



Garment supply chains in intensive care?

Human rights due diligence in times of (economic) crises

POLICY PAPER

The new coronavirus (COVID-19) affects almost every area of people's lives and economic activity and has led to a significant disruption of world trade. The current situation demonstrates how precarious our global systems of production and consumption are. In response to the COVID-19 pandemic, a significant number of consumer countries have either gone into full lockdown, or have, for example, closed retail shops. This has led to a drastic drop in demand, hitting garment sector brands and retailers¹ particularly hard.

Many global brands and retailers' instant reaction was to unilaterally cancel orders for goods already produced or in the process of being produced.² Of suppliers in Bangladesh who abruptly lost in-process contracts without compensation, 72.4 percent said they were unable to provide their workers with income when furloughed (sent home temporarily), and 80.4 percent said they were unable to provide severance pay when order cancellations resulted in worker dismissals, with over 95 percent reporting no support from brands and retailers to cover these costs.³ This data underscores the massive power imbalances between consumer-facing brands and their suppliers in the global garment industry, allowing global companies to set terms unilaterally with grave consequences for workers and suppliers. Faced with the COVID-19 crisis, textile companies fall back on exactly what their supply chains are designed for: externalizing costs, outsourcing economic risk, and shifting the responsibility for

¹ The paper uses the term brands and retailers. Although the instruments cited on business and human rights refer to the generic term business, the paper wants to focus on the role so-called lead companies play in the garment supply chain.

² See Mark Anner, 'Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains,' *Penn State Center for Global Workers' Rights* (March 2020)

³ Anner (2020)

workers' social rights to suppliers. They simply leave behind corporate social responsibility promises as well as human rights obligations. With this reaction, once again, the garment sector is a paradigmatic example of the dynamics of global supply chains.

Still, human rights remain the benchmark government and business activity must be measured by, and they remain applicable in times of severe economic crises. This current crisis clearly shows that if governments and corporations had more seriously fulfilled and respected human rights in recent years, especially economic and social rights, fewer workers would be hit as hard by the current situation. Social security systems – to which all people have a right – prepare societies to alleviate hardships created by crises such as COVID-19. Their absence allows full-blown violations of social and economic human rights: the right to food, adequate housing, health and social protection.⁴

Therefore, in this paper, we explore the following questions:

- What should proper due diligence by brands and retailers have looked like in

relation to these human rights in the years preceding the current crisis?

- What are current human rights due diligence expectations of companies?
- What should human rights due diligence look like in the future to improve global supply chain workers' rights?

WORKERS' PROTECTION BY THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of the most widely ratified human rights covenants.⁵ In the current situation, it is highly relevant to determine which social and economic rights workers in global supply chains enjoy, and which actors are responsible to protect and respect them.

The ICESCR guarantees:

- The right to social insurance (Article 9)⁶
- The right to an adequate standard of living (Article 11), which includes the right to food and housing

⁴ The paper later on refers to the International Covenant on Economic, Social and Cultural rights which in turn guarantees the right to social insurance. However, this paper advocates for a broad inclusive application of rights to workers who have not (yet) made contributions. Social insurance systems are understood to refer to contribution based systems, and therefore the paper will use the broader term social protection, unless when it cites the covenant.

⁵ Most garment producing countries are state parties to the treaty, except for Malaysia. See www.indicators.ohchr.org/ (last accessed 8 April 2020)

⁶ The ILO has further developed minimum standards in ILO C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102) and has more recently developed a comprehensive vision on Social Protection Floors in Recommendation 202 R202 - Social Protection Floors Recommendation, 2012 (No. 202).

- The right to enjoyment of the highest attainable standard of physical and mental health (Article 12)

The UN Committee on Economic, Social, and Cultural Rights states that the right to social security encompasses the right to access and maintain benefits from various situations, including unemployment and sickness, and that all people should be covered by a social security system. While the ICESCR acknowledges that for some states (e.g. with resource constraints), it may be difficult to fulfill certain rights in the short-term, states should act as best they can within their means (the so-called progressive realization of rights). Still, state parties are required to provide a minimum essential level of each right. If resources are highly constrained, this should include programs targeted to the vulnerable.⁷ Specifically, on social security, the committee highlights that special attention should be given to individuals and groups who traditionally face difficulties in exercising this right, including women, the unemployed, and workers who are typically inadequately protected by social security.⁸

Most garment production happens in places where both the legally mandated minimum wage as well as de facto wage payments do not cover basic needs and rights enshrined in the covenant and therefore do not amount to a living wage. The committee clarifies that the right to remuneration should be sufficient to enable the worker and his or her family to

enjoy other rights in the covenant, including social security. Nevertheless, most garment producing countries have been reluctant to establish deep and wide social security. Similarly, there is no evidence to suggest that the purchasing prices from brands and retailers would be adequate to allow for the payment of a living wage which also provides for the payment of adequate social security contributions

Still, some countries offer legal protections for workers who lose their jobs, including partial wages in case of temporary suspension, severance in case of termination, and in some cases unemployment insurance schemes. A number of systems are based on employer contributions but are unfortunately coupled with minimal enforcement. In a sector with tight margins that even sells under costs of production, employers are de facto enabled and incentivized to forego payment (due to this weak enforcement). For example, in Pakistan, where systems for health insurance, unemployment and old age benefits exist, it is standard practice for factory owners to only officially register a very small number of employees in the systems. The majority of the work force is employed through a third-party contract system.

In the face of the current crisis, it is difficult for garment exporting countries to make up for decades of limited or absent economic and social rights. Some governments' measures to support workers in the face of the crisis raise

⁷ General Comment No. 3: The Nature of States Parties' Obligations, Article 2, paragraph 1 of the covenant, *UN Committee on Economic, Social and Cultural Rights*, E/1991/23 (1990)

⁸ General Comment No. 19: The right to social security, Article 9 of the covenant, *UN Committee on Economic, Social and Cultural Rights*, E/C.12/GC/19 (2008)

questions of whether states have the necessary financial means for these programs, and given their ad-hoc and temporary nature, they lack a robust system to implement the sudden expansion worker rights, which can easily be rolled back once the crisis ends. These interventions are also unlikely to reach all workers, and exclude those especially at risk, such as contract, migrant or home-based workers.⁹

The response of brands and retailers to COVID-19 is the cancellation of orders. This means significant job losses without notice and/or redundancy pay due to manufacturer inability to pay. The resulting loss of income for workers in the absence of, or insufficient, functioning, social protection systems, severely endangers garment workers' ability to provide themselves and their families with adequate food and pay for their accommodation. This leads to a violation of the right to food and housing. Reports already show that workers in India and Pakistan have to rely on NGOs and trade unions for food to survive.¹⁰ For instance, the Pakistani National Trade Union Confederation delivered hundreds of food bags for workers in various localities around and in Karachi.¹¹ In India, tens of thousands of migrant garment workers

are apparently stranded in factory hostels, sharing rooms with up to a dozen people.¹² In the absence of health insurance, these workers are completely vulnerable to the spread of the pandemic.

In many factories where production continues, workers' right to safe working conditions is not guaranteed, as safety precautions to prohibit the spread of the coronavirus are not in place. Especially in the garment sector, where a piece of fabric travels through many hands, it is imperative that effective protective strategies are established. To ensure workers' right to a safe workplace, they at a minimum would need to be provided with safe transportation to the workplace, the provision of personal protective equipment (PPE) at the workplace, the assurance of safe distances and a premium pay for hazardous work.

THE HUMAN RIGHTS DUE DILIGENCE REQUIREMENTS OF THE UN GUIDING PRINCIPLES

The UN Guiding Principles on Business and Human Rights (UNGPs) recognize that responsibility also lies with businesses (both suppliers and brands/retailers). The UNGPs, the OECD Guidelines on Business Enterprises and Human Rights, and the ILO Tripartite

⁹ The government of Bangladesh has pledged to cover workers' wages for up to one month. Without this social protection, they would remain entirely without a safety net. While some governments, such as in Sri Lanka and Pakistan, took further measures, banning dismissals and mandating that workers continue to receive part of their wages, the programs are stumbling in implementation. For example, in Sri Lanka, factories on the edge of bankruptcy are expected, but unable, to cover a significant part of these expenses, and in Pakistan, measures fail to reach informal workers who make up most of the industry. For Myanmar see www.mmmtimes.com/news/government-private-sector-

supply-food-lower-income-group.html (last accessed 8 April 2020); for Thailand see www.bangkokpost.com/business/1889480/20m-register-for-financial-aid (last accessed 8 April 2020)

¹⁰ See live updates compiled by Clean Clothes Campaign at: www.cleanclothes.org/covid19 (last accessed 8 April 2020)

¹¹ Ibid.

¹² Anuradha Nagaraj, 'Coronavirus threatens Indian garment workers stranded in factory housing', *Thomson Reuters Foundation*, March 2020

Declaration on Multinational Enterprises reflect the international consensus that companies can cause, or contribute to, the violation of any given human right, and that they have the responsibility to respect human rights and mitigate and remedy harm in this regard. The UNGPs outline a human rights due diligence¹³ process companies need to go through in order to fulfill their responsibility to respect human rights as follows:¹⁴

- *Identifying and assessing actual or potential adverse human rights impacts* that an enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships (Guiding Principle 18)
- *Integrating findings from impact assessments across relevant company processes* and taking appropriate action according to the company's involvement in the impact (Guiding Principle 19)
- *Tracking the effectiveness of measures* and processes to address adverse human rights impacts in order to know if they are working (Guiding Principle 20)
- *Communicating how impacts are being addressed* and showing stakeholders – in particular affected stakeholders –

that there are adequate policies and processes in place (Guiding Principle 21)

These standards clearly need to be applied to business' decisions and behavior in the face of the current crisis. Indeed, while the COVID-19 crisis is an external event, cancelling orders is a pure business decision, and as any other, is subject to the same due diligence obligations.

WHAT DOES HUMAN RIGHTS DUE DILIGENCE MEAN IN THE CURRENT SITUATION?

The due diligence strategy of a company needs to be understood as one comprehensive strategy which is ongoing. However, to break down the question of the human rights due diligence obligations of fashion brands and retailers, we propose to examine different time periods in function of the appearance of the COVID-19 crisis:

- (a) Prior to the COVID-19 crisis and the cancellation of orders
and
- (b) when cancelling orders in response to the COVID-19 crisis

PRIOR TO THE COVID-19 CRISIS AND CANCELLATION OF ORDERS

First of all, most textile brands and retailers have decided to source from countries with

¹³ The OECD calls it “due diligence for responsible business conduct” and details a six-step process. See also OECD, “OECD Due Diligence Guidance for Responsible Business Conduct” (2018)

¹⁴ Corporate human rights due diligence – identifying and leveraging emerging practice, *United Nations Office of the High Commissioner for Human Rights*, www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx (last accessed 8 April 2020)

competitive prices and low salary costs. In result, brands and retailers should have anticipated the prevalent practice that employers do not pay workers a living wage, and/or do not contribute (sufficiently) to a social security system.

In doing a proper human rights risk assessment, textile brands and retailers should have identified that workers receiving below living wages, and that lacking or limited social security systems are a major risk factor for the violation of the right to social protection and to an adequate standard of living, as previously described.

Given power dynamics that favor brands and retailers, as brands take the role of price-setters, making suppliers price-takers, the former are likely to contribute to or even cause human rights risks.¹⁵ This is especially true for production countries, where social insurance systems either heavily rely on employers, or are replaced by employer liability or severance pay. In these situations the prices brands and

retailers pay determine suppliers' ability to pay workers a living wage that would enable them to prepare financially for a crisis.¹⁶ The purchasing price also has a major impact on supplying factories' ability to meet legally mandated social security contributions, as well as additional private insurance contributions.

Obviously, neither voluntary corporate social responsibility initiatives nor human rights due diligence processes without effective enforcement mechanisms have been able to ensure that brands and retailers fully respect the human rights of workers in their supply chain. If brands and retailers had started to seriously fulfill their human rights due diligence obligations five or 10 years ago, and fundamentally changed their purchasing practices, workers would be in a different position today and much less vulnerable to the current crisis.

WHEN CANCELLING ORDERS IN RESPONSE TO THE COVID-19 CRISIS

First and foremost, all relevant instruments

supply chains: Global Survey results, 'INWORK Policy Brief No. 10 (2017).

¹⁶ Indeed, any contribution (or lack thereof) to a social security system should be considered an integral part of the salary. See in particular article 3 of ILO C131 – Minimum Wage Fixing Convention, 1970 (No. 131). It states, "the elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include (a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."

¹⁵ The most recent unilateral order cancellations prove clearly who has the power in the business relationship. For further analysis see Mark Anner, 'Predatory purchasing practices in global apparel supply chains and the employment relations squeeze in the Indian garment export industry,' *International Labour Review* (2019); Mark Anner, 'Squeezing workers' rights in global supply chains: purchasing practices in the Bangladesh garment export sector in comparative perspective,' *Review of International Political Economy* (2019); Mark Anner, 'Binding power: The sourcing squeeze, workers' rights, and building safety in Bangladesh since Rana Plaza,' Center for Global Workers' Rights (2018); Mark Starmanns, 'Purchasing practices and low wages in global supply chains: Empirical cases from the garment industry,' *ILO Conditions of Work and Employment Series* No. 86 (2017), Vaughan-Whitehead and Pinedo Caro, 'Purchasing practices and working conditions in global

specify that it is important for businesses “to comply with all applicable laws.”¹⁷ This means, for example, that brands and retailers that benefit from European consumer markets need to pay their suppliers promptly, which is recognized as 60 days after receiving an invoice.¹⁸ More specifically in light of the COVID-19 crisis, this means that brands and retailers need to honor contracts that they have already signed. Some brands and retailers are reportedly seeking to evade this responsibility by invoking *force majeure*. The legality of this approach varies depending on the specifics of the contract and jurisdiction but is often questionable. Brands and retailers should avoid misusing *force majeure* contract provisions to evade their responsibilities.

Secondly, for new orders or those that have been legally terminated, brands and retailers should exercise human rights due diligence and assess potential human rights risks of their business decisions. The OECD Guidelines in particular spell out, what business behavior compatible with their human rights due diligence obligations looks like in the case of ending a business relationship. They stress that “[t]he enterprise should also take into account

potential social and economic adverse impacts related to the decision to disengage.”¹⁹ Further, companies should provide reasonable notice to representatives of the workers, and, where appropriate, to the relevant governmental authorities.²⁰ They should also co-operate with worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects.

In contexts which offer limited unemployment insurance, brands and retailers, as a mitigation measure, need to work with their suppliers to ensure workers receive income during the time that there is no production and roll out a temporary redundancy²¹ package which can compensate or complement the state unemployment scheme. This can be done through engagement with suppliers and worker representatives. Special attention should be given to migrant workers and home-based workers.

Finally, in the event that a decision of a brands results in the bankruptcy of a supplier, brands are responsible to ensure workers are

¹⁷ See the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises. More specifically on disengagement, see OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, Section I. 3.2.5. which states that “if an enterprise determines the need to disengage, it should seek to do so responsibly. Specifically, the enterprise should: comply with national laws...”

¹⁸ See for example the Late Payment Directive 2011/7/EU

¹⁹ OECD Guidelines for Multinational Enterprises, 2011, Commentary on Chapter 2, paragraph 22.

²⁰ OECD Guidelines for Multinational Enterprises, 2011, Chapter 5; Similarly the OECD Guidance on the garment sector specifies that brands should “provide

detailed information supporting the business decision to management and to the union, where one exists.” OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, 2017, Section I. 3.2.5.

²¹ ILO R R166 – Termination of Employment Recommendation, 1982 (No. 166) highlights that all parties concerned should seek to avert or minimize as far as possible termination of employment for reasons of an economic, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.

effectively treated as a privileged creditor in line with ILO Convention 95.²²

CONCLUSION AND THE WAY FORWARD

Years of little progress on workers' social and economic rights, and weak human rights due diligence on the companies' side have left garment workers vulnerable during the COVID-19 crisis. Human rights due diligence processes are continuous, and learning is central. However, previous efforts of brands and retailers to improve working conditions in supplying factories generally, and specifically living wages and social protections, have rarely shown the necessary results.

Brands and retailers have also proven to be unprepared for the human rights impacts of the crises like the current one. This has contributed or even caused the violation of workers' rights to social insurance and to an adequate standard of living, including the right to adequate food and housing. In response, brands and retailers should in the immediate step in and provide mitigating measures to the actual human rights impacts upon the workers making their clothes.

The crisis requires urgent action. Besides mitigating immediate adverse human rights impacts, brands should step up and help lay the foundation for much-needed structural change which would have comprehensive social protection for all workers as a basis.

Future human rights due diligence processes should take into account the outlined human rights risks of garment supply chains. When rebuilding more resilient supply chains, brands and retailers should ensure that suppliers pay workers living wages and social benefits. Thus, brands and retailers will need to rethink and change the current pricing model and underlying business model. Penn State academic Mark Anner has pointedly said that “[t]hese changes include order stability that allows for proper planning, timely payments of orders, and full respect for workers' rights. It also includes a costing model that covers all the costs of social compliance: living wages, benefits, severance pay, building safety etc. One way to cover some of these expenses is an additional charge levied on freight on board (FOB) prices.”²³ Outsourcing economic risks at all costs is incompatible with a serious human rights due diligence process.

As the standards of serious human rights due diligence processes are obviously high, and require the buy-in of many brands and retailers, there is a clear need for a level playing field. European governments and the EU must therefore introduce legislation making human rights due diligence obligatory for brand and retailers and outlaw unfair trading practices. Government should ensure sanctions when these obligations are neglected. Also, those affected by human rights violations that are directly linked to, or have been caused by, a brand's business activity, need the ability to bring claims.

²² C095 - Protection of Wages Convention, 1949 (No. 95)

²³ Anner (2020)

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