CORPORATIONS AND HUMAN RIGHTS LAW: THE EMERGING CONSENSUS AND ITS EFFECTS ON WOMEN'S EMPLOYMENT RIGHTS

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INTRODUCTION

In today's globalized economy, corporations directly impact human dignity, yet states do not have the ability to carry out their duties to protect human rights from corporate harm. Facing intense competition to attract and maintain foreign investment, developing states find it necessary to entice transnational corporations ("TNCs") with cheap labor and relaxed human rights enforcement.[1] The current human rights paradigm, thus, suffers from a severe governance gap rooted in the statist feature of international law. Its impact has been devastating.

A case study of the garment industry illustrates this governance gap as well as its disparate effects upon women. Furthermore, an analysis of the relevant soft law instruments reflects the fact that women have been largely overlooked in efforts to fill the human rights governance gap. Mindful of both the gendered evolution of the human rights corpus and the ongoing work to expand the human rights paradigm to recognize women's experiences,[2] this Article seeks to discover the extent to which the consensus emerging from the relevant soft law instruments addresses women's employment rights.

Part I outlines the evolution of the governance gap and describes its effects on the garment industry and its female workforce. Part II outlines soft law initiatives pertaining to human rights and corporations. Finally, Part III identifies the axes of convergence between the soft law initiatives and analyzes how the emerging framework impacts women's employment rights. In particular, it notes

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[1] For purposes of consistency, the term "transnational corporation" ("TNC") will be used throughout this paper but should be interpreted as synonymous with terms such as "multinational enterprise." Similarly, American English spellings will be used consistently throughout the paper unless the British spellings appear as part of quoted material or in reference to the International Labour Organization or its "core labour standards."

[2] *See, e.g.*, HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 222-29 (2000).

how the emerging framework overlooks women's experiences and demonstrates how the broader incorporation of a human rights perspective has the potential to better address women's rights.

I. THE GOVERNANCE GAP, THE GARMENT INDUSTRY, AND WOMEN

International law is state-centered. Its origins are traditionally thought to be intertwined with the advent of the state system after the Peace of Westphalia and consequently, international law is understood to govern relations between States.[3] The international human rights corpus was constructed within the confines of international law's central doctrine of sovereign consent.[4] Simply put, states have consented to, and are thus bound to comply with, human rights duties while individuals are rights-holders.

This statist structure may have made sense when the human rights corpus was constructed in the aftermath of the Holocaust, with the desire to protect individuals from similar abuses of public power. Since then, however, it has become clear that entities other than states pose significant threats to human dignity, and the efficacy of the human rights edifice requires contemplation of duties on non-state actors as well.[5] Indeed, legal scholars have recognized that the failure to expand the human rights paradigm to address the actions of non-state actors limits human rights discourse to pure rhetoric.[6]

The statist feature of human rights law overlooks the capacity of non-state actors, such as corporations, to influence state behavior.[7] Multinational corporations are some of the largest economies in today's world: "Three hundred multinationals currently account for 25% of the world's total assets, and only 21 nations have gross domestic products that exceed the annual sales of each of the six largest multinationals."[8] The trends that have helped build corporate wealth and power have reduced the relative strength of states, which has revealed the misplaced reliance on state sovereignty as protector of human rights:[9]

> [t]he emphasis on monetarist policies and increased integration of international markets for goods and finance, the massive privatization of state assets and the shift in developing countries to trade liberalization and export promotion, all served to redefine the economic role of the state.

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[3] *See* A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. OF INT'L STUD. 133, 134 (2001).

[4] *See id.* at 135.

[5] *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 469 (2001).

[6] *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 35 (2006).

[7] *See* Steve Charnovitz, *The Labor Dimension of the Emerging Free Trade Area of the Americas*, *in* LABOUR RIGHTS AS HUMAN RIGHTS 143, 163 (Philip Alston ed., 2005).

[8] Gare A. Smith, *An Introduction to Corporate Social Responsibility in the Extractive Industries*, 11 YALE HUM. RTS. & DEV. L.J. 1, 3 (2008).

[9] RHYS JENKINS ET AL., CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 2 (Rhys Jenkins, et al. eds., 2002).

> These trends were reflected in government policies towards TNCs, which shifted dramatically from regulation of their activities to intense competition to attract [foreign direct investment].[10]

Faced with the need to attract or maintain foreign investment, states bow to corporate pressure to relax or loosely enforce human rights protections.[11] In other words, because of this global shift in power, states are, at times, unable to perform their duty to protect individuals from human rights abuses.

A. The Garment Industry

The effects of this governance gap are particularly acute in the garment industry, which has experienced exponential growth in the use of global production chains during the past few decades.[12] Labor costs are the main reason for this trend: the garment industry is "one of the most labor intensive industries" and the expense and availability of labor vary geographically.[13] Additionally, "trade liberalisation"—tariff reductions and foreign investment incentives in export processing zones ("EPZs") and "communication innovations"—internet communications allowing international real-time coordination of production and delivery—made global production chains attractive and feasible to competitive firms.[14] Moreover, according to the proponents of the "new capitalism"—underpinned by laissez-faire economics—poor laborers abroad would eventually benefit from global production chains as cheap labor costs in the developing world would attract foreign investment, which would then "'trickle-down' to the poor."[15]

Despite faith in the trickle-down effect, the restructuring of the garment industry to embrace global supply chains has increased power and profit at the top of the chain, while decreasing power and profit below.[16] The flood of TNCs seeking to manufacture abroad resulted in "a dramatic growth in the number of producers, heightening competition among the world's factories . . . for a place at the bottom of the chain."[17] Meanwhile, efficient use of global supply chains enabled a few leading brands to dominate the market so that today, "control, if not ownership, has been wrested from small entrepreneurs and lies in the hands of a shrinking number of highly capitalized corporate giants."[18] Consolidated power at the top of the supply chain allows brands and retailers to both dictate working

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[10] *Id.*

[11] *See* Charnovitz, *supra* note 7, at 163-64.

[12] *See* KATE RAWORTH, TRADING AWAY OUR RIGHTS: WOMEN WORKING IN GLOBAL SUPPLY CHAINS 33 (Anna Coryndon ed., 2004).

[13] *See* JANE L. COLLINS, THREADS: GENDER, LABOR, AND POWER IN THE GLOBAL APPAREL INDUSTRY 42 (2003).

[14] RAWORTH, *supra* note 12, at 33.

[15] Jane Wills & Angela Hale, *Threads of Labour in the Global Garment Industry*, *in* THREADS OF LABOUR 1, 12 (Angela Hale & Jane Wills eds., 2005).

[16] RAWORTH, *supra* note 12, at 34.

[17] *Id.*

[18] COLLINS, *supra* note 13, at 9.

conditions along the supply chain as well as capture the majority of the profit.[19] In fact, due to the intense competition, contractors at the bottom of the supply chain frequently accept contracts below cost and then attempt to profit by lowering their labor costs by subcontracting even further.[20]

The abundant supply of cheap labor around the world also means that jobs along the supply chain are insecure—brands are constantly relocating to factories in states that offer cheaper labor.[21] Developing states must compete with each other to relax labor standards and human rights protections to attract investment and stabilize jobs within their borders.[22] Even though some data suggests that low labor standards do not necessarily correlate with good export performance, the mere threat of divestment may entice governments to lower labor standards out of fear that corporations will take their business elsewhere.[23] Consequently, human rights conditions at the bottom of the global supply chains have deteriorated severely: "[L]ong hours, forced overtime, lack of basic health and safety conditions, physical violence, denial of social security and employment rights, lack of access to healthcare and maternity rights, and sexual and psychological harassment are among the many forms of abuse that have been widely documented."[24]

In the face of public outcry over corporate human rights records, which threatened enormous reputation costs, TNCs began issuing corporate social responsibility statements and codes of conduct, which they purported to apply throughout their global supply chains.[25] In reality however, these corporate codes of conduct have not led to significant changes in corporate behavior—reports of human rights violations are still widespread.[26] Upon close analysis, this is not surprising. TNCs place conflicting pressures on factories: while calling for compliance with corporate codes of conduct, TNCs continue to demand fast production times and low labor costs.[27] Given the intense competition and constant threat of divestment, factories at the bottom of the supply chain comply with

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[19] RAWORTH, *supra* note 12, at 33-34.

[20] *See* Laura Dubinsky, *The Fox Guarding the Chicken Coop: Garment Industry Monitoring in Los Angeles*, *in* CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 160, 162 (Rhys Jenkins et. al. eds., 2002).

[21] *See* RAWORTH, *supra* note 12, at 54.

[22] *See* Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 219, 219 (De Schutter ed., 2006).

[23] Charnovitz, *supra* note 7, at 165.

[24] Marina Prieto et al., *The Potential of Codes as Part of Women's Organizations' Strategies for Promoting the Rights of Women Workers: A Central America Perspective*, *in* CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 146, 146 (Rhys Jenkins et. al. eds., 2002).

[25] *See* Wills & Hale, *supra* note 15, at 13.

[26] *See* RAWORTH, *supra* note 12, at 56.

[27] *See* John H. Goolsby, *Is the Garment Industry Trying to Pull the Wool over Your Eyes? The Need for Open Communication to Promote Labor Rights in China*, 19 LAW & INEQ. 193, 204 (2001).

production demands at the expense of code compliance.[28] Factories have employed numerous strategies to get around the codes of conduct and labor inspections, including increasing hourly production requirements to avoid overtime, hiding labor abuses from inspections—which are often planned and announced—and using subcontractors and home-workers whose lack of contracts, low pay, and hazardous work conditions are not revealed in inspections.[29]

Thus the explosion of global supply chains and the attendant concentration of power in brands and retailers have created a dynamic in which TNCs directly influence the human rights conditions throughout their supply chains and governments lack the power to enforce human rights protections. In the garment industry especially, women bear the brunt of this governance gap.[30]

B. Women Workers in the Garment Industry

The majority of the labor-intensive jobs throughout the garment industry's global supply chains are occupied by women.[31] For example, women make up seventy-five percent of Kenya's factory workforce, eighty-five percent of the Sri Lankan factory workforce and ninety percent of the factory workforce in Cambodia.[32] These statistics do not appear to be an accident.

Indeed the garment industry's global supply chains feed on the seemingly endless supply of low-cost female laborers. Gender inequality limits women's opportunities, which increases their willingness to work in substandard conditions.[33] Furthermore, "factory owners in many settings buy into and reproduce the idea that women are more docile and compliant and thus more appropriate workers for these conditions."[34] However, while women are sought after for labor-intensive positions, men occupy the managerial positions for which they receive higher wages.[35] In other words, the garment industry has harnessed a source of wealth that amplifies gender inequality and has the cyclical effect of creating a seemingly endless supply of uneducated women willing to take demanding jobs for low pay and no upward mobility.

Women workers and their families desperately need these jobs and have often chosen them because they pay more and are preferred over other available opportunities, such as domestic work, prostitution, or piecework at home.[36] For

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[28] Linda Shaw & Angela Hale, *The Emperor's New Clothes: What Codes Mean for Workers in the Garment Industry*, *in* CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 101, 108 (Rhys Jenkins et al. eds., 2002).

[29] RAWORTH, *supra* note 12, at 59-62.

[30] *See id.* at 29.

[31] *Id.* at 16.

[32] *Id.* at 58.

[33] *See* Fauzia Erfan Ahmed, *The Rise of the Bangladesh Garment Industry*, 16 N.W.S.A. J. 34, 38 (2004).

[34] COLLINS, *supra* note 13, at 157.

[35] *See* Ahmed, *supra* note 33, at 39.

[36] *See id.* at 40.

some women, the benefits of garment work are described as including "economic independence, greater equality in the household, personal freedom and female companionship."[37] Likewise, feminist ethnographies of women workers have also noted the fact that garment work provides women, who have not previously had comparable opportunities, with "new forms of consciousness."[38]

However, the alleged benefits of women's garment work should be questioned. First, women cannot rely on garment work for job stability, so any potential benefits quickly vanish with the relocation of factories and jobs.[39] Second, factory work may not lead to shifting power relations at home—a woman might feel compelled to disgorge her wages to her husband to avoid the prospect of violence or abandonment.[40] Furthermore, women are forced to juggle factory work with family responsibilities, often without the support of extended families who live far from urban factory zones. [41] Women's double duties are often passed on to their daughters, who are the first to be pulled out of school to help out at home.[42] Moreover, taking paid work in the garment industry upsets the customary balance of gender relations and comes with a social cost: in some contexts garment workers have reported that a social stigma has attached to factory work, making women workers less eligible for marriage.[43] Likewise, "empowerment of women in the workplace might not be well received in the local community and might even raise the risk of increased domestic violence."[44] Indeed, the explosion of factory jobs for women in Mexico's EPZs challenged traditional gender relations, which resulted in escalated violence against women.[45] For these reasons, despite the fact that the global supply chains have increased employment opportunities for women, such work has not yielded gender equality or women's empowerment.[46]

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[37] Marina Prieto-Carrón, *Women Workers, Industrialization, Global Supply Chains and Corporate Codes of Conduct*, 83 J. OF BUS. ETHICS 5, 6-7 (2008).

[38] *Id.* at 7.

[39] *See id.*

[40] Ahmed, *supra* note 33, at 40.

[41] *Id.* at 42.

[42] RAWORTH, *supra* note 12, at 26.

[43] *See* Ahmed, *supra* note 33, at 40.

[44] MANDATE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, CONSULTATION SUMMARY, INTEGRATING A GENDER PERSPECTIVE INTO THE UN "PROTECT, RESPECT AND REMEDY" FRAMEWORK 6 (2009) [hereinafter CONSULTATION SUMMARY] *available at* http://198.170.85.29/Gender-meeting-for-Ruggie-29-Jun-2009.pdf.

[45] *See* Comm. on the Elimination of Discrimination against Women, *Report on Mexico Produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico*, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005).

[46] *See* Mary Cornish et al., *Securing Gender Justice: The Challenges Facing International Labour Law*, *in* GLOBALIZATION AND THE FUTURE OF LABOUR LAW 377, 378-79 (John D. R. Craig & S. Michael Lynk eds., 2006); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 J. INTL. L. 613, 641 (1991).

II. RELEVANT SOFT LAW INSTRUMENTS

With the growth of the governance gap described above, there has been a resounding call for the human rights paradigm to expand and recognize the direct human rights obligations of the corporation.[47] While the doctrinal possibility and wisdom of such an expansion are heavily debated, many scholars argue it is not only possible, but necessary.[48] International legal duties have already been recognized on actors other than states, such as individuals, inter-governmental organizations and rebel groups, for example.[49] In fact, the international community has been willing to recognize corporate duties in other areas of international law, so some scholars argue there is no theoretical reason corporate human rights duties could not be recognized.[50]

The practical reason for the absence of binding corporate human rights obligations is the lack of political will to recognize them.[51] However, governments have been willing to develop soft law instruments to regulate in this area, which shows that "governments at least talk about duties upon corporations with respect to human rights."[52] These multinational guidelines are considered "soft law" because they are not legally binding.[53] However, soft law instruments are significant in that they have been "formulated by democratically elected governments" and have been "endorsed by the representatives of the businesses themselves. . . ."[54] Moreover, scholars have noted that the binding and non-binding conceptions of hard and soft law respectively, are misleading: "guidelines may even be more important than so-called legally binding instruments which are unilaterally imposed and whose effective implementation can often not be guaranteed any way."[55]

Significantly, soft law instruments can evolve into or serve as building blocks for future binding international law.[56] David Kinley, one of the scholars at the forefront of the field of business and human rights law, notes that transnational codes of conduct "provide the foundations for harder legal regulation, not only because they constitute the policy firmament from which future domestic and

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[47] *See* Joseph M. Lozano & Maria Prandi, *Corporate Social Responsibility and Human Rights*, *in* CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 183, 184 (Ramon Mullerat, ed., 2005); CLAPHAM, *supra* note 6, at 56.

[48] *See, e.g.*, Ratner, *supra* note 5; CLAPHAM, *supra* note 6.

[49] *See* Ratner, *supra* note 5, at 466-67; CLAPHAM, *supra* note 6, at 30-31.

[50] *See* Ratner, *supra* note 5, at 488.

[51] *See* ROGER BLANPAIN & MICHELE COLUCCI, THE GLOBALIZATION OF LABOUR STANDARDS: THE SOFT LAW TRACK 127 (2004).

[52] Ratner, *supra* note 5, at 488.

[53] *See id.*

[54] BLANPAIN & COLUCCI, *supra* note 51, at 7.

[55] *Id.*

[56] David Weissbrodt & Muria Kruger, *Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 914 (2003).

international laws are likely to develop, but also because corporations, in their desire to stipulate standards and to proclaim their adherence to them, are . . . engaging in commercial speech."[57] Indeed, the convergence of the parallel soft law initiatives in this area displays a growing international consensus pertaining to the normative expectations of corporate behavior.[58] The fact that corporations are changing their practices to avoid negative human rights implications and responding to consumer expectations by adopting codes of conduct are further evidence of emerging norms.[59]

Even those scholars who doubt that these soft law instruments "can be considered as evolving norms of customary international law" readily admit that "they can of course result in future changes in the law."[60] Thus, the "stunning" mass of soft law in this area is noteworthy and serves as a guidepost for corporate navigation of human rights responsibilities.[61] It is important not to overlook the significance of the soft law initiatives and to "encourage by all means the contribution they can make to economic and social progress. . . ."[62] In this regard, the following summary of the relevant soft law initiatives provides a base from which to analyze the emerging normative framework and its impact on women's employment rights, which is the subject of Part III.

A. OECD Guidelines

The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises ("OECD Guidelines" or "Guidelines") were adopted in 1976, updated in 2000,[63] and are currently being revised.[64] The Guidelines present voluntary "principles and standards of good practice"[65] for multinational enterprises "operating in or from" the forty-two adhering states.[66] The Guidelines cover a range of issues from bribery to pollution and employment, and include a general provision on human rights.[67] In particular the Guidelines state that,

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[57] DAVID KINLEY, CIVILIZING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY 193-94 (2009).

[58] *See* BLANPAIN & COLUCCI, *supra* note 51, at 5-6.

[59] *See* Weissbrodt & Kruger, *supra* note 56, at 321.

[60] Eric De Brabandere, *Non-state Actors, State-Centrism and Human Rights Obligations*, 22 LEIDEN J. OF INT'L L. 191, 208 (2009).

[61] *Id.* at 207 (claiming "Every reader . . . will be stunned by the large quantity of non-binding instruments, or so-called 'soft law.'").

[62] BLANPAIN & COLUCCI, *supra* note 51, at 127.

[63] Ratner, *supra* note 5, at 487.

[64] *See* OECD.ORG, 2010 Update of the OECD Guidelines for Multinational Enterprises, [hereinafter Update of the OECD Guidelines] http://www.oecd.org/document/33/0,3343,en_2649_34889_44086753_1_1_1_1,00.html (last visited Aug. 24, 2010).

[65] OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, PART I., § I. CONCEPTS AND PRINCIPLES, ¶ 1 [hereinafter OECD GUIDELINES] *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (last visited Aug. 24, 2010).

[66] Update of the OECD Guidelines, *supra* note 64.

[67] *See* OECD GUIDELINES, *supra* note 65.

"enterprises should . . . [r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[68] Other provisions bear direct relevance to human rights as well—multinational enterprises are urged to comply with core labour standards, create employment opportunities, provide training for employees, and to "[r]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework. . . ."[69]

While voluntary, the Guidelines form "the first multilateral initiative taken by several governments in the corporate human rights field."[70] Furthermore, there are incentives for TNCs to comply. For example, the Guidelines are sometimes relevant in investment decisions and are likely to be taken into consideration by domestic courts when looking at *forum non conveniens* arguments.[71] Some level of corporate deference for the Guidelines is demonstrated by the fact that most companies respond to complaints brought under them.[72] Significantly, the Guidelines are widely referenced by scholars and international bodies—a tribute to their relevance and normative strength.[73]

Nonetheless, from a human rights perspective, the Guidelines deserve the skepticism they have received.[74] One key weakness of the Guidelines is their apparent lack of objectivity: specifically, the Guidelines form part of the OECD Declaration on International Investment and Multinational Enterprises, which is aimed at "facilitate[ing] direct investment in its Member States,"[75] and corporations that participated in the drafting process had less than stellar human rights records.[76] Furthermore, the Guidelines have received criticism for their insufficient attention to human rights,[77] for being out of date and for their lack of specificity.[78] Fortunately, the deficiencies pertaining to human rights are central to the current revision process.[79]

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[68] *Id.* at PART I., § II. GENERAL POLICIES, ¶ 2.

[69] *Id.* at, ¶ 4, 5; PART I., § IV. EMPLOYMENT AND INDUSTRIAL RELATIONS, ¶ 1-2.

[70] Lozano & Prandi, *supra* note 47, at 193.

[71] CLAPHAM, *supra* note 6, at 207.

[72] *Id.* at 211.

[73] *See* De Brabandere, *supra* note 60, at 206 (stating the fact that the UN Panel of Experts on the illegal exploitation of natural resources in the DRC has cited the OECD Guidelines).

[74] *See* CLAPHAM, *supra* note 6, at 199.

[75] Lozano & Prandi, *supra* note 47 at 193.

[76] *See* CLAPHAM, *supra* note 6, at 199 (explaining that corporations participating in the drafting had been involved in the 1973 Chilean Coup).

[77] *See* Weissbrodt & Kruger, *supra* note 56, at 919.

[78] The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect, and Remedy: A Framework for Business and Human Rights*, ¶ 46, *delivered to the Human Rights Council* [hereinafter Ruggie 2008 Report] UN. Doc. A/HRC/8/5 (Apr. 7, 2008).

[79] *See* OECD TERMS OF REFERENCE FOR AN UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2010) [hereinafter OECD TERMS OF REFERENCE] *available at* http://www.oecd.org/dataoecd/61/41/45124171.pdf.

The OECD Guidelines are unique in their implementation, creating National Contact Points ("NCPs"), which are "the key government institution[s] responsible for promoting effective implementation of the Guidelines."[80] Any person or organization can approach an NCP.[81] NCPs handle all inquiries, clarify the meaning of the guidelines when necessary, and act as problem solvers when complaints arise.[82] When NCPs fail to resolve a particular issue, they can submit it to the Committee on International Investment and Multinational Enterprises ("CIME") for clarification.[83] Such clarifications are issued without the name of the particular TNC, nonetheless, this is seen as a condemnation of the TNCs behavior.[84]

While scholars have predicted that the OECD implementing procedures will become increasingly relevant, they have identified problems with the NCPs in practice.[85] For instance, while NGOs are technically permitted to approach an NCP, NCPs have made it difficult for them to do so by requiring NGOs to obtain the power of attorney before raising a case or requiring NGOs to file complaints in the country where the problem is alleged to have occurred.[86] Some governments have even failed to set up functioning NCPs.[87] Furthermore, there are concerns relating to potential conflicts of interest of NCPs that are organized within governmental departments and concerns regarding the lack of resources of many NCPs to effectively investigate or mediate.[88]

B. ILO Tripartite Declaration

The International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ("ILO Tripartite Declaration") was adopted by the ILO Governing Body in 1977 and amended in 2000.[89] The importance of this declaration stems from its adoption by, and application to, the three groups within the ILO's governing body: governments, labor, and multinational enterprises.[90] The principles cover equality, employment security, training, work conditions and employee organization, and collective bargaining.[91] Furthermore, the ILO Tripartite Declaration has been interpreted to

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80 BLANPAIN & COLUCCI, *supra* note 51, at 60.

81 OECD.ORG, National Contact Points for the OECD Guidelines for Multinational Enterprises, http://www.oecd.org/document/3/0,3343,en_2649_34889_1933116_1_1_1_1,00.html (last visited Aug. 24, 2010).

82 OECD GUIDELINES, *supra* note 65, at PART II., § I. NATIONAL CONTACT POINTS, ¶ 1.

83 *Id.* at PART II., § II. THE INVESTMENT COMMITTEE, ¶ 4.

84 CLAPHAM, *supra* note 6, at 209-10.

85 *Id.* at 208-10.

86 *Id.*

87 *Id.* at 209.

88 *See* Ruggie 2008 Report note 78, at ¶ 98.

89 CLAPHAM, *supra* note 6, at 211.

90 *Id.* at 212. *See also* Ratner, *supra* note 5, at 486.

91 INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES

incorporate the objectives of the subsequent ILO Declaration on Fundamental Principles and Rights at Work.[92] Thus, the eight core labour conventions, deemed "fundamental" within the 1998 Declaration, and the fundamental rights referenced therein—the freedom of association, the right to collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination in employment and occupation—are significant to the interpretation and implementation of the ILO Tripartite Declaration.[93] Finally, the Declaration calls on governments, businesses, and labour to "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations," thereby incorporating the human rights corpus by reference.[94]

While voluntary, the principles can be seen as an authoritative interpretation of some of the ILO conventions and recommendations on which they are based.[95] In an article setting forth his thesis for how international law can provide for corporate human rights obligations, legal scholar Steven Ratner emphasized that "[m]ost of these precepts restate various obligations on governments, but the reformulation of some as creating duties (albeit soft ones) on corporations is significant."[96] Furthermore, scholars have cited the fact that the Tripartite Declaration has the backing of the multi-stakeholder ILO as evidence of consensus within the international community.[97]

The Sub-Committee on Multinational Enterprises ("Sub-Committee") is the implementing body for the Tripartite Declaration. The Sub-Committee conducts a survey of stakeholders—member states, national employer organizations, and workers' organizations—to gather information about their experience implementing the Declaration and compiles the information for the ILO Governing Body.[98] However this procedure has attracted much criticism: the last survey was in March of 2001, covering 1996-1999, and the survey results did not reveal much about the respect for workers' rights and the recommendations were limited to "further study and consultation."[99]

The Tripartite Declaration also includes a procedure for the clarification or interpretation of its provisions.[100] In case of a dispute, Governments can request interpretations and employer or workers' organizations can request interpretations

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CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY v (4th ed. 2006) [hereinafter ILO TRIPARTITE DECLARATION] *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

92 *Id.* at Addendum II.

93 *Id.*

94 *Id.* at General Policies, ¶ 8.

95 *See* CLAPHAM, *supra* note 6, at 212.

96 Ratner, *supra* note 5, at 487.

97 *See* BLANPAIN & COLUCCI, *supra* note 51, at 41.

98 CLAPHAM, *supra* note 6, at 216.

99 *Id.* at 217.

100 *Id.*

when governments fail to do so on their behalf.[101] The International Labour Office in consultation with the Sub-Committee prepares the draft reply and the ILO Governing Body ultimately considers the draft.[102] The Declaration has faced criticism regarding these implementation procedures; for example, Andrew Clapham, a leading scholar on the effects of human rights in the private sphere, has suggested that the ILO Declaration is not a useful tool for those affected by human rights violations because it lacks a "grievance procedure with . . . some meaningful remedy."[103]

C. UN Global Compact

The United Nations Global Compact—proposed by former UN Secretary General, Kofi Annan, at the 1999 World Economic Forum[104] and formally launched in July 2000[105]—is "an agreement between the United Nations and the world business community, for the respect and promotion of human rights."[106] The Global Compact asks companies to voluntarily observe ten core principles pertaining to human rights, labor, environment, and anti-corruption within their spheres of influence.[107] Notably, the Global Compact calls on companies to both "support and respect the protection of internationally proclaimed human rights" and to "make sure that they are not complicit in human rights abuses."[108] These principles are given further definition by the incorporation of the UN's "Protect, Respect, Remedy" framework, discussed below, and by specifying that the content contemplated by the Global Compact includes, "at a minimum . . . the International Bill of Human Rights and the core International Labour Organization ("ILO") Conventions."[109]

The Global Compact has been distinguished from the OECD Guidelines and the ILO Tripartite Declaration in that "it does not 'police', enforce, or measure" and is therefore not a regulatory instrument.[110] Any company of any size can adhere to the Global Compact by filling out the online registration form and submitting a commitment letter signed by the company's chief executive.[111] Participants are required to produce annual Communications on Progress ("COP"),

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101 *Id.*

102 ILO TRIPARTITE DECLARATION, *supra* note 91, at Procedure for the Examination of Disputes. *See also* CLAPHAM, *supra* note 6, at 217.

103 CLAPHAM, *supra* note 6, at 218.

104 *See* Lozano & Prandi, *supra* note 47, at 187-88.

105 BLANPAIN & COLUCCI, *supra* note 51, at 111.

106 Lozano & Prandi, *supra* note 47, at 188.

107 UNITED NATIONS GLOBAL COMPACT, THE TEN PRINCIPLES (2010) [hereinafter UN GLOBAL COMPACT] www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

108 *Id.* at Principles 1, 2.

109 *Id.* at Principle 1.

110 BLANPAIN & COLUCCI, *supra* note 51, at 41.

111 UNITED NATIONS GLOBAL COMPACT: CORPORATE CITIZENSHIP IN THE WORLD ECONOMY 4 (2010), *available at* http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf.

which explain progress toward the ten principles as well as broader UN goals and non-communicating participants are eventually delisted.[112] At base, the UN Global Compact is an attempt to "benchmark[] good companies and their codes, making this information publicly available and easily accessible."[113]

The Global Compact enjoys widespread corporate support—as of June 2009, more than 7,700 participants had committed themselves to the Global Compact.[114] However, the Compact's principles have "generally elicited skepticism from human rights proponents because of their vagueness and their apparent failure to generate significant pressure upon corporations to improve their performance."[115] For example, Clapham notes the absence of effective monitoring of participation and argues that the Compact has allowed companies and others to use it as a shield against more regulation and a clear framework.[116] Indeed, many companies that endorsed the Global Compact are repeat offenders.[117] Nonetheless, the Global Compact has been given a central place in the UN's "Protect, Respect, Remedy" framework, discussed below, through the work of John Ruggie, the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, who suggests that the Global Compact could play a central role in promoting the "sharing of information, improvement of tools, and standardization of metrics" pertaining to corporate due diligence responsibilities.[118]

D. UN Draft Norms

Despite their eventual loss of inertia, the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises in regard to Human Rights ("Norms"), which was adopted unanimously in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights ("Sub-Commission") deserve mention here as well.[119] The Norms were drafted by a working group of five international experts, including David Weissbrodt, the architect of the original draft.[120] The Norms comprise "the most comprehensive document in this area of business and human rights"[121] and can be distinguished

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[112] *See* United Nations Global Compact.org, Progress and Disclosure, Communicating Progress, http://www.unglobalcompact.org/COP/communicating_progress.html (last visited Dec. 28, 2010).

[113] McLeay, *supra* note 22, at 238.

[114] United Nations Global Compact.org, Participants and Stakeholders, UN Global Compact Participants, http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html (last visited Dec. 28, 2010).

[115] STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS, MORALS 1396 (3d ed. 2008).

[116] CLAPHAM, *supra* note 6, at 224.

[117] *See id.*

[118] Ruggie 2008 Report, *supra* note 78, at ¶ 64.

[119] *See* Lozano & Prandi, *supra* note 47, at 190 (stating that the Sub-Commission was previously called the Sub-Commission on the Prevention of Discrimination and Protection of Minorities).

[120] *See id.* at 191.

[121] Giovanni Mantilla, Emerging Human Rights Norms for Non-State Actors: The Case of

from the previously mentioned initiatives as "the first non-voluntary initiative accepted at the international level."[122] While drafted in non-voluntary language, the Norms are not a treaty, but a soft law instrument that purported to derive its authority from its "sources in treaties and customary international law, as a restatement of international legal principles applicable to companies."[123]

Significantly, "[t]he Norms appear to be . . . more focused on human rights than any of the international legal or voluntary codes of conduct."[124] The Norms set forth a broad list of requirements for corporations to respect human rights, to avoid having a negative effect on the enjoyment of human rights, to ensure compliance with human rights by periodic reporting and independent monitoring among other measures, and to require compliance by all business partners and sub-contractors.[125] The Norms state that "[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."[126]

Despite their unanimous adoption by the Sub-Commission, the Norms were tabled by the UN Commission on Human Rights in 2004.[127] Even though the working group's mandate directed them to "contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights,"[128] the UN Commission on Human Rights "decided, without a vote" that the Draft Norms had "not been requested by the Committee" and thus had "no legal standing."[129]

The Sub-Commission's unanimous acceptance of the Draft Norms has been distinguished from the Commission's decision to set the Norms aside based on the contrast between the Sub-Commission's composition of "more or less 'independent experts'" and the Commission's composition of state representatives.[130] State opposition to the Norms has been attributed to the claims that the Norms

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Transnational Corporations 18 (Feb. 2009), http://www.allacademic.com//meta/p_mla_apa_research_citation/3/1/4/0/6/pages314062/p314062-1.php.

122 Weissbrodt & Kruger, *supra* note 56, at 903.

123 *Id.* at 913.

124 *Id.* at 912.

125 UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* [hereinafter UN Draft Norms] U.N. Doc. E/CN.4/Sb.2/2003/12/Rev.2 (Aug. 13, 2003).

126 *Id.* at ¶ 1.

127 *See* Mantilla, *supra* note 121, at 19.

128 Sub-Commission on the Promotion and Protection of Human Rights, *The Effects of the Working Methods and Activities of Transnational Corporations*, ¶ 4(c), Res. 2001/3 (Aug. 15, 2001), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.3.En?Opendocument.

129 Commission on Human Rights, *Report to the Economic and Social Council on the Sixtieth Session of the Commission*, ¶ 2004/116, U.N. Doc. E/CN.4/2004/L.11/Add.7 (Apr. 22, 2004) (describing resolution 2004/116). *See also* Mantilla, *supra* note 121, at 19-20.

130 Mantilla, *supra* note 121, at 21.

"duplicated the work of other UN bodies" and that governments tend to protect the interests of the corporations within their territories.[131] Indeed, the Commission's decision may well have been a consequence of the active lobbying efforts of the International Chamber of Commerce and the International Organization of Employers in opposition to the draft Norms.[132]

Despite their ultimate fate, it is still important to determine what the Norms contributed to the business and human rights discussion.[133] For one, "they effectively reactivated the debate within the UN regarding the need to clarify and codify the legal responsibilities of these non-state actors, opening up a possibility for legal accountability which, once opened, may prove almost impossible to close again."[134] Moreover, the Norms are useful for the present analysis of the emerging normative framework as they were an attempt to "synthesize various prior codes created by the U.N. or other international organizations, corporations, unions, or NGOs."[135]

Significantly, the Norms hint at an emerging consensus, evidenced by the multi-stakeholder drafting process, which afforded the opportunity for NGOs, companies, unions, and scholars to provide input and suggest revisions.[136] Interestingly, "[h]ost states, according to Weissbrodt, maintained their support for the Norms, viewing them as a tool to prevent potential human rights misconduct by corporations."[137] Likewise, the Norms garnered noteworthy corporate support by some of the corporations that had been involved in the drafting process, including Novartis, British Petroleum, and Barclays Bank.[138]

E. SRSG and the UN "Protect, Respect, Remedy" Framework

The Draft Norms, and the debate they sparked, appeared to focus further UN attention and resources on corporate human rights responsibilities. For one, the UN Commission on Human Rights approved a mandate for a Special Representative of the Secretary-General ("SRSG") on the issue of human rights and transnational corporations and other business enterprises in 2005 and a few months later, the Secretary General appointed John Ruggie, who was one of the main architects of the UN Global Compact and who played a lead role in securing the General Assembly's adoption of the Millennium Development Goals at the Millennium Summit in 2000.[139] Subsequently, Ruggie was given a second mandate, extending

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131 *Id.* at 21.

132 *Id.* at 21-22.

133 *See* CLAPHAM, *supra* note 6, at 226-27.

134 Mantilla, *supra* note 121, at 25.

135 Goolsby, *supra* note 27, at 211.

136 *See* Weissbrodt & Kruger, *supra* note 56, at 904.

137 Mantilla, *supra* note 121, at 22.

138 *Id.* at 23 (noting that others, including Ruggie, disagree and have argued that no corporations supported the Norms after recognizing their legal implications).

139 *See id.* at 25-26. Press Release, UN Department of Public Information, Secretary-General

to 2011.[140] In carrying out his mandate, Ruggie has convened multi-stakeholder consultations, conducted research projects, produced documents, received submissions, and reported to the Commission on Human Rights and the Human Rights Council.[141]

The SRSG concluded that international human rights instruments do not yet impose direct legal duties on corporations, arguing that direct corporate responsibility is not explicitly set forth in international human rights instruments, treaty bodies' commentaries are ambiguous, and human rights courts focus on state duty to protect.[142] To the dismay of the supporters of the Draft Norms, Ruggie argued that the Norms were not—as they claimed to be—restatements of relevant international law because they extended beyond previously accepted international law.[143] This quick dismissal of the Norms has garnered much criticism.[144]

The SRSG's primary contribution was the "Protect, Respect and Remedy" policy framework he propounded in his 2008 Report, which was ultimately endorsed by the Human Rights Council in June 2008.[145] Now referred to as the UN framework, Ruggie's policy framework contemplates: the state duty to protect, the corporate responsibility to respect, and access to remedies.[146]

The second principle is most relevant for present purposes. The corporate responsibility to respect is not a legal duty but rather "a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Council itself."[147] In his words, this principle means corporations should "do no harm."[148] Ruggie has also stressed that the corporate responsibility to respect "applies to all companies in all

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Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Doc. SG/A/934, (July 28, 2005).

[140] PRELIMINARY WORK PLAN: MANDATE OF THE SPECIAL REPRESENTATIVE ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES : 1 SEPT. 2008 – 30 JUNE 2011 1 (2008). *available at* http://198.170.85.29/Ruggie-preliminary-work-plan-2008-2011.pdf.

[141] *See* Ruggie 2008 Report, *supra* note 78, at 3; The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework,* ¶ 7, *delivered to the Human Rights Council* [hereinafter Ruggie 2010 Report] U.N.Doc. A/HRC/14/27 (Apr. 9, 2010).

[142] *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 41-44, *delivered to the Human Rights Council* [hereinafter Ruggie 2007 Report] U.N.Doc. A/HRC/4/035 (Feb. 9, 2007).

[143] *See* Mantilla, *supra* note 121, at 27.

[144] *See* KINLEY, *supra* note 57, at 198 (citing Amnesty International's criticism by way of example).

[145] *See* Mantilla, *supra* note 121, at 32.

[146] *See* Ruggie 2008 Report, *supra* note 78.

[147] Ruggie 2010 Report, *supra* note 141, at ¶ 55.

[148] Ruggie 2008 Report, *supra* note 78, at ¶ 24.

situations."[149] Thus, he explained that "[i]n addition to compliance with national laws, the baseline responsibility of companies is to respect human rights."[150]

The corporate responsibility to respect human rights carries with it an inherent responsibility to conduct due diligence with respect to human rights, "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it."[151] The SRSG explained that, "there are few if any internationally recognized rights business cannot impact—or be perceived to impact—in some manner."[152] The SRSG defined the scope of the requisite due diligence by "the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities."[153]

There are four essential components of due diligence: "a statement of policy articulating the company's commitment to respect human rights; periodic assessment of actual and potential human rights impacts of company activities and relationships; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance."[154] All four components are necessary for corporations to "know and show" that they are respecting human rights.[155] Furthermore the SRSG emphasized the dynamism of the corporate responsibility to respect and the need for continual dialogue with relevant stakeholders.[156]

The UN Framework has been "well-received by most of the key audiences, including states, corporations and major international NGOs."[157] However it has also garnered criticism. Ruggie has not moved far beyond the traditional state-centered human rights paradigm, in fact he consistently notes that the first prong of his framework—the state duty to protect—"lies at the very core of the international human rights regime," and that the second prong—the corporate responsibility to respect—is merely voluntary unless incorporated into domestic law.[158] Thus, Kinley argues that Ruggie's proposed framework ignores the underlying problem—that some states are too weak or unwilling to protect human rights given the relative strength of corporations operating inside their borders.[159] However, even those who are critical of the UN's "protect, respect, remedy" framework are hopeful that Ruggie's extended mandate will give him time to build international

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149 Ruggie 2010 Report, *supra* note 141, at ¶ 57.
150 Ruggie 2008 Report, *supra* note 78, at ¶ 54.
151 *Id.* at ¶ 25, ¶ 56.
152 *Id.* at ¶ 52.
153 *Id.* at ¶ 72.
154 Ruggie 2010 Report, *supra* note 141, at ¶ 83.
155 *Id.* at ¶ 83.
156 *Id.* at ¶ 84.
157 Mantilla, *supra* note 121, at 33.
158 Ruggie 2008 Report, *supra* note 76, at ¶ 9.
159 KINLEY, *supra* note 57, at 198-99.

consensus and argue that his mandate is the "most obvious and best-equipped instrument for advancing intelligent, engaged, and committed investigation of how to fill the regulatory gaps that exist between domestic and international laws in respect of transnational human rights breaches by corporations."[160]

III. AN EMERGING CONSENSUS & ITS EFFECTS ON WOMEN'S EMPLOYMENT RIGHTS

The previous section described the intricate web of soft law guidelines that has been woven around corporations and human rights. Significantly, each of the soft law initiatives discussed refer to each other—they consider their efforts to be collaborative. For example, the ILO Tripartite Declaration explicitly refers to the activities of the OECD and the Global Compact.[161] The Global Compact emphasizes its derivation from the Universal Declaration of Human Rights ("UDHR") and ILO instruments.[162] The preface to the OECD Guidelines explains that "[g]overnments are co-operating with each other and with other actors to strengthen the international legal and policy framework in which business is conducted" and traces relevant developments.[163] The Draft Norms professed the intention to build upon all the above-mentioned soft law instruments and initiatives in an effort to "contribute to the making and development of international law" in this area.[164] Finally, the SRSG argues that the second component of the UN framework—the corporate responsibility to respect human rights—is recognized by the other relevant soft law initiatives.[165]

As the soft law infrastructure evolves, it is important to consider whether the normative framework is emerging in a direction that will be sufficient to fill the human rights governance gap. Given its disparate impact on women and the historical tendency for international law to evolve around male experiences and expectations, it is essential to determine whether the emerging consensus suffers from a similarly gendered composition. Using the garment industry as its focus, the remainder of this paper identifies the convergence between the soft law initiatives described above and analyzes whether the emerging normative structure sufficiently contemplates women's experience and is capable of protecting women's employment rights.

A. Incorporation of ILO Core Labour Standards

The most visible axis of convergence among the soft law initiatives is the incorporation—explicit or implicit—of the ILO core labour standards. The Global Compact, OECD Guidelines, and the ILO Declaration all retain the core labour

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160 *Id.* at 201.

161 ILO TRIPARTITE DECLARATION, *supra* note 91, at Tripartite Declaration of Principles.

162 UN GLOBAL COMPACT, *supra* note 107.

163 OECD GUIDELINES, *supra* note 65, at PART I, PREFACE, ¶ 8.

164 UN Draft Norms, *supra* note 125.

165 Ruggie 2008 Report, *supra* note 78 at ¶ 23.

standards from the 1998 ILO Declaration on the Fundamental Principles and Rights to Work.[166] Indeed, the Commentary to the OECD Guidelines indicates the intention to restate the fundamental rights in the ILO 1998 Declaration.[167] Furthermore, the core labour standards were clearly reflected in the Draft Norms,[168] and while the SRSG's Framework intentionally avoided presenting an enumerated list of rights, the principle of corporate responsibility claims to reflect the ILO Tripartite Declaration, which explicitly incorporates the core labour standards.[169] Thus, the soft law framework has coalesced around the corporate responsibility to respect the freedom of association and the right to collective bargaining, the elimination of child labour, the abolition of forced or compulsory labour, and the elimination of discrimination in occupation and employment.[170]

1. The Narrow Focus on the Core Labour Standards Overlooks Other Rights

While the core labour standards reflect a few important rights, they seem to overlook the remainder of the human rights corpus. This narrow focus is inadequate to address the concerns surrounding corporate activities and their effects on women's employment rights. The human rights paradigm recognizes a broad range of employment rights, extending well beyond the core labour standards.

In outlining the right to work, the UDHR goes beyond the prohibitions of discrimination, compulsory labor, and child labor and the focus on trade unions and collective bargaining, to emphasize the "free choice of employment, to just and favourable conditions of work and to protection against unemployment."[171] Similarly the UDHR recognizes "the right to just and favourable remuneration ensuring . . . an existence worthy of human dignity,"[172] and the right to rest and leisure including "reasonable limitation of working hours and periodic holidays with pay . . . ."[173] Subsequent human rights instruments have built upon these employment rights and consistently recognize the rights to fair wages, safe working conditions, reasonable hours, and equal pay, work conditions, and promotion opportunities for men and women.[174]

The human rights paradigm has also evolved to recognize the right to "equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men,

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166 *See* BLANPAIN & COLUCCI, *supra* note 51, at 121.

167 *See* OECD GUIDELINES, *supra* note 65, at PART III, COMMENTARY ON EMPLOYMENT AND INDUSTRIAL RELATIONS, ¶ 44.

168 *See* UN Draft Norms, *supra* note 125, at §§ B & D.

169 *See* Ruggie 2008 Report, *supra* note 78, at ¶ 23.

170 *See* BLANPAIN & COLUCCI, *supra* note 51, at 6.

171 Universal Declaration of Human Rights, G.A. Res. 217A. art. 23(1), U.N. GAOR, 3d Sess., 1st plen. mtg. [hereinafter UDHR] U.N. Doc A/810 (Dec. 12, 1948).

172 *Id.* at art. 23(3).

173 *Id.* at art. 24.

174 International Covenant on Economic, Social and Cultural Rights, art. 6, 7, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter ICESCR].

with equal pay for equal work."[175] The Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW") goes even further and requires State Parties to eliminate discrimination against women regarding the right to work, the right to employment opportunities, "the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining," the right to equal pay and benefits, the right to equal valuation of work, the right to social security, the right to paid leave, and the right to health and safety in the workplace.[176] The Committee on the Elimination of Discrimination Against Women ("the CEDAW Committee") has recognized that "unpaid work constitutes a form of women's exploitation that is contrary to the Convention."[177]

Importantly, the human rights paradigm explicitly addresses the gendered division of labor and its effects on women's employment opportunities. Recognition of the right to paid maternity leave has gained prominence as the human rights corpus has evolved.[178] Furthermore, CEDAW requires State Parties to ensure women are not discriminated against based on marriage or maternity.[179] In this regard, CEDAW explicitly calls on states to introduce maternity leave without negative ramifications, to encourage the creation of workplaces amenable to caring and familial obligations, to institute special protections for pregnant women, and to prohibit termination of employment based on pregnancy, maternity leave or marital status.[180]

It is apparent that the broader array of employment rights—recognized in the international human rights corpus—and the gender perspective that has been incorporated throughout the past decades, more adequately contemplate women's experiences in the global supply chains than the focus on core labour standards.[181] However, it must also be noted that the limited focus on the core labour standards has unintended negative consequences for many women. For example, when TNCs faced public criticism for the use of child labor in manufacturing soccer balls in Pakistan, they set up labor standards and monitoring mechanisms that eradicated the use of child labor in their factories, forcing their competitors to do the same.[182] However, the narrow focus on child labor left women and girls in an even more precarious situation when they were replaced by male workers.[183] It was noted that

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[175] *Id.* at art. 7.

[176] Convention on the Elimination of All Forms of Discrimination Against Women art. 11(1), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

[177] CEDAW Committee, General Recommendation 16, on Unpaid Women Workers in Rural and Urban Family Enterprises (1991) [hereinafter CEDAW Committee] *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom16.

[178] *See* ICESCR, *supra* note 174, at art. 10(2).

[179] CEDAW, *supra* note 176, at art. 11(2).

[180] *Id.*

[181] *See* discussion *infra* Part III.B.

[182] McLeay, *supra* note 22, at 235.

[183] *Id.*

"[i]n the absence of transitional programs and still needing income, women and children were forced to shift to other, less desirable forms of employment, including prostitution."[184] Thus, the narrow focus on the elimination of child labor failed to consider how women's rights would be implicated in shifting factory work to men.

2. The Core Labour Standards are Inapplicable to Women

As a nucleus of the emerging normative framework, the core labour standards are problematic for women's rights. The selection of the core labour standards as such has been called a political compromise,[185] yet women have not been adequately represented at any stage of the political deal-making, so the resulting compromises often fail to reflect their priorities. In a 2002 book analyzing the impact of corporate codes of conduct on labor rights, Ruth Pearson and Gill Seyfang explained that "[t]his lack of representation has then been reflected in the marginalization of women from any form of collective bargaining, be it plant level negotiations, national industry standards or international tripartite agreements such as the International Labor Organization (ILO)."[186] Unfortunately, women are still excluded from corporate social responsibility discussions.[187] The lack of female participation has allowed male experiences to serve as the metric for "universal" experience, while women's priorities have, once again, been relegated to the "particular."[188]

There are two main reasons why the priorities of women workers may differ from those of male workers within the garment industry's global supply chains. The first is that a woman's experience is increasingly characterized by confinement to the informal workforce, and the second is that women are forced to balance any paid labor with the continuing familial and care-taking roles placed on them by societal gender relations.[189] Indeed, these aspects of women's experiences are reflected in their priorities, which tend to include the formalization of work status, rights for pregnant workers, and the right to refuse overtime and to take holidays in order to balance their unpaid family and child-rearing responsibilities.[190]

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184 *Id.*

185 *See* ANJA K. FRANCK, KEY FEMINIST CONCERNS REGARDING CORE LABOR STANDARDS, DECENT WORK AND CORPORATE SOCIAL RESPONSIBILITY 20 (2008), *available at* http://www.cleanclothes.org/resources/recommended/key-feminist-concerns-regarding-core-labour-standards.

186 Ruth Pearson & Gill Seyfang, *'I'll Tell You What I Want...': Women Workers and Codes of Conduct*, *in* CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 43, 43 (Rhys Jenkins et. al. eds., 2002) (internal citations omitted).

187 *See* FRANCK, *supra* note 185, at 23.

188 *Id.* at 19. *See also* Charlesworth, Chinkin, & Wright, *supra* note 46, at 625.

189 *See* FRANCK, *supra* note 185, at 21.

190 *See* Shaw & Hale, *supra* note 28, at 106.

a. Overlooking the Informal Workforce

Constructed around the disappearing male model of paid employment—"highly unionized, working full time, based in fixed enterprises"[191]—the core labour standards do not contemplate employment within an informal economy.[192] The garment industry's informal sector includes a wide variety of labor arrangements including contract workers, home workers, and paid or unpaid family and dependent workers.[193] While both men and women comprise the informal work force, "the over-representation of women in the informal economy, particularly in marginalized and vulnerable occupations" has been well documented.[194] For example, the CEDAW Committee has recognized that a "high percentage of women in the States parties work without payment, social security and social benefits in enterprises owned usually by a male member of the family."[195]

The core labour standards fail to protect the subcontracted workforce because it remains hidden and difficult to trace. Factory inspections overlook the existence of subcontracted labor, home workers, and the substandard work conditions they face.[196] Due to the extensive subcontracting, "[workers] will often be unaware of who they are working for, and are even less likely to know about any codes of conduct or their implementation."[197] In failing to extend rights protections to the informal economy, the core labour standards fail to contemplate the worst employment rights abuses: research has shown that "the abuse of workers' rights is greatest the furthest away they are from the centres of production."[198] Out of sight and out of mind, informal laborers are forced to accept low and irregular wages without access to employee benefit programs.[199] Furthermore, because they lack formal contracts, workers in the informal workforce cannot access state welfare and social protection programs.[200]

Female members of the informal work force "face multiple challenges of discrimination based upon both their employment status and gender ideologies."[201] Women are far more likely to be in the informal workforce because gender inequalities have left them with less education, fewer job opportunities and more

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191 Philip Alston, *Labour Rights as Human Rights: The Not So Happy State of the Art*, *in* LABOUR RIGHTS AS HUMAN RIGHTS 1, 22-23 (Philip Alston ed., 2005).

192 Cornish et al., *supra* note 46, at 381.

193 FRANCK, *supra* note 185, at 16.

194 CONSULTATION SUMMARY, *supra* note 44, at 2.

195 CEDAW Committee, *supra* note 177.

196 *See* RAWORTH, *supra* note 12, at 56.

197 Wills & Hale, *supra* note 15, at 13.

198 Angela Hale & Jane Wills, *Conclusion*, *in* THREADS OF LABOUR 234-35 (Angela Hale & Jane Wills eds., 2005).

199 *See* Cornish et al., *supra* note 46, at 381.

200 *See* FRANCK, *supra* note 185, at 16 (internal citation omitted).

201 *Id.* at 17.

family responsibilities than their male counterparts.[202] Plus, the same gender inequalities that led women into the informal sector place them in a worse situation once they are there: "[w]omen in the informal sector have less property and fewer assets; are largely under-compensated; are prevented from obtaining the necessary credit to sustain themselves and their families; and are less able to access and enforce their rights."[203] Furthermore, the instability of women's informal work limits their ability to "re-negotiate their care-giving responsibilities at home . . . [and] most continue to be the primary carers, with little or no support from their partners."[204]

b. Inaccessibility of Trade Unions and Collective Bargaining

The contents of the core labour standards are based on assumptions underlying the male construction of employment relations. Their focus on the right to organize and collective bargaining is disconnected from women's experiences in global supply chains and thus inadequate to protect their employment rights.[205]

Trade unions are largely inaccessible in the informal sector because informal laborers are dispersed in their homes and in small workshops, rather than together in a single factory, making union organizing more difficult.[206] Furthermore, the largely female informal workforce has less negotiating leverage up the supply chain because their informal status makes their jobs highly mobile and their gender often limits alternative job opportunities in the event of termination.[207] Indeed, the ILO's tripartite structure and its reliance on trade unions has been called "increasingly anachronistic" because it overlooks these realities of the informal workforce.[208]

However, even women who are fortunate enough to work in the formal workforce face obstacles to unionization. Trade unions themselves contribute to women's under-representation in instances in which male-dominated union leadership fails to organize them.[209] Even when the exclusion of women is not overt, recruitment practices and meeting locations can act to bar women's entry. For example, in Kenya, "[union] recruitment . . . often takes place in bars in the evening-places not considered appropriate for women."[210] Furthermore, due to their double burdens at home and at work, women face time restraints that impede their ability to join trade unions, much less dedicate time to leadership positions.[211]

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202 *See* RAWORTH, *supra* note 12, at 18.

203 Cornish et al., *supra* note 46, at 381.

204 RAWORTH, *supra* note 12, at 28.

205 *See* Shaw & Hale, *supra* note 28, at 110.

206 Cornish et al., *supra* note 46, at 396.

207 *See* FRANCK, *supra* note 185, at 22.

208 Alston, *supra* note 191, at 23.

209 *See* Shaw & Hale, *supra* note 28, at 102 (internal citations omitted).

210 RAWORTH, *supra* note 12, at 25.

211 *See* FRANCK, *supra* note 185, at 24.

Money is another factor as women's wages are often lower than their male counterparts and their jobs are unstable, which may result in decreased willingness to pay monthly union dues.[212]

Furthermore, workers face direct and indirect pressure not to organize. Due to the mobility of the global supply chains, garment workers realize that TNCs may readily shift production to different factories to take advantage of lower wages or a workforce that does not demand better work conditions.[213] Firms are able to shop around for cheap labor and this enables them "to pit workers in different locations against each other, dampening wage negotiations, undermining unionization, and fostering concessionary bargaining in which employees must give up benefits in order to retain their jobs."[214] Many factories actively strive to prevent unionization as well.[215] In fact, one reason factories prefer to hire women is that their limited employment options and experience mean they have "little exposure to organizing traditions."[216] Likewise, research on the garment industry in Bangladesh showed that factories employed women from different social classes to obstruct worker solidarity and that factory owners used village kin as informers to prevent unionization efforts.[217]

3. Core Labor Standards Are Incapable of Combating Structural Discrimination

While the core labor standards do cover anti-discrimination, the general provision fails to address the ways in which gender discrimination is built into the structure of the garment industry.[218] Indeed, women are forced to accept jobs with low pay and without contracts precisely *because* gender discrimination has limited their access to other forms of employment. In other words, the problem is not that women are discriminately prohibited from obtaining work in the garment industry, quite the opposite—women are tracked into garment labor and are forced to accept substandard work conditions while their male counterparts, with more employment options, are tracked into more stable positions with managerial responsibilities and higher pay.[219]

Even if the generic anti-discrimination provision moves beyond mere equal pay for equal work—which offers no protection for women when they perform different jobs than men—to embody the more progressive "equal pay for work of equal value," it fails to adequately protect women's employment rights because women's work continues to be valued less than men's work. Jane Collins, a scholar who has studied the use of gendered discourses of pay within the garment

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212 *See* RAWORTH, *supra* note 12, at 24.
213 *See* Wills & Hale, *supra* note 15, at 7.
214 COLLINS, *supra* note 13, at 10.
215 *See* RAWORTH, *supra* note 12, at 61.
216 COLLINS, *supra* note 13, at 13.
217 Ahmed, *supra* note 33, at 38-39.
218 FRANCK, *supra* note 185, at 18.
219 *See* RAWORTH, *supra* note 12, at 22.

industry, has described how "skill naturalization" is used to devalue women's work and justify their lower wages and substandard work conditions.[220] It is argued that the abilities needed to carry out factory work in the garment industry "are neither scarce nor acquired at much cost to the worker."[221] The required tasks are seen as "similar to women's tasks at home," so they are typed "low skill" and are therefore "low-paid." [222] Indeed, by "naturalizing" the skills of women workers, it is as if "sewing skills are found in a local population in the same way that a natural resource is discovered."[223] On the contrary, however, Collins' interviews with apparel industry managers have revealed that all factory jobs require training "to become familiar with a machine, learn a complicated series of operations, and exercise discretion and care in performing them."[224] In other words, learned skills and technical abilities are required for these positions.

Women's low wages are even explicitly justified by stereotyped gender roles. For example, research showed that factory managers and owners in Java purposefully paid men more than women "because they had to support families" even though "[m]ost male . . . workers were unmarried . . . and their factory wages were not used to meet their daily subsistence needs."[225] The same study revealed that even when women garment workers supported their families financially, their income was viewed as supplemental, and women were still considered to be the dependents of male family members.[226] Similarly, it is sometimes argued that women want jobs in the informal sector because the "flexibility" allows them to balance their work and familial responsibilities; however the truth is that they rarely have the choice.[227]

B. Tapping into the Transformative Potential of the Human Rights Paradigm

Fortunately for women, the consensus that emerges from the relevant soft law instruments does not end with the core labor standards. In fact, the parallel initiatives appear to be converging towards recognition that the human rights corpus should be tapped as a whole, rather than by reference to a few select rights. This is a welcomed trend—without it, the emerging normative framework could aptly be called a "piecemeal implementation of quasi-human rights principles, with

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220 COLLINS, *supra* note 13, at 175-176.

221 *Id.* at 176.

222 RAWORTH, *supra* note 12, at 22.

223 COLLINS, *supra* note 13, at 173.

224 *Id.* at 174.

225 Diane L. Wolf, *Linking Women's Labor with the Global Economy: Factory Workers and their Families in Rural Java*, *in* WOMEN WORKERS AND GLOBAL RESTRUCTURING 25, 30-32 (Kathryn Ward ed., 1990).

226 *Id.* at 30.

227 RAWORTH, *supra* note 12, at 20.

the potential to 'dumb down' human rights to the lowest, most easily achievable norms."[228]

The emerging consensus surrounding the need to draw upon the human rights paradigm is both acknowledged and propelled by the work of the SRSG. After surveying the relevant soft and hard law instruments, the SRSG reported that "[it] stands to reason that human rights should be at the very center of these concerns . . . . [Securing] respect for human rights must be a central aim of governance at all levels, from the local to the global, and in the private sector no less than the public."[229] In rejecting the UN Draft Norms and designing the Protect, Respect, Remedy policy framework, the SRSG chose not to delineate specific rights for which corporations can bear responsibility—as the UN Draft Norms attempted to do—and sought to define "the specific responsibilities of companies with regard to *all* rights."[230] Ruggie has consistently emphasized the relevance of the human rights edifice as a structure in its entirety, counseling corporations to look to the human rights corpus for an "authoritative list of rights" when conducting human rights due diligence.[231] The SRSG cautioned that the international human rights instruments are state-based, but noted that they contain rights that "are the baseline benchmarks by which other social actors judge companies' human rights practices."[232]

Importantly, recent developments within the other soft law frameworks have incorporated Ruggie's emphasis on the human rights paradigm. The OECD Guidelines are currently undergoing revision and the Terms of Reference for the envisioned update explicitly say "[t]he update should develop more elaborated guidance on the application of the Guidelines to human rights, including if deemed appropriate, in a separate chapter of the Guidelines, drawing, in particular, on the work of the UNSRSG."[233] Likewise, the UN Global Compact has integrated the UN Framework and has incorporated the work of the SRSG.[234] Indeed, attorneys who are seasoned practitioners in this area have recognized the movement in this direction: "the behavior of multinationals . . . is increasingly assessed not just under local law, but pursuant to international normative standards, such as the Universal Declaration on Human Rights and conventions by the International Labor Organization . . . ."[235]

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[228] McLeay, *supra* note 22, at 234 (referring to the possibility that corporate codes of conduct could end up reflecting a lowest common denominator).

[229] Ruggie 2010 Report, *supra* note 141, at ¶ 19.

[230] Ruggie 2008 Report, *supra* note 78, at ¶ 51 (emphasis added).

[231] Ruggie 2010 Report, *supra* note 141, at ¶ 60.

[232] *Id.* at ¶ 60.

[233] OECD TERMS OF REFERENCE, *supra* note 79, at 3.

[234] UN GLOBAL COMPACT, *supra* note 107, at Principle 1.

[235] Smith, *supra* note 8, at 4 (while [Smith] is referring to the extractive industry, his comments are applicable to all TNCs).

There is already a solid foundation for the emerging normative framework to embrace a more comprehensive incorporation of the human rights corpus. Each of the soft law instruments refers to the UDHR as a foundation for the instrument.[236] The soft law instruments purport to gain authority from the responsibilities that corporations owe to society as 'organ[s] of society' in the UDHR.[237] The SRSG acknowledged "the Declaration's aspirations and moral claims were addressed, and apply, to all humanity—and . . . companies themselves invoke it in formulating their own human rights policies."[238] Indeed, Clapham has explained that the UDHR has no general rule that states are the only duty-bearers.[239] Clapham argues that the UDHR's inclusion of "every organ of society" makes it clear that every entity, including corporations, was contemplated by the drafters.[240]

A more comprehensive incorporation of the human rights paradigm has the potential to enrich the evolving normative structure by harnessing the transformative elements of human rights. This is a pivotal shift in the evolution of the emerging normative consensus—one that is necessary if the soft law framework is ever going to yield an effective solution to the human rights governance gap. The final section of this paper will demonstrate how the transformative aspects of the human rights paradigm could help to steer the evolution of the normative framework in a direction that more adequately contemplates women's employment rights.

1. The Connection Between Structural and Individual Discrimination

As the emerging normative framework draws from the human rights paradigm, it stands to gain from the rich development that has taken place within the concepts of equality and non-discrimination. Specifically, the human rights paradigm has evolved to recognize and address the connection between structural and individual discrimination. These developments could help to re-interpret the general non-discrimination component of the core labor standards to move beyond the male construction of employment relations, and to tackle the structural discrimination upon which the garment industry is built.

Within the concept of substantive equality, the human rights paradigm has evolved to recognize structural discrimination as an obstruction to the equal enjoyment of individual human rights. Indeed, the Committee on Economic, Social and Cultural Rights has recognized that "[w]omen, in particular, are often denied

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236 *See* United Nations Global Compact.org, Human Rights, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html (last visited Dec. 21, 2010); UN Draft Norms, *supra* note 125, at Preamble; OECD GUIDELINES, *supra* note 65, at Commentary ¶ 4; ILO TRIPARTITE DECLARATION, *supra* note 91, at General Policies ¶ 8; Ruggie 2008 Report, *supra* note 78, at ¶ 58.

237 *See* Lozano & Prandi, *supra* note 47, at 202.

238 Ruggie 2007 Report, *supra* note 142, at ¶ 37.

239 CLAPHAM, *supra* note 6, at 33.

240 *Id.* at 228.

equal enjoyment of their human rights, by virtue of the lesser status ascribed to them by tradition and custom or as a result of overt and covert discrimination."[241] CEDAW requires States Parties to

> take all appropriate measures . . . [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[242]

The link between structural and individual discrimination is even recognized in the UDHR, which states that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[243]

A more comprehensive incorporation of the human rights paradigm would enable the emerging normative framework to draw upon these concepts to address discriminatory industry configuration and managerial decision-making. CEDAW's recognition of the need to modify customs when they discriminate against women—an explicit reference to the linkages between structural and individual discrimination—is a necessary building block in this regard. While CEDAW is indeed addressed to States Parties, as duty-holders, the CEDAW Committee, as well as other human rights treaty bodies, has already recognized the ways in which culturally constructed gender roles and the resulting gender inequality influence industry practices. The CEDAW Committee has recognized that the principle of "equal remuneration for work of equal value" fails to have any meaningful effect if the "gender segregation in the labour market" is ignored.[244] Similarly, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") has explained that sex discrimination can be based on "stereotypical assumptions, such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men."[245] The Human Rights Committee has re-interpreted the International Covenant on Civil and Political Rights ("ICCPR") to integrate a gender perspective, notably observing that: "prevailing customs and

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[241] U.N. Econ. & Soc. Council [ECOSOC], Committee on Econ., Soc., and Cultural Rights, *General Comment N. 16: Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, ¶ 5, U.N. Doc. E/C.12/2005/3 (May 13, 2005) [hereinafter ECOSOC] *available at* http://www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf.

[242] CEDAW, *supra* note 176, at art. 5(a).

[243] UDHR, *supra* note 171, at art. 28.

[244] U.N. Convention on the Elimination of all Discrimination Against Women, Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 13: Equal Remuneration for Work of Equal Value* (1989), http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom13 [hereinafter CEDAW Committee on the Elimination of Discrimination Against Women].

[245] ECOSOC, *supra* note 241, at ¶ 11.

traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value."[246]

The emerging consensus must address the ways that gender ideology is used to justify the gender segregation of the labor force, the valuation of work, and resulting wage differential. It must also remove the obstacles women face as they are expected to conform to socially constructed gender roles while working within a labor market built around male experiences. In this regard, the emerging framework could build upon CEDAW's recognition of "maternity as a social function" and the corollary "common responsibility of men and women in the upbringing and development of their children."[247] Indeed scholars have emphasized "[p]arental leave policies are a way to acknowledge and cross-subsidize the economic costs of parenting which have historically fallen on women's shoulders."[248] The human rights project has begun to speak to non-state actors in this regard:

> As a follow up to the Beijing *Platform for Action* and *Beijing+5*, employers (including private sector employers) have an obligation to take proactive steps to implement equal pay for work of equal value, to eliminate gender segregation in the labor force, and to review, analyze and reformulate wage structures for female-dominated jobs with a view to raising their status and earnings.[249]

Furthermore, treaty bodies are increasingly recognizing corporate responsibility. For example, the ICESCR has said that "all members of society . . . including . . . the private business sector have responsibilities regarding the realization of the right to health [including maternal health]."[250]

This emphasis on the interrelation between structural and individual discrimination could enable the emerging consensus to address the interaction between industry practices and gender relations outside the workforce. For example, in an article analyzing the role of gender in the garment industry in Bangladesh, scholar Fauzia Ahmed has suggested that employers "begin a voluntary plan to allow women to deduct savings from their paychecks. Such a strategy would allow women to save some of their hard-earned money without

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246 U.N. International Covenant on Civil and Political Rights [ICCPR], Human Rights Committee, *General Comment No. 28: Equality of Rights Between Men and Women*, ¶ 31, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument [hereinafter ICCPR].

247 CEDAW, *supra* note 176, at art. 5(b).

248 Cornish et al., *supra* note 46, at 395.

249 *Id.* at 381.

250 U.N. Econ. and Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 42, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument.

arguments at home."[251] Likewise, the emerging consensus must address the ways in which gender inequality in the workplace obstructs women's access to the public benefits to which they are entitled. For example, the ICESCR has recognized the fact that women's lower wages, confinement to the informal workforce, and time away from work for pregnancy or family responsibilities all inhibit their ability to contribute to social security schemes. [252] While the ICESCR remained constrained by the statist character of human rights law, its recognition of the importance of eliminating those factors or taking them into account "in the design of benefit formulas"[253] has potential application to the private sector as well. By drawing upon the human rights paradigm, the emerging normative framework could build upon this work to address the ways in which discrimination structuring corporations augments gender inequality outside the workplace.

Recognition of the connection between structural and individual discrimination could also enable the emerging consensus to move beyond its reliance on national law as a baseline for corporate human rights responsibility. Unfortunately, due to the underlying lack of political will to recognize binding corporate human rights duties, the soft law instruments have converged around a baseline respect for national law and policy.[254] This is problematic for women as national laws frequently suffer from the same gendered construction that has been detailed throughout this paper. Indeed, "women . . . are frequently excluded from the establishment of national and local labor practices in their own countries . . ."[255] Furthermore, women are frequently denied protection under national laws as many women work in the informal sector or in EPZs.[256] In fact, the human rights governance gap revolves around the fact that governments are frequently unwilling or unable to enforce national laws in the face of corporate pressure and the threat of divestment. For all these reasons, the emerging consensus must move beyond its explicit respect for national laws.

Furthermore, there is an inherent conflict between the call to respect national laws and the convergence toward a more comprehensive incorporation of the human rights paradigm. The SRSG has even acknowledged that national laws and international human rights are frequently in tension.[257] Here again, the emerging

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251 Ahmed, supra note 33, at 42.

252 U.N. Economic and Social Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *General Comment 19: The Right to Social Security*, ¶ 32, U.N. Doc E/C.12/GC/19 (Feb. 4, 2008), *available at* http://www.romatogether.org/documents/GR19_CESCR.pdf.

253 *Id.* at ¶ 32.

254 *See* OECD GUIDELINES, *supra* note 65, at PART I, PREFACE, ¶ 1; UN GLOBAL COMPACT, *supra* note 107, at Principle 1; UN Draft Norms, *supra* note 125, at § E ¶ 10; ILO TRIPARTITE DECLARATION, *supra* note 91, at General Policies ¶ 8; Ruggie 2008 Report, *supra* note 78, at ¶ 54.

255 Pearson & Seyfang, *supra* note 186, at 56.

256 RAWORTH, *supra* note 12, at 44-45. *See also*, ICCPR, *supra* note 246, at ¶ 31.

257 John Ruggie, Special Representative of the Secretary-General On The Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report to the Human Rights Council, Business and Human Rights: Towards Operationalizing the "Protect, Respect, Remedies" Framework* ¶ 66-68, A/HRC/11/13 (Apr. 22, 2009) [hereinafter Ruggie 2009 Report].

framework should build upon CEDAW's linkages between individual and structural discriminations to develop ways in which corporations could institute a gender perspective to navigate national laws. For example, the experts who met with the SRSG to discuss the integration of a gender perspective into his mandate noted that "many countries still have gender-biased laws on their statute books" so that companies might have to "develop processes and policies that respect the spirit of gender equality, while not contravening local or national laws."[258] Indeed, recognition of the structural discrimination—embedded within industry structure and in national laws—would enable the emerging consensus to move beyond its male construction and to recognize the misplaced emphasis on national laws as a baseline for corporate human rights responsibility.

2. Participation and Representation

As the emerging consensus converges toward a more comprehensive incorporation of the human rights paradigm, participation and representation rights hold significant promise for the protection of women's employment rights. Indeed, effectively closing the human rights governance gap may well hinge upon the empowerment that is derived from participation and representation. A greater focus on women's right to participate both in the formulation of the soft law framework and in trade unions and newer forms of labor organization will give women workers voice in the construction of the emerging framework and will garner inclusion of women's priorities. Furthermore granting women workers ownership over the normative structure has the instrumental effect of increasing the likelihood that women workers will embrace and utilize the framework to enforce their rights.

a. Participation, Empowerment and Ownership

Equal opportunities to participate in government and the formulation of policy at all levels is a fundamental component of the human rights paradigm and features prominently in CEDAW. Article 7 recognizes the importance of women's participation in the formulation of policy and in government and non-governmental organizations.[259] Article 8 recognizes the importance of women's equal participation in the representation of governments in the international arena and within international organizations.[260] Despite the statist constraints of international law, the CEDAW Committee has recognized that gender equality depends upon women's "full and effective participation," which in turn requires the "the encouragement and support of *all sectors of society*."[261] Furthermore, the

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[258] CONSULTATION SUMMARY, *supra* note 44, at 5.

[259] CEDAW, *supra* note 176, at art. 7.

[260] *Id.* at art. 8.

[261] CEDAW Committee on the Elimination of Discrimination Against Women, *supra* note 244, at *General Recommendation 23: Women in Political and Public Life*, ¶ 15 (1997) (emphasis added).

Committee has recognized the transformative potential of women's participation for individual women and for society, arguing that "[w]omen's full participation is essential not only for their empowerment but also for the advancement of society as a whole."[262]

The human rights paradigm has also incorporated transformative measures to counteract structural obstacles to women's participation. The emerging normative framework should build upon the temporary special measures employed within the human rights paradigm to further substantive equality.[263] In fact, scholars have argued that "[affirmative] action or employment equity measures and laws are necessary to attack the occupational segregation of women both horizontally and vertically."[264] Fortunately the emerging framework already has a strong foothold for the implementation of transformative measures. The SRSG has explained that "'doing no harm' is not a passive responsibility for firms but may entail positive steps for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes."[265] Likewise, the ILO Tripartite Declaration has at least acknowledged the need for corporations to comply with "government policies designed to correct historical patterns of discrimination and thereby to extend equality of opportunity and treatment in employment."[266]

Women's participation in corporate citizenship discussions and the drafting of multinational guidelines is key to dismantling the male conception of employment relations. Women have priorities that are not contemplated in the emerging consensus.[267] Studies have shown that the inclusion of a "critical mass" of women makes a significant difference in both process and substance.[268]

Unfortunately, women workers have been excluded from participation both because of their gender and their location at the bottom of the supply chains in the Global South.[269] To the extent that NGOs and trade unions have been involved in the drafting of multi-stakeholder initiatives, consultations have taken place in "home" countries rather than in the communities which "host" the factories at the bottom of the supply chain.[270] This is problematic because "women workers in different places may not necessarily share the same priorities or have the same needs."[271] In fact, women workers have voiced their concerns that well-meaning

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262 *Id.* at ¶ 17.

263 *See* CEDAW, *supra* note 176, at art. 4.

264 Cornish et al., *supra* note 46, at 394.

265 Ruggie 2008 Report, *supra* note 78, at ¶ 55.

266 ILO TRIPARTITE DECLARATION, *supra* note 91, at ¶ 22.

267 *See* Pearson & Seyfang, *supra* note 186, at 44.

268 *See, e.g.*, CEDAW Committee on the Elimination of Discrimination Against Women, *supra* note 244, at *General Recommendation 23: Women in Political and Public Life*, ¶ 16 (1997) (discussing "critical mass").

269 *See* Prieto et al., *supra* note 24, at 156.

270 Shaw & Hale, *supra* note 28, at 104.

271 FRANCK, *supra* note 185, at 21.

action in the North might overlook devastating consequences in the South, such as "dismissal or . . . factory closures and companies leaving the country."[272] To adequately protect women's employment rights, the emerging normative framework must be grounded in women's participation throughout the global supply chains.

Furthermore, because the efficacy of the soft law framework depends upon its relevance in local contexts, the empowering potential of participation is key. The soft law instruments will gain traction and an international consensus will be possible only if the workers "accept that codes are a useful mechanism for protecting their rights. Only then will workers be able to use codes as a negotiating tool and be in a position to monitor their implementation."[273] Women workers are more likely to recognize the utility of soft law instruments and their relevance to their daily work environment if they have participated in or been adequately represented in the drafting process. "Workers' rights will never be realized unless workers are empowered to defend them. They are the only people who know the day-to-day realities of their jobs."[274] Participation garners inclusion of women's priorities and creates women's ownership over the emerging normative framework, thereby empowering women to claim their rights.

This instrumental function of participation—enhancing the extent to which women use the emerging framework to claim their rights—will also be helpful in ensuring the application of the normative framework throughout the length of the global supply chains. Each of the soft law initiatives converge around the recognition that application to the supply chains is essential.[275] In fact, the Terms of Reference for carrying out the update of the OECD Guidelines foresee a revision pertaining to the Guidelines' application to supply chains and note that the SRSG's focus on due diligence should apply throughout supply chains.[276] The participation component of the human rights paradigm would empower women workers to make that happen.

b. Beyond Trade Unions

Moreover the human rights paradigm offers a useful set of tools for the emerging consensus to make trade unions more accessible to women workers and to recognize and encourage other forms of labor organization. Trade unions feature prominently throughout the human rights paradigm.[277] CEDAW protects a

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[272] Prieto et al., *supra* note 24, at 156.

[273] Shaw & Hale, *supra* note 28, at 104.

[274] RAWORTH, *supra* note 12, at 82.

[275] *See* UN Draft Norms, *supra* note 125, at § H ¶ 15; ILO TRIPARTITE DECLARATION, *supra* note 91, at ¶ 6; UN GLOBAL COMPACT, *supra* note 107, at Principle 1; Ruggie 2010 Report, *supra* note 141, at ¶ 58; OECD TERMS OF REFERENCE, *supra* note 79, at 3.

[276] OECD TERMS OF REFERENCE, *supra* note 79, at 3.

[277] *See, e.g.*, UDHR, *supra* note 171, at art. 23(2)-(4); ICESCR, *supra* note 174, at art. 8(1)(a); G.A. Res. 2200A, art. 22(1), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966);

woman's right to participate in non-governmental organizations and associations, which include trade unions.[278] In fact, the CEDAW Committee has recognized the need for trade unions to address gender inequality:

> [T]rade unions . . . have an obligation to demonstrate their commitment to the principle of gender equality in their constitutions, in the application of those rules and in the composition of their memberships with gender-balanced representation on their executive boards so that these bodies may benefit from the full and equal participation of all sectors of society and from contributions made by both sexes.[279]

However, in today's globalized world, it is clear that workers need more than traditional trade unions to protect their employment rights within the global supply chains. With the constant threat of divestment and the resulting instability of jobs, "[m]anufacturing workers in particular, need to be able to challenge the impact of subcontracting that is controlled beyond their own workplace. If workers are to bargain to improve their conditions of work, the competitive contracting environment and the unequal power relations on which it rests need to be tackled."[280] In this regard, scholars have emphasized the efficacy of grassroots women's organizations and alliances between new and old forms of labor organization.[281] Indeed, women workers' organizations around the world have already "begun to fill the gap in labor representation."[282] Other forms of labor organization have also begun to increase women's representation and participation, for example, "workers' justice centres have been set up to reach, support and mobilise groups of low-paid workers, many of them migrants, who have weak associations with their workplaces and stronger affiliations outside."[283] The emerging normative framework must evolve to recognize the utility of labor organization outside traditional trade unions and the human rights paradigm has paved the way.

The human rights paradigm recognizes labor organization outside the male trade union construct. ICESCR explicitly recognizes the "right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations."[284] This is important for women workers as such networks have the potential to counter TNCs' ability to pivot

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CEDAW, *supra* note 176 at art. 7(c); CEDAW Committee on the Elimination of Discrimination Against Women, *supra* note 244, at *General Recommendation 23: Women in Political and Public Life*, at ¶ 5.

278 CEDAW, *supra* note 176, at art. 7(c); CEDAW Committee on the Elimination of Discrimination Against Women, *supra* note 244, at *General Recommendation 23: Women in Political and Public Life*, at ¶ 5 (1997).

279 CEDAW Committee on the Elimination of Discrimination Against Women, *supra* note 244, at *General Recommendation 23: Women in Political and Public Life*, at ¶ 34 (1997).

280 Wills & Hale, *supra* note 15, at 7-8.

281 Shaw & Hale, *supra* note 28, at 111.

282 Wills & Hale, *supra* note 15, at 11.

283 *Id.* at 12.

284 ICESCR, *supra* note 174, at art. 8(1)(b).

workers against each other. Indeed, the CEDAW Committee has recognized the utility of a wide variety of organizations in conjunction with trade unions, calling for women's equal participation in all "aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life."[285] The emerging framework should build upon the human rights paradigm's ability to see beyond trade unions in order to carve out space and protection for the ways in which women effectively harness their collective power.

CONCLUSION

In identifying the disparate effects of the human rights governance gap on women in the garment industry, this Article demonstrates how the emerging consensus has inherited a gendered composition, which overlooks women's experiences to the detriment of their employment rights. The skeletal convergence of the soft law instruments identified throughout this Article is helpful to forecast the evolution of a normative framework and to steer it to adequately protect women's rights.

The Article identifies two primary axes of convergence: a coalescence around the ILO core labor standards and a growing awareness of the need to draw upon the human rights paradigm in its entirety, rather than by reference to a select group of rights. In particular, this Article highlights how the emerging consensus could harness the transformative potential of the human rights paradigm by incorporating its focus on structural discrimination and by unleashing the empowering potential of women's participation rights.

Moreover, the Article identifies footholds within the emerging consensus and corresponding guideposts within the human rights paradigm for the application of these concepts in the private sector. As the relevant soft law instruments continue to converge, a gender perspective and a more comprehensive incorporation of the human rights paradigm are essential to guide the evolution of the normative framework towards effectively filling the governance gap.

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[285] CEDAW Committee on the Elimination of Discrimination Against Women, *supra* note 244, at *General Recommendation 23: Women in Political and Public Life*, at ¶ 5 (1997).