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EFFECTIVE ENGAGEMENT OF MULTINATIONAL CORPORATIONS TO ADDRESS EXISTING INADEQUACIES IN THE ENFORCEMENT OF NORMS AGAINST HUMAN TRAFFICKING AND FORCED LABOR[†]

*Taylor Hannegan**

I. INTRODUCTION

In all its forms, human trafficking is the third largest criminal enterprise in the world, generating roughly 150 billion dollars every year and growing rapidly.[1] Though there is arguably some dispute about the number of victims of human trafficking and forced labor, the most widely accepted number seems to fall between twenty-one and twenty-seven million people living in conditions of modern slavery today.[2] Even the lowest estimates suggest there are millions of victims.[3] Though the estimates vary somewhat, private forced labor exploitation constitutes roughly sixty-four percent of the victims; forced sexual exploitation makes up nineteen percent, with state-imposed forced labor as the last sixteen percent.[4] Estimates also suggest that these abuses disproportionately impact women and girls, with females comprising roughly seventy percent of the victims.[5] Regardless of the exact number, it is clear that the situation is dire and demands global attention and action.

Norms against human trafficking and forced labor are certainly developing, and they have a strong theoretical foundation upon which to grow. Article 4 of the Universal Declaration of Human Rights expressly states "no one shall be held in slavery

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[†] This is a revised version of the Article that appears in the print version of this volume of the *Denver Journal of International Law and Policy*.

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1. *Human Trafficking by the Numbers*, HUM. RTS. FIRST (Jan. 7, 2017), https://www.humanrightsfirst.org/resource/human-trafficking-numbers.

2. International Labour Organization, *Global Estimates of Modern Slavery*, *Forced Labour and Forced Marriage*, ALLIANCE, 2017, at 21 – 22. The ILO's newest estimate is that there are 40.3 million people in modern slavery, with 24.9 in forced labor and 15.4 in forced marriage. This article focuses specifically on the 24.9 million people in forced labor.

3. Business & Human Rights Resource Centre, *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action*, BUS. & HUM. RTS. RESOURCE CENTRE, 2018, at 3.

4. International Labour Organization, *supra* note 2, at 10.

5. *Id.*

or servitude; slavery and the slave trade shall be prohibited in all their forms."[6] There are fourteen international conventions related to the prohibition of trafficking and similar crimes, and countless more domestic laws dealing with the same.[7] Yet, as the continually high number of victims demonstrates, these initiatives clearly are not working fast enough. There is no simple solution to deal with the enormity of this problem. It requires a multi-faceted approach spanning the social, economic, and political spheres.

Given the attention dedicated to preventing these abuses and the long history of such efforts, there is a strong argument to be made that the norms against human trafficking are reaching a *jus cogens*[8] status. This, in turn, would permit greater state involvement and intervention to encourage action be taken to curb these abuses.

To such an end, engaging private, multinational corporations and subjecting them to more concrete enforcement mechanisms would address the problem from one angle that is currently underdeveloped.[9] It is true that an ever-increasing number of companies are implementing some form of the "People, Planet, Profit" triple bottom line maxim when making business decisions.[10] Corporate social responsibility is no longer a term being discussed solely by human rights scholars and cutting-edge companies. Dana Raigrodski maintains that a paradigm-shift is needed that factors in the true cost of business, but "[a]dmittedly, such a paradigm-shift will take time and significant commitment by companies, and it may not be attainable across the board."[11] Many other companies still adhere to the adage that a business's only responsibility is to increase its profits. Others still may engage in "whitewashing" of

6. G.A. Res. 217 (III) A, at art. 4, Universal Declaration of Human Rights (Dec. 10, 1948).

7. Susan W. Tiefenbrun, *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers,* 23 T. JEFFERSON L. REV. 199, 200 n.5 (2001). From an international standpoint: "The International community has condemned slavery, involuntary servitude, violence against women and other elements of trafficking in the form of declarations, treaties, and United Nations resolutions and reports. These include the Universal Declaration of Human rights of 1948; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/67. 51/66. and 52/98; the Final Report of the World Congress Against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); the 1991 Moscow Document of the Organization for Security and Cooperation in Europe; the U.N. Convention Against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol Against Smuggling of Migrants by Land, Sea and Air (November 15, 2000); *see also* The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?, 2 LOY. U. CHI. INT'L L. REV. 193, 197 n.24 (2005).

8. International Labour Organization, *supra* note 2, at 5, 15.

9. Rachel Nicolson, Dora Banyasz & Nikita Oddy, *UN Working Group established to create a binding treaty on transnational corporations and human rights,* INT'L BAR ASS'N, June 26, 2015, at 1. Though there is an initiative to develop a binding treaty for transnational corporations, there is currently no strict and enforceable law governing multinational corporations.

10. Eric Engle, *Alternative Corporate Finance: Attracting Capital Through Self-Financing and Corporate Social Reporting*, 22 CURRENTS INT'L TRADE L.J. 17, 21 (2014).

11. Dana Raigrodsky, *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, 106 (2016).

their activities, attempting to gain the social and economic benefit of corporate responsibility with hollow efforts.

Beyond that, the fact that human trafficking and forced labor continue to be so widespread indicates either that the companies emphasizing the triple bottom line are not at all involved in these activities, or that they too are involved and the measures are simply ineffective. Regardless of the true nature of the issue, greater regulation to prevent these crimes should be pursued. Imposing legal regulations such as tax incentives and penalties as well as corporate liability can serve as a catalyst to affect such a shift in corporate behavior.

II. THE EXISTING INTERNATIONAL FRAMEWORK: A SOLID BASE FOR POLICY, A LACKING FOUNDATION FOR ENFORCEMENT

As mentioned, there are currently at least fourteen international conventions and agreements related to preventing human trafficking and forced labor.[12] Unlike some other social ills, trafficking is almost universally acknowledged as a global problem requiring global action.

The International Labor Organization's Committee of Experts on the Application of Conventions and Recommendations (CEACR) has determined that the definition of forced labor under ILO standards encompasses human trafficking as defined by the Palermo Protocol.[13] Absent qualification, then, forced labor and human trafficking shall both be used to refer to the broader concept of human rights violations covering forced labor and human trafficking.

Substantively, the laws and conventions related to these crimes are relatively similar in their definitions. Generally speaking, the laws define trafficking in persons as,

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.][14]

12. Tiefenbrun, s*upra* note 7.

13. International Labour Office, *General Survey on the Fundamental Conventions Concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization*, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, 2012, at ¶ 272.

14. G.A. Res. 55/25, art. 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Nov. 15, 2000) [hereinafter Palermo Protocol].

The definition of human trafficking or forced labor has gone through many iterations over many decades.[15] Though this definition seemingly covers the vast majority of situations of human trafficking, some have criticized it as being overly complex.[16] Some have interpreted it as excluding labor that began voluntarily but shifted to be coercive or violent in nature.[17] Many of the critiques of the laws dealing with human trafficking is that they are too narrowly construed and do not offer protections to many people in conditions that, but for one subtle nuance, would normally be considered trafficking.[18] Several authors have attempted to establish a more concise definition that still encompasses all the relevant situations of exploitation and slavery.[19]

Perhaps the most successful definition comes from Professor Kevin Bales who identifies three core factors at issue.[20] First, there is a loss of free will of the victim or slave. Second, is the use of violence to control the victim. Third, is some form of economic exploitation that would typically preclude the victim from receiving compensation for their work.[21] Even this definition has received criticism, with Ann Jordan of the International Human Rights Law Group noting that the definition would exclude cases that involved only psychological coercion.[22] While Professor Bales suggests that psychological coercion and similar practices are accompanied by physical violence, it is still possible that this would not always be the case.

Therefore, the most appropriate and broad definition, for the purposes of this paper, is a variation on the definition offered by Professor Bales. Human trafficking and forced labor are "[a] social or economic relationship marked by the loss of free will where a person is forced" or coerced into giving up the ability to sell his or her own labor power freely.[23] This expansive definition could potentially include a scenario that would not have historically been considered trafficking but still does not go nearly so far as to jeopardize internationally acceptable working conditions.

A. An Extensive International Prohibition on Human Trafficking and Forced Labor

The most comprehensive and current international law focusing specifically on human trafficking is the Palermo Protocol to Prevent, Suppress, and Punish

15. Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act*, 17 LEWIS & CLARK L. REV. 931, 936 – 38 (2013).

16. *See* Anne Gallagher, *Trafficking in Persons Report,* 23 HUM. RTS. Q. 1135, 1138 – 39 (2001).

17. John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS. U.L.J. 1, 11 – 12 (2015).

18. *Id.* at 937.

19. Amy Weatherburn, *Dominika Borg Jansson, Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons*, 15 HUM. RTS. L. REV. 775, 777 (2015).

20. Kevin Bales, *International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labor*, 24 COMP. LAB. L. & POL'Y J. 321, 326 (2003).

21. *Id.* at 327.

22. *Id.* at 326 n.9. Professor Bales states "I suspect that, in fact, we are not in disagreement, for I would argue that psychological coercion and traditional practices are normally backed up by violence."

23. *Id.* at 326 – 27.

Trafficking in Persons.[24] It provides morally binding provisions wherein states are expected to pursue three crucial components: Prevention, Protection, and Promotion.[25] Broadly speaking, the Palermo Protocol is designed to prevent and counteract trafficking, protection and assist victims, and promote cooperation between states.[26]

The Protocol is directed solely toward state parties and technically lays out several obligations.[27] Every state should adopt legal measures to criminalize the offenses as described in the protocol.[28] States must also take steps to protect and repatriate victims, enact policies to prevent trafficking, and undertake information sharing and training programs with other states in order to further address these crimes.[29] State parties should endeavor to implement the components of the Protocol, or seek to improve their existing measures.[30]

The Palermo Protocol on trafficking, however, offers little in the way of concrete enforcement. None of the aforementioned provisions have any legally binding enforcement mechanisms. Instead, the Protocol relies entirely on state parties feeling morally obligated to enact the articles of the Protocol.[31] Some have criticized this dearth of legally binding enforcement as undermining the efficacy of the protocol.[32] Others, though, suggest that legally enforceable measures would be coercive in nature, and therefore both violative of state sovereignty and beyond the scope of the United Nations.[33] Furthermore, if there were legal requirements to the Protocol, it would likely hamper adoption by states that would most benefit from following its guidelines.

Domestically, the United States has one of the more far-reaching statutes.[34] The Trafficking Victim's Protection Act (TVPA) ranks countries into three tiers based on the actions they're taking to prevent human trafficking related crimes.[35] Should a country fall to the bottom tier, the United States will impose certain non-economic sanctions on the country in an effort to enforce the developing norms against human trafficking and forced labor.[36] Contrary to the Palermo Protocol on trafficking, the TVPA has immediate legal effects for those that fail to adhere to its suggestions.[37] Such sanctions, imposed unilaterally on foreign states, have been shown to increase

24. Palermo Protocol, *supra* note 14, at arts. 1 – 20.

25. *Id.* at art. 2.

26. *Id.*

27. *Id.* at Preamble.

28. *Id.* at art. 5.

29. *Id.* at arts. 2, 8, 10.

30. *Id.* at arts. 6, 7.

31. *See, e.g.*, *id.* at 939 – 40.

32. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 466 (2006).

33. *See* Anne Gallagher, *Trafficking in Persons Report,* 23 HUM. RTS. Q. 1135, 1138 – 39 (2001).

34. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, § 101, 114 Stat. 1464, 1466 (2000) (codified as amended at 22 U.S.C. § 7101 (2005)).

35. *Id.*

36. *Id.* at 22 U.S.C § 7107(d)(1).

37. *Id.*

compliance with international norms such as those dealing with human trafficking.[38] From a purely theoretical perspective, this would very possibly be a positive response. However, the use by the United States of its considerable relative power could also be problematic since these sanctions would be pursued unilaterally without international or regional support.[39]

Since failing to follow the TVPA has tangible consequences, some states attempt to adhere more closely to the TVPA than the Palermo Protocol.[40] This understandably draws criticism of the United States framework for potentially undermining the United Nations system.[41] The coercive measures of the TVPA also raise questions on the issue of sovereignty and whether the United States is using its considerable power to influence governmental affairs in other states.[42]

Both the Palermo Protocol and the TVPA effectively rely on the three-P paradigm.[43] The paradigm examines the issue of trafficking through views on prosecution, prevention of human trafficking, and victim protection.[44] Laws related to this paradigm are typically grounded in criminal law and deal particularly with state actions.[45]

While the concrete enforcement of the United States system may be more effective in bringing about quantifiable shifts in governmental behavior,[46] it is not without its flaws. The United Nations Protocol's reliance on moral enforcement is insufficient to bring about the requisite systematic change. Both frameworks leave much to be desired and concern themselves largely with state parties.

B. An Emerging Jus Cogens Norm Prohibiting Human Trafficking and Forced Labor in All Its Forms

Both of the systems discussed above, and the countless other similar legal frameworks worldwide, are indicative of the severity of the human rights abuses and import of concerted efforts to address them. The fact that there are a great number

38. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions,* 26 YALE J. INT'L L. 1, 31 (2001).

39. *Id.* at 48 – 49, 74 – 75. "[T]he United States sometimes walks a fine line between hypocrisy and straightforward imperialism where it seeks to enforce rights embodied in human rights instruments that it has not ratified itself or where it flexes its economic muscle to dictate policy to smaller developing nations." Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L.J. 577, 601 (1998).

40. Chuang*, supra* note 32, at 439-40.

41. *Id.* at 439*; see also, International People Trafficking: Hearing Before the Subcomm. on Near E. and S. Asian Aff. of the S. Comm. Foreign Rel.,* 106th Cong. (2000) (Statement of Frank E. Loy, Undersecretary of State for Global Affairs, describing bilateral anti-trafficking initiatives); *Trafficking in Women and Children: Hearing Before the Subcomm. on Near E. and S. Asian Aff. of the S. Comm. of Foreign Rel.,* 106th Cong. 76–85 (2000) (Testimony of Bill Yeomans, Chief of Staff, Department of Justice Civil Rights Division).

42. Cleveland, s*upra* note 38, at 48.

43. Nicola Jägers & Conny Rijken, *Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations*, 12 Nw. J. Int'l Hum. Rts. 47, 51 (2014).

44. *Id*.

45. *Id.*

46. Chuang, *supra* note 32, at 464.

of international conventions dealing with slavery, dating back even to 1852, lends credence to the notion that the banning of slavery and slave-like practices have reached a status of *jus cogens* norms.[47] *Jus cogens* norms suggest that states may never violate these standards and further implicitly authorize states to take action to prevent violations of such norms.[48]The plethora of stringent modern laws dealing with an absolute prohibition on slavery emphasizes the peremptory rules to which all states must adhere in relation to these human rights abuses.[49] While state parties have traditionally been guilty of such violations with corporations excluded from jurisdiction or regulation, "violations of *jus cogens* norms have been invoked against non-State entities."[50] Corporations are receiving greater attention under both domestic and international law in relation to their actions impacting the communities in which they are based.[51]

The concept of corporate liability for *jus cogens* violations is not an entirely new one. In both *United States v. Krauch* and *United States v. Krupp*, the Court concluded that although it was individuals on trial, it was the company itself that had violated international law through the actions of its employees.[52] Some authors note that current international tribunals may not have specific jurisdiction over corporations, but that national laws may allow claims against non-state actors to proceed based on claims of violations of international law.[53] Particularly given the overriding and fundamental nature of a *jus cogens* norm, it is more than reasonable to suggest that a multinational corporation could face liability for violating international law.

The United Nations Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG), John Ruggie, stated, "Under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes…"[54] He recognized that the potential for corporate liability may exist in international law. National laws have also increasingly ascribed both criminal and civil responsibilities to corporations under international standards.[55]

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47. Robert Smith, *The Lagos Consulate 1851-1861,* appendix A (Univ. of Cal. Press 1989).

48. *Id.* at 55.

49. Jägers & Rijken, s*upra* note 43 at 56.

50. *Id.*

51. *Id.* at 56.

52. Ralph Gustav Steinhardt, Christopher N. Camponovo & Paul Hoffman, INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS, 721 (2009) (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

53. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS*,* 251 (2006).

54. Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 61, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (suggesting further that the most heinous human rights violations would include slavery, human trafficking, and forced labor).

55. *Id.* at ¶ 63.

C. Imposing Obligations on Multinational Corporations: A Moral Request Without Enforcement

Traditionally, discussions of human rights at the international level have focused specifically on state parties and excluded non-state actors (except in occasional advisory roles).[56] Even when dealing with a *jus cogens* norm such as the prohibition on slavery, it is only in the most recent few years that the international community has begun to take measures to impose any sort of legal responsibility on corporations to help protect human rights. Most notably, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights in 2011 (the Guiding Principles).[57] The United Nations endorsement is intended to initiate implementation of the "Protect, Respect, Remedy" framework that was adopted previously in 2008.[58]

The Guiding Principles thus establish that states must take action to protect human rights, corporations must take action to respect human rights, and states must work with corporations to help provide remedies to those who have suffered human rights abuses.[59] These three pillars provide the foundation for the United Nations Guiding Principles, and in theory, the foundation upon which states and corporations should take action.

Corporations, under the Guiding Principles, have a responsibility to act with due diligence to respect internationally recognized human rights.[60] At a minimum, this is stated to refer to those human rights as promoted in the International Bill of Human Rights and the principles contained in the International Labor Organization's Declaration on Fundamental principles and Rights at Work.[61] Corporations are certainly encouraged to go beyond the rights enumerated herein, the Universal Declaration of Human Rights, part of the International Bill of Human Rights, explicitly prohibits slavery in all its forms in Article 4.[62] Even if corporations were only adhering to the Guiding Principles at the lowest level of requested compliance, slavery would still be impermissible.

The Guiding Principles should serve to inform state parties, and corporations, and should provide direction to any initiative being considered. Much like the Palermo Protocol, however, the Guiding Principles fall short because they contain no legally binding provisions. While corporations are encouraged and expected to respect human rights and engage in corporate social responsibility, even the

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56. *Id.* at ¶ 61.

57. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, at 4, U.N. Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Guiding Principles].

58. U.N. Economic and Social Council, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human rights*, ¶¶ 1, 10, 18 U.N. Doc. E/CN.4/Sub.2.2003/12/Rev.2 (Aug. 23, 2003).

59. Guiding Principles, *supra* note 57, at 6-7, 22.

60. *Id.* at 16.

61. *Id.* at 13.

62. G.A. Res. 217 A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).

corporation found to be in violation of the International Bill of Human rights would suffer no ill consequences under the United Nations provisions. Even the author of the Guiding Principles himself, Professor John Ruggie, was careful to maintain that the international legal system generally shies away from imposing legal obligations on businesses, with the Guiding Principles being no different in that respect.[63]

Accordingly, some have once again criticized the Guiding Principles for the same reasons as they criticize the Palermo Protocols, suggesting that a company's responsibility to respect "is too low a bar, that companies should have so-called 'positive' obligations as well including to fulfill or realize rights."[64] Given the continued scope of the problem internationally, moral obligations are a good initial step. In all likelihood, however, they are insufficient to influence significant change at this time.

III. *JUS COGENS* AND PERMISSIBLE STATE REGULATIONS

It has been suggested that "taking into account the character of the *jus cogens* prohibition on slavery, there might be solid ground to reconsider the corporate *responsibility* to protect, and to rephrase this as a corporate obligation."[65] Particularly as corporations may be increasingly held liable for human rights violations, it would be wise for corporations to treat their responsibility as a legal obligation.

Within the United Nations Guiding Principles, the fact of the *jus cogens* prohibition on human trafficking and forced labor undoubtedly permits much more significant state action and interference on non-state actors such as multinational corporations. In order to realize the state obligation to protect human rights, the state itself can take action to ensure that a corporation similarly fulfills its obligation to respect human rights. Technically, the state's obligations under the Guiding Principles are to protect human rights through regulations and policy, investigation, and enforcement.[66] Imposing regulatory measures on multinational corporations certainly falls within the purview of permissible and encouraged state action within the Guiding Principles. Despite the usual hesitancy to regulate businesses in their international affairs, if states are truly committed to protecting human rights such actions should be pursued.

IV. EXISTING STATE REGULATIONS IMPOSED ON MULTINATIONAL CORPORATIONS: A STEP IN THE RIGHT DIRECTION

BSR, a global nonprofit consulting group committed to assisting companies develop sustainable business strategies, recently suggested in their report on the future of business and human rights that "[a] mandatory legal and social framework

63. Christine Bader et al., *The U.N. Guiding Principles on Business and Human Rights: Analysis and Implementation*, THE KENAN INST. FOR ETHICS AT DUKE UNIV. REP., at 1, 7 (2012) https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf.

64. *Id.*

65. Jägers & Rijken, s*upra* note 43, at 56.

66. Guiding Principles, s*upra* note 57, at 10–1.

for respecting human rights is emerging," and "[i]n the future, successful companies will be those that comply, and thrive, in this new legal and normative context."[67] Their report points to efforts such as the United Kingdom's Modern Slavery Act (Modern Slavery Act) and France's Corporate Duty of Vigilance law (Duty of Vigilance).[68] Each of these laws, as well as California's Transparency in Supply Chains Act (Supply Chains Act),[69] represents something of a milestone in enforcing human rights standards on corporations. While similar laws have historically been scarce, an ever-increasing number of states have proposed or adopted laws with almost identical requirements.[70] While the requisite levels of legal compliance and penalties may vary, the mere existence of such laws is a promising development.

A. Due Diligence and Disclosure Requirements Relying on Naming and Shaming: California's Transparency in Supply Chains Act and the United Kingdom's Modern Slavery Act

The Supply Chains Act and the Modern Slavery Act contain examples of the most widely enacted provisions with other states recently implementing or pursuing similar statutes.[71] These laws require certain disclosures but typically require little more and impose few, if any, legal consequences.[72] The Supply Chains Act and the Modern Slavery Act have substantively similar requirements[73] but also suffer from similar shortcomings.

California's Supply Chains Act was the absolute first initiative of its kind designed to address potential corporate involvement in trafficking and forced labor through reporting requirements.[74] Along with the general affirmation of the criminal nature of slavery and human trafficking, the act principally relied on the finding that

> consumers and businesses are inadvertently promoting and sanctioning these crimes through the purchase of goods and products that have been tainted in the supply chain, and that, absent publicly available disclosures, consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking.[75]

67. Bus. for Soc. Responsibility, *Human Rights: What Are They? What Do They Mean for Your Company?*, BUS. FOR SOC. RESP., 4 https://www.bsr.org/files/work/bsr-human-rights.pdf.

68. *Id.*

69. S. B. 657, 2010 Leg., 111th Cong., para. 4 (Cal. 2010).

70. Sharan Burrow, *Eliminating Modern Slavery: Due Diligence and the Rule of Law,* BUS. & HUMAN. RIGHTS. RESOURCE CTR., https://www.business-humanrights.org/en/eliminating-modern-slavery-due-diligence-and-the-rule-of-law.

71. *See* Joint Standing Committee on Foreign Affairs, Defence, and Trade, Parliament of the Commonwealth of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, (2017), at 14 [2.24]–[2.25].

72. Modern Slavery Act 2015, c. 30, pt. 6, § 54(9)–(11) (U.K.); Cal. Civ. Code § 1714.43(d) (West 2012).

73. Modern Slavery Act 2015, c. 30, pt. 6, § 54(1) (U.K); Civ. Code § 1714.43(a)(1).

74. Civ. Code § 1714.43(g).

75. Cal. Office of the Attorney Gen., *The California Transparency in Supply Chains Act (2015)*, ST. OF CAL. DEPT. OF JUST., para. 1, https://oag.ca.gov/SB657.

Entering into force in 2012, the Act has two key components: its defined scope of coverage and its disclosure requirements.[76] While the Supply Chains Act is successful in its scope, the legal requirements are likely insufficient to act as a catalyst for true and significant change. The law does still represent an important step forward in mandating corporate social responsibility, and it is able to offer guidance to companies and other governments looking to pursue similar laws.

The Supply Chains Act limits its applicability to "[e]very retail seller and manufacturer doing business in [California] and having annual worldwide gross receipts that exceed one hundred million dollars…"[77] Retail seller and manufacturer classification are both determined by the entity's status on their tax return.[78] "Doing Business in California" is a broad grant of jurisdiction under California Law; it applies to companies that are either organized or domiciled in California as well as any that meet any of the following conditions: 1) have sales in California over $500,000 or twenty-five percent of its total sales; 2) have retail property and tangible personal property worth more than $50,000 or represent twenty-five percent of the business' total real and tangible personal property value; or 3) the amount paid by the taxpayer in the state for compensation is greater than $50,000 or twenty-five percent of the total compensation.[79] Finally, gross receipts references the "gross amounts realized… on the sale or exchange of property, the performance of services, or the use of property or capital… in a transaction that produces business income." [80]

Concerning disclosures, the Supply Chains Act mandates that the retail sellers and manufacturers falling within its scope post disclosures related to five specific categories.[81] Specifically, the covered companies must at least "disclose to what extent, if any," it does the following:

> (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
> (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
> (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
> (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

76. S. B. 657, 2010 Leg., 111th Cong., para. 4 (Cal. 2012).
77. Cal. Civ. Code § 1714.43(a)(1) (West 2012).
78. *Id*. at §1714.43(C)–(D).
79. Cal. Rev. & Tax Code §23101(b)(1) (West 2012).
80. Cal. Rev. & Tax Code § 25120(f)(2) (West 2009).
81. Civ. Code § 1714.43(c).

> (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.[82]

More simply put, companies must disclose their efforts to combat human trafficking and forced labor, or lack thereof, through verification, audits, certifications, accountability, and training.

If every company covered by the Supply Chains Act were to pursue corporate social responsibility initiatives in each of these five categories, the impact could be tremendous. However, the Supply Chains Act not only fails to require that companies pursue such initiatives, it fails to require that companies even provide positive statements for each of these five categories. Effectively, as long as a company states that it takes no action related to a particular category, the requirements of the law would be met.[83] Should a corporation fail to meet its disclosure obligations, the sole remedy is an action brought by the Attorney General of California for injunctive relief.[84]

The United States Federal Government did, at one point, propose similar legislation. It seems unlikely, however, to pursue such legislation anytime soon.[85]

The United Kingdom's Modern Slavery Act is identical in many ways to the Supply Chains Act, though it will likely impact a larger cross-section of companies. Section 54 of the Act deals specifically with Transparency in supply chains and is the only article imposing obligations on businesses.[86] Whereas the Supply Chains Act covered "retail sellers and manufacturers," the Modern Slavery Act targets "commercial organisations."[87] Such "commercial organisations" are within the scope of the law if they both 1) supply goods or services and; 2) have a turnover of at least the "amount prescribed by regulations made by the Secretary of State."[88] Currently, this amount is set to 36 million pounds, or about 48 million dollars. The potential scope of application is much greater under the Modern Slavery Act than the Supply Chains Act with its lower revenue bar and slightly more forgiving definition of relevant organizations.

The two acts do require essentially the same information in their mandatory disclosures. Though the Modern Slavery Act does not necessitate information on the

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82. *Id.*

83. *Id.*

84. *Id.* at § 1714.43(d).

85. H.R. 2759, 112th Cong. (2011). The United States Federal Government has proposed legislation similar to that in California as of 2011. *Id.* Titled the "Business transparency on Trafficking and Slavery Act" the last action taken was referral to committee as of August 22, 2011. *Id.* Even though the Bill is, for all intents and purposes dead, it is still encouraging as it represents a departure from the previously held belief that the state should be the sole actor in attempting to combat human trafficking and forced labor. Now, given the political priorities of the Trump administration and the inclination to remove regulations, it does seem even less likely that a new Bill would succeed at the federal level. Marieke Koekkoek, Axel Marx & Jan Wouters, *Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Supply Chains Act,* 4 GLOBAL POLICY 522, 527 (2017).

86. Modern Slavery Act 2015, c. 30, pt. 6, § 54 (U.K.).

87. *Id.*; Cal. Civ. Code § 1714.43(a)(1) (West 2012).

88. Modern Slavery Act 2015, c. 30, pt. 6, § 54(2) (U.K.).

same five categories as the Supply Chains Act, it does suggest that the slavery and trafficking statement ought to include information about the organizations structure, policies, due diligence process, risk management, organizational efficacy, and related trainings.[89] Substantively, it covers similar topics as the five categories listed explicitly in the Supply Chains Act.[90]

Once again, if the organization has taken no action and has no information to share, the organization must only release a statement establishing such.[91] Even if the organization has taken no steps to eradicate human trafficking, a statement indicating such would be sufficient to fulfill the organization's obligations. The High Court may issue an injunction, and in Scotland a civil proceeding may be brought for specific performance.[92] This would still only require that the company release an official statement determining that no actions had been taken.

Under neither law would a business suffer immediate negative consequences as a result of a violation of the law. Though laws such as these typically rely on so-called "naming and shaming," neither law contains provisions allowing the release of a list of companies that must comply, nor do they authorize publication of the names of companies failing to do so. Absent these sorts of provisions, "naming and shaming" would rely on an active and engaged consumer seeking out an organization's statement.

Several non-governmental organizations (NGOs) have taken it upon themselves to collect and disseminate the statements published by companies, or to indicate when a company has failed to adhere to the mandatory disclosure under either the Supply Chains Act or the Modern Slavery Act.[93] One such NGO, KnowTheChain, was able to identify roughly 500 companies subject to the Supply Chains Act.[94] However, the Attorney General issued a guidance document designed to clarify the application of the law to 2,600 companies, suggesting that there are far more than 500 companies that must disclose their efforts.[95] Without additional public insight into the companies from whom disclosure is required, the purpose of the law—

89. *Id.* at § 54(5*).*

90. *Id.*; Civ. Code § 1714.43(c).

91. Modern Slavery Act 2015, c. 30, pt. 5, § 54(4) (U.K.).

92. *Id.* at § 54(11).

93. Taylor Wessing, *Modern Slavery Act – Home Office and NGOs Drive for Compliance*, LEXOLOGY, (Nov. 20, 2018), https://www.lexology.com/library/detail.aspx?g=f303cb64-d737-479b-8425-4cd2cbd20079.

94. KnowTheChain, *Insights Brief: Five Years of the California Transparency in Supply Chains Act*, 3 (2015) https://knowthechain.org/wp-content/uploads/2015/10/KnowTheChain_InsightsBrief_093015.pdf [hereinafter *Insights Brief*].

95. *Id.* at 6. Effectively, this means that KnowTheChain was only able to identify 19 percent of covered companies without additional information upon which to rely. *Id.* at 4. In their report, KnowTheChain states that it "recognizes that its dataset does not fully reflect all the companies subject to SB 657 and may reflect some companies not subject to SB 657. With the public information available, it is not feasible to definitively determine all of the companies that are subject to the law." *Id.* at 13; *See also 2017 Results,* CORPORATE HUMAN RIGHTS BENCHMARK (2017) https://www.corporatebenchmark.org/ (examining efforts by the top 98 publicly traded companies on 100 human rights indicators. Unsurprisingly, their results indicate a small group of companies leading the rest).

providing consumers with information to enable them to make educated purchases promoting human rights—would appear to be significantly frustrated.

Given the similarities between the two laws, it is certainly not surprising to find that the European disclosures are as similarly skewed as those in California. A separate initiative, the Modern Slavery Registry under the NGO Business and Human Rights Resource Centre, collected 3,316 statements across twenty-six sectors touching thirty-five countries.[96] Government estimates suggest, however, that more than 12,000 companies are required to comply with the Modern Slavery Act. [97]

Of the 500 companies *identified* by KnowTheChain, only fifty-three percent had statements as required by law that adequately addressed all five categories.[98] A full twenty percent failed to address even a single one of the five categories.[99] Further, only forty-six percent of the available disclosures could be accessed from a company's homepage online, a separate requirement of the law.[100] Of the nineteen percent of companies identified, only thirty-one percent complied with every requirement of the law.[101] Ideally, these numbers will see an increase now that the Attorney General has released their guidance document; despite the fact compliance was required as of 2012, the Attorney General did not make clear how companies should interpret the law until April 2015.[102] Even under the new guidelines, increased adoption is certainly not guaranteed, particularly given the absence of transparency afforded to consumers and the number of companies that seemingly have yet to attempt to comply with any provision of the law.

There is less information available about compliance with the Modern Slavery Act; though former Prime Minister Theresa May commissioned an independent review to determine the impact of the law, the final report did not contain a single mention of the impact of Article 54.[103] As this is the sole article implicating corporations and their role in preventing human trafficking,[104] it seems to be a glaring omission. The most in-depth report comes from the Business and Human Rights Resource Centre. The NGO analyzed statements from companies in the Financial Times Stock Exchange 100 Index (FTSE).[105] The Business and Human Rights

96. *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action*, MODERN SLAVERY REGISTRY, (2017) http://www.modernslaveryregistry.org/ (last visited Dec. 11, 2017).

97. Press Release, U.K. Prime Minister's Office, Home Office, and Prime Minister David Cameron, PM Seeks Stronger Co-Operation with Vietnam to Stop Modern Slavery as New Measures Come into Force, (July 29, 2015), ¶ 4, https://www.gov.uk/government/news/pm-seeks-stronger-co-operation-with-vietnam-to-stop-modern-slavery-as-new-measures-come-into-force.

98. *Insights Brief*, *supra* note 94, at 7.

99. *Id.*

100. *Id.*

101. *Id.* at 5.

102. *Id.* at 6.

103. Caroline Haughey, *The Modern Slavery Act Review*, (2016), at 32 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf (report commissioned by then Home Secretary Theresa May).

104. Modern Slavery Act 2015, c. 30, at i–iii (U.K.).

105. Bus. & Human Rights Res. Ctr., *FTSE 100 At the Starting Line: An Analysis of Company Statements Under the UK Modern Slavery Act*, BUS. & HUM. RTS. RESOURCE CTR. at 1 (2016) https://business-

Resource Centre identified twenty-seven company statements disclosed as of September 30, 2016.[106] According to the report, "[t]he performance of the FTSE 100 is a litmus test… [w]ith their resources and experience, these companies should be leading the rest."[107]

The report scored each company's disclosure in each of the six identified areas for potential reporting. Under their analysis, no company received a top score in any of the six areas.[108] Each topic was scored out of a possible five points.[109] In aggregate, the companies scored an average of 2.1 out of five.[110] These scores were based on companies that actually submitted statements as required by law; if estimates are correct that more than 12,000 companies fall within the scope of the law and only 3,316 statements have been submitted, then the vast majority of companies are severely lacking under the law.[111] Despite these shortcomings, the report was optimistic that the companies would take significant steps to improve. Since it was the first year of required disclosure, the report posits that companies may still be in the early stages of developing official policies.[112] Additionally, the report suggests that some companies may be wary of true transparency for fear of repercussions or standing out negatively amongst their peers.[113]

Both the reports by KnowTheChain and the Business and Human Rights Resource Centre recommend that the government should produce a list of companies required to put forth statements under the acts.[114] This would provide consumers information, and also enable companies to learn best practices from one another, ideally facilitating adoption throughout industries.[115]

The Business and Human Rights Resource Centre report makes an important recommendation absent from KnowTheChain's report. It states that the United Kingdom should work with other governments worldwide to "create mandatory transparency; mandatory due diligence… and government incentives in the form of access to public procurement contracts for those demonstrating due diligence and access to remedy."[116] This recommendation recognizes the importance of mandatory, legally binding measures while also suggesting incentives for companies engaged in best practices.

While both the Supply Chains Act and the Modern Slavery Act have flaws related to their lack of legal consequences and fall short of truly providing consumers

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humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf [hereinafter *FTSE 100*].

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 6.
110. *Id.* at 8.
111. *Id.* at 1–2.
112. *Id.* at 13–4.
113. *Id.*
114. *Id.* at 15.
115. *Id.* at 14; *see also Insights Brief, supra* note 94 at 6.
116. *FTSE 100*, *supra* note 105 at 15.

the requisite information to make an informed choice, their importance should not be understated. Prior to the Supply Chains Act, there were no similar laws targeting corporations and their role in curbing or supporting human trafficking. Laws such as these provide the foundation upon which to develop stronger norms and more stringent laws. They represent the first crucial steps in addressing actors other than the state to tackle a problem that has no single solution. Elements of these laws can be seen in new laws with stronger mechanisms, such as France's Corporate Duty of Vigilance law.[117]

B. Going Beyond Transparency and "Naming and Shaming" through Mandated Implementation and Vigilance

The Duty of Vigilance law was introduced not by the government, but by Sherpa, an organization based in Paris designed to protect victims of economic crimes.[118] The group acts as both a think tank and an advocate and was obviously integral in the development and passage of the law.[119] The law itself was adopted on February 21, 2017. Shortly thereafter, the law was challenged and subsequently found constitutional in France's highest court, after which it came into force on March 28th.

Though the Duty of Vigilance law is similar in many ways to the Supply Chains Act and the Modern Slavery Act, it contains a critical component different than almost every previous law. Whereas both the California the United Kingdom laws technically permit companies to fulfill their disclosure obligations by stating that they take no action in a particular context, the Duty of Vigilance law does not provide inaction as an option. Instead, companies are mandated to "establish and implement an effective vigilance plan."[120] If a company were to submit a statement saying that no actions had been taken, the lack of action would be considered a violation of the Duty of Vigilance law.[121]

The Duty of Vigilance law does not rely on revenue to determine which companies fall within its purview instead defining its scope based on location and number of employees.[122] If a company's main office is in French territory and it employs at least 5,000 employees, including within its direct and indirect subsidiaries, then the law applies.[123] Alternatively, if the company employs 10,000 employees worldwide and has at least a French subsidiary, then the law may apply even if headquartered outside France.[124] Unfortunately, this is likely a much more narrow scope of coverage. According to the International Bar Association, the Duty of Vigilance law will likely only be applicable to approximately 150 of the biggest companies in

117. Trade and Industry Code [C. COM.] art. L. 225-102-4-5 (Fr.), http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf.

118. SHERPA, *About Us* (2014), https://www.asso-sherpa.org/mandate.

119. *Id.*

120. Trade and Industry Code, *supra* note 117 at Art. L. 225-102-4(I).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

France.[125] That said, France is home to twenty-nine of the Global 500, the world's 500 largest companies ranked by revenue.[126] Those twenty-nine companies represent 1.52 trillion dollars of revenue,[127] meaning the law could still have a profound effect.

Broadly speaking, under the Duty of Vigilance Law covered corporations must establish and implement a vigilance plan; they must publish that plan publicly; and they must release implementation reports detailing their efforts on a yearly basis.[128] The plan should be designed to address not only human rights violations and risks, but also environmental impacts, and should do so throughout the company's supply chain and subsidiaries.[129] In essence, the law mandates that companies establish and implement corporate social responsibility initiatives.

More specifically, companies have five principal obligations. First, the vigilance plan should include "a mapping that identifies, analyses and ranks risks."[130] Based on this mapping, the plan should then establish procedures to assess the situation throughout the supply chain, including subsidiaries, subcontractors, and suppliers; essentially, anyone with whom the company has a commercial relationship.[131] Third, corporations should take action to lessen possible risks and mitigate serious violations of human rights or environmental impacts.[132] Fourth, the plan must contain "an alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned."[133] This cannot be done in isolation, helping to guarantee a more effective and inclusive alert scheme based in the company's reality.[134] Finally, the company must develop a monitoring system to continually evaluate the previous measures and gauge their efficacy.[135]

Each one of these components is mandatory. It is not sufficient for the company to state that they have taken no actions to mitigate potential violations or that they have no alert mechanism.[136] If a company is not meeting its obligations under the law, formal notice may be given requesting they cure their deficiencies.[137] If, three months after receiving formal notice to comply, the company has not rectified the

125. Anna Triponel & John Sherman, *Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law,* INT'L BAR ASS'N. (May,17 2017), https://www.ibanet.org/Article/Detail.aspx?ArticleUid=E9DD87DE-CFE2-4A5D-9CCC-8240EDB67DE3.

126. FORTUNE, *France, Global 500* (2017), http://fortune.com/global500/list/filtered?hqcountry=France.

127. *Id.*

128. Trade and Industry Code, *supra* note 117.

129. *Id.*

130. Trade and Industry Code, *supra* note 117 at art. L. 225-102-4(I)(1).

131. *Id.* at art. L. 225-102-4(I)(2).

132. *Id.* at art. L. 225-102-4(I)(3).

133. *Id.* at art. L. 225-102-4(I)(4).

134. *Id.* at art. L. 225-102-4(I)(1).

135. *Id.* at art. L. 225-102-4(I)(5).

136. *Id.* at art. L. 225-102-4(I)(1).

137. *Id.* at art. L. 225-102-4(I)(2).

situation, a court with proper jurisdiction may, at the request of a party with sufficient interest, enjoin said company to comply with the possibility of penalty.[138]

Originally, the law drafted by Sherpa provided for the possibility of a civil penalty if a company failed to comply and create a vigilance plan.[139] The law first underwent significant changes while it was being considered in parliament, largely due to lobbying efforts from businesses.[140] Even then, the law initially allowed courts to impose a fine of up to ten million Euros on the company solely for noncompliance.[141] If the company breached its legal duties under the law, and such a breach caused damages, the court could increase the fine up to thirty million Euros.[142] However, after it was finally adopted, "120 right-wing legislators from both chambers of the French Parliament referred the Bill to the Council, France's highest court, on the grounds of unconstitutionality."[143] Many believed that the Council would strike down the law, or would, at the very least, apply a liberal reading to a company's obligations under the law, weakening it considerably.[144] Instead, the Council issued somewhat of a landmark decision and upheld a significant portion of the law, striking only the civil fines.[145]

While it is unfortunate that the Council removed what would have been one of the more substantial enforcement mechanisms proposed to address both human rights and environmental issues, the court's decision seems to suggest that it was primarily based on unclear language in the law.[146] Seemingly nothing in the decision appears to take a stance directly on the constitutionality of a possible civil fine, which ideally leaves the door open for future legislation imposing such a penalty.

The Duty of Vigilance law also provides the possibility of a remedy for victims of a violation in Article 2.[147] Should a company fail to perform its obligations under the law, they may be held liable for damages and to compensate for any harm that

138. *Id.* at art. L. 225-102-4(II).

139. Sandra Cossart, Jérôme Chaplier, & Tiphaine Beau De Lomenie, *Developments in the Field, The French Law on Duty of Care: A Historic Step Towards Making Globalization work for All,* 2 BUS. & HUMAN RIGHTS J. 321 (2017), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7C85F4E2B2F7DD1E1397FC8EFCFE9BDD/S2057019817000141a.pdf/french_law_on_duty_of_care_a_historic_step_towards_making_globalization_work_for_all.pdf.

140. *Id.* at 317.

141. *Id.*

142. *Id.*

143. *Id.* at 318.

144. *Id.*

145. Decision No. 2017-750 DC of March 23, 2017, (Fr.) http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-750-dc/decision-n-2017-750-dc-du-23-mars-2017.148843.html.

146. *Id.* The Council, stating that "[i]n view of the generality of the terms it has used, the broad and indeterminate nature of the reference to "human rights" and "fundamental freedoms" and the scope of the companies, enterprises and activities falling within the scope of the plan of action. vigilance which it instituted, the legislator could not, without disregarding the requirements deriving from Article 8 of the Declaration of 1789 and in spite of the objective of general interest pursued by the law referred, retain that may be subject to payment a fine of up to EUR 10 million for a company which has committed a defined breach in terms which are also insufficiently clear and precise."

147. Trade and Industry Code, *supra* note 117 at art. L. 225-102-5.

occurs.[148] This provision of the law, in theory, represents merger of all three pillars of the United Nations Guiding Principles. France is mandating protection of human rights with a legal system that requires companies to respect such rights. Should the company fall short of respecting these rights, then the company may be held liable for the violation in court, and is thus required to provide the victims with a remedy.[149]

Where the Duty of Vigilance law falters, though, is in placing the burden of proof upon victims of violations. There is no simple solution regarding the burden of proof, particularly when dealing with human rights violations. However, under the Duty of Vigilance law, victims have to prove both that they suffered some sort of harm and also that the harm could have been avoided had the company practiced due diligence.[150] Therein lies the issue; the reality facing many of the workers in a company's supply chain would make it extraordinarily difficult to access the resources required to meet such a burden of proof. In its decision striking down the civil fines of the law, the Council also determined that the provisions of Article 2 did not create a new system of vicarious liability, and instead upheld the traditional notion of civil liability in tort.[151] This requires that a "direct causal link between these breaches [of the duty of vigilance and due diligence] and the damage" be established.[152] In this sense, the law could have an even greater impact if the burden of proof were for the victim to prove only that a harm had occurred, at which point the burden would shift to the employer to demonstrate due diligence had been followed. Even then, this would ideally be done only to mitigate damages instead of absolving liability.

The law should have also required that companies implement extra non-judicial options for victims seeking remedies. The Guiding Principles discuss this as an important component of access to remedy.[153] Once again, however, this law represents a tremendous step forward in governments holding corporations responsible for respecting human rights, something that would have been almost unfathomable even fifteen years ago.[154]

148. *Id.*

149. *Id.*

150. *Id.* at art. L. 225-102-4(I) and art. L. 225-102-5. Some critics have also suggested that the law may only require "reasonable vigilance" which could be interpreted as a lower standard than the international due diligence standard discussed in the United Nations Guiding Principles. Under Article 1 of the law, it does state that "[t]he plan shall include the reasonable vigilance measures to allow for risk identification and the prevention of sever violations of human rights and fundamental freedoms…"However, when examining the law in its entirety, including Article 2's access to remedy provisions, it maintains that the standard is one of due diligence. Additionally, proponents of the law have proposed that typical interpretations of the law would suggest a due diligence standard be used; given the international standards implicated by the law, this seems to be the most reasonable interpretation.

151. Decision No. 2017-750 , *supra* note 145.

152. *Id.*

153. Guiding Principles, s*upra* note 57.

154. Cossart et. al., *supra* note 139 at 323.

V. REALIZING THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS THROUGH STRENGTHENED LEGAL FRAMEWORKS

In addition to the three laws discussed above, there have been many attempts to tactfully encourage or require corporate social responsibility in some form.[155] They have seen varying degrees of success, though the consensus seems to be that they are marginally effective at best.[156] As previously noted, the international norms prohibiting trafficking and forced labor are well-developed and reaching *jus cogens* status if they have not done so already. Regardless, the nature of these norms, in conjunction with the United Nations Guiding Principles on Business and Human Rights, would seem to permit stronger state intervention and regulation into corporate affairs to encourage or mandate corporate social responsibility.

Building upon the foundation of those norms and the existing laws as discussed, there are several potential avenues states could pursue when seeking to further their protections for human rights. The most feasible option seems to be a system of tax incentives and penalties. States could also expand access to remedies for victims by adjusting civil liabilities. Finally, though unlikely under many governments, states could develop a system to impose criminal liability on corporations and those most responsible or complicit in egregious violations of human rights.

A. Requiring Respect for Human Rights and Combatting Human Trafficking through Stronger Legal Enforcement Systems

Traditionally, advocating for the protection of human rights at the international level would be done through systems such as the United States Trafficking Victim's Protection Act, or the United Nations Palermo Protocols.[157] The discussions are between state actors and the need for effective protections is curbed by considerations of state sovereignty. Oftentimes, the negotiating parties hold more or less equal bargaining power and success may hinge on compromises that undercut the potential of a law or treaty.

These issues are nearly absent when states are dealing with corporations. The private sector still wields tremendous power in many political situations through well-developed lobbying machines, but imposing a penalty on a corporation for violating human rights does not impermissibly violate that corporation's sovereignty.

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155. For example, the Dutch parliament is considering a law that would establish a duty of care to prevent child labor and could also impose fines for violations similar to the initial draft of the French Duty of Vigilance law. Barbara Bier, Christien Saris, & Daan Doorenbos, *Bill adopted by Dutch Parliament introducing a duty of care to prevent child labour*, STIBBE (May 22, 2017), http://stibbe.m17.mailplus.nl/genericservice/code/servlet/React?encId=Sw4ZZe9GRvHkWbW&actId=222732&command=openhtml. The Dodd-Frank Act in the United States had several strong provisions including Section 1502 that would have required companies to state if a product had "not been found to be 'DRC Conflict Free.'" This required disclosure was found to violate the First Amendment of the Constitution in *Nat'l Ass's of Mfrs. v. SEC,* 800 F.3d 518 (D.C. Cir. 2015) and has instead become optional as a result.

156. Melissa Zacharias, *The Effectiveness of Corporate Social Responsibility Programs: A Legal Perspective,* FORDHAM J. CORP. & FIN. L. (Nov. 10, 2017) https://news.law.fordham.edu/jcfl/2017/11/10/the-effectiveness-of-corporate-social-responsibility-programs-a-legal-perspective/.

157. Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act,* 17 LEWIS & CLARK L. REV., 931 (2013).

There are even some corporations that may have more power in practice than a state's government; far more often, however, the corporation must be servient to the controlling government where the corporation is domiciled. Corporations may be involved in the political process and may request that compromises be made that would undermine the efficacy of a law, but ultimately the government has the final say in the matter.

1. Tax Programs to Incentivize Corporate Behavior and Further Promote Human Rights Norms Globally

Tax incentives and penalties are well-founded means to encourage or discourage certain behavior and have historically been used to do just that.[158] Most notably, green initiatives and environmental issues have been addressed extensively through various regulations and tax policies.[159] Indeed, federal tax policies in the United States have been successfully implemented to apply pressure both legally and economically to bring about social change.[160] Other countries have used tax rules for similar effects; Switzerland implemented an alternative tax rule to curb carbon emissions wherein a carbon tax would be imposed, but only if the industry failed to meet carbon abatement objectives through voluntary means.[161] Nordic countries have used tax incentives to reduce emissions and pollution for many years.[162] Though also discussing global climate change and environmental issues, Roberta Mann suggests "[t]he tax system is an appropriate and effective way to encourage businesses to adopt an environmental ethic and take action to reverse global warming."[163] Tax incentives have been used to facilitate incredible growth in renewable energy, particularly with private and commercial use of solar panels.[164] On the other side, tax penalties may "provide the 'stick' to go along with the 'carrot' of tax incentives."[165] Using both concurrently would help maximize the potential for corporate compliance.

Economic incentives such as tax policies would ideally facilitate a change in behavior by corporations. These instrumental sanctions seek to alter conduct by

158. Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 975-76 (1986), noting that "tax incentives may be more efficient for the implementation of government policies than direct expenditure programs because of lower transaction costs."

159. *Id.*

160. *Id.*

161. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *Environmentally Related Taxes in OECD Countries: Issues and Strategies*, 21, 133 (2001), https://www.cbd.int/financial/fiscalenviron/g-fiscaltaxes-oecd.pdf.

162. Christina K. Harper, *Climate Change and Tax Policy,* 30 B.C. INT'L & COMP. L. REV. 411 (2007).

163. Roberta Mann, *Waiting to Exhale: Global Warming and Tax Policy,* 51 AM. U. L.REV. 1135, 1222 (2002).

164. Sara Matasci, *Congress extends solar tax credit - everything you need to know about the federal ITC,* Energysage (Jan. 6, 2019), https://news.energysage.com/congress-extends-the-solar-tax-credit/.

165. Mann, *supra* note 163.

adjusting the cost/benefit analysis.[166] Along these same lines, in his remarks to the World Economic Forum in 2008, Bill Gates advocated for profit-based market incentives to be used whenever possible.[167] Typically, however, businesses largely ignore externalities "or values not internalized by the market system and by the business itself."[168] Companies may be especially likely to ignore these costs "when the shared risks imposed by those costs seem to be some else's risk, be it environmental degradation [or an] exploited workforce…"[169]

In essence, state governments can increase the cost of noncompliance and can internalize risks previously ignored by corporations. Increasing that cost will increase a corporation's attention to the risk, which will in turn increase efforts to diminish that risk. Applied, governments can impose tax penalties on corporations that are either committing human rights violations or failing to take preventative measures as prescribed in laws like France's Duty of Vigilance law.[170] These potential penalties, if costly enough, will adjust the cost/benefit analysis of a failure to comply. In turn, they will effectively force corporations to pursue initiatives respecting human rights and preventing—or at least mitigating—human trafficking and forced labor. Eventually, this may have the desired end result of shifting norms to go further in respecting human rights and could influence business attitudes with regard to corporate social responsibility on a much broader scale.

If a company's true concern were, in fact, their bottom line and profit maximization for their shareholders, a system of tax incentives and penalties related to compliance or noncompliance, respectively, would be effective. In a 2008 survey of 566 executives in the United States, the top three reasons given for a firm's pursuit of corporate citizenship were all somehow related to the company's bottom line.[171] Tax revenues earned from noncomplying companies could be assigned to facilitate remedies for victims or to establish independent monitoring programs to investigate possible violations. Given that the Guiding Principles prescribe that non-judicial

166. Diane L. Fahey, *Can Tax Policy Stop Human Trafficking?,* 40 GEO. J. INT'L L. 345, 371 (2009). Professor Fahey advocates essentially more for tax incentives and penalties on the wealthiest private citizens in other countries, suggesting they would be able to influence law and policy in their home country to discourage human trafficking. She identifies several types of sanctions, including symbolic sanctions (attempting to reassure the public that "something" is being done to address a particular problem), expressive sanctions (seeking to change norms generally instead of the behavior of a specific target) and instrumental sanctions (adjusting the cost/benefit analysis as mentioned).

167. Bill Gates, *Prepared Remarks be Bill Gates, Co-Chair and Trustee,* GATES FOUND. (Jan. 24, 2008), https://www.gatesfoundation.org/media-center/speeches/2008/01/bill-gates-2008-world-economic-forum.

168. Michael J. O'Hara, *Governing for Genuine Profit,* 36 VAND. J. TRANSNAT'L L. 765, 768 (2003).

169. Raigrodsky, *supra* note 11.

170. *See generally* Trade and Industry Code, *supra* note 117 at art. L. 225-102-2.

171. Economist Intelligence Unit, *Corporate Citizenship: Profiting from a Sustainable Business,* ECONOMIST, 20 (2008), http://graphics.eiu.com/upload/Corporate_Citizens.pdf. The survey found that revenue growth, increasing profit, and cost savings were the top reasons motivating corporate social responsibility initiatives. The survey also included interviews with "16 senior executives and experts in corporate citizenship."

remedies should be available to victims,[172] tax revenue could be integral in providing these services.

In order to give companies the opportunity to cure any deficiencies they may have in their corporate social responsibility and human rights structures, the tax penalties should be imposed over a span of time, gradually getting more costly if noncompliance continues. There should, however, be strong incentives immediately for verified proactive and preventative measures put into place by a company, even if they were established before the tax provisions were to take effect.

Naturally, corporations and their lobbyists would push back on this sort of proposal. These efforts in and of themselves could be criticized through "naming and shaming;" in all likelihood, the companies protesting tax penalties for failing to establish human rights due diligence programs or for violating human rights would be the ones committing such action. Alternatively, companies that have already put such measures in place voluntarily would seek to benefit from tax incentives for doing so, and may even advocate for the tax program.

Tax incentives and penalties offer companies a financial incentive to change their negative behavior or continue their beneficial human rights initiatives. It could help bring about a much-needed paradigm-shift in corporate attitudes and approaches to corporate social responsibility.

2. Increasing Corporate Liability in the Civil and Criminal Spheres

Though it is likely a far less politically feasible option, states could attempt to impose additional liability on corporations in both the civil and criminal systems. Imposing any sort of new liability on a corporation would undoubtedly face considerable challenges. An attempt to do so would most certainly have to contend with an army of lobbyists while the bill was being considered; if, by chance, it was adopted, corporations would send their best lawyers to fight it in court. It is still worth consideration though, as it could have a truly significant impact in providing remedies to victims of corporate violations of human rights related to human trafficking. As the specifics of imposing liability in these types of situations would be tremendously complicated, this paper seeks only to introduce the possibility of such measures.

On the civil side, the Duty of Vigilance law at least permits victims to pursue recompense from corporations.[173] It also requires that a corporation pay damages to a victim, assuming the victim is able to prove that due diligence by the corporation would have prevented the harm.[174] As previously discussed, this is a high burden of proof for the victim. Countries could improve on the French law in future iterations by lowering the burden of proof or even shifting it to the corporation in particularly egregious scenarios of human rights violations.

The French Council's decision stating that there was no new standard for vicarious liability in the Duty of Vigilance law demonstrates to some degree a

172. Guiding Principles, s*upra* note 57.
173. Trade and Industry Code, *supra* note 117 at art. L. 225-102-2.
174. *Id.*

disinclination to assign additional liability to corporations.[175] Other jurisdictions may not follow France's reasoning.

For example, it is possible that victims may be able to bring a civil case in the United States under the Alien Tort Statute (ATS). The law permits that "[t]he district 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."[176] After the decision in *Filártiga v. Peña-Irala*, the statute has been interpreted by the courts as permitting foreign citizens to seek a remedy in the United States for human rights violations when those violations occurred abroad.[177] The Supreme Court had not, until recently, explicitly considered whether or not corporations could be held liable under the ATS.

Then, in *Jesner v. Arab Bank, PLC*, the Court first turned to the question of "whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights."[178] To this question, the Court looks largely to the jurisdictional reach of international tribunals and determines that there exists "sufficient doubt on the point to turn to… whether the Judiciary must defer to Congress."[179] In the absence of a clear norm permitting corporate liability under international law, the Court examines whether the ATS contains a private right of action that could impose liability upon a corporation.[180] The Court examines similar laws, such as the Torture Victim Protection Act, and the causes of action contained therein. Ultimately, the Court determines that "Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations."[181] The Court further cautions that holding foreign corporations liable under the ATS would permit other nations to hale United States' corporations into their courts, thereby "hinder[ing] global investment in developing economies."[182] In conclusion, the Court states that "[f]or these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for the violations of international law must be determined in the first instance by the political branches of the Government."[183]

The dissent is compelling, however, and criticizes the plurality's approach. The dissent notes both that the Court has previously "held that the ATS permits federal courts to recognize private causes of action for certain torts in violation of the law of nations without the need for any further congressional action"[184] and that there

175. Cossart et. al., *supra* note 139 at 322.

176. 28 U.S. Code § 1340 (1999).

177. *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980); *See also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (clarifying that the ATS did not create a cause of action but merely helped establish a grant of jurisdiction).

178. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1399 (2018).

179. *Id.* at 1402.

180. *Id.* at 1403.

181. *Id.* at 1405.

182. Brief for United States as *Amicus Curiae*, in *American Isuzu Motors, Inc. v. Ntsebeza.* O.T. 2007, No. 07-919, p.20.

183. *Jesner, supra* note 178 at 1408.

184. *Id.* at 1419 (internal quotations omitted).

need not be "sufficient international consensus with regard to the mechanisms of enforcing these [international] norms."[185] Effectively, the dissent argues that the question is not whether there is an international norm permitting Corporate Liability, but rather whether there is a norm prohibiting the behavior that gives rise to a claim against a corporation. *Jesner* concerns itself with injuries and deaths as a result of terrorism, against which there exists a norm. Similarly, as this paper argues, there should be a norm against trafficking and forced labor.

Though the outcome of *Jesner* was a disappointment for advocates of transnational human rights,[186] the plurality opinion still seems to leave open the possibility of Congressional expansion of the ATS to encompass corporate liability. Though that seems unlikely, it is not beyond the realm of future possibility. Importantly, *Jesner* did not eviscerate all potential for holding corporations responsible for violations of internationally recognized human rights norms.

Beyond laws such as the Duty of Vigilance law and the ATS, the legal notion of *respondeat superior* may allow for corporate liability in both civil and criminal cases. For civil cases, respondeat superior could be applied to establish vicarious liability and hold a corporation generally liable for the actions of one of its agents.[187] Criminally, "[i]t is now well established under the respondeat superior doctrine that corporations can be held criminally responsible for wrongs committed in their names."[188] As this doctrine has evolved in the United States, its scope has been curtailed and now relies on the "scope of authority" requirement.[189] Essentially, the employee or agent who committed the crime must have acted within his or her scope of employment and with the intent to benefit the corporation.

That said, courts have permitted prosecutions to go forward based on acts done by employees if they were within the duty of the employee and done on behalf of a corporation.[190] Furthermore, corporations cannot absolve themselves of criminal liability by demonstrating that they had programs to guarantee that their employees comply with the law. Essentially, due diligence is not typically a valid legal defense: "[A] corporate compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law."[191]

Due to the nature of the business structure of many multinational corporations, it could prove difficult to assign corporate criminal liability to a business in one country based on the acts of a subsidiary based in another country. Under the current scope of corporate criminal liability, the courts would also likely only have

185. *Id.* at 1420.

186. Rebecca J. Hamilton, *Jesner v. Arab Bank,* 112 Am. J. Int'l L. 720-727 (2018)

187. Definition of "Respondeat Superior" https://www.law.cornell.edu/wex/respondeat_superior.

188. Kathleen F. Brickley, *Perspectives on Corporate Criminal Liability,* Wash. U. St. Louis (Jan. 2012), https://ssrn.com/abstract=1980346. She notes that the United States Supreme Court formally recognized respondeat superior for corporate prosecutions in *New York Central & Hudson River Railroad Co. v. United States,* 212 U.S. 481 (1909).

189. *Id.* at 7.

190. *U.S. v. Amer. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-5 (3d Cir. 1980).

191. *U.S. v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009) (internal quotations omitted).

jurisdiction in the country wherein the criminal act actually occurred, which does little to bring effective justice to many of the victims of crimes such as human trafficking and forced labor. The ATS is limited to civil actions based in tort, but a similar law-granting jurisdiction over criminal acts would again face staunch opposition to its passage and its implementation.

As previously mentioned, the details of imposing either civil or criminal corporate liability are beyond the scope of this paper. Civil liability could provide valuable recourse for victims, while criminal liability would be a powerful stick to wield over corporations. Both avenues would bolster the corporate response and help to prevent further human rights abuses.

VI. CONCLUSION

The norms against human trafficking and modern slavery are well established and have seemingly reached *jus cogens* status. With that, states must take action to protect the rights of those being abused. While not every state is able or willing to do so, the states that can, must. The strength of the norms permits greater state regulation and involvement in enforcing them. Under the Guiding Principles, corporations have a moral obligation to respect human rights. This obligation, however, has thus far proved to be limited in its efficacy. Therefore, states should impose legally binding and enforceable systems to engage multinational corporations in a manner that is still underdeveloped.

Regardless of whether states decide to adopt tax incentives, impose stronger corporate liability, or pursue a different route entirely, the scope of the human trafficking and forced labor problem demands action. A select few countries could have a tremendous impact on businesses and the corporate social responsibility sphere. France is home to twenty-nine of the Global 500, and 428 of those 500 are based in ten countries.[192] If even half of those countries implemented stronger requirements for corporations to respect human rights, the effect would be dramatic.

There may come a time when corporations and governments alike have changed course and adhere to moral obligations simply because it is the right choice. That time has yet to come; instead, those with the power to influence change must not stand idly by.

192. FORTUNE, *supra* note 126.