

NOTES & COMMENTS

IS INCORPORATION A LICENSE TO VIOLATE HUMAN RIGHTS WITH IMPUNITY? AS OF NOW, VIOLATIONS ARE IN VOGUE

by
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For decades, the international community has relied on corporations to take responsibility for the protection of human rights and manage accountability for violations of those rights. Yet countless human rights violations have ensued within the fashion industry as a result of multinational corporations conducting business within the current framework. This Comment looks at the human rights at stake if the international community stays its current course, offers insight into how the existing framework developed, questions the efficacy of this approach, and suggests a new framework for the international community to consider.

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INTRODUCTION

If a dictator rose to power and forced nearly 18,000 children to build an empire, would the international community respond?¹ What if a country’s leadership displaced and forced one million vulnerable people to produce goods?² Now, what if those same acts were at the behest of a large multinational corporation in the fashion industry? Intervention would be nearly inevitable if a government systematically carried out these harms. But somehow, incorporation seems to grant impunity. Fashion companies build empires at the hands of children and by way of forced labor, yet the international community has not intervened.

Multinational corporations (MNCs) today have an extraordinary amount of political and economic power, often matching and even surpassing that of nation-states.³ In the context of human rights, power is important: those who hold power

¹ In Mexico, garment manufacturing employs 17,826 children, according to recent estimates. INT’L LAB. AFFS. BUREAU, U.S. DEP’T OF LAB., 2020 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 27 (2020).

² Tragically, this is the case in China, as highlighted by the recent Uyghur Forced Labor Prevention Act submitted to the U.S. Congress. Press Release, White House, Statement by Press Secretary Jen Psaki on the Uyghur Forced Labor Prevention Act (Dec. 14, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/14/statement-by-press-secretary-jen-psaki-on-the-uyghur-forced-labor-prevention-act/>.

³ For instance, a recent study found that as much as 94% of deforestation in Brazil could be illegal—carried out with blatant disregard for Brazilian law. Press Release, World Wildlife Fund,

can protect rights, infringe upon them, or a combination thereof. Nation-states' constitutions often recognize this and structure government accordingly. *Jus cogens*⁴ norms also reflect this understanding of power. In fact, this understanding of the relationship between power and rights is part of why international law developed: to keep States' power in check and to protect human rights.

But States are no longer the only international players with the power to influence and secure rights.⁵ As of 2000, companies outnumber countries on the list of the top 100 economic entities in the world, evidencing a shift in primary international powerbrokers.⁶ Companies come to the tables of heads of States, wielding influence to impact major international decisions for the companies' benefit. But companies benefit from profits—not from securing human rights. As companies take seats at the table, shifting global power dynamics, weaker States “are unable to effectively play the role of primary agents of justice,” and strong MNCs often either seize upon States' inability to carry out justice or are otherwise “complicit in violation[s] of human rights.”⁷

In the early 2000s, John Ruggie developed the U.N. Guiding Principles on Business and Human Rights (UNGPs), also known as the Ruggie Principles, articulating that corporations have responsibilities regarding international human rights.⁸ This pronouncement was a step toward accountability for MNCs to abide by human rights norms. Endorsed by the U.N. Human Rights Council in June 2011,⁹ the UNGPs entrusted corporations with the responsibility to uphold those human rights guidelines and to self-regulate. In the years that followed, some corporations did so, motivated by a sense of duty or by provocation from tragedies such

New Study Finds 94% of Deforestation and Habitat Destruction in Brazil's Amazon and Cerrado Could be Illegal (May 17, 2021), <https://www.wwf.org.uk/press-release/illegal-deforestation-report-brazil>. It is largely motivated by demand for leather in the fashion industry and therefore driven by the MNCs that seek to meet that demand. *See infra* note 37. Thus, what happens in the Brazilian rainforest is not dictated by the Brazilian government; it is dictated by the MNCs that source their leather from there.

⁴ *Jus cogens* norms are those that are considered “so fundamental” that all States are bound by them, without exception. *Jus Cogens*, OXFORD REFERENCE (7th ed. 2014), <https://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-2143>.

⁵ Vojko Strahovnik, *Corporations as Agents of Global Justice*, in HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS 161, 167 (Jernej Letnar Čeranič & Tara Van Ho eds., 2015).

⁶ *See infra* note 154.

⁷ *Strahovnik, supra* note 5, at 166.

⁸ David Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, SUR INT'L J. ON HUM. RTS., June 2010, at 199, 199.

⁹ Surya Deva, *Multinationals, Human Rights and International Law: Time to Move Beyond the “State-Centric” Conception*, in HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS, *supra* note 5, at 27, 28.

as the collapse of Rena Plaza in Bangladesh.¹⁰ Yet the UNGPs are not binding, and they lack clarity regarding legal requirements for MNCs.¹¹ Therefore, despite the endorsement of the UNGPs and the resulting efforts made by some corporations, the complexity of the global economic system and the increasingly layered nature of the supply chain have rendered the UNGPs and other similar steps largely ineffective. As it stands today, MNCs often succumb to pressures from market demand, shareholders, and profit margins, and subsequently give little weight to the human rights-related responsibilities outlined in the UNGPs.

This Comment builds on prior scholarship by examining the current state of international human rights within the fashion industry and by proposing an international framework to address MNCs' violations of human rights norms. An increase in supply chain issues and consumer concerns, as well as recent hints of progress,¹² warrant an updated analysis and proposal. The global landscape has changed since John Ruggie developed the UNGPs in the early 2000s. Even since the United Nations endorsed the Ruggie principles in 2011, technology has transformed the fashion industry. Micro-trends¹³ and ultra-fast fashion¹⁴ put human rights at greater risk—excess supply, quick turnaround, and low prices come at the expense of the

¹⁰ This tragic event, discussed *infra* Part II.B., led to lawsuits against MNCs such as Walmart, The Children's Place, and J.C. Penney because each had their clothes made at factories in the unsafe building. Hillary Beaumont, *Three Years After a Factory Collapse Killed 1,130 Workers, This Brand Is Still Making Clothes in Bangladesh*, VICE (Apr. 22, 2016, 7:20 AM), <https://www.vice.com/en/article/mbnmxq/three-years-after-a-factory-collapse-killed-1130-workers-this-brand-is-still-making-clothes-in-bangladesh>. After the collapse, over 200 clothing companies signed an accord, agreeing to inspections and reports. *Id.* As this Comment will discuss, the efficacy of the accord is questionable.

¹¹ Steven R. Ratner, *Introduction to the Symposium on Soft and Hard Law on Business and Human Rights*, 114 AM. J. INT'L L. UNBOUND 165, 165 (2020).

¹² See Press Release, White House, *supra* note 2; Lavanga Wijekoon, Kate Bresner, Michael Congiu & Stefan Marculewicz, *Europe and Canada Seek to Mandate Human Rights Due Diligence and Transparency Obligations on Companies and Their Global Partners*, LITTLER (Oct. 28, 2021), <https://www.littler.com/publication-press/publication/europe-and-canada-seek-mandate-human-rights-due-diligence-and>.

¹³ Micro-trends are those that rise and fall quickly, which, in the fashion industry can mean within three to five years. Mariel Nelson, *Micro-Trends: The Acceleration of Fashion Cycles and Rise in Waste*, WORLDWIDE RESPONSIBLE ACCREDITED PROD. (May 17, 2021), <https://wrapcompliance.org/blog/micro-trends-the-acceleration-of-fashion-cycles-and-rise-in-waste/>. Macro-trends, on the other hand, might stick around for as many as ten years, such as flapper dresses in the 20s, bell-bottoms in the 70s, and shoulder pads in the 80s. *Id.*

¹⁴ Ultra-fast fashion churns out new fashion cycles in a matter of weeks. Rachel Monroe, *Ultra-Fast Fashion Is Eating the World*, ATLANTIC (Feb. 6, 2021), <https://www.theatlantic.com/magazine/archive/2021/03/ultra-fast-fashion-is-eating-the-world/617794/>. Sometimes, the timeline can even be a matter of days. In 2019, just hours after Kim Kardashian posted a photo of herself in a gold dress on social media, Misguided, a fashion company, shared a photo of a similar outfit on its Instagram and promised the dress would be available to buy in a matter of days. *Id.*

rights of the people who churn out the clothing in the latest trends. Though some companies have dedicated themselves to more ethical practices, others stay the course, and others seize upon the lack of regulation and make seemingly false claims about their human rights practices. Despite growing awareness of human rights abuses in the supply chain, international law surrounding human rights as they apply to corporations has not kept pace. This Comment analyzes international human rights in light of these shifts and offers a renewed proposal that merges bottom-up and top-down approaches to ending impunity for corporate human rights abuses around the world.

In Part I, this Comment explores some of the more shocking and perhaps lesser-considered human rights abuses at stake. In Part II, this Comment considers the path from the early 1900s to the early 2000s, focusing on two specific tragedies—the Triangle Shirtwaist Factory Fire and the Collapse of Rena Plaza—the corresponding policies that prevailed at the time, and the changes that resulted from those tragedies. In Part III, this Comment briefly addresses the globalization of production and, in Part IV, analyzes the problems with the currently applicable international human rights framework. Finally, in Part V, this Comment proposes a new framework modeled after one that has seen success in the United States. The new framework would utilize existing mechanisms to bring about widespread protection for human rights in the fashion industry worldwide.

I. THE RIGHTS AT STAKE

This Comment’s discussion of the rights at stake is not exhaustive. The human rights at stake are far too numerous for this Comment to cover. Instead, this Comment endeavors to explicitly address some of the more shocking violations of human rights by current labor practices that must not be left out of international agreements.

A. *Torture, Cruel, Inhuman, or Degrading Treatment or Punishment*

Though not explicitly in the UNGPs, the right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment” is included in the Universal Declaration of Human Rights (UDHR)¹⁵ and expounded upon in the Convention Against Torture (CAT).¹⁶ Still, support for this right is not globally unanimous. The United States, for example, frequently expresses and acts upon

¹⁵ “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, T.I.A.S. NO. 94-1120.1, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

reservations¹⁷ to obligations under the CAT,¹⁸ and is not alone in doing so.¹⁹ Perhaps the tentative support by the United States is because this right is traditionally thought of within the context of war prisoners—such as those held at Guantanamo Bay—and balanced against national security interests.

But wavering value for and protection of this right leaves room for state actors to carry out torture amidst the production of consumer goods and clothing. This is the reality of the supply chain in one of the world's biggest producers, China.²⁰ One owner of a clothing factory in Guangzhou explained, “it is well-known that factories illegally subcontract some of their work to Chinese prisons and various detention centers.”²¹ These manufacturers feel “they have no choice but to secretly outsource to gulags, because they cannot meet the global consumer demand for budget prices and the latest trends.”²² Research indicates “brands’ demands for lower prices, faster production, and fulfillment of unanticipated orders . . . compel factories to illegally subcontract work to places like labor camps.”²³ These camps provide free labor, but they also serve the government’s interest in “reforming prisoners”—and thus reap large bonuses as rewards—when prisoners admit guilt,²⁴ sign a guarantee that their

¹⁷ A reservation to a treaty is defined as “a declaration by a state made upon signing or ratifying a treaty that the state reserves the right not to abide by certain provisions of the treaty.” *What Are Reservations to Treaties and Where Can I Find Them?*, DAG HAMMARSKJÖLD LIBR., <https://ask.un.org/faq/139887> (July 20, 2022).

¹⁸ See *Status of Ratification: Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://indicators.ohchr.org/> (last visited Dec. 26, 2022) (select “Convention against Torture and Other Cruel, Inhuman” from “Select a treaty” drop-down menu; then select “United States” from “Select a country to view profile” list; then click “Declarations” tab).

¹⁹ See *id.* (select countries from “Select a country to view profile” list; then select “Declarations” tab in pop-up window).

²⁰ China is also home to one of the world’s largest fashion companies, SHEIN. Louise Matsakis, Meaghan Tobin & Wency Chen, *How Shein Beat Amazon at Its Own Game—And Reinvented Fast Fashion*, REST OF WORLD (Dec. 14, 2021), <https://restofworld.org/2021/how-shein-beat-amazon-and-reinvented-fast-fashion>. In June of 2020, SHEIN accounted for 28% of all fast fashion sales in the United States, which was almost as much as two fast fashion behemoths, H&M and Zara, combined. *Id.* SHEIN takes the “fast” in fast fashion to a new level, reportedly moving clothes from design to packaging in one week. Timo Kollbrunner, *Toiling Away for Shein: Looking Behind the Shiny Façade of the Chinese “Ultra-Fast Fashion” Giant*, PUB. EYE (Nov. 2021), <https://stories.publiceye.ch/en/shein/>.

²¹ AMELIA PANG, MADE IN CHINA: A PRISONER, AN SOS LETTER, AND THE HIDDEN COST OF AMERICA’S CHEAP GOODS 24 (2021).

²² *Id.* at 21.

²³ *Id.*

²⁴ This violates Article I of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession . . . when such pain or suffering

illicit political or religious ideas have changed, and demonstrate general compliance.²⁵ The bonuses are contingent on documented and significant changes in the prisoners' reformation, so when forced labor proves ineffective or inefficient, the camps resort to torture.²⁶

Practically, human rights violations in this industry might look like this: a fast fashion brand contracts with a Chinese factory, placing a large order for holiday-season clothes with a fast turnaround time. The factory, unable to meet the quantity and timeline requirements on its own, secretly subcontracts with a labor camp to save the contract with the fast fashion brand. One of the prisoners, held due to banned religious beliefs, begins work on the clothes on his tenth day of a hunger strike.²⁷ When his "reeducation" does not progress after one or two 16-hour days of work on the clothes, he is pulled from the production line and force-fed with a feeding tube. Then, the prisoner is placed back on the line to continue making clothing.²⁸ Torture and other cruel, inhuman, degrading treatment and punishment should have no place in supply chains.

B. *Child Labor*

Article 32 of the Convention on the Rights of the Child provides that "[p]arties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."²⁹ Though this right is near-universally recognized, it is regularly infringed upon within the fashion industry.

is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

CAT, *supra* note 16, art. 1.

²⁵ PANG, *supra* note 21, at 62. A survivor of one of the camps explained, "The state paid the labor camp ten thousand yuan [around \$1,458] a month for each Falun Gong practitioner they accepted to undergo ideological reform . . . We became goods in their trade." *Id.* (alterations in original).

²⁶ *Id.*

²⁷ This example is largely based on Sun Yi's experience as told in PANG, *supra* note 21. Sun's story caught national attention in 2013 when a Portland resident found an SOS letter within a package of Halloween decorations and reported it to the Oregonian. *See id.* at 20, 62; Rachel Stark, *Halloween Decorations Carry Haunting Message of Forced Labor*, OREGONIAN, https://www.oregonlive.com/happy-valley/2012/12/halloween_decorations_carry_ha.html (Dec. 22, 2019, 7:02 PM).

²⁸ PANG, *supra* note 21, at 24–25, 62.

²⁹ Convention on the Rights of the Child art. 32, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* International Labour Organization, Minimum Age Convention (No. 138), June 19, 1976; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, T.I.A.S. No. 13045, 2133 U.N.T.S. 37245 (universally ratified).

In Argentina and Azerbaijan, child labor is used to harvest cotton.³⁰ In Bangladesh, footwear, garments, leather, and textiles are produced with child labor.³¹ In India, some silk threads and fabrics sourced by spinning mills are produced using bonded child labor.³² In Ethiopia, hand-woven textiles are made by child labor and forced labor.³³ The same is true of garments in Argentina, India, and Vietnam.³⁴

Globally, the U.S. Department of Labor reports that 15 countries use child labor for cotton and 8 use child labor in the production of garments.³⁵ This count does not include the countries using child labor in the production of leather, textile, or other items in the fashion industry. Despite the prevalence and awareness of the use of child labor in the fashion industry, the International Labour Organization (ILO) reports that “[g]lobal progress against child labour has stalled since 2016.”³⁶

C. Labor Trafficking

The UDHR provides, “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”³⁷ This right has been reiterated in separate treaties, state constitutions, and the global fight against human trafficking. Forced labor is a *jus cogens* violation. Yet, “[d]uring our endless search for the newest trends for the lowest prices, we become complicit in the forced-labor industry.”³⁸ As noted above, Chinese manufacturers often feel they have no choice but to resort to utilizing forced labor.³⁹

Worldwide, according to the ILO, 24.9 million people are victims of forced labor, with 16 million of those exploited in the private sector.⁴⁰ The risk of forced

³⁰ INT’L LAB. AFFS. BUREAU, *supra* note 1, at 20 tbl.1.

³¹ *Id.*

³² KNOWTHECHAIN, 2018 APPAREL & FOOTWEAR BENCHMARK FINDINGS REPORT 13 (2018), https://knowthechain.org/wp-content/uploads/KTC_AF_2018.pdf.

³³ INT’L LAB. AFFS. BUREAU, *supra* note 1, at 21 tbl.1.

³⁴ *Id.* at 20, 22, 24 tbl.1.

³⁵ *Id.* at 25 fig.3.

³⁶ INT’L LAB. ORG. & U.N. CHILD.’S FUND, CHILD LABOUR: GLOBAL ESTIMATES 2020, TRENDS AND THE ROAD FORWARD 8, 12 (June 2021), <https://data.unicef.org/resources/child-labour-2020-global-estimates-trends-and-the-road-forward/>.

³⁷ G.A. Res. 217 (III) A, *supra* note 15, art. 4.

³⁸ PANG, *supra* note 21, at 21.

³⁹ *Id.*; *see also* text accompanying note 20.

⁴⁰ KNOWTHECHAIN, *supra* note 32, at 8. While these numbers encompass more than the fashion industry, they are relevant to the broader proposal of this Comment and are indicative of the prevalence of the violation of this right.

labor exists throughout the supply chain. Workers picking cotton,⁴¹ harvesting rubber,⁴² raising cattle,⁴³ producing leather, cultivating silk cocoons,⁴⁴ spinning yarn, or manufacturing clothing or shoes have all been found to be at risk of forced labor.⁴⁵ In India's Tamil Nadu region, yarn spinners are often promised a lump-sum payment at the end of their three- to six-year contract and are thus bound to their work.⁴⁶ In Brazil, forced labor is utilized for garment production.⁴⁷ Despite the international community's vehement stance against slavery, forced labor is prevalent today.

D. Sex Trafficking

The link between sex trafficking and the fashion industry may not be obvious, but it is stronger and more direct than commonly recognized. Understood as a "modern form of slavery," sex trafficking is a type of labor exploitation wherein individuals are physically, fraudulently, or coercively forced to perform commercial sex acts.⁴⁸ Prohibiting slavery is *ius cogens*, as illustrated by its inclusion in at least six U.N. protocols and agreements,⁴⁹ as well as each of the International Bill of Human

⁴¹ The U.S. Department of Labor and Verité have found forced labor in cotton picking in Uzbekistan, Kazakhstan, Tajikistan, Turkmenistan, Benin, Burkina Faso, China, and Pakistan. *Id.* at 13. The forced cotton picking is State-sanctioned in China, Turkmenistan, and Uzbekistan. *Id.*

⁴² In Myanmar, Liberia, and Côte d'Ivoire, migrant workers harvesting rubber on plantations have been found working without employment contracts while their employers maintained possession of their passports. *Id.*

⁴³ Workers on cattle ranches in Bolivia, Brazil, Niger, Paraguay, and South Sudan are at risk of forced labor. *Id.*

⁴⁴ In Uzbekistan, silk cocoon cultivation is conducted by forced labor. *Id.*

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 13.

⁴⁷ INT'L LAB. AFFS. BUREAU, *supra* note 1, at 20 tbl.1.

⁴⁸ *Human Trafficking: Modern Enslavement of Immigrant Women in the United States*, AM. C.L. UNION, <https://www.aclu.org/other/human-trafficking-modern-enslavement-immigrant-women-united-states> (last visited Dec. 26, 2022) (referencing Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7102(8)).

⁴⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319; International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 2 U.S.T. 1979, 92 U.N.T.S. 19; International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 415; Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271; G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000); *Id.* at annex III, Protocol Against

Rights documents.⁵⁰ Because “[t]he garment industry employs between one sixth and one seventh of all women” in the world⁵¹ and because the pay and conditions in the garment industry are, for some, untenable, “the apparel industry seeps uncomfortably quickly into larger issues of women’s job options and poverty, and raises serious questions about how we talk about and respond to the issue we now call human trafficking.”⁵²

One facet of the human-trafficking link is the connection between factory work and child marriage. Recently, for instance, police prevented the marriage of a 14-year-old girl in the Ningxia region of northwestern China.⁵³ The practice is reportedly common because parents from rural areas “are keen for their children to tie the knot before they go off to work in factory towns—a common fate for many.”⁵⁴ This means that work in factory towns, including work for fast-fashion companies, factors into parents’ decisions to exchange their daughters’ hands in marriage for money, potentially exposing them to further abuses.⁵⁵ It stands to reason that if factory conditions comported with human rights standards—living wages, reasonable hours, protection from discrimination and abuse, and safe workspaces—parents would no longer feel compelled to make this choice.

the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime; G.A. Res. 54/263, Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography (May 25, 2000).

⁵⁰ See INT’L HUM. RTS. CLINIC, WILLAMETTE U. COLL. OF L., MODERN SLAVERY IN OUR MIDST: A HUMAN RIGHTS REPORT ON ENDING HUMAN TRAFFICKING IN OREGON 9–10 n.28 (June 2010), <https://willamette.edu/law/pdf/hrc/trafficking-report.pdf>.

⁵¹ ANNE ELIZABETH MOORE, THREADBARE: CLOTHES, SEX & TRAFFICKING 10 (2016).

⁵² *Id.* (“[T]he leakage oozes further: the garment industry plays a significant but complicated role in how we define and legislate sex work—around the world and here in the U.S. All told, the apparel industry has a much stronger hold over women’s economic and migratory freedoms worldwide than we have so far been able to comprehend.”).

⁵³ Cheryl Ho, *Police in China Send Girl, 14, Back to Parents Who Allegedly Tried to Sell Her into Marriage for \$40,000*, CNN, <https://www.cnn.com/2021/12/10/asia/china-teen-bride-intl-hnk/index.html> (Dec. 10, 2021, 1:34 AM). Under Chinese law, women under 20 years of age are not permitted to marry. Marriage Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 10, 1980, rev’d Apr. 28, 2001, effective Jan. 1, 1981), art. 6, *translated in Marriage Law of the People’s Republic of China*, CONG.-EXEC. COMM’N ON CHINA, <https://www.cecc.gov/resources/legal-provisions/marriage-law-of-the-peoples-republic-of-china-amended> (last visited Dec. 26, 2022); see also Susan Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INT’L L.J. 731, 757–58 (2009) (explaining the development of family planning policies in China as it relates to human trafficking).

⁵⁴ Ho, *supra* note 53.

⁵⁵ “Trafficking begins with a promise that fulfills a need.” Kathleen A. McKee & Lynne Marie Kohm, *Examining the Associations Between Sustainable Development Population Policies and Human Trafficking*, 23 MICH. ST. INT’L L. REV. 1, 19 (2014).

Another interesting link between sex trafficking and the clothing industry comes by way of non-profit organizations that seek to address sex trafficking.⁵⁶ One way that some try to do so is by providing alternative means for work, which sometimes means garment work.⁵⁷ Though the work may come with other benefits like childcare, medical care, and safe conditions, the pay may be less than traditional factories or even less than the living wage.⁵⁸ On a societal level, this normalizes the low pay for garment work,⁵⁹ which perpetuates the social and economic conditions that are ripe for trafficking.⁶⁰

E. Discrimination Against Women

The UDHR provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”⁶¹ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defines discrimination against women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶²

⁵⁶ This Comment does not dispute that non-profit organizations seeking to address trafficking have good intentions and benefit individuals and communities. It only seeks to note a connection that presented itself during the course of research. It is likely that many organizations have contemplated and addressed this issue, and that many other organizations would do so if it is necessary. Further investigation and analysis are beyond the scope of this Comment.

⁵⁷ MOORE, *supra* note 51, at 94–100.

⁵⁸ *Id.* at 100.

⁵⁹ *Id.* at 102. Moore also posits that this practice can even normalize the labor practices that are typical in the clothing industry. *Id.*

⁶⁰ When women have more opportunities for financial stability, they are “less likely to be lured into trafficking schemes predicated on false promises of escape from poverty and placement in lucrative jobs.” McKee & Kohm, *supra* note 55, at 30.

⁶¹ G.A. Res. 217 (III) A, *supra* note 15, art. 7. In addition, the Convention on the Elimination of All Forms of Discrimination against Women, Part III, Article 11 provides that “[p]arties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights,” including “[t]he right to equal remuneration.” Convention on the Elimination of All Forms of Discrimination Against Women art. 11, Dec. 18, 1979, 1249 U.N.T.S. I-20378 [hereinafter CEDAW].

⁶² CEDAW, *supra* note 61, art. 1.

Yet discrimination against women is one of the most rampant and widespread human rights abuses in the fashion industry.⁶³ Because approximately one out of every six or seven women worldwide work in the industry, the impact of that abuse spreads far and wide.⁶⁴ The women in the industry endure disparate pay⁶⁵ and disproportionate amounts of sexual harassment and abuse in the workplace.⁶⁶

F. *Migrant Workers*

Migrant workers represent a disproportionate percentage of those within the clothing industry and thus disproportionately face human rights abuses therein. According to one researcher, “in the production departments [in China] there are only migrant workers.”⁶⁷ These migrant workers seek long hours to earn as much money as possible before returning to their homes.⁶⁸ In Jordan, migrant workers comprise as much as 77% of the workforce in the clothing industry, and in Mauritius, migrant workers comprise up to 44% of the workers in the industry.⁶⁹ Migrant workers are even more vulnerable to exploitation and conditions that violate human rights law because they frequently do not know the language, cultural norms, or rights available to them in the regions or countries where they travel for work.⁷⁰ Upon auditing suppliers who employ migrant workers, one company discovered that 82% of those suppliers withheld the passports of the workers and 86% of the suppliers utilized

⁶³ JAN-CHRISTIAN NIEBANK, GERMAN INST. FOR HUM. RTS., BRINGING HUMAN RIGHTS INTO FASHION: ISSUES, CHALLENGES AND UNDERUSED POTENTIALS IN THE TRANSNATIONAL GARMENT INDUSTRY 9 (Alper Baysan, Alison Borrowman & Anna Würth eds., 2018).

⁶⁴ MOORE, *supra* note 51, at 10.

⁶⁵ Some go so far as to say the garment industry “is probably the single-most responsible entity for the global gender wage gap.” *Id.* at 10. According to a recent ILO report, though estimates differ somewhat based on whether hourly wages or monthly wages are considered, on average, men are paid approximately 20% more than women. PATRICK BELSER, ROSALIA VAZQUEZ-ALVAREZ & DING XU, INT’L LABOUR ORG., GLOBAL WAGE REPORT 2018/19: WHAT LIES BEHIND GENDER PAY GAPS 23 (2018).

⁶⁶ KNOWTHECHAIN, *supra* note 32, at 9. One veteran in the industry explained, “I have seen it. I was in India, for ten years, every 6–8 weeks. . . . [The workers] really have a terrible life. You know, if men would be working in the textile industry, on the sewing machines, you’d go broke tomorrow. The girls have stamina.” MOORE, *supra* note 51, at 64 (quoting Johann Perzi, who has been in men’s fashion for 52 years, 11 of which were spent at a major Austrian company, Kleider Bauer) (alteration in original). He added, “I worked it out once, [the workers earn] about 30 cents an hour.” *Id.*

⁶⁷ Kollbrunner, *supra* note 20.

⁶⁸ *Id.* Workers interviewed by this researcher indicated they were paid per item of clothing at a rate dependent on the difficulty of the item. *Id.*

⁶⁹ KNOWTHECHAIN, *supra* note 32, at 9.

⁷⁰ *Id.* at 10.

compulsory savings, deducting up to 30% of each worker's salary as "runaway insurance," unavailable to the worker until they return to their home country.⁷¹

The human rights of migrant workers must be protected. Unfortunately, this is not widely accepted. Though a related convention, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPMW), entered into force in 2003 with 57 parties and 39 signatories, major world powers such as the United States, China, and members of the European Union did not sign it.⁷² The lack of commitment to the CPMW leaves migrant workers vulnerable to continued human rights abuses in the fashion industry.

II. ROOTS OF IMPUNITY

Striking the perfect balance between the rights of companies and individuals has been contentious for lawmakers and courts for a century, if not more. This globalized issue is best understood within the context of history. This Section includes key moments that have situated the fashion industry within its current human rights conundrum.

A. "Laissez Faire" Economics and the Triangle Shirtwaist Factory Fire

In the United States, in the early years of the 20th century, the Supreme Court opted for a more hands-off approach in a closely decided case,⁷³ setting a precedent that controlled until the late 1930s.⁷⁴ *Lochner v. New York* was decided in the interest of protecting the "right to purchase or sell labor" and declared unconstitutional a law that set a maximum number of hours that bakers could work.⁷⁵ In *Lochner's*

⁷¹ *Id.* at 10–11, 11 n.20. Sometimes employers pull from the compulsory savings accounts to purchase workers' airfare. *Id.* at 11 n.20.

⁷² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. I-39481.

⁷³ *Lochner v. New York*, 198 U.S. 45 (1905). The case was decided 5–4 with strong dissents. Justice John Harlan emphasized that the work conditions led to serious medical problems and premature deaths. *Id.* at 71 (Harlan, J., dissenting). Justice Oliver Wendell Holmes rejected the majority's use of the Constitution to protect a laissez-faire approach to the economy. *Id.* at 75 (Holmes, J., dissenting).

⁷⁴ The case was then overturned and became a symbol for judicial overstepping. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 8.2.3, at 653 (5th ed. 2015).

⁷⁵ *Lochner*, 198 U.S. at 45. *But see id.* at 75 (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.").

wake, many minimum wage laws were also declared unconstitutional.⁷⁶ Labor protections gave way to the freedom to contract.

In the midst of this environment of loosened protections and laissez-faire capitalism, the Triangle Shirtwaist Factory in New York City caught fire.⁷⁷ The majority of the Triangle Company workers were immigrant women, and some of the workers were as young as 15.⁷⁸ They worked 13-hour shifts⁷⁹ in the “fireproof”⁸⁰ Asch Building, cutting and sewing “cheek by jowl,” surrounded by clippings of flammable fabric, among other flammable products and chemicals.⁸¹ The building was home to several factories but had “few working bathrooms, faulty ventilation, . . . outmoded heating and cooling systems[,]” poorly lit and dangerous stairwells, no overhead sprinklers, and just one insufficient fire escape.⁸² With just a spark, the place went up in flames.⁸³ As the fire burned, workers attempted to flee but found

⁷⁶ *E.g.*, *Adkins v. Child. ’s Hosp.*, 261 U.S. 525, 553, 559 (1923) (declaring unconstitutional a law that set a minimum wage law for women, pointing to “the great . . . changes which have taken place . . . in the contractual, political and civil status of women” as support for the determination that the law served no valid purpose); *Morhead v. New York ex rel. Tipaldo*, 298 U.S. 918, 923, 926 (1936) (reaffirming *Adkins* and declaring unconstitutional a state law that prescribed a minimum wage for women).

⁷⁷ Symposium, *Conscious Couture: How U.S. Companies Are Addressing Problems in Overseas Garment Factories*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 573, 579 (2016) [hereinafter *Conscious Couture*]. Just the day before the fire, the New York State Court of Appeals had struck down a new workers compensation law as unconstitutional. William Henning, Jr., *Triangle’s Victims Left Loved Ones Behind—And Quite a Legacy*, in N.Y. COMM. FOR OCCUPATIONAL HEALTH & SAFETY, DON’T MOURN—ORGANIZE: LESSONS FROM THE TRIANGLE SHIRTWAIST FACTORY FIRE 3, 3 (N.Y. Comm. for Occupational Health & Safety ed., 2011) (citing *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 439, 448 (N.Y. 1911)).

⁷⁸ Howard Markel, *How the Triangle Shirtwaist Factory Fire Transformed Labor Laws and Protected Workers’ Health*, PBS NEWSHOUR (Mar. 31, 2021, 8:50 PM), <https://www.pbs.org/newshour/nation/how-the-triangle-shirtwaist-factory-fire-transformed-labor-laws-and-protected-workers-health>.

⁷⁹ *Id.*

⁸⁰ *Id.* Interestingly, the owners of the factory “had a suspicious history with fires.” *The Fire that Ignited Change—The Triangle Shirtwaist Factory*, WASH. STATE DEP’T OF LAB. & INDUS. (July 19, 2019), <https://www.lni.wa.gov/agency/blog/articles/the-fire-that-ignited-change-the-triangle-shirtwaist-factory>.

⁸¹ Markel, *supra* note 78.

⁸² *Id.* The fire escape was “neither durable nor big enough to accommodate all of the people working [there] in the event of a fire.” *Id.* The managers reportedly refused to install fire-safety related mechanisms such as sprinkler systems or fire alarms. *The Fire that Ignited Change—The Triangle Shirtwaist Factory*, *supra* note 80.

⁸³ Markel, *supra* note 78.

the elevator was stuck,⁸⁴ doors were locked,⁸⁵ and the only fire escape was broken; some opted to jump from windows rather than await the impending flames or suffocating smoke.⁸⁶ Despite their role in the tragedy, when the owners were tried in a court of law, they were not convicted.⁸⁷

The tragedy led to activism that shaped labor policy in the United States. “The public outcry over what was clearly a preventable tragedy brought a renewed sense of urgency to the labor movement and to other groups working to improve women’s and immigrants’ rights in the workplace.”⁸⁸ By 1912, New York’s labor protection laws were “among the most progressive in the nation.”⁸⁹ By the mid-1930s, the nation was ready to abandon *Lochner* and follow New York’s example. In the wake of the Great Depression, in the face of unemployment and “incredibly” low wages, “employees had no realistic chance of bargaining in the workplace.”⁹⁰ The idea of the “legal ‘freedom’ of contract . . . came increasingly to be seen as an illusion” and positive action by the government to balance power and protect rights became more widely accepted.⁹¹ Protections were incorporated into federal law between 1933 and 1939.⁹² “Once a dirty and unsafe place, filled with dangerous machines and small

⁸⁴ *Id.* The elevator broke after just four loads of 12 workers. *The Fire that Ignited Change—The Triangle Shirtwaist Factory*, *supra* note 80.

⁸⁵ The owner reportedly locked them so the workers would not “rob him blind.” N.Y. State Dep’t of Lab. & Workers’ Comp. Bd., Statement, *NYS Department of Labor & Workers’ Compensation Board Honor the Legacy of the Triangle Shirtwaist Fire*, in DON’T MOURN—ORGANIZE: LESSONS FROM THE TRIANGLE SHIRTWAIST FACTORY FIRE, *supra* note 77, at 10.

⁸⁶ Proclamation No. 8639, 60 Fed. Reg. 17,327, 17,327 (Mar. 29, 2011).

⁸⁷ Joel Shufro, *Without Unions, We Would Have Many More Triangle Fires*, in DON’T MOURN—ORGANIZE: LESSONS FROM THE TRIANGLE SHIRTWAIST FACTORY FIRE, *supra* note 77, at 36.

⁸⁸ *The Triangle Shirtwaist Factory Fire Account*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, <https://www.osha.gov/aboutosha/40-years/trianglefactoryfireaccount> (last visited Dec. 26, 2022).

⁸⁹ Markel, *supra* note 78. Other states followed, setting standards for sprinkler systems, stairwells, and doors that open outward. See *The Fire that Ignited Change—The Triangle Shirtwaist Factory*, *supra* note 80.

⁹⁰ CHEMERINSKY, *supra* note 74, § 8.2.3, at 649.

⁹¹ *Id.* (internal quote omitted).

⁹² See Markel, *supra* note 78. The woman who would become President Franklin D. Roosevelt’s secretary of labor and initiate many of the protections that exist today, Frances Perkins, had been having tea with a friend in Lower Manhattan when the fire occurred and what she witnessed impacted her future work. Hilda L. Solis, Opinion, *What the Triangle Shirtwaist Fire Means for Workers Now*, WASH. POST (Mar. 18, 2011), https://www.washingtonpost.com/opinions/what-the-triangle-shirtwaist-fire-means-for-workers-now/2011/03/15/ABVAFIs_story.html.

children, American factories and offices are now far safer than they once were only a century ago.”⁹³

B. The Guiding Principles and Rena Plaza

On the international stage, in the early years of the 21st century, the United Nations opted for a more non-interventionist approach to the interface between corporations and international human rights law. Though there had been momentum in the international community for accountability via the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (“Norms”), international companies pushed back.⁹⁴ The Norms did not pass a U.N. vote.⁹⁵ Instead, in 2005, the U.N. Human Rights Council asked John Ruggie to investigate issues surrounding businesses and human rights.⁹⁶ Three years later, he made his proposal public, which became the “Guiding Principles on Business and Human Rights” (“Guiding Principles”), endorsed by the U.N. Human Rights Council in June 2011.⁹⁷ The Guiding Principles instructed that companies have a responsibility to respect human rights obligations rather than a duty to respect those rights.⁹⁸ Ruggie summed it up by saying, “the structure of current international law is such that human rights duties for the most part are imposed on states, not on companies directly.”⁹⁹

In the midst of this environment of loosened responsibilities and laissez-faire capitalism, factories continue to repeat the story of the Triangle Shirtwaist Factory Fire, but so far, without the triumphant latter chapters. Conditions are often unsafe,

⁹³ Markel, *supra* note 78. This is not to say that the United States is completely safe for workers. In fact, as recently as 2020, about 91 workers in the United States died per week. See News Release, Bureau of Labor Statistics, Census of Fatal Occupational Injuries Summary, 2020, (Dec. 16, 2021). As former U.S. Secretary of Labor Hilda L. Solis explained, over 4,340 workers were killed on the job in 2010, and over 3.3 million were seriously injured. Solis, *supra* note 92. Sweatshops still exist in the United States, too. *Id.*

⁹⁴ Bilchitz, *supra* note 8, at 199, 201.

⁹⁵ *Id.* at 199. This process repeated itself in 2017, when negotiations on the U.N. Binding Treaty on Human Rights and Transnational Corporations failed after negotiations in the Hague. See Rep. on the Third Sess. of the Open-Ended Intergovernmental Working Grp. on Transnat’l Corp. and Other Bus. Enter. with Respect to Hum. Rts., at 6–8, U.N. Doc. A/HRC/37/67 (2018).

⁹⁶ Bilchitz, *supra* note 8, at 201.

⁹⁷ *Id.* at 199; U.N. Hum. Rts. Off. of the High Comm’r, Guiding Principles on Business and Human Rights, HR/PUB/11/04 (2011); Human Rights Council Res. 17/4, A/HRC/RES/17/4 (June 16, 2011).

⁹⁸ Deva, *supra* note 9, at 28 (quotation omitted).

⁹⁹ JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 39–47 (2013).

and company owners continue to act with impunity in shirking human rights responsibilities. In 2010, a fire in Bangladesh led to the deaths of 28 garment workers.¹⁰⁰ Two or more of the six doors were locked.¹⁰¹ In 2012, in the Tazreen Factory, a fire led to the deaths of 112 workers, many of whom jumped from buildings to avoid being burned—much like the workers in the Triangle Shirtwaist Factory Fire.¹⁰²

More widely known, the collapse of Rana Plaza in Bangladesh in 2013 caused over 1,100 deaths.¹⁰³ Rana Plaza, like the Asch Building, was home to several factories.¹⁰⁴ Most of the victims were young women.¹⁰⁵ Also, like the Triangle Fire, this disaster was the culmination of several decisions disregarding workers' safety: the top floors had been built without permits, and the ground underneath the building was unstable.¹⁰⁶ Regardless, two of the factories in the building had recently passed audits.¹⁰⁷ Also, similar to the Triangle Fire, the tragedy led to activism, but this time the activism was worldwide, and the pressure focused not only on the national government but also on the companies contracting with the factories.¹⁰⁸ The Bangladeshi government began making changes to improve factory conditions, and coalitions of U.S. and European companies formed, changing the standards within factories in direct relationship with those companies.¹⁰⁹

But the world has yet to see the kind of widespread change that took place after the Triangle Shirtwaist Factory Fire. There, changes were cemented into federal law during the New Deal—two decades after the fire. It is now almost a decade after the collapse of Rana Plaza, yet associated human rights are still in grave danger. Because production is a global endeavor, States need to set international policy.

III. THE GLOBALIZATION OF PRODUCTION

To understand the scale of the problem and to adequately address proposed solutions, it is important to understand how the fashion industry evolved from consisting of several domestic industries to, essentially, only one global industry. The

¹⁰⁰ Garrett Brown, *The More Things Change . . .*, in DON'T MOURN—ORGANIZE: LESSONS FROM THE TRIANGLE SHIRTWAIST FACTORY FIRE, *supra* note 77, at 28.

¹⁰¹ *Id.*

¹⁰² Symposium, *Conscious Couture*, *supra* note 77, at 580.

¹⁰³ *Id.* at 579.

¹⁰⁴ *Id.* at 595.

¹⁰⁵ PBS NewsHour, *Are Your Clothes Made in Safer Factories After the 2013 Bangladesh Factory Disaster?*, YOUTUBE, at 0:28–30 (Apr. 23, 2018), <https://youtu.be/vB3lOyyBfOU>.

¹⁰⁶ *Id.* at 0:38–43.

¹⁰⁷ PANG, *supra* note 21, at 82.

¹⁰⁸ PBS Newshour, *supra* note 105, at 1:35–45.

¹⁰⁹ *Id.* at 2:18–3:18.

evolution has consisted of radical changes in the demand, supply, and production for the fashion industry around the world.

Because the demand of the United States greatly impacts the industry as a whole, consider the changes in demand and production in the country over the last century. In 1901, on average, 14.0% of a family's total expenditures went toward clothing.¹¹⁰ In 1972–73 average clothing expenditures for a similar family dropped to 7.8% of the family's total expenditures.¹¹¹ By 2002–03, that percentage dropped to 4.2% (\$1,694)—just over a quarter of what it had been at the beginning of the century.¹¹² Yet, in the same timeframe, production became more complex and geographically distant from consumers. In 1960 and the years before, 95% of clothing in the United States was made in the United States.¹¹³ But by 2013, just 2–3% of clothing in the United States was made domestically.¹¹⁴

One contributor to this significant shift was the Multi-Fibre Agreement (MFA). Interestingly enough, the United States raised the idea at the General Agreement on Tariffs and Trade in 1959 due to pressure from the domestic textile lobby's concerns that free trade spelled trouble for the future of domestic textile production.¹¹⁵ The protectionist concerns led to the Short-Term Arrangement on cotton articles in 1961, the Long-Term Arrangement in 1962, and eventually, the MFA in 1973, which expanded to cover a wider swath of textiles.¹¹⁶ Through the MFA, developed nations gave developing nations order quotas, enabling the latter to enter the garment industry.¹¹⁷ This incentivized those nations to get into the clothing production business and compete to do so at lower costs,¹¹⁸ which whet American and global appetites for cheaper clothing. As the MFA phased out, the infrastructure remained in place, and the global demand for cheaper clothing was cemented.¹¹⁹ In

¹¹⁰ ELAINE L. CHAO, U.S. DEP'T OF LAB. & KATHLEEN P. UTGOFF, U.S. BUREAU OF LAB. STAT., Rep. No. 991, 100 YEARS OF U.S. CONSUMER SPENDING: DATA FOR THE NATION, NEW YORK CITY, AND BOSTON 3 (May 2006).

¹¹¹ *Id.* at 34.

¹¹² *Id.* at 58.

¹¹³ Symposium, *Conscious Couture*, *supra* note 77, at 576.

¹¹⁴ *Id.*

¹¹⁵ Mayumi Murayama, *Globalisation and Female Employment in Bangladesh: Readymade Garment Workers in Post-MFA Era*, in INST. OF DEVELOPING ECONS. JAPAN EXTERNAL TRADE ORG., EMPLOYMENT IN READYMADE GARMENT INDUSTRY IN POST-MFA ERA: THE CASES OF INDIA, BANGLADESH AND SRI LANKA 53, 57 (Mayumi Maruyama ed., Mar. 2006).

¹¹⁶ *Id.*

¹¹⁷ MOORE, *supra* note 51, at 17.

¹¹⁸ See Marcelo Raffaelli, *Some Considerations on the Multi-Fibre Arrangement: Past, Present, and Future*, in MANAGING RESTRUCTURING IN THE TEXTILE AND GARMENT SUBSECTOR: EXAMPLES FROM ASIA 59, 60 (Saha Dhevan Meyanathan ed., 1994).

¹¹⁹ Stacey Frederick & Cornelia Staritz, *Developments in the Global Apparel Industry After the MFA Phaseout*, in SEWING SUCCESS?: EMPLOYMENT, WAGES, AND POVERTY FOLLOWING THE

the years that followed, prices fell further as quicker and more flexible production became key to securing contracts.¹²⁰ Developing countries' economies became dependent on the earnings generated by the garment industry, thus disincentivizing the prioritization of enforcing human rights standards that might raise prices or jeopardize relationships with foreign MNCs.¹²¹ As globalization progressed, consumers, national economies, MNCs, and factories became hooked on this post-MFA mode of operation.

IV. THE PROBLEMS WITH THE CURRENT FRAMEWORK

Under the existing framework, corporations have responsibilities, and States that are signatories to the implicated treaties have the duty to protect the rights of their citizens. The world has witnessed several attempted solutions, and attention on the human rights abuses in the fashion industry has waxed and waned.

In this framework, companies act in compliance with health, safety, and minimum wage laws—or human rights responsibilities, norms, and laws—“for one of three reasons: 1) economic—it costs them less to comply than to risk fines and penalties; 2) social—they don't want to be unfavorably compared to others in their industry; and 3) normative—they believe it is the right thing to do.”¹²² Currently, the first, economic motivation, only happens in countries with robust enforcement mechanisms. The second, social motivation, rarely provokes compliance with international human rights law because the norm in the industry is to turn a blind eye to abuse, and consumers are thousands of miles removed from the workers and human rights abuses. The third, normative motivation, is exemplified by companies such as Patagonia¹²³ and is increasingly gaining popularity as consumers become

END OF THE MULTI-FIBRE ARRANGEMENT, 56, 58 (Gladys Lopez-Acevedo & Raymond Robertson eds., 2012).

¹²⁰ *Id.*

¹²¹ See, e.g., Laura A. Carlson & Vera Bitsch, *Social Sustainability in the Ready-Made-Garment Sector in Bangladesh: An Institutional Approach to Supply Chains*, 21 INT'L FOOD & AGRIBUSINESS MGMT. REV. (SPECIAL ISSUE) 269, 270 (2018); Stacey Frederick & Cornelia Staritz, *Pakistan, in SEWING SUCCESS?: EMPLOYMENT, WAGES, AND POVERTY FOLLOWING THE END OF THE MULTI-FIBRE ARRANGEMENT*, *supra* note 119, at 433–34 (“In the context of heightened competition post-MFA, the Pakistani government relaxed labor legislation to reduce labor costs.” Workdays were extended from 8 to 12 hours, implementation of the minimum wage is lacking—resulting in pay that does not meet the national minimum, and “annual wage increments are often ignored.” The ILO also found short-term contracts are used widely to skirt costs employers are otherwise be required to pay such as maternity leave and transportation.)

¹²² Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward*, 2017 U. CHI. LEGAL F. 143, 144 (2017).

¹²³ *Social Responsibility*, PATAGONIA, <https://www.patagonia.com/social-responsibility/> (last visited Dec. 26, 2022). Patagonia holds itself and its suppliers to “the highest environmental and

more conscious of the impact of their purchasing power.¹²⁴ Yet the tides of change move slowly, and for every Patagonia, there is a SHEIN.

Competition, subcontracting,¹²⁵ thinning profit margins,¹²⁶ globalization, and now the pandemic have amounted to a perfect storm for human rights violations in the fashion industry. To keep up with competitors, brands push for faster turnaround and devise ways to offer more for less.¹²⁷ Instead of owning their own production facilities, most fashion companies contract out to factories with cheap labor.¹²⁸ Because the MNCs have more bargaining power in the contract relationship, they can “squeeze[e] suppliers to offer more for less, and can shift sourcing locations at will.”¹²⁹ These pressures leave factory owners with little wiggle room in their budgets to make safety improvements in factories, increase wages for their workers, or comport with other human rights standards.¹³⁰ In the midst of the COVID-19 pandemic in 2020, “[s]cores of clothing brands and retailers . . . canceled orders without assuming financial responsibility even when workers had finished making their products.”¹³¹

A study by the Worker Rights Consortium found that 31 export garment factories in nine countries fired a total of 37,637 workers without paying the full severance pay they legally earned—\$39.8 million collectively.¹³² But such avoidance of

social standards in the industry” by utilizing the available industry tools and standards and creating more rigorous standards when necessary. *Id.* The company has also developed programs to investigate its impact throughout the supply chain. *Id.* Yet, Patagonia has come under fire, accused of complicity in the exploitation of Uighur Muslim workers in China. Julian Kossoff, ‘*Virtually the Entire Apparel Industry*’—From Gap to H&M to Adidas—Is Profiting from Forced Uighur Labor, *Activists Say*, BUS. INSIDER (July 23, 2020, 8:35 AM), <https://www.businessinsider.com/uighur-forced-labor-global-brands-profit-ed-activists-letter-2020-7>.

¹²⁴ See, e.g., Fine, *supra* note 122, at 144.

¹²⁵ See Kollbrunner, *supra* note 20. Companies seem prone to shirking responsibility, ever pointing the finger to the next entity in the supply chain. When asked about non-compliance with Chinese labor laws in a factory in Foshan China, a spokesperson from Prologis, the American logistics company that owns the warehouse, the spokesperson responded, “Our customers are responsible for the operations of their business within their leased premises on our property. With respect to the concern you raised, we have no knowledge of non-compliance.” *Id.*

¹²⁶ Fine, *supra* note 122, at 144.

¹²⁷ KNOWTHECHAIN, *supra* note 32, at 8.

¹²⁸ Elizabeth Paton, *Garment Workers Who Lost Jobs in Pandemic Still Wait for Severance Pay*, N.Y. TIMES, <https://www.nytimes.com/2021/04/06/fashion/garment-workers-severance-pay-theft.html> (Apr. 13, 2021).

¹²⁹ *Id.*

¹³⁰ See *id.*

¹³¹ *Brands Abandon Asia Workers in Pandemic: Companies Canceling Orders, Adding to Job Loss, Unpaid Wages*, HUM. RTS. WATCH (Apr. 1, 2020, 2:00 AM), <https://www.hrw.org/news/2020/04/01/brands-abandon-asia-workers-pandemic>.

¹³² WORKERS RIGHTS CONSORTIUM, FIRED, THEN ROBBED: FASHION BRANDS’ COMPLICITY IN WAGE THEFT DURING COVID-19, at 12 (2021), <https://www.workersrights.org/>

responsibility is hardly new; manufacturers in various countries have reported that few brands ever assume business risks when ordering items.¹³³

There is growing global awareness that the current framework does not advance human rights, and the time is ripe for a new international legal framework to address these human rights abuses. Earlier this year, the European Union, recognizing that the current framework has failed to ensure human rights, announced mandatory due diligence legislation.¹³⁴ Companies will be required to identify and confirm suppliers' and subcontractors' business practices¹³⁵ and to prevent and mitigate adverse impacts.¹³⁶ This legislation demonstrates that the consensus for change is growing. It is time for a binding international agreement across the world.

V. A NEW FRAMEWORK

The long-held stance has been that international law is between nation-states, and individual nation-states are responsible for protecting people within their borders from human rights violations. Respect for sovereignty prevents one nation-state from interfering in the affairs occurring in other nation-states. Exceptions exist, to an extent, when individuals' actions or the actions of a State are deemed so egregious that the international community chooses to intervene. However, the current arrangement has left individuals' rights infringed upon. The cumulation of those infringements amounts to a societal cost not yet shouldered by the infringers.¹³⁷ Instead, individuals and States are left to bear the burden of the societal cost of the infringements. Because money is power, this cost-shifting arrangement effectively leads to an incremental power shift: corporations, off scot-free, glean a bit of power

wp-content/uploads/2021/04/Fired-Then-Robbed.pdf. The report only covers about 10% of the mass layoffs due to garment factory closures around the world in 2020. Paton, *supra* note 128. The authors of the report estimate the real total is closer to 213 factories, impacting over 160,000 workers who are owed a collective \$171.5 million. *Id.*

¹³³ HUM. RTS. WATCH, *supra* note 131.

¹³⁴ *The European Due Diligence Act*, CTR. FOR THE PROMOTION OF IMPS., MINISTRY OF FOREIGN AFFS. (July 1, 2021), <https://www.cbi.eu/news/european-due-diligence-act>.

¹³⁵ *Id.*

¹³⁶ *European Parliament Adopts Legislative Initiative on Corporate Due Diligence and Corporate Accountability*, BORENIUS: LEGAL ALERTS (Mar. 16, 2021), <https://www.borenius.com/2021/03/16/european-parliament-adopts-legislative-initiative-on-corporate-due-diligence-and-corporate-accountability/>.

¹³⁷ Much of the following three paragraphs are indebted to Environmental Liability of Companies, EUR. PARL. DOC. PE 651.698, at 19 (May 2020) (reporting results of a study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs). Though the study addressed environmental liability, it aptly captures the problem of corporations' impunity more broadly: "As a rational actor the company would not incur the costs to deal with the externality as there is no legal rule forcing the company to do so. . . . [L]egal rules are necessary to force internalisation of the externality." *Id.* at 19.

from the country each time the country is left to clean up the corporation's human rights mess.

If the international community instead agreed to a new treaty that aligned current international systems and implemented mechanisms for accountability, power would rightfully shift back to nation-states, corporations would more accurately value their products and services, and nation-states would more effectively protect the rights of their citizens. The current relatively laissez-faire approach leaves human rights unprotected and empowers MNCs at the expense of nation-states. Trusting companies to self-regulate¹³⁸ based on a stated responsibility to do so has meant only a fraction of companies truly do self-regulate. Furthermore, "if one country improves the working conditions, the goods will be manufactured somewhere else."¹³⁹ This leaves human rights abuses unaddressed.

A. *Why Multi-National Corporations Should Be Held Accountable for International Human Rights Violations*

Under the current framework, corporations might shift from location to location as States update accountability practices, effectively shifting the fora of the abuses but not addressing the root of those abuses, which may lie within the practices of corporations themselves. When corporations contract with outside factories, those factories cannot improve human rights practices if doing so would lead to higher labor costs or longer production periods because it could cost them the contract. Thus, factories are poor targets for regulation because few factories are solvent enough to withstand the loss of major contracts. When a factory loses a contract or is forced to close, impacted corporations can simply find another factory. Therefore,

¹³⁸ This should not be surprising. We have seen this in the United States in multiple industries. Speaking of the Sarbanes-Oxley Act:

The [Security and Exchange Commission] hypothesized that the self-regulatory approach to overseeing auditors had failed for reasons that included unreliable funding of the oversight function, the performance of inconsistent peer reviews by public accounting firms, the voluntary nature of [Security and Exchange Commission Practice Section] oversight, ineffective sanctions, and nonpublic proceedings.

Sarah J. Williams, *The Alchemy of Effective Auditor Regulation*, 25 LEWIS & CLARK L. REV. 1089, 1106 (2022). Each of those critiques could be said about the current approach to oversight of production for fast fashion. In fact, it may be even worse in this context because there is no guarantee there will be proceedings. Congress is running into the same issue with self-regulation and expected responsibility among social media companies. Senator Richard Blumenthal recently explained, "I believe that the time for self-policing and self-regulation is over . . . Self-policing depends on trust. Trust is over." *Instagram's CEO Faces Senators Accusing His Company of Harming Some Young Users*, NPR (Dec. 8, 2021, 6:50 PM), <https://www.npr.org/2021/12/08/1062541547/instagrams-ceo-senators-testimony-mosseri>. How many human rights abuses will individuals endure before the international community tells fast fashion the trust is over?

¹³⁹ Symposium, *Conscious Couture*, *supra* note 77, at 590.

the approach with the most potential for longstanding change is to address the common denominator: the corporation. For example, speaking of the current problematic situation, Johann Perzi, a veteran in the industry, explained that MNCs “will say, they are protecting working places in India or in China, but that is not quite a true thing.”¹⁴⁰ Having worked in the fashion industry in India for between six and eight weeks each year for a decade, Perzi notes the long hours required by the factories, as well as the stamina required for workers to endure the circumstances. Perzi concludes “[t]he only way to describe what H&M is doing is abusing the human relationship. [The workers] really have a terrible life. . . . I worked [their wages] out once, it’s about 30 cents an hour.”¹⁴¹ If India or China were to implement comprehensive labor practices enforcement and exact severe fines on companies whose orders do not allow for lawful production practices,¹⁴² H&M might shift more of its orders to factories in countries where human rights standards are not met so that the company will not face the added fines. Without a new framework, MNCs avoid negative consequences for violations of the UDHR or other human rights instruments.¹⁴³

Though companies might avoid the negative consequences of human rights violations during production, those consequences do not cease to exist. Instead, they are externalized¹⁴⁴ (or semi-externalized,¹⁴⁵ depending on the production arrangement) and are imposed on third parties.¹⁴⁶ The company does not feel the cost of its violations—financially, socially, legally, or otherwise. If the company is not obligated to pay for the semi-external or external effects, or to work to remedy them, the social costs created by the human rights violations are not incorporated into the company’s valuation of its products. Since the semi-externality is not taken into account, and the company does not have to pay remedies or make adjustments to

¹⁴⁰ MOORE, *supra* note 51, at 62–64 (quoting Johann Perzi, who has been in men’s fashion for 52 years, 11 of which were spent at Kleider Bauer—a major Austrian company. Johann Perzi’s grandfather was an apprentice to C.M. Frank, tailor to the Prince of Wales, Emperor Napoleon III, and the King of Italy, among many others).

¹⁴¹ *Id.* at 64.

¹⁴² This might be the case if the pay was too low, the turnaround time too short, and the order too large to allow for a living wage and eight-hour workdays with sufficient breaks for all of the required workers. Symposium, *Conscious Couture*, *supra* note 77, at 590.

¹⁴³ MNCs also avoid negative consequences through the impunity afforded in countries that lack the infrastructure to implement enforcement. See, e.g., *id.* at 589–90.

¹⁴⁴ Even when the human rights violations occur at the supplier level, they “are often rooted in the buyers’ own purchasing practices, particularly unfair timing demands, pricing pressures, poor forecasting, last-minute order modifications, and irresponsible exits.” *ABA Working Group Co-Led by Rutgers Law Professor Publishes Model Contract Clauses to Protect Workers in International Supply Chains*, RUTGERS (Apr. 7, 2021), <https://law.rutgers.edu/news/aba-working-group-co-led-rutgers-law-professor-publishes-model-contract-clauses-protect-workers>.

¹⁴⁵ Environmental Liability of Companies, *supra* note 137, at 18.

¹⁴⁶ *Id.*

prevent further human rights violations, relative prices will be too low to cover the actual cost of the product. With such low prices, consumers will demand too much of the product, which creates high costs for society. The high demand is then shouldered by the factories and developing countries, creating an environment that is ripe for further human rights abuses, and the cycle begins again. This creates a market failure.¹⁴⁷ Companies are allowed to externalize the costs of human rights abuses, imposing those costs on society.

If, instead, MNCs were forced to pay for the external (or semi-external) effects they create, they would be incentivized to find efficient means of cost abatement. The MNCs would incorporate those costs into their decision-making process. This additional cost would ensure MNCs face the first of the three reasons companies comply with human rights responsibilities, norms, and laws mentioned in Part IV: economic motivators.¹⁴⁸

B. *Why Not Hold MNCs Accountable in Individual Nation-States*

Accountability in individual nation-states has been the approach of the modern era, but it has been largely ineffective. Part of the difficulty lies in the complexity of the supply chain. The multi-layered production process makes way for corporations that place the orders to point to and lay blame on sub-contracted producers, and sometimes those producers can do the same to another level of sub-contracted producers. The further down the line the blame goes, the less likely that the sub-contracted producer is to be solvent, much less able to pay fines, increase wages, or improve conditions. Were the Haitian government to hold a small factory in Haiti accountable for its human rights abuses, the factory might go out of business, costing the workers their jobs and the country the time and effort for the lawsuit; meanwhile, the company that ordered those products is free to sub-contract with another small factory with similar conditions. Myriad human rights abuses are thus left unaddressed by many nation-states.

The solution cannot rely upon individual nation-states to hold the MNCs who place the orders accountable either. With that approach, a country like Haiti, with a GDP of \$13.418 billion,¹⁴⁹ could face a company like Zara, with an annual revenue of \$30.45 billion in 2021,¹⁵⁰ which is more than double Haiti's national GDP. Zara's money, influence, and teams of lawyers would face off with Haiti and its

¹⁴⁷ *Id.*

¹⁴⁸ See generally Fine, *supra* note 122.

¹⁴⁹ GROSS DOMESTIC PRODUCT 2021, WORLD DEVELOPMENT INDICATORS DATABASE, BANK 3 (July 1, 2020), <https://databank.worldbank.org/data/download/GDP.pdf>.

¹⁵⁰ *Zara Parent Inditex Continues Digital Transition, Expects 30% eCommerce in 2024*, PYMNTS (Mar. 16, 2022), <https://www.pymnts.com/news/retail/2022/zara-parent-inditex-continues-digital-transition-expects-30-pct-e-commerce-2024/>.

struggling justice system.¹⁵¹ It is unlikely that Haiti could serve true justice in this scenario. If, instead, Spain, the country that is home to Zara's headquarters, were to get involved, issues of extraterritorial jurisdiction would arise.¹⁵² Again, the individual nation-state, Spain in this scenario, could not address the human rights abuses.

The individual country-by-country approach to addressing human rights abuses carried out by MNCs has left countless abuses unaddressed. All the while, those MNCs whose orders initiate the process that leads to abuses, and their CEOs,¹⁵³ amass more wealth than the GDP of entire nations¹⁵⁴ and carry on with business as usual.

¹⁵¹ "At the heart of the dysfunction is a chronic lack of accountability, pervasive corruption, and outdated laws and procedures. . . . Judges have decried a system 'kidnapped by politics,' and advocates denounced increased barriers to access to justice. . . ." MARIE-CLAUDE JEAN-BAPTISTE, INT'L LEGAL ASSISTANCE CONSORTIUM WITH CYRUS R. VANCE CTR. FOR INT'L JUST., HAITI: THE RULE OF LAW IN PERIL 4 (Aug. 2021), <http://ilacnet.org/wp-content/uploads/2021/08/Haiti-The-Rule-of-Law-in-Peril-.pdf>. This is not just a hypothetical; it is the reality of the current system. See Jake Johnson, *157 of World's 200 Richest Entities Are Corporations, Not Governments*, INEQUALITY.ORG (Oct. 19, 2018), <https://inequality.org/research/richest-entities-corporations-governments/>.

¹⁵² The European Union adopted the Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence in February 2022. Press Release, European Commission, Just and Sustainable Economy: Commission Lays Down Rules of Companies to Respect Human Rights and Environment in Global Value Chains (Feb. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145. Although adoption changes the hypothetical scenario, it still leaves unaddressed those scenarios involving corporations headquartered outside of the European Union. As of 2013, companies headquartered in the United States cannot be sued under the Alien Tort Statute for actions in other countries that violate human rights law. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013) (holding "all the relevant conduct took place outside of the United States" and "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" to rebut the presumption against extraterritorial application). As of March 2021, 59 of the biggest companies in the world were headquartered in the United States; China was home to the headquarters of 14 of the world's largest companies. Jenna Ross, *The Biggest Companies in the World in 2021*, VISUAL CAPITALIST (June 10, 2021), <https://www.visualcapitalist.com/the-biggest-companies-in-the-world-in-2021/>. Bearing in mind *Kiobel* and the Chinese government's involvement in the Chinese supply chain, it is unlikely the State-by-State approach will be effective for individuals whose rights have been infringed by American or Chinese corporations.

¹⁵³ For example, Bernard Arnault, CEO of Moët Hennessy Louis Vuitton is, as of December 26, 2022, the wealthiest person in the world, with a net worth of \$176.6 billion. *The Real-Time Billionaires List*, FORBES, <https://www.forbes.com/real-time-billionaires/#492b1fa33d78> (last visited Dec. 26, 2022). Other billionaires in the fashion industry include Armancio Ortega of Zara, ranked 16th with a net worth of \$64.0 billion and Phil Knight of Nike, ranked 25th with a net worth of \$44.8 billion. *Id.*

¹⁵⁴ In December of 2000, of the 100 largest economic entities in the world, 51 were corporations and 49 were countries. Sarah Anderson & John Cavanagh, Inst. for Pol'y Stud., *Of the World's 100 Largest Economic Entities, 51 Are Now Corporations and 49 Are Countries*, CORP. ACCOUNTABILITY PROJECT, <http://www.corporations.org/system/top100.html> (Jan. 3, 2002).

C. *Co-Enforcement as a Means to Hold MNCs Accountable*

This Comment proposes holding MNCs accountable via a multi-pronged approach modeled after a strategy that is gaining momentum in the United States: strategic co-enforcement.¹⁵⁵ The approach would incorporate (1) a legally binding document requiring companies headquartered in or operating within signatory nation-states to follow international human rights law; (2) an international agency responsible for managing the strategic enforcement; and (3) collaboration with inter-governmental organizations (IGOs), non-governmental organizations (NGOs), and worker organizations. This approach utilizes existing structures and experts while simultaneously incorporating the necessary missing pieces: an internationally binding legal instrument and enforcement mechanism. With the combined three components and the strategic, collaborative approach, this model will be poised for broad impact capable of reshaping the global supply chain to make room for the protection of human rights.

1. *The Document*

A necessary component of this strategic co-enforcement model is the international adoption of a legal framework imposing legal obligations (a treaty) on companies participating in the international market. This legal instrument could draw from similar efforts taking place in Germany, Norway, the Netherlands, the European Union Commission, and Canada.¹⁵⁶ It could also build on the “Zero Draft” of a treaty issued by the Working Group on Business and Human Rights in 2018.¹⁵⁷ The Zero Draft not only required MNCs to undertake due diligence procedures regarding human rights abuses, but it also imposed liability on parent companies whose subsidiaries or suppliers commit human rights violations.¹⁵⁸ Though the draft was revised in 2019 due to strong opposition from business groups and States such as the United States and those in the European Union, discussions regarding further drafts are ongoing.¹⁵⁹

That was just before the Ruggie Principles were developed. Since that time, the money—and therefore power and influence—of MNCs has continued to grow. Based on 2017 revenue, 69 of the top 100 economic entities and 157 of the top 200 economic entities are corporations—not governments. Johnson, *supra* note 151.

¹⁵⁵ Increasingly supplanting the complaint-based model, this approach focuses enforcement “at the top of industry structures, targeting entire business entities rather than individual workplaces, holding joint employers liable for violations . . .” Fine, *supra* note 122, at 145.

¹⁵⁶ Wijekoon et al., *supra* note 12.

¹⁵⁷ See generally Zero Draft 16.7.2018 of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, of the Open-Ended Intergovernmental Working Group, established pursuant to Hum. Rts. Council Res. 26/9 (July 14, 2014).

¹⁵⁸ *Id.*; see also, Georgia Papalia, *Doing Business Right: The Case for a Business and Human Rights Treaty*, 3 PERTH INT’L L.J. 96, 112–13 (2018).

¹⁵⁹ Ratner, *supra* note 11, at 165.

2. *The Agency*

Enforcement of this treaty would fall, in part, to an appointed international entity, referred to herein as “The Agency.” The international community must decide whether to delegate enforcement to an existing international entity, such as the ILO, or to create a new entity solely dedicated to strategic enforcement. If the former approach is taken, it will be imperative that those leading the charge are familiar with this model and ready to carry it out.

The process would differ somewhat from that of other human rights treaties and treaty bodies. Here, The Agency would implement a strategic approach, investigating abuses, imposing penalties for those abuses, mandating remedies, and providing recommendations. The Agency would target MNCs that are, themselves or through their sub-contracted suppliers, the biggest infringers of human rights. Because of the interconnected nature of the supply chain, this would inevitably mean that enforcement against those corporations whose factories are most problematic would impact suppliers of other major companies.¹⁶⁰ Further, as The Agency holds the biggest infringers accountable, other large MNCs will, having seen the risk of penalties and the burden of remedies, be incentivized to make efforts to improve the conditions in their supply chains. In addition, The Agency can strategize with labor organizations, National Human Rights Institutions (NHRIs),¹⁶¹ NGOs, and workers’ organizations to address smaller-scale infringements through those channels. This approach simultaneously addresses the problem at the top and at the bottom of the supply chain.

3. *Collaboration*

In addition, because several IGOs and voluntary regulatory regimes have been implemented over the years, The Agency could collaborate with those IGOs and build upon the knowledge gained by the voluntary regulatory regimes in order to create more impact.¹⁶² Janice Fine¹⁶³ proposes that strategic co-enforcement is strengthened if it also makes room for “workers, worker organizations, and high road firms to take part”¹⁶⁴ because this approach supplements what the government

¹⁶⁰ See Daniel W. Gerber & Brian R. Biggie, *The Global Supply Chain: Measuring, Mitigating and Managing Exposure in a Supply Chain Dependent Globalized Market*, 79 DEF. COUNSEL J. 412, 415 (2012); ALMA ANGOTTI, ALEXANDRA WILL & ELIZABETH SISUL, HUMAN RIGHTS IN YOUR SUPPLY CHAIN ISN’T JUST GOOD BUSINESS—REGULATIONS ARE COMING 5 (2022), <https://guidehouse.com/insights/financial-services/2022/esg/human-rights-supply-chains?lang=en>.

¹⁶¹ In the 2010 Edinburgh Declaration, NHRIs from all over the world pledged to work towards curbing abuse by MNCs and to support victims of those abuses; their subsequent work can support this new model. Pip Dargan, *Foreword* to NIEBANK, *supra* note 63, at 5.

¹⁶² Fine, *supra* note 122, at 165.

¹⁶³ *Id.* at 143. Janice Fine is a professor at Rutgers University and Research and Strategy Director at the Center for Innovation in Worker Organization.

¹⁶⁴ *Id.* at 145.

lacks: a sufficient number of investigators, on-the-ground insight, and relationships with vulnerable workers.¹⁶⁵ In the current model, workers are “passive victims,” and organizations that support and shine a light on human rights abuses are only able to provide political support for enforcement.¹⁶⁶ But that enforcement is only possible in countries with a stable enough infrastructure to take on MNCs. This Comment proposes that The Agency strategically collaborates with the existing entities to maximize its own resources and efficacy in the furtherance of the protection of human rights in the fashion industry.

Some of the requisite pieces for strategic co-enforcement are already in place. Organizations with on-the-ground insight and relationships with workers have been trying to address the issue for years.¹⁶⁷ The Supply Chain Resource Cooperative, for instance, is creating the Ethical Apparel Index to “summarize indicators of forced labor and slavery in factories, violations of minimum and living wages, standard building safety and housing conditions, and freedom of association.”¹⁶⁸ The Cooperative plans to then convey the information to stakeholders such as brands, investors, and consumers.¹⁶⁹ Other consumer-focused organizations, such as Good on You, have similarly sought to make information about human rights abuses in the supply chain accessible to consumers.¹⁷⁰

Finally, part of the efficacy of strategic co-enforcement hinges on publicizing the human rights abuses of infringers. Such publicity has, on its own, already effectuated shifts in the practices of some MNCs.¹⁷¹ For example, exposure has been a

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ The Workers Rights Consortium, for example, sounded the alarm about the Covid-19 severance theft reported on by the New York Times. *See* Paton, *supra* note 128. The organization already conducts worker-centered investigations “away from their factories, without management’s knowledge so workers can speak openly, with no fear of reprisal. This enables the [Workers Rights Consortium] to uncover labor abuses that brands and their auditing organizations routinely ignore.” *How We Work*, WORKERS RTS. CONSORTIUM, <https://www.workersrights.org/> (last visited Dec. 26, 2022).

¹⁶⁸ Robert Handfield, *Improving the Lives of Apparel Workers by Creating an Ethical Apparel Index*, SUPPLY CHAIN RES. COOP.: N.C. STATE UNIV. (Feb. 13, 2021), <https://scm.ncsu.edu/scm-articles/article/improving-the-lives-of-apparel-workers-by-creating-an-ethical-apparel-index>.

¹⁶⁹ *Id.*

¹⁷⁰ *Wear the Change You Want to See*, GOOD ON YOU, <https://goodonyou.eco/about/> (last visited Dec. 26, 2022).

¹⁷¹ For example, advocacy organization Stand.earth researches complex supply chains, tracking raw materials, environmental destruction, and human rights violations throughout the supply chain. *Nowhere to Hide: How the Fashion Industry Is Linked to Amazon Rainforest Destruction*, STAND.EARTH (Nov. 29, 2021), <https://www.stand.earth/publication/forest-conservation/amazon-forest-protection/amazon-leather-supply-chain> (scroll down to the slide deck and click to slide 3). Stand.earth maintains that its “work has helped to shift the practices or

powerful tool on the environmental front. Vogue featured climate activist Greta Thunberg on its cover in 2021, a signal of mounting awareness of the fashion industry's troubling environmental footprint.¹⁷² The next year, Moody's, a global investment and rating service, explained that fashion companies will need to either adapt and implement environmentally sustainable and transparent practices, including investing in decarbonization, or face scrutiny from "call-out and cancel culture."¹⁷³ Public scrutiny could detrimentally impact MNCs' bottom lines. However, as evidenced by the urgings of NGO European Environmental Bureau for the European Union to add textiles to its Ecodesign Directive, which sets requirements to block "unsustainably produced, inefficient, toxic, wasteful, and polluting textile products" from entering the European Union market, publicity and legal standards work best hand-in-hand.¹⁷⁴ This Comment contends that publicity surrounding violations of human rights in the fashion industry will be most potent when paired with the other components of strategic co-enforcement.

CONCLUSION

MNCs in the fashion industry are capable of inflicting great harm on the human rights of individuals around the world, and it is time for the international community to protect those rights.

The nature of the supply chain and the power wielded by MNCs have changed drastically over the last century, and even more so over the last few decades. In light of these transformations and the inefficacy of the current framework, it is time for international law to establish a new framework that sets legal standards and enforcement mechanisms to hold MNCs accountable for violations of international human rights norms.

Protection of international human rights in the fashion industry must come through a binding agreement among nation-states, an international agency poised to strategically enforce the agreement, and strategic collaboration with groups that

procurement policies of some of the biggest forest products companies in the world, including Kimberly-Clark, Limited Brands, Staples, Disney, and Nestlé." *Id.*

¹⁷² Antonia Zimmerman, *Fast Fashion's Waste Model Is Going Out of Style*, POLITICO (Aug. 13, 2021, 3:53 PM), <https://www.politico.eu/article/fast-fashion-waste-losing-appeal-greta-thunberg-environment/>.

¹⁷³ Don-Alvin Adegeest, *Consumer Backlash Could Dent Fast Fashion Companies' Profits*, FASHIONUNITED (Apr. 14, 2021), <https://fashionunited.uk/news/fashion/consumer-backlash-could-dent-fast-fashion-companies-profits/2021041454975>.

¹⁷⁴ Zimmerman, *supra* note 172; *see also* Directive 2009/125, of the European Parliament and of the Council of 21 October 2009 Establishing a Framework for the Setting of Ecodesign Requirements for Energy-Related Products, 2009 O.J. (L 285) 10.

have long been working to uphold international human rights norms. Because impunity for human rights violations is impermissible for individuals and countries, the international community must hold corporations to account as well.