GLOBAL REGULATION OF CORPORATE CONDUCT: EFFECTIVE PURSUIT OF A SLAVE-FREE SUPPLY CHAIN

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Attractive as they seem, free trade and capital flows have also brought about major negative impacts. Achieving socially sustainable globalization and maintaining a global economic order that respects human dignity remains a matter of concern. Human-by-human exploitation in the form of modern slavery is deeply entrenched in many businesses, large and small. In recent years, there has been a proliferation of efforts towards building a supply chain that would be free from questionable practices and abuses of the human rights of workers. Efforts have been made to advocate for a human rights-based code of conduct for businesses, for a meaningful corporate social responsibility, and for ethical consumerism. Existing law, policy, and social activism have made some strides toward committing businesses to trace their supply and to cutting ties with contractors accused of using forced labor. Still, the law is unsettled as it regards corporate liability. Globalization, the complexities of outsourcing, extended supply chains and their mostly unregulated nature have exacerbated trafficking in humans. This extraordinary problem, as it persists, calls for extraordinary measures. A business as usual approach has not solved the problem. It is time for nation states to step up their regulatory approach regarding businesses. Individually and as a community, nation states need to create a rule-based system for corporations forcing compliance, a system that would be workable and effective.

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> "[W]e all know quite well that the enjoyment of human rights can also be threatened by non-State actors. Private persons may exercise a considerable constraint on other individuals. This fact is putting the State in a situation where it may have to intervene into the relations existing between the individuals, drawing limitations to their freedom to act."[1]

1. ECKART KLEIN, THE DUTY TO PROTECT AND TO ENSURE HUMAN RIGHTS 19–20 (Eckart Klein ed., 2000).

INTRODUCTION

Slavery is not just the solitary act of one individual. In the economic sector, it can arise at various stations of production and distribution of goods and services. In the modern division of labor, creation and distribution of a product often requires cooperation of various entities, mostly commercial, from raw materials to finished merchandise—a so-called "supply chain."[2] In a globalized economy wedded to the goal of minimizing labor costs, resource extraction, growth of farm products and livestock, as well as manufacturing as the beginning phases of the chain of supply are often moved to countries with substantially lower wages and fewer protections for workers and service providers. Too often, the labor conditions in these countries are nothing short of exploitative; in the aggregate, the abuse of labor in these mostly developing countries constitute the elements of modern slavery, i.e., trafficking in human beings. The most promising approach to staunching this problem effectively is to address the entity in control of the supply chain, i.e., the corporation, generally in highly developed countries, that sets up the chain of supply by outsourcing some of its parts.

In line with free market principles, the goal of generating goods and services free of slave labor has been pursued by appeals to the conscience of corporations, their self-restraint by voluntary codes, and the threat of consumer boycotts.[3] There is an enormous number of entities that have been established to trace, explore, assess, analyze, conclude and report on the scope, magnitude, and effectiveness of corporate initiatives to protect vulnerable workers in their supply chains. This Article will evaluate the success of these efforts, although thorough research on this matter is difficult to undertake. Their sheer

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2. Examples of supply chain activities include mining, farming, refining, design, manufacturing, packaging and transportation. Barbara Farfan, *Supply Chain Management and Logistics, Retail Examples*, BALANCE SMALL BUS. (Oct. 21, 2018), https://www.thebalancesmb.com/definition-of-supply-chain-management-2892749.

3. *See generally* Kathleen Agena, Commentary, *Boycotts Could Stop Slave Labor*, ALB. TIMES UNION (July 25, 2016), https://www.timesunion.com/opinion/article/Boycotts-could-stop-slave-work-8401719.php (advocating for the use of boycotts to increase public awareness of slave labor); Felicity Lawrence, Opinion, *How Did We Let Slavery Become Part of Our Everyday Lives?*, GUARDIAN (Apr. 2, 2018), https://www.theguardian.com/commentisfree/2018/apr/02/modern-slavery-daily-life-exploitation-goods-services (addressing the impact of consumption trends on forced labor); J.J. Rose, *Thailand's Slave Fishermen: What's Needed to Solve the Crisis?* AL JAZEERA (Sept. 13, 2018), https://www.aljazeera.com/indepth/features/thailand-slave-fishermen-needed-solve-crisis-180911223139627 (addressing the forced labor of fishermen in Thailand but questioning the utility of a consumer boycott).

number, their uncountable websites and sub-sites, missions, visions, and projects also create a blurred, almost Kafkaesque, situation. It is hard to come out with a clear picture or understanding of what exactly corporations are doing to effectively end modern slavery in their supply chains and provide services and products that are free of slave labor. But the blame does not fall on these entities, often because it is difficult to ascertain empirically the internal workings of corporations.

The efforts made by a good number of corporations in this regard are not to be trivialized either. On the contrary, they are to be appreciated and commended for their *voluntarism* in combating this battle. The proliferation of efforts toward building a supply chain free from questionable practices that have led to extreme abuse of workers' human rights and, even worse, to the facilitation of human trafficking by exacerbating the demand for cheap labor, products, and services, is indeed admirable. Whether advocating for a human rights-based code of conduct or for the power of ethical consumerism, groups and movements indicative of social activism from various workers' organizations, religious organizations, humanitarian agencies, and private companies have all dealt with the issue of how corporations should address forced or exploitative labor in their chain of supply. To their credit and within the boundaries of their respective mandates, certain groups have been fairly successful in getting some big businesses to commit to tracing their supply chains and cutting ties with contractors accused of using the means of modern slavery.

The following questions arise and will be addressed in this Article. Is reliance on consumer initiatives such as boycotts and labeling of products made free of slave labor the proper approach? To the extent corporations have addressed this issue, has the reliance on voluntary self-restraint been successful? Aren't corporations under the binding legal obligation to maximize profit for their shareholders? Wouldn't they violate their *raison d'être* by worshipping other gods than mammon, i.e. the interests of their workers? Thus, the time may have come to redefine the legitimate purpose, the mission of corporations. This can effectively be done only by nation states. But, are they able and willing to do that? Governments may not yet read and comprehend the signs of the times that may mandate such action.[4]

4. "O ye hypocrites, ye can discern the face of the sky; but can ye not discern the signs of the times?" *Matthew* 16:3 (King James). In Matthew 16:1-4, the Bible shows how

> [t]he Pharisees and Sadducees were opposed to each other in principles and in conduct; yet they joined against Christ. But they desired a sign of their own choosing: they despised those signs which relieved the necessity of the sick and sorrowful, and called for something else which would gratify the curiosity of the proud.

There is over-confidence in voluntary reporting, disclosures, and transparency of the almighty market, and on the players that animate it—the globally active corporations. Governments seem to be playing a rope-a-dope in this contest between maximum corporate profit and respect for elementary human rights,[5] holding in abeyance the ultimate effective weapon, which is binding regulation.

In an era when the term "sovereignty" has come back to justify a "my country first" mentality without regard for the lesser members of the world community, is the nation state pursuing a fair-weather responsibility *vis-à-vis* the safeguarding of universal human rights and human dignity? Can or should nation states advance further in their regulatory functions related to business and thus go beyond what is presently mandated in the legislation of so-called "big four" coerced labor regulatory schemes?[6] In a globalized world, is it even possible for one nation state to claim that it will be able to end trafficking within and outside of its borders? Do and should nation states have any responsibility to regulate business conduct beyond their borders, based on their obligations under human rights law? As individual states? As a community of nations? What would animate or inhibit individual and collective state intervention? As this Article will illuminate, this vexing economic and social condition that has seen millions suffer under the yoke of modern slavery has also challenged our vision for human dignity.

MATTHEW HENRY & NOAH WEBSTER, MATTHEW HENRY BIBLE STUDY: REVISED KING JAMES VERSION 788 (P.F. van der Schelde ed., 2011). So far, the nation state continues to bend before corporations for fear of breaking, but bending for too long is losing its validity. In his address to the Third World Meeting of Popular Movements, Pope Francis warned attendees that "[c]orruption, arrogance and public display by leaders increases collective unbelief and a sense of abandonment, and feeds the mechanism of fear that sustains that evil system." Pope Francis, *Address of His Holiness Pope Francis to Participants in the 3rd World Meeting of Popular Movements*, LIBRERIA EDITRICE VATICANA (Nov. 5, 2016), http://w2.vatican.va/content/francesco/en/speeches/2016/november/documents/papa-francesco_20161105_movimenti-popolari.html.

5. It suffices to read about one of the most cherished initiatives in the world today, the UN Global Compact, to understand that the global community of nations has not so far dared, beyond "calls," to properly challenge the corporate world. For details, see *infra* Section VII.A.

6. *See* Gerald T. Hathaway & Matthew A. Fontana, *Business and Human Rights: Threading the Needle of Multiple Jurisdictions in Supply Chain Integrity, Including Human Trafficking Compliance*, 2018 A.B.A. SEC. LAB. & EMP. L. 1, 7, https://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/Industry%20Deep%20Dives%20Fashion.pdf (providing that the "big four" regulatory schemes addressing coerced labor are the Federal Acquisition Regulations anti-trafficking provisions, California's Transparency in Supply Chain Act, the United Kingdom's Modern Slavery Act of 2015, and France's coerced labor regulations).

I. DELIMITING THE PROBLEM: WHAT CORPORATE BEHAVIOR CONFLICTS WITH THE IDEAL OF AN ORDER OF HUMAN DIGNITY?

A. The Notion of Human Dignity and Human Rights

Great historic movements for human freedom, equality, and solidarity were the predecessors that gave rise to demands for human rights universally. The American and French revolutions particularly referenced the idea of the rights of man. The new world order after the World War II heralded the human being and human dignity as the centerpiece of the particular structure of an international order that justifies basic political and social institutions established to respect and protect human dignity. This in turn constitutes a fundamental value in many legal systems. Enshrined in positive law as demands for all important values that constitute human dignity are the Universal Declaration of Human Rights;[7] the International Covenant on Civil and Political Rights;[8] and the International Covenant on Economic, Social and Cultural Rights.[9] There are also equivalent expressions in regional human rights conventions, as well as the bills of rights embodied in national constitutions of various countries, showing that human rights became and still remain at the heart of good governance despite various legal and political interpretations over time.

Though recognition of human rights is realized in positive law, it is well accepted that the concept of human rights stems from the doctrine of natural rights,[10] which holds that individuals are entitled to fundamental rights beyond those prescribed by law, merely by virtue of being humans possessed with sympathy and psychological imagination, or because they are created in the image of God.[11] The

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7. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

8. Adopted Dec. 19, 1966, 999 U.N.T.S. 171; *see also infra* note 138.

9. Adopted Dec. 16, 1966, 999 U.N.T.S. 3.

10. *See* LOUIS HENKIN, THE AGE OF RIGHTS 1–5 (1990).

11. The Catholic tradition anchors rights in God's will that created man in His own vision, maintaining that "[m]en have been ransomed by the blood of Jesus Christ. Grace has made them sons and friends of God, and heirs to eternal glory." Pope John XXIII, Pacem in Terris*: Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*, LIBRERIA EDITRICE VATICANA ¶ 10 (Apr. 11, 1963), http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html (enumerating the rights to which man is entitled). According to Catholic social teachings, since all human beings are endowed with intelligence and free will, they have rights and obligations flowing directly and simultaneously from their own nature. Similarly, these rights and obligations are universal and inviolable, so they cannot be surrendered. On the other hand, these natural rights are inseparably

notion of human dignity, though undefined, referenced in the Universal Declaration of Human Rights seemed to have gained consensus by all traditions representing nations within the United Nations.[12] The idea of human rights is an essential part of the liberal creed, since it refers more to a state of feeling, rather than to a statutory provision. The positive manifestation of human rights law can be traced back hundreds of years through the development of the legal history of many Western countries,[13] which progressively recognized that human rights cannot be created or granted but are firmly grounded in the basic dignity[14] and equality of each person.[15] Consequently, the political systems cannot and should not simply be "value-neutral" for pragmatic purposefulness,[16] because such systems would not be able to accomplish human aspirations. As articulated in these universal documents, peoples'

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connected with just as many respective duties. Rights as well as duties find their source in natural law, which grants or enjoins them. Natural law, by granting every fundamental human right, imposes at the same time a corresponding obligation. *Id.* ¶¶ 28–30.

12. THE CAMBRIDGE HANDBOOK ON HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES xviii (Marcus Düwell et al. eds., 2014).

13. From the Magna Carta of 1215 and the Bill of Rights of 1689, to the Treaty of Westphalia between Roman Catholics and Protestants in 1648, to the 1774 Treaty of Kuchuk Kainarji, or Napoleon's emancipation of the Jews, to the Virginia Bill of Rights of June 12, 1776, elements and statements of human rights gradually developed into a more comprehensive international law of human rights. *See* Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223, 229 (2005).

14. For an excellent reference on the concept of human dignity, see THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY, *supra* note 12; THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002).

15. In particular, the German philosopher Immanuel Kant contributed substantially to the conception and essence of rights. In 1785, he expressed the view that we, as human beings, should always treat humanity with liberty and equality, without one trying to overpower the other purely for personal gains in the most selfish manner. *See generally* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (James W. Ellington trans., 3d ed. 1993) (1785). Kant states that "[t]he imperative [is to] [a]ct in such a way that you treat humanity . . . always at the same time as an end and never simply as a means" and to him this imperative is universal. *Id.* at 36. He also adds that "[t]his principle of humanity . . . is the supreme limiting condition of every man's freedom of action." *Id.* at 37. He recognizes dignity "infinitely beyond all price, with which it cannot in the least be brought into competition or comparison without, as it were, violating its sanctity." *Id.* at 41. He finds autonomy as "the ground of the dignity of human nature and of every rational nature" because "the will of every rational being is a will that legislates universal law." *Id.* at 38, 41.

16. An interesting discussion on this issue occurs in Erik Wolf's analysis of Gustav Radbruch's philosophy of law. *See* Erik Wolf, *Revolution or Evolution in Gustav Radbruch's Legal Philosophy*, NAT. L.F. 2–3 (1958).

aspirations have not changed, though they still have to be fulfilled. In 1980, Yale professors McDougal, Lasswell, and Chen, who developed the New Haven School of Jurisprudence, wrote:

> [T]he peoples of the world, whatever their differences in cultural traditions and styles of justification, are today increasingly demanding the enhanced protection of all those basic rights, commonly characterized in empirical reference as those of human dignity, by the processes of law in all the different communities of which they are members, including especially the international or world community.[17]

Their assessment still rings true today. The demands have not changed, but the processes of law have not been able to fully realize the promise of 1948. We are still far away from the ideal of human dignity. The laws in action at all levels of government lag behind the laws on the books when it comes to human rights, particularly in the areas of slavery and forced labor.[18] The duty of nation states to respect the right of persons to be free from slavery has been overwhelmingly achieved by legal prohibitions and the subsequent conduct of states.[19]

It suffices to note in this regard that the prohibition of slavery has reached the rare and exceptional status of a *jus cogens* norm.[20] Beyond that, it was considered a crime against humanity in the Nuremberg Charter,[21] the Tokyo Charter,[22] and the Statutes of the International Criminal Tribunal for the former Yugoslavia[23] and International

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17. MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 6 (1980). For a discussion of values that animate various claimants in the context of human trafficking, see Roza Pati, *Trading in Humans: A New Haven Perspective*, 20 ASIA PAC. L. REV. 135, 145–47 (2012).

18. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 4 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 8, Dec. 19, 1966, 999 U.N.T.S. 171, 175.

19. According to the International Labour Organization (ILO), there are still an estimated 4.1 million people in state-imposed forced labor, mainly in agriculture, construction for the purpose of economic development, and military conscripts forced to perform work of non-military nature. *See* INT'L LABOUR ORG. & WALK FREE FOUND., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 11 (2017) [hereinafter GLOBAL ESTIMATES OF MODERN SLAVERY], https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575540.pdf.

20. *Cf.* Vienna Convention on the Law of Treaties arts. 53, 60, May 23, 1969, 1155 U.N.T.S. 331.

21. Charter of the International Military Tribunal of 1945 art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279.

22. Charter of the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, T.I.A.S. 1589, 4 Bevans 20.

23. S.C. Res. 827, art. 5(c), U.N. Doc. S/RES/827 (May 25, 1993).

Criminal Tribunal for Rwanda,[24] though there is no definition of the term per se in any of these documents. Human rights conventions have also prohibited "slavery" on a universal and regional level, though they also fail to include any express definition.[25] Various cases in the context of World War II could be read as including forced or compulsory labor under enslavement as a crime against humanity,[26] and, moreover, as holding accountable corporations and industrialists that used slave labor.[27] In the context of human trafficking and on the basis of more recent developments in the field, one can legally argue that certain forms and situations of human trafficking are akin to the old phenomenon of enslavement and thus warrant the same treatment in the word and practice of the law.[28]

However, the missing piece today is the reluctance on the part of nation states to comply with their duty to protect the individual from abuse by third parties, those non-state actors that Professor Eckart Klein refers to,[29] including corporations and their respective chains of supply. The magnitude and scope of the problem are still open questions, as the next section will illustrate.

B. Facts and Figures: A Dim Picture

The most recent UN Global Compact Progress Report 2018 enumerates a number of achievements of the alliance of companies committed to respecting human rights. This includes labor rights—in

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24. S.C. Res. 49/955, art. 3(c), U.N. Doc. S/Res/955/Annex (Nov. 8, 1994).

25. *See, e.g.*, Council of Europe, Convention on Action against Trafficking in Human Beings art. 4, May 16, 2005, C.E.T.S. No. 197; Organisation of African Unity, African Charter on Human and Peoples' Rights art. 5, June 27, 1981.

26. Proceedings of the International Military Tribunal, *reprinted in* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 563–66 (1947) (regarding Baldur von Schirach); "The Milch Case," Opinion and Judgment of the U.S. Military Trib. II, *reprinted in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 773, 789 (1997); "The Pohl Case," Opinion and Judgment of the U.S. Military Trib. II, *reprinted in* 5 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 958, 969–70 (1997).

27. *See* Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 321–24 (2008). For a good historical analysis on the use of slave labor by corporations, see Ciara Torres-Spelliscy, *Slaves to the Bottom Line: The Corporate Role in Slavery from Nuremburg to Now*, 46 STETSON L. REV. 167–68 (2016).

28. For an analysis on these developments, see Roza Pati, *States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in* Rantsev v. Cyprus and Russia, 29 BOSTON U. INT'L L.J. 79, 126–30 (2011).

29. KLEIN, *supra* note 1, at 19–20.

line with Sustainable Goal 8, Decent Work and Economic Growth—as well as fundamental universal principles by "leveraging their supply chains and taking collective action to address decent work deficits."[30] It also spotlights the facts that approximately a third of companies partaking in the UN Global Compact ("UNGC")[31] consider human rights in their supply chain and their subcontracting operations. Over 450 million people work in supply chain-related jobs.[32] Forty-two percent of companies report conducting due diligence processes on potential suppliers, which seems to be good progress.[33]

However, the UNGC report is unable to confirm many of these statistics because they are based only on surveys and voluntary corporate reporting.[34] We have to take their credibility at face value. Even exulting these numbers, they still leave much to be desired, particularly in light of the fact that the above statistics include reporting for only forty-five corporations of North America, a minuscule number of companies compared to the 608 companies that represent Europe.[35] Add the fact that corporations surveyed reported that their top challenge was extending strategy for implementation of principles throughout the supply chain,[36] and you would understand the cautionary note.

Reality speaks a different language when it comes to the impact of global trade and economy in the life of those millions counted above. The estimates testify to a massive concentration of wealth in the hands of mega-corporations covering the planet substantially.[37] Their conduct

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30. U.N. GLOBAL COMPACT, UNITED NATIONS GLOBAL COMPACT PROGRESS REPORT 2018 9 (2018) [hereinafter UNGC PROGRESS REPORT 2018], https://www.unglobalcompact.org/docs/publications/UN-Global-Compact-Progress-Report–2018.pdf.

31. For more information on the U.N. Global Compact, its mission, and its principles, see *Who We Are*, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc (last visited June 1, 2019).

32. UNGC PROGRESS REPORT 2018, *supra* note 30, at 9.

33. *Id.*

34. *Id.* at 10 (explaining its methodology, including key data from the *2018 UN Global Compact Annual Survey*—an extensive survey of 1130 corporate participants hailing from 100 countries "that asks business[es] to report on their sustainability commitments" and any actions they have taken to comply with their commitments).

35. *Id.* at 11.

36. Forty percent of corporations listed extending strategy throughout the supply chain as a top challenge in advancing to the next level of implementation, the most difficult area. *Id.* at 21.

37. In 2011, it was estimated that 737 corporations controlled over eighty percent of all the wealth in the world. *See* Stefania Vitali et al., *The Network of Global Corporate Control*, 6 PLOS ONE 1 (Oct. 2011), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0025995&type=printable. Note further that in 2017, according

based on the present corporate structure, which focuses on the best interest of shareholders, can at best be considered to be morally conscious, if they so choose, while they continue to operate in an environment that has created fertile ground for exploitation with impunity. The expansive urbanization in each and every country of the world, the galloping speed of development in technology and communications, the increased mobility and the uncontrolled and mismanaged migration[38] have augmented the consequent ills that characterize global life today: exploitation, inequality, disparities in wealth distribution, and deeper polarization amongst countries of the North and South and the West and East, as well as within the borders of each and every country.[39] Because of economic inequality, in 2017 alone, 258 million people left their home countries to migrate to other nations.[40] When we add the phenomenon of the unregulated world

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to Global Justice Now, sixty-nine of the top 100 entities by revenue are corporations. Global Justice Now further asserts that, when examining the top 200 entities, the gap deepens: 157 of them are corporations. *See* Jake Johnson, *157 of World's 200 Richest Entities Are Corporations, Not Governments*, INEQUALITY.ORG (Oct. 19, 2018), https://inequality.org/research/richest-entities-corporations-governments. The revenue of the top ten corporations combined surpasses the revenue of more than 196 governments combined. *See Global 500*, FORTUNE, http://fortune.com/global500/list (last visited June 1, 2019); *The World Factbook*, CIA, https://www.cia.gov/library/publications/the-world-factbook (last visited June 1, 2019). Leading the top ten mega-corporations is Walmart, whose total revenue in 2017 reached $485.9 billion, making it the richest corporation in the world by revenue. Wal-Mart operates in 28 nations. *Top 10 Richest Companies in the World in 2018 by Revenue*, FIN. ONLINE (2018), https://financesonline.com/top-10-richest-companies-in-the-world-in-2018-by-revenue. It has 11,000 stores worldwide, out of which 6,328 operate beyond U.S. territory. *Walmart's Net Sales Worldwide from 2006 to 2018 (in billion U.S. dollars)*, STATISTA (2019), https://www.statista.com/statistics/183399/walmarts-net-sales-worldwide-since-2006.

38. There is an intrinsic link between labor migration and exploitation in human trafficking, succinctly connected by Professor Chuang as the "exploitation of the world's poor by the world's wealthy." Janie A. Chuang, *Using Global Migration Law to Prevent Human Trafficking*, 111 AM. J. INT'L. L. UNBOUND 147, 147 (2017). Professor Chuang further articulates that a regime that she calls global migration law would indeed pull the focus away from the voluntary "ethical codes of conduct," and concentrate on forging an international consensus on legal liability. *Id.* at 150.

39. The richest one percent possess more than half of the total global wealth. UNGC PROGRESS REPORT 2018, *supra* note 30, at 32 (quoting Rupert Neate, *Richest 1% Own Half the World's Wealth, Study Finds*, GUARDIAN (Nov. 17, 2017), https://www.theguardian.com/inequality/2017/nov/14/worlds-richest-wealth-credit-suisse).

40. *Id.*

market for human labor[41] we encounter a vulnerable human resource readily available to be used and abused as modern slaves.

With all due respect to skeptics and to politically correct fanatics, the fact of the matter is that slavery has never left us. Except for the fact that slavery is no longer institutionalized in any political and legal system, and that modern slaves are no longer a legally registered *investment*,[42] the types of exploitation, degradation, and mistreatment encompassing any or all features attached to the right of ownership in situations of absolute control of one person over another, induced through force, fear, fraud, and coercion are starkly similar to the old phenomenon of chattel slavery. Facts and figures indicate that there is no such a thing as a world free from modern slavery.[43] Indeed, a permanence of abject poverty, unemployment, inadequate housing, lack of medical care, and education has created a sub-stratum of an unexhausted pool of vulnerable people who, aspiring for a better life, have become easy prey for human traffickers.[44] These social conditions constitute the root causes—the push factors—for the readily available expendable and renewable supply.

Despite recent progress, two reports on human trafficking from the International Labour Organization (ILO) and the U.S. Department of State show that there is still much to do to eradicate modern-day slavery. These studies shed some light on the people who have fallen

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41. A very interesting analysis of the human supply chain as a key structure of the global economy and as a close analogue of the product supply chain comes from Jennifer Gordon, who notes that

> [t]he incentives that have given rise to human and product supply chains both grow from comparative advantage in the global context—the idea that each country will benefit from specializing in what it can offer most cheaply to the global economy, be that coal or workers, and that global growth will be maximized when firms are permitted to draw resources and labor from wherever they are cheapest.

Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 485 (2017).

42. Tom Obokata, TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH 18 (2006) (discussing how governments have focused on human trafficking in the criminal sphere rather than a human rights issue).

43. Indeed, an explanation is still warranted today about "what abolition means in the face of modern-day slavery," as then-Secretary of State Hillary Clinton had noted back in 2012. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2012 2 (2012) [hereinafter TIP REPORT 2012], https://2009-2017.state.gov/r/pa/ei/pix/2012/06/193371.htm.

44. *See generally Human Trafficking 101: Who Are the Victims?*, ALL. FOR FREEDOM, RESTORATION, & JUSTICE, https://engagetogether.com/2018/02/22/human-traffickin g-101-victims (last visited June 1, 2019).

prey to human trafficking. The first study done by the ILO offers a global estimate of forty million people falling prey to modern slave-trader and human traffickers in 2016 alone, of which twenty-five million people are considered to be victims of forced labor.[45] All of them were coerced or deceived into doing jobs they are not free to leave.[46] Considered to be a conservative estimate, this encompasses sixteen million forced laborers in the private economy and almost five million in forced sexual exploitation.[47] Among private industries that exploit forced labor, construction, agriculture, manufacturing, and fishing ranked high.[48] Twenty-three percent of forced labor trafficking victims are migrants, internally or internationally moved across state borders and administrative lines.[49] In a separate report, the ILO estimates that 152 million children are victims of child labor and almost half of them are aged five to eleven years.[50] The cost of coercion amounts to $150.2 billion in illegal profits,[51] all of this generated in the private economy.[52] It is not a coincidence that the highest profits come from Asia, estimated at $51.8 billion, and from developed economies,

45. In addition to the victims of forced labor, an additional fifteen million victims were compelled into forced marriages world-wide. *See* GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 19, at 5.

46. *Id.* at 9.

47. *Id.* at 9–10. To put that into percentages: sixty-four percent of the victims are used and abused in the private economy, by individuals and enterprises, whereas nineteen percent of this group are forced into commercial sexual exploitation. *Id.* at 29.

48. *Id.* at 9–10.

49. *Id.* at 30.

50. *See* INT'L LABOUR ORG., GLOBAL ESTIMATES OF CHILD LABOR: RESULTS AND TRENDS 2012–2016 5 (2017), https://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/documents/publication/wcms_575499.pdf. Of these children, 70.9 percent are in agriculture, 11.9 percent in industry and 17.2 percent in services. *Id.*

51. *See* INT'L LABOUR ORG., PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 13 (2014) [hereinafter THE ECONOMICS OF FORCED LABOUR]. The report further noted that about two thirds of the estimated total of $150 billion, or $99 billion, came from forced sexual exploitation, while $51 billion resulted from forced economic exploitation, including domestic work, agriculture and other economic activities. *Id.* In 2012, the Trafficking in Persons Report estimated that human trafficking generated an annual profit of $20 billion. *See* TIP REPORT 2012, *supra* note 43, at 11. At that time, the report had evidenced progress, but had also pointed out cases of "standing still or even sliding backwards," to quote then Secretary of State Hillary Clinton. *Release of the 2012 Trafficking in Persons Report*, U.S. DEP'T OF STATE, (June 19, 2012), https://2009-2017.state.gov/secretary/20092013clinton/rm/2012/06/193368.htm. Recent figures, as indicated above, show more of a backwards slide.

52. THE ECONOMICS OF FORCED LABOUR, *supra* note 51, at 13.

estimated at $46.9 billion.[53] The highest profits come about because of the large number of victims in Asia and the high profit per victim extracted in developed economies.[54]

It is no surprise that corporate outsourcing and the supply chain availability is highly concentrated in Asia. The manufacturing industry of United States alone outsourced fifty-three percent of its operations abroad, and about forty-four percent of outsourcing industries list profit, by reducing operating costs, as their top reason for outsourcing.[55] Among the top outsourced countries in terms of workforce are India, Indonesia, China, the Philippines, and Thailand.[56]

The second report comes from the U.S. Department of State. The Trafficking in Persons Report ("TIP Report") of 2018 identified 10,011 victims of human trafficking (commercial sexual exploitation and forced labor) in the Americas alone.[57] Of these identified human trafficking victims, only 2139 were survivors of forced labor.[58] There is a stark contrast between this data and the ILO figures, which estimate that there are over one million victims of forced labor in the Americas.[59] The TIP Report data indicates that a meager 100,409

53. *Id.*

54. *Id.*

55. *See* Brandon Gaille, *27 US Outsourcing Statistics and Trends*, BRANDON GAILLE SMALL BUS. & MARKETING ADVICE (May 27, 2017), https://brandongaille.com/26-us-outsourcing-statistics-and-trends. Mr. Gaille is a well-known blogger featured, inter alia, in Entrepreneur Magazine, Forbes, CNN and The New York Times. *See* BRANDON GAILLE SMALL BUSINESS & MARKETING ADVICE, https://brandongaille.com (last visited June 1, 2019).

56. Gaille, *supra* note 55.

57. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2018 60 (2018), https://www.state.gov/trafficking-in-persons-report-2018 [hereinafter TIP REPORT 2018].

58. *Id.*

59. GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 19, at 19. The report includes a cautionary note that in the Americas there is a lack of data collection. *Id.* at 10. In order to be fully accurate, it is worth noting that the definition of what is included as *forced labor* in the ILO report and what the TIP Report encompasses within human trafficking differ to some extent. The ILO bases its estimate of forced labor to comprise "forced labor in the private economy (forms of forced labor imposed by private individuals, groups, or companies in all sectors except the commercial sex industry), forced sexual exploitation of adults and commercial sexual exploitation of children, and state-imposed forced labor." *Id.* at 9. Whereas the TIP Report of 2018 notes that

> forced labor, sometimes also referred to as labor trafficking, encompasses the range of activities—recruiting, harboring, transporting, providing, or obtaining—involved when a person uses force or physical threats, psychological coercion, abuse of the legal process, deception, or other coercive means to compel someone to work. Once a person's labor is obtained

victims were identified globally in 2017, out of which 23,906 were survivors of labor trafficking[60]—compare the latter number to the twenty-five million people in forced labor as estimated by the ILO report above.[61] Despite efforts by individual governments to control trafficking within their own borders, the available data suggests that current legal frameworks are insufficient to end modern slavery.

The situation is far worse regarding violations of human rights, including the right to be free from slavery and forced labor, when committed by corporations abroad.[62] Governments have been reluctant to enact legally binding norms that would establish true accountability for corporate conduct detrimental to human rights.

II. PAST TRENDS IN DOMESTIC LAW

Sporadic as they are, some nations have already concerned themselves with making legal decisions that are intended to confront human trafficking in the supply chain. Countries that are home to many multinational corporations like the United States, the United Kingdom, France, and Australia have been at the forefront of such regulation. There is ample literature that describes, analyzes, and assesses these laws, so this Article will not focus at length on all of them. It suffices to note that such regulation could be mapped into three categories: mandatory transparency, mandatory due diligence, and public procurement laws.

> by such means, the person's prior consent to work for an employer is legally irrelevant: the employer is a trafficker and the employee a trafficking victim.

TIP REPORT 2018, *supra* note 57, at 32.

60. TIP REPORT 2018, *supra* note 57, at 43.

61. GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 19, at 5.

62. Though the Trafficking Victims Protection Reauthorization Act (TVPRA) grants U.S. courts jurisdiction over any offenses allegedly committed by a U.S. national, the provision has yet to be entertained in any U.S. court. *See* 18 U.S.C. § 1596(a) (2012). There is additional research on this matter and on "the financial benefit" provision of the TVPRA. *See, e.g.*, Laura Ezell, Note, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 501–02 (2016) (stating that prior to 2000, there were no U.S. laws suitable to hold multinational corporations liable if they benefited from human rights violations); Robert C. Thompson et al., *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 841–42 (2009) (pointing out that host countries frequently do not have forums to account for the actions of violators of human rights).

A. Regulating Corporate Conduct: Law in Books

Mandatory transparency laws, aimed as consumer empowerment laws, require companies to disclose and report on actions they are taking to address modern slavery in their business operations offshores.[63] Thus, such regulation expands disclosure trends to include social policy issues. The two main mandatory transparency legislations are the California Transparency in Supply Chains Act of 2010 (CTSCA)[64] and the UK Modern Slavery Act of 2015.[65] They are established on the premise that, upon corporate disclosure,[66] the

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63. *See, e.g.*, California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (a)(1) (West 2012); Modern Slavery Act 2015, c. 30 (U.K.).

64. CAL. CIV. CODE § 1714.43 (West 2012). The California Transparency in Supply Chains Act requires "retail seller[s] and manufacturer[s] doing business in [California]" and generating over $100 million in annual revenue to disclose their "*efforts* to eradicate slavery and human trafficking from [their] direct supply chain[s]." § 1714.43 (a)(1) (emphasis added). For a summary of the CTSCA, see Kamala D. Harris, *The California Transparency in Supply Chains Act: A Resource Guide*, CAL. DEP'T OF JUSTICE (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

65. Modern Slavery Act 2015, c. 30 (U.K.). The Act covers commercial organizations that do business in the United Kingdom and earn more than £36 million globally per year and requires businesses to disclose steps they have taken to ensure that there is no slavery and human trafficking in any of its supply chains. For a comparative review of the CTSCA and the U.K. Modern Slavery Act of 2015, see Andrew G. Barna, Note, *The Early Eight and the Future of Consumer Legal Activism to Fight Modern-Day Slavery in Corporate Supply Chains*, 59 WM. & MARY. L. REV. 1449, 1460–66 (2018).

66. The detail and substance of CTSCA disclosures available on company websites vary greatly. Some companies make very sparse statements. For example, Mitsubishi Electric Automotive America plainly asserts that its goods are not manufactured with forced labor or child labor and makes no references to efforts being made to ensure that that is the case. *See California Transparency in Supply Chains Act Disclosure Statement*, MITSUBISHI ELECTRIC AUTO. AM., http://www.meaa-mea.com/ca-supply-chains-act (last visited June 1, 2019). Other companies make broader statements referencing each of the CTSCA's five disclosure areas: (1) third party verification of the supply chain, (2) auditing practices, (3) supplier certifications, (4) accountability, and (5) training for employees. *See, e.g.*, *Other Disclosures*, ABBOTT, https://www.abbott.com/policies/other-disclosures.html (last visited June 1, 2019); *California Transparency in Supply Chains Act Disclosure*, NATHAN'S FAMOUS, https://nathansfamous.com/california-transparency-in-supply-chains-act-disclosure (last visited June 1, 2019). Finally, some companies take their disclosures a step further than the CTSCA requires by not only publishing their compliance information on their websites but also promulgating annual reports that go into much greater detail about exactly what steps the company is taking, which third party verification systems and auditing companies they are using, the nature of the training employees receive and of the accountability to which they are held, and what actions the company has taken to remedy identified instances of forced labor in their supply chains. *See, e.g.*, *Supplier Responsibility*, APPLE, https://www. apple.com/supplier-responsibility (last visited June 1, 2019); APPLE, SUPPLIER RESPONSIBILITY: 2018 PROGRESS REPORT (2018),

consumers would be able to "distinguish companies on the merits of their efforts to supply products free from the taint of slavery,"[67] consequently contributing to the eradication of slavery through the power of their purchasing decisions. The consumer pressure would thus come to bear fruit in forcing companies to clean up their direct supply chain.[68] Evaluation of such efforts has shown that only limited change in corporate conduct did result from such regulation.[69]

Additionally, the only enforcement mechanism in the CTSCA, listed under § 1714.43(d), is "an action brought by the Attorney General for injunctive relief."[70] To date, the Attorney General of California has not pursued any such injunctions.[71] In addition, the CTSCA does not confer standing upon victims of forced labor, or upon the consumers of products made by companies whose supply chains are not free of trafficking.[72] Plaintiffs have tried to indirectly utilize the CTSCA by filing consumer complaints arguing that some disclosure statements made pursuant to the act amounted to false advertising, but their efforts have

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https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2018_Progress_Report.pdf; *California Transparency in Supply Chains Act Disclosure Statement*, VF CORP., https://www.vfc.com/california-transparency-in-supply-chains-act (last visited June 1, 2019); VF CORP., VF CORPORATION 2015 ANNUAL REPORT (2015), https://d1io3yog0oux5.cloudfront.net/_445ee8b2d255f8b98d3994ebad86a8f9/vfc/db/74/17020/annual_report/VF_Annual_Report_2015-Digital.pdf.

67. California Transparency in Supply Chains Act of 2010, S.B. 657, § 2(i) (Cal. 2010).

68. CAL. CIV. CODE § 1714.43(a)(1) (West 2012).

69. Some opine that such disclosure trends may be utilized by corporates to gain a good reputation without making any real progress. *See generally* Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT'L L. 530, 549–55 (2018). Companies are in compliance with the act just by stating that they have not taken any steps to address modern slavery. For an analysis of the effectiveness of mandatory disclosure and due diligence requirements, see BUS. & HUMAN RIGHTS RES. CTR., MODERN SLAVERY IN COMPANY OPERATIONS AND SUPPLY CHAINS: MANDATORY TRANSPARENCY, MANDATORY DUE DILIGENCE AND PUBLIC PROCUREMENT DUE DILIGENCE 8–13 (2017) [hereinafter MODERN SLAVERY IN COMPANY OPERATIONS]. ITT, Inc., an automotive technology manufacturer, makes its disclosure in the five-pronged format but explicitly states that it generally does not conduct third party verification of its supply chains, nor audit suppliers regarding human trafficking. *See California Transparency in Supply Chains Act Disclosure Statement*, ITT, http://www.itt.com/california-transparency-in-supply-chains-act-disclosure-statement (last visited June 1, 2019).

70. CAL. CIV. CODE § 1714.43(d).

71. Julie A. Gutierrez, *Less than Transparent: How California's Effort to Shine Light on Modern Slavery May Ultimately Keep Consumers in the Dark*, 19 LOY. J. PUB. INT. L. 57, 71 (2017).

72. Emma Cusumano & Charity Ryerson, *Is the California Transparency in Supply Chains Act Doing More Harm than Good?*, CORP. ACCOUNTABILITY LAB (July 25, 2017), https://legaldesign.org/calblog/2017/7/25/is-the-california-transparency-in-supply-chains-act-doing-more-harm-than-good.

been unsuccessful thus far.[73] Specifically, the California courts and the U.S. Court of Appeals for the Ninth Circuit have interpreted the disclosure statements as aspirational and not necessarily statements of the actual success of companies' actions to combat trafficking in their supply chains.[74] As a result of the lack of a full-bodied enforcement structure in the CTSCA, companies subject to the act are not monitored as to whether or not actions match their disclosure statements, nor are they the subject to direct financial penalties.[75] Hence, the regulation has not succeeded in curbing the abuse.[76]

The other set of regulations features a mandatory due diligence requirement, which mandates businesses to have in place a human rights due diligence process to identify, prevent, mitigate, and account for how a company addresses any negative impacts of their business activities on human rights.[77] The French law,[78] for example, demands corporations to create and implement a vigilance plan. The law requires large French companies[79] to assess and address the adverse impacts of their business activities on human rights and the environment. It mandates publication of annual public vigilance plans

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73. Gutierrez, *supra* note 71, at 73–75.

74. *Id.*; *see also* Wirth v. Mars, Inc., 730 F. App'x 468, 469 (9th Cir. 2018) (mem.); Hughes v. Big Heart Pet Brands, 740 F. App'x 876, 877–78 (9th Cir. 2018); De Rosa v. Tri-Union Seafoods, LLC, 730 F. App'x 466, 467 (9th Cir. 2018) (mem.); Barber v. Nestle USA, Inc., 730 F. Appx 464, 465 (9th Cir. 2018) (mem.).

75. Alexandra Prokopets, Note, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37 HASTINGS INT'L & COMP. L. REV. 351, 364–65 (2014).

76. For a discussion on the flaws of CTSCA and "polic[ies] that encourages hiding, blurring, or outright lying" on the part of companies, see Gutierrez, *supra* note 71, at 81–82. For recommendations related to transparency, see Maria Grazia Giammarinaro, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children on Her Mission to the United States of America*, U.N. Docs. A/HRC/35/37/ Add.2 at 9, 22 (July 21, 2017), https://undocs.org/A/HRC/35/37/Add.2.

77. *See* MODERN SLAVERY IN COMPANY OPERATIONS, *supra* note 69, at 16–17.

78. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 relating to the duty of vigilance of the parent companies and the companies giving orders] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazzete of France] Mar. 28, 2017 (Fr.); *see also France Adopts Corporate Duty of Vigilance Law: A First Historic Step Towards Better Human Rights and Environmental Protection*, CIDSE (Feb. 23, 2017), https://www.cidse.org/newsroom/france-adopts-corporate-duty-of-vigilance-law. html.

79. MODERN SLAVERY IN COMPANY OPERATIONS, *supra* note 69, at 17 ("The law requires the largest French companies that have more than 5000 employees in France, or more than 10,000 employees globally, to have a due diligence plan . . . ."). About 150 companies will be covered by this law. For similar laws in Europe, see *id.* at 17–18.

linked to the company's own activities, as well as the activities of companies under their control with whom they have established a commercial relationship, such as suppliers and subcontractors.[80] On a smaller scale, the U.S. Trade Facilitation and Trade Enforcement Act of 2015[81] removed the "consumptive demand" clause of the Tariff Act of 1930, which allowed the importation of goods produced by forced labor in cases where domestic product could not meet the demand.[82] The law now prohibits the importation of all products made by forced labor.[83] The burden lies with the importing company to conduct supply chain due diligence to prove that products are not made with forced labor down to the bottom of the global supply chain.[84] Otherwise, the company's imported merchandise could be denied entry into the United States or seized by U.S. Customs and Border Protection and the company could be prosecuted.[85]

Countries like the United States have also integrated regulation to prevent modern slavery into public procurement practices. The U.S. Federal Acquisition Regulation (FAR)[86] prohibits the government from accepting a federal contract sourced abroad unless a company certifies that they will not sell a product suspected of being produced with forced labor and child labor or of relying on human trafficking.[87] FAR expects the corporation to make a good faith effort to ensure that forced labor or child labor was not used to make their products; the contractors need to certify that they and their subcontractors are not engaged in human trafficking.[88] Contractors must prepare certification and compliance plans for contracts that are sourced abroad and exceed $500,000 in value.[89]

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80. *Id.* at 17.

81. Pub. L. No. 114-125, 130 Stat. 122 (codified at 19 U.S.C. §§ 4301–4454 (Supp. IV 2016)).

82. § 910, 130 Stat. at 239.

83. 19 U.S.C. § 1307 (2012).

84. 19 C.F.R. § 12.43 (2018).

85. §§ 12.42(a), (d), (e).

86. FAR 22.17 (2015).

87. FAR 22.1703.

88. FAR 22.1502, 22.1703; *see also* MODERN SLAVERY IN COMPANY OPERATIONS, *supra* note 69, at 22. For an alternative take on the influence of international institutions on a country's government procurement, see Nicole Giles, Note, *The World Trade Organization's Missed Opportunity: How the Agreement on Government Procurement Can Be Transformed from a Vehicle of Trade to One of Human Rights*, 47 PUB. CONT. L.J. 399, 408 (2018).

89. MODERN SLAVERY IN COMPANY OPERATIONS, *supra* note 69, at 22. Furthermore, on the federal level, there have been efforts to enact a new law called the U.S. Business Supply Chain Transparency on Trafficking and Slavery Act. *See* H.R. 3226, 114th Cong. (2015); H.R. 4842, 113th Cong. (2014); H.R. 2759, 112th Cong. (2011). However, the

One can see that although there are some tools available to address human trafficking in the supply chain, they either have not been utilized to their full potential or they are addressing the problem very tangentially. Additionally, the lack of extraterritorial application of most of these laws has created a gap in their enforcement.[90] This enforcement gap was addressed and upheld by the U.S. Supreme Court in its *Kiobel* decision.[91]

B. *The Supreme Court's* Kiobel *Decision: A Model of Law in Action*

In *Kiobel v. Royal Dutch Petroleum, Co.,*[92] the Supreme Court discusses the longstanding presumption of statutory interpretation that without explicit indications to the contrary in their statutory text, laws are presumed not to apply extraterritorially.[93] In this case, the presumption was specifically being applied to the Alien Tort Statute (ATS),[94] which enables non-U.S. citizens to raise claims for torts violating the law of foreign nations in U.S. federal courts.[95] Citizens of Nigeria, who had received asylum in the United States, brought a claim against two multinational oil corporations from the Netherlands and the United Kingdom, as well as their subsidiary in Nigeria.[96] The torts alleged were aiding and abetting the Nigerian government in perpetrating "(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[97] These acts were allegedly undertaken to stifle

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conditioning factors so far do not indicate that it will pass anytime soon. *See* Barna, *supra* note 65, at 1466, 1469.

90. *See Corporate Crime: New Principles Will Help Governments and Law Enforcement Tackle Corporate Abuse*, AMNESTY INT'L (Oct. 6, 2016) [hereinafter *Corporate Crime*], https://www.amnesty.org/en/latest/news/2016/10/corporate-crime-new-principles-will-help-governments-and-law-enforcement-tackle-corporate-abuse ("Some national justice systems do not have jurisdiction over crimes committed by their companies in other countries. And even where those laws do exist, the power and financial clout of corporations makes authorities reluctant to act. This often means that there is total impunity for companies when they are involved in criminal activity overseas.").

91. *See infra* Section II.B.

92. 569 U.S. 108 (2013).

93. *Id.* at 115–17.

94. 28 U.S.C. § 1350 (2012).

95. *See Kiobel*, 569 U.S. at 113–14 ("[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." (quoting 28 U.S.C. § 1350)).

96. *Id.* at 111–12.

97. *Id.* at 114.

local opposition to oil exploration arising out of concerns about a potentially harmful environmental impact.[98] In *Kiobel*, the Court ultimately held that claims under the ATS are not exempted from the presumption against extraterritorial application unless the claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption."[99]

The presumption against extraterritoriality as applied in *Kiobel* has prompted myriad critiques of the case's implications for victims of international human rights violations seeking restitution.[100] Some argue that *Kiobel* virtually eliminated all hope of succeeding in tort claims against U.S. and foreign corporate entities.[101] Others contend that *Kiobel* specifically precludes the liability of foreign businesses, but U.S. companies could still be liable, as cases concerning these companies are much more likely to pass the "touch and concern" test of *Kiobel*.[102] Either case exemplifies the need for a legal framework to hold corporations accountable for human rights abuses, according to other critics of *Kiobel*: "[T]he perceived threat of U.S. litigators and judges to bypass the legal systems of other sovereigns . . . seems to be dated, in light of the realities of modern globalization and transnational character of corporate activity today."[103]

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98. *Id.* at 113.

99. *Id.* at 124–25.

100. *See, e.g.*, Matthew J. Carey, Note, *How Concerned Should We Be? The Conundrum of* Kiobel*'s Touch and Concern Test and Corporate Liability Under the Alien Tort Statute*, 49 SUFFOLK U. L. REV. 451, 463–64 (2016) (drawing attention to confusion in the federal judiciary and noting the difficult plaintiffs face in properly securing jurisdiction over multinational corporations); Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation after* Kiobel, 107 AM. J. INT'L L. 858, 858 (2013) (arguing that *Kiobel* ostensibly "sound[ed] the death knell" for actions brought by former plaintiffs against foreign defendants for human rights abuses committed in foreign countries); Caroline Kaeb & David Scheffer, *The Paradox of* Kiobel *in Europe*, 107 AM. J. INT'L L. 852, 857 (2013) (noting that the *Kiobel* decision pushed American jurisprudence away from a global regulatory trend recognizing expanded liability for corporations involved in international criminal activity); Beth Stephens, *Extraterritoriality and Human Rights After* Kiobel, 28 MD. J. INT'L L. 256, 274 (2013) (criticizing *Kiobel* for empowering a corporate agenda that seeks to limit international exposure to human rights abuse claims).

101. Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After* Kiobel, 92 MICH. B.J. 44, 47 (2013) ("Even though *Kiobel* left many questions unresolved, it clearly ended the period when foreign human rights plaintiffs could look to the federal courts as a friendly forum as long as personal jurisdiction over their abusers was established.").

102. Anupam Chander, *Unshackling Foreign Corporations:* Kiobel*'s Unexpected Legacy*, 107 AM. J. INT'L L. 829, 829–30 (2013).

103. Kaeb & Scheffer, *supra* note 100, at 853 (internal quotations omitted).

It has also been asserted that the presumption of European support for the holding in *Kiobel* is misplaced.[104] While the governments of the Netherlands and the United Kingdom filed amicus briefs in support of the respondents in *Kiobel*, it should be noted that it was corporations from these very nation states who were being brought before the U.S. courts.[105] However, the European Commission also filed an amicus brief for the European Union in *Kiobel*, arguing that "the United States' exercise of universal [civil] jurisdiction [with no U.S. nexus of the parties or conduct] under the ATS is consistent with international law."[106] This stance by the European Union in *Kiobel* is further borne out by the application of the Brussels I Regulation,[107] commonly thought of as the "Alien Tort Statute of the European Union."[108] This regulation not only holds European corporations responsible for their torts overseas, but also extends to non-European corporations that are subsidiaries of European companies.[109] The Brussels I Regulation has not yet been heavily relied upon, as European legal traditions tend to lean more on criminal trials than civil proceedings for the righting of perceived wrongs, but nevertheless, the existence of this regulatory framework for tortious corporate actions in foreign jurisdictions illustrates opposition to the notion that "corporations should be free from liability for their overseas involvement in violations of international law."[110]

A final argument in opposition to the consequences of *Kiobel* is that certain human rights violations, particularly those that have risen to the level of being absolute and non-derogable, i.e., torture, genocide, and slavery, are universally proscribed. International law requires that nation states "provide victims of human rights violations with access to justice and effective remedies."[111] In light of the peremptory nature of certain human rights, nation states arguably fail to meet their obligations under international law when they fail to redress the

104. *Id.* at 852.
105. *Id.*
106. *Id.* at 852–53 (internal quotations omitted).
107. Council Regulation 44/2001 of 22 December 2000, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC).
108. Kaeb & Scheffer, *supra* note 100, at 854.
109. *Id.* at 855.
110. *Id.*
111. Stephens, *supra* note 100, at 256, 259.

violation of those rights by multinational corporations, whether those violations occur extraterritorially or not.[112]

Even if this argument is not accepted, there is no reason why goods and services that come into the United States at the tail end of a global supply chain could not be seen as "touching and concerning" the territory of the United States.[113] This fact would remove the presumption against extraterritorial application of the ATS and would allow it to be applied against acts of enslavement down the line in foreign contexts. In any event, claims against U.S. citizen corporations should still be allowed.[114]

C. Shifting Responsibilities De Jure and De Facto

Beyond the uncertain route of the ATS, today's scholarship and news place much emphasis on supply chain disclosure regimes as a way to reach consumers. The hope is that consumers will then react negatively toward companies who use slave labor.[115] While there is a dearth of empirical scrutiny of the efficacy of disclosure regimes, disclosure regimes are not designed in a way that achieves any success in stopping corporate abuses of human rights. Disclosure regimes simply help shift the burden onto the consumer, who is now tasked to be well informed and alert about what she purchases in order to make a conscious decision. While this might sound good, it is impractical. First, it is impossible to reach all consumers with awareness and knowledge about which companies are in compliance and which are not before they make the decision to purchase or to boycott. We

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112. *Id.* at 259–60. *See generally* Ryan J. Turner, *Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, 17 MELB. J. INT'L L. 188, 199–200, 209 (2016).

113. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013) (Kennedy, J., concurring) (suggesting that other cases may arise with similar allegations which are not covered by the Court's holding and will require "further elaboration and explanation").

114. Stephens, *supra* note 100, at 273 ("The corporate defendants in *Kiobel* were Dutch, British, and Nigerian citizens, with minimal ties to the United States. By contrast, a U.S. citizen corporation has a substantial presence in the United States and connections to this country that are qualitatively different from 'mere corporate presence.' Second, *Kiobel* does not preclude claims against individual defendants, who can, of course, be physically present in only one country. As a result, it seems likely that U.S. citizens, both corporate and individual, and non-citizen individuals living in the United States will have sufficient contacts with the United States to overcome the *Kiobel* presumption. Finally, the language of the concluding paragraph suggests that some claims involving conduct in the United States will 'touch and concern' the United States with sufficient force to justify judicial recognition of a cause of action." (footnotes omitted)).

115. Barna, *supra* note 65, at 1490 (lamenting the fact that the consumers have not been able to hold companies accountable for "oversell[ing] their supply-chain efforts").

cannot expect that consumers will go and read "the dirty lists" published by some governments before they go shopping.[116] This should not be the homework of consumers generally, though there is nothing wrong with more enlightened consumers making moral decisions in commercial transactions of everyday life. Indeed, the consumer should not be burdened with thinking about how decent the product or service they purchase is; rather, the companies should be expected to serve slave-free products and services. Even if we were to accept shifting the burden to consumers as a solution to the problem, the present legal regime does not "fully [commit] a company to eliminate coerced labor from supply chain or face legal liability."[117] Moreover, experimental studies have shown that supply chain disclosure regimes are unlikely to modify consumer behavior to the extent that they will reduce human rights abuses by corporations.[118]

While trust is vested in the voluntary social responsibility commitment of corporations and the attendant reporting disclosures, many have concluded that the legal regime almost accepts that "human trafficking is an ongoing issue that cannot be fully controlled by the company itself."[119] Others believe that setting higher expectations on transparency will make corporations use their control as customers to influence their global supply chains and increase accountability of suppliers for underperformance on challenging issues like human rights and human trafficking.[120] It sounds good, but are we right to trust that corporations will actually use their power and clean up their supply chain voluntarily? Does their structure position

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116. *See, e.g.*, U.S. DEP'T OF LABOR, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR REPORT https://www.dol.gov/sites/default/files/documents/ilab/ListofGoods.pdf; Annie Kelly, *Brazil's "Dirty List" Names and Shames Companies Involved in Slave Labor*, GUARDIAN (JULY 24, 2013), https://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour (describing Brazil's public list of "almost 300 companies, from major brands to small enterprises, who have been found to be profiting from slave labour").

117. *See* Hathaway & Fontana, *supra* note 6, at 19.

118. *See generally* Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1, 39 (2017).

119. Hathaway & Fontana, *supra* note 6, at 19 (quoting T. Markus Funk et al., *First Amendment Defenses Apply to Class Actions Demanding 'Confessions' About Human Trafficking Supply Chain Risks*, BLOOMBERG BNA 2 (Nov. 13, 2015)).

120. Susan McPherson, *8 Corporate Social Responsibility (CSR) Trends to Look for In 2018*, FORBES (Jan. 12, 2018), https://www.forbes.com/sites/susanmcpherson/2018/01/12/8-corporate-social-responsibility-csr-trends-to-look-for-in-2018 (quoting Suzanne Fallender, Director of Corporate Responsibility at Intel Corporation).

them properly to do the right thing? The answers to these questions depend on our view of the legal responsibility of corporations.

III. *EXCURSUS*: THE BOTTOM LINE AS THE LEGAL RESPONSIBILITY OF CORPORATIONS

Demand has been dubbed as the "pull factor" for the aggravated exploitation of labor. There is a market demand for a broad range of cheap products and services. Corporations are willing to satisfy this demand in conformity with their appetite for maximum profit.

To make it easier to quickly respond to this demand, corporations have been focused on the advantages of globalization, outsourcing, and the openness of free trade. Globalization is about promoting free trade, which improves the productivity of firms. The attenuated effect of globalization is a wider variety of goods available to the consumer at lower prices.

Companies have numerous incentives to engage in offshore activities that help them reduce the costs of production. These offshore activities can include a favorable trade agreement with a host country, reduced tariffs, or improved infrastructure in a host country. The common understanding is that "[e]veryone benefits from this gain in productivity."[121] Indeed, outsourcing and global trade have boosted the living standards of most people in the developed world, but the staple of consumerism has become tainted by use of slave labor in products and services. Some industries are making efforts to respond to the demand for transparency and combat trafficking in their supply chain,[122] but the truth is that they are still not fully equipped to effectively clean their supply chain all the way to the bottom. KnowTheChain is a resource that lists industries that have made efforts to minimize forced labor in their supply chain, noting particularly the food and beverage industry with Unilever as the

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121. *The Great Unbundling: Does Economics Need a New theory of Offshoring?*, ECONOMIST (Jan. 18, 2007), https://www.economist.com/finance-and-economics/2007/01/18/the-great-unbundling.

122. *See Company Resources*, KNOWTHECHAIN, https://knowthechain.org/resources/companies (last visited June 1, 2019). KnowTheChain is a collaborative partnership that seeks to measure industries' effectiveness in addressing forced labor in companies' supply chains. KnowTheChain publishes annual reports for each industry, benchmarking successes and setbacks in the companies' individual performances and industry averages overall. To compile these reports, KnowTheChain gathers information about each company from their websites and other public postings and sends follow up inquiries which companies may choose to respond to with further disclosures about their practices and policies. *See About Us*, KNOWTHECHAIN, https://knowthechain.org/about-us (last visited June 1, 2019).

industry leader,[123] the garment industry featuring Adidas as its anti-forced labor champion,[124] and the information technology industry with Intel Corp. leading the way in its disclosures regarding forced labor policies and prevention.[125] But, is this good enough? Can

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123. *2018 Food & Beverage Benchmark: Unilever PLC (LSE:ULVR)*, KNOWTHECHAIN, http://ktcdevlab2.wpengine.com/benchmarks/comparison_tool/5/?company=133 (last visited June 1, 2019). Unilever is the industry leader among food and beverage companies in terms of minimizing forced labor in its supply chains. Within the past year, Unilever has instituted trainings on forced labor for its suppliers and assessments of whether the trainings were effective. The company also developed grievance mechanisms for workers in its palm oil supply chain. Additionally, when the company discovered one of its Arabian suppliers was withholding worker passports, it stepped in to ensure that the supplier changed policies and provided workers with a letter in their own language indicating that their identification documents would only be held on a voluntary basis for safekeeping and would be made available upon request within 24 hours. As the industry leader, Unilever has a great deal of room for improvement, for example, in creating grievance mechanisms for its other commodities and disclosing exactly what percentage of its suppliers are audited annually. *See* KNOWTHECHAIN, 2018 FOOD & BEVERAGE BENCHMARK FINDINGS REPORT 11, 28 (2018), http://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark_reports/KTC_FB_2018.pdf.

124. *2018 Apparel & Footwear Benchmark: Adidas AG (BG:ADS)*, KNOWTHECHAIN, http://ktcdevlab2.wpengine.com/benchmarks/comparison_tool/6/?company=139 (last visited June 1, 2019). In the garment industry, Adidas is far ahead of the industry averages by every measure: commitment & governance, traceability & risk assessment, purchasing practices, recruitment practices, worker voice, monitory, and remedy for grievances. Adidas trains not only its direct suppliers but also its second-tier suppliers about forced labor if those suppliers are in high-risk countries. The company uses multiple approaches to mapping its supply of laborers, including conducting migrant worker interviews and requiring its suppliers to disclose their recruitment practices. When it discovered unlawful fees had been withheld from workers and that some laborers had been unlawfully terminated at one of its supplier factories in Malaysia, Adidas worked with that factory to reimburse the workers and to reinstate those who were fired. Moreover, Adidas has a text message-based worker hotline which has received over 23,000 grievances from workers in Cambodia, Indonesia, Vietnam, and China. The company is trying to set up similar hotlines in other regions. The company's efforts at transparency extend deep into its supply chain, beyond only direct suppliers. *See* KNOWTHECHAIN, 2018 APPAREL & FOOTWEAR BENCHMARK FINDINGS REPORT 5 (2018), http://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark_reports/KTC_AF_2018.pdf.

125. *2018 Information and Communications Technology Benchmark: Intel Corp. (NASDAQGS:INTC)*, KNOWTHECHAIN, https://knowthechain.org/benchmarks/comparison_tool/4/?company=78 (last visited June 1, 2019). In the electronics industry, Intel Corp. leads the way in its disclosures regarding forced labor policies and prevention. The company has begun publishing a supplier list, as well as conducting unannounced audits of some of its suppliers, and has worked to ensure that recruitment fees for laborers were reimbursed. However, these efforts have not necessarily extended to the company's raw material tier of suppliers, which is a

corporations within their own structure and mission genuinely satisfy the tenets of corporate social responsibility?

Economist Milton Friedman's now infamous article, *The Social Responsibility of Business is to Increase its Profits*,[126] has been the cornerstone of the argument against corporate social responsibility ("CSR") since it was first published in 1970.[127] Friedman's primary contentions are twofold: (1) that CSR is nothing but thinly veiled, pseudo-intellectual socialism aimed at destroying the free market and Western society; and (2) the only social or moral responsibility of a business is to serve the interests and objectives of its shareholders because corporate executives are the shareholders' agents.[128] By its nature, a for-profit entity exists to maximize profit.[129]

There is a longstanding and robust counterargument to this emphasis on shareholders' profit interests, in favor of CSR, based on either or both of the notions that "engaging in such behavior is appropriate because it is good for business"[130] and it is "the right thing to do."[131] It follows that CSR may in fact be beneficial to the shareholders as much as to other stakeholders affected by corporate decision making. But proponents of CSR cannot deny the fact that such action by corporate entities is, virtually always voluntary.[132] Regardless of which side of the

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problem in an industry that relies on mineral extraction for the production of its goods. The risks of forced labor and the use of conflict minerals remain high. *See* KNOWTHECHAIN, 2018 INFORMATION AND COMMUNICATIONS TECHNOLOGY BENCHMARK FINDINGS REPORT 5 (2018), https://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark_reports/KTC-ICT-May2018-Final.pdf.

126. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf.

127. *See generally* Tibor R. Machan, *Stakeholder vs. Shareholder Debate: Some Skeptical Reflections*, 9 CONTEMP. READINGS L. & SOC. JUST. 7, 11–12 (2017).

128. *See* Friedman, *supra* note 126, at 1.

129. *See* Arthur Acevedo, *Responsible Profitability? Not on My Balance Sheet!*, 61 CATH. U. L. REV. 651, 658–59 (2012) (explaining that the corporations began justifying their actions with the concept of shareholder value maximization at the start of the twentieth century); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 18 (2012) (noting that corporations' business decisions are driven based on profit).

130. Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 353 (2017).

131. *Id.*

132. *See* Andreas Thrasyvoulou, *Corporate Social Responsibility: Here to Stay*, 4 LEGAL ISSUES J. 69, 73 (2016) ("CSR was defined as . . . 'a concept whereby companies integrate social and environmental concerns in their business operations . . . on a voluntary basis . . . .'" (quoting *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, at 6, COM (2001) 366 final (July 18, 2001)));

debate is correct about the ethical obligations of corporate executives regarding social responsibility,[133] perhaps a more pressing question remains as to whether corporations are capable of consistently implementing socially responsible policies if, at their foundation, profits are the absolute measure of whether corporate officers are upholding their fiduciary duty as a matter of legal obligation. As famously established in *Dodge v. Ford Motor Co.*,[134] corporations must be run to produce a profit.[135]

Theoretically, socially responsible corporate practices are permissible to the extent that they do not diminish profits. But, if a socially responsible choice, such as absolutely eliminating forced labor from a corporation's supply chain, is an action that would reduce the profitability of the business, it is arguable that this is not a decision within the corporate officers' authority. This poses a problem if society is to rely on the voluntary adoption of CSR policies as the necessary corporate contribution to ending labor trafficking. Of course, if trafficking and poor labor conditions become public knowledge resulting in a loss of profits, *then* it could be argued that adopting new CSR policies is both the ethical and legal duty of the corporate executives.

For example, when it was publicized in the 1990s that the shoe and clothing company Nike had exploited workers within its factories outside of the United States, the public outcry and subsequent fall in profits caused Nike to quickly adopt CSR practices around forced labor in its supply chain.[136] While this example can be taken as an indication that CSR is viable when exploitative practices are known to the public, it could also serve as an incentive for corporate officers to obscure any exploitation from public knowledge.

The argument so far has established that the corporate structure itself juxtaposes the corporation's legal and institutional pressure to its moral pressure, thus boxing corporations into doing what they can without disturbing the bottom line—the profit of their shareholders. The argument now turns to the main actor, the nation state, and its

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see also Anna Williams Shavers, *Human Trafficking, The Rule of Law, and Corporate Social Responsibility*, 9 S.C. J. INT'L L. & BUS. 39, 85 (2012).

133. Dana Raigrodski proposes a third way—a "business approach"—making the case that businesses should pursue slave-free supply chains as a core business strategy, which advances profit-seeking goals. *See generally* Dana Raigrodski, *Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains*, 8 WM. & MARY BUS. L. REV. 71 (2016).

134. 170 N.W. 668 (Mich. 1919).

135. *Id.* at 684.

136. Shavers, *supra* note 132, at 67.

responsibility under the law to secure protection for human beings from slavery, human trafficking, and forced and compulsory labor.

IV. THE STATES' RESPONSIBILITIES REGARDING HUMAN RIGHTS

There is no contestation that nation states individually are the primary addressees of human rights obligations under international human rights law and, as a community of nations, "collectively they are the trustees of the international human rights regime."[137] What are the legal bases that mandate nation states to protect against human rights abuses committed by corporate actors?

Under Article 2(1) of the International Covenant on Civil and Political Rights ("ICCPR"),[138] "[e]ach state party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind."[139] The duty to *respect*, the most fundamental of state obligations, is thus the first duty that a state undertakes by subscribing to international human rights law. The provision mandates a state's non-interference with human rights: the state should refrain from harmful acts toward the individual and not encroach upon the rights enshrined in the Covenants.[140] In the context of human trafficking, according to this interpretation, the state incurs no responsibility as long as it does not make it a state policy to involve itself in human trafficking, and its agents acting on behalf of the state do not directly get involved in it.[141] Concerns could also arise regarding the conduct of law enforcement personnel and border control agents toward the treatment of human trafficking victims. If a state designated a trafficked person illegally crossing its border as a criminal rather than a victim and deported that person in violation of the principle of *non-refoulement*,[142] then this could be considered a

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137. U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK 7 (2011) [hereinafter IMPLEMENTING THE UNGPS], https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

138. Adopted Dec. 19, 1966, 999 U.N.T.S. 171.

139. *Id.* art. 2(1).

140. Except to the extent that such limitations are provided for by law for certain prescribed purposes. For a detailed analysis of limitations on rights, see Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223, 248–50, 257–59, 268–69, 272–77 (2005).

141. G.A. Res. 55/25 art. 3, 5, Nov. 15, 2000, 2237 U.N.T.S. 39574.

142. If a nation state has substantial grounds to believe that an individual will be subjected to human rights violations in another nation state, it has an obligation under human rights law not

failure of the state's duty to respect. On the other hand, a corrupt state agent may be involved at any stage of human trafficking as a facilitator. In such a case, state's liability is not *a priori* invoked. However, it is incumbent upon the state to investigate the allegation, to prosecute and punish the perpetrator as required by the law. Consequently, the state remains in compliance with its duty to respect human rights.[143]

The duty to respect is closely connected to the duty to *ensure*,[144] which establishes obligations for the states to create and maintain a public order that encompasses a decent life for the individuals, a life compatible with the inherent dignity of the human being. The duty to ensure involves a duty to protect human rights. In lay terms, this means that the state must protect the individual from harm caused by more assertive, aggressive, and abusive third-party, non-state actors.[145] The preventive dimension of human rights law foresees that private conduct might interfere with the liberty, rights, and freedoms of the individual. The law itself mandates "the state to take positive measures against the encroachment of rights by power forces beyond the state."[146] Compliance with state's obligation to protect human rights requires criminalization of human trafficking at all its stages: recruiting, transferring, transporting, harboring, or receiving persons for the purpose of exploitation.[147] It also requires setting up the necessary administrative infrastructure to ensure implementation of fair labor standards, access to movement without improper restrictions and also application of a fair and non-discriminatory immigration policy and law in its territory and under its jurisdiction.[148]

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to transfer the individual to that nation state. This protection is called "non-refoulement." Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement*, 80 FORDHAM L. REV. 73, 75 (2011).

143. Roza Pati, *States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in* Rantsev v. Cyprus and Russia, 29 B.U. INT'L L.J. 79, 132 (2011).

144. KLEIN, *supra* note 1, at 300.

145. Pati, *supra* note 143, at 133.

146. *Id.* at 134 (citing KLEIN, *supra* note 1, at 301). *See generally* Roza Pati, *Beyond the Duty to Protect: Expanding Accountability and Responsibilities of the State in Combating Human Trafficking*, *in* THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA 319, 328 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

147. Pati, *supra* note 143, at 134.

148. *Id.*

Remedies must be available and accessible in cases of infringing activities and acts that interfere with the enjoyment of human rights.[149] Lack of investigations, scarce prosecutions, and penalties that are not commensurate to the gravity of the crime would violate the state's duty to protect.[150] "Lack of due diligence on the part of the state is a violation imputable to the state, no matter what form it takes: direct omission, tolerating the act, or, even worse, covering it up."[151] This duty encompasses state's protective function in combating trafficking of persons, including when perpetrated by corporations abroad.[152] The nation state should have the political will to adopt effective regulation by enacting new legislation or amending existing laws that prohibit corporate crimes, such as the use of slave labor in their business activities, investigate the abuses when they happen, and provide an effective remedy to the victims. States evading their responsibility to protect by either their inability or their unwillingness to meet their obligations under international human rights law and tolerating human rights-abusing corporations send a message that corporations are too powerful to hold accountable, and that they stand above the law.[153] Indeed, collective action by nation states, to the moment of the writing of this Article, has not gone beyond soft law, as the section below indicates.

V. PAST TRENDS IN THE COLLECTIVE RESPONSE OF NATIONS TO REGULATE CORPORATIONS

A. *The United Nations Global Compact*

Launched in 1999, the UNGC is considered to be a universal principles-based approach to social responsibility by corporations.[154] It is cherished as the United Nations flagship for responsible business action and, consisting of ten principles, it is built on the fundamental belief that business can be a powerful force for good and play a significant role in improving our world. The UNGC describes itself as a "*call* to companies

149. *Id.*

150. *Id.*

151. *Id.* at 134–35. Such conduct could be an internationally wrongful act invoking state responsibility.

152. *Id.* at 135.

153. *Corporate Crime*, *supra* note 90. Further adding that no country has ever put to trial any company for violations of human rights abroad, no matter how much evidence has been brought against them by NGOs. *Id.*

154. *See The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited June 1, 2019).

to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals."[155] The first two principles relate to human rights and respectively state that "[b]usinesses should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses."[156] Two other principles that align with the topic of this Article relate to labor rights and they respectively direct that businesses should uphold "the elimination of all forms of forced and compulsory labour, 'and' the effective abolition of child labour."[157] Counting 9997 companies, 162 countries, and having issued 61,284 reports in its records, the UNGC celebrates efforts to engage corporations in initiatives that respect human rights.[158] However, looking at the findings of the 2018 UNGC Progress Report, the picture remains dim. According to the report, only twenty-seven percent of companies have reported performing risk assessments directly linked to human rights while only seventeen percent have reported conducting impact assessments linked to human rights.[159] The fact is that companies do not seem to respond well to *calls* requiring action to respect and support human rights throughout their supply chains and operations. A statement by Lise Kingo, CEO and Executive Director of the UNGC, clarifies further the *call* on businesses to place human rights at the center of their strategy and explains that the "deep changes needed to achieve the Goals will require transforming value systems, establishing a culture of integrity and aligning business practices with universal principles."[160]

A comparative analysis of some of the data included in the report is warranted to understand the value of government regulation in various aspects represented by the ten principles of the UNGC. While ninety percent of companies that answered the survey in 2018 reported that they have some policy in place that relates to all ten principles, the numbers reveal a glaring gap when it comes to assessing the impact[161]

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155. *See Who We Are*, *supra* note 31.
156. UNGC PROGRESS REPORT 2018, *supra* note 30, at 14.
157. *Id.* For statistics showing the respective progress, see *supra* Section I.B.
158. U.N. GLOBAL COMPACT, https://www.unglobalcompact.org (last visited June 1, 2019).
159. *See* UNGC PROGRESS REPORT 2018, *supra* note 30, at 9 (emphasizing the need to implement and improve procedures to assess risk and impact on human rights).
160. *UN Global Compact Launches New Report on Human Rights as the Foundation of Sustainable Business*, UN GLOBAL COMPACT (Nov. 26, 2018), https://www.unglobalcompact.org/news/4412-11-26-2018.
161. The UNGC defines Impact Assessment as "[a] process for identifying, understanding, assessing and addressing the effects of your company's programmes, projects and activities on society and your operating environment." UNGC PROGRESS REPORT 2018, *supra* note 30, at 19.

of their activities on society. In the year 2018, only sixteen percent of companies conducted impact assessments as they relate to human rights policies, only twenty-six percent were related to labor, and fifty percent to the environment.[162] While fifty percent might not seem to be a great success in assessing the impact on the environment, it still indicates a much higher rate of compliance than in the area of human rights and labor. Generally speaking, there is more robust regulation of the environment—globally, regionally, and domestically—which in turn affects corporate compliance. Better results are not based on the moral conscience of the corporations, but companies perform better if they are forced to comply with legally binding provisions.

For almost two decades, the principles called upon businesses to adopt corporate behavior to prevent abuses and to respect human rights. While this *call* remains a noble move, alas, aligning businesses with universal principles of human rights has proven to be a true challenge.

B. The United Nations Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights ("UNGPs"), informally known as the "Ruggie Framework,"[163] were the first corporate human rights responsibility initiative to be endorsed by the United Nations through its Human Rights Council in 2011.[164] The UNGPs constitute a set of thirty-one guidelines for governments and businesses to address human rights abuses and are intended to mitigate and remedy any such abuses.[165] The UNGPs stand on three pillars that constitute the basis for their implementation:

> (a) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) [t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect

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162. *Id.*

163. These principles were written by the Special Representative of the Secretary-General, Professor John Ruggie, in consultation with multiple stakeholders to provide a global standard aimed at preventing and addressing human rights abuses linked to business activity. For the background and an analysis of the UNGPs, see John F. Sherman III, *The UN Guiding Principles: Practical Implications for Business Lawyers*, IN-HOUSE DEF. Q. 50 (Winter 2013).

164. UN Human Rights Council, UN Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (June 16, 2011), https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

165. *See generally* IMPLEMENTING THE UNGPS, *supra* note 137.

> human rights; (c) [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.[166]

For a long time, the UNGPs have been considered the foundations for action by nation states, civil society and the private sector. In many respects, they have guided the various initiatives that have been promulgated by all these actors, of course with limited success, as indicated in the above sections.

Indeed, the UNGPs faced a lot of critique from various sides at the time they came out. A meaningful assessment came from the Senior Director for International Law and Policy at Amnesty International emphasizing that

> [t]he draft guiding principles enjoy broad support from business, precisely because they require little meaningful action by business. Prof. Ruggie has acknowledged that governments often fail to regulate companies effectively, and that companies working in many countries evade accountability and proper sanctions when they commit human rights abuses. The fundamental challenge was how to address these problems. His draft guiding principles fail to meet this challenge.[167]

The reality we face today has proven the above assessment to be accurate. To date and despite many efforts, governments have still failed to regulate corporate behavior effectively.

C. Excursus*: Amnesty International's Corporate Crimes Principles*

Impunity for corporate crimes committed offshore has always been at the center of the concern of global human rights organizations emphasizing that "corporate actors need to know that they will be held to account for corporate crimes."[168] In 2016, Amnesty International co-hosted the Corporate Crimes Principles ("CCPs") to make good on this conviction.[169]

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166. *Id.* at 1.

167. *Letter to the Financial Times on the New Principles*, H20 (Jan. 20, 2011), https://h2o.law.harvard.edu/text_blocks/29016. For this stance and more posts, primarily from the civil society sector, criticizing the Principles, see *NGOs Criticize UN Special Representative Ruggie's Draft Guiding Principles on Business & Human Rights*, BUS. & HUMAN RIGHTS RES. CTR., https://www.business-humanrights.org/en/ngos-criticise-un-special-representative-ruggies-draft-guiding-principles-on-business-human-rights (last visited June 1, 2019).

168. *Corporate Crime*, *supra* note 90 (quoting Amol Mehra, Director of International Corporate Accountability Roundtable).

169. *See generally* INDEP. COMM'N OF EXPERTS, THE CORPORATE CRIMES PRINCIPLES: ADVANCING INVESTIGATIONS AND PROSECUTIONS IN HUMAN RIGHTS CASES iv (2016) [hereinafter CORPORATE CRIMES PRINCIPLES], http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf (identifying principles to guide prosecutors and investigators in holding companies accountable for corporate crime).

It specifically urged state actors like France, Germany, the United States, and the United Kingdom to take measures in order to hold companies criminally accountable for serious human rights abuses committed overseas.[170] The CCPs were developed by legal experts and supported by Amnesty International and the International Corporate Accountability Roundtable[171] and are aimed at advancing the investigation and prosecution of human rights abuses. The CCPs define corporate crime as "[i]llegal conduct that is linked to a human rights abuse, including conduct that should be criminalised in order to meet requirements under international law even if the State has failed to do so."[172] Inter alia, they recommend enacting stronger legislation; investigating corporate crime as a matter of priority; ensuring financial, technical, and human resources to investigate and prosecute corporate crime; empowering investigators and prosecutors with the understanding that serious human rights abuses by companies can amount to a crime in the domestic legal system; and encouraging cross-border cooperation with police and the judiciary in relevant jurisdictions, including host states where crimes are alleged to have been committed.[173]

While these principles remain within the domain of efforts promulgated by non-state actors, they nevertheless seem to have been a good point of reference for the most recent initiative by nation states: create a legally binding instrument that mandates corporate respect for human rights by regulating corporate activity.

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170. *See id.* at v (encouraging all state actors to embrace the principles within the study).

171. International Corporate Accountability Roundtable is a roundtable promoting rights-based global norms and consisting of members, networks and advisers. *See Mission*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, https://www.icar.ngo/about/mission (last visited June 1, 2019). Some of their members and partners include Amnesty International, Human Rights Watch, AFL-CIO: America's Unions, Free the Slaves, ECPAT USA, Interfaith Center on Corporate Responsibility, Coalition of Immokalee Workers and many more. *See Members*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, https://www.icar.ngo/partners (last visited June 1, 2019).

172. CORPORATE CRIMES PRINCIPLES, *supra* note 169, at viii.

173. *Id.* at iii–iv. More pragmatically, the Principles *also* provide practical guidance on case selection, evidence collection, victims' access to justice, witness protection, identifying tools, resources and strategies for effectively pursuing corporate crime cases, by also cross-border collaboration. According to the Principles, creating an environment that is conducive to pursuing corporate crimes cases is a necessity. This can be done by incentivizing the law enforcement to pursue corporate crimes and by providing them with the necessary tools and resources and by building their institutional capacity, independence and impartiality to do so. *Id.* at 3.

VI. TRENDING NOW: TOWARD A LEGALLY BINDING INSTRUMENT

Realizing that the recommendatory UNGPs did not effectively ameliorate corporate conduct to sufficiently respect human rights, the UN Human Rights Council membership concluded that a binding treaty is necessary.[174] Consequently, UN Human Rights Council Resolution 26/9 established a working group named the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights ("IWG"). The IWG's mandate is "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[175] Over the course of three years, government and non-governmental representatives, academics, practitioners, and even some corporate representatives from various nations met to discuss the scope, function, and content of a binding treaty. The work of the IWG resulted in a treaty draft known as the "Zero Draft," which was released in July 2018.[176]

In its preamble, the draft invokes the rules of international law of human rights regarding international responsibility of states, by stressing particularly that

> the obligations and primary responsibility to promote, respect protect and fulfill human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law.[177]

This language is in line with Article 2 of the ICCPR.[178] The treaty covers human rights violations in the context of transnational business

174. These concerns were also emphasized in the *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, which stated: "A lack of capacity and understanding to grapple with the implications of the Guiding Principles is cited as one of the most common challenges and one reason why uptake of the Principles has not been quicker." U.N. Human Rights Council, Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/29/28, ¶ 84 (2015). In fact, the UNGPs lack clarity what exactly the corporations are supposed to do.

175. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, ¶ 1 (July 14, 2014).

176. *See* U.N. Office of the High Comm'r for Human Rights, Zero-Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, art. 2, ¶ 1 (July 16, 2018) [hereinafter Zero-Draft], https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf.

177. *Id.* at art. 1.

178. Article 2 of the ICCPR states that every state "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights

activities,[179] but fails to enumerate the specific human rights that would fall under the treaty. Later versions of the treaty are to address this issue, particularly considering that the two major treaties on human rights separate civil and political rights from economic, social, and cultural rights. Business activities of transnational character encompass any for-profit activity undertaken by natural or legal persons.[180] Thus, the treaty targets only private multinational corporations but not purely domestic corporations or state-owned enterprises. Grievances for human rights violations may be addressed in the court of the state where acts or omissions occurred, or in the state in which the violator is domiciled.[181] This means that nation states will be mandated to include extraterritorial jurisdiction in their respective legislation. This is a step forward from the standard contained in the UNGPs, which asserts that, under human rights law, nation states are not generally required to regulate the extraterritorial activities of businesses domiciled in their territory and/or under their jurisdiction.[182]

Intending to cut impunity, this provision would also allow the courts in the host state to exercise jurisdiction over companies domiciled abroad. Furthermore, at the request of victims, the court may apply the law of the sending state.[183] There is no statute of limitations for violations of human rights that constitute crimes under international law.[184] Victims are afforded prompt access to justice and remedies, while the state investigates all human rights violations effectively, promptly, thoroughly, and impartially.[185] The treaty requires the state to establish criminal, civil, and administrative liability.[186] States must ensure that "all persons with business activities of transnational character" undertake human rights due diligence "throughout such business activities,"[187] as well as the activities of their "subsidiaries and . . . entities under [their]

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recognized in the present Covenant, without distinction of any kind" and must "take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 999 U.N.T.S. 171, 173–74.

179. *Zero-Draft*, *supra* note 176, at art. 3, ¶ 1.

180. *Id.* at art. 4, ¶ 2.

181. *Id.* at art. 5, ¶ 1.

182. *See generally* IMPLEMENTING THE UNGPS, *supra* note 137, at 3 ("States must protect against human rights abuse within their territory and/or jurisdiction . . . .").

183. *Zero-Draft*, *supra* note 176, at art. 7, ¶ 2.

184. *Id.* at art. 6, ¶ 1.

185. *Id.* at art. 8, ¶¶ 1, 3.

186. *Id.* at art. 10, ¶ 1.

187. *Id.* at art. 9, ¶ 1.

direct or indirect control."[188] But, the treaty allows states to exempt certain small or mid-sized businesses to avoid undue administrative burdens.[189] The due diligence provision contemplates that a corporation prevent the activities of business partners in their supply chain, or be held liable.[190] This stance departs from the UNGPs, which sought to prevent, mitigate, and account for human rights impact through its corporate human rights due diligence provision. The standard is no longer just about the process of progressively taking steps, but it is about an outcome: prevent abuses in the respective business activities, including those in the supply chain, or incur liability.[191] The treaty foresees a monitoring mechanism, a Committee of Independent Experts and a Conference of States Parties.[192]

In many respects, the Zero Draft indicates much progress toward regulating corporate behavior. It accomplishes what is acceptable of a first draft and creates a solid basis for further discussion. Of course, no one is expecting nation states, particularly the sending nations, to be thrilled at the prospects of accepting responsibility that they have intentionally avoided. Consensus on the content of the treaty will need time to build, and the draft will change in so many respects. Unfortunately, nation states with the most powerful corporations, like the United States and Canada, have already opted out of participating in any of the IWG discussion sessions.[193] Nations like Russia and China, as well as the European Union, are not satisfied with the contents of the draft treaty, but at least they are part of the discussion.[194] The fact is that while some nation states resist regulation of corporate conduct, peer pressure—legal and non-legal—will soon force action. Corporations will have to face sub-national, national, and international human rights regulations with binding force.

An example of the global compliance pull on a legal regime that is binding only in one region of the world is the European General Data

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188. *Id.* at art. 9, ¶ 2(a).
189. *Id.* at art. 9, ¶ 5.
190. *Id.* at art. 10, ¶ 6(b) (imposing civil liability on these corporations).
191. *Id.*
192. *Id.* at art. 14, ¶¶ 1, 4, 5.
193. *See* Littler, *United Nations Further Deliberates a Treaty Seeking to Impose Corporate Liability for Human Rights Violations*, JDSUPRA (Nov. 8, 2018), https://www.jdsupra.com/legalnews/united-nations-further-deliberates-a-63383.
194. *Id.*

Protection Regulation,[195] in effect since May 25, 2018. It has already spurred action by businesses around the world—Google, Facebook, and others—with a view to ensuring *that* customers in various parts of the world not be treated differently.[196] Within the United States, the State of California is trying to follow the regulatory lead of the European Union.[197] Political controversy in such areas accentuates rather than diminishes the need for progressive development of international law.

VII. APPRAISAL: IS THIS DEVELOPMENT TOWARD A GLOBAL TREATY REGIME COMPATIBLE WITH THE GOAL OF A WORLD ORDER OF HUMAN DIGNITY?

As stated above, human dignity has been defined, in post-World War II international law, as the guiding light for a newly values-based international community.[198] Law should "serve human beings,

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195. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119), 88 (providing that the regulation is only applicable in Member States).

196. Particularly, the "threat of fines for violating [the General Data Protection Regulation ('GDPR')]—up to €20 million or [four percent] of annual global revenue—have led many companies, including Facebook, to simply apply GDPR standards to all users." Grace Dobush, *EU Regulators Have a New Plan to Keep Google and Facebook in Line: Regulate Them like Traditional Telecoms*, FORTUNE (July 5, 2018), http://fortune.com/2018/07/05/eu-regulators-facebook-google-regulation-gdpr. The United Kingdom already issued its first GDPR notice against AggregateIQ Data Services. Charlie Osborne, *UK Issues First-Ever GDPR Notice in Connection to Facebook Data Scandal*, ZDNET (Sept. 25, 2018, 07:09 GMT), https://www.zdnet.com/article/uk-issues-first-ever-gdpr-notice-in-connection-to-facebook-data-scandal. Google and its parent company, Alphabet, have been fined €4.34bn (£3.8bn). Michael Baxter, *EU Fines Google £3.8 Billion, and That's Without a Data Breach*, GDPR: REP. (July 19, 2018), https://gdpr.report/news/2018/07/19/eu-fines-google-3-8-billion-and-thats-without-a-data-breach.

197. The California Consumer Privacy Act of 2018, scheduled to enter into force on January 1, 2020, was signed into law by Governor Jerry Brown on June 28, 2018. *See California Enacts Broad Privacy Laws Modeled on GDPR*, SIDLEY AUSTIN LLP (June 29, 2018), https://www.sidley.com/en/insights/newsupdates/2018/06/california-enacts-broad-privacy-laws-modeled-on-gdpr. It is designed to emulate the GDPR, giving consumers more transparency regarding and control over their data, including detailed disclosure requirements for companies collecting data about California residents. *Id.*

198. *See* U.N. Charter art. 1, ¶ 3 (including "promoting and encouraging respect for human rights" as one of the primary purposes of the United Nations); G.A. Res. 217 (III) A, art. 1, Universal Declaration of Human Rights (Dec. 10, 1948) ("All human beings are born free and equal in dignity and rights.").

not the other way round."[199] To that end, the goal of law has to be to ensure maximum access by all to the processes of shaping and sharing all things humans value. A thorough empirical study has established such value aspirations as power, wealth, affection, well-being, respect, rectitude, skills, and enlightenment.[200] Legal regulations curbing human trafficking in global supply chains definitely promote the shaping and sharing of power, affection, well-being, rectitude, and respect.

Nation states have a responsibility to protect and ensure human rights, having the common good of a world order of human dignity in the center of their considerations. Hence, nation states have to interfere with the private sector by enacting laws and regulations to comply with their obligations under human rights law and policy. Governments regulate to provide protection when needed. That is the job of government. But, when is regulation too much?

One may ask whether legal regulation on the global plane is compatible with the goal of providing community access to power, which in turn helps maximize self-determination of the community. This goal would mandate regulation at the lowest community level possible, because therein lies the community's access to the process of decision making.

The principle of subsidiarity addresses this concern and is cherished by constitutional and religious traditions alike.[201] Stemming from the recognition of the dignity, unity, and equality of all people, the

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199. GENERAL THEORY OF INTERNATIONAL LAW 73 (Siegfried Wiessner ed., 2017).

200. Roza Pati, *Trafficking in Persons and Transnational Organized Crime: A Policy-Oriented Perspective*, *in* HANDBOOK ON HUMAN TRAFFICKING, PUBLIC HEALTH AND THE LAW 27, 29 (Wilhelm Kirch et al. eds., 2014) (concluding that any "legal solution to a societal problem" should provide all with access to these values). For details on these values, see MCDOUGAL ET AL., *supra* note 17, at 3, 7–13.

201. Subsidiarity is a key principle of the Catholic Church and its Social Teaching. It is relevant to include this religious perspective, particularly since Christianity is the largest religion globally with Catholics representing about half of the world's Christians. In Catholic Social Teaching, the principle of subsidiarity is a constant directive of the social doctrine of the Catholic Church. The essence of this principle is delineated in the Encyclical *Quadragesimo Anno* as follows: "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." Pope Pius XI, Quadragesimo Anno*: Encyclical of Pope Pius XI on the Reconstruction of the Social Order*, LIBRERIA EDITRICE VATICANA ¶ 79 (May 15, 1931), http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html; cf. Pope John Paul II, *Centesimus Annus*, LIBRERIA EDITRICE VATICANA ¶ 48 (May 1, 1991), http://w2.vatican.va/c ontent/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html.

common good has a social and a community dimension, as it belongs to everyone and remains *common*.[202] A good society is one that remains at the service of the dignity of the human being—for the good of all people and the good of the whole person.[203] But, the dignity of the human being can only be promoted amongst an aggregate of cultural, economic, social, and professional relationships between the individual and the social groupings he or she belongs to. These relationships constitute the communities that make decisions that affect the life of the corresponding community as a whole and the life of every individual part of the community. It is this network of relationships, central to the identity of the individual, that create the apt ground for the common good. Access to decision making has to start at the lowest level. This constitutes the essence of subsidiarity. The principle of subsidiarity thus requires societies of a superior order to adopt attitudes of *subsidium* with respect to lower-order societies.[204] Pope Leo XIII in the first great social encyclical, *Rerum Novarum*,[205] suggested that the government is supposed to assume only such tasks that are beyond the capacity of the

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202. *See* PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 164 (2004) (examining the principle of the common good).

203. *See* REV. JOSEPH DEHARBE, S.J., A COMPLETE CATECHISM OF THE CATHOLIC RELIGION (Rev. John Fander trans., 6th ed. 1912) (outlining the catechetical duties for all). Also, for an analysis of human dignity as a normative concept, the meaning of the inherent dignity of the human person and conduct incompatible with it, as well as the relation of human dignity to human rights, see generally Eckart Klein, *Human Dignity in German Law, in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 145–59 (David Kretzmer & Eckart Klein eds., 2002).

204. The *Compendium of the Social Doctrine of the Church* explains that:

> On the basis of this principle, all societies of a superior order must adopt attitudes of help ("subsidium")—therefore of support, promotion, development—with respect to lower-order societies. In this way, intermediate social entities can properly perform the functions that fall to them without being required to hand them over unjustly to other social entities of a higher level, by which they would end up being absorbed and substituted, in the end seeing themselves denied their dignity and essential place. Subsidiarity, understood *in the positive sense* as economic, institutional or juridical assistance offered to lesser social entities, entails a corresponding series of *negative* implications that require the State to refrain from anything that would de facto restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted.

Compendium of the Social Doctrine of the Church, LIBRERIA EDITRICE VATICANA ¶ 186, http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html (last visited June 1, 2019).

205. Pope Leo XIII, Rerum Novarum*: Encyclical of Pope Leo XIII on Capital and Labor*, LIBRERIA EDITRICE VATICANA ¶ 32 (May 15, 1891), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html (emphasizing the role that states should play in serving the common good).

individual or a private group. Any acts or functions that can be performed by the private sector with the same effectiveness as when undertaken by the government should be performed by society.[206] As Jacques Maritain stated, the government should "leave to the multifarious organs of the social body the autonomous initiative and management of all the activities which by nature pertain to them."[207] The principle of subsidiarity mandates that the higher order entity supports the lower order entity when in need.[208] It also helps the lower order entity to coordinate its activity with the rest of society,[209] as guided by the common good. Thus, subsidiarity involves the government having negative and positive obligations to secure the common good.[210]

The principle of subsidiarity also undergirds, in many respects, the structure of federalism in its birthplace, the United States. The founding fathers designed the Constitution to leave many issues in the hands of the states, as the federal government was only to do what the states could not do for themselves.[211] In particular, evidence of the notion of subsidiarity in the United States is seen in the Tenth Amendment to the U.S. Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[212] In a broader context, federalism creates the milieu for the principle of subsidiarity to flourish, as it links individuals and groups in a union that has greater capacities to provide for the common good, while preserving the self-composition of the parties involved.[213]

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206. *Id.* ("The foremost duty . . . of the rules of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as of themselves to realize public well-being and private prosperity.").

207. JACQUES MARITAIN, MAN AND THE STATE 23 (1951).

208. *See supra* notes 201, 204.

209. *See* Pope John Paul II, *Centesimus Annus* ¶ 48 (May 1, 1991), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html (stating that the State is to only oversee and direct "the exercise of human rights in the economic sector").

210. *See Compendium of the Social Doctrine of the Church*, *supra* note 204; *see also* Christopher Kaczor, *Seven Principles of Catholic Social Teaching*, CATHOLIC CULTURE, https://www.catholicculture.org/culture/library/view.cfm?recnum=7538 (last visited June 1, 2019) (emphasizing that the principle of subsidiarity combats a state's tendency to exceed their powers).

211. David A. Bosnich, *The Principle of Subsidiarity*, 6 RELIGION & LIBERTY 9, 9–10 (July & Aug. 1996).

212. U.S. CONST. amend. X.

213. *See* Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELEY J. INT'L L. 359, 362–63 (2002) (comparing the principles of federalism and subsidiarity).

Federalism can increase access to power and thus enhance democratic experiences.[214] It encourages decision making and problem solving at the place where the affected individuals reside.[215] It is an architecture for freedom[216] that balances pluralism and homogeneity, protects and empowers minorities, and distributes government services.[217]

The governance scheme within the European Union exemplifies the implementation of the principle of subsidiarity in an intergovernmental context.[218] The principle of subsidiarity was first incorporated into the governance of the European Union through the Maastricht Treaty with the goal of allocating power in a way that recognizes the sovereignty of the individual member states and provides for the betterment of the European Community as a collective, centralized whole.[219] The use of the principle of subsidiarity and its definition in the treaty has two dimensions. The negative dimension, in which the European Community is obligated not to interfere with the lower body—the member states—when the lower body can sufficiently achieve the proposed action.[220] The positive dimension, in turn, requires that the higher body has an obligation, or duty, to help the lower

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214. *See* A.E. Dick Howard, *The Values of Federalism*, 1 NEW EUR. L. REV. 143, 144 (1993) (examining how American constitutionalism makes democracy work).

215. Id.

216. *See* Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 NEW EUR. L. REV. 129, 141 (1993) (arguing that federalism allocating authority and control).

217. *See generally* Howard, *supra* note 214.

218. *See* Henkel, *supra* note 213, at 360–61 (explaining that the European Member States sought to prevent "distance between the Union and its citizens while . . . recognizing the importance of cultural differences"). For a detailed analysis of the relationship between the centralized European Community and the individual autonomous states, see MARC WILKE & HELEN WALLACE, SUBSIDIARITY: APPROACHES TO POWER-SHARING IN THE EUROPEAN COMMUNITY (1990); Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, HOKKAIDO U. (Mar. 31, 1994), https://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44(6)_p652-553.pdf.

219. *See* Henkel, *supra* note 213, at 360–61 (explaining the European Union's adoption of subsidiarity); *see also* Consolidated Version of the Treaty Establishing the European Community art. 5, Nov. 10, 1997, 1997 O.J. (C 340) 173 ("The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the *principle of subsidiarity*, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." (emphasis added)).

220. *See* Henkel, *supra* note 213, at 368 (noting that the negative dimension "protects the prerogatives of the Member States against undue Community interference").

body if the lower body cannot sufficiently achieve its goal.[221] The principle of subsidiarity was further fleshed out in the Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts ("Treaty of Amsterdam").[222] The Protocol on the Application of the Principles of Subsidiarity and Proportionality,[223] annexed to the Treaty of Amsterdam, is based on four criteria:

> (1) the close-to-the-citizen criterion ("to ensure that decisions are taken as closely as possible to the citizens of the Union"), (2) the sufficiency criterion (the action must bring value over and above that which could be achieved by individual Member-State's government action alone), (3) the benefits criterion ("action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States"), and (4) the autonomy criterion ("the action should secure greater freedoms for the individual").[224]

These criteria are a good basis for assessing, by analogy, the feasibility of when and at what extent the principle of subsidiarity can be applied to possible solutions for the societal problem of trafficking in persons.

To conclude, the basic premise of human rights is that each person has inherent and inalienable rights simply because they were born and not because it is something given to them by a higher authority. The principle of subsidiarity "presuppose[s] that human flourishing requires freedom" and conditions to reach ultimate fulfillment.[225] Therefore, the inherent right to freedom that is held by all individuals should be protected through the negative and positive dimensions of subsidiarity by the various levels of government. To put this idea in the human trafficking context, an individual's human dignity and worth can and should be affirmed by being free from slavery. Each level of society is then responsible for promoting the

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221. *See id.* (emphasizing the Community focus of the Member States).

222. 1997 O.J. (C 340) 1; *see also* Gráinne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam* 24 (Harvard Jean Monnet Working Paper No. 7/99, 2000), https://jeanmonnetprogram.org/archive/papers/99/990701.html (noting how a series of EU treaties built momentum toward a formal system of subsidiarity as set forth by the Treaty of Amsterdam).

223. 2007 O.J. (C 306) 150.

224. Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL'Y & L. 247, 254 n.26 (2011) (quoting the Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C340) 1).

225. *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 43 (2003) (referring to freedom in the context of being free "to *act* in such a way as to participate fully in the goods of an authentically human life").

lower level's aims that point toward helping the individual obtain freedom from slavery. The higher levels would violate the subsidiarity principle if they took on the tasks that would be more effectively undertaken by a lower level body. However, they would also violate subsidiarity, if they do not offer assistance to the lower level, when the latter is about to fail in the protection of the individual's right to be free from slavery.

Due to their interlocking transnational nature, global supply chains that include elements of modern slavery can, on the prescriptive level, be best combatted by regulation on the global level, via treaty and its subsequent implementation at the domestic level. Under the treaty, the subsidiarity principle would mandate that society, including corporations, and the nation state work together to effectively combat the trafficking links in the chain of supply. In a federation, the federal government would ratify the pertinent treaty, something the lower level authorities do not have competence to do, and then would delegate responsibilities to the component states and private entities for ensuring that each individual remains free from slavery in the most effective way.

When dealing with human rights issues, it is important to recognize that there will be differences among cultures when trying to apply international norms consistently; but, the principle of subsidiarity recognizes that those issues must be overcome and presumes that each nation state will seek to achieve a common good.[226] The principle of subsidiarity promotes shared responsibility among higher and lower ranked authorities. International law will set the standard and must entrust the implementation to the individual nation states down to their local authorities, unless it is shown that the standards cannot be met sufficiently at the local level. Defining each level's obligations to further the common good, as well as monitoring the implementation of those obligations appears to be a way in which the principle of subsidiarity can be made operational in any architecture of authority.

Under subsidiarity, it would indeed make sense that corporations exercise self-constraint not to abuse human rights, by means of their choosing. But, this feature of subsidiarity does not in and of itself provide a guarantee of accountability. Corporations, being profit-driven, so far have been accountable mostly to their shareholders. The solution is not an assumed enlightenment of each and every shareholder, not to mention that this stance would shift the onus of responsibility to the shareholder. Hence the nation state, as the entity that is accountable to all people through elections, should properly serve its people and always defend their interests. In this case by regulating corporate conduct.

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226. *Id.* at 58.

CONCLUSION

Human trafficking within and beyond national borders is a serious problem not amenable to simple solutions. Past trends in decisions have not succeeded in putting an end to this massive enslavement and cutting slave labor in the supply chain will not be possible under the present international or national legal regimes. With no penalties for non-compliance, no independent bodies to ensure compliance, no avenues of redress for victims of such exploitation, the existing regulations remain *lex simulata*. More drastic measures are now warranted. The conditioning factors that perpetuate modern slavery in business operations have not changed for the better. On the contrary, there is an exacerbated risk of more people falling into the trafficking trap, while powerful multinational corporations further expand their geographical base of production, distribution, and value chains, spreading their tentacles worldwide.[227]

Corporations pursuing the interest of shareholders accept only limited self-restraint regarding human rights. Most of their policy remains on paper while their operational code differs. Corporations mostly pay lip service to the idea of human rights.

The remedy of so-called "consumer activism" has not been effective so far, and it is doubtful that it will gain any traction in the future to effectively impose accountability for violations of fundamental human rights in the chain of supply.

Various countries face strong opposition by business lobby groups to the regulation of corporations warning against "overly prescriptive" laws that place what they call an "undue burden" on them.[228] In the United States, corporations are considered to be the driving force of the economy and organized society, i.e., the government, should stay out of their way. Operating in the atmosphere of the exceptional American capitalism—coupled with the idea of ordered liberty, equality for all, strong on meritocracy, and bringing about personal happiness—corporations have indeed generated the greatest amount of wealth and prosperity ever

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227. The World Economic Forum reported in 2018 that twenty-two percent of companies surveyed have a presence in more than fifty-one locations, with fifty-nine percent of employers expecting that by 2022 they will further modify their geographical base of production, distribution and value chains, with sixty-four percent of them citing labor costs as their main drive as well as additional relevant factors such as the flexibility of labor laws in destination countries. *See* WORLD ECONOMIC FORUM, FUTURE OF JOBS REPORT 2018, vii, 4 (2018), http://www.weforum.org/docs/WEF_Fut ure_of_Jobs_2018.pdf.

228. Farrah Tomazin, *Big Business Will Be Forced to Report Annually on Slavery in Supply Chains*, AGE (updated Aug. 16, 2017, 1.29am), https://www.theage.com.au/national/big-business-will-be-forced-to-report-annually-on-slavery-in-supply-chains-20170815-gxwv20.

known in history. The product of an economy of the people, by the people and for the people, the U.S. corporate establishment operating on the territory of the United States abides by the rules of a well-grounded social, economic, and political system based on the rule of law. But, in the era of the globalized economy we live in, decisions made by a corporation regarding any matters related to its business operations have a much broader impact and transcend the borders of any one sovereign nation. They indeed may touch and concern the life and livelihood of populations from multiple sovereigns. Being profit-driven, and more often than not even excess-driven,[229] they will shun the fundamentals of respect for human rights, unless mandated not to do so.

The nature of the world economy today requires that the government play a greater role than that of a mere arbiter, challenging the market logic that the government should stay *out of the business* of businesses. Even in countries that have a greater affinity for regulation, there are no truly effective measures to protect the worker in supply chains or economies of poor countries. Yet, these countries are not shy to set mandatory standards on an acceptable curvature for bananas.[230] It goes without saying that if regulation is deemed necessary and is strictly imposed for the curvature of a banana, it would be even more necessary to make sure that these bananas are not coming to the market through slave labor.

A collective prescription into hard law that mandates national action seems to be a good way to arrive at that goal. When nation states feel threatened, as they did by the transnational organized crimes, they act.[231] The reality is that they do not have the same sense of threat or urgency about the activity of corporations. This has to change.

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229. As His Holiness Pope Francis stated:

> We have created new idols. The worship of the ancient golden calf has returned in a new and ruthless guise in the idolatry of money and the dictatorship of an impersonal economy lacking a truly human purpose.

Pope Francis, *Apostolic Exhortation:* Evangelii Gaudium, LIBRERIA EDITRICE VATICANA ¶ 55 (Nov. 24, 2013) (citation omitted), http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html.

230. *Bendy Bananas—The Myth to End All Myths*, EUROPEAN PARLIAMENT LIAISON OFFICE IN THE U.K. (May 26, 2016), http://www.europarl.europa.eu/unitedkingdom/en/media/euromyths/bendybananas.

231. In recent years, we have seen progress in the context of the UN Convention on Transnational Organized Crime, adopted Dec. 12, 2000, 2225 U.N.T.S. 209, and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, adopted Nov. 15, 2000, 2237 U.N.T.S. 319. These two instruments mandate criminalization and enforcement action in domestic law, and their application has successfully established individual criminal liability. Since entering into force, the UN Convention on Transnational Organized Crime has garnered support by nation states and it has engendered good progress.