15 The Business Sector and the Rights to Work and Just and Favourable Conditions of Work

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15.1 Introduction

Theoretical underpinnings, scope and normative force of the rights to work and just and favourable conditions of work have been contentious even in the traditional state-centric paradigm of human rights protection.[1] This makes the task of specifying the role of the business sector in securing these rights particularly taxing, especially because the frameworks governing the responsibility of businesses for human rights protection in general have been in a state of flux.

The goal of this chapter is to elucidate the role and responsibility of the business sector for safeguarding these two rights by clarifying the origins, legal nature, scope and enforcement of obligations placed upon corporate actors. Specifically, the chapter examines whether and how the status of a duty-bearer affects the ambit of the two rights and obligations they give rise to. In other words, what are the differences between the role of businesses and that of states in securing the rights to work and just and favourable conditions of work? While the traditional (positivist) paradigm of human rights protection sees states as ultimately responsible for ensuring that rights are respected by everyone within their respective jurisdictions, certain aspects of the two rights may be fulfilled *only* by states. In that sense, the scope of duties arising out of the rights to work and just and favourable conditions of work which businesses can in theory be responsible for is materially different.

In addition, the chapter seeks to establish whether and how the status of a right-holder affects the obligations and responsibility placed upon business actors and whether any obligations are owed to individuals

[1] See for example V Mantouvalou (ed.), *The Right to Work Legal and Philosophical Perspectives* (Hart 2014).

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employed by the subsidiaries and suppliers of a business actor who are based outside of its country of domicile. The answer to these questions largely depends on the source of obligations placed upon corporate actors. If obligations of businesses to secure the rights to work and just and favourable conditions of work stem directly from international law, it is plausible to assume that they apply regardless of the status and the country of domicile of a right-holder. In that context, the involvement of a corporate actor in adverse human rights impacts – through its own activities or business relationships – determines the scope of the latter's responsibility.[2] If, however, the two rights bind only states, which are required to give them effect through domestic legislation, the extent to which duties of corporate actors extend to individuals beyond the territory of their country of domicile depends on whether such domestic legislation envisages any extraterritorial obligations. At the moment, only a few countries provide for such a possibility, but there is a palpable trend of domestic legislation moving towards that direction.[3] Could it be that international law *mandates* states to prescribe such extraterritorial obligations for their corporate nationals? While some may find this proposition outlandish, the chapter shows that it is not entirely unwarranted.

The question of the role of the business sector in securing the rights to work and just and favourable conditions of work in general, and in extraterritorial situations in particular, is pertinent in the current globalised economy. Businesses actors, especially multinational corporations, wield considerable power compared to that of states and have been shifting production to countries with weak labour rights protections.[4] As a result,

[2] The principle of due diligence has become a standard for assessing business conduct with regards to their involvement in adverse human rights impacts and was first introduced by the UN OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework', UN Doc HR/PUB/11/04 (2011) [UNGPs]. Principle 17 specifies that: '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, tracking responses, and communicating how impacts are addressed.' However, the Commentary to this principle specifies that 'business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses'. See further L Smit et al., 'Study on Due Diligence Requirements Through the Supply Chain: Final Report' (European Commission 2020).

[3] Ibid., 19.

[4] R Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press 2013) 10.

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the vast number of workers in precarious jobs are left without protection even against the most severe forms of labour exploitation, exposing the traditional paradigm of human rights protection as manifestly out of touch with modern life.

Section 15.2 first outlines the rights to work and just and favourable conditions of work, their origins, nature, scope and relationship. It sketches out the legal parameters of the two rights that stem from international human rights law. The focus is on the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the interpretations of the two rights by the Committee on Economic, Social and Cultural Rights (CESCR) due to their global reach.[5] Section 15.3 then seeks to clarify the ambit of these rights when applied against business actors as opposed to states. It explores the nature and scope of business' obligations to secure the rights to work and just and favourable conditions of work and different modes of putting such duties into effect. In doing so, Section 15.3 examines a case study on labour rights abuses in global food supply chains, which highlights the problems with relying solely on the municipal legal regimes and territorial approach to safeguarding labour rights. In conclusion, the chapter reflects on the three modalities of framing obligations of the business sector to secure the rights to work and just and favourable conditions of work in today's globalised economy and considers whether states have, or should have, an international obligation to enact and enforce legislation that enables individuals from other jurisdictions to seek redress for the violations of the two rights by their corporate nationals.

15.2 The Rights to Work and Just and Favourable Conditions of Work in International Human Rights Law

The rights to work and just and favourable conditions of work have been entrenched in a range of human rights instruments widely ratified among

[5] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3. As of June 2020, the ICESCR had 171 states parties. See C O'Conneide, 'The Right to Work in International Human Rights Law' in Mantouvalou (n. 1) 102. He notes that '[t]he CESCR and the European Committee on Social Rights (ECSR) respectively, have adopted a similar reading of the scope and normative content of the right to work which draws upon the provisions of relevant ILO instruments and other international standards and reflects a shared understanding of the general substantive parameters of the right'.

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states.[6] Despite this, their scope and legal nature have been contested among scholars[7] and the jurisprudence of international bodies addressing these two rights is limited.[8]

A number of questions pertaining to each of the two rights remain open to debate. What does each right effectively amount to? Who is a right-holder? Who are the duty-bearers? Does each right confer on individuals entitlements that are directly enforceable before the courts? What are the remedies available for the breach of these rights? How do these two rights relate to each other? And most importantly for the discussion here, what is the role and responsibility of the business sector is securing these rights?

15.2.1 The Scope of the Rights to Work and Just and Favourable Conditions of Work and Their Mutual Relationship

The Universal Declaration of Human Rights was the first international instrument to articulate the rights to work and just and favourable conditions of work, combining these two rights within the same provision, which prescribes that '[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.[9] While the subsequent international human rights instruments address these rights in separate provisions,[10] the CESCR, which is responsible for overseeing the interpretation of the ICESCR, noted that:

> The ICESCR proclaims the right to work in a general sense in its article 6 and explicitly develops the individual dimension of the right to work through the

[6] Art. 23(1) UDHR; Arts. 6 and 7 ICESCR; Arts. 1–4 European Social Charter (ESC); Art. 15 EU Charter of Fundamental Rights (EU Charter); Art. 15 African Charter on Human and People's Rights (African Charter); Arts. 6 and 7 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol); Art. 11(1)(a) CEDAW; Art. 5(e)(i) ICERD.

[7] See generally Mantouvulou (n. 1).

[8] For example, Optional Protocol to ICESCR (OP-ICESCR) establishes mechanisms for bringing violations of economic, social and cultural rights before the CESCR, including: an individual complaints mechanism, an interstate complaint mechanism and an inquiry procedure. However, since OP-ICESCR entered into force on 5 May 2013 CESCR has heard only nine cases concerning the two rights and each ended with inadmissibility decision.

[9] Art. 23(1) UDHR.

[10] Arts. 6 and 7 ICESCR; Arts. 1–4 ESC; Arts. 6 and 7 San Salvador Protocol.

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recognition in article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions.[11]

Defining the right to work in such a 'general and non-exhaustive manner'[12] makes the scope of this right unclear,[13] which has prompted some commentators to question whether it effectively amounts to a justiciable right or just a goal.[14]

The CESCR has issued two General Comments, which attempt to delineate the normative content of the two rights in the context of the ICESCR. Thus, General Comment No 18 addresses the right to work, which is said to consist of two aspects: the right of every human being to decide freely to accept or choose work, including not to be forced to accept work, and the right not to be unfairly dismissed.[15] While both aspects are capable of being violated by businesses, it is apparent that the latter assumes an employment relationship.[16]

Furthermore, 'work' as specified in article 6 ICESCR must amount to *decent work*, that is 'work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration'.[17] It is unclear whether this implies that work that falls short of this standard violates the right to work, even if it is chosen 'freely'. Moreover, by emphasising that article 6 ICESCR enshrines a right to *decent* work, the Committee makes another explicit connection between the right to work and the right to just and favourable conditions of work, concluding that '[t]hese fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment'.[18] Stating that the right to work effectively safeguards 'the physical and mental integrity of the worker' and 'work safety and remuneration',[19] while also including in it

[11] CESCR, 'General Comment No. 18: The Right to Work (Art. 6 of the Covenant)', UN Doc E/C.12/GC/18 (6 February 2006).

[12] Ibid. [13] H Collins, 'Is There a Human Right to Work?', in Mantouvalou (n. 1) 17.

[14] JW Nickel, 'Giving Up on the Human Right to Work', in Mantouvalou (n. 1). See also D Ashiagbor, 'The Right to Work', in G de Búrca, B de Witte (eds.), *Social Rights in Europe* (Oxford University Press 2005) 241 ('The "right to work" is a right fraught with definitional problems.')

[15] General Comment No. 18 (n. 11) para. 6.

[16] Though such an employment relationship does not necessarily have to be legal. See for example the UK Supreme Court's decision in *Hounga* v. *Allen and Another* [2014] UKSC 47, where the majority held that it would be an affront to current public policy against trafficking to allow an employer to evade liability by reference to the illegality of the contract of employment entered into between them.

[17] Ibid., para. 7. [18] Ibid. [19] Ibid.

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'the right to form trade unions',[20] broadens the scope of this right to include interests expressly protected by other fundamental rights. It is therefore not surprising that some critics argued that the General Comment 'balloons' the content of this right, which effectively becomes 'unavailable for individual claiming'.[21]

The normative content of the right to just and favourable conditions of work is similarly unsettled. The wording of the provisions in various treaties differs. The European instruments are broader in the protections offered, while the African Charter includes the narrower requirement of 'equal pay for equal work'.[22] Still, even if one takes into account a single instrument, there is potentially an array of interpretations on the ambit of this right. Thus article 7 ICESCR specifies that just and favourable conditions of work concern four aspects: fair remuneration; safe and healthy working conditions; equal opportunity for promotion; and rest and leisure time (including holiday pay). General Comment 23 clarifies that these four aspects represent 'a non-exhaustive list' of fundamental elements to guarantee just and favourable conditions of work. Such interpretation is said to be justified by the explicit reference to the term 'in particular', which is taken to indicate that there may be other dimensions of this right that are not expressly referred to. General Comment 23 also explains that this right 'is an important component of other labour rights enshrined in the Covenant and the corollary of the right to work', which further dilutes its normative scope. Thus, it is said to cover also: prohibition of forced labour and social and economic exploitation of children; freedom from violence and harassment, including sexual harassment; and paid maternity, paternity and parental leave.[23]

Notably, while the analysis of the relationship between the two rights has mainly focused on their overlap and complementarity, a claim that the right to work directly conflicts with the right to just and favourable conditions of work has escaped detailed scrutiny. Mundlak thus reminds that:

> [T]he [right to work] may require compromising rights at work – ie, the right to work in decent working conditions or the right not to be discriminated against. For example, flexible employment contracts that seek to incorporate young workers into the labour market in exchange for lesser working conditions, wages and

[20] Ibid., para. 12 (c). [21] Nickel (n. 14) 145. [22] General Comment No. 23 (n. 25).
[23] General Comment No. 23 (n. 25) para. 6.

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benefits, or special arrangements that seek to incorporate people with disabilities into the labour market by lowering their wages.[24]

15.2.2 Obligations, Enforcement, Remedies: State As the Ultimate Guarantor of the Rights to Work and Just and Favourable Conditions of Work

The rights to work and just and favourable conditions of work give rise to a myriad of obligations, which are primarily directed at states. Two underlying principles govern the implementation of such obligations: progressive realisation of the rights and the 'respect, protect, fulfil' framework for their implementation.[25]

While both rights are qualified by the requirement that states should ensure their progressive realisation, each right is said to give rise to certain 'core obligations', which are of immediate effect. These include: a duty to adopt and implement a national employment strategy and plan of action; to guarantee through law the exercise of the right without discrimination; to establish in legislation minimum wages; to prohibit harassment; to adopt and implement a comprehensive national policy on occupational safety and health; and to enforce minimum standards in relation to rest, leisure, reasonable limitation of working hours, paid leave and public holidays.[26]

When it comes to the obligations arising out of the right to work specifically, even though decent work is explicitly recognised as part of this right by the CESCR, General Comment No 18 only discusses the progressive attainment of full employment. It is not clear why respect for the physical and mental integrity of a worker, conditions of work safety, or protection against forced labour – each of which are expressly recognised within the ambit of the right to work – would not warrant immediate action rather than progressive realisation, not least because some of these interests are considered 'absolute' human rights. Thus, certain infringements of labour standards, such as forced labour and practices of modern slavery,

[24] G Mundlak, 'Working Out the Right to Work in a Global Labour Market', in Mantouvalou (n. 1) 295.

[25] CESCR, General Comment No. 18 (n. 11) paras. 19–28; CESCR, 'General comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work', UN Doc E/C.12/GC/23 (27 April 2016) paras. 50–64.

[26] General Comment No. 18 (n. 11) para. 31; General Comment No. 23 (n. 25) para. 65.

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are recognised as *jus cogens* norms – norms that protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable.[27] While it is clear that only the most severe labour rights violations would reach a high threshold to be considered *jus cogens*, this would still cover a significant portion of current practices, given the extent of modern slavery in global supply chains.[28]

The obligations to *respect*, *protect* and *fulfil* human rights include a requirement for states to refrain from interfering directly or indirectly with the enjoyment of a specific right, to take measures that prevent third parties from interfering with the enjoyment of the right, and to provide, facilitate and promote that right.[29] Notably, while states are required to give effect to the rights to work and just and favourable conditions of work in domestic law,[30] such a duty is not necessarily discharged by way of enacting these very rights in their national orders.[31] Instead, Bogg notes that a treaty obligation under international human rights law to guarantee a human right may be discharged 'by enacting a range of more specific legal rights the effect of which is to ensure that the abstract human right is respected in practice'.[32]

Significantly, the obligations of states to give effect to the rights to work and just and favourable conditions of work in domestic law encompass a duty to ensure that their corporate nationals respect these rights in their extraterritorial activities. Thus, General Comment No 23 is explicit in its requirement that 'States parties should introduce appropriate measures to ensure that non-State actors domiciled in the State party are accountable for violations of the right to just and favourable conditions of work

[27] ILC, 'First Report on Jus Cogens', UN Doc A/CN.4/693 (8 March 2016); ILC, 'Fourth Report on Peremptory Norms of General International Law (Jus Cogens)' (31 January 2019) paras. 102–7; 'Report of the UN Special Rapporteur on Torture, 'Reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment', UN Doc A/73/207 (20 July 2018). See also a recent decision by the Supreme Court of Canada: *Nevsun Resources Ltd.* v. *Araya*, 2020 SCC 5.

[28] J Nolan, G Bott, 'Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices' (2018) 24 Australian Journal of Human Rights 44.

[29] H Shoe, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd ed., Princeton University Press 1996).

[30] General Comment No. 18 (n. 11) para. 22; General Comment No. 23 (n. 25) paras. 58–60.

[31] AL Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work', in Mantouvalou (n. 1) 165.

[32] Ibid. On the other hand, in the same volume Nickel categorically claims that the ICESCR 'does not require ratifying countries to enact legislation'. Nickel (n. 14) 145.

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extraterritorially and that victims have access to remedy.'[33] It maintains that '[t]his responsibility is particularly important in States with advanced labour law systems, as home-country enterprises can help to improve standards for working conditions in host countries'.[34] In the same vein, General Comment No 18 on the right to work specifies that '[t]o comply with their international obligations in relation to article 6, States parties should endeavour to promote the right to work in other countries'.[35] Similar reasoning is deployed with respect to other Covenant rights[36] (as well as by other UN treaty bodies),[37] lending force to a conclusion that the ECSCR mandates States Parties to secure the rights to work and just and favourable conditions of work of individuals adversely affected by extra-territorial operations of their corporate nationals.[38] This argument is further bolstered by the fact that the ICESCR does not contain a general jurisdiction clause that would limit its scope to persons within, under, or subject to the 'jurisdiction' of a state party, which is the case with many other (but not all) human rights instruments.[39]

States' compliance with rights enshrined in the ICESCR is monitored by the CESCR – a body of independent experts which discharges its role by issuing 'concluding observations' in respect of the state reports which are submitted to it on a five-yearly basis, 'General Comments' that set out its authoritative interpretation of specific provisions of the Covenant, and lastly, by virtue of the Optional Protocol to ICESCR,[40] the CESCR can also 'receive and consider communications from individuals claiming that their rights under the

[33] General Comment No. 23 (n. 25) para. 70. [34] Ibid.
[35] General Comment No. 18 (n. 11) para. 30.
[36] Such as the right to food, right to health or right to water. See CESCR, 'General Comment No. 24 (2017) on State Obligations under ICESCR in the Context of Business Activities', UN Doc. E/C.12/GC/24 (10 August 2017) paras. 25–37.
[37] CRC Ctee, 'General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights', UN Doc. CRC/C/GC/16 (17 April 2013) paras. 38–46.
[38] See in general, F Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 HRLR 1; M Langford et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013); D Palombo, *Business and Human Rights: The Obligations of the European Home States* (Hart 2020) 157. See also Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 28 September 2011.
[39] See for example M Milanović, *Extraterritorial Application of Human Rights Treaties* (Cambridge University Press 2011) 11–18.
[40] Optional Protocol to the International Covenant on Economic, Social and Cultural.

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Covenant have been violated, undertake enquiries into grave or systematic violations of its provisions and consider interstate complaints'.[41] While the CESCR emphasises that states are 'ultimately accountable' for compliance with the two rights, the two General Comments expressly acknowledge 'responsibilities'[42] of private enterprises in their realisation.[43]

Thus, General Comment No 18 on the right to work claims that '[p]rivate enterprises – national and multinational – while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work'.[44] General Comment No 23 similarly notes that '[b]usiness enterprises . . . have a responsibility to respect the right to just and favourable conditions of work, avoiding any infringements and addressing any abuse of the right as a result of their actions'.[45] Nonetheless, beyond mentioning 'the employer's responsibility for the safety and health of workers',[46] neither General Comment specifies which aspects of the two rights apply to businesses nor whether their responsibilities extend beyond securing rights to their direct employees mandated by domestic legislation.

15.3 The Scope of Business' Obligations to Secure the Rights to Work and Just and Favourable Conditions of Work

It is obvious that not all obligations arising out of the rights to work and just and favourable conditions of work are capable of being discharged by

[41] O'Conneide (n. 5) 104.

[42] In their critique of the work of Ruggie, Deva and Bilchitz highlight that 'the SRSG even distinguishes the language employed in relation to corporations: companies do not have any binding obligations; rather, they merely have responsibilities'. See D Bilchitz, S Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future', in S Deva, D Bilchitz (eds.), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 15.

[43] General Comment No. 18 (n. 11) para. 52; General Comment No. 23 (n. 25) paras. 74–5. See also See UN Guiding Principles on Business and Human Rights, principles 11, 12, 22 and 23. The CESCR recently issued 'General Comment No. 24 (2017) on State obligations under ICESCR in the context of business activities', UN Doc. E/C.12/GC/24 (10 August 2017), where it reinforced its earlier position that '[t]he present general comment addresses the States parties to the Covenant, and in that context it only deals with the conduct of private actors – including business entities – indirectly'. Yet the same document also states that 'under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice'.

[44] General Comment No. 18 (n. 11) para. 52.

[45] General Comment No. 23 (n. 25) para. 75.

[46] Ibid., para. 74.

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businesses. Thus, for example, obligations to formulate a national employment policy,[47] or a policy for the prevention of accidents and work-related health injuries,[48] to adopt comprehensive non-discrimination legislation,[49] or to implement technical and vocational education plans[50] could only be given effect by a state.

Yet, obligations concerning decent work or safe working conditions are more readily attributable to business actors.[51] In fact, some of the notable cases driving the initiatives for a greater responsibility of the business sector for human rights protection in general concern the issues of decent work, forced labour, and health and safety standards. These include, for example, the Ali Enterprises factory fire in Pakistan,[52] the Rana Plaza factory collapse in Bangladesh,[53] or the most recent lawsuit against the world's largest tech companies accused of being complicit in the deaths of children in cobalt mines in the Democratic Republic of the Congo.[54] These are some of the most extreme examples of the effects of precarious working conditions in global supply chains on the enjoyment of universally recognised human rights.[55]

Therefore, despite states being ultimately responsible for maintaining an environment conducive to the fulfilment of the two rights, certain obligations can be both upheld and violated by businesses. These include: a duty

[47] General Comment No. 18 (n. 11) para. 26. [48] General Comment No. 23 (n. 25) para. 25.
[49] Ibid., para. 33. [50] Art. 6 (2) ICESCR and General Comment No. 18, para. 27.
[51] Similarly, with respect to the ICCPR, the UN Human Rights Committee noted that 'individuals are protected by the State, not 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*' (emphasis added). See 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para. 8.
[52] P Wesche, M Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers Before German Civil Courts: Lessons from Jabir and Others v. KiK' (2016) 16 HRLR 370.
[53] J Salminen, 'The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?' (2018) 66 Am J Comp L 411.
[54] A Kelly, 'Apple and Google Named in US Lawsuit over Congolese Child Cobalt Mining Deaths' (The Guardian, 16 December 2019), available at: www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths.
[55] ILO, *Decent Work in Global Supply Chains* (International Labour Conference, 105th Session 2016); G LeBaron et al., *Confronting Root Causes: Forced Labour in Global Supply Chains* (University of Sheffield 2018); ILO, OECD, IOM, UNICEF, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains* (2019).

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to ensure safe and healthy working conditions; to guarantee fair wages that provide a decent living; to not engage in forced labour and social and economic exploitation of children; to protect against discrimination, violence and harassment, including sexual harassment. Notably, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation (together with freedom of association and the effective recognition of the right to collective bargaining) are recognised as 'core labour standards' in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which has become a global frame of reference for both states and corporate actors when it comes to labour rights protection.[56]

But even though these obligations *could* apply to businesses, the question of the scope of persons whom they are owed and the means of their enforcement are not apparent. To illustrate central issues with ensuring respect for the rights to work and just and favourable conditions of work in the global economy, it is useful to consider a case study on reported labour rights abuses in the Thai food industry supplying international and European markets.

15.3.1 Labour Exploitation in Global Food Supply Chains

In 2012, a Finnish NGO Finnwatch conducted research into the procurement process of the biggest Finnish retail chains' private label products. The report revealed serious human violations in the operations of Natural Fruit, a pineapple processing company in Thailand.[57] Natural Fruit factory supplied pineapple concentrate to Refresco, the Netherlands-based company, which is said to control 20 per cent of the European private label soft drink and fruit juice market with an exclusive right to produce PepsiCo, Coca-Cola, Schweppes and Unilever in a number of European countries. In addition to the Finnish retail chains, the Finnwatch reports that Refresco's clients include Lidl, Aldi, Carrefour, Dia, Morrisons,

[56] P Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 EJIL 457; ILO, *The Labour Principles of the United Nations Global Compact: A Guide for Business* (ILO 2008); ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (ILO 2017).

[57] S Vartiala et al., *Cheap Has a High Price: Responsibility Problems Relating to International Private Label Products and Food Production in Thailand* (Finnwatch, 21 January 2013).

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Edeka, Rewe, Superunie, Ahold and Système U.[58] The Finnwatch report alleged that the factory employed many undocumented workers from the neighbouring Myanmar, including children younger than the legal minimum age in Thailand, that the workers were paid less than the minimum wage prescribed by Thai laws, were forced to work overtime, had their passports and work permits confiscated and were subject to discrimination, violence and dangerous working conditions. These allegations potentially engaged several human rights including forced labour. As a Party to the International Covenant on Civil and Political Rights (ICCPR), the ILO Forced Labour Convention and its 2014 Protocol,[59] Thailand has had clear obligations to prevent and address forced labour committed by private actors.[60]

Not only did such revelations fail to result in an official investigation into and eventual redress for the alleged exploitation of the workers, but instead a researcher working on the Finnwatch report has been subject to multiple civil and criminal charges for disseminating purportedly 'the false findings of the research'.[61] He was simultaneously a target of another set of lawsuits in Thailand brought by a poultry company because he helped expose various forms of labour abuses against its workers, including allegations of forced labour.[62] Having endured what was described by the civil society organisations as 'judicial harassment', he eventually fled the country.[63]

In addition to exposing the flaws in domestic legal protection of labour rights in Thailand, this case raises the question of accountability of the companies that purchased products from the local producers. When the accusations against Natural Fruit became public, some of their international clients provided financial assistance to human rights defenders subject to

[58] Ibid., 3.

[59] ILO, Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) (No. 29); Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 11 June 2014, entered into force 9 November 2016).

[60] ILO, *Hard to See, Harder to Count – Survey Guidelines to Estimate Forced Labour of Adults and Children* (1 June 2012) 20.

[61] Judgement of the Southern Bangkok Criminal Court, Case No. Or2949/2559, 20 September 2016, on file with the author.

[62] M Jovanovic, 'Modern Slavery in the Global Food Market: A Litmus Test for the Proposed Business and Human Rights Treaty' (EJIL: Talk, 12 August 2019), available at: www.ejiltalk.org/modern-slavery-in-the-global-food-market-a-litmus-test-for-the-proposed-business-and-human-rights-treaty/.

[63] Finnwatch, *Q&A: Criminal and Civil Prosecutions – Natural Fruit vs. Andy Hall* (31 May 2018) available at: https://finnwatch.org/images/pdf/NaturalFruitvsAndyHallQA_May312018.pdf.

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litigation emphasising that 'employees must have the opportunity to safely and legitimately raise their concerns'.[64] Yet, this falls short of accepting responsibility for ensuring that basic labour rights are being secured throughout their supply chains. The Finnwatch report thus reveals that the Netherlands-based Refresco claimed to have audited the Natural Fruit factory in 2010, 2011 and in 2012 – the same year when the Finnwatch research took place – but it found no issues, which is said to be 'proof enough of inadequate monitoring standards'. The report implies that had the company done a diligent job, it is likely that the abuses would have been uncovered earlier and further violations could have been prevented. Still, such due diligence obligations remain sporadic, largely voluntary and often unenforced. It is, therefore, vital to examine frameworks and rules that govern the responsibilities of the business sector for securing core labour rights in global value chains and consider global trends in this fast-evolving area of law.

15.3.2 The Responsibility of the Business Sector in Securing Labour Rights in Global Supply Chains

Obligations of the business sector to secure the rights to work and just and favourable conditions of work stem from various sources, which differ in scope, normative force and modes of implementation. These include domestic law in host states, domestic law in home states and various international instruments that apply to businesses directly, which will be examined in turn.

15.3.2.1 Domestic Regulation in Host States

Domestic regulation in host states binds every business actor that operates on that state's territory. Still it is considered that host country legislation 'will generally target local conduct and are likely to have limited effectiveness in holding a transnational corporation to account for the activities of its suppliers in a host country'.[65] What is more, not every state is willing or able to enforce international labour standards domestically. By failing to give effect to international labour standards in their territory, host states may breach their own international obligations. The case study discussed in the previous section raises the questions of whether Thailand complied with its

[64] L Rankinen, SVP Sustainability, SOK (10 April 2018), available at www.s-kanava.fi/en/uutinen/the-freedom-of-action-of-human-rights-defenders-must-be-ensured/4442128_384136.
[65] Nolan and Bott (n. 28) 45.

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international obligations as a State Party to the ICESCR, which require states to provide effective protection of international labour rights to: '[A]ll workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.'[66] While the possibilities of enforcing these international obligations against Thailand are weak, the practices of modern slavery, which are reportedly wide-spread throughout the country,[67] may well result in import prohibitions under the US Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).[68] A ban on importing goods made with forced labour has existed in US law since the 1930 Tariff Act,[69] but was subject to a 'consumptive demand' exception, which effectively allowed for importing merchandise made with forced labour where the consumption of the goods in the United States exceeded the domestic production capacity. This exemption was removed by the 2016 TFTEA, leading to an increased enforcement of the import ban by the US Customs and Border Protection (CBP).[70]

15.3.2.2 Domestic Regulation in Home States

Beyond domestic law in host states, businesses are increasingly subject to home state regulation, which includes a diverse set of regulatory approaches

[66] General Comment No. 23 (n. 25) para. 5.

[67] US Department of Labor, Bureau of International Labor Affairs, List of Goods Produced by Child Labor or Forced Labor, available at: www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods?tid=5525&tfield_exp_good_target_id=All&tfield_exp_exploitation_type_target_id_1=All&titems_per_page=10; Greenpeace, 'Dodgy Prawns: The Hidden Environmental and Social Cost of Prawns in Australia' (Greenpeace Australia Pacific, December 2015).

[68] Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) prescribes that 'all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision'. This prohibition used to be subject to 'consumptive demand' exception, which had allowed importation of certain goods produced by using forced labour, if such goods were not produced 'in such quantities in the United States as to meet the consumptive demands of the United States'. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. 114-25 § 910 removed this exception.

[69] Section 307 of the Tariff Act of 1930, 19 U.S.C. 1307.

[70] US Customs and Border Protection, Withhold Release Orders and Findings, available at: www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings.

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such as: mandatory reporting requirements,[71] the above-mentioned import prohibitions, or the mandatory human rights due diligence requirements imposed on firms by the French[72] and Dutch legislation.[73] The EU has recently announced intention to introduce legislation on mandatory corporate environmental and human rights due diligence in 2021.[74]

These legislative initiatives differ in terms of the scope of human rights violations targeted by a regulatory action. For example, transparency legislation in California, the United Kingdom and Australia concern only practices of modern slavery and would not capture lesser abuses of labour rights. Mandatory due diligence requirements in the Dutch legislation apply only to child labour, whereas obligations under the French Duty of Vigilance Law extend to any 'impacts on human rights and fundamental freedoms, health and safety of persons and on the environment' resulting from the activities of the entities falling within the ambit of the law. In addition, some legislative initiatives target specific sectors such as the EU Conflict Minerals Regulation,[75] which concerns four minerals – tin, tantalum, tungsten and gold – often mined using forced labour, or the recent initiative to introduce due diligence regulation by the EU in the cocoa sector.[76] Moreover, while transparency legislation seeks to induce change in corporate practice by relying on 'consumers [who] can use the information to exercise ethical shopping – preferring those with better policies – and the NGOs and politicians can use "shame" to steer organizations to

[71] The California Transparency in Supply Chains Act 2010 (SB 657); UK Modern Slavery Act 2015; Australian Modern Slavery Act 2018; 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 ('Non-Financial Reporting Directive').

[72] French Duty of Vigilance Law, LOI n° 2017-399 (27 March 2017).

[73] Dutch Child Labour Due Diligence Law 2019.

[74] BHRRC, 'EU Commissioner for Justice Commits to Legislation on Mandatory Due Diligence for Companies', available at: www.business-humanrights.org/en/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies.

[75] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130 (19 May 2020).

[76] A group of business and civil society organisations has produced a joint position paper supporting due diligence regulation by the EU in the cocoa sector. See 'Joint Position Paper on the EU's Policy and Regulatory Approach to Cocoa' (2 December 2019), available at: www.voicenetwork.eu/wp-content/uploads/2019/12/Joint-position-paper-on-the-EUs-policy-and-regulatory-approach-to-cocoa.pdf.

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better practice',[77] due diligence legislation also entails risks of legal liability for not taking effective steps to identify and address human rights issues in their business activities and relationships.

FRENCH DUTY OF VIGILANCE LAW (2017)

Scope

Company registered in France with at least 10,000 employees within the company and within its direct or indirect subsidiaries (or 5,000 if all such affiliates are incorporated in France)

Obligations

- Set up and implement a vigilance plan to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors or suppliers, with whom it maintains an established commercial relationship. Those measures must be adequate and effectively implemented.
- Publish the vigilance plan, report on its implementation, and include both the plan and report in the annual management report.

Enforcement

A failure to establish, implement or publish a vigilance plan, *even in the absence of any harm*, allows any party with standing – affected persons, NGOs, trade unions or public municipalities – to request the competent judge to issue an injunction to comply with its obligation. A judge can also order the publication, dissemination or display of their decision, arguably creating a reputational risk calculated to incentivize companies to comply with their duties.

[77] S New, 'Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility?' (2015) 20 Supply Chain Management: An International Journal 697, 701.

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A failure to comply with vigilance obligations, which results in harm that 'the execution of these obligations could have prevented', may lead to civil liability. Three conditions for establishing liability under French tort law are: the breach of an obligation, a damage, and causality between the two.

DUTCH CHILD LABOUR DUE DILIGENCE LAW (2019)

Scope

Companies selling goods or services to Dutch end-users, including companies registered outside the Netherlands.

Obligations

- A company must determine whether there is a reasonable suspicion that a product or service has been produced using child labour. The investigation must focus on sources that can be reasonably known and that are accessible.
- If such a suspicion exists, the company must develop and implement an action plan in line with international guidelines (the UNGPs or the OECD Guidelines for Multinational Enterprises) to prevent this impact.
- Companies must submit a statement to regulatory authorities declaring that they have carried out due diligence. Unlike the UK MSA and French Duty of Vigilance Law, such a statement is submitted only once.

Enforcement

Any person can file a complaint with the regulator on the basis of concrete evidence that the company's products or services were produced with child labour. They must first submit the complaint to the company itself.

If the regulatory authorities determine that the company has not conducted due diligence in line with the legislation, they issue legally

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binding instructions and provide a timeframe for execution. Fines can be imposed for a failure to comply with instructions and if a company is fined twice within five years, the subsequent violation can lead to imprisonment of the responsible director. Non-compliance with the law can lead to imprisonment and fines of € 750,000 or 10 per cent of the company's annual turnover.

UK MODERN SLAVERY ACT (2015)

Scope

Every organisation carrying on a business in the UK with a total annual turnover of £36 million or more.

Obligations

Eligible companies must produce a slavery and human trafficking statement for each financial year of the organisation. The statement must include 'the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business'. An organisation which has taken *no steps* to ensure slavery and human trafficking is not taking place within its supply chains will comply with the statutory obligation by publishing a statement stating this to be the case.

Enforcement

If a business fails to produce a slavery and human trafficking statement for a particular financial year the Secretary of State may seek an injunction through the High Court requiring the organisation to comply. If the organisation fails to comply with the injunction, they will be in contempt of a court order, which is punishable by an unlimited fine.

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THE US TARIFF ACT (1930) & THE TRADE FACILITATION AND TRADE ENFORCEMENT ACT (2015)[78]

Prohibits the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured labour – including forced child labour. Such merchandise is subject to exclusion and/or seizure and may lead to criminal investigation of the importer(s).

Any person who has reason to believe that merchandise produced by forced labour is being, or is likely to be, imported into the United States may communicate his belief to any Port Director or the Commissioner of US Customs and Border Protection (CBP).

When information reasonably but not conclusively indicates that such merchandise is being imported, the Commissioner of CBP may issue withhold release orders (WROs). Shipments of merchandise subject to WROs will be detained and importers have the opportunity to either re-export the detained shipments or to submit information to CBP demonstrating that the goods are not in violation of the Tariff Act.

CBP acts on information concerning specific manufacturers/exporters and specific merchandise. The agency does not generally target entire product lines or industries in problematic countries or regions. However, it may use the List of Products Produced by Forced or Indentured Child Labor produced by the Department of Labor as source documents for research purposes.

Even without express regulation, home states have shown preparedness to extend protection to individuals beyond their territory who are adversely affected by businesses domiciled in those states. This is usually achieved through domestic litigation based on tort law.[79] A recent decision

[78] The content in this section is largely reproduced from the US Customs and Border Protection web portal.

[79] R Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 City University of Hong Kong Law Review 1; C van Dam, 'Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights' (2011) Journal of European Tort Law 221; Wesche and Saage-Maaß (n. 52); European Parliament, *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries* (1 February 2019).

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by the Canadian Supreme Court (SCC) in *Nevsun Resources Ltd.* v. *Araya* suggests a possible novel approach.[80] The case involves allegations by Eritrean nationals who claim to have been forced to work on the construction of the Bisha mine in Eritrea, established in 2008 under the ownership of the Bisha Mining Share Company, which is 40 per cent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 per cent owned by Nevsun, a company incorporated in British Columbia. Eritrea has been notorious for its controversial national service programme involving lengthy military conscription and forced labour.[81] The plaintiffs advanced a novel argument claiming that their treatment amounted to the breach of customary international law rules prohibiting slavery, forced labour, torture, crimes against humanity, and cruel, inhuman and degrading treatment, which are automatically incorporated into domestic law through the common law. Accordingly, breaches of these international law rules are said to give rise to a civil remedy under domestic common law.

Emphasising that international human rights norms are 'not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities',[82] the SCC agreed with plaintiffs' argument that customary international law forms part of the law of Canada,[83] that the norms invoked by the plaintiffs are part of customary international law with crimes against humanity and the prohibition against slavery being of such fundamental importance as to be characterised as *jus cogens*,[84] and significantly, that rules of customary international law can also bind corporations.[85] It further accepted that existing conventional common law torts may be inadequate to redress wrongs so severe that they breach norms of customary international law.[86] Notably, the SCC's ruling is just a permission to advance these arguments at the ensuing trial and it remains to be seen if the plaintiffs will be successful in sustaining them. It should be also noted that the first instance decision was based on the court's finding that 'Nevsun exercised effective control over the Bisha Company through

[80] *Nevsun Resources Ltd.* v. *Araya*, 2020 SCC 5.

[81] See UN HRC, 'Report of the Commission of Inquiry on Human Rights in Eritrea', UN Doc. A/HRC/29/42 (4 June 2015).

[82] *Nevsun Resources Ltd.* v. *Araya* (n. 79) para. 1. [83] Ibid., paras. 94–5.

[84] Ibid., paras. 99–103.

[85] Ibid., paras. 104–13, 185. Dissenting Justice Brown disagreed with this arguing that corporations cannot be bound by international law at paras. 188–91.

[86] Ibid., para. 129.

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its majority position on the company's board and operational control through its involvement in all aspects of Bisha's operations',[87] something which the company denies. Regardless of the eventual outcome, the decision is said to: '[R]aise the threshold of litigation risk for Canadian corporations, opening the door for further claims based on its ruling ... The Canadian Supreme Court has, in effect, claimed a wide extraterritorial jurisdiction over the foreign conduct of Canadian multinational groups so as to further their compliance with a growing body of human rights-oriented responsibilities.'[88]

15.3.2.3 Voluntary Guidelines and Multi-Stakeholder Initiatives

In addition to domestic legislation, businesses are subject to regulation by a myriad of international instruments, most notable of which are the UN Guiding Principles on Business and Human Rights (UNGPs),[89] the OECD Guidelines for Multinational Enterprises (OECD Guidelines)[90] and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration).[91] The UNGPs are not targeted solely at labour rights and refer to a range of human rights including forced labour and slavery. Their significance is reflected in an express recognition that a company's responsibility to respect human rights applies not only to its own activities but also to those impacts that are 'directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[92] This understanding has been emulated in revised versions of both the OECD Guidelines and the ILO MNE Declaration.

Whereas the OECD Guidelines do contain a specific chapter on 'Employment and Industrial Relations' and the ILO MNE Declaration is essentially concerned with facilitating 'the positive contribution which

[87] PT Muchlinski, 'Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: Nevsun Resources Limited v. Araya' (2020) 1 Amicus Curiae 505, 508.
[88] Ibid., 523.
[89] UN OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework', UN Doc. HR/PUB/11/04 (2011).
[90] OECD, *Guidelines for Multinational Enterprises 2011* (OECD 2011).
[91] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977) and amended at is 279th (November 2000), 295th (March 2006) and 329th (March 2017) [ILO MNE Declaration].
[92] UNGPs, Guiding Principle 13.

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multinational enterprises can make to . . . the realization of decent work for all', both instruments largely echo the 1998 ILO Declaration on Fundamental Principles and Rights at Work. They nonetheless fail to provide specific content to a general obligation of corporations to respect four fundamental principles and rights at work enshrined in this instrument: the freedom of association and right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour and non-discrimination in employment and occupation. For example, the ILO MNE Declaration instructs 'multinational as well as national enterprises' to take 'immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour in their operations' without elaborating any concrete steps that ought to be taken to comply with this duty.[93]

These framework instruments have helped shape a number of private regulatory initiatives and codes of conduct (often referred to as 'multi-stakeholder initiatives') intended to provide substantive content to corporate human rights responsibilities.[94] Despite their considerable authority,[95] these instruments are not legally binding. Their implementation therefore rests on either the good will of corporations or on enforcement through municipal law,[96] leading to vastly divergent practices among businesses. Still, some notable examples of corporate initiatives to address labour rights violations in their supply chains have been highlighted by a leading UK civil society coalition on corporate accountability.[97] According to their 2017 report:

> Seafoods supplier Direct Seafood reports that it joined the Thai Seafood Working Group, organised by the Ethical Trading Initiative to investigate the farmed prawn industry in Thailand which is a 'well-known and reported high risk area'. It also documents the type of actions it considers when presented with evidence of poor labour practices. The company pledges to immediately cease contractual relations in the most serious cases (e.g. worker passport confiscation and forced labour) but

[93] ILO MNE Declaration (5th ed., 2017) para. 25.
[94] E Groulx Diggs, MC Regan, B Parance, 'Business and Human Rights as a Galaxy of Norms' (2019) 50 Geo J Int'l L 309, 332–9.
[95] Bilchitz and Deva (n. 42) 2 (noting that the UNGPs have become a 'common reference point in the area of business and human rights').
[96] Secretary of State for Foreign and Commonwealth Affairs, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' (12 May 2016).
[97] CORE, Anti-Slavery International, BHRRC and UNICEF UK, 'Modern Slavery Reporting: Weak and Notable Practice' (June 2017).

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when there is an opportunity to influence working hours and conditions, the company states that it attempts to train and educate suppliers on better practices.[98]

The Interpretative Guide to the UNGPs emphasises that '[d]ecisions on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so',[99] because the policy of 'cut and run' from suppliers when labour exploitation is exposed effectively penalises exploited workers.[100] Instead, companies are said to have 'a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence'.[101]

Furthermore, in a recent evaluation of the fifty largest private sector commercial banks globally based on their implementation of the UNGPs, only ABN AMRO is said to have reached the 'leader category' owing to its 'most advanced human rights reporting among the banks ranked'.[102] The report notes that the bank has taken 'detailed measures . . .to assess clients on modern slavery risk factors'.[103] ABN AMRO's Head of Environmental and Social Risk and associates recently published a piece where they stated that: 'ABN AMRO has therefore started to include tailor-made questions on labour practices in its due diligence process. Companies are asked, for example, whether they have foreign subsidiaries that are involved in the recruitment process, whether recruitment agencies they work with are certified, and whether labour agreements are drafted in the employee's native language.'[104]

Despite these notable efforts to identify and mitigate risks, it is noted that '[e]ven the best performing banks are failing to demonstrate in their human rights reporting that they have played a role in remediating or addressing specific adverse human rights impacts'.[105] Similarly, Oxfam's survey of largest supermarkets in Europe and US notices some improvement but emphasises that '[n]o supermarket ensures that the workers and producers in their supply chains are paid enough to eat properly'.[106] The main obstacle to achieving

[98] Ibid., 6.
[99] UN, *The Corporate Responsibility to Respect Human Rights – An Interpretive Guide* (UN 2012) 50.
[100] M Romis, 'What are Supermarkets Doing to Tackle Human Suffering in Their Supply Chains?' (Oxfam, 3 July 2019), available at: https://views-voices.oxfam.org.uk/2019/07/supermarkets-supply-chains/.
[101] See n. 98, 18. [102] The BankTrack Human Rights Benchmark 2019 (3rd ed., 2019) 6.
[103] Ibid., 17.
[104] M Van Dijk, M De Haasand, R Zandvliet, 'Banks and Human Trafficking: Rethinking Human Rights Due Diligence' (2018) 3 Business and Human Rights Journal 105, 108.
[105] Human Rights Benchmark (n. 101) 3. [106] Romis (n. 99).

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that are said to be 'unfair trading practices' where supermarkets use their position to pressure suppliers with low prices, which inevitably results in their inability to pay workers a living wage.[107] This effectively annuls any positive efforts companies undertake in other areas. New illustrates such dynamics vividly:

> Indeed, it could be that the standard initiatives of anti-modern slavery CSR are themselves, in some senses, part of the enabling mechanisms for modern slavery to persist: the right hand (the CSR activity, the policy statements) gives the appearance of working to reduce the problem; the left hand (the brutal exercise of commercial power, hard negotiation on prices and trading terms) generate the conditions in which forced labour emerges.[108]

15.3.2.4 The 'Galaxy' of Norms and Piecemeal Protection of Labour Rights in Global Supply Chains

The previous discussion provided a snapshot of a plethora of instruments that compete in articulating specific obligations for businesses to give effect to human rights in general and to the rights to work and just and favourable conditions of work specifically.[109] Such efforts are largely uncoordinated and create uncertainty for businesses operating across various jurisdictions when it comes to their obligations to respect fundamental rights at work. This also leads to a piecemeal protection of labour rights, despite at least some of them being recognised as universal and absolute.

The perceived problems of uncoordinated obligations and piecemeal protection of fundamental labour rights could potentially be solved by imposing direct legally binding obligations on businesses through international law.[110] This solution raises, nonetheless, the problem of their enforcement, because securing such international obligations would still largely depend on states.[111] Accordingly, imposing direct international obligations on corporate

[107] Ibid. [108] New (n. 77) 706. [109] Groulx Diggs, Regan and Parance (n. 93).

[110] SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 11 Yale LJ 443, 543 (noting that '[r]ecognizing duties on enterprises, rather than merely on governments, also has the advantage of putting pressures directly on them not to seek refuge in some state that may be lax about enforcement').

[111] JH Knox, 'Horizontal Human Rights Law' (2008) 102 Am J Int'l L 1, 19, 45–7 (observing that '[i]nternational law has the legal capacity to place direct horizontal duties on all private actors not to violate one another's human rights. What it lacks is the practical and political capacity to enforce such duties.' Furthermore, he rightly notes that international

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actors, which then depend on states to guarantee their enforcement, has hardly any advantage compared to states undertaking a duty to ensure accountability of their corporate nationals for securing human rights in their global operations. This may have been the logic behind the recent initiative to adopt a binding international instrument on Business and Human Rights, which addresses states as primary duty bearers.[112] While the prospects of the BHR treaty remain uncertain, sight should not be lost of the previously discussed explicit position of the CESCR that ICESCR requires states to secure the rights to work and just and favourable conditions of work of individuals adversely affected by extraterritorial operations of their corporate nationals. While the scope of any such duties and the means of their enforcement remain to be elaborated in detail, the increasing number of domestic jurisdictions that recognise extraterritorial obligations of their corporate nationals alongside the most recent EU initiative to introduce legislation on mandatory corporate environmental and human rights due diligence in 2021 suggests that the direction of travel of law in this area is firmly set.[113] It is nonetheless important to note that any obligations of home states do not set aside the primary obligation of host states to secure labour rights in their territory, but are rather intended to supplement it.[114]

15.4 Conclusion

Obligations of the business sector to secure the rights to work and just and favourable conditions of work stem from different sources, which vary in

monitoring mechanisms 'do not have enough experts, funding, and technical support to carry out their already-massive mandates of overseeing governmental compliance' and that the 'resources necessary to monitor compliance with all businesses, or even just those with transnational connections' would exceed by a large margin currently available funding). But see J Butler, 'The Corporate Keepers of International Law' (2020) 114 Am J Int'l L 189 (describing a 'corporate keepers phenomenon' which is said to encompass a broad range of business activities and decisions in support of international law that are often not required by the company's state of nationality or that the home state 'has expressly rejected, failed to implement, or carried out inadequately').

[112] UN HRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', UN Doc. A/HRC/RES/26/9 (14 July 2014). See Chp. 27 on the BHR treaty in this volume.

[113] See e.g. BHRRC, 'Initiatives for Mandatory Human Rights and Environmental Due Diligence in Europe (Non-Exhaustive)' (3 July 2020).

[114] A Khalfan, 'Division of Responsibility Amongst States' in Langford et al. (n. 38) 310.

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scope, legal nature and normative force. These obligations fall into three broad groups: *direct international law duties* (DIDs); *direct domestic law duties* (DDDs); and *indirect international law duties* (IIDs).

DIDs are duties that stem from international instruments that apply to corporate actors directly, most notable examples being the UNGPs, OECD Guidelines and ILO MNE Declaration. The downside of such duties, as they currently stand, are their non-binding nature and the fact that their 'enforcement' still depends on goodwill of corporations to abide by them. The upside is that they (ought to) apply to businesses globally and uniformly. DDDs are duties that stem from domestic law, which states develop on their own initiative, as evidenced by the French Duty of Vigilance Law, Dutch Child Labour Due Diligence Law or the UK Modern Slavery Act. The problem with DDDs is that they are piecemeal and incoherent, which results in unequal protection of individual rights and a complex regulatory environment for businesses that operate across different jurisdictions. Finally, IIDs are imposed by domestic law as a result of states' *own* international obligations to secure rights against violations by private parties, which are widely recognised in human rights law. Being grounded in legally binding and universally applicable international instruments, IIDs can remedy the weaknesses of both DIDs and DDDs, but they have a blind spot. The blind spot is caused by a traditional view that international obligations of states apply within their territorial jurisdiction (broadly conceived). Given that some states may be unwilling or unable to enforce universal labour rights within their respective territories, this leads to the same problem encountered with DDDs – uneven geographical protection. In other words, this traditional view leaves a vast number of global workers unprotected even against the most severe labour rights abuses, such as modern slavery. But international human rights law is well-equipped to overcome this challenge by recognising an obligation of states to extend protection to individuals beyond their jurisdiction whose rights are adversely affected by operations of their corporate nationals. When it comes to the rights to work and just and favourable conditions of work, this is expressly acknowledged by the CESCR and a recent initiative to adopt the BHR treaty suggests that the idea of placing obligations on states to regulate and oversee extraterritorial activities of their corporate nationals are gaining universal traction.

Recognising an international duty of states to impose extraterritorial obligations on their corporate nationals has yielded considerable results in

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other areas of international law such as anti-corruption. Thus, by adopting the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997, a significant number of states pledged to pass domestic legislation to regulate their national companies as they conducted business abroad.[115] Kaczmarek and Newman note that '[g]iven the potential payoff to a country's firms of maintaining a weak enforcement regime, the fact that more than 60 per cent of OECD members have enforced their national laws is striking'.[116] Their study furthermore conducts a quantitative analysis of the extraterritorial implementation of the US foreign bribery legislation between 1998 and 2008 concluding that jurisdictions which experienced US intervention were twenty times more likely to enforce their own national rules. These findings suggest an important influence that domestic law in powerful states may have on international anticorruption efforts. Strong reasons justify a similar approach to the protection of labour rights in the global economy where the free movement of goods, services and capital around the world is said to result in many countries competing to attract trade and investment by lowering their labour standards.[117]

In sum, in today's economy dominated by global value chains, which are organised by transnational corporations domiciled predominantly in the US and the European Union,[118] severe labour exploitation often goes unpunished because of poor compliance with international labour standards in home countries. In these circumstances, the orthodox view of international human rights law, which assigns responsibility for securing rights based on the principle of territoriality, compartmentalises the protection of international labour rights and effectively defeats the idea of their universality. In light of the general perception that the current voluntary regime has had a limited impact on the way businesses manage their human rights impacts[119] and unsuccessful attempts to impose legally

[115] Art. 4(2) OSCE Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

[116] SC Kaczmarek, AL Newman, 'The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation' (2011) 65 International Organization 745, 747.

[117] D Charny, 'Regulatory Competition and the Global Coordination of Labor Standards' (2000) 3 JIEL 281, 282–5.

[118] UNCTAD, 'Transnational Corporations and Foreign Affiliates', UN Doc. UNCTAD/GDS/CSIR/2004/1 (2004).

[119] Smit et al. (n. 2).

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binding international obligations on corporations to respect human rights,[120] a solution for this legal void may lie in recognising an international obligation of states to impose extraterritorial duties on their corporate nationals to secure fundamental labour rights throughout their global operations. It might be preferable that such a duty is framed in express terms, as proposed in the recent revised draft of the BHR treaty, yet this could be done through the evolutive interpretation of the existing international human rights framework.[121] Budding domestic legislation and jurisprudence can serve as a guidance for shaping such developments in international law. While the rationale of recognising an international obligation of states to regulate extraterritorial activities of their corporate nationals is not instrumental per se – it is grounded in the universality of human rights and the need to ensure their practical and effective protection – strong evidence from the study of extraterritorial obligations for international bribery suggests that this may have a knock-on effect on the enforcement of labour standards by states that are less disposed to enforce labour rights within their territorial jurisdictions.

[120] D Weissbrodt, M Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 Am J Int'l L 901; D Bilchitz, S Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future', in Deva and Bilchitz (n. 42).

[121] E Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014).

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