SLAVES TO THE BOTTOM LINE: THE CORPORATE ROLE IN SLAVERY FROM NUREMBERG TO NOW

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Historically, behind many a slave's suffering the threat of violence alone, there has been a businessman staring at a balance sheet making the calculation as to whether that suffering is necessary for the good of the bottom line. The temptation for corporations to use slave labor is a perennial problem. With the profit motive propelling strategic corporate choices, trying to keep labor costs to a bare minimum can make slave labor seductively attractive. Even today, the problem of slave labor is still with us, infecting the American food supply from seafood to chocolate bars.[1]

Most American students learn of the *Dred Scott* case[2] in which an African American slave, Mr. Scott, unsuccessfully tried to sue for his

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1. Naomi Jiyoung Bang, *Casting a Wide Net to Catch the Big Fish: A Comprehensive Initiative to Reduce Human Trafficking in the Global Seafood Chain*, 17 U. PA. J. L. & SOC. CHANGE 221, 221 (2014).

> Americans devour the "All You Can Eat Shrimp" buffets . . . without a second thought that their fish could be the product of human trafficking and forced labor. . . . [O]ff the coasts of Thailand, . . . rogue captains buy crew members from human traffickers, . . . creating "a perfect storm" of slavery and environmental degradation.

Id. See also Annie Kelly, *Nestlé Admits Slavery in Thailand While Fighting Child Labour Lawsuit in Ivory Coast*, GUARDIAN (Feb. 1, 2016), http://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast ("Nestlé . . . went public with the news it had found forced [labor] in its supply chains in Thailand and that its customers were buying products tainted with the blood and sweat of poor, unpaid and abused migrant workers.").

2. Scott v. Sandford, 60 U.S. 393 (1856).

freedom before the U.S. Supreme Court in 1857.[3] They then learn how slavery ended less than a decade later in the United States under the Thirteenth Amendment to the U.S. Constitution, which just celebrated its 150th anniversary.[4] This sparse narrative leaves the misimpression that slavery no longer exists or that slavery is no longer a legal problem for U.S. courts. As I explain in the book *Corporate Citizen? An Argument for the Separation of Corporation and State*,[5] both of these conclusions are factually wrong.

The first time corporate actors were held criminally accountable for their role in using slaves on a large scale was at the Nuremberg Tribunals of industrialists after World War II. Since then, certain multinational corporations still indirectly profit from the use of slave labor, now typically found in supply chains in the third world. Dissecting why the industrialists were prosecuted and others were not is not my purpose here. Rather, in this Article I want to explore what we can learn from the corporate Nuremberg prosecutions and why trying to solve the problem of the corporate role in perpetuating slavery (and other human rights abuses) through nonbinding norms or the tort system is inadequate to the task.

Evidence of the inadequacy of our current legal system in dealing with the corporate role in slavery can be found on the docket of the U.S. Supreme Court from 2015. Tucked in among the blockbuster cases about abortion, affirmative action, and political corruption in the 2015–2016 Supreme Court term was a little-noticed certiorari petition from Nestlé U.S.A. asking, essentially, to be dismissed from a case that alleged the company had aided and abetted the slavery of children in Côte d'Ivoire.[6] One of the troubling things about Nestlé U.S.A.'s asking to be let out of the suit was that its legal argument was not an outrageous request given recent Supreme Court cases that make it nearly impossible for human rights plaintiffs to bring successful suits against multinational corporations in U.S. courts.[7]

This Article argues that, at a minimum, U.S. courts need to be reopened as proper fora for hearing civil human rights cases brought

3. Public Broadcasting System, *Dred Scott's Fight for Freedom*, PBS.ORG, http://www.pbs.org/wgbh/aia/part4/4p2932.html (last visited Nov. 4, 2016).

4. U.S. CONST. amend. XIII § 1.

5. CIARA TORRES-SPELLISCY, CORPORATE CITIZEN? AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE (Carolina Academic Press 2016).

6. Pet. for Writ of Cert., Nestlé U.S.A., Inc. v. Doe I, 136 S. Ct. 798 (2016), http://www.scotusblog.com/wp-content/uploads/2015/11/Doe-v.-Nestle-Cert.-Petition-final.pdf.

7. *E.g.*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

against multinational corporations that do significant business in the United States, regardless of where the harm occurred. The reason that American courts should be reopened is not just to give financial relief to victims, but also to change the calculus within corporations to make slave labor as financially unattractive as possible. But, further, this Article argues that we need to get back to the moral clarity of the Nuremberg trials of the industrialists and have the fortitude to actually prosecute corporate actors that knowingly perpetuate slavery.

This Article will revive the lost history of the atrocious use of slaves in Europe during World War II as revealed in the legal transcripts of the Nuremberg Tribunals, as well as how those tribunals held some industrialists accountable for their crimes. Then, the piece will explore how post-World-War-II reforms in human rights have taken steps in the right direction yet still fail to hold corporate actors fully accountable. Then, the piece will look at how human rights lawyers are turning to civil law to try to fill this enforcement gap, although even this modest effort is hitting jurisdictional roadblocks—including ones raised by the U.S. Supreme Court. And, finally, this piece considers some modest reforms that have been enacted or proposed to address the use of slave labor in corporate supply chains.

I. THE USE OF SLAVES ON AN INDUSTRIAL SCALE IN WORLD WAR II

For at least four centuries, corporations have often been vectors driving demand for slave labor. From the British chartering companies that were given monopolies to trade in African slaves in the 1600s,[8] to slave labor used in European factories under Nazi rule in World War II, to slavery in the cocoa plantations in Côte d'Ivoire supplying multinational corporations today, slavery has had a stubborn persistence.[9] Attempts by civilized nations to curb slavery have also

8. *See* Frenise A. Logan, *The British East India Company and African Slavery in Benkulen, Sumatra 1687–1792*, 41(4) J. NEGRO HIST. 339, 339 (Oct. 1956) ("[W]hile another English company, the Royal African, was busily transporting Guinea slaves westward into the then new lands of North America and the West Indies, the East India Company was similarly occupied, though on a smaller scale, with the business of shipping Madagascar slaves to India and the East Indies."); The National Archives (UK), *Britain and the Slave Trade*, NATIONALARCHIVES.GOV.UK 2, http://www.nationalarchives.gov.uk/slavery/pdf/britain-and-the-trade.pdf (last visited Nov. 4, 2016) ("From 1660, the British Crown passed various acts and granted charters to enable companies to settle, administer and exploit British interests on the West Coast of Africa and to supply slaves to the American colonies.").

9. Stephanie Forshee, *Judge: Chocolate Wrappers Aren't the Place to Disclose Child Labor*, CORP. COUNS. (Apr. 6, 2016), http://www.corpcounsel.com/id=1202754317475/Judge-Chocolate-Wrappers-Arent-the-Place-to-Disclose-Child-Labor#ixzz45T0wkDFNA ("[T]he Trade Facilitation and Trade Enforcement Act of 2015 . . . removes the exemption under the Tariff Act of 1930 that

been an ongoing quest for centuries. In fact, some of the earliest iterations of what we would now think of as international tribunals were set up in the 1800s to address the illegal trade of slaves.[10]

One of the threshold questions in international human rights cases alleging the use of slaves against corporate defendants that American courts must answer is whether corporations are proper defendants as a matter of international law. Nestlé U.S.A. argued in its certiorari petition to the U.S. Supreme Court that it could not be a proper defendant precisely because it is a corporation.[11] Many of the judges who have had to wrestle with human rights cases against multinational corporations have come to the conclusion that merely incorporating cannot bar international law from applying to an entity's actions.[12] For example, the Seventh Circuit's Judge Richard Posner noted, "It is neither surprising nor significant that corporate liability [has not] figured in prosecutions of war criminals and other violators of customary international law. That [does not] mean that corporations are exempt from that law."[13] Meanwhile, Judge Judith W. Rogers of the D.C. Circuit held,

> Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for

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has allowed corporations to use forced labor if products are not available 'in such quantities in the [United States] as to meet the consumptive demands of the [United States].'").

10. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 552–53 (2008).

> Between 1817 and 1871, bilateral treaties between Britain and several other countries (eventually including the United States) led to the establishment of international courts for the suppression of the slave trade. Though all but forgotten today, these antislavery courts were the first international human rights courts. They were made up of judges from different countries. They sat on a permanent, continuing basis, and they applied international law. The courts explicitly aimed to promote humanitarian objectives. Though the courts were extremely active for only a few years, over the treaties' lifespan, the courts heard more than [six hundred] cases and freed almost [eighty thousand] slaves found aboard illegal slave trading vessels. During their peak years of operation, the courts heard cases that may have involved as many as one out of every five or six ships involved in the transatlantic slave trade.

Id. (footnotes omitted).

11. Pet. for Writ of Cert. at 12, Nestlé U.S.A., Inc. v. Doe I, 136 S. Ct. 798 (2016), http://www.scotusblog.com/wp-content/uploads/2015/11/Doe-v.-Nestle-Cert.-Petition-final.pdf.

12. *E.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. App'x 7 (D.C. Cir. 2013); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011).

13. *Flomo*, 643 F.3d at 1019.

> "shockingly egregious violations of universally recognized principles of international law."[14]

One response to the argument that corporations (or the people who run them) cannot be properly held liable for human rights abuses as a matter of international law is to look at the prosecutions of corporate actors after World War II. This is a reasonable place to start, since World War II and the reactions to the Axis powers' abuses formed the basis for the modern international approach to human rights through the creation of the United Nations, the adoption of the International Declaration of Human Rights, and the adoption of treaties to protect human rights internationally.[15]

Between World War I and World War II, Europe and the United States had worked through the League of Nations to end the practice of slavery through the Slavery Convention of 1926[16] and the Forced Labor Convention of 1930.[17] The 1926 Convention defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[18] These provisions were not worth the paper they were written on in the hands of the Nazis and German businessmen during World War II, including those at two firms called I.G. Farben and Krupp.[19] According to William Manchester, who chronicled the rise and fall of Krupp, "[t]he diplomats from forty nations who signed the [Forced Labor] convention of 1930 had thought they were stamping out isolated examples of exploitation in remote jungles. They never dreamed that within twelve years Europe's mightiest tycoon would be bargaining for 'entire convoys' of bondsmen."[20] And, as will be detailed below, being forced to work can be just the start of horrors that slaves are faced with. Once under a master's control, they can be starved, beaten, tortured, and killed or live under constant threat of the same.

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14. *Exxon Mobil Corp.*, 654 F.3d at 57 (quoting Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983)).

15. The Jackson Center, *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERTHJACKSON.ORG, https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law (last visited Nov. 4, 2016).

16. Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, 263 [hereinafter Slavery Convention].

17. Convention Concerning Forced or Compulsory Labour, May 1, 1932, U.N.T.S. 55.

18. Slavery Convention, *supra* note 16, at art. 1(1).

19. WILLIAM MANCHESTER, THE ARMS OF KRUPP: THE RISE AND FALL OF THE INDUSTRIAL DYNASTY THAT ARMED GERMANY AT WAR 487 (2003).

20. *Id.* at 488.

A high water mark for holding corporate actors criminally responsible for using slave labor occurred in the Nuremberg trials after World War II. The Nuremberg Tribunals were one important way of trying to impose the rule of law after a decidedly lawless period in Europe. As Chief Prosecutor of Nuremburg Robert Jackson famously said, "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[21] The Nuremburg Tribunals were conducted to hold those who aided and abetted the Nazis, including the industrialists who used slave labor, accountable.[22]

Most of the Nuremberg trials focused on military leaders who perpetrated crimes against humanity in the lead-up to World War II and during the war. These Nuremberg trials are typically called the International Military Tribunals.[23] After those tribunals completed their work, there were twelve subsequent Nuremberg proceedings, including one that dealt with medical experiments and three important tribunals that addressed the actions of German industrialists.[24] As a report on the industrialist trials written for the United Nations in 1949 explained, the use of slave labor was the primary violation of international law that the industrialists faced at Nuremberg:

> It is well known that the German war system depended essentially on exploitation by the Germans of the industrial resources and the production of the occupied countries. Closely associated with that was the use of what has been called slave [labor], that is either the [labor] of deportees from occupied countries or the [labor] of the inhabitants themselves in those countries.[25]

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21. Robert H. Jackson, *Opening Statement Nuremberg Trials* (Nov. 21, 1945), *available at* http://www.pbs.org/wnet/supremecourt/personality/sources_document12.html.

22. 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, 340 (2008).

23. *Id.* at 333–35.

24. U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings*, HOLOCAUST ENCYCLOPEDIA (July 2, 2016), https://www.ushmm.org/wlc/en/article.php?ModuleId=10007074 (trials against industrialists are Case #5, The *Flick* Case; Case #6, The *I.G. Farben* Case; and Case #10, The *Krupp* Case). In addition to slave labor, the additional trials prosecuted people for conducting inhuman medical experiments on civilians, murder and cruel treatment, using judicial power to commit war crimes, deportation, and violating international treaties. Doug Linder, *The Subsequent Nuremberg Trials: An Overview*, UMKC.EDU, http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/subsequenttrials.html (last visited Nov. 4, 2016).

25. THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOLUME X, vii (1949), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf.

As William Manchester explains in his book *The Arms of Krupp*, time has clouded history, and the view pervades modern Germany that the industrialists had to use slave labor at the request of the Nazis.[26] As Manchester notes, "[t]his is untrue. The forgotten mountains of Nuremberg documents are quite clear about this. They reveal that the Reich's manufacturers not only had a choice; most of them took advantage of it."[27]

There were three industrialist trials at Nuremberg: the cases against Flick, Farben, and Krupp.[28] "The Americans also contemplated prosecuting the directors of Siemens, Bosch (the electrical manufacturers), the Deutsche Bank, Mannesmann, and dozens of other German companies, but lack of judicial resources and political support made it impossible to assemble cases."[29] In his opening statement of the *Farben* Tribunal, the Chief Prosecutor General Telford Taylor said, "[T]he indictment accuses these men of major responsibility for visiting upon mankind the most searing and catastrophic war in modern history. It accuses them of wholesale enslavement, plunder and murder. . . . They were the warp and woof of the dark mantle of death that settled over Europe."[30] The executive leaders of all three firms were accused of using slave labor.[31] But each trial came to a different conclusion about culpability.[32]

Farben and Krupp were key to financing the Nazi rise to power both by funding the Nazi Party and by rearming Germany in violation of the Treaty of Versailles that ended World War I.[33] As U.S. Supreme Court Justice and Chief of Counsel for the United States at Nuremberg Robert H. Jackson wrote,

> Immediately after the seizure of power the Nazis went to work to implement [their] aggressive intentions by preparing for war. They

26. MANCHESTER, *supra* note 19, at 5.

27. *Id.*

28. Linder, *supra* note 24.

29. DIARMUID JEFFREYS, HELL'S CARTEL IG FARBEN AND THE MAKING OF HITLER'S WAR MACHINE 361 n* (2008).

30. JOSIAH E. DUBOIS JR., THE DEVIL'S CHEMISTS 74–75 (1952) (quoting General Taylor). Nota bene, this book was published in the United Kingdom under the title GENERALS IN GREY SUITS: THE DIRECTORS OF THE INTERNATIONAL 'I.G. FARBEN' CARTEL, THEIR CONSPIRACY AND TRIAL AT NUREMBERG.

31. Linder, *supra* note 24.

32. *Id.*

33. MANCHESTER, *supra* note 19, at 364 (At a key meeting of industrialists on February 20, 1933, "[Gustav] Krupp rose as [the] senior man. He led his colleagues with a pledge of a million marks, and [Hjalmar] Schacht collected two million more from the other[] [industrialists]."); *see also* Ciara Torres-Spelliscy, *How Big Business Bailed Out the Nazis*, BRENNAN CENTER BLOG (May 20, 2016), https://www.brennancenter.org/blog/how-big-business-bailed-out-nazis (discussing Farben and Krupp's financing of the Nazi party).

> first enlisted German industrialists in a secret rearmament program. Twenty days after the seizure of power Schacht was host to Hitler, Goering, and some twenty leading industrialists. Among them were [Gustav] Krupp von Bohlen of the great Krupp armament works and representatives of I. G. Farben and other Ruhr heavy industries. Hitler and Goering explained their program to the industrialists, who became so enthusiastic that they set about to raise three million Reichsmarks to strengthen and confirm the Nazi Party in power. Two months later Krupp was working to bring a reorganized association of German industry into agreement with the political aims of the Nazi government. Krupp later boasted of the success in keeping the German war industries secretly alive and in readiness despite the disarmament clauses of the Versailles Treaty, and recalled the industrialists' enthusiastic acceptance of "the great intentions of the Fuehrer in the rearmament period of 1933–39."[34]

Krupp in particular was the key financier for the Nazi Party. As the Nuremberg Tribunal on Krupp concluded,

> It was clear from the evidence that Gustav Krupp embraced Nazism. . . . He played an important part in bringing to Hitler's support other leading industrialists and through the medium of the Krupp firm . . . from time to time made large scale contributions to the [Nazi] Party Treasury.[35]

In recognition for his financial backing of the Nazi Party, Hitler awarded Gustav Krupp the title of Fuhrer of Industry in 1933.[36] During World War II, the Nazis would repay the favor of this early financial support, aiding the German industrialists in many ways, including providing forced labor for their factories and mines. As a chemist at Farben, Dr. Ambros, reported contemporaneously: "[W]e further decided upon all measures for the use of the [concentration] camp for the benefit of the [Farben rubber] works. Our new friendship with the SS is proving very profitable."[37]

34. Robert H. Jackson, *Closing Arguments for Conviction of Nazi War Criminals*, 20 TEMP. L.Q. 85, 90–91 (1946), *available at* https://www.roberthjackson.org/wp-content/uploads/2015/01/Closing_Argument_for_Conviction_of_Nazi_War_Criminals.pdf.

35. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 84.

36. CYPRIAN P. BLAMIRES, WORLD FASCISM: A HISTORICAL ENCYCLOPEDIA, Vol. 1, at 366 (2006). The original German term for Krupp's title is "Wehrwistschaftsführer." *Id.*

37. JOSIAH E. DUBOIS JR., GENERALS IN GREY SUITS: THE DIRECTORS OF THE INTERNATIONAL 'I.G. FARBEN' CARTEL, THEIR CONSPIRACY AND TRIAL AT NUREMBERG 172 (U.K. 1953).

A. The *Flick* Tribunal

Flick was a group of industrial businesses that included coal and iron ore mines, and steel manufacturing.[38] In the *Flick* case, all six defendants were charged with using slave labor, among other crimes.[39]

The prosecution in the *Flick* Tribunal applied a French precedent from World War I for charging industrialists of committing war crimes, noting,

> [A] very similar proceeding was conducted before a French military tribunal [against private, non-state actors]. The defendants included Hermann Roechling . . . and half a dozen others who were accused of the plunder of private property in France during the First World War in violation of the laws of war. . . . The French military court found the defendants guilty, and imposed sentences of up to [ten] years' imprisonment.[40]

Thus, even as early as World War I, there was a recognition that private parties could be liable for violations of international law.

The fact that Flick had used forced labor was not really in dispute. Rather, the question at trial became whether the firm used the slaves because the Nazis had forced them to do so. Three of the *Flick* defendants were acquitted on the slavery count because "the tribunal conclud[ed] that all three were entitled to a defense of necessity on the slave-labor count."[41] As the tribunal found, "[A] determinative factor in [the *Flick*] case . . . '[was that] it appear[ed] that the defendants here involved were not desirous of employing foreign [labor] or prisoners of war.'"[42]

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38. THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOLUME IX 1 (1949), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf.

39. U.S. Holocaust Memorial Museum, *Subsequent Nuremberg Proceedings, Case #5, The* Flick *Case*, HOLOCAUST ENCYCLOPEDIA (July 2, 2016), https://www.ushmm.org/wlc/en/article.php?ModuleId=10007076.

> The [Flick] men had been indicted on March 18, with the indictment listing five counts. All the defendants were charged with committing war crimes and crimes against humanity through the use of slave labor, the deportation for labor of civilians of German-occupied territories, and the use of [prisoners of war] for war operations.

Id.

40. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 170–71.

41. KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 93 (2011).

42. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 149.

B. The *Krupp* Tribunal

Krupp was a large arms manufacturer for Nazi Germany that used forced labor by, among other atrocities, conscripting prisoners from Auschwitz, including men, women, and children.[43] At certain points, Krupp records show the firm rejected using paid German workers because they could get free labor from the Auschwitz concentration camp.[44] "Until the collapse in 1945, Krupp employed forced labor in nearly a hundred factories sprawled across Germany, Poland, Austria, France, and Czechoslovakia."[45] The defendants in *Krupp* were charged with committing war crimes and crimes against humanity—specifically, aiding and abetting the commission of murder, extermination, enslavement, deportations, imprisonment, and torture:

> Count III [in *Krupp*] charges all of the accused with having . . . during the period from September, 1939, to May, 1945, committed War Crimes and Crimes against Humanity . . . in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of [organizations] and groups, including Krupp, which were connected with the commission of atrocities and offences against persons, including: murder, extermination, enslavement, deportations, imprisonment, torture, abuse and other inhuman acts committed against civilian populations of countries and territories under the belligerent occupation of or otherwise controlled by the Third Reich, enslavement and deportation of foreign and German nationals, including concentration camp inmates, employment of prisoners of war in war operations, and in work having direct relation to war operations, including the manufacture and transport of armament and munitions, and in dangerous occupations, persecution on political, racial and religious grounds and exploitations and ill-treatment of all categories of persons referred to above.[46]

As the United Nations later explained of the *Krupp* Tribunal, enslavement was a core offense: "It was alleged [by Nuremberg Prosecutors] that under the slave [labor program] of the Third Reich, Krupp had employed in Krupp enterprises over [fifty-five thousand]

43. MANCHESTER, *supra* note 19, at 5 ("Berthawerk [was] a Krupp howitzer plant in Silesia built and manned by Jewish slave labor from Auschwitz . . . .").

44. *Id.* at 6 (Krupp records showed "Krupp opposed a proposal to employ German workmen. . . . stress[ing] [] the firm's close connection with the Auschwitz concentration camp.").

45. *Id.* at 492.

46. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 74.

foreign workers, over [eighteen thousand] prisoners of war and over [five thousand] concentration camp inmates . . . ."[47] Many of the facts of enslavement by Krupp went undisputed at trial. To wit,

> [t]he fact that large numbers of civilians had been brought under compulsion from occupied territories, and had been used in the German armament industry together with concentration camp inmates and prisoners of war on a vast scale, was not denied by the Defence [sic]. Likewise, the undisputed evidence showed that the firm of Krupp had participated extensively in this [labor program].[48]

Some Krupp slaves were subject to torture, including being put in a five-foot by twenty-two-inch by twenty-two-inch cabinet called the "cage" or "der Käfig."[49] A few holes at the top provided the only ventilation.[50] Guards occasionally sadistically poured water down the holes to suffocate the human beings inside.[51]

During World War II, Krupp created a legal subterfuge where it forced enslaved workers from western Europe to sign contracts stating they would work for free so that they were technically not enslaved.[52] As the United Nations reported, the consequence for failing to cooperate as a compliant worker was often being turned over to the Nazi Gestapo:

> The evidence showed that an ever-increasing majority of these "free" workers were compelled by the Krupp firm to sign contracts, and if they refused to do so, they were liable to be sent to penal camps. At the end of their contractual period of employment, the "contract" was unilaterally considered renewed. If one of them failed to report for work, he was treated as "slacking," and also deprived of the small and insufficient food rations. Often they were reported to the Gestapo. Those who left their employment with the Krupp firm, were charged with "breach of contract" and were frequently sent to a punishment camp maintained by the Gestapo.[53]

The sources of Krupp slaves were numerous, including:

47. *Id.* at 74–75.
48. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 92–93.
49. MANCHESTER, *supra* note 19, at 583.
50. *Id.*
51. *Id.* at 583–84.
52. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 96.
53. *Id.* at 96–97.

> wholesale manhunts [through which] able-bodied men were shipped to Germany as "convicts" without having been charged or convicted of any offence. Many were confined in a penal camp for three months during which time they were required to work for industrial plants. If their conduct met with approval they were graduated to the status of so-called "free" [labor].[54]

These workers had no liberty to leave work to return home.[55] Indeed, the penalty for trying to escape was typically lethal violence.[56] "It was the rule that escaping Russians must be shot."[57] Or, as William Manchester explained of Krupp's brutal use of the Nazi concentration camps, "[o]n his [Alfried Krupp's] orders his foremen had entered Auschwitz to select fit workers—and to consign the unfit to the [crematorium] chimneys."[58] An ex-slave of a Krupp factory later testified about his treatment:

> [W]e were deprived of freedom and became a piece of property which our masters put to work. But here the similarity with any known form of slavery ends, for we were completely expendable piece of property. We did not even compare favorably with Herr Krupp's machinery . . . . The equipment . . . was well maintained. . . . We, on the other hand, were like a piece of sandpaper which, rubbed once or twice, becomes useless and is thrown away to be burned with the waste.[59]

Children were also swept into slavery by the Krupp firm. "In 1943 some of the Eastern children employed by the Krupp firm were from twelve to seventeen years old. In 1944 children as young as six years of age were assigned for work."[60] And women were also enslaved at Krupp facilities:

> The accused [*Krupp* defendants] then started negotiations with the commander of the Buchenwald concentration camp, with the result that [two thousand] female concentration camp inmates were allocated to the Krupp firm. . . . These female concentration camp inmates ranged in age from [fifteen] to [twenty-five] years. They

54. *Id.* at 97.
55. *Id.*
56. *Id.*
57. *Id.* at 99.
58. MANCHESTER, *supra* note 19, at 793; *see also id.* at 516 ("Recalcitrants, [Krupp's Fritz van] Bulow ordered[,] were to be 'brought before the Gestapo.' He continued, 'In such cases, the Gestapo always passes death sentences . . . .'").
59. *Id.* at 522 (quoting ex-slave Tad Goldsztajn).
60. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 99.

> belonged to the Jewish faith and had because of their religion been forcibly removed from their homes. . . . The camp . . . maintained by the Krupp firm and used for the housing of these 520 female concentration camp inmates, was in every respect deplorable. The housing, sanitary and medical facilities were extremely bad, the protection against air raids consisting only of open trenches. . . . The mistreatment of these girls was a matter of common knowledge.[61]

In the *Krupp* Tribunal's opinion, the court ruled "practically every one of the [] provisions [of the Geneva Convention Articles 29-32] was violated in the Krupp enterprises."[62] And that was just as applied to the prisoners of war. Krupp also used concentration camp inmates as slaves, which was a separate violation.[63] As a result, "all of the accused [in *Krupp*], except one, were found guilty of having contrary to the provisions of international law, employed prisoners of war, foreign civilians and concentration camp inmates under inhuman conditions in work connected with the conduct of war (Count III)."[64]

The sentences for *Krupp* defendants ranged from three to twelve years. The highest sentence was given to Alfried Krupp.[65] The *Krupp* defendants thus, long after helping the Nazi rise to power and benefiting from Nazi policies including using the steady supply of forced labor, were finally held accountable in the Nuremberg Tribunals. Under subsequent German law, these criminal convictions opened the door to civil suits by victims. Jewish ex-slaves of Krupp settled with the firm in 1959 for albeit paltry reparations.[66]

C. The *Farben* Tribunal

In the case of *I.G. Farben*, defendant directors at Farben were accused of human rights abuses through the firm.[67] In particular, Count III against the *Farben* defendants alleged,

> [T]he accused, individually, collectively, and through the instrumentality of Farben, with the commission of War Crimes and Crimes against Humanity . . . participated in the enslavement and

61. *Id.* at 101–02.
62. *Id.* at 141.
63. *Id.* at 146.
64. *Id.* at 70.
65. *Id.*
66. MANCHESTER, *supra* note 19, at 790–92 (victims received $750 or even less or $0 when the funds ran out).
67. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 93 (quoting the *Farben* Indictment para. 18, VII TWC 19).

> deportation to slave [labor] of the civilian population of territory under the belligerent occupation or otherwise controlled by Germany; the enslavement of concentration camp inmates, including Germans; and the use of prisoners of war in war operations and work having a direct relation to war operations. It was further alleged that enslaved persons were mistreated, [terrorized], tortured and murdered.[68]

Farben was a chemical company that made everything from Bayer Aspirin, to Agfa photography chemicals, to the poison used in the Nazi gas chambers—Zyklon-B.[69] At the request of the S.S., Farben-controlled Degesch, which manufactured Zyklon-B, removed the warning odor that alerted humans to the presence of the lethal gas.[70] As Joseph Borkin explains in his book *The Crime and Punishment of I.G. Farben*, "For five and a half years, Hitler's tanks, trucks, and planes were propelled by I.G. [Farben]'s gasoline, their wheels made of I.G.'s rubber."[71] Attorney Belle Mayer Zeck, who worked on the *Farben* prosecution, once described the defendant Farben directors as "men who looked like businessmen, talked like businessmen, and were really murderers."[72]

Farben had privately owned parts of the Auschwitz concentration camp known as Monowitz or Auschwitz III.[73] At Monowitz, "IG took over responsibility for food and health care—a distinction of singular irrelevance to most prisoners because the provision of both was as criminally inadequate as anything supplied by the [Nazi] state."[74] Evidence at the *Farben* Tribunal showed, among other things, that

> [t]he construction of the [Farben] Auschwitz plant began in 1941. In October of that year, 1,300 concentration camp inmates were employed. In a report from the nineteenth construction conference, held on 30th June, 1942, reference was made for the first time to the employment of forced [labor] other than from the concentration camp.[75]

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68. *Id.* 4–5.
69. *Id.* at 12, 23.
70. JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 123 (1978).
71. *Id.* at 2.
72. Belle Mayer Zeck, *Subsequent Nuremberg Proceedings, Case #6, The* I.G. Farben *Case — Oral History*, U.S. HOLOCAUST MEMORIAL MUSEUM (1996), https://www.ushmm.org/wlc/en/media_oi.php?ModuleId=10007077&MediaId=5586 (last visited Nov. 4, 2016).
73. BORKIN, *supra* note 70, at 152 ("[T]he court found that I.G. Auschwitz and Fuerstengrube, a nearby I.G. coal mine where slave labor was used, were wholly private protects.").
74. JEFFREYS, *supra* note 29, at 310.
75. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 26.

Farben paid the S.S. for concentration camp laborers (four deutsche marks for skilled laborers, three marks for unskilled labor, and one-and-a-half marks for child labor).[76] None of this money went to the workers themselves.[77] "In 1942, according to Farben figures, their slave employment rose to [twenty-two thousand]; in 1943 to [fifty-eight thousand]; and by 1945 to well over [one hundred thousand]."[78] And in the horror that was work under the Nazi regime, those slaves who could no longer work at Farben were subject to execution:

> The plight of the concentration camp inmates[] was that of extreme hardship and suffering. With inadequate food and clothing, large numbers of them were unable to stand the heavy [labor] [at the Farben Auschwitz factory]. Many of those who became too ill or weak to work were transferred by the S.S. to Birkenau and exterminated in the gas chambers.[79]

Failed attempts to escape from Farben's Auschwitz factory also resulted in death.[80] As former Nazi prisoner Dr. Robert Elie Waitz said, "The final aim was unmistakable: the dehumanization and eventual extermination of the prisoners employed in the I.G. [Farben] plant at Auschwitz. I heard an S.S. officer in Monowitz saying to the prisoners, 'You are all condemned to die, but the execution of your sentence will take a little while.'"[81] Diarmuid Jeffreys, in his book *Hell's Cartel*, notes, "[T]he Jews' time in Monowitz . . . was necessarily brief because it was part of a carefully planned process of extermination through labor."[82] Nuremberg Prosecutor Josiah DuBois estimated that "from Camp I alone Farben employed altogether more than [three-hundred thousand] slaves—though not at one time. Some [two-hundred thousand] died on the job or were sent to their deaths . . . ."[83]

As Joseph Borkin explains in his book,

> By adopting the theory and practice of Nazi morality, [I.G. Farben] was able to depart from the conventional economics of slavery in which slaves are traditionally treated as capital equipment to be

76. BORKIN, *supra* note 70, at 117.
77. *Id.*
78. DUBOIS, *supra* note 37, at 50.
79. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 26.
80. BORKIN, *supra* note 70, at 113 ("[A]lthough escape seemed hopeless, attempts were made every day. The result was several hangings a week.").
81. *Id.* at 143 (quoting Dr. Robert Elie Waitz).
82. JEFFREYS, *supra* note 29, at 314.
83. DUBOIS, *supra* note 37, at 220–21.

> maintained and serviced for optimum use and depreciated over a normal life span. Instead, I.G. reduced slave labor to a consumable raw material, a human ore from which the mineral of life was systematically extracted.[84]

Among the many mistreatments Farben subjected slaves in its control to were medical experiments. The *Farben* Tribunal records contained stories from doctors at Auschwitz, including a Dr. Weber who said, "Officially the I.G. [Farben] would like to remain in ignorance of the experiments on human beings . . . ."[85] As Diarmuid Jeffreys explains in *Hell's Cartel*, next to Auschwitz (three kilometers away) was Birkenau, where the "Angel of Death," Josef Mengele, conducted medical experiments on twins.[86] "Some had organs removed, others were castrated, blinded, or deliberately infected with fatal diseases in order to test prototype serums and drugs—many of which were supplied by the IG's Bayer pharmaceutical division."[87] Indeed, Farben was paying Dr. Mengele for the Bayer drug experiments on concentration camp inmates.[88]

Many slaves who were not murdered through gas chambers, hangings, or guns simply died of being worked to death. "From the bare records available, [three hundred thousand] concentration camp workers passed through I.G. Auschwitz of whom at least [twenty-five thousand] were worked to death."[89] A British prisoner of war who ended up at Auschwitz reported, "The beatings, the constant brutality. It was all around you. I would see about six or seven people killed every day or drop dead where they worked."[90] The *Farben* Tribunal judgment concluded that

> [t]he use of concentration camp [labor] and forced foreign workers at Auschwitz with the initiative displayed by the officials of Farben in the procurement and utilization of such [labor], is a crime against humanity and, to the extent that non-German nationals were

84. BORKIN, *supra* note 70, at 126.
85. DUBOIS, *supra* note 37, at 210 (quoting Dr. Weber).
86. JEFFREYS, *supra* note 29, at 327.
87. *Id.*
88. *Id.* at 328 ("As [Farben manager] Wilhelm Mann said in a letter to an SS contact at Auschwitz, 'I have enclosed the first check. Dr. Mengele's experiments should, as we both agreed, be pursued. Heil Hitler.'").
89. BORKIN, *supra* note 70, at 127.
90. JEFFREYS, *supra* note 29, at 278 (quoting P.O.W. Denis Avey).

> involved, also a war crime, to which the slave [labor] programme [sic] of the Reich will not warrant the defence [sic] of necessity.[91]

The *Farben* Tribunal also concluded, "The use of prisoners of war in coal mines in the manner and under the conditions disclosed by this record, [is] a violation of the regulations of the Geneva Convention and, therefore, a war crime."[92] In the end, in the *Farben* Tribunal at Nuremberg, "[Farben executive Carl] Krauch and four others of the accused were found guilty of the charges alleging the employment of prisoners of war, forced [labor] and concentration camp inmates in illegal work and under inhuman conditions."[93]

Ten of the Farben directors were found not guilty on all charges. Those who were convicted got prison sentences ranging from eight years to eighteen months. This result left a bad taste in the mouth of some of the men involved in the prosecution of Farben. Prosecutor Dubois complained bitterly that these sentences were "[l]ight enough to please a chicken thief . . . ."[94] After the tribunal had rendered its final decision, Judge Hebert wrote his dissent and sent it to be included in the trial record.[95] Among other conclusions, Judge Hebert stated of Farben:

> Utilization of slave labor in Farben was approved as a matter of corporate policy. To permit the corporate instrumentality to be used as a cloak to insulate the principal corporate officers who authorized this course of action is, in my opinion, without any sound precedent under the most elementary concepts of criminal law.[96]

The records from the industrialist tribunals at Nuremberg show that corporations can be horrid abusers of slave labor. The trials also show the uphill battle to hold corporate actors responsible, but that guilty convictions are possible in the hands of willing prosecutors and capable courts.

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91. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 25, at 53.
92. *Id.* at 54.
93. *Id.* at 2.
94. JEFFREYS, *supra* note 29, at 398–99.
95. DUBOIS, *supra* note 37, at 348.
96. *Id.* (quoting Judge Hebert).

II. POST-WORLD-WAR-II APPROACHES TO SLAVERY AND CORPORATIONS UNDER INTERNATIONAL LAW

The good news is there is an ever-expanding international consensus that slavery is wrong. Indeed, "[v]irtually all societies have abolished chattel slavery—buying and selling persons as legally recognized property."[97] The U.N. Universal Declaration of Human Rights of 1948, which was adopted after strong advocacy by First Lady Eleanor Roosevelt, contains a prohibition against slavery.[98] The United States voted in favor of the declaration at the United Nations.[99] The declaration is non-binding, through over the years it has become largely recognized as part of the principles of customary international law.[100] In 1956, the United Nations passed the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[101] In 1967, the United States became a signatory to the Supplementary Convention.[102] Article 7(a) of the Supplementary Convention provides, "'Slavery' means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and 'slave' means a person in such condition or status."[103] Child slavery is a crime prohibited under international law.[104]

The bad news is that, despite these international laws barring slavery, modern forms of slavery "include various types of involuntary servitude, debt bondage, forced labor, and most forms of government-imposed involuntary labor. Modern slavery perpetrators use force, fraud, or coercion against their victims, often compelling work through

97. Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 ABA J. LAB. & EMP. L. 1, 4 (2015) (internal citation omitted).

98. G.A. Res. 217A (III), U.N. Doc. A/819, at 71 (1948).

99. United Nations Bibliographic Information System, *A/RES/217(III)[A]*, UNBISNET.UN.ORG, http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~!909326~!0&ri=1&aspect=power&menu=search&source=~!horizon (last visited Nov. 4, 2016).

100. United Nations, *Human Rights Law*, UN.ORG, http://www.un.org/en/sections/universal-declaration/human-rights-law (last visited Nov. 4, 2016).

101. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3.

102. 18 U.S.T. 3201 (1967).

103. Supplementary Convention on the Abolition of Slavery, *supra* note 101, at 226 U.N.T.S. 3.

104. International [Labor] Organization Convention No. 182 on the Worst Forms of Child [Labor], 1999, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C182; International [Labor] Organization Convention No. 138 on the Minimum Age for Admission to Employment, 1973, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138.

use of physical violence or threats of violence directed at victims or their loved ones."[105]

And the fragile political will that drove prosecution of the industrialists for their use of slave labor has never really been replicated since World War II. Instead, in the past dozen years, the United Nations, through various pronouncements, has urged corporate actors to respect human rights, including the prohibitions on slavery. For example, the United Nations in 2003 published *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, which said,

> States have the primary responsibility to promote, secure the fulfilment [sic] of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment [sic] of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.[106]

Another norm established by the United Nations for transnational corporations is that they

> shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory [labor], hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.[107]

Additionally, the U.N. norms forbid the use of slave labor by corporations, stating that corporations "shall not use forced or compulsory [labor] as forbidden by the relevant international

105. Weiss, *supra* note 97, at 4.

106. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, United Nations, Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Fifty-Fifth Session Agenda Item 4 Economic, Social and Cultural Rights E/CN.4/Sub.2/2003/12/Rev.2 at 4 (Aug. 26, 2003), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement.

107. *Id.*

instruments and national legislation as well as international human rights and humanitarian law."[108]

Then, in 2011, Professor John Ruggie, who served as the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, articulated a new set of Guiding Principles to govern corporations vis-à-vis human rights protections.[109] As the Ruggie principles state, "[t]hese Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."[110] Like the U.N. norms from 2003, the Ruggie principles urged that "[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[111] As Professor Marley S. Weiss explains, under the Ruggie principles, states have the duty

> to enact and enforce laws that vindicate human rights by prohibiting trafficking and forced labor. Businesses must "respect" domestic and international laws. States and businesses both share the "duty to remedy" violations—states must provide victims access to legal remedies, and businesses must assure remedial action is taken for known human rights violations.[112]

The Ruggie principles are a step in the right direction, but are clearly not enough for those who have already been victimized by corporations.[113] The Ruggie principles have been criticized by

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108. *Id.*

109. Special Representative of the Secretary-General on the Issue of Human Rights and Transnat'l Corps. and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 13, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

110. *Id.* at 6.

111. *Id.* at 13.

112. Weiss, *supra* note 97, at 22–23 (internal citations omitted).

113. Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871, 922 (2012).

> [T]he Guiding Principles represent the first time that the issue of business and human rights has had the imprimatur of the U.N. . . . [T]his is quite a significant milestone. . . . [T]he Human Rights Council[] . . . has established a working group whose mandate includes promoting and disseminating the Guiding Principles[.]

Id. (quoting Human Rights Council Res., Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4 (Jul. 6, 2011), *available at* https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement).

Professor John H. Knox for being far too lenient on corporate actors: "[T]here is no basis for excluding corporations from the scope of general legal obligations on states to protect against harm to human rights from private actors. It would be nonsensical, for example, to exclude corporations from the scope of the state duty to suppress slavery."[114] Similarly, Professor Robert C. Blitt states that they fall short in two aspects: "First . . . the principles do not aspire to create binding international law or impose obligations on [Transnational Corporations]. . . . [Second,] the Guiding Principles do not offer a plug-and-play 'tool kit' for identifying corporate human rights responsibilities."[115] Or, as Professor Jena Martin Amerson explains, the Ruggie principles leave a great deal of work unfinished:

> [W]hile Ruggie's work is transformational, it is still incomplete. The Guiding Principles are significant, but they are nonbinding. Victims of human rights abuses who lack the means of redress in their domestic sphere are still largely unable to turn to international law in order to hold [transnational corporations] accountable for their role in the abuse. This can lead to significant human rights abuses left unchecked, particularly in weak governance zones, where the State itself either perpetrates the abuse or is unwilling to stop the aggressor. . . . [T]he Principles were more of the same as previous frameworks, relying on businesses to self-monitor in order to achieve benefits for affected communities.[116]

As Marley S. Weiss states, multinational corporations should take care to avoid participating in forced labor regardless of what local laws may technically outlaw:

> [T]ransnational businesses should comply with international anti-trafficking standards, even if domestic laws in the country of business operations do not incorporate expressly and fully

114. John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations* (Aug. 16, 2011) (Wake Forest Univ. Legal Studies Paper No. 1916664) (on file with the Social Science Research Network & Wake Forest University School of Law) at 9, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916664. *See also* Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48 TEX. INT'L L.J. 33, 56–57 (Fall 2012) ("While recent U.N. activity may have bestowed a patina of authoritativeness on the [Special Representative of the Secretary-General]'s Guiding Principles, these principles remain—at least for the present time—non-binding.").

115. Blitt, *supra* note 114, at 43.

116. Amerson, *supra* note 113, at 874–76, 915–16 (citing Marcy Murnighan, *Human Rights: A Moral and Material Business Concern*, THE MURNINGHAN POST (June 30, 2011), http://www.murninghanpost.com/2011/06/30/human-rights-a-moral-and-material-business-concern).

> international anti-trafficking standards. In light of the transnational focus . . . and domestic laws implementing these and other international instruments, anti-trafficking and forced labor prohibitions likely apply to all businesses and their international value and supply chains.[117]

III. SLAVERY IS STILL KNOCKING ON THE SUPREME COURT'S DOOR

Unfortunately but predictably, hortatory exhortations from the United Nations have not stopped the corporate use of slaves in the modern day. Exhibit number one of this failure is the *Nestlé U.S.A.* case that was recently pending at the U.S. Supreme Court.

The petition for certiorari in the 2015–2016 Supreme Court term in a case called *Nestlé U.S.A. v. Doe* is evidence that slavery is still a current conundrum.[118] The case arose when several "John Does" from Côte d'Ivoire, Africa, sued Nestlé U.S.A. for aiding and abetting their enslavement as children in cacao farms where it sources raw materials for use in its chocolate.[119] (The case was originally captioned *Doe v. Nestlé U.S.A.*) The *Nestlé U.S.A.* suit started about a decade ago and, as it wound its way through the legal system, Nestlé U.S.A. made a variety of legal arguments about the Alien Tort Statute and why it should not apply to Nestlé U.S.A. and its business practices before this case landed at the Supreme Court's doorstep.[120] Fortunately for these plaintiffs, and for future human rights plaintiffs, the Supreme Court denied certiorari in the case.[121] If the Supreme Court had taken the case and agreed with Nestlé U.S.A., then the arguments Nestlé U.S.A. made could have insulated all multinational corporations from answering for human rights abuses in U.S. courts.

This is not the first time that Nestlé U.S.A. has been accused of using child slaves in its supply chain. Indeed, Nestlé U.S.A and other chocolatiers were accused of sourcing chocolate from farms using slaves in the 1990s as well.[122] At that time, Congress came very close to slapping Food and Drug Administration (FDA) labels on food to inform consumers of whether the chocolate had been produced with slave

117. Weiss, *supra* note 97, at 21 (internal citations omitted).
118. John Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016).
119. *Id.* at 1016.
120. Defs.' Mot. to Dismiss 4–9, Dec. 5, 2005, No. CV-05-5133-SVW.
121. *Doe*, 766 F.3d at 1028–29.
122. Brian O'Keefe, *Inside Big Chocolate's Labor Problem*, FORTUNE (March 1, 2016), http://fortune.com/big-chocolate-child-labor.

labor.[123] To head off this legislation, the industry agreed to self-regulate and wean itself off of slave labor.[124] This does not appear to have happened as several large candy companies are back in court, several courts actually, standing accused of continuing to use forced child labor.[125] In 2014, Hershey's had an institutional investor use its rights of inspection under Delaware's General Corporation Law Section 220 to get more information about its use of slave labor in its supply chain.[126] And in September 2015, Nestlé U.S.A., Hershey's, and Mars were sued for not letting customers know that their chocolate may have been produced with slave labor.[127] These customer suits have been dismissed because, under the relevant California laws,[128] the companies were not under a duty to disclose the use of slave labor at point of sale.[129] For example, in *McCoy v. Nestlé U.S.A., Inc.*, the district court concluded,

> The fact that major international corporations source ingredients for their products from supply chains involving slavery and the worst forms of child labor raises significant ethical questions. The issue before this Court, however, is whether California law requires corporations to inform customers of that fact on their product packaging and point of sale advertising. Every court to consider the issue has held that it does not. This Court agrees.[130]

123. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 107-76, 115 Stat. 704 (2001).

124. Payson Ctr. for Int'l Dev. & Tech. Transfer Tulane University, *Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cocoa Sector in Côte d'Ivoire and Ghana*, FOURTH ANN. REP. (Sept. 30, 2010).

125. O'Keefe, *supra* note 122.

126. La. Mun. Police Emp. Ret. Sys. v. Hershey Co., Civ. Action No. 7996-ML (Del. Ch. Mar. 18, 2014), *available at* http://www.law.du.edu/documents/corporate-governance/disclosure/lampers/hershey-ruling.pdf.

127. Alan Goforth, *Mars Uses Different Approach as Nestle, but Also Wins Dismissal of Forced Labor Lawsuit*, LEGAL NEWSLINE (Mar. 22, 2016, 2:29 PM), http://legalnewsline.com/stories/510701162-mars-uses-different-approach-as-nestle-but-also-wins-dismissal-of-forced-labor-lawsuit ("Candy maker Mars Inc. is not required to disclose possible supplier violations of forced and child labor law violations on packaging at the point of sale, the U.S. District Court for the Northern District of California recently ruled . . . in *Hodsdon v. Mars* . . . .").

128. California's Unfair Competition Law (UCL), CAL. BUS. & PROF. CODE §§ 17200–17210; False Advertising Law (FAL), CAL. BUS. & PROF. CODE §§ 17500–17509; Consumers Legal Remedies Act (CLRA), CAL. CIV. CODE §§ 1750–1784.

129. Forshee, *supra* note 9 ("California federal judge ruled last week that The Hershey Co. and Nestle USA Inc. do not have to disclose on their chocolate wrappers that ingredients may have been harvested on farms using child labor.").

130. No. 15-CV-04451-JCS, 2016 WL 1213904, at *1 (N.D. Cal. Mar. 29, 2016) (order granting motion to dismiss, issued concurrently with Dana v. Hershey Co., No. 15-CV-04453-JCS (N.D. Cal.)); *see also* Hodsdon v. Mars, Inc., No. 15-CV-04450-RS, 2016 WL 627383, at *1 (N.D. Cal. Feb. 17,

But by far, the most troubling suit alleging the use of slave labor is the one previously mentioned brought against Nestlé U.S.A. by John Does who claim to be the formerly enslaved children in the company's supply chain of raw materials for chocolate in *Doe v. Nestlé U.S.A.*[131] In the Ninth Circuit, Nestlé U.S.A. tried to have the John Does' suit dismissed.[132] If one thinks the horrors visited on the World War II slaves have never been repeated, the evidence from the *Nestlé U.S.A.* case provides for some sobering reading. The Ninth Circuit refused to dismiss the case.[133] As the Ninth Circuit described the plight of the plaintiffs:

> The plaintiffs in this case are three victims of child slavery. They were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers. They were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured. Plaintiff John Doe II witnessed guards cut open the feet of children who attempted to escape, and John Doe III knew that the guards forced failed escapees to drink urine.[134]

The questions raised in the *Nestlé U.S.A., Inc. v. Doe* certiorari petition at the Supreme Court were the following:

> (1) Whether a defendant is subject to suit under the Alien Tort Statute for aiding and abetting another person's alleged violation of the law of nations based on allegations that the defendant intended to pursue a legitimate business objective while knowing (but not intending) that the objective could be advanced by the other person's violation of international law; (2) . . . whether a proposed application of the Alien Tort Statute would be impermissibly

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2016) (order granting motion to dismiss), appeal docketed, No. 16-15444 (9th Cir. Mar. 16, 2016). The court stated:

> The terrible reality of labor practices in the cocoa fields of Côte d'Ivoire notwithstanding, the FAL, UCL, and CLRA do not require the disclosure Hodsdon seeks. While Hodsdon has shown he has standing to bring these claims, the FAL does not provide the relief he requests, the claim accordingly may not proceed. Because Mars has no duty to disclose this information at the point of sale, Hodsdon's claims under the CLRA and the "unlawful" and "fraudulent" prongs of the UCL similarly may not advance.

Id.

131. John Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1016 (9th Cir. 2014).
132. *Id.* at 1013.
133. *Id.* at 1016.
134. *Id.* at 1017.

> extraterritorial under *Kiobel v. Royal Dutch Petroleum Co.*; and (3) whether there is a well-defined international-law consensus that corporations are subject to liability for violations of the law of nations.[135]

At the Supreme Court, Nestlé U.S.A. tried to build on a case that excused Shell (also known as Royal Dutch Petroleum) from a human rights case called *Kiobel*[136] in 2013. In *Kiobel*, the Supreme Court decided that the Alien Tort Statute did not apply to foreign-cubed fact scenarios where there was a foreign defendant and a foreign plaintiff, and the underlying events took place in a foreign location.[137] The Supreme Court in *Kiobel* left the door open for suits that "touch and concern" the United States.[138] In its certiorari petition, Nestlé U.S.A., an American defendant, essentially argued that foreign-squared fact scenarios (where a foreign plaintiff sues an American company for events in a foreign land) should also be excused from suit.[139] Nestlé U.S.A.'s lawyers made extraordinarily broad arguments. They also argued that no corporations can be held liable for violating international law (also known as the law of nations).[140] If this line of argument had been successful, it could have freed every corporation from worrying about suit in American courts for human rights abuses abroad, no matter how heinous—including child slavery. The risk of excusing corporations from such liability was averted in Nestlé U.S.A.'s case, but remains a live risk to be revived in future litigation since the current trend is to make it harder for victims to litigate their cases in U.S. courts. In an added bit of absurdity, at the very same time that Nestlé U.S.A. was asking the Supreme Court to dismiss it from the suit by ex-child slaves in the chocolate harvest, Nestlé U.S.A. admitted slavery was elsewhere in its seafood supply chain.[141]

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135. *Nestlé U.S.A., Inc. v. Doe Petition for Certiorari Denied on January 11, 2016*, SCOTUSBLOG (2016), http://www.scotusblog.com/case-files/cases/nestle-u-s-a-inc-v-doe.

136. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

137. *Id.* at 1669.

138. *Id.* (Alito, J., dissenting).

139. Pet. for a Writ of Cert., Nestlé U.S.A., Inc., Archer-Daniels-Midland Co., & Cargill, Inc. v. Doe (Sept. 18, 2015), *available at* http://www.scotusblog.com/wp-content/uploads/2015/11/Doe-v.-Nestle-Cert.-Petition-final.pdf.

140. *Id.* at 4.

141. Martha Mendoza, *Nestlé Admits Slavery and Coercion Used in Catching Its Seafood: Global Audit by the Food Giant Finds Abuse of Workers Who Catch Seafood from Thailand*, CBC NEWS (Nov. 23, 2015, 12:44 PM ET), http://www.cbc.ca/news/business/nestle-seafood-thailand-1.3331127; *see also* Oliver Nieburg, *Hershey and Nestlé Cocoa Slave Labor Lawsuits Dismissed*, CONFECTIONERY NEWS (Mar. 31, 2016), http://www.confectionerynews.com/Manufacturers/Hershey-and-Nestle-cocoa-slave-labor-lawsuits-dismissed ("Hershey, Nestlé, and Mars have acknowledged cocoa in its supply chains may be procured by slave labor and the worst forms of child labor.").

The troubling thing is that *Kiobel*, which let Shell of the hook for human rights abuses in Nigeria, was decided 9-0,[142] and another case from 2014 called *Daimler*,[143] which excused the car company from a suit for human rights abuses during Argentina's Dirty War, was also unanimous against the plaintiffs. Fortunately, the denial of certiorari in *Nestlé U.S.A., Inc. v. Doe* allows the case to continue to be litigated in the federal courts below. But even so, the plaintiffs are likely to face an uphill climb of proving definitively that the events in Côte d'Ivoire touch and concern the United States, or that Nestlé U.S.A. had the sufficient *mens rea* to aid and abet the plaintiffs' enslavement.

Since criminal prosecution of corporate actors for aiding and abetting slavery is disturbingly rare, over the past few decades in the United States, human rights lawyers have tried to hold corporations accountable for their human rights abuses, including their use of slave labor, by using civil law to get monetary damages and settlements.[144] Now, corporations are facing suits in the United States for aiding and abetting human rights abuses abroad, including the illegal use of slaves. These are not criminal cases brought by the state. Rather, these are civil cases brought by the victims and their representatives accusing the firms of various torts. The pathway into the courthouse is the Alien Tort Statute. This is what the John Does in the *Nestlé U.S.A.* case are using to sue the company for their past enslavement.[145] But this effort has been an uphill slog in the United States with the Supreme Court erecting obstacle after obstacle to allowing suits against corporations in cases like *Kiobel* and *Daimler*, as discussed above.[146] The ability to get a corporation in court under the Alien Tort Statute requires

142. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

143. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

144. There have been criminal cases under the Trafficking Victims Protection Act such as United States v. Navarrete, 333 Fed. App'x 488 (11th Cir. 2009) (unreported case affirming conviction of Navarrete) and United States v. Soto, 242 Fed. App'x 984 (5th Cir. 2007) (unreported case affirming conviction of Soto). And there have been some trials of corporate entities in cases involving human trafficking such as Nunag-Tanedo v. East Baton Rouge Parish Sch. Bd., No. 10-01172-AG-MLG, 2010 WL 4771448 (C.D. Cal. Oct. 27, 2010) (finding liability for labor recruiter Universal Placement International and awarding $4.5 million in damages to the class of Filipino teachers), *aff'd* 632 Fed. App'x 896 (9th Cir. 2015) and David v. Signal Int'l, LLC, No. 08-CV-1220, 2015 WL 1281018 (E.D. La. Mar. 20, 2015) (in a civil case a jury awarded $14.1 million in compensatory and punitive damages to five guest workers who were subjected to involuntary servitude).

145. *See* Sharon Samuel, *Human Trafficking, Corporate Liability, and the Courts*, HUMANRIGHTSFIRST.ORG (Mar. 26, 2016), http://www.humanrightsfirst.org/blog/human-trafficking-corporate-liability-and-courts ("Nestle . . . has also been involved in a lawsuit brought by alleged trafficking victims under the Alien Tort Statute. . . . The Supreme Court declined to hear the case, and thus . . . Nestle, ADM and Cargill must now return to the Circuit Court . . . .").

146. *Kiobel*, 133 S. Ct. 1659; *Daimler*, 134 S. Ct. 746.

plaintiffs to thread an incredibly narrow needle.[147] As the Second Circuit held in a recent case,

> Together, *Kiobel I* [from the Second Circuit in 2010] and *Kiobel II* [from the Supreme Court] put such aggrieved potential plaintiffs in a very small box: The two decisions read cumulatively provide that plaintiffs can bring [Alien Tort Statute] suits against only natural persons, and perhaps non-corporate entities, based on conduct that occurs at least in part within (or otherwise sufficiently touches and concerns) the territory of the United States. At a time when large corporations are often among the more important actors on the world stage, and where actions and their effects frequently cross international frontiers, *Kiobel I* and *Kiobel II* may work together to prevent foreign plaintiffs from having their day in court in a far greater proportion of tort cases than Congress envisioned when, centuries ago, it passed the [Alien Tort Statute].[148]

Although it should be noted that the Second Circuit's approach is not universally embraced by other circuits, the path for plaintiffs elsewhere in U.S. courts is similarly fraught.

Despite the narrowing path for possible viable civil cases that aggrieved human rights plaintiffs can bring, there are some cases that are moving forward. Among these cases against corporations for human rights abuses under the Alien Tort Statute is a case against CACI International Inc. for participating in torture at Abu Ghraib.[149] In another case, where Ford and IBM were accused of aiding and abetting Apartheid in South Africa, liability has been, so far, avoided under the Alien Tort Statute.[150] This case was appealed to the U.S. Supreme Court,

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147. *See In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 155–56 (2d Cir. 2015), *as amended* (Dec. 17, 2015) ("*Kiobel I* and *Kiobel II* may work in tandem to narrow federal courts' jurisdiction under the [Alien Tort Statute] more than what we understand Congress may have intended in passing the statute.").

148. *Id.* at 156.

149. *Abu Ghraib Survivors Appeal Immunity for Corporation Involved in Torture*, CTR. FOR CONST. RTS. (Sept. 22, 2015), http://ccrjustice.org/home/press-center/press-releases/abu-ghraib-survivors-appeal-immunity-corporation-involved-torture.

> *Al Shimari v. CACI International Inc*. was filed in 2008 on behalf of four Iraqi men who were tortured at the so-called "hard site" at Abu Ghraib. The men were subjected to electric shocks, sexual violence, forced nudity, broken bones, and deprivation of oxygen, food, and water. . . . The [Alien Tort Statute] . . . has been used to hold both individuals and corporations accountable for serious human rights violations.

Id.

150. *In re* S. African Apartheid Litig., 56 F. Supp. 3d 331, 339 (S.D.N.Y. 2014), *aff'd sub nom.* Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015), *cert. denied sub nom.* Ntsebeza v. Ford Motor Co., 84 USLW 3454 (U.S. June 20, 2016).

where certiorari was denied.[151] In a third case, so-called comfort women are suing corporations, among other defendants, for their sexual slavery during World War II.[152] Eventually, the Supreme Court must answer the questions left open by *Kiobel*, *Daimler*, and the certiorari denial in *Nestlé U.S.A.*: namely, if and when corporations can be held liable in the United States for their role in aiding and abetting slavery abroad.

IV. CLOSING SLAVERY LOOPHOLES BY STATUTE

The legal landscape for addressing corporate use of slave labor can appear bleak: providing former slaves little legal recourse under civil law (and customers little transparency about whether the products they buy were produced by a supply chain tainted with slavery). Since a comprehensive international treaty that places criminal liability on corporations for human rights abuses is unlikely in the short term, reformers have set their sights on more modest goals under domestic laws in several nations. But there are recent positive developments in the effort to wean corporations from using slave labor. In 2016, President Obama signed a law that denies food producers the major American market for their goods if they were

151. Tyler Giannini & Susan Farbstein, *Clinic Files Petition for Certiorari in Final Attempt to Hold Two U.S. Corporations Accountable for Supporting Apartheid*, HARVARD HUMAN RIGHTS PROGRAM BLOG (Feb. 10, 2016), http://hrp.law.harvard.edu/alien-tort-statute/clinic-files-petition-for-certiorari-in-final-attempt-to-hold-two-u-s-corporations-accountable-for-supporting-apartheid.

> The case, which involves the actions of U.S. corporations IBM and Ford, raises questions about whether a defendant's knowledge is sufficient to establish aiding and abetting liability, or whether specific intent or motive must also be demonstrated. It also concerns how closely a human rights violation must be connected to the United States in order to sue under the Alien Tort Statute [], and whether corporations can be held liable at all under the [statute]. The petition argues . . . IBM and Ford purposefully facilitated violations of international law by enabling the "denationalization and violent suppression, including extrajudicial killings, of black South Africans living under the apartheid regime."

Id.

152. He Nam You v. Japan, No. CV C 15-03257 WHA, 2015 WL 8648569, at *1 (N.D. Cal. Dec. 14, 2015).

> [Korean] Plaintiffs allege that they were abducted by the Japanese government during the Second World War, forced into servitude, and exploited as sex slaves for the benefit of Japanese soldiers at "comfort stations" in Japan. . . . plaintiffs allege . . . [defendants] aided and abetted the Japanese military in committing the atrocities that form the basis of their claims, both by facilitating plaintiffs' transportation throughout the campaign and by providing general support to the war effort.

Id.

produced with forced labor.[153] *The Guardian* offered a summary of this new import law:

> The Tariff Act of 1930, which gave Customs and Border Protection the authority to seize shipments where forced [labor] was suspected and block further imports . . . has been used only [thirty-nine] times in all, largely because of two words: "consumptive demand"[—]if there was not sufficient supply to meet domestic demand, imports were allowed regardless of how they were produced. The Trade Facilitation and Trade Enforcement Act signed by Obama on Wednesday eliminated that language, allowing stiffer enforcement.[154]

The law also allows U.S. Customs to initiate an investigation into the use of slaves in the food supply if it receives a petition from anyone showing "reasonably but not conclusively" that particular food imports were made using forced labor.[155]

Another small glimmer of hope comes from a few legislatures who want more transparency around slavery in the supply chain of goods that consumers buy. Starting with a law in California called the Transparency in Supply Chains Act, certain multinationals must disclose aspects of their supply chain.[156] As the Attorney General of California noted under the disclosure law, covered companies must post on their webpages:

> 1. Verification. At a minimum, disclose to what extent, if any, that the retail seller or manufacturer engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. . . . 2. Audits. At a minimum, disclose to what extent, if

153. *See* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125 § 910, 2016 U.S.C.C.A.N. (130 Stat. 122) 122, 239–40 (eliminating the "consumptive demand exception to [the] prohibition on importation of goods made with convict labor, forced labor, or indentured labor").

154. *Obama Revives Anti-Slavery Law to Target Thailand's Seafood Exports*, GUARDIAN (Feb. 25, 2016), http://www.theguardian.com/world/2016/feb/26/obama-revives-anti-slavery-law-to-target-thailands-seafood-exports.

155. *Id.*

156. Katie Kinloch, *Transparency in Supply Chains Reporting—Where Are We Now?*, LEXOLOGY (Apr. 4, 2016), http://www.lexology.com/library/detail.aspx?g=4bb0fce7-c01f-449f-ade3-0d5b4a98c73b.

> Businesses in California have been required to report on supply chain transparency since 2012. No enforcement actions have yet been brought against non-compliant businesses. Crucially, though, there are indications that modern slavery, forced [labor], and human trafficking issues are rising up the public agenda and play an increasing part in consumer decision-making.

Id.

> any, that the retail seller or manufacturer conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. . . . 3. Certification. At a minimum, disclose to what extent, if any, that the retail seller or manufacturer 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. Internal Accountability. At a minimum, disclose to what extent, if any, that the retail seller or manufacturer maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking. 5. Training. At a minimum, disclose to what extent, if any, that the retail seller or manufacturer 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. Even Companies Taking No Actions Must Comply[.][157]

This California law applies to companies doing business in California that have annual worldwide gross receipts of more than one hundred million dollars and that identify themselves as retail sellers or manufacturers on their California tax returns.[158] As discussed earlier in this piece, though, the California courts have read this law as not requiring point of sale disclosures about supply chains to consumers.

This California law inspired the United Kingdom to adopt a similar transparency standard that gives the public more information about supply chains on company webpages.[159]

Meanwhile at the European Parliament, Rapporteur Ignazio Corrao in the *Motion for a European Parliament Resolution on Corporate*

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157. KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE, at 3–4 (2015), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

158. *Id.*

159. Kinloch, *supra* note 156.

> 31 March 2016 was a key date in the life of the Modern Slavery Act 2015. Businesses whose financial year ended on that date are the first who are required to publish an annual supply chain transparency statement. The legal requirement . . . [is] every business trading in the UK which has a turnover of at least £36m must publish an annual statement setting out the steps it has taken to ensure that modern slavery and human trafficking are not taking place in its business or supply chains. The statement must be approved by the board and signed by a director (or equivalent) and published on the business's website, with a prominent link on its homepage.

Id.

Liability for Serious Human Rights Abuses in Third Countries stated in 2016,

> [The Committee] [c]alls on the Council and the Commission to act in accordance with Article 83 of the TFEU [Treaty on the Functioning of the European Union], in order to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension pertaining to serious human right violations in third countries committed by corporations, given the nature and impact of such offences and the special need to combat them on a common basis . . . .[160]

If adopted, Europe could be the first multinational region of the world to meaningfully tackle corporate culpability for slavery. A few European nations have already acted. For example, in the Netherlands, human trafficking, which includes slave labor, is criminalized for corporations.[161] And in France, as this Article is being written, there is legislation[162] pending that would hold companies liable for their use of slavery in their supply chains.[163] If the French legislation becomes law and is successful, it could be the next chapter in holding corporations liable for their use of slavery.[164] But these laws are so new that judging their efficacy is premature.

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160. Rapporteur Ignazio Corrao, European Parliament, Committee on Foreign Affairs, *Draft Report on Corporate Liability for Serious Human Rights Abuses in Third Countries* (Mar. 18, 2016), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-578.743%2B01%2BDOC%2BPDF%2BV0%2F%2FEN.

161. *See* Criminal Code, Serious Offences against Personal Liberty Section 273f (Netherlands) (Jan. 10, 2012), *available at* http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf (criminalizing human trafficking); Criminal Code Section 51 (Netherlands) (Jan. 10, 2012) (stating "Criminal offences can be committed by natural persons and legal persons").

162. Petite Loi du 30 Mars 2015 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'ordre [Proposed Law of March 30, 2015, on the Due Diligence of Parent Companies and Business Supply Chains], 2015, *available at* http://www.assemblee-nationale.fr/14/ta/ta0501.asp.

163. *See* David McClintock, *French Parliament Volleys Back to the Senate (Again) the Supply Chain Due Diligence Law 'Devoir de Vigilance*,' SUSTAINABLE PROCUREMENT VIEWS (Mar. 29, 2016), http://blogspot.ecovadis.com/2016/03/french-assembly-volleys-back-to-senate.html ("The [French legislation] seeks to force parent-companies and groups to ensure their suppliers and subsidiaries—located anywhere in the world—adhere to basic responsible business practices. It would make parent companies liable for human rights violations . . . of their suppliers or subsidiaries.").

164. Roel Nieuwenkamp, *Legislation on Responsible Business Conduct [RBC] Must Reinforce the Wheel, Not Reinvent It*, OECD INSIGHTS BLOG (Apr. 15, 2015), http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it.

> Under the law French companies employing [five thousand] employees or more domestically or [ten thousand] employees or more internationally would be

V. CONCLUSION

As Amnesty International explains, in "[fifteen] years no country has put a company on trial after [a non-governmental organization] brought evidence of human rights related crimes abroad. The inability and unwillingness of governments to meet their obligations under international law and stand up to rights-abusing companies sends the message that they are too powerful to prosecute[.]"[165] The civilized world needs to return to the moral clarity it held ever so briefly during the Nuremberg trials of the industrialists to hold present-day corporate actors accountable for their exploitation of slave labor through criminal sanctions. And barring that, civil courts need to be far more accommodating to victims of slavery who have been harmed by corporate actors and seek monetary redress.

So far, the U.S. Supreme Court is building barriers instead of paths forward to holding corporations accountable for their human rights abuses. This should change, and the recent vacancy on the U.S. Supreme Court is a chance for the Court to modify course and adopt a jurisprudence that places accountability more at the feet of the firms that are causing human rights harms. We need to do better. This requires more accountability in the western world, including in U.S. courts. Instead of letting corporations off the hook, U.S. courts should state, as President Harry Truman once did, "The buck stops here."[166] Slavery will only end when the cost of using slaves far outstrips the short-term profit that slavery provides corporations. One way to make slavery more expensive is to raise the cost through allowing victims of slavery the ability to litigate their abuse in U.S. courts. Slavery will stop when the businessman looking over a ledger thinks the high price of slavery is not worth it.

> responsible for developing and publishing due diligence plans for human rights, and environmental and social risks. Failure to do so could result in fines of up to [ten] million euros.

Id.

165. Amnesty International, Press Release, *Corporate Crime: New Principles Will Help Governments and Law Enforcement Tackle Corporate Abuse*, AMNESTY.ORG (Oct. 6, 2016), https://www.amnesty.org/en/press-releases/2016/10/corporate-crime-new-principles-will-help-governments-and-law-enforcement-tackle-corporate-abuse (quoting Seema Joshi, Head of Business and Human Rights at Amnesty International).

166. HARRY S. TRUMAN LIBRARY & MUSEUM, *Truman: The Buck Stops Here*, TRUMANLIBRARY.ORG, https://www.trumanlibrary.org/buckstop.htm (last visited Nov. 4, 2016).