Shared Responsibility, Global Justice, and the Representation Structure and Norms of the International Labor Organization (ILO)

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This paper is part of a broader project that aims to applying normative insights of global justice theories to international labor law, the research will contribute to the emerging literature on the ILO. In particular, it would continue to theorize the concept of shared responsibility as it applies to the sphere of international labor and, second, to explore the legal and institutional implications of this concept for the International Labor Organization (ILO).

Introduction

Processes of globalization, particularly economic integration and post-industrialism, have profoundly transformed production methods and labor conditions of workers worldwide (Piore & Sabel, 1984; Hirst & Zeitlin, 1991). Until recently, the nation-state was considered the main agent responsible for legislating and enforcing labor standards within state borders. However, past three decades have witnessed the decline of organized labor (Arthurs, 2006; Bercusson, Estlund, 2008) and weakening of the state as a primary political and economic unit in world society (Esping-Andersen, 1996; Held et al., 1999). Concurrently, trade volumes grew significantly, and transnational labor corporations (TNCs) gained unprecedented influence and power (Strange, 1996; Sklair, 2002), alongside the rise of global production chains (complex transnational networks of businesses that cooperate collectively to achieve the procurement, manufacture, and distribution of a family of related products) (Henderson, 2002; Christopher, 1998). Within these flexible modes of transnational production, many workers find themselves in what is referred to as "structural disempowerment", as they are unable to control opportunities and resources or compel external decision makers to share the responsibility for maintaining their well-being (Young, 2006; McDonald, 2007). As the debate whether free trade causes race to the bottom or a regulatory chill of labor standards continues (Mosley (2011); Blanton and Blanton (2012)) the fact remains that workers that are part of transnational production chain, in particular in developing countries, are often subjected to sub-standards labor conditions. Legal protection of these workers’ rights (e.g. safety and health regulations, minimum hours, prevention of child labour) are often minimal or nonexistent, as demonstrated by the recent disasters in Bangladesh, Cambodia and China.¹

Who should be responsible, both morally and legally, for remedying workers’ unjust conditions and protecting their rights? What scope of moral and legal obligations should be borne by individuals or institutions towards workers who reside and work in foreign countries? What role should be played by transnational organizations in generating

international labour standards? Is there a democratic way to regulate labour standards and enforce them in a global labour market? The urgency of these questions was recognized with the shocking news from Bangladesh on April 2013, when a factory collapse had taken place in Bangladesh’s garment industry, claiming the lives of more than 1,000 workers.

Despite the growing interest around the world in issues of global labour, scholarly study of the normative implications of international labour regulations has remained surprisingly limited. This broader project and this article in particular, seek to contend with such issues by bridging the disciplinary gap between the normative paradigm underpinning the recent literature on global justice and the empirical paradigm of international labour law.2

**Normative Background – Shared Responsibility**

Given that the state’s ability to protect workers on the national level has been undermined, the main challenge today is finding appropriate institutional arrangements for allocating responsibility in a manner that, at least minimally, realizes basic labor standards. This entails a new conception of responsibility. With the global expansion of production and services, responsibility for providing decent work conditions can no longer be defined in terms of “state responsibility” or “individual responsibility”. That is to say, responsibility can no longer be assigned exclusively to a single actor or agent, whether an individual or collective entity, but rather, “shared responsibility” should be borne by several actors or agents (Young, 2010; Dahan, Lerner, Milman-Sivan (hereafter DLM-S), 2011a; DLM-S, 2013b). Yet while such shared responsibility would be more compatible with the current global social and economic realities, it is individual/state responsibility that generally characterizes the traditional model of legal liability for labor conditions. A notion of shared responsibility has recently been emerging in various fields of law, such as torts (Porat, 2004), international environmental law (Perez, 2004), and development rights (Salomon, 2007). Similar frameworks need to be developed in the international labor sphere (Hyde, 2011).

This article will build on my previous work that explored the philosophical foundations for a concept of shared responsibility in the realm of the social practice of labor (DLM-S, 2011a; DLM-S, 2013b). This theoretical work produced a normative framework, building on a practice-dependence theory of international labour standards. It argues for a cosmopolitan understanding of global labour rights as duties of justice, rather than as mere humanitarian assistance. Namely, a cosmopolitan approach to “shared responsibility” whereby the responsibility to promote labor standards is not limited to the territory of a particular state (as opposed to a national understanding of the term, Miller, 2007).

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2 An edited volume aimed at addressing this gap is forthcoming in Cambridge University Press, see GLOBAL JUSTICE AND INTERNATIONAL LABOUR RIGHTS (Eds., Y. Dahan, H. Lerner, F. Milman-Sivan).
In other words, responsibility for a violation of workers’ rights in a particular state can be borne by actors or institutions external to that state, or even by other states. I further argued that a concept of shared responsibility is essential and should be accorded greater weight in international labor literature and policy given the increasingly unjust labor conditions across the globe. This is a phenomenon to which millions of people contribute by participating in global economic institutions and practices. Economic integration, internationalization, and decentralization of production chains have increased the number and type of public and private actors who, potentially, bear some legal and moral responsibility for workers’ conditions (e.g., TNCs, vendors, suppliers, consumers, localities, and regional institutions). While traditional individual conceptions assign responsibility for labor conditions to a sole agent, the concept of just shared responsibility imposes a duty on all actors to ensure minimal labor standards for workers.

This normative framework proposed four principles of responsibility allocation (DLM-S, 2011a): (1) the notion of benefit—who benefits from the work and the poor working conditions; (2) the notion of contribution—who contributes to the situation; (3) the idea of capacity—who has the capacity to guarantee workers’ rights, including ensuring adequate work conditions; and (4) the idea of connectedness—the nature of the relations amongst people participating in joint activities. This dynamic conception of responsibility departs from traditional understandings of shared liability, in being realistic regarding present conditions and future trends. Furthermore, it is a prospective approach and developmental in orientation, as it both responds to the conventional interest in setting criteria for assigning blame and punishment as well as engages participants in a collective process of change, a process that is more forward looking and preventive (Young, 2010; DLM-S, 2011a; DLM-S, 2013b; DLM-S, 2013).

This article would further concretize this earlier attempt at conceptualizing shared responsibility and apply it to the legal sphere, most specifically to the ILO, a key player in the current international labor regime. While the ILO has been the focus of extensive criticism with regard to its operation and institutional structure (e.g., Leary, 1996; Cooney, 1998; Langille, 1999; Maupain, 2000; Barenberg, 2009; Milman-Sivan, 2009; Murray, 2010), there has been very little work analyzing the general conception of responsibility and the particulars of the Organization’s structure in light of global justice theories criteria (DLM-S, 2013).

One important, under-investigated, and under-theorized distinction in the field of international labor law is the differentiation between responsibilities to ameliorate unjust working conditions on the interactional level versus the institutional level. While the former refers to private contractual interactions between various actors, in particular within global chains of productions (e.g., brands, sub-contractors, and vendors), the latter refers to regulation of the global economy by public global institutions or through regional agreements (e.g., the WTO, NAFTA, EU, and ILO). The literature currently concentrates, by and large, on examining how responsibility should be assigned with respect to

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private bodies, namely, on the interactional level (Young, 2010; Hyde, 2011; DLM-S, 2011a; Macdonald, 2011), while some initial research has applied this notion of responsibility to the institutional level. Yet, the interaction and relations between the interactional and institutional levels have as yet to be thoroughly investigated. The minor research thus far on shared responsibility has focused either on how it is manifested in international norms (Salomon, 2007) or on the structure of the international labor institutions (DLM-S, 2013), without touching on the inter-relations between the interactional and institutional aspects.

This article will build on this distinction between the interactional and the institutional levels of analysis. In addition, it will utilize my initial findings that the ILO continues to reflect, in part, an outdated conception of the allocation of responsibility in international labor, namely what I call a “statist model” of responsibility (DLM-S, 2013).

**ILO and the Statist Model of Responsibility**

This article will argue that the ILO’s current activities and institutional structure do not fully conform to the theoretical concept of shared responsibility. In particular, two ILO structures will be addressed: (1) its unique “tripartite” representative structure comprised of representatives of the government, employers, and workforce of each member state; and (2) its norm-generating and decision-making processes. This article will ask the question, what reforms are needed in the ILO’s norm-generation and representative mechanisms of the ILO in order to move away from a “statist model” and more towards a “shared responsibility model”?

In another article I have demonstrated how and in what form the statist model, i.e., a state centered, individualistic backward looking conception that dominates the supervisory system of the ILO. I have argued that recent global economic, political, and legal developments mandate a new conception of responsibility, and presented an alternative conception of responsibility, as it should be applied to its supervisory system. The proposal included, for example, a suggestion to identify the potential actors that should be considered responsible for remedying unjust labor conditions according to the four principles of shared responsibility defined above. The ILO identifies two types of violations of labor standards. One type is legislative in nature, which I accordingly term “legal violations,” namely, an inadequacy in the legal scheme in a given country. In such cases, the territorial state clearly bears responsibility for the violation and its amendment. There is, however, a second type of violation, which I term “practice violations,” where workers’ rights are violated in practice. In such cases, actors other than the territorial state may bear responsibility for the violation. While the territorial state always bears some degree of responsibility for violations within its borders, the ILO should not automatically assume that other states or private employers are without responsibility. This leads to the allocation of responsibility for workers’ rights among key actors that are overlooked by the existing supervisory systems: (1) states other than the state in whose territory the labor rights are violated and (2) powerful TNCs that participate in global production chains. Pragmatic considerations seem to imply that the ILO should focus on several main candidates for sharing responsibility. For example, once a supply or distribution chain is identified, the ILO should engage with the most
powerful player in the chain. 4

Particular procedures within the supervisory system, including the operation of the Expert Committee and the Conference Committee, as well as other procedures should be reformed for trans-border enforcement of labor standards that fulfils the shared responsibility model. Most significantly, the CEACR should expand the scope of actors to which it assigns responsibility. Namely, when it detects practical labor rights violations, it should no longer assume automatically that the sole actor responsible for the violation is the state in whose territory the violation occurred. Rather, it should weigh assigning responsibility to other states as well as to private bodies, by applying the four principles of responsibility allocation and making an initial assessment of each actor’s degree of responsibility. Where states other than the territorial state are involved, the assessment of their responsibility could proceed through regular procedures, such as direct contact or observations, while analogous procedures could be instituted to assist the CEACR in making a final assessment regarding private bodies.

In addition, the CEACR should expand the information it gathers by revising its questionnaires to request information that goes significantly beyond a description of the state’s legal reality and instead (or also) provides a picture of actual labor rights protection. Naturally, such a change to the operation of the CEACR would yield parallel modifications to the functioning of the Conference Committee, as they would have to address new actors, such as TNCs. The proceedings of the Conference Committee should address directly all the actors identified by the CEACR in every particular case. The Conference Committee’s considerations for choosing cases for discussion and follow-up should thus be transformed accordingly, particularly in cases where one of the actors is a private body. As noted, for such cases, the ILO could contemplate developing parallel proceedings to those currently applied to states. For example, observations, when warranted, could also be published with regard to private entities, as in the case of states. Allowing observations against TNCs or other private employers would incentivize workers’ organizations and civic organizations to include relevant information about violations that targets particular employers. In addition, one expected outcome of the application of the shared responsibility model would be that industrialized states would presumably shoulder more responsibility than they currently do, particularly as origin states.

Incorporating TNCs and nonterritorial states into the ILO complaints system as potential subjects of investigation would require adapting the Commission of Inquiry’s procedures and, for cases of freedom of association, those of the ad-hoc committee. To fully integrate the shared responsibility model, where a state has not yet ratified core conventions, the ILO would need to waive the requirement of state consent currently necessary before the FFCC may

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4 This expansion of the scope of actors that could bear responsibility for labor standards raises a set of practical problems. To begin with, there is the threshold question of whether there would be the political will to implement such reforms. Indeed, it has been clearly noted in the past that the ILO suffers from political impasse. Moreover, the ILO would likely encounter legal and conceptual difficulties in implementing this model of responsibility. States would be wary of accepting responsibility for labor rights violations outside their jurisdiction and of attributing responsibility to private bodies. Nevertheless, the path to overcome these problems is through notions and practices already prevalent in the existing international labor regime, as demonstrated in previous work. For example, in recent years, we have been witness to several serious attempts to internationalize the regulation of corporate social responsibility.
initiate an investigation, as is the case with the CFA procedure. The CFA’s current mandate to investigate cases without
the involved states’ consent, even if they have not ratified the relevant conventions, should be extended to the other
three core rights—the right to be free of forced labor, the right to equality at work, and the right to be free of child
labor—a move that has been advocated by Bob Hepple, for example. From a practical perspective, the CFA’s and FFCC’s
existing procedures, with the necessary modifications, could serve as a model in adapting the representations procedure
and could also inform new Commission of Inquiry procedures for initiating investigations regardless of ratification status.
In fact, the representations procedure already borrowed procedural rules from the ILO legislative bodies that supervise
the freedom of association norm.

ILO Norm-Generating Procedures and Representative Structure – Preliminary Analysis and Recommendations

This article will first analyze to what extent does the norm-generation process and the representative structure of the
ILO incorporates elements that are compatible with the notion of shared responsibility. To the extent that the ILO
reflects conformity with the conception of shared responsibility, it strengthens the argument for adopting shared
responsibility as a guiding normative criterion. Where the ILO’s institutional design and operation is inconsistent with
the concept, reform suggestions are in order. My work so far has established that the ILO incorporates both the statist
and the shared responsibility conceptions, and that reforms are needed to make these structures more aligned with a
share responsibility model of responsibility. The argument for shared responsibility as a guiding normative criterion in
international labor law is bolstered by the fact that ILO conforms to some extent with this understanding of
responsibility.

To illustrate briefly, in accepting representatives of workers’ and employers’ organizations as members, the ILO is
the only international institution to deviate from the conventional model whereby only states are admitted as members
of international organizations. The ILO further incorporates additional elements that are compatible with a notion of
shared responsibility, including, the prospective aspect of shared responsibility is integrated into the “technical
assistance” activities (Servais, 2011; Blackett, 2011). Likewise, there is intense involvement of non-state representatives
in the norm-generation process. The ILO norm-generation process is designed to allow considerable participation of
governments as well as employers’ and workers’ organizations, which results in large amounts of national information
regarding the conditions that would allow or hinder the ratification and application of the proposed standards.

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6. See the GB’s decision to accept the procedural rules that apply to cases of freedom of association as guidelines that would assist in
resolving disputes as to procedural quandaries that relate to the procedure of representations under Article 24 of the ILO Constitution.

7. At both stages of the discussions at the Conference, employers’ and workers’ groups may propose texts, make amendments, and
consider the ultimate form of the standard. See Standing Orders of the International Labour Conference arts. 39(1), 39(6) (adopted on Nov. 21,
Delegates from employers’ and workers’ groups are intensely involved, almost on equal footing, at the different stages of the discussions at the International Labour Conference and can propose texts, make amendments, and deliberate on the ultimate form of the standard.

However, this representation of non-state interests is channeled through the *individual state*: each state sends its own such representatives. In addition, ILO standards—namely, conventions (the primary proclamations of labor standards) and recommendations (non-binding labor standards)—are formulated to create duties for *individual member states*. Thus, states in fact remain the sole bearers of legal responsibility for violations of ILO labor standards, as they are the only actors expected to ratify and comply with them *individually*. This central feature of the ILO could be classified as more in line with the individualistic state responsibility conception. Similarly, while some ILO conventions are worded in a manner that places direct duties on corporations, the ILO holds corporation responsible mainly through the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy Declaration (the MNE Declaration), which is voluntary, non-binding and mostly ineffective instrument. Further, the ILO adheres to the general understanding that obligations arising from ratified ILO conventions are confined to state borders: “In general the obligations resulting from ratification of an international labour Convention, like all such obligations arising under general international Conventions, are limited to matters arising within the jurisdiction of the party to the Convention upon which the obligation rests.”

My first argument, therefore, would be that the conceptions of responsibility implicit in the ILO’s institutional design are mixed and should be reformed in order to more fully comply with the theoretical framework of shared responsibility as it applies to the institutional level (developed in the first stage). At this point, proposals will be generated for reform and development of new legal tools, where needed, based on the normative analysis.

In the second stage of the research I aim to propose reforms to the two relevant ILO mechanisms. These would draw

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1919) [hereinafter Standing Orders of the ILC], available at http://www.ilo.org/public/english/standards/relm/lic/lic-so.htm. The Office sometimes seeks advice from the United Nations and other specialized agencies as to proposed instruments, but the scope for NGO participation remains limited. This partly accounts for the relatively greater participation of human rights NGOs in UN activities rather than in the ILO’s activities. NGOs may influence ILO work indirectly through the international workers organizations, such as the International Trade Union Confederation (ITUC), which have consultative status with the ILO, or by submitting information informally to the Office. They may further apply to the Director-General to be put on the list of organizations whose objectives are in harmony with the objectives of the ILO. Such inclusion on the list, if authorized, entitles them to be notified of meetings and to apply for special permission to distribute documents in the ILO and to participate in meetings by making oral presentations. But the scope of NGO participation remains limited. This partly accounts for the relatively greater participation of human rights NGOs in UN activities rather than in the ILO’s activities.


on the further development of the theoretical framework of shared responsibility. Here are some very preliminary avenues of investigation: One example to be investigated in this framework will be developing a new norm-generating system whereby international norms would view and determine states’ responsibility as extending beyond their own territorial borders11 (the Indigenous and Tribal Peoples Convention, 1989, under which states are obligated to engage in economic and other types of cooperation across borders could serve as an insightful example). Along these lines, international labor norms could assign responsibility to “home states” or “states of origin” where a TNC’s management resides in cases of a rights violation by that TNC in other countries (compare Seck, 2008; Gatto, 2011).

Another possible area of reform could relate to the representative structure of the ILO. For example, the shared responsibility framework might produce a normative need for adequate participation by powerful multinational corporations in the ILO’s representative structure (compare similar suggestions for efficiency reasons in Rogers, 2009). Such representation would be essential were corporations to be subject to various forms of accountability under a shared responsibility framework (Barenberg, 2009; DLM-S, 2013). It could also provide a rationale for increasing the extent to which the ILO provides prospective and financial assistance as opposed to retrospective sanctions (Langille, 2009).

The engagement of private bodies with public regulation has been recognized as the most effective path for improving labor standards throughout supply chains (Locke, 2013). The specific obligations that could/should be assigned to TNCs (to promote labor rights throughout their supply chains operations) range from very minimal to more burdensome obligations. In my work I would like to conceptualize and develop the obligations of TNCs within the international labor regime to engage with international labor institutions such as the ILO. These are what I tentatively term “the Institutional-like Aspects of TNC’s Obligations.” Such obligations, for both ex-ante and ex-post engage with the public institutions such as the ILO, could range from very minimal to very significant obligations. These could include, on the minimal side, legal obligations of TNCs to cooperate with ILO Commission of Inquiry investigations. More significantly, we could ask if TNCs have moral and thus should have legal obligations to participate in a (voluntarily, in the first stage) ILO supervisory system that would resembles the state supervisory system. One could also imagine the ILO developing a mechanism to facilitate the signing and application of International Framework Agreements, whereby International Unions sign collective agreements on a regional or international level with particular TNCs.

On the theoretical level, my research would thus attempt to develop the normative aspects of shared responsibility that support such obligations. At the same time, on the empirical-institutional level, I will attempt to envision how the ILO could facilitate such obligations through reforming its own mechanisms and envisioning novel ones, which are built
on familiar well established procedures. The feasibility of the normative avenue draws on two features of shared responsibility concept: (1) the distinction between interactional and institutional aspects of responsibility, and (2) the understanding of shared responsibility as a forward looking concept.

Shared responsibility as a forward looking concept demands that responsible actors promote ex-ante action to prevent foreseen future violations, as well as ex-post remedial actions to correct injustice. Namely, it corresponds to what David Miller has termed remedial responsibility (Miller, 2007).¹² Transnational arrangements, such as the CSR, and, in particular, to Ruggie’s recent interpretation of the UN Guiding Principles on Business and Human Rights (Ruggie, 2011) have acknowledged that TNCs have forward looking obligations such as to perform due diligence to detect possible violation of human and labor rights throughout their supply and production chains. While this initiative had been heavily criticized on several grounds, this article will aim to argue that this positive step to clarify the TNCs obligations throughout the supply chains is limited because of its focus on the interactional aspects of corporate obligations. This article will examine whether such obligations should be supplemented, and go beyond the interactional side of the TNC’s actions. It would consider whether normatively it is feasible to have broader expectations from the most powerful TNCs to engage in forward looking activities via engagement with the international organization such as the ILO.

To sum, shared responsibility could provide a basis for developing supplements and reforms for the ILO’s traditional tripartite structure and norm-generation mechanisms, and lay the foundation for promoting a more coherent and justifiable ILO. At the same time, this normative framework would be developed to consider ex-ante obligations from TNCs to participate and engage with public institutions, particularly with international institutions such as the ILO.


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¹² Miller distinguishes between remedial and outcome responsibility. The latter determines whether an agent produced an outcome and thus is required to compensate for the damage it caused, whereas the former determines whether an agent bears an obligation to remedy harm not necessarily caused merely by the agent itself. The two types of responsibility are not completely detached. One of the factors taken into account in allocating remedial responsibility is who bears outcome responsibility. In discussing global justice and labor, remedial responsibility is of main concern, since, as Miller explains, “the idea of remedial responsibility potentially applies whenever we encounter a situation in need of remedy.” The starting point of any consideration of remedial responsibility, then, is an unjust state of affairs requiring some kind of correction, which raises the question of whose responsibility it is to make this correction. When the unjust state of affairs is structural, one avenue of investigation should be who is responsible to change the unjust structure.


