

Regulating Modern Slavery: Contemporary Developments, Corporate Responsibility and the Role of the State

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Declaration

I hereby declare, to the best of my knowledge, that this thesis is my original work, entirely written by me, and has not been submitted to another University for another degree. Full acknowledgement has been given to all sources used.

Akilah A. Jardine

Abstract

Today slavery is illegal in every part of the world. It has been recognised as a crime against humanity and a violation of fundamental human rights. Nonetheless, the exploitation, marginalisation and degradation of human beings for material profit continue to flourish in 21st-century society. Sophisticated criminal networks and transnational illicit operations, coupled with weak governance and a high demand for slave labour, has allowed modern slavery to evolve and thrive underground, where vulnerable individuals are exploited for a multitude of purposes.

Due to the complex nature of modern slavery, not only is a comprehensive approach needed to address its commonalities, but particular attention needs to also focus on the complexities and challenges unique to specific forms of exploitation. Further, due its transnational nature its regulation requires the involvement and co-operation of various actors in the international community. In particular, one area that has been subject to increasing concern is the role of corporate entities in joining the fight against slavery, by ensuring that their operations and supply chain networks are not tainted with exploitative labour and riddled with human rights abuses. The international community has recognised that while corporate entities have the capacity to promote positive effects such as economic development, job opportunities, and technological innovations, that their operations can also adversely affect vulnerable individuals and communities. Thus, through the concept of corporate social responsibility (CSR), and various human rights initiatives, businesses have been facing pressure to use their global resources, and power to acknowledge their influence and impact on significant global issues such as human rights, modern slavery, forced labour and human trafficking. Separately, as States are the prime guarantors of international human rights, they have an obligation to establish and enforce effective measures to regulate modern slavery, including the conduct of those who violate human rights and engage in the exploitation of people. Concerning unethical business practices, States then have a responsibility to establish corporate liability for complicity in modern slavery and related issues.

Against the backdrop of global contemporary forms of slavery, this thesis aims to understand the extent of corporate obligation to respect internationally recognised human rights in the regulation of modern slavery, and challenge the perceived role of firms in combatting slavery in their operations. Moreover, this study considers the role of the State in enforcing CSR in line with its international obligation to protect human rights and combat modern slavery by preventing and prohibiting the crime, protecting the victims and prosecuting the offenders. This thesis will then conclude with an exploration of domestic level operations in the United Kingdom and evaluate what key approaches mean in the support of victims, the prosecution of offenders, and the responsibility of UK businesses.

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Sexual Offences Act 2003

Chapter One: Introduction

1.1 Background of Study

The current capitalist world is built on the exploitation of human beings and the world's resources. The exploitation, marginalisation and degradation of human beings occurred in almost every society, dating back to ancient times, with references to the practice found in religious texts such as the Bible¹ and the Qur'an². The trafficking and exploitation of people as commodities, though not a new phenomenon, has nonetheless evolved into a sophisticated and complex criminal enterprise, operating underground as a highly secretive and profitable business with low risk of detection. The continued abuse of vulnerable individuals for profit is a crime that academics, national and international bodies, and modern day abolitionists have likened to slavery due to the sinister methods by which present-day slave owners operate and the level of exploitation that victims are subjected.³

Slavery today, though now illegal in every part of the world,⁴ and recognised as a crime against humanity,⁵ continues to flourish in the 21st-century as it has undergone a gradual transformation, morphing itself into the cracks of society where its presence has become a norm in most trades and customs. In 2016, The Global Slavery Index estimated that there are 45.8 million slaves in the

1 Book of Exodus ; 21

2 The Holy Qur'an ; 16:75

3 Maggy Lee, 'Introduction: Understanding Human Trafficking' in Maggy Lee (ed.), *Human Trafficking* (Routledge 2012) 3-4

4 Kevin Bales, *Disposable People: New Slavery in the Global Economy* (3rd edn, University of California Press 2012) 5

5 Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 7(1)(c)

world,⁶ more than at any other one time in history. Many of these individuals constitute the poorest and most vulnerable members of society and are exploited for a multitude of purposes such as sexual exploitation, forced labour, domestic servitude and organ trafficking.⁷ Men, women and children continue to be deceived into exploitative circumstances, which can mimic traditional slavery of bondage and servitude. Modern traffickers and slave owners often prey on vulnerable individuals desperate to improve their standard of living. While some individuals are forced or deceived into performing exploitative work, the circumstances of others compel them to accept working in dangerous and often degrading conditions. Criminal syndicates are extremely sophisticated in their operations, whether transporting a victim from one place to another, or exerting psychological or physical control over a victim to maintain the running of their underground and illicit operations.

Due to the often transnational nature of this invisible modern slave trade, it affects all nations, and it has been advocated for systematic collaboration among various agents in the global community to address the causes and consequences of the crime. Enforcing measures to combat modern slavery such as establishing adequate identification, support and protection of victims, prosecuting offenders, and addressing the demand for exploitative goods, services and people, is now high on the agenda of many national, regional and international bodies. As will be illustrated throughout this study, modern slavery is a highly complex phenomenon. As people are exploited for a number of purposes, each type of exploitation has its own unique challenges and complexities. Accordingly, methods to combat such a crime cannot solely adopt a holistic approach and need to take into consideration differing factors

6 The Global Slavery Index, 'Global Findings' (*The Global Slavery Index*, 2016) <

<http://www.globalslaveryindex.org/findings/> accessed 22 October 2016

7 UNODC, *Global Report on Trafficking in Persons* (2014) 33

that prove a challenge to combatting specific forms of slavery. Subsequently, against the backdrop of modern forms of slavery, and contemporary developments in its regulation, this thesis aims to examine one area that is becoming widely targeted as a tool for regulating slavery – the role of corporate entities. Governmental and non-governmental bodies are beginning to recognise the role corporations can play in the fight against slavery due to their global influence, power and resources. For example, the UK's Modern Slavery Act has established a supply chain provision, calling its businesses to be transparent and accountable in ensuring that their supply chains and business operations are not tainted with slavery.⁸ Moreover, in the United Nations recent 2030 sustainable development agenda, the UN called on businesses to utilise their resources to address relevant global issues such as poverty and overseeing equal and decent work for all.⁹

With specific regards to approaches to combat modern slavery, it has been suggested that research on this area tends to focus on the victims, as opposed to the organisations that influence and benefit from exploitative conditions.¹⁰ Thus, in exploring different forms of slavery, and the causes and consequences of exploitation, this study aims to contribute to research on modern slavery by also assessing the perceived role and credibility of corporate entities, particularly multinational corporations, in the global fight against modern forms of slavery. From a human rights perspective this thesis considers the responsibility of businesses under international human rights hard law and soft law in regulating slavery, and addresses the role of State regulation and robust government interference in enforcing corporate social responsibility. Separately, in emphasising the role of the State in fulfilling its

⁸ Modern Slavery Act 2015 (MSA), s54

⁹ See: Transforming our World: The 2030 Agenda for Sustainable Development (2015) A/RES/70/1

¹⁰ Andrew Crane, 'Modern Slavery as a Management Practice : Exploring the Conditions and Capabilities for Human Exploitation,' (2013) 38 Academy of Management Review 49, 51

international obligations to combat modern slavery, this thesis will also examine domestic level operations in the United Kingdom to evaluate the effectiveness of key anti-slavery initiatives.

1.2 Terminology

As a result of human trafficking and modern slavery being interrelated offences, the terms 'human trafficking' and 'modern slavery' are often used interchangeably as an umbrella term throughout this thesis. However, for clarification purposes, the term 'trafficking' adopts the UN Trafficking Protocol definition on the trafficking of human beings, which loosely defines the act as the movement of people for the purpose of exploitation.¹¹ As will be explored in Chapter Two, such a universal definition of human trafficking allows for the punishment of perpetrators involved at any stage of the crime, for example, the recruiting or harbouring of an individual. The term 'modern slavery' may refer to the actual act of exploiting a person, i.e. the end result of trafficking, encompassing various forms of exploitation. This thesis will illustrate circumstances where victims may not have been trafficked, as defined by international law, but nevertheless have been forced into slavery like conditions, for example those who voluntarily accept employment in poor working conditions, such as sweatshop labour or those exploited through bondage labour. Moreover, the terms 'modern slave owners' and 'modern traffickers' used early on in the thesis, indicate respectively offenders who are involved in the direct exploitation of individuals and those who may only participate in the actual process or act of 'trafficking.'

¹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (UN Trafficking Protocol) art 3 (a)

Evidently, the trafficking and exploitation of human beings in the 21st -century is often addressed as a crime that is 'modern.' As aforementioned, slavery is as old as civilisation itself and is not a new phenomenon, but rather an intensified one that has evolved and adapted to changing times. Though the characteristics of modern slavery can mimic traditional forms of slavery the term 'modern' is used throughout this thesis to imply the current state of evolution of human enslavement and the modern *types of servitude*, modern *modi operandi* used to recruit and exploit slaves, and the need for modern *approaches* to combat it.

Separately, discussions on human trafficking tend to reflect on the Trans-Atlantic slave trade where African slaves were legally and brutally exploited as property.¹² The term 'slavery' often conjures images of such a trade as one of the worst forms of human enslavement and abuse which lasted for over 300 years. Comparisons between the Trans-Atlantic slave trade and modern slavery is often made to illustrate contemporary developments in slavery. Defining slavery today as 'modern' is not intended to water down the exploitation of present day victims, but it may allow it to be easily understood in layman terms, as people can comprehend the seriousness of the exploitation of individuals and why such a crime is categorised as a form of 'slavery.' Contrarily, because of the history and legacy of the Trans-Atlantic slave trade, others may choose to use the term 'modern' to not overlook the African slave trade. For example Arrindell, in addressing 21st-century slavery as 'so-called "modern day slavery"' and the Trans-Atlantic slave trade as 'Slavery with a capital "S"' holds:

Slavery with a capital "S", has no comparison in the annals of human history. We should not trivialize it by comparing it to so-called "modern day slavery." Nobody in their right minds would compare the atrocities that many authoritarian and even so-

¹² Karen E. Bravo, 'Exploring the Analogy between Modern Trafficking in Human and the Trans-Atlantic Slave Trade' (2007) 25 Boston University International Law Journal 207,294

called democratic states have committed and still commit today in the name of “national security” to the Holocaust. I must admit, however, that Slavery with a capital “S”, is a festering wound that will not heal until we really clean it up, sanitize it, and apply a healing balsam that would make the ugly scars it has left less frightening.¹³

The legacy of the Trans-Atlantic slave trade continues to be apparent in various African societies, where some academics have considered underdeveloped, blaming its slow economic progress on the trade.¹⁴ Like Arrindell, whether explicitly expressed or not, others may hold the view that addressing human trafficking and modern forms of exploitation as ‘slavery’ diminishes the atrocities of the trade. Understandably, in combatting modern forms of slavery, comparisons between the current exploitation of human beings and the trade in African slaves, should not be used to highlight the seriousness of the modern human slave trade at the expense of the Trans-Atlantic trade. Conversely, one should not use the Trans-Atlantic slave trade to diminish the suffering of the victims of modern slavery. As this study will illustrate, human trafficking and extreme forms of exploitation today often involve the dehumanization of people, the exercise of powers attaching to the right of ownership over individuals, and undoubtedly grave human rights abuses. The exploitation of individuals today can amount to slavery, though of a different nature. Though the Trans-Atlantic slave trade and the modern traffic in human beings may differ in character and impact, they both involve the ill treatment of people resulting in severe human rights violations. By its very nature, both forms of slavery encompass the extreme exploitation and disregard for human life. It involves businesses and individuals profiteering at

13 Rhoda Arrindell, ‘Emancipation Day Address to the People of St. Martin’ (*PearlFM*, 19 May 2012) <

<http://pearlfrmradio.sx/2012/05/22/rhoda-emancipation-represents-the-birth-of-our-identity/>> accessed 18 April 2017

14 See : Babacar M'baye, ‘The Economic, Political, and Social Impact of the Atlantic Slave Trade on Africa’ (2006)

11 The European Legacy 607-622 ; Nathan Nunn, ‘The Long-Term Effects of Africa’s Slave Trade’ (2008) 123 *The Quarterly Journal of Economics* 139-176 ; Walter Rodney, *How Europe Underdeveloped Africa* (BBogle-L’ouverture Publications 1972)

the expense of humanity. The atrocities that occurred during the Trans-Atlantic slave trade should never be diminished, and at the same time, we should not devalue the suffering of human beings today because the nature of their exploitation differs. This study illustrates that human suffering in any shape or form is unacceptable, and moreover, one man or woman suffering should not diminish the suffering of another, then, now or in the future. Throughout this thesis, the study at times reflects on the Trans-Atlantic slave trade to illustrate the current evolution of the definition of slavery, the objectification of human beings as commodities, and the development of legal regulations to address contemporary slavery.

1.3 Methodology

The research conducted is a doctrinal legal study drawing on a number of primary and secondary resources. The list of sources consulted is exhaustive. Key international and regional primary legal sources relevant to modern slavery, human trafficking, forced labour and human rights examined include: the Slavery Convention ; the Forced Labour Convention ; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery ; the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights ; the Convention on the Rights of the Child ; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ; the Rome Statute of the International Criminal Court ; Convention against Transnational Organized Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Council of Europe Convention on Action against Trafficking in Human Beings, EU Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims, and the ILO Protocol of 2014 to the Forced Labour Convention. Further, it examined opinions and jurisprudence by human rights treaty bodies

such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of all Migrant Workers and their Families, and the Committee on the Rights of the Child, as well as the Inter-American Court of Human Rights, and the European Court of Human Rights. The study also consulted reports by UN Special Rapporteurs on Contemporary Forms of Slavery, including its causes and consequences, on the Trafficking in Persons, especially women and children, on the Sale of Children, Child Prostitution and Child Pornography, as well as Working Groups on Transnational Corporations and other Business Enterprises, on Trafficking in Persons, and on the Universal Periodic Review. Non-binding soft law instruments referred to which concerned the role of businesses and human rights included the United Nations Guiding Principles on Business and Human Rights, the UN Global Compact, and the International Organization for Standardization guidance on social responsibility. Reports consulted by international NGOs, included Amnesty International, and Human Rights Watch. The thesis also referred to reports by the ILO, regional bodies such as the Group of Experts on Action against the Trafficking in Human Beings, relevant domestic legislations and jurisprudence, and reports by NGOs and governmental bodies. Finally, the study consulted the work of various scholars in related fields such as international human rights law, business and human rights, modern slavery, human trafficking and forced labour.

1.4 Structure of Study

The thesis is divided into three parts:

Part One, *Slavery in the 21st-Century*, sets the backdrop for the thesis by presenting an overview of the emergence and scale of human trafficking and modern slavery, and the present commodification of human beings. Chapter Two, *Contemporary Developments in Modern Slavery*, explores the concept of slavery, and reflects on the Trans-Atlantic slave trade as one of the most notable forms of slavery in history. The Chapter also considers the modern traffic and exploitation of human beings as a form of slavery, a transnational organised crime, and as grave human rights abuses. Factors that have contributed to the continued exploitation of vulnerable human beings such as global expansion and the high demand for cheap and uncompensated labour are examined. Further, as the trafficking and trading of human beings often involve the movement of people across borders, often conflating with other forms of irregular and illicit forms of migration, more specifically human smuggling, this Chapter distinguishes between these distinct, yet related criminal activities.

Chapter Three, *Human Trafficking and Forced Labour Exploitation*, introduces the evolution of the current international definition of human trafficking and explores the exploitation of individuals for the purpose of forced labour. Further as human trafficking, modern slavery and forced labour are often defined through the context of exploitation, the Chapter explores three forms of exploitation ; casual exploitation, direct exploitation, and mutually beneficial and indirect exploitation, and considers the issue regarding victims' consent to exploitative circumstances.

Part Two of the thesis, *The Role of Corporate Entities and the State in the Regulation of Modern Slavery*, narrows the research to focus on profit and the exploitation of vulnerable individuals as inseparable opposites. It highlights the pressure on corporate entities to get involved in the fight against modern slavery, the challenges they encounter in the face of global competitive trade and the obligations conferred on them to ensure that they are not complicit in human rights abuses and modern slavery. Chapter Four, *Globalisation and the Resulting Labour Exploitation in Business Operations and Supply Chains*, explores the positive as well as adverse effect of the merging and expansion of world economies on businesses, particularly multinational corporations. In examining the use of labour exploitation as a business practice, it explores some indicators of labour exploitative conditions such as low wages and abusive and unsafe working conditions. Further, the Chapter demonstrates how self-interest, exploitation and a consumerist-obsessed economy continues to bolster the exploitation of the most vulnerable members of society, and concludes on the role of consumer leadership in forcing firms to operate their affairs in an ethical and social manner.

Chapter Five, *Corporate Social Responsibility in the Regulation of Modern Slavery*, examines the international responsibility of corporate entities to respect human rights in the regulation of modern slavery. The Chapter begins with an examination of Corporate Social Responsibility (CSR) and considers how such a concept can be used as a tool to combat modern slavery. Further, it explores obligations of corporate entities under international human rights hard law and soft law mechanisms to consider the role of international instruments in regulating the conduct of businesses to combat modern slavery. Moreover, given the nature of global trade and the competitive business arena, this Chapter challenges the credibility of CSR.

Chapter Six, *The Role of the State in the Regulation of Modern Slavery and CSR*, explores key international obligations and responsibilities of the State in regulating modern slavery, in particular the prohibition and prevention of the crime, the protection of victims and the prosecution of offenders. Further, it addresses the role of the State in the CSR agenda to regulate the conduct of firms to respect human rights and ensure that their operations and supply chain networks are not tainted with exploitative labour.

Finally, as States play a fundamental role in the fight against modern slavery, **Part Three** of this study, *The UK's Fight to End Modern Slavery*, will conclude with an evaluation of the effectiveness of domestic level operations in the United Kingdom. Chapter Seven, *Modern Slavery and the UK: An Overview of UK Approaches to Combatting Slavery*, explores the nature of labour exploitation in the UK, presents an overview of UK approaches to combatting modern slavery, particularly the Modern Slavery Strategy and the Modern Slavery Act 2015, and considers what such mechanisms mean in the support of victims, the prosecutions of offenders, and the responsibility of UK businesses.

Part One : Slavery in the 21^s-Century

Chapter Two: Contemporary Developments in Modern Slavery

2.1 Introduction

Today slavery is illegal in every country in the world.¹⁵ Since the abolition of the Trans-Atlantic slave trade, the practice has been acknowledged as a crime against humanity,¹⁶ and a serious violation of an individual's fundamental human rights.¹⁷ There now exists various international regulations which condemn acts of slavery and servitude, and related offences such as forced and compulsory labour.¹⁸ Nonetheless, slavery remains a topic on public and political agendas in the 21st-century as people continue to be exploited as commodities for material profit.

As mentioned, it is estimated that 45.8¹⁹ million people are forced into slavery today for purposes such as sexual exploitation, child sexual exploitation, forced labour, and domestic servitude. Unlike traditional forms of slavery,

¹⁵ Bales, *Disposable People* (n 4) 5

¹⁶ Rome Statute, art 7(1)(c)

¹⁷ Eg. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 4 ; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 4 ; Charter of Fundamental Rights of the EU 2012/C 326/02 (EU Charter) art 5 ; American Convention on Human Rights 1144 UNTS 123 (ACHR) art 6 ; African Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) (African Charter) art 5 ; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 8 ; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW) Art 11

¹⁸ Eg. Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 ; Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) ILO Convention 29 ; ILO Protocol of 2014 to the Forced Labour Convention (ILO Forced Labour Protocol of 2014) ; Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) ILO Convention 105 ; ICCPR, art 8 ; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) ILO Convention 182 (Worst Forms of Child Labour Convention)

¹⁹ The Global Slavery Index 'Global Findings' (n 6)

victims today come from all spheres of life. The commonality among individuals most susceptible to exploitation is often their desperation to improve their standard of living. This desire to improve their socio-economic status is then often taken advantage of by illicit individuals who coerce and deceive vulnerable people into exploitative circumstances.

Human trafficking, the process by which individuals are enslaved, is recognised as the largest transnational organised crime next to drug trafficking, generating profits of \$150 billion.²⁰ It is considered a more lucrative business as unlike drugs, a person could be used and re-sold, allowing a trafficker to maximise his income.²¹ Though the process of human trafficking can occur within borders, it is often seen as a transnational and cross-border crime.²² Moreover, as the majority of victims are transported across borders illegally, human trafficking tends to be viewed as a migratory problem and is often linked to categories of irregular migration such as human smuggling. Distinguishing the two can prove a challenge as often they share certain similarities and circumstances.²³ This new face of modern slavery is often compared with the Trans-Atlantic slave trade, because the victims, like African slaves, are trafficked and exploited for their labour.²⁴ No country is resistant to human trafficking and modern slavery, as a country could be a source of victims, a destination where they are exploited, or be used as a smuggling route to transport individuals from one country to another.²⁵ The underground nature of human trafficking coupled with the involvement of corrupt or weak law enforcement, makes it difficult to detect and collect information on the scale

20 International Labour Office, *Profits and Poverty: the Economics of Forced Labor* (ILO Publications 2014) 13

21 Alexis A. Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organisations that Promote it' (2001) 9 *European Journal on Criminal Policy and Research* 163, 191

22 See : Section 2.6

23 Aronowitz (n 21) 167

24 Bravo (n 12) 294.

25 UNODC, *Global Report on Trafficking in Persons* (2016) 5

of the crime, often leaving it, 'under-reported, under-detected and therefore under-prosecuted.'²⁶ Thus, combatting human trafficking and contemporary forms of slavery on a global scale requires a comprehensive understanding of the evolution and scale of the crime, the modus operandi of criminal syndicates, and ultimately the key drivers and consequences of exploitation.

2.2 The Concept of Slavery

As slavery has existed from the dawn of civilisation itself, it is not entirely clear when it was first practiced. Nevertheless, there have been various perceptions on the origins and nature of slavery, as academics have attempted to contribute to our understanding on what constitutes a slave and the factors that influence the existence of slavery.²⁷ Against the backdrop of scholarly discussion on such an institution, one common key theme explored is the meaning behind the terms 'slave' and 'slavery.' Such interpretations can help us to understand how such a phenomenon has evolved.

The term 'slave' is often interpreted as the use of person as property where another owns them. This in turn involves a sense of ownership and division of power where disparity exists between the individual that is enslaved and his owner. Nieboer notes that no man is literally free, as a result of limitations dictated by social rules and customs, and consequently both a slave and a freeman may be subject to similar restrictions.²⁸ Nevertheless, he suggests that a slave is one who is governed by their master's unlimited power over them, one who lacks political rights and is compelled to work under the

26 Jo Goodey, 'Human Trafficking: Sketchy Data and Policy Responses' (2008) 8 *Criminology and Criminal Justice* 421, 425

27 See: Herman J. Nieboer, *Slavery as an Industrial System: Ethnological Researches* (Martinus Nijhoff 1900) ; Evsey D. Domar, 'The Causes of Slavery: A Hypothesis' (1970) 30 *The Journal of Economic History* 18-32 ; Stanley L. Engerman, 'Some Considerations Relating to Property Rights in Man' (1973) 33 *The Journal of Economic History* 43-65

28 Nieboer (n 27) 3

'possession' or 'property' of his master.²⁹ Similarly, Wright defines a slave as 'a property owned by, and in the power, of another person.'³⁰

Patterson rejects the interpretation of slaves as property, suggesting that to only define slavery as human beings treated as property ignores other categories of persons, which may be treated as property, but not considered a slave.³¹ He notes:

If we must use the property concept...we need to be more specific. We must show not simply that slaves are a category of persons treated as property objects, but...that they are a *subcategory* of human proprietary objects. The fact that we tend not to regard "free" human beings as objects of property – legal things – is merely a social convention.³²

According to Patterson, it is customary to not apply ownership over people, more specifically relationships such as that between a man and wife or a mother and child, as such a classification is impolite and socially unacceptable whereas 'with slaves politeness is unnecessary.'³³ He also rejects the interpretation of a slave as a property because they are bought and sold. He notes that in pre-modern societies certain generations of slaves were not allowed to be sold because of their close relationship with their masters. However in others it was common to sell 'free' persons such as the sale of women as wives, where women did not feel degraded, but rather pride in being sold for a specified amount.³⁴ Moreover, in comparing a slave to an athlete, he rejects the claim that a slave is one who has no choice in the 'sale or withdrawal of their services.'³⁵ Patterson recognises that initially, athletes had no say in

29 Ibid 3, 30

30 John Wright, *The Trans-Saharan Slave Trade* (Routledge 2007) 2

31 Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press 1982) 21

32 Ibid, 21-22

33 Ibid, 22

34 Ibid, 24

35 Ibid, 25

who could buy 'their body and services', particularly if they wanted to advance their careers.³⁶

Thus in offering his interpretation of slavery, and not completely disregarding the treatment of a slave as property, Patterson pays particular attention to the role of power and differing levels of inequality or domination which exists between individuals, where one individual has total power over another. He defines slavery as 'one of the most extreme form of the relation of domination, approaching the limits of total power from the viewpoint of the master, and of total powerlessness from the viewpoint of the slave,'³⁷ and '...the permanent, violent domination of natally alienated and generally dishonored persons.'³⁸ This extreme form of domination he argues includes the social, psychological and cultural control of a person.

He focuses on the concept of natal alienation and social death of a slave. He suggests that 'If the slave no longer belonged to a community, if he had no social existence outside of his master, then what was he? The initial response in almost all slave holding societies was to define the slave as a socially dead person.'³⁹ According to Patterson, social death is represented in two ways:⁴⁰

1. Intrusive; the slave is seen as the permanent domestic enemy. He did not and could not belong because he was the product of a hostile, alien culture.
2. Extrusive; An insider who had fallen, one who ceased to belong and had been expelled from normal participation in the community because of a failure to meet certain minimal legal or socioeconomic norms of behavior.

36 Ibid

37 Ibid,1

38 Ibid,13

39 Ibid, 38

40 Ibid, 39-41

The former can be said to continue to exist in various parts of the world, such as Mauritania, where there is a distinction between a slaving class and a ruling class. Though slavery is abolished in Mauritania, the hierarchy that has divided the rich from the poor centuries ago, and moreover, the social acceptance of slavery, continues to be deeply rooted and practised in their society, where people are often perceived to have been born slaves and therefore could not belong.⁴¹

Natal alienation of the slave was also an important aspect in ensuring compliance and obedience. This, Patterson argues, includes four basic aspects:

First, the symbolic rejection by the slave of his past and his former kinsmen; second, a change of name; third, the imposition of some visible mark of servitude; and last, the assumption of a new status in the household or economic organization of the master.⁴²

Such practices allow a slave owner to strip a slave of his individuality and identity, remoulding him into an image the master favours, which is one that is easier to control. As will be explored further in this study such methods of control continue to be practised in contemporary forms of slavery.

As mentioned, various concepts of slavery help us to understand how such a phenomenon has evolved. Moreover, from a legal perspective, the evolution of the practice has helped shaped current international regulations on slavery. Whereas it was legal to own a slave, as illustrated during the Trans-Atlantic slave trade, legal ownership of a person is no longer permitted. In legalistic terms international regulations on slavery, though not explicitly implied, has reflected the notion that a slave is a person who is treated as property where

41 Mark Lusk and Faith Lucas, 'The Challenge of Human Trafficking and Contemporary Slavery' (2009) 25 *Journal of Comparative Social Welfare* 49, 52

42 Patterson (n 31) 52

there exists an unequal balance in power relations. For example, Article 1 of the League of Nations 1926 Slavery Convention holds that slavery, 'is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'⁴³ Moreover, it defines the slave trade as:

[A]ll acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves.⁴⁴

This definition illustrates that the practice of slavery pertains to conditions 'over whom any or all of the powers attaching to the right of ownership are exercised,' but also exercise of *any* of those powers, such as selling, exchanging or transporting him.⁴⁵ Thus, a person does not have to exercise absolute ownership over another person. Subsequent protocols such as the UN 1956 Supplementary Convention adopted the 1926 Slavery Convention definition of slavery, expanding its scope to include various offences, involving the right of ownership such as debt bondage, forced marriage, and the exploitation of children,⁴⁶ specifying more clearly conditions which constitute slavery.

Due to the illegality and evolution of contemporary forms of slavery, the law has had to adapt to cover situations which involve human rights violations that amount or contributes to slavery or like practices. As discussed in Chapter

⁴³ Slavery Convention, art 1 (1)

⁴⁴ Ibid, art 1 (2)

⁴⁵ Marjan Wijers, 'Analysis of the Definition of Trafficking in Human Beings in the Palermo Protocol' La Strada International Research Paper No. 1354 (2005) 31

<<http://lastradainternational.org/lisidocs/354%20Analysis%20def%20Palermo%20protocol.pdf>> accessed 24 November 2013

⁴⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery (adopted 30 April 1956, entered into force 30 April 1957) (Supplementary Convention on the Abolition of Slavery) art

One, slavery today is often defined as ‘modern’ perhaps to distinguish it from traditional chattel forms of slavery (though cases today can resemble such), and ‘human trafficking’ which defines the movement of people for the purpose of exploitation. Due to the evolution of modern slavery, various forms of exploitation (such as forced labour, debt bondage, domestic servitude, forced marriage and sexual exploitation), as well as methods used to obtain slaves (recruiting, harbouring, transporting, or receiving), the terms ‘human trafficking’ or ‘modern slavery’ are often used as an umbrella term. Moreover, as some victims give their consent to situations where they find themselves exploited, contrary to traditional forms of servitude, the expression ‘modern slavery’ can imply modern methods that are used to acquire victims’ consent such as the use of force, fraud or coercion.

Under these umbrella terms, each form of exploitation and methods used to exploit can have its own unique complexities. Nevertheless, what they all have in common is the exercise of power to abuse an individual’s vulnerability to exploit them. In *Rantsev v. Cyprus and Russia*,⁴⁷ the European Courts of Human Rights (ECtHR) held:

[T]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment.⁴⁸

Though Patterson rejects the notion that a slave is a property because he can be bought and sold, the factor that distinguishes this form of exploitation from his comparisons to an athlete or a woman that is content with being sold, is that human beings are bought and sold, in the modern sense, to be used as commodities. As Bales recognises, modern forms of slavery, ‘is not about

⁴⁷ App no. 25965/04 (ECtHR, 7 January 2010)

⁴⁸ Ibid, para 281

owning people in the traditional sense of the old slavery, but about controlling them completely.⁴⁹

In 2012 a group of experts considered how slavery should be defined within the law. The 'Research Network' studied current international legal definitions on slavery and acknowledged that there was a lack of legal clarity.⁵⁰ As a result of this, the group produced the 'Bellagio-Harvard guidelines on the legal parameters of slavery,' which defined slavery and distinguished it from forced labour and other institutions and practices similar to slavery. Drawing on the definition of slavery laid out in the League of Nations 1926 Slavery Convention, the guidelines note that slavery should be defined as:

[C]ontrol over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.⁵¹

According to the guidelines, the key element in determining the legal definition of slavery is the control over a person that equates to possession.⁵² Though it is now unlawful to assert ownership over a human being, such a factor is paramount in determining slavery. In recognising that persons could be possessed or controlled in a number of ways, such as physical control, or social and legal isolation, the guidelines acknowledges the unique experiences of enslaved victims and contemporary forms of slavery. According to Bales and Robbins, combatting slavery requires 'social and economic remedies in

49 Bales, *Disposable People* (n 4) 4

50 Research Network on the Legal Parameters of Slavery, 'Bellagio-Harvard Guidelines on the Legal Parameters of Slavery' (Bellagio Harvard Guidelines)<

<http://www.law.qub.ac.uk/schools/SchoolofLaw/FileStore/Filetoupload,651854,en.pdf>> 19 April 2017

51 Ibid, 2

52 Ibid

addition to legal ones.’⁵³ With the guidelines clarifying the legal definition of slavery for scholars as well as relevant law enforcement institutions, it also addresses:

[T]he fundamental social and economic relationship between two people that constitutes slavery. It forms a bridge between the lived reality of enslavement and the legal definition needed to specify and address this crime.⁵⁴

Furthermore, to distinguish cases of slavery from other situations, the guidelines note that the control has to equate to possession, allowing an individual to exercise any or all of the powers attaching to the right of ownership. ‘Powers attaching to the right of ownership’ include buying, selling or transferring a person, using a person, managing the use of a person, profiting from the use of a person, transferring a person to an heir or successor, and disposal, mistreatment or neglect of a person.⁵⁵ In determining whether slavery exists, it notes that particular attention should be made to the ‘substance and not simply to the form of the relationship in question’ and whether there has been an exercise of powers attaching to the right of ownership.⁵⁶ This can allow slavery to be determined by the actual conditions, removing any ‘cultural or social “packaging”’⁵⁷ that may attempt to normalise or conceal the act.⁵⁸

53 Kevin Bales and Peter T. Robbins, ‘ “No One Shall Be Held in Slavery or Servitude” : A Critical Analysis of International Slavery Agreements and Concepts of Slavery’ (2001) 2 Human Rights Review 18, 20

54 Kevin Bales, ‘Slavery in Contemporary Manifestations’ in Jean Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press 2012) 283

55 Bellagio Harvard Guidelines (n 50) 2-4

56 Ibid, 4

57 Bales, ‘Slavery in Contemporary Manifestations’ in Jean Allain (n 54) 282

58 For example, in rural parts of India, women and young girls in impoverished families are exploited through cultural and traditional customs within their own communities. The women are dedicated and married to deities, thereby becoming Devadasis, servants or slave of God. As a Devadasi, a girl is considered a ‘servant of God but wife of the whole town’ and forced to provide sexual services for her community. It is believed that dedicating and marrying young girls to deities would bring good fortunes to her family. In some parts of India young girls whose mothers are Devadasis

Though forced labour, defined as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,’⁵⁹ the guidelines note that it can often only amount to slavery where there exists the exercise of the powers attaching to the right of ownership. This applies to other ‘institutions and practices similar to slavery’ such as forced marriage, debt bondage and child exploitation.⁶⁰ Separately, in *Prosecutor v. Kunarac*, the International Tribunal for the Former Yugoslavia Appeals Chamber held that in addition to the exercise attaching to the powers of the right of ownership recognised by the 1926 Slavery Convention, circumstances amounting to slavery include:

[C]ontrol of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.’⁶¹

Dissecting the practice of slavery to grasp an understanding of its very nature is challenging and complex, given its predominance in antiquity, as well as its current state of evolution. Nevertheless, though the forms of exploitation and the methods by which modern traffickers and slave owners operate has evolved, what continues to be a determining element in the concept of slavery is the obvious existence of inequalities and the limitations placed on individuals’ freedom. Thus, slavery involves an individual’s ability to exercise authority over another, whose privileges has been subject to some or complete limitation.

are often forced into the sex industry themselves, where they endure sexual abuse and exploitation. These young girls then find themselves trapped in a life of sexual enslavement. See: Maria-Costanza Torri, ‘Abuse of Lower Castes in South India: The Institution of Devadasi’ (2009) 11 *Journal of International Women’s Studies* 31 ; See also Chapter Three: Section 3.5.3 on Bonded Labour in Brick Kilns in Asia

59 Forced Labour Convention, art 2(1)

60 Bellagio-Harvard Guidelines (n 50) 5-6

61 *Prosecutor v. Kunarac, Kovac and Vukovic* (Appeal Judgement) IT-96-23 (12 June 2002) para 119

2.3 Reflecting on the Trans-Atlantic Slave Trade

Historically, one of the most notable existences of slavery was the Trans-Atlantic slave trade where African slaves were legally subjected to extreme forms of exploitation for material wealth. As mentioned, contemporary debate on modern slavery tend to reflect on the Trans-Atlantic slave trade to highlight the prevalence of slavery in the 21st-century. In grasping an understanding of the concept and evolution of modern slavery, it is important to reflect on the Trans-Atlantic slave trade where millions of African slaves were exploited in the most barbaric of ways.

There is no one definitive answer as to what caused the Trans-Atlantic slave trade, and in fact, Africans had been traded as slaves centuries before, for instance, during the Trans-Saharan slave trade where they were transported between the Mediterranean and Sub-Saharan Africa.⁶² During the Trans-Atlantic trade, Africans were often kidnapped in slave raids, while slave-trading ports were set up alongside parts of the continent, such as the coast of West Africa where slaves were traded and shipped to the Americas and the Caribbean to be sold and forced into slavery.⁶³ Once sold they were compelled to work on plantations in the production of goods such as sugar, tobacco and cotton.⁶⁴

The treatment of slaves during the Trans-Atlantic slave trade was barbaric and inhumane, resulting in many slaves subjected to physical and psychological abuse.⁶⁵ The trade led to the dehumanisation of an entire race purely to accumulate wealth from their labour. As Muhammad comments on the crime

62 Patricia M. Muhammad, 'The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law' (2004) 19 American University International Law Review 883, 889

63 Rodney (n 14) 107

64 Eric Williams, *Capitalism and Slavery* (The University of North Carolina Press 1994) 4

65 Muhammad (n 62) 895-896

against humanity during the trade, 'The Atlantic passage tells a story of what heartless creatures will do: derive profit from the labor and life of a human being. A life of whom is not calculated or bartered for in any civilized society.'⁶⁶ Though indentured labourers were brought to the Americas to work under contract, African slaves were considered cheaper and better workers.⁶⁷ As William notes, 'The money which procured a white man's services for ten years could buy a Negro for life.'⁶⁸ Thus, slave traders and owners went to great lengths to justify the enslavement of Africans. In the 17th century, the English produced the most literary work dehumanising Africans to validate their enslavement.⁶⁹ Christianity was used to convince the public that enslaving Africans was not immoral.⁷⁰ Beckles notes that slavery was 'a commerce to be patronized by royalty, blessed by the clergy, and practiced by the aristocracy and gentry.'⁷¹

The Trans-Atlantic slave trade is evidence in history where people were legally degraded to property, under the absolute ownership of their master. Compared to other social groups such as indentured or white servants, African slaves had no rights to protect them from the dehumanisation that they were subjected to. They were property, and there were various laws put in place for their 'social governance and economic management.'⁷² As Beckles points out, 'When British slave traders purchased the African body, they also sought to purchase

⁶⁶ Ibid, 895

⁶⁷ Williams (n 64) 19

⁶⁸ Ibid

⁶⁹ Hilary M. Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University of the West Indies Press 2012) 39

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid, 56

the legal rights attendant to property. As such, they could do with their “property” whatever the law allowed.’⁷³

The notion that African slaves were property was evident in a case involving a slave ship called the *Zong*.⁷⁴ In 1781, 132 slaves were thrown overboard to their death as the captain of the ship mistakenly believed that water supply was low on board. The owners of the *Zong* attempted to claim insurance for the ‘property’ they lost. Though the case was unsuccessful because there was sufficient water on board, and held if not the ship could have made a port call, the case highlighted the dehumanisation of human beings in the realms of the law.⁷⁵ It was held that the death of a slave by a natural cause was not insurable and that insurance could only be claimed if the master of a ship was forced to discard some his ‘cargo’ for the sake of the others.⁷⁶ The case was not tried as a criminal one but rather ‘an action on a policy of insurance, to recover the value of certain slaves thrown overboard for want of water.’⁷⁷

Granville Sharp, a key campaigner for the abolition of the trade, exposed the case in an attempt to prosecute crewmembers for the murder of the slaves. However, according to Watner, ‘Sharp’s call for punishment was doomed because law and public opinion in 18th-century England still did not regard the African as a human being. In the eyes of most Englishmen, they were chattels or property, and the insurers were bound to pay for their loss.’⁷⁸

The reluctance to abolish the slave trade lay on the fact that many considered it as necessary to the progressive and successful development of economies.

⁷³ Ibid, 57

⁷⁴ *Gregson v Gilbert* [1783] 3 Doug KB 232

⁷⁵ See: James Oldham, ‘Insurance Litigation Involving the *Zong* and other British Slave Ships, 1780-1807’ (2007)

²⁸ *The Journal of Legal History* 285-318

⁷⁶ Ibid, 303

⁷⁷ *Gregson v Gilbert* [1783] 99 ER 629

⁷⁸ Carl Watner, ‘In Favorem Libertatis: The Life and Work of Granville Sharp’ (1980) 4 *Journal of Libertarian Studies* 215,225

Quoting Wakefield, Williams acknowledges that the existence of slavery was 'not moral, but economical circumstances; they relate not to vice and virtue, but to production.'⁷⁹ Moreover, in rejecting the argument that the enslavement of Africans was founded first on racism he notes, 'The reason was economic, not racial; it had to do not with the color of the laborer, but the cheapness of the labor.'⁸⁰ Racism was only used later to justify enslavement.

The trade in African slaves generated such profit that nations advocated for their enslavement. In Britain, firms such as the English Royal African Company was established to govern the sale of Africans, while nations enacted laws condoning the treatment of African slaves as property.⁸¹ The riches of the trade outweighed the brutal exploitation and marginalisation of the slaves. The Trans-Atlantic slave trade is the most notable existence of slavery in history as not only did it treat and trade slaves as commodities, but it also showed the lengths that man and the legal system went to degrade and dehumanise another human being for material wealth. For those who took part in the trade, profit greatly prevailed the misery of African slaves.

It was a long and challenging fight for activists in campaigning to end the slave trade and the very institution of slavery, as the practice continued for over 300 years. The trade flourished not only for the greed of slave owners but also because of the legal system which permitted their marginalisation and exploitation. Over two hundred years later, slavery is now illegal in every country in the world, with the condemnation of the practice now reflected in international regulations, such as the Universal Declaration of Human Rights, which holds that, 'no one is to be held in slavery or servitude.'⁸² Nevertheless, slavery continues to flourish in the 21st-century, pumping blood to the heart of

⁷⁹ Williams (n 64) 6

⁸⁰ Ibid, 19

⁸¹ Beckles (n 69) 56, 57

⁸² UDHR art 4

the economic system, as vulnerable and desperate men, women and children are exploited for a multitude of purposes.

2.4 Human Trafficking as a Form of Slavery

As established, slavery involves a situation where an individual attaches any or all of the powers attaching to the right of ownership over another. As aforementioned this can cover involvement such as the selling, using, managing or profiting from the use of a person. Undoubtedly, the trafficking of human beings for the purpose of exploitation can include such abuses, particularly during recruitment, transit and exploitation stages.

Human trafficking is often considered a form of slavery as it often involves the exercise of power over vulnerable individuals, whether through deceit or coercion, and encompasses various illicit methods to control victims. Similar to traditional forms of slavery, particularly the Trans-Atlantic slave trade, modern day owners are very knowledgeable on how to control their victims, often using physical and psychological abuse such as isolation, torture and imprisonment to ensure compliance. Presently, modern day traffickers also control victims using means such as debt bondage, abuse of cultural beliefs, or an individual's vulnerability.⁸³ A case involving a Nigerian girl illustrates how traffickers use cultural and religious beliefs to control their victims. The victim was forced to lie in a coffin to put the fear of death in her, obliged to eat raw chicken hearts, had her hair clipped off and kept to signify that she could be found wherever she was.⁸⁴ Another victim forced into domestic slavery was so isolated and trapped in her captor's home that the only way for her to escape was to jump out of the building resulting in her breaking most of her limbs and

83 United Nations Office on Drugs and Crime, 'Human Trafficking: An Overview' (UNODC, January 2008) 14
<http://www.ungift.org/doc/knowledgehub/resource-centre/GIFT_Human_Trafficking_An_Overview_2008.pdf >
accessed 20 October 2013

84 Sarah Forsyth and Tim Tate, *Slave Girl – Return to Hell*, (John Blake Publishing 2013) 69-70

temporary paralysis of her lower body.⁸⁵ Separately, some modern slaves are often beaten and made to develop drug addictions which traffickers take advantage.⁸⁶ Others in forced labour are compelled to work in inhumane conditions with lack of protective work gear, working long hours for little or no pay.

A key form of control over trafficked and enslaved persons today is often the removal of identifications documents (legal and illegal) to restrict an individual's freedom.⁸⁷ In some cases, it is not uncommon for traffickers to withhold victims' illegal documentation, threatening to report them to the law enforcement so that they could be deported. More sinister methods of ownership that mimics traditional forms of slavery, include traffickers branding victims with tattoos, as a visible mark of servitude to instil a sense of ownership and power over them.⁸⁸ Traffickers' *modi operandi* aim to diminish a victim's self-worth and hope of escaping. Indeed there are situations where some victims are allowed to leave their trafficker temporarily. In reflecting on other existences of slavery in history, such as the Trans-Atlantic slave trade, one may ask, if victims are free to leave (thus having the opportunity to seek help) surely they cannot be slaves? However, the ability to control a slave does not simply require physical means, but rather it involves the psychological control that victims are often unable to emancipate themselves from. Victims fear their captors. Some even struggle to function without them as they are so used to that control or as in many cases, it is the only way of life they have known.

85 Beatrice Fernando, 'Trapped on the Balcony : A Tale of a Sri Lankan Held Hostage in Lebanon' in Jesse Sage, Liora Kasten, and Gloria Steineim (eds.), *Enslaved: True Stories of Modern Day Slavery* (Palgrave Macmillan 2006) 110

86 Jamie Shandro, Makini Chisolm-Straker, Herbert C. Duber, Shannon L. Findlay, Jessica Munoz, Gillian Schmitz, Melanie Stanzer, Hanni Stoklosa, Dan E. Wiener and Neil Wingkun, 'Human Trafficking: A Guide to Identification and Approach for the Emergency Physician' (2016) 68 *Annals of Emergency Medicine* 501, 502

87 *Ibid*, 503

88 *Ibid*, 502

Often the abuse creates a state of mind similar to Stockholm Syndrome where victims become dependent on their traffickers and exploiters.⁸⁹ As Bales notes, whereas traditional slavery later focused primarily on the race of the slave, modern slavery thrives more on the 'weakness, gullibility and deprivation' of individuals.⁹⁰

Though the practice of a person exerting control over another and the purposes for which people are trafficked and exploited can mimic traditional forms of slavery, the modern traffic in human beings has various distinctive elements that distinguish it from traditional forms. In comparing 'old slavery' and 'new slavery' Bales identifies a number of key differences ; legal ownership, the purchase cost of slaves, the profits, the availability of slaves, the relationship between a slave and their owner, the maintenance of slaves, and the ethnic differences.⁹¹ In comparison to traditional forms of slavery, particularly the Trans-Atlantic slave trade where there existed documented ownership to assert legal rights over a slave as property, modern day traffickers and exploiters do not exert legal ownership over their victims. Ownership today is not only illegal but it is predominately asserted by the use or threat of violence, and abuse of an individual's vulnerability. Though such abuses were also evident during the Trans-Atlantic slave trade, evidence of ownership came in the form of legal documentation such as bill of sales or titles of ownership.⁹² Separately, concerning the purchase costs of slaves, in contrast with African slaves, the price of slaves today are significantly cheaper, with higher profit margins. Traditionally, the high purchase costs of slaves did not produce high profits, with Bales suggesting that in the American South in

89 Elizabeth Hopper and José Hidalgo, 'Invisible Chains: Psychological Coercion of Human Trafficking Victims' (2006) 1 Intercultural Human Rights Law Review, 185, 199

90 Bales, *Disposable People* (n 4) 11

91 Ibid, 15

92 Ibid, 17

1850, profits generated from slave labour only amounted to about five percent annually. In comparison, he notes that agricultural bonded labourers in India generate over fifty percent of profits annually.⁹³ Because the price of slaves is significantly cheaper today, not only do they generate more profits for their owner, but they are also available in abundance and therefore more disposable. Modern traffickers and exploiters do not have to focus on maintaining their slaves as they are easily replaceable.⁹⁴ Thus the relationship between the slave and their owner can often exist on a short term basis. Nevertheless, as will be illustrated in the subsequent chapters, like the relationship between slaves and owners during the Trans-Atlantic slave trade, some relationships today can exist in the long-term, particular where victims are bounded by contracts and debt bondage with increasing interest rates. Finally, an apparent distinction between traditional forms of slavery and modern slavery, is that slavery today is not rigidly categorised or distinguishable by ethnical or racial differences.⁹⁵ Though hierarchical and traditional customs practiced in some communities still exist, bounding individuals to slavery-like customs, such as Mauritania, or bonded labour in parts of Asia, this is not the fundamental basis of today's slavery. Rather, the modern trafficking and exploitation of human beings is founded on the abuse of power imbalances.⁹⁶

It is evident, that the trafficking and exploitation of human beings is not a new phenomenon as the abuse of power to exert control over human beings as commodities continues to exist as well as flourish in today's society. Nevertheless, the modern traffic of human beings has evolved in the sense that not only is it illegal, but the scale to which it exists surpasses that of

93 Ibid, 16-18

94 Ibid, 17

95 Ibid, 17

96 Ibid

traditional forms of slavery as slaves today are widely available, cheaper, more disposable and much more profitable. As will be explored in section 2.7 there are certain factors or characteristics that increases the abundance of victims and individuals' susceptibility to exploitation. Moreover, whereas traditionally slaves did not give their consent to exploitative conditions, the subsequent Chapter will illustrate circumstances of modern forms of slavery where individuals' consent to conditions has led to their exploitation. Though slavery is now illegal, present day traffickers and criminal networks are becoming more sophisticated in the techniques used to control modern slaves, exert ownership over vulnerable individuals, and ultimately dehumanising them as property.

2.5 Human Trafficking and Modern Slavery as Human Rights Abuses

As with traditional forms of slavery, human trafficking, modern slavery, and related offences involve violations of individuals' fundamental human rights and thus is often conceptualised as a grave human rights issue.⁹⁷ Human rights abuses could exist in the recruitment of a victim, during transit phases, and undoubtedly at the end result of exploitation. For example, concerning UDHR, an individual could be subjected to inhumane and degrading treatment (prohibited under Article 5),⁹⁸ in order to coerce them into slavery they could have their liberty restricted or limited (prohibited under Article 3),⁹⁹ overworked without rest (prohibited under Article 24),¹⁰⁰ restricted from accessing adequate necessities to ensure health and wellbeing (prohibited under Article 25)¹⁰¹ and ultimately held in slavery or servitude (prohibited under Article 4).¹⁰²

97 Lee (n 3) 9.

98 UDHR art 5

99 Ibid, art 3

100 Ibid, art 24

101 Ibid, art 25

102 Ibid, art 4

Additionally, as modern slavery can involve other criminal activities such as human smuggling, and forced criminal acts as part of their exploitation, to criminalise victims for their participation in such acts could potentially amount to a violation of the right to equality before the law and equal protection of the law¹⁰³ and moreover effective remedy for human rights abuses.¹⁰⁴ Obokata notes that adopting a human rights perspective to combatting trafficking is vital as it takes into account the nature and circumstances surrounding the exploitation, and in acknowledging human rights violations against the victims, protects them from criminalisation, and also from further victimisation.¹⁰⁵ Moreover he suggests that combatting human trafficking from a human rights approach addresses the root causes of the crime, enabling us 'to understand these issues in depth and to seek not only legal, but also political, economic and social solutions accordingly.'¹⁰⁶

As slavery today takes a number of forms, such as sexual exploitation, debt bondage, domestic servitude, forced marriage, forced labour and child labour, each type of exploitation can have its own unique complexities that prove a challenge when regulating the crime. Victims' experiences of trafficking and enslavement can greatly differ among individuals, particularly due to the level of abuse inflicted and harm suffered. Thus, acknowledging human trafficking and modern slavery not solely as a criminal justice issue but also a violation of fundamental human rights further allows us to address the root causes and consequences of exploitation, protect victims from further victimisation, and grasp an understanding of the methods used in recruiting and controlling them.

103 Ibid art 7

104 Ibid, art 8

105 Tom Obokata, 'A Human Rights Framework to Address Trafficking of Human Beings' (2006) 24 Netherlands Quarterly of Human Rights 379, 384

106 Ibid

2.6 Human Trafficking as a Transnational Organised Crime

Criminal syndicates are now able to operate on an international scale by developing highly complex criminal networks, taking advantage of the ease of moving people and goods, the secrecy of underground organisations, weak State regulations and the high rewards and low risk of detection. Due to human trafficking usually involving the movement and enslavement of people across various borders and collaboration among criminal organisations in the international community, it is viewed as a form of transnational organised crime. There is no one succinct definition of organised crime as the modus operandi, and scale of operations may drastically differ.¹⁰⁷ Nevertheless, organised crime composes of sinister entrepreneurial actors and relationships motivated by maximising profit through illegal activities.¹⁰⁸ In its Convention against Transnational Organized Crime, the UN defined an organised criminal groups as:

[A] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.¹⁰⁹

Moreover, it outlined various elements of a transnational crime:¹¹⁰

- it is committed in more than one State;
- it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

¹⁰⁷ Tom Obokata, *Transnational Organised Crime in International Law* (Hart Publishing 2010) 14

¹⁰⁸ Ibid, 19

¹⁰⁹ United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) (Transnational Organized Crime Convention) art 2(a)

¹¹⁰ Ibid, art 3(2)

- it is committed in one State but has substantial effects in another State.

From this definition, a transnational organised crime broadly defines one which disrupts or threatens regulations in more than one State. Thus, the aim of international conventions on suppressing transnational organised crime is to harmonise the way in which States respond to such criminal activities by providing universal definitions of crimes, and direction on measures to adopt to combat it, such as prosecuting offenders.¹¹¹

According to Passas, 'cross-border crime is conduct which jeopardizes legally protected interests in more than one national jurisdiction and which is criminalized in at least one of the states concerned.'¹¹² As a result of the threat transnational crime poses to the order and development of multiple States, combatting such a crime requires the co-operation among State authorities and the implementation of measures outlined by international law in national legislation and legal systems. According to Cryer et al:

Transnational criminal law therefore consists, on the one hand, of treaty obligations between States and, on the other, the application of criminal law by those States to individuals in the implementation of those treaty obligations.¹¹³

Furthermore, as the trafficking of human beings affects all countries, illegal activities involved in the commissioning of the crime are often transnational. As mentioned, a country can be a source of victims (state of origin), used as a route to move people from one place to another (transit), transported to a location where a victim is relocated to be exploited (destination), or all three

111 Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 330-331

112 Nikos Passas, 'Cross-border Crime and the Interface between Legal and Illegal Actors' (2003) 1 *Security Journal* 19, 20

113 Cryer, Friman, Robinson and Wilmshurst (n 111) 330

simultaneously. Though individuals can be trafficked internally within a region, human trafficking is often viewed as a transnational crime as victims are likely to be transported across borders to be exploited. The UN's 2016 Global Report on Trafficking in Persons recognised that in most cases traffickers and victims were more likely to come from the same background, and further, traffickers were likely to recruit in their own country but cross borders to exploit their victims.¹¹⁴ For example, in Western and Central Africa there exists extensive inter-region trafficking where children are exploited through forced labour and women and girls, in particular, are trafficked for sexual exploitation.¹¹⁵ However, victims are also transported for sexual exploitation to other regions such as Western Europe, Southern Africa and the Middle East.¹¹⁶

Transnational organised criminals, whether they carry out their operations on a large or small scale or vary in illicit objectives, are resourceful entrepreneurs taking advantage of vulnerable individuals, international integration, the ease of mobility and weak or corrupt law enforcement. The transnational nature of their criminal activities allows many to commit the crime in one country and circumvent the law in another. According to Shelley:

[T]hey also thrive in a globalised world because the legal controls are state based, whereas the crime groups are transnational...Through their flexibility and because of their network structures, they avoid cumbersome legal procedures, which prevent law enforcement from striking effectively at the smuggling networks that cross regions and continents.¹¹⁷

The business of modern slavery often involves a multitude of transnational actors to carry out its operations. Ultimately for a large-scale transnational

114 UNODC, *Global Report on Trafficking in Persons* (2016) 7

115 UNODC, 'Human Trafficking: An Overview' (n 83) 8

116 Ibid

117 Louise Shelley, 'Human Trafficking as a Form of Transnational Crime' in Maggy Lee (ed.), *Human Trafficking* (Routledge 2012) 117

trafficking network to thrive, criminal syndicates must collaborate with unlawful associates on an international level to aid in the organising, recruitment, transportation, concealment and exploitation of human beings. Often criminal syndicates liaise with corrupt law enforcement officials who abuse their public power by aiding traffickers in the trafficking, exploitation and intimidation of victims, and providing security, travel documents and visas.¹¹⁸ They may also obstruct justice by falsifying criminal investigations and prosecutions.¹¹⁹

Modern traffickers have various methods of recruiting victims on a transnational scale. For example, in luring vulnerable women and girls for sexual exploitation, many are recruited through advertisements in newspapers and various organisations such as employment or marriage agencies.¹²⁰ Though individuals can be trafficked by criminal gangs, it is not uncommon for some to be acquainted with their traffickers.¹²¹ For example, in Vietnam, Le notes that alongside strangers, many victims were trafficked by friends, acquaintances, and family members.¹²² Also, in times of economic crises, war and conflict, traffickers often prey on an individual's desperation to escape their situations.¹²³ Furthermore, there can exist a nexus between criminals involved in human trafficking and those in other organised crime groups carrying out criminal activities such as drug and arms smuggling, money laundering and terrorism. For example, terrorist groups such as ISIS and Boko Haram,

118 See: United Nations Office on Drugs and Crime, 'The Role of Corruption in Trafficking in Persons' (UNODC, 2011) <https://www.unodc.org/documents/human-trafficking/2011/Issue_Paper_-_The_Role_of_Corruption_in_Trafficking_in_Persons.pdf> accessed 9 August 2016

119 Ibid

120 Donna M. Hughes, 'The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women' (2000) 53 *Journal of International Affairs* 625, 634

121 Sharvari Karandikar, Lindsay B. Gezinski, and Jacquelyn C.A. Meshelemiah, 'A Qualitative Examination of Women Involved in Prostitution in Mumbai, India: The Role of Family and Acquaintances' (2011) 56 *International Social Work* 496, 500

122 PhuongThao D. Le, ' "Reconstructing a Sense of Self" Trauma and Coping among Returned Women Survivors of Human Trafficking in Vietnam' (2017) 27 *Qualitative Health Research* 509, 510

123 UNODC, *Global Report on Trafficking in Persons* (2016) 10

regularly engage in the kidnapping and trafficking of women and children.¹²⁴ Moreover, not only are women and girls used as sex slaves or exploited through forced marriages, but some terrorist group purchase children to use as suicide bombers and soldiers in armed conflict.¹²⁵

Transnational organised crimes constitute a serious threat to the global community. Criminal organisations operate using high levels of violence and threaten the authority of States, 'favouring those with profitable market environments, economic inequalities and low risk of detection.'¹²⁶ The crimes carried out by such criminal syndicates is not only a challenge for nations, but the violence that often accompanies their illicit activities also threatens its citizens.¹²⁷ The transnational nature of modern slavery proves a challenge for governments and law enforcement agencies by inducing public, safety and health concerns. Thus, combatting the trafficking of human beings and modern slavery requires transnational co-operation, effective intelligence sharing and communication, and joint anti-trafficking initiatives throughout the wider global community.

2.7 Factors that influence Modern Slavery

2.7.1 Globalisation

As evidenced by historical slavery, the trafficking of human beings is not a modern development. However, its current complexities have been aided by advances in technology and globalisation of which sophisticated traffickers

¹²⁴ Louise I. Shelley, 'ISIS, Boko Haram, and the Growing Role of Human Trafficking in 21st Century Terrorism' (*The Daily Beast*, 26 December 2014) <<http://www.thedailybeast.com/articles/2014/12/26/isis-boko-haram-and-the-growing-role-of-human-trafficking-in-21st-century-terrorism.html>> accessed 4 March 2016

¹²⁵ Ibid

¹²⁶ Akilah Jardine, 'Transnational Organized Crime, Harm and Victimisation' in Karen Corteen, Sharon Morley, Paul Taylor, and Jo Turner (eds.), *A Companion to Crime, Harm and Victimisation* (Policy Press 2016) 233

¹²⁷ Ibid, 234

have taken advantage. Technological advancement has resulted in better communication, transport and travel on an international scale. Globalisation has expanded global exports of goods and services, increased the flow of capital, and widen job opportunities. It has allowed businesses to reach consumers on a global scale, and take advantage of reduced taxes on international trade. The process of globalisation is not a new phenomenon, but rather an intensified one which has encouraged various political and economic developments.¹²⁸

From a positive perspective, globalisation can help increase economic opportunities for less developed countries, encourage cultural diversity, and the opportunity to explore a new world allowing for easier access to new, low-cost and alternative products and services. Nonetheless, not everyone can salvage the opportunities that can arise from this ever-growing international integration with some academics questioning whether globalisation has led to inequality. Access to competitive and alternative goods can weaken a country's infrastructure as consumers are driven towards cheaper goods whose profits do not benefit their own economy.

The International Monetary Fund admits that 'Even supporters of globalization agree that the benefits of globalization are not without risks - such as those arising from volatile movements.'¹²⁹ Human trafficking is considered one of the dark sides of globalisation due to the sophisticated operations and the level of exploitation it encompasses.¹³⁰ As it is now easier for individuals to move from

128 Sakiko Fukuda-Parr, 'New Threats to Human Security in the Era of Globalization' (2003) 4 Journal of Human Development, 167, 168

129 International Monetary Fund, 'Globalization' <<http://www.imf.org/external/np/exr/key/global.htm>> accessed 2 January 2014

130 Loring Jones, David W. Engstrom, Tricia Hilliard, and Mariel Diaz, 'Globalization and Human Trafficking' (2007) 34 Journal of Sociology & Social Welfare 107, 108

one place to another, modern traffickers and slave owners are also able to take advantage of the ease of movement in operating the modern slave trade.

As mentioned human trafficking and modern slavery is a topic frequently discussed on political agendas as it influences national and foreign policies, threatens global security and undermines the sovereignty of States by violating human rights, and hindering the effective enforcement of anti-slavery measures. It has been argued that globalisation and regional integration has contributed to human trafficking and modern slavery as an ever increasing transnational organised crime with Nagle describing human trafficking as a 'heinous, unintended consequences' of this new face of international integration.¹³¹

Brewer argues that as the world shrinks due to globalisation, the movement across international borders continues to grow.¹³² An integrated world economy attracts people from less developed countries to the more developed world with the prospect of opportunities of education and a better standard of living. However, on the other side, these highly developed countries are homes to large multinational corporations, businesses and corrupt criminal networks. For such businesses to make a profit and to maintain their position in a highly competitive global market there has been a need to keep expenses low by employing cheap labour.¹³³

On commenting on the motivation behind modern forms of slavery, particularly labour exploitation, Belser notes that if it were not for lower labour wages and high profits then what would be the reason for anyone to exploit another human

131 Luz E. Nagle, 'Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude' (2008) 26 Wisconsin International Law Journal 131, 137

132 Devin Brewer, 'Globalization and Human Trafficking' [2009] Topical Research Digest: Human Rights and Human Trafficking 46

133 Nagle (n 131) 139

being through forced labour.¹³⁴ In citing economist Paul Krugman, he notes, 'there is no point in enslaving or enserfing a man unless the wage you would have to pay him if he was free is substantially above the cost of feeding, housing and clothing him.'¹³⁵ This view also applies not solely to forced labour but also to other forms of modern slavery.

The motivation behind the continued exploitation of human beings in the globalised economy is simply to maximise capital. It encompasses the greed of man to economically exploit a vulnerable person solely for the benefit of himself. Traffickers act as middlemen acquiring the human capital or tools of production needed for their consumers or clients, whether it be for sexual exploitation or forced labour. Commenting on labour exploitation, Nagle suggests:

[Trafficking] results in part from a consumerism mentality obsessed with the capacity to acquire goods and services from around the world at a good value. The fact that most trafficking victims constitute a "durable good" also adds continuing value to the enterprise.¹³⁶

As a result of this need for cheap labour, goods and services it is not surprising that many individuals find themselves in difficult economic and poor working conditions. As will be further explored in Part Two of this thesis, the high demand for cheap goods and services in the globalised world creates a market where vulnerable and often poor individuals continue to be economically exploited.

134 Patrick Belser, 'Forced Labour and Human Trafficking: Estimating the Profits' (2005) Special Action Programme to Combat Forced Labour Working Paper No.42, 2

<<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1016&context=forcedlabor>> accessed 4 November 2013

135 Ibid

136 Nagle (n 131)150

2.7.2 “Push” and “Pull” Factors

Lack of a comprehensive understanding of the scope of human trafficking and modern slavery hinders the development of effective strategies.¹³⁷ There is no one explanation for what influences the continued enslavement and exploitation of people. According to the United Nations Office on Drugs and Crime (UNODC), ‘Trafficking is a complex phenomenon that is often driven or influenced by social, economic, cultural and other factors.’¹³⁸ Though the influences of modern slavery may differ between nation states, there nonetheless exists certain commonalities as to what predicts human trafficking and makes an individual susceptible to exploitation. This combination of cultural, social, political and economic factors helps us to understand some of the root causes of trafficking in both countries of origin and destination on an international scale.

Due to globalisation mobility between countries is cheaper, and easier. Easier communication, technological advances and the flow of knowledge has opened up a whole new world full of opportunities for individuals to better their standard of living. Though mobility is easier than ever before, stricter borders have resulted in desperate people falling into the hands of traffickers and criminal syndicates to help acquire jobs or illegal entry into a country. Modern traffickers often target vulnerable and naive individuals who are ready to act on the prospect of a better life. Often individuals choose to act on the opportunity to better their economic status abroad on success stories of others who have benefited from such a risk. For example, Vijeyarasa makes reference to the ‘Cinderella Syndrome’ whereby women from Ukraine are

¹³⁷ Galma Jahic and James O. Finckenauer, ‘Representations and Misrepresentations of Human Trafficking’ (2005) 8 Trends in Organized Crime 24, 37

¹³⁸ United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (2008) 423

enticed to migrate by 'anecdotal imagery about real or perceived opportunities for work abroad when coupled with poor social-economic circumstances.'¹³⁹

The factors that motivate an individual to leave their country of origin and increase their vulnerability to being trafficked and exploited can be divided into two categories; push factors and pull factors.¹⁴⁰ According to Nagle:

Human trafficking benefits from one of the crucial engines of globalization – the supply and demand of transportable commodities, as well as from the transfer of capital, the opening of borders and trade deregulation...global conditions create a supply and demand chain conducive to human trafficking and comprised of several push and pull factors...that contribute to supply because they force people to seek ways to improve their personal and economic situation.¹⁴¹

High unemployment, poverty, economic and political instability, discriminatory labour markets, social unrest, gender or race discrimination, lack of opportunity, human rights violations, and the prospect of improving ones standard of living abroad are just a few reasons that push or encourage an individual to migrate in search of a better living.¹⁴² People who find themselves facing such difficulties are often vulnerable and desperate to do whatever they can to better their situations. Many seek help from smugglers and put themselves in extremely dangerous circumstances. This is evident in the ongoing humanitarian crisis in Syria where thousands risk their lives to cross borders illegally. Though such journeys have had catastrophic consequences resulting in the deaths of thousands, for many it is a risk worth taking.

139 Ramona Vijayarasa, 'The Cinderella Syndrome: Economic Expectations, False Hopes and the Exploitation of Trafficked Ukrainian Women' (2012) 35 Women's Studies International Forum 53, 54

140 See: Neha Misra, 'The Push & Pull of Globalization: How the Global Economy makes Migrant Workers Vulnerable to Exploitation' (2007) 14 (3) Human Rights Brief 2-4

141 Nagle (n 131) 137

142 Ibid, 137-138

Traffickers often prey on these individuals' desperation and vulnerability, coercing and deceiving them of false promises of a better life abroad.

High demand for cheap labour, weak laws against forced work, demand for commercial sex, corruption and the promise of better opportunities, are some factors that contribute to the high demand for vulnerable individuals.¹⁴³ Additionally, the demographics of a developed country may consist of mature adults resulting in a shortage of young low skilled workers.¹⁴⁴ There is then a demand for foreigners who are more likely to take on jobs that nationals would not, accept low wages and work in difficult environments.¹⁴⁵ By employing these migrant workers, businesses are able to keep labour and production costs low. Often the pay migrant workers are given, despite being low, is much higher than what they would expect to receive back home. This is evident in Thai migrants working in the construction sector in Japan whose wages are 40% less than Japanese workers.¹⁴⁶ According to Jones et al., though their wage is less than the Japanese workers, it is considerably higher (as much as ten times) than the wage they would be paid in Thailand.¹⁴⁷ Likewise, businesses may favour labour markets in developing countries where there exists weak labour laws, safety policies and no minimum wage.¹⁴⁸

Regulating modern slavery not only requires an understanding of the consequences of exploitation, but also factors that influence the continued abuse of vulnerable individuals. Combatting the crime requires an insight into the factors that influence and attract people to migrate in search of a better

¹⁴³ Ibid, 138

¹⁴⁴ Kevin Bales, 'What Predicts Human Trafficking?' (2007) 31 *International Journal of Comparative and Applied Criminal Justice* 269, 276

¹⁴⁵ Misra (n 140) 2

¹⁴⁶ Jones, Engstrom, Hilliard and Diaz (n 130) 112-113

¹⁴⁷ Ibid, 113

¹⁴⁸ Lusk and Lucas (n 41) 51

living, or accept poor forms of work. Though individual victim experiences of human trafficking and modern slavery can differ, push and pull and factors help us to grasp an understanding of the root causes of exploitation, including the demand for exploitative goods, services or people. Such considerations can help feed into the bigger picture in its regulation.

2.8 Distinguishing between Human Trafficking and Human Smuggling

As the process of human trafficking often involves the movement of people across borders, it involves numerous offences which tend to overlap, and therefore an internationally recognised definition allows for better indicators of the crime. One such crime which tends to overlap with human trafficking is that of another category of irregular migration recognised as human smuggling. The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, defines human smuggling as:

[T]he procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.¹⁴⁹

In 1994, the International Organization for Migration defined human trafficking as a crime where there is a voluntary movement of illegal entry across international borders, by use of a trafficker where money or other forms of payment is exchanged.¹⁵⁰ This definition omitted exploitative elements, thereby mirroring the current international definition on the smuggling of migrants. Human trafficking and human smuggling are interrelated concepts

¹⁴⁹ Protocol against the Smuggling of Migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) (Smuggling Protocol) art 3(a)

¹⁵⁰ Frank Laczko, 'Data and Research on Human Trafficking' (2005) 43 International Migration 5, 10

as both crimes often involve the act of illegal entry into a country. The commonality of the crimes is that frequently individuals leave their country of origin voluntarily and are at risk of being exploited as a result of them being smuggled as an illegal alien into another country. Human smuggling and human trafficking tend to involve similar factors that encourage individuals to leave their country of origin such as lack of education and jobs, discrimination, and conflict. Though both individuals may choose to migrate voluntarily for similar reasons their status can become blurred. There are several factors that can distinguish between a smuggled migrant and a trafficked victim. Firstly, there is the issue of consent. Smuggled individuals are considered to have given complete consent to the facilitation of their movement across borders illegally.¹⁵¹ On the other hand, victims of human trafficking often give partial consent to the movement (whether within or across borders) as it was obtained through deception or coercion. In the case of human trafficking, the consent is to the movement but not to the resulting exploitation. Secondly, the relationship between the smuggler and the migrant can help distinguish the two crimes. In the case of human trafficking, a customer transaction exists between the smuggler facilitating the move, and the exploiter.¹⁵² Thus, the victim is merely the commodity within this relationship. In the case of human smuggling the transaction exists directly between the smuggler and migrant. Thirdly, once the facilitation of movement has occurred, another issue is whether the migrant is free to leave the smuggler. The distinction often becomes blurred here, as a smuggled migrant could in fact become a victim of human trafficking. For instance, once smuggled into another country, due to their illegal status a migrant may accept poor employment which exposes them to some level of

151 Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54 *International and Comparative Law Quarterly* 445, 447

152 Brian Iselin and Melanie Adams, 'Distinguishing Between Human Trafficking and People Smuggling' (2003) UNODC Regional Centre for East Asia and the Pacific, Bangkok 2003, 5 < [https://www.embraceni.org/wp-content/uploads/2006/06/Distinguishing\[1\]1.pdf](https://www.embraceni.org/wp-content/uploads/2006/06/Distinguishing[1]1.pdf)> accessed 22 May 2017

exploitation.¹⁵³ Moreover, the migrant may be aware that a trafficker will be providing them with work but nevertheless ignorant as to the true circumstances.¹⁵⁴ A smuggled person can also become a victim of human trafficking if they pay their smuggler a percentage of the money before the journey and then is held on a debt-bondage and exploited to repay the remainder upon arriving in the destination country.¹⁵⁵

Further, like victims of human trafficking, smuggled migrants can suffer from physical and psychological damages also amounting to human rights abuses. As mentioned, poor socio-economic circumstances can be detrimental to individuals, coercing them to seek help from smugglers. Migrants could also be subject to exploitation during transit, such as suffering inhumane treatment including being transported under unsafe conditions and also subject to physical and sexual abuse.¹⁵⁶ Due to the blurring line between human trafficking and human smuggling, and as a result of human trafficking frequently involving the movement of people across borders, it often conflates with policies surrounding migratory issues. Often it can be difficult for law enforcement officials to recognise victims of trafficking as a result of their illegal status within a country. Thus the focus tends to be placed on stricter border security and controls to reduce the number of illegal immigrants.¹⁵⁷ According to Haynes, to combat illegal immigration politicians have aimed to stress on the similarities of human trafficking and human smuggling to tighten border

153 Paolo Campana and Federico Varese, 'Exploitation in Human Trafficking and Smuggling' (2016) 22 *European Journal on Criminal Policy and Research* 89, 94

154 John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 38 *International Migration* 31, 34

155 Aronowitz (n 21) 167

156 Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2005) 17 *International Journal of Refugee Law* 394, 400

157 Raimo Väyrynen, 'Illegal Immigration, Human Trafficking, and Organized Crime' (2003) *World Institute for Development Economics Research Discussion Paper No. 2003/72*, 6

<<https://www.wider.unu.edu/sites/default/files/dp2003-072.pdf>> accessed 21 January 2014

operations.¹⁵⁸ She suggests that while governments are aware that although both crimes may share similar elements are in fact quite distinct, often their main focus is not on combating trafficking of human beings but rather reducing the number of illegal immigrants entering their country.¹⁵⁹

Though both smuggled migrants and trafficked victims can be subject to exploitation and abuse, distinguishing the two has been considered vital. Firstly, misidentification of victim of human trafficking can lead to further victimisation of the individual. The consequences of exploitation can have a detrimental effect, both physically and psychologically and thus it is crucial for them to be issued the necessary protection and assistance that is needed to support them in recovering from any trauma or harm. Secondly, identification of a victim of human trafficking can protect them from further victimisation such as the risk of being re-trafficked. Many victims as a result of being an illegal alien in a foreign country are fearful of law enforcement officials for fear of prosecution and deportation and therefore may not comply with enforcement officials.¹⁶⁰ When this occurs, it is not surprising that many victims of trafficking who have been wrongfully labelled as a smuggled migrant are deported home and subsequently find themselves subject to further victimisation.¹⁶¹ There is no doubt that the offence of illegal immigration threatens the public order of a country. Nevertheless, officials need to not be blinded solely by the offence of illegal immigration and recognise that many illegal immigrants could, in fact, be victims of human trafficking. As Iselin and Adams note, 'To err on the side

158 Dina F. Haynes, 'Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers' (2004) 26 Human Rights Quarterly 221, 232

159 Ibid

160 Amy Farrell, 'Improving Law Enforcement Identification and Response to Human Trafficking' in John Winterdyk, Benjamin Perrin and Philip Reichel (eds.), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2012) 187

161 Svitlana Batsyukova, 'Human Trafficking and Human Smuggling: Similar Nature, Different Concepts' (2012) 1 Studies of Changing Societies 39, 40

of a guilty presumption is not only a deprivation of natural justice but if it is a trafficked victim we have discovered, then we may be continuing the victimisation of someone who has already suffered too much.’¹⁶² Victims of human trafficking are not perpetrators and should not be punished as such. Though they may have consented to the facilitation of illegal entry into a country that consent is nullified once it was obtained through deception or coercion and the individual finds themselves subject to exploitation solely for the profit of another.

Thirdly, it has been considered vital in distinguishing between human trafficking and human smuggling as the way in which the terms are viewed have an impact on the status and treatment of victims and offenders by law enforcement officials. Though individuals who have been smuggled can be subject to abuse, one fundamental difference between the Trafficking Protocol and the Smuggling of Migrants Protocol is the protection that is offered to the migrants. The Trafficking Protocol encourages State parties to provide victims of human trafficking the necessary protection and assistance to help victims recover from harm or trauma they may have suffered at the hands of their exploiters.¹⁶³ Furthermore, it suggests that countries with which victims were exploited in, be offered temporary visa permits or permanent residency.¹⁶⁴ Unlike these recommendations, the Smuggling of Migrants Protocol simply requires that States ensure the safe and humane treatment and protection of the migrants.¹⁶⁵ Moreover, it is important to distinguish between the trafficking of human beings, and smuggling of people as by not doing so will prevent better data and accurate research which is crucial in understanding the scope

¹⁶² Iselin and Adams, (n 152) 9

¹⁶³ UN Trafficking Protocol, art 6

¹⁶⁴ Ibid, art 7

¹⁶⁵ Smuggling Protocol, art 16

of human trafficking, existing trends and policies, preventing the offence, protecting victims and prosecuting offenders.

2.9 Conclusion

Though legal ownership of human beings is no longer permitted, the illegal trafficking and exploitation of human life proves to be a complex global phenomenon. Though modern slavery can mimic traditional forms of slavery, as victims are subject to human rights violations through various forms of exploitation, the scale of modern slavery continues to rapidly evolve in the face of global integration as modern day traffickers, and slave owners find new ways to lure, control and exploit vulnerable individuals while circumventing the law. Modern slaves today are available in abundance, making them cheaper and more disposable. Millions today are held in captivity or forced to accept exploitative conditions – their vulnerability and eagerness for a better life abused and taken advantage of. The underground nature of modern slavery and the sinister methods modern day slave owners use to control individuals, makes it difficult to detect victims and their perpetrators.

Due to the scale of the crime, particularly its transnational nature, it is evident that regulating modern slavery requires international collaboration to grasp a comprehensive understanding of the intricacies and complexities of such an evolving crime. Likewise, measures cannot solely adopt a ‘one-size-fits-all’ approach, as it is vital that they take into account the unique experiences of trafficked and enslaved victims, including coercive forces and the multitude of purposes for which they are exploited.

Chapter Three: Human Trafficking and Forced Labour Exploitation

3.1 Introduction

Modern slave owners and traffickers are becoming increasingly knowledgeable in the commoditisation of human beings. As aforementioned, it is significantly cheaper to purchase a slave today than it was centuries ago, making modern slaves more disposable as they could be used, abused, disposed, and easily replaced.¹⁶⁶ An exploiter's prime aim is to maximise his capital at the expense of vulnerable individuals. Like traditional forms of slavery, modern day traffickers and exploiters have mastered methods in not only luring and controlling their victims, but have also accessed and utilised trades and industries where they extract profit from the continued exploitation of individuals. As stated, individuals can be trafficked and exploited for a multitude of purposes. For example, UNODC acknowledged sexual exploitation, forced labour and organ trafficking as common forms of exploitation detected for victims of trafficking.¹⁶⁷ Furthermore, there exists other types of exploitation for which people are trafficked, such as forced begging, forced marriage, benefit fraud, and child soldiers in armed conflict.¹⁶⁸

This Chapter aims to explore the legal definition of human trafficking and highlight some characteristics of modern slavery. Particularly, it considers some ways in which people are exploited and enslaved through forced labour. Moreover, it proposes to clarify the meaning of exploitation, and as victims of forced labour often consent to their exploitative situations, aims to address the issue of voluntary consent to exploitation. This Chapter illustrates that similar

¹⁶⁶ Bales, *Disposable People* (n 4) 14

¹⁶⁷ UNODC, *Global Report on Trafficking in Persons* (2014) 33

¹⁶⁸ *Ibid*, 35

to addressing specific issues pertaining to modern slavery, regulating forced labour exploitation can prove a challenge due to its multifaceted nature.

3.2 The Evolution of “Human Trafficking”

3.2.1 The Emergence of the White Slave Traffic

Following the abolition of the Trans-Atlantic slave trade, the international community acknowledged a new offence which concerned the trafficking of human beings. Anti-prostitution conventions initially greatly influenced international legal frameworks supervising this new form of slavery.¹⁶⁹ Early conventions addressed the offence as the ‘White Slave Traffic,’ a term primarily concerning the transportation of European women and girls for the purpose of prostitution.¹⁷⁰ Gould acknowledged that early developments on the trafficking of human beings conjured images of:

[W]hite adolescent girls who were drugged and abducted by sinister immigrant procurers, waking up to find themselves captive in some infernal foreign brothel, where they were subject to the pornographic whims of sadistic, non-white pimps and brothel masters.¹⁷¹

The 1904 League of Nations International Agreement for the Suppression of the ‘White Slave Traffic’ was the first international regulation targeting this new form of slavery, defining trafficking as the ‘procuring of women or girls for immoral purposes abroad.’¹⁷² Subsequent conventions continued to associate

169 Corin Morcom and Andreas Schloenhardt, ‘All About Sex?! The Evolution of Trafficking in Persons in International Law’ (2011) The University of Queensland Human Trafficking Working Group Research Paper, 11 <<https://law.uq.edu.au/files/4311/Evolution-of-Int-Law-relating-to-Trafficking-in-Persons.pdf> > accessed 6 April 2017

170 Elizabeth I. Yuko, ‘Theories, Practices and Promises: Human Trafficking laws and policies in destination states of the Council of Europe’ (LLM Dis, Dublin City University 2009) 45

171 Chandré Gould, ‘Cheap Lives: Countering Human Trafficking – Considerations and Constraints’ (2006) 16 South African Crime Quarterly 19, 19-20

172 International Agreement for the Suppression of the “White Slave Traffic” (adopted 18 May 1904, entered into force 18 July 1905) 1 LNTS 83, art 1

trafficking with sexual exploitation with images of white women and girls procured against their will into prostitution.¹⁷³

In 1921, the League of Nations established the Convention for the Suppression of the Traffic in Women and Children, which removed the term 'White Slave,' and expanded the scope of the definition to include women and children of all races.¹⁷⁴ Yuko suggests that the reason for such a change was due to the expansion of various States involved in the signing of the convention. She notes:

The removal of the term, 'white' from the 1921 Convention is most likely the result of the widening geographical scope of the signatories, which included several States from Eastern Europe, Central, and South America and Asia - the populations of which may have been considered to be non-white. As a result, being white was no longer a qualification for protection under this treaty.¹⁷⁵

It is unclear why the term 'slavery' was also removed from the convention's title. Gallagher notes that though the conventions did not specifically define what the act of trafficking composed of, they primarily focused on the act of organising and compelling the movement of women and girls abroad for prostitution.¹⁷⁶ She notes, 'The end results of that recruitment, typically the detention of a woman or girl against her will in a brothel, were considered to be outside the scope of international action.'¹⁷⁷

Separately, though trafficking conventions evolved to include other races, it continued to exclude men and also to associate trafficking with forced

173 Jo Doezeema, 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18 Gender Issues 23, 25

174 International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415

175 Yuko (n 170) 53

176 Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 14

177 Ibid

prostitution of women and girls.¹⁷⁸ Consequently, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, broadened the scope of the convention to include men, though it continued to primarily concern the exploitation of prostitution.¹⁷⁹ Morcom and Schloenhardt suggest that the shift towards the inclusion of other forms of exploitation in trafficking legislation, thus including men, was due to international law on labour.¹⁸⁰ Legislation such the International Labour Organization (ILO) 1930 Forced Labour Convention¹⁸¹ and the 1957 Convention concerning the Abolition of Forced Labour,¹⁸² reflected the ILO's mission of universal social justice, internationally recognised human rights, and equal opportunity and rights for all,¹⁸³ by prohibiting any acts of forced and compulsory labour. Furthermore, regulations concerning the exploitation of children, such as the 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,¹⁸⁴ the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,¹⁸⁵ and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution

178 International Convention for the Suppression of the Traffic in Women of Full Age (adopted 11 October 1933, entered into force 24 August 1934) 150 LNTS 431

179 International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951) 96 UNTS 271

180 Morcom and Schloenhardt (n 169) 17

181 ILO Convention 29

182 ILO Convention 105

183 International Labour Organization, 'Mission and Impact of the ILO' <<http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> > accessed 28 May 2016

184 Worst Forms of Child Labour Convention ILO Convention 182

185 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) (Optional Protocol on the Involvement of Children in Armed Conflict)

and Child Pornography,¹⁸⁶ highlighted the various purposes for which children are exploited (in addition to sexual exploitation) and stressed on the need to enforce measures to protect children from all forms of exploitation.¹⁸⁷

3.2.2 The United Nations' Trafficking Protocol

The principle international legal instrument on the trafficking of human beings is now the UN Palermo Protocol on Preventing, Suppressing and Punishing Trafficking in Persons, especially Women and Children.¹⁸⁸ The Trafficking Protocol identifies the three main processes of human trafficking; the *Act* (i.e recruitment, transportation, transfer, harbouring, or receipt of persons), the *Means* (i.e threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim) and the *Purpose* (i.e for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs).¹⁸⁹ This definition of human trafficking has been viewed as an international attempt to define the offence under a single term, so as to 'charge all the traffickers at different stages of the crime with the same offence of trafficking [and] advocate for harsher sentences for each person as a conspirator to the overall crime.'¹⁹⁰ The protocol encourages State parties to establish adequate legislation in its national legal system to criminalise the offence of trafficking, including

186 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) (Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography)

187 Morcom and Shloenhardt (n 169) 20

188 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (UN Trafficking Protocol)

189 Ibid, art 3 (a)

190 Joseph L. Dunne, 'Hijacked: How Efforts to Redefine the International Definition of Human Trafficking Threatens its Purpose' (2011) 8 Williamette Law Review 403, 408

approaches to address the prevention, prosecution and investigation of the crime.¹⁹¹ It also highlights the importance of collaborative effort among relevant bodies in the international community to regulate the movement of individuals across borders, and also to exchange information to establish a better understanding of traffickers' *modi operandi* such as trafficking routes, and the recruitment and transportation of victims.¹⁹²

In comparison to earlier conventions, the Trafficking Protocol has added to the scope of international law on the trafficking of human beings by extending the law to include men, as well as other trafficking offences beyond sexual exploitation such as forced labour and organ trafficking. Nevertheless, though international law regulating human trafficking has evolved to include men and other forms of exploitation, the offence continues to be viewed often as a sexually exploitative crime against women. For example, Jones notes that the disregard of men from human trafficking discussions is evident in media reports, to which he recognised a human trafficking segment which made at least twenty-five references to 'women' or 'girls' as victims but however making no mention of male victims.¹⁹³ Additionally, Dugan notes that sexual abuse receives considerably more coverage in the media than other forms of exploitation such as forced labour or domestic servitude as media outlets appeared to prefer stories that are more newsworthy and more appalling.¹⁹⁴ Furthermore there seems to be an underlying notion that a male is unlikely to

¹⁹¹ UN Trafficking Protocol art 5, art 6

¹⁹² Ibid, art 10 (1)

¹⁹³ Samuel V. Jones, 'The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (2010) 4 Utah Law Review 1143, 1143

¹⁹⁴ Emily Dugan, *Forced labour and human trafficking: Media coverage in 2012* (Joseph Rowntree Foundation 2013), 13, 17

be a victim of human trafficking as he is incapable of being vulnerable.¹⁹⁵

Dugan accepts that there exists:

[A] bias in society where women and children are more easily perceived as victims than men. Man's traditional role may mean that some people in authority – and some journalists – are still less inclined to see them as vulnerable.¹⁹⁶

As a result of the disregard for male victims of human trafficking, such a crime tends to be viewed as what Jones describes as 'sensationalized accounts of heinous male predators molesting female captives'.¹⁹⁷ The Trafficking Protocol, though commended for including men as well as other forms of exploitation in the scope of international law regulating modern slavery, has been criticised for forming a conception of what a victim looks like.¹⁹⁸ By mentioning 'women and children' in the title, the protocol emphasises the importance in combatting trafficking in women and children as victims of trafficking, subconsciously mirroring earlier treaties which aimed at the protection of women from prostitution. Shoaps suggests that by adopting a 'gendered approach of especially protecting women and children, the Palermo Protocol perpetuates the iconized "perfect victim"'.¹⁹⁹ A risk of doing so, could potentially not only have an adverse effect on male victims, but it could lead to the disregard of other forms of trafficking such as forced labour and domestic servitude, which also affects women and girls.

195 Jones, 'The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (n 193) 1172-1173

196 Dugan (n 194) 17

197 Jones, 'The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (n 193), 1144

198 Laura L. Shoaps, 'Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act' (2013)

17 Lewis & Clark Law Review 931, 936

199 Ibid, 937

The protocol has also been criticised for overemphasising the criminalisation of offenders as opposed to victim protection.²⁰⁰ As the protocol supplements the UN Convention against Transnational Organized Crime, it focuses on combating the crime from a criminal justice perspective as opposed to a human rights approach.²⁰¹ Though the protocol establishes that States should adopt policies to prevent trafficking,²⁰² Mollema notes that emphasis on criminalisation can lead to a 'supply-side approach' focusing on migratory issues such as border control, with little regard on the causes of human trafficking.²⁰³ Such an approach can only lead to further victimisation of the individual. As Ollus acknowledges, while related migratory issues such as human smuggling is 'a crime against state sovereignty, trafficking is foremost a crime against the individual and only secondarily a crime against state sovereignty.'²⁰⁴ Furthermore she notes, 'in seeing trafficking only as a form of migration, there is a risk of insensitivity towards individual victims at the expense of protecting the state from undesired aliens.'²⁰⁵

Criticism of the protocol also stems from the fact that it lacks adequate enforcement measures as there are no procedures put in place to ensure effective State implementation of its measures. Article 5 states that each Member State is to adopt the necessary legislation and measures to criminalise, and prevent trafficking of human beings but however fails to point out the exact actions that are to be adopted. It allows parties to determine the measures to take according to their national legislation which can lead to

200 Nina Mollema, 'Combating Human Trafficking in South Africa: A Comparative Legal Study' (Dphil thesis, University of South Africa 2013) 42

201 Ibid, 41

202 UN Trafficking Protocol, art 9

203 Mollema (n 200) 42

204 Natalia Ollus, 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children: a tool for criminal justice personnel' (2002) Resource Material Series No. 62, 17 <

http://www.unafei.or.jp/english/pdf/RS_No62/No62_06VE_Ollus1.pdf > accessed 6 April 2017

205 Ibid

inconsistencies in the way in which human trafficking is tackled.²⁰⁶ Moreover, a State's attitude towards acts related to different types of exploitation may conflict with its international obligation to regulate and combat contemporary forms of slavery. For example debate surrounds the impact of legislation regulating prostitution on that of human trafficking.²⁰⁷ With regards to sex trafficking and sexual exploitation it is questionable whether a country's attitude towards prostitution (whether it be the criminalisation of prostitution, the Swedish model which criminalises clients, or the Dutch model which legalises prostitution) may affect the way in which they respond to sexual forms of trafficking.²⁰⁸ Nevertheless, though the Trafficking Protocol does not explicitly details effective measures that should be adopted by States to combat the offence, in 2009 the United Nations Office on Drugs and Crime (UNODC) established a model law on trafficking in persons to assist Member States in implementing the protocol into their domestic legal systems.²⁰⁹

3.3 Defining Exploitation

Human trafficking and modern forms of slavery are often distinguished from other criminal activities as a result of the level of abuse involved. Because of this such crimes are often defined through the context of exploitation.²¹⁰ The Trafficking Protocol does not explicitly define 'exploitation', and the degree of abuse needed to satisfy the crime, though it's model law against the trafficking in persons outlines exploitative conduct that the protocol prohibits.²¹¹

²⁰⁶ Mollema (n 200) 43

²⁰⁷ See: Samuel Lee and Petra Persson, 'Human Trafficking and Regulating Prostitution' (2015) New York University Law and Economics Working Papers No. 299 <http://lsr.nellco.org/nyu_lewp/299_> accessed 6 August 2016

²⁰⁸ Ibid

²⁰⁹ UNODC, '*Model Law against Trafficking in Persons*' (2009)

²¹⁰ See for example: Modern Slavery Act 2015, s3

²¹¹ UNODC, '*Model Law against Trafficking in Persons*' (2009) 27-28

Academics generally agree that exploitation can occur in the event where two parties have mutually consented to terms or conditions, and have attempted to offer their own explanation on elements that indicate an exploitative situation.²¹² The purpose of this section is to provide some clarification in identifying conditions which amount to unfair exploitation or as Davidson terms 'inappropriate exploitation'²¹³ with regards to human trafficking and modern slavery.

3.3.1 Casual Exploitation

Casual Exploitation defines situations where an individual's intention to take advantage of another to benefit himself is not considered unfair even though he gains by exploiting the disadvantage or weakness of that person. Mayer notes that this form of exploitation often occurs in competitive games and sports.²¹⁴ For example, A and B are opponents in a Karate match. A is aware that though B delivers strong punches, he is weak in his defence. A, in acknowledging his own strength in defending, takes advantage of B's weakness by blocking his punches, while systematically delivering his own, thereby defeating B. In this situation, A is able to benefit tremendously by identifying B's vulnerability and taking advantage of it. However, can it be said that A's exploitation of B was unfair? In cases like this, Mayer argues that though an individual is said to have exploited the weakness of another, it does not mean that such an act was necessarily unjust. According to Mayer:

If I exploit Blue's carelessness in a game of chess and take her queen, I have gained at Blue's expense but my gain is not unfair. I inflicted a loss, but such inflictions are permitted by the rules of

212 See: Mikhail Valdman, 'A Theory of Wrongful Exploitation' (2009) 9 (6) *Philosophers' Imprint* 1-14

213 Julia O. Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of Freedom' (2010) 10 *Global Networks* 244, 249

214 Robert Mayer, 'Sweatshops, Exploitation, and Moral Responsibility' (2007) 38 *Journal of Social Philosophy* 605, 606

the game. There are contexts, then, in which I may exploit the weaknesses of others without the taint of unfairness.²¹⁵

3.3.2 Direct Exploitation

Direct Exploitation involves circumstances where an individual's act of taking advantage of another's weakness or unique vulnerabilities, results in damage or harm. With regards to human trafficking and modern slavery, this could take several forms. The first covers standard human trafficking cases involving individuals who are abducted, exploited and enslaved. In this case, the individual lacks any choice and has not agreed to any terms or conditions with their exploiter. Secondly, exploitation could occur despite both individuals agreeing and consenting to certain terms and conditions as the exploiter has an ulterior motive.²¹⁶ Individuals utilise measures such as fraud, coercion or deceit to obtain the consent of another.²¹⁷ This situation often occurs in cases of modern slavery. For example, B is a poor individual, desperate to earn money to better his family's circumstance. A offers B a seemingly once in a lifetime job opportunity in the United Kingdom. A tells B that he would be earning a substantial income in a great job, working on a farm. They agree that A will pay for B's passport, identification documents, and any essentials that B will need until he receives his first paycheck. Once B receives his first paycheck, it is agreed that he will start paying A back for the money he spent to help him move and settle into his new job. Unbeknownst to B, he will be earning an extremely low salary compared to what was agreed, while still expected to pay back A. He is also expected to work and live in extremely poor

²¹⁵ Ibid

²¹⁶ Whether as to the work the individual is unaware that he has to perform, or the nature and condition of the work. Direct Exploitation is often common in human smuggling cases where a migrant seeks assistance from a smuggler to enter a country illegally, unaware that the smuggler intends to exploit him or sell him, thus making it a human trafficking offence as opposed to standard human smuggling.

²¹⁷ UN Trafficking Protocol, art 3 (a)

and hazardous conditions that he did not consent to. Furthermore, he is not allowed to leave and return home until he pays back A. In this situation, A's benefit from the exploitation of B's vulnerability is unfair as dishonesty about the job opportunity was used to acquire B's consent resulting in B placed in restrictive conditions he is unable to escape.

3.3.3 Mutually Beneficial and Indirect Exploitation

Mutually beneficial and Indirect Exploitation describes situations where an individual takes advantage of the weakness or vulnerability of another without the use of coercion or deceit. Moreover, the person who is exploited may suffer no serious harm or damage. In some cases where this occurs, those being exploited are benefiting from the exploitative situation. For example, B is offered a job in a factory to produce T-shirts. B is aware that her employer A will be paying her a very low wage and expects her to work long hours in poor working environments. B is content with working in the factory as it is better than not having a job or is a better alternative to working for C who offers much lower wages and forces employees to work in dangerous conditions. It may be assumed that both A and B are mutually benefiting from the situation. Is it correct to say that B is being subject to exploitation even though her situation is benefiting her? According to Meyers, an individual can be exploited even though they benefited from the exploitation, consented to the circumstances, and favours the conditions to alternative options.²¹⁸ Emphasising the issue of fairness as opposed to the issue of harm of the individual, Meyers belief is that, though an individual may consent to exploitative conditions, their situation is still considered morally unacceptable as, 'it is taking advantage of their desperate situation and benefiting disproportionately from their labour.'²¹⁹

218 Chris Meyers, 'Wrongful Beneficence: Exploitation and Third World Sweatshops' (2004) 35 *Journal of Social Philosophy* 319, 323-324

219 *Ibid.*, 327

Zwolinski in assessing whether a situation similar to the above scenario is exploitative believes that particular attention should focus on the benefits made by both A and B, and whether 'each party acts within their rights with respect to the other, and ensure that parties are left at least as well off as they would be under *those* circumstances.'²²⁰ This stance would ignore B's position if she did not accept the job in the factory because of her desperation and vulnerability.²²¹ Here, Zwolinski emphasises the substance of the relationship and not simply its form or nature. Moreover, from his point of view, which will be discussed further in Chapter Four when exploring labour exploitation, two main ways in determining whether B is exploited is the wages paid, as well as the condition (e.g., safety regulations, working long hours, etc) that she is expected to work in.²²²

This thesis uses the term exploitation to cover circumstances as outlined in section 3.3.2 and 3.3.3. It defines situations where a person has taken unfair advantage of an individual's vulnerability and weaknesses to benefit himself resulting in harm to that individual. Harm in this sense can signify where a person is subjected to damages or violations of their human rights or losses that place him in a worse position if he had not been exploited. Furthermore it covers situations where an individual may not necessarily view their conditions as unfair and also suffer no harm, but nonetheless, is being exploited as a result of the substance of the relationship. As Wood acknowledges, the term exploitation invokes a sense of moral condemnation when 'proper respect for others is violated when we treat their vulnerabilities as opportunities to advance our own interests or projects.'²²³

220 Matt Zwolinski, 'Sweatshops, Choice, and Exploitation' (2007) 17 *Business Ethics Quarterly* 689, 706

221 Ibid

222 Ibid

223 Allen W. Wood, 'Exploitation' (1995) 12 *Social Philosophy and Policy* 136, 150-151

3.4 Forced Labour Exploitation

3.4.1 Defining “Forced Labour”

In 2016, ILO estimated that there are 24.9 million people in forced labour.²²⁴ Also, in UNODC 2014 Global Report, it was acknowledged that 40% of trafficked victims detected were subjected to forced labour.²²⁵ Article 2(1) of the ILO Forced Labour Convention defines forced or compulsory labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’²²⁶ The convention lays out certain exceptions to the definition such as work exacted under compulsory military service laws, normal civic duties, work ordered as a consequence of a conviction in a court of law, and in cases of emergencies or minor communal services.²²⁷

The ‘menace of any penalty’ broadly covers situations where an individual is compelled to perform work or service for another by use of physical, psychological or financial coercion. According to ILO, such penalties, whether directly inflicted or used as a threat, include physical violence against the worker or his family, sexual abuse, supernatural retaliation, imprisonment or confinement, financial repercussions, immigration threats such as deportation or reporting individuals to authorities, dismissal from employment, and deprivation of rights, privileges and basic necessities such as food and shelter.²²⁸ ILO acknowledges that simply paying an individual a low wage or compelling them to work in poor conditions does not equate to forced labour

²²⁴ ILO, *Global Estimates of Forced Labour : Forced Labour and Forced Marriage* (2017) 22

²²⁵ UNODC, *Global Report on Trafficking in Persons* (2014) 9

²²⁶ Forced Labour Convention, art 2(1)

²²⁷ Ibid, art 2(2)

²²⁸ A Global Alliance Against Forced Labour, *Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* (ILO Publications 2005) 5

as such an offence encompasses grave human rights abuses and restriction of freedom.²²⁹ ILO acknowledges that due to the diverse nature of forced labour and the multitude of ways individuals could be coerced to perform work, that forced labour is 'not defined by the nature of the work being performed (which can be either legal or illegal under national law) but rather by the nature of the relationship between the person performing the work and the person exacting the work.'²³⁰

Further, forced labour concerns situations where an individual did not voluntarily consent to the work or service exacted.²³¹ Regarding the issue of consent ILO recognises that involuntarily consent extends to situations where individuals have had their freedom restricted and were coerced into exploitative labour through fraud and deception. The individual must be working against their will or have consented to work not knowing the true nature of the labour and conditions involved and find it difficult to leave.²³² Methods used to compel an individual into involuntary work include bonded labour - where the individual was born into servitude, abduction, the selling or possession of a person, debt bondage with high or increasing interest rates, deception as to the type of work to be performed, withholding of an individual's wages and identity or personal documents.²³³

ILO distinguishes between three main forms of forced labour: forced labour imposed by the State, forced sexual exploitation and forced labour exploitation in the private sector.²³⁴ Though forced prostitution is acknowledged as a form of forced labour, the definition extends to other types of labour such as

229 Ibid, 6

230 ILO, *Global Estimate of Forced Labour: Results and Methodology* (IL Publications 2012), 19

231 A Global Alliance Against Forced Labour (n 228) 6

232 ILO, *Global Estimate of Forced Labour: Results and Methodology* (n 230)19

233 A Global Alliance Against Forced Labour (n 228) 6

234 ILO, *Global Estimate of Forced Labour: Results and Methodology*(n 230)13

construction, agriculture, manufacturing, bonded labour and domestic servitude. Furthermore, ILO developed a list of indicators in determining forced labour:²³⁵

- Abuse of vulnerability
- Deception
- Restriction of movement
- Isolation
- Physical and sexual violence
- Intimidation and threats
- Retention of identity documents
- Withholding of wages
- Debt bondage
- Abusive working and living conditions
- Excessive overtime

As will be discussed further in Chapter Four, paying an individual a low wage and compelling them to work in poor conditions may not necessarily equate to forced labour. Rather, it is the circumstances surrounding the nature of their work such as the restrictions placed on their freedom, the violation of their human rights and the psychological or physical abuse used to compel them to work. As mentioned in Chapter Two, forced labour can amount to slavery, if the control over the person equates to possession, where there exists an exercise of any, or all of the powers attaching to the right of ownership, including using a person, managing the use of a person, profiting from the use of a person and mistreatment or neglect of a person.²³⁶

The subsequent sections will illustrate that forced labour today often mimics traditional forms, as some practices are entrenched in social, cultural and traditional customs or norms. However though the type of work as well as

²³⁵ ILO, 'ILO Indicators of Forced Labour' (2012)

²³⁶ See : Chapter Two, section 2.2

methods used to coerce individuals may overlap, present-day forced labour is more widespread as it is found in all corners of the world, thriving in legal and illegal industries such as the sex trade, drug trafficking, and labour-intensive trades such as construction, agriculture, mining, food and hospitality.²³⁷ Moreover, the methods used to coerce trafficked victims now also include retention of an individual's identity documents, thus restricting their movement and threatening to report them to law enforcement and immigration if they do not comply with their exploiters.²³⁸

3.5 Forms of Forced Labour

3.5.1 Forced Sexual Exploitation

In traditional forms of forced labour and slavery such as the Trans-Atlantic slave trade, it was not uncommon for individuals to be subjected to sexual abuse and exploitation. Likewise, in more modern forms of slavery, victims today are also forced into sexual exploitation. Nevertheless, the industrialisation of the sex trade and the commodification of human beings has resulted in an upsurge in the availability of sexual goods and services.²³⁹ The modern sex trade is booming, generating billions in profits - from prostitution, pornography, sexually provocative performances, cybersex, brothels and so-called massage parlours. Advances in technology such as the use of the internet has turned sex work into an online commercial enterprise where clients seek various sexual services, with some platforms allowing them the opportunity to rate and access reviews of their sexual encounters with specific

²³⁷ A Global Alliance Against Forced Labour (n 228) 9

²³⁸ Ibid

²³⁹ Richard Poulin, 'Globalization and the Sex Trade: Trafficking and the Commodification of Women and Children' (2003) 22 Canadian Women Studies 38

sex workers.²⁴⁰ Traffickers can advertise their victims and services online and also offer online sexual services such as cybersex and pornography. Though many legitimate sex workers²⁴¹ can advertise their services online, many traffickers and exploiters use this as a way to conceal the exploitation of their victims, disguising them as legitimate sex workers. Due to the high demand for sexual services, individuals - particularly women and children - have been lured and trapped into the sex industry.²⁴²

The mechanisms used to lure and compel individuals into forced sexual exploitation can vary but many victims are coerced through direct forms of exploitation. As mentioned in 3.3.2 direct exploitation can occur where an individual is abducted and forced into exploitative conditions, or where the individual's consent was obtained through fraud, coercion or deception. Concerning the latter, victims of forced sexual exploitation are often recruited by agencies and modern traffickers promising them the opportunity to travel and work in jobs such as nurses, nannies, dancers and waitresses.²⁴³ With regards to victims trafficked across borders, like other forms of forced labour traffickers often offer to pay for their passports, visas and any travel documents and essentials such as accommodation and food which the victim is unable to afford.²⁴⁴ Victims are reassured that they will be able to repay the traffickers once they start working, but then often find their identity documents withheld,

240 Keith Soothill and Teela Sanders, 'The Geographical Mobility, Preferences and Pleasures of Prolific Punters: A Demonstration Study of the Activities of Prostitutes' Clients' (2005) 10 (1) Sociological Research Online <<http://www.socresonline.org.uk/10/1/soothill.html>> 30 August 2016

241 The term 'sex worker' is used to refer to individuals who voluntarily choose to engage or take up employment within the sex industry. The term 'legitimate' does not imply that the sexual services provided by sex workers are legalised but rather their genuine free will to engage in the sex industry.

242 UNODC 2014 Global Report reported that 53% of trafficked victims detected in 2011 were forced into sexual exploitation, and between 2010-2012, 97% of victims trafficked for the purpose of sexual exploitation were female. See: UNODC, *Global Report on Trafficking in Persons* (2014) 9,37

243 Paola Monzini, 'Trafficking in Women and Girls and the Involvement of Organized Crime in Western and Central Europe' (2004) 11 International Review of Victimology 73, 78

244 Ibid

assigned a debt bondage to repay their trafficker, including additional payments and high interest rates which is often nearly impossible to satisfy.²⁴⁵

While some victims are abducted and forced into the sex industry, victims can be forced into sexual servitude by family members, friends or acquaintances. For example, low-income families who struggle to survive and support themselves are faced with the difficult decision of selling or giving up their children in exchange for money.²⁴⁶ Unbeknownst to many of these vulnerable families, their children are often subjected to forced labour, including forced prostitution.

In some cases, women are lured into sexual slavery through forced marriage. Article 1 (c) of the UN 1956 Supplementary Convention on the Abolition of Slavery defines forced marriage as any practice whereby:²⁴⁷

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.

ILO recognises that forced marriage in itself is a form of forced labour exploitation.²⁴⁸ Forced marriage is one lacking free and informed consent with an element of physical force or psychological pressure.²⁴⁹ It should not be

²⁴⁵ Martti Lehti and Kauko Aromaa, 'Trafficking for Sexual Exploitation' (2006) 34 *Crime and Justice* 133, 158

²⁴⁶ Oguzhan O. Demir, 'Methods of Sex Trafficking: Findings of a Case Study in Turkey' (2010) 11 *Global Crime* 314, 315

²⁴⁷ Supplementary Convention on the Abolition of Slavery, art 1(c)

²⁴⁸ ILO, *Global Estimates of Forced Labour: Forced Labour and Forced Marriage* (2017) 22

²⁴⁹ ECPAT, 'Child Trafficking for Forced Marriage' (2008) Wilberforce Institute for the Study of Slavery and Emancipation Discussion Paper <http://www.ecpat.org.uk/sites/default/files/forced_marriage_ecpat_uk_wise.pdf> accessed January 7 2014

confused with arranged marriage where families arrange for their children to meet in the hope of a marriage which their children could choose to accept or reject.²⁵⁰ In many impoverished communities forcing a child (i.e., anyone under the age of 18) to marry is a way for families to improve their economic status as a dowry for the child is paid to them.²⁵¹ Some families also believe that marrying a child young protects them from rape, unplanned pregnancies as well as contracting various diseases.²⁵² Nonetheless, forcing a child or adult to marry can lead to further victimisation and exploitation as the individual is abused through forced labour and acts of sexual exploitation.²⁵³ Some victims have been coerced into marriage by fiancés or long term partners who promise them a better future abroad but subsequently deceive them by subjecting them to exploitive hardship.²⁵⁴ For instance, in the Netherlands vulnerable women and young girls are seduced into intimate relationships by so called 'lover boys' who sell them on to traffickers or force them into prostitution themselves.²⁵⁵

Often some individuals who are enslaved in the sex trade are aware that they will be engaging in prostitution and performing sexual services, but do not anticipate the violence, inhuman treatment and restriction to their freedom involved.²⁵⁶ An issue that has been subject to some debate around forced sexual exploitation has been the question of whether a woman who voluntarily chooses to engage in prostitution can acquire the status of a trafficked victim. The UN trafficking protocol itself does not distinguish between the two, neither does it criminalise prostitution. It merely requires that elements of the crime

250 Ibid

251 Nawal M. Nour, 'Child Marriage: A Silent Health and Human Rights Issue' (2009) 2 *Reviews in Obstetrics & Gynaecology* 51, 53

252 Ibid

253 ECPAT, 'Child Trafficking for Forced Marriage' (n 249)

254 Ibid

255 Julia Rooke and Caroline Pare, 'Lover Boys' (Al Jazeera, 15 May 2012)

<<http://www.aljazeera.com/programmes/witness/2012/05/201251115345899123.html>> accessed 23 August 2016

256 Hughes, 'The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women' (n 120), 636

such as transportation, use of coercive and deceptive means and exploitation are present.

On the question of whether a prostitute can be trafficked, Wijers outlines two concepts of forced prostitution.²⁵⁷ On the one hand forced prostitution refers to the coercion of someone *into* prostitution, excluding acts of violence that may occur *within* prostitution.²⁵⁸ Wijers suggests that if forced prostitution is used to refer to the forcing of an individual to engage in prostitution, then in determining whether that individual is a victim of sexual exploitation, their innocence acts as an essential element.²⁵⁹ This questions whether the individual had not engaged in prostitution before and was not aware that they would be forced to engage in such. If the victim was not mindful of the fact that they would be involved in prostitution, then it is more than likely that they would be considered a victim.²⁶⁰ Nevertheless, Wijers notes that to deny an individual who has engaged in prostitution before (or was aware that they would be engaging in such acts), of victim status is a violation of international human rights, as it discriminates against the individual and denies them equal protection that is granted to all.²⁶¹ On the other hand, if forced prostitution is equivalent to forced labour in the sex industry, like other trades such as construction, it is irrelevant whether the victim was aware of the conditions that they would be working on, or had taken part in the trade before.²⁶² Furthermore, as Wijers points out, the prime act of trafficking 'is not prostitution per se, but the use of coercion and deceit.'²⁶³

²⁵⁷ Wijers (n 45)

²⁵⁸ Ibid, 11

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² Ibid

²⁶³ Ibid, 12

Separately, sexual violence and exploitation are often prevalent in times of armed conflict. Times of war results in the displacement of families making vulnerable individuals, particularly women and children at risk to being targeted for sexual exploitation. According to Leatherman, 'Many forms of abuse and torture accompany rape in war as integral to the campaign of terror.'²⁶⁴ For example, in areas in Syria and Iraq under Islamic State control young women and girls are kidnapped and trapped in captivity as sex slaves providing sexual services for militants.²⁶⁵ Those who managed to escape had to deal with the stigma of having sex outside marriage due to being raped and unable to seek help from their relatives.²⁶⁶ Other terrorist groups such as Nigeria's Boko Haram have threatened and targeted women and children as a strategy to instil their ideals. Most notably, in 2014 the terrorist group abducted over 200 Chibok school girls threatening to sell them as slaves.²⁶⁷

Victims of forced sexual exploitation are often beaten, raped, have their family threatened, suffer psychological and physical distress, kept isolated, and are at risk of contracting sexually transmitted diseases. More modern forms of coercion reported include some traffickers recording victims engaging in sexual acts and then threatening to send it home to their families.²⁶⁸ Disobedient victims are sometimes mutilated or killed as a form of punishment and used as an example for other victims to comply with their exploiters.²⁶⁹ Many victims encounter such physical and mental abuse that they lose their sense of self-respect, become emotionally dependent on traffickers and

²⁶⁴ Janie L. Leatherman, *Sexual Violence and Armed Conflict* (Polity Press 2011) 46

²⁶⁵ Amnesty International, 'Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq' (2014)

²⁶⁶ Ibid, 13

²⁶⁷ Benjamin Maiangwa and Daniel Agbibo, 'Why Boko Haram Kidnaps Women and Young Girls in North-Eastern Nigeria' (2014) 3 *Conflict Trends* 51-56

²⁶⁸ Victor Malarek, *The Natashas: The Horrific Inside Story of Slavery, Rape, and Murder in the Global Sex Trade* (Arcade Publishing 2011) 32

²⁶⁹ Ibid, 40

become traffickers themselves by luring other vulnerable individuals into the sex industry.²⁷⁰

As evident, sexual exploitation is a gross violation and heinous act against individuals. Like other forms of modern slavery, victims are exposed to physical violence, emotional abuse and torture. However, victims of sex slavery are subjected to the most despicable and intimate acts of violence. As Kara notes:

The brutalities associated with sex slavery are perverse, violent and utterly destructive. Whips, cigarette burns, broken bones, starvation – every slave has suffered these tortures, but sex slaves suffer each of these as well as innumerable counts of rape – ten, fifteen, twenty, or more times per day.²⁷¹

Individuals subjected to forced sexual exploitation who do manage to escape often find it difficult to lead normal lives. Some are rejected by their families and communities, develop serious health issues and suffer physical and emotional instability, while many who may have been trafficked are at risk of being re-trafficked due to their increased vulnerabilities.

3.5.2 The Kafala System: Building the Fifa 2022 World Cup Stadium

ILO recognises conditions imposed by States that may lead to the exploitation of individuals such as work imposed by public bodies, military work, compulsory participation in public works and forced prison labour.²⁷² Further,

270 Thozama M. Luty and Mark Lanier, 'An Integrated Theoretical Framework to Describe Human Trafficking of Young Women and Girls for Involuntary Prostitution' in Jay Maddock (ed.), *Public Health – Social and Behavioural Health* (InTech 2012) 566 <

http://cdn.intechopen.com/pdfs/36964/InTechAn_integrated_theoretical_framework_to_describe_human_trafficking_of_young_women_and_girls_for_involuntary_prostitution.pdf> accessed 23 August 2016

271 Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2010) x

272 ILO, *Global Estimates of Forced Labour : Forced Labour and Forced Marriage* (2017) 40

restrictive State regulations can also contribute to the exploitation of vulnerable individuals. For example in the Arab Gulf States where foreigners make up a high percentage of the workforce, there exist variances of the Kafala or sponsorship system which the States practice when employing migrant labourers. Under the Kafala system, a migrant worker is sponsored by a Gulf Cooperation Council (GCC) agency or a citizen who employs the worker under contract.²⁷³ By sponsoring a migrant worker, a GCC employer is held responsible for the worker or group of employees.²⁷⁴ The purpose of the Kafala system is to regulate and monitor the influx of migrant workers into a country and thereby monitoring security concerns.²⁷⁵ Also, it defines the rights and responsibilities of migrant workers and their employers such as conditions on visa and residency.²⁷⁶

According to Murray, while this system may mirror other forms of migrant workers programs throughout the world, the Kafala system differs as it gives employers total control, places restrictions on the workers and does not award them the same rights as domestic workers, as they could be deported at any time.²⁷⁷ Moreover, their passport, identification and any travel documents are often withheld by employers, preventing migrants from leaving until their contract is completed. This has led to the Kafala system being viewed by organisations such as Amnesty International, as a form of state-sanctioned slavery.

273 Heather E. Murray, 'Hope for Reform Springs Eternal: How the Sponsorship System, Domestic Laws and Traditional Customs Fail to Protect Migrant Domestic Workers in GCC Countries' (2013) 45 *Cornell International Law Journal* 461, 467

274 *Ibid*

275 Steven D. Roper, Lillian A. Barria, 'Understanding Variations in Gulf Migration and Labour Practices' (2014) 6 *Middle East Law and Governance* 32, 34

276 *Ibid*, 35

277 Murray (n 273) 467-468

In its report, *The Dark Side of Migration: Spotlight on Qatar's Construction Sector Ahead of the World Cup*, Amnesty International found that migrant workers in the construction sector in Qatar (where many are currently employed to build the FIFA World Cup 2022 football stadium) were most likely bound to a contract where they suffer abuse involving them having their pay withheld for months, sometimes not paid, passports withheld therefore not being allowed to leave the country, working long hours in conditions that risk their health and safety, and being made to live in squalid accommodation.²⁷⁸ Workers were also found to have suffered psychological distress and trauma due to the abusive treatment by their employers,²⁷⁹ which The Guardian newspaper speculated that by 2022, 4000 migrants working on FIFAs football stadium will have died.²⁸⁰

In commenting on the living conditions of migrant workers, Crocombe acknowledges industrial camps spread across Qatar where employers house over one million workers:

Qatar ensures [they] remain hidden from Qataris and foreign visitors. Within its walls, employers regularly house nearly two dozen men into cramped bedrooms, many of which lack fundamental necessities, such as running water and electricity. In the summer months, where temperatures can sky rocket up to 50°C, air conditioners are scarce and proper ventilation is non-existent. To make matters worse, employers frequently dock migrant workers' salaries to cover basic living expenses such as bedding, food, and healthcare.²⁸¹

278 Amnesty International, 'The Dark Side of Migration : Spotlight on Qatar's Construction Sector Ahead of the World Cup' (2013) 6

279 Ibid

280 Jamie Doward, 'Qatar World Cup: 400 Nepalese Die on Nation's Building Sites Since Bid Won' (*The Guardian*, 15 February 2014) < <http://www.theguardian.com/football/2014/feb/16/qatar-world-cup-400-deaths-nepalese>> accessed 21 February 2014

281 Nigel G. Crocombe, 'Building a New Future : 2022 FIFA World Cup as a Potential Catalyst for Labor Reform in Qatar' 37 *Suffolk Transnational Law Review* 33,40

Amnesty International held that in Qatar, government representatives acknowledged that sponsorship provides 'a balance between the rights of the worker and the rights of the employer.'²⁸² Nonetheless, Amnesty recognises that workers in Qatar are treated unfairly and taken advantage of as some are deceived about the true nature of their working conditions and are subjected to various restrictions and abuses such as having their wages withheld. If a worker wants to change jobs, they require permission from their employers to do so. According to Amnesty, under Qatar's sponsorship law, a worker is allowed to change employers if there is evidence of abuse or legal confrontation.²⁸³ Nevertheless, it was reported in 2012, that 607 workers requested sponsorship transfers, with only 49 being allowed to transfer permanently while 211 were transferred only temporarily.²⁸⁴

Workers who are subjected to various abuses often find their options limited, due to restrictions such as needing their employers' permission to leave or being forced to leave the country if they are no longer sponsored. This results in many being obliged to continue working under abusive circumstances. The Kafala system may also be considered as a direct form of exploitation as workers are unaware of the level of abuse they would be subjected to in the private sector. By allowing employers to exert control and marginalise migrant workers with limited options for escape, the Kafala system heightens the vulnerability of migrant workers, encouraging environments where exploitation thrives.

²⁸² Amnesty International, 'The Dark Side of Migration' (n 278) 93-94

²⁸³ Ibid, 95

²⁸⁴ Ibid

3.5.3 Bonded Labour in Brick Kilns in Asia

It is estimated that globally, over 50% of persons subject to forced work are exploited through debt bondage or bonded labour.²⁸⁵ Bonded labour concerns compulsory work that is performed in order to repay debts or services. Article 1(a) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines debt bondage as:

[T]he status or condition arising from pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.²⁸⁶

Traditionally this form of forced work concerned agricultural labour existing in hierarchal relationships where members of a lower caste took out loans from those higher up in the hierarchy.²⁸⁷ Today, bonded labour continues to exist in countries such as Nepal, Pakistan, Bangladesh and India. There are a number of ways an individual is coerced into bonded labour. Due to social and cultural traditions that are deeply rooted in communities, some individuals choose to sell themselves or families to pay for various customs such as weddings, festivals, celebrations and cultural rituals.²⁸⁸ Moreover, due to the hierarchy that continues to exist within some communities, individuals belonging to a lower caste tend to respect those of a higher status who are often the ones subjecting them to abuse and exploitation and at times will refuse to testify

285 ILO, *Global Estimates of Forced Labour : Forced Labour and Forced Marriage* (2017) 39

286 Supplementary Convention on the Abolition of Slavery, 1(a)

287 ILO, *Global Estimates of Forced Labour : Forced Labour and Forced Marriage* (2017) 39

288 Heidi Boutros, 'India's Modern Slaves: Bonded Labor in India and Methods of Intervention' (2005) 12 *Frontiers: The Interdisciplinary Journal of Study Abroad* 1,5-6

against them.²⁸⁹ Additionally, amidst cultural and traditional forms of coercion and their unique psychological influences, individuals are subjected to threats of, or actual physical abuse, that compels them to work.²⁹⁰ The exploitation involved in debt bondage can be categorised as a mixture of direct exploitation - due to the existence of traditional coercive elements as well as the fraudulent nature of the work and the terms of contract – and a mutually beneficial and indirect form of exploitation as individuals offer themselves or their labour to pay for loans and various customs. According to the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, discriminatory factors such as belonging to minority groups, a lower caste and gender inequality can make individuals more vulnerable to exploitation and abuse.²⁹¹

Bonded labourers consist of the poorest members of society and often repaying a loan with increasing interest takes a considerable amount of time, that the debt can be passed on through generations.²⁹² In many cases, workers are given extremely low wages and are forced to make additional deductions while meeting high-interest rates. In parts of India, many of the workers, including women and children, are forced to accept low paid jobs working in brick kilns where they can spend as much as 14 hours a day making bricks from clay.²⁹³ The workers are not only forced to live and work in harsh conditions, and their movement restricted, but many are also physically

289 Ibid, 6

290 Ibid, 6-7

291 See: UNCHR 'Report of the Special Rapporteur on Contemporary forms of Slavery, including its causes and consequences' (2016) UN Doc A/HRC/33/46

292 Ravi S. Srivastava, 'Bonded Labor in India: Its Incidence and Pattern' (2005) Special Action Programme to Combat Forced Labour Working Paper No.43, 23

<<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1017&context=forcedlabor> > accessed 20 August 2015

293 See: Jayoti Gupta, 'Informal Labour in Brick Kilns: Need for Regulation' (2003) 38 Economic and Political Weekly 3282,3289

abused to instil discipline in them.²⁹⁴ Though bonded labour can occur over a long period, it is common for individuals in bonded labour today to work under seasonal and short term bonds. Breman acknowledges that many individuals are seasonal workers who voluntarily choose to enter into contracts particularly to pay off debts or earn money for their basic survival.²⁹⁵ Often the workers are unable to negotiate wages until after they have entered the contract with their employers – which most likely ends up being a very low wage due to employers wanting to maximise their income.²⁹⁶

Due to the heightened transnational nature of modern slavery, contemporary forms of bonded labour now exists across the globe where individuals are trafficked and exploited to repay loans to their traffickers for the facilitation of their movement.²⁹⁷ Moreover, the form of work carried out is no longer restricted to agriculture but according to ILO, bonded labour can exist in the construction sector, domestic work and factory work, and also sexual exploitation.²⁹⁸ In addition to lack of adequate enforcement, legislation and legal measures to prevent this form of exploitation and protect victims,²⁹⁹ bonded labour has been proven difficult to regulate as it is often embedded in historical and social customs, while contemporary forms are hidden in the informal economy.

3.5.4 Domestic Servitude

Additionally, people are also exploited through domestic servitude where they are compelled to perform a range of duties such as childminders, care workers,

²⁹⁴ Srivastava (n 292)19, 26

²⁹⁵ Jan Breman, 'On Labour Bondage, Old and New' (2008) 51 *The Indian Journal of Labour Economics* 83,86

²⁹⁶ Ibid, 84-85

²⁹⁷ ILO, *Global Estimates of Forced Labour : Forced Labour and Forced Marriage* (2017) 38

²⁹⁸ Ibid

²⁹⁹ See: UNCHR 'Report of the Special Rapporteur on Contemporary forms of Slavery, including its causes and consequences' (2016) UN Doc A/HRC/33/46

and housekeeping duties such as cleaning, and cooking for their employers. Like other forms of forced labour, domestic servitude was common in traditional forms of slavery. For example, during the Trans-Atlantic slave trade, many Africans were categorised as house slaves, gaining their masters' trust to work in the household performing duties such as looking after the children, including breastfeeding, preparing meals, cleaning and other various managerial duties relating to the up keeping of the master and his household.

At present, it has been suggested that the increase in the number of domestic workers employed in private households is due to the changing dynamics of the role of men and women in society.³⁰⁰ Traditionally men were seen as the breadwinners, while women as caregivers who stayed at home taking care of the children and carrying out basic housekeeping duties.³⁰¹ Nevertheless, since the shift towards the inclusion of women in the working environments, families have sought domestic workers and maids to help with the upkeep of the household. Due to many individuals, particularly migrant workers, working in private households, they tend to be more vulnerable as the abuse is kept secretive in the informal economy. According to A Global Alliance Against Forced Labour:

Domestic workers are especially vulnerable to forced labour because of the unprotected nature of their work and the highly personalized relationship between the worker and employer. Domestic work takes place in the private household, which is typically excluded from labour market regulations. Although labour inspection is required in all employment situations, in practice the home is out of bounds for labour inspectors.³⁰²

300 Einat Albin and Virginia Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41 *Industrial Law Journal*, 67,68

301 Ibid

302 A Global Alliance Against Forced Labour (n 228) 50

Lalani notes that victims of domestic servitude are often vulnerable to exploitation because of their dependency on their employers for housing, income and immigration status.³⁰³ Many are underpaid, live in secluded and squalid conditions and are subjected to violence by their employers. Some workers have their passports withheld, are linguistically, socially and culturally isolated and often work without a contract, unaware of their rights.³⁰⁴ Domestic servitude often involve direct forms of exploitation as not only does the informal nature of their work increase the likelihood of abuse and fraudulent contracts, but also they are often unaware of the nature of their work which can involve having their documents withheld, have their freedom restricted, not being paid, and having their wage subject to deduction to pay for sustenance such as housing and food. Further, such form of exploitation does not solely affect adults as it also affects a high proportion of children as they are often cheaper and easier to manipulate.³⁰⁵ Domestic servitude can be particularly dangerous for children as not only does it hinder their development by limiting their access to education and keeping them in physical and social isolation, but children can be compelled to work under dangerous conditions and forced to carry out work that exhausts their physical capabilities.³⁰⁶ Like other forms of abuse against children, it is not uncommon for parents struggling with poor socio-economic circumstances to give their children to persons who they believe may offer the child opportunities to improve their standard of living, such as access to education. For instance, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences highlighted the

303 Mumtaz Lalani, 'Ending the Abuse: Policies that Work to Protect Migrant Domestic Workers' (Kalayaan, 2011) 11 <<http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Kalayaan-Report-final.pdf>> accessed 28 September 2016

304 OSCE, 'Unprotected Work, Invisible Exploitation: Trafficking for the purpose of Domestic Servitude' (2010) 15 <<http://www.osce.org/secretariat/75804?download=true>> accessed 28 September 2016

305 UNCHR 'Report of the Special Rapporteur on Contemporary forms of Slavery, including its causes and consequences' (2010) UN Doc A/HRC/15/20 para 22

306 Ibid, paras 36 and 37

restavèk system practiced in Haiti where it is estimated that as much as 500,000 children sent to host families are exploited in domestic servitude.³⁰⁷

The aforementioned forms of forced labour provide only a snapshot of the scale of exploitative circumstances individuals are compelled to work. Millions are living in poverty, with the desperation to escape difficult and dangerous conditions driving some to voluntarily consent to low paid jobs working under abusive circumstances. For many, accepting such exploitative forms of work may be their only option to earn an income.

3.6 Consent to Exploitation

In traditional forms of slavery such as the Trans-Atlantic slave trade, victims did not consent to the exploitative treatment that they were subjected to. As evident in the previous sections individuals often give their consent to exploitative circumstances. Nevertheless, voluntary consent does not nullify their status as trafficked victims or enslaved persons. The UN Trafficking Protocol recognises that means such as coercion, deception, fraud and abuse of position of vulnerability can lead to the exploitation of an individual. As aforementioned, there is little guidance on the extent of the means used to constitute the crime of trafficking as defined by the protocol.³⁰⁸ The underlying rationale of the protocol is that a victim's consent to trafficking or exploitation is irrelevant once the methods above were used to gain their consent.³⁰⁹ Furthermore, the protocol does not state whether such methods must be used to nullify consent.³¹⁰ With regards to whether a victim could consent to being

³⁰⁷ Ibid, para 38

³⁰⁸ UNODC, 'The Role of "Consent" in the Trafficking in Persons Protocol' (UNODC, 2014) 25 <
https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf> accessed 21
May 2017

³⁰⁹ UN Trafficking Protocol, art 3(b)

³¹⁰ UNODC, 'The Role of "Consent"' (n 308) 26

trafficked, the protocol explicitly states that a child (i.e., anyone under the age of 18) cannot consent to trafficking or exploitation, and such a requirement is irrelevant, even if the aforementioned methods were used.³¹¹ The protocol recognises that a person under the age of 18 can be trafficked even if force, other forms of coercion, abduction, fraud, or deception were not used in the process of exploitation.

To provide more clarity on the issue of consent, UNODC has provided a number of guidelines on the issue of consent in the trafficking in persons protocol.³¹² For example, its 2009 Model Law against Trafficking in Persons acknowledges that:

Once the elements of the crime of trafficking, including the use of one of the identified means (coercion, deception, etc.), are proven, any defence or allegation that the victim ‘consented’ is irrelevant. It also means, for example, that a person’s awareness of being employed in the sex industry or in prostitution does not exclude such person from becoming a victim of trafficking. While being aware of the nature of the work, the person may have been misled as to the conditions of work, which have turned out to be exploitative or coercive.

This provision restates existing international legal norms. It is logically and legally impossible to ‘consent’ when one of the means listed in the definition is used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will.³¹³

With regards to the trafficking of people across borders, Chapter Two explored how human trafficking tends to be confused with other categories of irregular migration such as human smuggling.³¹⁴ As mentioned the prime cause for the confusion is that often human trafficking victims agree to be smuggled into another country illegally but then find themselves exploited. Jones in

311 UN Trafficking Protocol, art 3(c)

312 UNODC, ‘The Role of “Consent”’ (n 308)

313 UNODC, ‘*Model Law against Trafficking in Persons*’ (2009) 26

314 See : Chapter Two, section 2.8

recognising that consent can expire before elements such as fraud, force or coercion exists, expresses that often the issue of consent places individuals into one of two categories – migrant smuggling or human trafficking.³¹⁵ As a result of the difficulty in distinguishing between a smuggled migrant and a victim of human trafficking Jones divides the distinction into five categories. Category A covers standard human trafficking cases where unlike a smuggled migrant, the victim does not go against the law but rather is exploited through force, deceit or coercion.³¹⁶ Category B involves standard human smuggling where the individuals voluntarily violate the law by arranging assistance into another country illegally.³¹⁷ Category C are smuggled migrants who find themselves subject to exploitation once they have arrived at the country of destination.³¹⁸ Often it is hard to recognise these individuals as victims of human trafficking as coercion may not be present. Category D concerns people who voluntarily agree to engage in prostitution or other forms of forced labour as a means to pay smugglers for assisting them in entering the country of destination illegally.³¹⁹ Jones acknowledges that:

Although they are conceptually quite distinct from Category C individuals, who are subject to coercive agents and influences after crossing the border, Category D and Category C individuals nearly mirror one another because the somatic distinction between one who is enslaved by a coercive agent and one who freely consents to be a slave is not readily discernible.³²⁰

The final classification, Category E may not have crossed borders illegally but voluntarily consents to prostitution or other forms of forced labour due to

315 Samuel V. Jones, 'Human Trafficking Victim Identification: Should Consent Matter?' (2011) 45 Indiana Law Review 483, 486

316 Ibid, 488

317 Ibid, 493

318 Ibid, 494

319 Ibid, 497

320 Ibid

desperate measures in acquiring money or basic necessities.³²¹ Regarding the categories that can hold an individual accountable for them being subjected to exploitation, Jones suggests that Categories D, E, and possibly C can place blameworthiness on the individuals even though the obvious harm is a result of their 'risk-producing consent or deliberate actions.'³²²

Nevertheless, though the Trafficking Protocol does not explicitly infer the degree of means such as force, fraud, or coercion, needed to nullify consent, and fulfil the definition of trafficking, the purpose of the protocol is to combat trafficking from all angles by prosecuting offenders at every stage of the crime, whether it be harbouring, transporting, receiving or the exploitation of an individual. A person may be considered to have given partial consent if all the true facts of the exploitation were not disclosed. However it would be unreasonable, and counterproductive to disregard the exploitation an individual because they consented to circumstances that led to their exploitation. Furthermore, as a result of modern slavery often involving violations against fundamental human rights, and moreover as international law has prohibited slavery and slave-like practices, recognising such acts as a crime against humanity,³²³ a person cannot legally consent to such exploitation.

3.7 Conclusion

This Chapter has explored some ways in which people are trafficked, exploited and enslaved through forced forms of labour on a global scale. The types of exploitation discussed is only a snapshot of the purposes for which people are exploited. As evident, contemporary forms of slavery continue to mimic

³²¹ Ibid

³²² Ibid, 499

³²³ Rome Statute art 7(1)(c)

traditional practices. However, modern slavery not only exists on a larger scale, but it continues to thrive due to increased migratory flows within and across borders, allowing traffickers to utilise traditional as well as modern forms of coercion and control such as debt bondage, physical and psychological abuse, retention of identity documents and threat of deportation or report to law enforcement authorities. While modern types of exploitation explored can be practiced throughout the globe, there are specific forms that are geographically unique. For example, trafficking for the purpose of sexual exploitation is mainly detected in Europe and Central Asia, while in East Asia and the Pacific, the most common form of exploitation is forced labour.³²⁴ In the Americas, both sexual exploitation and forced labour are equally detected.³²⁵

As demonstrated, various complexities such as migration issues, root causes such as poverty and unemployment, technological advancements, methods of control, and the transnational growth of the crime proves a challenge to regulating and combating human trafficking and modern slavery as a whole. Nonetheless, as illustrated each type of exploitation has its own specific challenges. For example, conditions imposed by States that contribute to the exploitation of individuals, forced sexual exploitation that can hide behind advances in technology such as the internet, and domestic servitude which is also kept hidden in the informal economy. It is evident that combatting modern forms of slavery not only requires a holistic approach targeting the common factors or elements involved in the trafficking and enslavement of human beings, but also requires measures that are tailored to address the issues and complexities that are unique to specific forms of exploitation.

324 UNODC, *Global Report on Trafficking in Persons* (2014) 9

325 Ibid

Part Two: The Role of Corporate Entities and the State in the Regulation of Modern Slavery

Chapter Four: Globalisation and the Resulting Labour Exploitation in Business Operations and Supply Chains

4.1 Introduction

The previous chapters in Part One of this thesis explored the global scale and complexities surrounding the regulation of 21st-century slavery. Particularly, concerning labour exploitation Chapter Three discussed some types of forced and exploitative labour that continue to exist such as sexual exploitation, bonded labour and domestic servitude and demonstrated some conditions imposed on individuals to compel them to work. In the face of international trade and global expansion, this Chapter narrows the focus of the thesis by examining the practice of labour exploitation in business operations and supply chains. It acknowledges the evolution of the globalised economy and the opening of markets that has resulted in an overabundance of goods and services, resulting in heightened competition among firms. To meet the high demand for goods and services, thus maintaining their position in a highly competitive business arena, it explores corrupt business practices that firms adopt and key labour exploitative conditions outlined by ILO, particularly low wages and forcing individuals to work in abusive conditions. Further, it considers the role of consumers in creating the high demand for goods and services which in turn fosters the exploitation of labour. This Chapter illustrates that the practice of labour exploitation in the economy is a product of both global competitive business operations and heightened consumer consumption.

4.2 Globalisation and Business

As mentioned in Chapter Two, modern slavery is considered one of the dark sides of globalisation. As the term globalisation does not have a concrete definition scholars have offered their own insights on how it is best defined.³²⁶ Globalisation has been interpreted as the compression of time and space where the world has gradually shrunk by changes in transportation, telecommunications and the influence of the capitalist system;³²⁷ 'increasing interdependence of national economies in trade, finance, and macroeconomic policy'³²⁸; and the 'intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.'³²⁹ The common ground of such definitions is that globalisation is a concept or series of processes involving international expansion and integration of global economies, activities and identities. As Giddens proposes, 'Globalisation has something to do with the thesis that we now all live in one world.'³³⁰

Globalisation is not a new phenomenon but rather has evolved to adapt to the social, economic and political changes in society. Friedman outlines three eras of globalisation, which he argues progressively shrank the world allowing for the interconnectedness of global communities. The first era, he referred to as Globalization 1.0 existed from Christopher Columbus' first voyage in 1492 until 1800 and concerned the competitiveness of countries whose sole focus was the amount of 'muscle' they had to compete with others.³³¹ According to

326 See: Mauro F. Guillén, 'Is Globalization Civilizing, Destructive or Feeble? A Critique of Five Key Debates in the Social Society Literature' (2001) 27 Annual Review of Sociology 235-260

327 See: David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Blackwell Publishers 1991) 240

328 Guillén (n 326) 236

329 Anthony Giddens, *The Consequences of Modernity* (Polity Press 1990) 64

330 Anthony Giddens, *Runaway World: How Globalization is Reshaping Our Lives* (Profile Books 2002) 7

331 Thomas L. Friedman, *The World is Flat: The Globalized World in the Twenty-First Century* (Penguin 2006) 9

Friedman, this era shrunk the world from size large to medium with its prime questions being, 'Where does my country fit into global competition and opportunities? How can I go global and collaborate with others through my country?'³³² Globalization 2.0, which lasted from 1800 to 2000, further reduced the globe and saw the force behind global integration concentrated in multinational companies and businesses.³³³ According to Friedman, developments such as steam engines and railroads facilitated easier movement of people and goods across the globe. Furthermore, technological innovations such as the internet, telephone and computer, bolstered the flow of information and communication. This age of globalisation saw the focus shift from country to company where the prime questions asked were, 'Where does my company fit into the global economy? How does it take advantage of the opportunities? How can I go global and collaborate with others through my company?'³³⁴

Friedman suggests that the third phase of globalisation that we are currently in began in 2000. Globalization 3.0 significantly shrank the world by giving individuals the power to integrate and compete globally.³³⁵ Individuals are now able to access platforms and opportunities on a global scale by utilising new technological advancements to work and compete with others where ever they are.³³⁶ On commenting on the current phase of globalisation Passaris notes that, '...the fuel of the new economy is technology and its currency is human capital. The product of the new economy is knowledge and its market is the virtual marketplace of the internet.'³³⁷

332 Ibid

333 Ibid

334 Ibid,10

335 Ibid

336 Ibid

337Constantine E. Passaris, 'The Business of Globalization and the Globalization of Business' (2006) 9 Journal of Comparative International Management 3,4

Collectively, individuals are now considered the driving force behind global integration by collaborating with others globally. This has then empowered large and small scale companies by allowing them to access information, connect, and compete with other businesses anywhere in the world. Because of global partnership and advances in technology, firms can now be based in one country, source cheap raw resources and manufacture products in another, and target consumers half way across the globe. As Alli et al. recognises, 'the process of globalization is facilitated by technology which dislocates humans from both time and space and projects them into a world where the future and past exist simultaneously.'³³⁸ According to Friedman, Globalization 3.0 has removed the barriers to accessing the global economy such as communication and the operations and growth of a company is no longer geographically limited.³³⁹

Nevertheless, globalisation has increased competitiveness among businesses on a national, regional and international level.³⁴⁰ As markets and industries globalise, businesses and multinational corporations have to compete with similar firms to maintain their position in a highly competitive market.³⁴¹ Because of globalisation, not only are multinationals competing against each other, but so to are firms within their supply chains. As consumers, when we purchase a product we tend to think of that product as being created by the company whose name or logo is branded on it, for example, a Dell or Apple laptop. Nevertheless, for every product we purchase, whether it is a computer, a mobile phone, a T-shirt, or something as seemingly simple as a tea bag, businesses have to source every part of that product from a number of

338 Ali M. Alli, George S. Winter, and David L. May, 'Globalization: Its Effects' (2011) 6 International Business & Economics Research Journal 89

339 Friedman, *The World is Flat: The Globalized World in the Twenty-First Century* (n 331) 195

340 See: Margarethe F. Wiersema and Harry P. Bowen, 'Corporate Diversification: The Impact of Foreign Competition, Industry Globalization, and Product Diversification' (2008) 29 Strategic Management Journal 115-132

341 Ibid

suppliers and go through a series of processes to get the final product to the consumer. When we think of supply chains, we may conjure images of simple linear processes composed of operations involving the extraction of raw resources, manufacturing of products and distribution to retailers and end consumers. Nonetheless, such a process may not be as straightforward and can be quite complex. To ensure efficiency, each firm involved in the supply chain must co-operate and collaborate with each other which can often be a difficult task. The supply chain of a multinational corporation can be much more complex as it spans over a series of networks resembling a spider's web. Within the business arena, companies are no longer competing individually but rather collectively through their supply chains. Effective productivity overall requires each firm to not only work collectively as a whole but also ensure efficient performance individually, thus increasing competition among suppliers. As Boatright points out 'Because of globalization, no company, no matter how well-intentioned, is able to compromise on competitiveness.'³⁴²

For firms to be able to compete against others, they have to take certain steps to maintain their position such as improving product innovation, successfully managing relationships throughout supply chains and creating value for its stakeholders. Separately, companies have often opted to employ or utilise cheap labour forces to cut costs. Many often do so either through the outsourcing of production to countries where there is an abundance of low-skilled and cheap labour forces or by employing migrant workers from less developed countries in more industrialised nations.³⁴³ As will be explored in this Chapter, such operations and the pressure to meet high demands for good

342 John R. Boatright, 'Globalization and the Ethics of Business' (2000) 10 *Business Ethics Quarterly* 1, 4

343 See: John Smith, 'The Political Economy of Outsourcing' in Louise Waite, Gary Craig, Hannah Lewis, and Klara Skrivankova (eds.), *Vulnerability, Exploitation and Migrants: Insecure Work in a Globalised Economy* (Palgrave Macmillan, 2015) 28-43

and services can result in the marginalisation and exploitation of vulnerable workers.

Boatright recognises that business is a game, where the purpose of the game is to make a profit in 'which the players themselves make up some of the rules as they go along.'³⁴⁴ Nonetheless, as will be discussed further in this thesis, in maximising profit, businesses have to operate in a manner where they are staying within the rules of the game. For the purpose of this research, the rules of the game imply behaving in a socially responsible and ethical manner while abiding by legal rules. The 'shrinking' or 'flattening' of the world has resulted in the increase in international regulations and institutions in an attempt to control and manage the outcomes of globalisation such as trading rules and regulations. Simultaneously, the growth of such international expansion and interconnectedness have helped shape legal norms. Michaels notes that traditionally, national and international law rarely overlapped as national law concerned relationships between the State and individuals, while international law concerned wider relations between States.³⁴⁵ However, he notes that international law has now evolved to include various governmental as well as non-governmental agents, and now concerns itself with issues pertaining to individuals such as human rights law and international criminal law - matters that were once considered to be confined to State capabilities.³⁴⁶ Likewise, as inter-connectedness between nations has increased, national laws have had to evolve to adapt to address transnational concerns that are not confined to a single State³⁴⁷ – such as human trafficking and modern slavery.

³⁴⁴ Boatright (n 342) 2

³⁴⁵ Ralf Michaels, 'Globalization and Law: Law Beyond the State' in Reza Banakar and Max Travers (eds.), *Law and Social Theory* (2nd edn, Hart Publishing 2013) 300

³⁴⁶ Ibid

³⁴⁷ Ibid

4.3 Labour Exploitation as a Business Practice

To address the challenges brought on by a competitive global arena companies have had to adopt certain measures to ensure the continued success of their business. A step many have taken to make a profit to maintain their position in a highly competitive market is by employing a cheap labour force. This can be so even if a company could surpass profit margins without having to exploit cheap labour. Chapter Three established that exploitation is generally interpreted as situations by which an individual takes unfair advantage and gains excessively off the weakness or vulnerable circumstances of another. Businesses and employers may not necessarily create an individual's vulnerable situation but rather act as opportunists, taking advantage of it.³⁴⁸ For example, reflecting on the situations outlined in direct and mutually beneficial and indirect forms of exploitation, firms may not be the initial cause of an individual's poverty stricken circumstances or disadvantages, but they may take advantage of and exploit the individual's circumstances to advance their own causes in the competitive global market. Thus, as will be explored in the following sections, giving an individual the opportunity to make some form of income, though minute in sufficing their basic necessities, does not fully improve the individual circumstances, and thus continues to keep them vulnerable.

Though the practice of labour exploitation can occur in any activity involved in a supply chain, it is often prevalent in third party contractors, particularly in the outsourcing of production and manufacturing of goods and services for multinational corporations. Not only do multinational corporations source various resources and components from suppliers across the globe, but global expansion has allowed them to save costs by relocating their production to

³⁴⁸ Mayer (no 214) 608

other countries. In many cases, businesses may not be involved in the direct exploitation of individuals but nonetheless act as accessories adding fuel to the fire of labour exploitation. Quoting Roach, Smith acknowledges that the extraction of products 'from relatively low-wage workers in the developing world has become an increasingly urgent survival tactic for companies in the developed economies.'³⁴⁹ The outsourcing of production from the home country of a company to a lesser developed country has some positive and negative outcomes. The moving of production from one's home country can have a negative effect on employment by putting people out of jobs, removing job opportunities, and can further result in a brain drain where skilled subcontractors choose to migrate abroad with their company.³⁵⁰ Subsequently, from a positive outlook, outsourcing can benefit a company's home country by allowing consumers in that country to access cheaper products and services imported from foreign countries.³⁵¹

Businesses could choose to outsource their production half way across the world for multiple reasons; lower minimum wages, reduced tax rates in poorer countries, more advanced technological developments and lack of a labour force due to the aging population in home countries. Furthermore, outsourcing of production allows a company to reduce manufacturing costs and focus on specific capabilities of the company such as allocating resources, research, design and marketing of products and services.³⁵²

To boost productivity by meeting the high demand of products and services on the market, many multinational corporations liaise with various independent

349 Smith, 'The Political Economy of Outsourcing' in Waite, Craig, Lewis, and Skrivankova (n 343) 35

350 Joan E. Ricart, Pablo Agnese, Niccolò Pisani, and Tunji Adegbesan, *Offshoring in the Global Economy: Management Practices and Welfare Implications* (Fundación BBVA, 2011) 33

<http://www.fbbva.es/TLFU/dat/DE_2011_offshoring.pdf> accessed 21 October 2016

351 Ibid, 34

352 K. Matthew Gilley and Abdul Rasheed, 'Making More by Doing Less: An Analysis of Outsourcing and its Effects on Firm Performance' (2000) 26 *Journal of Management* 763, 766

manufacturing and production firms which source an abundance of cheap labourers. For instance, the practice of labour exploitation has been found in factories in the apparel industry, who often utilise exploitative and cheap labour, paying workers extremely low wages and forcing them to work in poor and hazardous conditions. These predominantly sweatshop factories are often based in poor or developing countries where there is an abundance of vulnerable individuals who are desperate to accept whatever work they can to meet basic needs.

The Global Slavery Index listed India, China, Pakistan, Bangladesh and Uzbekistan as the countries with the highest proportion of modern slaves with an estimated 58% of enslaved persons living in those countries.³⁵³ It reported that the majority of goods produced by cheap labourers that are manufactured for consumers in Western Europe, Japan, North America and Australia come from these countries.³⁵⁴ Bangladesh is one of the largest exporters of garments and apparel in the world.³⁵⁵ Its factories are favoured among popular apparel corporations due to the abundance and cheapness of workers and the quick surplus of goods created. Nonetheless, the exploitation and treatment of workers in similar factories around the globe have been widely covered in the media and equally critiqued by scholars and human rights activists. For example, the collapse of one of Bangladesh's garment factory, the Rana Plaza, in 2013 that claimed the lives of over 1,000 workers opened the world's eyes and drew their attention to the level of exploitive treatment and poor conditions that workers producing our garments were forced to work in. It was reported that the workers were forced to continue working in the building

³⁵³ The Global Slavery Index (n 6)

³⁵⁴ Ibid

³⁵⁵ See: Knondoker A. Mottaleb and Tetsushi Sonobe, 'An Inquiry into the Rapid Growth of the Garment Industry in Bangladesh' (2011) 60 *Economic Development and Cultural Change* 67-89

despite the building being classed as unsafe.³⁵⁶ The Rana Plaza had links to various popular companies such as Benetton, J.C Penney, Walmart, Matalan and Primark.³⁵⁷ A year before the Rana Plaza disaster, Ali's Enterprises, a garment manufacturing factory in Pakistan exploded, killing over 250 workers while injuring others who jumped from the building to escape the fire.³⁵⁸ Shockingly, it was reported that after the fire, managers forced workers to remain in the building to 'save the clothes.'³⁵⁹

Many vulnerable workers have no alternative option, and poverty drives them to these factories where they help in the production, and manufacturing of goods whose value is worth considerably more than what the workers themselves are paid. In the case of sweatshop labourers, the exploitation of labour creates value for multinational corporations by offering an unequal exchange in valued goods for an extremely low-cost workforce. These multinational corporations may not necessarily be engaged in the direct exploitation of individuals, but by employing such agencies and factories to produce goods, they act as accessories to the exploiters.

However, some may view subcontractors as independent to themselves and wrongfully believe that ending labour exploitation and modern forms of slavery is the sole responsibility of the factories, agencies, and governments and not the corporations themselves. For example, in 2015 UK sports retail giant Sports Direct came under fire for the treatment of its workers in its

356 Jim Yardley, 'Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame' (*The New York Times*, 22 May 2013)

< http://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html?_r=0 > accessed 22 October 2016

357 Clean Clothes, 'Compensating the victims of the Rana Plaza: Resolving the funding crisis' (*Clean Clothes Campaign*, March 2015) <<https://cleanclothes.org/safety/ranaplaza/compensating-the-victims-of-rana-plaza-resolving-the-funding-crisis>> accessed 8 April 2017

358 'Ali Enterprises: A Factory Inferno' (*Clean Clothes Campaign*) < <https://cleanclothes.org/safety/ali-enterprises> > accessed 22 October 2016

359 Ibid

warehouses.³⁶⁰ The company's employment agencies were found to be paying workers below the national minimum wage and concerns were raised about the health and safety protocols of their establishments. Various deductions were made from the workers already low salaries such as pre-paid debit card and insurance schemes.³⁶¹ Furthermore, the workers were subjected to various penalties such as one which withheld 15 minutes pay for every minute a worker was late.³⁶² Founder of the company Mike Ashley argued that he was not aware of the treatment of employees in his warehouses due to workers being subcontracted through two agencies. Sports Direct alleged that the agencies were responsible for employing workers and establishing the terms and conditions of their employment, and also the poor wages that were paid.³⁶³ Parliament's Business, Innovation and Skills Select Committee noted that the only reason Sports Direct chose to use these employment agencies was to reduce unnecessary costs and to not be responsible for the employment of workers.³⁶⁴ The Select Committee recognised that Ashley should be held accountable for the treatment of the workers, although he may not have been aware of their circumstances, or knowingly chose to ignore it to maximise his company's profit.³⁶⁵ In denouncing Sports Direct as an example of bad business practice, the committee highlighted the importance of effective corporate governance in ensuring good business practice, by balancing the interests of people affected by its operations, such as stakeholders and

360 Business, Innovation and Skills Select Committee, *Employment Practices and Sports Direct*, 22 July 2016, HC 219 2016-2017

361 Ibid

362 Ibid, para 45

363 Ibid, para 28

364 Ibid, para 29

365 Ibid, para 77

employees, and to also enable adequate detection and remedying of poor working conditions.³⁶⁶

Separately, Nike, a multinational footwear and sports corporation, was criticised for the treatment of workers in its manufacturing factories and have been accused of using sweatshop labour. In 1989 alarms were raised about the treatment of the workers in its factories, particularly in Indonesia, none of whom were directly employed by Nike.³⁶⁷ It was reported that workers were forced to work long hours in deplorable conditions which were worsened as the popularity and demand for Nike's products increased.³⁶⁸ At the time, the corporation's initial response was, 'these aren't our factories, it's not our problem.'³⁶⁹

Not only are businesses aiming to compete with each other by utilising a cheap labour force, but competition also exists among these subcontractors to provide an abundant low-cost work force.³⁷⁰ Contrary to Nike's initial comment, though these firms may exist independently, the company and its suppliers are nonetheless connected through the supply chain, which subsequently calls on corporations to be morally and ethically responsible, and moreover exercise social consciousness in their business affairs to contribute to the regulation of modern forms of slavery.

366 Ibid, para 74

367 John Miller and Lucy Parker, *Everybody's Business: The Unlikely Story of How Big Business Can Fix the World* (Biteback Publishing 2013) 69

368 Ibid

369 Ibid

370 Smith, 'The Political Economy of Outsourcing' in Waite, Craig, Lewis, and Skrivankova (n 343) 32

4.4 Indicators of Labour Exploitative Conditions

The previous Chapter explored some forms of labour exploitation and considered a number of ways an individual could be compelled to perform work or service for another through the use of physical, financial or psychological coercion. As mentioned, ILO outlined a number of conditions that determine exploitative labour such as debt bondage, physical and sexual abuse (including threat of), deception as to the nature of the work, restrictions placed on individuals movement, and intimidation and threats. The aim of this section is to further expand on key exploitative conditions in the context of the business environment, particularly, low wages and abusive working conditions.

4.4.1 Low Wages

In addition to individuals having the right to work in fair and just working conditions, they are also entitled to fair wages. In particular, the International Covenant on Economic, Social and Cultural Rights acknowledges the right of individuals to receive fair wages and equal remuneration for work of equal value, without discrimination of any kind, and decent living wages for workers and their families.³⁷¹ The Committee on Economic, Social and Cultural Rights on the right to just and favourable conditions of work, recognises that fair wages are wages above the minimum wage that take into account the work being performed, the skills needed to perform the work, working conditions, workers' responsibilities, and the impact of the work on their health and life.³⁷² Making reference to article 2(2) of the covenant, the Committee emphasises the importance for the value of work to correspond with the remuneration

³⁷¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) 7(a)(i) and (ii), 2(2)

³⁷² UNCHR General Comment No.23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/GC/23, para 10

received, notwithstanding discriminatory distinctions such as gender, religion, or social origin.

Applying the definition of exploitation to a working environment where a company can maximise profit by keeping labour costs low, raises two main questions; is simply paying an employee a low wage exploitation? And at what point do the lines between mere cheap labour and exploitation cross? ILO explicitly states that not all indicators have to be present in a situation involving forced or compulsory labour, and in some cases, a single indicator could be sufficient.³⁷³ From the list of indicators, it is evident that not paying or withholding an employee's agreed wage for their labour can amount to forced labour. However, can we infer exploitation from the employer who pays their workers a low wage?

Chapter Three illustrated that employers could exploit their employees even though the worker voluntarily chose to accept a low-paid job. Such a situation benefits both the employer who can maximise profit and the labourer who may have no alternative option for work. Zwolinski points out that one of the factors in determining whether an individual is in fact exploited is the wage paid to them by the employer.³⁷⁴ Making reference to sweatshop labour - where individuals are often forced to work long hours in dangerous circumstances for a low wage - he argues that employers who pay their workers below the living wage may be guilty of exploitation, though the worker themselves may see the benefit from the job over any other alternative option, such as having no job at all.³⁷⁵ According to Zwolinski, these employers may be guilty of exploitation because they are abusing and benefiting from an individual's vulnerable circumstances. This goes back to Meyers' view mentioned in Chapter Three,

373 ILO, 'ILO Indicators of Forced Labour' (2012)

374 Zwolinski (n 220) 706

375 Ibid

where he suggests exploitation as being unfair where the gains made by the employer greatly surpasses that of the employee.³⁷⁶ In considering whether paying an employee a low wage equates to exploitation, Mayer suggests that the test in judging fairness is, 'if the disadvantage which the sweatshop owner exploits is the desperation of labor, then the loss inflicted on the exploited workers is measured from the baseline of what a nondesperate worker would accept for doing this job.'³⁷⁷

A difficult task is determining what exactly a low wage is. For instance, the Committee on Economic, Social and Cultural Rights acknowledge that in addition to fair wages corresponding to the work performed and the circumstances around the work, it must be adequate in meeting the needs of workers such as the cost of living, and various social and economic factors recognised under the Covenant.³⁷⁸ Most modern abolitionists and labour rights activists may hold companies accountable for ending labour exploitation of individuals and tend to overlook the role the government plays in determining and enforcing a minimum wage (and working standards) which will differ from country to country depending on the cost of living and sustenance. For example, in 2013, after pressure from labour strikes and demonstrations, Smith notes that the Bangladesh government raised the minimum wage by 77% - which though a dramatic increase – he points out is less than one-fifth of what is needed to sustain the basic necessities for a small family comprising of one adult and two children.³⁷⁹ Raising and legally enforcing minimum wages and decent working conditions for workers is a measure that can only be legally

³⁷⁶ Meyers (n 218) 324

³⁷⁷ Mayer (n 214) 607

³⁷⁸ UNCHR General Comment No.23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/GC/23, para 18

³⁷⁹ John Smith, *Imperialism in the Twenty-First Century: Globalization, Super-Exploitation, and Capitalism's Final Crisis* (Monthly Review Press, 2016) 15

enforced by the government. For instance, the Committee on Economic, Social and Cultural Rights also acknowledge the role of the government in implementing measures to promote equal and fair wages and reviewing minimum wages against the standard of living.³⁸⁰

Nonetheless, an issue with enforcing a minimum wage is that companies, wanting to maintain a cheap labour force, may choose to relocate their production elsewhere to save costs – thereby moving the exploitation from one location to another. Governments of both home and destination countries therefore play a major role in adopting and upholding a level playing field where regulations oblige companies to act responsibly with respect to individuals' human rights wherever they operate, thereby allowing both parties to benefit equally from its transactions. Although it is easily perceived that firms should stop exploiting individuals, the complex nature of modern slavery raises a number of issues. One being, if we remove that person from an exploitative situation, there is a possibility that doing so will only cause more harm than good for the individual. Indeed the positive effect is that they will no longer be subject to exploitation, but nonetheless, they may have lost their only access to income. It is important for governments to enforce rules and regulations that not only protect the rights of its citizens but also to prevent citizens from being driven further into exploitative situations.

Although one may argue that exploited labourers voluntarily choose to accept working low paid jobs in poor conditions, Zwolinski interestingly questions - given the economic circumstances of the worker - whether they, in fact, had any choice at all.³⁸¹ He points out that coercion reduces an individual's options and forces them to choose a better or more preferred situation. Poverty, he

380 UNCHR General Comment No.23(2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/GC/23, paras 15, 20 and 21

381 Zwolinski (n 220) 701

argues, is itself a means of coercion as it gives vulnerable individuals only a selected few options such as 'prostitution, theft, sweatshop, labour or starvation.'³⁸² Furthermore, he argues that:

[R]emoving the *most preferred* option - does not make things any better for the worker. The coercion of poverty reduces a worker's options, but so long as he is still free to choose from among the set of options available to him, we will do him no favors by reducing his options still further. Indeed, to do so would be a *further* form of coercion, not a cure for the coercion of poverty.³⁸³

Concerning the latter question, 'where does the line between mere cheap labour and exploitation cross?' Most may construe that for a person to be exploited, they must have suffered some form of a loss. However suffering a loss is not a determining factor as most exploited individuals may often consider their situation advantageous.³⁸⁴ Mayer makes a comparison between theft and exploitation of a person arguing that 'After the theft, the victim has less than before. But victims of exploitation never have less than before, and in fact usually, gain by being exploited.'³⁸⁵ Goodin proposes that exploitation be viewed as a process and not just an end result.³⁸⁶ Though ILO states that the presence of one factor may be sufficient to amount to forced labour, in some cases deciding whether a business is exploiting an individual, we need to view exploitation beyond mere cheap labour and consider all the circumstances surrounding the nature of the work, such as force, coercion, and other indicators as listed by the ILO, and whether the work being performed is in line with international standards.

382 Ibid

383 Ibid

384 Robert E. Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve (ed.), *Modern Theories of Exploitation* (Sage Publications 1987) 173

385 Mayer (no 214) 607

386 Goodin (n 384) 181

4.4.2 Abusive and Unsafe Working Conditions

In addition to paying an employee a low wage or withholding their wages, individuals could also be compelled to work under abusive working conditions where they are subject to various abuses such as physical and sexual abuse, psychological trauma or coercion, excessive overtime or being compelled to work in unsafe conditions hazardous to their health. As mentioned in the previous section, poverty and the desperation to seek opportunities to improve their socio-economic circumstances often increases the vulnerability of individuals, which is then taken advantage of by exploiters who benefit from their disadvantage and deceive them about the nature and terms of the work to be performed.

Regarding working hours, it is not uncommon for vulnerable workers to be compelled to work long hours, particularly excessive overtime. For instance, the exploitation of workers in performing excessive overtime is prevalent in the textiles, clothing, leather and footwear industries where sectors are labour intensive, and highly competitive with low wages.³⁸⁷ A worker may be coerced to do so by their employer, or their circumstances may force them to work additional hours to meet sustenance or to pay off debts and loans. International standards recognise the importance of ensuring that workers are not working excessive hours hazardous to their mental and physical health, and acknowledge the importance of adequate rest to support this.³⁸⁸ For instance, article 7(d) of International Covenant on Economic, Social and Cultural Rights

387 ILO, *Global Dialogue Forum on Wages and Working Hours in the Textiles, Clothing, Leather and Footwear Industries* – (Geneva, 23–25 September 2014) (ILO Publications, 2015) GDFTCLI/2014/9

388 Eg. Hours of Work (Industry) Convention (adopted 28 November 1919, entered into force 13 June 1923) ILO Convention No.1 ; Hours of Work (Commerce and Offices) Convention (adopted 28 June 1930, entered into force 28 August 1933) ILO Convention No.30 ; Forty Hour Week Convention (adopted 22 June 1935, entered into force 23 June 1957) ILO Convention No. 47 ; ILO Reduction of Hours of Work Recommendation, 1962 (No.116), Weekly Rest (Industry) Convention (adopted 17 November 1921, entered into force 19 June 1923) ILO Convention No. 14

holds that States should protect the right of individuals to adequate rest, as well as reasonable limitation of working hours. Nevertheless, as aforementioned, the integration of world economies and the intensification of competition within the business arena coupled with the high consumer demand for goods and services, has resulted in firms aiming to increase productivity at the expense of vulnerable workers. Thus, vulnerable workers are often forced to work excessive hours to meet the demand for high efficiency and productivity while simultaneously keeping the cost of labour low. Contrarily, on researching on employment wages and working conditions in Asia's garment sector, Huynh suggests that work intensity is not a prerequisite in being competitive, arguing that, 'Improving productivity in the industry is paramount for competitiveness, but productivity gains must be driven by greater efficiency – not work intensity...greater production volume, based on long hours and excessive overtime, can both compromise workplace safety and health and create disincentives...' ³⁸⁹

Parallel to long working hours, workers can also be forced to work under other circumstances hazardous to their mental and physical health. Article 7(b) of the International Covenant on Economic, Social and Cultural Rights, recognise the right of individuals to safe and healthy working conditions. This includes the prevention of occupational accidents and diseases.³⁹⁰ As vulnerable workers are often treated as commodities, they can be compelled to work in environments where the value of the exploitation of their labour supersedes that of their own wellbeing, as evident in the disasters occurring in the Rana Plaza garment factory in Bangladesh and Ali's Enterprise in Pakistan. This is

389 Phu Huynh, 'Employment, wages and working conditions in Asia's Garment sector: Finding new drivers of competitiveness' (2015) ILO Asia-Pacific Working Paper Series, 14 < http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_426563.pdf> accessed 10 October 2017

390 UNCHR General Comment No.23(2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/GC/23, para 25

of particular concern when involving the use of child labourers. For instance, in the tobacco farming industry in Indonesia, children are often used to perform various tasks such as digging soil for planting, planting tobacco seeds, applying fertilizers and pesticides, harvesting and cutting tobacco leaves, and preparing leaves for curing.³⁹¹ The work performed poses a risk to children that is likely to harm their health and safety. For example, Human Rights Watch found that children suffered from illnesses related to exposed nicotine, such as nicotine poisoning, toxic pesticides, and illnesses from exposure to extreme heat.³⁹² Moreover, children were often harmed by tools used in tobacco farming, and suffered pain and exhaustion from the work performed.³⁹³

Separately, concerning the exploitation of workers in the commercial environment, UNODC and ILO recognise the role of recruiters and recruitment agencies in instigating or facilitating the exploitation of individuals and abusive working conditions.³⁹⁴ Such agencies play a vital role in the business arena as globally they help to provide and satisfy the demand and supply for labour across a range of sectors. Moreover, they can be involved in not only the placement of workers, but also their contract agreements, overseeing terms and conditions of work, travel and visa requirements, and the management of workers.³⁹⁵ However though recruitment agencies is a legitimate course of action in supplying labour, illicit practices pose a threat to particularly

391 Human Rights Watch, *"The Harvest in my Blood" Hazardous Child Labor in Tobacco Farming in Indonesia*" (HRW 2016) 32

392 Ibid, 38

393 Ibid

394 See: UNODC, 'The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking of Persons' (2015) < http://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf> accessed 10 October 2017 ; Beate Andrees, Alix Nasri, Peter Swiniarski, *Regulating Labour Recruitment to Prevent Human Trafficking and to Foster Fair Migration : Models, Challenges and Opportunities* (ILO Publications 2015)

395 UNODC, 'The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking of Persons' (n 394) 5

vulnerable workers. Principally, there is the danger of agencies charging excessive or illegitimate fees for their services which increases the vulnerability of workers as they are forced to accept exploitative work to pay their fees. Unscrupulous recruitment practices such as deception as to the nature of the work, and wages paid, can deceive vulnerable individuals into believing that the high recruitment fees will be easily repayable. Moreover, such unlawful agencies could be part of illicit trafficking networks who lure individuals to exploit.³⁹⁶ For instance, Amnesty International reported that in the construction sector in Qatar, Nepalese workers were often deceived as to the nature of the work during the recruitment process. Once in Qatar, workers found that the terms and conditions of their employment were significantly different to that agreed during the recruitment process.³⁹⁷ Their wages were significantly less than agreed, sometimes withheld, their passports were confiscated, they were compelled to work long hours and forced to live in poor accommodation.³⁹⁸ Further, as a result of many migrant workers taking on loans and debts back home to pay recruitment fees, because they were deceived into believing they could easily be repaid, employers aware of this were likely to take further advantage of their circumstance.³⁹⁹ Amnesty reported that such employers aware of the debts would further reduce the workers' salaries, compelling them to remain in abusive conditions as they had to repay debts, and moreover, due to Qatar's restrictive sponsorship laws, they were unable to change jobs without their employers' consent, as they would face deportation.

Though international standards on labour primarily focused on conditions analogous to forced and compulsory labour, as opposed to the actual process

³⁹⁶ Ibid, 1

³⁹⁷ Amnesty International, 'The Dark Side of Migration' (n 278) 33

³⁹⁸ Ibid, 6

³⁹⁹ Ibid, 34-35

of recruitment, in more recent times, regulations have highlighted the connection between forced and compulsory work, the trafficking of vulnerable individuals and illicit and abusive recruitment methods. For instance, article 2(d) of ILO's Protocol of 2014 to the 1930 Forced Labour Convention acknowledges that in establishing effective approaches to prevent forced and compulsory labour, Member States should adopt measures to protect persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process.⁴⁰⁰ Further, its Forced Labour Recommendation No. 203 on supplementary measures for the effective suppression of forced labour, also highlights the link between forced labour and fraudulent recruitment practices. Article 4 (b) recognises that in adopting effective preventative measures Member States should adopt steps such as:

[T]argeting awareness-raising campaigns, especially for those who are most at risk of becoming victims of forced or compulsory labour, to inform them, inter alia, about how to protect themselves against fraudulent or abusive recruitment and employment practices, their rights and responsibilities at work, and how to gain access to assistance in case of need.⁴⁰¹

Moreover, Member States have a duty to ensure:

[The] promotion of coordinated efforts by relevant government agencies with those of other States to facilitate regular and safe migration and to prevent trafficking in persons, including coordinated efforts to regulate, license and monitor labour recruiters and employment agencies and eliminate the charging of recruitment fees to workers to prevent debt bondage and other forms of economic coercion.⁴⁰²

Article 8 also recognises that States should adopt the necessary measures to eliminate abuses and fraudulent labour recruitment and employment practices

400 ILO Forced Labour Protocol of 2014, art 2 (d)

401 ILO Recommendation R203: Forced Labour (Supplementary Measures) Recommendation (103rd Conference Session Geneva 11 June 2014) art 4(b)

402 Ibid, art 4 (i)

such as the prohibition of recruitment fees to workers, and advocate transparent employment contracts establishing efficient complaint, remedial and penalty procedures.⁴⁰³

Evidently, there is a plethora of ways in which vulnerable workers are lured and confined into performing forced or compulsory work. As evident such abuses can be directly inflicted by companies, or exist through third-party subcontractors in their supply chains. As will be explored further in the subsequent Chapter, such unethical business practices has generated concern on the implications of business operations on human rights and the need for firms to be accountable and transparent with regards to activities occurring within as well as outside the walls of their firms.

4.5 Consumer Demand Fostering the Exploitation of Labour

4.5.1 Addressing the “Culture of Consumption”

Though in actuality, anyone can become a victim of modern slavery - it is those individuals at the bottom of the economic pyramid that are often more vulnerable to economic exploitation producing goods and services for multinational corporations to cater to the more privileged individuals at the top of the pyramid. As discussed, globalisation has not only allowed firms to access markets across the globe, but it has also allowed consumers access to competitive foreign goods and services. Thus, the increased competition among firms, and the obsession with achieving profit margins and maintaining the success of a company in the long term can often place pressure on firms, or their suppliers to increase productivity, at the expense of vulnerable members of society. Simultaneously, in a consumerist obsessed society preoccupied with the consumption and accumulation of material wealth, this

⁴⁰³ Ibid, art 8

demand greatly contributes to the pressure on firms, thus bolstering the exploitation of human beings.

As explored in section 4.3 businesses could choose to outsource their production half way across the world for multiple reasons. In addition to benefiting firms in the long term by allow them to maximise their capital through low wages and reduced taxes, it can also allow businesses to improve efficiency and productivity to meet the demand of the market, thus matching competitive advantage. As mentioned, a high demand in the market for goods and services can simultaneously result in a high demand for cheap labour. According to Ricart et al.:

[T]he demand for labor is a derived demand since it originates in the demand for the goods or services produced by a company. This means that the strength of the demand of any kind of labor depends on the ability to produce a product or service and its market value. The demand for labor depicts the relationship between the quantity of labor demanded by companies and the wage rate they have to pay, all other factors equal. Additionally, profit maximization constitutes the primary goal for competitive companies and compels entrepreneurs to strive for the highest productivity rate. This implies finding productive and efficient workers who are willing to work for the least remuneration.⁴⁰⁴

Thus, heightened levels of demand for goods and services from consumers can in turn contribute to the exploitation of labour. According to Kasser et al., we live in a 'culture of consumption' where consumers have played a key role.⁴⁰⁵ A culture of consumption, the authors suggest, can be interpreted in a number of ways. For example, from an economic point of view – consumption which is an expected outcome of the capitalist economy, or from a historical perspective - a consequence of the Industrial Age, which resulted in the

404 Ricart, Agnese, Pisani and Adegbesan (n 350) 37

405 Tim Kasser, Richard M. Ryan, Charles E. Couchman, and Kennon M. Sheldon, 'Materialistic Values: The Causes and Consequences' in Tim Kasser and Allen D. Kanner (eds.), *Psychology and Consumer Culture : The Struggle for a Good Life in a Materialistic World* (American Psychological Association 2003) 12

economy utilising modern methods to entice consumers.⁴⁰⁶ Nevertheless, Kasser et al. note, that from a psychological perspective, people have influenced this consumerist culture and subsequently have been influenced by it. In comparing this to other cultures and religions, the authors note:

As recognized by most sociocultural and anthropological approaches, in order for some dimension of a culture to exist, it must be supported by individual human beings who follow the beliefs and practices of that culture; at the same time, the individual humans who support that aspect of culture are themselves shaped by the beliefs and practices that they have internalized. Take, for example, the particular aspect of culture known as religion. In order for any religion to exist, a reasonably large number of individuals must believe in the tenets and engage in the practice it espouses. If everyone stopped going to its religious centers, practicing the way of life it encourages, and reading its texts, the religion would die out, as have many religions in the past. At the same time that a religion is created by its followers, its followers are shaped by the religion. When individuals believe in the ideas of the religion and engage in its practices, their identities, personalities, and behaviours are molded in particular and profound ways.⁴⁰⁷

As a result, this common belief held by such a large group of people have helped shape our value systems, which continues to fixate on material desires. This has thus resulted in an economy where markets overconsume, firms overproduce, and vulnerable individuals are overworked to satisfy such desires. Our desire for material wealth is not a new concept, as our value systems differ and change over time, particularly aided by growth in technological advancements. We exist in a world where our value systems continue to put material desires over humankind. In the 15th century, Columbus' obsession with finding gold and wealth in the Americas, lead to the genocide of indigenous populations.⁴⁰⁸ During the 15th and 19th century, the

406 Ibid

407 Ibid

408 See: Tink Tinker and Mark Freeland, 'Thief, Slave Trader, Murderer: Christopher Columbus and Caribbean Population Decline' (2008) 23 Wicazo Sa Review 25-50

fixation with accumulating wealth from the enslavement of Africans affected an entire continent, hindering the advancement of African societies and causing economic instability.⁴⁰⁹ Today, people continue to be exploited to fuel our current demands and our economies. Though businesses can enjoy profits while enforcing labour standards throughout their firm, high demands, competition, power, money and greed continues to trump humanism, as society continues to gain undeservedly at the expense of the vulnerable majority. Though slavery is illegal in every part of the world and its practices frowned upon by actors in the international community, society continues to seemingly lack an emotional attachment to our humanness. As Kasser et al. note, this culture of consumerism is not only influenced by society but also exerts influence itself. There is a need for individuals and corporate entities to acknowledge our power and role in the economy that is fuelling the exploitation of people and further widening the gap between the advantage and the disadvantage. As Oxfam notes, the economy 'is failing the majority of people, and failing the planet. There is no dispute that today we are living through an inequality crisis...'⁴¹⁰

4.5.2 The Role of Consumers

Traditionally, consumers had no role in value creation, and companies simply decided what goods and services would be of value for the market.⁴¹¹ However consumers are now becoming increasingly more connected to value creation as they exert influence on not only what a company produces but also how a

409 Nunn 'The Long-Term Effects of Africa's Slave Trades' (n 14) 139-176

410 Oxfam, 'An Economy for the 1% : How Privilege and Power in the Economy Drive Extreme Inequality and How This Can Be Stopped' (2016) Oxfam Briefing Paper No. 10, 6

<https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf> accessed 1 February 2017

411 Coimbatore K. Prahalad and Venkat Ramaswamy, 'Co-Creation Experiences: The Next Practice in Value Creation' (2004) 18 (3) Journal of Interactive Marketing 5, 7

company behaves. Businesses thrive on the existence of its customers. In aiming to make a profit and to survive in the long term, they must satisfy their consumers. Moreover, the overall success of a company depends on its ability to not only provide goods and services but to behave and operate in a manner that satisfies the market. As consumers, not only do we have an influence on what products and services a company innovates and supplies, and the effective management of their supply chains, but from a social perspective we can also influence how a company chooses to carry out its operation, as a poor reputation can be detrimental to a firm. Technological developments such as the internet and the growth of social media are connecting consumers with happenings across the globe making us more socially conscious.⁴¹² As individuals, we are not just citizens of our country but are citizens of the integrating global economy. To reiterate Giddens, 'we all now live in one world.'⁴¹³ It has been perceived that due to our leadership and influence capabilities, consumers have a role in exercising social consciousness and acknowledging the existence of modern slavery and labour exploitation in our supply chains, that we too are a part of as end consumers.

Consumers are now recognising and exercising their sovereignty by voicing their opinions, forcing companies to operate their business affairs in an ethical and social manner. A business who is not trustworthy and transparent risks damaging the relationship with its consumers. The exercise of consumer consciousness was illustrated in the Volkswagen scandal that came to surface in 2015 where it emerged that the popular German car manufacturer was selling cars equipped with specialist software that cheated emission tests by

412 Simon Mainwaring, 'The New Power of Consumers to Influence Brands' (*Forbes*, 7 September 2011) <
<http://www.forbes.com/sites/simonmainwaring/2011/09/07/the-new-power-of-consumers-to-influence-brands/#5ba4896da29e>> accessed 23 October 2016

413 Giddens, *Runaway World: How Globalization is Reshaping our Lives* (n 330) 7

falsifying results.⁴¹⁴ The scandal caused outrage and damaged the trust of many consumers who bought the cars because they were supposedly efficient and environmentally friendly.⁴¹⁵ As a result of backlash from its consumers and various health organisations, global sales of Volkswagen cars significantly dropped and its chief executive officer Martin Winterkorn was forced to resign. Previously, Winterkorn had claimed in 2012, 'our pursuit of innovation and perfection and our responsible approach will help to make us the world's leading automaker by 2018 – both economically and ecologically.'⁴¹⁶

With regards to supply chains, as users of products and services, we are not considered detached from the supply chain and as end-consumers, determine the way a company performs. As explored, we create the high demand for specific goods and services which drive companies to supply at a reasonable price that we are willing to pay. Subconsciously we too are accessories to exploitation, through over-consumption, creating the demand and purchasing end goods that involved the exploitation of poor, desperate and vulnerable individuals.

Nevertheless, there can exist various challenges to exercising consumer conscientiousness when making purchasing decisions. One particular issue regards monopolists who have control of a specific product or service sold on the market. Because of such limitations, customers may have no other alternative option but to purchase the product from such a company who may be profiting from the use of exploitative labour in their supply chains.

414 Russell Hotten, 'Volkswagen: The Scandal Explained' (*BBC*, 10 December 2015)

<<http://www.bbc.co.uk/news/business-34324772>> accessed 23 October 2016

415 Graham Ruddick, 'VW customers demand answers and compensation over emissions scandal' (*The Guardian*, 15 October 2015) <

<https://www.theguardian.com/business/2015/oct/15/vw-customers-demand-answers-and-compensation-over-emissions-scandal>> accessed 23 October 2016

416 Martin Winterkorn, 'Letter to Our Shareholders' (*Volkswagen*, 2012)

<<http://annualreport2012.volkswagenag.com/strategy/lettertoourshareholders.html>> accessed 23 October 2016

Separately, the abundance of a specific product on the market may drive some businesses to employ a cheap workforce to compete with other businesses. Due to the abundance of cheap alternative goods, consumers who may be socially conscious may have no choice but to continue purchasing products and services that may involve slave labour as they simply cannot afford to pay the higher price for ethical goods.

Furthermore, a difficult task for consumers is knowing what product involved the use of slave labour in the production and manufacturing of it. Part of the problem is not only knowing if the manufacturing of a product utilised slave labour, but also tracing where labour exploitation may be used in the supply chain. Only a minute part of a product, as opposed to the whole product, may have involved exploitation. Moreover, the production and manufacturing of a product may not necessarily involve slave labour, but labour exploitation could exist later in the supply chain in the distribution and selling of the final product or service.

For those customers who exercise consumer conscientiousness by researching on products that contain slave labour, a popular tactic in attempting to force a business to be socially responsible is by campaigning against and boycotting the business. Nevertheless, boycotting a business though potentially allowing the consumers' voice to be heard, is not a practical solution to ending modern slavery. If the overall aim is to boycott these companies to put them out of business, we must consider the impact this will have on the victims. As Zwolinski points out, many of these workers are not working to afford luxuries, but rather they are working to survive, and though exploitative, the job may be their only option for making some form of an

income and thus removing that may only amount to another form of coercion.⁴¹⁷

4.6 Conclusion

The integration of the global economy, or what Friedman refers to as the 'shrinking' of the world, has brought about a number of positive changes such as access to new goods and services and the opportunity for individuals and businesses to migrate, communicate and work globally. However, the interconnectedness of world economies is not without its negative and shameful side effects. The intensification of competitiveness among businesses on a global scale has fuelled the exploitation of poor, vulnerable and desperate individuals who are trapped in poverty and unable to equally salvage from the benefits of the integrated economy.

The heightened competition among firms brought on by globalisation, coupled with the need to maximise profit, has driven many businesses to reduce costs by employing cheap labour. Though some businesses may not be directly exploiting individuals, they act as accessories by liaising with firms that do so through their supply chains. Like other forms of exploitation, labour exploitation is a complex phenomenon that raises a number of issues when establishing solutions to eradicate this practice. Eradicating this form of exploitation in supply chains is a team effort requiring the co-operation and determination among all external and internal agents in the global community. The exploitation of individuals in all areas of supply chains from the extraction of raw resources straight to the selling of the final product is unacceptable. The continued exploitation of the world's human resources is not just a shame on various factories and its managers, but it is a disgrace on governments, a disgrace on the corporations who profit from exploitative labour and the end

⁴¹⁷ Zwolinski (n 220) 692

consumers who purchase and utilise these products. The marginalisation and the exploitation of these vulnerable human beings to produce goods and services is not solely one group or company's issue; it is the world's problem. As global participants in the integrated economy, we are all accessories to exploitation.

Chapter Five: Corporate Social Responsibility in the Regulation of Modern Slavery

5.1 Introduction

Contrary to Nike's initial response of 'these aren't our factories, it's not our problem'⁴¹⁸ to exploitative labour in their Indonesian factories in 1989, companies have been pressured to acknowledge their relationship with the wider global community and to act in a socially responsible and ethical manner while abiding by legal rules and regulations. Chapter Four explored how the operations of businesses in a global competitive business arena can lead to the exploitation of individuals by a firm, either directly inflicted or through subcontractors. Moreover, it addressed the culture of consumption that contributes to the high demand for exploited labour.

Against the backdrop of the global sustainable development agenda, this Chapter aims to evaluate the perceived role of corporate entities in the regulation of modern slavery. From a range of sources, this Chapter explores the significance of corporate social responsibility (CSR) and its relation to modern slavery, illustrating pressures on businesses to ensure that their operations are not only contributing to wider global issues, but also operating in a manner that respects human rights so that their supply chains are not tainted with exploitative labour. Further, the Chapter explores the obligations of firms in relation to human rights under international law, attempts by the international community to regulate business conduct through hard law and soft law human rights initiatives, and consider whether it is necessary to hold corporations directly accountable under international human rights law. Separately, drawing on international soft law initiatives, this Chapter

⁴¹⁸ Miller and Parker (n 367) 69

establishes how CSR can be used as a tool to combat modern slavery. Conversely, due to the nature of businesses operating in a competitive arena, that thrives and fixates on the mass accumulation of wealth, goods and services, the Chapter critiques the credibility of CSR. It discusses the ambiguity and potential flaws of CSR and moreover, with regards to combating modern slavery from a human rights perspective, illustrates that such responsibility is a moral rather than legal obligation.

5.2 The Role of Corporate Social Responsibility (CSR) in the Regulation of Modern Slavery

5.2.1 The Business Case for Sustainability : Corporate Social Responsibility

In its recent sustainability agenda, the UN aims to achieve certain sustainable goals by 2030 to promote global development in and around planet earth.⁴¹⁹ Essentially, sustainability is all about developing and enforcing actions to aid in the creation and advancement of a better world. The most widely used definition of sustainable development derives from the UN Report of the World Commission on Environment and Development 1987 Our Common Future, which proposed that 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'⁴²⁰ The report noted that there were some who wanted the approaches to a more sustainable world to be concentrated in environmental issues. Nevertheless, it was held that sustainability cannot solely concern the preservation and protection of the environment but rather a relationship exists 'between the human world and the planet that sustains it.'⁴²¹

419 The UN 2030 Agenda for Sustainable Development (n 9)

420 UN, 'Report of the World Commission on Environment and Development: Our Common Future' (1987)

<<http://www.un-documents.net/our-common-future.pdf>> accessed 9 November 2016

421 Ibid

It noted that issues such as poverty and the growing population hindered global development and furthermore, such hindrances greatly affected the world's natural resources. Consequently, in 1992, the world's first Earth Summit was held in Rio de Janeiro, which brought together the international community to strategize measures for a more sustainable world. The Rio Declaration on Environment and Development outlined 27 guiding principles to achieve sustainability, with principle one asserting that, 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'⁴²² At present focus on achieving sustainability extends to economic and social concerns that hinder global development. The concept of sustainable development calls for actors in the global community to protect and nurture not only the planet that we live in but also the people who reside within in it.

The responsibility of ensuring a more sustainable developed world does not lie with a single actor. More recently, firms have been facing pressure to operate their business in a sustainable manner to contribute to the advancement of the world we live in. Initially, businesses tended to believe that operating sustainably meant solely caring for the environment and reducing unnecessary costs.⁴²³ Nonetheless, Elkington introduced a concept known as the 'triple bottom line' (TBL) or the three pillars of sustainability, which defines an organisation's ability to exceed its goals of simply measuring and maximising profit, and rather incorporate and manage their economic, environmental and social capabilities.⁴²⁴ The TBL, therefore, concerns 'economic prosperity, environmental quality, – and the element which business had preferred to

422 Report of the United Nations Conference on Environment and Development' (Rio de Janeiro 1992) A/CONF.151/26 (Vol. I)

423 John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Capstone Publishing 1997) 72-73

424 Ibid, 70

overlook – social justice.’⁴²⁵ According to Elkington, solely concentrating on economic or environmental factors such as pollution or global warming, will not maintain our planet sustainably and consequently, we have to consider other disastrous factors such as world poverty and mass migration. He notes, ‘Society depends on the economy - and the economy depends on the global ecosystem, whose health represents the ultimate bottom line.’⁴²⁶

In the UN’s recent agenda on sustainable development, it highlighted the important role of corporate influence. Businesses, particularly multinational corporations are said to play a fundamental role in contributing to the achievement of sustainable goals, particularly those pertaining to the eradication of global poverty in all forms and ensuring ethical treatment of workers in the working environment. According to the UN’s agenda:

Private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. We acknowledge the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. We call on all businesses to apply their creativity and innovation to solving sustainable challenges.⁴²⁷

It also recognised international trade of goods and services as ‘an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development.’⁴²⁸ Further, Goal 8 of the UN’s agenda includes overseeing equally decent and productive work for all, the protection of worker’s rights and ensuring safe working conditions. Its’ target 8.7 also proposed to adopt measures to put an end to forced labour (including child labour), the trafficking of human beings, and ultimately, modern forms of slavery by 2030.

⁴²⁵ Ibid

⁴²⁶ Ibid, 73

⁴²⁷ The UN 2030 Agenda for Sustainable Development (n 9)

⁴²⁸ Ibid , para 68

The concept of business approach or involvement to sustainable development is often defined as corporate social responsibility (CSR) to which there currently exists no single accepted definition.⁴²⁹ The concept of sustainable development and CSR are often used interchangeably, or sustainable development is used as an umbrella term implying CSR as one of the three pillars of sustainable development. Often scholars may choose not to distinguish between the two concepts to avoid confusion as they both involve overlapping elements. Ebner and Baumgartner explored the different theories of CSR that scholars used in academic literature.⁴³⁰ From one point of view, the term CSR is interpreted as a concept focusing on stakeholders, employees or any individual or group, which exerts influence on the business and therefore are affected by its operations.⁴³¹ CSR in this context focused simultaneously on the ethical and social treatment of its stakeholders while meeting profit margins to maintain the success of the company in the long term. According to Ebner and Baumgartner, some academics believed that a company could not be socially responsible unless it encompassed the needs of its stakeholders.⁴³² Separately, others viewed CSR as the concept of sustainable development tailored for the involvement of corporate entities, as economic, environmental and social sustainability is often interpreted as a concept for individuals and governments.⁴³³ Harjoto and Jo, in attempting to define CSR, interpret the concept as, 'how firms manage the business process

429 Andrew Crane, Dirk Matten and Laura J. Spence, *Corporate Social Responsibility : Readings and Cases in a Global Context* (2nd edn, Routledge 2014) 5

430 See: Daniela Ebner and Rupert J. Baumgartner, 'The Relationship Between Sustainable Development and Corporate Social Responsibility' (Corporate Responsibility Research Conference, Dublin 2006) <

http://www.crrconference.org/Previous_conferences/downloads/2006ebnerbaumgartner.pdf > accessed 28

November 2016

431 Ibid, 7

432 Ibid, 8

433 Ibid

to produce an overall positive impact on society and refers to serving people, communities, and the environment in ways that go above and beyond what is legally and financially required of a firm.⁴³⁴

Carroll is notable for introducing a model or pyramid that distinguishes various responsibilities incorporated in CSR.⁴³⁵ The bottom of the pyramid involves the standard responsibilities of businesses that is to produce quality products and services, maintain profitability, competitiveness and efficiency to promote the success of the company.⁴³⁶ Above this, businesses also have a responsibility to abide by the legal rules established by governments.⁴³⁷ In carrying out their various operations and managing performance, a firm should operate in a manner that is within the law. Carroll also recognised the ethical responsibilities of business, which concerns acknowledging, and acting on what is just or fair according to societal norms.⁴³⁸ Ethical responsibility involves a company not only recognising the difference between right and wrong, but also ensuring that the operations of their business do not go against societal values. Carroll recognises that ethical and moral norms are embedded in and influence regulations and will lead to the enactment of new laws in society and therefore a company has a duty to respect and uphold any changes in ethical standards made in society.⁴³⁹ Corporations also have voluntary philanthropic responsibilities, which Carroll argues is to be good corporate citizens. Though companies are not obliged to be philanthropic, that is to donate to or collaborate with various charitable causes to aid in the advancement of human

434 Maretno A. Harjoto and Hoje Jo, 'Corporate Governance and CSR Nexus' (2011) 100 *Journal of Business Ethics* 45

435 See: Archie B. Carroll, 'The Pyramid of Corporate Social Responsibility : Toward the Moral Management of Organizational Stakeholders' (1991) 34 *Business Horizons* 39-48

436 Ibid, 40

437 Ibid, 41

438 Ibid

439 Ibid

and societal development and growth, it is seen as 'the icing on the cake' as companies use their resources for the betterment of society and not solely their business.⁴⁴⁰

A cursory inspection on the policies of a range of multinationals reveals a plethora of corporations pledging to carry out their operations in a sustainable manner and outlining their commitment and steps they have taken to contribute to a more sustainable world, as well as philanthropic causes they are involved in. For instance, from car giants such as Ford⁴⁴¹, Honda⁴⁴², and Volkswagen⁴⁴³ to coffee chains such as Starbucks⁴⁴⁴ and Costa Coffee,⁴⁴⁵ firms are highlighting the positive impact and influence of their business on the communities they interact with as well as the planet in which we live in. Companies are becoming more aware of the benefit of not only being socially accountable to internal and external happenings around their firm but also the importance of being transparent in its operations and performances to both stakeholders, customers and society at large. Firms such as cosmetic brand Lush Cosmetics⁴⁴⁶ and The Body Shop⁴⁴⁷, have embedded social, and sustainable consciousness within their brand image gaining the reputation for not only the products and services they provide but for also the social, ethical

440 Ibid, 42

441 Ford, 'Accelerating Today for a Better Tomorrow' (2016) < <http://corporate.ford.com/microsites/sustainability-report-2015-16/doc/sr15.pdf> > accessed 21 April 2017

442 Honda, 'Corporate Responsibility Statement' <<http://csr.honda.com/responsibility-statement/>> accessed 21 April 2017

443 Volkswagen, 'Corporate Responsibility' < <http://en.volkswagen.com/en/company/responsibility/corporate-responsibility.html> > accessed 21 April 2017

444 Starbucks, 'Responsibility: Earning the Right to be Part of Your Community' < <https://www.starbucks.co.uk/responsibility> > accessed 21 April 2017

445 Costa Coffee, 'Good Together: We Care About the Communities We Serve and the World We Live In' < <http://www.costa.co.uk/responsibility/> > accessed 21 April 2017

446 Lush Cosmetics, 'Our Policies' <<https://uk.lush.com/tag/our-policies>> accessed 21 April 2017

447 The Body Shop, 'Building for the Future' (2015) < <https://www.thebodyshop.com/medias/Values-Report-2015-6.pdf?context=pdf/ha8/h40/9089793032222.pdf&attachment=true> > accessed 21 April 2017

and moral standards by which they operate. A company that is transparent, socially responsible and considers its influence on sustainable development can benefit greatly by making their brand or firm more reputable, more competitive and thereby achieving profit margins.⁴⁴⁸

As mentioned in Chapter Four, The UK's Parliament's Business, Innovation and Skills Select Committee in criticising Sports Direct as a bad example of business practice, stressed on the importance of corporate governance in incorporating good business practice into a firm's policies.⁴⁴⁹ To ensure effective CSR performance, corporate governance is vital in balancing the interests of those within and outside the firm against widespread unethical business practices. According to Mason and Simmons, 'The focal point of criticism on CSR is the board of directors, as this key group defines and implements corporate strategy, and serves to safeguard the interests of key beneficiaries.'⁴⁵⁰ In order to remain accountable and transparent in the balancing of interests of all those influencing the success of the organisation, it is important to establish corporate governance, an operational practice by which a firm is directed, monitored and controlled to secure its long-term success, while operating in line with legal frameworks.⁴⁵¹ By establishing processes to balance and resolve issues from parties involved, a firm is able

448 See: International Finance Corporation, 'The Business Case for Sustainability' (2012) The World Bank Working Paper No. 72694 <<https://www.cbd.int/financial/mainstream/ifc-businesscase.pdf>> accessed 11 November 2016 ; Maurice Berns, Andrew Townend, Zayna Khayat, Balu Balagopal, Martin Reeves, Michael S. Hopkins, and Nina Kruschwitz, 'The Business of Sustainability : What it Means for Managers Now' (2009) 51 MIT Sloan Management Review 20-27

449 Business, Innovation and Skills Select Committee, *Employment Practices and Sports Direct*, 22 July 2016, HC 219 2016-2017 para 74

450 Chris Mason and John Simmons, 'Embedding Corporate Social Responsibility in Corporate Governance: A Stakeholder Systems Approach' (2014) 119 Journal of Business Ethics 77

451 Stijn Claessens, 'Corporate Governance and Development' (2006) 21 The World Bank Research Observer 91, 93

to increase productivity and profitability through efficient decision making and implementing effective strategies to achieve unified goals.

According to Rahim, 90% of corporate leaders are doing more to incorporate CSR policies into their firm's strategies.⁴⁵² Due to 'sensitive consumerism and competition' corporate governance is used as the 'vehicle' to drive social responsibility onto business agenda and into business policies.⁴⁵³ Therefore, companies embedding social accountability principles into their firm's strategies have established corporate ethics, as well as relevant bodies to develop, address and review such policies,⁴⁵⁴ and 'relies on the business judgement of corporate governance to ensure this accountability.'⁴⁵⁵ Rahim notes that companies are now focusing on being affiliated with CSR standardisations to endorse their practices:

Corporate self-regulation, nowadays, is less involved in the process for communicating the CSR performance to the business constituents. They depend upon the standardization organizations for this communication; by acquiring appropriate affiliations from the standardization organizations, business enterprises demonstrate that they are able to implement CSR related compliances. ⁴⁵⁶

As will be discussed further in this Chapter, initiatives such as the UN Global Compact on corporate sustainability⁴⁵⁷ and the International Organization for Standardization (ISO) 26000 guidance on social responsibility,⁴⁵⁸ help guide

452 Mia M. Rahim, 'The Impact of Corporate Social Responsibility on Corporate Governance: The Rise of Standardization of CSR Principles' in Asli Y. Mermod and Samuel O. Idowu (eds.), *Corporate Social Responsibility in the Global Business World* (Springer 2013) 94

453 Ibid, 93-94

454 Ibid, 94

455 Ibid, 101

456 Ibid, 94

457 See: UN Global Compact < <https://www.unglobalcompact.org/what-is-gc> > accessed 8 May 2017

458 See: International Organization for Standardization, *ISO 26000 – Guidance on social responsibility* (BSI Standards Publication 2010)

businesses in the regulation of CSR principles, and can help businesses be more trustworthy, accountable, and transparent. Good corporate governance subsequently ensures that such guidelines are implemented and practised effectively and efficiently throughout their firm's operations.

Because of their dominant and powerful influence in the global community corporate involvement in the sustainability agenda is vital, particularly in areas that are adversely affected by the actions of corporate entities. As Elkington suggests, 'corporations are the only organizations with the resources, the technology, the global reach, and, ultimately, the motivation to achieve sustainability.'⁴⁵⁹The concept of CSR is vital as it balances sustainable interests of the global community against prevailing and unethical business practices. Implementing the concept into the business model of a firm allows companies to not only acknowledge their impact in society but also promotes accountability and transparency. Simultaneously, implementing CSR policies can produce positive outcomes for a firm. As CSR can be interpreted and implemented differently, this Chapter focuses on the social strand in relation to regulating modern slavery, particularly respecting individuals' fundamental human rights throughout their operations and networks, ensuring that they are not tainted with exploitative labour and riddled with human rights abuses. As aforementioned, implementing CSR policies requires proactive involvement in the form of effective corporate governance. Nevertheless, as will be illustrated, CSR is not solely a concern for corporate actors but simultaneously its implementation relies on the involvement of State actors in the international community as essentially they set the context in which businesses operate by promoting and enforcing standards, and regulations that firms should adhere to.

459 Elkington (n 423) 71

5.2.2 Corporate Social Responsibility as a Tool to Combat Modern Slavery

Undoubtedly, the concept of CSR is essential for the advancement of society. It is vital as it also helps firms to monitor its relationships with people within and outside the firm, and operate in a manner that adheres to societal expectations. Concerning modern slavery, human trafficking, forced labour and interrelated concerns such as social inequalities, fair rights and treatment of individuals, equal access to opportunities, safe working conditions and respect for human rights, firms are now being brought into the heart of the agenda in the regulation of modern slavery. Similar to Elkington, Byerly proposes that businesses, particularly multinational companies have the power, resources and capabilities needed to address issues on the CSR agenda, most specifically modern slavery.⁴⁶⁰ The Special Rapporteur on the trafficking in persons, especially women and children, also recognise that:

[B]usinesses are well positioned to contribute to efforts to combat human trafficking because of the level of resources and influence that they can leverage. Some major companies, in particular multinational corporations, are often larger economies than many developing States and can exert enormous political, economic and social influence over the States in which their suppliers or subcontractors may be based.⁴⁶¹

Byerly recognises that firms not only exercise power but also exert social influence, which calls on them to practice good corporate citizenship requiring them to 'work with others to provide solutions to humanitarian crises and major social problems facing the world.'⁴⁶² Due to pressure from modern day abolitionists, national and international bodies, and the potential risk of

460 See: Robin T. Byerly, 'Combating Modern Slavery: What can Business Do?' (2012) 9 Journal of Leadership, Accountability and Ethics 25-34

461 UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2012) UN Doc A/67/261 para 31

462 Byerly (n 460) 28

damage to a firm's reputation, companies are faced with the pressure of being transparent in their operations to ensure that their business operations and supply chain networks are not tainted with slave labour.

As explored in Chapter Four, understandably, corporate actors should be involved in such global affairs due to the negative impact their operations can have on vulnerable individuals and communities. As aforementioned, one of the effects of globalisation was the merging and expansion of markets that allowed the growth of companies and granted firms access to foreign consumers and vice versa. A concern with the ever-integrating world economy is the challenge it poses to companies aiming to adhere to societal codes of conduct. The unprecedented upsurge in the demand for goods and services can place added pressures on supply chain networks, which can lead to difficult or unsafe working conditions, the exploitation of workers, and human rights abuses throughout the chain. Implementing CSR within a firm's business model to regulate modern forms of slavery allows their operations to be transparent, giving prominence to the impact of its operations on related human rights issues. Transparency also draws attention to areas of operations where exploitation and abuses are likely to occur and allows such environments to be subject to closer scrutiny. Transparency can foster a more effective CSR approach to regulating modern slavery, by placing pressure on businesses to be more accountable for abuses occurring throughout their activities, forcing them to establish due diligence processes and remedial actions for abuses and violations detected. Ultimately, establishing and embedding CSR policies into the ethics of a business promotes best practice and can overtime feed into a more efficient and rigorous framework in the regulation of modern slavery and the protection of human rights. On the other hand, taking proactive steps to combat the trafficking and exploitation of

human beings can create advantages for firms. The Special Rapporteur on the trafficking in persons, especially women and children notes:

[T]here are positive incentives for businesses to contribute to efforts to combat human trafficking. By taking an active role in preventing and combating trafficking, companies can enhance their brand image and reputation among consumers, investors and other influential stakeholders. Their investment of resources in local communities to mitigate factors that place them at risk of trafficking such as lack of access to education and employment opportunities, may also strengthen the relationship with local stakeholders and generate positive effects in the long term by producing a better-skilled and better-educated local workforce.⁴⁶³

Further, with the increase in both national, regional and international regulations governing human trafficking, modern slavery, forced labour, and human rights, firms now have to choose between facing corporate liability issues or establishing corporate responsibility.⁴⁶⁴ Companies that fail to establish measures within their firms to detect such abuses can risk infringing anti-trafficking legislation and face criminal prosecution or civil actions.⁴⁶⁵ A key issue in utilising CSR as a tool to combat modern slavery, is how it should actually be implemented, i.e. what actions should a firm be taking to ensure transparency and accountability. In addressing international instruments, particularly soft law human rights initiatives, section 5.4 will explore how such principles guide firms on the steps to take to respect and protect human rights, and further expand how such actions could extend to apply to issues related specifically to CSR and modern slavery.

463 UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2012) UN Doc A/67/261 para 30

464 Anna W. Shavers, 'Human Trafficking, the Rule of Law, and Corporate Social Responsibility' (2012) 9 South Carolina Journal of International Law and Business 39, 41

465 Ibid

5.3 Obligations of Corporate Entities under International Law

5.3.1 Corporate Responsibility under International Human Rights Law

The Universal Declaration of Human Rights holds that, ‘all peoples,’ ‘all nations’ and ‘every organ of society’ must promote and respect fundamental human rights.⁴⁶⁶ Ordinarily it is understood that States are the prime guarantors and protectors of such rights. This duty, as will be further explored in Chapter Six, confers on States positive obligations to ensure that State actors and non-state actors respect human rights and are not complicit in crimes such as modern slavery and forced labour. The Charter of Economic Rights and Duties of States recognises that States have a duty to then ‘regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.’⁴⁶⁷ Nevertheless, though States are the prime guarantors of human rights, this obligation to respect human rights also extends to non-state actors.⁴⁶⁸ The Special Rapporteur on the trafficking in persons, especially women and children notes, ‘while international law is primarily addressed to States, it is clearly recognized that powerful non-State actors such as corporations have responsibilities to respect human rights.’⁴⁶⁹ Corporate liability to criminal activities and violations has been echoed in a number of international and regional instruments. For instance, article 10 of the UN Convention on Transnational Organized Crime acknowledges the liability of legal persons for

⁴⁶⁶ UDHR, preamble

⁴⁶⁷ Charter of Economic Rights and Duties of States (adopted 12 December 1974) UNGA Res 3281 (XXIX) art 2(b)

⁴⁶⁸ Carlos M. Vázquez, ‘Direct vs. Indirect Obligations of Corporations Under International Law’ (2005) 43 Columbia Journal of Transnational Law 927, 933

⁴⁶⁹ UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2012) UN Doc A/67/261, para 24

their involvement in organised criminal activities, proposing that such liability be criminal, civil or administrative.⁴⁷⁰ Further, it stipulates that, 'Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal and non-criminal sanctions, including monetary sanctions.'⁴⁷¹ The recognition of holding corporate actors liable for the exploitation of human beings has been echoed in the EU Trafficking Directive,⁴⁷² the Council of Europe Trafficking Convention⁴⁷³, and ILO's Forced Labour Recommendation No.203.⁴⁷⁴ The duty of corporations to respect human rights often calls on them to respect all human rights of individuals, abstain from activities that threaten such rights, use their power, influence and resources in the global community to protect individuals from human rights violations throughout their operations and networks, and to abide by relevant regulations.⁴⁷⁵

Though various instruments acknowledge corporate liability, the responsibility of holding corporate entities directly liable continue to lie with State capabilities, leaving the State to determine how best to criminalise corporate conduct in line with international standards.⁴⁷⁶ Nevertheless, as corporations in their entity can only be regulated and subjected to national legal systems, this does not imply that such actors do not have international legal obligations. As Clapham notes:

[A] non-state actor such as a corporation can still be the bearer of international duties outside the context of international courts and tribunals. Lack of international jurisdiction to try a corporation

470 Transnational Organized Crime Convention, art 10 (1), (2)

471 Ibid, art 10(4)

472 Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] (EU Trafficking Directive) OJ L101/1, art 5, 6

473 Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) No. 197, (Council of Europe Trafficking Convention) art 22

474 ILO Recommendation No. 203, art 13(c)

475 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 230-231

476 Ibid, 251

does not mean that the corporation is under no international legal obligations. Nor does it mean that we are somehow precluded from speaking about corporations breaking international law. In fact, states can be bound in international law to ensure that the corporations respect duties defined in international treaties.⁴⁷⁷

Evidently, there are a number of ways in which corporations can be held accountable for breaches of international law. For instance, both corporate entities and individuals could be held accountable in national courts through criminal and civil sanctions, corporate individuals could be brought against an international criminal court, and States could be held accountable by human rights treaty bodies for failing to carry out its international obligations.⁴⁷⁸ Concerning breaches in international law committed by individual actors, international law has criminalised certain acts that can hold such individuals criminally liable. With the establishment of the Rome Statute of the International Criminal Court (ICC) individuals can be directly held responsible for offences such as genocide, and crimes against humanity (including torture, and enslavement), where such offences were committed as part of a widespread or systematic attack against any civilian population with knowledge of the attack, and war crimes.⁴⁷⁹ So for instance, an individual acting on behalf of a corporation, who knowingly discriminated against vulnerable groups, facilitating and subjecting them to acts criminalised by the statute in order to exploit and enslave them, can be held liable within the jurisdiction of the court. As ICC only has jurisdiction over natural persons, as opposed to legal, liability can only be placed on individuals within a company.⁴⁸⁰ Thus, the implementation of international regulations into

⁴⁷⁷ Ibid, 31

⁴⁷⁸ Ibid, 32

⁴⁷⁹ Rome Statute, art 5, 6, 7 and 8

⁴⁸⁰ Ibid, art 25 ; Also see: Wolfgang Kaleck and Miriam Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010) 8 Journal of International

domestic laws is vital in conferring liability on corporate entities as a whole. Nevertheless, recent developments have emerged in an attempt to pierce the corporate veil to international criminal liability, challenging the perception that only individual corporate actors can be accountable for international crimes.⁴⁸¹ For instance, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights proposes to establish an international criminal law chamber of the African Court to extend its international criminal jurisdiction to corporate entities. While article 46(b) concerns international crimes committed by individuals,⁴⁸² article 46(c) applies specifically to corporate criminal liability, holding them liable for international crimes committed in African States. The article provides:⁴⁸³

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

Crime Justice 699,710 ; John G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007)

101 The American Journal of International Law 819, 832

481 Andrew Clapham, 'Non-State Actors' (December 2016) in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds.), *International Human Rights Law* (Oxford University Press 3rd edn), Forthcoming 2017, 17

482 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) Art 46(b)

483 Ibid, art 46(c)

Article 46(c) covers a number of defences that corporate entities may put forward to protect themselves from liability for international crimes. For instance, where difficulty may arise in identifying a specific actor that is responsible for the exploitation of vulnerable workers, liability on the corporation as a whole may be inferred from actions included in policies attributed to the firm. Moreover, as corporations can be composed of complex hierarchal structures involving the delegation of tasks to different actors, the corporation in its entity may not use the division of knowledge or involvement in exploitative conduct to evade liability. Additionally, in holding corporations criminally liable under the Statute, criminal responsibility can also be applicable to individual actors who were involved in the offence. Perhaps a key advantage of holding corporate entities and individuals liable for international crimes committed in African States is that it allows for multinational actors to be prosecuted in the African Court, and not in their country of origin which may have inadequate regulations to deal with corporate extraterritorial conduct, thus protecting firms from liability. This could prove advantageous where corporate operations are complicit in the marginalisation and exploitation of individuals and communities in vulnerable States. Further, in addition to recognising international crimes by the Rome Statute, the African Statute extends criminal acts to include offences such as piracy, corruption, money laundering, and illicit exploitation of natural resources.⁴⁸⁴

Evidently, though corporate entities may not be held directly accountable under the international legal system, there are other legal systems and mechanisms put in place to hold corporations liable for complicity in modern slavery and more so violations of human rights. Nevertheless, in the absence of direct international accountability against businesses for breaches in

484 Ibid, art 28(a)

international human rights law, actors in the international community continue to advocate for an international instrument that legally binds corporate conduct to respect human rights. Due to their economic influence and power in the globalised world, corporations are thought to, in some cases, exert more power than States,⁴⁸⁵ and advocates generally argue that ‘with power should come responsibility.’⁴⁸⁶ In addition to their powerful presence in the global community, those in favour of such an international instrument governing business activities, also argue that though recognised as legal persons, they comprise of individuals entitled to rights and obligations, making decisions and acting on behalf of the corporation, including, violating human rights.⁴⁸⁷ Moreover, as will be discussed in the following section, voluntary initiatives established to assist corporations to regulate their actions, have been criticised for lacking effective monitoring and enforcement capabilities, as corporate entities are not obliged to adhere to such guidelines and thus suffer no legal consequences.⁴⁸⁸ Further criticism stems from the fact that as businesses favour environments where they can flourish, to compete for foreign investments governments may be less likely to establish effective measures to regulate corporate conduct.⁴⁸⁹ Carrillo-Santarelli proposes:

If neither voluntary standards nor State obligations ensure the protection of victims, something is missing. That void can be filled by regulating international corporate obligations, preventing gaps in domestic legal systems that can be taken advantage of

485 Nicolás Carrillo-Santarelli, ‘Corporate Human Rights Obligations: Controversial but necessary’ (*Business & Human Rights Resource Centre*, 25 August 2015) < <https://business-humanrights.org/en/corporate-human-rights-obligations-controversial-but-necessary> > accessed 1 May 2017 ; Mordechai Kremnitzer, ‘A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law’ (2010) 8 *Journal of International Criminal Justice* 909

486 David Weissbrodt and Muria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 *The American Journal of International Law* 901

487 Vázquez (n 468) 944, Kremnitzer (n 485) 911

488 Kaleck and Saage-Maaß (n 480) 713

489 Clapham, *Human Rights Obligations of Non-State Actors* (n 475) 238

by actors that, because of their nature and operations, can move across borders.⁴⁹⁰

Advocates in favour of a legally binding international instrument also argue that it will provide remedies and reparation for victims, step in when individual States cannot regulate corporate conduct effectively, legally limit the exercise of corporate power, and ultimately fill legislative gaps as other laws related to regulating corporate conduct such as consumer, environment, criminal and corporate law though covering parameters of corporate conduct, do not provide guidance on the treatment of human beings.⁴⁹¹ As Redmond comments on corporate law, 'Corporate law...concerns are with financial accountability to investors, not accountability for human rights standards. Human rights concerns are for the most part extraneous to corporate regulation, culture and remedies.'⁴⁹²

One such attempt to create a legally binding international instrument transpired in 2003 where the Working Group on the Working Methods and Activities of Transnational Corporations, on commission by the UN Sub-Commission on the Promotion and Protection of Human Rights, established the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'⁴⁹³ - the first initiative that called for legal intervention of corporate conduct in relation to human rights at an international level.⁴⁹⁴ Drawing on existing international human rights instruments and related business and human rights standards, the norms directly applied and extended the scope of human rights obligations to

490 Carrillo-Santarelli (n 485)

491 Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 1476-1477

492 Paul Redmond, 'Sanctioning Corporate Responsibility for Human Rights' (2002) 27 *Alternative Law Journal* 23

493 United Nations Economic and Social Council, 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (26 August 2003) UN Doc. E/CN.4/Sub.2/2003/12/Rev.2

494 Weissbrodt and Kruger (n 486) 903

businesses.⁴⁹⁵ The norms acknowledged the positive influence of firms, which is, having, 'the capacity to foster economic well-being, development, technological improvement and wealth' but also 'the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations.'⁴⁹⁶ Though international instruments acknowledge that corporate entities have obligations to respect human rights, and should be held liable for engaging in conduct or criminal offences detrimental to human beings, the norms aimed to take this obligation a step further by developing international law to acknowledge such responsibilities as legal obligations, thus directly holding corporate entities liable. Further, though they reaffirmed that the prime responsibility to promote and protect human rights remain with States, the norms proposed legal obligations of businesses to also include the duty to promote, fulfil, respect and protect human rights recognised by national and international regulations.⁴⁹⁷ Thus legal obligations to fulfil the realisation of human rights that are ordinarily considered State duties, were to be applied to corporate entities such as respecting the right to equal opportunities, ensuring non-discriminatory treatment, upholding the rights of workers and protection from economic exploitation.⁴⁹⁸

In an attempt to hold businesses accountable, and to establish legal enforcement mechanisms, the norms required businesses to ensure that they

495 Such as: 'Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Slavery Convention, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; ICCPR; the Convention on the Rights of the Child; ICMW...' See for more: United Nations Economic and Social Council 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (26 August 2003) UN Doc.

E/CN.4/Sub.2/2003/12/Rev.2

496 Ibid

497 Ibid, A para 1

498 Ibid, B-G

incorporate social responsibility and sustainability principles in all aspects of their operations including subcontractors, suppliers, or other legal persons involved throughout their different operations⁴⁹⁹ and proposed the establishment of monitoring mechanisms by subjecting businesses to monitoring and verification by national and international bodies, including the United Nations.⁵⁰⁰ Where corporations are found to be in breach of international human rights obligations, the norms required them to provide compensation to individuals, bodies or communities who were affected by such violations.⁵⁰¹ The norms intended for cases involving corporate misconduct resulting in human rights abuses to be applied in national courts and international tribunals in line with relevant regulations.⁵⁰²

The norms had a clear intention to become a legally binding international instrument that would impose obligations on corporate entities. According to Weissbrodt and Kruger:

[T]he legal authority of the Norms now derives principally from their sources in international law as a restatement of legal principles applicable to companies, but they have room to become more binding in the future. The level of adoption within the United Nations, further refinement of implementation methods by the working group, and increasingly broad acceptance of the Norms will continue to play an important role in the development of their binding nature.⁵⁰³

Though there was support for international legally binding obligations to hold businesses directly responsible for breaches of international human rights law,⁵⁰⁴ the norms were not enforced. Criticism of the norms included the view that such an instrument would essentially transfer human rights obligations

499 Ibid, H para 15

500 Ibid, para 16

501 Ibid, para 18

502 Ibid

503 Weissbrodt and Kruger (n 486) 915

504 Ibid, 906

from States to businesses – resulting in the privatisation of human rights, threaten business activity and development, ignore the fact that the application of human rights obligations may vary in different States, and that voluntary non-binding initiatives were more significant.⁵⁰⁵ Nevertheless, in 2014 an open-ended intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to human rights was endorsed by the Human Rights Council to further elaborate a legally binding instrument to regulate the conduct of businesses in international human rights law.⁵⁰⁶ The Working Group sat its third session in October 2017 as it deliberates elements to be included in the draft legally binding instrument.⁵⁰⁷

5.3.2 Challenges in Regulating Corporate Conduct through International Human Rights Hard Law

Given that international instruments recognise the liability of firms in committing human rights abuses, as well as individual actors' liability for international crimes, and essentially holding States responsible for setting the context in which businesses operate to respect human rights, it is questionable whether it is necessary to establish direct corporate international accountability. In arguing that there is 'room today to reverse the assumption that corporations have absolutely no liability under international law' Clapham holds:

Although the jurisdictional possibilities are limited under existing international tribunals, where national law allows for claims

⁵⁰⁵ Clapham, *Human Rights Obligations of Non-State Actors* (n 475) 233-234

⁵⁰⁶ Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument (2016) A/HRC/31/50

⁵⁰⁷ Draft report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Chair-Rapporteur: Guillaume Long 23 – 27 October 2017 ; Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 (29/09/2017)

based on violations of international law, it is becoming clear that international law obligates non-state actors.⁵⁰⁸

There can be several challenges against allowing international human rights law to directly regulate firms and their operations. For example, taking into account the complexity of a company's supply chain and the challenges of coordinating all actors involved in various operations, though such activities must operate uniformly to ensure a domino effect of all processes throughout the rest of the chain, the actions involved in such business operations nevertheless often exist independently from each other. Thus, it has been argued that holding businesses responsible for human rights violations, ignores the nature and complexity of business operations, particularly multinationals, and holds them accountable for human rights abuses that may not be directly inflicted by their firm. Former UN Secretary-General's Special Representative on Business and Human Rights, Ruggie noted:

Transnational corporate networks pose a regulatory challenge to the international legal system. To begin with, in legal terms purchasing goods and services from unrelated suppliers generally is considered an arm's-length market exchange, not an intra-firm transaction. Among related parties, a parent company and its subsidiaries are distinct legal entities, and even large scale projects may be incorporated separately. Any one of them may be engaged in joint ventures with other firms or governments. Owing to the doctrine of limited liability, a parent company generally is not legally liable for wrongs committed by a subsidiary even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as the parent's mere agent. Each legally distinct entity is subject to the laws of the countries in which it operates, but the transnational corporate group or network as a whole is not governed directly by international law.⁵⁰⁹

Though it may be less challenging to hold businesses accountable for international human rights abuses resulting as a direct consequence of a firm's

508 Clapham, *Human Rights Obligations of Non-State Actors* (n 475) 251

509 Ruggie (n 480) 824

operations, such a regulation becomes more complex when the abuse inflicted occurred in activities operating further down in an extended supply chain and thus not directly inflicted by the firm. This issue was highlighted by the Special Rapporteur on contemporary forms of slavery, including its causes and consequences who recognised the challenge for businesses to exercise human rights due diligence throughout their supply chain networks, particularly when firms that have no direct relationship with the company inflicting abuse.⁵¹⁰

If international law is to hold businesses directly accountable for human rights abuses, it has to take into consideration the complexity of supply chain networks, and consider whether firms are liable for all operations existing in the entire chain or limited to certain tiers. Furthermore, if human rights abuses occur during an activity involved in the supply chain, it questions what specific firm that responsibility falls on. As chains can operate in a similar fashion to a domino effect, will all businesses in the chain be liable for human rights violations inflicted by a specific actor? Subsequently, will all firms be subjected to equal liability for human rights abuses or if not, how will the ratio of responsibility be decided? Moreover, as Ruggie notes, firms in a chain are subject to the regulations of the countries where they operate. As a result, an internationally binding instrument will have to take into account the differences between national laws particularly in relevant areas regulating immigration and labour issues, that may conflict.⁵¹¹ Further, as it is the State's prime role in setting the context in which businesses operate for example through labour standards and national minimum wages, should a company be held liable if a State fails to provide effective legal and regulatory measures to protect

510 UNCHR Report of the Special Rapporteur on Contemporary forms of Slavery, including its causes and consequences (2015) UN Doc A/HRC/30/35, para 64

511 See: UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2012) UN Doc A/67/261, paras 17 and 18

individuals from exploitation? Chapter Four acknowledged that firms may not necessarily create an individual's vulnerable situation, but nevertheless act as opportunists taking advantage of it. Likewise, firms could also take advantage of a State's weak stance against upholding human rights, and enforcing decent working conditions. The Special Rapporteur on contemporary forms of slavery, provides that regardless of such gaps in national systems, businesses should partner with other firms, stakeholders and labour organisations and liaise with public policy actors to encourage the establishment of effective regulatory measures.⁵¹² Separately, the Special Rapporteur notes that addressing the root causes of slavery is not the sole responsibility of governments and that firms also play an important role in addressing the factors that influence the abuse of vulnerable groups.⁵¹³

This leads to a common criticism of international law regulating the conduct of businesses with regards to human rights. It has been argued that conferring international human rights obligations directly on businesses, specifically through human rights regulations, passes State responsibilities to non-democratic institutions, therefore potentially undermining the role of the State.⁵¹⁴ As international law has made States the prime guarantors of human rights, by fulfilling its obligations through its domestic legal system and establishing effective regulations to address human rights violations by non-state actors, it has been argued that imposing such obligations on corporate entities may weaken government capabilities in fulfilling its responsibilities, and moreover, where State enforcement of its obligations are weakened or ineffective, governments may be less inclined to be more proactive.⁵¹⁵

512 UNCHR Report of the Special Rapporteur on Contemporary forms of Slavery, including its causes and consequences (2015) UN Doc A/HRC/30/35, para 69 (f)

513 Ibid

514 Ruggie (n 480) 825

515 Ibid, 826

Contrarily, Carrillo-Santarelli suggests that imposing direct international human rights obligations on corporations would not give firms more power. Rather, he notes, it would make relevant authoritative bodies responsible for implementing international law more observant towards corporate conduct and also 'make criticism of corporate abuses stronger, given the expressive effects of law and stigma attached to conduct contrary to human rights.'⁵¹⁶ Clapham holds that there is a need to address the notion that human rights concerns a relationship between States and citizens and rather view human rights not as rights recognised by States, but rather rights inherent to the protection and respect of human beings:

When we see human rights as rights rather than self-imposed governmental duties, and when we envisage the rights project as founded on better protection for human dignity rather than privileges granted by states, we can start to see how we might imagine human rights obligations for non-state actors. Rather than concentrating on abstract questions of legitimacy we can take a more sentimental approach and imagine ourselves in the shoes of a victim. From the victim's perspective, the inhuman and degrading treatment is an assault on dignity whether it is suffered at the hands of a policeman, a rebel commander, or a private security company.⁵¹⁷

Undoubtedly, in addition to State efforts and other actors in the international community such as NGOs, the role of corporate entities should not be diminished as they play a complimentary role in the regulation of modern slavery and related issues. Nevertheless, if international law is to directly regulate and bind the conduct of corporations with regards to human rights, it is evident that there will need to be a clear differentiation between the role of the State and corporate obligations, so as to not undermine and blur the role of such actors.

⁵¹⁶ Carrillo-Santarelli (n 485)

⁵¹⁷ Clapham, 'Non-State Actors' in Moeckli, Shah, Sivakumaran and Harris (forthcoming) (n 481) 3

5.4 Regulating Corporate Social Responsibility and Accountability to Human Rights through International Soft Law

In the absence of international human rights obligations holding businesses directly liable for human rights violations, and in an attempt to make corporate entities more accountable and transparent for business-related human rights concerns, a number of international bodies have established CSR related principles and guidelines to assist firms in incorporating human rights due diligence. For example, the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises,⁵¹⁸ the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,⁵¹⁹ and the UN Global Compact, which urge businesses to carry out their operations with respect to internationally recognised human rights and sustainable development.⁵²⁰ Such soft law instruments, though having no legal basis, are instrumental in enabling businesses to understand and participate in the wider global case for sustainability issues, and conduct their activities in line with societal and legal expectations of businesses. The aim of this section is to summarise key principles of some soft law instruments pertaining to business and human rights, particularly, the United Nations Guiding Principles on Business and Human Rights (UNGPs), the United Nations Global Compact, and the International Organization for Standardization (ISO) 26000 guidelines on social responsibility. Subsequently, sections 5.4.4 and 5.4.5 will analyse the relevance and implication of soft law instruments in regulating corporate conduct to combat modern slavery.

518 Established in 1976 and revised several times since then. See: OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011)

519 Established in 1977 and revised several times since then. See: ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (17 March 2017) GB.329/POL/7

520 See: UN Global Compact (n 457)

5.4.1 The United Nations Guiding Principles on Business and Human Rights

Implementing the UN's 'Protect, Respect and Remedy Framework' the United Nations Guiding Principles on Business and Human Rights aim to provide international guidance on the responsibility of both governments and corporate actors in relation to human rights and business operations. The UNGPs are universal as they apply to all States and businesses and they are founded on three pillars ; the State duty to protect human rights, the corporate responsibility to respect human rights and access to remedy for victims.⁵²¹

The first pillar outlines the responsibility of States to ensure that all businesses do not violate human rights. States are thus responsible for ensuring the protection of human rights abuses from non-state actors committed within their jurisdiction. According to the guiding principles, States have a duty to adopt appropriate measures to investigate and monitor business activities and develop legal rules and regulations governing the operations of the business, and establish clear guidance in respecting human rights for businesses wherever they operate.⁵²²

The second pillar concerns the responsibility of all corporate entities to respect human rights throughout their operations and networks.⁵²³ The guidelines provide that it is the corporations' responsibility to engage in activities, establish initiatives or strategies in identifying, addressing and remedying situations where the human rights of a person is violated, particularly with vulnerable groups. The UNGPs also hold that firms should concern themselves with human rights violations which may not be directly inflicted by

⁵²¹ OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04

⁵²² Ibid, 3, 4

⁵²³ Ibid, 15

the parent company.⁵²⁴ Additionally, to be transparent, the guidelines recommend that firms produce statements outlining the steps taken and progress made to demonstrate their commitment to respecting human rights.⁵²⁵

The third pillar concerns the steps that should be taken to effectively remedy human rights violations. The States duty is to take reasonable steps to ensure that their legal system is adequate in providing access to remedy to those whose human rights were violated by business activities within their territory, and to proactively investigate, punish and rectify human rights abuses caused by firms.⁵²⁶ Further, the UNGPs suggest that firms establish operational-level grievance procedures for those affected by their activities which can create a channel to monitor and report human rights concerns, but also allow firms to participate in the rectification of abuses directly inflicted and in a timely manner.⁵²⁷

5.4.2 The United Nations Global Compact

In 2000, the UN launched the Global Compact, an initiative to encourage businesses worldwide to operate in a socially responsible and sustainable manner.⁵²⁸ Its principles are derived from UDHR, ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention against Corruption.⁵²⁹ The Global Compact is the largest international initiative on

⁵²⁴ Ibid, 18

⁵²⁵ Ibid, 16

⁵²⁶ Ibid, 27

⁵²⁷ Ibid, 32

⁵²⁸ UN Global Compact, 'Communication on Progress 2011' (2012) 5 <

https://www.unglobalcompact.org/system/attachments/16882/original/UNGC_2011.pdf?1343898163 > accessed 8

May 2017

⁵²⁹ Ibid

sustainability in the world, encouraging businesses to use their influence and resources to adopt proactive measures in integrating the initiatives' principles into the firms operations.

The Compact is founded on 10 principles categorised within the core values of human rights, labour, environment and anti-corruption.⁵³⁰ The core value concerning human rights contains two principles which stipulate that businesses should support and respect the protection of internationally recognised human rights, and that they are not complicit in human rights violations.⁵³¹ The second core value concerning issues related to labour, contains four principles, recognising that businesses should uphold the rights of freedom of association and collective bargaining, the elimination of all forms of forced and compulsory labour, the abolition of child labour and the elimination of occupational discrimination.⁵³²

The Compact is very broad as though it highlights what businesses should and should not do, it does not explicitly outline the steps companies should take to incorporate such principles. Nevertheless, regarding human rights, drawing on other initiatives and frameworks such as the UN sustainable development goals and the UNGPs, it has produced various guidelines to assist companies in understanding, respecting and supporting human rights in their business operations, particularly through due diligence processes.⁵³³

⁵³⁰ Ibid

⁵³¹ Ibid

⁵³² Ibid

⁵³³ Global Compact Network Netherlands and OXFAM, Shift, 'Doing Business with Respect for Human Rights' (2016) <https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf> accessed 13 October 2017 ; Castan Centre for Human Rights Law, OHCHR, United Nations Global Compact, 'Human Rights Translated 2.0 : A Business Reference Guide' (2017)<https://www.unglobalcompact.org/docs/publications/HRT_final_web.pdf> accessed 13 October 2017 ; United Nations Global Compact, *A Guide for Business : How to Develop a Human Rights Policy* (2nd edn, United Nations Global Compact and Office of the United Nations High Commissioner for Human Rights, 2015) ; Global

The initiative is not an accredited framework but rather acts as a facilitator to companies in implementing its principles in line with the UN's sustainable development goals. Moreover it encourages dialogue, partnership and sharing of progress and best practice among participants.⁵³⁴ According to its progress report on business solutions to sustainable development:

The Ten Principles function as a lighthouse guiding businesses' actions and ensuring that financial profit is not generated at the expense of people, society and the environment. The 17 Sustainable Development Goals are time-bound quantitative targets to work towards. The UN Global Compact provides a platform for sharing ideas on how to contribute to them, and a basis for measuring progress towards each goal.⁵³⁵

5.4.3 International Organization for Standardization Guidance on Social Responsibility

The International Organization for Standardization (ISO), a non-governmental international organization, established a team of multi-stakeholders and experts to produce a set of guidelines on incorporating social responsibility for different types and structures of firms. The result, ISO 26000, defines and highlights the importance of CSR, its relationship with sustainable development, and the benefits on the performance of a firm.⁵³⁶ Its guidance encompasses a number of clauses which aim to assist firms in understanding, recognising and implementing the concept and principles of social responsibility into organisational practices. Moreover, it identifies and explores core issues and considerations related to social responsibility, particularly

Compact Network Germany and TwentyFifty Ltd, '5 Steps Towards Managing the Human Rights Impacts of your Business' (2015) <<https://www.unglobalcompact.org/library/4921>> 13 October 2017 ;

534 UN Global Compact, 'United Nations Global Compact Progress Report : Business Solutions to Sustainable Development' (2017) 14 <

https://www.unglobalcompact.org/docs/publications/UN%20Impact%20Brochure_Concept-FINAL.pdf> accessed 12 October 2017

535 Ibid, 15

536 ISO 26000 – *Guidance on social responsibility* (n 458)

organisational governance, human rights, labour practices, the environment, fair operating practices, consumer issues and community involvement and development.

ISO 26000 guidelines are extensive, with its text covering a number of issues pertaining to corporate responsibility. Like other instruments, it emphasises the importance of respecting human rights through the adoption of effective due diligence processes to identify, prevent and redress any abuses resulting from business operations, particularly in high risk circumstances such as conflict, and poverty. Like the UN Global Compact,⁵³⁷ the guidelines recognise three key ways in which businesses could be complicit in human rights abuses.⁵³⁸ Firstly, and more apparent, concerns organisations direct and deliberate involvement in violating human rights. Secondly, an organisation could be indirectly complicit to human rights abuses by benefiting from abuses committed throughout their networks. Thirdly, complicity could exist where a company fails to take appropriate actions to raise concerns and speak out against widespread human rights abuses and unethical business practices. In addition to outlining the actions and expectations of businesses, the guidelines note conduct firms should avoid such as providing goods and services, or partnering with other bodies that violate human rights.⁵³⁹ Concerning access to remedies for individuals affected by its activities, like the UNGPs, it also recognises the need for effective grievance procedures that compliment State efforts.⁵⁴⁰

537 UN Global Compact, 'The Ten Principles of the UN Global Compact : Principle Two: Human Rights'

<<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>> 13 October 2017

538 ISO 26000 – *Guidance on social responsibility* (n 458) 26

539 Ibid, 27

540 Ibid

Further, a key supplement to its guidelines is the inclusion of model approaches to implementing the guidelines in different sectors.⁵⁴¹ Such models can help organisations improve on their CSR policies and also give firms a foundation to establishing and incorporating CSR initiatives to respect human rights.

5.4.4 Relevance of International Soft Law Instruments to CSR and Modern Slavery

Evidently, business accountability to human rights is high on global sustainability agendas. In addition to State efforts, corporate actors play a vital and supplementary role in respecting, and protecting human rights by monitoring their activities in relation to international human rights standards. Soft law human rights initiatives, such as those outlined above, highlight the importance of businesses in understanding human rights, their relevance to businesses and their activities, and also approaches that firms should adopt to promote respect for such rights. There are a number of overlapping principles between different frameworks, particularly in relation to the accountability and transparency of firms, and the emphasis on the establishment of due diligence processes through the development of human rights policies and operational-level grievance mechanisms to remedy human rights violations. Moreover, they also stress on partnership between business and governments, governmental agencies, civil society bodies, and individuals and communities affected by the operations of firms. In the absence of direct accountability for international human rights abuses, the instruments recognise that businesses cannot be neglected in global discussions in respecting human rights as their operations can produce adverse effects.

⁵⁴¹ Ibid, 87-97

Regarding their relevance to CSR, as Harjoto and Jo note, CSR concerns businesses that operate in a manner that goes 'above and beyond what is legally and financially required' of them.⁵⁴² Though the guidelines all acknowledge that firms have to ensure they act in compliance with relevant regulations in respecting human rights, they also recognise the importance of firms acting beyond legal requirements irrespective of a State's stance in fulfilling its own international human rights obligations.⁵⁴³ Thus, soft law instruments, rather than enforcing legal obligations on corporate actors, act as a guide, steering firms in the right direction towards good practice in incorporating sustainability issues while emphasising the need to adhere to relevant regulations. Perhaps the most significant contributions of soft law instruments are that they can educate firms on the concept of CSR, laying out the foundation for companies to establish or improve policies, promote accountability and transparency and encourage a forum of discussion among relevant multi-stakeholders.

Concerning the regulation of modern slavery resulting from unethical business practices, soft law initiatives can also prove instrumental. Primarily, as modern slavery is a grave human rights issue, encompassing a number of violations against individuals' rights, principles relating to human rights outlined in soft law instruments can thus be applicable. Moreover, the instruments acknowledge additional concerns related to slavery such as forced labour, employment practices, and complicity issues. For instance as mentioned, principles 4, 5 and 6, of the UN Global Compact concern unethical labour practices encouraging businesses to be aware of and understand forced labour practices, including the use of child labour, and discriminatory labour

⁵⁴² Harjoto and Jo (n 434) 45

⁵⁴³ Guiding Principles on Business and Human Rights (n 521) 13 ; *ISO 26000 – Guidance on social responsibility* (n 458) 24 ; UN Global Compact, 'The Ten Principles of the UN Global Compact – Principle One : Human Rights' < <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> > 13 October 2017

practices. Principle 4 recognises that employers should be mindful of different forms of forced labour, such as those outlined in previous chapters, particularly, slavery, debt bondage, physical and psychological violence, abusive working conditions, and withholding or non-payment of wages.⁵⁴⁴ Moreover it urges businesses that in regulating its conduct to combat forced labour, it is vital to acknowledge that forced labour is a global issue and is not confined solely to developing countries and thus their policies should address issues pertaining to forced labour throughout the entire business network.⁵⁴⁵ Principle 4 asserts that business-related actions to combat forced labour, should include measures such as policy commitments to not engage or benefit from forced labour, respect for international standards, prohibition of recruitment fees imposed on subcontracted workers, monitoring of supply chains, prohibition of the confiscation of workers' identity documents, and awareness of countries, regions, industries and sectors where the practice of forced labour is prevalent.⁵⁴⁶ Similarly, ISO 26000 guidance on social responsibility also take into account the fundamental principles and rights in the working environment and related labour and human rights issues.⁵⁴⁷ Its guidelines acknowledge that labour practices do not solely concern direct relationships between firms and employees, and workplaces it directly manages, but rather it also pertains to relationships and operations, not directly controlled or managed by the firm, such as subcontracted employment.⁵⁴⁸ As modern forms of slavery, particularly labour exploitation encompasses a number of issues and concerns related to employment practices, ISO guidelines can prove beneficial for companies in regulating modern slavery in

544 UN Global Compact, 'The Ten Principles of the UN Global Compact – Principle Four : Labour' <

<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-4>> 14 October 2017

545 Ibid

546 Ibid

547 ISO 26000 – *Guidance on social responsibility* (n 458) 33-40

548 Ibid, 33

their networks and supply chains, as it offers a comprehensive understanding of various labour practice issues such as employment, health and safety concerns and appropriate actions and expectations of businesses.

Soft law instruments can also prove beneficial in the CSR agenda against modern slavery as they help to identify a number of key measures companies should integrate into their codes of conduct. For instance, like other business-related sustainability issues, regulating modern slavery and related issues requires the establishment of effective due diligence procedures. Evidently, a key commonality between the soft law instruments' suggestions on due diligence procedures is their emphasis on understanding and awareness, policy enactment and evaluation, collaboration, reporting and transparency, and philanthropy.

To incorporate CSR principles into business practices to combat modern slavery, firms should first develop a comprehensive understanding of modern slavery, related issues, and the potential adverse impact of its operations on vulnerable individuals, communities, industries and sectors wherever they operate. Moreover, as suggested by the UN Global Compact and ISO 26000, in addition to being aware of and adhering to legal rules and regulations, businesses must respect and support international standards pertaining to human rights, and other issues related to modern slavery such as human trafficking, forced labour and employment practices.⁵⁴⁹ Secondly, firms should enact and evaluate proactive policies to prevent, identify, investigate and remedy concerns involving the use of exploitative labour. For instance, pertaining human rights, UNGPs recognise that, 'business enterprise need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place.'⁵⁵⁰ Thus, policies to combat

549 Ibid ; UN Global Compact, 'The Ten Principles of the UN Global Compact – Principle Four : Labour' (n 544)

550 Guiding Principles on Business and Human Rights (n 521) 16

modern slavery should include raising awareness of the crime through training to personnel, highlighting the company's zero tolerance for exploitative labour and their commitment to taking steps to address and eradicate any instances involving slave labour. It is vital that such commitment encourages its suppliers to adopt a similar stance. As businesses often focus on achieving profit and being competitive, highlighting the benefit of incorporating CSR principles into its business management models could be used as a driving force to help motivate parties to eradicate exploitation in supply chains. Further, to prevent exploitation in its operations it should ensure that its policies adequately address issues pertaining to the employment of individuals, the terms and conditions work, and the health and safety of work and also ensure the protection of the most vulnerable workers, such as migrant workers. Company due diligence procedures should also measure the risk of specific areas of their operations where exploitation is most likely to occur and enact appropriate measures to monitor and remedy any concerns. Essentially, policies should also establish effective whistleblowing procedures to encourage reports on the use of exploitative labour and related abuses. As suggested by the UNGPs, policies should not only be approved and reviewed by board of directors or senior management to illustrate the company's commitment to regulating modern forms of slavery,⁵⁵¹ but they should be consistently reviewed so that firms can evaluate their performance to ensure best practice. Further, as the UN Global Compact principle one, and the UNGPs highlight, policies should include operational-level grievance mechanisms to remedy the causes and consequences of exploitation.⁵⁵² As the exploitation of individuals thrive underground, and can be connected to business activities, it is important that due diligence procedures promote multi-stakeholder collaboration among

⁵⁵¹ Ibid

⁵⁵² UN Global Compact, 'The Ten Principles of the UN Global Compact – Principle One : Human Rights' (n 543) ; Guiding Principles on Business and Human Rights (n 521) 24

governmental bodies, labour organisations, other businesses, and partners in their extended supply chain networks and the communities in which they operate in, to share, support and improve efforts in regulating slavery. To combat modern slavery companies should be transparent and accountable in their activities. Transparency and reporting on the steps they have taken to regulate modern forms of slavery allows firms to be subject to scrutiny and compels them to ensure that they operate in a manner that respects and supports fundamental human rights. As principle one of the Global Compact asserts:

Reporting is a driver for change, externally as well as internally: It fulfils companies' obligations to account for how they address human rights impacts; shapes stakeholders' perceptions of a company and helps to build trust; and is increasingly acknowledged as a stimulus for internal development with a positive impact on business decisions and outcomes. Communications should be of a form and frequency that reflects the company's human rights impacts, be accessible to the intended audience and provide enough information for stakeholders to evaluate the adequacy of the company's response to impacts.⁵⁵³

More recently, firms are beginning to exercise corporate responsibility and transparency in relation to modern slavery by producing statements of their commitment to eradicating slavery and exploitation within their business operations and supply chain networks. For instance, as will be discussed in Chapter Seven, with the establishment of the UK's Modern Slavery Act, certain UK firms are now required to release annual publicly accessible reports on the steps they have taken (or have not taken) to ensure that their supply chains are not tainted with exploitative labour.⁵⁵⁴

⁵⁵³ UN Global Compact, 'The Ten Principles of the UN Global Compact – Principle One : Human Rights' (n 543)

⁵⁵⁴ Modern Slavery Act 2015, s.54

Finally, firms should engage in philanthropic causes which contributes to human development. As noted by Carroll such an approach is seen as the 'icing on the cake' complimenting their efforts.⁵⁵⁵ Further, ISO 26000 notes:

Human development includes the process of enlarging people's choices by expanding human capabilities and functioning, thus enabling women and men to lead long and healthy lives, to be knowledgeable and to have a decent standard of living. Human development also includes access to political, economic and social opportunities for being creative and productive and for enjoying self-respect and a sense of belonging to a community and contributing to society.⁵⁵⁶

In addition to improving workplace ethics, creating jobs, and increasing opportunities within the work place, principle one of the UN Global Compact also recognise that companies must foster opportunities in the community, empowering particularly vulnerable individuals and groups.⁵⁵⁷ As victims of modern slavery often comprise of poor and vulnerable individuals at the bottom of the economic pyramid, businesses can play an influential role in empowering people who are poor, because of their access to wealth, job opportunities and global reach.⁵⁵⁸ Polak and Warwick suggest that creating and enhancing opportunities such as access to basic products and services can help improve the livelihood of people who are poor and can result in more sustainable outcomes. Providing those in poverty with basic resources can result in a domino effect improving the lives of such individuals. Services such as clean water can improve the health and employability of people, therefore saving costs on medical bills, and allowing individuals to use the money on

⁵⁵⁵ Carroll (n 435) 42

⁵⁵⁶ ISO 26000 – *Guidance on social responsibility* (no 458) 40

⁵⁵⁷ UN Global Compact, 'The Ten Principles of the UN Global Compact – Principle One : Human Rights' (n 543)

⁵⁵⁸ Paul Polak and Mal Warwick, *The Business Solution to Poverty* (Berrett-Koehler 2013) 61

their sustenance, and access to education, which can allow them to develop skills that are necessary to secure employment needed to live sustainably.⁵⁵⁹

Undoubtedly, soft law instruments are favourable for the business case for sustainability. Moreover, they are vital for the business case in regulating modern slavery. Such instruments not only drive corporate responsibility and accountability onto global sustainability agendas, but they also compliment international standards, by defining expectations and obligations of business actors and outlining steps they should take and issues to consider when incorporating sustainability issues into their codes of conduct to combat modern slavery, forced labour and human trafficking.

5.4.5 Implications of International Soft Law Instruments in Regulating Corporate Responsibility

Though soft law instruments are advantageous as well as crucial in allowing businesses to understand the wider global case for sustainability, it can prove difficult to determine whether companies are integrating the principles and guidelines into their codes of conduct, and if so determining the effectiveness of such implementation. Thus transparency becomes pivotal. To encourage transparency some soft law instruments have established platforms for companies to report on their commitment to sustainability issues. In particular, the UN Global Compact has encouraged companies who participate in the initiative to produce annually a Communication on Progress (COP) report, outlining the actions they have taken to integrate its principles into its business models.⁵⁶⁰ Currently, almost 10,000 businesses across 163 countries participate in the UN Global Compact,⁵⁶¹ with nearly 50,000 COPs uploaded

⁵⁵⁹ Ibid, 63

⁵⁶⁰ UN Global Compact, 'Transparency Builds Trust' < <https://www.unglobalcompact.org/participation/report> > 15 October 2017

⁵⁶¹ 'United Nations Global Compact Progress Report : Business Solutions to Sustainable Development' (n 534) 16

into the initiative's repository on its website.⁵⁶² At minimum, COP reports are required to include statements by chief executive officers of their commitment and support for the Global Compact principles, their proactive approaches to integrating the Compact's key areas, i.e human rights, labour, environment, anti-corruption, and a measurement of its performance.⁵⁶³ As transparency and accountability are key in ensuring good practice in incorporating sustainability issues, failure of a company to submit a COP can result in a company being removed from participating in the initiative.⁵⁶⁴ Business reports to the initiative is divided into three categories: Global Compact Active which meet the minimum requirements as mentioned, Global Compact Advanced, which concerns firms fulfilling a more advanced and detailed criteria – particularly, conducting a self-assessment on its implementation of the Compact's principles, taking further action to support UN goals, and corporate sustainability governance and leadership - and Global Compact Learners, which fail to meet minimum requirements.⁵⁶⁵

The Global Compact's overview on the COPs submitted in 2015 reported that 82% of statements were Global Compact Advanced, 10% were Global Compact Active and 8% Global Compact Learner.⁵⁶⁶ This illustrates that the majority of companies participating in the initiative are going beyond the bare minimum requirements to implement the Compact's principles into its strategies and operations. For instance, their report acknowledged that Global Compact Advanced reporting includes actions taken to support and contribute to wider UN sustainability goals, philanthropic contributions, partnerships, and

⁵⁶² 'Transparency Builds Trust' (n 560)

⁵⁶³ 'Global Compact Communication on Progress Policy' (n 528)

⁵⁶⁴ Ibid

⁵⁶⁵ Ibid

⁵⁶⁶ UN Global Compact, 'Communication on Progress 2015 Key Facts' (2015) <

https://www.unglobalcompact.org/docs/communication_on_progress/cop-key-facts-2015.pdf> 15 October 2017

external verification, and supply chains.⁵⁶⁷ The Compact's recent progress report on business solutions to sustainable development illustrate that more companies are now integrating and reporting on the UN's sustainable development goals and the Compact's principles. For instance, it reported that 75% of companies have put measures in place to address sustainable goals, and 70% of companies are engaging in public reporting, with 55% acknowledging the impact of reporting on promoting the implementation of sustainability issues.⁵⁶⁸ Though company reports show strong commitment to sustainable development, the Global Compact progress report recognises that a major barrier lies with the monitoring of the companies impact and their performance in relation to its strategies. They recognise that though the policies and strategies of most companies reflect the aims of the initiative, that very few are conducting corporate responsibility impact assessment.⁵⁶⁹ This weakens soft law instruments as their principles and guidelines are merely adopted as a check list, with little regard to the actual implementation of the policies and the monitoring of their effectiveness. Concerning modern slavery, the Special Rapporteur on the trafficking in persons, especially women and children recognises that:

For a voluntary code of conduct or initiative to be effective in preventing human trafficking in supply chains, it is not sufficient for it to simply state a commitment to combating human trafficking. It should, at a minimum, provide for the undertaking of a risk assessment to map out all actors involved in the supply chain and identify where the risks of human trafficking may be present. This should be followed by the development and implementation of a high-level, company-wide policy prohibiting trafficking and trafficking-related acts at all levels of the supply chain. The implementation of the policy by all suppliers should be monitored and assessed by social auditors who are properly trained in the issue of human trafficking. The policy should also contain a set of remedial measures that a company should take if trafficking cases are found in supply chains such as referral to

⁵⁶⁷ Ibid

⁵⁶⁸ 'United Nations Global Compact Progress Report : Business Solutions to Sustainable Development' (n 534)10

⁵⁶⁹ Ibid, 31

victim support agencies and ensuring victims' access to grievance mechanisms. In developing corporate strategies to prevent and combat trafficking in supply chains, business should also consult and cooperate with civil society organizations with expertise in trafficking issues.⁵⁷⁰

Separately, in relation to human rights, a UN Guiding Principles Reporting Framework also acknowledged that in their database there was an increase in the number of human rights policy commitment.⁵⁷¹ Nevertheless, the concerns they found was that some companies' policy commitment only committed to respecting certain human rights, such as labour related issues, as opposed to all human rights, where business activities can have adverse effects on. Moreover it found that policy commitment to incorporating human rights, differed between sectors. For instance, it recognised that companies operating in the apparel industry tended to produce poor human rights commitments in comparison to those operating in the extractives, food and beverage sector.⁵⁷² It is uncertain why this may be the case, but what is evident is that discrepancy between companies' policy commitments and strategies, and their implementation will continue to exist as firms are left to determine how best to integrate such issues in their operations.

Though soft law instruments can help guide firms in the right direction in implementing sustainability issues, the main concern lies with enforcement, measuring and monitoring performance and impact, and the overall effectiveness of the policies. This lack of enforcement and monitoring capabilities of soft law instruments, presents a barrier to holding businesses accountable to fundamental human rights, modern slavery and other relevant

570 UNCHR, Report of the Special Rapporteur on trafficking in persons, especially women and children (2012) UN Doc A/67/261, para 38

571 Michelle Langlois, 'Reporting Trends & Insights : Are Companies Making the Commitment to Respect Human Rights?' (UNGP Reporting Framework, August 2016) <<https://www.ungpreporting.org/reporting-insights-trends-are-companies-making-the-commitment-to-respect-human-rights/>> 15 October 2017

572 Ibid

issues. Thus, though more businesses are incorporating related principles into their operations, such voluntarily initiatives have been viewed as codes 'without accountability, a public relations document without substance,'⁵⁷³ and thus conferred as moral as opposed to legal responsibility.

5.4.6 Is Corporate Social Responsibility Misleading?

The concept of CSR as a solution to a more sustainable world, and even more so to the eradication of modern forms of slavery is no doubt crucial. Incorporating such economic powerhouses in the fight against slavery can help deter and disrupt criminal networks who subcontract workers through employment agencies, and allow for improved data collection on the forms of labour exploitation, the victims, and the industries where exploitation is likely to be found. Nevertheless, in adopting a pragmatic view of global trade in the capitalist economy, it is questionable whether businesses can be trustworthy enough to self-regulate CSR principles to combat modern slavery. In reflecting on the realities of human enslavement in the past such as the Trans-Atlantic slave trade, and the patterns of slavery today in the economy, the feasibility of such a concept can be challenged. As New notes, 'the phenomenon of forced labour...is something that is naturally generated by the normal system, a point that resonates with older arguments about the place of historical slavery in industrial capitalism.'⁵⁷⁴

No matter how one defines the nature of the capitalist economy, maintaining competitiveness and self-interest will seemingly continue to be at the heart of such a system.⁵⁷⁵ According to Bakan:

573 Oliver F. Williams, 'The UN Global Compact: The Challenge and The Promise' (2004) 14 *Business Ethics Quarterly* 755, 757

574 Stephen J. New, 'Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility' (2015)

20 *Supply Chain Management : An International Journal* 697, 703

575 Adam Smith, *The Wealth of Nations* (Vol. 1, J.M. Dent 1964) 400

The corporation's legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others...the corporation is a pathological institution, a dangerous possessor of the great power it wields over people and societies.⁵⁷⁶

Such a fixation on accumulating wealth, and maintaining competitiveness through mass production of goods and services, is embedded in the core of the economy and thus questions whether corporations can regulate significant issues in the wider global community. Friedman, perhaps one of the most controversial economic theorists on the role of social responsibility of businesses, argued that 'only people have responsibilities'⁵⁷⁷ and that the social responsibility of business is to make a profit, while abiding by the legal norms and rules laid out in society. He differentiates between corporate responsibility of an individual versus that of a businessman. As an individual, he suggests that the corporate executive is spending his own money but as a businessman, by making social responsibility decisions on behalf of the firm, he is imposing his own tax (by increasing prices, spending customers money, lowering the wages of his employees) and deciding how it should be spent.⁵⁷⁸ He suggests, that the sole responsibility of business is, 'to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.'⁵⁷⁹ His laissez-faire view of corporate responsibility to social happenings has been subject to criticism as he perceived the corporation as an autonomous entity, operating in complete

576 Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2005) 1-2

577 Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (New York, 13 September 1970) 1 < <http://www.umich.edu/~thecore/doc/Friedman.pdf>> accessed 24 April 2017

578 Ibid, 2

579 Ibid, 6

isolation from societal happenings and obsessing on internal economic activities to maximise profit for shareholders.⁵⁸⁰

Though the basis of Friedman's view is unconvincing, profit and incorporating CSR principles to address exploitation in the economy appear to be inseparable opposites. Bakan submits that businesses have continued to morph and hide their self-interests, now behind the 'marketing strategy' of corporate responsibility, distracting us from its underlying motives.⁵⁸¹ Schwartz and Gibb suggest that though the economy has changed compared to 300 years ago, one important aspect that has remained the same is a business's reliance on its reputation – something that can take years to build but be destroyed easily.⁵⁸² Nevertheless, they note that recognising underlying issues within a firm (such as labour exploitation) can take years to uncover, and often dependent on their level of involvement:

[A]n important business activity makes a transition in the eyes of the public from acceptable to unacceptable. These transitions generally occur over a period of years, beginning with certain, almost unnoticed, early indicators and gathering speed when the practice or activity reaches a certain level of visibility, whether because of concentration of power, the position of its advocates, or other, similar factors. Over time, public opinion gradually forces some outside power (in these cases, national governments) to, in turn, force business to change by imposing legal or regulatory constraints.⁵⁸³

As discussed in Chapter Two, this is evident during the Trans-Atlantic slave trade, where in England, though initially against the methods of acquiring slaves for the trade such as kidnapping, merchants and firms progressively

580 See: Colin Grant, 'Friedman Fallacies' (1991) 10 *Journal of Business Ethics* 907-914

581 Bakan (n 576) 27

582 Peter Schwartz and Blair Gibb, *When Good Companies Do Bad Things: Responsibility and Risk in an Age of Globalization* (John Wiley & Sons 1999) 10

583 *Ibid*, 12

went to great lengths to justify the enslavement of African slaves to make the practice more acceptable and legitimate.⁵⁸⁴ However, as the trade thrived, the brutal treatment towards African slaves came to light, igniting a plethora of abolitionists arguing for the legal and moral condemnation of the practice.

Based on the nature of global trade in the economy, there can be several arguments against the credibility of CSR in regulating modern slavery. Firstly, as mentioned, the core of the economic system is based on businesses maximising profit often to satisfy their own self-interest with seemingly little regard to happenings outside the walls of the firm. As far-fetched as Friedman's view of 'the social responsibility of business is to make profit' may appear, Friedman acknowledges the frank nature of the operations involved in the economy and firms' fixation with accumulating wealth and maintaining their success. Simultaneously, as discussed in section 4.5.1, while firms are operating to achieve profit margins, so too are consumers acting on their own self-interest by creating the demand for high-quality goods and services at low prices. The entirety of the capitalist system is founded on the practice of providing goods and services and the accumulation of mass amounts of material wealth.

Furthermore, due to the nature of the economic system, in some way it could be exploiting the concept of CSR to mask firm's ulterior motives. As aforementioned, firms are beginning to realise the importance of being transparent in their operations and exercising social consciousness. Reputation could make or break a business, and those who are not entirely interested in implementing CSR into the ethics of their company may only do so because of not wanting to risk damage to the company's image. As the media and advances in technology continue to narrow the gap between the

⁵⁸⁴ See: Beckles (n 69) 37-56

market and the operations of firms, companies can no longer risk the reputation of their firm and are more than ever highlighting the positive impact and influence of their firm on the wider global community. Though there are companies who may want to incorporate CSR policies into their firms to contribute to the regulation of modern slavery, the nature of capitalism and global trade questions the genuineness of their actions, as many may only be adopting such measures to advance or protect their own causes. Because of this, it appears that corporate entities may simply be trying to find or rather prove benevolence, facilitating a gradual intrusive socialism, distracting us from its underlying motives. Separately, New suggests, in addition to forced labour being a direct consequence of the system, the CSR anti-slavery agenda, could itself be a contributing factor to modern slavery. He proposes:

It could be that the standard initiatives of anti-modern slavery CSR are themselves, in some sense, part of the enabling mechanisms for modern slavery to persist: the right hand (the CSR activity, the policy statements) gives the appearance of working to reduce the problem; and the left hand (the brutal exercise of commercial power, hard negotiation on prices and trading terms) generates the conditions in which forced labour emerges.⁵⁸⁵

Moreover, as mentioned in section 5.2.1, an additional criticism of corporate self-regulation is that there is no concrete or single definition of CSR. While there is pressure on corporations to operate more sustainably, firms are often left to adopt their own interpretation of CSR, therefore leaving it to them to decide on how it is best put into practice. This could further lead to a company exploiting the concept for its own self-interest. Thus companies are likely to satisfy their own agendas, by being more compliant in disclosing the positive steps they have taken to ensure good practice in their operations, but less

585 New (n 574) 703

likely to disclose bad practices which are a direct consequence of their influence, policies or operations.⁵⁸⁶

There exists a multitude of work exploring how businesses can save the world by lifting millions of people out of poverty, contribute to the regulation of modern slavery, help to improve societies and communities and help to contribute to a more sustainable world. Though firms could in fact potentially be the solution to global issues such as poverty and labour exploitation, through the looking- glass, capitalism will seemingly continue to take more than it gives back, while hiding behind philanthropy.

Nevertheless, though CSR could be exploited as a marketing strategy, the concept is vital in contributing to various aspects of sustainable development. While firms fixation may prioritise achieving profit margins, contrary to Friedman's view their activities do not operate in complete isolation from societal happenings. As recognised by regional and international regulations, corporate entities do have obligations as their operations can indeed produce adverse effects and dire consequences on particularly vulnerable individuals and communities. Nonetheless, though firms may not be trustworthy in self-regulating their actions to contribute to global issues, particularly modern slavery, their involvement is vital because of their global influence and resources. As aforementioned, business contribution is important particularly in vulnerable States where there is inadequate regulation of modern slavery, forced labour and human trafficking. Moreover, concerning multinationals whose operations are global, their involvement is crucial in regulating complex transnational business concerns that may prove to be beyond State capabilities. Further, the concept of CSR plays a significant role as it places pressure on businesses to be transparent and accountable in their operations.

⁵⁸⁶ Ibid, 702

It demonstrates to firms that their operations do not exist in complete isolation and moreover that they cannot solely focus on financial concerns within the firm. CSR makes them answerable to the impact of their operations, and compels them to be more attentive and proactive. Additionally, as discussed in previous sections, CSR can guide businesses in the right direction in combatting modern slavery alongside maintaining the success of the firm.

Further, it must be acknowledged that there are companies whose ethos genuinely concern the regulation and eradication of unethical business practices within their networks and supply chains. The presence of such firms in the business arena is vital as it encourages good practice and demonstrates to other firms how they can balance financial concerns alongside ensuring ethical business practices as well as respect for individuals' human rights throughout their operations.

Modern slavery, as established, is a complex global phenomenon. Corporate responsibility in itself is not the answer to the regulation or eradication of slavery. In reality, effective CSR is only part of the solution. The answer to regulating modern slavery lies with global partnership among key actors in the international community, including international bodies, NGOs, nation-states, relevant governmental agencies and undoubtedly corporate entities.

5.5 Conclusion

As evident in this Chapter, modern slavery, forced labour, human trafficking and related issues such as poverty, migration, and unethical business and labour practices, is a concern that threatens global sustainability. As highlighted, corporate entities are now being brought into the heart of sustainability agendas and more so included in forums on combatting modern slavery. In relation to human rights, though firms cannot be held directly accountable under international law for violations, international regulations

nevertheless recognise that corporate entities have responsibilities. Because of the risk of human rights abuses that occur from the operations of firms, corporate entities have an obligation to utilise their resources and global influence to concern themselves with abuses inflicted throughout their operations, ensuring that they are not complicit in such violations. In addition to implementing soft law measures and abiding by legal norms, the responsibility of businesses also extend to addressing the root causes and consequences of slavery on individuals and communities their activities impact.

Though corporate entities can use their resources and influence to address global issues, this Chapter has acknowledged that CSR can be interpreted as a misleading and ambiguous concept due to firms' often foremost priority of making a profit, and thus CSR may be used as a marketing strategy to disguise a firm's ulterior motives. Nevertheless, though maintaining and building a good reputation can encourage businesses to incorporate CSR, there is no guarantee that a company who chooses not to implement CSR will have an adverse effect on the reputation of their business. Subsequently, while soft law initiatives can help firms in self-regulating their policies and operations to address global issues pertaining to modern slavery, the following Chapter will illustrate that government interference is crucial to establish a level playing field where they can support and compel businesses in adopting proactive measures to safeguard human rights and address issues related to modern slavery.

Chapter Six : The Role of the State in the Regulation of Modern Slavery and CSR

6.1 Introduction

In exploring the liability of corporate entities for violations under international human rights regulations, the previous Chapter acknowledged the role of the State in holding corporate actors responsible for abuses inflicted by the operations of their firms. As established, though corporate entities are not directly accountable under international human rights law, this does not imply that they do not have responsibilities and cannot be held legally accountable. The aim of this Chapter is to further explore key international obligations of States in the regulation of modern slavery, forced labour, human trafficking, and related issues, in particular, the prohibition and prevention of modern slavery, the protection of victims, and the prosecution of offenders and moreover consider its role in the CSR agenda against slavery.

6.2 International Obligations and Responsibilities of the State in Regulating Modern Slavery

6.2.1 Prohibition and Prevention

Various international and regional regulations acknowledge that States have a duty to prohibit and prevent modern slavery,⁵⁸⁷ human trafficking,⁵⁸⁸ forced labour⁵⁸⁹ and related issues such as child exploitation,⁵⁹⁰ and the right not to

587 Slavery Convention, art 2 ; ICCPR, art 8 ; EU Charter, art 5 ; ECHR, art 4 ; African Charter, art 5 ; ACHR, art 6

588 UN Trafficking Protocol, art 2 ; Council of Europe Trafficking Convention, art 5 ; EU Trafficking Directive 2011/36/EU, OJ L101/1 art 2 and art 18

589 Forced Labour Convention, art 1 ; Abolition of Forced Labour Convention, art 1 ; ILO Forced Labour Protocol of 2014, art 2

590 Worst Forms of Child Labour Convention, art 1 ; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 32(1), art 34; Optional Protocol on the

be subjected to torture, cruel or degrading treatment or punishment.⁵⁹¹ Further, States have a responsibility to uphold individuals' fundamental rights such as the right to liberty,⁵⁹² and the right to enjoy just and favourable conditions of work.⁵⁹³ The obligation to prohibit and prevent offences related to modern slavery was recently echoed in *Chowdury and Others v. Greece*, which concerned the forced and compulsory labour of Bangladeshi migrant workers on strawberry plantations in Manolada, Greece.⁵⁹⁴ The European Court of Human Rights held that the State though ratifying the UN Trafficking Protocol and the Council of Europe Trafficking Convention, failed to put the necessary measures in place to prohibit and prevent trafficking.⁵⁹⁵ In acknowledging that freedom of movement is not a perquisite for the offence of forced or compulsory labour, and that abusing individuals' vulnerability can be used as a method to control them, the Court held that the State has a duty to ensure that its legal system is adequate in prohibiting such exploitation, preventing it from occurring, protecting victims, including effective identification of victims, and investigation and prosecution of offenders.⁵⁹⁶ Particularly, it was held that as the issue of exploitation on such plantations had been raised by news reports, and also in parliament, relevant authorities were therefore aware of

Involvement of Children in Armed Conflict, art 1 ; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, art 1

591 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT) art 2 ; ICCPR, art 7 ; ECHR, art 3 ; African Charter, art 5

592 ICCPR art 9(1) ; EU Charter, art 6 ; ECHR, art 5 ; ACHR art 7 ; African Charter, art 6

593 ICESCR art 7 ; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) (ICERD) art 5 (e)(i) ; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW) art 11

594 App No. 21884/15 (ECtHR, 30 March 2017) (Judgement currently only available in French) See: European Court of Human Rights, 'Migrants who were subjected to forced labour and human trafficking did not receive effective protection from the Greek State' (*ECHR Press Release 112*, 30 March 2017)

595 Ibid

596 Ibid

such violations, but nevertheless failed to take appropriate actions to address such issues as well as to prevent and protect the victims.⁵⁹⁷

In preventing offences related to modern slavery, States have a duty to establish adequate measures to address the root causes of modern slavery such as poverty, economic instability, lack of education and opportunity and weak law enforcement. As established, modern slavery continues to thrive because a supply and demand exists, and individuals most susceptible to exploitation are often those facing poor-socio economic circumstances such as poverty and lack of opportunities. Thus States are responsible for addressing the factors that increase individuals' vulnerability to exploitation and the demand that fosters such exploitation. For instance, article 2(f) of ILO Protocol of 2014 to the Forced Labour Convention and article 4(a) of Forced Labour Recommendation No.203 acknowledges that States are responsible for addressing the root causes and factors that increase individuals' vulnerability to forced or compulsory labour.⁵⁹⁸ Moreover, article 9(4) of the UN Trafficking Protocol recognises that States should, 'take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.'⁵⁹⁹ Concerning poverty, article 11 of the International Covenant on Economic, Social and Cultural Rights, recognise that States should ensure the right of individuals to adequate standard of living for themselves and their families, including adequate food, clothing, housing, continuous improvement of living conditions and to be free from hunger.⁶⁰⁰ Further, article 9 holds that States must recognise the right of everyone to social security, including social

⁵⁹⁷ Ibid

⁵⁹⁸ ILO Forced Labour Protocol of 2014, art 2(f), ILO Recommendation No. 203, article 4(a)

⁵⁹⁹ UN Trafficking Protocol, art 9(4)

⁶⁰⁰ ICESCR, art 11(1),(2)

insurance.⁶⁰¹ The Committee on Economic, Social and Cultural Rights hold that national legal systems in recognising the right to social security, should ensure that such systems also combat poverty and social exclusion recognised under article 11.⁶⁰²

An individual's vulnerability to exploitation can further increase when their poor socio-economic circumstances, and desperation to improve their standard of living is coupled with migratory issues. Migrant workers can be particularly vulnerable to exploitation if they perform work in the informal economy and if their status in a State is illegal. Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families concedes that States should uphold the realisation of migrant workers and their families' rights without discrimination such as race, religion, national, ethnical or social origin and nationality.⁶⁰³ Article 10 also prohibits migrant workers and their families from being subjected to torture, or to cruel, inhuman and degrading treatment or punishment,⁶⁰⁴ while article 11 holds that no migrant worker or member of his family should be held in slavery, servitude or compelled to perform forced or compulsory labour.⁶⁰⁵ To prevent migrant workers and their families from being subjected to exploitation, the convention stipulates that States prohibit the unauthorised removal and destruction of workers' identity or immigration documents,⁶⁰⁶ ensure migrant workers enjoy equal treatment of work granted to nationals, including the terms and conditions of the work, such as pay, rest, and safety,⁶⁰⁷ and where possible,

⁶⁰¹ Ibid, art 9

⁶⁰² UNCHR General Comment No.19(2008) on the right to social security (art.9 of The International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/GC/19, para 28

⁶⁰³ ICMW, art 7

⁶⁰⁴ Ibid, art 10

⁶⁰⁵ Ibid, art 11

⁶⁰⁶ Ibid, art 21

⁶⁰⁷ Ibid, art 25

the right to social security.⁶⁰⁸ In an advisory opinion delivered in response to a request by Mexico, the Inter-American Court of Human Rights held that regardless of a migrant worker's undocumented status, such an individual is to be protected under the principles of equality before the law and non-discrimination in the fulfilment of their rights in both international and national legislation. The court held, '...the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature' and moreover to prevent migrant workers human rights from being violated, they should 'avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.'⁶⁰⁹

To ensure equal treatment of migrant workers, the Committee on the Protection of the Rights of all Migrant Workers and their Families concedes that States should compel employers to have contracts that are 'free, fair and fully consented to, the terms of employment of migrant workers, including those in an irregular situation, in a language they understand, outlining their specific duties, hours of work, remuneration, days of rest and other conditions of work.'⁶¹⁰ Further the Committee holds that States should ensure adequate measures against situations where individuals are not paid their wages, paid lower wages because of their status as migrants, have their wages withheld for a period of time, or have their wages transferred to accounts where migrant workers are not able to access.⁶¹¹ States are also expected to conduct inspections of work places where migrant workers are likely to be employed,

608 Ibid, art 27

609 Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 173

610 UNCHR General Comment No.2 (2013) on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, para 68

611 Ibid

ensuring that labour inspectors' attention is concentrated in the conditions of work and the protection of workers is in line with applicable regulations.⁶¹²

Regarding States' duty to establish adequate approaches to curbing the demand for exploitative goods, services and people, article 6 of The Council of Europe Convention on Action against Trafficking in Human Beings holds, 'To discourage the demand that fosters all forms of exploitation of persons, especially women and children that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures...'⁶¹³ Further, the UN Model Law against Trafficking in Persons also suggests that in addressing the demand side of trafficking, States should adopt measures that raise awareness of the different forms of exploitation, educate the general public on products and services that utilise exploitative labour, encourage firms to not engage in exploitative labour directly through their business operations and supply chains, enforce effective labour standards and ensure the protection of vulnerable migrant workers.⁶¹⁴ The sixth session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime acknowledged best practices adopted by States for addressing the demand for labour, services or goods that foster the exploitation of others.⁶¹⁵ It was reported that on a national level, State approaches to curbing the demand for exploitative goods, services and people comprised of the establishment of effective labour regulations,⁶¹⁶ including legislation that made employers liable for the management of their supply

612 Ibid

613 Council of Europe Trafficking Convention, art 6

614 UNODC, '*Model Law against Trafficking in Persons*' (2009) 67

615 Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Sixth Session (2012) Best practices for addressing the demand for labour, services or goods that foster the exploitation of others, CTOC/COP/2012/4

616 Ibid, para 9

chains,⁶¹⁷ establishing national rapporteurs or equivalent bodies to monitor the rights of workers and the workplace,⁶¹⁸ the training of employers and employees in industries and sectors that are susceptible to exploitation,⁶¹⁹ research on such industries,⁶²⁰ and increasing general public awareness by educating schools, local communities and groups.⁶²¹ Further, to sustain the demand for exploitation, most States recognised the importance of regional and international collaboration and co-operation through bilateral agreements and projects, particularly between countries where victims originate from and where they are trafficked to.⁶²²

The perennial existence of modern slavery, human trafficking, forced labour and related concerns continues to thrive purely because of the abundance of vulnerable individuals' and the demand fostering their exploitation. The State's role in preventing or suppressing such violations is therefore imperative as they have a duty to establish measures that promote the empowerment of the most vulnerable members of society, and the realisation of their fundamental human rights in addition to prohibiting the marginalisation and discrimination of such groups. It is only by increasing opportunities for such individuals to emancipate themselves from poor-socio economic circumstances, will modern slavery be curbed. Simultaneously, suppression also heavily relies on sustaining the demand for exploitation that continues to fuel modern slavery.

617 Ibid, para 11

618 Ibid, para 15

619 Ibid, para 17 and 25

620 Ibid, para 21

621 Ibid, para 20

622 Ibid, para 30

6.2.2 Protection of Victims

As victims of modern slavery can suffer grave violations of human rights, it is vital that States put appropriate measures in place to protect them from further victimisation. This duty, as will be further discussed in the subsequent section, includes establishing adequate legislation to penalise and prosecute conduct resulting in the exploitation of victims. For instance, in *Siliadin v France*⁶²³, which concerned a Togo national who was brought to France and forced to perform domestic work, ECtHR established that article 4 of ECHR conferred on Member States a positive obligation to ensure ‘the penalisation and effective prosecution of any act aimed at maintaining a person’⁶²⁴ in a situation of slavery, servitude, or forced or compulsory labour. ECtHR held that France was in violation of article 4 as it did not establish adequate legislation to criminalise the relevant offences,⁶²⁵ which as a result failed to afford the victim effective protection of her fundamental human rights.⁶²⁶ Further, in addition to establishing effective criminal justice provisions to penalise and punish relevant offences, ECtHR held in *Ranste v Cyprus*⁶²⁷ that the positive obligation of States extend beyond the establishment of adequate legislation, and included the obligation to prevent human trafficking (which fell within the scope of article 4⁶²⁸) and to protect the victims. The Court held, ‘the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking.’⁶²⁹ Drawing on the UN Trafficking Convention and the Council of Europe Trafficking Convention, and highlighting the need for a comprehensive

⁶²³ App no 73316/01 (ECHR, 25 July 2005)

⁶²⁴ Ibid, para 112

⁶²⁵ Ibid, para 141

⁶²⁶ Ibid, para 148

⁶²⁷ App no. 25965/04 (ECtHR, 7 January 2010)

⁶²⁸ Ibid, 282

⁶²⁹ Ibid, 284

approach to combat human trafficking, the Court stipulated that States' obligations included establishing a combination of measures to prevent trafficking, punish traffickers and protect the victims, to effectively combat the crime.⁶³⁰ Concerning the protection of victims, the Court held that a positive obligation arises where relevant authorities 'were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited.'⁶³¹ Where such a case has been established, and it is found that authorities failed to take adequate measures to protect the victim, there would be a violation of article 4.⁶³²

Essentially, it is the State's responsibility to make right any injustices caused. The promotion and fulfilment of individuals' fundamental human rights to combat modern slavery goes beyond adopting relevant regulations as States must ensure that such measures are enforced effectively to protect victims. This was highlighted in *Hadijatou Mani Koraou v. The Republic of Niger*, which concerned a woman who was sold as a child to a tribe chief to be his concubine, where she was subject to abuse, forced labour and sexual exploitation.⁶³³ The Economic Community of West African States' Court of Justice, considered that despite Niger having legislation in place to prohibit discrimination, and cruel, inhumane and degrading treatment, it failed to protect her from slavery, thus showing tolerance or acceptance of the practice.⁶³⁴

A number of international and regional instruments recognise that in fulfilling such obligations, States have a duty to offer effective remedy to support and

⁶³⁰ Ibid, 285

⁶³¹ Ibid, 286

⁶³² Ibid

⁶³³ Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008

⁶³⁴ Ibid, para 84

protect victims with full respect for their human rights.⁶³⁵ For instance, article 2(1) of the International Covenant on Economic, Cultural and Social Rights provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

On commenting on article 2(1), the Committee on Economic, Social and Cultural Rights elaborated that the convention obliged States to take action that is 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.'⁶³⁶ In elaborating on the 'appropriate means' to be taken, the Committee holds that this list is not exhaustive and that steps to fulfil its obligations should include adequate legislation, judicial remedies and 'administrative, financial, educational and social measures.'⁶³⁷ Further, the obligations of States to adopt such measures, 'with a view to achieving progressively the full realization of the rights,' stipulates that though the covenant recognises that the full realisation of economic, social and cultural rights is a gradual process it does not imply that the obligation imposed is not significant but rather 'imposes an obligation to move as expeditiously and effectively as possible towards that goal.'⁶³⁸ Additionally, article 2(1) obliges States to utilise its 'maximum of its available resources' to achieving the realisation of these rights. The Committee holds

635 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) A/RES/40/34 ; ICCPR, art 2(3)(a) ; UN Trafficking Protocol Chapter II; Council of Europe Trafficking Convention Chapter III ; EU Trafficking Directive 2011/36/EU, OJ L108, art 11 ; ICMW, art 16(2) ; ILO Forced Labour Protocol of 2014, art 3

636 UNCHR, General Comment No.3 (1990) The nature of States parties' obligations (art.2, para.1, of the Covenant), Committee on Economic, Social and Cultural Rights, UN Doc E/1991/23, para 2

637 Ibid, paras 3,5 and 7

638 Ibid, para 9

that available resources imply that even where a State has inadequate resources, it illustrates that ‘every effort has been made to use all resources that are its disposition’ to satisfy such obligations.’⁶³⁹ Furthermore it recognises that resources comprise of not solely State capabilities but also extends to those of the international community ‘through international assistance and co-operation.’⁶⁴⁰

Amidst obligations to protect and promote individuals’ fundamental human rights, there are a range of actions States should adopt to protect victims of modern slavery. In particular, establishing adequate approaches to identifying victims, basic support such as housing, medical and financial assistance, and legal advice, protection from further victimisation, intimidation or retaliation, and protection from criminalisation.

The obligation to establish adequate approaches in identifying victims is reflected in a number of instruments. For example, article 10 of the Council of Europe Trafficking Convention requires that Member States’ competent authorities include individuals equipped with specialist training in identifying and supporting victims, promoting collaboration among relevant support bodies.⁶⁴¹ This responsibility is also recognised in ILO’s Forced Labour Recommendation No. 203 which stipulates that States take appropriate actions in strengthening the enforcement of national regulations to identify victims, including establishing indicators of forced labour for bodies such as labour inspectors, relevant law enforcement, social workers, immigration officials, public prosecutors, employers, employers’ and workers’ organisations, and NGOs.⁶⁴² The Office for the High Commissioner for Human Rights recommended principles and guidelines on human rights and human

639 Ibid, para 10

640 Ibid, para 13

641 Council of Europe Trafficking Convention, art 10 (1)

642 ILO Recommendation No. 203, art 13(d)

trafficking, also recognises that States, governmental and non-governmental bodies should establish measures for relevant bodies in correctly identifying victims and provide appropriate training in implementing such measures.⁶⁴³ Additionally, the guidelines highlight the importance of developing procedures in identifying perpetrators engaged in the trafficking and exploitation of individuals.⁶⁴⁴

As evident from previous Chapters, it can prove difficult to identify victims for numerous reasons ; they could be exploited and isolated in the informal economy, individuals may not view themselves as victims and see exploitative circumstances as advantageous, their illegal status within a State or their participation in criminal activities could make them fearful of law enforcement officials, and/or physical and psychological control including the fear of retaliation from traffickers and exploiters if they seek help. Simultaneously, from a law enforcement perspective, inadequate training, including lack of understanding of modern slavery, human trafficking, forced labour and related issues and conflation with other categories of irregular migration such as human smuggling, can hinder the effective identification of victims. The identification of victims is crucial in not only exposing illicit networks, and improving intelligence on a local, national, regional, and international level, but effective identification of victims enables them to access specialist support to help them recover from harm inflicted as a result of exploitation. Lack of adequate training in the identification of victims, can leave victims invisible, and can also hinder proper recording of crimes, leading to cases not being fully investigated and adding to further victimisation. Further the identification of victims protects them from criminalisation for offences such as illegal immigration, or illegally working. As explored in Chapter Two, misidentification

⁶⁴³ UN OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (United Nations Economic and Social Council 20 May 2002) E/2002/68/Add.1, 4

⁶⁴⁴ Ibid

of victims leading to their criminalisation could amount to a violation of the right to equality before the law and equal protection of the law⁶⁴⁵ and also effective remedy for human rights abuses.⁶⁴⁶ The importance of effective identification of victims to prevent criminalisation, was highlighted by the Working Group on Trafficking in Persons which acknowledged that Member States should establish the principle of non-liability of illegal acts committed by victims either under duress where they were compelled to commit the offence, or where the offence was directly connected to the trafficking of the individual.⁶⁴⁷ The group held that without such a principle, assistance and support offered to victims was ineffective.⁶⁴⁸ Regionally, at the Organization for Security and Co-operation in Europe 16th Alliance against Trafficking in Persons conference, the issue of combatting the trafficking in human beings for the purpose of forced criminality was stressed, with emphasis on effective identification as essential to the protection of individuals' rights.⁶⁴⁹

Once victims are identified an effective system must be available, equipped with appropriate resources to respond to individuals' special needs. As victims may be severely traumatized by their experiences, and overwhelmed by emancipation from their traffickers and exploiters, such support and protection must be sufficient in addressing their unique physical and psychological needs, with regard for their immediate safety and wellbeing. Article 12 of the Council of Europe Trafficking Convention recommends that assistance to victims

645 UDHR art 7

646 Ibid, art 8

647 Working Group on Trafficking in Persons(2010) Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking CTOC/COP/WG.4/2010/4, para 11

648 Ibid

649 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 'Combatting Trafficking in Human Beings for the Purpose of Forced Criminality' (16th Alliance against Trafficking in Persons Conference, Vienna 2016) < <http://www.osce.org/secretariat/238656?download=true>> accessed 20 October 2017

include resources such as adequate accommodation, psychological and material assistance, access to emergency medical treatment, translational services, counselling and legal advice.⁶⁵⁰ Further, State parties must ensure that such assistance is 'provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.'⁶⁵¹ To ensure that victims benefit from such resources, article 13 proposes a recovery and reflection period of at least 30 days where they are reasonable grounds to believe that an individual is a victim. The purpose of this time is to help victims to recover from abuse and decide whether they would like to co-operate with relevant authorities.⁶⁵² Such a framework, has been established in the UK, to aid relevant authorities and law enforcement in the identification, support and protection of victims of human trafficking and modern slavery.⁶⁵³ The National Referral Mechanism (NRM) though having no statutory basis is currently the main tool and process of identification of victims in the UK. It guides relevant bodies on how potential victims are referred into the process, and the steps to be taken by specialist authorities in deciding whether an individual is, in fact, a victim of human trafficking or modern slavery. The process pools together, NGOs, and authoritative bodies from various sectors to establish a system in identifying, rehabilitating and protecting victims. The Council of Europe convention further provides that during the reflection period, individuals should not be removed from the State and moreover should be granted temporary residence permit where the individual's remainder in the State is necessary because of the nature of their

650 Council of Europe Trafficking Convention, art 12

651 Ibid, art 12(7)

652 Ibid, art 13(1)

653 See: National Crime Agency, 'National Referral Mechanism' <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>> accessed 16 October 2016

circumstances, or it is essential for the individual to co-operate with investigations or criminal proceedings.⁶⁵⁴

Concerning illegal migrants who were trafficked and exploited, several instruments recognise that States should issue victims residence permits.⁶⁵⁵

Generally, a residence permit is granted to a victim if certain conditions are satisfied. For example, a residence permit may be granted to allow victims the right to remain during legal proceedings against their traffickers or exploiters, to protect them from further victimisation, and to access appropriate support and redress.⁶⁵⁶ A State also has an obligation to not remove an individual from their territory, returning them to a State where there is substantial grounds to believe that the individual may be subject to further harm.⁶⁵⁷

Where a victim is returned to their country of origin, States also have a responsibility to ensure the safe facilitation of repatriation. This duty is recognised in the UN Trafficking Protocol and the Council of Europe Trafficking Convention which acknowledge the importance of co-operation between State of origin and the State where the victim was exploited, to ensure the safe repatriation of victims, without undue and unreasonable delay, including the issuing of necessary travel documents.⁶⁵⁸ Additionally, the Council of Europe Convention, proposes that States adopt repatriation measures to facilitate the reintegration of victims into the community in their State of origin.⁶⁵⁹

Separately, international and regional instruments have recognised the obligation of States to provide remedial actions and compensation for victims

654 Council of Europe Trafficking Convention, art 14

655 Ibid ; UN Trafficking Protocol art 7 ; ILO Recommendation No. 203, art 11 (a),(b)

656 UN OHCHR, 'Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2010) HR/PUB/10/2, 159

657 *Jasin v. Denmark*, Communication No. 2360/2014, CCPR/C/114/D/2360/2014, paras 8.3 and 8.9

658 UN Trafficking Protocol, art 8 ; Council of Europe Trafficking Convention, art 16

659 Council of Europe Trafficking Convention, art 16 (5)

for abuses inflicted.⁶⁶⁰ For instance, article 12 of ILO's Forced Labour Recommendation No. 203 provides that 'Members should take measures to ensure that all victims of forced or compulsory labour have access to justice and other appropriate and effective remedies, such as compensation for personal and material damages.'⁶⁶¹ It acknowledges that States' responsibility to ensure effect remedies include:

- (a) ensuring, in accordance with national laws, regulations and practice, that all victims, either by themselves or through representatives, have effective access to courts, tribunals and other resolution mechanisms, to pursue remedies, such as compensation and damages;
- (b) providing that victims can pursue compensation and damages from perpetrators, including unpaid wages and statutory contributions for social security benefits;
- (c) ensuring access to appropriate existing compensation schemes;
- (d) providing information and advice regarding victims' legal rights and the services available, in a language that they can understand, as well as access to legal assistance, preferably free of charge; and
- (e) providing that all victims of forced or compulsory labour that occurred in the member State, both nationals and non-nationals, can pursue appropriate administrative, civil and criminal remedies in that State, irrespective of their presence or legal status in the State, under simplified procedural requirements, when appropriate.⁶⁶²

The importance of such measures was also echoed in the report of the Special Rapporteur on trafficking in persons especially women and children. The Special Rapporteur recognised that often victims of trafficking are left without

660 EU Trafficking Directive 2011/36/EU, OJ L101/10, art 17 ; Council of Europe Trafficking Convention, art 15 ; UN Trafficking Protocol, art 6(6) ;

ILO Recommendation No. 203, art 12 ; ECHR, art 13 ; ACHR, art 25 ; African Charter, art 7(1)

661 ILO Recommendation No. 203, art 12

662 Ibid

remedy and effective support, though international standards recognise the right of individuals to remedial actions for abuses inflicted, and despite it being customary that States have a responsibility to amend such wrongs that violate their international obligations.⁶⁶³ The report acknowledged that because human trafficking tended to be viewed as a criminal justice issue, as opposed to a human rights one, victims do not receive appropriate remedies as they are 'often seen as "instruments" of criminal investigations, rather than as holders of rights.'⁶⁶⁴ Further, it notes:

In many, States, trafficked persons do not receive remedies in a holistic manner as a matter of right, but are only provided with ad hoc measures which are effectively by-products of criminal investigation, such as temporary residence permits contingent upon cooperation with law enforcement authorities and assistance in recovery which is in turn tied to temporary residence permits.⁶⁶⁵

Thus, in promoting the rights of individuals to effective remedies, the Special Rapporteur produced draft basic principles, outlining the key obligations of States and the rights of individuals.⁶⁶⁶ For instance, the draft principles stipulate that States should promote the right of individuals to reparations as well as their rights in accessing such reparations.⁶⁶⁷ Further it suggests that appropriate reparation should include actions such as restitution, compensation and recovery.⁶⁶⁸ Promoting the right of individuals to take part in legal proceedings, including informing them on their legal rights, legal procedures and assistance, and ensuring that relevant legislative actors are

663 UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2011) UN Doc A/HRC/17/35, para 9

664 Ibid, para 61

665 Ibid

666 Ibid, annex I

667 Ibid, principle 1(3)

668 Ibid, principle 1(4)

trained on human trafficking issues is pivotal in seeking compensation.⁶⁶⁹ Further, as accessing certain support such as legal assistance and temporary residence permit are often granted on the basis that an individual is co-operative in legal proceedings, the Special Rapporteur held that accessing remedial actions such as recovery, support and compensation should be on a non-conditional basis in order to give full effect to the realisation and fulfilment of their rights.⁶⁷⁰

Concerning the protection of children, they too are also entitled to the right to effective remedies, and it is the duty of States to take due regard to their unique vulnerabilities, ensuring that approaches to support and protecting them are carried out in their best interest. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, urges States to acknowledge the specific vulnerabilities of children, particularly circumstances of the child and their family, discriminatory factors, and migratory issues, such as unaccompanied minors, that places children at risk to abuses that violate their rights and hinder their development.⁶⁷¹ Further, the report of the Special Rapporteur emphasises that in ensuring the realisation of children's rights, the State should take steps such as ensuring that its legal system criminalises the sale of children for forced labour and contributing circumstances such as debt bondage, establish measures to develop a comprehensive understanding of the factors that contribute to the sale of children for forced labour, and strengthen mechanisms that address the root causes, engaging multi-stakeholders, consumers, and labour inspectors.⁶⁷²

669 UNCHR Report of the Special Rapporteur on trafficking in persons, especially women and children (2011) UN Doc A/HRC/17/35, para 67 and 69

670 Ibid, paras 65, 66 and 75

671 UNCHR Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography (2016) UN Doc A/71/261, paras 51-56

672 Ibid, paras 97-101

Article 3(1) of the Convention on the Rights of the Child provides that, ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.’⁶⁷³

Further, article 39 acknowledges that:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.⁶⁷⁴

Thus, the rights granted to adult victims, equally apply to child victims, though in each case, States must take due regard to the ‘personal context, situation and needs’ of the child.⁶⁷⁵ According to the Committee on the Rights of the Child, such interests must be at the centre of concern when fulfilling the rights of children.⁶⁷⁶

6.2.3 Prosecution of Offenders

Amidst State responsibilities in regulating modern slavery is the duty to investigate, prosecute and punish offenders partaking in the commissioning of the offence.⁶⁷⁷ Effective prosecution and punishment of criminal syndicates is imperative as it can disrupt criminal networks, deter individuals from getting involved in illicit activities, protect victims from further victimisation, empower

⁶⁷³ Convention on the Rights of the Child, art 3(1)

⁶⁷⁴ Ibid, art 39

⁶⁷⁵ UNCHR General Comment No. 14(2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1), Committee on the Rights of the Child, UN Doc CRC/C/GC/14, para 32

⁶⁷⁶ Ibid, para 17

⁶⁷⁷ Transnational Organized Crime Convention, art 11 ; EU Trafficking Directive 2011/36/EU, OJ L101/7, art 9 ; Council of Europe Trafficking Convention, Chapter V ; Slavery Convention, art 6

individuals with the confidence to engage in legal proceedings against exploiters and may result in victims being issued compensation or reparation. As it is customary that States have jurisdiction over their own territory,⁶⁷⁸ they have a duty to establish an effective criminal justice response in investigating, prosecuting and punishing offenders, through the establishment of adequate and stringent legislation in their domestic law in line with international standards.⁶⁷⁹ As mentioned, concerning human rights violations States could be held accountable by human rights treaty bodies if it fails to carry out such international obligations. This was acknowledged in *Tharu et al. v. Nepal* where the Human Rights Committee referring to article 4(2) of the Optional Protocol to the International Covenant on Civil and Political Rights highlighted the responsibility conferred on States to investigate alleged violations against the rights recognised in the Covenant, and to provide the Committee with information, and written explanation and statements on such abuses and any actions taken by States.⁶⁸⁰

Under the principle of due diligence, States are responsible for breaches in international law by public officials and non-state actors, if an act or omission is attributed to the State.⁶⁸¹ As offences related to modern slavery are often committed by non-state actors, States are not held liable for the actual act itself, but nevertheless bear responsibility for failure to prevent the act from occurring, or failure to investigate, punish and redress the act.⁶⁸² In *L.e v. Greece*, which concerned trafficking for the purpose of sexual exploitation of a Nigerian national in Greece, the ECtHR held that in fulfilling their positive obligations under ECHR, the State has a duty to conduct adequate

⁶⁷⁸ Obokata, *Transnational Organised Crime in International Law* (n 107) 47

⁶⁷⁹ See: UNODC, 'International Framework for Action to Implement the Trafficking in Persons Protocol' (2009) 17

⁶⁸⁰ Communication No. 2038/2011, CCPR/C/114/D/2038/2011, para 10.2

⁶⁸¹ Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 656) 75

⁶⁸² Ibid

investigations into human rights violations, and prevent unreasonable and considerable delays in criminal proceedings.⁶⁸³ Also, in bringing legal proceedings against exploiters, States must ensure that the human rights of such individuals are upheld, such as the right to a fair trial and the right to be presumed innocent until proven guilty.⁶⁸⁴

As the responsibility of enforcing international regulations lie with the State, it is subsequently the State's duty to ensure that their national legal systems adequately incorporate international rules.⁶⁸⁵ For instance, in *Velásquez Rodríguez v Honduras*⁶⁸⁶ which concerned breaches against the Inter-American Convention on Human Rights by the Honduras government, and the duty of States to guarantee fundamental human rights, the Inter-American Court of Human Rights held:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it...⁶⁸⁷

Thus, the State is not liable for the actual human rights abuses committed, but are held accountable for failure to adopt adequate measures:⁶⁸⁸

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to

683 App No. 71545/12 (ECtHR, 21 January 2016) (Judgement not currently available in English) See: European Court of Human Rights, 'Criminal complaint by a victim of human trafficking was not dealt with by the Greek authorities in a way compatible with the Convention' (ECHR Press Release 28, 21 January 2016)

684 UDHR art 11 ; ECHR, art 6 ; EU Charter, art 47 and 48 ; ACHR, art 8 ; African Charter, art 7

685 Obokata, 'A Human Rights Framework to Address Trafficking of Human Beings' (n 105) 385

686 Judgement, Inter-American Court of Human Rights Series C No. 4 (29 July 1988)

687 Ibid, para 172

688 Moreover, due to the transnational nature of corporate entities and their operations, countries can establish policies in line with its international human rights obligations to address human rights abuses that occur extraterritorial. See: Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 European Journal of International Law 1072-1091 ; Ruggie (n 480) 830-831

carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation... The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.⁶⁸⁹

This obligation was again echoed by the Inter-American Court of Human Rights in *Massacres of El Mozote and Nearby Places v. El Salvador* where it was held:⁶⁹⁰

The Court has established that, in keeping with the American Convention on Human Rights, States Parties are obliged to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of the due process of law (Article 8(1)), all within the general obligation of the States to guarantee the free and full exercise of the rights recognized in the Convention to all persons subject to their jurisdiction (Article 1(1)). The Court has also indicated that the right of access to justice must ensure, within a reasonable time, the right of the presumed victims or their next of kin that everything necessary is done to discover the truth about what happened and to investigate, prosecute and punish, as appropriate, those eventually found responsible.

According to the Special Rapporteur on trafficking in persons, a concern in exercising due diligence lies with the implementation as opposed to the enactment of legislation.⁶⁹¹ The Special Rapporteur recognises that while over 90% of States have established regulations to prohibit the trafficking of human beings, the regulations are either inadequate in addressing related issues, or there exists a lacuna in effective implementation.⁶⁹² Lack of implementation of

689 Velásquez Rodríguez v Honduras, para 174, 176

690 Judgement, Inter-American Court of Human Rights Series C. No. 252 (25 October 2012) Para 242

691 UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2015) UN Doc A/70/260, para 29

692 Ibid

regulations is said to reflect States' failure in criminalising, investigating and punishing the offence, essentially, preventing victims from seeking redress.⁶⁹³ The Special Rapporteur notes that nationally, States must ensure that their investigation and prosecution measures are adequate in identifying and punishing individuals within their jurisdiction, ensuring that other relevant barriers do not restrain the administration of justice.⁶⁹⁴ Further, the Human Rights Committee held in *Monika v. Cameroon* that 'criminal investigation and consequential prosecution are necessary remedies for violations of human rights' and that States 'must ensure that those responsible are brought to justice.'⁶⁹⁵

Regarding offences that occur cross-border, the Special Rapporteur notes that States also have a duty to co-operate with authorities abroad in the investigation of offences that occurred outside their State, and moreover States should ensure that their national legal systems include extraterritorial jurisdiction to criminalise 'trafficking and strengthen protections against trafficking in contracting or procurement practices for activities abroad.'⁶⁹⁶ Due to the often transnational nature of modern slavery, efficient State responses can ensure that criminal syndicates are punished for crimes wherever they are committed, so as not to choose to operate in countries where they are more likely to circumvent the law.⁶⁹⁷ Concerning crimes that exist extraterritorial but committed by a national of the State or against a victim who is a national of that State, a State may choose to exercise jurisdiction over the offence, and in the event where it is possible for more than one State to exercise jurisdiction, countries must co-operate with each other to assess

⁶⁹³ Ibid

⁶⁹⁴ Ibid, para 30

⁶⁹⁵ Communication No. 1965/2010, CCPR/C/112/D/1965/2010, para 12.3

⁶⁹⁶ UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2015) UN Doc A/70/260, para 31

⁶⁹⁷ Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 656) 190

which is the most appropriate to prosecute that case.⁶⁹⁸ The UN Convention against Transnational Organized Crime provides guidance to States for offences that are committed extraterritorial. For instance, article 18(1) provides that where the crime committed is transnational in nature:

State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1(a) and(b) is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.⁶⁹⁹

Moreover, in relation to offences committed by legal persons, the Convention provides:

Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreement and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.⁷⁰⁰

Evidently, though States are not obliged under international law to extend their jurisdiction to crimes committed across borders, the Transnational Organized Crime Convention recognises that States have a duty to co-operate with each other where such assistance is necessary to conduct effective investigations, prosecutions and legal proceedings against offenders whose crimes are transnational in nature. Further, such assistance could be promoted through

⁶⁹⁸ Ibid, 190-191

⁶⁹⁹ Transnational Organized Crime Convention, art 18(1)

⁷⁰⁰ Ibid, art 18(2)

the establishment of joint investigations to ensure an effective criminal justice response.⁷⁰¹

Separately, in addition to inadequate legislation, limitations to effective prosecution can be a result of issues such as weaknesses in the identification and protection of victims, insufficient investigation leading to lack of evidence, limited understanding of modern slavery, forced labour, human trafficking and related issues by relevant authorities, poor co-operation between national as well as international bodies, and the involvement of corruption. Thus, State approaches to combatting modern slavery should include effective regulatory measures that take into account such hindrances.

6.3 The Role of the State in the CSR agenda against Modern Slavery

Evidently as the prime guarantors of international human rights, State responsibility for protecting individuals fundamental human rights within their jurisdiction is enshrined in international and regional instruments. This obligation is often fulfilled by ensuring that its national laws are compatible with international standards or by incorporating international regulations into their national legal systems.⁷⁰² Among State responsibilities, they also have a duty to uphold the rule of law in ensuring that every individual and non-state actor within its jurisdiction is held accountable for breaches in human rights standards and their involvement in the trafficking and enslavement of human beings. As stated in section 5.3.1, international and regional regulations have acknowledged that States have an obligation to hold corporate entities accountable for crimes committed in its territory.

⁷⁰¹ Ibid, art 19

⁷⁰² Alston and Goodman (n 491) 1047

Whereas the role of corporate entities is complimentary to State efforts, States are essentially responsible for setting the context in which business activities operate. As established, the operations of corporate actors can result in the exploitation of individuals and grave human rights violations, and though key relevant international instruments recognise this, corporations in their entity are not directly bound by such regulations. Therefore, in fulfilling its own international obligations, States have a duty to adopt adequate measures in its national system to ensure that such actors are held accountable.

Referring specifically to CSR, Fox, et al. outlined four roles of the public sector; mandating, facilitating, partnering and endorsing.⁷⁰³ Through mandating, governmental agencies have the ability to take steps such as defining minimum standards of performance for businesses, highlighting the relationship between minimum legal standards and corporate codes of conduct, and uphold citizen concerns for firms who are non-compliant.⁷⁰⁴ Furthermore, governmental agencies could facilitate businesses by offering them incentives and penalties for good social and environmental performance and offer support through guidelines on performance reporting, investments, research funding and raising awareness.⁷⁰⁵ Additionally, inter-governmental agencies could pool their resources and skills together by liaising with other bodies to ensure stakeholder engagement.⁷⁰⁶ Finally, governmental agencies are responsible for supporting the concept of CSR and endorsing practices, strategies and guidelines around it.⁷⁰⁷

703 See: Tom Fox, Halina Ward and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (World Bank 2002)

704 Ibid, 3

705 Ibid, 4

706 Ibid,

707 Ibid, 5

As mentioned elsewhere, such roles in relation to modern slavery, human trafficking and forced labour have been echoed in international and regional instruments, as well as opinions on jurisprudence by various human rights treaty bodies and Special Rapporteurs. In addition to States' general obligations outlined in the previous section such as preventing, investigating, punishing and rectifying abuses committed within its territory, States are also expected to adopt measures to prevent businesses from engaging in conduct detrimental to human rights, as well as impose duties on such actors that compel them to incorporate relevant mechanisms in their firm to respect human rights.⁷⁰⁸ For instance, States are responsible for adopting and imposing adequate labour standards, and establishing mechanisms to monitor business activities to ensure that their operations are in line with relevant international standards. The Special Rapporteur on the trafficking of human beings, especially women and children, propose that States' actions include incorporating relevant international norms into their national systems, strengthening labour laws, reinforcing business accountability by establishing mechanisms that highlight unethical business practices that involve the trafficking of human beings, and developing resources to encourage businesses to take proactive steps in the fight against modern forms of slavery.⁷⁰⁹ As explored under section 5.4 measures to monitor business activities to regulate modern slavery can include compelling businesses to adopt and report on the implementation of due diligence processes, and ensuring transparency in their business operations and activities.⁷¹⁰ For example, to encourage corporate responsibility and transparency, the Brazilian

708 UNCHR General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc E/C.12/GC/24, para 4

709 UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2012) UN Doc A/67/261, para 49

710 UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2015) UN Doc A/70/260, para 40

Government had once established a public record ‘dirty list’ naming and shaming individuals and companies that were found by labour inspectors to be complicit in slavery who were then subject to various financial penalties.⁷¹¹ States have a duty to compel and support businesses in establishing due diligence processes to ensure that they are taking appropriate measures to prevent the use of exploitative labour in their supply chains, and in the event that such violations are unearthed, have effective operational-level grievance mechanisms in place.

Section 5.3.2 highlighted the challenges of international law binding corporate actions to regulate human rights violations, particularly given the complexity of supply chains and arms-length operations occurring throughout networks. As regulating transnational corporate conduct to combat modern slavery may prove challenging, it is then vital for States to strengthen their individual capabilities to prevent, monitor and rectify corporate complicity. By utilising national resources to address unethical business practices occurring within a State, it allows for such actors to be held accountable regardless of the firm’s State of origin’s attitude towards international violations occurring outside the home State. As Ruggie notes, ‘Each legally distinct entity is subject to the laws of the countries in which it operates, but the transnational corporate group or network as a whole is not governed directly by international law.’⁷¹² Thus as reiterated in previous sections, it is the State’s duty to incorporate international regulations effectively into their national legal systems to directly hold corporations accountable for offences concerning modern slavery, human trafficking and forced labour.

⁷¹¹ UNCHR Report of the Special Rapporteur on Contemporary forms of Slavery, including its causes and consequences (2015) UN Doc A/HRC/30/35, para 34 ; UNCHR Report of the Special Rapporteur on Trafficking in Persons, especially women and children (2015) UN Doc A/70/260, para 40

⁷¹² Ruggie (n 480) 824

Concerning business activities that are transnational, as aforementioned ordinarily States exercise jurisdiction over their own territory. Nevertheless, this does not imply that States do not have extraterritorial obligations. The Committee on Economic, Cultural and Social Rights recognise that States have various extraterritorial obligations to prevent conduct that infringes on individuals' rights committed across borders by corporate entities registered in their jurisdiction.⁷¹³ To fulfil such extraterritorial obligations, the Committee holds that States should ensure that business ventures such as trade and investment agreements do not undermine other State parties capabilities in fulfilling their own obligations under the covenant, that international co-operation be strengthened to create environments that fulfil individuals' rights, hold corporations accountable for breaches, enable victims access to remedial actions, and ensure that firms are aware of their responsibilities and the State's expectations of their conduct, when operating in other territories.⁷¹⁴ There has been some recent developments with regards to States' establishing measures to regulate unethical corporate conduct abroad with respect to human rights and modern slavery, for example the UK Modern Slavery Act 2015 and the California Transparency in Supply Chains Act 2010 which requires firms to ensure that their global supply chains are not tainted with slave labour. Perhaps the most notable development in exercising extraterritorial obligations in holding corporate actors accountable for violations of international law committed extraterritorial is the United States' Alien Tort Claims Act 1789.⁷¹⁵ The statute allows non-US citizens who have been victims of abuses, including international crimes, committed in other States to bring legal proceedings in US courts against those responsible. In addition to

713 UNCHR General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24, para 26

714 Ibid, paras 29-37

715 28 U.S.C. § 1350

individual liability for international violations,⁷¹⁶ there have been several cases involving corporate entities brought against US courts for their complicity in human rights abuses.⁷¹⁷ Nevertheless the scope of the statute is still unclear as to whether corporations can in fact be held liable and if so under what circumstances. Particularly, confusion around the interpretation and scope of the statute intensified as a result of the US Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*,⁷¹⁸ where it was held:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.⁷¹⁹

This decision essentially left courts confused and divided on whether corporations can be sued under the statute.⁷²⁰ In a recent case *Jesner v. Arab Bank, PLC*,⁷²¹ the US Supreme Court is yet to clarify whether corporations can be sued for their involvement in human rights abuses committed abroad.

Though a State's prime responsibility to ensure the protection of human rights exists within its territory, when concerning particularly modern slavery, extending its jurisdiction to regulate extraterritorial corporate conduct can prove advantageous as it allows firms to be punished for their complicity in

716 See : *Filartiga v. Pena-Irala* 630 F.2d 876 (1980) ; *Kadic v. Karadzic* 70 F.3d 232 (1995) ; *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004)

717 See: *Wiwa v. Royal Dutch Petroleum Co* 226 F.3d 88 (2000) ; *Doe v. Unocal Corp.* 395 F.3d 932 (2002) ; *Bowoto v. Chevron Texaco Corp.* 312 F.2d 1229 (2004) ; *Sinaltrainal v. Coca-Cola Co.* 578 F3d 1252 (2009) ; *Doe v. Exxon Mobil Corp* 658 F. Supp. 2d 131 (2009)

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

719 *Kiobel v. Royal Dutch Petroleum*, No. 10.1491, slip op. at 14 (2013)

720 See : U.S Chamber Institute for Legal Reform, 'Lawsuits against Corporations under the Alien Tort Statute' < http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuits_Against_Corporations_Under_the_Alien_Tort_Statute_.pdf> accessed 13 November, 2017

721 No. 16-499 (2017)

such a crime, regardless of where they operate and particularly when such complicity occurs in States' with inadequate slavery, human trafficking, and forced labour regulatory frameworks. Moreover as aforementioned elsewhere, exercising extraterritorial obligations can provide remedial actions for individuals and vulnerable groups exploited. Extending jurisdiction, improving national capabilities, and international co-operation to combat modern slavery can help feed into the bigger picture in its regulation by removing defence barriers to corporate complicity, holding them liable for violations wherever they operate.

Though the role of the State is crucial in combatting modern slavery through the regulation of CSR, it has been criticised for being limited and in some cases inadequate. According to Dentchev et al., the contemporary debate on CSR often interprets it as a voluntary ethical concept beyond the realms of the law, implying that the government's role in implementing CSR is minimal, or non-existent.⁷²² Furthermore, scholars have suggested that globalisation has resulted in the politicisation of CSR where States lack the capabilities to regulate business operations due to corporate global influence and therefore withdraw from their traditional role by relying on soft law approaches to give businesses the power and responsibilities to self-regulate significant global issues.⁷²³ Nevertheless, Schrempf-Stirling suggests that States play a crucial role in the CSR agenda as they have the capabilities and means to set the context by which business activities operate.⁷²⁴ Noting that, 'corporate responsibility is embedded within the regulatory setting of political institutions' Schrempf-Stirling acknowledges that States' capacity to regulate CSR is not

722 Nikolay A. Dentchev, Mitchell van Balen and Elvira Haezendonck, 'On Voluntarism and the Role of Governments in CSR: Towards a Contingency Approach' (2015) 24 *Business Ethics: A European Review* 378

723 New (n 574) 700 ; Judith Schrempf-Stirling, 'State Power: Rethinking the Role of the State in Political Corporate Social Responsibility' (2016) *Journal of Business Ethics* 1-14

724 Schrempf-Stirling, *ibid* 4

diminished.⁷²⁵ As governments have the legal mechanisms to establish regulations such as labour and human rights standards through its national laws, as well as through trade agreements, and moreover can choose to extend its jurisdiction to oversee its business activities operating extraterritorial, States have the ability to regulate CSR standards.⁷²⁶ As mentioned, to fulfil its international obligations in respecting and protecting human rights, States have a duty to exercise jurisdiction over its territory by establishing effective legislation and measures. However, regulating business activities outside the jurisdiction of the State to ensure that their operations do not violate human rights, continues to rely on State discretion.

Agreeably, by being concerned with the social responsibility of businesses in society, particularly in relation to modern slavery, forced labour and human trafficking, governments can in turn monitor and manage business performance through hard law and establish a wider understanding of the role and impact of firms in the economy and the anti-slavery agenda to help influence and shape policy measures. Various levels of governmental bodies can have a positive influence on the implementation of CSR strategies. Governments can enforce legislation, and establish charges such as taxes to ensure compliance.⁷²⁷ It can also help to create an environment, 'to establish the settlement of ethical norms and make sure that society complies with them.'⁷²⁸

Understandably with regards to businesses which profit from exploitative labour in their operations or supply chain networks, though States may have the capabilities to establish mechanisms to regulate business activities, it is questionable how operative such regulations can be, given the global nature

⁷²⁵ Ibid

⁷²⁶ Dentchev, van Balen and Haezendonck (n 722) 378

⁷²⁷ Ibid, 388

⁷²⁸ Ibid

and complexity of business activities. Such an undertaking can also be challenging where business activities operate in failed States or those with weak or ineffective stances against regulating modern slavery, and related issues such as unethical labour practices. Moreover, due to the transnational nature of corporate operations, it is uncertain whether governments have the ability to monitor such activities effectively.

Thus, in the absence of international regulations holding corporations directly accountable for human rights abuses and the uncertainty about the effectiveness of government regulations, soft law approaches could potentially fill some gaps in global governance. Though section 5.4.6 critiqued the concept of CSR, identifying how such a concept can be exploited and appear misleading, the obligations of corporate entities in global anti-slavery agendas must not be trivialised. Further as, aforementioned, there are companies whose ethos are genuinely founded on advancing human development, and ensuring that their practices and operations do not exploit and violate vulnerable groups. As established, the role of such global actors should not undermine the State, but rather compliments governmental capabilities. As corporate entities have the global resources, power and outreach to regulate complex transnational activities, it is imperative that they are included in the forum on slavery, to help shape effective policy that incorporates an understanding of both legal affairs and complex business management issues. The combination of adequate hard law regulations and voluntary soft law initiatives can then help balance the interests of the global community, allowing all actors to contribute and utilise resources to regulate modern slavery. As Scherer and Palazzo note:

The decline in governance capability of nation-states is partly compensated by the emergence of new forms of global governance above and beyond the state. International organizations, civil society groups, and private businesses in cooperation with state agencies, or without their support, have

started to voluntarily contribute expertise and resources to fill gaps in global regulation and to resolve global public goods problems.⁷²⁹

6.4 Conclusion

This Chapter has illustrated that the State's role in the fight against modern slavery and more so in the regulation of corporate conduct to combat slavery is imperative. Though actors in the international community advocate that corporations should be responsible for ensuring that modern forms of slavery do not exist in their business operations and supply chain networks, particularly by implementing labour standards, such measures can only be legally enforced by governments. Government interference is crucial to establish a level playing field where they can support and compel businesses in adopting proactive measures to safeguard human rights and issues pertaining to modern slavery, while preventing, punishing, and rectifying violations. While soft law instruments can help businesses incorporate CSR strategies to combat modern slavery, such guidance have no monitoring or enforcement capabilities, and in practice may not effectively deal with the root causes of exploitation such as poverty, economic hardship and discrimination. In actuality, such concerns can be championed through adequate regulations and rigorous law enforcement – measures that can only be implemented and enforced by effective national legal systems and international bodies.

⁷²⁹ Andreas G. Scherer and Guido Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2011) 48 *Journal of Management Studies* 900, 903

Part Three: The UK's Fight to End Modern Slavery

Chapter Seven: Modern Slavery and the UK: An Overview of UK Approaches to Combatting Slavery

7.1 Introduction

Britain's history is long rooted in slavery for its major involvement in the exploitation and enslavement of human beings. As briefly explored in Chapter Two, the English dominated the majority of the slave trade where they published numerous literary work justifying the enslavement of slaves, embarked on the kidnapping of Africans, disrupted societies and established various legislation and slave companies to regulate the buying, selling and governing of slaves.

It has now been two centuries since Parliament abolished the Trans-Atlantic slave trade and the practice of slavery, recognising the barbaric injustices committed against African slaves.⁷³⁰ Nevertheless, though slavery is abolished in the United Kingdom, similar to every part of the globe, it continues to not only exist but flourishes in 21st-century society. The UK has been recognised as a country of origin, transit and destination, whereby people are transported to and from for the purpose of exploitation.⁷³¹ In 2013 it was estimated that there were between 10,000 and 13,000 potential victims of modern slavery in the UK.⁷³² Like other estimates on the number of victims of modern slavery on a global scale, this calculation is not a concrete figure and the number of victims exploited could be much greater than this. In 2016, former Home Secretary, and current Prime Minister Theresa May reflecting on the role of Britain in the Trans-Atlantic slave trade and its abolition, announced, 'Just as

730 An Act for the Abolition of the Slave Trade 1807 (47 Geo. III, C.XXXVI)

731 U.S Department of State, 'Trafficking in Persons Report' (*U.S Department of State*, June 2016) 384

<<https://www.state.gov/documents/organization/258876.pdf> > accessed 16 March 2017

732 HM Government, *Modern Slavery Strategy* (HM Government, 2014) 9

it was Britain that took an historic stand to ban slavery two centuries ago, so Britain will once again lead the way in defeating modern slavery and preserving the freedoms and values that have defined our country for generations.’⁷³³

Part one of this thesis presented a panoramic view of the global scale and evolution of modern slavery, while part two explored the role of corporate entities and moreover the State in combatting slavery and respecting and protecting internationally recognised human rights. This Chapter further narrows the focus to explore domestic level operations in the UK. This Chapter will explore the nature of labour exploitation in the UK, present an overview of UK approaches to regulating slavery, in particular its Modern Slavery Strategy and the Modern Slavery Act 2015 and evaluate what its approaches mean in the support of victims, the prosecution of offenders, and the responsibility of UK businesses.

7.2 Labour Exploitation in the UK

The National Referral Mechanism (NRM), the UK’s framework for identifying and supporting victims of modern slavery, provides that a common purpose for which people are trafficked and exploited in the UK is through forced labour which affects both adults and minors. Though the NRM does not provide information on the specific types of exploitative labour people are subjected to, it has been suggested that such victims of unfree labour are often found in sectors requiring a low-skill and cheap labour force such as construction, hospitality and food industry.⁷³⁴ Moreover, an increasing number of victims are

⁷³³ Theresa May, ‘Defeating Modern Slavery’ (*Home Office*, 30 July 2016)

<<https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article>> accessed 28 February 2017

⁷³⁴ Klara Skrivankova, *Forced Labour in the United Kingdom* (Joseph Rowntree Foundation 2014)

abused in jobs such as car washes and nail salons⁷³⁵ and forced to commit criminal activities such as pickpocketing and the cultivation of cannabis farms.⁷³⁶

Victims of labour exploitation in the UK compose of both nationals and foreigners, desperate for work, and willing to accept low wages working in dangerous or potentially unsafe conditions. Though forced labour pertains to exploitative circumstances, it often encompasses immigration issues as the status of a victim (whether legal or not) can make them more susceptible to exploitation.⁷³⁷ This is because exploiters could abuse an individual's lack of knowledge of the legal system and abuse their limited understanding of the language, therefore keeping their victim in isolation.

Many migrant workers have been enticed by undercover criminals, illegitimate agencies, or false employment advertisements to travel to the UK under the false pretence of the conditions and nature of the work they are expected to perform.⁷³⁸ Traffickers target vulnerable groups such as homeless people who may have pre-existing conditions such as alcohol and drug addiction, or mental

735 See: British Broadcasting Corporation, 'Modern Slavery Fears: Nearly 100 Held in Nail Bar Crack Down' (*BBC*, 28 December 2016) <<http://www.bbc.co.uk/news/uk-38447101>> accessed 5 February 2017 ;

Rowena Mason, 'Home Office Targets Nail Bars Over Illegal Immigration' (*The Guardian*, 28 December 2016) <<https://www.theguardian.com/uk-news/2016/dec/28/home-office-targets-nail-bars-over-illegal-immigration>> accessed 5 February 2017; Sean O'Neill, 'Car-wash Worker Kept as Modern Slave Electrocuted as He Showered' (*The Times*, 19 January 2017) <<http://www.thetimes.co.uk/article/car-wash-worker-kept-as-modern-slave-electrocuted-as-he-showered-z037kp0r9>> accessed 7 February 2017

736 Amelia Gentleman, 'Huge Cannabis Farm "Was Staffed by Trafficked Vietnamese Teenagers"' (*The Guardian*, 25 February 2017) <<https://www.theguardian.com/uk-news/2017/feb/24/huge-cannabis-farm-staffed-trafficked-vietnamese-teenagers>> accessed 15 March 2017

737 Skrivankova, *Forced Labour in the United Kingdom* (n 734) 7

738 Bridget Anderson and Ben Rogaly, 'Forced Labour and Migration to the UK' (*Centre of Migration Policy and Society*, and *Trade Union Congress*, February 2005) 44 <https://www.compas.ox.ac.uk/media/PR-2007-Forced_Labour_TUC.pdf> accessed 31 March 2017

health issues and thus lack support networks to protect them from the risk of exploitation.⁷³⁹

Victims often have their identification documents withheld, tied to a debt bondage, and forced to live in accommodation provided by their exploiters.⁷⁴⁰ Not only are victims expected to pay back any debt owed to their traffickers or exploiters from the small wages that they make, but they often have to pay for the accommodation provided by exploiters, utilities, and transport to and from various jobs.⁷⁴¹ By the time the worker has paid these individual debts from their wages, they have little to nothing left to themselves.

Like other contemporary forms of slavery, forced labour in the UK can occur on a small scale or exist through large-scale operations and can be found throughout numerous business transactions. According to research funded by the Joseph Rowntree Foundation, forced labour in the UK, 'is principally an issue of exploitation, supply chain management and business operations – intersecting with the vulnerability of individual workers.'⁷⁴² The pressure to increase profit and productivity has resulted in the practice of forced labour in UK businesses and their supply chains, leading to a high demand for workers and pressure to increase performance. As a result of this, it has been suggested that forced labour is more likely to be found in a company's product supply chain (processes involved from the extraction of raw resources through to the finished product) and labour supply chains (various direct and indirect relationships between workers, employers and subcontractors).⁷⁴³ Moreover,

739 See: The Passage, 'Understanding and Responding to Modern Slavery within the Homelessness Sector: A Report Commissioned by the Independent Anti-Slavery Commissioner' (IASC, January 2017) 5
<<http://passage.org.uk/wp-content/uploads/2017/01/The-Passage-anti-slavery-document.for-web.24.01.17.pdf>>
accessed 9 March 2017

740 Anderson and Rogaly (n 738) 42,43

741 Ibid

742 Skrivankova, *Forced Labour in the United Kingdom* (n 734)

743 Ibid, 9-11

the increase in the length of a supply chain, which can occur to cope with the burden of completing tasks, often allows for the infiltration of subcontractors who utilise exploitative labour.⁷⁴⁴

Victims could also be employed in legitimate businesses working in non-exploitative conditions but nonetheless are controlled by criminal syndicates who control their earnings. In some cases, criminal networks establish agencies where they hire out workers to firms to perform small independent jobs.⁷⁴⁵ In such a situation it is difficult for the exploitation to be evident. Moreover, not only is the individual deprived of fair wages paid to them, but they can be further victimised by having their personal identification details exploited to commit criminal activities such as benefit fraud where their exploiters use their victim's identity to give false information about their circumstances in order to illegally claim State benefits.⁷⁴⁶

Forced labour is increasingly gaining recognition as one of the main forms of exploitation in the UK, particularly due to the Morecombe Bay disaster in 2004 that led to the death of Chinese migrant workers who drowned while picking cockles at sea.⁷⁴⁷ Again in 2011, a case came to light involving the Connors⁷⁴⁸ family, who targeted vulnerable men, who were enslaved on caravan sites and forced to perform unpaid work.⁷⁴⁹ The men were compelled to work long hours and were not paid the wages promised. The Connors family inflicted physical and psychological harm on their victims by subjecting them to frequent

⁷⁴⁴ Ibid

⁷⁴⁵ Anderson and Rogaly (n 729) 30

⁷⁴⁶ Skrivankova, *Forced Labour in the United Kingdom* (n 725) 9

⁷⁴⁷ Alex Balch, 'Understanding and Evaluating UK Efforts to Tackle Forced Labour' in Gary Craig, Louise Waite, Hannah Lewis and Klara Skrivankova (eds.) *Vulnerability, Exploitation and Migrants: Insecure Work in a Globalised Economy* (Palgrave Macmillan 2015) 86

⁷⁴⁸ R v. Connors and others [2013] EWCA Crim 1165

⁷⁴⁹ Alexandra Topping, 'Four face Jail After First Conviction Under New "Slavery" Laws' (*The Guardian*, 11 July 2012) <<https://www.theguardian.com/uk/2012/jul/11/four-face-jail-slavery-law-convictions>> accessed 13 March 2017

beatings, forcing them to live in degrading and inhabitable conditions, shaving their heads, threatening them with abuse if they attempted to escape, and collecting some of the victims' State benefits.⁷⁵⁰ The family were charged under section 71 of the Coroners and Justice Act 2009, the prime legislation at the time concerning slavery, servitude and forced or compulsory labour of a person, carrying a maximum sentence of 14 years imprisonment.⁷⁵¹

As will be further illustrated in subsequent sections, the combatting of forced labour alongside other contemporary forms of slavery is now high on the UK's legal and political agenda, as the government has aimed to fulfil its international obligations through strengthening its approaches. In 2016, the UK ratified the ILO 2014 protocol to the 1930 Forced Labour Convention to reinforce its commitment to combatting slavery which now obliges State parties to enact effective policies in the prosecution of perpetrators, ensure the prevention of forced labour and the protection and support for victims in addition to awarding victims compensation to contribute to their rehabilitation.⁷⁵²

7.3 Overview of UK Approaches to Combatting Modern Slavery

As explored in Chapter Six, States have a host of responsibilities and duties to fulfil their international and regional obligations in combatting modern slavery and promoting respect for human rights. The UK is no exception, as it is subject to various anti-trafficking, anti-slavery and human rights regulations such as ECHR (which led to the creation of the UK Human Rights Act 1998), the Slavery Convention, the Forced Labour Convention, the UN Trafficking Protocol, the Council of Europe Convention on Action against the Trafficking

⁷⁵⁰ R v. Connors and others [2013] EWCA Crim 1165

⁷⁵¹ Coroners and Justice Act 2009 s71(3)(b)

⁷⁵² International Labour Organization (ILO) Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 11 June 2014, entered into force 9 November, 2016)

of Human Beings and Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims. The ignition of anti-trafficking campaigns in the early 2000s encouraged the enactment of policy relating to forced labour and other forms of exploitation in the UK.⁷⁵³ The creation of the UN's Trafficking Protocol in 2000 led to the establishment of legislation to combat various forms of trafficking offences against human beings. For example, offences under the Sexual Offences Act 2003⁷⁵⁴ pertaining to the trafficking of persons into, within, or out of the UK for the purpose of sexual exploitation, the Asylum and Immigration (Treatment of Claimants) Act 2004 concerning the trafficking of human beings⁷⁵⁵ and section 71 of the Coroners and Justice Act 2009⁷⁵⁶ which concerned, slavery, servitude and forced or compulsory labour. The government has since taken proactive steps in an attempt to establish itself as a nation leading the international fight against modern slavery, with initiatives such as the NRM and the Modern Slavery Act 2015. As mentioned in the previous Chapter, international and regional regulations have encouraged States to combat human trafficking and modern slavery through establishing mechanisms to prevent exploitation, to protect the victims, and prosecute offenders and further, strengthen co-operation among actors in the international community. Establishing and implementing measures to improve the fight against human trafficking and modern slavery has been high on the UK's agenda, demonstrating the government's commitment to tackling the crime.

753 Balch, 'Understanding and Evaluating UK Efforts to Tackle Forced Labour' in Craig, Waite, Lewis and Skrivankova (n 747) 87-88

754 Sexual Offences Act 2003 (SOA), s57-60

755 Asylum and Immigration (Treatment of Claimants) Act 2004 (AITCA), s4

756 Coroners and Justice Act 2009 (CJA), s71

7.3.1 The Modern Slavery Strategy

In 2014, the government launched its Modern Slavery Strategy, a comprehensive approach to combatting modern slavery, human trafficking and forced labour. The strategy highlights the importance of extensive collaboration and partnership between various governmental agencies, NGOs and civil society bodies. In recognising that 'legislation is only part of the answer',⁷⁵⁷ the strategy encourages more robust, stringent, and coordinated law enforcement alongside placing victims at the forefront of its approaches. Additionally, in recognising that modern slavery is an international problem, therefore, requiring an international response, the strategy also aims to tackle issues relating to modern slavery not solely in the UK but by co-operating with other agencies on an international level.

To execute its objectives in combatting slavery, the approach focuses on a four 'Ps' model strategy; pursue, prevent, protect and prepare. The first approach concerns strengthening national and international capabilities to conduct joint investigations and encouraging multi-agency collaboration to improve intelligence gathering, disrupt criminal networks, prosecute criminal syndicates, and mobilise traffickers' assets.⁷⁵⁸ Further, on a national level, it proposes the training of law enforcement and frontline professionals such as police forces in the identification and protection of victims.

The second strategic approach aims to reduce the threat of modern slavery by infiltrating criminal networks to increase expertise and knowledge on illicit operations and their *modi operandi* and establish measures to prevent individuals from engaging in modern slavery or re-offending.⁷⁵⁹ In executing

⁷⁵⁷ UK *Modern Slavery Strategy* (n 732) 5

⁷⁵⁸ *Ibid*, 31

⁷⁵⁹ *Ibid*, 45

this approach the UK hopes to send a clear message to criminal syndicates and those considering joining these networks, that the government will not tolerate any involvement in modern slavery at any stage of the crime, and will not be lenient in its operations, 'so that someone who steals a car to use it for human trafficking can receive a tougher sentence than an ordinary car thief.'⁷⁶⁰ For example, section 4 of the Modern Slavery Act 2015 establishes a new offence of committing an offence with intent to commit offences relating to slavery prohibited by the Act through aiding, abetting, counselling or procuring.⁷⁶¹ Separately, the strategy aims to prevent people from engaging in modern slavery by addressing the root causes such as the vulnerable socio-economic circumstances that motivate or lure individuals into joining or establishing criminal networks.

Thirdly, the government aims to protect victims by safeguarding the wellbeing of vulnerable people who are susceptible to exploitation, particularly children and the homeless. The government proposes to increase public awareness, encourage dialogue on issues relating to abuse, and educating local authorities, borders forces and organisations involved in the private sector, specifically where exploitative labour is most likely to be found, in the detection of human trafficking, modern slavery, and the appropriate response protocols.⁷⁶²

Lastly, the government's 'prepare' approach concerns putting necessary and adequate preparations in place to deal with victims' specific vulnerabilities and provide them with support essential to their rehabilitation and reintegration into society.⁷⁶³ To help victims, this approach once again highlights the importance

⁷⁶⁰ Ibid, 47

⁷⁶¹ Modern Slavery Act 2015 (MSA), s4

⁷⁶² UK *Modern Slavery Strategy* (n 732) 51

⁷⁶³ Ibid, 59

of strengthening identification capabilities by ensuring that relevant professionals and bodies most likely to come into contact with victims are well equipped with effective training. Once an individual is identified as a victim or potential victim, they are then offered specialist support to aid in their recovery such as housing, financial assistance, legal advice, and access to medical care. The purpose of such mechanism is not only to help victims to recover from trauma and abuse but to also safeguard them from being re-trafficked. The approach also protects victims from the criminalisation of any criminal offences committed under duress from exploiters (as implemented in the Modern Slavery Act 2015⁷⁶⁴) and where possible provide the victim with reparation through compensations. Victims are then supported with co-operating with law enforcement officials in prosecuting offenders, as well as offered integration support in remaining in the UK if they are entitled to, or support with transitioning back to their country of origin.

The Modern Slavery Strategy undoubtedly illustrates the government's commitment to combating modern slavery on UK territory as well as internationally, through national, regional and international multi-agency collaboration. Bodies such as organised crime division, National Crime Agency's Modern Slavery Human Trafficking Unit, was created to liaise with agencies such as the UK Border Force, Home Office, NGOs and professionals in the field of human trafficking and modern slavery. Additionally, in 2016 the government administered a Modern Slavery Innovation Fund and a Child Trafficking Protection Fund to organisations and professional bodies to help develop new initiatives to tackle modern slavery in popular countries of origin,

⁷⁶⁴ MSA, s45

improve policies and intelligence gathering, establish special protection and support of victims, and ultimately the punishment of offenders.⁷⁶⁵

7.3.2 The Modern Slavery Act 2015

Not only is Britain's Empire remembered for their involvement in the Trans-Atlantic trade, where at one point it was estimated that they dominated 50% of all slaving imports, the empire is also remembered as one of the leading nations instigating the abolition of the trade and the eventual abolition of the institution of slavery in its colonies.⁷⁶⁶ Over 200 years later, with the ever increasing evolution and danger of contemporary forms of slavery, now also flourishing on UK soil, and not solely targeting foreigners, parliament has once again laid out a path for other nations to follow by passing the Modern Slavery Act, a benchmark legislation committed to the fight against all forms of servitude. The Modern Slavery Act, the first of its kind in Europe,⁷⁶⁷ heightens the UK's commitment to combating human trafficking and contemporary forms of slavery.

The Act establishes a number of key provisions. For example, the first notable change made is evident in sections 1 to 3 where it consolidated offences related to human trafficking and modern slavery that were scattered throughout various legislations.⁷⁶⁸ As mentioned in section 7.3, prior to the Modern Slavery Act, offences relating to the trafficking of human beings and modern slavery were covered under the Coroners and Justice Act 2009⁷⁶⁹ the

⁷⁶⁵ Home Office, 'Home Secretary Pledges £11 million for Groups Fighting Modern Slavery' (*Home Office*, 27 October 2016) <<https://www.gov.uk/government/news/home-secretary-pledges-11-million-for-groups-fighting-modern-slavery>> accessed 20 March 2017

⁷⁶⁶ John Oldfield, 'Introduction: Imagining Transatlantic Slavery and Abolition' (2007) 41 *Patterns of Prejudice* 239

⁷⁶⁷ May, 'Defeating Modern Slavery' (n 733)

⁷⁶⁸ MSA, s1-s3

⁷⁶⁹ CJA, s71

Sexual Offences Act 2003⁷⁷⁰ and the Asylum and Immigration (Treatment of Claimants) Act 2004.⁷⁷¹ Haynes,⁷⁷² suggests that the consolidation of offences was an attempt to establish clearer certainty between the offences, as well as prohibit related conduct to fulfil its international obligations in regulating modern slavery.⁷⁷³ Referring to the ECtHR decision in *C.N. v the United Kingdom*,⁷⁷⁴ the obligations of States to establish adequate legislation to investigate and criminalise offences that fell within the scope of article 4 of ECHR was highlighted. The case concerned a Ugandan national who was brought to the UK to escape sexual and physical violence, and subsequently exploited through domestic servitude in the UK. The victim was not recognised as a victim of human trafficking as at the time, the legislation in question⁷⁷⁵ primarily concerned offences related specifically to the act of trafficking and did not apply to offences of domestic servitude though falling within the scope of article 4 of ECHR.⁷⁷⁶ The European Court of Human Rights held that as a result, law enforcement capabilities was significantly limited ‘to investigating and penalising criminal offences which often – but do not necessarily – accompany the offences of slavery, servitude and forced or compulsory labour.’⁷⁷⁷ Thus legislation at the time was considered inadequate in affording protection to the victim for the specific offence of domestic servitude.⁷⁷⁸

The 2015 Act now distinguishes between the offences of slavery, servitude, and forced and compulsory labour, human trafficking, related acts such as

770 SOA, s57-60

771 AITCA, s4

772 Jason Haynes, ‘The Modern Slavery Act (2015): A Legislative Commentary’ (2016) 37 Statute Law Review 33 at 37

773 Ibid

774 [2012] ECHR 1911

775 AITCA, s4

776 *C.N. v United Kingdom* App no 4239/08 (ECHR, 13 November 2012) para 74

777 Ibid, para 76

778 Ibid, para 74

organ trafficking and sexual exploitation and also includes a specific provision on overseas domestic workers who have been subject to exploitation.⁷⁷⁹ Also, as mentioned, the Act establishes an additional offence criminalising individuals who commit an offence with the intent of committing the relevant offences, such as aiding, abetting, counselling or procuring.⁷⁸⁰

Prior to the enactment of the Modern Slavery Act, for trafficking and slavery-related offences under the Coroners and Justice Act 2009, the Sexual Offences Act 2003, and the Asylum and Immigration (Treatment of Claimants) Act 2004, the maximum sentence imposed on an individual convicted on indictment was 14 years.⁷⁸¹ The new Act aiming to deter individuals from engaging in criminal offences, and enforcing strict consequences on those who do, has increased the conviction to life imprisonment.⁷⁸² Moreover, a person convicted on indictment of partaking in the new offence of committing an offence with intent to commit the relevant offences can be imprisoned for a term up to 10 years.⁷⁸³

With regards to the protection of victims, the Act establishes a number of provisions. For example, it requires the Secretary of State to provide guidance to relevant authorities in identifying, supporting and protecting victims,⁷⁸⁴ and make arrangements for independent child trafficking advocates to support and promote the wellbeing of children who are believed to be victims of human trafficking.⁷⁸⁵ That Act also requires that slavery and trafficking reparation orders be made where the court in requesting the confiscation of offenders assets, can require them to also compensate victims for any trauma or harm

⁷⁷⁹ MSA, s53

⁷⁸⁰ Ibid, s4

⁷⁸¹ CJA, s71(3)(b) ; SOA, s57(2)(b), s58(2)(b), s59(2)(b) ; AITCA, s4(5)(a)

⁷⁸² MSA, s5(1)(a)

⁷⁸³ Ibid, s5(2)(a)

⁷⁸⁴ Ibid, s49(1)

⁷⁸⁵ Ibid, s48

arising from the abuse inflicted.⁷⁸⁶ Additionally, Section 45 establishes a statutory defence to protect victims from being criminalised for criminal offences committed as part of their exploitation.⁷⁸⁷ However Schedule 4 lists a number of offences that the defence will not apply to, such as kidnapping, manslaughter, murder and wounding with intent to cause grievous bodily harm.⁷⁸⁸ Moreover, whereas a potential adult victim of human trafficking and slavery has to voluntarily consent to their referral into the national support framework in order to be identified as a victim, the Modern Slavery Act now includes the duty of law enforcement officials and authorities to notify the Secretary of State or relevant bodies of suspicions that an individual may be a victim of human trafficking or slavery.⁷⁸⁹

The Act also introduces slavery and trafficking prevention and risk orders granting relevant law enforcement authorities to apply for courts to place restrictions on persons who have been involved in human trafficking and slavery offences or those who are at risk of committing an offence.⁷⁹⁰ Such measures help to protect individuals from harm likely to occur if the defendant committed the offence.

Perhaps one of the most notable and welcoming provisions included in the Modern Slavery Act is its provision on transparency in supply chains.⁷⁹¹ The Act recognises the power and influence of businesses and the important role they can play in the fight against modern slavery through accountability and transparency. Section 54 requires that businesses pay attention to their supply chains, as well as various operations connected to their firms to ensure that

⁷⁸⁶ Ibid, s8-10

⁷⁸⁷ Ibid, s45

⁷⁸⁸ Ibid, Schedule 4

⁷⁸⁹ Ibid, s52

⁷⁹⁰ Ibid, s14, s23

⁷⁹¹ Ibid, s54

they are free from slavery. It requires that businesses with a specified turnover produce statements of actions taken by the company during each financial year on the steps they are taking to ensure slavery does not exist in its business operations. The statement of action is to include information on the organisation, its structure and its suppliers, policies and remedies related to slavery, assessment and management of areas of the business where slavery is more than likely to exist, and the training that is available to the workforce. Depending on the organisational structure and size, such a statement must be approved and signed by senior management or members, and be made publicly accessible. A company who fails to take such actions is nevertheless expected to also produce a statement outlining that their organisation has taken no steps to ensure its business and supply chains are free from human trafficking and slavery. Moreover, the Secretary of State may bring civil proceedings in the High Court for an injunction on organisations who fail to produce a statement.⁷⁹² By including a supply chain clause in its provisions, it reflects the government's commitment outlined in its Modern Slavery Strategy to target human trafficking from all angles and sectors.

The Act also establishes an Independent Anti-Slavery Commissioner post,⁷⁹³ to encourage good practice in the identification and support of victims of human trafficking and slavery, increase prosecution of criminal offenders and ensure effective measures are put in place to prevent harm to individuals that can arise from the offences laid out in the Act. The commissioner is also expected to establish strategic action plans outlining steps to be taken to achieve his objectives to be completed in specified timeframes, as well as produce annual reports demonstrating progress.

⁷⁹² Ibid, s54(11)

⁷⁹³ Ibid, s40-44

7.4 Evaluating UK Approaches to Combatting Modern Slavery

7.4.1 Supporting Victims and Prosecuting Offenders

As explored in Chapter Six, States have a plethora of responsibilities to fulfil their international obligations to promote and protect individuals' fundamental human rights in the regulation of modern slavery. As evident from section 7.3 the UK understands the gravity of modern slavery and proposes to establish approaches to combat it.

Concerning the protection of victims, section 6.2.2 highlighted the importance of the obligation to protect victims from further victimisation, ensure effective remedies to give full effect to the realisation of their rights, access support such as housing, medical and legal aid, and help victims to bring legal proceedings against offenders. To fulfil this international obligation of supporting and protecting victims, the UK has adopted a number of measures. In particular, as mentioned the UK's NRM is the prime tool for identifying and supporting victims of modern slavery, human trafficking and forced labour.⁷⁹⁴ Such a framework proposes to effectively identify victims, and offer them a support system or 'reflection period' where they are able to access services to aid in their recovery.

Though the NRM has resulted in the positive identification of victims the framework has been criticised on a number of grounds. For instance, the role of relevant law enforcement officials responsible for identifying potential victims into the system has been criticised for lacking necessary training to do so effectively, which can lead to the misidentification of victims, subjecting them to further victimisation. Organisations such as the Home Office, the Centre for Social Justice, and the Anti-Trafficking Monitoring Group, heavily criticised the decision process of determining whether an individual is a

⁷⁹⁴ See: National Crime Agency (n 653)

victim.⁷⁹⁵ Concerns that hinder effective identification include mistrust of law enforcement, inability of victims to communicate trauma and feelings⁷⁹⁶ that can result in insufficient information, lack of knowledge and confidence in executing their role,⁷⁹⁷ conflation of decisions with asylum issues,⁷⁹⁸ inadequacy and ineffectiveness of training for relevant officials,⁷⁹⁹ and lack of an understanding of the NRM process.⁸⁰⁰ Attempts to improve the process of identifying victims in pilot areas in England also proved unsuccessful as relevant officials continued to lack an understanding of their responsibilities, and moreover the continued involvement of the UK Visas and Immigration in the decision-making process meant that evidence used in asylum interviews were also used in the decision process for determining if an individual is a victim, not only shifting focus from considering the individual as a victim, but also slowing up the decision-making process by relying on asylum claims, which tended to be a lengthy process.⁸⁰¹ Such issues are said to have led to inconsistencies in the referral system.

In reviewing the UK's Modern Slavery Act, Haughey also noted that although between 2014 and 2015 there was a 40% increase in the identification of victims, there continued to be insufficient training of law enforcement officials,

795 See: Jeremy Oppenheim, 'Review of the National Referral Mechanism' (*Home Office*, November 2014)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467434/Review_of_the_National_Referral_Mechanism_for_victims_of_human_trafficking.pdf> accessed 17 December 2015 ; Anti-Trafficking

Monitoring Group 'The National Referral Mechanism: A Five Year Review' (*ATMG*, February 2014)

<http://www.ecpat.org.uk/sites/default/files/atmg_national_referral_mechanism_a_5_year_review_email.pdf>

accessed 10th December 2015 ; CSJ Slavery Working Group, *It Happens Here: Equipping the United Kingdom to Fight Modern Slavery* (CSJ 2013)

796 ATMG NRM – A Five Year Review, Ibid11

797 Unseen, 'The National Referral Mechanism Pilots: A Review of the Training' (Unseen, June 2016) 42

<<http://www.unseenuk.org/uploads/20160609115454807.pdf>> accessed 13 March 2017

798 Oppenheim (n 795) 8

799 Ibid, 17

800 Ibid, 84

801 See: Unseen (n 797)

weaknesses in approaches to 'identifying, investigating, prosecuting and preventing slavery, including learning from what works and what does not,' and lack of quality of data on the nature and scale of slavery that essentially hindered operational response.⁸⁰² The inadequacy of the identification of victims could also be linked to current law enforcement responses. For instance, Haughey notes that though law enforcement agencies have improved their efforts in responding to modern slavery, efforts continued to be inconsistent. It has been suggested that there is a need to improve national and regional competencies in order to develop operative intelligence-led law enforcement to assess the risk of modern slavery within and across borders.⁸⁰³ Improving the identification of victims and current law enforcement responses could help feed into a better intelligence-led approach, by increasing data collection, improve surveillance, and help develop strategic interventions.

Regarding the support of victims, the government's Modern Slavery Strategy acknowledged the importance of offering assistance to aid in their rehabilitation and reintegration into society. Article 13 of the Council of Europe Trafficking Convention recommends that its Member States grant potential victims a minimum 30 day reflection period to assist individuals in their physical, psychological and social recovery.⁸⁰⁴ The UK's reflection period is 45 days and during this time individuals are offered support while they await a decision as to their status as a victim. The purpose of the reflection period is to support the recovery of the individual, assisting them in deciding the steps they would like to take, such as taking legal action against their exploiters, and protecting them from criminalisation for offences such as illegal immigration.

802 Caroline Haughey, 'The Modern Slavery Act Review : One Year On', (Home Office, July 2016) 3

803 Ibid, 4

804 Council of Europe Trafficking Convention, art 13 (1)

One of the criticisms of the reflection period has been the time limit of 45 days, which has been considered inadequate in allowing sufficient time for victims to recover, particularly when victims have increased vulnerabilities and when the time allocated to recover is wrongly conflated with asylum decisions. It is unrealistic to assume that a person who may have been trafficked and exploited for a significant length of time and subjected to degrading treatment can recover from their trauma in a little over a month. The NRM could be comparable to the Italian model,⁸⁰⁵ which offers victims a short-term programme of 3 months where they are given access to support.⁸⁰⁶ Additionally, if it is decided that the individual is in need of further assistance, they can apply for a social assistance and integration programme where they can be issued a residence permit to extend their stay in Italy.⁸⁰⁷ In 2006 the UK Parliamentary Joint Committee on Human Rights (JCHR) in comparing UK approaches to supporting victims to the Italian model, recommended that the UK extend its reflection period to a minimum of three months, to allow sufficient time for victims to recover and assess their options.⁸⁰⁸ Further, JCHR commended the Italian system for placing the welfare and interests of victims at the heart of its anti-slavery agenda.⁸⁰⁹ Particularly, the committee acknowledged Italy's social protection assistance programmes, which not only provided victims with necessities such as accommodation, medical assistance and education, but also supported victims in reintegrating into Italian society.⁸¹⁰

805 See: Cristina Andreatta, 'Protection, Assistance, and Social (Re) Integration of Human Trafficking Survivors: A Comparative Analysis of Policy Approaches and Practices in the UK and Italy' (2015) Centre for Social Justice and Change. Working Paper Series No. 2, 25 < http://roar.uel.ac.uk/4054/1/WP2_Andreatta_Trafficking-survivors.pdf> accessed 17 May 2017

806 Legislative Decree No 228/2003, art 13

807 Legislative Decree No 286/1998, art 18

808 Joint Committee on Human Rights (JCHR), Human Trafficking - Twenty-sixth Report of Session (Vol. 1) para 203

2005–06

809 Ibid, para 183

810 Ibid, para 186

The residence permits offered to victims were equivalent to a reflection period, as it allowed victims the opportunity to find employment. Further, in assisting victims who chose to return to the home country, the Italian government worked with the International Organization for Migration to facilitate safe return of the individual, and equipping them with occupational training to help them secure employment back in their country.⁸¹¹ JCHR noted that an average of 80 people were repatriated annually, with no cases reported of individuals' being re-trafficked.⁸¹²

The Human Rights Council Working Group on the Universal Periodic Review also highlighted the need for the UK to strengthen its framework to ensure adequate support and protection of victims.⁸¹³ The UK support offered has been criticised for not assisting victims with moving on and recovering in the long term once care has ended.⁸¹⁴ During the short time period, pressure is often placed on support workers to put measures in place for victims before they leave the reflection period.⁸¹⁵ This can be damaging to victims with particular health issues such as post-traumatic disorders.⁸¹⁶ Andreatta notes that in comparison to the UK NRM which lacks sustainable support and independent development:

[T]he Italian system seems to be focused on promoting the empowerment and autonomy of the victims, which are encouraged to tap into their personal resources and develop the competences they need to renegotiate their place in society,

811 Ibid, para 189

812 Ibid

813 Report of the Working Group on the Universal Periodic Review – United Kingdom of Great Britain and Northern Ireland (2017) A/HRC/36/9 at 134.143

814 CSJ, *It Happens Here* (n 795) 170

815 Ibid, 171

816 Alex Balch, 'Integrating Survivors of Modern Slavery' (*Centre for the Study of International Slavery*, March 2017) 8

<<https://www.liverpool.ac.uk/media/livacuk/csis/Fresh,Start,A5.pdf>> accessed 9 March 2017 4

overcoming trauma and rebuilding a dignified, empowered and independent life.⁸¹⁷

Further, once the victim exists the NRM process, whether they remain in the UK or return home, there is no mechanism set in place to monitor their progress to prevent re-trafficking. Recent research on the support offered by the NRM has suggested that in NGO City Hearts, 76% of victims are unreachable once they leave the support network.⁸¹⁸ The research suggested that support should be sustainable by assisting victims with reintegrating back into society and recover from their traumatic experiences by forming close-knit networks with the community and establishing sustainable income through stable employment.⁸¹⁹ Nevertheless, a limitation with such sustainable support is that it can only monitor the progress of those with the right to reside or remain in the UK. With regards to illegal migrants, the US Trafficking in Persons Report also recommended that the UK provide more long-term support for victims, other than simply deporting them once they have been identified as a victim, and enable all victims, regardless of their immigration status, to access specialist support to aid in their recovery.⁸²⁰

Recently the UK government has made significant changes to improving the support offered under the NRM system. For instance, the minimum reflection period of 45 days was increased to 90 days, the minimum 'move on' period which allowed victims to transition out of the NRM was increased from 14 days to 45 days, and weekly drop-in centres were introduced to help victims with ongoing support and advice.⁸²¹ Further, as the NRM has no statutory basis, The Group of Experts against Trafficking in Human Beings (GRETA)

817 Andreatta (n 805) 29

818 Balch, 'Integrating Survivors of Modern Slavery' (n 816) 8

819 Ibid, 16

820 U.S Trafficking in Persons Report 2016 (n 731) 385

821 HC Deb 26 October 2017 vol 630 c513

responsible for monitoring and reviewing States' implementation of the Council of Europe Trafficking Convention, suggested that the government put in law, victims' right to a recovery and reflection period.⁸²² Subsequently, a Modern Slavery Victim Support Bill was introduced to the House of Lords, which proposes to introduce three new sections to the Modern Slavery Act.⁸²³ Section 48A which would legitimise victims' right to support during the reflection period, section 48B which would provide confirmed victims with support and leave to remain for a period of 12 months, and section 48C which outlines the type of support and assistance victims are entitled to and how it is to be provided.⁸²⁴

Incorporating the framework to supporting victims into legislation is a welcoming change. The Modern Slavery Strategy makes it explicitly clear the government's pledge to improve its capabilities to effectively identify and support victims. Its regard to improving victim support is more evident in the recent and proposed changes to its current system. Victims of human trafficking can struggle to have a voice and to recover from their traumatic experiences, and therefore the UK must continue to enforce and improve its mechanisms in supporting them in doing just that. Further, the empowerment of victims is imperative in uncovering criminal networks and prosecuting offenders. In the UK's Independent Anti-Slavery Commissioner's Strategic Plan, Hyland notes:

Effective support for victims will also help increase the numbers of prosecutions. When made to feel safe, victims will be more inclined to come forward and share their accounts, which helps

822 GRETA, 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom – First Evaluation Round' (*Council of Europe*, 12 September 2012) para 283

823 HL Deb 8 September 2017 vol 783 c2213

824 Ibid

build a better picture of the criminality and feeds into an improved law enforcement response.⁸²⁵

Concerning the punishment of offenders, as established in section 6.2.3 international and regional regulations confer on States a positive obligation to establish an effective criminal justice system to investigate cases of modern slavery and to prosecute and punish offenders. The increase in the level of custodial sentencing for offenders convicted of modern slavery from 14 years to a term of life imprisonment, as well as 10 years for the additional offence under section 4, reflects the government's commitment to adopting stringent steps in punishing offenders, and deterring individuals from taking part in the exploitation of individuals. Further, as aforementioned, the statute grants courts the power to make slavery and trafficking prevention and risk orders, which restricts the conduct of offenders. Nonetheless, current statistics in the prosecution and conviction of offenders, in comparison to the estimated number of slaves, and potential victims of modern slavery in the UK, illustrate that there is room for improvement in the UK's criminal justice system. The table below taken from Hyland's Annual 2016-2017 report, shows the number of defendants that have been convicted of modern slavery and human trafficking offences between 2014 and 2016.⁸²⁶

Defendants prosecuted for modern slavery offences on a principal offence basis, England and Wales, 2014, 2015 and 2016						
Principal offence basis	2014		2015		2016	
	Prosecuted	Convicted	Prosecuted	Convicted	Prosecuted	Convicted
Slavery, servitude and forced labour	25	8	30	9	5	12
Human trafficking for sexual exploitation	49	4	38	14	12	31
Human trafficking for non-sexual exploitation	24	27	37	8	13	12
Modern Slavery Act 2015	0	0	12	0	51	0
Total	98	39	117	31	81	55

⁸²⁵ Kevin Hyland, *Independent Anti-Slavery Commissioner Strategic Plan 2015-2017* (IASC, October 2015) 18

⁸²⁶ Kevin Hyland, *Independent Anti-Slavery Commissioner Annual Report 2016-2017* (IASC, October 2017) 44

As the criminal justice provision in the Modern Slavery Act was put into effect on the 31st July 2015, the first three principal offences illustrate prosecutions and convictions prior to the new legislation. As evident, since the enactment of the Act, 12 defendants were prosecuted in 2015 and 51 in 2016 for conduct criminalised by the statute. Hyland reported that between the 2015/16 and 2016/17 financial year, there were 3,125 police recorded crimes for modern slavery in England and Wales, and separately, in the same time period, 6,970 individuals were referred through the NRM as potential victims of modern slavery.⁸²⁷ Given the government's estimate of up to 13,000 slaves in the UK, alongside the police recorded crimes and the NRM statistics, the current rate of prosecution and conviction of offenders is significantly low. Though the number of convictions have increased over the years, with the majority of victims sentenced⁸²⁸ the figures illustrate that much more needs to be done to fulfil the UK's core obligations in effectively investigating and prosecuting cases to combat modern slavery. The figures could also be a reflection of the failures of the NRM system to effectively identify, support and protect victims as well as the inadequacy and inconsistency of current law enforcement responses. A report published by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, also recognised discrepancy between police responses to modern slavery, particularly in the identification of victims, understanding indicators of modern slavery, and recording and investigations of crimes.⁸²⁹ In acknowledging the inconsistencies in the recording and investigations of crimes, GRETA also recommended that the UK government continue to improve its law enforcement and criminal justice response and investigative capabilities to fulfil its obligations. They note:

⁸²⁷ Ibid, 43

⁸²⁸ HC 17 October 2016 c48815W

⁸²⁹ See: Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, *Stolen Freedom: The Police Response to Modern Slavery and Human Trafficking* (HMICFRS 2017)

While welcoming the increased penalties for human trafficking, GRETA considers that the UK authorities should strengthen their efforts to ensure that human trafficking cases are investigated proactively, prosecuted successfully, and lead to effective, proportionate and dissuasive sanctions. In this context, the UK authorities should encourage the specialisation of investigators, prosecutors and judges in cases relating to human trafficking.⁸³⁰

As it is still early days since the Modern Slavery Act has come into force, and given the recent development in the support offered to victims, improvements in the UK's national system to regulate modern slavery is eagerly anticipated.

7.4.2 Combatting Modern Slavery through UK Businesses

As explored in previous sections, various international and regional regulations have conferred on States a duty to ensure that its national system is adequate in holding non-state actors liable for violations committed within its territory. Concerning the actions of corporate entities domiciled in its jurisdiction, States have a core obligation to ensure that the conduct of such actors do not infringe on the rights of individuals. Thus, in relation to modern slavery, they have a duty to establish adequate mechanisms to ensure that its businesses are not complicit in human rights abuses.

Evidently, the UK recognises the importance of balancing the interests of businesses with respect for human rights and modern slavery. In its Modern Slavery Strategy, the government highlights the importance of raising awareness of slavery throughout the business arena, particularly in industries where slavery is most likely to occur and aims to educate its companies on measures to adopt to ensure that their supply chains or direct business operations are not tainted with slave labour.⁸³¹ As discussed in Chapter Five,

⁸³⁰ GRETA, 'Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom – Second Evaluation Round' (*Council of Europe*, 7 October 2016) para 311

⁸³¹ UK *Modern Slavery Strategy* (n 732) 57-58

in 2011 the UN produced guiding principles to help businesses detect, eradicate, evade and rectify human rights abuses in their operations and also outlined the responsibilities of the State in setting the context in which business activities operate. The UK was the first country to produce a National Action Plan (NAP) implementing the UNGPs.⁸³² It's NAP outlines the developments that the government has made on a national and international level to ensure that UK businesses do not violate human rights throughout their operations, and encourages other nations to adopt a similar stance. Its action plan expands on the UNGPs three pillars; State duty to respect, protect and fulfil human rights, the corporate responsibility to respect human rights, and access to remedies where rights have been violated.⁸³³ For example, in carrying out its obligations to protect human rights, the government has established legal regulations to prevent discrimination in the workplace, protect workers from exploitation, and ensure best practice in businesses.⁸³⁴ This is evident in section 172 of the Companies Act 2006 which ensures that in promoting the overall success of the company, firms consider issues such as the long-term consequences of any decision made, and the impact of its operations on the community, its employees, and other relationships.⁸³⁵ So for example, regarding human rights issues related to modern slavery, human trafficking and forced labour, in promoting the success of the company, directors have an obligation to ensure that its decisions and practices (for instance, labour and employment practices) benefit the company as a whole including its members as well as its various relationships and does not produce adverse effects. Moreover they have an obligation to report on social, community and

832 HM Government, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (HM Government, revised May 2016)

833 Ibid

834 Eg. Health and Safety at Work Act 1974, Gangmasters (Licensing) Act 2004, National Minimum Wage Act 1998, Equality Act 2010

835 HM Government *Good Business* (n 832) 7 ; Companies Act 2006, s172

human rights issues.⁸³⁶ The government also recognises that with regards to upholding and respecting human rights directly through business operations, there is a need for business-lead initiatives which places firms at the forefront of protecting human rights, while the government adopts a supportive role outlining its expectations of firms, and providing guidance on transparency and accountability.⁸³⁷

With specific regards to slavery, there was an all-around positive response to the inclusion of a supply chain clause in the Modern Slavery Act. Initially, the Act did not include such a provision, but pressure from NGOs urged the government to include a supply chain clause, which came into force in October 2015.⁸³⁸ By including the duty of large UK businesses to be transparent in their operations, the government recognises not only the influence and power of corporations but also the dark side of its operations that has resulted in the exploitation of human beings in various trades. In legally obliging its businesses domiciled in the UK to be more transparent, the government appears to be attempting to regulate business conduct to combat slavery. As Hyland notes, 'Transparency...is not an end in itself but rather a means to creating accountability.'⁸³⁹

In an attempt to make its businesses more transparent, all UK firms with a total annual turnover of £36 million or more are now required by law to produce an annual statement outlining the steps the company are taking or have not taken to ensure that their supply chains and business operations are free of

836 Companies Act 2006, s414C 7(b)(iii)

837 HM Government, *Good Business* (n 832)14

838 Ruth Chambers, 'A New Law: Tackling Slavery in Supply Chains' (*CORE*, 26 March 2015) <<http://corporate-responsibility.org/new-law-tackling-slavery-supply-chains/>> accessed 3 April 2017

839 Kevin Hyland, 'Call for Central Repository Written Statements' (*IASC*, 22 December 2016

<<http://www.antislaverycommissioner.co.uk/news-insights/call-for-central-repository-written-submissions/>> accessed 30 March 2017)

slavery.⁸⁴⁰ It is uncertain why such a provision does not apply to companies with a turnover of less than £36 million. As explored elsewhere throughout this thesis, modern slavery, human trafficking and forced labour can occur not only during large scale operations but can also exist in small scale operations including family run or small business enterprises such as nail salons, car washes, restaurants, farming, cleaning, and so on. Moreover, such firms are not excluded from the competitive business arena, and thus are just as likely to exploit individuals to retain profit and keep costs low in order to maintain the success of the company. Accordingly, to effectively combat modern slavery by regulating the conduct of businesses, the government should extend such a provision to include all companies, regardless of their annual turnover.

The government has provided statutory guidance for businesses on what firms are required to produce human trafficking and slavery statements, advice on writing a concise, appropriate and relevant statement, and the vital information that must be included such as the company's anti-trafficking and slavery policies.⁸⁴¹ To ensure 'accountability, leadership and responsibility' the statutory guidance gives direction to senior management or partners in a firm on approving, signing and publishing the statement and how to respond to evidence of slavery in their operations.⁸⁴² These statements are to be posted on the company's website so that it is publicly accessible, while those who do not have a website are required to provide a copy within 30 days to anyone requesting it in writing. The enactment of the Act has brought about a positive change in regulating slavery in the business arena. For example, it is estimated that from a small sample size of 34 businesses, almost 76% of responders

840 Home Office, 'Transparency in Supply Chains: A Practical Guide' (*Home Office*, 29 October 2015) 7 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf > accessed 2 April 2017

841 Ibid, 11

842 Ibid, 14

reported that Directors are now more engaged with issues of risk within their supply chain networks, 77% have increased focus on risk monitoring following the establishment of the Act, and 74% reported an increased focus on policy development and codes of conduct within their firm.⁸⁴³

Though the number of statements outlining firms actions in relation to modern slavery, human trafficking and forced labour has increased significantly since the transparency in supply chain clause came into effect, it is unclear how proactive business led anti-slavery policies are. As explored in 5.4.6 companies could be producing such statements as a marketing strategy, as not doing so could have an adverse effect on the firm and their reputation. As mentioned, firms are now realising the importance of being transparent in their operations and exercising social consciousness and therefore they can no longer risk the reputation of their company. Thus, some may choose to produce such statements to the bare minimum requirements to satisfy their own self-interest. It brings to question the extent of transparency, as they could choose to report on the positive steps their firm is taking to regulate modern slavery and mask potential adverse effects of its operations and activities.

The transparency in supply chain provisions essentially lacks effective enforcement and monitoring mechanisms to ensure that firms are not complicit in modern slavery. By legally requiring businesses to upload their statement on the company's website, the Act appears to principally 'use the power of the purchaser to prevent slavery and exploitation.'⁸⁴⁴ In the government's transparency in supply chains guidance it also holds that failure to comply 'may

843 See: Ergon Associates and Historic Futures, 'Has the Modern Slavery Act had an impact on your Business?' (October 2016) < <https://business-humanrights.org/sites/default/files/documents/msa-report-ergon-oct2016.pdf> > Accessed 19 June 2017

844 Ryan J. Turner, 'Transnational Supply Chain Regulation : Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17 Melbourne Journal of International Law 188, 254

damage the reputation of the business.’⁸⁴⁵ Thus, it can be said that a company who produces a statement stating that they have taken no actions to ensure transparency, could nevertheless suffer repercussions as consumers and the general public are aware of their potential negative attitude and disregard to combatting slavery. However, though such a consequence is not certain, the Special Rapporteur on Trafficking in Persons, especially women and children note:

Businesses cannot, and should not, shy away from the issue of human trafficking, not only because it amounts to human rights violations and is a criminal offence in most States, but also because it creates reputational and financial risks to their operations. First, allegations of human trafficking can pose serious threats to brand value and company reputation, in particular for companies producing consumer goods. Once a company’s image has been tarnished, it is often difficult to reverse that damage. This may affect consumer demand and existing and future business partnerships, resulting in a loss of contracts and/or future business opportunities. Second, allegations of human trafficking may also threaten investor relations and risk divestment on the part of both ethical and mainstream investors.⁸⁴⁶

Article 6 of the Directive 2011/36/EU holds that Member States should establish measures to ensure that legal persons are liable for offences concerning the trafficking of human beings that are ‘effective, proportionate and dissuasive,’ including criminal or non-criminal fines and sanctions such as ‘exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision, judicial winding-up, or temporary or permanent closure of establishments which have been used for committing the offence.’⁸⁴⁷ Concerning particularly, company directors, there are a number of legal and

⁸⁴⁵ Home Office, ‘Transparency in Supply Chains: A Practical Guide’ (n 840) 6

⁸⁴⁶ UNCHR Report of the Special Rapporteur on trafficking in persons, especially women and children (2012) UN Doc A/67/261 para 29

⁸⁴⁷ EU Trafficking Directive 2011/36/EU, OJ L101/7, art 6

financial repercussions that can hold them accountable. For instance, the courts could impose a confiscation of assets,⁸⁴⁸ and impose a slavery and trafficking reparation order requiring the offender to pay compensation to the victims for any harm suffered.⁸⁴⁹ Under UK regulations, corporate actors have been held liable for the exploitation of individuals. For example, in *Galdikas and others v DJ Houghton Catching Services Ltd and others*,⁸⁵⁰ the High Court awarded £1 million in compensation to Lithuanian nationals who were trafficked to the UK, exploited and forced to work on farms around the country. Also in *R v Rafiq (Mohammed) and another*,⁸⁵¹ a managing director of a bed manufacturing firm was sentenced to 27 months imprisonment for the exploitation of Hungarian men in his factories, who were forced to work up to 18 hours a day, five to seven days a week, with their wages amounting to £10 a week.

Though there are legal and financial repercussions that can be imposed on company directors who engage in modern slavery, human trafficking and forced labour, requiring a company's anti-slavery policies to be transparent allows them to be subject to additional monitoring and scrutiny, and therefore such mechanisms may prove complimentary to legal regulations by exposing corrupt and unethical business practices and promoting best practices. Thus, due to the importance of consumer leadership discussed in Chapter Four, a measure that can be adopted to encourage businesses to take practical steps to regulating slavery as opposed to a simple statement stating that they have taken no actions, is to put them more in the spotlight so that their actions or lack thereof, can be subjected to public scrutiny. The government recognises that in ensuring that businesses comply with the provision, 'it will be for

848 Modern Slavery Act 2015, s7

849 Ibid, s9

850 [2016] EWHC 1376 (QB)

851 [2016] EWCA Crim 1368

consumers, investors and Non-Governmental Organisations to engage and/or apply pressure where they believe a business has not taken sufficient steps.⁸⁵² Such a monitoring mechanism could be established through a central governmental repository. Though it was not the Act's intention to create such a repository⁸⁵³ having such a centralised database may be crucial in monitoring and scrutinising business attitudes with regards to slavery. Initially, the House of Lords (HoL) on debating the bill, considered whether there should be a central repository where business statements on modern slavery may be held – a measure supported by Hyland and various NGOs such as Amnesty International UK, Focus on Labour Exploitation and Unseen.⁸⁵⁴ As the Act drew on measures implemented in the California Transparency in Supply Chains Act 2010, groups involved in the implementation of such an act, highlighted the failure of the California's legislation in creating an official repository of business measures on combatting slavery.⁸⁵⁵ It was held that the act's failure to include such a repository, effectively weakened the legislation. Baroness Kennedy of Cradley in the HoL pointed out that such tool is needed in allowing the UK government, and other bodies, to access and review business operations in relation to slavery.⁸⁵⁶ Moreover, Baroness Young of Hornsey, in acknowledging the role of consumer leadership, suggested that such digitalised collection of statements could potentially give consumers the knowledge and information needed to exert influence.⁸⁵⁷ Nevertheless, such a government endorsed repository continues to not exist.⁸⁵⁸ At present two

852 Home Office, 'Transparency in Supply Chains: A Practical Guide' (n 840) 6

853 HL Deb 13 April 2016 vol 771 c256

854 HL Deb 4 March 2015 vol 760 c230

855 Ibid, c231

856 Ibid, c232

857 Ibid, c.233

858 HC 21 February 2017 c62209W

organisations, Business and Human Rights Resource Centre,⁸⁵⁹ and Semantrica⁸⁶⁰, have created central repositories of businesses modern slavery statements. As of 17th May 2017, 1964 companies have uploaded their statements to Business and Human Rights Resource Centre's modern slavery registry.⁸⁶¹

In December 2016, Hyland called for suggestions on the benefits of a central repository for business statements and how it could help monitor the impact of the Modern Slavery Act.⁸⁶² The establishment of a central repository could potentially make businesses more transparent in their operations as their statements could be easily accessible and comparable, allowing for effective monitoring and accountability.⁸⁶³ It also establishes a level playing field for responsible business, sifting through corrupt firms, while enabling others to learn from good business practices adopted by others.⁸⁶⁴ As Hyland acknowledges:

A central repository is one mechanism that could help translate increased transparency into accountability by easing the ability to analyse and compare statements. This will in turn hold businesses to account, by allowing the public, businesses, consumer groups and potential investors to compare corporate responses to the challenge of addressing modern slavery. For this new transparency to result in the necessary accountability to improve labour practices, there needs to be commensurate effort from the media, citizens, academics and activists, to actually engage with the data that is made available. A central repository, if designed appropriately, would aid this engagement.⁸⁶⁵

859 Business and Human Rights Resource Centre, 'Modern Slavery Registry' <<http://www.modernslaveryregistry.org/>> accessed 17 May 2017

860 TISC Report <<https://tiscreport.org/what-were-doing>> accessed 28 March 2017

861 Business and Human Rights Resource Centre, 'Modern Slavery Registry' (n 859)

862 Hyland. 'Call for Central Repository Written Statements' (n 839)

863 HL Deb 4 March 2015 vol 760 c231

864 Ibid

865 Hyland. 'Call for Central Repository Written Statements' (n 839)

As such a repository will be accessible to the wider public, if established, it should be user-friendly in layman terms, so as to allow for effective scrutiny. Stricter enforcement in monitoring business activity and the establishment of an accredited central repository is vital in making business more transparent and accountable. However, as businesses still have the leniency in regulating their conduct through soft law initiatives, it is questionable how transparent their operations are, as they may only choose to disclose information that puts their company in a positive light. Moreover though the number of companies producing statements are increasing, illustrating their regard to initiate change regarding modern slavery in their business practices, some statements have been criticised for being of poor quality.⁸⁶⁶ It has been suggested that businesses who have already begun reporting and incorporating human rights policies prior to the Act, produced better quality and more detailed statements in line with the provisions, while other statements only satisfied the minimum requirements outlined in the transparency in supply chain guidance.⁸⁶⁷ Nevertheless, as it is still early days since the establishment of the Act, and taking into account the fact that some businesses may not have established anti-slavery or related policies in their firm, the government expects 'organisations to build on their statements year on year and for the statements to evolve and improve over time.'⁸⁶⁸

Separately, alongside the lack of adequate enforcement measures, the transparency in supply chain provision can be criticised for failure to include a crucial element in the international fight against modern slavery. According to Section 54 of the Modern Slavery Act, its provision pertains to commercial organisations which it defines as, 'a body corporate (wherever incorporated)

866 Rae Lindsay, Anna Kirkpatrick and Jo E. Low, 'Hardly Soft Law : The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights,' (2017) 18 Business Law International 29, 37

867 Ibid

868 Ibid ; Home Office, 'Transparency in Supply Chains: A Practical Guide' (n 840) 6

which carries on a business, or part of a business, in any part of the United Kingdom, or a partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.’⁸⁶⁹ According to the government’s guidance on transparency in supply chains, it is the courts duty to determine whether a firm ‘carries on a business’ in the UK, by applying a ‘common sense approach,’ while paying particular attention to specific details in each case.⁸⁷⁰ The government holds that this ‘common sense approach’ to determining whether a firm ‘carries on a business’ should also apply to commercial organisations formed outside of the UK but, ‘anticipate that applying a common sense approach will mean that organisations that do not have a demonstrable business presence in the United Kingdom will not be caught by the provision.’⁸⁷¹ Moreover, it holds that ‘having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act completely independently of its parent or other group companies.’⁸⁷² The guidance also notes that where foreign subsidiaries form part of the parent company’s supply chain or business, the parent company’s statement should also include steps taken by their subsidiaries to combat slavery.⁸⁷³ Furthermore, though non-UK subsidiaries may not be legally required to produce a statement, the guidance advises parent companies to oblige them to produce their own statement, as such a step would incorporate good practice into non-UK subsidiaries that operate in particularly vulnerable or high-risk industries or locations.⁸⁷⁴ The Act has been criticised for only legally requiring firms carrying out business in the UK to provide modern slavery statements, thus lacking effective extraterritorial

869 MSA, s54(12)(a-b)

870 Home Office, ‘Transparency in Supply Chains: A Practical Guide’ (n 840) 7-8

871 Ibid

872 Ibid

873 Ibid

874 Ibid

reach. Essentially it ignores the implication of UK business activities operating outside of the country, as long as exploitative goods and services do not come into the country.⁸⁷⁵ So for example, 'a subsidiary of a UK company providing, e.g., construction services in Qatar would not have to report under MSA.'⁸⁷⁶

Such an omission subsequently questions the government's commitment of placing 'Britain at the forefront of this fight, leading the world with our efforts to stamp out modern day slavery and human trafficking.'⁸⁷⁷ As mentioned in Chapter Six, the UN Convention on Transnational Organized Crime provides that States have a responsibility to ensure that where crimes are transnational in nature, that they co-operate with each other to establish effective investigation, prosecution and judicial proceedings. Though international law does not oblige States to extend their jurisdiction, where a State's involvement is necessary to bring about effective proceedings, they should ensure full co-operation and legal assistance with relevant States. By failing to legally acknowledge the role UK business operations play in the wider global community, the government essentially falls short of its obligations to prevent and punish corrupt business operations wherever they operate and regardless of where goods and services are provided. Essentially, it sends the message to the world that slavery is not acceptable in our own backyard but may continue to exist in that of others.⁸⁷⁸

875 International Trade Union Confederation, 'Closing the Loopholes – How Legislators can build on the UK Modern Slavery Act,' (*ITUC*, 2 February 2017) 6 <https://www.ituc-csi.org/IMG/pdf/uk_modern_slavery_act.pdf> accessed 29 March 2017 ; Parosha Chandran, 'A Loophole in the Slavery Bill Could Allow Companies to Hide Supply Chain Abuses' (*The Guardian*, 24 March 2015) <<https://www.theguardian.com/global-development/2015/mar/24/loophole-modern-slavery-bill-transparency-supply-chain-abuses>> accessed 4 April 2017

876 International Trade Union Confederation, 'Closing the Loopholes' Ibid 6

877 Theresa May, 'Anti-Slavery Service: Prime Minister's Speech' (*Victims of Crime and Crime Prevention*, 12 October 2016) <<https://www.gov.uk/government/speeches/anti-slavery-service-prime-ministers-speech>> accessed 27 March 2017

878 Chandran (n 875)

Its pledge to ‘introduce a legal duty on all businesses above a certain turnover threshold to disclose each year the steps they have taken to ensure that modern slavery does not take place in their business or supply chains anywhere in the world,’⁸⁷⁹ is not echoed in the Modern Slavery Act as the law fails to address the wider global picture of corporate influence. The failure to include a provision legally requiring business to also report on their operations outside of the country has not been acknowledged. Neither was it recognised by the Home Office review of the Modern Slavery Act or the Independent Anti-Slavery Commissioner’s annual report. The UK has made it clear of their intent to partner with other agencies and governments to fight modern slavery on an international level, for example through its joint-investigative operations, its Modern Slavery Fund, its partnership with ILO to help support it’s Alliance 8.7 initiative to achieving the UN’s sustainable goal of eradicating forced labour, modern slavery, human trafficking and child labour,⁸⁸⁰ and its commitment to fulfilling the UNGPs. Nevertheless, such attitude towards fulfilling, respecting and protecting human rights should be reflected in the Modern Slavery Act in concerning slavery in global supply chains regardless of where the company provides goods and services. Such a revised provision will strengthen the aim of the Act in combatting slavery on an international level by enforcing legal accountability on business operations to report on global supply chains. It is unclear whether such a provision will be revised. Nevertheless, to observe its international obligations, the government will have to consider strengthening its international relations and capabilities, and reinforce its commitment to combat modern slavery through global business operations by providing mutual legal assistance wherever violations from firms are inflicted.

879 UK *Modern Slavery Strategy* (n 732) 58

880 Hyland, *Independent Anti-Slavery Commissioner Strategic Plan 2015-2017* (n 825) 15

As mentioned, the Modern Slavery Strategy sends the message to those involved and benefiting from the exploitation of human beings, the UK's commitment to clamping down on perpetrators and criminal networks involved at any stage of the crime, and its commitment to contribute to the eradication of modern slavery on a global level. Therefore, such attitude should also extend to UK business operations outside of the country to send the same message to their businesses that the government is doing everything in their power to ensure that no part of their operations or supply chains, existing within and outside the UK is tainted with slave labour.

7.5 Conclusion

The United Kingdom's efforts to combat modern slavery on a national and international level is a leading example of good practice. Its mechanisms such as the Modern Slavery Strategy, the Modern Slavery Act, the NRM and its NAP, illustrate the government's commitment to utilising its resources and capabilities to regulate contemporary forms of slavery. The approaches mentioned in this Chapter is only a snapshot of UK efforts to combat modern slavery, human trafficking and forced labour. Nevertheless, it is evident that its regulations are not without its criticisms. In particular, this Chapter has acknowledged the weaknesses in law enforcement responses in the identifying and supporting victims, investigating cases related to modern slavery and prosecuting offenders. The rate of prosecution in the UK, though increasing, continues to be significantly low in comparison to the number of potential and identified victims. Not only can this result in the UK falling short of its obligation to support and protect victims, but it allows perpetrators and offenders to slip through gaps in the law. To combat slavery it is imperative to find the perpetrators and disrupt criminal networks, and thus due to the underground nature of modern slavery, it is vital to effectively identify victims. In addition to a criminal justice approach to tackling slavery, there is also a

need to improve mechanisms to support victims. What is lacking is support that is sustainable in helping victims to recover in the longer term. Thus, the recent and proposed changes to support is desirable.

Finally, as mentioned, modern slavery is an international problem requiring an international response. In addition to the co-operation between relevant agencies in the international community, its regulation relies on the effectiveness of national capabilities. The UK is only a piece of the puzzle of the wider global fight against modern slavery, and its commitment to combat such a crime on a national and international scale is reflected in its strategies. Notably, the UK must be commended for its approach to regulate modern slavery through corporate entities. Nevertheless, to strengthen such regulations, the UK should apply the Modern Slavery Act's transparency in supply chain provision to all businesses, regardless of their size or turnover, establish a central repository to increase transparency and accountability, and use its legislation to extend its jurisdiction to regulate the conduct of businesses wherever they operate and provide goods and services, in order to afford mutual legal assistance to States vulnerable to the adverse impact of business operations.

Chapter Eight: Conclusion

The aim of this study was to present an insight into the evolution, complexities and challenges of contemporary developments in slavery, and explore the role of corporate entities and the State in its regulation. This study has illustrated that modern slavery is a serious issue for the global community. It is a parasite that continues to feed on societal weaknesses while taking advantage of global integration. Though modern slavery is now prohibited globally, human beings continue to be traded and treated as commodities. What differentiates modern slavery from historical practices, is that it has undergone a gradual transformation, where modern traffickers and exploiters act as opportunists taking advantage of individuals' vulnerabilities and use sophisticated and ruthless means to lure, control and exploit them for various purposes. Many of today's victims face poor socio-economic circumstances and are lured through false job advertisements, or false promises of a better life. Though victims today often consent to exploitative circumstances or give partial consent, international law has recognised human enslavement and exploitation as grave violations of human rights.

As human trafficking and modern slavery is a global issue, combatting it requires co-operation among all actors in the international community, to systematically and efficiently tackle it from all angles, including the factors that contribute to the exploitation of individuals such as global poverty, high unemployment and lack of opportunities, as well as the high demand for goods, services, cheap and uncompensated labour, and weak or ineffective State regulation. As illustrated throughout this thesis, as citizens and actors of the integrating global economy, we are all accessories to exploitation, and thus to eradicate such a crime global partnership is vital.

Amidst contemporary developments in relation to slavery, this study chose to highlight the perceived role and credibility of corporate entities in regulating modern slavery. Though corporate partnership has been long advocated for in addressing global issues such as environmental sustainability, firms are beginning to find themselves included in agendas against slavery, such as the UN's 2030 global sustainable development goals. Due to firms' global influence, there is no doubt that they have the capabilities and resources to address some of the world's sustainable issues. Nevertheless, the activities of businesses operating in a competitive global arena has also resulted in the exploitation of individuals and grave human rights abuses. This thesis chose to address the regulation of modern slavery through the corporate angle, to consider not only the perceived role of such entities in combatting modern slavery but moreover question the credibility of businesses in self-regulating their conduct with regard to significant global issues.

In emphasising the role of corporate responsibility in combatting modern forms of slavery, present legal literature fails to acknowledge the complexity of activities involved in managing a firm. As discussed in Chapter Four, managing a supply chain and all actors involved in supply chain networks, is a highly complex issue as supply chains are not linear processes and in most cases, resemble a spider's web composed of numerous tiers of suppliers often operating at arm's length from each other. Moreover, due to the nature of global trade in the economy, companies' priority appear to concentrate on self-interest and maximising profit. Though there are companies who may genuinely want to contribute to the eradication of slavery in their supply chains, the nature of firms makes them untrustworthy in self-regulating their own conduct to do so. To reiterate Bakan, 'The corporation's legally defined

mandate is to pursue, relentlessly and without exception, its own self-interest...'⁸⁸¹

International hard law and soft law instruments have recognised that legal persons have a responsibility to ensure that their operations do not produce adverse effects or are complicit in human rights abuses, and moreover that States have an obligation to hold corporate entities liable if such violations occur. Nevertheless, actors in the international community continue to advocate for direct accountability of corporate conduct under international law for human rights abuses. However this thesis has questioned whether such an instrument is in fact essential, given that corporate actors can be held liable in national legal systems, and individual actors, in some circumstances, under international criminal law. Moreover, it questions how operative such an instrument will be.

If established, such an instrument will have to take into account the complexity of global business operations, firms' often lengthy and intricate supply chain networks and individual State capabilities. As questioned in Chapter Five, if international law is to regulate the conduct of business actors, it has to consider what specific company in the chain such liability will fall on, and whether all businesses will be held equally accountable as they all act uniformly in the chain. Separately, if the operations of a specific firm are directly connected to the exploitation of individuals, how the ratio of liability is decided can prove challenging. Undoubtedly, the benefit of an international legally binding instrument holding corporate entities liable is that it could avoid the challenge of deciding which specific corporate individual is responsible for abuse committed, and could also result in victims being awarded compensation. Nevertheless, an additional concern is whether international bodies have the

⁸⁸¹ Bakan (n 576) 1-2

capacity and resources to investigate, monitor, punish, and moreover, regulate complex transnational business operations in the global economy. There is room for research exploring how international bodies can address such issues, in addition to effectively monitoring global business activities in upholding human rights. In dealing with these concerns, future research will have to adopt a pragmatic view of solutions to combat modern slavery with consideration for both business management affairs and legal issues.

Separately, Chapter Six explored key responsibilities of States in contributing to the global fight against modern slavery in establishing approaches to prohibit and prevent the crime, protect victims and prosecute offenders within its jurisdiction. The State's role in the international agenda against slavery is crucial as not only are they responsible for enforcing legal regulations, but they also set the context in which criminal groups and activities operate and where the exploitation of individuals thrive. Moreover, it is for international regulations to establish the context in which States' fulfil their international obligations. Due to the transnational nature of human trafficking, impacting all countries, States have the capabilities to individually, as well as collectively combat modern slavery. However, whether such powers are exercised effectively greatly depends on individual State response. Thus, rather than shifting responsibility from the State to international bodies, focus needs to be placed on strengthening, developing and utilising States specific resources and competencies.

Throughout this study, it is clear that the trafficking and exploitation of human beings is a criminal justice as well as a grave human rights abuse issue. It threatens the governance, order and security of a State, particularly when corrupt officials partake in criminal activities, it utilises illicit means and behaviour, such as coercion, and violence, and can be associated with other unlawful and sinister activities. The methods by which criminal syndicates

operate also infringe on the human rights of vulnerable and poor individuals, by exercising ownership over the person, exploiting their vulnerabilities, restricting their freedom and ultimately reducing their options. States have an obligation to deal with the root causes of trafficking, to investigate and punish offenders, and to establish measures in identifying, supporting and protecting victims. State attitudes towards certain legal, political and social issues, such as migration or labour rights can ultimately impact or create environments where exploitation flourishes.

With regards to regulating corporate conduct in line with its international obligations to combat slavery and protect fundamental human rights, it is the State's duty to strengthen their specific capabilities so that business activities can be monitored wherever they operate, and moreover, do not infringe on individuals' human rights. So for example, a UK business sourcing its garments from Bangladesh factories, is less than likely to result in the exploitation of workers, as Bangladesh's government has enforced sustainable minimum wages, decent working standards, and rigorous monitoring and consequences of unlawful business activities, while the UK government ensures that their businesses are trained and supported on respecting and reporting on human rights in their operations, and moreover held accountable for incidences involving human rights abuses wherever they operate. States should ensure that their national legal systems allows for the exercise of extraterritorial jurisdiction to regulate transnational conduct in order to monitor and establish liability for business activities that operate in particularly vulnerable nations. However, it has to be acknowledged that it is unrealistic to assume that all States will uphold such a positive and effective stance towards regulating modern slavery, thus where a State has been considered by the international community as weak or inadequate, such gaps could potentially

be filled by other actors in the international community such as other governments, NGOs, and multinational corporations.

Separately, in exploring the role of States in combatting modern slavery, this thesis opted to include an evaluation of domestic level operations in the UK, to exemplify State response. The UK was chosen, given its history in the Trans-Atlantic slave trade where it contributed to the exploitation of African slaves, and a leading role in the eradication of the slave trade and the institution of slavery. It was also chosen as not only has the government established various tools to combat modern forms of slavery, but its regulations have also brought UK businesses into its anti-slavery agenda.

The UK must be commended for requiring its businesses to report on the steps they are taking to ensure that their operations and supply chain networks do not utilise slave labour. Nevertheless, the thesis have identified several flaws in its mechanism. In particular to ensure that its regulations are effective in holding its businesses accountable and transparent, the government should ensure that its businesses are not simply providing statements on the steps they have taken or have not taken to combat modern slavery, and instead put them more in the spotlight to ensure that they are taking proactive measures by implementing anti-slavery policies, including due diligence processes throughout the firm and its relationships. As the Act lacks monitoring capabilities, the government should establish a central repository of business statements so that they could be subject to further scrutiny by the general public, NGOs, and relevant agencies. As discussed, such a step could compliment State efforts as well as assess and compare the quality of statements to ensure that businesses are not simply implementing bare minimum standards to meet the Act's requirements. Further, the government should amend its regulations to concern business activities that operate abroad, irrelevant of where goods and services are provided. International and

regional regulations have acknowledged that though not obligatory, national legal systems should extend their jurisdiction to concern abuses that occur outside their territory. By strengthening its legislation, as well as working in close collaboration and agreement with other actors in the international community, the government can reinforce its commitment to ensure that slavery does not take place in UK business activities, anywhere in the world. Amidst such a shortcoming, this study has highlighted the important and complimentary role of soft law initiatives in filling the gaps of inadequate State regulation. Furthermore, the government should make its transparency in supply chain provision applicable to all businesses regardless of their turnover, as the practice of modern slavery thrives in businesses of all sizes.

In addition to the role of corporate entities, and the State in the regulation of modern slavery, this thesis has also illustrated that the general and often unsuspecting public, need to also be brought into the heart of the agenda in order to curb the demand for goods and services that has considerably contributed to the underground practice of slavery. Carrying out a universal and concerted attack against modern slavery, not only requires the assistance of national, regional and international bodies including NGOs, and corporations, but it also demands the involvement of citizens in the global community. The participation of such actors must go beyond raising awareness of modern slavery, but also extend to measures to create better and more informed citizens. The international community has to develop approaches to teach citizens that modern slavery is not just a social issue, but it is also a serious crime against human beings. To combat modern slavery, we need to address the culture of consumption that has created the demand for exploitative goods and services, resulting in vulnerable individuals being overworked and exploited. Furthermore, in addition to establishing conscious consumers, focus needs to also be placed on educating people who are

moving up the corporate ladder, individuals who collectively, will one day form and regulate corporate entities. It is only by building better citizens can the exploitation of human beings be reduced as it addresses heightened demands for wealth, exploitative goods, services and people.

Ultimately, to effectively combat human trafficking and modern slavery, victims and at risk individuals and communities need to also be brought into the heart of anti-slavery agendas. As reiterated throughout this thesis, human trafficking and modern slavery are crimes that often operate underground. Thus, to uncover such illicit operations, enlisting such individuals is crucial in the global fight against slavery. Victims help us to understand modern traffickers' *modi operandi*, particularly who they target, how they target them, methods and routes of trafficking, control and exploitation. They also help relevant law enforcement officials to gather intelligence in uncovering and infiltrating criminal networks and unscrupulous business practices. The inclusion of victims can also lead to higher prosecution, compensation, and ultimately the detection of further victims. Nevertheless, to include victims in the heart of the conversation against slavery, it is crucial to establish adequate measures in identifying, supporting and protecting them. As explored in Chapter Six and Seven, the identification of victims need to be consistent and competent across all relevant agencies within a State, and also relies on improved and more coordinated law enforcement responses. Furthermore, in supporting victims, measures that are empowering and sustainable are paramount. In addition, to support such as medical, legal, counselling and housing, support offered should encourage victims to recover in the long term, through increased social and economic opportunities. Moreover, it is vital to empower those individuals at the bottom of the socio-economic pyramid, through inclusive capitalism, allowing individuals access to basic and affordable goods and services needed

for their sustenance, and income opportunities to help emancipate them from their poverty stricken and vulnerable circumstances in the long term.

In concluding, this thesis advocates that the regulation of modern slavery, human trafficking and forced labour, both domestic, regional and international, must emphasise on a humanitarian approach, as opposed to an immigration or criminal justice one. Overconsumption, overproduction, profiteering, and lack of an emotional attachment to our humanness is destroying not only the environment and the world we live in, but it also threatens human life and human dignity. Societies must begin to appreciate that human life is our most valuable asset and must collectively engage in the most honourable pursuit to defend such rights. For human beings to be free from the risk of enslavement and exploitation, society needs to re-evaluate our value systems, placing human life and human dignity at the forefront. Global agendas should focus on creating a world where the majority of mankind value humanity above wealth and material possessions. Society will not truly be free from slavery until we recognise and fight for the equal dignity of all.

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