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Chains**

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MODERN SLAVERY IN GLOBAL SUPPLY CHAINS

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Abstract

Global supply chains have, for many, become synonymous with human rights abuses. Modern slavery occurs in every region of the world and is found in a range of sectors including (but not limited to) domestic work, manufacturing, construction, mining, agriculture and fishing. Modern slavery is an area of potential commercial (including reputational) risk for companies. The relatively recent development of state-based legislative initiatives that focus on generating greater transparency of human rights risks in supply chains is starting to hardening human rights requirements for business. What is less clear, is whether such disclosure and due diligence requirements can link transparency with accountability and generate substantive (not just procedural) human rights compliance.

INTRODUCTION

Global supply chains have, for many, become synonymous with human rights abuses. While a globalized economy has generated millions of jobs over the last quarter century, lifting hundreds of millions of people out of extreme poverty; the spread of these ubiquitous supply chains has come at a cost. Global outsourcing has become a central feature of today's globalized economy, and reliance on diversified and often opaque supply chains has given rise to major human rights accountability challenges (Mayer and Gereffi, 2010; ILO 2016). Exploitative labour practices have developed persistently over time and continue to do so by cleverly adapting to social and economic changes (Datta and Bales, 2013). The shift in production from the developed to the developing world, combined with highly fragmented global production networks, has had profound effects on the nature of modern global manufacturing and the lives of the workers involved in producing the goods (Mayer and Gereffi, 2010; Locke 2013).

Modern slavery is a global problem. It is estimated that more than 40 million people are trapped in modern slavery (ILO and Walk Free, 2017). The ILO estimates that forced labor in the private economy generates US\$150 billion in illegal profits each year (ILO 2014). Regular revelations about modern slavery show that this practice can reach into every aspect of a company's operations and supply chains, as well as into consumers' lives through our daily consumption and it poses uncomfortable truths for businesses and individuals (Datta and Bales, 2013; Nolan and Boersma, 2019). There is growing recognition of the need to address this problem and avoid forced labor and related practices that can and do occur in modern business transactions.

MODERN SLAVERY

There is no globally recognised definition of modern slavery. It is an umbrella term that incorporates a range of serious exploitative practices that includes trafficking in persons; slavery; servitude; forced marriage; forced labor; debt bondage; deceptive recruiting for labor or services; and the worst forms of child labor and is visible in many global supply chains (ILO and Walk Free, 2017). Each of these terms is defined in treaties of the United Nations and the International Labour Organization.

Modern slavery is best understood as existing on a continuum of exploitation (Nolan and Boersma, 2019). Such an outlook recognises that people can be exposed to working conditions that gradually worsen, sometimes leading to slavery or slavery-like conditions. As Lewis et al (2015) argue, while some individuals “enter labour situations that from the outset feature highly adverse conditions of little or no pay, debt or threats, [others] enter work on the expectation or promise of decent pay and conditions but find themselves in increasingly constrained and deteriorating circumstances that close down avenues for exit.”

Modern slavery occurs in every region of the world in both developing and developed countries (ILO and Walk Free, 2017). Women are disproportionately affected (accounting for 71% of the estimated 40 million victims) and one in four victims of modern slavery are children (ILO and Walk Free, 2017). Forced labor is a form of modern slavery often considered most relevant to workplace exploitation in global supply chains. Forced labor is defined in ILO Convention No. 29 on forced labor and refers to work that people must perform against their will under the threat of punishment. Of the 25 million people estimated to be working as forced laborers, 16 million of these are working in the private economy and half of those are experiencing debt bondage (where individuals work to pay off a debt while losing control over working conditions and repayments) (ILO and Walk Free, 2017). Modern slavery is found in a range of sectors including (but not limited to) domestic work, manufacturing, construction, mining, agriculture and fishing. (Datta and Bales, 2013; Crane et al, 2019).

SUPPLY CHAIN RESPONSIBILITY

Globalisation has hastened a shift in the manner in which business is conducted – from largely being confined within the borders of individual states to hierarchal transnational companies, and, ultimately, to large transnational fragmented global supply chains (Mayer and Gereffi, 2010). Trade, production, investment, employment relations and labor itself have drastically changed with the growth of supply chains. The United Nations Conference on Trade and Development (2013) estimates that approximately 80% of international trade can now be linked to the global production networks of multinational enterprises. Increasingly, companies do not generally own or operate the end factories in which their goods are produced and they may contract with hundreds, sometimes thousands, of different suppliers annually. Such fragmentation is not a spontaneous process, “but rather a business strategy to facilitate success” (LeBaron 2014).

The supply chain is an area of potential commercial (including reputational) risk for companies. It is increasingly recognized that “one of the most significant and growing liabilities from which firms are attempting to distance themselves is that of forced labor” (LeBaron 2014). Evolving acceptance of a company’s responsibility to respect human rights as set out in the UN Guiding Principles on Business and Human Rights (Human Rights Council, 2011) is making

it more difficult for companies to disassociate themselves from human rights abuses, such as modern slavery, which business may be causing, contributing or directly linked to.

Crucially, companies that source through supply chains do not have responsibilities towards workers at suppliers and subcontractors in the same way as they do towards their own employees (Mares, 2018). The supply chain has become an intrinsic part of the lead firm's operations but is generally comprised of separate legal entities. Many of the business relationships present in a supply chain will lie beyond the formal legal bounds of the corporate enterprise. Even though sub-contractors, both authorized and unauthorized, may potentially be linked to those companies that are situated at the apex of the global supply chain, the terminology of the UN Guiding Principles on Business and Human Rights does not directly attribute legal liability to the lead company for the activities of its supplier. Further, while the corporate responsibility to respect human rights applies to every company along the supply chain, in practice corporate responses and interventions will vary based on factors such as risk assessment analysis and the potential leverage of a company to address the specific human rights issues (Human Rights Council, 2011).

REGULATING MODERN SLAVERY IN SUPPLY CHAINS

The application of human rights standards to global corporate operations has largely relied on self-regulation by business, alongside the coercive voice of civil society (Choudhury, 2018). The utility of these voluntary initiatives has not been so much their ability to act as a tool of legal accountability but rather, to engage with companies and enable them to better understand the contemporary responsibilities of business with respect to human rights. Writing in 2008, then United Nations (UN) Special Representative for Business and Human Rights, John Ruggie noted that “the root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences” (Human Rights Council, 2008).

The principal challenge is to ensure that the standards espoused in laws, codes or guidelines directed at business are consistent, comprehensive and implemented. It is clear not only that substandard working conditions are a global problem but that regulating and improving working conditions in global supply chains is a work in progress. Multiple motives (including reputation protection), pressure points (governments, media, trade unions, non-governmental organizations (NGOs), consumers, workers, investors) and internal leadership within some companies have influenced, and continue to influence, corporate approaches to improving compliance with human rights standards (Nolan and Boersma, 2019). What remains is disagreement about the most effective means of advancing respect for and compliance with international human rights and labour standards.

The relatively recent development of state-based legislative initiatives that focus on generating greater transparency in supply chains is starting to change this dynamic and hardening human rights requirements for business. What is less clear, is whether such disclosure and due diligence requirements can link transparency with accountability and generate substantive (not just procedural) human rights compliance.

Recent legislative efforts to address modern slavery in global supply chains have emanated from Australia (Modern Slavery Act, 2018), the United Kingdom (UK) (Modern Slavery Act,

2015) and California (Transparency in Supply Chains Act, 2010) and emphasize corporate disclosure as a means of combatting modern slavery (Mares, 2018, Nolan and Boersma, 2019). These laws impose reporting requirements on the lead firms in supply chains and are contributing to an evolving understanding of the actions that a company is expected to undertake with respect to the prevention of modern slavery.

Addressing modern slavery in global supply chains is the primary duty of states, but the fragmented nature of supply chains can make cross-border regulation challenging and business is increasingly being called on to play a part in reducing the incidence of slavery. These legislative measures impose corporate social reporting requirements that operate beyond national borders as a means of reducing modern slavery in global supply chains. The rationale behind these types of reporting requirements is that the reputational implications of forced disclosure will compel companies to undertake human rights focused examination of their supply chain practices and thus improve respect for human rights (Mares 2018). Modern slavery disclosure laws aim to harness the power of stakeholders, such as consumers, civil society, workers' representatives and investors, as regulators and enforcers of the law (Grabosky, 2017). However, while these laws harden the expectation that business will conduct itself responsibly, they are ultimately founded on a soft approach to enforcement which is essentially outsourced to the market (Grabosky, 2017).

This focus on using transparency as a mechanism to generate improved respect for human rights in supply chains earlier received prominence with the introduction of section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act, (2010). With this mandatory reporting provision, US policy makers put business on notice that companies need to be more transparent about their sourcing strategies and mandated corporate social disclosure as a means of achieving this. This law creates a reporting requirement for publicly traded companies in the US with products containing specific conflict minerals. The purpose of this provision is to provide greater transparency about how the trade in minerals is potentially fuelling and funding the armed struggle in the Democratic Republic of the Congo; functionally, it relies on the adverse reputational impact of such a disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions.¹

This mechanism of mandatory social disclosure was then applied in the modern slavery space. In 2010, California adopted the California Transparency in Supply Chains Act (CTSCA) (Civil Code Section 1714.43 (also known as Senate Bill 657 (Steinberg) (2009-10)) which came into effect in 2012. The CTSCA requires large retail and manufacturing firms to disclose efforts to eradicate slavery and human trafficking from their supply chains and is another example of mandated corporate social disclosure. The adoption of the UK's Modern Slavery Act in 2015 focused broader global attention on the use of legislative disclosure requirements to address the human rights impacts of business. Section 54 of the UK Modern Slavery Act requires specified commercial organizations which supply goods or services in the UK to disclose information about their efforts to address modern slavery in their supply chains. In 2018, Australia passed its own Modern Slavery Act which follows a similar model to the UK law. However Australia has benefitted from the lessons learned in the UK (UK Government, 2019) and its law has addressed some of the shortcomings of the UK Act by including reporting obligations for the federal government, mandatory reporting criteria and a government-funded online repository for statements. However, institutionalizing transparency is unlikely to automatically lead to improvements in corporate behavior (Sarfarty 2015). What is key, is ensuring that the laws encourage a move toward substantive compliance with human rights rather than simply cosmetic compliance (Krawiec 2003).

Other jurisdictions have adopted different approaches to addressing modern slavery in supply chains. The US has the Tariff Act of 1930 (s307 amended in 2016) which applies to all US importers and allows the government to apply a temporary withholding or conclusive ban of goods that are suspected to be the result of forced (or child) labour. In addition, the US Federal Acquisitions Regulations (subpart 22.17 amended in 2015) requires qualifying government contractors and subcontractors to certify that they have made efforts to ensure their supply chain is free from forced labour and human trafficking. Failure to comply may result in a termination of the procurement contract. The US Department of Labor issues a public list of products it believes are produced by forced and child labor.

Since 2004, Brazil has published a ‘dirty list’ disclosing companies who have engaged in illicit labour practices who are then banned from accessing any public financing (Ministry of Labor and Employment Decree No. 540/2004). The dirty list is a public register of companies found by governmental inspectors to have forced labor in their supply chains. Companies named on the list are monitored for two years and are also potentially subject to fines. The ‘dirty list’ is reinforced by a further governmental decree (Decree No. 1 150), which recommends that financial bodies refrain from granting financial assistance to companies on the list.

These laws adopt different tactics to address human rights abuses in supply chains but taken together are evidence of a change in regulatory strategy that reflects a growing consensus that corporate actors have a role to play in addressing the human rights impacts of business and that the state has a regulatory responsibility to prevent and redress those abuses. Modern slavery laws though currently limited in their design, do have the potential to harden responsible business conduct principles that have traditionally been cast in a soft voluntary format.

MANDATORY HUMAN RIGHTS DUE DILIGENCE – THE NEXT STEP?

Alongside these narrowly focused modern slavery disclosure laws some countries are working on or have developed broader supply chain governance laws that assess human rights risks more generally, not just those associated with modern slavery. These laws incorporate differentiated and varied enforcement frameworks. Two relevant examples are the ‘duty of vigilance’ law passed in France in 2017² and the Netherlands Child Labour Due Diligence Act adopted in 2019 (not yet in effect). Since 2010, at least 11 national or regional laws have been approved, or are under consideration, that require companies to report on their supply chain practices and incorporate a broader variety of enforcement mechanisms.³

The French Corporate Duty of Vigilance Law 2017 requires large French companies⁴ to identify and prevent adverse human rights (and environmental) impacts, including those resulting from their supply chains. Specifically, companies must implement, and report annually on, a ‘vigilance plan’ to prevent human rights abuses. The plan must assess the company’s human rights risks, as well as risks associated with its subsidiaries, subcontractors or suppliers with whom the company maintains an established business relationship. Once identified, companies are required to take appropriate action to mitigate risks or prevent serious violations, to create risk alert mechanisms in conjunction with trade unions and monitor and assess the efficiency of its measures. Interested parties may enforce non-compliance with the law through the courts.

The Netherlands has adopted the Child Labour Due Diligence Act that will require companies selling products or services to Dutch end-users to identify whether child labour is present in their supply chain and, if this is the case, to develop a plan of action to address it and issue a due diligence statement.

The French and Dutch laws provide for stronger enforcement measures than the Australian, UK and Californian modern slavery law. In France, a court may impose an injunction on companies to comply with the vigilance requirements (akin to a duty of care) and companies may potentially be held liable under a civil lawsuit where companies have failed to implement due diligence plans and harm has occurred that can be causally linked to that failure (BHRCC and ITUC, 2017). The Dutch law actively involves the regulator in the enforcement framework and provides for a process of due diligence implementation and the potential for fines to be imposed for noncompliance.

The European Union's 2014 Directive (2014/95/EU), requires companies with more than 500 employees to report on how they manage human rights risks, including modern slavery, in their supply chains. Although the EU Directive does not specifically refer to supply chains, the definition of risk contemplates business relationships that are likely to cause adverse impacts on human rights. Specifically, companies must provide a description of their relevant policies, their due diligence processes, the outcomes of those policies, principal human rights risks, how they are managed, and key performance indicators. The EU Directive is broader than the UK, California and Australian Acts in that it applies to all human rights impacts, not just modern slavery but like those laws, lacks a hard enforcement framework.

On 29 April 2020, the European Commissioner for Justice, announced that the European Council will introduce rules for mandatory corporate environmental and human rights due diligence in 2021 (BICL et al, 2020, Feldman et al, 2020). The announcement is the latest in a series of developments representing a rising tide of human rights and environmental due diligence obligations. The new EU regime will add to existing legal obligations and further codify existing soft law frameworks. It will also be relevant to legal actions for alleged human rights abuses, establishing the standard of conduct expected from companies. However, the enforcement framework remains as yet unclear. In addition, there are several other laws under consideration, including in Switzerland, Canada, Germany and Hong Kong, that focus on supply chain responsibility (BHRCC and ITUC, 2017).

ALIGNING PURPOSE AND PROFIT

Calls for companies to adopt a more purposeful approach to business including one that includes greater transparency and responsibility for issues such as modern slavery are growing. In 2019 the US Business Roundtable issued a Statement on the Purpose of a Corporation in which it acknowledged that companies must consider their impact on customers, employees, suppliers and the communities in which they operate. It also suggests a degree of leverage on the part of the lead firm to influence the conduct of the supplier to ensure fair working conditions (Mayer and Gereffi, 2010).

Also in 2019, Larry Fink, CEO of Black Rock, the largest asset management company in the world, called on business leaders to consider the purpose of their company. "Purpose is not a mere tagline or marketing campaign; it is a company's fundamental reason for being – what it does every day to create value for its stakeholders. Purpose is not the sole pursuit of profits but the animating force for achieving them. Profits are in no way inconsistent with purpose – in

fact, profits and purpose are inextricably linked. Profits are essential if a company is to effectively serve all of its stakeholders over time – not only shareholders, but also employees, customers, and communities. Similarly, when a company truly understands and expresses its purpose, it functions with the focus and strategic discipline that drive long-term profitability” (Fink, 2020). Fink argues that business should proactively address socio-economic issues.

Such public statements about the breadth, depth and interdependent nature of supply chains are now a more common occurrence and a far cry from the narrower perspective and ‘denial of responsibility’ approach of companies just a few decades earlier to human rights abuses in their supply chains (Ratner, 2001). However, to address modern slavery in a substantial rather than cosmetic way, it is necessary to establish a legal framework that requires (not requests) compliance and for business to adopt a purposeful mindset that is reflected in their business model and supply chain operations.

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¹ Section 1502 does impose penalties for not reporting or complying in good faith. Also, the information filed by companies is subject to s18 of the *Securities Exchange Act* 1934 which attaches liability for any false or misleading statements.

² LAW No 2017-399 of March 27, 2017 on the Duty of Vigilance of parent companies and instructing companies, JORF No 0074 of 28 March 2017, text No 1. (French Law)

³ Tariff Act of 1930, 19 USC § 1654 (US); Federal Acquisitions Regulation (FAR) 48 CFR 1, 22.17 (US), Child Labour Due Diligence Law 2019 (Netherlands); Modern Slavery Act 2015 (UK), s 54; Duty of Vigilance Law 2017 (France); *Dodd-Frank Wall Street Reform and Consumer Protection Act* 12 USC § 1502; Transparency in Supply Chains Act of 2010, *Cal Civil Code §1714.43*; Conflict Minerals Regulation 2021 (EU), Responsible Business Initiative (Switzerland), Modern Slavery Act 2018 (Cth); Modern Slavery Act 2018 (NSW).

⁴ The law applies to any company established in France with at least 5,000 employees within the company head office and its direct and indirect subsidiaries, whose head office is located on French territory, or that employs at least 10,000 employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory or abroad.