

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY: SYMPOSIUM ON THE LAW AND
POLITICAL ECONOMY OF BUSINESS AND HUMAN RIGHTS: A TURN
TO ROOT CAUSES?

Pricing and distribution in global value chain regulation

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Abstract

Global value chains (GVCs) function as a distributive arrangement at a global scale, generating and relocating wealth while often exacerbating inequalities across and within countries. The recent rise in GVC-related regulation must hence also be assessed in its distributive implications. Human rights due diligence, the current heart of the playbook of GVC regulation, largely refrains from challenging lead firms' business models, pricing strategies, and sourcing practices. Given thick evidence that sourcing squeeze translates into vulnerabilities on the ground that are conducive to rights violations, this lacuna significantly limits the potential of human rights due diligence to address wrongful conduct deeply entrenched in economic inequality, such as modern slavery. This article argues that human rights due diligence is marked by a 'distributional self-restraint', i.e., a self-inflicted reluctance to engage with deeper underpinnings or root causes of human rights violations. This self-restraint has a pedigree in the intellectual history of the United Nations Guiding Principles on Business and Human Rights (UNGP) and of human rights more broadly, as well as in the naturalizing narrative from neo-classical economics around 'free markets' and price formation that have immunized prices in value chains from being seen as conducive to harm. It also manifests itself in the legislative texts and debates around the EU Corporate Sustainability Due Diligence Directive. To overcome such limitations, this article develops the notion of a reflexive governance of pricing and sourcing practices that requires companies to assess and reflect, with stakeholders at different tiers, the impact of lead firm pricing down the chain, especially on living wages and incomes.

Keywords: global value chains; human rights due diligence; law and political economy; pricing; sourcing practices

1. Introduction: The political economy of corporate accountability for human rights

The legal framework of corporate accountability along global value chains (GVCs) is developing at a high pace. Drawing on the power of human rights as a vernacular of change, debates on 'business and human rights' have adopted the guiding narrative surrounding human rights as a persistent

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‘arc of progress’.¹ The shift of the dominant regulatory paradigm of corporate responsibility from voluntary and reporting-based instruments to ‘mandatory due diligence’ is commonly portrayed as a linear trajectory towards more demanding and effective legal mechanisms. Debates within international organizations, parliaments, or civil society campaigns confidently radiate this belief in incremental reforms. Each level of reform responds to shortcomings of the previous one by imposing tighter standards, leaving fewer loopholes, and allowing stricter enforcement.² However, it paints an incomplete picture to view the legal genealogy of corporate human rights violations as a sequence of gradual improvements. It emphasizes ‘progress’ over continuity and overlooks the deeper political dynamics involved in the design and construction of regulatory ‘innovations’. Moreover, it diverts attention from shared and structural deficits of the regulation of corporate responsibility that persist across different modes of regulation. Most importantly, the legal regime of transnational corporate responsibility since the UN Guiding Principles on Business and Human Rights (UNGP) does not aim to challenge established patterns of wrongful corporate conduct, but suggests that wrongs along value chains arise from a small range of identifiable types of illegal conduct. Such wrongs are portrayed as exceptional, outside of common commercial practices, and exogenous to companies’ business models. If the problem is one of abnormal and excessive corporate conduct, it can allegedly be fixed while existing business models are left in play.

This article challenges this bracketing of business models and of the broader political economy of global value chains in the current human rights regime applicable to corporate conduct. More specifically, it uses the example of sourcing and pricing practices by lead firms at the head of a value chain to argue that due diligence neither exposes nor prevents pervasive business practices that are the breeding ground for many rights violations. Price or margin squeeze towards suppliers,³ often combined with abrupt increases in order volumes, short timelines and general volatility of commodity prices at the international level have been identified as contributing to a cycle of exploitative wage levels and extensive vulnerability at the factory level.⁴ Prices, in other words, are determined at the lead firm level and on respective commodity markets and are transmitted along the value chain.⁵ Global price dynamics typically supplant local factors in price formation, with immense implications for development in the Global South.⁶ For primary commodities, lead firms will often refer to global benchmark prices to hedge their risk from price variation and thereby connect value chain pricing to the dynamics of financial investors and speculators.⁷ Yet, due diligence legislations with its current legal and conceptual registers does little to mandate lead firms to revisit such practices. There is hardly any discussion of possible

¹N. Bhuta, ‘Recovering Social Rights’, in N. Bhuta (ed), *Human Rights in Transition* (2024), 1, 4 at 5.

²For a detailed reconstruction, see S. Deva, ‘From “Business or Human Rights” to “Business and Human Rights”: What Next?’, in S. Deva and D. Birchall (eds.), *Research Handbook on Human Rights and Business* (2020), 1; D. Augenstein, ‘Towards a New Legal Consensus on Business and Human Rights: A 10th Anniversary Essay’, (2022) 40 *Netherlands Quarterly of Human Rights* 35.

³The concept of ‘price squeeze’ has a different and distinct meaning in competition law where it refers to a vertically integrated firm selling an input good to an unintegrated rival who also competes with the seller in a downstream market segment. Cf. E. Hovenkamp and H. Hovenkamp, ‘The Viability of Antitrust Price Squeeze Claims’, (2009) 51 *Arizona Law Review* 273.

⁴M. Anner, ‘Squeezing Workers’ Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective’, (2020) 27 *Review of International Political Economy* 320; G. LeBaron, ‘Wages: An Overlooked Dimension of Business and Human Rights in Global Supply Chains’, (2021) 6 *Business and Human Rights Journal* 1.

⁵C. Staritz et al., ‘Price-Setting Power in Global Value Chains: The Cases of Price Stabilisation in the Cocoa Sectors in Côte d’Ivoire and Ghana’, (2023) 35 *The European Journal of Development Research* 840.

⁶H. Bargawi and S. Newman, ‘From Futures Markets to the Farm Gate: A Study of Price Formation Along Tanzania’s Coffee Commodity Chain’, (2017) 93 *Economic Geography* 162.

⁷B. Tröster and U. Gunter, ‘The Financialization of Coffee, Cocoa and Cotton Value Chains: The Role of Physical Actors’, (2023) 54 *Development and Change* 1550 (highlighting the parallel role of many lead firms in commodity derivative markets); A. Chadwick, ‘Regulating Excessive Speculation: Commodity Derivatives and the Global Food Crisis’, (2017) 66 *International and Comparative Law Quarterly* 625.

distributive repercussions of due diligence on lead firms' pricing and business models – besides companies lamenting additional costs of *verifying* compliance, while *achieving* compliance by conforming with human rights in GVCs in the first place is presented as economically insignificant.

Overall, this article argues that due diligence exercises a form of 'distributional self-restraint': It carefully circumvents the macro-level questions of value generation and capture in the political economy of global value chains, and the micro-level questions of pricing and wages in such an economy. In terms of political communication, this lacuna has allowed portraying due diligence as representing a win-win scenario in which different actors, including business, would allegedly have symbiotic interests. However, this orientation restricts or even forfeits due diligence's ability to critique material inequalities that are entrenched in global value chains and affect small-scale suppliers, farmers, and workers.⁸ It downplays, rather than clearly exposes and denounces, the gap between the status quo of global production and the target scenario under perfectly enacted due diligence.⁹ The result is a focus on compliance practices that remains detached from the substantive transformations necessary to meet the vision of value chains consistent with human rights. This conceptual decoupling is reflected also in business practice where corporate responsibility and pricing are usually dealt with by separate corporate units.

Engaging with this limitation of due diligence is particularly salient at a moment where this mechanism is poised to become the bedrock of regulating value chains for the years to come. Without addressing the distribution of value, pricing, and wages as reflected in lead firms' business model, the reach of corporate responsibility in value chains falls structurally short of attaining 'root causes of human rights violations'.¹⁰ Such 'root causes' generally represent entanglements between the conduct of individual economic actors and structural conditions in the respective market, regulatory environment, or other institutional context in which this actor intervenes. Reorienting due diligence in a more distributively aware manner and enabling it to permeate to such root causes will be a critical task moving forward. While the spread of due diligence legislation is an important achievement for a broad coalition of civil society organizations that seemed highly unlikely still some years ago, concerns are real that their critical gist 'runs out of steam'¹¹ before it could even leave a mark. Importantly, the ultimate effects of these legislations can hardly be assessed at present as they will likely depend on factors that reach far beyond the adopted legislative texts and will only crystallize over time.¹² Due diligence establishes a dynamic and learning regulatory regime that involves multiple actors with distinct roles and interpretive authority, draws on novel compliance techniques to navigate internal tensions and ambiguities, and is animated by a distinct imaginary of law's engagement with (international) political economy.¹³ The future of due diligence is thus not set in stone and some caution seems warranted

⁸The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto', (2016) 4 *London Review of International Law* 57; I. Venzke, 'The Law of the Global Economy and the Spectre of Inequality', (2021) 9 *London Review of International Law* 111.

⁹For a similar critique of EU climate policy downplaying the dimension of necessary steps, cf. C. Eckes, 'Tackling the Climate Crisis with Counter-Majoritarian Instruments: Judges Between Political Paralysis, Science, and International Law', (2021) 6 *European Papers. European Forum* 1307.

¹⁰S. Marks, 'Human Rights and Root Causes', (2014) 74 *Modern Law Review* 57; M. Anner, J. Bair and J. Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks', (2013) 35 *Comparative Labor Law and Policy Journal* 1.

¹¹As in B. Latour, 'Why Has Critique Run Out of Steam? From Matters of Fact to Matters of Concern', (2004) 30 *Critical Inquiry* 225.

¹²R. McCorquodale and J. Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses', (2021) 68 *Netherlands International Law Review* 455.

¹³Cf. J. Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', (2017) *Harvard Kennedy School, Corporate Responsibility Initiative Working Paper No. 67*, at 15 ('my hope was that [the UN Guiding Principles for Business and Human Rights] would trigger an iterative process of interaction'). On the regulatory vision

both towards overly embracing and blanket dismissive accounts that either anticipate catalytic effects for human rights protection or see comprehensive corporate capture as unavoidable.

A distributive analysis of due diligence foregrounds questions regarding the costs and burden-sharing of a green transition, all of which are particularly virulent in a climate of political economy marked by rising costs of living, inflation, and ongoing logistical and geopolitical value chain distortions.¹⁴ It allows demystifying the corporate narrative that any increase in factory wages and compliance costs will directly and inevitably affect consumer prices. A look into the manifold mechanisms of value capture and pricing techniques along value chains quickly reveals this immediacy to be simplistic. First, the political economy behind the consumer welfare standard, e.g., as the vantage point of competition law analysis, requires seeing consumer price as in many ways ‘made’ rather than ‘given’.¹⁵ Second, value chain pricing and wages tie in with nascent debates on profit margins as exemplified by energy and rent caps and, more generally, the rediscovery of price as a tool of political planning.¹⁶ These broader perspectives on pricing and valuation are productive lenses for putting this debate in perspective.¹⁷

Methodologically, the article explores intersections of two nascent scholarly approaches to transnational economic law, that is ‘business and human rights’ and ‘law and political economy’. While the former has evolved in parallel to, and in close engagement with, the juridification of corporate accountability roughly over the past decade,¹⁸ the latter serves as an umbrella term for scholarship united in the commitment to trace social, economic, and ecological change within legal thought and make legal methodology, doctrine, and practice sensitive towards matters of social justice and inclusivity.¹⁹ Combining both approaches allows the detection of hidden economic underpinnings of ‘business and human rights’ and its instruments. In particular, the article seeks to trace and explicate how particular economic concepts (i.e., neo-classical price theory, economic upgrading) are often implicitly translated into or trickle into legal thought and policy analysis where they function to normalize and bracket certain features of the global political economy. This occurs at both the macro- and the micro-level of analysis which the article therefore puts in relation to one another. Exposing the role of pricing inscribes into the recently growing attention to the intersections between public and private legal institutions in the international political economy, including contract and corporation as building blocks of corporate power within GVCs.²⁰

underlying the UNGP, cf. A. Duval, ‘Ruggie’s Double Movement: Assembling the Private and the Public Through Human Rights Due Diligence’, (2023) 31 *Nordic Journal of Human Rights* 279.

¹⁴WTO, Global Value Chain Development Report 2023: Resilient and Sustainable GVCs in Turbulent Times (2023), available at doi.org/10.30875/9789287075673, at 12–17, 90–131.

¹⁵F. Esposito, *The Consumer Welfare Hypothesis in Law and Economics* (2023).

¹⁶See, e.g., I. Weber and E. Wasner, ‘Sellers’ Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?’, (2023) 11 *Review of Keynesian Economics* 183.

¹⁷See, e.g., A. Cohen, ‘Negotiating the Value Chain: A Study of Surplus and Distribution in Indian Markets for Food’, (2020) 45 *Law and Social Inquiry* 460; I. Feichtner and G. Gordon (eds.), *Constitutions of Value. Law, Governance and Political Ecology* (2023); M. Mazzucato, *The Value of Everything. Making and Taking in the Global Economy* (2018).

¹⁸See Augenstein, *supra* note 2.

¹⁹See, e.g., J. Britton-Purdy et al., ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’, (2020) 129 *Yale Law Journal* 1784; A. Harris and J. J. Varellas III, ‘Law and Political Economy in a Time of Accelerating Crises’, (2020) 1 *Journal of Law and Political Economy* 1; S. Deakin et al., ‘Legal Institutionalism: Capitalism and the Constitutive Role of Law’, (2017) 45 *Journal of Comparative Economics* 188; K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019); for a distinct European perspective, cf. I. Kampourakis, ‘Bound by the Economic Constitution: Notes for “Law and Political Economy” in Europe’, (2021) 1 *Journal of Law and Political Economy* 301; A. Beckers, K. Eller and P. Kjaer, ‘The Transformative Law of Political Economy in Europe’, (2022) 4 *European Law Open* 749.

²⁰Cf. J. Salminen, ‘Towards a Genealogy and Typology of Governance Through Contract Beyond Privty’, (2020) 16 *European Review of Contract Law* 25; K. H. Eller, ‘Is “Global Value Chain” a Legal Concept? Situating Contract Law in Discourses Around Global Production’, (2020) 16 *European Review of Contract Law* 3; G. Sarfaty, ‘Translating Modern Slavery into Management Practice’, (2020) 45 *Law and Social Inquiry* 1027; C. Villiers, ‘A Game of Cat and Mouse: Human Rights

The remainder of the article is structured as follows. I will first explore the intersections of power, pricing, and inequality in GVCs (Section 2), before illustrating how these intersections have formed a blind spot in the regulatory framework of corporate accountability (Section 3). In the subsequent step, I shall discuss routes to overcome this blind spot within the current architecture of corporate accountability (Section 4). A brief outlook for future research concludes (Section 5).

2. Power, pricing, and inequality in global value chains

GVCs are networks of economic actors that serve as basic operative units of today's economic organization and transnational production. Conceptualized by some as 'global inequality chains',²¹ they set the conditions for participation and (in-)equality in the global economy and form the infrastructure that captures, relocates, and appropriates value.²² Others have suggested a framing as 'global wealth chains'²³ to denote how value chains use the institutional and legal context to reshuffle the geographies of wealth. Generally, the proliferation of GVCs is founded on a combination of outsourcing and offshoring, whereby firms focus on their most value-producing core competences, such as research and development, product design, marketing, and intellectual property, while transferring less-value generating aspects of production, such as manufacturing, component design and back-office functions, to entities and jurisdictions with the lowest costs related to these tasks. Cost discrepancies between suppliers, jurisdictions and locations are a key driver for value chain structures.²⁴ The organizational complexity of value chains, often composed of tens of thousands of legally distinct companies, has long haunted the debate around corporate responsibility that arose since the 1970s around multinational corporations (MNCs), conceptualized as unitary and integrated actors.²⁵

Much of the appeal of the leading GVC analytic by Gereffi et al.²⁶ for policy analysis stems from its attempt to trace 'value added' at each chain juncture. In development discourses, involvement in GVCs and upgrading to higher value-added segments in the chain has long been portrayed as a key to economic development and possible mitigation of North-South.²⁷ While illustrations of such upgrading exist, they have often not been accompanied by broader social or ecological upgrading and remained restricted by power dynamics within GVCs and value capture with lead firms that deepen inequalities. GVCs, in other words, are both a possible mitigation to and a source of inequalities, generating new winners and losers across and within countries.²⁸ This

Protection and the Problem of Corporate Law and Power', (2023) 36 LJIL 415; B. Sjafell, 'How Company Law Has Failed Human Rights – and What to Do About It', (2020) 5 *Business and Human Rights Journal* 179.

²¹D. Quentin and L. Campling, 'Global Inequality Chains: Integrating Mechanisms of Value Distribution into Analyses of Global Production', (2018) 18 *Global Networks* 33.

²²E. Havice and J. Pickles, 'On Value in Value Chains', in S. Ponte, G. Gereffi and G. Raj-Reichert (eds.), *Handbook on Global Value Chains* (2019), 169.

²³L. Seabrooke and D. Wigan, 'Global Wealth Chains in the International Political Economy', (2014) 21 *Review of International Political Economy* 257; L. Seabrooke and D. Wigan, 'The Governance of Global Wealth Chains', (2017) 24 *Review of International Political Economy* 1.

²⁴Cf. W. Milberg and D. Winkler, *Outsourcing Economics: Global Value Chains in Capitalist Development* (2013).

²⁵See D. Lustig, *Veiled Power: International Law and the Private Corporation 1886–1981* (2020), 195 et seq.

²⁶G. Gereffi, J. Humphrey, and T. Sturgeon, 'The Governance of Global Value Chains', (2005) 12 *Review of International Political Economy* 78.

²⁷See notably World Bank, *World Development Report 2020: Trading for Development in the Age of Global Value Chains* (2020); for a critique of this report as 'expansion of neoliberal globalization couched in the language of global value chains', see J. Bair et al., 'Capitalist Crisis in the 'Age of Global Value Chains'', (2021) 53 *Environment and Planning* 1253. On the concept of 'upgrading', cf. S. Barrientos, G. Gereffi and A. Rossi, 'Economic and Social Upgrading in Global Production Networks: A New Paradigm for a Changing World', (2012) 150 *International Labour Review* 319.

²⁸Cf. United Nations Department of Economic and Social Affairs, *World Social Report 2020: Inequality in a Rapidly Changing World* (2020) (mentioning GVCs and the rising use of technology therein as contributing to income and wage inequalities); J. Bair and M. Werner, 'Commodity Chains and the Uneven Geographies of Global Capitalism:

requires a closer look at the specific internal dynamics within GVCs and how they generate inequality and vulnerability. To decipher the role of pricing in this, the interdependencies between pricing and value chain structures must be uncovered. Such insights remain hidden when debates on prices are either focused on the first tier (without discussing how pricing trickles down the chain), or at the final tier of worker wages (without discussing upstream factors).

2.1. Vulnerabilities created through lead firm sourcing practices

Within GVCs, lead firm sourcing practices – referring to timelines, pay, and other specifications – play a central role for stable and fair supplier relationships that can avoid poverty wages and the vulnerabilities to exploitation emerging from them.²⁹ Sourcing practices are important determinants of wage and working conditions at the factory and producer level. Attempts by production countries to adopt counterstrategies, e.g., by regulating farm-gate prices or attracting other premiums have rarely been able to halt the pass-through of prices from the global to the local level.³⁰ In turn, many of the most severe human rights violations along value chains – such as modern slavery – need to be understood as endemic to the business models and current dynamics of value chains. Rather than constituting occasional ‘bad apples’, brought about by particular criminal intent or individual moral turpitude, such violations result from what are common commercial sourcing practices.³¹

Over the past decade or two, lower-tier suppliers find themselves confronted with increasingly contradictory expectations from lead firms, that is to increase both productivity as well as labour and environmental conditions. These demands are passed on to lower-tier suppliers often through powerful middlemen, that is large and consolidated supplier firms which coordinate deeper supplier networks and hence serve as mediators of lead firm power.³² In the words of scholars of compliance and organizational studies, such conflicting results in ‘decoupling’ between lead firm governance and factory-level conditions.³³ A recent study conducted by the ILO in five major markets sheds light on purchasing practices’ effects on wages.³⁴ When lead firm purchases occur with low forecasting accuracy, with inaccurate technical specifications, or require suppliers to sell

A Disarticulations Perspective’, (2011) 43 *Environment and Planning A* 988; B. Selwyn, ‘Poverty Chains and Global Capitalism’, (2019) 23 *Competition & Change* 71; B. Selwyn, ‘Commodity Chains, Creative Destruction and Global Inequality: A Class Analysis’, (2015) 15 *Journal of Economic Geography* 253; further B. Milanović, *Global Inequality: A New Approach for the Age of Globalization* (2016); and J. Hickel, *The Divide* (2017).

²⁹See J. Lang, S. Ponte and T. Vilakazi, ‘Linking Power and Inequality in Global Value Chains’, (2023) 23 *Global Networks* 755; G. LeBaron, ‘The Role of Supply Chains in the Global Business of Forced Labour’, (2021) 57 *Journal of Supply Chain Management* 29; D. Danielsen, ‘Situating Human Rights Approaches to Corporate Accountability in the Political Economy of Supply Chain Capitalism’, in D. Brinks, J. Dehm, and K. Engle (eds.), *Power, Participation, Private Regulatory Initiatives* (2020), 224; R. Locke and H. Samel, ‘Beyond the Workplace: “Upstream” Business Practices and Labor Standards in the Global Electronics Industry’, (2018) 53 *Studies in Comparative International Development* 1; D. Miller and K. Hohenegger, ‘Redistributing Value Added Towards Labour in Apparel Supply Chains: Tackling Low Wages Through Purchasing Practices’, (2016) *ILO Conditions of Work and Employment Series No. 83*; M. Amengual, G. Distelhorst and D. Tobin, ‘Global Purchasing as Labor Regulation: The Missing Middle’, (2020) 73 *Industrial and Labor Relations Review* 817; M. Anner, ‘CSR Participation Committees, Wildcat Strikes and the Sourcing Squeeze in Global Supply Chains’, (2018) 56 *British Journal of Industrial Relations* 75.

³⁰G. Bensch, K. Kaestner and C. Vance, ‘Pass-Through of Cocoa Prices Along the Supply Chain: What’s Left for Farmers in Côte d’Ivoire’, (2023) *Ruhr Economic Papers No. 1035* available at [dx.doi.org/10.4419/96973204](https://doi.org/10.4419/96973204).

³¹For a reconstruction of the dominant policy and academic discourse around modern slavery as ‘hidden crime’, cf. LeBaron, *supra* note 29; on lead firm practices shrinking the space of worker agency, cf. B. Selwyn, *Workers, State and Development in Brazil: Powers of Labour, Chains of Value* (2012).

³²T. M. Nguyen, ‘Hidden Power in Global Supply Chains’, (2023) 64 *Harvard International Law Journal* 35.

³³Y. Bird, J. Short and M. Toffel, ‘Coupling Labor Codes of Conduct and Supplier Labor Practices: The Role of Internal Structural Conditions’, (2019) 30 *Organization Science* 847; P. Bromley and W. Powell, ‘From Smoke and Mirrors to Walking the Talk: Decoupling in the Contemporary World’, (2012) 6 *The Academy of Management Annals* 483.

³⁴International Labour Organization, *Purchasing Practices, and Working Conditions in Global Supply Chains*, available at www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-travail/documents/publication/wcms_821479.pdf (covering Bangladesh, China, India, South Africa, and Turkey).

production below costs, the data shows repercussions both on the timeliness and the level of wage payments, as well as on overtime.³⁵ Suppliers react to highly fluctuating order volumes and changing specifications by resorting to temporary workforce, further outsourcing, and lower pay. Lead firms, in other words, find contractual strategies to mitigate or externalize risks arising from volatile commodity market prices.³⁶ A cross-country and cross-sectoral Global Supplier Survey³⁷ conducted by the ILO in 2017 provides a snapshot of the pressure that buyers' pricing exerts on suppliers. More than a third of the suppliers reported having accepted orders below their production costs, a number reaching more than half in the textiles sector. Suppliers located in countries with a lower Human Development Index (HDI) were shown to be much more likely to sell below costs, reflecting a lower bargaining position compared with suppliers in more developed countries that have access to more diversified buyers and countries and may also offer products with higher value added. Smallholders that rely on export-related income often have limited alternatives to selling to large operators and are likely to accept (too) low prices. Many suppliers reported that the need to secure future orders in a highly competitive environment generates a lock-in effect that mandates accepting orders below pay.³⁸ This is corroborated by data showing how prices paid by lead firms for garment have remained relatively stable over the past years, indicating that the rise and proliferation of corporate responsibility has had little repercussions.³⁹ Moreover, at the level of worker wages, studies have demonstrated how wages around the poverty line as well as wage theft and delayed payment exacerbate worker vulnerability to forced labour.⁴⁰ Generally, the degree of a power imbalance, complexity and volatility of a chain appears to amplify the impact of pricing down the chain.

2.2. Lead firm power and the making of prices in GVCs

Pricing in value chains is both a result of and a means of lead firm power.⁴¹ To understand how power imbalances affect the distributive outcomes of value chains, it is important to stress that GVCs and pricing practices are no mere result of a 'natural' market order, but *designed* as a consequence of a strategic play with legal niches and the blind spots of legal institutions.⁴² Located between 'make' or 'buy', between market contracting and hierarchical corporate integration, GVCs are marked by different means of governance through which lead firms build and employ their power to orchestrate their supplier networks.⁴³ Through governance, lead firms seek to leverage the benefits of decentralization while ensuring that their interests and standards are respected along the chain.⁴⁴ Towards this, lead firms utilize various governance techniques, all of which set GVC transactions apart from a textbook market exchange. While in such an exchange, the price of a good is typically the central parameter and functions to absolve contracting parties from knowing or inquiring deeper into production conditions, the scenario differs in most GVC transactions. Here, parties establish an entire relational infrastructure that binds them together

³⁵*Ibid.*, at 4–8.

³⁶A. Cohen, M. Vicol and G. Pol, 'Living Under Value Chains: The New Distributive Contract and Arguments About Unequal Bargaining Power', (2022) 22 *Journal of Agrarian Change* 179; from a contractual perspective, K. Parella, 'Contractual Stakeholderism', (2022) 102 *Boston University Law Review* 865, at 906–9.

³⁷International Labour Organization (ILO), Purchasing Practices and Working Conditions in Global Supply Chains: Global Survey Results (2017), available at www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-travail/documents/publication/wcms_556336.pdf.

³⁸Among suppliers who had accepted below pay orders, 77 per cent stress the intensity of competition as primary factor.

³⁹See Anner, *supra* note 4.

⁴⁰See LeBaron, *supra* note 4.

⁴¹See Staritz et al., *supra* note 5; for a contractual analysis, cf. J. Lipson, 'Promising Justice: Contract (as) Social Responsibility', (2019) *Wisconsin Law Review* 1109, at 1156.

⁴²K. Sobel-Read, 'Global Value Chains: A Framework for Analysis', (2014) 5 *Transnational Legal Theory* 364.

⁴³M. Dallas, S. Ponte and T. Sturgeon, 'Power in Global Value Chains', (2019) 26 *Review of International Political Economy* 666.

⁴⁴R. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (2013).

and turns powerful lead firms into price-setters. At the same time, lead firms need to deploy more subtle strategies to dissociate themselves from harmful production conditions – legally, economically, geographically, environmentally, culturally.

Why is it that pricing and wages are barely present in debates of value chain governance, despite the importance of lead firm governance techniques for value chain dynamics, as we have just seen? Such sanctity of prices follows from an implicit adoption of neo-classical economic thought in legal conceptualizations (and, to some extent, in GVC studies) that have bracketed prices. As Robert Hale has famously argued, the liberal architecture of the modern state, especially through the institutions of property and contract, serves to obscure its coercive and distributive effects.⁴⁵ In a long pedigree of economic thought,⁴⁶ the price system has been portrayed as ‘natural’ and spontaneous outcome of decentralized economic organizing, making it ‘distinctly unfashionable’⁴⁷ to talk about ‘just’ prices, despite the century-old fascination with the topic.⁴⁸ Information economics sees prices as information signals that allow market actors to make transactional decisions in the absence of centralized coordination.⁴⁹ A particular appeal has been identified in the fact that prices overcome the epistemic problem of value difference among market participants and serve as a shared scale of valuation that makes individual preferences commensurable even in the eye of deep disagreements on base values. The formal equality with which the price system treats everyone in its orbit has been positively connotated even by critical scholars.⁵⁰ This vision has become so consolidated that two important normative consequences were at least implicitly derived from it. The price system, at the macro level, is credited for a fair distribution of the shares of production, and at the micro level for the *a priori* fairness of a contractual transaction. It is this aura of prices as ‘natural’ that can ‘do no wrong’ that has placed prices in value chains largely outside of critique in legal debates and outside the scope of policy intervention as possible contributor to human rights violations.⁵¹ This has been refuted in recent years by authors who, like Patel and Moore, have shown how the ‘cheapness’ of natural resources and labour results from a complex institutional setup⁵² – reviving Karl Polanyi’s famous argument that there is an element of design behind allegedly ‘free’ market setups.⁵³ As much as value chains themselves are determined by background rules that determine modes of economic exchange, the same holds true for prices that do not ‘just happen’ in the decentralized and spontaneous way that neo-classical price theory purports.⁵⁴

⁴⁵R. Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’, (1923) 38 *Political Science Quarterly* 470.

⁴⁶See E. Glen Weyl, ‘Price Theory’, (2019) 57 *Journal of Economic Literature* 329, at 332 (emphasizing that the recent ‘resurgence of price theory has highlighted the relatively primitive state of its methodological foundations’ while acknowledging that price theory decidedly seeks simplification and hence makes approximation and neglect of certain less significant parameters an explicit part of its apparatus). On the influence on legal thought, cf. P. Behrens, *Die ökonomischen Grundlagen des Rechts* (1986), 113 et seq.

⁴⁷R. Hockett and R. Kreitner, ‘Just Prices’, (2018) 27 *Cornell Journal of Law and Public Policy* 771.

⁴⁸Cf. C. Geisst, *Just Price in the Markets: A History* (2023) (tracing the concept of ‘just prices’ from its early philosophical foundations to its modern-day economic imaginary).

⁴⁹N. Luhmann, ‘Das sind Preise: Ein soziologisch-systemtheoretischer Klärungsversuch’, (1983) 34 *Soziale Welt* 153.

⁵⁰D. Markovits, ‘Market Solidarity: Price as Commensuration, Contract as Integration’, Inaugural Address for the Guido Calabresi Professorship at Yale University, 9 April 2012.

⁵¹*Locus classicus* F. A. Hayek, *Law, Legislation and Liberty* (1982), 69–70 (arguing that the decentralized nature of a ‘free’ society in which no single actor decides on the position of different individuals and groups ‘simply cannot meaningfully be described as just or unjust’).

⁵²R. Patel and J. Moore, *A History of the World in Seven Cheap Things: A Guide to Capitalism, Nature, and the Future of the Planet* (2017).

⁵³K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* ([1944] 2011); in a contemporary perspective, see A. Lang, ‘Market Anti-Naturalisms’, in J. Desautels-Stein and T. Christopher (eds.), *Searching for Contemporary Legal Thought* (2017), 312; D. C. North, ‘Markets and Other Allocation Systems in History: The Challenge of Karl Polanyi’, (1977) 6 *Journal of European Economic History* 703.

⁵⁴See Hockett and Kreitner, *supra* note 47; see also K. Çalıskan, ‘The Meaning of Price in World Markets’, (2009) 23 *Journal of Cultural Economy* 239 (using an ethnographic study of the cotton trade to show how global market prices are not set by demand and supply, but are produced as ‘mercantile tools’).

While economic sociologists have stressed how prices are formulated as the outcome of social relations that reflect an intersubjective creation of meaning as well as respective power dynamics and competitive pressures,⁵⁵ the analytical framework has usually been a horizontal market segment, not a vertically disintegrated value chain. Such value chains function as a specialized price system where the idea of a decentralized agnosticism as to prices appears even more misplaced. For example, lead firms growingly turn to the predictive power of big data and algorithmic governance along the value chain to tailor their demand.⁵⁶ Lead firms' superior bargaining power allows them to engage in a specific pricing strategy that is commonplace in GVCs. Management literature distinguishes a multiplicity of such strategies, i.e., the different processes and modes of assessment within a company that will guide the pricing decision. A common typology distinguishes between a cost-, competition-, or value-based pricing practice.⁵⁷ All three accounts expose that there is an element of strategic decision-making in price setting. Cost-based pricing orients prices around companies' production costs, while competition-based pricing draws reference to competitors. Cost-based pricing in particular bears the risks of misalignment with customers' willingness to pay, which has recently bolstered value-based pricing that takes the customers' perception of a product's use value as key criterion. This last strategy amounts to *top-down pricing*. Here, a designated retail price from which all internal costs are deducted forms the starting point of all pricing agreements down the chain. In a value chain context, this means that prices paid to suppliers and ultimately worker wages down the chain are largely conditioned upon valuations that take place on legally and geographically distant consumer markets. In a stylized understanding of 'supply and demand', the complexity of value chains is flattened to aggregate 'costs of production', without attention to the distribution of those costs. Consequently, such price engineering is structurally insensitive to the wage level and the number of tiers down the chain. In such a setting of prices being strongly determined by one or several parties, the normative appeal of prices – their ability to commensurate and allow exchange in the eye of different sets of preferences – diminishes and can no longer serve to justify price levels.⁵⁸

The following section will turn to the mechanism of human rights due diligence to argue that value, pricing, and wages have remained conceptually peripheral.

3. The distributional self-restraint of human rights due diligence

Human rights due diligence is referred to as the 'lingua franca'⁵⁹ or the 'gold standard' of corporate accountability. Introduced to the international legal scene through the UNGP, the idea of a company-led, risk-based assessment of human rights impacts has become the regulatory mode of the hour.⁶⁰ It forms part of companies' 'responsibility to respect' human rights as put forward in the UNGP. At its

⁵⁵See M. Callon, *Markets in the Making. Rethinking Competition, Goods, and Innovation* (2021), 288 (pricing is the 'result of a process that often begins very early, when a good is still only a vague idea in a design studio or a research lab'); J. Beckert, 'Where Do Prices Come From? Sociological Approaches to Price Formation', (2011) 9 *Socio-Economic Review* 757; J. Beckert, 'Markets from Meaning: Quality Uncertainty and the Intersubjective Construction of Value', (2020) 44 *Cambridge Journal of Economics* 285.

⁵⁶See further I. Kampourakis, 'The Market as an Instrument of Planning in Sustainability Capitalism', (2023) 2 *European Law Open* 511, at 530 (stressing the role of private parties in economic planning).

⁵⁷See on this A. Hinterhuber, 'Towards Value-Based Pricing – An Integrative Framework for Decision-Making', (2004) 33 *Industrial Marketing Management* 765; J. Raja et al., 'Learning to Discover Value: Value-Based Pricing and Selling Capabilities for Services and Solutions', (2020) 114 *Journal of Business Research* 142.

⁵⁸See Markovits, *supra* note 50 ('market prices can commensurate traders' values and preferences only if contracts arise, as under the doctrines of offer and acceptance, through specific intentions to obligate. If one party could impose contractual obligation on a counterparty that lacked specific intent to be bound, based on the efficiency or fairness of the terms, then the contract price would cease to reflect the formally egalitarian balance of the parties' values and preferences. Instead, it would reflect the idiosyncratic view of what is efficient or fair under whose flag the contract was imposed.')

⁵⁹S. Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?', (2023) 36 *LJIL* 389.

⁶⁰R. McCorquodale and C. Blanco-Vizarreta, 'Guiding Principle 17: Human Rights Due Diligence', in B. Choudhury (ed.), *The UN Guiding Principles on Business and Human Rights: A Commentary* (2023), 126.

conceptual heart, due diligence requires companies to identify, prevent, mitigate, and account for their adverse human rights impacts in a proactive manner. As a central innovation of the UNGP, the corporate responsibility is extended beyond impacts that business enterprises cause or contribute to through their own activities to also encompass impacts that are ‘directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts’.⁶¹ Due diligence forms the core of several national legislations, such as the French Duty of Vigilance law of 2017,⁶² the German Supply Chain Act of 2021,⁶³ the Norwegian Transparency Act of 2021⁶⁴ and the Dutch Child Labour Law of 2019⁶⁵. Besides, it features prominently in European legislation, most notably in the recent Corporate Sustainability Due Diligence Directive (CSDDD),⁶⁶ the Deforestation Regulation,⁶⁷ the Conflict-Minerals Regulation,⁶⁸ and more indirectly also in the recent EU Forced Labour Ban⁶⁹. Lastly, due diligence is the focal point of international legal developments, such as within the OECD.⁷⁰ The concept owes its rapid dissemination in legislation, litigation, and advocacy to the vision and consensus-seeking agenda of the late John Ruggie, then UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises.⁷¹ Since the conceptual groundwork was provided in the UNGP which now radiate into and inspire to a large degree European and national legislation, the primary focus in this article will be on the UNGP. Ruggie sought to overcome the political deadlock that had arisen after the opposition by certain states and the international business community against previously developed rules that postulated a direct extension of human rights obligations on transnational corporations.⁷²

⁶¹Office of the United Nations High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc. HR/PUB/11/04 (2011), Guiding Principle 13. See also K. Parella, ‘Guiding Principle 13: Responsibility of the Business Sector’, in B. Choudhury (ed.), *The UN Guiding Principles on Business and Human Rights: A Commentary* (2023), 101.

⁶²French Law on the Corporate Duty of Vigilance 2017, Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, 0074 Journal officiel de la République française, 28 March 2017.

⁶³Act on Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, 2959, Lieferkettensorgfaltspflichtengesetz. English translation available at www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supplychains.pdf.

⁶⁴Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions, LOV-2021-06-18-99, entry into force 01 July 2022. Unofficial English translation available at www.lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent.

⁶⁵Dutch Child Labor Due Diligence Law 2019, Wet zorgplicht kinderarbeid, 24 October 2019, available at www.eerstekamer.nl/trefwoord/wet_zorgplicht_kinderarbeid.

⁶⁶Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

⁶⁷Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010.

⁶⁸Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas.

⁶⁹Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937.

⁷⁰OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023), available at doi.org/10.1787/81f92357-en.

⁷¹See, on the various uptakes of the UNGP, S. Deva, ‘Business and Human Rights: Alternative Approaches to Transnational Regulation’, (2021) 17 *Annual Review of Law and Social Science* 139 and L. Smit et al., ‘Study on Due Diligence Requirements Through the Supply Chain: Final Report’, *Publications Office of the European Commission* (2020). Ruggie himself saw human rights due diligence as but one element of the UNGP, not its core, cf. the debate between J. Bonnitcha and R. McCorquodale, ‘The Concept of Due Diligence in the UN Guiding Principles on Business and Human Rights’, (2017) 28 *EJIL* 899 and J. Ruggie and J. Sherman, III, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’, (2017) 28 *EJIL* 921, at 923.

⁷²Cf. UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (13 August 2003).

However, the UNGPs are no mere middle-ground compromise, but a fundamental and pragmatic reformulation of human rights under conditions of polycentric governance which amalgamizes public and private elements.⁷³ The underlying regulatory vision dovetails with Ruggie's earlier scholarly work, rooted in international relations, in which he characterized the post-Second World War international economic order as 'embedded liberalism'.⁷⁴ Growing liberalization at the international level would be cushioned domestically through various policies of social protection (in what he labelled 'advanced' economies). Where such cushioning (or 're-embedding') was not comprehensive or effective because of the apparent inability or unwillingness of many states to address adverse effects of transnational business, Ruggie diagnosed 'governance gaps'.⁷⁵ He noted:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.⁷⁶

When taking the incongruence in scope and reach between state-centered human rights law and transnational corporate conduct as the diagnostical starting point, the *detritorialization* and *proceduralization* of human rights through companies' responsibility to respect appears as a possible remedy.⁷⁷ Yet, while this incongruence is real, it is enshrined in qualitatively new and structural threats to human rights in the global economy. These threats are no mere matter of norm application or gap-closing, but require human rights to redefine and defend their place in the rebalancing of power relations between capital, labour, and the environment. My argument is that human rights due diligence has not sufficiently embraced this role (yet), but instead cultivates a 'distributional self-restraint' that derives from the intellectual and political history of human rights law, especially as represented in the UNGP (Section 3.1), and the lasting impact of what is often termed the 'business case for corporate social responsibility', a line of argument which foregrounds economic viability as key motive for human rights compliance (Section 3.2). Ultimately, this 'distributional self-restraint' also manifests itself in the legislative texts and debates around the EU Corporate Sustainability Due Diligence Directive (Section 3.3).

3.1. Human rights' accounts of inequality: Locating human rights due diligence

Human rights due diligence (HRDD) opens a new chapter of the turbulent and much-debated relationship between human rights and social and economic inequality.⁷⁸ This relation cannot be retraced in full here, but I shall present central arguments of the most poignant critics before discussing

⁷³See Ruggie and Sherman, III, *supra* note 71 (responsibility to respect is 'neither based on nor analogizes from state-based law. It is rooted in a transnational social norm, not an international legal norm'). For a comprehensive intellectual history of the UNGPs, cf. Duval, *supra* note 13.

⁷⁴J. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order', (1982) 36 *International Organization* 379; for an excellent discussion, cf. A. Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime', (2006) 9 *Journal of International Economic Law* 81.

⁷⁵Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (7 April 2008) para. 104.

⁷⁶*Ibid.*, para. 3. See also J. Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy', (2018) 12 *Regulation and Governance* 317.

⁷⁷See Ruggie, *supra* note 13.

⁷⁸See J. Dehm, B. Golder and J. Whyte, 'Introduction: "Redistributive Human Rights?" Symposium', (2020) 8 *London Review of International Law* 225; D. Brinks, J. Dehm and K. Engle, 'Introduction: Human Rights and Economic Inequality', (2019) 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 363.

how these arguments resonate with HRDD. Samuel Moyn, in his powerful account of human rights, noted how the rise of human rights to a universal political grammar coincided with neoliberal shifts around the globe.⁷⁹ The force of human rights has been so mesmerizing, Moyn argues, that earlier aspirations of distributive equality were replaced by that of 'sufficiency'. In this depiction, human rights have proven malleable to ultimately conform to, rather than put into question, different modes of political economy over time. In the classical liberalism of the nineteenth century, human rights placed respect for freedom of contract and a Lockean sanctity of property front and center.⁸⁰ In the post-Second World War period, the advent of economic and social rights reintroduced egalitarian elements which remained, however, strictly confined to the national level of a welfare state model which only few countries reached. In the era of neoliberal globalization after the end of the Cold War, lastly, human rights have fortified the normative individualism that undergirds neoliberal policies and is employed to oppose economic planning.⁸¹ The broad (even if of course never universal) consensus around human rights rests on a class compromise, achieved at the cost of a very abstract and depoliticizing formulation of core values and legal structures that made human rights agreeable also to corporate interests. The opening of Pandora's box by recognizing corporate 'human' rights was but one consequence of this.⁸² Importantly, the language of rights entailed and purported a specific political culture and vision of change that closed off or made less likely certain alternative paths.⁸³ Human rights transited 'from a language of revolution to that of routine governance',⁸⁴ and – as a central argument by Moyn – a range of international legal actors, including policy makers, human rights advocates, development economists, and political philosophers contributed to and internalized the underlying shift from 'equality' to 'basic needs'. While empowering and liberating on matters of status equality, they developed in isolation from broader redistributive agendas. One example is the new international economic order (NIEO) developed by states in an early post-colonial setting in the 1970s that advocated for an institutional framework for a global and post-colonial scaling of welfare mechanisms.⁸⁵ The NIEO was developed in reaction to the absence of such redistributive ambitions in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966. Importantly, a predecessor text to the UNGP, the UN Code of Conduct on Transnational Corporations, was developed from 1975 onwards as part of the larger NIEO initiative.⁸⁶ Up until 1992 when the project was discontinued as political support dwindled, the draft Code had become a pioneering initiative to reconcile transnational corporate conduct with Global South countries' development agendas – illustrating that today's human rights lens on the matter is not without historic alternatives. The rules addressed host states' regulatory sovereignty, principles of good corporate governance, financing, taxes, IP, and environmental protection, among others.⁸⁷ In line with the dominant developmental

⁷⁹S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

⁸⁰L. Herzog, *Inventing the Market: Smith, Hegel, and Political Theory* (2013), 121–8.

⁸¹See J. Whyte, *The Morals of the Market. Human Rights and the Rise of Neoliberalism* (2019). For a rediscovery of collective imaginaries in EU law, cf. recently M. Bartl, 'Towards the Imaginary of Collective Prosperity in the European Union (EU): Reorienting the Corporation', (2022) 1 *European Law Open* 957.

⁸²S. Steininger and J. von Bernstorff, 'Who Turned Multinational Corporations into Bearers of Human Rights?', in I. Venzke and K. J. Heller (eds.), *Contingency in International Law* (2021), 281; S. Pahuja and A. Saunders, 'Rival Worlds and the Place of the Corporation in International Law', in P. Dann and J. von Bernstorff (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019), 141.

⁸³Cf. D. Kennedy, 'International Human Rights Movement: Part of the Problem?', (2002) 5 *Harvard Human Rights Journal* 101, 108; M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', (2001) 42 *Harvard International Law Journal* 201; on counterfactual histories of international law, cf. I. Venzke, 'The Path not Taken: On Legal Change and its Context', in N. Krisch and E. Yildiz (eds.), *The Many Paths of Change in International Law* (2024), 309.

⁸⁴M. Koskenniemi, 'Rocking the Human Rights Boat', in N. Bhuta et al. (eds.), *The Struggle for Human Rights* (2021), 51 at 57.

⁸⁵Cf. Lustig, *supra* note 25, at 179–219.

⁸⁶J. Bair, 'Corporations at the United Nations: Echoes of the New International Economic Order?', (2015) 6 *Humanity: An International Journal of Human Rights Humanitarianism and Development* 159.

⁸⁷For the latest draft version, see of Commission on Transnational Corporations, Report on the Special Session (7–18 March and 9–21 May 1983) Official Records of the Economic and Social Council, 1983, Supplement No. 7, E/1983/17/Rev. 1 (1983),

perspective – which was also reflected by the institutional competences for the dossier within the UN – only a brief paragraph was dedicated to human rights. This changed drastically when the UN Human Rights Commission became in charge of transnational corporations in the late 1990s, and a development policy dimension receded in favor of a human rights framing. A similar development exists at the level of the International Labor Organization (ILO) which, despite dealing extensively with networked and disaggregated production in recent years, maintains the less evocative ‘global supply chain’ term, concerned that the ‘global value chain’ nomenclature makes underlying questions of valuation and distribution all too apparent and pressing.⁸⁸

This is not the place to engage in detail with the extensive critical scholarship on the disenchantment with human rights, and many commentators have argued that the human rights movement is cognizant of these strategic fallacies, or at least can be.⁸⁹ This certainly holds true for large parts of the ‘business and human rights’ movement as well. Even from this sketch, however, at least three aspects seem to resonate with the intellectual genesis of the UNGP and HRDD. First, the UNGP’s emphasis on ‘adverse human rights impacts’ reflects the negative, protective dimension of human rights (‘avoid infringing’⁹⁰), rather than a positive transformative aspiration. Given Ruggie’s aim to secure backing for the UNGP also by the business sector, the negative phrasing – calling for the cessation of an allegedly narrow set of conduct – was much more palatable. The UNGP have abandoned the language and normative ideal of structural reform and global redistribution that animated the NIEO. The second aspect concerns the broad leeway and interpretive authority granted to companies under HRDD. Often, companies recur to private compliance initiatives whose own business model makes them entangled in the power structure of the value chain they are supposed to assess.⁹¹ In the absence of strong stakeholder engagement, companies are the masters of their due diligence, with very few in-built mechanisms of scrutiny, and hence few safeguards against a levelling down of human rights in their managerial and risk-based interpretation. This generates by now well-established risks of ‘cosmetic compliance’⁹² and corporate capture.⁹³ A third aspect is that the aspirational and universal language of human rights which fuels also the UNGP has as its flipside the absence of a clear problem diagnosis of root causes *beyond* the idea of ‘governance gaps’. Not only does the metaphor of ‘gaps’ suggest a rather accidental, residual, and passive nature of the legal framework of globalization. It also does not specify what actors and institutions contribute to the construction and now exploitation of such ‘gaps’.⁹⁴ While polycentric governance opens up a productive space by acknowledging the limits of states’ regulatory capacity in a globalized and fragmented World Society⁹⁵ and by tapping into

Annex II. For an account of the negotiation process, cf. K. Sauvant, ‘The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned’, (2015) 16 *Journal of World Investment and Trade* 11.

⁸⁸J. Brudney, ‘Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains’, (2023) 23 *Chicago Journal of International Law* 272.

⁸⁹See, e.g., the review of Moyn’s book by G. de Búrca, (2018) 16 *ICON* 1347.

⁹⁰See UNGP, *supra* note 61, Guiding Principle 11. The explanatory Commentary adds that business enterprises ‘may undertake other commitments or activities to support and promote human rights’.

⁹¹T. Barkay et al., ‘Anti-Trafficking Chains: Analyzing the Impact of Transparency Legislation in the UK Construction Sector’, (2024) *Law & Social Inquiry*, available at www.doi.org/10.1017/lsi.2024.6.

⁹²I. Landau, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’, (2019) 20 *Melbourne Journal of International Law* 221; C. O. Lichuma, ‘Mandatory Human Rights Due Diligence (mHRDD) Laws Caught Between Rituals and Ritualism: The Forms and Limits of Business Authority in the Global Governance of Business and Human Rights’, (2024) *Business and Human Rights Journal*, available at www.doi.org/10.1017/bhj.2023.47.

⁹³G. Baars, ‘“It’s Not Me, It’s the Corporation”: The Value of Corporate Accountability in the Global Political Economy’, (2016) 4 *London Review of International Law* 127.

⁹⁴C. Mak, ‘Mapping “Wild Zones” of Globalisation: On Private Actors and the Rule of Law’, (2021) 17 *International Journal of Law in Context* 107.

⁹⁵N. Luhmann, ‘The World Society as a Social System’, (1982) 8 *International Journal of General Systems* 131; see for a similarly polycentric regulatory vision behind the UN Sustainable Development Goals, J. Ellis and D. Edmonds, ‘Coming to Terms with the SDGs: A Perspective from Legal Scholarship’, (2023) 36 *LJIL* 251.

the problem-solving potential of private and societal actors, this must not overshadow the contribution of private actors and pervasive business models to the problem creation in the first place. The liberal roots of the UNGPs and the discursive power of human rights have been powerful to achieve a broad consensus,⁹⁶ possibly *because* of their portrayal of human rights violations as a circumscribed category of harm that can be eradicated without altering business models.⁹⁷ In the UNGP debate, discussions around ‘business models’ only became a reference with the rise of digital platforms and their data-driven models of value creation.⁹⁸

These three aspects suggest that HRDD as a new (‘polycentric’) generation of human rights⁹⁹ remains rather symbiotic with structures of power and existing distributive arrangements in the global economy. Unlike previous conceptualizations rooted in developmental policy and the NIEO, human rights due diligence draws chiefly on the legacy of human rights and their rise over the twentieth century. It in fact presents itself as a somehow *obvious* continuation of this development which naturally deserves endorsement and outshines alternative ‘paths not taken’.¹⁰⁰

3.2. The long shadows of the ‘business case for corporate social responsibility’

A second conceptual reason for the ‘distributional self-restraint’ of human rights due diligence stems from the economic narrative cultivated around (what was then mostly referred to as) corporate social responsibility (CSR) before it became juridified, e.g. through due diligence legislation. In the foundational days for thinking about corporate responsibility, around the year 2000, the so-called ‘business case for CSR’ was built around the idea that ‘responsible’ corporate behaviour was appealing *economically*, rather than warranted by moral, legal, or other reasons.¹⁰¹ This framing of CSR working *within* a market rationality, rather than mitigating or circumscribing it was eagerly adopted by company leaders, economists, and policymakers.¹⁰² Critics lamented that it subverts moral considerations to market rationality and expands market rationality to non-market realms.¹⁰³ Prioritizing the economic reading of CSR indeed missed the opportunity to understand tools of CSR as open-ended institutions of colliding discourses expressing economic, legal, social and other rationalities.¹⁰⁴ What is more, despite the gradual juridification of CSR in international standards, in the UNGP and ultimately in national and European legislation, the ‘business case’ of the earlier days of CSR remains a key conceptual and political reference and

⁹⁶Including at the national level, for an illustration from the German debate leading to the adoption of the Due Diligence Act, cf. D. Weihrauch, S. Carodenuto and S. Leipold, ‘From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act’, (2023) 17 *Regulation and Governance* 909.

⁹⁷In management studies, business models describe the logic and strategy of how a business creates, captures, and delivers value for itself, its customers and stakeholders. As such, they ‘outline the architecture of revenues, costs, and profits associated with the business enterprise delivering that value, cf. S. Shafer, J. Smith and J. Linder, ‘The Power of Business Models’, (2005) 48 *Business Horizons* 199.

⁹⁸UN OHCHR B-Tech project, Addressing Business Model Related Human Rights Risks, B-Tech Foundational Paper (2020), available at www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/B_Tech_Foundational_Paper.pdf.

⁹⁹A. Beckers, ‘From Corporate Personality to Corporate Governance: The Transformation of International Human Rights Protection in Corporate Governance Structures’, in N. Bhuta and R. Vallejo (eds.), *Human Rights and Global Governance* (forthcoming 2024).

¹⁰⁰See Venzke, *supra* note 83.

¹⁰¹A. Carroll and K. Shabana, ‘The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice’, (2010) 12 *International Journal of Management Reviews* 85.

¹⁰²Cf., e.g., N. Lohmeyer and G. Jackson, ‘The Business Case as New Vocabulary of Motive: Discourse Coalitions Around CSR in Germany, 1970–2014’, (2018) *Academy of Management Proceedings*, available at www.doi.org/10.5465/AMBPP.2018.208.

¹⁰³R. Shamir, ‘Corporate Social Responsibility: Towards a New Market-Embedded Morality’, (2008) 9 *Theoretical Inquiries in Law* 371.

¹⁰⁴See as the background of such a reading of CSR, G. Teubner, ‘Alter Pars Audiatur: Law in the Collision of Discourses’, in R. Rawlings (ed.), *Law, Society and Economy* (1997), 149; L. Moncrieff, ‘Karl Polanyi and the Problem of Corporate Social Responsibility’, (2015) 42 *Journal of Law and Society* 434.

highly influential in the background. It undergirds much of the legal and policy debate in the EU that routinely refers to this motive to advocate for due diligence legislation¹⁰⁵ and has served to fend off calls for deeper transformations of business models. The simultaneous framing of ‘risks to human rights’ as material ‘risks to business’, such as through reputational or capital markets-driven impacts has exposed the UNGP to the language and logic of business.¹⁰⁶ Legal discourse, in other words, has not been able to recalibrate an inclination (or bias) towards business interests (‘CSR has to pay off’) that took root when CSR was still treated as decidedly ‘extra-legal’.

We have seen how the UNGP’s intellectual history has favoured a ‘distributional self-restraint’ – a self-inflicted reluctance to engage with deeper underpinnings or root causes of human rights violations that is however not inherent to due diligence and hence not inevitable. Turning now to the most influential current legislative project around due diligence, the EU Corporate Sustainability Due Diligence Directive, we will detail how such a regulatory paradigm manifests itself in legislative texts and debates.

3.3. Pricing and sourcing practices in the EU Corporate Sustainability Due Diligence Directive

The EU Corporate Sustainability Due Diligence Directive¹⁰⁷ that entered into force on 25 July 2024 represents the most significant legislative text inspired by the UNGP. The final text as well as the legislative process and the positions taken by the co-legislators¹⁰⁸ corroborate a reluctance to address pricing and sourcing practices. This is also reflected in the political framing during the legislative debate that did not, even from progressive voices, evoke a distributive assessment of EU trade relations but strongly adhered to the idea that human rights and environmental compliance was possible within the business model of value chain capitalism. ‘Sustainability due diligence’ makes such compliance manageable by singling out a small number of actionable ‘risks’ among which companies enjoy wide discretion to prioritize.¹⁰⁹ Addressing those risks that are presented

¹⁰⁵See Commission Staff Working Document, Impact Assessment Report accompanying the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, SWD(2022) 42 final, at 15, 23. For a recent and extensive meta-study cf. T. Whelan et al., ‘ESG and Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published between 2015 and 2020’, NYU Stern Center for Sustainable Business, 2021, available at www.stern.nyu.edu/sites/default/files/assets/documents/ESG%20Paper%20Aug%202021.pdf; A. Antolin, L. Babbitt and D. Brown, ‘Why Is the Business Case for Social Compliance in Global Value Chains Unpersuasive? Rethinking Costs, Prices and Profits’, (2021) 160 *International Labour Review* 571.

¹⁰⁶M. Rogge, ‘Risk, Uncertainty and the Future of Corporate Human Rights Due Diligence’, (2022) *Harvard Kennedy School, Corporate Responsibility Initiative, Working Paper No. 81*, available at www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_81_AWP_FINAL.pdf.

¹⁰⁷Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

¹⁰⁸See for the initial proposal European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM/2022/71 Final (23 February 2022), available at eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0071 (Commission proposal); for the European Council’s position, Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 – General Approach, Interinstitutional File 15024/1/22 (30 November 2022), available at data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf (Council’s General Approach); for the amendments put forward by the European Parliament as a result of its political compromise European Parliament, Amendments Adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)) (1 June 2023), available at www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html (EP political compromise) and lastly for the final compromise text endorsed by the Council, Council of the European Union, Letter to the Chair of the JURI Committee of the European Parliament, Interinstitutional File 2022/0051(COD) (15 March 2024), available at data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf (Council final compromise).

¹⁰⁹Prioritization has become gradually more regulated in the legislative process, with the Council’s General Approach, *supra* note 108, introducing an explicit provision (Art. 6a) and the EP political compromise, *supra* note 108, detailing requirements of a ‘prioritization strategy’ (amendment 204) that shall have repercussions also on civil liability (amendment 76).

as sporadic and exceptional is deemed possible without contextualizing causes that are either *intrinsic to the business model* or lie *beyond individual company conduct*. As the controversial political debate on the effects of the EU CSDDD on SMEs has shown,¹¹⁰ the economic effects of the Directive are predominantly seen as ‘compliance costs’, understood as the managerial efforts to *verify* compliance, rather than ‘transition costs’, understood as investments into structural transitions and capability-building along the chain. The EU Commission’s Impact Assessment, for instance, comprises an extensive data collection on ‘compliance costs’ while it excluded ‘transition costs’ from the survey, calling them ‘difficult to estimate’ and depending on individual companies’ ‘risks, impacts and preparedness’.¹¹¹ What is more, the burden of compliance costs is often pushed down the chain to smaller suppliers.¹¹² Due diligence legislation effectively creates additional bottlenecks which suppliers, workers, and farmers need to pass for access to GVCs, including bearing extra costs of audits and adjustment of standards, while the respective value is largely captured by lead firms in the Global North.¹¹³

Turning to the different iterations of the CSDDD throughout the legislative process, a ‘distributional self-restraint’ is particularly recognizable in the Commission proposal which makes only very limited and cautious mention of pricing practices, not in its normative provisions but in a recital.¹¹⁴ The list of human rights treaty provisions to be considered in the due diligence process, presented as Annex to the proposal, comprises references to ‘fair wages’ and ‘decent living’ as stipulated in Article 7 of the International Covenant on Economic, Social and Cultural Rights.¹¹⁵ The amendments proposed by the European Parliament¹¹⁶ made two important contributions that are relevant in this context. First, they include the right to a *living* wage and the right to a living income explicitly in the Annex¹¹⁷ as well as in the recitals¹¹⁸ and provisions.¹¹⁹ This came

¹¹⁰This led to the exclusion of SMEs from the personal scope of application of the CSDDD, despite the UNGP not making such a distinction and extending the responsibility to respect human rights to ‘all enterprises regardless of their size, sector, operational context, ownership and structure’ (see UNGP, *supra* note 61, Principle 14).

¹¹¹Commission Staff Working Document, Impact Assessment Report accompanying the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, SWD(2022) 42 final, Annex 4 – Identification and Assessment of Impacts, 69 et seqq.

¹¹²E.g., S. Ponte, ‘The Hidden Costs of Environmental Upgrading in Global Value Chains’, (2022) 29 *Review of International Political Economy* 818; A. Van Assche and R. Narula, ‘Internalization Strikes Back? Global Value Chains, and the Rising Costs of Effective Cascading Compliance’, (2023) 50 *Journal of Industrial and Business Economics* 161.

¹¹³S. Ponte, *Business Power and Sustainability in a World of Global Value Chains* (2019), 133 (stating that in the ‘name of sustainability, a massive transfer of value is taking place from the Global South to the Global North, from producers to global buyers and consumers, and from labour to capital.’). For a more optimistic analysis, cf. J. Jäger, G. Durán and L. Schmidt, ‘Expected Economic Effects of the EU Corporate Sustainability Due Diligence Directive (CSDDD)’, *Verlag Arbeiterkammer Wien*, 2023, available at www.akeuropa.eu/en/expected-economic-effects-corporate-sustainability-due-diligence-directive-csddd (expecting a positive economic welfare effect on the Global South and positive net effects on the European economy).

¹¹⁴Commission proposal, *supra* note 108, Recital 30 states ‘... When identifying adverse impacts, companies should also identify and assess the impact of withholding an adequate relationship’s business model and strategies, including trading, procurement and pricing practices. ...’. The only reference of remuneration pertains to the very opposite end of the value chain, namely directors’ remuneration (Art. 15(3)).

¹¹⁵See Commission proposal, *supra* note 108, Ann., Part I, point 7 (‘Violation of the right to enjoy just and favourable conditions of work including a fair wage, a decent living, safe and healthy working conditions and reasonable limitation of working hours in accordance with Art. 7 of the International Covenant on Economic, Social and Cultural Rights’) and point 17 (‘Violation of the prohibition of withholding an adequate living wage in accordance with Art. 7 of the International Covenant on Economic, Social and Cultural Rights’). Art. 7 ICECS does not, however, explicitly speak of an ‘adequate living wage’.

¹¹⁶See EP political compromise, *supra* note 108.

¹¹⁷*Ibid.*, Amendment 335 to Ann., Part I, subheading I, point 7 (‘The right to enjoy just and favourable conditions of work including remuneration that provides for a decent living, safe and healthy working conditions and reasonable limitation of working hours. This includes both the right to a living wage for employees and the right to a living income for self-employed workers and smallholders in accordance with Art. 7 of the International Covenant on Economic, Social and Cultural Rights and Art. 23(3) of the Universal Declaration of Human Rights’).

¹¹⁸See *ibid.*, Amendment 30 to Recital 29a.

¹¹⁹See *ibid.*, Amendment 163 to Art. 7(2), Amendment 187 to Art. 8(3).

after broad advocacy by companies and NGOs alike that asked to ‘not compromise on the definitions’ of both terms.¹²⁰ While ‘living wage’ refers to payments received by a worker from their employer for a particular amount of working time, a ‘living income’ is earned by an independent worker through the sale of their good or service and is often composed of different sources. Second, the amendments placed ‘business models’ and purchasing practices more central, reflecting a possible connection between human rights impacts and day-to-day business operations that can be in line with companies’ overall strategy.¹²¹ Moreover, the European Parliament proposed to expand the scope of a Code of conduct already foreseen in the Commission proposal (Article 5(2)) to apply to ‘all relevant corporate functions and operations, including pricing practices and purchasing decisions, for instance on trading and procurement’.¹²² The explicit reference to pricing was erased in the final text.¹²³ The only remaining mention of prices in this text relates to ‘price pressures’ in the agricultural sector which have been an important concern to producers in the Union.¹²⁴

Overall, the CSDDD still reflects the idea of a bracketing of pricing and business models which was prevalent in the legislative history and especially the Commission proposal, even if some of the Parliament’s proposals to mitigate this lacuna found their way into the final text. Taking the Parliament’s ambition further, we will now turn to additional strategies of a more distributively aware due diligence regime.

4. Taking human rights due diligence seriously

We have seen the tension between the aspirational tone of HRDD and its ‘distributional self-restraint’ – as long as questions of value, pricing and wages are bracketed, HRDD will not be able to penetrate to economic root causes. A change of perspective that connects the concept of ‘adverse impacts on human rights’ explicitly to business models and sourcing practices appears necessary. The argument is that because of the cascading effects that lead firm pricing generates down the chain, lead firms need to assess and reflect how their upstream pricing and wider sourcing practices affect lower tiers of their value chain. To be sure, pricing is far too multi-factorial and dependent on various influences for due diligence to require certain substantive price floors or ceilings. Rather, due diligence mandates lead firms to design the *procedure of pricing-setting in a reflexive and informed manner*. Pricing can no longer benefit from the naturalist imaginary of its spontaneous emergence, but lead firms shall actively reflect the impact of their pricing-setting and sourcing conditions, especially with regard to volatile price changes and price squeeze. Importantly, this concerns not merely the price level, but includes payment conditions and meeting of payment terms, conduct in case of default and price adjustments. Pricing and sourcing conditions need to be understood as a *means of conducting* due diligence, not just corporate conduct *subject to* due diligence.

¹²⁰Letter by 60 companies, investors and initiatives of 25 May 2022, available at media.business-humanrights.org/media/documents/Letter-Inclusion-Living-Wage-Income-in-EU-CSDDD.pdf.

¹²¹The EP Political Compromise required companies, where relevant, to ‘adapt business models and strategies including purchasing practices, including those which contribute to living wages and incomes for their suppliers, in order to prevent potential adverse impacts, and develop and use purchase policies that do not encourage potential adverse impacts on human rights or the environment. See EP political compromise, *supra* note 108, Amendment 163 to Art. 7(2), reflected in Recital 46 of the final text (now referring to ‘business plan’). Cf. also Amendments 40 to Recital 30, Amendment 62 to Recital 45, Amendment 145 to Art. 5(1)(c) and Amendment 231 to Art. 13(1).

¹²²*Ibid.*, Amendment 23 to Recital 28.

¹²³*Ibid.*, Recital 39 now reads: ‘The code of conduct shall apply in all relevant corporate functions and operations, including procurement, employment and purchasing decisions.’

¹²⁴*Ibid.*, Recital 47 embodies an EU-centered vision specific to the agricultural sector by claiming to ‘protect agricultural producers in the Union against unfair competition and against harmful practices by operators established not only inside but also outside the Union.’

In principle, due diligence's reliance on the notion of 'impact', understood as the empirical manifestation of consequences of corporate conduct, can open the door to legally mandating such a change. If sourcing squeeze is recognized as a root cause, a literal reading of companies' obligations to identify and remedy 'adverse human rights and environmental impacts' suggests that such business practices need to consider their 'impact' along the chain. In such a perspective, the UNGP's tacit replacement of a deontic rights-based understanding of human rights by a consequentialist or managerialist understanding can be turned into a critical feature. Through the lens of 'impact', human rights would confront the use of power discrepancies in value chains, as well as the opacity, informality, and complexity of global production. This would, to be sure, shift the focus towards questions of institutional design and its entanglement with international political economy, and hence rather further away from a perspective of individual entitlements of rightsholders.¹²⁵ An increased *deindividualization of human rights* might, somewhat counter-intuitively,¹²⁶ offer a strategy to confront business dynamics along value chains that generate individual and collective vulnerabilities but are usually 'too far', 'too indirect' or 'too unspecific' to be addressed by human rights.

4.1. Moving beyond the factory-level: Embedding the quest for living income and living wages in the political economy of value chains

We have seen that until now, in both legislative texts and conceptual debate, living income and living wages are portrayed as a factory-level issue that companies need to be attentive towards,¹²⁷ but which is not, in turn, seen as shaped by their own corporate conduct. In the terminology of the UNGPs, companies are seen at best as 'directly linked', but not as 'contributing' to wage-related adverse human rights impacts. In the UNGP framework, human rights impacts that a company is 'contributing to' need to be 'addressed' (Guiding Principle 13 (a)), while for those impacts that a company is 'directly linked to', this company needs to 'seek to prevent or mitigate' (Guiding Principle 13 (b)) them.¹²⁸ We have also seen above that price squeeze and sourcing practices materialize down the chain so that there are good reasons to see lead firms as 'contributors'. This then raises the intricate question of how the trickling down of pricing and sourcing practices can be grasped in normative and governance terms: What establishes the contribution and what are companies expected to do to 'assess' the negative impacts?

The key normative contention of 'reflexive pricing' is that companies ought to develop inclusive mechanisms of assessing and reflecting, with stakeholders at different tiers of the chain, the impacts of pricing, including for primary commodities down the chain. This does not suggest that lead firms are key shapers of, e.g., primary commodity prices, which, in fact, are determined through institutional mechanisms including financialization that reach beyond lead firms' influence.¹²⁹ But by deploying their own pricing and sourcing practices down the chain, including based on primary commodity prices, lead firms are under a legal responsibility to assess their own impact. Several initiatives and governance tools offer support to lead firms in this regard, even though it requires critical scrutiny to see how well they align, ultimately, with the stated objectives. Voluntary living wage commitments by global brands, in particular, have not materialized in changes of commercial practices in part because

¹²⁵For such a perspective of rightsholders, see Deva, *supra* note 59.

¹²⁶See however N. Luhmann, *Grundrechte als Institution* (1965); G. Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors', (2006) 69 *Modern Law Review* 327.

¹²⁷See, e.g., German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz*), § 2 (2) Nr. 3, 4, stipulating that companies must inform themselves about wage payment practices and to check pay slips at least selectively.

¹²⁸Note that not all pieces of legislation that are inspired by the UNGP explicitly adopt this differentiation; see, e.g., the nuances added in Recital 33 of the Council final compromise, *supra* note 108.

¹²⁹See Tröster and Gunter, *supra* note 7.

they were not grounded in the political economy and power dynamics of value chains, but have been externalized to Multi-Stakeholder-Initiatives that have often diluted and distorted the definition of 'living wage'.¹³⁰ Following the disillusionment with such initiatives, Enforceable Brand Agreements (inspired by the Bangladesh Accord¹³¹) seek to make such commitments more robust. One example is 'Wage Forward',¹³² an initiative calibrated on the US Fair Food Program run by the Coalition for Immokalee workers in Florida. A second example with a different governance setup is the Fairtrade premium for producers that certain standards in the Fairtrade certification system foresee.¹³³ Besides, several toolkits have emerged that assist lead firms in assessing what is referred to as the 'full price', 'hidden price', or 'true costs' in their production.¹³⁴ These tools serve however primarily as quantitative indicators of sustainability performance, especially in life-cycle analysis (LCA), that make various forms of externalities visible at the point of sale, without a clear direction of changing pricing practices.

4.2. Building blocks of reflexive pricing governance

Placing HRDD firmly within the political economy of value chains cannot be achieved by due diligence rules and processes alone. In fact, it is the very idea of HRDD to mandate a corporate process which translates into and is guided by legal mechanisms, doctrines and institutional arrangements that stem from outside of HRDD legislation. Put differently: The due diligence process deliberately cuts across existing legal fields and manifests itself in many legal venues that complement the rules on due diligence strictly speaking. Some of those venues already exist while others will still need to be developed so that only initial orientations are possible at this point.

One such lever comes from contract law, a field not unfamiliar with thinking about fairness and control of pricing. Contract thinking about equality in exchange historically had a certain substantive vision of what constitutes a just price (*iustum pretium*) as developed by Thomas Aquinas and taken over by natural law scholars, before these questions were rescinded behind the supply-demand theories of liberal market economists, especially Adam Smith.¹³⁵ In this paradigm, a 'just' price became associated with the market price voluntarily agreed upon under competitive conditions, with the law being mostly limited to procedural control and the doctrine of 'just price' falling dormant.¹³⁶ To be sure, in extreme cases, substantive revision is also possible, such as in usury. Several authors in legal and political philosophy have suggested that prices which abuse and

¹³⁰G. LeBaron et al., 'The Ineffectiveness of CSR: Understanding Garment Company Commitments to Living Wages in Global Supply Chains', (2022) 27 *New Political Economy* 99; S. Marshall, *Living Wage: Regulatory Solutions to Informal and Precarious Work in Global Supply Chains* (2019).

¹³¹See on the accord between J. Bair, M. Anner, and J. Blasi, 'The Political Economy of Private and Public Regulation in Post-Rana Plaza Bangladesh', (2020) 73 *ILR Review* 969.

¹³²'Wage Forward', available at wageforward.org.

¹³³See, however, a recent study commissioned by Fairtrade that concludes that Fairtrade is in a difficult position to advocate for meaningful due diligence, either cutting 'into profits of producers (which is against Fairtrade's core business of promoting a better income)' or to undermine its own standing as certifier by losing 'volume and market share, especially in competition with other certifications, which in turn can affect the fair price of producers as well'. Cf. A. van Baar and F. Knoote, 'A Fair Price for Human Rights Due Diligence', *Fairtrade International*, 2022, available at files.fairtrade.net/publications/A-fair-price-for-human-rights-due-diligence-Dec-2022.pdf, at 83.

¹³⁴The Oicconomy Sustainability Assessment Tool, for instance, provides criteria to identify and quantify costs to the planet (e.g., regarding biodiversity, pollution, land use or waste), people (e.g., regarding wages or health), and the broader political and economic system (e.g., regarding taxes, anti-corruption), cf. 'Oicconomy Pricing', *Utrecht University*, available at www.oicconomy.geo.uu.nl. For an analysis, cf. P. Croes and W. Vermeulen, 'Comprehensive Life Cycle Assessment by Transferring of Preventative Costs in the Supply Chain of Products. A First Draft of the Oicconomy System', (2015) 102 *Journal of Cleaner Production* 177; W. Vermeulen, P. Croes and L. van der Feen, 'Piloting Oicconomy Pricing: First Experiences of Producers Applying Full Cost Sustainability Assessment of Products', (2023) *Business Strategy and the Environment* 1.

¹³⁵J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), 94–102, see also J. Gordley, 'The Just Price: The Aristotelian Tradition and John Rawls', (2015) 11 *European Review of Contract Law* 197.

¹³⁶See, e.g., the exclusion of price control in the EU Unfair Terms Directive.

entrench exploitative conditions, e.g., of workers, need to be considered as unjust.¹³⁷ Both the doctrinal and the theoretical efforts remain however largely limited to bilateral constellation of exchange and do not capture the cascading of prices in GVCs and its macro-economic environment.¹³⁸ In a GVC setting, the conditions for price squeeze typically result from contractual cascading and its enabling conditions in the political economy of the value chain, i.e., factors reaching beyond the individual contract. Despite a recent surge in interest in prices in private law debates,¹³⁹ a reformulation of ‘just price’ theory reflective of macro-economic conditions of value chain capitalism is still to be developed.¹⁴⁰ How can contract law react if contractual obligations upstream generate a demand for illegal labour practices? One venture in this direction comes from the Model Contract Clauses for Human Rights Projects by the American Bar Association.¹⁴¹ Another one – taking a more anthropological perspective on contracts – would be to develop practical governance tools through which companies can grasp impacts of their pricing policies along the value chain. Given that commercial pricing is today largely algorithmic, the underlying calculative models – part of what could be called the ‘code’ of global value chains¹⁴² – set the course for price policies. At the operational level, these translate into revenue plans, audits, contract forms, order and pricing sheets, and related documents. These documents are the interface through which lead firms ‘see’¹⁴³ their value chains, and – as Annelise Riles has shown for the financial sector¹⁴⁴ – small adjustments to such documents can at times provoke tangible changes in perspective.

Next to contract law, it is the interface between due diligence and competition law that offers guidance on the powers and limitations of due diligence. Competition law both serves as a complementary legal lever that ties in with and even moves beyond the aspirations of due diligence. At the same time, competition law may be invoked as a shield against a redistributive amplification of due diligence. As a starting point, competition law, while limited in its enforcement at the transnational level, seems conceptually more equipped to address imbalances of power in the broader political economy of value chains.¹⁴⁵ Unlike contractual means to redress bargaining power that remain tied to a bilateral perspective on ensuring fairness of the process of exchange, competition law embraces an institutional understanding of markets and value chains and considers itself as part of the legal ground rules of exchange.¹⁴⁶ Compared to the due diligence

¹³⁷E. Anderson, ‘How Should Egalitarians Cope with Market Risks’, (2007) 9 *Theoretical Inquiries in Law* 239.

¹³⁸H. Dagan and A. Dorfmann, ‘Precontractual Justice’, (2022) 28 *Legal Theory* 89, at 96 (problematising the absence of a standard within contract law to determine price fairness that is not identical with a ‘market price’ to whose formation contract law has contributed).

¹³⁹See Hockett and Kreitner, *supra* note 47; specifically in the context of online price discrimination G. Wagner and H. Eidenmüller, ‘Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions’, (2019) 86 *University of Chicago Law Review* 581.

¹⁴⁰See Y. Listokin, ‘A Theoretical Framework for Law and Macroeconomics’, (2019) 21 *American Law and Economics Review* 46 (on the limitations and distortions that neo-classical price theory brings for macro-economic policy).

¹⁴¹American Bar Association, ‘Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0’, 28 April 2021. *Ibid.*, Art. 1.3(c) stipulates: ‘Buyer shall collaborate with Supplier to agree on a contract price that accommodates costs associated with upholding responsible business conduct, [including, for the avoidance of doubt, minimum wage and health and safety costs, at a standard at least as high as required by applicable law [and International Labour Organisation norms]].’ See on this S. Dadush, ‘Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses’, (2019) 68 *American University Law Review* 1519; for a related initiative, cf. Re: Structure Lab, ‘Forced Labour Evidence Brief: Commercial Contracts and Sourcing’, 2021, available at www.restructurelab.org/s/ReStructureLab_CommercialContracts_July2021-a8pg.pdf.

¹⁴²K. H. Eller, ‘Is “Global Value Chain” a Legal Concept? Situating Contract Law in Discourses Around Global Production’, (2020) 16 *European Review of Contract Law* 3, at 22.

¹⁴³M. Fourcade and K. Healy, ‘Seeing Like a Market’, (2017) 15 *Socio-Economic Review* 9.

¹⁴⁴A. Riles, *Collateral Knowledge. Legal Reasoning in the Global Financial Markets* (2011).

¹⁴⁵See, e.g., I. Lianos and B. Carballa-Smichowski, ‘A Coat of Many Colours – New Concepts and Metrics of Economic Power in Competition Law and Economics’, (2022) 18 *Journal of Competition Law and Economics* 795.

¹⁴⁶I. Lianos et al., ‘Power in the Food Value Chain. Theory and Metrics’, in I. Lianos, A. Ivanov and D. Davies (eds.), *Global Food Value Chains and Competition Law* (2022), 256 at 258. The intellectual origins of institutionalist thought in competition

mechanism, this results in a greater openness of competition law, including unfair trading practices law, towards addressing business models as such, especially in nascent approaches of a 'holistic' competition law that understands competition law instruments as means of social regulation pursuing a multiplicity of goals.¹⁴⁷ The underlying idea is that in globally interconnected markets that directly impact all spheres of life and determine ecological futures, competition law cannot remain agnostic towards wider policy goals.¹⁴⁸ Moreover, these strands of competition law trace corporate power and the diverse means of its manifestation, both formal and informal, legal and technological, and identify the incentive structure within which central actors are operating. Take the example of the EU Directive on Unfair Commercial Trading Practices in the agri-food chain.¹⁴⁹ Unlike in the due diligence context where rights violations are framed as singular instances of disregard of basic and essential norms, rather than animated by economic incentives, the law of unfair trading practices *recognizes a potential economic appeal* of the practices which are banned as illegal.

Overall, both contract and competition law can serve important complementary functions in the due diligence process and both regimes should be placed more prominently in debates on business and human rights. Coincidentally, this will allow connecting rich scholarly work that traces the political economical effects of both regimes to the mechanics of due diligence.

5. Conclusions

Global value chains are the institutional form of today's global economy. They create links of interconnectedness between actors, places, and economic dynamics and gradually replace a territorial conception of markets by a functional conception of vertically disintegrated economic cooperation. As such, GVCs function as a distributive arrangement at a global scale, generating and relocating wealth while often exacerbating inequalities between and within countries, especially along the lines of class, gender, and race as well as colonial cartographies. The recent 'GVC turn'¹⁵⁰ in transnational corporate regulation, wherein regulators growingly target GVCs, both directly and as a proxy for other transnational policy goals, must hence also be assessed in its distributive implications. This includes both its ability to alter the existing political economy of GVCs and the political economy of due diligence as a regulatory regime itself, i.e., who bears costs of required transitions and compliance. Human rights due diligence, the current heart of the playbook of GVC regulation, offers significant advances as opposed to previous paradigms of self-regulation and transparency regulation.¹⁵¹ There are, however, broader lines of continuity than is commonly acknowledged, since all modes of regulation suggest that compliance is possible while leaving existing GVC business models largely intact. HRDD currently displays what I have labelled 'distributional self-restraint', i.e., a bracketing of questions of upstream business models and related questions of pricing and sourcing practices. Important contributing factors to the current political economy of GVCs as expressed in pricing, such as weak collective bargaining and

law reach back to the ordoliberal tradition of the Freiburg School, cf. F. Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft', (1966) XVII ORDO 75.

¹⁴⁷See, e.g., O. Andriychuk, 'Between Microeconomics and Geopolitics: On the Reasonable Application of Competition Law', (2022) 85 *Modern Law Review* 598; A. Gebrandy, 'Rethinking Competition Law Within the European Economic Constitution', (2019) 57 *Journal of Common Market Studies* 127; I. Lianos, 'Reorienting Competition Law', (2022) 10 *Journal of Antitrust Enforcement* 1.

¹⁴⁸K. H. Eller, 'Food Chain Certification and the Social Pluralism of Competition Law', in I. Lianos, A. Ivanov and D. Davis (eds.), *Global Food Value Chains and Competition Law* (2022), 397.

¹⁴⁹Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain.

¹⁵⁰J. Salminen, M. Rajavuori, and K. H. Eller, 'Global Value Chains as Regulatory Proxy: Transnationalising the Internal Market through EU Law', in H.-W. Micklitz, A. Beckers and R. Vallejo (eds.), *Transnational European Private Law* (2024), 367.

¹⁵¹Cf. K. H. Eller, 'The Information Architecture of Corporate Accountability', in H. Shamir et al. (eds.), *Modern Slavery and the Governance of Global Value Chains* (forthcoming).

competitive pressures on host states, are blind spots from the perspective of due diligence. Given the thick evidence that sourcing squeeze translates into vulnerabilities on the ground and forms a root cause of many rights violations, the distributive blind spot of HRDD makes it unlikely for this mode of regulation to be an effective challenge to rights violations that are entrenched in economic inequality, such as modern slavery. Importantly, the ‘distributional self-restraint’ is not only anchored in positive law and the policy debates around the EU CSDDD. Rather, it is a direct continuation of the political and economic imaginary that inspired John Ruggie in the development of the UNGP as well as of the naturalizing narrative from neo-classical economics around ‘free markets’ and ‘market prices’ that have immunized prices in value chains from being seen as conducive to harm. Legal debates and doctrines have at least indirectly internalized such conceptions and hence remain insensitive to the strategic uses of lead firm power in GVCs, inter alia through sourcing squeeze. To overcome such limitations, this article has called for a reflexive governance of pricing and sourcing practices that requires companies to assess and reflect, with stakeholders at different tiers, the impact of lead firm pricing down the chain, especially on living wages and incomes. This goes beyond the mere amount of prices, but it includes payment conditions more broadly. Two practical steps seem central. First, HRDD should be seen as connected to and complemented by the various legal regimes that enable and regulate global production, such as contract and competition law. Pricing and sourcing practices are so deeply woven into the legal fabric of GVCs that HRDD cannot be effective if it remains detached from it. Second, overcoming HRDD’s ‘distributional self-restraint’ requires solutions of institutional (re-)design that reach beyond categories of individual rights. If HRDD ought to contribute to a less unequal global economy and reflect some of the impetus of the NIEO which preceded it, it will need to develop a conceptual register of institutional transformation¹⁵² that complements a framing of individual rights. This also allows bridging micro-, meso-, and macro-level perspectives on inequality in GVCs. Despite the multiple analytical and methodological frames in which pricing and sourcing practices in GVCs can be placed, the different levels are profoundly connected and should be read as such.

¹⁵²On the transformative nature of contemporary legality cf. P. Kjaer, ‘What Is Transformative Law?’, (2022) 1 *European Law Open* 760.