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# The Use of Child Labour in Global Supply Chains

International Regulatory Responses to Human Rights Violations Occurring  
in the Supply Chains of Transnational Corporations

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# 1 Introduction

## 1.1 Background to the Study

Child labour is one of the most widespread and serious international human rights violations. The practice presents a grave danger to labour rights and the rights of the child, including the enjoyment of crucial human rights such as the right to health and education. Additionally, some forms of child labour constitute a *jus cogens* violation, one of the most serious transgressions of international law. Nevertheless, child labour has proliferated in business practices across the world, particularly, although not exclusively, in developing states.<sup>1</sup> The issue has further been exacerbated by the exponential increase in the volume of goods produced in global supply chains in recent decades.<sup>2</sup> Due to the increasingly widespread use of global supply chains for faster and inexpensive production of globally traded products, the demand for cheap labour has also increased dramatically. As a result, child workers have emerged as a particularly sought-after source of labour due to their vulnerability, which has impacted especially negatively their human rights.

Transnational corporations have had an increasingly definitive impact on the use of child labour in global business. Large corporate actors today have an enormous potential to violate the human rights of workers across their production processes.<sup>3</sup> Transnational companies can either perpetrate such abuses themselves or, more frequently, can assist or fail to prevent the commission of such violations by other business entities across their global supply chains.<sup>4</sup> Therefore, given the increasing capacity of global corporations to perpetuate human rights abuses, such as the use of child labour, there is growing recognition of the importance of regulating their transnational business operations.<sup>5</sup> The international business and human rights framework (the BHR framework) has thus emerged over the last few decades as an outlet for regulating global supply chains and corporate human rights abuses. The present thesis aims to explore the effectiveness of this framework, in combination with international human rights law, to hold transnational businesses accountable for child labour occurring in their

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<sup>1</sup> UNICEF, 'Child Labour' (2017) <https://data.unicef.org/topic/child-protection/child-labour/>, accessed 27 July 2019.

<sup>2</sup> Justine Nolan, 'Human Rights and Global Corporate Supply Chains: Is Effective Supply Chain Accountability Possible?' In Surya Deva and David Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, Cambridge 2017) 240.

<sup>3</sup> Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (2<sup>nd</sup> edn, Routledge, Oxton 2014) 148.

<sup>4</sup> Ramona Elizabeth Cirlig, 'Business and Human Rights: From Soft Law to Hard Law?' (2016) 6 *Juridical Tribunal* 228, 229.

<sup>5</sup> David Bilchitz, 'Introduction' in Deva and Bilchitz (n 2) 8.

global supply chains. The focus falls particularly on the occurrence of child labour in developing states.

## 1.2 Key Concepts

### 1.2.1 Transnational Corporations (TNCs)

Several terms are used in academia and in international fora to describe large corporate actors with global business operations. The most commonly used ones are Multinational Enterprises (MNEs), Multinational Corporations (MNCs) and Transnational Corporations (TNCs). Many authors seem to use these terms interchangeably to describe powerful corporate entities whose business ties stretch across multiple national jurisdictions.<sup>6</sup> So do various international regulatory initiatives. For instance, the OECD Guidelines broadly describe MNEs as business entities that ‘*comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways*’ and whose production processes ‘*extend throughout the world*’.<sup>7</sup> The ILO Tripartite Declaration defines MNEs as enterprises with public, private or mixed ownership, which ‘*own or control production, distribution, services or other facilities outside the country in which they are based*’.<sup>8</sup> This definition is particularly useful to discuss the regulation of corporations, as it succinctly describes a core component of TNCs’ functioning – the transnational character of their production operations. As will be discussed in Chapter 3, 4 and 5, this characteristic of the business activities of TNCs have proven to be one of the greatest challenges in the regulation of unethical business behaviour.

The present work will focus on TNCs and their supply chains. The thesis adopts the definition provided by Gatto who distinguishes between MNEs and MNCs/TNCs. She refers to MNEs as a more complex corporate structure of several controlling entities (parent companies) headquartered in multiple national jurisdictions.<sup>9</sup> In contrast, TNCs are corporations which, although conducting business through international supply chains, have their place of incorporation in one sole jurisdiction.<sup>10</sup> The present work focuses specifically on TNCs as a single

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<sup>6</sup> For example, see Deva (n 3) 21.

<sup>7</sup> OECD Guidelines for Multinational Enterprises (adopted 1976, last revised 2011), <http://dx.doi.org/10.1787/9789264115415-en>, accessed 25 June 2019, p 17.

<sup>8</sup> ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Fifth Edition) (adopted November 1977), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf), accessed 20 June 2019, art 6.

<sup>9</sup> Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations Under EU Law and International Law* (Edward Edgar, Cheltenham 2011) 38.

<sup>10</sup> *ibid* 38.

corporate entity acting as the parent company in a complex and transnational supply chain. Since a core purpose of this thesis is to explore how the use of child labour is regulated in these global supply chains, the corporate structure of a TNC is deemed more appropriate. As a parent company, TNCs represent a single entity, as opposed to the more complicated structure of an MNC. This simplification would allow for a more straightforward analysis of the current international regulatory framework.

### 1.2.2 Human Rights Violations

The aim of this work is not to provide a philosophical or moral evaluation of which entitlements classify as human rights, or of the normativity of human rights law. As a result, the following discussion is based on two core presumptions. Firstly, the analysis focuses solely on those standards which have been accepted under international human rights law by the majority of states on the international scene as the main point of discussion. Thus, the study adopts a universalist perspective, as opposed to moral relativism, of child labour as most appropriate for the present analysis. Secondly, the discussion assumes that the human rights discussed below have been widely accepted as norms of international (and national) human rights law, and thus derive their normativity from legal sources, as opposed to moral considerations. This perspective will allow the focus of the study to fall on the extent to which child labour in global supply chains can be regarded as a violation of a legal duty/responsibility. There are three key ways in which TNCs can impact human rights through their business operations: they can violate human rights directly or indirectly, or they can benefit the enjoyment human rights.<sup>11</sup> Firstly, TNCs can have a positive impact on human rights, for instance by engaging in corporate social responsibility initiatives to support the communities most impacted by their business operations. Secondly, TNCs can violate human rights indirectly by being complicit in abuses perpetrated by other actors, such as governments.

Thirdly, TNCs can violate human rights directly throughout their business operations. The present work focuses specifically on this last instance of TNCs' impact on human rights. TNCs are increasingly becoming a core perpetrator of human rights, with states' influence on such enjoyments gradually decreasing in the face of the growing economic power of transnational business.<sup>12</sup> One example of such practices concerns the use of child labour.<sup>13</sup> TNCs often enjoy enormous economic power not only over their workers but also over national authorities which can be compelled to minimize work-place protection for employees. Thus, in

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<sup>11</sup> *ibid* 9.

<sup>12</sup> Deva (n) 3; Gatto (n) 8 – 9.

<sup>13</sup> Gatto (n) 9.

situations of sub-optimal and/or hazardous working conditions, labourers benefit from little to no legal protection from exploitation and abuse. A second example relates to the use of child labour in violation of the international *jus cogens* prohibition of slavery. As will be discussed in greater detail in Chapter 2, child workers are an especially vulnerable group and their exposure to harmful working conditions for the purpose of economic exploitation could be construed as a modern form slavery. Finally, the practice of child labour deprives child workers of the enjoyment of core human rights, such as the right to health and to education. Therefore, TNCs which utilise child labour in their production processes could be committing grave human rights violations.

### **1.3 Research Question and Methodology**

The aim of the present thesis is to explore to what extent TNCs can be held accountable for the use of child labour in their global supply chains in developing states under the existing regulatory framework. The case-study of child labour, specifically child labour in cotton production, was selected because the practice exemplifies the core challenges in curtailing corporate human rights violations. To explore this issue, the analysis focuses on four sub-questions. Firstly, Chapter 2 explores how child labour is regulated under international human rights law. The chapter defines which individuals fall within the scope of the protection from child labour and assessed how child labour is addressed in international human rights law, the framework of the ILO and in relation to the *jus cogens* prohibition of slavery. The case-study of cotton production is used as an example of hazardous agricultural work. Secondly, Chapter 3 examines how global supply chains are regulated under within the international framework. The core objective is to define the concept of global supply chains and to explore to what extent these production processes are regulated in international law. A detailed assessment of the corporate law principles of limited liability and separate legal personality will not be provided due to word count limitations. Instead, the focus will fall on the broader international economic framework set out by the World Trade Organization (WTO) as a core influence on the development of mandatory standards for the regulation of corporate human rights violations.

Finally, Chapters 4 and 5 assess the existing international regulatory framework applicable to human rights duty-holders regarding the abolition of child labour. The analysis centres around the state duty to protect and the corporate responsibility to respect human rights, as formulated in international law and the BHR framework, most notably the UNGPs. The third aspect of human rights enforcement, i.e. access to remedies where corporate human rights violations have occurred, has not been assessed due to word count limitations. Chapter 4 focuses on the duties of states to regulate human rights violations committed by non-state actors. The analysis focuses on several important debates regarding the regulation of corporate human

rights abuses. The main discussion points include the state-centricity of international law, the home-host state dichotomy, and the concept of extraterritoriality and its relevance to state sovereignty. Chapter 5 aims to answer the question what the corporate responsibility to respect human rights is, focusing specifically on the use of hazardous child labour in the global supply chains of TNCs. The aim is to explore the effectiveness of the most prominent BHR initiatives in regulating corporate human rights violations.

The assessment provided in this thesis aims to determine to what extent the existing regulatory initiatives can be effective in holding TNCs accountable for the use of hazardous child labour in their global supply chains. The objective of the study is not to provide a socio-legal analysis of the root causes of child labour or the economic imperatives of utilizing the practice in global production processes. Neither does the author seek to provide a detailed discussion of international trade and investment law. Therefore, an in-depth assessment of the international economic framework and its implications for international development and the enjoyment of human rights falls outside the scope of the present work. Although these issues will be given some consideration in different parts of the thesis, the core focus of this work is international (human rights) law and the BHR regime and their effectiveness in holding TNCs accountable for child labour in global supply chains. Consequently, the thesis uses traditional doctrinal analysis to explore the core international hard- and soft-law human and labour rights instruments and BHR initiatives. This analysis is supplemented by a literature review of the effectiveness of the selected regulatory regimes in curtailing the use of child labour in the global supply chains of TNCs.



## 2 Child Labour

### 2.1 Key Concepts

#### 2.1.1 Overview and Definition of Child Labour

Child labour is a global phenomenon which has existed since the Industrial Revolution in the 19<sup>th</sup> century but is currently most prevalent in low-income states in Asia, Africa and Latin America.<sup>14</sup> While there are multiple and complex reasons for the occurrence and pervasiveness of child labour, poverty is among the key causes.<sup>15</sup> The practice violates several core human rights, such as the right to education, the right to health, the right to be free from slavery or slavery-like practices and various labour rights. UNICEF and the ILO define child labour as ‘*child work that should be abolished*’ due to its harmful effects of children’s well-being.<sup>16</sup> This indicates that not all types of child work are harmful and thus illegal; instead, there is a spectrum of practices ranging from permissible to prohibited. Thus, on the one hand, there is work which is considered beneficial to children, and which promotes their physical, mental, moral and/or spiritual development without interfering with schooling, rest and recreation.<sup>17</sup> On the other hand, intolerable exploitative practices, such as the economic exploitation of children, constitute prohibited forms of child labour.<sup>18</sup> To distinguish between permissible/beneficial child work and child labour, UNICEF defines the latter as an exploitative and destructive practice, which

*‘involves full-time work at too early an age; too many hours spent working; work that exerts undue physical, social and psychological stress; work and life on the streets in bad conditions; inadequate pay; too much responsibility; work that hampers access to education; work that undermines children’s dignity and self-esteem [and] work that is detrimental to full social and psychological development’.*<sup>19</sup>

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<sup>14</sup> ILO, ‘Global Estimates on Child Labour: Results and Trends 2012-2016’ (2017), [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_575499.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575499.pdf), accessed 11 June 2019, 32; Franziska Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press, New York 2009) 1.

<sup>15</sup> Humbert (n 14) 86.

<sup>16</sup> *ibid* 17.

<sup>17</sup> *ibid* 18.

<sup>18</sup> *ibid* 18.

<sup>19</sup> UNICEF, *The State of the World’s Children* (Oxford University Press, Oxfordshire 1997) 24.

The ILO uses a similar definition to UNICEF. It classifies as child labour any work which deprives a child of their childhood, potential and dignity, and which is harmful to children mentally, morally, physically or socially and interferes with the right to school.<sup>20</sup> Therefore, child labour is framed as a practice which poses a threat to children by infringing on core human rights and threatening their full development. To further understand the negative impacts this practice has, it is necessary to examine several core international law components of child labour: which individuals are classified as children; which practices constitute child labour; what the link between hazardous child labour and the *jus cogens* prohibition of slavery is. The following sections define each of these elements. The assessment also discusses the current rates of child labour, and examines hazardous child work in agriculture, focusing specifically on cotton production.

### 2.1.2 Who Benefits from Protection: Defining ‘Child’ and ‘Childhood’

There is no widespread international consensus concerning the exact definition of childhood.<sup>21</sup> The Preamble of the Convention on the Right of the Child (CRC), for instance, recognizes that the conceptualization of childhood is dependent on the specific national cultural and social context and the respective domestic human rights framework.<sup>22</sup> This creates some uncertainty as to which individuals legally fall within the category of ‘children’ and thus enjoy protection against child labour and violations of the rights of the child. There is more widespread international and academic consensus that childhood entails a period of life where education and the development of the child are the core concerns.<sup>23</sup> As a result, international human rights law today accepts that children should enjoy protection from practices which interfere with their human rights, such as the right to education and the right to health. This is reflected, for instance, in Article 24, ICCPR<sup>24</sup> and Article 10 ICESCR,<sup>25</sup> which recognize that children must enjoy enhanced legal protection due to their status as minors. Consequently, defining the minimum age of work is crucial to defining who benefits from protection against early employment due to their status as children.

There are several international instruments which offer guidance on what the minimum age of work for children is. The aim behind each approach is to guarantee to all children without

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<sup>20</sup> ILO, ‘What is Child Labour’, <https://www.ilo.org/ipec/facts/lang--en/index.htm>, accessed 27 June 2019.

<sup>21</sup> Humbert (n 14) 18.

<sup>22</sup> *ibid* 16 – 17.

<sup>23</sup> *ibid* 16.

<sup>24</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 24 (1)

<sup>25</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR), art 10.

discrimination the enjoyment of their human rights, especially the right to education and the right to health. An additional objective to establishing a minimum age threshold is to protect children from work which can jeopardise their morals and development. The ILO Minimum Age Convention (Convention 138) defines the minimum age of employment as no '*less than the age of compulsory schooling and in no event less than fifteen*'.<sup>26</sup> The instrument also creates an obligation for states parties to progressively raise the minimum age of employment '*to a level consistent with the fullest physical and mental development of young persons*'.<sup>27</sup> Article 3 also stipulates that a lower age of sixteen can be permissible under the condition that '*the health, safety and morals of the young person concerned are fully protected and they have received adequate specific instruction or vocational training in the relevant branch of activity*'.<sup>28</sup> The ILO Convention on the Worst Forms of Child Labour (Convention 182) defines the term 'child' to '*apply to all persons under the age of 18*' and thus introduces a broader ground for protection against human rights violations stemming from the practice of child labour.<sup>29</sup> The CRC classifies as children all individuals below the age of eighteen, unless domestic law stipulates a different age of majority.<sup>30</sup> The Convention does not provide a specific threshold for admission to employment for children but stipulates that the working hours and conditions of employment should be appropriate and subject to state regulation.<sup>31</sup>

### 2.1.3 Forms of Child Labour: Hazardous Work as a Worst Form of Child Labour

The discussion regarding the minimum age of employment highlights that international law does not prohibit child work as such; instead it aims to regulate undue interferences with the rights of the child and prevent economic exploitation.<sup>32</sup> There is also a distinction between the different forms of child labour and the specific challenges to human rights associated with each practice. The ILO and UNICEF distinguish between eight different forms of exploitative child labour; work occurring in hazardous working conditions; domestic work; street children; child labour occurring in the informal economy; child slavery; trafficking in children and

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<sup>26</sup> ILO, Minimum Age Convention (adopted 26 June 1973, entered into force 19 June 1976), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C138](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138) (Convention 138), accessed 10 July 2019, art 2 (4).

<sup>27</sup> *ibid* art 1.

<sup>28</sup> *ibid* art 3 (3).

<sup>29</sup> ILO, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C138](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138) (Convention 182), accessed 19 July 2019, art 2.

<sup>30</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 1.

<sup>31</sup> *ibid* art 32 (1).

<sup>32</sup> Humbert (n 14) 68.

commercial sexual exploitation; children involved in armed conflict; children involved in illicit activities.<sup>33</sup> All forms of child labour concern the economic and social exploitation of children and thus are considered harmful work. The ICESCR thus stipulates that exploitative work should be punishable by law, as should be the employment of children below the minimum age of work.<sup>34</sup> Consequently, work performed by young children, i.e. children who at the time of employment are below the minimum age of employment, is also considered harmful. For the purposes of the present thesis, the analysis will centre mostly on hazardous work, although the related concepts of child slavery and work in the informal economy will also be mentioned.

According to Article 3 of Convention 182, hazardous work falls under the category of worst forms of child labour.<sup>35</sup> Such practices refer to the use of individuals under the age of eighteen in all forms of slavery, sex work, illicit activities and hazardous work, i.e. *'work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children'*.<sup>36</sup> Article 4 requires that states parties prohibit the employment of children in conditions which are deemed hazardous under domestic law. Although the Convention does not provide an exhaustive list of prohibited activities, ILO Recommendation No 190 offers the following examples as instances of hazardous work:

- '(a) work which exposes children to physical, psychological or sexual abuse;*
- (b) work underground, under water, at dangerous heights or in confined spaces;*
- (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;*
- (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;*
- (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer'*.<sup>37</sup>

Thus, for instance, agricultural work is considered among the most dangerous forms of hazardous work performed by children.<sup>38</sup> Working conditions in agricultural work usually entail

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<sup>33</sup> *ibid* 19.

<sup>34</sup> ICESCR (n 25) art 10 (3).

<sup>35</sup> Convention 182 (n 29) art 3.

<sup>36</sup> *ibid* art 3 (d).

<sup>37</sup> ILO, Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999) [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R190](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R190) (Recommendation 190), accessed 21 July 2019, art 3.

the exposure of children to toxic substances and dangerous tools and equipment without adequate safety precautions, as well as work which is too physically demanding for young persons.<sup>39</sup> Additionally, agriculture is linked to the informal economy: TNCs or national enterprises often contract out some of the production processes to small-scale informal family businesses.<sup>40</sup> The ILO defines the informal economy (or informal sector) as ‘*all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements*’, with the exception of illicit activities.<sup>41</sup> This lack of adequate regulation means that most workers involved in such work, who usually live in extreme poverty, are extremely vulnerable to exploitation.<sup>42</sup> Most children are employed in the informal sector, but such informal workers are not recognised as legal persons and thus usually do not enjoy legal protection under domestic law.<sup>43</sup> Therefore, child labour in agriculture often satisfies the conditions of worst forms of child labour both as hazardous work and employment in the informal sector.

#### 2.1.4 Slavery

Although the present work focuses on hazardous work, it is important to consider whether hazardous work can itself be considered a form of slavery. There is a core distinction between slavery and child labour – while labour is an activity, slavery is a status.<sup>44</sup> There is a multitude of international instruments which prohibit slavery. Firstly and most notably, the Slavery Convention defines slavery as ‘*[t]he status or condition of a person over whom any or all powers attaching to the right of ownership are exercised*’.<sup>45</sup> The Convention distinguishes between permissible forced labour exacted for public purposes and forced or compulsory labour analogous to slavery.<sup>46</sup> Secondly, the Universal Declaration for Human Rights (UDHR) prohibits slavery in all forms, and so does the ILO Abolition of Forced Labour Convention

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<sup>38</sup> Humbert (n 14) 20.

<sup>39</sup> *ibid* 20.

<sup>40</sup> *ibid* 21.

<sup>41</sup> ILO, Recommendation Concerning the Transition from the Informal to the Formal Economy (adopted 12 Jun 2015), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R204](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204), accessed 12 July 2019, art 2.

<sup>42</sup> ILO, ‘Informal Economy’, <https://www.ilo.org/global/topics/employment-promotion/informal-economy/lang-en/index.htm>, accessed 12 July 2019.

<sup>43</sup> Humbert (n 14) 21.

<sup>44</sup> *ibid* 21.

<sup>45</sup> Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927), 253 LNTS 60 (Slavery Convention), art 1 (1).

<sup>46</sup> *ibid* art 5.

(Convention 105).<sup>47</sup> Thirdly, the ICCPR also prohibits slavery and forced labour as the destruction of a person's legal personality.<sup>48</sup> Finally, the ILO Forced Labour (Convention 29) defines forced labour as '*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntary*'.<sup>49</sup> The instrument excludes military service, civic obligations, court convictions, work or services exacted in cases of public emergency, and minor communal services.<sup>50</sup> The instrument thus intrinsically links forced labour as a form of slavery to labour illegally attained through coercion.

The Supplementary Convention to the Abolition of Slavery (Supplementary Convention) lists the following practices as slavery: debt bondage, serfdom, forced marriage and sham adoptions for the purpose of economic exploitation.<sup>51</sup> In this regard, it is important to consider the practice of debt bondage, which is prevalent in agriculture and the textile industry.<sup>52</sup> One of the most common form is family bondage whereby a child is forced to work so as to pay off a loan owed by their family.<sup>53</sup> The debt incurred is often manipulated by the creditor in a way where it becomes impossible for the parents or the child to repay the debt.<sup>54</sup> The Supplementary Convention defined debt bondage as

*'the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as a security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined'*.<sup>55</sup>

Therefore, child labour performed in debt bondage falls within the category of slavery as traditionally conceptualised under international law. However, it could also be possible to define

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<sup>47</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA 217 A (III), art 4; ILO, Convention concerning the Abolition of Forced Labour (adopted 25 Jun 1957, entered into force 17 Jan 1959), [https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105), accessed 22 July 2019 (Convention 105), art 1.

<sup>48</sup> ICCPR (n 24) art 8; Humbert (n 14) 54.

<sup>49</sup> ILO, Convention concerning Forced or Compulsory Labour (adopted 28 Jun 1930, entered into force 01 May 1932), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C029](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029), accessed 21 July 2019 (Convention 29), art 2.

<sup>50</sup> *ibid* art 2 (2).

<sup>51</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3 (Supplementary Convention) art 1.

<sup>52</sup> Humbert (n 14) 21.

<sup>53</sup> *ibid* (n) 21 – 22.

<sup>54</sup> *ibid* 22.

<sup>55</sup> Supplementary Convention (n 51) art 1 (a).

hazardous labour, even when performed outside of the confines of debt bondage, as a slavery-like practice or a modern form of slavery. Under the ICCPR, slavery is defined as ownership over a human being which strips them of their legal personality.<sup>56</sup> UNICEF and the ILO provide a broader definition of slavery, whereby the economic exploitation of child labour amounts to a practice similar to slavery.<sup>57</sup> The organisations define as slavery-like practices both bonded labour, which by its nature can entail the economic exploitation of children by both their parents and by their employers, as well as industrial and agricultural work as forms of hazardous work.<sup>58</sup> It is also possible to argue that child labour fall within the scope of Article 1 of the Supplementary Convention, as it entail the economic exploitation of children and involves a degree of undue dependency of the victims on another person (for instance, their parents or employer).<sup>59</sup> However, the core insight as to the status of child labour as a form of slavery comes from the *jus cogens* prohibition of slavery.

*Jus cogens* norms are peremptory international law norms from which no derogation is permissible.<sup>60</sup> Due to the crucial importance the international community attributes to these norms, such rules are universally binding, regardless of whether a states has consented to the norm.<sup>61</sup> To acquire the status of *jus cogens*, a majority of states must have recognized the rule under consideration as peremptory (what is defined as *opinio juris*).<sup>62</sup> In addition, there must have been consistent and widespread state practice demonstrating that the international community regards derogations from the norm as prohibited.<sup>63</sup> The prohibition of slavery is regarded as a *jus cogens* norm.<sup>64</sup> It is also possible to argue that modern forms of slavery have achieved a similar status under current international law.<sup>65</sup> Child slavery, which falls within the traditional definition of slavery, is therefore a *jus cogens* norm. Regarding the status of child labour involving hazardous work as a peremptory rule, the assessment is less straightforward.

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<sup>56</sup> Humbert (n 14) 54.

<sup>57</sup> *ibid* 41.

<sup>58</sup> *ibid* 41 – 42.

<sup>59</sup> *ibid* 41.

<sup>60</sup> Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

<sup>61</sup> Hugh Thirlway, ‘The Sources of International Law’ in Malcolm D. Evans, *International Law* (4<sup>th</sup> edn, Oxford University Press, Oxford 015) 114 – 115; Larry May, ‘Habeas Corpus as *Jus Cogens* in International Law’ (2010) 4 *Crim Law and Philos* 249, 250.

<sup>62</sup> Thirlway (n 61) 115.

<sup>63</sup> *ibid* 115.

<sup>64</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Judgment) [1970] ICJ Rep 3, para 34; May (n) 250.

<sup>65</sup> Humbert (n 14) 115.

The prohibition of employing children in hazardous working conditions would have to satisfy the conditions of widespread state practice and *opinio juris*. Regarding state practice, there are a multitude of international treaties dealing with hazardous work which have been ratified by a large majority of states without widespread reservations to the relevant provisions.<sup>66</sup> For instance, the CRC has been ratified by almost all states, and the ICCPR, the ICESCR, and Convention 29, 105, 138 and 182 have received ratification in a majority of states.<sup>67</sup> As far as *opinio juris* is concerned, it is necessary to consider whether most states regard the prohibition of hazardous child labour as unconditionally prohibited. The Rome Statute of the International Criminal Court lists both ‘enslavement’ and ‘[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’ as crimes against humanity, which are prohibited as *jus cogens* norms.<sup>68</sup> Therefore, child slavery comes under the definition of enslavement in Article 7 (2) (c), and child labour in hazardous working conditions falls within the latter category. In addition, the state obligations to protect children from child labour, including slavery and hazardous work in the treaties discussed above, permit no derogation.<sup>69</sup> Consequently, child labour in hazardous working conditions can be considered to fall within the scope of the *jus cogens* prohibition of slavery.

## 2.2 Current State of Affairs

### 2.2.1 Statistics

The ILO estimates that in 2016 152 million children were in child labour, amounting to approximately 1 in 10 children internationally.<sup>70</sup> Of them, 73 million were in hazardous work, facing significant dangers to their health, safety and development.<sup>71</sup> Child labour remains most prevalent in low-income and middle-low-income states.<sup>72</sup> While the number of child labourers declined between 2012 and 2016, the progress of eradicating child labour, especially in hazardous work, has slowed down.<sup>73</sup> The ILO has estimated that, unless states undertake urgent measures to regulate the child labour, especially hazardous child labour, by 2025 there

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<sup>66</sup> *ibid* 115.

<sup>67</sup> *ibid* 115 – 116.

<sup>68</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, accessed 21 July 2019 (Rome Statute), art 7 (1) (c) and (k); Dinah Shelton, ‘International Law and ‘Relative Normativity’’ in Evans (n 61) 141.

<sup>69</sup> See, for example, CRC (n 30) art 38, art 4, art 5 and art 25, and Convention 138 (n 26) art 4 (3).

<sup>70</sup> ILO, ‘Global Estimates on Child Labour’ (n 14) 11.

<sup>71</sup> *ibid* 5, 11.

<sup>72</sup> *ibid* 32.

<sup>73</sup> *ibid* 12.



will be 121 million child labourers, of whom 52 million will be employed in hazardous working conditions.<sup>74</sup> The largest population of children performing hazardous work in 2016 was in the age group of 15 to 17 years of age.<sup>75</sup> As discussed in relation to the minimum age of admission to employment, Conventions 138 and 182 stipulate that labourers in this age group do not automatically qualify for protection against child labour. These individuals are, nevertheless, classified as child labourers: this group suffers increased rates of illness and injury compared to other age segments as a result of the physical and psychological hazards involved.<sup>76</sup> In addition, 15 – 17-year olds are at the greatest risk of premature school drop-out.<sup>77</sup>

One of the core challenges child labour poses to the rights of the child is that the practice deprives children of the right to education. The ILO estimates that child labourers are especially at risk of having no access to education: within the group of 5 – 14-year olds (36 million children), 32 per cent were out of school in 2016.<sup>78</sup> Moreover, although the majority of child labourers have access to educational facilities, the same study estimates that early employment nonetheless impairs their learning abilities. There is growing research suggesting a strong negative correlation between child labour and education: the physical and psychological toll of employment deprives children of the opportunity to derive adequate benefits from schooling.<sup>79</sup> This issue is exacerbated by the fact that rural areas with greater concentration of child labourers working in agriculture often lack accessible, high-quality educational opportunities and facilities.<sup>80</sup> Therefore, their academic performance tends to rank lower than that of children not in child labour.<sup>81</sup> Child workers are thus at a significantly greater risk of remaining economically vulnerable and being unable to escape poverty.<sup>82</sup>

Child labourers are unable to attain the skills and knowledge necessary to move from low-paid, insecure, hazardous work which requires only manual labour into better-paying, less harmful employment.<sup>83</sup> Child labourers already engaged in hazardous work have little opportunity to escape dangerous working conditions and are consistently exposed to health hazards

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<sup>74</sup> *ibid* 12.

<sup>75</sup> *ibid* 41.

<sup>76</sup> *ibid* 41.

<sup>77</sup> *ibid* 41.

<sup>78</sup> *ibid* 47.

<sup>79</sup> *ibid* 48.

<sup>80</sup> FAO, 'Reducing Child Labour in Agriculture through Good Agricultural Practices: FAO Experiences' (2012), <http://www.fao.org/3/a-av096e.pdf>, accessed 23 July 2019, para 2.1.

<sup>81</sup> ILO, 'Global Estimates on Child Labour' (n 14) 48.

<sup>82</sup> FAO (n 80) para 2.2.

<sup>83</sup> *ibid* para 2.2; ILO, 'Global Estimates on Child Labour' (n 14) 53.

which can result in illnesses, injuries and death.<sup>84</sup> Children are a particularly vulnerable group regarding poor working conditions and environmental factors, as their development is heavily influenced by their environment.<sup>85</sup> Factors such as poverty, exploitation and exposure to dangerous substances have been proven to have an overwhelming adverse effect of children's psychological and mental development, including to cause disability.<sup>86</sup> Therefore, the involvement of children, especially those not in school, in income-generating activities, can have long-term harmful effects on their health and development.<sup>87</sup> Such negative health consequences can last into adulthood<sup>88</sup> and expose children to life-long poverty and discrimination. Premature employment further exacerbates pre-existing vulnerabilities and poses significant threats the children's right to education, as well as their right to life and to health. Agricultural work is especially harmful in this regard.

### 2.2.2 Agriculture

The ILO ranks agriculture are one of the most dangerous sectors concerning occupational safety and health.<sup>89</sup> The sector accounts for the largest share of child workers: in 2016, approximately 71 per cent of all children (108 million) involved in child labour were working in agriculture.<sup>90</sup> It is also the main entry point for the youngest group of child labourers – approximately 83 per cent of 5 -11-year olds performed agricultural work in this time period.<sup>91</sup> Progress in reducing the percentage of child labourers has been slow due to high levels of poverty in rural areas, as well poor regulation of working conditions and the minimum employment age in the sector.<sup>92</sup> Children working in agriculture are most often involved in farming and livestock herding.<sup>93</sup> For the purposes of the present study, the analysis will focus on small-scale and commercial farming. The percentage of children involved in agricultural work decreases with age in favour of work in industry and the service sector.<sup>94</sup> However, the nature

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<sup>84</sup> FAO (n 80) para 2.2; ILO, 'Global Estimates on Child Labour' (n 14) 53.

<sup>85</sup> Dr. A. Vennila, 'Impact on Child Labour: Issues and Challenges' (2018) 7 IJHSSI 47, 47 – 48.

<sup>86</sup> ILO, 'Facts on Disability and Child Labour' (July 2011) [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms\\_165280.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_165280.pdf), accessed 23 July 2019, 3; *ibid* 48; FAO (n) 2.2.

<sup>87</sup> ILO, 'Facts on Disability' (n 86) 4; ILO, 'Global Estimates on Child Labour' (n 14) 53.

<sup>88</sup> FAO (n 80) para 2.2.

<sup>89</sup> ILO, 'Occupational Safety and Health (OSH) and Hazardous Work of Children in Agriculture', [https://www.ilo.org/ipec/areas/Agriculture/WCMS\\_172349/lang--en/index.htm](https://www.ilo.org/ipec/areas/Agriculture/WCMS_172349/lang--en/index.htm), accessed 22 July 2019; ILO, 'Child Labour in Agriculture', <https://www.ilo.org/ipec/areas/Agriculture/lang--en/index.htm>.

<sup>90</sup> ILO. 'Global Estimates on Child Labour' (n 14) 5, 12.

<sup>91</sup> *ibid* 12.

<sup>92</sup> FAO (n 80) para 2.3.

<sup>93</sup> ILO, 'Global Estimates on Child Labour' (n 14) 12.

<sup>94</sup> *ibid* 40.

of agricultural work child labourers perform is extremely harmful to their health and exposed children to life-long poverty.<sup>95</sup>

Firstly, poverty is both a cause and an effect of child labour in agriculture.<sup>96</sup> This is largely due to the lack of educational opportunities in many rural areas, especially in developing states, the inadequate agricultural technology used in small- and medium-sized farms, the limited unionisation of agricultural workers and the widespread acceptance of child labour in many developing countries.<sup>97</sup> As mentioned above, premature employment exposes children to additional economic vulnerability which can extend into adulthood. Secondly, the working conditions in agriculture are particularly hazardous to children. Such work often involves exposure to toxic substances, such as pesticides, as well as strenuous labour outside, which can lead to dehydration.<sup>98</sup> Furthermore, agricultural work is physically exhausting and repetitive, and is likely to cause injuries and deformities to children.<sup>99</sup> Finally, work in agriculture is widely unregulated in many states. As is discussed below, many agricultural enterprises are small-scale family-owned farms where children perform unpaid work for their parents.<sup>100</sup> As a result, children working on family farms are often not considered child workers for the purposes of domestic legislation and are thus excluded from legal protection. Moreover, state authorities usually do not have the capacity to monitor remote rural areas.<sup>101</sup>

Child labour in farm work is a challenging target for regulators, as it can be difficult to distinguish between non-hazardous, beneficial work and child labour. Light duties on family farms which do not interfere with compulsory schooling and are age-appropriate can be valuable.<sup>102</sup> However, child work in farming can also expose children to substantial workplace hazards.<sup>103</sup> The ILO estimates that the majority of child labourers work on family farms without payment and their work is often not acknowledged as child labour under national law.<sup>104</sup> Children engaged in agricultural work are usually exposed to sharp tools and dangerous machinery, snake

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<sup>95</sup> ILO, 'Occupational Safety' (89).

<sup>96</sup> *ibid*; FAO (n 80) para 2.1.

<sup>97</sup> ILO (Occupational Safety); FAO (n) paras 2.1, 2.3.

<sup>98</sup> FAO (n) para 2.2; ILO (Occupational Safety).

<sup>99</sup> *ibid*.

<sup>100</sup> ILO, 'Child Labour in Agriculture' (n 89); FAO (n 80) para 2.3.

<sup>101</sup> FAO (n 80) para 2.3.

<sup>102</sup> *ibid* 1.1; ILO, 'Child Labour in Agriculture' (n 89).

<sup>103</sup> ILO, 'Farming', [https://www.ilo.org/ipec/areas/Agriculture/WCMS\\_172416/lang--en/index.htm](https://www.ilo.org/ipec/areas/Agriculture/WCMS_172416/lang--en/index.htm), accessed 25 June 2019.

<sup>104</sup> *ibid*.

bites and dangerous environmental conditions and agrochemicals.<sup>105</sup> Children working on commercial farms are exposed to similar hazardous working conditions.<sup>106</sup>

### 2.2.3 Child Labour in Cotton Production

Cotton production is a representative example of the hazards of child labour in agriculture and the challenges in regulating the practice. Cotton is one of the most widely produced and traded crops internationally.<sup>107</sup> In 2016 cotton was the most used textile fibre on the global market and accounted for one third of all fibre demand.<sup>108</sup> The majority of cotton production today occurs in developing states, such as India, Pakistan and China in Asia, several African states (most notably in Sub-Saharan Africa), and Brazil, Mexico, Argentina and Colombia in Latin America.<sup>109</sup> China and India alone produce approximately half of all international cotton output.<sup>110</sup> Even in states where the crop is grown at much slower volumes, cotton still accounts for an important share of the GDP.<sup>111</sup> For instance, the ILO calculated in 2016 Sub-Saharan African states produced between 10 and 13 per cent of the global cotton output which generated between 35 and 75 per cent of all domestic export earnings.<sup>112</sup> This output created income for approximately 100 million farmers globally, as well as an additional 250 million additional workers involved in transportation, ginning, baling and storage.<sup>113</sup> As a result, cotton production is a core source of domestic revenue in several developing states. It is also an important source of employment, especially with regards to smaller scale farming in rural areas, as the production process requires a large volume of low-skilled labour.<sup>114</sup> Therefore, the regulatory efficacy and oversight over such a heavily labour-intensive sector (or lack thereof) can provide important insights into the dilemmas of regulating child labour.

Cotton is cultivated both in large mechanised production systems and small family farms where the production process relies primarily on manual labour.<sup>115</sup> This small-scale labour-intensive production process in particular encompasses high rates of hazardous child la-

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<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> ILO, 'Child Labour in Cotton: A Briefing' (2016) (Report), [https://www.ilo.org/ipec/Informationresources/WCMS\\_IPEC\\_PUB\\_29655/lang--en/index.htm](https://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_29655/lang--en/index.htm), accessed 21 July 2019, v, 5.

<sup>108</sup> *ibid* v, 1, 5.

<sup>109</sup> *ibid* v, 2.

<sup>110</sup> *ibid* 1.

<sup>111</sup> *ibid* 2.

<sup>112</sup> *ibid* 2.

<sup>113</sup> *ibid* 2.

<sup>114</sup> *ibid* v.

<sup>115</sup> *ibid* v.

bour.<sup>116</sup> The production process traditionally comprises of five major stages across the supply chain: ‘production’, i.e. the cultivation and harvesting of the crop; ‘ginning’, i.e. the separation of the cotton lint from the cotton seed; ‘trading’, i.e. the sale and purchase of cotton across suppliers; ‘manufacturing’, i.e. the production of the final product; and, finally, ‘distribution’, i.e. the transportation of the product to the final retailers.<sup>117</sup> The occurrence of hazardous child labour is especially prevalent in the production stage, which is especially labour-intensive and can often entail exposure to dangerous substances and tools. Such high rates of child labour are due to the high demand for labour in cotton production, the ineffective regulation of working conditions in the sector, as well as the fact that children are often a cheaper source of labour compared to adult workers.<sup>118</sup> Most commonly, children plant manually cotton seeds, work with toxic substances, such as pesticides, handpick cotton, and labour long hours in extreme weather conditions without sufficient pay, food and rest.<sup>119</sup> Additionally, to supply the high volumes of workers necessary for a non-highly mechanised production, employers may use children as young as 5 years of age in the production stage.<sup>120</sup> These practices involve significant long-term health and safety risks for child labourers and impact significantly the physical and psychological development of children.<sup>121</sup> As a result, regulating the broader production processes of cotton, i.e. its supply chains, is crucial to tackling child labour in this sector.

### **3 Global Supply Chains**

#### **3.1 Overview: The Challenge of Globalisation**

The regulation of corporate human rights violations, especially those occurring in global supply chains, have presented unique challenges to the international regime. Deva has argued that the existing international law and BHR regulatory frameworks are largely inadequate to redress corporate impunity for such abuses.<sup>122</sup> He has identified a multitude of issues regarding the ineffective regulation of businesses, including which business entities exactly should be subject to regulation.<sup>123</sup> This issue relates to one of the main challenges that both international law and national regulators and policy-makers face when addressing the conduct of TNCs –

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<sup>116</sup> *ibid* v, 9.

<sup>117</sup> *ibid* 5 – 6.

<sup>118</sup> *ibid* 12.

<sup>119</sup> *ibid* 11 – 12.

<sup>120</sup> *ibid* 12.

<sup>121</sup> *ibid* 12.

<sup>122</sup> Deva (n 3) 12.

<sup>123</sup> *ibid* 50 – 61.

the rise of globalization and global supply chains. The phenomenon of globalization can be defined as the increasing interconnectedness and interdependence between various national and international (business) actors brought forward by the movement of intellectual property, capital, services and people.<sup>124</sup> Since the 1970s, the global economy has been characterized by a significant reduction in both trade barriers and state regulation of foreign direct investment (FDI), i.e. the liberalisation of international trade.<sup>125</sup> This shift in economic policy has had a dramatic impact on the way in which business is conducted.

Today TNCs tend to adopt a business model where a parent company performs only ‘core’ business competences, i.e. finance, marketing and technology ownership, and ‘outsources’ most production operations to other business entities.<sup>126</sup> Therefore, the business operations of TNCs stretch across a multitude of jurisdictions and encompass many interconnected business enterprises.<sup>127</sup> This has resulted in the emerge of global supply chains as the standard model of transnational business. The following analysis explores the definition of global supply chains. The chapter also discusses the relationship between TNCs and other business enterprises located within the same supply chain, with a brief outline of the challenges presented by the corporate law doctrines of separation of entities and limited liability. The main regulatory challenge examined is the dominant international trade model set forth by the World Trade Organization (WTO). The impact of WTO policy on the link between transnational business and the proliferation of child labour in global supply chains is also explored.

### **3.2 Global Supply Chains: Definition**

The dominant corporate structure of transnational businesses today encompasses a parent company (the TNC) at the top of a chain of multiple subsidiaries, contractors and suppliers.<sup>128</sup> These business entities are usually dispersed across various jurisdictions and the production process is fragmented across a multitude of small- and medium-scale enterprises, as well as the parent company.<sup>129</sup> The collection of these entities thus forms a long and complex global supply chain. The OECD defines a supply chain as ‘*the system of all the activities, organisations, actors, technology, information, resources and services involved*’ in the entire production process, from obtaining the raw material to the final product purchased by the end con-

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<sup>124</sup> *ibid* 5.

<sup>125</sup> *ibid* 3; Gatto (n 9) 3 – 4.

<sup>126</sup> Janet Dine, *Companies, International Trade and Human Rights* (Cambridge University Press, Cambridge 2005) 4.

<sup>127</sup> Deva (n 3) 4.

<sup>128</sup> Nolan (n 2) 239.

<sup>129</sup> *ibid* 239.

sumer.<sup>130</sup> This establishes a complex relationship between TNCs, which sit at the top of the supply chain, and enterprises further down the production process. The TNC acts as the controlling organization, while other business entities within the supply chain are under a differing degree of control by the parent company.<sup>131</sup> However, in most legal systems the parent company, i.e. the TNC, and other business entities within the supply chain are regarded as distinct legal entities and thus retain separate legal personalities.<sup>132</sup>

As a result of this doctrine, even where such a separation does not correspond to economic reality and TNCs actually exercise control over their business partners and subsidiaries, the parent company can be held liable for human rights violations occurring within the supply chain only in exceptional circumstances.<sup>133</sup> Multiple reports exist of TNCs exploiting this regulatory loophole by creating complex corporate structures and long supply chains with multiple subsidiaries so as to dissociate themselves from human rights violations and evade responsibility/liability.<sup>134</sup> For instance, the cotton supply chain has traditionally been opaque and highly-internationalized, with production processes divided between hundreds of enterprises scattered across multiple jurisdictions.<sup>135</sup> This complexity creates a significant regulatory hurdle in linking the occurrence of child labour across a complicated, transnational supply chain to the controlling entity, i.e. the parent company. As a result, although in theory TNCs can often exercise sufficient control over their supply chains to be held responsible for human rights violations occurring therein, establishing a strong causal link between the parent company and the alleged abuses can be difficult in practice.

### 3.3 Regulatory Challenges at the International Level: The WTO System

When discussing the international regulation of human rights abuses occurring in global supply chains, it is important to assess the current international economic law model in which global businesses operate. The World Trade Organization (WTO) is the core institution re-

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<sup>130</sup> OECD, 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (2016), <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>, accessed 28 June 2019, 14.

<sup>131</sup> Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business and Human Rights Journal 41, 47 – 48.

<sup>132</sup> *ibid* 48.

<sup>133</sup> *ibid* 48 – 49.

<sup>134</sup> See, for example, Bilchitz (n 5) 3 – 4.

<sup>135</sup> ILO, 'Child Labour in Cotton' (n 107) v, 6; Environmental Justice Foundation, 'Somebody Knows: Where Your Cotton Comes from: Unravelling the Cotton Supply Chain' (2009) [http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/2009\\_ejf\\_somebodyknowswherecottoncomesfrom.pdf](http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/2009_ejf_somebodyknowswherecottoncomesfrom.pdf), accessed 29 July 2019, 5 – 7.

sponsible for the regulation of international trade. The international rules set out by the WTO are almost universally adopted into domestic policy, as is the doctrine of free trade and the strive for deregulation of international economic activity.<sup>136</sup> The organization thus has a decisive impact on the global economic order and the way in which modern business is conducted.<sup>137</sup> The WTO regime presents a stark contrast between the strict regulation of trade and economic concerns it provides on the one hand, and its silence on labour and human rights violations occurring within the global economic order, on the other. Membership to the organization is conditional on the elimination of restrictions on imports and exports of goods within member states, not on the establishment of stronger labour standards or ethical business models.<sup>138</sup> Therefore, to evade liability for non-conformity with WTO framework, states parties may be tempted/pressured to relax the domestic application of labour and human rights standards.

Until recently, any discussion of the challenges posed by trade and international economic activity regarding the enjoyment of labour rights was rejected in the WTO context.<sup>139</sup> Thus, for instance, the system did not incorporate any social clauses, i.e. an explicit recognition of the link between trade rules and labour rights regulation, and labour standards were only mentioned in one WTO instrument.<sup>140</sup> Although social clauses in bilateral and multilateral trade agreements have become more common today, these have had a limited impact on the regulation of child labour.<sup>141</sup> The existing international trade system also lacks an effective mechanism for the adjudication of human rights violation occurring in the context of international business activities.<sup>142</sup> This, in addition to the model of trade deregulation adopted by the organization, has led some to view the WTO as a vehicle for forwarding the economic interests of TNCs for limited oversight of their business activities to the detriment of labour and human rights concerns.<sup>143</sup>

This model of deregulation, coupled with the extensive protection of TNCs' economic interests offered by international investment law, has allowed the use of child labour in global supply chains to flourish. Many developing states have argued that under the existing trade and investment regimes, increasing the domestic regulatory oversight of human rights and

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<sup>136</sup> Sara Dillon, 'Child Labour and the Global Economy: Abolition or Acceptance?' (2015) 84 *Nordic Journal of International Law*, 297, 300.

<sup>137</sup> *ibid* 300.

<sup>138</sup> *ibid* 300.

<sup>139</sup> Humbert (n 14) 3 – 5.

<sup>140</sup> *ibid* 3; WTO, Singapore Ministerial Declaration (adopted 13 December 1996) WT/MIN(96)/DEC.

<sup>141</sup> Humbert (n 14) 3 – 4.

<sup>142</sup> Dillon (n 136) 300, 302.

<sup>143</sup> *ibid* 308.



providing for stricter labour standards would contradict their state obligation under WTO law and the relevant bilateral and multilateral investment treaties to which they are parties.<sup>144</sup> Instead, lower labour rules have often been painted as a comparative advantage for developing states in search for FDI and accelerated economic development.<sup>145</sup> A conditionality approach, i.e. requiring that participation in the WTO system would be conditional on the improvement of national human rights standards and on the lowering of the rates of child labour, has been strongly rejected.<sup>146</sup> This opposition has been based on the argument that such an approach would penalize poorer states, as well as on the perception that the WTO is not an appropriate forum for regulating corporate human rights violations.<sup>147</sup> Thus, for example, the economic importance of cotton production for both GDP growth and business enterprises can be seen as a strong cause for the lack of effective domestic regulation of hazardous child labour among many cotton-producing states. The crop is a central global cash crop both for many developing states striving for accelerated levels of economic growth and for all companies using cotton in their production processes.<sup>148</sup>

This conceptualization of free trade as deregulation of transnational economic activity has led to a race-to-the-bottom model of international business: TNCs seek out the jurisdictions with the most lenient regulation and the cheapest sources of labour to establish their overseas business operations.<sup>149</sup> As child workers represent one of the cheapest forms of labour, which is also widely available in poor communities where children lack access to education and other resources, the system has in practice facilitated the use of hazardous child work in global supply chains. Moreover, due to the lack of relevant standards or legal remedies concerning child in the WTO system, the issue has not received sufficient scrutiny under international trade law.<sup>150</sup> Instead, some authors have pointed out, it has been that the economic interests of TNCs have become most firmly embedded in the economic model offered by the WTO.<sup>151</sup> Thus, regulating human rights violations committed by TNCs and their subsidiaries/suppliers, such as child labour in global supply chains, through trade regulation has proven ineffective. It is therefore necessary to consider other mechanisms of international regulation to assess whether TNCs can be held responsible/accountable for the use of child labour in their global production processes.

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<sup>144</sup> Humbert (n 14) 7.

<sup>145</sup> *ibid* 7.

<sup>146</sup> Dillon (n 136) 303.

<sup>147</sup> *ibid* 303.

<sup>148</sup> ILO, 'Child Labour in Cotton' (n 107) v.

<sup>149</sup> Dillon (n 136) 301.

<sup>150</sup> *ibid* 302.

<sup>151</sup> *ibid* 308.

## 4 International Human Rights Law: State Obligations

### 4.1 State-Centricity of International Law

The following discussion centres on the core regulatory challenges presented by the existing international legal framework. The traditional state-centricity of international human rights law is examined as a first core hurdle to the effective regulation of corporate human rights violations and child labour in global supply chains. This analysis is supplemented with specific examples of the international human rights instruments examined in Chapter 2. The second important issue identified is the controversial nature of the concept of extraterritorial regulation and the home-host state debate. Thirdly, the analysis focuses on the changing position of non-state actors in international law. The purpose is to explore to what extent TNCs and other business entities can be considered subjects of international law and thus be embedded with direct international human rights law obligations. This last point will be further explored in Chapter 5 by the analysis of the human rights responsibilities imposed on corporations by the international BHR framework.

States have traditionally been the primary subjects of international law: despite a slight shift in this perspective since the 1970s and the inception of the international BHR framework, it is widely accepted that nation states remain both the main international law subjects and the core human rights duty-bearers.<sup>152</sup> Traditionally, states had the exclusive duty to protect human rights on their territory.<sup>153</sup> The state duty to protect human rights thus includes the regulation of corporations operating within a state's jurisdiction and, where a human rights violation does take place, the provision of access to remedies to the victims.<sup>154</sup> In this sense, state authorities have traditionally been perceived to have jurisdiction primarily within their national territory (save for exceptional circumstances).<sup>155</sup> Consequently, non-state actors such as TNCs have largely remained outside the regulatory scope of international law. The regulation of global supply chains and the human rights violations occurring therein have also been relegated mostly to domestic oversight, despite the highly internationalized character of these business activities. Thus, all instruments targeting child labour discussed in Chapter 2 are ad-

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<sup>152</sup> Carloz Lopez, 'Human Rights Legal Liability for Business Enterprises: The Role of an International Treaty' in Deva and Bilchitz (n 2) 301; Gatto (n 9) 10.

<sup>153</sup> De Schutter (n 131) 44.

<sup>154</sup> *ibid* 44.

<sup>155</sup> Sigrud Skolqgy, 'Regulatory Obligations in a Complex World: States' Extraterritorial Obligations Related to Business and Human Rights' in Deva and Bilchitz (n 2) 331.

dressed to states as the core duty-holders, not to corporate actors (either smaller business entities across the supply chain or TNCs as parent companies).

For instance, the ICCPR stipulates that states bear the obligation to recognize through legislation and other appropriate measures the rights recognized in the Covenant.<sup>156</sup> Similarly, the ICESCR recognises a state obligation to progressively realise the rights protected therein, including a general duty to protect from human rights violations committed by third parties and a specific duty to protect children from economic exploitation.<sup>157</sup> The CRC obliges states to provide for a minimum age of employment, for appropriate regulation of working conditions, and for sanctions and penalties to protect children from economic exploitation and the performance of hazardous work.<sup>158</sup> The ILO Conventions also place the duty to protect against child labour and to regulate offending business entities on national authorities. Convention 138, for example, provides a duty for states to take all effective measures to abolish child labour, including to stipulate a minimum age for admission to employment and a higher minimum age for admission to hazardous work.<sup>159</sup> As a result, domestic law and the efficacy of its enforcement play a crucial role in combating child labour.<sup>160</sup>

National legislation sets out the principles according to which private actors can be held accountable for child labour and provides the basis for punitive action against offending businesses; thus, ideally, domestic laws should serve as a deterrent against the use of (hazardous) child labour in production processes.<sup>161</sup> However, the nature of global supply chains creates two important regulatory challenges for domestic authorities. Firstly, child labour within the same supply can occur within multiple states and be caused by various actors dispersed across various jurisdictions. As a result, regulating the occurrence of child labour in one state does not automatically result in the elimination of child labour in across a highly internationalised supply chain. Secondly, the strictness of the human rights standards enforced is different states varies, as does the regulatory oversight of business entities operating domestically. Therefore, the enforcement of strict prohibitions regarding child labour on the territory of one state cannot automatically curtail the use of child labour in other countries without sufficient regulation over the entire supply chain. It is thus clear that international effort is necessary to provide lasting and efficient solutions to the use of (hazardous) child labour in TNCs' global supply chains. The eradication of child labour and the enforcement of penalties against of-

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<sup>156</sup> ICCPR (n 24) art 2 (2).

<sup>157</sup> ICESCR (n 25) arts 2 (1), 10 (3).

<sup>158</sup> CRC (n 30) art 31.

<sup>159</sup> ILO Convention 138 (n 26) art 1, 2 (4), 3, 4 (3).

<sup>160</sup> Humbert (n 14) 31.

<sup>161</sup> *ibid* 31 – 32.

fending business enterprises has, however, been frustrated by a lack of international mechanisms to tackle corporate human rights violations.

A core issue concerning the direct regulation of TNCs and global supply chains on the international scene has been the way legal personality has traditionally been conceptualized in international law. There is a circular link between international legal personality and international legal obligations: for any entity to be considered a subject of international law, it must have direct rights and duties under the international legal system.<sup>162</sup> Vice versa, if an entity does not have such rights and obligations, it cannot claim international legal personality or be held accountable for breaches of international law.<sup>163</sup> Therefore, if TNCs as non-state actors are not perceived to be subjects of the international legal system, they cannot be endorsed with obligations flowing from international law or be subjects to international regulatory oversight. Recently, there has been a slight shift in this conceptualization of international legal personality: a limited personality for TNCs has increasingly been recognized as necessary for tackling various human rights violations, especially in soft-law BHR instruments.<sup>164</sup> However, there is still significant disagreement as to whether TNCs can be considered to have international legal personality, particularly under international human rights law.<sup>165</sup> Many states, corporations and scholars vehemently oppose such a development. This opposition has recently become most evident in the deliberations surrounding the Draft BHR Treaty which would impose such obligations on corporations with transnational business activities.

Developed states particularly have been reluctant to become involved in the drafting of a BHR Treaty.<sup>166</sup> The EU especially opposed holding TNCs liable for human rights violations directly under international law. The argument put forward was that there was no precedent for international corporate liability for human rights violations, as states remain the primary duty-bearers of international legal obligations.<sup>167</sup> Another frequently stated reason for not endorsing TNCs with direct human rights obligations under international law relates to the question of in which jurisdiction corporate human rights violations should be regulated. The business operations of TNCs are normally fragmented across multiple states.<sup>168</sup> Today, most

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<sup>162</sup> Lopez (n 152) 302.

<sup>163</sup> *ibid* 302.

<sup>164</sup> *ibid* 302-304; Gatto (n 9) 26.

<sup>165</sup> Gatto (n 9) 53.

<sup>166</sup> Humbertu Cantu Rivera, 'Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40 *U.N.S.W.L.J.*, 1200, 1204 – 1212.

<sup>167</sup> European Parliament, 'Towards a Binding International Treaty on Business and Human Rights' (April 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS\\_BRI\(2018\)630266\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI(2018)630266_EN.pdf), accessed 8 June 2019, 1; Gatto (n 9) 10.

<sup>168</sup> Gatto (n 9) 13.

TNCs are incorporated in one state, while most other business entities across their supply chains operate abroad.<sup>169</sup> The jurisdiction of incorporation of the parent company (the TNCs) is usually termed the ‘home state’.<sup>170</sup> In contrast, the states where TNCs situate their production processes, operating most commonly through subsidiaries and contractors at different levels of the supply chain, are their ‘host states’.<sup>171</sup> In theory, corporate human rights violations can be regulated in either of these jurisdictions. However, the home/host state dichotomy has proven more challenging and neither set of jurisdictions have proven willing or able to effectively regulate corporate human rights abuses.

#### **4.2 Extraterritoriality: Home versus Host State Jurisdiction over Corporate Human Rights Violations**

The regulatory framework at the host state level has often proven insufficient to curtail corporate human rights abuses or to provide an effective remedy to the victims of such violations.<sup>172</sup> The recent comparative increase in the rates of child labour globally is also suggestive of the ineffectiveness of host-state regulation in curtailing the use of child workers in global supply chains. Therefore, home states remain at the alternative domestic regulator. The human rights standards in home states are usually higher and enforced more vigorously compared to host states.<sup>173</sup> Consequently, home states could (theoretically) enforce extraterritorial jurisdiction over TNCs committing human rights violations in host states. Extraterritoriality refers to a state acting to regulate conduct that did not occur within its territory.<sup>174</sup> Thus, home states could require corporate actors operating in host countries to comply with the human rights standards applicable in their jurisdiction of incorporation (prescriptive jurisdiction); alternatively, home state courts could adjudicate cases of corporate human rights violation which occurred abroad (adjudicative jurisdiction).<sup>175</sup> However, home states have generally been reluctant to extraterritorially regulate human rights violations committed by domestically incorporated TNCs. Two notable exceptions in this regard have been France, which has imposed due diligence obligations on large domestically incorporated businesses, and the Neth-

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<sup>169</sup> Deva (n 3) 3 – 4.

<sup>170</sup> *ibid* 155.

<sup>171</sup> *Ibid* 154.

<sup>172</sup> Bilchitz (n 5) 3.

<sup>173</sup> Deva (n 3) 155.

<sup>174</sup> Humberto Cantu Rivera, ‘Corporate Accountability in the Field of Human Rights’ On Soft Law Standards and the Use of Extraterritorial Measures’ in Bard Andreassen and Vo Khanh Vinh, *Across Borders: Advancing Human Rights in Transnational Business* (Intersentia, Cambridge 2016) 111.

<sup>175</sup> *ibid* 111 – 112.

erlands where national courts have shown greater willingness to hold TNCs legally accountable for human rights violations occurring within their transnational business operations.<sup>176</sup>

Extraterritoriality, especially extraterritorial adjudicative jurisdiction, has been controversial under international law. The international system remains unclear as to the permissibility of extraterritorial jurisdiction over TNCs' operations in host states, and many states (especially home states) have voiced strong opposition to the doctrine of extraterritoriality.<sup>177</sup> Home states have generally argued that extraterritorial jurisdiction over corporate human rights abuses is contrary to international law. Due to the intrinsic link between extraterritoriality and state sovereignty, extraterritorial jurisdiction TNCs' operations would be an infringement of the principle of non-intervention in foreign states' domestic affairs.<sup>178</sup> Pursuant to the UN Charter, a cornerstone of international law is the principle that the territorial integrity and political independence of all states must be preserved.<sup>179</sup> This principle strongly reflects a core doctrine of international law – that sovereignty should not be infringed upon unless in exceptional circumstances or with the consent of states themselves.<sup>180</sup> Therefore, in international law as jurisdiction has traditionally been applicable mostly on a state's respective territory, while extraterritorial jurisdiction has been framed as an infringement the sovereignty of foreign governments.<sup>181</sup> As a result, some home states have argued that supply chain human rights violations should be regulated domestically by the respective host state on whose territory the abuse allegedly occurred. Common law courts especially have rejected the application of extraterritorial jurisdiction over TNCs on the basis of *forum non conveniens*, i.e. the argument that host states are the more appropriate forum for adjudication of corporate human rights violations.<sup>182</sup>

However, extraterritoriality is not necessarily prohibited under international law. UN treaty bodies, such as the CESCR Committee, have expressed support for the extraterritorial protection of human rights. In General Comment 14, the Committee stated that states parties to the ICESCR should

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<sup>176</sup> Penelope Simons, 'The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises: Moving Forward Strategically' in Deva and Bilchitz (n 2) 61; see, for instance, *Case C/09/337050 Friday Alfred Akpan et al v Royal Dutch Shell plc et al* [2013] HA ZA 09-1580, para 4.5.

<sup>177</sup> *ibid* 112.

<sup>178</sup> Deva (n 3) 110.

<sup>179</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, article 2 (4).

<sup>180</sup> Skoqgly (n 155) 326.

<sup>181</sup> *ibid* 331, 327.

<sup>182</sup> Deva (n 3) 69; Bilchitz (n 5) 4.

*‘prevent third parties from violating [human rights] in other countries, if they are able to influence these third parties by ways of legal or political means, in accordance with the Charter of the United Nations and applicable international law’.*<sup>183</sup>

The Committee reaffirmed this in General Comment 15<sup>184</sup> and has further stated that states parties must regulate human rights abuses committed by corporations incorporated on their territory when such violations occur abroad.<sup>185</sup> Moreover, in its *Lotus* judgment, the Permanent Court of International Justice rejected a presumption that states are prohibited from exercising jurisdiction within their own territory for acts committed abroad.<sup>186</sup> Instead, the Court concluded that unless explicitly prohibited, extraterritoriality is permissible under international law, as well as many national legal systems.<sup>187</sup> Current international human rights law accepts that the international community might have a legitimate interest when it comes to systemic human rights violation occurring in a country.<sup>188</sup> Furthermore, other areas of international law, such as international trade law and international environmental law, have established clear rules on extraterritorial jurisdiction where a state cannot/does not regulate the conduct of private parties on its territory.<sup>189</sup> Extraterritoriality does not imply that a home state would assume jurisdiction over the legislative process in a host state; instead it stipulates that home states regulate corporate entities over which they already have regulatory oversight.<sup>190</sup> Therefore, the extraterritorial regulation of human rights abuses by home states, although not required, is also not prohibited under international law.

### **4.3 The Role of Non-State Actors**

In addition to the somewhat limited acceptance of extraterritoriality, the issue of TNCs’ status under international law is itself an important hurdle to the regulation of corporate human rights violations. Until recently, corporate actors were regarded as solely economic entities, whose only duty was to create (financial) value for their shareholders.<sup>191</sup> This approach stipulates that embedding TNCs with human rights responsibilities would present an undue obsta-

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<sup>183</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the ICESCR) (2000) E/C.12/2000/4, para 39.

<sup>184</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment 15: The Right to Water (Arts. 11 and 12 of the ICESCR) (2002) E/C.12/2002/11, para 31.

<sup>185</sup> Committee on Economic, Social and Cultural Rights, ‘Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights’ (2011) E/C.12/2011/1, para 5.

<sup>186</sup> *The Case of the S.S. Lotus (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10, para 46.

<sup>187</sup> *ibid* paras 46, 50.

<sup>188</sup> Skoqgly (n 155) 328.

<sup>189</sup> *ibid* 328.

<sup>190</sup> *ibid* 328.

<sup>191</sup> Deva (n 3) 121, 132.

cle to free trade and rejects a BHR regulation as harmful to global and national markets.<sup>192</sup> During the last three decades, however, this view has shifted due to the widespread recognition of the growing influence of business on human rights and the urgent need for effective mechanisms to regulate corporate behaviour.<sup>193</sup> In 2011, the combined value-added of the operations of TNCs amounted to 4 per cent of the world GDP, with 85 per cent of these companies being based in the US, the EU and Japan.<sup>194</sup> TNCs are crucial actors in international development and the global economic activity, as they provide the bulk of FDI in the jurisdictions where they have business activities.<sup>195</sup> As a result, most states today have enacted policies to attract FDI: such investments are especially sought after in host states where large-scale corporate activity is perceived as crucial to technology transfer and job creation.<sup>196</sup> Due to this extensive economic (and social) power, TNCs have become a core influence on the enjoyment of human rights.<sup>197</sup>

Consequently, the international community has recognized that regulating corporate activity pertaining to business' influence on human rights enjoyment is necessary for the protection of these entitlements against abuses.<sup>198</sup> Thus, the question of whether TNCs can have some limited international legal personality has become central to the BHR framework. Traditionally, non-state actors have not been recognized as subjects of international law.<sup>199</sup> This position was reflected by the International Court of Justice in *Barcelona Traction*.<sup>200</sup> However, in a different ruling the ICJ stipulated that any legal system recognizes various subjects of law, varying in their status and the nature of their respective rights.<sup>201</sup> Moreover, the Court stated that

*'the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise*

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<sup>192</sup> *ibid* 121-122; 131; 158.

<sup>193</sup> Rivera, 'Corporate Accountability' (n 174) 110; Daniel M. Aragao and Manoela C. Roland, 'The Need for a Treaty: Expectations on Counter-Hegemony and the Role of Civil Society' in Deva and Bilchitz (n) 131.

<sup>194</sup> Gatto (n 9) 3.

<sup>195</sup> *ibid* 4.

<sup>196</sup> *ibid* 4.

<sup>197</sup> *ibid* 8 – 9.

<sup>198</sup> Cirlig (n 4) 228 – 229; Rivera, 'Corporate Accountability' (n 174) 110.

<sup>199</sup> *ibid* 54.

<sup>200</sup> *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1964] ICJ Rep 4, 13.

<sup>201</sup> *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178.



*to instances of action upon the international plane by certain entities which are not [s]tates’.*<sup>202</sup>

Thus, the Court recognized a non-state actor, international organisations, as having a limited international legal personality. Furthermore, since the 1970s, corporate actors have gradually been acquiring rights under international law.<sup>203</sup> For instance, bilateral and multilateral treaties, as well as free trade agreements provide for significant rights and legal protections for TNCs operating abroad.<sup>204</sup> The European Court of Human Rights has also recognized that companies have certain substantive and procedural rights under the European Convention on Human Rights, such as the rights to a fair trial and to privacy.<sup>205</sup> Many scholars have argued that TNCs today bear certain direct rights and obligations directly under international law, especially in the area of labour standards and in relation to monitoring human rights compliance across their supply chains.<sup>206</sup> On this basis, the present study adopts the view that business entities has some, albeit limited, legal personality under international law. As a result, TNCs and other entities across their supply chains could be held responsible for human rights violations perpetrated within their operations. The following chapter examines to what extent the existing international framework can regulate the occurrence of child labour in global supply chains.

## **5 The International BHR Framework: Corporate Responsibilities**

### **5.1 Overview**

The above-mentioned international human rights treaties regulating child labour are all hard-law instruments, i.e. they always impose binding obligations on state parties.<sup>207</sup> In contrast, the international BHR framework is characterised by its soft-law nature. The objective of this thesis is not to provide a comprehensive discussion of the normative value of soft-law instruments in international law-making. However, soft law has crucial significance in the developing regulation of TNCs and supply chains as an outlet for holding corporate actors accountable for human rights violations occurring in global supply chains. Soft law encompasses a broad range of non-legally binding international instruments, such as declarations, resolutions

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<sup>202</sup> *ibid* 178.

<sup>203</sup> Gatto (n 9) 55.

<sup>204</sup> Lopez (n 152) 305.

<sup>205</sup> Gatto (n 9) 58.

<sup>206</sup> Lopez (n 152) 303 – 304.

<sup>207</sup> Alan Boyle, ‘Soft Law in International Law-making’ in Evans (n 61) 120.

and guidelines.<sup>208</sup> The normativity of soft law has been subject to contentious debate on the international scene.<sup>209</sup> Article 38 of the Statute of the International Court of Justice, which is the authoritative text on the classic sources of international law, recognises as sources of international law treaties, international custom and general principles of law (as primary sources), as well as judicial decisions and the teachings of the most highly qualified legal scholars (secondary sources). As a result, soft law does not have the binding force of traditional sources of international law.<sup>210</sup> This has led some to dismiss soft-law initiatives as having a solely declaratory effect.<sup>211</sup> However, soft law instruments can have crucial significance in the development of international law.

Firstly, soft law can provide evidence of the development of international customary law (which is a binding source of international obligations) by indicating the existence of *opinio juris* or by indicating consistent state practice.<sup>212</sup> Such instruments often are carefully drafted and receive more immediate and widespread support compared to multilateral treaties, as they provide greater flexibility for domestic implementation.<sup>213</sup> Therefore, soft-law initiatives are powerful expressions of good faith on the part of states and can in some circumstances be a first step to the conclusion of binding multilateral agreements.<sup>214</sup> Secondly, soft law can provide important guidance in the interpretation and implementation of vague or ambiguous international law norms.<sup>215</sup> This significance of soft-law regulation was recognized in 2010 by the International Court of Justice in the *Pulp Mills* case.<sup>216</sup> Therefore, law could play a crucial role in the development of future corporate responsibility for human rights violations, and in qualifying the status of extraterritoriality and supply chain regulation in international human rights law. The aim of the following discussion is to assess to what extent TNCs can effectively be held responsible for the occurrence of child labour in their global supply chains under the existing soft-law BHR framework. The analysis is centred on the following key BHR instruments: the OECD Guidelines for Multinational Enterprises (the OECD Guidelines); the regulatory framework set forth by the ILO; the United Nations Guiding Principles on Business and Human Rights (the UNGPs), whose discussion references the previous analysis of human rights state obligations; the Draft Treaty on Business and Human Rights (the Draft Treaty), and the Alien Tort Claims Act or Alien Tort Statute (the ATCA/ATS). The last

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<sup>208</sup> *ibid* 119 – 120.

<sup>209</sup> Rivera, ‘Corporate Accountability’ (n 174) 125.

<sup>210</sup> Boyle (n 206) 118.

<sup>211</sup> Rivera, ‘Corporate Accountability’ (n 174) 129.

<sup>212</sup> Boyle (n 206) 118 – 120.

<sup>213</sup> *ibid* 120 – 122.

<sup>214</sup> *ibid* 121; 123.

<sup>215</sup> *ibid* 124; Rivera ‘Corporate Accountability’ (n 174) 129.

<sup>216</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 4, paras 62, 197.

framework, although a domestic piece of legislation, has proven a more feasible outlet for remedying transnational corporate human rights violations. As a result, the present work adopts the view that the discussion of the regulatory framework surrounding child labour in global supply chains can benefit from a general assessment of the ATCA.

## 5.2 Core Regulatory Initiatives

### 5.2.1 The OECD Guidelines

The OECD Guidelines is a soft-law BHR instrument, similarly to the ILO Tripartite Declaration and the UNGPs (discussed in the following sections), first adopted in 1976. The Guidelines have seen subject to several revisions, the latest one in 2011 when the Guidelines were aligned to a large extent with the UNGPs to achieve greater coherence of the international BHR Framework.<sup>217</sup> Under the Guidelines, states have the core duty to regulate corporations, while business enterprises are encouraged to follow the instrument's employment and human rights standards (among others).<sup>218</sup> Importantly, the 2011 revision references several core international human and labour rights instruments.<sup>219</sup> Thus, in paragraph II-1 the Guidelines place a responsibility on TNCs to effectively contribute to the abolition of child labour. The revision introduced other important improvements. It establishes a due diligence requirement for companies and acknowledges that adhering states are under the obligation to ensure TNCs' compliance with national and international human rights standards.<sup>220</sup> The Guidelines also extended their scope to non-adhering (non-OECD) states and to TNCs operating within such jurisdictions.<sup>221</sup> Additionally, the OECD Guidelines have an established enforcement mechanisms in the form of National Contact Points (NCPs), which has been praised for its efficacy in bringing attention to unethical corporate behaviour. NCPs '*offer good offices and facilitate access to consensual and non-adversarial procedures*'.<sup>222</sup> This gives NCPs significant power to affect TNCs' reputation in cases of adverse findings and provides a possibility for civil and/or criminal litigation for victims of corporate human rights abuses.<sup>223</sup> This essentially positions NCPs as enforcers of the principles incorporated in the OECD Guidelines against non-adhering corporations.

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<sup>217</sup> Deva (n 3) 80; Cirlig (n 4) 232.

<sup>218</sup> Cirlig (n 4) 232.

<sup>219</sup> Gatto (n 9) 78.

<sup>220</sup> Deva (n 3) 85-86.

<sup>221</sup> Gatto (n 9) 77.

<sup>222</sup> Cirlig (n 4) 233.

<sup>223</sup> *ibid* 233.

However, the Guidelines have also been criticized for their limited impact on unethical business practices. One concern, which is consistently brought up against various soft-law BHR instruments, is the Guidelines' lack of binding obligations for TNCs. Many proponents of hard-law regulation argue that such soft-law mechanisms serve simply as a way for TNCs and governments to avoid mandatory regulation and concrete sanctions for human rights violations; as Cirlig argues, '*[i]n the end, they are just recommendations and enterprises are set up to make profits, not to promote human rights*'.<sup>224</sup> Thus, the effectiveness of the OECD Guidelines is somewhat frustrated by their lack of mandatory punitive measures for offending TNCs and for states which fail to meet their duty to regulate corporate actors within their jurisdictions. Moreover, Deva, one of the strongest critics of soft-law BHR instruments, has pointed out that the confidentiality of proceedings with NCPs limits the social impact of the Guidelines.<sup>225</sup> Therefore, despite the positive changes introduced by the 2011 revision, the OECD Guidelines' potential to hold TNCs accountable or liable for using child labour in their supply chains remains somewhat limited.

### 5.2.2 The ILO Framework

The ILO system can be contrasted to the international trade framework. The regulatory focus of the ILO lies in labour rights protection, including the eradication of child labour. The ILO Declaration on Social Justice for Fair Globalization provides a strong recognition that

*'the violation of the fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes'*.<sup>226</sup>

A similar recognition of the impermissibility of maintaining lower labour standards for trade policies is incorporated into the Declaration on Fundamental Principles and Rights at Work.<sup>227</sup> However, the ILO lacks the strong enforcement mechanism of the WTO.<sup>228</sup> The ILO states that the purpose of its supervisory system is '*to ensure that countries implement the conven-*

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<sup>224</sup> *ibid* 233.

<sup>225</sup> Deva (n 3) 87.

<sup>226</sup> ILO Declaration on Social Justice for a Fair Globalization (adopted 10 June 2008), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms\\_371208.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf), accessed 21 July 2019, art 1 (A) (iv); Humbert (n) 6.

<sup>227</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (adopted 18 June 1998), <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>, accessed 15 July 2019, para 5.

<sup>228</sup> Dillon (n 136) 307.

tions they ratify' by examining 'the application of standards in member states and [pointing] out areas where they could be better applied' and assisting 'countries through social dialogue and technical assistance'.<sup>229</sup> Thus, without the threat of punitive sanctions, states can evade international responsibility for not complying with their obligations under the respective conventions. The ILO lacks the regulatory power to compel non-compliant states to completely abolish child labour or enforce stricter regulation and has instead focused on setting (aspirational) goals for the reduction of the rates of child labour.<sup>230</sup> Additionally, while various ILO Conventions provide concrete human rights standards for employers, each instrument also stipulates that, in the current framework of international law, only states can be bound by these provisions.<sup>231</sup> As far as the imposition of direct responsibilities/duties on corporations is concerned, the most relevant instrument the ILO has produced is the ILO Tripartite Declaration.

The Declaration was adopted in 1977 and is the only ILO instrument which directly addresses business enterprises, instead of being directed at states. Its focus falls on labour rights generally, with a specific focus on child labour after the 2000 revision. The Declaration urges both TNCs and states to adopt measures targeting the abolition of child labour. States are required to adopt effective domestic policies to eliminate the worst forms of child labour and to progressively raise the minimum age for admission to employment.<sup>232</sup> As far as business enterprises are concerned, the Declaration stipulates that both nationally-based and global companies should take measures to abolish the worst forms of child labour in their production processes and to respect the minimum age for admission to work when employing minors.<sup>233</sup> The instrument further stipulates that TNCs should align their production practices with the norms stipulated in the ILO Declaration on Fundamental Principles and Rights at Work and the 1998 Follow-up to contribute to the elimination of child labour.<sup>234</sup> This emphasis on the desirability of awareness and regulation of child labour at the corporate level is a welcome development in the international BHR framework. Such an approach can contribute to the recognition of TNCs' responsibility to respect human rights and to regulate unethical business behaviour in their supply chains. A recognition of the role of corporations not only as economic actors but also as regulators could lead to furthering the perspective of business entities as core actors in the human rights sphere. In turn, this could increase the regulatory and social oversight of

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<sup>229</sup> ILO, 'ILO Supervisory System/Mechanism', <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>, accessed 17 August 2019.

<sup>230</sup> *ibid* 307.

<sup>231</sup> Lopez (n 152) 307.

<sup>232</sup> ILO Tripartite Declaration (n 8) para 26.

<sup>233</sup> *ibid* para 27.

<sup>234</sup> *ibid* para 10 (d).

TNCs' business activities and put increased pressure on corporations to curtail child labour in their supply chains. States are also advised to ratify the Minimum Age and Child Labour Conventions (Conventions 138 and 182), as well as the corresponding Recommendations 146 and 190 to further combat child labour.<sup>235</sup>

A unique feature of this instrument is its tripartite structure. The Declaration was designed by engaging governments, employers and civil society, and includes shareholder consultations as a main concern.<sup>236</sup> However, the ILO Tripartite Declaration has not proven sufficiently effective in curtailing labour rights abuses, including violations of the prohibition of child labour, in TNCs' global supply chains. Firstly, this instrument is rarely discussed as extensively in literature and by policy makers as other soft-law initiatives, which has limited its influence on current BHR policies and corporate practices. Compared to the OECD Guidelines, and particularly the UNGPs and the Draft Treaty, the ILO Tripartite Declaration is rarely mentioned as an influential instrument in the current BHR framework. Secondly, the Declaration has been criticized for its limited scope and the lack of clarity as to which enterprises should be subject to regulation, its directory nature and the absence of an implementation mechanism or a monitoring process.<sup>237</sup> Furthermore, the instrument places too great attention on host state labour standards as the yardstick for acceptable business practices.<sup>238</sup> As host states usually have lower human rights standards compared to their international or home state equivalents, it is doubtful to what extent this approach could be effective in curtailing hazardous child labour. Therefore, the Declaration has a relatively limited implementation potential in preventing the occurrence of child labour in global supply chains.

### 5.2.3 The UNGPs

The core discussion which has recently emerged regarding the regulation of transnational business concerns the effectiveness of hard law versus soft law in tackling corporate human rights violations. Today, governments, scholars and civil society seem to be split between the supporters of the UNGPs as a soft-law mechanism of regulation versus the supporters of a hard-law alternative in the form of a BHR Treaty. The UNGPs are a unique instrument in that at the time of its endorsement in 2011 it was universally accepted by states as a desirable set of guidelines for the regulation of corporate human rights violations.<sup>239</sup> The UNGPs were also designed through consultations with a wider variety of stakeholders and were hailed by many

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<sup>235</sup> Gatto (n 9) 79.

<sup>236</sup> Deva (n 3) 88, 90.

<sup>237</sup> *ibid* 90.

<sup>238</sup> *ibid* 91.

<sup>239</sup> Simons (n 176) 58.

as a ‘milestone’ in the development of the BHR framework.<sup>240</sup> The Principles were celebrated as a core step towards embedding (transnational) businesses with human rights responsibilities by explicitly separating state obligations concerning human rights protection from corporate responsibilities.<sup>241</sup> The inclusion of a due diligence doctrine in the framework has also advanced discussion regarding the responsibility of TNCs to regulate their supply chains.<sup>242</sup> Additionally, the UNGPs are regarded as a comprehensive articulation of the state duties to protect human rights from violations committed by non-state actors.<sup>243</sup>

The Principles incorporate a three-pillar structure, separating the role of states and businesses regarding the protection and promotion of human rights. Under Pillar 1, states bear duty to protect human rights from corporate human rights violations occurring within their territory.<sup>244</sup> This includes the standard international legal duty to enact and enforce laws requiring businesses operating domestically to respect human rights, and to provide effective and appropriate remedies for victims of corporate human rights violations.<sup>245</sup> This conceptualization of the state duty to protect against corporate human rights violations corresponds to the conventional conceptualisation of states as the main duty-bearers under international human rights law. Pillar 2 stipulates that businesses have a responsibility to respect human rights in their production processes and to address the adverse influence their operations may have on human rights.<sup>246</sup> Thus, the UNGPs provide a three-component framework to the corporate responsibility to respect human rights:

*‘instituting a policy commitment, undertaking ongoing human rights due diligence to identify, prevent, mitigate and account for their human rights impacts and putting in place processes to enable remediation for any adverse human rights impacts they cause or contribute to’.*<sup>247</sup>

Therefore, the duty to respect human rights extends not only to the core business operations of TNCs, but also to activities carried out throughout the supply chain.<sup>248</sup> Pillar 3 articulates the need for effective remedies for victims of corporate human rights abuses.<sup>249</sup> For the purposes

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<sup>240</sup> *ibid* 58; Cirlig (n 4) 230.

<sup>241</sup> Deva (n 3) 109; Simons (n 237) 58.

<sup>242</sup> Cirlig (n 4) 232.

<sup>243</sup> *ibid* 232.

<sup>244</sup> Deva (n 3) 104, 108.

<sup>245</sup> Cirlig (n 4) 232.

<sup>246</sup> Deva (n 3) 104, 107 – 109.

<sup>247</sup> Cirlig (n 4) 232.

<sup>248</sup> *ibid* 232.

<sup>249</sup> Deva (n 3) 104.

of the present thesis, the discussion below will assess the effectiveness of the first two pillars of the framework.

Despite these positive contributions to the international BHR framework, the UNGPs have also been fiercely criticised on several grounds by BHR scholars and civil society.<sup>250</sup> Much criticism has been voiced against the conceptualisation of human rights state duties under Pillar 1. One important concern has been how the UNGPs envision extraterritorial regulation. The UNGOs stipulate that states should provide clear expectations *‘that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’*.<sup>251</sup> This formulation suggests an acceptance of extraterritorial regulation of business activities which could provide an outlet for regulating human rights violations occurring in global supply chains. However, the Commentary to Principle 2 states that, although extraterritorial regulation is not prohibited under international law, *‘[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction’*. Despite a recognition that there are strong policy reasons for home states to regulate TNCs and their supply chains extraterritorially, Principle 2 does not endorse a legal obligation for states to do so. As a result, without articulating a clear obligation for extraterritorial jurisdiction, the UNGPs do not adequately address the home-host state debate.<sup>252</sup> Therefore, presently, home states do not bear a legal obligation to tackle child labour in the global supply chains of domestically incorporated TNCs. Instead, regulation is relegated to host states which have so far had only limited success in effectively curtailing the widespread use of children in agricultural work.

The inclusion of the principle of due diligence in Pillar 2 has also been criticised as undermining the effectiveness of the framework to provide standards for corporate accountability and to regulate human rights abuses occurring in global supply chains. The UNGPs do not provide a specific definition of human rights due diligence.<sup>253</sup> Instead, the UN OHCHR has defined it as

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<sup>250</sup> Larry Cata Backer, ‘Principled Pragmatism in the Elaboration of a Comprehensive Treaty on Business and Human Rights’ in Deva and Bitchitz (n 2) 106.

<sup>251</sup> UN OHCHR, Guiding Principles on Business and Human Rights (2011) HR/PUB/11/04 (UNGPs), Principle 2.

<sup>252</sup> Simons (n 237) 59.

<sup>253</sup> Robert McCorquodale and Lisa Smith, ‘Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty’ in Deva and Bilchitz (n 2) 222.



*‘an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights’.*<sup>254</sup>

The UNGPs provide further guidance by stating that corporations should be able to demonstrate that they have conducted all reasonable steps to avoid involvement in human rights violations occurring within their business operations.<sup>255</sup> Factors such as the size of the enterprise, the jurisdiction(s) where its business operations are located and the degree of leverage it has over other entities within its supply chain determine the extent of the responsibility to conduct due diligence.<sup>256</sup> Therefore, TNCs seem to be endorsed with a direct responsibility to regulate other business entities within their global supply chains as so to eradicate the use of child labour.

However, it is important to point out that the principle of due diligence incorporated into the UNGPs is not formulated as a legal obligation. Instead of anchoring corporate human rights responsibilities in international law, the Principles frame the responsibility to respect human rights and conduct due diligence as a social expectation.<sup>257</sup> This reiteration of the state-centricity of international law has been criticized by the opponents of the UNGPs as a step back from the effective regulation of corporate human rights violations.<sup>258</sup> In addition, the Principles do not address the doctrine of separation of entities, according to which TNCs retain a separate legal personality from other business enterprises across the supply chain.<sup>259</sup> Furthermore, the UNGPs remain silent on the issue of limited liability, i.e. the principle that a company’s shareholders cannot be held liable for any human rights transgressions committed by the corporation.<sup>260</sup> These two principles pose significant challenges to holding TNCs responsible for the occurrence of child labour in their supply chains.<sup>261</sup> Without a clear endorsement of parent company liability, or supply chain liability, parent companies remain separate legal entities from their subsidiaries and suppliers. Thus, TNCs can always invoke the defence that its core operations are separate from the operations of their subsidiaries/suppliers and that instances of child labour occurring within the supply chain do not fall within the regulatory scope of the parent company. As a result, the regulation of child labour

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<sup>254</sup> UN OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012) HR/PUB/12/02, 4.

<sup>255</sup> UNGPs (n 249) Commentary to General Principle 12.

<sup>256</sup> McCorquodale and Smith (n 251) 223.

<sup>257</sup> Bilchitz (n 5) 8.

<sup>258</sup> *ibid* 8.

<sup>259</sup> McCorquodale and Smith (n 251) 229.

<sup>260</sup> Nolan (n 2) 247.

<sup>261</sup> *ibid* 247.

occurring in the initial production stages (such as the production stage within the cotton supply chain) are relegated to the regulatory oversight of host states and local business entities. However, due to the high economic value of cotton, neither of those sets of actors has an interest effectively regulating the use of child labour in the production process. Home states and TNCs do not have legal obligations to regulate hazardous child labour in global supply chains. Therefore, no regulator, either at the host or home state level, can be held effectively responsible for the occurrence of child labour across global supply chains.

#### 5.2.4 The Draft Treaty on Business and Human Rights

The Draft Treaty has been framed by its proponents as an alternative to the UNGPs which could provide a solution to the short-comings of a soft-law instrument.<sup>262</sup> As the negotiations surrounding the adoption of the Treaty were ongoing during the writing of this thesis, the following assessment focuses on the first two sessions of the negotiations. The UN Human Rights Council adopted a resolution in 2014 for the establishment of an open-ended intergovernmental working group to elaborate on an international BHR Treaty.<sup>263</sup> The aim was to design a binding treaty under international human rights law which would regulate the operations of TNCs and other business entities.<sup>264</sup> The drafting of a hard-law BHR instrument has been polarising.<sup>265</sup> A strong opposition between developing states and developed states emerged during the first two sessions of the deliberations.<sup>266</sup> A majority of developing states expressed support for the treaty.<sup>267</sup> Civil society also called for the endorsement of businesses with international human rights legal obligations so as to tackle the inability/unwillingness of states to regulate corporate human rights abuses domestically.<sup>268</sup> In contrast, developed states opposed an instrument embedding either domestic or transnational businesses with human rights obligations directly under international law, instead supporting a soft-law approach.<sup>269</sup> As a result, the desirability of a hard-law BHR instrument is contested on the international scene, posing questions of the extent to which the adoption of the treaty is practically feasible.<sup>270</sup>

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<sup>262</sup> See, for instance, de Schutter (n 131); Rivera, 'Negotiating a Treaty on Business and Human Rights' (n 166); Bilchitz (n 5).

<sup>263</sup> De Schutter (n 131) 41.

<sup>264</sup> *ibid* 41 – 42.

<sup>265</sup> Simons (n 237) 48.

<sup>266</sup> Rivera, 'Negotiating a Treaty' (n 166) 1203 – 1213.

<sup>267</sup> Simons (n 237) 49.

<sup>268</sup> Rivera, 'Negotiating a Treaty' (n 166) 1214.

<sup>269</sup> Simons (n 237) 49; Surya Deva, 'Scope of the Proposed Business and Human Rights Treaty: Navigating through Normativity, Law and Politics' in Deva and Bilchitz (n 2) 164.

<sup>270</sup> Rivera, 'Negotiating a Treaty' (n 166) 1212; Bilchitz (n 5) 6.

The proponents of the treaty believe that a hard-law initiative could fill the regulatory loopholes left by the UNGPs. For instance, the Draft Treaty could establish a legally binding duty for states for extraterritorial regulation of business entities domiciled on their territories, thus extending the regulatory oversight to global supply chains.<sup>271</sup> Another issue the treaty could tackle is the state-centricity of the existing international regulatory framework which discourages the endorsement of business with legally binding obligations directly under international human rights law.<sup>272</sup> The instrument can also redress the imbalance of competing legal regimes in international law. Although theoretically there is no hierarchy between different international legal regimes, in practice obligations arising under international economic law (such as trade and investment law) often surpass international human rights duties.<sup>273</sup> Therefore, proponents of the Draft Treaty argue that the instrument should expressly recognize the supremacy of international human rights law over economic concerns.<sup>274</sup>

However, there are also concerns about the feasibility of adopting a BHR Treaty. Firstly, the scope of treaty has become a contested point of discussion. One important issue which has arisen has been the inclusion of global supply chains. The HRC Resolution is ambiguous as to whether supply chain regulation should fall within the scope of the instrument, or whether the traditional separation of entities approach should be upheld.<sup>275</sup> Ruggie (the creator of the UNGPs) has also expressed concern that a single BHR treaty would be too ambitious in scope.<sup>276</sup> If the draft were to encompass all areas of international human rights law, the instrument would be too vague and would therefore be devoid of substance.<sup>277</sup> Some civil society organizations have also pointed out that The Draft Treaty lacks a precise definition of the scope of human rights due diligence obligations.<sup>278</sup> Additionally, there have been concerns on the part of both civil society and states that the latest draft does not clearly establish what the regulatory targets of the framework would be (solely TNCs or all business enterprises).<sup>279</sup> The EU has also expressed opposition to the inclusion of a mandatory state obligation for extrater-

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<sup>271</sup> De Schutter (n 131) 46.

<sup>272</sup> Deva, 'Scope of the Proposed Treaty' (n 267) 157 – 158.

<sup>273</sup> Bilchitz (n 5) 13 – 14.

<sup>274</sup> *ibid* 14.

<sup>275</sup> Deva, 'Scope of the Proposed Treaty' (n 267) 167.

<sup>276</sup> Bilchitz (n 5) 17.

<sup>277</sup> *ibid* 17.

<sup>278</sup> European Coalition for Corporate Justice, 'ECCJ's View on a Binding UN Treaty on Business and Human Rights' (2018) <http://corporatejustice.org/documents/treaty/eccj-position-on-un-treaty-and-zero-draft-october-2018-final-for-web.pdf>, accessed 15 June 2019.

<sup>279</sup> *ibid*; European Parliament Research Service, 'Towards a Binding International on Business and Human Rights' (April 2018) PE 620.229, 7.

ritorial regulation of TNCs and their supply chains.<sup>280</sup> As a result, it is unclear at present whether the Draft BHR Treaty would prove to be a viable alternative to regulating corporate human rights violations and the occurrence of child labour in the global supply chains of TNCs.

### 5.2.5 The ATCA

The ATCA, or ATS, is the most frequently deployed BHR regime by victims of corporate human rights violations who seek access to legal remedies.<sup>281</sup> This is largely due to the fact that this instrument has proven most effective in enhancing the bargaining power of claimants against TNCs; thus corporations are more frequently compelled to settle cases brought against them.<sup>282</sup> The ATCA has proven more effective compared to other BHR initiatives in allowing victims to claim compensation for corporate human rights violations. The instrument is, therefore, one of the few viable alternatives for victims of corporate human rights abuses to access justice. The Act provides that US ‘*district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*’.<sup>283</sup> The statute stipulates three conditions for bringing a claim. Firstly, the claim must be brought before domestic courts by an alien, i.e. a claimant who is not a US national; secondly, the claimant must allege the commission of a tort which has had a negative impact on their rights; and, finally, the alleged tort must have been committed in violation of either ‘*the law of nations*’ or a US treaty.<sup>284</sup> There have been several high-profile cases brought under the Act which were settled, such as *Kiobel*, the *Wiwa* cases and *Doe v Unocal*. Such high-profile cases have brought increased social scrutiny to unethical business practices and grave human rights abuses. However, it can also be argued that the statute has thus far had limited legal value in holding TNCs liable for human rights abuses. The jurisprudence of national courts under the ATCA has produced several important restrictions to holding corporate actors accountable for human rights violations.

Firstly, US courts have been reluctant to recognize corporate liability for directly committed human rights violations or for aiding and abetting of human rights abuses. The test used in *Unocal* relied on assessing whether the corporation delivered ‘*knowingly practical assistance or encouragement that [had] a substantial effect on the perpetration of the crime*’.<sup>285</sup> Howev-

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<sup>280</sup> *ibid* 7.

<sup>281</sup> Deva (n 3) 68.

<sup>282</sup> *ibid* 68.

<sup>283</sup> Alien Tort Claims Act 1789, 28 U.S. Code § 1350.

<sup>284</sup> Deva (n 3) 66.

<sup>285</sup> *Doe v Unocal* [2002] 395 F.3d 932, para 35.

er, in complex supply chains where a parent company uses multiple contractors and suppliers which, in turn, use additional sub-contractors and sub-suppliers, this can be difficult to prove. The Court of Appeals of the Ninth Circuit further stated that such assistance would also require the offending entity to have had ‘*practical or constructive knowledge*’ of the situation.<sup>286</sup> In *Talisman Energy*, the Court of Appeals of the Second Circuit applied a stricter test. The Court ruled that, in accordance with existing international law, the standard according to which corporate liability can be established is purpose to commit harm, not knowledge of the occurrence of harm alone.<sup>287</sup> Thus, liability cannot be imposed on business entities ‘*which knowingly (but not purposefully) aid and abet a violation of international law*’.<sup>288</sup> Pursuant to this reasoning, a TNC would only be held liable for hazardous child labour where the TNC explicitly directed other entities across its supply chain to use child labourers with the explicit purpose of committing a violation of the *jus cogens* prohibition of slavery. However, in a complex supply chain stretching across hundreds of business enterprises and multiple jurisdictions, a clear chain of command can be difficult to establish and thus it would be easy for a TNC to evade liability. Additionally, in *Kiobel* The Court of Appeals of the Second Circuit held that corporate liability was not ‘*a discernible – much less universally recognized – norm of international customary law that [the Court] may apply pursuant to the ATS*’ and dismissed the case.<sup>289</sup> The US Supreme Court later affirmed the dismissal and did not engage in a meaningful analysis of the status of corporate liability under international law.<sup>290</sup>

Secondly, the ruling in *Sosa* significantly restricted the scope of the third condition for bringing a claim under the ATCA, i.e. that the alleged tort must be in violation of ‘*the law of nations*’. The US Supreme Court stated that the concept of ‘*law of nations*’ should be understood in light of the few international law violations which were recognized within common law at the time of adoption of the ATS (1789).<sup>291</sup> The court adopted a historic interpretation of the text of the statute and concluded that the original legislative intention was not to provide an outlet for the adjudication of a wider set of claims before US courts.<sup>292</sup> Therefore, for a claim based on current international law to be actionable before the domestic judiciary, the contemporary norm in question must have acquired a similar legal status to those grounds accepted as actionable in the 18th century.<sup>293</sup> Additionally, the court stated that the ATCA

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<sup>286</sup> *ibid* para 36.

<sup>287</sup> *The Presbyterian Church of Sudan v. Talisman Energy, Inc* [2009] 582 F.3d 244, 7 – 8, 37, 40 – 43.

<sup>288</sup> *ibid* 42.

<sup>289</sup> *Kiobel v. Royal Dutch Petroleum* [2010] 621 F.3d 111, 2.

<sup>290</sup> *Deva* (n 3) 113 – 114.

<sup>291</sup> *Sosa v. Alvarez-Machain* [2004] 542 U.S. 692, 25.

<sup>292</sup> *ibid* 25, 30.

<sup>293</sup> *Deva* (n 3) 71.

was not designed with the purpose of making ‘*some element of the law of nations actionable for the benefit of foreigners*’.<sup>294</sup> The dismissal in *Kiobel* was partly based on precisely this extremely limited interpretation of the scope of the ATS and of international law.<sup>295</sup> As a result, the grounds on which an alleged corporate human rights violation can be adjudicated before US courts are in practice severely restricted.

Another limitation to holding TNCs accountable under the ATS for human rights violations stems from a presumption against extraterritoriality adopted by US courts. The Supreme Court ruled that a ‘*presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption*’.<sup>296</sup> This interpretation of the scope of the ATCA presents a major obstacle not only to access to justice for corporate human rights violations in particular, but to the universality of human rights generally.<sup>297</sup> In addition, the common law doctrine of *forum non conveniens* operates as yet another hurdle. According to this doctrine, common law courts can dismiss a case on the basis that ‘*the balance of relevant public and private interest factors favours that the trial takes place in a foreign forum*’.<sup>298</sup> Thus, national courts seem to reject that they may have any extraterritorial jurisdiction over corporate human rights abuses occurring abroad, even where the alleged perpetrator is a domestically incorporated company. Instead, the doctrine of *forum non conveniens* provides a convenient ground for US judges to deflect regulation to the host state where a human rights abuse has occurred as a more appropriate forum. However, victims can often face even more significant hurdles to accessing justice in these jurisdictions.

As a result, the ATS, although a promising BHR initiative in theory, has proven not to be wholly effective in tackling corporate human rights violations, such as child labour. An interpretation of the ATS in conformity with contemporary international law trends would acknowledge that, at the very least, *jus cogens* norms, such as the prohibition of slavery and by extension hazardous child labour, are accepted norms of international law which can serve as legitimate grounds for holding TNCs liable for human rights abuses. A more creative interpretation of international law would point to the possibility for holding corporate actors accountable for grave human rights violations under international criminal law.<sup>299</sup> However, the restrictive interpretations given to the scope of the ATCA by domestic courts suggests a

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<sup>294</sup> *Sosa* (n 289) 24.

<sup>295</sup> Rivera, ‘Corporate Accountability’ (n 174) 113.

<sup>296</sup> *Kiobel, Individually and on Behalf of Her Late Husband Kiobel, et al. v. Royal Dutch Petroleum Co. et al.* [2013] 133 S. Ct. 1659, 1.

<sup>297</sup> Rivera, ‘Corporate Accountability’ (n 174) 115.

<sup>298</sup> Deva (n 3) 69.

<sup>299</sup> Lopez (n 152) 304, 309.

strong form of American exceptionalism whereby US courts actively attempt to distance themselves from current international developments with regards to business and human rights.<sup>300</sup> This has severely limited the potential of the ATCA to provide an outlet for regulating the occurrence of child labour in the global supply chains of TNCs.

## 6 Conclusion

In conclusion, the occurrence of child labour in the global supply chains of TNCs is a complex, multi-faceted issue which have proven difficult to regulate under international human rights law and the existing international BHR framework. Today there is widespread international recognition of the harmful effects child labour has on children and their human rights, as well as on broader social issues such as poverty. Child labour in hazardous working conditions has been recognized as a particularly dangerous practice and has in recent decades been framed as a modern of slavery. Thus, the use of child labourers in hazardous working conditions belongs to the category of *jus cogens* norms and can be considered among the worst human rights violations under international law. Cotton production is a clear example of the extensive harm hazardous child work can do, as well as of the extent to which children's vulnerability is exploited for economic profit in global supply chains. However, despite widespread condemnation for this phenomenon and the proliferation of international human rights instruments regulating child labour, curtailing the rates of child workers has proven challenging. Progress in eradicating the use of child labour international has slowed down in recent years, especially in relation to hazardous work. Additionally, existing regulation has proven ineffective in holding business entities accountable for the use of child workers in their production processes.

Global supply chains have proven to be a core hurdle in the eradication of child labour, as they have emerged as a particularly difficult regulatory target. Due to the highly internationalised and decentralised nature of transnational business, there is exists a complex relation between smaller entities across a supply chain and the parent company, the TNCs. As a result, locating the entity responsible for controlling the production processes and thus accountable for the use of child labour is difficult. This complexity is further exacerbated by the principle of separation of legal personalities which shields TNCs from accountability for violations committed by their subsidiaries, suppliers and subcontractors. The WTO model of deregulation of transnational business activity has also hindered the development of coherent standards for the regulation of global supply chains. Moreover, the existing international human

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<sup>300</sup> Rivera, 'Corporate Accountability' (n 174) 116.

rights and BHR frameworks have proven ineffective in holding corporate actors directly responsible for the commission of human rights violations.

International human rights law has proven ineffective to tackle the status of TNCs as non-state actors and thus endorse them with legally binding obligations. The state-centricity of international and the uncertain status of extraterritorial regulation of business operations are two core obstacles to the use of child labour in global production processes. Moreover, the international BHR framework has also failed to embed either TNCs or national business entities with mandatory duties to respect human rights and to actively combat the use of child labour. Despite some important insights into the links between global business and the proliferation of human rights violations, the current framework has proven deficient in effectively regulating global supply chains. The existing initiatives have not recognized parent companies as legally accountable for the use of child labour in their transnational production processes, nor have they provided a definitive solution to the controversial status of extraterritoriality. As a result, holding either TNCs or smaller-scale business entities legally responsible for child labour at the international level is not yet a viable regulatory option. The regulation of this issue, therefore, remains within the scope of domestic governments, despite the relative ineffectiveness of national oversight of corporate human rights violations.



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