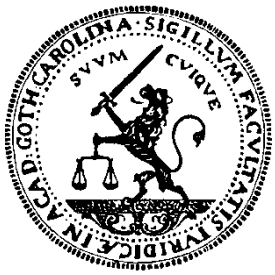

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Labour Governance of Global Supply Chains:

A Study of the Implications of Globalization on Labour Law and the Protection and Enforceability of Labour Rights within Global Supply Chains

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International Human Rights Law
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Summary

The aim of this thesis is to build an understanding of the current instruments and mechanisms governing global supply chains, and to identify the governance gaps in the protection of labour rights. In order to fully understand the implications of globalization on labour law, the thesis undertakes a theoretical framework drawing on transnational labour law perspectives and a conceptual analysis of global supply chains. By doing so, the thesis has been able to discern the implications on two of the organizing principles of labour law, namely: the territorial authority of the state and the organization of the company. It has further been show that states have actively participated in the deregulation and denationalization of labour law and trade, which in turn has not only lead to weaker labour protection, but has also led to changes in the organization of production. By outsourcing and offshoring production to locations where production costs are lower and the protection of labour rights generally weaker, transnational corporations (TNCs) are able to exploit cheap labour without being held legally liable for violations of labour rights within the supply chains.

This understanding of the ideas behind labour law and the mechanisms of global supply chains provides the background against which the international legal framework on labour law and private labour regulations have been further examined. By examining relevant instruments of the International Labour Organization, the United Nations, and regional instruments, it has been shown that the state-centrism of these instruments make it difficult to effectively protect labour rights within global supply chains. Although various instruments, such as the OECD Guidelines on Multinational Enterprises, do address TNCs more directly, these instruments are of soft law character and do not create any legal obligations. Due to these gaps in the international labour law framework, there has been a shift to private regulatory initiatives on labour, such as corporate social responsibility (CSR) practice, which involve the direct participation of TNCs. However, the thesis has shown that CSR practices allow for TNCs to avoid binding obligations. As a reaction to this, Global Union Federations have started to negotiate Global Framework Agreements (GFAs) with TNCs. Although GFAs are better at incorporating workers' interests, they do not have any clear relationship to law or legal enforcement. The thesis has shown that these problems can be remediated through specifications in the GFAs. However, due to the contractual nature of GFAs, it is required that TNCs consent to the content of a GFA in order to be bound by its obligations. Thus, the GFA cannot serve as a guarantee for the protection of labour rights within global supply chains.

Sammanfattning

Syftet med denna uppsats är att bygga en förståelse kring de gällande regelverk och mekanismer som styr globala leverans- och försörjningskedjor samt att identifiera de luckor som finns i det arbetsrättsliga skyddet. För att kunna förstå de konsekvenser som globaliseringen har haft på arbetsrätten utgår uppsatsen från ett teoretiskt ramverk som bygger på perspektiv från transnationell arbetsrätt samt en konceptuell analys av leverans- och försörjningskedjor. Genom att göra detta har uppsatsen kunnat visa de konsekvenser som globaliseringen har haft på två principer som arbetsrätten är organiserad kring, nämligen statens territoriella auktoritet och organiseringen av företaget. Stater har aktivt deltagit i avregleringen och avnationaliseringen av arbetsrätten och handeln, som i sin tur har lett till svagare arbetsrättsligt skydd och förändringar i organiseringen av produktionen. Genom att utkontraktera eller förelägga produktionen till länder där produktionskostnaderna är lägre och det arbetsrättsliga skyddet oftast svagare, har transnationella bolag kunnat undgå rättsligt ansvar för kränkningar av arbetsrätten samtidigt som de kunnat bibehålla kontrollen över produktionen.

Denna förståelse av de ändringar som globaliseringen fört med sig för arbetsrätten och produktionen utgör också den bakgrund mot vilken det internationella rättsliga ramverket rörande arbetsrätt samt privat arbetsrättslig reglering har undersökts. Genom att studera de relevanta regelverk av Internationella arbetsorganisationen, Förenta Nationerna samt regionala regelverk, har uppsatsen visat att det statscentrerade fokuset i dessa regelverk gör det svårt dem att effektivt skydda arbetsrätten inom leverans- och försörjningskedjor. De regelverk som är mer direkt riktade till transnationella bolag, såsom OECD Guidelines on Multinational Enterprises, är inte bindande. På grund av dessa svagheter inom det internationella rättsliga ramverket har det skett en skiftning mot privata arbetsrättsliga regleringar såsom Corporate Social Responsibility. Dessa initiativ bygger bland annat på direkt deltagande av transnationella bolag. Uppsatsen har dock visat att dessa initiativ utgör ett sätt för transnationella bolag att undvika bindande regler. Som en reaktion till detta har Global Union Federations börjat förhandla globala ramavtal med transnationella bolag. Fastän globala ramavtal är bättre på att inkorporera arbetarnas intressen har de dock inte kunnat etablerat något klart band till lag och rättslig verkställighet. Uppsatsen har visat att dessa problem kan åtgärdas genom vissa specifikationer i de globala ramavtalen. Dock kräver globala ramavtal samtycke från transnationella bolag för att kunna binda bolagen vid de arbetsrättsliga förpliktelserna i avtalet. Således kan globala ramavtal inte utgöra en garanti för arbetsrättsligt skydd inom leverans-och försörjningskedjor.

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Abbreviations

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
BIAC	Business and Industry Advisory Committee
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CSR	Corporate Social Responsibility
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
GFA	Global Framework Agreement
GUF	Global Union Federation
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization

IUF	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations
MNE	Multinational Enterprises
NCP	National Contact Point
OECD	Organization for Economic Co-operation and Development
TNC	Transnational Corporation
TUAC	Trade Union Advisory Committee
UN	United Nation
UNGC	UN Global Compact
UNGP	UN Guiding Principles on Business and Human Rights

1.Introduction

1.1 Background

The collapse of the garment factory building Rana Plaza in 2013, exposed a dark side of globalization and was a reminder of how working conditions and workers' safety have been rendered invisible due to modern marketing and the increasing distance between consumption and production through long chains of trade across the globe.[1] Moreover, the tragic building collapse facilitated an intensification of transnational labour networks and human rights activists demanding a change of the system that allows transnational corporations to exploit low labour conditions for their own gains and without any consequences.[2]

Trade liberalization together with trade agreements have created a context in which consumers can buy products which have been produced in a line of several countries, regardless of their nationality or class affiliation.[3] Globalization has forced production to adapt to the fast tempo of the economy and consumption patterns. Delegating work to third parties in other countries has thus become a strategy that companies use in order to enhance efficiency and reduce costs.[4] The chains of trade, referred to above, commonly known as global supply chains, are products of contemporary globalization. They are made up of practices such as subcontracting, outsourcing and other allied arrangements.[5] Controversies and tragedies such as Rana Plaza, illustrate how efficiency and profit maximization through global supply chains often come at the expense of working

[1] See Wichterich C and Islam Khan MR, "After Rana Plaza: Multi-Stakeholder Governance of the RMG Industry in Bangladesh." (2015) Global Labour Column 3.

[2] Scheper C, "Labour Networks under Supply Chain Capitalism: The Politics of the Bangladesh Accord." (2017) 48 Development & Change 1070.

[3] Mosley L, "Labor Rights in the Age of Global Supply Chains." (2017) 116 Current History 17.

[4] See Mosley, 17; Tsing A, "Supply Chains and the Human Condition." (2009) 21 Rethinking Marxism 149.

[5] Tsing, 150.

conditions and workers' safety.[6] The negative effects of these practices are as global as economic globalization itself. They are not only found in the form of exploiting working conditions across sweatshops and call centers in the Global South, they have also forced workers in the Global North to adapt to the market's demands of flexibility, at the expense of job stability.[7]

The processes of economic globalization, on one hand, and legal globalization, on the other, have developed asymmetrically and furthered the disconnection between global economic forces and the state-centered legal framework governing them.[8] Specifically, the way in which transnational corporations operate has transformed by financial concentration within the parent company and decentralization of production through the use of multiple suppliers. Transnational corporations operate through supply chains, which allow them to minimize legal responsibility for the consequences that their economic activities generate in certain jurisdictions.[9] Transnational corporations have thus become powerful beyond the reach of traditional labour law, which fails to establish a legal connection between the parent company of the transnational corporation and one of its subsidiaries.[10]

The development of complex ownership structures of supply chains has sparked questions related to states' ability and desire to regulate labour across borders. While the way of conducting business has evolved to become more transnational, and less fixated on the state, the ways in which rights are protected, both human rights and labour rights, still remain

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[6] Donaghey J and others, "From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains." (2014) 53 Human Resource Management 231.

[7] Hepple B, Labour Laws and Global Trade. (Hart 2005) 5-6.

[8] Baylos A, "Entreprises transnationales et accords internationaux" in Daugareilh I, La responsabilité sociale de l'entreprise transnationale et globalisation de l'économie. (Bruylant 2011) 1.

[9] Martin I, "Corporate governance structures and practices: From ordeal to opportunities and challenges for transnational labour law" in Blackett A and Trebilcock, A Research Handbook on Transnational Labour Law. (Edward Elgar 2015) 51, 53.

[10] Ibid., 51-52.

centred on state sovereignty.[11] As a result, the lack of effective labour regulations has created governance gaps when it comes to labour rights within supply chains. [12]

As a reaction to the ineffectiveness of traditional labour law, a growing range of corporate social responsibility (CSR) practices have emerged since the 80s in order to make up for the absence of an international labour law framework that regulates labour conditions within global supply chains. However, CSR practices have been criticized for not including the voices of workers, which is the reason for the development of global frameworks agreements (GFAs).[13] GFAs are negotiated and concluded between transnational corporations and Global Union Federations (GUFs) in a context outside the nation state. In these agreements, transnational corporations (TNCs) consent to respect workers' rights and to promote them along their chains of suppliers.[14] However, the rights they are referring to were made to target nation-state and intended to be enacted in national labour legislation.[15] And it has been shown that it is difficult to implement the rights in the agreements everywhere across the supply chains of the TNCs, and thus only have a limited impact on suppliers and subcontractors.[16]

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[11] Nolan J and Bott G, "Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices" (2018) 24 Australian Journal of Human Rights 46.

[12] See Donaghey and others, 230; Schömann I, "The Impact of Transnational Company Agreements on Social Dialogue and Industrial Relations" in Papadakis K, Shaping Global Industrial Relations. The Impact of International Framework Agreements. (Palgrave Macmillan 2011) 24.

[13] See e.g. Donaghey and others, 230; Papadakis K, "Introduction and Overview" in Papadakis K, Shaping Global Industrial Relations. The Impact of International Framework Agreements. (Palgrave Macmillan 2011) 1-2.

[14] Hadwiger F, "Global Framework Agreements: Achieving Decent Work in Global Supply Chains?" (2015) 7 International Journal of Labour Research 76-77.

[15] Baylos, 10.

[16] Drouin R, "Freedoms of association in international framework agreements" in Blackett A and Trebilcock A, Research Handbook on Transnational Labour Law. (Edward Elgar 2015) 225.

1.2 Aim and research question

The aim of this thesis is to build an understanding of the current instruments and mechanisms governing global supply chains and to identify the governance gaps in the protection of labour rights. By paying particular focus to the ways in which global supply chains operate in an international legal context, the thesis aims to reveal the challenges they present to international labour law. To this end, the thesis will examine the relationship between global supply chains and international labour law, and whether international labour law in its current form is capable of properly dealing with issues relating to labour rights within supply chains by paying special focus to the implementation and enforcement of labour rights within global supply chains.

In order to fulfil the aim of the thesis, an in-depth study of the following aspects is required. First, the thesis undertakes a theoretical framework drawing on transnational labour law perspectives for the aim of understanding which implications global supply chains, as a product of globalization, have on labour rights. When it comes to the question of governance, the thesis will specifically study relevant international labour law (including human rights in employment), the concept of private regulatory initiatives, and global framework agreements and how they relate to the phenomenon of global supply chains.

Moreover, the thesis will undertake a conceptual analysis of the phenomenon of global supply chains and the mechanisms and logic behind them. For this reason, the thesis will not only be based upon a transnational labour law perspective, but will also draw on sociological, geographical and cultural political economic perspectives on global supply chains. Although originating from different academic fields, these perspectives integrate and share many commonalities in the way they view globalization and the power dynamics within it. Combining them together is important for a

broader and multi-dimensional understanding of why and which challenges global supply chains present to labour rights.

In the light of this purpose, this thesis seeks to answer the following questions:

- How does *international labour law* govern global supply chains?
- How do *private regulatory initiatives on labour*, such as CSR practices and GFAs, govern global supply chains?
- What are the challenges when it comes to the *implementation and enforcement* of both international labour law and private labour regulations within global supply chains?

1.3 Methodology

To understand the relevant fundamental ideas of labour law and the discourse on their relationship with political, legal and economic changes due to globalization, the thesis draws from the interdisciplinary theoretical framework of labour law. This involves not only legal perspectives, but also other perspectives, drawing from literature discussing the sociological, geographical and cultural political economic perspectives of globalization and global supply chains. This entails the work of Anna Tsing, Christian Scheper, Gary Gereffi and Frederick Mayer, and Susan Marks, amongst others.

The theoretical labour law framework used in the thesis builds on academic discussions on labour law and its relationship to jurisdiction and territoriality. This theoretical framework is of great importance for the thesis since it provides a perspective on the legal material which allows us to see the challenges that globalization present to labour law, and thus helps us to identify the gaps in the governance of supply chains, To this end, a literature

review will be used in order to discern the most central aspects of the role that territoriality plays within labour law. The literature review will be based on the academic research within so called transnational labour law, mainly Adelle Blackett's and Anne Trebilcock's "Research Handbook on Transnational Law", which focuses on the nature and the role of labour law within the context of globalization.[17]

When it comes to global supply chains, the thesis will firstly study the conceptual basis of global supply chains in order to build a general understanding of which practices they entail. This part of the thesis is important in order to see the consequences they produce for labour that are not always obvious from a purely legal perspective due to the lack of legal linkages within the supply chains and them not conforming to the traditional employer-employee relationship. The above examination is important since the structuring and mechanisms behind supply chains will have implications for how they are governed by international labour law. The study of global supply chains has evolved recently over the years and thus does not represent a homogenous body of theory.[18] To this end, the thesis will mainly rely on a literature review focused on the dimensions of territoriality and governance structures of global supply chains.

Thereafter, the thesiswill turn the attention to how these practices affect the application and efficiency of labour law's notion of territoriality. In order to understand whether and how international labour law is equipped to deal with labour rights in the context of globalization and within global supply chains, the thesis demands an establishment of the content and scope of international labour standards and other relevant labour rights and human rights instruments and documents concerning labour and what legal

[17] See Blackett A and Trebilcock A "Conceptualizing transnational labour law" in Blackett A and Trebilcock A, Research Handbook on Transnational Labour Law. (Edward Elgar 2015).

[18] Robinson PK and Rainbird H, "International Supply Chains and the Labour Process." (2013) 17 Competition & Change 94.

obligations they create and for whom. To this end, the thesis will rely on a legal dogmatic method which entails the systematization and interpretation of relevant legal sources to determine the meaning of law.[19] When studying the legal material, the thesis will particularly focus on the binding or voluntary character of the material, and the placement of responsibility for the implementation and enforcement of the relevant instruments. This will be done both by simply reading the relevant material and academic literature on the material and by discussing relevant case law from regional human rights courts.

The legal material that will be studied in the thesis entails the Constitution of the ILO, the ILO Tripartite Declaration on Fundamental Rights and Principles at Work and the "core" ILO conventions, the ILO Declaration on Multinational Enterprises, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, together with the general comments and statements made by their treaty bodies. The thesis will also study the European Convention on Human Rights, the European Social Charter, the American Convention on Human Rights, the African Charter on Human and People's Rights, and relevant case law relating to these instruments. Moreover, with regard to soft law initiatives and instruments, the thesis will study the UN Global Compact, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines on Multinational Enterprises.

Due to international labour law being of both public and private character, the thesis will also devote itself to an examination of certain private regulatory instruments that aim to target TNCs directly. To this end, the thesis will rely on literature and previous studies focusing on the emergence and implications of so called corporate social responsibility practices and global framework agreements. Most of the focus will be dedicated to global

[19] See Smits J, "What is legal doctrine?" in van Gestel R, Micklitz H-W and Rubin EL, Rethinking Legal Scholarship: A Transatlantic Dialogue (Cambridge University Press 2017).

framework agreements and the thesis will also examine some of their central aspects regarding content. Also, this part will be based upon previous studies of global framework agreements. In order to illustrate how an agreement between GUFs and TNCs can be designed in order to efficiently cover and protect supply chains, the thesis will study the content of the 2013 and 2018 Bangladesh Accords. This part of the thesis will be based on both the agreement itself, but also on the previous analysis of other scholars.

Lastly, this thesis will undertake an analysis, comparing the different instruments and other regulatory instruments, both on a private and public level, and how they allocate responsibilities when it comes to implementation and the different enforcement mechanisms.

1.4 Terminology

The term transnational corporations (TNCs) will be used broadly and, at times multinational enterprises (MNEs) is used instead. Whereas the literature used for this thesis, mainly use the term transnational corporations, international labour and human rights instruments involve the term multinational enterprises. Although there exist certain unclarity and discussion regarding the distinctions between these terms, for the purpose of this thesis it is sufficient to establish that they may be understood as firms legally structured across nation states. Throughout the chapter the terms “corporation,” “firm,” and “company” will be used interchangeably. Although chapter 3 will discuss differences in legal implications in labour law between the terms: “firm” and “corporation,” they both denote the same institutions, focusing on the part of a TNC that are located in the home country of a TNC. When using the term "lead firm,” the thesis refers to the parts of a TNCs that has the main control over its organized economic activity.

The thesis will use the term global supply chains when referring to the input-output structure of value-adding activities between suppliers of materials and services, beginning with raw materials and/or services, and ending with finished products and services.[20]

The thesis will use the terms "private labour regulations" and "private regulatory initiatives on labour" (sometimes only "private regulatory initiatives") interchangeably when referring to various forms of non-state, privately generated regulations or policies on labour conditions.[21]

1.5 Delimitation

In recent decades, regulations relating to labour conditions within supply chains have emerged in both regional and domestic legislations.[22] However, these legislations will not be directly addressed in the thesis since its main focus is to provide an overall analysis and discussion on the relationship between international labour law and global supply chains. In terms of international law, the main focus will be on relevant labour and human rights instruments of the International Labour Organization (ILO), United Nations (UN), but also regional human rights instruments. When it comes to European human rights instrument, the thesis will restrict itself to Council of Europe instrument, and will thus not address the EU Charter of Fundamental Rights or other EU law. This is mainly due to the fact the Court of Justice of the European Union (CJEU), is not strictly a human

[20] Gereffi G, and Mayer F, "Regulation and Economic Globalization: Prospects and Limits of Private Governance." (2010) 12 Business & Politics 4; Mares R, "The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments." (2010) 79 Nordic Journal of International Law 195.

[21] See Blackett and Trebilcock, 24; Hepple 69.

[22] See e.g. LeBaron G and Rühmkorf A, "The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act." (2019); Sarfaty GA, "Shining Light on Global Supply Chains." (2015) 56 Harvard International Law Journal 419.

rights court, but reads the rights entailed in the EU Charter of Fundamental Rights in the light of other rights entailed in EU law.[23]

As regards public soft law initiatives, the thesis will restrict itself to the content and scope of relevant work of the UN and the Organization for Economic Co-operation and Development (the OECD).

When it comes to private labour regulation, the thesis will mainly focus on CSR and GFAs. CSR entails practices such as unilateral codes of conduct, quality guidelines, and multi-stakeholder initiatives with the aim to privately regulate and monitor the working conditions of TNCs.[24] However, the thesis will only provide a historical and general overview of the emergence of CSR practices, mainly focusing on codes of conduct, in order to highlight and give a broader understanding of the evolvement and functions of GFAs .

In regard to global supply chains, this thesis is unable to cover all of its aspects, and thus the thesis will only cover some selected features of global supply chains that bear particular importance for its aim, namely legal linkages and organizational structure. The specific national labour markets and the status of labour regulation in the country of production are not a subject of this thesis. Instead, the focus of the thesis is the transnational governance practices.

Due to the restrictions of the thesis, the role of international trade organizations when it comes to governance of TNCs and their supply chains, will not be examined.

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[23] See European Commission, "Why do we need the Charter?", <https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en> accessed 26 May 2020; European Union, "Court of Justice of the European Union", <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en> accessed 26 May 2020.

[24] Papadakis, 1-2.

1.6 Outline

Chapter 2 will study the notion of territoriality within labour law and how it has been affected by globalization. Moreover, by looking into the framework of transnational labour law, the chapter will explore alternative ways of thinking labour law in the current era of globalization.

Chapter 3 seeks to achieve an understanding of global supply chains and the logics and mechanisms behind them by conceptualizing global supply chains, and examining the organizational structure of TNCs and what implications these have had for labour law.

Chapter 4 will examine the international legal framework governing labour by particularly focusing on the work and instruments of the ILO, the UN, and regional human rights instruments. Moreover, the chapter will study soft law instruments and initiatives of the UN and the OECD.

Chapter 5 is devoted to providing a general overview of CSR practices and GFAs. The chapter firstly addresses the emergence of private regulatory initiatives, such as corporate social responsibility practices. Thereafter, the chapter will study the special characteristics of GFAs and their ability of guaranteeing protection of labour rights. Lastly, the chapter will examine the content and structure of the Bangladesh Accord.

Chapter 6 provides an analysis based on the findings made in the previous chapters of the thesis. The chapter will use the findings made in chapters 2-3 and compare them to the findings of chapters 4-5.

Chapter 7 is devoted to answering the research questions of this thesis. The chapter thus summarizes the analysis in chapter 6.

2. The Territoriality of Labour Law in a Globalized Reality

2.1 Introduction

The identity of traditional labour law as we know it today was built on four pillars: the nation-state, large factories, full-time employment, and general representation of labour through the unions.[25] However, at the present time, each of these pillars are in the midst of reconstruction. The form of the nation-state is under transformation; developments due to globalization are intensifying the international economic and political integration.[26] The great factories of the post-war periods are no longer the center of production. Instead, the production of companies is often fragmented, taking place across the globe.[27] Moreover, technological changes have brought major changes to the organization of work. While the workforce, much like the production, has been fragmented and traditional forms of work has decreased, new forms of work have emerged, often referred to as atypical employment or precarious work, not suited for the reach and scope of the traditional structure of labour law.[28] Furthermore, union density has continued to decline in developed countries at the same time as insecure employment and the informal sector is growing.[29]

This thesis mainly deals with questions regarding changes within the first two pillars, namely the changing role and capacity of the state to govern

[25] See D'Antona M, "Labour Law at the Century's End: An Identity Crisis?" in Conaghan J, Fischl RM and Klare KE, Labour Law in an Era of Globalization: Transformative Practices and Possibilities. (Oxford University Press 2004).

[26] Klare K, "The Horizons of Transformative Labour and Employment Law" in Conaghan J, Fischl RM and Klare KE, Labour Law in an Era of Globalization: Transformative Practices and Possibilities. (Oxford University Press 2004) 5; Macklem P, "Labour Law Beyond Borders." (2002) 5 Journal of International Economic Law 606, 610.

[27] D'Antona, 34.

[28] See Weiss M, "Re-Inventing Labour Law?" in Langille B and Davidov G, The Idea of Labour Law. (Oxford University Press 2011) 45-46.

[29] Klare, 4-5.

economic matters, and changes in how and where production is taking place. These changes in the relationship between labour law, the state and the organization of the firm are all related to issues of territorial and extra-territorial character. Thus, it is important to understand the ideas and the reality in which labour law has developed and the current reality in which labour law operates. This chapter will begin with a general description of the notions of territory and the state, and how labour law has been shaped in relation these notions. Then, the chapter will turn to examine the ways in which certain developments of globalization has affected application of labour law. Lastly, the chapter will explore some of the developing scholarly work on alternative ways of viewing and thinking labour law within the current global developments.

2.2 The Territorial Fundaments of Labour Law

Rules and regulations build on territory, and their reach and use are dependent of the organizing in and connection to territory by referring to activities taking place in those certain spaces.[30] Likewise, the notion of territory is strongly tied to the idea of the nation-state that, within its own territory, regulates political and economic matters.[31] Sovereignty links power with space and thus territorializes the power of the state.[32] Naturally, labour law was also built on the basis of territory. However, with the important difference that the determination of labour law is not completely dependent of the state; it involves the prescribing of norms by non-state actors, for example, through collective bargaining.[33] Comparing to other

[30] See Supiot A, "The Territorial Inscription of Laws" in Calliess GP, Fischer-Lescano A, Wielsch D, and Zumbansen P, Sociologische Jurisprudenz – Festschrift für Gunther Teubner. (De Gruyter Rechtswissenchaften Verlags, 2009) 375; Hudson A, "Beyond the Borders: Globalisation, Sovereignty and Extra-Territoriality" (1998) 3 Geopolitics 89.

[31] D'Antona, 33.

[32] See Hudson, 89.

[33] See Mundlak G, "De-Territorializing Labor Law." (2009) 3 Law & Ethics of Human Rights 189.

legal fields, labour law operates differently since it is also taking place through political, social and cultural processes outside the regulatory processes of states, and the norms and procedures that these processes produce stand outside conventional courts. Even in cases where labour law is enacted by the state, the laws are usually interpreted and applied by agencies and tribunals within the bodies of labour movement.[34]

Throughout history, labour law has been used to challenge the hegemonic claims of the law and legal institutions of the state.[35] So although, it is built around the notion of territoriality, the territoriality itself is only used as an organizing principle, in order to protect the rights and the interests of the collective of workers. Unlike goods exchanged within product markets, labour law deals with service and the production of goods which is inseparable from the workers as persons with needs to be satisfied.[36] Thus, the workers are not only actors within labour law, but their needs and interests also constitute the specific subject of labour law.[37] To point out, central elements of labour law such as freedom of association and collective autonomy reflects how labour rights did not emerge from the state, but rather from the workers themselves, recognizing the inherent inequality between employers and employees and the need to resist and redress this inequality.[38] For this reason, labour law looks at the employment relationship with a certain understanding of the organization and sociology of economic activity and the special relationship between the employer and the employee.[39] It recognizes that power and wealth are asymmetrically

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[34] Arthurs H, "Labour Law After Labour" in Langille B and Davidov G, The Idea of Labour Law. (Oxford University Press 2011) 15-16.

[35] Ibid. 15.

[36] Goldin A, "Global Conceputalizations and Local Constructions of the Idea of Labour Law" in Langille B and Davidov G, The Idea of Labour Law. (Oxford University Press 2011) 70.

[37] See Blackett and Trebilcock, 12.

[38] See Blackett, Trebilcock, 13; Blackett A, "Transnational labour law and collective autonomy for marginalized workers: Reflections on decent work for domestic workers" in Blackett A and Trebilcock A, Research Handbook on Transnational Labour Law. (Edward Elgar 2015) 230.

[39] See Klare.

distributed in society, especially amongst workers and employers, which puts workers in an inherently disadvantaged position.[40] Thus, labour law also serves the function to promote and engage in alternative approaches to law. In this way, labour law takes a special shape by being neither non-law nor a traditional form of law, but rather a counterforce to the social ordering in society.[41]

However, the traditional point of departure which labour law had when it entered to the social and political world is not the same and it might be gradually disappearing. Important to remember is that labour law as we know it today is a product of industrialization.[42] At the time of its emergence, markets were primarily domestic and globalization was not a problem. Production and commercial dealings were all under the roof of the same jurisdiction, making them easier to screen and regulate through the use of national legislation.[43] Due to globalization, practices such as outsourcing, sub-contracting and other dislocating strategies are put on the agenda, making both production and the market more of a global phenomenon rather than domestic. Moreover, the structure and organization of the enterprise has also changed, and has turned to ”merely a virtual entity”, which will be elaborated on in chapter 3, creating further challenges for the application of labour law.[44]

[40] Arthurs, (2011) 17.

[41] Ibid., 16.

[42] Klare, 4; D’Antona, 34.

[43] Weiss, 45.

[44] Ibid.

2.3 Disruptions of the Fundament: the Implications of Globalization on the Territoriality of Labour Law

Globalization is a wide term that refers to many various developments, from the closeness between countries, cultures and people brought by technology to increased trade between countries across the globe.[45] In the area of law, it is characterized by privatization, deregulation and trade liberalization drawing from neo-liberal policies and ideas.[46] An important aspect is that the movement of capital, being a component of globalization and pursued of all states, is treated asymmetrically in relationship to labour. After all, the free movement of people is often treated as a threat to the sovereignty of states.[47] However, the principle of territoriality within labour law has not been modified accordingly to globalization; it is still operating on the basis of state territory. And it is precisely this that causes a problem; the deterritorialization of markets create a mismatch between the way labour law operates and how current production is taking place.[48] Whereas other categories of law have been able to keep up in a way to deal consequences of globalization, labour law has not adapted in a way that allows it to tackle labour issues and protect labour rights throughout global chains of production, extending across the territories of several states.[49]

Important to recognize is that states have created the space in which globalization has become possible: "[W]hat was conceived as national becomes denationalized in a process propelled by actors and sources of authority that proliferate in territory beyond the decanter state."[50] To protect

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[45] Supiot, 384.

[46] See Joseph S, "UN Covenants and Labour Rights" in Fenwick C, Novitz T, Human Rights at Work : Perspectives on Law and Regulation. (Hart 2010) 346.

[47] Mundlak, 190.

[48] Ibid., 191, 194.

[49] Ibid., 195.

[50] Blackett and Trebilcock, 4.

economic institutions, legal regimes try to control the direction of markets by specialized legal measures. Thus, the law is used to vindicate private property rights and contractual rights, and to ensure that the competition of the market is not altered by any anti-competitive measures.[51]

Globalization does not only entail the movement of capital, but also the movement of labour, and thus the movement of workers. There are many cases showing the efforts of workers and labour unions contesting the lowering of labour standards due to employers trying to get around the principle of territoriality. For instance, the cases *Viking* and *Laval* from the CJEU demonstrate how limitations on rights under labour law, in this case the right to collective action, put aside the principle of territoriality. Both cases involve economic operations of companies resulting in the application of lower labour standards than those that would be applied in the place in which the economic activity would actually be performed.

The *Viking* case concerned a ship traveling from Helsinki to Estonia, bearing the Finnish flag. Viking Line was planning to reflag under Estonia, which in turn would result in lowering the labour costs by binding itself to Estonian labour norms and collective labour relations. As a response to this, the Finnish trade union sought industrial action to pressure the ship from reflagging.[52] In *Laval*, a Latvian contractor employed Latvian workers in a construction site in Sweden which was met with industrial action from Swedish trade unions in order to force the contractor into a collective agreement with a Swedish trade union.[53]

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[51] See Collins H, "Theories of Rights as Justifications for Labour Law" in Langille B and Davidov G, The Idea of Labour Law. (Oxford University Press 2011) 138.

[52] Court of Justice of the European Union, International Transport Workers' Federation & anor v Viking Line ABP & anor, 11 december 2007, Case C-438/05.

[53] Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & ors Case, 18 december 2007, C-341/05.

In both cases, the CJEU stated that the right to take collective industrial action was a fundamental right, and that in the case the right to take collective industrial action infringes on the right of freedom of establishment under EU law (by making it less attractive for companies to exercise), then the action has to be legitimate and proportional to its aim.[54] In other words, the CJEU, through their ruling on the cases, undermined the principle of the territorial effect of labour legislation.[55] While labour law is applied on territorial basis, the test for determining the establishment of an undertaking, within an EU context, is not territorial since the determination prioritizes companies within the EU to freely move across borders.[56] Thus, the outcomes of both cases constituted a major setback for trade unions and workers within the EU.

Although these cases took place in the context of the European Union (EU), they serve as examples of the inadequacy of the principle of territoriality within labour law, and how it can be altered for the aim of trying to control the market toward a certain direction, protecting the actors on the trade and service market, from actions of trade unions that could discourage business. As previously mentioned in this chapter, states have through legislation chosen to prioritize cross-border competition on the cost of labour rights (in this case through the EU). In the end, the CJEU left it to the national courts to decide what should be done on the matter, however, it also gave guidance on the issue by directing the member states to weigh collective industrial action to the freedom of establishment.

In the midst of all of these changes, how is labour law doing? Globalization has stirred up the supply of labour, transnational markets and global supply

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[54] See Court of Justice of the European Union, International Transport Workers' Federation & anor v Viking Line ABP & anor, 11 december 2007, Case C-438/05, paras 44, 46, 72, 75, 77; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & ors Case, 18 december 2007, C-341/05, paras 91, 99, 94, 101.

[55] See Deakin S, "Regulatory Competition after Laval" (2007) 10 Cambridge Yearbook of European Legal Studies 592.

[56] Ibid.

chains. Nevertheless, the workforce is also experiencing distance and fragmentation by not being aware of each others' existence, although being interconnected by TNCs. The global collective of workers is distanced due differences in cultures, working customs, languages and legal frameworks. In this context, the risk is that the globally separated workers do not see each other as co-workers, but as competitors for available jobs. As we can see, the globalization of trade and production has not only dissolved the proximity in employment, but it has also damaged the idea of labour solidarity.[57]

All things considered, the traditional form of the nation-state is in the midst of a transformation. The trend of states letting market and trade run on its own has consequently created a new hegemony of actors beyond the nation-state.[58] The rise of transnational corporations has created a governance deficit, including a domestic governance deficit, which has caused new problems for labour law when it comes to its reach and enforcement. As will be discussed in chapter 4, international standards on labour are either too weak or there is no capacity to enforce them, whereas when it comes to domestic labour law, especially in developing countries, states lack the capability needed to regulate industry in terms of the capacity of law, monitoring and enforcement.[59]

[57] See e.g. Arthurs, (2011) 22; Atleson J "The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law" in Conaghan J, Fischl R M and Klare K, Labour Law in an Era of Globalization: Transformative Practices and Possibilities (Oxford University Press 2004) 399.

[58] See Gereffi and Mayer, 4.

[59] See e.g. Kolben K, "Transnational Labor Regulation and the Limits of Governance." (2011) 12 Theoretical Inquiries in Law 405-406; Gereffi and Mayer, 1-2.

2.4 Labour Beyond Territory: Alternative Ways of Approaching Labour Law

The global movements of capital, goods and people pose a challenge to the idea of governance through national law and international law.[60] All that being said, globalization is here and now, it is a given. Ultimately, this demands us to examine labour law through a perspective that incorporates the structures and actions of new actors in the international market and their relationship to and impact on the enforcement of labour law, in order to get an accurate understanding of where it is that labour law in its current form fails to govern labour in the global market. Therefore, in the scholarly world, attention is being shifted towards questions of how to rethink the rules governing the movement of capital, commodities and labour and how to should look at the new actors that have come along with globalization and their relationship to labour regulation.[61] This entails studying labour law not only through the international labour law framework, but also through the structures of firms through corporations (mainly related to contract law and corporation law), and private regulatory initiatives on labour.

Various types of scholarly work and academic research, sometimes referred to as transnational labour law, has emerged as a way of understanding the implications the above developments have had on labour law.[62] Building on traditional ideas and concepts in labour law, these new ways of looking at and studying labour law recognize the asymmetries amplified by globalization and identify spaces for action "to construct counter-hegemonic alternatives".[63]

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[60] See Klare, 8.

[61] Sciarra S, "Collective Exit Strategies: New Ideas in Transnational Labour Law" in Langille B and Davidov G, The Idea of Labour Law. (Oxford University Press 2011) 414.

[62] Blackett and Trebilcock, 3.

[63] Ibid., 2.

The transnational labour law perspective draws many of its ideas from the notion of transnational law. The concept emerged during the post-war period and was partly led by the American professor Philip Jessup. His definition of transnational law referred to all rules regulating "events or facts that cross national borders' to include all those involving individuals, companies, States, organizations of States or any other group."[64] Transnational law entails a critique of how the human society was framed within the concept of a state.[65] In classic international law the state plays a central part and is viewed upon as the main actor when it comes to the implementation and enforcement of international law. In contrast, the important focus of the notion of transnational law, was the perspective on rights and obligations lying beyond the state.[66] However, the definitions of transnational law and transnational labour law is also contested. They can both be defined as concepts including all normative regimes governing relations across state boundaries or as pluralistic legal system constructed by transnational actors such as corporations, financial institutions, and trade unions.[67]

Transnational labour law does not try to reclassify international or national labour law. Moreover, it is not a new category of law. Rather, it reflects a recognition that with globalization, the global balance of power between labour and capital has shifted, and that there is something missing on the side of labour in the mechanisms of global governance.[68] By providing alternative ways of understanding the processes of globalization taking place within it, a counterweight is created to the idea that the market, and

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[64] Ojeda-Avilés A, Transnational Labour Law. (Wolters Kluwer Law & Business 2015) 5.

[65] Blackett and Trebilcock, 23.

[66] Ojeda Avilés, 3.

[67] See e.g. Arthurs H, "Conference Papers Labour Law and Transnational Law: The Fate of Legal Fields & the Trajectory of Legal Scholarship" (2018) 3 University of Bologna Law Review 232.

[68] Blackett and Trebilcock, 4.

the private law rules and actors governing the market, are crucial and naturally pre-existing for the framing and design of labour law.[69]

The evolvement of new actors in the process of de-nationalization taking place outside the traditional centers of law-making has sparked the question of whether it is about time that labour law found ways to operate beyond the principle of territoriality. Due to globalization of trade and the changes it has brought for the organization of labour, the labour market cannot longer be perceived as a territorial construct. The deterritorialization of labour law should then seek to encompass the entire market globally without being limited to territory.[70] According to Mundlak, territoriality should only be considered when there are real territorial concerns otherwise it risks obstructing legitimate concerns. Thus, de-territoriality aims to downplay the role of territory and sovereignty within the context of labour law.[71]

Important to remember is that the inequality within the labour market was not created by globalization, the inequality has always been there, and the labour movement's traditional response to this was collective action and regulation of the employment relationship on a local basis.[72] However, "[u]nder global restructuring, the compact has broken down, and the inequality is exacerbated."[73] Thus, the traditional solutions that the labour movement developed for these issues cannot be applied to these imbalances anymore.[74] The current context in which labour law is operating calls for new ways of thinking and doing labour law. Otherwise, there is a risk that the labour movement ends up with simply facing "the problem of developing new techniques (means) for applying old values (ends) to new

[69] Blackett and Trebilcock, 7.

[70] See Mundlak, 208, 212.

[71] Ibid., 213–218.

[72] See Blackett and Trebilcock, 13.

[73] Ibid.

[74] Mundlak, 218-219.

empirical realities."[75] These perspectives on labour law are important for the upcoming parts of this thesis in order to fully understand the challenges that global supply chains, as a product of globalization, present for the protection of labour rights.

2.4. Concluding Remarks

The traditional way of thinking labour is being challenged by the dissolving of territoriality within the context of trade that has come along with globalization. This thesis mainly focuses on two of these developments: the changes in authority of the nation state and the fragmentation of the firm. Labour law's traditional solution to the imbalances within the employer-employee relationship entailed the organizing principle of territory, which was constructed around the territorial powers of the nation-state. However, under the globalization of trade and economics and the emergence of new global actors without any clear links to territory, the territorial solution of labour law has become inadequate to deal with the shortcomings within the labour market. However, new ways of thinking labour law critically comprise spaces and actions beyond the state and its territory, in order to take into account the actions of other global actors and civil society. These perspectives challenge the territoriality of labour law and aim to find solutions that comprise the circumstance of the current global reality of production.

With this understanding of labour law's relationship to territory and state in mind, the next chapter will study a special development that comprises both the problems of the dissolving economic power of the nation-state and the fragmentation of the firm, namely global supply chains.

[75] Langille B, "Labour Law's Theory of Justice" in Langille B and Davidov G, The Idea of Labour Law. (Oxford University Press 2011) 101.

3. Globalized Production: Understanding Global Supply Chains

3.1 Introduction

As previously mentioned, the globalization of the economy has contributed to difficulties for states to control their activities in business and finance. What this development has meant for systems based on the nation-state as the main power in issues related to trade, labour and finance, is a very important political and legal question of our time.[76] Today, businesses across all sectors are in some way involved in complex chains of suppliers spanning across multiple countries with different legislations and human rights practices.[77] Although this way of structuring production and the economy has been, and is sometimes still, presented as an important opportunity for the economic and social development of states, it has also resulted in serious risks for workers that companies and states, due to unwillingness or inability, have failed to respond to.[78]

This chapter seeks to examine the mechanisms behind global supply chains and their implications for labour law. The chapter starts with a conceptual analysis of global supply chains in order to understand how they are organized, but also touches upon the question of why companies are motivated to engage in global supply chains in the first place. Thereafter, attention will be directed towards the relationship between global supply chains and labour law. In what ways do global supply chains challenge the

[76] See discussion in Marks S, "Empire's Law" (2003) 10 Indiana Journal of Global Legal Studies 461.

[77] See Tsing, 149; Human Rights Watch, "Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence" (2016) 2.

[78] See Human Rights Watch, 2.

territorial basis of labour law and what implications has this brought to the ability of labour law to operate within the context of global supply chains?

3.2 Conceptualizing Global Supply Chains

The way that capitalism operates today involves the disintegration of production, distribution and consumption across the globe through a complex web of companies and their business activities.[79] Within this web, companies are not seen as autonomous agents on the market, but rather as a part of production and consumption networks.[80] These webs of different suppliers of materials and services engaging int he process of transforming raw material into end products and services are variously referred to as global supply chains, global value chains and global production networks.[81]

The majority of the global productive activities take place through arm's-length, market-based relationships stretching over the globe, and are not confined within single firms.[82] There are different ways in which TNCs engage in global supply chains. Either, they engage directly by purchasing an existing supplier or by setting up their own production facilities in another country (offshoring), or they enter into a contractual relationship with an independent supplier in another country that performs particular tasks ordered by the TNC.[83] Moreover, TNCs can engage indirectly in global supply chains by purchasing production inputs from a domestic supplier that in turn receives parts of its input from abroad.[84] The reason

[79] See Anner M, "CSR Participation Committees, Wildcat Strikes and the Sourcing Squeeze in Global Supply Chains." (2018) 56 British Journal of Industrial Relations 77.

[80] Ibid., 77-78.

[81] Gereffi and Mayer, 4; Mares R, "The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments." (2010) 79 Nordic Journal of International Law 195.

[82] Costinot A, Vogel J and Wang S, "An Elementary Theory of Global Supply Chains" (2013) 80 The Review of Economic Studies 109; Anner, 77.

[83] Ibid.

[84] Hadwiger F, "Global Framework Agreements: Achieving Decent Work in Global Supply Chains" (2015) Background Paper, International Labour Office, Geneva, 12.

why corporations choose to outsource or offshore their peripheral activities is so that they can sharpen the focus on their core activities and comparative advantage.[85] Moreover, these practices lets companies capitalize on the differences in production costs both in acquiring and selling products and services.[86]

Outsourcing the work to wholly independent supplier factories has become the most common way for lead firms to deal with their production and also, increasingly, a common economic structure in the global economy.[87] The global supply chain of one individual TNC often involve a large number of suppliers or subcontractors, most of them belonging to the informal sector, making them even more vulnerable to labour and human rights abuses.[88] Furthermore, whilst many lead firms do outsource the production functions, there are many indications showing that lead firms have not abandoned their control over strategic issues. [89] Within supply chains, the production is diverse in space and time and is constituted of fragmented and interconnected processes. The production consists of many steps such as the designing of the product, to the marketing and distribution of the product.[90] By entering into commercial contractual arrangements with various suppliers, lead firms can make sure that they keep control over both the delivery and the quality of the products. This allows lead firms to direct other firms in the chain without having any so called ”equity relation” to those firms.[91]

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[85] Sarfaty, 425; Mares, 193; Martin, 53; Sobczak A, “Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulation of Labour Relations to Consumer Law” (2006) 16 Business Ethics Quarterly 167.

[86] Gerber D J, “Competitive Harm in Global Supply Chains: Assessing Current Responses and Identifying Potential Future Responses,,” (2018) 6 Journal of Antitrust Enforcement 7; Rawling M, “Capital Reintegration into Supply Chains and Its Implications for Labour Law.” (2006) 6 Employment Relations Record 11.

[87] See Mosley, 19; Anner, 77; Gereffi and Mayer, 4.

[88] Human Rights Watch, 2.

[89] Rawling, 5; Sobczak 168.

[90] Hassler M, “Commodity Chains” (2009) 2 International Encyclopedia of Human Geography 204.

[91] Rawling, 5.

Important to note is that many of the suppliers that provide production services at low costs with the largest production volume are situated in countries that also have the lowest ranking when it comes to the respect and protection of labour rights.[92] Since these countries account for around 50 per cent of all apparel exports globally, TNCs have a hard time avoiding production in these countries.[93]

3.3 The Legal Fragmentation of the Firm and its Implications on Labour Law

Labour law was based on what Isabelle Martin refers to as ”the model of the large integrated firm.”[94] However, the model of the firm has transformed and moved towards financial concentration and the decentralization of production, the result of which has been to make transnational firms “both more powerful and practically beyond the reach of positive labour law.”[95] This transformation of enterprises have come to present a challenge for labour law. One of the difficulties for labour law when it comes to the new ways in which businesses operate is the complete lack of legal connection between the concept of the corporation and the concept of the firm.[96] Whereas a firm entails the organizing of economic activity, a corporation is a legal instrument used for the legal structuring of the firm.[97] The laws that

[92] See Kucera D and Sari D. New labour rights indicators: Method and trends for 2000–15. (2019) 158 International Labour Review 419; International Trade Union Confederation (ITUC) “Report – ITUC Global Rights Index 2019” (2019).

[93] Anner, 76.

[94] Martin, 51; Morin M-L, “Labour Law and New Forms of Corporate Organization” (2005) 144 International Labour Review 5.

[95] Martin, 51.

[96] Ibid.

[97] See Martin, 52; Robé J-P, “The Legal Structure of the Firm” (2017) 1 Accounting, Economics, and Law: A Convivium 7; Zumbansen P, “The new embeddedness of the corporation" in Williams C and Zumbansen P, *The Embedded Firm – Corporate Governance, Labor, and Finance Capitalism.* (Cambridge University Press 2011) 120-122.

regulate corporations do not require there to be a connection between the boundaries of the firm and the corporation.[98]

The strategy that international firms use is to comprise several corporations, incorporated in the different countries in which they operate. However, from the perspective of law, the transnational firm as a whole does not exist. The law recognizes all of the different corporations, each incorporated nationally.[99]

Corporate fragmentation as a practice lets corporations enjoy all the rights conferred by their legal status, while at the same time decreasing their legal responsibility for the potential consequences of their economic activities.[100] The multiple layers of suppliers may be difficult to trace and therefore also difficult to regulate. Companies often rely on their first-tier supplier to identify the second-tier supplier, and so on.[101] However, the above practice, also has the effect of separating power and responsibilities normally associated to labour. The parent company can still have power over the decision making whereas the responsibilities related to employment are transferred to the contractors along the supply chains. By avoiding the legal proximity, lead firms can thus avoid situations which might actualize obligations according to labour law while simultaneously exploiting cheap labour. [102]

The increased mobility of investment and production facilities has created difficulties for states to govern the labour conditions within TNCs. In the current reality of global and neoliberal economics, the importance that the direct or indirect presence of a TNC in a developing country has for

[98] Martin, 52.

[99] Martin, 52.

[100] Ibid., 53.

[101] Sarfaty, 430-431.

[102] See Martin 53; Rawling p. 6.

employment and economic development should not be underestimated.[103] If a company dislikes a certain social policy of the state in which their products or services are produced they can always choose to move if other different national or local policies make it more convenient.[104]

As long as the living standards offered to the workers stay above the level of sustenance, TNCs have been able to keep up their production in developing countries and taking advantage of the low cost, which in turn has contributed to the stream of offshoring processes from developed to developing countries.[105] Important to note, however, is that although the moving of production has taken place towards one direction, the movement of capital has followed the opposite direction; from developing countries (typical locations for contractors in the bottom of the supply chains) to developed countries (usually locations where the lead firms are situated).[106]

Although states may regulate sub-contracting of production within their territory, sub-contractors outside the territory precludes recognition of employment relationships with the lead firm.[107] It is the territorial barrier, which separates legal jurisdictions, and in result creates a legal barrier between the prime contractor and its sub-contractors. This applies even if the prime-contractor may exercise control over the production taking place within the sub-contractors.[108] Workers of subcontractors are formally protected by national labour law, however, the only liable actor for respecting those laws is the contractor and not the TNC that has the main power for the economic strategy for the whole supply chain.[109]

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[103] Ojeda-Avilés, 285.

[104] See D'Antona, 34; Zumbansen, 128.

[105] Ibid.

[106] Ojeda-Avilés, 285.

[107] Ibid.

[108] Mundlak, 198-199.

[109] Sobczak, 167-168.

3.4 Concluding Remarks

Global supply chains embody the fragmentation of production as a business principle. They entail the practices of outsourcing parts of production to suppliers in territories where the production costs are cheaper. In current times, this way of running the production of a company has become the standard way of dealing with production. At the same time, these new business practices constitute challenges for labour law due to their complex web of production networks and the lack of legal linkages between lead firms and suppliers along the supply chain. Moreover, these challenges are much due to labour law being organized around the nation-state. However, as has been shown above, the state does not have much control over the whole global supply chains, since it can only regulate those fractions of the supply chain that are placed under the law of its territory.

In the next chapter, the thesis will focus on the content of the relevant legal framework and their relationship to global supply chains.

4. International Legal Framework

4.1 Introduction

International labour law is a branch of public international law which covers both substantive rules established at an international level, as well as procedural rules relating to their adoption and implementation.[110] As seen in chapter 2, labour law operates domestically, serving both economic and moral functions by determining the rights and obligations of the parties in employment relationships upholding human rights in the workplace.[111] That leaves us with the questions: how does international labour law operate, and can international labour law tackle labour issues within the supply chains of TNCs, spanning over multiple territories and jurisdictions?

The aim of this chapter is to build an understanding of the design and enforcement of relevant international legal instruments in order to get a better idea of the consequences these may have for the protection of labour and human rights within global supply chains. As a starting point, this chapter will examine the structure and mechanisms entailed in the instruments of the International Labour Organization (ILO), Since the ILO does not have any instrument exclusively devoted to labour rights within global supply chains, and due to the limitations on the study and its main focus on enforcement, attention will mainly be put on instruments relating to fundamental labour rights which are binding upon all member states of the ILO. Moreover, as will be shown below, instruments and regulations of other actors, both of public and private character, mainly refer to fundamental labour standards declared by the ILO.

[110] Swepston L "International Labour Law" in Blanpain R, Comparative Labour Law and Industrial Relations in Industrialized Market Economies. (Kluwer Law International 2014) 155.

[111] See Hepple, 13.

Likewise, this chapter will also treat relevant human rights instruments that deal with human rights in employment, such as UN instruments and regional human rights instruments. Due to the aim of this thesis, the chapter will mainly focus on the implementation and enforceability of the instruments. Furthermore, the chapter will not only focus on binding law, such as the instruments mentioned above but also voluntary, non-binding initiatives, namely the UN Global Compact, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises due to the special attention they give to TNCs.

4.2 International Labour Law Framework

4.2.1 ILO instruments

4.2.1.1 Background

The International Labour Organization (ILO) was established in 1919, by the Treaty of Versailles, as a parallel organization of the League of Nations. The establishment of the organization was a response to the calls for social justice for workers and for international law to regulate cross-border competition which was feared by the labour movement to have negative impacts on workers.[112] The traditional ILO principle "labour is not a commodity" stems from the idea that labour is not equivalent to commodities and capital, and that workers should not be treated as objects for market competition.[113]

Since 1944, the ILO operates as a specialized agency affiliated with the United Nations.[114] At the time of its founding, the ILO claimed that

[112] See Hepple, 29-30; Macklem, 615; Sengenberger W, "International labour standardize in the globalized economy: obstacles and opportunities for achieving progress" in Craig J D.R, Lynk M Globalization and the Future of Labour Law. (Cambridge University Press 2006) 331.

[113] See Hepple, 33; Blackett and Trebilcock, 28.

[114] Macklem, 615.

unregulated trade and investments could risk to worsen labour conditions and create "social dumping" or a "race to the bottom".[115] The suggested remedy for these risks was to establish universal minimum labour standards which all potential market players would have to obey. [116] Thus, the ILO emerged as a social regulator of globalization which, in the then current context of Western colonialism, was limited to capitalist states in the Global North and was thus, initially, a European project.[117] Although, the global economic and labour context have changed dramatically since 1919, the founding principles of the ILO have remained the same and its constitution has barely changed.[118]

The major legislative and executive organs of the ILO, namely the International Labour Conference and the Governing Body, are tripartite institutions. Moreover, the ILO has a permanent secretariat, the International Labour Office.[119] The tripartite composition of its institutions involves the active participation of governments, employer and employee delegates to the International Labour Conference to adopt labour standards.[120]

Conventions are considered being "hard standards" since they are legally binding on the member states which ratify them and are subject to supervision, whereas recommendations aim at providing guidance for legislation, policy and practice and to supplement conventions.[121] For an ILO Convention to be internationally binding on a Member State, it is

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[115] Sengenberger, 331.

[116] Ibid.

[117] Hepple, 33-34; Kott S, "ILO: Social Justice in a Global World? A History in Tension" (2019) 11 Revue Internationale de Politique de Développement 28.

[118] Kott, 22.

[119] International Labour Organization (ILO), Constitution of the International Labour Organisation, (adopted 1 April 1919, entered into force 28 June 1919), Article 2.

[120] Rombouts SJ, "The International Diffusion of Fundamental Labour Standards: Contemporary Convent, Scope, Supervision and Proliferation of Core Worker's Rights under Public, Private, Binding, and Voluntary Regulatory Regimes" (2019) 50 Columbia Human Rights Law Review 86; Swepston, 157.

[121] Constitution of the ILO, Article 19.5; Hepple, 4; Swepston, 157, 159.

required that the government of the state submit the conventions and recommendations of the ILO to their competent authorities (usually the legislature) within twelve to eighteen months of adoption.[122] Moreover, the member states must supply reports of conventions they have ratified, and when requested by the Governing Body of the ILO, on conventions they have not ratified. The reason for this, is so that the member states can indicate the position of their legislation and practice, the difficulties they have had with implementing the relevant provisions and their future prospects on the issue. These reports result in a general survey put together by the Committee of Experts.[123]

4.2.1.2 Responses to globalization

As a response to the challenges of globalization and to the intensifying criticism of ILO operations being "toothless" and ineffective, the ILO started looking at new ways of making international labour standards and the mechanisms surrounding them more up-to-date with the reality that globalization had brought to the labour market.[124] However, the driving force remains rooted in the traditional notion of social justice, although slightly evolved, now also embracing "the general welfare of mankind."[125]

In 1998, the ILO laid down its "core labour standards", or "workers' fundamental rights" in the Declaration of Fundamental Rights and Principles at Work (the Declaration).[126] The rights and principles referred to above, have been the centre of the reconstruction project of the ILO, and have been given special priority and processes.[127] The Declaration

[122] Hepple, 30; Swepston, 177.

[123] Swepston, 177.

[124] Hepple 56; Murray J "Taking Social Rights Seriously: Is there a Case for Institutional Reform of the ILO?" in Fenwick C, Novitz T, *Human Rights at Work : Perspectives on Law and Regulation.* (Hart 2010) 363.

[125] Swepston, 157.

[126] International Labour Organization (ILO), Declaration on Fundamental Principles and Rights at Work, (adopted 18 June 1998), International Labour Conference, 86th Session.

[127] Murray, 363; Sengenberger, 332.

reinforced principles laid down in the constitution of ILO and their status of being a direct source of law, such as freedom of association and non-discrimination, meaning that they are binding on all ILO member states, irrespectively if they have ratified the relevant Conventions or not.[128]

The declaration defined the following four areas, and their accessory ILO conventions, as the "core" or "fundamental" rights: freedom of association and collective bargaining (Convention no. 87 and 98[129]), forced labour (Convention no. 29 and 105[130]), non-discrimination (Convention no. 100 and 111[131]) and the minimum age in employment (Convention no. 138[132]).[133] In 1999, another core convention was added on the prohibition and immediate action for the elimination of the worst forms of child labour (Convention no. 182[134]).[135] One of the special elements of the Declaration is that the member states are bound to respect the principles by virtue of their membership, which obliges them to promote and to realize the fundamental rights mentioned above. Member states are still free to ratify the Conventions they prefer, however, they are obliged to respect, promote and

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[128] Rombouts, 90; Swepston, 160.

[129] International Labour Organization (ILO), Freedom of Association and Protection of the Right to Organise Convention, No. 87 (adopted 9 July 1948, entered into force 4 July 1950), International Labour Conference, 31st Session.; International Labour Organization (ILO), Right to Organise and Collective Bargaining Convention, No. 98 (adopted 1 July 1949, entered into force 18 July 1951), International Labour Conference, 32nd Session.

[130] International Labour Organization (ILO), Forced Labour Convention, No. 29 (adopted 28 June 1930, entered into force 1 May 1932), International Labour Conference, 14th Session.; International Labour Organization (ILO), Abolition of Forced Labour Convention, No. 105 (adopted 25 June 1957, entered into force 17 January 1959), International Labour Conference, 40th Session.

[131] International Labour Organization (ILO), Equal Remuneration Convention, No. 100 (adopted 29 June 1951, entered into force 23 May 1953), International Labour Conference, 34th Session.; International Labour Organization (ILO), Convention concerning Discrimination in Respect of Employment and Occupation, No. 111 (adopted 25 June 1958, entered into force 15 June 1960), International Labour Conference, 42nd Session.

[132] International Labour Organization (ILO), Convention concerning Minimum Age for Admission to Employment, No. 138 (adopted 26 June 1973, entered 19 June 1976), International Labour Conference, 58th Session.

[133] See ILO, Declaration on Fundamental Principles and Rights at Work.

[134] International Labour Organization (ILO), Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No. 182 (adopted 17 June 1999, entered into force 19 November 2000), International Labour Conference, 87th Session.

[135] See Hepple, 57.

realize the principles related to freedom of association, forced labour, child labour and non-discrimination which are set out in the conventions mentioned above.[136]

Moreover, in 1999, the ILO launched their Decent Work Agenda, as a part of their effort to refocus their activities in accordance with the new reality of globalization and its implications on labour rights.[137] The Decent Work Agenda is centered on four strategic objectives: the promotion and realization of standards and fundamental principles and rights at work, to create greater opportunities for women and men to secure decent employment and income, to enhance the coverage and effectiveness of social protection for all, and to strengthen tripartite and social dialogue. [138]

As can be seen, whereas the ILO has been trying to make itself more relevant in the context of globalization, deregulation of labour law and deterritorialization of business, the international labour standards set by the ILO are primarily directed at states and their implementation and enforcement are completely reliant on the active participation of states.[139] However, the ILO has also actively been trying to incorporate TNCs into its work, as will be illustrated below.

4.2.1.3 The MNE Declaration

The ILO has made efforts to direct their work towards TNCs, as can be illustrated by the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration).[140] The

[136] See ILO Declaration on Fundamental Principles and Rights at Work, para 2; Rombouts, 92.

[137] See Hepple, 63.

[138] See International Labour Conference (ILO), Address by Mr. Juan Somavia, Secretary-General of the International Labour Conference, 1 June 1999, International Labour Conference, 87th Session.

[139] See also Hepple, 4.

[140] Amended in 2000, 2006 and 2017. See International Labour Organization (ILO), Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, November 1977, Governing Body of International Labour Office, 204th Session (amended November 2000, 279th Session, March 2006, 295th Session, and March 2017, 329th Session).

MNE Declaration sets out certain principles in the field of employment, trainings, conditions of work and industrial relations.[141] The Declaration represents an international tripartite consensus amongst governments, workers' and employers' organizations and the behavior they request of enterprises.[142] The recommendations of the Declaration are not only addressed to MNEs, but also for the use by national enterprises, governments, employer and worker organizations.[143] The principles found in the declaration are derived from ILO Conventions and Recommendations, and their aim is to guide transnational enterprises in their operations. Moreover, the Declaration encourages positive contribution of transnational enterprises to the economic and social progress in the host countries and that they cooperate with government, trade unions and employers' organizations in those countries.[144]

As regards the scope and content, the MNE Declaration covers the areas of employment (employment promotion, social security, elimination of forced or compulsory labour, effective abolition of child labour, equality of opportunity and treatment, and security of employment), training, conditions of work and life (wages, benefits and conditions of work, and safety and health), and industrial relations (freedom of association and the rights to organize, collective bargaining, consultation, access to remedy and examination of grievances, and settlement of industrial disputes).[145] The ILO Tripartite Declaration, its accessory conventions and a large range of other ILO conventions and recommendations, such as the Social Security (Minimum Standards) Convention (1952, No. 102) and the Labour

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[141] Tergeist P, "Multinational Enterprises and Codes of Conduct: The OECD Guidelines for MNEs in Perspective" in Blanpain R, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies.* (11. ed., Kluwer Law International 2014) 232.

[142] Tergeist, 232-233; Biondi A, "New Life for the ILO Tripartite Declaration on Multinational Enterprises and Social Policy." (2015) 7 International Journal of Labour Research 107.

[143] Tergeist, 233.

[144] Biondi, 107.

[145] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

Inspection Convention (1947, No.81), are annexed to the MNE Declaration.[146]

Moreover, the General Policies of the Declaration states that MNEs should obey national laws, respect international standards, honor voluntary commitments, and harmonize their operations with the social aims and structure of countries in which they operate.[147] All that being said, the part on "Access to remedy and examination of grievances" clarifies that the main duty to protect individuals against "business-related human rights abuses" lies on the state, and that the state should "take appropriate steps to ensure, through judicial, administrative, legislative, or other appropriate means" that workers affected workers within the state's territory and/or jurisdiction have the access to effective remedy.[148]

Important to note is that the MNE Declaration solely lays out principles of guiding character for TNCs and states, not binding international norms. Although these principles are derived from and elaborate on ILO Conventions, i.e., binding sources of international law, the MNE Declaration itself remains a voluntary instrument. This may serve as an explanation to the fact that the MNE Declaration's follow-up mechanism has been shown incapable to deal with the task and that the instrument is weak in enforcement.[149] The MNE Declaration does not contain any sanctions and its dispute mechanism solely focuses on the interpretation of its contents. The supervision thus relies on a reporting system, outside the ILO's normal supervisory regime, which will be examined in the next subchapter.

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[146] See ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Annex.

[147] See ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, "General Policies", 4 ff.; Biondi, 108.

[148] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para 64.

[149] Hepple, 83.

As mentioned above, the follow-up procedure of the MNE Declaration calls for a survey to be conducted every four years on the state's observance of the MNE Declaration. However, the above procedure has shown to work better on paper than in reality. The reporting mechanisms proved to be a "negotiating nightmare" for the MNE Subcommittee, that is the responsible body for conducting periodic surveys and to consider requests for the interpretation of the provisions of the MNE Declaration.[150] In the end, the follow-up mechanism did not add any practical use of the declaration, although the language eventually negotiated was progressive. The number of replies was limited and as a result, in 2006, the ILO Governing Body decided to pause the above exercise to look into alternative options.[151]

4.2.1.4 Supervisory Machinery

The ILO's normal supervisory mechanism is more complex than that of the MNE Declaration. However, similar to the follow-up mechanism of the MNE Declaration, the two most distinctive features of the ordinary ILO supervisory system are: tripartism (the presence of governments' representatives, workers' representatives, and employers' representatives), and reliance upon voluntary actions by the member states.[152]

The regular system of supervision entails the examination of periodic reports submitted by the member states regarding the measures they have taken to implement the conventions they have ratified. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) evaluates governments reports in relations to their ratified conventions.[153] The above procedure provides an opportunity for a direct dialogue between the relevant governments, workers' and employers'

[150] See Biondi, 109.

[151] See Biondi, 109.

[152] Hepple, 50.

[153] Tortell L, "The ILO, Freedom of Association and Belarus" in Fenwick C, Novitz T, *Human Rights at Work : Perspectives on Law and Regulation.* (Hart 2010) 385.

organizations. Moreover, the reports contain observations of workers' and employers' organizations on the topic.[154] The comments made by the committee are either in the form of observations incorporated in its printed report or of requests directly addressed to the governments concerned.[155] If there are any problems in the application of the standards, the ILO seeks to assist its member states through social dialogue and technical assistance.[156] Member states that repeatedly fail to report or to reply to comments of CEACR, may be required to submit non-periodic detailed reports, examined by the International Labour Conference.[157] Cases that are considered to be more difficult are referred to the tripartite Conference Committee on the Application of Standards (CCAS), which is a standing committee of the International Labour Conference which examines reports in a tripartite setting and allows for discussion on specific parts of the reports. [158]

Moreover, there are special supervisory mechanisms when it comes to the area of freedom of association. It comprises two bodies: The Committee on Freedom of Association and the Fact-Finding and Conciliation Commission. This procedure may be invoked against states, regardless of their ratification of the freedom of association conventions, due to it being based on the authority of the ILO constitution.[159]

There are also several special supervisory procedures. For instance, Article 24 of the ILO Constitution allows for representation by workers' and employers' organizations to be made to the Governing Body, in cases where these organizations want to complain that a Member State has failed to

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[154] International Labour Organization (ILO), "Applying and Promoting International Labour Standards" <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> accessed 15 May 2020.

[155] Swepston, 179.

[156] ILO, "Applying and Promoting International Labour Standards".

[157] See Hepple, 49.

[158] ILO, "Applying and Promoting International Labour Standards".

[159] Swepston, 180-181.

secure effective observance of a convention which it has ratified.[160] In these cases, the Governing Body may set up a tripartite committee with the aim to examine the allegations and to make recommendations, which the Governing Body can decide on.[161] Also, under article 26 of the ILO constitution, any member states can file a complaint against another member states regarding the application of a convention that both states have ratified.[162] The Governing Body may also initiate the above complaint procedure on receipt of a complaint from a delegate to the International Labour Conference or on its own motion.[163] The Commission of Inquiry receives written submissions and hear witnesses. If necessary, it also makes visits to the relevant state. [164] The procedure under article 26, is the only way in which a legally binding determination can be made of the fact that a Member State has breached it obligations under an ILO Convention. The determination becomes finding once a Member States agrees to accept it, or if it abstains from referring the matter to the International Court of Justice.[165]

4.2.2 Human Rights instruments

4.2.2.1 The UN Covenants

Although the United Nations does not have mandate for matters on labour as such, a number of its human rights instruments do also entail labour rights.[166] The ICCPR and the ICESCR entail the greatest labour right

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[160] Constitution of the ILO, Article 24.

[161] See Hepple, 49.

[162] Constitution of the ILO, Article 26.

[163] See Swepston, 179.

[164] Swepston, 179-180.

[165] See Constitution of the ILO, Articles 26-34; Hepple, 50.

[166] See e.g. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Articles 23, 24; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 UNGA Res 2106 (XX) (ICERD), Articles 5.d.ix, 5.e.

coverage amongst the UN core human rights treaties, since both covenants are neither limited to a particular group nor do they require discrimination as a prerequisite for their activation.[167] For example, the ICESCR guarantees the right to work, recognizes the right to just and favorable working conditions and the right to join effective trade unions.[168] The ICCPR, on the other hand, entails a much narrower scope of labour rights, prohibiting slavery, servitude, and forced labour.[169] Moreover, the ICCPR guarantees freedom of association, including the right to form and join trade unions. [170]

Whereas the implementation of ICCPR is monitored by the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR) is responsible for the monitoring of ICESCR. All States that are parties to the Covenants are thus obliged to submit regular reports to the monitoring bodies on how the rights are being implemented in their countries.[171] Similar to the ILO, the rights themselves do not have direct effect on ratification, since it is the responsibility of states to implement of the rights provided under the covenants.[172] However, both Committees can examine potential violations of respective instruments in concrete situations and to consider inter-state complaints.[173]. The question of whether the HRC or CESCR can examine individual communications is dependent of whether

[167] Joseph, 332; Swepston, 162.

[168] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Articles 6, 7 and 9.

[169] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 8.

[170] Ibid., Article 22.

[171] See ICCPR, Article 40; ICESCR, Article 16.

[172] See ICCPR, Article 2; ICESCR, Article 2.

[173] Optional in ICESCR, see Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, A/RES/63/117 (adopted in 10 December 2008); ICCPR, Article 41.

the state in question has signed the optional protocols allowing for these procedures. [174]

While the ICESCR indicates States as the actors ultimately accountable for compliance with its provisions, its monitoring body, the Committee on Economic, Social and Cultural Rights (CESCR) has suggested that non-state actors also should observe the rights to work, due to the potential influence they might have in that area.[175] This involves, for example, that employers within the private sectors respect the right to work in their employment practices and that they promote awareness of it within their networks.[176] Nevertheless, the above stated remains nothing more than just a suggestion. As earlier mentioned, the responsibility to implement and enforce the rights both in ICCPR and ICESCR still remains with the state. By the same token, in 2011, the CESCR published a statement on the human rights obligations of state parties in the corporate sector in which it called upon states to "take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant."[177] CESCR has also further specified that when a State Party may exercise control, power or authority of business entities or situations outside its territory, extraterritorial obligations arise, if there is an impact on the enjoyment of human rights of the individuals in that territory.[178] These extraterritorial obligations also extend to any business entity over which the

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[174] See United Nations Human Rights Office of the High Commissioner (OHCHR), "Committee on Economic, Social and Cultural Rights – Monitoring the Economic, Social and Cultural Rights" <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> accessed 15 May 2020; OHCHR, "Human Rights Committee – Introduction" <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> accessed 15 May 2020.

[175] See Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 2006, E/C.12/GC/18; Joseph, 342-343.

[176] Joseph, 342-343.

[177] Committee on Economic Social and Cultural Rights (CESCR), "Statement on the Obligations of State Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights (May 2011) : 46th Session, Geneva, 2-20 May 2011, E/C.12/2011/1, 5.

[178] Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para 25 ff.

state may exercise influence, either by regulatory means or by the use of incentives.[179] Other international human rights treaty bodies have expressed similar views.[180] As regards the application of the obligations arising from ICCPR, the HRC has not directly referred to business enterprises, but has, more indirectly referred to them by stating the states responsibility to protect individuals of human rights violations committed by private entities. A State Party may thus violate the rights of Covenant by "permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[181] Moreover, the HRC has also stated that the ICCPR can give rise to extraterritorial obligations of states given that the individuals affected are within the "power or effective control of the forces of a state."[182]

Thus, when it comes to the conducts of companies, the responsibility to protect human rights still remains on the state and it is upon the state to regulate the conducts of companies in order to ensure that they do not commit any human rights violations.[183]

Efforts to create a human rights instrument which legally binds TNCs date back to 2003, when an UN working group published a draft on the "Norms on the Responsibilities of Transnational Corporations and Other Business

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[179] Ibid.

[180] See Augenstein D, and Dziedzic L "State Obligations to Activities under the European Convention on Human Rights" (2017), 15 EUI Department of Law Research Paper 2.

[181] See Human Rights Committee (HRC), 'General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 8.

[182] Ibid., para. 10.

[183] De Schutter O, "Human Rights in Employment Relationships: Contracts as Power" in Dorssemont F, Lörcher K and Schömann I, The European Convention on Human Rights and the Employment Relation. (Hart 2013) 105.

Enterprises with Regard to Human Rights".[184] However, States did not accept these norms and in 2004, the Human Rights Commission (HRC) announced that the draft would have no legal standing.[185] In 2014, a new effort was made when the HRC through a resolution established a intergovernmental working group which was tasked with developing an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[186] In 2018, the working group came with its first draft of the treaty. Unlike the 2003 draft, the 2018 draft does not aim to directly bind corporations to the treaty, but leaves the primary responsibility for protecting human rights with States.[187] TNCs are however, indirectly bound through due diligence obligations, and the treaty provides both civil and criminal liability for TNCs as a consequence of these obligation.[188]

4.2.2.2 Regional Instruments

This subchapter is going to examine different regional human rights instruments and relevant jurisprudence developed under their monitoring and adjudicating bodies, namely the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), the American Convention on Human Rights (ACHR), and the African Charter on Human and People's Rights (ACHPR). However, as will be shown, although some of the case law does concern the involvement of TNCs in human rights

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[184] See Subcommission on the Promotion and Protection of Human Rights. Working Group on the Working Methods and Activities of Transnational Corporations, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (Draft), 30 May 2003, E/CN.4/ Sub.2/2003/12.

[185] See Bialek J, "Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does It Regulate and How Likely Is Its Adoption by States?" (2019) 9 Goettingen Journal of International Law 509.

[186] Human Rights Council, 26/9 Elaboration of an internationally binding instrument on transnational corporations and other business enterprises with respect to human rights, 14 July 2014, A/HRC/RES/26/9.

[187] Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises (IGWG), Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Zero Draft Treaty), 26 July 2018, Article 2 ;Bialek, 518.

[188] Zero Draft Treaty, Article 10.

violations, none of the cases directly deal with the violations of the human rights of workers within the supply chain of the TNC.

As for the Asia-Pacific, the region plays a prominent role in providing global production and employment through supply chains, but does not have a region-wide inter-governmental system to protect and promote human rights.[189] Steps have been taken at a sub-regional level to strengthen human rights, for instance, through the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009, which adopted the ASEAN Human Rights Declaration in 2012. However, the AICHR is still new in the making and has yet not established a complaints mechanism for alleged human rights violations.[190]

4.2.2.2.1 Europe

The European counterparts to the ICCPR and the ICESCR are the European Convention on Human Rights (ECHR) and the European Social Charter (ESC). The ECHR was adopted in 1950 and much like the ICCPR, deals with civil and political rights, such as the prohibition on forced labour and the right to form and join trade unions.[191] Adopted in 1961 and revised in 1996, the ESC protects economic and social rights, such as freedom from discrimination on the basis of sex in employment and occupation [192] As can be seen, both instruments protect rights that constitute fundamental labour rights within the ILO system.

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189 International Labour Organization (ILO), "Global Supply Chains in Asia and the Pacific and the Arab States", <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_534370.pdf> accessed 22 May 2020; Asia Pacific Forum of National Human Rights Institutions, "Regional human rights mechanisms", <https://www.asiapacificforum.net/support/international-regional-advocacy/regional-mechanisms/> accessed 22 May 2020.

190 Asia Pacific Forum of National Human Rights Institutions, "ASEAN Intergovernmental Commission on Human Rights", <https://www.asiapacificforum.net/support/international-regional-advocacy/regional-mechanisms/AICHR/> accessed 22 May 2020.

191 See European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953), ETS 5, Articles 4 and 11; Swepston, 163.

192 See European Social Charter, (adopted 18 October 1961, entered into force 26 February 1965) ETS 35, (revised version adopted in 3 May 1996, entered into force 1 July 1999) ETS136, Article 20.

In 1995, a collective complaints procedure was introduced to the ESC, through an additional protocol. However, only 13 Council of Europe member state are bound by this procedure and the European Committee of Social Rights has thus only produced 5 judgments on the rights set out in ESC so far.[193] Although the European Court of Human Rights (ECtHR) mainly deals with rights of civil and political character, it has produced judgments relating to labour rights such as Van Der Mussele v. Belgium[194], Siliadin v. France[195], Demir and Baykara v. Turkey[196], Enerji Yapi-Yol Sen v Turkey[197], and Tymoshenko and others v. Ukraine.[198]

Under the ECHR, states are obliged to regulate and control corporate activities relevant to human rights, and in case of violations, provide for effective enforcements mechanisms.[199] If a state fails to follow these obligations, it can be liable for the human rights violations committed by private corporations.[200] To illustrate, in Fadeyeva v. Russia, the ECtHR found that Russia had violated the ECHR, since it did not secure the rights of Fadeyeva against a polluting industry (as a part of her right to private life under Article 8, ECHR).[201] The industry was polluting the environment above the level permitted under Russian law, and Fadeyeva, having no resources to move to a safer area, suffered from sever health problems.

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[193] Global Health and Human Rights Database, "European Committee of Social Rights", <https://www.globalhealthrights.org/category/regional-bodies/european-committee-of-social-rights/> accessed 22 May 2020.

[194] Van Der Mussele v. Belgium, App. No. 8919/80 (ECtHR, 23 November 1983).

[195] Siliadin v. France, App. No. 73316/01 (ECtHR, 26 October 2005).

[196] Demir and Baykara v. Turkey, App No. 34503/97 (ECtHR, 12 November 2008).

[197] Enerji Yapi-Yol Sen v. Turkey, App No. 68959/01 (ECtHR, 21 April 2009).

[198] Veniamin Tymoshenko and others v. Ukraine, App. No. 48408/12 (ECtHR, 2 January 2015).

[199] See Augenstein D, "State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights" (2011) Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, 2-3.

[200] Ibid.

[201] See Fadeyeva v. Russia, App No. 55723/00 (ECtHR, 9 June 2005).

According to the ECtHR, Russia had a positive obligation to secure Fadeyeva's rights to home and health by ensuring that the private industry would limit it's level of pollution in accordance with the what was required by Russian law, or by relocating Fadeyeva to a safer area.[202].

When it comes to acts performed, or producing effects, outside the territory of the state, the ECHR requires the act to have been committed within the jurisdiction of the state, in order for the extra-territorial application of ECHR to be possible. Over the past years, the question of extraterritoriality has been treated in a number of cases.[203] However, corporations and other non-state actors only incur duties to protect human rights through domestic legislations implementing State's obligations under ECHR.[204] The courts approach to human rights protection remains premised on a territorial notion of jurisdiction and the category of acts performed outside the State's territory requires the physical presence of state agents on the territory of another state.[205] Thus, by definition, the extraterritorial obligations are only applicable on state, and not applicable on private companies.[206]

4.2.2.2.2 The Americas

The American Convention on Human Rights (ACHR) was adopted by the Organization of American States in 1969.[207] Like the ECHR, the convention mainly deals with civil and political rights, but does include the prohibition of forced labour and the rights to association.[208] In 1988, economic, social and cultural rights were added to the convention through the Protocol of San

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[202] Ibid., paras 122-123, 132-134.

[203] See e.g. Case of Al-Skeini and others v. the United Kingdom, App. No. 55721/07 (ECtHR, 7 July 2011).

[204] See Augenstein and Dziedzic, 157.

[205] Augenstein and Dziedzic, 36-37.

[206] Ibid.

[207] American Convention on Human Rights (Pact of San José) (adopted 22 November 1969, entered into force 27 August 1979), OAS Treaty Series No 36.

[208] Swepston, 164.

Salvador.[209] The convention allows complaints to be made to the Inter-American Court of Human Rights (IACtHR), which has dealt with several cases concerning TNCs and their impact on the human rights. The cases involving TNCs have not dealt with the human rights of workers in particular, but rather the TNC's impact on the human rights and lifestyles of indigenous groups.[210]

Yakye Axa Indigenous Community v. Paraguay concerned an indigenous community, that due to the presence of three British TNCs that claimed the ancestral lands of the Yakye Axa as private property, had suffered serious breaches of their rights to enjoy a decent life (the right to personal integrity, food, water, housing, amongst others). IACtHR declared that Paraguay was responsible for the lack of protection of the Yakye Axa community, and imposed the obligation on Paraguay to return the ancestral land to the community.[211] In Kaliña and Lokono v. Suriname, the IACtHR concluded that the mining activities of a TNCs had significant negative impact on the ecosystem in the area, thus interfering with the indigenous rights of the community. The TNCs had been granted a 75-year concession for mining exploitation by Suriname. Furthermore, Suriname had sold ancestral land of Kaliña and Lokono people to non-indigenous people. The IACtHR ordered that there could be no conduct of business activities in indigenous lands without the consultation of the Kaliña and Lokono people. Again, it was the state that was responsible for the breach of rights. However, the IACtHR did establish that there was to be rehabilitation of the community land, as a shared obligation between the TNCs and the companies involved. [212]

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[209] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted in 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 (1988).; Swepston, 164.

[210] See Londoño-Lázaro MC, Thoene U and Pereira-Villa C, “The Inter-American Court of Human Rights and Multinational Enterprises: Towards Business and Human Rights in the Americas?” (2017) 16 Law & Practice of International Courts & Tribunals 447-448.

[211] Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Series C No. 125 (IACtHR, 17 June 2005); Londoño-Lázaro, Thoene and Pereira-Villa, 447-448.

[212] Case of Kaliña and Lokono People v. Suriname. Merits, Reparations and Costs. Series C No. 309 (IACtHR, 25 November 2015) para 290; Londoño-Lázaro, Thoene and Pereira-Villa, 450.

As with the ECHR, the Court cannot render a judgment condemning private companies, since its jurisdiction is limited to declaring the responsibility of state parties to the ACHR.[213] Although the IACtHR has expressed that there are shared obligations between states and MNEs, it is ultimately states that have the main obligation to protect human rights.[214]

4.2.2.2.3 Africa

The African Charter of Human and People's Rights, adopted in 1981, deals with both civil and political rights, and with economic, social and cultural rights.[215] The African Commission on Human and People's Rights (hereinafter the African Commission) has inter alia a protective mandate which allows for different communication procedures.[216]

In 2001, a case was brought to the African Commission concerning severe human rights violations involving a TNC. Since the 1990s, Royal Dutch Shell in joint venture with the Nigerian government, have been accused of severe human rights violations, specifically exposing the Ogoni community to danger, in relation with oil drilling and production in Nigeria.[217] The violations involved the forced mass eviction of the residents of the community, the loss of lives, destruction of homes schools, religious institutions and businesses, and the disruption of families and communities amongst other.[218] Furthermore, when activists accused Royal Dutch Shell of violations of their rights to a clean environment and livelihood, forcing

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[213] Londoño-Lázaro, Thoene and Pereira-Villa, 447.

[214] See American Convention on Human Rights, Article 2; Londoño-Lázaro, Thoene and Pereira-Villa, 453.

[215] Swepston, 164.

[216] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, Articles 45, 47.

[217] Aguiar A, "Fighting the Uphill Battle for Corporate International Legal Personality under the Regional Human Rights System in Africa" (2015) 51 Tort Trial & Insurance Practice Law Journal 178.

[218] Social & Economic Rights Action Center & Center for Economic & Social Rights (SERAC & CESR) v. Nigeria. Comm. No. 155/96 (ACtHPR, 6 June 2001), 1.

Royal Dutch Shell to withdraw from the area, the corporation asked to Nigerian government to protect their property and even payed for military transportation. This resulted in the military arresting, prosecuting and hanging activists who protested against Royal Dutch Shell's operations.[219]

In the case referred to above, the Court held Nigeria responsible for the violations of several rights under the African Charter.[220] However, important to note is that Royal Dutch Shell's involvement in the violations were never discussed nor even touched upon by the African Commission, despite the fact that Royal Dutch Shell had and continued to cause countless oil spills in the Niger Delta and made no efforts to discourage the military regime from executing activists.[221] The terms of the Commission's Charter only allows it to consider the actions of member states, their nationals and certain nongovernmental organization.[222]

4.3 Guidelines and Initiatives

This subchapter focuses on the voluntary labour initiatives directed towards both states and TNCs of two international organizations, namely the UN and the OECD. These initiatives are also referred to as soft law "since they do not possess the distinct characteristics of the binding sources of international law."[223]

[219] See Aguiar, 178.

[220] See SERAC & CESR v. Nigeria.

[221] Aguiar, 178.

[222] Aguiar, 165.

[223] Londoño-Lázaro, Thoene and Pereira-Villa, 445.

4.3.1 UN Global Compact & UN Guiding Principles on Business and Human Rights

The UN has worked longer than any other international organization to develop a code of conduct for MNEs.[224] In 2000, it adopted the UN Global Compact (UNGC) consisting of ten principles to which it invites companies to support and implement. The principles are divided into four categories: human rights, labour standards, environment, and anti-corruption.[225] The principles give a wide coverage of supply chains by referring concepts such as “sphere of influence," “complicity," and “involvement”.[226] However, the UNGC is neither legally binding nor does it aim at being a voluntary instrument subject to monitoring. Rather, its main aim is to encourage so called good business practice by offering a “learning platform.”[227]

In 2011, the UN Human Rights Council went one step further by adopting the UN Guiding Principles on Business and Human Rights (UNGPs).[228] The UNGPs rest on three pillars: the states duty to protect against human rights violations conducted by third parties, corporate responsibility to respect human rights, and the need for greater access to remedy for victims of human rights violations.[229] Thus, the UNGPs embrace a human rights due diligence framework for companies.[230] However, it is unclear whether this human rights due diligence stretches to other corporate entities which the TNCs has investment links with.[231] Although the principles have been

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[224] Tergeist, 233.

[225] Tergeist, 234.

[226] Mares, 11.

[227] Mares, 10.

[228] Tergeist, 236.

[229] See United Nations (UN), “Guiding Principles on Business and Human Rights: implementing the United Nations ‘Protect, Respect and Remedy’ Framework" (2011) HR/PUB/11/04.

[230] See De Schutter O, “Towards a New Treaty on Business and Human Rights” (2018) 1 Business and Human Rights Journal 41.

[231] Ibid.

directly referred to in IACtHR case law[232], giving it some legal importance, the UNGPs were designed as a regime of "shoulds". As a matter of fact, the General Principles explicate: "[n]othing in these guiding principles should be read as creating new international obligations."[233]

4.3.2 The OECD Guideline for MNEs

The OECD was the first organization to adopt guidelines for TNCs in 1976.[234] At the time, the Guidelines was a response to the increasing number of TNCs and their growing influence on the global market.[235] As a part of a bigger package of international investment instruments, the Guidelines were adopted to make sure that the business of TNCs adjust to the traditions and policies of the countries in which they were operating.[236] Moreover, it aimed to enhance the contribution of MNEs to equitable growth and social progress.[237]

Like the UNGPs, the OECD Guidelines rest on a human rights due diligence framework.[238] Moreover, the OECD Guidelines places a responsibility on both states and TNCs to respect a set of "minimum" rights, namely the rights found in the Universal Declaration of Human Rights, the ICCPR, the ICSECR, and the principles referred to into 1998 ILO Declaration. [239]

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[232] See IACtHR, Case of the Kaliña and Lokono People v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, para 224; Pereira 458 ff.

[233] UN, United Nations (UN), "Guiding Principles on Business and Human Rights: implementing the United Nations 'Protect, Respect and Remedy' Framework", 1.

[234] The latest revision dates from 2011.

[235] Tergeist, 214.

[236] Tergeist, 214; Hepple 79.

[237] Tergeist, 214.

[238] See OECD, "OECD Guidelines for Multinational Enterprises" (2011) OECD Publishing, 24 para 15.

[239] See OECD Guidelines, 32 para 39; Hepple 87.

Different from the ILO, only governments can be members of the OECD. However, businesses and unions enjoy consultative status through the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC).[240] The Guidelines address both parents companies and local entities "according to the actual distribution of responsibilities among the on the understanding that the will co-operate and provide assistance to one another as necessary to facilitate observance of the Guidelines."[241] It is the OECD's Investment Committee that is responsible for the management and implementation of the Guidelines. When necessary, the Committee clarifies the provisions of the Guidelines, but it is also responsible for the supervision if the so-called national contact points (NCPs).[242] The different NCPs deal with the complaint cases and other issues relating to implementation in the adhering countries.[243]

4.5 Concluding Remarks

As can be seen, rather than being based on hard sanctions and binding decisions, the ILO supervisory system builds exerting pressure on member states, and not companies, in order to make states comply with labour standards. The ILO aims to make member state implement the labour standards by the use of "softer" means such social dialogue, recommendations and technical assistance. However, as discussed in chapter 2, through processes of liberalization, such as deregulation, of labour, trade and production states, have let go of their power to regulate the conduct of businesses.

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[240] Hepple, 78.

[241] See OECD Guidelines, 17 para 3; Hepple 79.

[242] Tergeist, 215.

[243] Tergeist, 215.

The vertical vision of both labour rights, contained in the ILO, and human rights, examined under subchapter 4.2.2, serves as an explanation to why legal mechanisms on both a global and regional level do not offer a possibility to claim corporate liability for violations of labour and human rights. Although the efforts made by the ILO, the UN and the OECD, to address the operations of TNCs and their implications on labour and human rights, these instruments are not binding. Ultimately, it is only states that can be held liable for the violations of the rights formulated in the binding documents of international labour law.

5. Private Regulatory Initiatives

5.1 Introduction

Due to labour law being of both public and private character, the aim of this chapter is to provide a general understanding of private regulatory initiatives, the reasons for their emergence and how they differ from public international labour law. Moreover, this chapter aims to provide a deeper understanding of one specific category of private labour regulations, namely global framework agreements (GFAs). How do GFAs manage to tackle the negative impacts of globalization and privatizations on labour law? Can they provide effective protection for workers within the supply chains of big corporations?

The first part of this chapter will provide a general overview of the emergence of private regulatory initiatives. Thereafter, the chapter will devote itself to an examination of the nature, content and scope of GFAs, and also the interpretation and enforcement of GFAs. Lastly, the chapter will devote attention to another type of private initiative, namely the Bangladesh Accord, which shares many of the same characteristics of GFAs, but has managed to put more pressure on TNCs by inter alia making arbitration legally binding.

5.2 CSR Practices: General Overview

As shown in the chapters above, the international labour law framework relies on states to implement and enforce the regulations and secure labour rights. The absence of binding international rules governing the conduct of TNCs, the lack of legal linkages between lead firms and their suppliers creating the opportunity for lead firms to avoid liability, together with the inefficiency and failure of states to impose respect for labour rights upon

TNCs, have created a landscape where violations of labour rights within global supply chains are difficult to effectively sanction and remedy.

However, labour rights violations of transnational corporations has not gone unrecognized; civil society groups, trade unions, and NGOs are constantly scrutinizing the labour conditions under TNCs and confronting them to regulate their behavior. In the absence of authority, TNCs are also "called upon to participate in creating, shaping, and enforcing emerging environmental and social regulations."[244] The traditional, public regime of labour regulation, based on compliance by governments has thus shifted by moving towards an emerging regime that builds on the idea of encouraging the objects of regulation (companies) to institute systems for internal management themselves, in order to generate compliance.[245] In light of this, corporate social responsibility (CSR) has emerged as a business ethic that links together "environmental, labour and social requirements into a heterogenous set".[246] In general, CSR practices build on applying standards to the industrial plants that a (Western) transnational company has off-shored to countries, where there are deficits in legislations and legal institutions creating a lack of protection for the workers in that country ("third world" countries).[247] As can be seen from this development, labour law, as we know it, does not entail a monopoly on the regulation of labour relations.[248] Important to note is that whereas labour law was created for the purpose of compensating for the economic imbalances between the workers

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[244] Helfen M, Schüßler E and Botzem S, Legitimation Strategies of Corporate Elites in the Field of Labor Regulation: Changing Responses to Global Framework Agreements. 43 (Emerald Group Publishing Ltd 2015) 244.

[245] Croucher R and others, "Legal Sanction, International Organisations and the Bangladesh Accord." (2019) 48 Industrial Law Journal 551; Hadwiger, (2015b) 8; Hepple 70.

[246] Ojeda-Avilés, 285; Hepple, 73.

[247] See Ojeda-Avilés, 285.

[248] Sobczak, 168.

and the employers, contract and commercial law assumes the two parties to a contract on an equal footing.[249]

Although many CSR initiatives are aimed at the improvement of labour standards, organized labour has been absent from the definition, design and governance.[250] The lack of workers' voice and other weaknesses in CSR practices, such as corporate codes of conduct, have led to Global Union Federations (GUFs) developing their own regulatory framework.[251] These regulatory frameworks provide strategies for the aim of ensuring that TNCs engage in social dialogue and pay respect to fundamental labour rights, in particular, freedom of association.[252]

5.3 Global Framework Agreements

GFAs are negotiated agreements between TNCs and GUFs that aim at promoting and monitoring particular rights and standards across the global operations of TNCs by specifying the responsibilities these companies have in issues such as freedom of association, the right to collective bargaining, working conditions, and health and safety conditions.[253] In 1998, the first GFA was concluded between the French company Danone and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF).[254] Ever since, the practice of signing GFAs between TNCs and global or European trade union

[249] Sobczak, 167.

[250] Donaghey J and Reinecke J, "When Industrial Democracy Meets Corporate Social Responsibility — A Comparison of the Bangladesh Accord and Alliance as Responses to the Rana Plaza Disaster." (2018) 56 British Journal of Industrial Relations 15.

[251] Drouin. 218.

[252] See Drouin, 217; Donaghey and Reinecke, 15.

[253] See Papadakis, 2; Hadwiger, (2015) 77; Helfen, Schüßler and Botzem, 245; Papadakis, 2.

[254] Papadakis 3; Zimmer R, "From International Framework Agreements to Transnational Collective Bargaining" in Bungenberg M, Krajewski M, Tams C, Terhechte JP, and Ziegler A, European Yearbook of International Economic Law 2019. (Springer International Publishing 2020) 168.

federations has steadily been increasing. [255] A point often overlooked, is that GFAs are mainly a European phenomenon; the TNCs that have signed GFAs often have their headquarters in European countries.[256]

As previously mentioned, GFAs were born out of a growing need of organized labour on the global scale due to economic globalization. As with CSR practices, the growing spread of using GFAs as regulatory instrument stems from "a lack of resources, unclear communication channels, and political or ideological disagreements among the various actors from the labour side, which make such a transnational union collaboration difficult to form in the first place."[257] From the perspective of the unions, cross-border coordination of unions, both on a global and local level, is one of the central aims of a GFA. The idea is that good coordination contributes to democratization of industrial relations, and thus to the level of effectiveness of the GFA, and the improvement of labour conditions across the supply chains.[258] For the TNCs, the level of trust in the labour-management relations can be raised through GFAs, while at the same time improve the credibility of the company.[259]

GUFs are international federations that link and group together national trade unions operating in the same craft or industry.[260] Currently, there are 11 GUFs.[261] Important to keep in mind is that, compared to TNCs, GUFs are small organizations with limited power. Their influence on TNCs may thus vary between countries, sectors and individual companies making it more

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[255] Schömann I, "Transnational collective bargaining: in search of a legal framework" in Schömann I, Jagodzinski R, Boni G, Clauweart S, Glassner V, and Jaspers T, Transnational Collective Bargaining at Company Level; A New Component of European Industrial Relations? (European Trade Union Institute 2012) 219.

[256] Drouin, 218; Zimmer, 169.

[257] See Hadwiger, (2015) 77; Helfen, Schüßler and Botzem, 261.

[258] See Helfen, Schüßler and Botzem, 261; Papadakis, 3.

[259] Papadakis, 3.

[260] Drouin, 217.

[261] Global Unions, <http://www.global-unions.org/?lang=en> accessed 22 May 2020.

difficult for them to exercise pressure in certain sectors or geographical areas in which the TNC operates.[262]

Trade unions operating across borders is not a new phenomenon. For a long time trade unions across the globe have been attending ILO and GUF meetings, protesting at the request of sister unions facing repressions, and attending the congresses of those unions. The nature of international activity of unions has varied over time, both when it comes to degree and type of union activity.[263] As has been touched upon in chapter 2, the resistance toward the global organizing of unions, which emerged as a response to lacking domestic protections for workers, has taken place both at the regional and national level through national laws and legal institutions, for example, by placing restrictions on actions of cross-border solidarity such as secondary and sympathetic actions.[264]

When it comes to the nature of the agreement, GFAs differ from other categories of corporate social practices due to it being the only type of instrument that is the product of direct negotiations between the workers within the MNE and representatives of its management.[265] They are situated somewhere between voluntary standards, like the codes of conduct used within corporations, and international law.[266] Compared to unilateral CSR initiatives, such as codes of conduct and declarations, GFAs are much better at containing detailed implementation clauses, varying according to relevant issues covered and involved sectors.[267] Important to note is, what differs GFAs from corporate codes of conduct and other voluntary regimes is that they are the product of negotiations, and thus also an instrument of

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[262] See Helfen, Schüßler and Botzem, 261; Hepple, 76.

[263] Sukthankar, 37.

[264] Sukthankar, 37-38, 40.

[265] Papadakis, 2.

[266] See Helfen, Schüßler and Botzem, 249; Sukthankar, 43.

[267] Schömann, (2012) 225.

industrial relations since they entail labor representation and interest aggregation.[268] There are many different variations of GFAs and thus no agreement on their unified definition. However, there are some commonalities which show that there is some consensus on their features. First, a GFA should be global in its scope and include a reference to the supply chain. Second, it should involve GUFs as signatories. Third, a GFA should explicitly include, at a minimum, references and recognition of the rights reflected by the ILO in its fundamental Conventions.[269]

Whereas national collective agreements are usually concluded sector-wide or nationally, GFAs are concluded exclusively with a group or company.[270] When signing GFAs, TNCs confirm to comply and implement the standards and provisions set out in the GFA. Important for this thesis is that this commitment also counts for subsidiary companies and suppliers, but does not always cover the whole supply chain. Thus, GFAs can be found in all sectors, although, mostly used in the metal and electronic industries. By the end of 2018, more than 140 agreements were in place and 87% of these were concluded with European TNCs.[271]

The negotiation process of a GFA can look differently case to case. In many cases they start off by the GUFs trying to enter into negotiations with MNE management. The pressure tactics used by the GUFs vary, but mostly involve soft tactics.[272] A study on the negotiation processes of GFAs, made in 2015, showed that the managements of MNEs are normally reluctant to enter into negotiations with GUFs, and thus initially respond by declining

[268] Helfen, Schüßler and Botzem, 249; Zimmer, 169-170.

[269] See Hadwiger, (2015b) 16; Zimmer, 170.

[270] Sukthankar, 43; Zimmer 169.

[271] See Zimmer, 168-169.

[272] Helfen, Schüßler and Botzem 253.

their negotiation requests. However, if the union continues to push for an agreement the management may give in and start official negotiations.[273]

More recent GFAs usually include supply chains within their scope of reach, unlike older agreements, which do not always cover the whole supply chain.[274] Moreover, current agreements are usually developed to include rules on implementation and monitoring, such as complaints mechanisms, annual meetings, and reporting of management.[275] The content of clauses referring to the application to the GFA's supplier and subcontractors varies greatly among different agreements.[276] Workers' representatives play an important role in the implementation of the agreements. For the most part, the parties of the GFA agree to monitor the adherence of the agreement and in many cases a GFA foresees the creation of a committee on party basis in charge of the implementation.[277] Most agreements do not provide for a dispute resolution mechanism. In 2017, only 10% of all GFAs contained some kind of provisions on how potential disputes should be settled. This would often include either mediation or arbitration.[278]

In 2012, workers at a Siemens facility in the United States were trying to organize relying on the reference to freedom of association in the GFA that Siemens had signed with the GUF IndustriALL which required Siemens to use higher standards when operating in a country that does not reflect the principles of freedom of association. The workers were met with an aggressive anti-union campaign and Siemens insisted that the GFA did not require more than compliance with US law.[279] This also raises questions of

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[273] Helfen, Schüßler and Botzem, 254.

[274] Zimmer, 170.

[275] Ibid.

[276] Hadwiger, (2015b) 23.

[277] Zimmer, 171.

[278] Ibid.

[279] See Sukthankar, 45.

whom should interpret the standards. Is it the bodies of ILO, which the relevant jurisprudence has emerged from, or should it be solved in domestic court?

As can be seen in the example above, domestic law can in certain countries serve as a setback to international standards.[280] Unfortunately, GFAs have not guaranteed labour rights to workers in the ways some have hoped for. Instead, unions and TNCs have been confronted with a wide set of open questions. For example, questions of who has the entitlement of demanding compliance with the provisions of a GFA remains unsolved. The same applies to questions of how and in what forum the standards should be interpreted and applied.[281] Law and policies regarding collective agreements have traditionally been the preserve of the domestic legislation of states. Due to the extreme diversities between states when it comes to systems of industrial relations, a legal framework for transnational collective agreements has not been established.[282]

5.4 The Bangladesh Accord

In 2013, a garment factory building in Bangladesh called Rana Plaza, collapsed due to structural failure, leading to the death of 1129 garment workers and left more than 2500 seriously injured.[283] Although, the Rana Plaza was an extreme case, it is important to note that it was not isolated either in Bangladesh or in South East Asia more widely. This region has a bad reputation when it comes to the protection of workers and violations of labour rights are more frequent than in many other countries and/or regions.[284] Since China (previously being the primary location for low-cost garment

[280] Sukthankar, 45.

[281] Ibid., 44-45.

[282] Zimmer, 167.

[283] See Wichterich and Islam, 3.

[284] See Croucher, 553; Donaghey and Reinecke, 22.

sourcing) experienced capacity pressures and increased wages, lead firms started looking for cheaper production sources. In all of this, Bangladesh emerged as an attractive location for outsourcing due to its labour costs being among the lowest in the world. Moreover, governments in many developed states lowered the import tariffs from Bangladesh to "spur its economic development, further reducing the cost of sourcing from Bangladesh."[285]

In the case of Bangladesh, companies, rather than states, have become the enforcer in the employment relationship by implementing CSR practices, such as codes of conduct. However, the Rana Plaza disaster exposed the problems of labour rights in global supply chains and the failure of social inspection mechanisms adopted by companies as part of their CSR commitments. In fact, two of the factories in Rana Plaza had been inspected shortly before the building collapse.[286] As a response to the disaster, the Bangladesh Accord (the Accord) was signed in 2013 by the two GUFs IndustriALL and UNI Global Union, 180 apparel corporations and seven trade unions in Bangladesh, under the coordination of the ILO.[287] The Accord was to be binding for a period of five years.[288] However, in 2018, the signatory global unions and about 100 companies concluded a transitional agreement which prolonged the safety program laid out in the Accord until May 2021.[289]

The Accord constitutes a legally binding agreements between lead firms and trade unions and provides for legally binding arbitration in the home

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[285] Jacobs BW and Singhal VR, "The Effect of the Rana Plaza Disaster on Shareholder Wealth of Retailers: Implications for Sourcing Strategies and Supply Chain Governance" (2017) 49–51 Journal of Operations Management 53.

[286] Donaghey and Reinecke, 15, 22.

[287] Scheper, 1070.

[288] Accord on Fire and Building Safety in Bangladesh, 13 May 2013, 1.

[289] See Croucher, 557; Accord on Fire and Building Safety in Bangladesh, "Achievements 2013 Accord", <https://bangladeshaccord.org/updates/2018/07/20/achievements-2013-accord> accessed 22 May 2020.

countries of the signatory companies.[290] But what differs the Bangladesh Accord from an ordinary GFA? The accord builds on a multi-stakeholder model, involving several large purchasing companies (rather than one single employer), local "civil service" and the ILO. Workplace inspections are employed from outside and the Accord also incorporates elements of public transparency.[291] The initial 2013 Accord was made up of nine parts, covering the topics of scope, governance, credible inspections, remediation, training, complaints process, transparency and reporting, supplier incentives, and financial support.[292] The 2018 Accord adds to the list by including parts on release of responsibility, termination of the agreement, choice of law, support to the NTPA[293] , and dispute resolution.[294]

One of the central elements of the Bangladesh Accord is that it establishes a system of workplace inspections for the identification of weaknesses in health and safety standards in garment factories and for the remedy of these weaknesses.[295] The obligations set out in the Accord covers all suppliers along the supply chains of the signatory companies.[296] However, the 2018 Accord goes further than the former 2013 Accord, in the way that it also states that freedom of association must be protected in order to ensure workers' rights.[297] Moreover, the Accord contains a complaints mechanism which allows for workers, unions or companies to collectively bring a complaint against a factory. The Accord then takes on an arbitrator role and

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[290] See Accord 2013; 2018 Accord on Fire and Building Safety in Bangladesh, 21 June 2017; Scheper 1085; Croucher, 550.

[291] See Croucher, 9

[292] See Accord 2013.

[293] The National Tripartite Plan of Action on Fire Safety and Structural Integrity in the Garment Sector of Bangladesh.

[294] See Accord 2018.

[295] Croucher, 553; Drouin 228.

[296] Accord 2013, 1; Accord 2018, 2.

[297] Accord 2018, para 12b.

produces a ‘Resolution’ which decides which position the Accord has on the case.[298]

As mentioned above, one of the key features of both the 2013 and the 2018 Accord, is that arbitration is legally binding. Any decision made by the arbitration tribunal is enforceable in a court in the TNCs home country or any other country signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.[299] However, the problem with the 2013 Accord is that if a party refused to arbitrate, then there would be no national court in which to enforce the arbitration award.[300] This problem was solved in the 2018 Accord which specifies “arbitration shall be seated in the Hague and administered by the Permanent Court of Arbitration.”[301]

All things considered, the Bangladesh Accord both 2013 has managed to deal with the problems of legal enforceability and has established a clearer connection to law than more general GFAs, as discussed in subchapter 5.2.

5.5 Concluding Remarks

Globalization, deregulation of labour law together with the fragmentation of the firm has introduced a shift from public to private regulations such as internal self-regulatory corporate codes. Due to the lack of a worker's voice in corporate codes, GUFs have made efforts to protect the rights and interests of workers directly or indirectly employed by TNCs by pressuring them to sign GFAs.

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[298] See Accord 2013, para 5; Accord 2018, para 3; Donaghey and Reinecke, 33.

[299] Accord 2013, para 5; Accord 2018, para 3.

[300] Croucher, 12.

[301] Accord 2018, para 3.

However, as has been shown, GFAs relationship to law remains unclear which causes difficulties for their implementation and enforcement. Thus, the Bangladesh Accord illustrates an alternative to of guaranteeing the protection of workers' rights within the global supply chains, namely by incorporating enforcement mechanisms into the agreements. When considering the transferability of the Accord Model, one must take into account the severity of the Rana Plaza disaster. Important to realize, is the nature of both GFAs and the Bangladesh Accord are contractual and TNCs must consent to the legal obligations that comes with the provisions of the agreements.

6. Global Supply Chains: Governance and Implications on the Protection of Labour Rights

6.1 Introduction

The purpose of this thesis has been to examine the challenges that global supply chains present for governance through international labour law, with emphasis on the implementation and enforcement of international labour law in global supply chains. The thesis has thus explored the notion of territoriality in the theories of labour law and the implications globalization and the deterritorialization of trade have had on the application of labour law. The thesis has also explored the shift from public international labour law systems to private regulatory systems that has come along with globalization. Moreover, by studying the structure and mechanisms of global supply chains, the thesis has been able to provide a deeper understanding of international labour law and its capability of governing global supply chains.

The aim of this chapter is to analyze the findings of the previous chapters. Thus, this chapter will use the findings made in chapters 2-3 and compare them to the findings of chapters 4-5 in order to answer the research questions of the thesis, namely: How does *international labour law* govern global supply chains? How do *private labour regulations* govern global supply chains? And what are the challenges when it comes for the *implementation and enforcement* of these instruments?

6.2 Labour Law and Globalization

As a starting point, the thesis has aimed to discern the meaning of the notion of territoriality within labour law. Chapter 2 illustrated how, in order to countervail the imbalance's within the employer-employee relationship, labour law sought solutions based on the organizing principle of territory. This principle was constructed around the territorial powers of the nation-state. However, it has been shown that the traditional way of thinking labour is being challenged by the dissolving territoriality within the context of trade that has come along with the processes of globalization, such as liberalized financial markets, lowered transport costs and the rise of modern communication methods. This thesis has mainly focused on two of the implications of the above processes. Firstly, the changes in the states' authority to govern questions of economy, trade and labour, together with the privatization of labour law entailing the shift from state-centered, public regulatory systems, to private governance of labour law. Secondly, the organizational changes in production and the processes leading to the fragmentation of the firm.

As mentioned in subchapter 2.3, states have actively participated in realigning their domestic regulatory frameworks in neoliberal directions. This has involved the deregulation and denationalization of labour law and trade, which in turn, has had implications on the social and labour protection of states and the organization of production within states.[302] At the same time, states have used their authority to make sure that competition of the market is not threatened by anti-competitive measures. What is interesting to note is that by labeling the exercise of labour rights as anti-competitive measures, as was illustrated in subchapter 2.3 through the CJEU cases *Viking* and *Laval*, states have declared the efforts of trade unions to organize across borders to be unlawful. This goes to show that "the main thrust of the

[302] Rawling, 9.

backlash against labour's internationalism took place within domestic legal contexts outside the established battleground of labour law."[303]

As explained in subchapter 3.2, global supply chains are made up of business practices such as outsourcing parts of production to territories where productions costs are cheaper. They entail a complex web of production networks without legal linkages between the lead firms and their chain of suppliers and subcontractors. Most importantly, as has been shown in subchapter 3.2, this way of organizing production allows the lead firms, the majority of them belonging to the Global north, to escape liability for breaches of labour rights throughout their supply chains, generally spanning over the Global south. Since production is not controlled from above, but instead controlled horizontally beyond the formal boundaries of the firm, these practices can also be referred to as "vertical disintegration of production". This means that the economic power of lead firms has not been decentralized. Instead, they are exercising they power in new ways that preclude legal recognition of employment relations between the workers within the supply chains and the lead firm, creating a legal and territorial barrier between the two.[304]

6.3 International Labour Law Framework

As mentioned above, the processes of globalization and its developments raises, in particular, two concerns for labour law: the lack of authority of the state to deal with labour matters and the fragmentation of the firm. These concerns are also reflected within the sphere of international labour law. The international labour law framework is structured around the notions of territoriality and jurisdiction. The examination in chapter 4 suggests that there are two main concerns when it comes to the application of the current

[303] Sukthankar, 40.

[304] See Rawling, 7-8.

international labour law framework on labour rights violations taking place within global supply chains. First, international obligations on both labour rights and human rights are only binding on states, and not on private actors such as TNCs. Second, the jurisdictional and territorial scope of the instruments precludes the home country of a TNC from being held responsible for the human rights violations of that TNC in other countries, through its supply chains. As Augenstein and Dziedzic have noted, the "interaction between these two areas of legal doctrine lies at the heart of many difficulties of international law in accounting for human rights violations committed in the course of global business operations."[305]

The international labour law framework examined in this thesis includes the ILO Declaration of Fundamental Rights and Principles at Work (1998), declaring the rights laid down in Conventions 29, 87, 98, 100, 195, 111, 138 and 182, as fundamental rights binding upon all ILO Member States.[306] When examining the labour protection under ILO, the thesis has also covered the ILO Tripartite Declaration on MNEs. Moreover the thesis has examined the labour rights protection found in international and regional human rights instruments, namely the ICCPR, ICESCR, ECHR, ESC, ACHR, and ACHPR. In regard to soft law instruments, the thesis has studied instruments that specifically focuses on the operations of TNCs and their role in respecting labour and human rights, namely the UN Global Compact, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.

As shown in chapter 4, although the ILO tripartite mechanisms, in addition to governments, also involve workers' and employers' representatives, the implementation and the enforcement of the labour standards still follow the territorial space of member states' jurisdiction. The problem for the ILO

[305] Augenstein and Dziedzic, 4.

[306] See subchapter 4.2.1.2.

when it comes to global supply chains is that its instruments follow the horizontal lines of member states' jurisdiction and territory, and not the vertical lines of global supply chains.[307] The ILO Tripartite Declaration on MNEs was the ILO's response to the impacts that TNCs have on labour rights. However, the Tripartite Declaration has proven be weak in enforcement since it cannot be invoked before national courts and is not within the scope of ILO's supervisory regime. The disputes procedure is only aimed at interpretation and is unenforceable, and is thus rarely used. [308] As can be seen, there are no sanctions or remedies to secure compliance with the standards that the ILO Tripartite Declaration sets out.

Another problem regarding both the ILO Declaration and the ILO core conventions, is that they fail to deal with the fragmentation of the firm. The standards set out in the instruments do not fully cover suppliers and subcontractors within the global supply chains of a TNC. As mentioned in subchapter 3.2, a large number of suppliers and subcontractors belong to the informal sector. The ILO instruments, being designed accordingly to standard jobs and employment relationship, are not fit to deal nor cover the labour rights of workers in atypical employment relationships.[309]

Moreover, while it is true that almost all states belong or somehow participate in the ILO, the Governing Body still comprises the US, Germany, Italy, France, Japan, Russia, Brazil, India and China, that is "the states of chief industrial importance".[310] According to Macklem, the structure of the ILO is weighted in favor of western and/or industrialized countries, which invites questioning of whether the ILO still possesses the legitimacy to address some of the consequences of flexible production and

[307] Thomas H and Turnbull P, "From Horizontal to Vertical Labour Governance: The International Labour Organization (ILO) and Decent Work in Global Supply Chains." (2018) 71 Human Relations 536-537, 550.

[308] See Hepple, 83.

[309] Biondi, 107, 109.

[310] See ILO Constitution, Article 7.

globalization. The content and the structure of the instruments seem to speak to "the industrial histories of those state responsible for their formulation", an era in which "mass production was the dominant form of productive relations" and where rising unionism, standardized employment relations, and the state's direct involvement in a wide range of economic activities were aligned with the political direction of that time.[311]

All this being said, it is important to keep in mind that, at present time, the ILO is the only international organization with the mandate to bring representatives of states, labour and capital together to promote solutions to the working conditions within global supply chains. Thus, ILO also has the mandate to close existing gaps through legally binding public international regulation. Indeed, it will be a challenge to get state and employers' representatives profiting from global supply chains, to accept such a legal framework, but as Thomas and Turnbull argue: "it will speak volumes for the continuing relevance of the ILO in an age of globalization and for the prospects of decent work for millions of workers around the globe."[312]

With regard to international human rights instruments, subchapter 4.2.2 has shown how these instruments, much like the ILO instruments, were designed accordingly to the vertical relationship between the state and the individual, and not the horizontal relationship between the individual and private actors such as TNCs. As De Schutter notes: "[h]uman rights were originally designed to protect the individual from the power of the State, and their regime is deeply marked by that initial purpose."[313] Aside from cases where an employer may be considered as a de facto state agent, human rights violations of a private actors, for example a TNC, may not only stem from the conduct of the TNC itself, but it has to involve the

[311] Macklem, 617.

[312] Thomas and Turnbull, 555.

[313] De Schutter, (2013) 118.

failure of the state to adopt appropriate measures to avoid the violation from occurring in the first place. Moreover, the home state of the TNC does not have any extraterritorial obligations to protect the rights of individuals in other territories from the conduct of the TNC since its action, under current international law, cannot be imputed to the home state.[314] Thus, it is the state in which the violations are taking place that is responsible for failing to protect the labour and human rights of the individuals residing within its territory and/or jurisdiction. As has been shown through the case law from various regional courts, the involvement of a TNC cannot be assessed with responsibility, due to the fact that the international courts do not have the mandate to assess their liability.[315] Thus, although TNCs operate globally, they are not regulated globally. Since TNCs are not recognized as subjects of international law they cannot be held accountable for human rights violations under any of the current international legal frameworks. Ultimately, each individual entity of the TNC is subject to the jurisdiction of the state, in accordance with the territorial principle of jurisdiction.[316]

As regards the different guiding initiatives discussed in subchapter 4.3, it has been shown that they do in some ways address TNCs more directly than the international labour law framework, by laying out certain principles for TNCs to respect. For example, the OECD Guidelines has placed responsibilities on TNCs to observe international "core standards".[317] However, although the instruments discussed above do directly address TNCs, they are not binding on states and do not create any obligations under international law for TNCs. Rather, they aim to be guiding in what TNCs and states should and should not do. The emergence of these instruments also illustrate the reluctancy of states to adopt any binding instruments on TNCs. Moreover, although these instruments build on due diligence, a

[314] See De Schutter, (2013) 105.

[315] See chapter 4.2.2.2.

[316] See Londoño-Lázaro, Thoene and Pereira-Villa, 443.

[317] Page, Hepple, 87.

process familiar to business, it remains unclear on what it means in relation to the workers in the supply chain of the TNC.[318] According to Trebilcock, "[t]he fundamental mismatch between the direction of corporate structures and strategies — global — and the nation-based paradigm of labour rights and even transnational labour rights creates a basic constraint on how the due diligence framework can effectively deal with such issues."[319]

6.4 Private Labour Regulations

Chapter 5 has illustrated the development of private regulatory initiatives which involve the direct participation of TNCs, namely CSR practices such as corporate codes of conduct. These practices are voluntary, and thus do not reflect international legal norms, although they do refer to the ILO core conventions and the UNGPs. According to Hepple, private regulatory initiatives of TNCs build on capitalist and American conceptions of CSR practices, implemented through soft guidelines.[320] This also explains the popularity of voluntary codes; the existence of multiple regulatory initiatives may allow TNCs to avoid binding regulations or exclusively turn towards initiatives where regulations are set in line with their interests, putting them in a favorable position. TNCs have an interest in avoiding disruption in their global activities. Thus, having regulations under their own control, as in the form of private corporate codes, allows TNCs to "pacify workers, neutralize unions and reassure NGOs, governments and consumers."[321] This favorable position of TNCs is strengthened by weak and/or corrupt governments not enforcing labour rights, and the lack of sanction-based enforcement mechanisms within the ILO system.[322]

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[318] See Trebilcock, 107.

[319] Ibid.

[320] Hepple, 86.

[321] Hepple 85.

[322] Helfen, Schüßler and Botzem, 244, 250.

As shown in subchapters 5.2 and 5.3, trade unions have not remained passive throughout the above developments, but have actively been involving TNCs in collective bargaining. In this way, GUFs have developed their own regulatory framework, namely GFAs. As shown in subchapter 5.3, GFAs reflect collective agreements on a global scale. However, GFAs have developed without any clear relationship to law, neither domestic nor international, or public nor private, and have thus "developed in an international, European and national legal 'no man's land' from which they gain inspiration and which they reciprocally influence."[323] Since GFAs do not have a clear legal classification in existing categories of labour law, they constitute a kind of hybrid agreement with their only legal anchoring in private international law. [324] In national contexts, trade unions use collective action in order to push employers to sign collective agreements. However, as shown in subchapter 2.3 and discussed above, the right to collective action is limited to (and also limited within) the territory of the state. Like other labour rights, the right to collective action is state-centric, and lacks a clearly established international counterpart.[325] While, many unions had expected GFAs to perform as enforceable contracts, the unclear relationship to law and lack of legal enforcement reflects similarities of a GFA to soft law and corporate codes of conduct.[326] Thus, GFAs fail to cover the resistance or inaction by TNC in adopting the necessary measure to uphold the rights set out in the GFA; the effectivity of a GFA is much dependent on the TNCs commitment to GUFs.[327]

The Bangladesh Accord, examined in subchapter 5.3, serves as an example of how a GFA can be designed in order to secure the compliance of TNCs. It has been shown that in parts where GFAs are silent, the Bangladesh Accord

[323] Schömann, (2012) 219, 226.

[324] Schömann, (2012) 226.

[325] See discussion in Blackett and Trebilcock; Sukthankar.

[326] Sukthankar, 44.

[327] See Baylos, 14.

has managed to set up a rather clear and detailed complaints and arbitration mechanism. Furthermore, as has been shown, the Bangladesh Accord makes arbitration legally binding and also guarantees the enforceability of the arbitration award by specifying in which jurisdiction an arbitration award should be enforceable. Thus, the Bangladesh Accord has managed to effectively make use of a private judicial system for the protection of labour rights. Consequently, the workers' representatives involved in the Bangladesh Accord has managed to put strong pressure on the TNCs bound by the Accord to respect and comply with its provisions.

However, when considering the transferability of the Accord model, account most be taken to the scale and severity of the Rana Plaza disaster and the international scrutiny that followed, and the fact that the factories and workers involved and affected belonged to the garment industry. One important element of the business model of the garment industry is consumer sentiment, which makes the industry more sensitive to accidents such as Rana Plaza reaching the public eye, whereas companies in other sectors are less exposed to consumer sentiments.[328]

[328] See Croucher, 562.

7. Conclusion

By resorting to production through global supply chains, TNCs operate across the borders of the Global north and the Global south. Thus, it is important to keep in mind that the answer to the question of whether workers within global supply chains can enjoy their labour rights (or in case of violation, demand remedy), depends on the ability and/or willingness of the state, in which the worker is residing, to guarantee protection and to enforce its labour laws.

This thesis has shown that the structure of the labour rights protection found in the international labour law framework fails to take into consideration the specific circumstances of global supply chains. The vertical structure of the ILO instruments and its supervisory system, and human rights instruments such as the ICCPR, ICESCR, ECHR, ESC, ACHR, ACHPR, fall short when it comes to capturing the global operations of TNCs and their negative implications on labour rights across territories and jurisdictions. Although soft law instruments such as the UN Guiding Principles and the OECD Guidelines do refer to TNCs more directly, they do not create any new legal obligations, neither for TNCs nor for states.

The absence of binding international labour law obligations on the global operations of TNCs together with the growing pressure on TNCs from civil society groups, trade unions and NGOs, has led to an expanding range of private regulatory initiatives, such as CSR practices. However, it has been shown that CSR practices allows TNCs to prioritize their own economic interests over the workers' and to avoid legally binding obligations on labour issues. Thus, CRS practices have been said to have more to do with legitimating “sustainable capitalism” rather than to promote “sustainable social development in the world’s poorest and most disadvantaged

countries, with the active participation of the people of those countries."[329] As a reaction to the lack of workers' voice within CSR practices, GFAs have emerged as the global counterpart to collective agreements. However, it has been shown that GFAs remain in an unclear relationship with law, both international and domestic, which creates obstacles for the legal enforcement of the agreements. Although they can be developed and formulated in ways making their enforcement stronger, as illustrated by the example of the Bangladesh Accord, the nature of the obligations in GFAs remain contractual. GFAs are products of negotiation between GUFs and TNCs which means that the content and enforcement mechanisms of GFAs are dependent on the consent of the TNCs. Although, the importance and potential of GFAs should not be underestimated, they cannot serve as guarantee for the protection of labour rights within supply chains, and should therefore not serve as an alternative to international labour law.

Where does all of this leave us? As mentioned in the introduction of this thesis, working conditions within the global supply chains of TNCs often remain invisible to the public eye. Although, the media and NGOs frequently report on labour rights abuses within the global supply chains of TNCs, they are, unfortunately, quickly forgotten. Therefore, TNCs have generally been allowed to go back to "business as usual". In all of this, it is important to keep in mind that states have paved this way for TNCs, by aligning to neoliberal policies and allowing TNCs to enjoy the benefits from and the control of the production within global supply chains, without the legal liability for violations of labour and human rights occurring in those supply chains. It remains clear that there exists an international regulatory void when it comes to guaranteeing effective protection of labour rights and human rights of workers within global supply chains, without interference of the economic interests of states or TNCs.

[329] Hepple, 85.

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