



## INTERNATIONAL LABOUR HUMAN RIGHTS: SUPPLY CHAIN TRANSPARENCY

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For many multinational corporations, the ability to generate high profits and stay ahead of competitors in the modern global economy depends, in part, on their capacity to exert downward pressure on labour costs. This is often accomplished through opaque and complex supply chains, which stretch into the poorest regions of the world in search of cheap labour.<sup>1</sup> While it is undeniable that the emergence of a new global economic order and the liberalization of trade over the past few decades has led to significant economic progress for many, both in developing and developed economies, this has often been at an appalling, unseen, human cost. To a significant degree, the drive for ever-greater profits and competitive advantage accounts for the International Labour Organization's estimate that 14.2 million people are presently working in some form of forced labour related to the global economy, many of whom are forced to work in the lower echelons of corporate supply chains producing goods that those of us living in the developed world consume or use on a daily basis.<sup>2</sup>

Forced labour conditions can be found across a range of global industries, including mining, food, and

technology, among others.<sup>3</sup> Such conditions, while more prevalent in the developing world, are not, however, isolated to any specific part of the globe. Indeed, examples of forced labour activities have been uncovered in the United States, Canada, and the United Kingdom.<sup>4</sup>

In response, the issue of forced labour and the plight of its victims has been gaining increasing attention from activists, lawmakers, business leaders and journalists over the past decade. A significant amount of global attention has been focused on combating forced labour and human trafficking. However, until recently, the focus has been on preventing abuses at the source, through criminal law measures aimed at direct perpetrators, as well as on efforts to protect victims.<sup>5</sup>

While such a focus is, of course, critically important, more recently, legislators and non-governmental organizations (NGOs) have recognized the need to expand efforts to combat this scourge by focusing on a significant source of the global demand for low-cost labour - multinational corporations.<sup>6</sup> As a result, regulation around global corporate supply chain transparency and consumer awareness has been promoted as a modern tool to assist in the battle against forced labour.

The State of California took the first step in this regard by enacting legislation focused on multinational supply chain transparency. The California Transparency in

<sup>1</sup> Luz Estella Nagle, 'Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude' [2008] 26 Wis Int'l LJ 131, 139.

<sup>2</sup> *Ibid* 140; International Labour Organization, *Global Estimate of Forced Labour* (Special Action Programme to Combat Forced Labour, 2012) ch 2 <<http://www.ilo.org/sapfl/lang-en/index.htm>> accessed 12 January 2014.

<sup>3</sup> Nicola Phillips, 'Lessons from California: Why Compliance is Not Enough' *The Guardian* (London, 19 September 2013) <[www.theguardian.com/global-development-professionals-network/2013/sep/19/why-compliance-isnt-enough](http://www.theguardian.com/global-development-professionals-network/2013/sep/19/why-compliance-isnt-enough)> accessed 4 December 2013.

<sup>4</sup> See for e.g., a report on forced labour conditions discovered on citrus farms in Immokalee, Florida: John Bowe, 'Nobodies: Does Slavery Exist in America?' *The New Yorker* (New York, 21 April 2008) <[www.newyorker.com/archive/2003/04/21/030421fa\\_fact\\_bowe](http://www.newyorker.com/archive/2003/04/21/030421fa_fact_bowe)> accessed 23 January 2014; see also, a report on forced labour in the British seafood industry: George Arbuthnott, 'Trawler

Slaves: The Slaves in Peril on the Sea' *The Sunday Times Magazine* (London, 19 January 2014), 14.

<sup>5</sup> Robin Endres and Shuyin Lau Ngyuyen, 'The California Transparency in Supply Chains Act 2010: Policy Brief' (Robin Endres, 17 December 2012) <[robinendres.myefolio.com/Uploads/TISCA.pdf](http://robinendres.myefolio.com/Uploads/TISCA.pdf)> accessed 15 February 2014, 2; see also: UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000) <<http://www.refworld.org/docid/4720706c0.html>> accessed 24 April 2014; a number of UN member-states, including the U.S., Canada, U.K., and Australia have passed domestic legislation aimed at human trafficking perpetrators and their victims.

<sup>6</sup> For example, leading NGOs advocating for supply chain transparency include: Anti-Slavery International, Humanity United, Walk Free Foundation, Not For Sale, Sedex, and Verité.



Supply Chains Act of 2010<sup>7</sup> (the "California Transparency Law") came into force on January 1, 2012 as a first-in-the-world effort to combat forced labour and human trafficking through corporate supply chain disclosure requirements and consumer awareness efforts.<sup>8</sup> Following on California's lead, other jurisdictions have considered or enacted similar measures, including the U.S. federal government and the British Parliament.<sup>9</sup>

The supply chain transparency law developed in California is an important development, but some have argued that the scope and scale of the problem requires greater enforcement mechanisms and disclosure requirements if the legal regime is to have the impact it is purportedly designed to achieve. To bring about real change, legislators and business leaders are being asked to embrace transparency through concrete disclosure requirements, backed up by robust enforcement.

## SCOPE OF THE PROBLEM

In order to convince lawmakers, corporate leaders, and the general consumer public that the problem of forced labour in global supply chains is serious, widespread, and unacceptable, it is important to define the problem and outline its scope.

It is, of course, critical to recognize at the outset that the global supply chain can be a force for good. It is effective at providing significant benefits to end-users and those in the lower echelons of the supply chain. Global supply chains can, among other things, assist in

providing a wide range of low-cost products to consumers, an influx of capital to assist development in developing nations, a living wage for those in parts of the world with little alternative opportunity for economic progress, and higher profits and returns to corporate investors and employees.<sup>10</sup> In the modern global labour market, there is a continuous supply of foreign workers ready and willing to produce goods at a lower cost than the domestic labour market, and, in many instances, this is a positive development for workers in communities overseas and for the corporations downstream in the supply chain, along with the consumers who buy their products.<sup>11</sup>

However, global labour and product supply chains, containing multiple levels of subcontracting, particularly throughout the developing world, where labour laws are lax or non-existent, also provide fertile ground for forced labour conditions to arise.<sup>12</sup> It is corporate demand for ever-lower labour costs that often helps drive this dynamic.<sup>13</sup> Corporations are often immune from domestic legal accountability given the extraterritorial nature of their supplier relationships and the arm's length nature of supplier contracts and subcontracts, leading to a legal environment that permits corporate impunity.<sup>14</sup> While it is rare for a global multinational corporation to be directly involved in the use of forced labour, complicity may take on many forms, few of which are benign.<sup>15</sup>

## Defining the Problem

<sup>7</sup> California Transparency in Supply Chains Act 2010, Cal Civil Code s 1714.43, SB 657 (2012) (the "California Transparency Law").

<sup>8</sup> Pacheco (n 5) 1; see also, the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 USC s 78(m) (2010) ("Dodd-Frank"), which represents another important attempt at mandatory non-financial corporate disclosure.

<sup>9</sup> see for example, United States Business Transparency on Trafficking and Slavery Act, HR 2759 (112th); Transparency in UK Company Supply Chains (Eradication of Modern Slavery) UK Modern Slavery Act 2015, section 54.

<sup>10</sup> Debra Cohen Maryanov, 'Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain' [2010] Lewis and Clark L Rev vol 14:1, 399.

<sup>11</sup> Maryanov (n 15) 399.

<sup>12</sup> Andrew Crane, 'Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation' [2013] Academy of Management Review Vol 38 No 1, 52.

<sup>13</sup> *Ibid* 51.

<sup>14</sup> Naomi Jiyoung Bang, 'Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases' [2013] 35 Hous J Intl L 255, 257; see also: *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013) ("*Kiobel*"). The U.S. Supreme Court's decision in *Kiobel* restricted the reach of the U.S. Alien Tort Statute, 28 USC s 1350, reducing corporate litigation risk in the area of overseas human rights violations; including forced labour.

<sup>15</sup> Robin T. Byerly, 'Combating Modern Slavery: What Can Business Do?' [2012] J of Leadership & Accountability vol 9(5) 3.



In addressing this issue, one must first understand the nature of the problem. Forced labour is broadly defined by the ILO's Convention No. 29 as "all work or service which is extracted from any person under menace of penalty and for which the said person has not offered himself voluntarily."<sup>16</sup> This broad definition is intended to cover all forms of forced labour, given the varying methods employed around the world, and under different economic models.<sup>17</sup> The phrase "menace of penalty" has been interpreted to include physical violence, threats of the use of force, threats of denunciation to authorities, exploitation of a worker's immigration status, economic penalties linked to debts, or the confiscation of identity and travel papers.<sup>18</sup> The requirement that a person has "not offered himself voluntarily" is defined by a lack of consent, and, critically, initial consent to work can be vitiated if procured by deception or fraud.<sup>19</sup>

Often workers, particularly those attempting to escape poverty or other dire circumstances, will be deceived into accepting employment that purportedly pays a living wage and is undertaken freely, only to discover that instead they must work for months or years to pay off extraordinary recruitment debts.<sup>20</sup>

## Global Figures

The ILO estimates that, of the 20.9 million people around the world working under conditions of forced labour, 14.2 million are labouring in economic

activities supporting industries relevant to global supply chains.<sup>21</sup> These figures indicate that, at any given point in time, approximately three out of every thousand people on the planet are suffering in forced labour.<sup>22</sup>

Forced labour is a global issue, and no jurisdiction escapes its reach.<sup>23</sup> It is particularly high in the Asia-Pacific region, comprising over half of the total number of victims globally.<sup>24</sup> This statistic is especially troubling in light of the fact that countries such as China, India, Vietnam, and Thailand represent some of the most popular source nations for global multinational labour and product supply.<sup>25</sup>

The United States Department of Labor recently produced a list setting out 122 products or goods produced in 58 countries using forced labour, child labour, or both.<sup>26</sup> The items included on this list are as varied and common as strawberries, shrimp, soccer balls, coffee, chocolate, palm oil (an ingredient found in many household products), bricks, rubber, and cotton.<sup>27</sup> This is clearly not an isolated problem. It is a major concern in terms of its scope, longevity, and moral implications.

## SUPPLY CHAIN TRANSPARENCY LEGISLATION

In response to evolving norms, most prominently seen in the United Nations Guiding Principles on Business and Human Rights, governments are beginning to

<sup>16</sup> International Labour Organization, *Forced Labour Convention, C29* (28 June 1930); UN Expert Meeting on Trafficking in Persons, *Human Trafficking & Global Supply Chains: Background Paper* (12 November 2012, Ankara, Turkey) 5 <<http://www.ohchr.org/Documents/Issues/Trafficking/Consultation/2012/BackgroundPaper.pdf>> accessed 27 May 2014; In 1998, ILO Convention 29 was identified by the ILO as one of eight "core" Conventions, see <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_095895.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf)> accessed 12 April 2014.

<sup>17</sup> Karin Dryhurst, 'Liability Up The Supply Chain: Corporate Accountability For Labour Trafficking' [2013] *Intl L Politics* vol 45:641, 646; ILO, *The Cost of Coercion: Global Report Under the Follow Up to the ILO Declaration on Fundamental Principles and Rights at Work*, 98th Session 31 (2009) <[http://www.ilo.org/declaration/WCMS\\_106395/lang--en/index.htm](http://www.ilo.org/declaration/WCMS_106395/lang--en/index.htm)> accessed 12 March 2014.

<sup>18</sup> Dryhurst (n 22) 646.

<sup>19</sup> *Ibid.*

<sup>20</sup> Dryhurst (n 22) 647; Crane (n 17) 55.

<sup>21</sup> ILO (n 2); Johnson (n 13) 29; Johnson notes that some estimates put the figure in excess of the number of slaves transported to the west during the Atlantic slave trade; Sophia Eckert, 'The Business Transparency on Trafficking and Slavery Act: Fighting Forced Labour in Complex Global Supply Chains' [2013] *J Intl Bus L* 383, 384.

<sup>22</sup> For a regional breakdown of forced labour, see: Anti-Slavery International, *Slavery Today*, <[www.antislavery.org/english/slavery\\_today/forced\\_labour.aspx](http://www.antislavery.org/english/slavery_today/forced_labour.aspx)> accessed on 23 March 2014.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Eckert (n 29) 385.

<sup>26</sup> United States Department of Labor, *List of Goods Produced by Child or Forced Labor* (Report required by the *Trafficking Victims Protection Reauthorization Act* of 2005 and 2008) 13-21 <<http://www.dol.gov/ilab/reports/child-labor/list-of-goods/>> accessed 12 June 2014.

<sup>27</sup> *Ibid.*



recognize that to fulfil their obligations to prevent human rights abuses by corporations domiciled or operating within their territory, including for violations committed abroad, they must enact regulatory legislation, which compels corporate entities within their jurisdiction to take action to ensure they are not responsible for, or contributing to, forced labour practices throughout their global operations.<sup>28</sup>

It was out of an emerging recognition by state-actors of an obligation to take steps to prevent corporate contribution to human rights abuses, including forced labour, along with the repugnance of this particular issue that the movement toward supply chain transparency laws arose.<sup>29</sup>

### **The California Transparency in Supply Chains Act 2010**

Until the passage of the California Transparency Law, existing state, national, and international laws relating to forced labour have been centred on prosecuting direct perpetrators and the protection of victims, both of which are critical elements to an overall strategy to combat forced labour.<sup>30</sup> There was no means, however, for uncovering forced labour in global supply chains through disclosure and transparency beyond voluntary corporate self-regulation, NGO activism, and media reports. There are certainly companies that have taken a proactive approach to this issue. However, in light of the magnitude of the problem, lawmakers cannot rely exclusively on voluntary corporate policies or underfunded NGOs to oversee this critical issue.

The California Transparency Law came into effect in California on January 1, 2012. In its preamble, it recognizes the criminal nature of forced labour (referring to it as "slavery") and the fact that significant legislative efforts have been made to capture and punish perpetrators and to protect its victims.<sup>31</sup> It also acknowledges that legislative efforts to address the market for goods and products tainted by forced labour have been lacking, despite the fact that the market is a

"key impetus for these crimes."<sup>32</sup> Finally, it states that "consumers and businesses are inadvertently promoting and sanctioning these crimes" and that without available disclosures, "consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking."<sup>33</sup>

### **Which companies are affected?**

The California Transparency Law applies to companies (a) doing business in the state of California with more than \$100 million in annual worldwide gross receipts, and (b) that list either retail sales or manufacturing as their principal business activity on their corporate tax return.<sup>34</sup>

It broadly defines "doing business" to include companies that, for example, have California sales in excess of \$500,000; or have a California payroll exceeding \$50,000.<sup>35</sup>

California's size and the fact that it is the world's ninth largest economy ensures that a significant number of the world's global manufacturing and retail companies.<sup>36</sup>

### **What is required?**

A company that meets this standard must disclose its efforts to eliminate forced labour and human trafficking from its direct supply chain for tangible goods offered for sale.<sup>37</sup>

The required disclosure must be posted on the company's web site with a conspicuous and easily understood link to the required disclosure information. The disclosure must, at a minimum, disclose to what extent, if any, the business does each of the following:

- (i) Verifies product supply chains to evaluate and address the risk of human trafficking and slavery (the disclosure

<sup>28</sup> Jagers (n 26) 54.

<sup>29</sup> Endres (n 8) 2.

<sup>30</sup> *Ibid.*

<sup>31</sup> California Transparency Law (n 10) s 2(a)-(j).

<sup>32</sup> *Ibid.*

<sup>33</sup> California Transparency Law (n 10) s 2(a)-(j).

<sup>34</sup> *Ibid* s 3(a).

<sup>35</sup> *Ibid.*

<sup>36</sup> Funk (n 40) 2.

<sup>37</sup> California Transparency Law (n 10) s 2(j).



must specify if the verification was conducted by a third party or not);

- (ii) Performs supplier audits to evaluate compliance with company standards (the disclosure must specify if the verification was an independent, unannounced audit or not);
- (iii) Requires certification by direct suppliers that materials used in products comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business;
- (iv) Maintains internal accountability standards and procedures for employees or contractors that fail to meet company standards on slavery and trafficking; and
- (v) Trains relevant company employees and management on trafficking and slavery, particularly concerning the mitigation of risk within supply chains.<sup>38</sup>

The California Transparency Law is enforced by the Office of the California Attorney General (the "A.G.") and California's Franchise Tax Board. The Franchise Tax Board is required to provide the A.G.'s office with an annual list of businesses captured by the law's requirements, and the A.G.'s office is then required to review each company's disclosure to determine whether it is in compliance.<sup>39</sup>

The only remedy for non-compliance is a request by the A.G. for an injunctive order requiring the violating company to make the required disclosure. The California Transparency Law does not impose a direct financial or other penalty for non-compliance.<sup>40</sup> While this is clearly a limited enforcement tool, it is argued that an injunction, or the mere threat of an injunction, may act as a quasi-penalty by affecting the reputation

and brand of a retailer or manufacturer and therefore serve as an effective incentive for compliance.<sup>41</sup>

The California Transparency Law, of course, relies heavily on the relationship between companies and their consumers for a type of reputational risk enforcement. Regardless of one's view of the legislation, the exposure of abuses in a company's supply chain can wreak havoc on its reputation, brand image, and its bottom-line.<sup>42</sup> In fact, it was this reliance on market-based incentives, as opposed to stricter regulatory penalties, that helped the bill's proponents gain the political support needed to pass it into law.<sup>43</sup> Nevertheless, this places an undue amount of responsibility on the consumer public, with little room for effective government action.

One commentator indicated, however, that California is historically a "legislative leader" in the area of consumer and environmental protection laws, and that its adoption of a supply chain transparency law, even a limited one, will have a ripple effect.<sup>44</sup> For this reason alone, despite clear limitations, California, and the advocates responsible for its supply chain transparency legislation, are to be commended. This leadership role led to the UK adoption of broadly similar requirements in the Modern Slavery Act's Transparency in Supply Chains provision (s. 54).

In the UK, all companies with a turnover of more than 36 million doing business in the UK are now required to publish an annual statement setting out the steps they have taken to prevent slavery in their businesses and supply chains in the UK and overseas.

Although California, and now the UK, are playing a pivotal role in leading the charge to legislatively require more transparent supply chains as a means of combating forced labour, there is, as one writer argued, a "dissonance between the narrowness of its provisions and the expanse of its aspirations."<sup>45</sup>

<sup>38</sup> John Pickles and Shengjun Zhu, 'Capturing the Gains: The California Transparency in Supply Chains Act' [2013] Working Paper 15, UK Department for International Development, 3; California Transparency Law (n 10) s 3.

<sup>39</sup> California Transparency Law (n 10) s 4.

<sup>40</sup> Pickles (n 56) 4.

<sup>41</sup> *Ibid.*

<sup>42</sup> David J. Doorey, 'The Transparent Supply Chain: From Resistance to Implementation at Nike and Levi-Strauss' [2011] *J Bus Ethics* 103, 591.

<sup>43</sup> Endres (n 8) 6.

<sup>44</sup> Pacheco (n 5) 3.

<sup>45</sup> Nicola Phillips, 'The Transparency in UK Supply Chains Bill: Three Lessons' (*The Trafficking Research Project*, 28 March 2014)



## PROPOSAL FOR REFORM

There is no doubt that the California Transparency Law signifies an important breakthrough in the effort to bring greater transparency to the supply chains of multinational corporations. Indeed there are calls for Canada to adopt its own supply transparency law, most notably from World Vision Canada.<sup>46</sup> That said, without modification and reform it is unlikely that the law will be able to fulfil its potential. It is especially important to discuss and analyze proposed reforms at this moment in time when similar laws are being considered and implemented in other jurisdictions and while this issue continues to receive widespread attention. The goal for advocates and supporters is for California's lead in this area to result in a domino effect that sees this type of law become commonplace.

As a starting point, some argue the reach of the law should be expanded beyond retailers and manufacturers, to include other high-risk industries, including hospitality, mining, and agriculture. To be effective it must also include explicit, concrete disclosure requirements and meaningful enforcement provisions.

### Concrete Disclosure Requirements

First, there should be a recognized disclosure standard to which all affected companies have to adhere. For a law, in its current form, which is directed primarily at educating consumers, it is difficult for consumers to effectively differentiate between companies when the permitted disclosures vary so greatly.<sup>47</sup> As outlined, in meeting the requirements of the California Transparency Law, companies can merely state on their website that they take no steps with regard to forced labour in their supply chains, and still remain,

technically, compliant.<sup>48</sup> The law should be reformed to require companies to disclose the concrete steps they are taking to eradicate forced labour.<sup>49</sup> An effective transparency law must include clear and unambiguous disclosure requirements. Its impact is greatly reduced when it is open to a variety of interpretations.<sup>50</sup>

While corporations generally cannot be expected to control every activity within their supply chains, they should reasonably be expected to follow best practices to prevent forced labour. The corporate world has benefitted enormously from globalization, and, along with those benefits, must come certain obligations.<sup>51</sup> Corporations must be required to take mandatory positive steps to reduce the likelihood that the human beings involved in producing the goods or services they market and sell do so freely and safely.<sup>52</sup>

Given the extraordinary power and reach of the modern multinational corporation, some business leaders have realized that they can no longer remain purely driven by profit concerns, but must also be mindful of their responsibility to serve the common good.<sup>53</sup> Many leading global companies understand that by placing an emphasis on shared values they can create positive systemic change, innovation, durable economic value, and a broader vision for the future of capitalism.<sup>54</sup>

By mandating a standard form disclosure, which requires specific concrete steps be taken, the impact will be to ensure a more level competitive playing field between, on the one hand, companies that already voluntarily employ best practices, and those at the other end of the spectrum that fail to take any steps. No company should gain a competitive advantage by actively using or turning a blind eye to the use of forced labour to produce its products. A clear disclosure requirement with positive obligations will produce industry and sector-wide standards, compelling all

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<http://thetraffickingresearchproject.wordpress.com/2013/06/28/the-transparency-in-uk-company-supply-chains-bill-three-lessons/> accessed 2 April 2014.

<sup>46</sup> Jordan Press, 'Canadians could be buying goods made by child labourers, says World Vision' Toronto Star (Toronto, 9 June 2016) <[www.thestar.com/news/canada/2016/06/09/canadians-could-be-buying-goods-made-by-child-labourers-says-world-vision.html](http://www.thestar.com/news/canada/2016/06/09/canadians-could-be-buying-goods-made-by-child-labourers-says-world-vision.html)> accessed 30 August 2016.

<sup>47</sup> Phillips (n 63) 2.

<sup>48</sup> Todres (n 41) 206.

<sup>49</sup> Elizaveta Doubossarskaia, 'CA Transparency in Supply Chains Act: Can It Stop Worker Abuses Among Suppliers in the Developing World?' (MA Intl Studies thesis, University of San Francisco, 2012) 18.

<sup>50</sup> *Ibid* 82.

<sup>51</sup> Eckert (n 29) 403.

<sup>52</sup> *Ibid* 404.

<sup>53</sup> Byerly (n 20) 29.

<sup>54</sup> *Ibid* 29.



applicable companies to take action simultaneously and with the same degree of diligence.<sup>55</sup> This type of broad requirement will have an immediate impact for the potential victims upstream in the supply chain and, normatively, on the conduct of suppliers and sub-suppliers overseas.

Professor Nicola Phillips, in criticizing what she describes as the relatively limited requirements of the California Transparency Law, makes the point that the law is, in many ways, fully consistent with the modern concept of corporate self-regulation.<sup>56</sup> As she outlines, the law requires companies to report directly to consumers, as opposed to government, and relies on consumers to sanction companies for non-compliance.<sup>57</sup> As she acerbically describes it, "the law demands little, costs little, and can be a useful PR exercise."<sup>58</sup> Buying in to the law, as she says, "involves no substantial change to prevailing business models."<sup>59</sup> What is missing from Professor Phillips' assessment, however, is the impact that NGOs can have in using the disclosure to hold companies accountable through in-the-field research and awareness campaigns. It also fails to acknowledge the significant impact that even a relatively limited transparency law can have on creating momentum toward a more robust legal regime in the future.

In addition to requiring that companies take certain actions to eliminate forced labour, governments that are serious about using mandatory transparency to eliminate forced labour should, in consultation with business leaders and human rights NGOs, draft best practice guidance for business, rooted in the U.N. Guiding Principles. Such guidance is commonly found in the related field of international anti-corruption, where risks and red flags developed by various stakeholders help guide corporate due diligence and assist companies as they navigate a complex regulatory environment.<sup>60</sup> In the case of forced labour,

highlighting key risks such as the use of third-party labour recruiters (generally agreed to be a serious risk factor) would provide guide posts for compliance program development. Such best practice guidelines also provide a standard by which companies can measure their performance and, once again, help to level the playing field.

The California Transparency Law should require companies to compile and publish a list of all suppliers, sub-suppliers, and contractors involved in the production of their goods.<sup>61</sup> While, admittedly, it is not feasible to require companies to report and disclose on activities at every point in the often complex production process from raw material to the product that ends up on the store shelf, a balance between the depth and quality of disclosure and the cost to business must be weighed in the balance.<sup>62</sup> The solution, it has been argued, is to require a corporation's inquiry to go to its direct supplier, but beyond that require companies to publish the names and relationships of all suppliers in their supply chain.<sup>63</sup>

The production and public dissemination of supplier lists, along with a requirement for independent audits and inspections, aimed at highlighting a company's transparency has already been employed by Apple and some garment retailers.<sup>64</sup> Mandating steps such as these across high-risk industries and sectors, along with requiring companies to take remedial action when they discover forced labour in their supply chain, will provide consumers, investors, NGOs, and enforcement authorities with the necessary information to ensure accountability and will significantly aid corporations in fulfilling their obligations to eliminate forced labour and gross human rights abuses from their supply chains.

That said, no matter how detailed or in-depth increased reporting requirements are, in order to ensure all market

<sup>55</sup> Eckert (n 29) 396.

<sup>56</sup> *Ibid.*

<sup>57</sup> Phillips (n 63) 1.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> see for e.g., Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, 'A Resource Guide to the US Foreign Corrupt Practices Act' (14 November 2012)

<<http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>> accessed 2 June 2014; UK Ministry of Justice, 'The Bribery Act 2010: Guidance' (March 2011) <<https://www.gov.uk/government/publications/bribery-act-2010-guidance>> accessed 4 June 2014.

<sup>61</sup> Eckert (n 29) 414.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Eckert (n 29) 414.



participants comply, there must also be an effective enforcement regime.

## Enforcement

It is unlikely that disclosure and consumer awareness alone will go far enough in altering corporate behaviour across industries without the threat of robust enforcement to back it up.

The California Transparency Law, as it now stands, lacks an effective enforcement tool. Instead, the California Transparency Law relies almost exclusively on the threat of consumer pressure to compel corporations to follow best practices to ensure their products are free from forced labour. While consumer education and participation is integral to an overall strategy to combat forced labour, it is, on its own, an insufficient tool to tackle such a pervasive and severe problem. Even with stronger and more in-depth reporting requirements, consumers cannot be expected to be the sole instruments to compel ethical corporate conduct in this area.

A recent study illustrated the inconsistency often found between the average consumer's stated support for ethical purchasing and their actual willingness to take action at the point of purchase.<sup>65</sup> In an experiment in a retail store, researchers labeled one rack of socks as containing ethically produced products next to another rack with no such label.<sup>66</sup> Over the course of the experiment, the researchers gradually increased the price of the ethically produced socks.<sup>67</sup> Purchases of the ethically labelled socks dropped dramatically as the price rose, leading the researchers to conclude that price considerations ultimately dominate ethical concerns when it comes to purchasing decisions.<sup>68</sup> While there is no doubt that consumer action can impact corporate behaviour, and must form an important part of any overall strategy, relying primarily on consumers fails to fulfil the state obligation to put effective measures in place to prevent forced labour.

<sup>65</sup> Doubossarskaia (n 76) 23; Monica Prasad et al, 'Consumers of the World Unite: A Market-Based Response to Sweatshops' (Fall, 2004) *Labour Studies Journal* 29, no 3, 63.

<sup>66</sup> Doubossarskaia (n 76) 23.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Foreign Corrupt Practices Act of 1977, 15 USC s 78 ("FCPA").

In considering how best to enforce supply chain transparency and to ensure multinational companies are taking effective steps to ensure their supply chains are free from forced labour, lawmakers are beginning to look to the example provided by legislative efforts to curb the similarly situated issue of foreign corruption and bribery.

## Anti-Corruption Enforcement as a Model for Combating Forced Labour?

Over the past two decades, the United States has led the international field in enforcing its foreign anti-corruption laws. Increased and widespread enforcement of the Foreign Corrupt Practices Act (the "FCPA")<sup>69</sup> has resulted in massive monetary penalties for violations, and, more importantly, has forced companies to embed within their corporate culture a policy of zero-tolerance for corruption and bribery through robust compliance programs.<sup>70</sup> Given the active enforcement of anti-corruption laws, corporate leaders see foreign bribery as a significant risk factor, ensuring that it has become more than a passing compliance concern that could fall by the wayside with a change in management.

There are significant parallels between international anti-corruption efforts and those aimed at eradicating forced labour in global supply chains. Both attempt to respond to transnational problems, which involve a recognition that businesses operating abroad, often in parts of the world with little affinity for the rule of law, are more likely to participate in, be complicit in, or turn a blind eye to forms of ethical misconduct that they would likely avoid when operating in their home countries. On this point, it is not a coincidence that the global corruption map produced by anti-corruption NGO, Transparency International, could just as easily illustrate global hot spots for forced labour.<sup>71</sup> Both corruption and forced labour can lead to an unfair competitive advantage for those willing to act

<sup>70</sup> Lisa Lacy, 'The Rise and Rise of the FCPA' (*Business Insider*, 24 March 2011) <<http://www.businessinsider.com/the-rise-and-rise-of-fcpa-2011-3>> accessed 12 March 2014.

<sup>71</sup> Transparency International, *Corruption Perception Index* (2013) <<http://cpi.transparency.org/cpi2013/results/>> accessed 17 June 2014; Anti-Slavery International (n 30).



unscrupulously while engaging in business abroad. Finally, they both involve conduct that debases the user and the used, and which degrades the communities where it occurs.

While the use of forced labour is morally more offensive than paying a bribe to a foreign official to a secure a business advantage, anyone looking at the level of enforcement for these two types of offences would reasonably assume that lawmakers hold a different view. For two decades now, the U.S. has actively pursued allegations of bribery abroad using its powers under the FCPA, through both its Securities Exchange Commission and Department of Justice. More recently, the U.K., Canada, and Australia have followed suit with elevated enforcement efforts and updated legislative tools in the area of anti-bribery.<sup>72</sup>

Two key anti-corruption provisions in particular should be co-opted and applied to enforce supply chain transparency: the so-called "failure to prevent" offence found in the UK Bribery Act 2010 (the "Bribery Act") and the "books and records" offence found in the FCPA.<sup>73</sup>

### Failure to Prevent Forced Labour

The Bribery Act creates an offence, under section 7, where a commercial organisation fails to prevent a bribe being paid to obtain or retain business or a business advantage. A company can be liable under section 7 for failing to prevent bribery if an employee, subsidiary, agent, or service provider bribes another person anywhere in the world for an improper purpose. Importantly, this provision provides a statutory defence to the charge where the corporate organisation demonstrates that it had "adequate procedures" in place,

in the form of a robust anti-bribery compliance program, to prevent such misconduct.<sup>74</sup>

The offence does not require knowledge, intent, or recklessness.<sup>75</sup> Failure to prevent offences of this kind are generally impermissible under criminal law theory given the risk that it creates liability without fault, along with the potential for prosecutorial abuse.<sup>76</sup> As Peter Alldridge notes, "[I]iability for omissions is usually only thought of as being justified exceptionally, when there is a reason to suppose a person should act."<sup>77</sup> In relation to the Bribery Act, Alldridge notes that by framing the prohibition as it is in section 7, Parliament has placed a clear obligation on business to take positive steps to ensure that its employees and related parties do not engage in the prohibited conduct.<sup>78</sup>

The jurisdiction for this offence is broad, capturing any company that is incorporated in the U.K. or that carries out business in the U.K.<sup>79</sup> In defending a charge under this provision, the burden of proof rests with the company.<sup>80</sup> To discharge this burden, the corporation must demonstrate that it has adopted appropriate anti-bribery policies, and has taken steps to apply and enforce them.<sup>81</sup>

Importantly, the government is required under the Bribery Act to publish guidance about appropriate compliance procedures, and in contemplating charges, prosecutors are expected to apply the "adequate procedures" test in a flexible and proportionate way, depending on the size and resources of the company, together with the ethical risks associated with the industry and geographical area in which it operates.<sup>82</sup>

An effective supply chain transparency law should include a "failure to prevent" offence modelled on the

<sup>72</sup> See Bribery Act 2010, c 23 UK (the "Bribery Act"), s 7; the Canadian Corruption of Foreign Public Officials Act, SC 1998, c 34 (note, on June 19, 2013, the Canadian government amended its anti-corruption legislation to, *inter alia*, expand its jurisdictional reach and increase penalties for violations); Australian Criminal Code Act 1995 (Cth) (note, in February 2010, penalties for bribery offences in Australia increased substantially).

<sup>73</sup> Bribery Act (n 109) s 7; FCPA (n 106) s 78m(b)(4)-(5).

<sup>74</sup> Bribery Act (n 109) s 7(2).

<sup>75</sup> Peter Alldridge, "The UK Bribery Act: "The Caffeinated Younger Sibling of the FCPA"" [2012] 73 Ohio State L J 5, 1202.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*; Bribery Act (n 109) s 12.

<sup>80</sup> Bribery Act (n 109) s 7.

<sup>81</sup> Nick Gray, "The Bribery Act 2010: The New Corporate Offence of Failing to Prevent Bribery (*Who's Who Legal*, November 2010)

<<http://whoswholegal.com/news/features/article/28691/the-bribery-act-2010-new-corporate-offence-failing-prevent-bribery>> accessed 19 July 2014; Bribery Act (n 109) s 7.

<sup>82</sup> Gray (n 118) 2.



UK's anti-bribery statute. Such an offence would put real teeth into a law that, despite the best of intentions, lacks a punitive stick commensurate with the gravity of the conduct it attempts to eradicate. The provision would make it an offence where a relevant company or a person associated with it (including suppliers) uses forced labour in connection with a business activity or production process associated with the company's operations, or fails to take steps to prevent the use of forced labour in this context. The offence would specifically allow for a defence of due diligence and adequate procedures as provided for in the Bribery Act. Prosecutors would similarly be expected to consider a company's anti-forced labour procedures flexibly and proportionately in determining whether charges are warranted.

By creating a real risk of prosecution where forced labour is discovered in a corporation's supply chain, but at the same time providing an "adequate procedures" defence which is guided by published best practice guidelines, governments will fulfil their duty to protect the human rights of third parties by requiring a climate of compliance in which corporations are motivated to inculcate their employees, suppliers, and others upstream in their supply chains, within a zero-tolerance culture, just as we have witnessed in the field of anti-bribery. There will always be companies who do not require government intervention in order to conduct their business ethically, but there will also always be companies that will take advantage of any potential business gain, without reference to ethical concerns. The gravity of the problem of forced labour permits aggressive government enforcement in this area similar to that already in place to prevent bribery.

### **Ensuring Accurate Disclosure**

Another means of enforcing supply chain transparency is to make companies liable for misleading or false disclosures. Under the FCPA, it is an offence for a U.S. securities issuer to knowingly provide a false record or account.<sup>83</sup> Because improper payments to foreign officials to obtain a business advantage are usually concealed or improperly recorded on a company's

books, this provision is utilized by regulators as an effective enforcement tool. It can often be more straightforward to prove a false or misleading record than an actual payment given the complex offshore payment methods commonly employed.<sup>84</sup>

Using this model, it should become an offence to knowingly submit a false or misleading supply chain disclosure statement in respect of both the identity of a company's suppliers and the efforts undertaken by the company to eliminate forced labour. By requiring companies to devise and maintain a compliance system and, at the same time, obligating them to produce accurate annual disclosure statements outlining the steps they have taken, huge strides will be made to ensure across the board compliance in this area. Corporate leaders will have no choice but to view this as a key risk area, and it will level the playing field between companies already making significant efforts and those yet to see this as a priority.

### **CONCLUSION**

While the California Transparency Law represents an important step in the fight to eradicate forced labour from the supply chains of multinational corporations, future supply chain transparency

laws must go further if they are to achieve the objective of significantly limiting its use. This article has sought to provide a broad understanding of the relevant issues and to outline a path toward effective legislative reform as a way of ensuring transparent and humane supply chains in the global marketplace. Admittedly, transparency supported by enforcement alone is not a panacea, but it is an essential component of any comprehensive, reality-based effort to create a future free from forced labour.

While globalization continues to produce significant economic and social gains for many, the competitive modern economy also continues to create a grave social deficit, part of which includes the scourge of forced labour. The fight to eradicate forced labour has re-emerged as a defining issue of this century, and it should not be left to politicians, consumers, and NGOs,

<sup>83</sup> FCPA (n 106) s 78.

<sup>84</sup> Michael S. Schacter, 'Defending an FCPA Books And Records Violation' [2013] Vol 249 NY L J 16

[http://www.willkie.com/files/tbl\\_s29Publications%5CFileUplo ad5686%5C4301%5CDefending an FCPA Books and Records Violation.pdf](http://www.willkie.com/files/tbl_s29Publications%5CFileUplo ad5686%5C4301%5CDefending an FCPA Books and Records Violation.pdf) accessed 15 March 2014.



but must include corporate leaders who embrace and champion these reforms. Many leading companies already understand that their strategies shape the lives and life chances of millions, and that the traditional view of business as focused exclusively on returns is far too narrow.<sup>85</sup> The best and brightest global companies believe that business is an integral pillar of society and, in order to build enduring profitability, they recognize that the people they rely on at home and abroad cannot be afterthoughts or units to be exploited and castoff, but are instead central to building sustainable and lasting businesses.<sup>86</sup> Requiring transparency and concrete action to end forced labour through legislative reform will help ensure all market participants meet this important standard.

While in office, former U.S. president, George W. Bush, stated, "human beings should never be reduced to

objects of power or commerce, because their dignity is inherent. There is a moral law that stands above men and nations."<sup>87</sup> Building on this, U.S. president, Barack Obama, made a statement directed at the millions who toil in conditions of forced labour, saying, "[w]e hear you. We insist on your dignity. And we share your belief that if just given the chance, you will forge a life equal to your talents and worthy of your dreams."<sup>88</sup> This is clearly not a partisan issue, nor should it be. It is ultimately an issue which implicates all of humanity. One hopes the dream of a global economy free from forced labour becomes a reality for the millions of victims who go out into the world seeking nothing more than honest work in the hope of building a better life. Supply chain transparency and robust enforcement mechanisms are critical ingredients to bringing this dream closer to a reality.

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<sup>85</sup> Kanter (n 14) 4.

<sup>86</sup> Kanter (n 14) 4.

<sup>87</sup> President of the United States, George W. Bush, 'Address to the United Nations General Assembly' (New York, 23 September 2003)

<<http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>> accessed 12 July 2014; Skinner (n 7) 114.

<sup>88</sup> President of the United States, Barack H. Obama, 'Remarks by the President to the Clinton Global Initiative' (New York, 25 September 2012)  
<[http://www.whitehouse.gov/sites/default/files/docs/advisory\\_council\\_humantrafficking\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/advisory_council_humantrafficking_report.pdf)> accessed 14 August 2014.