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of the Parent Companies and the Companies Giving Orders], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 27, 2017.

⁸⁵ *See* OECD, *Due Diligence Guidance*, *supra* note 30.

⁸⁶ *Id.* at 24.

⁸⁷ *Id.* at 19-20. *See, e.g.,* Karin Dryhurst, *Liability up the Supply Chain: Corporate Accountability for Labor Trafficking*, 45 N.Y.U. J. INT'L L. & POL. 641, 665-66 (2013).

⁸⁸ *See generally* Justine Nolan, *Human Rights and Global Supply Chains*, *supra* note 27.

⁸⁹ *See generally* NICOLAS CARRILLO SANTARELLI, *DIRECT INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS: A LEGAL AND ETHICAL NECESSITY* (2017) (arguing that non-state actors have direct obligations in international human rights law).

protection of human rights in their global supply chains.

It is hard to expect transnational corporations to voluntarily take steps beyond the policies of corporate social responsibility. Vulnerable workers at textile and other factories predominantly in the southern hemisphere do not have sufficient social power to make changes themselves.⁹⁰ Those changes must come from the top levels of international governance in the form of different regulation strategies, as bottom-up initiatives are often unsuccessful.⁹¹ When the first dominos of positive change in the global supply chain of textile corporations fall, they will be followed by others, down to the lowest supplier level. Equally difficult is the question of what this will mean for foreign direct investment in developing countries, as corporations are often attracted to those regions due to low levels of domestic regulation.⁹² The hope is that international corporations will more effectively implement human rights protections, whilst simultaneously looking for a competitive advantage to continue to contribute to the further economic and social development of developing countries. A further split between the corporate interests of transnational corporations and the individual rights of local inhabitants in developing countries should be avoided, and a balance must be found between frequently opposing objectives.

⁹⁰ Alexandra Rose Caleca, *The Effects of Globalization on Bangladesh's Ready-Made Garment Industry: The High Cost of Cheap Clothing*, 40 BROOK. J. INT'L L. 279, 291-98 (2014).

⁹¹ See, e.g., Bassina Farbenblum & Justine Nolan, *The Business of Migrant Worker Recruitment: Who has the Responsibility and Leverage to Protect Rights?*, 52 TEX. INT'L L. J. 1, 22-29 (2017).

⁹² See Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements*, 38 U. PA. J. INT'L L. 425, 454-60 (2017). See generally Anil Yilmaz-Vastardis & Tara Van Ho, *Integrating Human Rights into the Extractive Industries: How Contracts Can Achieve Protection*, in NATURAL RESOURCES GRABBING: AN INTERNATIONAL PERSPECTIVE 225 (Francesca Romanin Jacur et al. eds., 2015).