Between Private Governance and Public Regulation: Covid-19 and Workers’ Rights in Global Garment Supply Chains

Daniel Augenstein | ORCID: 0000-0002-7203-2533
Associate Professor, Department of Public Law and Governance, Tilburg Law School, Tilburg University, Tilburg, The Netherlands
D.H.Augenstein@tilburguniversity.edu

Stefania Baroncelli | ORCID: 0000-0002-5194-8657
Full Professor of Law, Faculty of Economics and Management, Free University of Bolzano, Bolzano, Italy
Corresponding author
stefania.baroncelli@unibz.it

Orsolya Farkas
Research Fellow, Faculty of Economics and Management, Free University of Bolzano, Bolzano, Italy
orsolya.farkas@unibz.it

Abstract

The article traces the adverse human rights impacts of business responses to COVID-19 in the garment sector to long-standing systemic problems in global supply chain management. It scrutinises attempts by States and business enterprises in Europe to address these adverse impacts in the light of the ongoing implementation of the UN Guiding Principles on Business and Human Rights. The article discerns a shift in the European legal and policy framework from early attempts to promote corporate social responsibility to more recent modalities of home state regulation of corporations. In response to concerns that the EU’s regulatory turn in business and human rights may exhaust itself in perpetuating economic imperialism and market hegemony, the article highlights the importance of ensuring access to judicial remedies for foreign victims of business-related human rights violations; and of grounding unilateral home state regulation in a multilateral international legal framework.
Keywords


1 Introduction

The COVID-19 pandemic has once again drawn public attention to the adverse human rights impacts of unsustainable business practices in global supply chains linked to the European market. In the garment sector, major retailers in Europe have offloaded costs incurred through the pandemic-related breakdown of consumer markets to supplier factories in the Global South. These costs are ultimately born by workers in garment-producing countries, who are either driven from employment into poverty or continue to work while being exposed to health risks deemed unacceptable for shop owners and consumers in most parts of the Global North. The article traces the adverse human rights impacts of business responses to COVID-19 on garment workers to longstanding systemic problems in global supply chain management. It scrutinises attempts by States and business enterprises in Europe to address these adverse impacts in the light of the ongoing implementation of the UN Guiding Principles on Business and Human Rights (UNGPs).1

Section two links retailers’ responses to the COVID-19 pandemic to root causes of precarious working conditions in the global garment sector and critiques the insufficiency of corporate social responsibility (CSR) in protecting workers’ rights in the lower tiers of the supply chain. Section three traces the EU’s legal and policy framework on sustainable corporate governance from early preoccupations with promoting voluntary CSR initiatives to a more dedicated focus on business and human rights following the adoption of the UNGPs in 2011. Intimating a shift from private governance to public regulation, section four gauges the impact of existing or envisaged home state human rights due diligence legislation (HRDD legislation) in various European jurisdictions on workers’ rights in the global garment sector. In response to concerns that the EU’s regulatory turn in business and human rights may exhaust itself in perpetuating economic imperialism and market hegemony, section five highlights the importance of ensuring access to judicial remedies for foreign victims of business-related human rights violations; and of grounding unilateral home state regulation in a multilateral international legal framework.

COVID-19 and Corporate Social Irresponsibility in Global Garment Supply Chains

A research brief of the International Labour Organisation (ILO) documents the devastating impacts of the COVID-19 pandemic on workers in the lower tiers of garment supply chains in Asia and the Pacific. With the virtual collapse of global garment trade in the first half of 2020, the export of ready-made garments from Asia's producing countries dropped by 70%. As consumers in developed market economies saw their income decrease or disappear and governments ordered the shutdown of clothing outlets to prevent the spread of the virus, major brands and retailers tumbled into financial turmoil and had to apply for public funds or undergo restructuring. Income forfeited due to declining consumer demand and shop closures was often offset by postponing or cancelling production orders, renegotiating payment terms, or refusing to pay altogether for garments produced or shipped.

In April 2020, the OECD noted with regard to the Bangladeshi garment sector – which accounts for more than 80% of the country's annual exports and is highly dependent on imports by EU and US brands – that orders worth USD 2.67 billion had been cancelled or held up by global buyers: ‘As the sector employs over 4 million people, mostly women, cancellations of orders may cause obstruction of scheduled wages and shutdown of factories at a high scale’. Brands’ and retailers’ purchasing and pricing policies aggravated the already precarious situation of many garment factories, having to cope with rising costs and delayed production due to COVID-19 related bottlenecks in sourcing raw materials. These policies also contributed to large-scale violations of human and labour rights in the lower tiers of the supply chain. Inadequate wages and volatile working conditions meant that workers and their families hit by pandemic-related layoffs were driven directly from employment into poverty.

5 OECD, COVID-19 and Responsible Business Conduct (16 April 2020) p. 5.
into place unprecedented rescue packages to ease the economic and health impacts of COVID-19, including financial relief for business enterprises and unemployment benefits for workers, garment-producing countries often lack the necessary financial means, public infrastructure, health systems, and social safety nets.7

After the 2013 Rana Plaza disaster which resulted in the death of more than 1000 workers and two transnational private regulatory initiatives (the Alliance for Bangladesh Worker Safety and the Accord on Fire and Building Safety in Bangladesh), business enterprises in the garment sector have once again entered into a ‘crisis’ mode and find themselves confronted with widespread allegations of irresponsible business conduct. By investing in fire and building safety, factory monitoring, and workers training, those global brands and buyers participating in the Alliance and the Accord offered at least temporary and partial relief to workers in Bangladeshi garment factories.8 Yet due to their transnational and private (contractual) nature, both initiatives would only cover segments of the domestic garment industry and largely steer clear of (re-)distributive labour politics traditionally associated with the State. At the same time, unabated sourcing and pricing ‘squeezes’ of garment suppliers meant that, five years after Rana Plaza, workers had seen their real wages decline and violations of their labour rights increase.9 If companies’ legal commitments to the Alliance and the Accord at least implicitly acknowledged the insufficiency of ‘voluntary’ CSR initiatives, their failure to redistribute value down the supply chain casts a long shadow on today’s business responses to COVID-19.

The anti-sweatshop movements of the 1980s and 1990s stimulated research into structural forms of injustice and exploitation in global supply chains linked to the geographical dispersion of production towards the Global South and the concomitant concentration of market power by upstream business enterprises in the Global North.10 They also propelled the apparel and footwear industry (Nike, Lewis, GAP, etc.) into a pioneering role on corporate social

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8 The Alliance ceased operations in December 2018. The Accord expired in May 2021 and was replaced by a new time-bound International Accord for Health and Safety in the Garment and Textile Industry.
responsibility. Generations of private CSR initiatives in the garment sector – codes of conduct; compliance (auditing) initiatives; certification (labelling) schemes; and capacity-building approaches – have yielded some notable improvements of labour conditions in the lower tiers of the supply chain. Yet each of these initiatives has also been subject to sustained critique for their failure to deliver on workers’ rights and distributive justice, including an insufficient downstream implementation of buyers’ policy commitments in their codes of conduct; the command & control style and one-size-fits-all approach of private auditing; the commodification of social protection through investor- and consumer-driven labelling schemes; and the marginalisation of industrial relations in technical and managerial capacity-building efforts for suppliers.

The core problem with conventional CSR approaches to supply chain management, Richard Locke argues in his influential study on The Promise and Limits of Private Power, is that these approaches are too narrowly focused on improving labour protection on the factory floor. This neglects the role of upstream business practices by global brands and retailers in organising the production process and structuring the relations between key actors in the supply chain. Contemporary garment production has been tightened to just-in-time delivery at all stages of the process, from product design and the sourcing of raw materials to the shipping of ready-made garments and their display in shop windows. The life cycle of ‘fast’ fashion is extremely short, with some brands changing their collections on a monthly basis. As a consequence, even minor disruptions of the global production process can have major (financial) implications. While global buyers may seek to avert this risk by using intermediaries and/or sourcing from multiple suppliers, garment-producing factories have to quickly adjust to changing order specifications and volumes. The detrimental impacts on workers’ rights – precarious ‘hire and fire’ employment and excessive working hours – are exacerbated by global buyers’ pricing and purchasing policies that drive down wages and social protection standards, entrenching exploitation, discrimination, and poverty in the lower tiers of the supply chain.

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garment supply chain.\textsuperscript{15} Prices are ‘often so low that they do not allow suppliers to pay their workers the local minimum wage or social welfare payments, and delivery times lead to unreasonable working hours’. Moreover, ‘even where contractual clauses or supply codes of conduct require human rights and environmental standards, the prices paid to suppliers may not take into account the costs of adhering to [these] standards.’\textsuperscript{16}

Workers’ predicament is compounded by the inability and/or unwillingness of governments in garment-producing countries to enforce domestic labour protection standards, variously driven by fears of loosing competitive advantages (low labour costs) in global commodity markets following neoliberal structural adjustment programs; attempts to suppress the politicisation of labour exploitation by (‘communist’) trade union activity; and collusions of economic interest between government representatives and garment factory owners.\textsuperscript{17} Business responses to COVID-19 in the global garment sector, Mark Anner concludes, have brought into relief

the extreme fragility of a system based on decades of buyers squeezing down on prices paid to suppliers: factory closures, unpaid workers with no savings to survive the hard times ahead, and a government with such a low tax revenue that it has very limited ability to provide meaningful support to workers and the industry.\textsuperscript{18}

3 \textbf{From CSR to Business and Human Rights}

In April 2020, European Commissioner for Justice Didier Reynders announced an EU legislative initiative on mandatory supply chain due diligence.\textsuperscript{19} Noting the need for reform of global supply chains exposed by the COVID-19 pandemic, the Commissioner envisaged the new legislation to establish cross-sectoral


\textsuperscript{16} BIICL, CIVIC Consulting and LSE, Study of Due Diligence Requirements through the Supply Chain (2020) p. 221.


\textsuperscript{18} Anner, “Abandoned? The Impact of COVID-19 on Workers” op. cit, p. 1.

human rights and environmental due diligence requirements for all EU-based companies. The announcement was made on occasion of the presentation of a major EU-sponsored supply chain due diligence study. Building on the UNGPs, the study concluded that the prevailing ‘soft-law’ approach to business and human rights has proven insufficient. It also highlighted increasing stakeholder support for EU legislation that should set a single harmonised standard for all business enterprises operating in the internal market. Following on from the Commission’s announcement, the European Parliament’s Committee on Legal Affairs tabled a motion for a Resolution recommending a European Directive on Corporate Due Diligence and Corporate Accountability, which the Parliament adopted in a landslide vote in March 2021 (EP Resolution).

The envisaged Directive differs decisively from the European Commission’s earlier approach to corporate social responsibility. In a 2001 Green Paper, the Commission had defined CSR as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis ... not only fulfilling legal expectations, but also going beyond compliance by investing “more” into human capital, the environment and their relations with stakeholders’. This definition epitomises the core elements commonly associated with CSR. First, granted that ‘corporate citizens’ – as everyone else within the State’s jurisdiction – are required to abide by the rule of law, corporate responsibilities towards society are considered voluntary in the sense of not being mandated by public regulation and backed up by state enforcement. Second and related, while the inclusion of social and environmental concerns broadens the scope of these responsibilities from shareholders to (external) stakeholders and thus integrates other-regarding moral principles into business practices driven by economic self-interest, CSR traditionally does not reference human rights.

20 BIICL, CIVIC Consulting and LSE, Study of Due Diligence Requirements through the Supply Chain, op. cit.
21 European Parliament, Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)). On the EU’s approach to CSR and HRDD, see also in this special issue Monica Rosini, “From Corporate Social Responsibility to Human Rights Due Diligence: An Overview of Approaches, Initiatives and Measures Adopted by the European Union”.
This not only shapes its normative aspirations – responding to bounded social expectations rather than to universal values. It also, and third, determines its modus operandi: corporate responsibility through self-regulation instead of corporate accountability through rights and remedies.25

In 2011, the European Commission put forward a ‘modern’ definition of CSR that abandoned corporate voluntarism. Corporate social responsibility now means ‘the responsibility of enterprises for their impacts on society’, which should be met through ‘a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations’.26 The new approach reflects core tenets of the corporate responsibility to respect human rights – the second pillar of the UNGPs developed by UN Special Representative on Business and Human Rights (SRSG) John Ruggie between 2005 and 2011. UN Guiding Principle 11 requires business enterprises to ‘avoid infringing on the human rights of others’ and to ‘address the adverse human rights impacts with which they are involved’.27 Specifically, business enterprises should publicly signal their policy commitment to human rights; exercise human rights due diligence (HRDD) to ‘identify, prevent, mitigate and account for how they address their impacts on human rights’; and remedy ‘any adverse human rights impacts they cause or to which they contribute’.28

While the UNGPs barely touch directly on CSR, they have contributed much towards integrating human rights into corporate governance. The SRSG impressed upon business enterprises that corporate respect for human rights was not voluntary but mandated by their social licence to operate – a ‘global standard of expected conduct’ that ‘exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations’.29 This global standard of expected conduct refers to all internationally recognised human rights and is operationalised through corporate human rights due diligence (HRDD). Next to ‘identifying and managing material risks to the company itself’, HRDD should ‘include risks to rights-holders’, thus integrating a rights-based approach into corporate self-regulation.30 It ‘should cover adverse human rights impacts that the business enterprise may cause or contribute

27 UNGPs op. cit. Guiding Principle 11.
28 ibid, Guiding Principle 15.
29 ibid, Guiding Principle 16 (Commentary).
30 ibid, Guiding Principle 17 (Commentary).
to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’, thus expanding business responsibilities for human rights to the global value chain.\(^\text{31}\) Finally, where business enterprises ‘have caused or contributed to’ adverse human rights impacts, ‘they should provide for or cooperate in their remediation through legitimate processes’.\(^\text{32}\)

Existing evidence of business enterprises taking seriously their responsibilities for human rights is underwhelming. Widespread shortcomings in the implementation of the 2nd pillar include a limited uptake of the corporate responsibility to respect beyond mere policy commitments by business; an unduly narrow approach to HRDD often confined to first-tier suppliers and the use of contractual clauses and codes of conduct; a lack of dedicated focus on human rights in corporate governance and a ‘mismanagement’ of human rights risks; a misalignment between companies’ social human rights commitments and their legal (litigation) strategies; and a heavy reliance on the ‘business case’ for human rights that ties their protection to economic performance, reputational risks, and the expectations of investors and consumers.\(^\text{33}\) This general picture is confirmed by many global brands and retailers’ disregard of their corporate responsibility to respect human rights during COVID-19.

In a sector notoriously plagued by low wages and precarious working conditions, the adverse impacts of brands’ and retailers’ pricing and purchasing policies were clearly foreseeable and should qualify as contributions to violations of internationally protected human and labour rights – with the consequence that companies have to cease their harmful conduct and remedy its adverse impacts on workers in garment-producing factories.\(^\text{34}\) This is confirmed by the Office of the UN High Commissioner for Human Rights’ guidance on business enterprises’ implementation of their corporate responsibility to respect human rights. Decisions by a company’s buying division without due regard to suppliers’ capacity to comply with labour standards entail a risk of ‘contributing to adverse human rights impacts’.\(^\text{35}\) A company may also contribute to adverse human rights impacts by changing ‘product requirements for suppliers at the eleventh hour without adjusting production deadlines and

\(^{31}\) ibid, Guiding Principle 17(a).

\(^{32}\) ibid, Guiding Principle 22.

\(^{33}\) BIICL, CIVIC Consulting and LSE, Study of Due Diligence Requirements through the Supply Chain, op. cit. pp. 214–222.


prices, thus pushing suppliers to breach labour standards in order to deliver.36 Where a business enterprise’s involvement does not cross the threshold of ‘contribution’, decisions to disengage with suppliers should ‘take into account credible assessments of the potential adverse human rights impacts of doing so’.37 Instead, business practices by major brands and retailers in the garment sector have perpetuated the vicious circle between precarious employment conditions, (sub-) subsistence wages and excessive working hours, betraying their commitments to respect workers’ personal autonomy (‘contractual freedom’; ‘free’ as opposed to ‘forced’ labour), and rendering a meaningful exercise of their collective labour rights illusionary.

4 Home-State Regulation of Corporations

The UNGPs intertwine the corporate responsibility to respect human rights (2nd pillar) with the State duty to protect human rights against abuses by business enterprises (1st pillar) and access for victims to effective judicial and non-judicial remedies (3rd pillar). Together, the ‘protect, respect and remedy’ pillars form a complementary whole in which States are duty-bound to ‘translate’ international human rights norms into domestic laws and policies regulating corporate activities, while corporations respect human rights as globally recognised standards of expected conduct, with both providing remediation for breaches of these overlapping governance systems within their respective jurisdictions.38 As part of their duty to protect human rights, States need to adopt a ‘smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights’, including through incentivising and where necessary requiring corporate human rights due diligence.39

Various States in Europe have enacted or consider enacting legislation that renders (elements of) the UNGPs’ HRDD requirements legally binding on business enterprises with extraterritorial effect.40 Existing examples of home state regulation range from attempts to enhance corporate transparency through

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36 ibid, p. 17.
37 UNGPs op. cit., Guiding Principle 19 (Commentary).
39 UNGPs op. cit. Guiding Principle 3 (Commentary).
40 This is encompassed by the UNGPs’ ‘smart mix of measures’; see Shift, Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a “Smart Mix”
disclosure and reporting to the imposition of substantive due diligence obligations on business enterprises to protect human rights and the environment. Apart from the business entity’s place of incorporation (‘parent-based’ due diligence legislation), the necessary jurisdictional link can also be established in virtue of products and services placed on the State’s domestic market (‘market-based’ due diligence legislation). On the former model, a business enterprise domiciled within the State’s jurisdiction is legally required to exercise HRDD in relation to foreign operations by its subsidiaries and suppliers. On the latter model, market access by business enterprises is conditional upon compliance with certain product- and process (due diligence) standards protecting human rights abroad.

Transparency legislation – such as the EU Non-Financial Reporting Directive (NFRD) or the UK Modern Slavery Act – aims to promote corporate respect for human rights by imposing on business enterprises operating within the State’s jurisdiction non-financial reporting requirements about their global value chains. Rather than requiring substantive human rights due diligence, transparency legislation creates market incentives for companies to develop a socially responsible approach to business by enabling investors and consumers to evaluate their human rights and environmental performance. As with the NFRD, ‘disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection’. The considered examples of transparency legislation are relevant to the garment sector insomuch as they impose horizontal reporting requirements (the NFRD) or pertain to violations of labour rights that amount to modern slavery (such as forced labour).

Desk research and stakeholder interviews conducted during the EU Supply Chain Due Diligence Study have revealed the overall limited impact of transparency legislation on sustainable corporate governance. While recent years have seen increasing consumer demands for ‘sustainable fashion’, a main challenge of corporate reporting remains the poor quality of company

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42 ibid. Recital 3.
43 BIICL, CIVIC Consulting and LSE Study of Due Diligence Requirements through the Supply Chain, op. cit. pp. 245–250.
responses – which have led to concerns about mere ‘paper compliance’ and a ‘managerialisation’ of human rights reporting.\textsuperscript{45} States have begun to address these concerns through legislative amendments and dedicated (sector-specific) reporting guidelines. Yet the reliance of transparency legislation on market incentives also points to an ‘inherent limitation of mandated disclosure as a regulatory strategy, which cannot by itself force changes in conduct and offer reparations for harm’.\textsuperscript{46} Even where, as with the more recent Australian Modern Slavery Act,\textsuperscript{47} reporting requirements are mandatory and tailored to human rights risks to third parties, corporate disclosure tends to focus on information about material risks to the company and ex-post measures taken to address them.\textsuperscript{48} Even where, as in the case of the EU NFRD, compliance with reporting requirements is subject to State enforcement,\textsuperscript{49} transparency legislation cannot compel companies to exercise human rights due diligence.

Market-based due diligence legislation conditions market access by business enterprises upon compliance with substantive due diligence requirements that reach out into the global value chain. Examples in Europe include the EU Timber Regulation (\textsc{eutr}), the EU Conflict Minerals Regulation, and the Dutch Child Labour Due Diligence Law.\textsuperscript{50} \textsc{eutr} requires operators placing timber (products) on the internal market to develop a due diligence system to identify, assess and mitigate the risk of illegally lodged timber being sold in the European Union. EU Member States must apply ‘effective, proportionate and dissuasive’ penalties in case of non-compliance, which may include

\begin{itemize}
\item \textsuperscript{45} See, for example, Alliance for Corporate Transparency, \textit{An Analysis of the Sustainability Reports of 1000 Companies pursuant to the EU Non-Financial Reporting Directive (2016)}, available at https://www.allianceforcorporatetransparency.org/; David Monciardini, Nadia Bernaz and Alexandra Andhof, "The Organisational Dynamics of Compliance with the UK Modern Slavery Act in the Food and Tabaco Sector", \textit{60(2) Business and Society} (2021) pp. 288–340.
\item \textsuperscript{47} Australia Modern Slavery Act 2018 (No 153, 2018) Section 16; this approach advances beyond the ‘comply or explain’ approach in section 54(5) of the UK Modern Slavery Act 2015.
\item \textsuperscript{48} BIICL, CIVIC Consulting and LSE, \textit{Study of Due Diligence Requirements through the Supply Chain}, op. cit. p. 219.
\item \textsuperscript{49} Directive 2014/95/EU Recital 10.
\end{itemize}
The Dutch Child Labour Due Diligence Law adopted in May 2019 imposes due diligence (gepaste zorgvuldigheid) obligations to prevent child labour in the supply chain on business enterprises selling goods and providing services to Dutch end-users. The Act applies to all business enterprises (whether domiciled in the Netherlands or abroad) that supply goods and services to consumers in the Netherlands. Companies have to issue a (one-off) due diligence statement to the effect that they investigate reasonable suspicions of, and implement actions to address, instances of child labour in their supply chains. The Act provides for public monitoring and enforcement that combines administrative and criminal sanctions, but does not include civil remedies.

While market-based due diligence legislation addresses some of the shortcomings of reporting requirements, existing examples fall short of the requirements of the UNGPs. If the EU’s sector-specific due diligence legislation lacks a (dedicated) focus on human and labour rights, the Dutch law narrowly focuses on the protection of children. Confining the scope of due diligence to particular sectors and/or groups of rights holders contravenes the universality and indivisibility of human rights and may disincentivize business enterprises to address other (and potentially more salient) human rights risks. Moreover, as the justification of market-based due diligence legislation relies heavily on the protection of domestic consumers, none of the considered examples includes civil remedies for victims of business-related human rights violations inside or outside the European Union.

The Norwegian Transparency Act, the German Law on Corporate Due Diligence in Supply Chains and the French Duty of Vigilance Law are presently the only examples of HRDD legislation that cover all sectors of economic activity and all groups of rights-holders, including workers in the garment sector.

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51 Regulation (EU) No 995/2010 Recital 17; Articles 6 and 19.
52 Wet Zorgplicht Kinderarbeid.
54 Norwegian Transparency Act (‘Åpenhetsloven’) (2021); Gesetz ueber die unternehmens­erischen Sorgfaltpflichten in Lieferketten (2021); Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (2017). In March 2021, a private members’ bill was introduced into the Dutch Parliament that proposes to replace the Child Labour Due Diligence Law with a cross-sectoral Responsible and Sustainable International Business Conduct Act; see further https://www.mvoplatform.nl/en/translation-of-the-bill-for-responsible-and-sustainable-inter­national-business-conduct/.
However, these examples of ‘parent-based’ due diligence legislation only apply to comparatively large business enterprises and/or do not cover the entire supply chain. The French Duty of Vigilance Law confines human rights due diligence to ‘established commercial relationships’, which is a narrower standard than the UNGPs’ notion of ‘business relationship’. While not necessarily confined to first-tier suppliers, the French standard would appear insufficient to ensure workers’ protection across the garment supply chain – notorious for its arms-length supply relationships based on insecure, short-term, and often unwritten contracts. The German Law is more narrowly focussed on direct suppliers, with HRDD in relation to lower tiers of the supply chain only being required where a company fraudulently circumvents the direct supplier or obtains substantiated knowledge of potential human rights abuses by indirect suppliers. This tier-based approach is unlikely to be of much help in the cases at hand, given that major brands and retailers rarely source directly from the garment factories where the human rights abuse takes place. Only the French Duty of Vigilance currently provides for a civil remedy mechanism that enables victims to sue the parent/controlling company in France for violations of human and labour rights in its supply chain.

The EU Directive on Corporate Due Diligence and Corporate Accountability envisaged by EP Resolution 2020/2129(INL) promises to consolidate the trend towards more robust models of home state regulation in Europe. The new Directive should impose cross-sectoral HRDD requirements on business enterprises incorporated in the European Union and/or operating in the internal market. As compared to the French and the German model, the envisaged Directive also covers small and medium-sized enterprises that are publicly listed or that operate in high-risk sectors; and extends the scope of human rights due diligence obligations to all business partners and value chain relationships. There is an explicit requirement for business enterprises to ‘ensure that their purchase policies do not cause or contribute to potential or adverse impacts on human rights, the environment or good governance’.


Lieferkettengesetz§ 9.


European Parliament Resolution of 10 March 2021 Article 4(8).
inclusion of buyers’ purchasing practices into chain-wide HRDD obligations has the potential to significantly enhance the legal protection of workers in the lower tiers of global garment supply chains linked to the European market. The EP Resolution also envisages a civil remedy mechanism that would require Member States to impose strict liability on business enterprises, with the exercise of HRDD serving as a defence.\(^{59}\)

To date, existing legislation in Europe to prevent and redress business-related human rights violations in global supply chains only offers limited and patchy protection to workers in the garment sector. Leaving aside transparency legislation that does not impose substantive HRDD requirements, the effectiveness of ‘market-based’ due diligence legislation is hampered by its confinement to particular sectors of economic activity and/or to selected groups of rights-holders. ‘Parent-based’ due diligence legislation presently only applies to comparatively large business enterprises and does not ensure sufficient protection of workers in the lower tiers of the supply chain. Except for the French Duty of Vigilance Law, existing legislation does not include a civil liability mechanism that would ensure access to justice and effective remedies in Europe for workers in garment-producing countries.

5 New Clothes for the Old Emperor?

The inadequacy of traditional CSR approaches and of the corporate responsibility to respect human rights in protecting garment workers against the adverse impacts of business responses to COVID-19 is not reducible to ‘governance gaps created by globalisation’ that could be addressed simply by integrating human rights due diligence commitments into global supply chain management.\(^{60}\) Ten years into the implementation of the UNGPs, the awkward coupling of corporate voluntarism on the part of global brands and retailers with social compliance initiatives to enforce labour standards on the factory floor nurtures suspicions that the EU’s sustainable corporate governance discourse largely serves to disguise upstream market concentration by European lead firms and to deflect from corporate legal accountability for extraterritorial human rights harm. Far from offering a ‘neutral’ response to challenges of global labour governance, CSR has perpetuated power asymmetries in global supply chains and re-entrenched a neoliberal business model geared towards

\(^{59}\) ibid, Article 19(2).
workers’ exploitation in the Global South.\textsuperscript{61} Similarly, the disappointing uptake and implementation by business enterprises of their corporate responsibility to respect human rights may not only be due to a lack of dedicated guidance and technical expertise. It may equally be a consequence of the UNGPs’ attempt to foreground corporations’ global ‘social licence’ to operate as a response to persistent protection gaps in public international (human rights) law.\textsuperscript{62}

Mainstreaming human rights due diligence into corporate governance via a globalised liberal private sphere aims to compensate for the negative externalities of economic globalisation following the demise of the (Western/Westphalian) bargain of ‘embedded liberalism’ – in which the commitment to international trade liberalisation was balanced by an activist Welfare State able to promote social and economic equality at the national level.\textsuperscript{63} Yet inadvertently, it also perpetuates the liberal ‘wall of separation’ between public and private,\textsuperscript{64} which attributes to States and business enterprises their respective ‘duties’ and ‘responsibilities’ in the UNGPs’ polycentric global governance framework: ‘While corporations may be considered “organs of society”, they are specialised economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not mirror the duties of States’.\textsuperscript{65}

When transposed to the global level, this division of labour between the public-as-political and the private-as-economic not only consolidates the imbalance between corporate rights and duties in international law that has long served to tame host state sovereignty with imperatives of trade liberalisation and foreign investment protection.\textsuperscript{66} It also intimates a transformation of the role of home states in global governance from protecting victims of corporate human rights abuse towards creating a business-friendly regulatory environment that incentivises companies to contribute to the implementation of


\textsuperscript{65} Human Rights Council, \textit{Protect, Respect and Remedy: op. cit.} para 53.

de-territorialised public policy objectives. Put crudely, investing global business enterprises with human rights responsibilities is not simply a response to governance gaps created by economic globalisation; it is equally a governance technique through which States externalise their regulatory preferences and value commitments on the back of global market actors.

The revival of (international) law as a terrain of counter-hegemonic political struggle about the regulation of global supply chains confronts the EU’s regulatory turn in business and human rights with Europe’s darker legacies of imperial rule and market hegemony. Instead of providing relief to workers in the lower tiers of garment supply chains, the twofold trajectory from CSR to transnational private regulation, and from the corporate responsibility to respect human rights to home state regulation with extraterritorial effect, may signal the emergence of an ‘imperial global state’ ruled by a transnational capitalist class via de-centralised networks of global ‘good’ governance. Instead of paving the way towards a democratisation of international law and a globalisation of distributive justice, it may perpetuate the neoliberal marketisation of human rights through a juridification of global markets.

It is too early to assess the impact of the more recent modalities of home state regulation in Europe on the protection of workers’ rights in global garment supply chains. Such assessment is further complicated by the mismatch between the at times rather sweeping critiques of Third World and Neo-Marxist approaches to international law and the often unduly technocratic and managerial governance debate on global supply chain regulation. In one sense, the imposition of legal human rights due diligence requirements on business actors and activities linked to the European market represents the thus far

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robust attempt to counteract unfair business practices and worker exploitation in global garment supply chains, which may also contribute to removing obstacles for third States in implementing international labour standards in their domestic economies. In another sense, the regulation of extraterritorial human rights impacts via global market actors bespeaks post/neo-colonial concerns about economic imperialism (the ‘business case’ for human rights) and market hegemony (creating a global ‘corporate level playing field’ to protect national industries).

One way to mitigate these concerns is to strengthen access to justice for foreign victims of business-related human rights violations in European courts. Civil remedies not only ensure monetary compensation for extraterritorial human rights harm and contribute to enforcing States’ international human rights obligations in the relationship between lead firms and workers in global garment supply chains. They also offer a public and political forum for workers and other marginalised groups in the Global South to claim their human rights in the home states of corporate investment. However, the implementation of the UNGPs’ third (‘remedy’) pillar remains the Achilles heel of States’ attempts to ensure global corporate respect for human rights. In Europe, the French Duty of Vigilance Law is currently the only example of home state regulation that provides for tort remedies. The European Directive envisaged by the EP Resolution would extend the scope of civil liability to the entire supply chain, on the condition that business enterprises within the personal scope of the Directive, and undertakings under their control, have caused or contributed to human rights harm abroad. A reform of EU private international law envisaged in two Annexes to a previous European Parliament Report was not

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put to parliamentary vote,\textsuperscript{78} and the EP Resolution presently awaits its (dis-) approval by the European Commission’s Regulatory Scrutiny Board. Previous attempts in other European States to include a civil liability mechanism into corporate human rights due diligence legislation failed in a public referendum (Switzerland) and due to persistent pushbacks from the Federal Ministry of Economic Affairs and major business associations (Germany).\textsuperscript{79}

Another opportunity to mitigate concerns that the EU’s regulatory turn in business and human rights may serve as a pretext for economic imperialism and market hegemony are the ongoing negotiations of an international business and human rights treaty.\textsuperscript{80} If adopted, the treaty would place the unilateral imposition of HRDD requirements with extraterritorial effect on a secure multilateral legal footing, while also reinforcing the primacy of State obligations to respect, protect and fulfil human rights in the context of global business operations. The initial reaction to the international treaty initiative by the European Union and other States in the Global North was complacent if not defensive.\textsuperscript{81} There was a widely held perception that attempts at international legal reform would prove unfeasible or ineffective, jeopardizing the global consensus built around the UNGPs in 2011.\textsuperscript{82} Meanwhile, there is growing recognition of the complementarity between the two processes, with the more recent draft treaty texts clearly referencing the UNGPs’ notion of corporate human

\textsuperscript{78} European Parliament, \textit{Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability} (2020/2129(INI)), A9–0018/2021, Annexes I & II.

\textsuperscript{79} On Switzerland, see Swiss Coalition for Corporate Justice, \textit{The Initiative. Text with Explanations}, https://corporatejustice.ch/about-the-initiative/. In Germany, an informal draft by the Federal Ministries of Labour and Economic Cooperation that predated the German Law on Corporate Due Diligence in Supply Chains had still envisaged a civil liability mechanism; see \textit{Entwurf für Eckpunkte eines Bundesgesetzes über die Stärkung der unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in globalen Wertschöpfungsketten} (2020).


rights due diligence, while also consolidating the recognition of extraterritorial state obligations to prevent and redress corporate human rights abuse.\(^{83}\)

6 Conclusions

In the midst of a collapsing global garment sector, the Better Buying Institute called upon brands and retailers to collaborate with suppliers in honoring existing contracts and commitments. Next to ‘accepting and paying for all existing purchase orders for goods that have been shipped, are ready or in progress or are cut’, buyers should explore (financial) options to assist suppliers in retaining their workforce.\(^{84}\) The International Labour Organisation and the Sustainable Apparel Coalition have urged a ‘future-proofing’ of garment supply chains to ensure social protection and safety nets for workers in economic hardship.\(^{85}\) With mounting public pressure and ‘enlightening’ corporate self-interest, an increasing number of global brands and retailers have meanwhile heeded the call.\(^{86}\) While this provides much needed short-term relief for garment factories and their workers in the Global South, the ad hoc and after-the-fact nature of business responses to COVID-19 also illustrates the need for longer-term and forward looking reforms of crisis-ridden global garment supply chains.

Taking its cue from the adverse human rights impacts of business responses to COVID-19 in the garment sector, the article traced the evolution of the European legal and policy framework on business and human rights from early CSR initiatives to more recent modalities of home-state regulation of corporations. The EU’s regulatory turn in business and human rights was critiqued for its inadequacy in protecting workers in the lower tiers of global garment


supply chains. An undue reliance on market incentives to ensure corporate respect for human rights and a failure to mainstream HRDD requirements across the entire supply chain not only calls into question the effectiveness of more recent examples of home-state regulation in Europe. It also raises broader normative concerns that the juridification of corporate social responsibilities (to respect human rights) in a globalised liberal private sphere may perpetuate economic imperialism and market hegemony under the neutralising guise of an international rule of law. In response to these justified concerns, the article highlighted the importance of ensuring access to judicial remedies for foreign victims of business-related human rights violations; and of grounding unilateral HRDD legislation in a multilateral international legal framework.