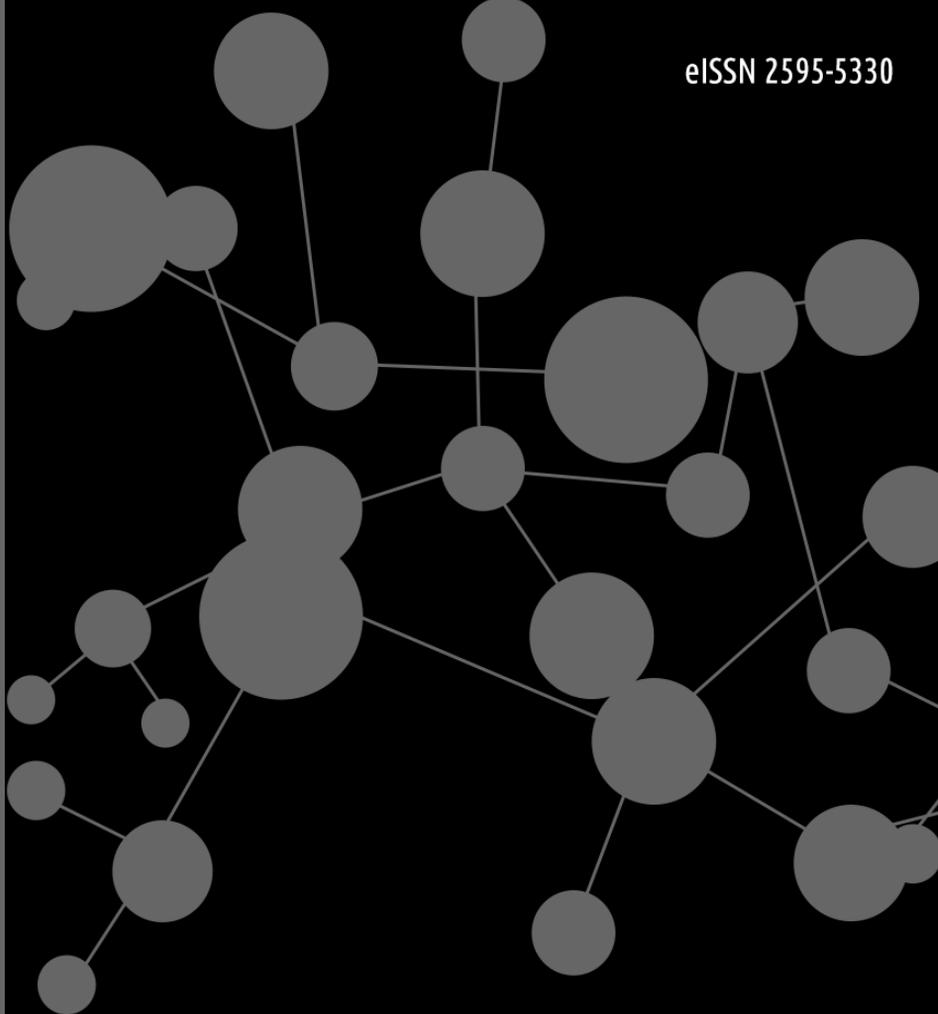


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Supply chains and the impacts on
the discussion on Human Rights
and Business



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INTRODUCTION

Homa, Center for Human Rights and Business, pursuing a series of technical works that may serve as future subsidies for an International Treaty on Business and Human Rights, is devoted here to developing the theme of supply chains. The theme becomes relevant, since the very nature of transnational activity, as explained below, requires a new approach to its accountability process, observing its scale of production, which transcends territorial barriers.

Economic globalization increasingly consolidates the corporate capture¹ of the State by transnational corporations (TNCs), which organize and reorganize the productive process and the labor force, observing the capitalist logic. As Guaman and Moreno (2017) demonstrate, the creation of a network of mechanisms with different institutional webs, promoting manipulation in legal, economic, political, social and cultural fields is noticeable. Thus, the architecture of international instruments is systematically rethought in order to allow these groups to remain immune to liability. This phenomenon has been called "architecture of impunity" (ZUBIZARRETA; RAMIRO, 2016, p.8) and has already expanded on global scales.

Among the strategies used by TNCs, the promotion of so-called supply chains is highlighted. These would be an expression of unprecedented fragmentation of production processes in an increasingly interconnected economy, in which much of the world's output of diverse products is based on different locations in the most varied countries, with inputs crossing borders several times during production (MARCATO, 2018). Therefore, Supply Chains are characterized by the decentralization and fragmentation of production and of the economic influence of large companies. However, its definition is not consolidated. There are diverse understandings of what

¹ According to Gonzalo Berrón, corporate capture can be defined as "the penetration of public bodies by people or agendas that come from corporations - usually large or transnational - and thus transforms public concern in private economic concern." (BERRÓN, 2015)

would be a supply chain, such as the International Labor Organization's² (2016) and the Trade Union Confederation of the Americas'³ (2017).

The Global Campaign⁴ (2017), in its turn, brings a detailed definition⁵ in its document of suggestions for a Human Rights and Business Treaty. In it, we can see the inclusion of several layers of suppliers and contractors, aiming to cover all possible activities within a production chain that result in Human Rights violations. Such coverage is essential if Human Rights violators are to be held accountable and punished, whether they violate rights directly or fund such violations through their operations. Thus, for the purposes aimed at this text, the definition of the Campaign will be used, due to its complexity and its scope of all actors possibly involved in the process of production and distribution in transnational companies.

In addition, CSA (2017) assumes as valid the concepts of Global Production Chains and Global Supply Chains, understanding the existence of other denominations that, even though different, are often used to describe the same process. However, for Novaes (2001), the production / supply chain can be described as the process that starts with raw material sources, goes through component factories, product manufacturing, distributors, retailers and finally to the final consumer.

² "The cross-border organization of the activities required to produce goods or services and bring them to consumers through inputs and various phases of development, production and delivery or provision of goods and services."

³ "The terms Global Supply Chain or Global Production Chain have been used to express the set of activities developed from the design of a product to its final use, including also after-sales services".

⁴ As the movement's website explains, "the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity is a network of over 200 social movements, networks, organizations and affected communities resisting the land grabs, extractive mining, exploitative wages and environmental destruction of TNCs in different global regions particularly in Africa, Asia and Latin America. The Campaign is a peoples global structural response to unaccountable corporate power which provides facilitation for dialogue, strategizing, exchanging information and experiences, acting as a space for visibility of resistance and deepening of solidarity and support for struggles against TNCs". For further information, access:<<https://www.stopcorporateimpunity.org/>>.

⁵ "For the purposes of this Treaty, the TNC supply chain consists of companies outside the TNC that contribute to the operations of the TNC – from the provision of materials, services and funds to the delivery of products for the end user. The supply chain also includes contractors, subcontractors or suppliers with whom the parent company or the companies it controls carry on established business relations. The TNC may exercise influence over a supply chain company depending on the circumstances".

The phenomenon of supply chain has gained greater proportions since the 1990s, when the so-called developing countries, notably those of the Global South, have opened up more definitively to the process of globalization. Those countries then adopted a model of neoliberal development, seeking to benefit from foreign investments to drive the local economy. In this way, large companies, mainly from the Global North, took advantage of such openness and increasingly expanded their transnational influence.

This dynamic contributed to transform these companies into giant economic groups, extremely fragmented and with influence in several regions - through the aforementioned supply chains. According to data from a study from MIT (Massachusetts Institute of Technology, Center for Transportation and Logistics) *apud* WTO/OECD (2013), among a group of 300 companies that grossed more than US\$1 billion in 2009, on average 51% of production 46% of the inventory, 43% of the customer services and 39% of the product development took place outside the country of origin of the firm. Still, according to UNCTAD (2013) and WTO/OECD (2013), global supply chains today account for more than 80% of world exports (Cardoso, Reis, 2016, p.2). In addition, according to a survey conducted by the ILO in 40 countries, 66% of the global workforce is associated with supply chains (CSA, 2017, p.13).

Such expansion and magnitude can be explained by the conjuncture of developing countries, which present extremely favorable conditions for economic exploitation. One of the major factors in this scenario is the phenomenon known as "race to the bottom", in which countries, especially those in the Global South, progressively seek to bend to demands from companies operating in their territory, aiming at attracting transnational investments. Hence, labor regulations are generally more flexible and local governments offer several benefits in the pursuit for the economic movement that foreign capital promotes.

A great example of flexibility is the Free Zones (FZ), which, according to the ILO, are industrial zones, with special incentives to attract foreign investors, where imported materials undergo industrial processes before being exported again. Also, according to the CSA, more than 66 million workers, spread over more than 3500 Free Zones (mostly located in Asia, Central America and Mexico), especially young women, work in improper conditions. FZs also raise environmental and tax criticism. Companies then take advantage of incentives like these to set up branches and hire smaller

producers around the world. This way, profit is increased and the risk of the activity is reduced based on an exploration process (CSA, 2017).

The organizational complexity of those entities creates a great obstacle to accountability, hampering the proper prevention and reparation of Human Rights violations. The obstacles in identifying the link between the parent company, the subsidiary and the various activities of the chain, for example, are increasing. Justine Nolan (2017, p.239) raises important questions about the subject, which include items such as the limits to the accountability of each company in the chain, the connection of the entire chain with the company at its top, and the possibility of accountability of one body of the chain by the actions of another legally distinct one.

Therefore, the relevance of an adequate examination of issues related to supply chains remains evident. For this purpose, the present document intends to address the concentration of economic power in supply chains, as well as due diligence mechanisms and their different nuances. Likewise, we aim at establishing parameters in the pursuit of proper accountability of companies for their violations of Human Rights. To this end, different proposals for accountability in the international scenario will be analyzed, such as the importance of a Treaty on Human Rights and Business for the treatment of the subject.

THE CONCENTRATION OF ECONOMIC POWER IN SUPPLY CHAINS

The main issue to be considered regarding the supply chain is the power concentration observed within it. This is due to this structure favoring the display of a scenario in which very few companies control the market, bringing up several consequences.

The power concentration in the supply chain gives those at the top the privilege to set prices for what is produced in other parts of the structure, which is especially severe at its base. Thus, subsidiaries and subcontractors are pressured to reduce the costs of the goods they supply to the chain - which increases the amount of profit concentrated at its top - and there is a sort of "selection" of those members that are more productive. Nonetheless, to reach high levels of productivity, those chains

generally resort to a number of approaches, which include, for the most part, human rights violations.

In this perspective, a common scenario is that in which small companies, suppliers of large transnational corporations who outsourced them, promote unsuitable work conditions employing practices such as modern slavery, irregular labor, child labor and the crippling of trade union movements in order to reduce their operational costs. Furthermore, they subject workers to low wages, excessively long work hours, and often violence, mainly exploiting groups such as blacks, Indians, women, youth and immigrants under this logic.

Built over such structural logic, transnational corporations seek to remove from their staff the responsibility for the conditions they themselves create, inasmuch as they do not formally recognize the majority of the workforce they use, an evident form of rendering their workforce invisible. For instance, based on the analysis of the structure of 25 multinationals, it is estimated that there are seventeen "hidden" workers (CSA, 2017, page 7) for each official employee of a transnational enterprise in Latin America.

Another exposure of this reality was the disaster in Rana Plaza, Bangladesh, in 2013, when an eight-story building containing garment factories collapsed, killing about 1130 people. On top of the terrible work conditions which the workers were subjected to, reports affirm that cracks were observed in the building the day before the tragedy, and that there were warnings about the instability of the construction; regardless, the workers were forced to enter it. This is another example that reveals the difficulties imposed by the value chain structure on corporate accountability, given that major fashion brands which were supplied by the factory, such as Primark and H&M, were not held liable for the episode.

It should also be considered that several subsidiaries and subcontractors not only jeopardize and flexibilize labor standards, but also those relating to the environment. In order to reduce their production costs, these companies commit a number of environmental violations, often under an obvious calculation scheme, which quantifies environmental risks, eventually getting to the conclusion that taking them maybe more "advantageous" than their properly preventing them.

In addition, the concentration of power in value chains allows large corporations to exert a huge influence on customers. By reducing competitiveness in

the consumer goods market they can decide what products will be available almost unilaterally.

DUE DILIGENCE AND RESPONSIBILIZATION

Having exposed the enormous power of the TNCs, it is possible to discuss due diligence, which defines that corporations are able to verify the harmful potential of their activity and to prevent dangerous consequences. In this perspective, the duty to oversee its own functioning can be considered as a hypothesis of obligation and responsibility for the transnational companies, and of regulation and inspection for the States.

The Guiding Principles on Business and Human Rights, developed by John Ruggie, encourage the adoption of due diligence mechanisms by TNCs and provide standards for their application in their clauses 17 to 21: they advocate oversight of activities by internal control and the use of mechanisms that ensure quality, good functioning and prevention of damage to the extent of its risks.

Their implementation consists of two main acts: one is an investigation of the facts, and the other is an evaluation of the facts according to parameters of protection" (Taylor, Mark B., Luc Zandvliet, Mitra Forouhar, 2009). Therefore, the context dictates what risks of the activity are assessed and what rights they threaten, and it is up to the company to observe these aspects when elaborating its internal policy. Hence, due diligence has an eminent soft law character and do not present any kind of substantial solution to such problems. For instance, it fails to assign responsibility to the main company for the actions of its subsidiaries and contractors.

Regarding states, De Schutter (2012) raises three responsibilities: (i) to identify actual or potential impacts; (ii) to prevent and mitigate impacts once identified; (iii) to investigate e convict companies for their acts (p.55-57). The goal is that the actions of companies become based on legal parameters entailed to their activities in order to prevent, mediate and redress damage based on standard procedures that consider the risks according to the nature of the activity.

It is necessary that supply chains comply to the logic of the so-called Human Rights Due Diligence and seek means of accountability applicable to their whole production system, from headquarters to subsidiaries and suppliers, establishing a

system in which the parent company is required to monitor the performance of the other companies that are part of their production process. The instrument appears to be a more reliable way to resolve the issue of impunity for transnational corporations and to ensure that due diligence is not restricted to the countries where the parent company is located, thus protecting all those involved in production, even those whose domestic environmental and labor laws are more flexible.

The de-characterization of the instrument as an initiative of exclusive responsibility and discretion of the companies, since there will be no self-regulation, constitutes an important paradigm shift in the quest for overcoming the prevalence of *lex mercatoria* on Human Rights. Therefore, the importance of the institutionalization of human rights due diligence as an obligation for companies is observed.

In order to do so, its process must, since the initial implementation project, be completely transparent and overseen by civil society, especially by the affected community, so that they can be the parameters for assessing risks and damage caused by the activity: the role of those groups is to precisely determine the extent of impact and the limits to the intrusion in the environment through the active participation of those affected during the process.

Nevertheless, some significant obstacles can be found. As mentioned earlier, the complex structures and economic power of large supply chains make it difficult for parent transnational corporations to be held accountable for human rights violations committed by its subcontractors or even subsidiaries.

Justine Nolan (2017) presents the notion of self-regulation as being very present in the discussions on Human Rights and Business (p.241). Such a stance has been adopted by important TNCs, which use "codes of conduct" to establish standards, especially with regard to hiring, in order to prevent slave labor in the participants of their supply chains. However, as the author rightly points out, recognizing the connection and the relevance among the activities of those subcontractors and subsidiaries and the end product is not the same as recognizing a legal responsibility. Although this is an important step, it does not solve the problem satisfactorily.

Hence, other types of practical and / or theoretically grounded approaches that could make significant progress towards stopping impunity are required.

Nolan (2017) mentions two legislative initiatives, the United Kingdom Modern Slavery Act and the United States California Transparency in Supply Chains Act. Both have similar scopes, and provide that companies shall review their operations and

contractors across their supply chain and produce reports as a way to prevent forced labor, slave labor, and human trafficking.

However, both documents work from a viewpoint of mandatory disclosure⁶, while not imposing any kind of civil or criminal liability. Nonetheless, the author emphasizes the importance of this type of regulation to establish the relationship between the exercise of control and responsibility (p.253).

During the early 2000s, Australia issued a series of Acts aimed at regulating supply chains, which require the tracking and disclosure of contractual relationships with suppliers and other parts of the chain with provisions for Legal accountability (NOLAN, 2017, p.255). This legislation pioneered in many ways, for example, by extending the status of employees also to home-based workers; by enabling court charges against various parts of the chain, not just the distribution sector, so the workers could claim their due benefits; by requiring mandatory disclosure both "up and down" the supply chain, reaching all its levels; and by providing a system that helps companies map their whole supply chain and check labor issues. Its main contribution, however, was the provision of reversal of the burden of proof, which requires from TNC to produce evidence even when in a defendant stance, ensuring that processes do not fail to achieve their results for alleged lack of evidence. (NOLAN, 2017, p 255-257). This provision is essential due to the fact that a large number of victims either cannot access or have their access to necessary evidence hampered by the companies themselves.

In 2018, Professor Jolyon Ford published an article in which he mentions the Australian interest in enacting another legislation based on the Modern Slavery Act, with adaptations motivated by the criticisms that the British one received.⁷

Another development worthy of note is the promulgation of a law by the National Assembly of France in February 2017 which imposes the legal duty of surveillance on large French parent companies in relation to their subsidiaries and subcontractors ("devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre").

It is the first time that a country has adopted a binding instrument clearly recognizing this type of responsibility. The Law was the result of an intense

⁶ Originally: mandate disclosure

⁷ The main goal of this article is to discuss whether the existence of a supply chain definition in the legal diploma is harmful or not.

mobilization of civil society and faced intense business lobby. The text provides for an obligation of the parent companies to design plans that anticipates any adverse impact of the activities in their supply chain, whether environmental or social. This also includes the activities of its subsidiaries, suppliers and subcontractors. In case of noncompliance to the obligations, victims and other interested parties may directly appeal to the Judiciary. If, in face of avoidable damage, it is found that no plan was designed, millionaire fines can be applied.

Whereas it is impossible not to recognize the great step that this legislation represents, civil society organizations in France regret some parts of the original bill that were not retained in the final version. Different from the Australian Act, the provision for reversal of the burden of proof, a decisive tool for accountability given the victim's small chances of producing evidence before a transnational company, unfortunately was not passed. The scope of the Act, which is limited to very large companies that amount to about only 100 in the entire French state, is also criticized.

The analysis of this context shows that, while the French example must be spread out and observed by other countries at national and international levels, it is also necessary to discuss the issue in other perspectives.

Based on the concepts brought by De Schutter (2015), three approaches in the situation of accountability of a corporation can be raised. The first, classic, seeks a factual analysis to determine that the subsidiary is an "alter ego" of the parent company and acted as an agent of it. This type of reasoning demands the production of evidence in the sense of establishing the separation between the personalities of the headquarters and subsidiary as merely fictional .

A second approach, derived from the first, sees transnational corporations as groups of formally separate entities, but argues that the acts of subsidiaries should be seen as acts of their parent companies, in the perspective of an "integrated enterprise", naturally leading to accountability.

The third approach, on the other hand, sets aside the idea of connecting the actions of the subsidiaries to the parent companies and provides for their responsibility based on their own omissions and by not performing due diligence properly.

After presenting some of the consequences of the first two approaches, De Schutter (2015) argues that the perspective that would be most advisable to avoid the exemption of the parent company from responsibility is to institutionalize its

obligation to oversee the actions of its subsidiaries. It is also possible to transpose this reasoning to the work of transnational companies in their supply chain (p.53).

Nevertheless, even from the point of view of monitoring, questions for the application of the accountability system arise.

For instance, differences arise as to what standards should be applied in cases of human rights violations committed by foreign companies. Whether the national legislation of the country of origin of the company or the country where its suppliers are installed should be applied is an object of dispute. In this context, it must be mentioned that there are cases in which the host countries of suppliers or subcontractors do not have adequate judicial apparatus for the process.

Therefore, it becomes necessary to discuss an international framework that provides for the accountability of companies that act transnationally in relation to the violation of Human Rights and that complements the duty of the states to regulate.

CONCLUSION

Bringing up the concept of "supply chain" to the discussions is essential for preventing human rights violations by transnational corporations. Given the complexity of that structures and the fact that there are regulatory gaps in their current frameworks, it is necessary to regulate them with an international treaty that deals with this matter. For instance, those gaps can be demonstrated by the shortcomings of the Guiding Principles, which do not cover the supply chain phenomenon at all, and are unsuitable to the complexity of business activity.

Such a treaty is already under negotiation within the United Nations Human Rights Council and is expected to reduce the impunity which we now witness. Nonetheless, it is important to emphasize, following the ideas of Nolan (2017: 261), that a Human Rights and Business Treaty should contain both principles and norms with varying degrees of normative force, and a comprehensive definition of supply chains, not limiting them to direct suppliers.

According to all that has unfolded so far, the International Human Rights and Business Treaty stands out as the ideal method to fill in this gap. After all, the very international nature of supply chains and the dispersion of productive activity around the world require an instrument that is not limited to territorial boundaries. Moreover,

having the basis of the chain identified as its most vulnerable link in a binding international instrument further highlights this need.

Thus, it is believed that drafting and bringing such Treaty into force is one of the ways of mitigating non-accountability, so that, perhaps, more structural changes may begin to occur.

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