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GLOBAL AGENCY FOR HUMAN RIGHTS: A CORPORATE DUTY?

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CORRUPTION: A DRIVING FORCE FOR CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS

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Abstract

Corruption undermines the legitimacy of institutions and processes, the rule of law, and eventually, the state.¹ Over time, the U.N. Human Rights Council has gradually paid increasing attention to the negative impact of corruption on human rights and made recommendations to states on how to combat corruption.² Corruption is an international phenomenon, prevalent in all countries regardless of economic or political systems, and it requires international attention from all stakeholders.³ The subset of a population that feels the effects of corruption are those disadvantaged groups, who typically have less opportunities to participate in the implementation of public policies and lack the resources to defend themselves when their rights have been violated.

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¹ *Corruption and Human Rights: OHCHR and Good Governance*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/good-governance/corruption-and-human-rights#:~:text=OHCHR%20promotes%20a%20human%20rights,and%20efforts%20at%20all%20levels>, (last visited Nov. 29, 2022) [hereinafter *Corruption and Human Rights*].

² *Id.*

³ *Id.*

In recent years, transnational corporations have taken steps to ensure that human rights are protected and accounted for within the spheres of their business operations.⁴ More recently, there has been a growing link between corruption and human rights violations in the business world. Global efforts to combat the effect of corruption on human rights have expanded significantly in the past few years. In the area of human rights, the United Nations has done so through the Global Compact, and thereafter through the adoption of the U.N. Guiding Principles on Business and Human Rights.⁵ Many corporations are incorporating the Guiding Principles in their corporate policies to ensure that human rights violations are minimized.⁶ In the area of corruption, transnational corporations are implementing a variety of compliance programs to ensure that their employees and business partners are not offering or receiving bribes from local and foreign government officials to gain business advantage.

The missing link in the discussion is the realization that high levels of corruption in a country affect the realization of human rights, even when affected stakeholders are taking meaningful action towards human rights protections.⁷ Specifically, a handful of corporations focus their attention on avoiding the receipt and payment of bribes, with little understanding of the impact of corruption on their effort to respect human rights while conducting business. This article will focus on the effect of corruption on the realization of human rights, including the impact of corporate business activities on human rights.

⁴ HEVINA S. DASHWOOD, *THE RISE OF GLOBAL CORPORATE SOCIAL RESPONSIBILITY: MINING AND THE SPREAD OF GLOBAL NORMS* 191 (Aseem Prakash ed., 2012).

⁵ See The U.N. Working Group on Business and Human Rights, *The U.N. Guiding Principles on Business and Human Rights: An Introduction* (2011), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf; see also Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, at 3.

⁶ See Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, 14 *J. HUM. RTS.* 162, 162-64 (2015).

⁷ *Corruption and Human Rights*, *supra* note 1.

*I. Problem Statement, Methodology and Observational Standpoint**A. Problem Statement*

This paper seeks to contribute to the ongoing debate around the responsibility of transnational corporations for the respect and promotion of human rights. Policy-oriented jurisprudence starts with stating the problem as characterized by a discrepancy between predicted and desired future decisions regarding the conflicting claims on any issue in society. Within the context of policy-oriented jurisprudence, the problem needs to be defined precisely and comprehensively, using all available sources of knowledge. Within the context of the business and human rights debate, the problem can, for example, be posed as: are transnational corporations liable under international law for human rights abuses, or is corruption a driving force for corporate human rights violations?

In addressing this problem, Lasswell and McDougal placed the individual at the center of their methodology since human dignity only directly applies to the individual.⁸ Given this perspective, the problem could be delimited as: should individuals and be entitled to remedies under international law when their rights have been violated by the corrupt activities of transnational corporations and host governments? Placing the individual at the center of the problem could help the decision maker to create a viable solution to the problem.

A thorough understanding of corruption, transnational business activities, and their effects on human rights may bring more challenges and a new perspective into focus. It may reveal the gaps that exist among the actors in this field – corporations, individuals, indigenous peoples, and international organizations about how or whether corruption impacts business activities, which in turn could impact human rights and to what extent.

⁸ See Siegfried Wiessner, *Non-State Actors and Their Impact on International Human Rights Law*, AALS Workshop on Human Rights, Oct. 26-28, 2000 (outline available with the *Intercultural Human Rights Law Review*).

*B. Methodology: The New Haven School / Policy-Oriented
Jurisprudence*

The New Haven School recognizes that today's societal problem regarding the impact of corruption on human rights is complex and multi-faceted. Due to this complexity, diplomats, scholars, and NGOs agree that there is no simple solution. Human rights abuse within the context of corporate business activities are as old as history itself. The traditional concept of international law must be expanded to include the societal problem created by transnational corporations through their business activities and how they affect the human rights of individuals in the society.

The Policy-Oriented Jurisprudence approach to solving problems, be they domestic or international, is to employ five intellectual tasks that allow a rational, interdisciplinary analysis which will be employed in this thesis. Section one focuses on the abstract, methodology, problem statement, and observational standpoint. Section two delimits the problem and addresses the concept of corruption and human rights. Section three identifies the conflicting claims, claimants, their perspectives, and their bases of power; it will focus on how the various actors perceive the effects of corruption on human rights and to what extent. Section four focuses on the analysis of past trends and their various conditioning factors. Analysis in terms of trends focuses on how similar situations relating to corruption, business, and human rights were resolved in the past. Section five seeks to project patterns into the future and predict what future decisions will be regarding the impact of corruption where human rights protection and preservation are concerned. Section six seeks to invent and evaluate new alternatives for more effective promotion of clarified policies regarding the impact of corruption on human rights protection. This section clarifies community policies concerning decisions and to state what future decisions should be. Such clarifications include both the description of the policies sought by others and the recommendation for solving the problem posed by the corruption within the context of human rights protection.

C. *Clarification of Observational Standpoint*

Policy-oriented jurisprudence makes it mandatory for the problem-solver to identify their observational standpoint before determining what social issue needs to be resolved. Within the realm of policy-oriented jurisprudence, both the reference to and content of the term “law” will vary depending on whether the standpoint is that of a member of the elite or the rank-and-file, and whether the observer is a member of the system observed, is an outsider, or is on the margin.⁹ Perception of the same issue may differ depending on the race, culture, class, gender, age, or crisis experienced by the observer.¹⁰ No standpoint is more authentic than another, but the author/scholar must be sensitive to the variations in perception and must try to disengage himself or herself, select one perspective that is appropriate to the problem, and carefully and consistently maintain it.¹¹

As a student and a professional who is tenacious and passionate about contributing to the field of international law, specifically international human rights law, my observational standpoint incorporates the components of corporate accountability for supply chain activities and critical legal discourse. In 2015, I began my LL.M. degree program in Intercultural Human Rights Law at St. Thomas University in Miami, Florida. I took a class on Human Rights and Business. This class exposed me to human rights issues as it relates to business activities within global supply chains. At the end of that class, I quickly realized my desire to explore this field of law more in-depth.

A few years after graduation, I started a corporate career as a compliance and ethics professional. My current role is both regulatory and operational. I specifically engage in ensuring that Third Party Intermediaries, including government officials, are screened, and vetted to ensure that they are not, nor have they been, involved in corrupt practices that include offering or receipt of bribes. My role is centered around helping the firm analyze and decide carefully with which entities it can lawfully conduct business, considering the various anti-corruption regulations, including the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act.

⁹ *See id.*

¹⁰ *See generally id.*

¹¹ *See generally id.*

In the course of my legal career, I have observed that corruption plays a key role in corporate human rights related abuses. Specifically, women, children, and migrant workers suffer from corporate human rights abuses relating to wage gaps, non-transparency in recruitment processes, high recruitment fees, and inhumane working conditions due to corporate practices by corporate partners and third-party intermediaries.

II. Delimitation of the Problem

A. Business and Corruption

During the last twenty years there has been a significant change in the way the world views corruption within the sphere of international trade and international business. The United States began criminalizing corruption in 1977, following the enactment of the Foreign Corrupt Practices Act. The FCPA had very little impact on international business for several years after. It is noteworthy that the United States Department of Justice barely prosecuted for corruption under the Act.¹² At that time, no other country criminalized bribery or corruption committed internationally.¹³ International development organizations at the time were reluctant to address corruption and treated it as a matter of internal concerns of individual states.¹⁴ In the mid-1900s, stakeholders began to gain a better understanding of the impact of corruption on the global economy and its contribution to poverty.¹⁵

The garment industry within global supply chains has received the most attention from the public and stakeholders. Garment factories in developing countries often expose workers to unhealthy and unsafe work environments. Specifically, due to unsafe factory building conditions and excessive overtime. It is imperative to note that many of these factories are found in countries where corruption is prevalent.

¹² See Lucinda A. Low et al., *The Demand Side of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 *FORDHAM L. REV.* 563, 564 (2015).

¹³ *Id.*

¹⁴ See Philip M. Nichols, *The Good Bribe*, 49 *U.C. DAVIS L. REV.* 647, 661-62 (2015).

¹⁵ See *id.* at 661-663.

In 2013, the Rana Plaza, which housed five different garment factories, collapsed. The incident claimed over 1,000 lives and injured about 2,500 more.¹⁶ The incident brought to light the unhealthy working conditions that workers in the garment industry are often subjected to.¹⁷ The garment industry in Bangladesh accounts for some of the lowest wages in the world.¹⁸ Many girls and women are exposed to unsafe working conditions with high incidents of work-related accidents and death.¹⁹ The majority of the factory buildings in Bangladesh do not appear to meet the standards required by construction and building regulations.²⁰

Due to the prevailing corrupt environment in Bangladesh, many of the auditors hired to look into labor practices within garment factories are easily manipulated by the workers of factory management who have been coached on how to respond to auditors' questions and potentially bribe them in exchange for favorable audit reports.²¹ Since certain health and safety issues are outside the purview of factory compliance audits, auditors rely on the actions of local government officials for those matters, including, issuing building permits and conducting safety inspections which are easily influenced by acts of corruption and bribery.²² Corruption enabled the Rana Plaza building to violate building codes by increasing its heights by several stories which were not in compliance with building regulations.²³ In Pakistan, factory fires are a norm. Local government building inspectors

¹⁶ *The Rana Plaza Accident and its aftermath*, INT'L LABOUR ORG.: TOPICS, EMPLOYMENT INJURY INSURANCE AND PROTECTION, https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm (last visited March 22, 2023).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Steve Henn, *Factory Audits and Safety Don't Always Go Hand in Hand*, NPR (May 1, 2013, 10:26 AM), <https://www.npr.org/2013/05/01/180103898/foreign-factory-audits-profitable-but-flawed-business>.

²² See *id.*; see also Kaunain Rahman, *Nine Years Since the Rana Plaza Tragedy: Has Fast Fashion Ironed out their Deadly Corruption Problems?*, TRANSPARENCY INT'L, (April 21, 2022), <https://www.transparency.org/en/blog/rana-plaza-tragedy-fast-fashion-deadly-corruption-problems>.

²³ Rahman, *supra* note 22.

casually accept bribes in exchange for ignoring violations of health and building safety regulations.²⁴

The examples analyzed above reflect the impact of corruption on business activities. Placing corruption at the center of the business and human rights debate indicates that corruption cannot be ignored as one of the driving forces of corporate related human rights abuse.

III. Conflicting Claims, Claimants, Perspectives and Bases of Power

A. Individuals

Individuals claim that they are entitled to the respect and protection of their rights through legal mechanisms under international law and domestic regulations.²⁵ They claim that they have the right to access remedies when their rights have been violated through the business activities of transnational corporations.²⁶ The individuals' bases of power lie within their rights as provided for in the Universal Declaration of Human Rights which states are obligated to protect and promote.²⁷

B. Supply Chain Workers / Garment Factory Workers

Supply chain workers claim that they are entitled to reparations and compensation over the loss of their livelihood. More importantly, the families of the victims who died when the Rana Plaza collapsed claim that they are entitled to compensation for the loss of their loved ones, some of whom left behind children and other dependents who need care. Their bases of power lie in the skills they provide to transnational corporations which in turn benefits the economy.

²⁴ Declan Walsh & Steven Greenhouse, *Inspectors Certified Pakistani Factory as Safe Before Disaster*, N.Y. TIMES (Sep. 19, 2012), <https://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html>.

²⁵ See G.A. Res. 217 (III), at A (Dec 10, 1948).

²⁶ See *id.*

²⁷ See *Do Victims of Corporate Human Rights Violations get Justice?*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (Dec. 6, 2020), <https://fra.europa.eu/en/news/2020/do-victims-corporate-human-rights-violations-get-justice>.

C. Nation-States

States claim that they have the sovereign right to not ratify treaties or be signatories to international instruments. They claim that states have no obligation under international law to protect the human rights of foreign nationals. States claim that they have no jurisdiction to determine what sort of remedies and reparations supply chain corporations should make available to victims of human rights abuse.²⁸

D. Transnational Corporations

Transnational corporations claim that they are unable to protect human rights and provide remedies to human rights victims under international law because they are not subjects of international law. They claim that the protection of human rights is within the purview of states and should remain so. Their bases of power lie in their economic abilities and the positive impact they have on the world economy.²⁹

E. Claims that Transnational Corporations are Not Subjects of International Law

The issue as to whether transnational corporations are liable under international law for human rights abuse is widely contested. According to the traditional theories of international law, the only subjects of international law are nation-states. Other entities, including individuals and businesses, interact with international law through their governments and agencies.³⁰ In 1949, the International Court of Justice indicated that an entity that international law treats as a person, which means an entity or something that is recognized by international law, can enforce international law by bringing international legal

²⁸ See generally Jennifer Zerk, *Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies*, at 1, 14. (2013) (A report prepared for the Office of the U.N. High Commissioner for Human Rights).

²⁹ Prakash Loungani & Assaf Razin, *How Beneficial is Foreign Direct Investments for Developing Countries?* INT'L MONETARY FUND (June 2001), <https://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm>.

³⁰ See generally Philip C. Jessup, *Use of International Law*, Five Lectures Delivered at the University of Michigan (Feb. 27, 28, Mar. 3, 6, and 7, 1958).

claims for reparations for injuries, also on behalf of its employees.³¹ A corporation may have a human rights claim to an effective remedy for violations of fundamental human rights granted by the constitution or by law before competent national tribunals.³²

IV. Past Trends in Decisions and their Conditioning Factors

A. Domestic Legislations Combating Corruption

1. U.S. Foreign Corrupt Practices Act

The U.S. Foreign Corrupt Practices Act was enacted in 1977 to make it unlawful for certain classes of persons and entities to make payments to foreign government officials for the purpose of gaining or retaining business advantage.³³ The anti-bribery provisions of the FCPA make it unlawful to utilize mail or any means of instrumentality of interstate commerce corruptly to promote an offer, payment, promise to pay, or authorization of money or anything of value to any person while knowing that some or all of the money will be offered directly or indirectly to a foreign government official to gain an unfair business advantage.³⁴

Under the FCPA, an exception exists for facilitation payments which are payments for procedural government action.³⁵ For example, with respect to payments made to customs officials to expedite customs clearance in certain jurisdictions, U.S. persons who are listed on the U.S. Stock Exchange are also required under the FCPA to meet its accounting provisions. Corporations are required to keep books and records accurately and maintain an adequate system of internal accounting controls.

³¹ This was stated for the United Nations itself, *Reparation for Injuries suffered in the service of the United Nations*, Advisory Op., 11 April 1949, I.C.J. Rep. 1949, at 174.

³² Universal Declaration of Human Rights, art. 8, G.A. Res. 217 (III)(Dec. 10, 1948).

³³ *Foreign Corrupt Practices Act An Overview*, THE U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last visited Jan. 3, 2023).

³⁴ *Id.*

³⁵ Emily N. Strauss, *Easing Out the Facilitation of Payment Exception*, 93 B.U. L. REV. 235, 241 (2010).

If a corporate employee, corporate agent, or partner pays a bribe or receives a bribe, this is deemed a violation of the FCPA. For such a corporation to avoid prosecution to obtain a favorable settlement with the Department of Justice, it must be able to show that it has adopted a risk-based and effective compliance program and is willing to cooperate with the DOJ's investigation of the alleged bribe.³⁶ Due to the well-established regulation and increased enforcement on bribery and corruption related conducts, corporations have in turn doubled down on compliance around bribery and corruption.

2. *U.K. Bribery Act*

The U.K Bribery Act of 2010 reflects the most drastic revision of anti-corruption and bribery laws in the United Kingdom in over one hundred years before its inception.³⁷ The U.K. Bribery Act covers not only bribes paid to foreign governments, but its provisions were expanded to include commercial bribes paid to private individuals and entities.³⁸ Under the UKBA, there are no exceptions for facilitation payments as provided for under the U.S. FCPA.³⁹ Corporate entities are covered under “adequate procedures defense,” which allows corporations to avoid liability by showing that they had an effective compliance program at the time of the bribe payment.⁴⁰

3. *The French Sapin II Law*

The French Sapin II Law was enacted to establish an anti-corruption device in France, by making it mandatory for corporations to get involved in the fight against corruption or risk financial sanctions.⁴¹ The law applies to corporations headquartered in France, whose parent companies are situated in France and employ more than

³⁶ *Id.* at 243-248.

³⁷ Gordon Belch, *An Analysis of the Efficacy of the Bribery Act 2010*, 5 ABERDEEN STUDENT L. REV. 134 (2010).

³⁸ Mark F. Mendelson & Matt McCahearty, *The U.K Bribery Act and Its Impact in U.S. and Multinational Businesses*, PAUL WEISS, at 1 (2010), <https://www.paul-weiss.com/media/110677/ukbriberyactr10withcover.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Sapin II Law: The New French Legal Framework for the Fights Against Corruption*, DENTONS, at 1 (Feb. 2017).

500 workers. The law does not apply to subsidiaries in foreign countries.⁴²

The French Sapin II Law requires French corporations to have an effective anti-corruption compliance program that includes a code of conduct which must clearly state and illustrate the acts of corruption and how they can be averted.⁴³ Risk mapping and assessment procedures are required as part of the program to assess and map the level of corruption risk that corporate partners, including suppliers, pose to the business.⁴⁴

B. The United Nations Approach at Regulating Transnational Corruption

1. The U.N. Global Compact

The Global Compact is an initiative intended to spread and increase the positive effects of economic development through corporate policies.⁴⁵ The main objective of this forum was to make businesses part of the solution to meet the challenges posed by globalization.⁴⁶ Kofi Annan appointed John Ruggie as U.N. Secretary-General and chief advisor for strategic planning in 1997.⁴⁷ Ruggie immediately began taking steps to seal the relationship between the United Nations and businesses. Kofi Annan announced the Global Compact⁴⁸ in 1999 encouraging businesses to join the U.N. in giving a human face to the world market.⁴⁹ The operating phase of the Global Compact was

⁴² *Id.* at 2.

⁴³ *Id.*

⁴⁴ *Id.* at 3.

⁴⁵ Oliver F. Williams, *The UN Global Compact: The Challenge and the Promise*, 14(4) *BUS. ETHICS Q.* 755 (2004).

⁴⁶ *See id.*

⁴⁷ *Annan appoints Ruggie special representatives on rights, corporations' businesses*, U.N. NEWS, (July 29, 2005) <https://news.un.org/en/story/2005/07/146922-annan-appoints-ruggie-special-representative-rights-corporations-businesses>.

⁴⁸ The United Nations Global Compact includes 10 principles, focused on human rights, labor rights, concern for the environment and corruption. The principles are taken directly from commitments made by states at the United Nations.

⁴⁹ Press Release, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb 1, 1999).

launched in New York in July 2000.⁵⁰ The Global Compact consists of ten principles.⁵¹ The principles were derived from a combination of the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development, and the UN Convention Against Corruption.⁵²

The U.N. Global Compact was intended as a voluntary initiative. Corporations that have subscribed to the principles are encouraged to issue a statement of support and must disclose on their annual report the progress they are making on internalizing and incorporating the principles within their business operations. Corporations are required to submit a summary of the report on the Global Compact website within a two-year period. Failure to submit said report will result in being removed from the list of participants. The overall purpose of the Global Compact is to accentuate the moral purpose of business.⁵³

The U.N. Global Compact became the biggest CSR initiative in the world with 21,892 participants including businesses, labor associations, and organizations from more than 162 countries.⁵⁴ The Global Compact has been able to educate supply chain businesses about their responsibilities to do no harm, although it is voluntary and not legally binding.⁵⁵ Its voluntary nature has led to its lack of success in holding supply chain businesses accountable for human rights abuses.

⁵⁰ *UN Global Compact*, U.N. PROCUREMENT DIVISION, <https://www.un.org/Depts/ptd/about-us/un-global-compact#:~:text=The%20Global%20Compact's%20operational%20phase,York%20on%2026%20July%202000> (last visited Apr. 5, 2023).

⁵¹ John M. Kline, Odenthal Ludger & UNCTAD, *The Social Responsibility of Transnational Corporations*, at 27 U.N. Doc. UNCTAD/ITE/IIT/Misc.21 (Oct. 1999), https://unctad.org/system/files/official-document/poiteiitm21_en.pdf.

⁵² *See id.*

⁵³ *See Williams supra* note 45; *see also* U.N. GLOBAL COMPACT, <https://unglobalcompact.org/> (last visited Apr. 5, 2023).

⁵⁴ *Id.*

⁵⁵ U.N. Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, at 1, U.N. Doc. HR/PUB/12/02 (2012).

2. *The UN Guiding Principles on Human Rights and Business*

The United Nations Human Rights Council unanimously endorsed the Guiding Principles on Human Rights and Business in 2011,⁵⁶ developed by John Ruggie⁵⁷ of Harvard Kennedy School, the former Special Representative of the U.N. Secretary General for Business and Human Rights.⁵⁸ The framework of the Guiding Principles assigns responsibility to states and also to businesses with the goal of preventing and addressing human rights-related issues.⁵⁹

In 2008, the United Nations had already endorsed the ‘Protect, Respect, and Remedy Framework’ for business and human rights,⁶⁰ developed by Professor Ruggie after three years of extensive research and discussion with businesses, society, government, and victims of business-related human rights violations.⁶¹ The framework recognizes the duty of states to protect the rights of everyone within their territory to be free from corporate abuses.⁶² This means that states must have effective regulations in place to prevent and address business-related human rights abuses and ensure access to an effective remedy when those rights have been violated.⁶³

C. Other Intergovernmental Organizations’ Approach to Regulating Transnational Corporations

1. The OECD Guidelines for Multinational Enterprises

The OECD Guidelines were adopted as an instrument to promote a more responsible corporate approach to human rights among

⁵⁶ *Supra* note 5.

⁵⁷ See U.N. Human Rights Office of the High Commissioner, *Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises*, <https://www.ohchr.org/en/issues/business/pages/srsgtranscorpindex.aspx> (last visited Apr. 5, 2023).

⁵⁸ *Id.*

⁵⁹ THE DANISH INSTITUTE OF HUMAN RIGHTS, *The UN Guiding Principles on Business and Human Rights*, <https://globalnaps.org/ungp/> (last visited Apr. 5, 2023).

⁶⁰ *Supra* note 5.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

multinational corporations and regulate their business activities in developing countries.⁶⁴ The Guidelines are a set of voluntary recommendations by governments to multinational enterprises with business activities in more than one country.⁶⁵ They are based on principles and standards of best practices and are known to be the first international voluntary instrument on corporate responsibility and conduct.⁶⁶ The Guidelines specifically set out standards of behavior to encourage responsible business conduct; for example, in the area of human rights, environment, anti-corruption, and transparency.

A group of NGOs have criticized the OECD Guidelines for being restrictive, questioning whether the Guidelines have truly earned their place as a leading corporate social responsibility instrument at the international level. The criticizing NGOs believe that the provisions of the Guidelines are narrow in scope and unjustified based on the revised text of the Guidelines, and that the exclusion of supply chain corporations makes it inadequate and discriminatory.⁶⁷ Many scholars and NGOs have criticized the Guidelines for being voluntary in nature and lacking enforcement mechanisms.⁶⁸ The Guidelines are viewed as ineffective and have little to no impact on global supply chain activities.⁶⁹

⁶⁴ See generally OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, <https://www.oecd.org/daf/inv/mne/ue-diligence-guidance-for-responsible-business-conduct.htm> (last visited Apr. 12, 2023).

⁶⁵ Guellec, D. & S. Wunsch-Vincent, *Policy Responses to the Economic Crisis: Investing in Innovation for Long-Term Growth*, No. 159, OECD DIGITAL ECON. PAPERS, (June 2009).

⁶⁶ Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 3 HANSE L. REV. 1, 71, 77-78 (Sept. 2008).

⁶⁷ See Statement on the Scope of the Guidelines and the Investment Nexus, OECD (2003), <https://www.oecd.org/daf/inv/mne/scopeoftheguidelinesandtheinvestment-nexus.htm>.

⁶⁸ See Cornelia Heydenreich et al., *OECD Watch: The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility*, at 1 (Dec. 2004).

⁶⁹ *Id.*

2. *ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*

The International Labor Organization adopted the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977. The purpose of the Tripartite Declaration is to provide guidance to multinational enterprises about how they can contribute through their business activities to a realization of good working conditions, equal opportunity, equal pay, and safety in the workplace.⁷⁰

One notable criticism of the Tripartite Declaration reflects in its application. Its general application and implementation have been weak and have so far not been further clarified or adjusted to address the missing points and issues necessary to address a full range of multinational business scenarios.

D. Conclusion

So far, this article has addressed the concept of corruption, human rights and the legal mechanisms that currently exist for combating corruption within the sphere of corporate business activities. It is imperative to note that within the context of the business and human rights debate, efforts are currently focused on the respect for human rights within the context of the U.N. Guiding Principles on Human Rights and Business. The efforts to combat corruption have been focused on developments in the criminal and anti-bribery regulations that are intended to push corporations towards adopting compliance programs to ensure that corporate partners and third parties, including, suppliers, distributors, and external workers are not offering or paying bribes to government officials and other commercial partners.

These sections touched on various attempts at regulating corporations as it concerns their influence on the enjoyment of human rights. This includes the U.N. Guiding Principles and Human Rights and Business, the OECD Guidelines for Multinational Enterprises, and

⁷⁰ *What is the ILO MNE Declaration?*, INT'L LABOUR ORG., https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm (last visited Apr. 3, 2022).

the ILO Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy. Due to the growing recognition that corruption impacts the enjoyment of fundamental human rights, it is imperative to tee up the concept of business, corruption, and human rights altogether. Bringing the three concepts under one umbrella will further promote the ability and responsibility of corporations towards the improvements of their performance on human rights obligations in the areas where they conduct business. In addition, discussing the three concepts together will give more attention to the need to combat corruption within the context of human rights and corporate business activities.

V. Projection of Future Trends

A. Incorporating Human Rights Obligations in the U.S. FCPA and the U.K. Bribery Act

So far, it is established that there are no sufficient and binding regulations that hold transnational corporations accountable for human rights violations. If the international community is to address the problem of corporate human rights violations and deal with the effects of corruption on the enjoyment of human rights, a binding regulation tailored at curbing corporations and human rights abuse is needed.

The adoption of a regulation modeled after the United States Foreign Corrupt Practices Act could fill the enforcement gap that is missing in the area of accountability for corporate human rights abuse. Adopting such legislation could put the duty of human rights enforcement in the hands of prosecutors within the judiciary of various national governments, rather than leaving it at the helm of various members of civil society, including the media, who have no legal jurisdiction or avenues to afford remedy to corporate human rights victims.

The U.S. FCPA is clear in its enforcement of corruption in that it clearly states what constitutes a violation of the statute and how to avoid violations. It imposes civil and criminal violation on U.S. corporations, including their partners, directors, and officers.⁷¹ Under the

⁷¹ Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. 1359, 1402 (2021).

FCPA, impacted victims of bribery and corruption are afforded a remedy at the conviction stage, as opposed to leaving the onus to victims to sue independently when their rights have been violated by corporations.⁷² Based on these factors and the many other features of the FCPA, it would be beneficial to have a regulation modeled after the FCPA. Alternatively, to start the conversation around enforcing human rights alongside corruption, the U.S. could adjust the FCPA to feature concrete human rights requirements and obligations for U.S. corporations since the FCPA applies to U.S. corporations with subsidiaries outside the United States. This could gradually motivate other national governments to adopt the same model and will nudge transnational corporations towards doing more and become more accountable for human rights while conducting business.

VI. Appraisal, Alternatives, and Recommendations

A. Appraisal

In attempting to combine corporate responsibility to fight corruption and respect human rights as it relates to their business conduct, a new responsibility arises for corporations to rise to the occasion of combating corruption alongside their responsibility to respect human rights. This new responsibility suggests that not only does corruption have a negative effect on the enjoyment of human rights, but that combating corruption is necessary for transnational corporations to respect human rights in areas where they conduct business.

In spite of increased efforts and enforcement around anti-bribery and anti-corruption legislations, corruption has remained a problem for corporations. It appears that compliance efforts in the area of preventing corrupt practices in business are lacking or simply not sufficient. For example, some corporations simply avoid conducting business in jurisdictions where corruption is prevalent according to the corruption perception index.⁷³ Taking this approach may exacerbate the problem as corporations that have less concerns for human rights

⁷² *Id.*

⁷³ See Guenter Degitz et al., *AlixPartners annual global anticorruption survey 2016*, ALIXPARTNERS (Apr. 2016), https://www.alixpartners.com/media/17068/ap_global_anticorruption_survey_executive_summary_apr_2016.pdf.

may increase their business activities in those jurisdictions, leaving no room for accountability in those areas.⁷⁴

For there to be adequate enforcement of corruption, corporations should look into ensuring that their compliance programs are effectively and adequately addressing corruption risks in areas where they conduct business. This could be achieved by conducting risk assessment in countries where they conduct business and ensure that risks are mitigated once identified.

It is imperative to note that many corporations are reactive when it comes to addressing corruption and corrupt practices. Hence, it remains less of a priority among other regulatory responsibilities. Corruption only receives attention from such corporations when they are confronted with a corruption or bribery investigation.⁷⁵ This further emphasizes one unique feature of the U.S. FCPA, which requires corporations to show that they have effective compliance programs that mitigate corruption and bribery risks.⁷⁶

In an effort to perform the responsibility for human rights, corporations could benefit from incorporating human rights standards and enforcement mechanisms into their existing internal policies for combating corruption. Bringing a human rights perspective into the fight against corruption brings the victims of violation on both sides to the center of the debate. Viewing the problem from the lens of human rights accountability could force corporations and respective stakeholders, including national governments, to consider the social impacts of corrupt activities and their long-term effects of the enjoyment of human rights.⁷⁷

⁷⁴ Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 397 (2010).

⁷⁵ *Anti-Bribery and Corruption Benchmark Report - 2017, Beyond Regulatory Enforcement: The Rise of Reputational Risk*, KROLL & ETHISPHERE, 2017, at 7.

⁷⁶ *Supra* note 33.

⁷⁷ David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 641 WIS. L. REV. 641, 641-94 (2017).

B. Alternatives

1. Expanding the Need to Combat Corruption to include Human Rights Responsibility

In attempting to combat corruption, the efforts should include syndicating business, corruption, and human rights due to the interconnectedness between the three. This increased responsibility should propel corporations to look beyond compliance and legal liability. It will further require corporations to proactively combat corruption, as opposed to the reactionary effort in this area. Corporations are forced to view the responsibility as a package since they will be required to combat corruption in their local communities while at the same time respecting human rights.

2. Naming and Shaming

The idea of naming and shaming is a popular strategy used to uphold human rights standards.⁷⁸ In combating corruption and their effects on human rights, transnational corporations could be challenged and forced into compliance in this area by shifting the focus of their enablers, including states that benefit from their business proceeds. Traditionally, states tend to be more vulnerable to public shaming due to their responsibility for human rights protection under international human rights instruments. The concept of sanctions has equally proven effective on states when human rights have been violated with impunity.⁷⁹ Focusing on such enablers instead of just transnational corporations could help the cause of corporate accountability for human rights.⁸⁰

⁷⁸ Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689, 689 (2008).

⁷⁹ See *The Charles Taylor Verdict: A Global Witness Briefing on a Dictator, Blood Diamonds and Timber, and Two Countries in Recovery*, GLOBAL WITNESS (April 2012).

⁸⁰ *Id.*

C. Recommendations

1. A Binding Regulation on Anti-Corruption and Human Rights

Presently, there is no binding regulation that regulates the business activities of transnational corporations, nor is there a worldwide enforcement mechanism or consensus for combating corruption. Notably, there is a growing consensus in the area of human rights obligation for corporations to have human rights obligations, but there is no legislation that addresses the need for corporations to combat corruption as part of their responsibility to respect human rights. The 2011 U.N. Guiding Principles on Human Rights and Business is not as efficient in holding corporations accountable for human rights abuse due to their voluntary nature.

Creating a combined responsibility for corporations in the area of corruption and human rights will ensure that individuals and victims of human rights violations that result from corrupt business practices have access to remedy when their rights have been violated. A binding treaty that features some level of extraterritoriality could patch the claim that states have no obligation under international human rights law to protect the human rights of foreign nationals from corporate violation.

2. Supply Chain Transparency

Transnational corporations, as part of their duties to protect human rights, should prioritize transparency in their supply chain activities. This could look like making information available to the public around the country of origin of their raw materials and finished products. Providing this information could, in the long run, create awareness about those countries and corporations that are notorious for labor and supply chain related human rights abuse.⁸¹ Making such information publicly available could help consumers make better and informed decisions to avoid or boycott products from abusive supply chains.

Notably, transnational corporations operate within different sectors of the economy and information shared could vary by sector.

⁸¹ *Supra* note 57.

For example, the garment industry could ensure transparency in their audit report by including all their tiers of suppliers, including building and factory construction companies. Since corruption and human rights violations extend beyond first-tier suppliers, human rights protection stands a better chance when transnational corporations accept the supply chain transparency as part of their responsibility to respect human rights in places where they conduct business.

3. *Responsible Recruitment and Outsourcing*

The supply chains of transnational corporations include many workers who are working to provide for their families. Many workers are often subjected to forced labor, unhealthy working conditions, and complicated recruitment processes, including high recruitment fees and the lack of legal protection in their countries of employment.⁸² The U.N. Guiding Principles are clear on recommendations to corporations around forced labor, but the application does not apply to the specific situations and challenges faced by workers in their day-to-day work life.

Transnational corporations should get more intentional about the recruitment process of their migrant and non-migrant workers. Active involvement in the process could look like conducting background checks and requiring labor certifications from third party recruiters and recruiting firms in compliance with the principles set forth in the U.N. Guiding Principles.

VII. *Conclusion*

Research by academics and civil society has shown that in comparison to anti-corruption legislation and initiatives worldwide, voluntary initiatives that attempt to implement human rights due diligence have not been effective in holding corporations accountable for human rights. Many voluntary initiatives have not delivered on set

⁸² See A. Anathalaskshmi, Liz Lee & Mei Mei Chu, 'Slavery' Found at a Malaysian Glove Factory. *Why Didn't the Auditor See It?*, REUTERS (May 19, 2021), <https://www.reuters.com/world/asia-pacific/an-audit-gave-all-clear-others-alleged-slavery-2021-05-19/> (Reuters reported in 2021 that labor audits of Brightway included 61 violations of global ethical standards and 50 violations of Malaysian labor laws.).

promises, while others have been criticized for setting low standards. The 2019 Corporate Human Rights Benchmark that accessed and ranked 200 of the largest listed corporations in high-risk sectors found that on average, those 200 companies are painting a distressing picture.⁸³ Most corporations are scoring poorly, and the U.N. Guiding Principles on Business and Human Rights are not being implemented.⁸⁴ Arguably, the adoption of the UNGPs has helped formulate the idea that corporations should respect human rights and has prompted several corporations to do so.

One of the major deficiencies of the U.N. Guiding Principles is that they are voluntary, with no enforcement mechanisms to hold supply chain corporations accountable for human rights violations. For example, in the apparel industry, workers continue to work under poor labor conditions in factories that produce for global brands. When the Rana Plaza building that housed garment factories collapsed in 2013, over 1,200 workers died, and 2,000 injured. Following the incident, the apparel brands and manufacturers worked with civil society groups to develop the Bangladesh Accord on Fire and Building Safety. The Accord is supposed to serve as a mechanism for identifying and correcting fire building safety concerns.

It is important to recall that in earlier analysis, it was established that corruption enabled the collapse of the Rana Plaza. More importantly, it is the fact that the corrupt practice found in the Rana Plaza incident was enforced and somewhat remedied as evidenced by the murder charges brought against 41 people, including the owner of the building, Sohel Rana, for their involvement in the factory collapse.⁸⁵ They were accused of corrupt practices, including signing off on building standards and forcing employees to work in the building despite knowing that the building was structurally faulty.

Business, corruption, and human rights are interrelated. Transnational corporations cannot fully uphold their duty to respect human

⁸³ Freshfields Bruckhaus Deringer, *Corporate Human Rights Benchmark 2019: result and plans for expansion*, LEXOLOGY (Dec. 10, 2019) <https://www.lexology.com/library/detail.aspx?g=10164911-eb56-4cb3-97d2-01ab0d9bf894>.

⁸⁴ *Id.*

⁸⁵ Deutsche Welle, *Bangladesh: Rana Plaza murder to resume after five years*, BUSINESS AND HUMAN RIGHTS RES. CTR., <https://www.business-humanrights.org/en/latest-news/bangladesh-rana-plaza-murder-trial-to-resume-after-five-years/> (last visited January 20, 2023).

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rights without addressing potential corrupt practices in their supply chains. While human rights stakeholders should not treat corruption as a separate issue, transnational corporations should move beyond a compliance approach to anti-bribery and anti-corruption. In combating corruption, transnational corporations should endeavor to combine their anti-corruption and human rights initiatives as part of their internal corporate policies.