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# Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations

Nicola Jägers & Conny Rijken\*

## I. INTRODUCTION

¶1 Captives from Myanmar and Cambodia are sold to captains on Thai fishing boats to work for months or even years on the boats with little or no payment, with long working days up to 20 hours a day under grave conditions.

¶2 The Indian garment industry has been accused of using child labor for fancy labels that are sold in Western countries.

¶3 In the greenhouses in Almeria in the Southeastern part of Spain, illegal migrants live in shacks made of old boxes and plastic sheets without sanitation and access to clean running water, receive less than half the minimum wage, and harvest vegetables sold in supermarkets in other European countries.<sup>1</sup>

¶4 These are a few examples of the criminal exploitation involved in the trafficking in human beings (“THB”). The crime is severe and widespread, evoking violations of multiple fundamental rights. THB can take place for the purpose of sexual exploitation, labor exploitation, or the removal of organs. All these different forms of THB have their own dynamics, relevant actors, and stakeholders, and to some extent need to be addressed differently. Reliable figures are hard to come by, and there is no clear-cut line between trafficking and non-trafficking cases. Estimates on the number of trafficking cases vary, but the most recent estimate by the International Labour Organisation (ILO) claims that there are around 20.9 million victims of modern slavery worldwide at any time.<sup>2</sup> The ILO estimates that 55 percent of the victims of forced labor are female, but in the case of victims of sex trafficking, that figure reaches 98 percent. The ILO figures also show that in Asia and the Pacific region, the number of trafficking victims remains high and that the number of victims from the African continent is on the rise.

¶5 Despite the increased attention for THB over the last ten years there are no indications that the number of cases is decreasing. What has been learned in this period is that addressing THB only as an organized crime issue limits the options for adequately

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<sup>1</sup> See, e.g. Felicity Lawrence, *Spain’s Salad Growers are Modern-Day-Slaves, Say Charities*, THE GUARDIAN (Feb. 7, 2011, 2:00 PM), <http://www.theguardian.com/business/2011/feb/07/spain-salad-growers-slaves-charities>.

<sup>2</sup> INT’L LABOUR ORG., GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13 (2012), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf).

addressing the phenomenon.<sup>3</sup> The figures from the ILO show that a law enforcement response, which has been the main angle from which activities to combat THB have developed, has had limited effect. Furthermore these efforts have a repressive character rather than a preventive one. For these reasons, new avenues need to be sought to address the phenomenon.

¶6 Nowadays there is more and more support for the idea that action to combat THB must not only be based in criminal law, but must also utilize other fields of law, especially labor law and migration law. Moreover, as follows from the examples above, labor exploitation occurs in work situations, both in the formal and informal labor market, and therefore businesses can play an important role in the prevention of this form of THB.

¶7 This article addresses THB for the purpose of labor exploitation with the focus on the prevention thereof. As the aforementioned examples show, corporations profit from the exploitation of laborers, and by doing so, infringe on peoples' fundamental rights. Furthermore, labor exploitation interferes with the principle of fair competition, providing another argument for both States and corporations to combat such practices. This article aims to contextualize the corporate responsibility to respect the principles as articulated in the United Nations Protect-Respect-Remedy (PRR) Framework and the Guiding Principles on Business and Human Rights (the GPs)<sup>4</sup> in relation to THB. It will do so by analyzing the role of the corporation in avoiding, causing, or contributing to THB through its own activities or the activities in business relationships. It will develop a normative framework for corporations to implement the GPs to prevent THB. Based on this framework it will be possible to assess the preventive strategy regarding THB of a specific corporation enabling a State to decide whether it should take action or not. As such, the framework will also help clarify what the State duty to protect regarding the prevention of THB for labor exploitation entails, and the relationship between this State obligation and the corporate responsibility to prevent THB.

¶8 Before turning to an analysis of the PRR Framework and GPs in the context of THB, the article will first address the question of what trafficking for purposes of labor exploitation entails.

## II. TRAFFICKING IN HUMAN BEINGS FOR PURPOSES OF LABOR EXPLOITATION

¶9 Trafficking in human beings is often referred to as modern slavery. In the context of THB, slavery and slavery-like practices are defined as forms of exploitation. Exploitation refers to the aim for which the involuntary or forced recruitment has taken place.<sup>5</sup> However, without delving too much into the difficulties of the definition of THB

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<sup>3</sup> Directive 2011/36, of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Victims Replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101); Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197; DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2012), <http://www.state.gov/j/tip/rls/tiprpt/2012/>.

<sup>4</sup> See generally U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011).

<sup>5</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, art. 3, U.N. Doc. A/55/383 (Dec. 25, 2003) [hereinafter "Palermo Protocol"] (according to

as adopted in the main international THB document, the Palermo Protocol (also called the trafficking protocol),<sup>6</sup> it can be stated that the link between THB and “slavery” or “slavery-like practices” was not broadly discussed at the time the protocol was adopted. The Palermo Protocol came up with a common definition of trafficking in human beings, bringing a major change by including various forms of labor exploitation under the same umbrella as sexual exploitation. Up until that time the definition of THB mainly concerned THB for sexual exploitation. The inclusion of exploitation in labor and services in the THB discourse seriously enlarged the group of actors involved in THB both on the active and the repressive side (both perpetrators and those involved in combating THB). It also brought THB into the legal and regulated part of society as labor exploitation can take place in legally established, well-regulated and monitored businesses. Thirteen years since the adoption of a common definition of THB in the Palermo Protocol, THB is nevertheless still primarily associated with sexual exploitation. That labor exploitation is not lesser of a problem follows from the figures given by the ILO, the organization working in this field ever since it was established.

¶10 Labor exploitation is not defined in the Palermo Protocol or the ILO. In the Palermo Protocol, exploitation is described as follows: “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>7</sup>

¶11 It is clear from this description that forced labor or services fall within the scope of exploitation. The ILO adopted a broad definition of the term “forced labor,” including THB. However, not all forms of THB qualify as a form of forced labor and therefore this inclusive definition was criticized. The ILO defines forced labor 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.”<sup>8</sup>

¶12 This definition is quite narrow and maybe at the time of drafting (1930), it was suitable for most forms of forced labor that occurred. Nowadays, the ILO definition is too limited. One can for instance start work on a voluntary basis but might after a while decide to quit. If this person is not allowed to do so, strictly speaking he falls outside the scope of the convention.

¶13 In 2005, the ILO gave further guidance on the interpretation of the definition of forced labor and pleaded for a broad application including situations in which a person cannot freely leave a job. In addition, the ILO in its global estimate in 2012 reiterated that forced labor includes slavery and practices similar to slavery (such as debt bondage and serfdom) and that it encompasses THB. As mentioned, this does not mean that a situation that does not fit the definition of forced labor cannot be considered THB—for example, cases in which trafficking occurs for the removal of organs.

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Article 3, the “trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* art. 3(a).

<sup>8</sup> Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55.

¶14 In addition to a more lenient application of the ILO definition of forced labor, the Palermo description of exploitation is to be considered a minimum description. That description is the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. Other forms of involuntary work or even voluntary work falling outside the activities listed in the Palermo protocol might qualify as exploitative as well. This manifests one of the most difficult questions, currently being debated in the context of THB—namely, when decent work evolves into a form of forced labor and under what conditions this can be considered to fall in the scope of THB.<sup>9</sup> In an attempt to answer this question, Skrivankova calls this the continuum of exploitation, with decent work on the one end of the spectrum and forced labor on the other end.<sup>10</sup> She argues that a work situation is a constantly changing one and the modes of coercion are different in the various stages of exploitation.

¶15 Skrivankova advocates that not all situations of exploitation can best be addressed from a law enforcement perspective but that a labor law response might in some cases be more adequate, both for the exploited person and for the exploiter.<sup>11</sup> Therefore, she is in favor of a broad response including a labor law response to labor exploitation, which also entails forced labor.<sup>12</sup> More clarity on the distinction between bad labor conditions, exploitation in the context of THB, and forced labor is very much needed but is not the focus of our article. However, the realization that these phenomena are not well defined, do overlap and may be differently understood by scholars and practitioners helps to explain some of the difficulties in operationalizing the corporate responsibility to respect in relation to prevent labor exploitation addressed below.

### III. THE STATE'S OBLIGATION TO PREVENT THB

#### A. *The Current Approach to Addressing THB for Labor Exploitation: the Three P-Framework*

¶16 The complexity of THB, which is influenced by a variety of factors ranging from migration opportunities and needs, to labor market dynamics, poverty, and cultural diversity, requires a coordinated and integrated approach to address it effectively. The combating of THB is included in many international conventions, both those specifically set up for this aim<sup>13</sup> as well as in the more general human rights conventions,<sup>14</sup> since

<sup>9</sup> James G. Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849 (2010).

<sup>10</sup> See KLARA SKRIVANKOVA, *BETWEEN DECENT WORK AND FORCED LABOUR: EXAMINING THE CONTINUUM OF EXPLOITATION* 19 (2010).

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.* at 29-30.

<sup>13</sup> International Convention for the Suppression of the "White Slave Traffic," May 18, 1904, 1 L.N.T.S. 83; International Agreement for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 11 U.N.T.S. 424; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 1342; Palermo Protocol, *supra* note 5; Directive 2011/36, *supra* note 3.

<sup>14</sup> See *e.g.* Declaration on the Elimination of Discrimination Against Women, art. 6, Nov. 7, 1967, 1249 U.N.T.S. 13 [hereinafter "CEDAW"]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 (1967); European Convention of Human Rights, art. 4, Nov. 4, 1950, 213 U.N.T.S. 221.

THB is considered a grave breach of various human rights.<sup>15</sup> Obokata identifies four core State obligations in human rights law that apply to THB: the obligation to prohibit trafficking, to punish traffickers, to protect victims, and to address the causes and consequences of the act.<sup>16</sup> These four obligations reflect similar standards that have come forward in several U.N. documents on what a human-rights-based approach to violence against women implies.

¶17 Based on these conventions, the combating of human trafficking has revolved around a three-P paradigm. This paradigm represents the Prosecution and Prevention of THB, and the Protection of victims, while simultaneously emphasizing that any effective implementation of these obligations is dependent on underlying coherent policies.<sup>17</sup> The three Ps in relation to combating THB are broadly accepted as a framework to concretize State obligations. The framework, for instance, is used by the U.S. State Department in their annual evaluation of THB responses of all countries in the world.<sup>18</sup> Although some may add other Ps to this paradigm, for instance a P for partnership, or a P for promotion, these seem to be sufficiently covered in the three P-Framework.

¶18 Applying this framework, and consistently spelling out the obligations in each of the three Ps, provides a tool for giving guidance to States to address THB in an integrated way. The three P-paradigm contemplates the legal response to THB for States and elucidates the notion that action on all aspects is required. Despite the recognition that the State's obligation on all three levels needs to be addressed equally, the response to THB has primarily been based in criminal law, and sometimes an answer is sought in migration law. This is especially true in countries wanting to limit and manage migration influx.<sup>19</sup> More recently, and with the qualification of THB as a human rights problem, the obligations and responsibilities of States towards the victims of this crime are pointed out, represented in the P for the protection of victims. In recent years, these obligations have been further elaborated upon and have been the main point of reference for counter trafficking measures for some organizations and States. Examples of these are the adoption of the Council of Europe Convention on Action Against Trafficking in Human Beings in 2005 and the EU Directive on THB<sup>20</sup> which reflects the three P's in its title: "Directive . . . on preventing and combating trafficking in human beings and protecting its victims . . .".<sup>21</sup>

<sup>15</sup> ANN GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010). For a critical examination of the human rights based approach, see generally Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012).

<sup>16</sup> Tom Obokata, *A Human Rights Framework to Address Trafficking of Human Beings*, 3 NETHERLANDS Q. OF HUM. RTS. 379 (2006).

<sup>17</sup> See Special Rapporteur on Violence Against Women, Its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶29, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

<sup>18</sup> U.S. DEP'T OF STATE, *supra* note 3.

<sup>19</sup> See James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking"*, 49 VA. J. INT'L L. 1 (2008); Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789 (2009)

<sup>20</sup> Directive 2011/36, *supra* note 3; Council of Europe Convention on Action against Trafficking in Human Beings, *supra* note 3.

<sup>21</sup> *Id.*

*B. The Obligation to Prevent THB for Purposes of Labor Exploitation*

¶19 A next step in addressing the three Ps is focusing on the prevention of this crime. So far, this aspect is underexposed in research, policy and debate, as opposed to the prosecution of perpetrators and the protection of victims.

¶20 The prevention of THB prominently demonstrates the complexity of THB. For each part of the trafficking chain (from forced recruitment to the actual exploitation and everything in between), preventive strategies need to be framed that take into account the specific situation in that particular part of the chain. When considering preventive measures in countries of origin, where the recruitment takes place, the local situation in that country must be addressed. Preventive measures might then be employed to reduce poverty, to increase education opportunities, to mitigate discrimination of minorities, etc. In the countries of destination, where the actual exploitation materializes, preventive strategies are of a different kind. Although States are the primary actors in preventive strategies, they are dependent on the cooperation of other actors and stakeholders, and they need the other actors and stakeholders involved to fulfill their due diligence obligation in relation to the prevention of THB. Generally, THB is not conducted by the State itself but by private actors—for example corporations, making it more difficult to construe the State obligations. As this article focuses on the obligation to prevent THB in relation to corporate responsibility to respect human rights, it further elaborates on the possible preventive strategies in countries of destination where the actual exploitation takes place.

¶21 A further distinction in the end-part of the chain can be made between demand and supply existing in relation to the *products* from THB and the demand and supply for *labor and services* for those who might be or might become victims of trafficking. The responsibility for preventing THB materializes both in the production of goods and the demand and supply for labor and services (e.g. by temporary work agencies). In relation to the supply of products, preventive strategies must be aimed at guarantees that products on the market are produced THB-free and that products from suppliers are THB-free. However, in relation to corporate activities and the demand for labor and services, it is obvious and understandable that corporations do play a role in the prevention of THB. They are the ones who have an obligation to treat employees in accordance with national labor laws and international standards, and not to be associated with THB and slavery-like practices.

¶22 In that context, the ILO has developed a broad normative framework set out in the Declaration on Fundamental Principles and Rights at work.<sup>22</sup> Corporations that obviously play a dominant role are those that specialize in the supply of labor and services either in one country or across borders, like temporary work agencies. These must be considered when structuring preventive strategies.

¶23 In sum, corporations are important actors when it comes to preventing THB for labor exploitation, which is primarily a State obligation in the context of the three P-paradigm. In the following sections, this article will first explore the corporate

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<sup>22</sup> Int'l Labour Organization [ILO], *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (June 18, 1998); see also U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

responsibility to respect human rights as developed within the U.N. in general before turning to the corporate responsibility to prevent THB for labor exploitation in particular.

#### IV. THE CORPORATE RESPONSIBILITY TO RESPECT IN RELATION TO THB

¶24 The previous sections have shown that the prime responsibility for combating THB, including the obligation to prevent THB, rests upon States. However, it is clear that especially in situations concerning THB for labor exploitation there is only so much a State can do. Corporations have a vital role to play. Even though a growing number of corporations are developing programs to address the issue of slavery and THB, little has been asked of corporations in this field.

##### A. *The Protect, Respect, and Remedy Framework*

¶25 The debate on the exact responsibilities and obligations of corporations for the protection of human rights under international law is by no means settled. The issue has nevertheless been given significant impetus with the adoption of the U.N. Guiding Principles on Business and Human Rights (hereinafter “Guiding Principles” or “GPs”)<sup>23</sup> by the Human Rights Council in 2011. The GPs are intended to implement the so-called “Protect, Respect, Remedy (PRR) Framework” adopted in 2008.<sup>24</sup> The GPs and the PRR Framework are the outcome of the six-year mandate of the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG), Professor John Ruggie. The SRSG was appointed to clarify the relationship between corporations and international human rights after an earlier ill-fated attempt within the U.N. to adopt a standard on corporations and human rights.<sup>25</sup> The result of that standard-setting attempt—which took a rather top-down approach to the issue by emphasizing obligations of corporations in this field—was effectively a deadlock. During his mandate, the SRSG took a more bottom-up approach moving away from the idea of legally binding obligations for corporations and looking more at what corporations can and should do to ensure that they do not infringe upon human rights.

¶26 The PRR Framework and GPs are non-binding. However, the reports by the SRSG were unanimously adopted by the Human Rights Council and are now widely considered as the common position laying down the standard of expected behavior from corporations regarding human rights.

¶27 The PRR Framework consists of three pillars.<sup>26</sup> The first pillar contains the State duty to protect against human rights abuses committed by third parties, including corporations, by means of appropriate policies, regulation, and adjudication.<sup>27</sup> The second pillar is the

<sup>23</sup> *Id.*

<sup>24</sup> U.N. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HR/C/8/5 (Apr. 7, 2008).

<sup>25</sup> U.N. Economic and Social Council, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 23, 2003).

<sup>26</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 22.

<sup>27</sup> *Id.*



corporate responsibility to respect, which essentially means that corporations must not infringe on rights of others.<sup>28</sup> Finally, the third pillar reflects the shared responsibility of States and corporations to provide effective remedies after corporate-related adverse impacts have occurred.<sup>29</sup>

### 1. The Corporate Responsibility to Respect

¶28 The focus of this article is on the second pillar, the corporate responsibility to respect. However, the SRSG has pointed out that the pillars are “interdependent in a dynamic system of preventative and remedial measures”<sup>30</sup> therefore, where relevant in the context of preventing THB for the purpose of labor exploitation, the two other pillars will also be discussed.

¶29 According to GP 15, the corporate responsibility to respect, as laid down in the second pillar of the PRR Framework, implies that corporations should “have in place policies and processes including a policy commitment to meet their responsibility to respect human rights; a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and processes to enable the remediation of any adverse human rights impacts.”<sup>31</sup> According to the SRSG, this corporate responsibility to respect must be “ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”<sup>32</sup>

¶30 The SRSG places the concept of human rights due diligence at the core of the corporate responsibility to respect. In the 2008 PRR Framework, the SRSG identified the following four core-elements of a basic human rights due diligence process: having a human rights policy, assessing human rights impacts of companies activities, integrating those values and findings into corporate cultures and management system, and tracking as well as reporting performance.<sup>33</sup> These four core elements were further developed by the SRSG in the 2011 Guiding Principles.<sup>34</sup> Paragraph 5 analyzes what these core elements of human rights due diligence imply in the context of the corporate responsibility to prevent THB for labor exploitation.

¶31 Due diligence, according to the SRSG, is a well-established legal principle. Several factors have to be taken into consideration to determine the scope of the corporation’s responsibility. The SRSG mentions the country and local context of the business activity; the impacts of the company’s activity within that context as a producer, buyer, employer, and so on; and the question of whether and how the company might contribute to abuse.<sup>35</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Protect, Respect and Remedy: A Framework for Business and Human Rights*, *supra* note 24, at 6-9.

<sup>30</sup> *Id.* at ¶ 6.

<sup>31</sup> *Id.* at ¶ 15.

<sup>32</sup> *Id.* at ¶ 17.

<sup>33</sup> *Id.* at ¶ 49.

<sup>34</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 22, at ¶¶ 16-21.

<sup>35</sup> Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, ¶ 50, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009); *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 22, at ¶¶ 17-21 and accompanying text.

¶32 The corporate responsibility to respect includes all recognized human rights as, according to the SRSG, corporations can affect the whole spectrum. At a minimum, corporations should respect the International Bill of Human Rights, consisting of the Universal Declaration and the two Covenants, as well as the ILO Declaration on Fundamental Principles and Rights at Work.<sup>36</sup> The corporate responsibility to respect applies to all companies—not only the core companies, but also its affiliates. Moreover, this responsibility does not merely apply to a company’s own activities but also covers adverse human rights impacts that are the result of its business relationships with other parties, including those down the supply chain.<sup>37</sup> In other words, human rights violations that take place in affiliated corporations fall within the scope of the corporate responsibility to respect.<sup>38</sup>

¶33 The corporate responsibility to respect human rights is not grounded in a legal obligation. Nevertheless, according to the SRSG, non-compliance by corporations will have consequences because such failure

can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations—as part of what is sometimes called a company’s social license to operate.<sup>39</sup>

## 2. Implications of the *Jus Cogens* Character of Some Forms of THB

¶34 As mentioned above, the corporate responsibility to respect is a non-legal notion usually depending on societal pressure for compliance. However, in the prevention of THB for labor exploitation, the special nature of the norms involved should be taken into consideration. The prohibition of slavery and slavery-like practices are so-called *jus cogens* norms, or peremptory norms of international law that have to be adhered to at all times.<sup>40</sup> *Jus cogens* norms evoke strong obligations on the part of States and exceptions to these norms are not accepted under international law. Moreover, violations of *jus cogens* norms have been invoked against non-State entities, most notably in relation to individuals (the jurisdiction of the International Criminal Court (“ICC”) being a clear example).<sup>41</sup> Even though legal persons do not fall within the jurisdiction of the ICC, this is not enough reason to conclude that the prohibition of international crimes does not apply to corporations. In the words of Clapham, “[a]lthough the jurisdictional possibilities are limited under existing international tribunals, where national law allows

<sup>36</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 22, at ¶ 12 and accompanying text.

<sup>37</sup> *See, e.g., id.* at ¶¶ 13, 16-17 and accompanying text.

<sup>38</sup> *See infra* note 46-47 for more on the corporate responsibility to respect in business relationships.

<sup>39</sup> *Protect, Respect and Remedy: A Framework for Business and Human Rights*, *supra* note 24, at ¶ 54.

<sup>40</sup> *See Int’l L. Comm’n, Report of the International Law Commission*, Commentary to Article 26, ¶ 5, U.N. Doc. A/56/10 (Apr. 23 – June 1 and July 2 to Aug. 10, 2001).

<sup>41</sup> *See also* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 90-91 (2006).

for claims based on violations of international law, it is becoming clear that international law obligates non-state actors.”<sup>42</sup>

¶35 Relatively recent developments, especially at the national level, support the notion that the *jus cogens* norms also generate both civil and criminal obligations for non-State actors such as corporations. Most notably, the cases brought against corporations before U.S. district courts under the Alien Tort Statute (“ATS”) acknowledge that corporate violations of *jus cogens* norms may give rise to civil liability.<sup>43</sup> There have been allegations concerning corporate involvement in trafficking brought before the U.S. courts under this law.<sup>44</sup> Even though the PRR Framework and GPs do not explicitly reflect the growing acceptance of directly applying international *jus cogens* norms to corporations, the SRSG did acknowledge it in his preparatory work. According to the SRSG, “emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, *slavery, human trafficking*, forced labor, torture and some crimes against humanity.”<sup>45</sup> Thus, when taking into account the character of the *jus cogens* prohibition of slavery, there might be solid ground to reconsider the corporate *responsibility* to respect, and to rephrase this as a corporate obligation.

¶36 In addition, the *jus cogens* prohibition of slavery indisputably legitimizes strong State action in terms of prevention as well as repression. The ultimate aim of the first pillar of the PRR Framework, protection against THB (as a modern form of slavery),

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<sup>42</sup> *Id.* at 251.

<sup>43</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003) (“Substantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations. Extensive Second Circuit precedent further indicates that actions under the ATCA against corporate defendants for such substantial violations of international law, including *jus cogens* violations, are the norm rather than the exception.”); *but see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d. Cir. 2010), *aff’d* 133 S. Ct. 1659 (2013) (where the court found that international law does not provide for the possibility to hold corporations directly accountable. This case was brought before the Supreme Court. Regrettably, the Supreme Court ordered a reformulation and the question it addressed was limited to the issue of the extraterritorial reach of the ATS); *see also Kiobel v Royal Dutch Petroleum Co.* 133 S. Ct. 1659, 1669 (2013) (where the U.S. Supreme Court significantly restricted the extraterritorial reach of the ATS by concluding that the ATS did not overcome the presumption against territoriality, which effectively implies that U.S. courts will no longer have jurisdiction under the ATS over cases against non-U.S. corporations for human rights violations abroad). The initial question of whether corporations can be held liable under international law for human rights violations has not yet been addressed by the Supreme Court.

<sup>44</sup> *See generally Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 679-81 (S.D. Tex. 2009) (in August 2008, family members of twelve men killed in Iraq and a surviving worker filed a lawsuit in U.S. federal court against Kellogg Brown & Root, a U.S. military contractor in Iraq, and its Jordanian sub-contractor, Daoud & Partners. The action was brought under federal trafficking law and the Alien Tort Claims Act and is based on, among other things, allegations of racketeering, trafficking, forced labor, slavery, and false imprisonment.).

<sup>45</sup> Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of Human Rights: Interim Rep. of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 61, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (emphasis added); *but see* John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS. FOUNDATIONS AND IMPLEMENTATION 51, 73 (Radu Mares ed., 2012).

allows States to intervene in the trade market. This is an area where States are usually rather reluctant to intervene based on considerations (and obligations) of free trade.

¶37 As stated above, the three pillars of the PRR Framework are interrelated with the State duty to protect in the first pillar and the shared responsibility of States and corporations to provide effective remedies reflected in the third pillar. The obligations to combat THB, outlined in the previous section, are addressed to States. These obligations share the common goal of preventing THB from taking place and challenge the outcomes of THB. States must utilize all means available to achieve this aim, including policies, regulations, and adjudications. Such policies and regulations can and must be addressed to corporations operating within a State's jurisdiction to fulfill the corporations' duty to protect against human rights violations, specifically THB prevention. If corporations do not act in accordance with the national policies and regulations, the State needs to investigate and adjudicate. In this way, the link between the pillars and THB materializes.

¶38 Only recently, and especially after the adoption of the PRR Framework and the GPs, has it been acknowledged that States have an obligation. Now, the challenge is to find ways to implement this obligation. States have to find new avenues to create incentives for corporations to refrain from THB and to not use THB practices in their production and supply chains. Examples of such practices are scarce, yet one example is the California Transparency in Supply Chains Act,<sup>46</sup> which will be discussed further below. Another example, reflecting more far-reaching interference with corporations, is the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>47</sup> However, the purpose of the act is to prevent contributions to the civil conflict in the Democratic Republic of Congo ("DRC") and does not relate to preventing or prohibiting THB or slavery. The relevant part of this Act is section 1502, which requires manufacturers to determine that their products do not contain certain metals, so-called "conflict minerals," originating from the DRC or adjoining countries. The company must disclose its determination to the Security and Exchange Commission ("SEC") and on the company's website. If the company cannot prove that the minerals from their suppliers originate from outside the DRC or its adjoining countries, then the companies have to show that they exercised due diligence to determine the minerals' source and chain of custody.<sup>48</sup> This due diligence must be verified by an independent, private-sector audit.<sup>49</sup> The company must file the so-called Conflict Minerals Report with the SEC and make the report available on their company website. Depending on whether or not the origin of the minerals is determined, the product will be labeled "DRC Conflict Free" or "Not been found to be DRC Conflict Free".<sup>50</sup> The implementation rules of these acts have only been

<sup>46</sup> CAL. CIV. CODE § 1714.43 (2010).

<sup>47</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. §78(m) (2010).

<sup>48</sup> ORG. FOR ECON. CO-OPERATION AND DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAIN MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2012), <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf> (the due diligence measures must conform to a nationally or internationally recognized due diligence standards such as the due diligence guidance approved by the Organisation for Economic Co-operation and Development).

<sup>49</sup> See Jonathan C. Drimmer & Noah J. Philips, *Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of SEC Regulation of Social Issues*, 1 HUM. RTS. & INT'L LEGAL DISCOURSE 131, 144 (2012).

<sup>50</sup> Cf. *SEC Adopts Rule for Disclosing Use of Conflict Minerals*, U.S. SEC. & EXCH. COMM'N (Aug. 22, 2012), <http://sec.gov/news/press/2012/2012-163.htm> (providing more information regarding the rules adopted by the SEC to implement the Dodd-Frank Act).

adopted in August 2012; nevertheless the Enough Project—an NGO tracking crimes against humanity in Africa—revealed that the profits for local armed groups in DRC from these “conflict minerals” has already dropped 65 percent over the last two years.<sup>51</sup>

¶39 The Dodd-Frank Act is not a ban on the use of conflict minerals, but rather a disclosure requirement. As will be discussed below, the California Transparency Act only requires corporations to make their policy aimed at combating THB, if they have one, transparent. The Dodd-Frank Act actually requires corporations to undertake human rights due diligence down their supply chain if it cannot be determined that no use is made of conflict minerals. It clearly reflects the interaction between the first and the second pillars of the PRR Framework showing how a State, based on its obligation to protect, can impose obligations that contribute to the exercise of the corporate responsibility to respect. Such obligations are not (yet) placed on corporations when it comes to fighting the crime of THB.

¶40 The comparatively far-reaching duties placed on corporations in the Dodd-Frank Act to adopt a policy aimed at tracing products down the supply chain can be justified from the perspective of the severity of the crimes committed in DRC facilitated with money from non-compliant corporations. In the same vein, an argument can be made on the basis of the *jus cogens* character of the norm prohibiting slavery that corporations not only have an obligation to carry out a due diligence investigation to ensure slavery free supplies and services, but also that States, in order to comply with their obligation to protect, need to impose obligations to adopt slavery preventive strategies for corporations as well. In this way, the lack of a legal basis for why corporations should take up their responsibility to respect in the PRR Framework can be filled.

¶41 The PRR Framework and the GPs provide links to further explore the implications of the corporate responsibility to respect through human rights due diligence in the context of preventing THB for labor exploitation. As mentioned above, four core elements of the corporate responsibility to implement human rights due diligence have been identified: the responsibility to have a human rights policy in place; assess human rights impacts of companies’ activities; integrate those values and findings into corporate cultures and management systems; and, finally, to track as well as report upon the performance. In the following section, these elements will be discussed in the context of preventing THB for the purpose of labor exploitation.

## V. THE CORPORATE RESPONSIBILITY TO PREVENT THB FOR LABOR EXPLOITATION

¶42 In this section, a textured analysis will be performed by integrating the two previous sections aiming at the identification of concrete actions to be taken by corporations to prevent THB using the due diligence framework developed by the SRSG and elaborated upon in section 4. Under the heading “Foundational Principles,” GP 15 makes clear that the corporate responsibility to respect consists of three dimensions, namely, the responsibility to have in place i) policies and processes, ii) a human rights

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<sup>51</sup> FIDEL BAFILEMBA ET AL., FROM CONGRESS TO CONGO: TURNING THE TIDE ON CONFLICT MINERALS, CLOSING LOOPHOLES, AND EMPOWERING MINERS 1 (Aug. 6, 2012), <http://www.enoughproject.org/publications/congress-congo-turning-tide-conflict-minerals-closing-loop-holes-and-empowering-miners>.

due diligence process, and iii) remediation processes.<sup>52</sup> The foundational principles are followed by the “Operational Principles,” which elaborate on these three dimensions.<sup>53</sup> In the 2008 PRR Framework, having a human rights policy was considered part of the human rights due diligence process. In the Guiding Principles, the adoption of a policy expressing a commitment to human rights is part of the corporate responsibility to respect but not placed under the heading of human rights due diligence. According to the GPs, human rights due diligence consists of assessing actual and potential impacts, integrating and acting upon the findings and tracking and reporting performance.<sup>54</sup> This article analyzes four elements of the corporate responsibility to respect to determine the implication in the context of THB for labor exploitation, namely, the responsibility to:

1. Adopt a human rights policy;
2. Assess actual and potential human rights impact;
3. Integrate commitments and assessments into internal control and oversight mechanisms; and
4. Track and report performance.<sup>55</sup>

¶43 These elements are not a static framework and, as will be seen below, there is no clear-cut line between them. Nevertheless they provide a valuable normative framework to further concretize the corporate responsibility in the context of THB and for a holistic approach to this responsibility.

¶44 The third dimension of the PRR Framework, to provide for remediation processes, will not be drawn into the analysis here. This article focuses on those elements in the PRR Framework and the GPs to the extent they contribute to the prevention of THB. Although we acknowledge the preventive effect of deterrent remedies, these come into play when the violation—in the context of our article, the THB—has occurred. In that sense it is not part of a preventive strategy. Therefore, in the following sections, the four identified core elements of the corporate responsibility to respect will serve as the normative framework to operationalize this responsibility in the context of preventing THB. The analysis will not only show what actions corporations should take in accordance with the PRR Framework and the GPs to prevent THB for purposes of labor exploitation, it will also reveal some of the shortcomings of the Framework and the Guidelines.

¶45 As mentioned earlier, corporations can take measures aimed at preventing THB in their own business and can adopt a policy not to make use of supplies that are manufactured by using exploitative practices—in other words, measures addressed down the supply chain. As these two types of measures differ in character, the measures that can be adopted in each of the categories will be discussed separately when operationalizing the corporate responsibility to prevent THB.

¶46 An important initiative addressing the corporate responsibility in relation to combating human trafficking has been the adoption of the Athens Ethical Principles (“AEPs”) in 2006 and the Luxor Protocol with implementation guidelines for these

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<sup>52</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 22, at ¶ 15.

<sup>53</sup> *Id.* at ¶ 15-22.

<sup>54</sup> *Id.* at ¶ 16-17.

<sup>55</sup> *Id.* at ¶ 15-20.

principles.<sup>56</sup> Interestingly, this initiative, organized by the Greek Ministry of Foreign Affairs, involved all relevant stakeholders, including CEOs from the private sector, representatives from NGO's, international organization, and governments. Seven principles have been identified which businesses have to commit themselves to in order to contribute to the combating of trafficking. These principles are policy setting, public awareness raising, strategic planning, personnel policy enforcement, supply chain tracing, government advocacy, and transparency.<sup>57</sup> Although parallels can be drawn between these principles and the elements of corporate responsibility distilled from the GPs on the corporate responsibility to respect, the AEPs are strongly linked to support governmental action as they include corporations' responsibility to implement awareness raising campaigns and coordinate with the government.

¶47 These principles call on businesses to undertake activities not directly related to their core activities, increasing the risk that businesses will drop their cooperation. As such, it can be an extra burden to comply with all the principles. In addition, the seven ethical principles are not clearly defined and distinguished and in some places overlap. Moreover, they focus on responsibilities down the supply chain, and although we agree that these are extremely important, they should not be imposed *instead of* responsibilities for own activities, but *on top of* their existing responsibilities. Notwithstanding these critical remarks, the AEPs are a useful tool when further operationalizing and analyzing the four elements of the corporate responsibility to respect and therefore serve as an inspirational document.

¶48 For this analysis, a recent legislative act is relevant. In January 2012, the state of California enacted the California Transparency in Supply Chains Act (hereinafter "California Transparency Act").<sup>58</sup> This is the first legislative initiative that addresses the role of corporations in the prevention of THB for labor exploitation. This Act requires companies over a certain size<sup>59</sup> with any retail or manufacturing presence in the state of California to post on their website what, if anything, they are doing to prevent slavery and human trafficking in their supply chain. It is not relevant where the corporation has its headquarters. The law does not require that a corporation take steps to combat THB in their supply chain; it merely requires a corporation to post its policies and measures taken if any. Non-compliance with the California Transparency Act does not provide for a private right of action. The ultimate sanction is an action by the California Attorney General for injunctive relief.

¶49 In August 2011, a similar act has been proposed at the federal level—the Business Transparency on Trafficking and Slavery Act (hereinafter the "H.R. Act").<sup>60</sup> This act will require publicly listed corporations to include similar disclosures in their annual reports filed with the SEC. Commentators have noted the significance of these acts as signaling a departure from the exclusive reliance on the State as the entity to combat THB.<sup>61</sup> Again,

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<sup>56</sup> *Athens Ethical Principles*, END HUMAN TRAFFICKING NOW, <http://www.endhumantraffickingnow.com/the-athens-ethical-principles/>; *The Luxor Protocol*, END HUMAN TRAFFICKING NOW, <http://www.endhumantraffickingnow.com/the-luxor-protocol/>.

<sup>57</sup> *Athens Ethical Principles*, *supra* note 56.

<sup>58</sup> California Transparency in Supply Chains Act, CAL. CIVIL CODE §1714.43 (2012).

<sup>59</sup> The Act applies to corporations with worldwide annual gross receipts of at least \$100 million. *Id.*

<sup>60</sup> Business Transparency on Trafficking and Slavery Act, H.R.2759, 112th Cong. (2011).

<sup>61</sup> Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. CIRCUIT 80, 81 (2012).

the H.R. Act (when and if it is adopted) does not impose obligations for corporations, and its effect to a great extent depends on the willingness of corporations to comply. As argued previously, the *jus cogens* character of the prohibition of at least some forms of THB justifies more far-reaching interference and regulation. The California Transparency Act and the Business Transparency Act can therefore only be seen as a welcome first step.

¶50 Even though it is too early to evaluate the impact of the California Transparency Act, it is interesting to see how this Act relates to the responsibilities of corporations as they have been identified in the PRR Framework and the GPs. Therefore, where relevant, the California Transparency Act will be drawn into the analysis to see if and how this Act operationalizes the corporate responsibility to respect.

¶51 In a similar fashion, the E.U. is trying to push corporations within the E.U. to a policy more sensitive to corporate social responsibility (“CSR”).<sup>62</sup> Most recently, the Commission proposed to amend the accounting directives, imposing a requirement on certain companies to report and be transparent with regards to their impact on social and environmental matters.<sup>63</sup> Large companies with over 500 employees will have to provide this information in their annual reports.<sup>64</sup> Companies themselves decide which aspects are relevant to report on, and they can also provide such information at the group level instead of for each individual company within a group.<sup>65</sup> The proposal includes maximal flexibility for the companies in the way they present the information and “has been designed with a non-prescriptive mindset,” including significant “comply or explain” options.<sup>66</sup> In accordance with Article 1(a) of the proposal to amend Article 46 of Directive 78/660/EEC,<sup>67</sup> the companies concerned will have to address the human rights impact, as well as employee-related matters, and report on its policy, results, and risk-related aspects. The consequences of non-compliance are not indicated in the proposal.

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<sup>62</sup> See A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, EUR. PARL. DOC. (COM 681) (2011); see also European Company Law and Corporate Governance: A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, EUR. PARL. DOC. (COM 740) (2012).

<sup>63</sup> Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Nonfinancial and Diversity Information by Certain Large Companies and Groups, EUR. PARL. DOC. (COM 2013) 207 (2013).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Commission Moves to Enhance Business Transparency on Social and Environmental Matters*, EUROPEAN COMM’N (Apr. 16, 2013), [http://europa.eu/rapid/press-release\\_IP-13-330\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-13-330_en.htm?locale=en).

<sup>67</sup> Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Nonfinancial and Diversity Information by Certain Large Companies and Groups, *supra* note 63. The addition of Article 46(a) in the proposal can be summarized as follows. For companies whose average number of employees during the financial year exceeds 500, and on their balance sheet dates, exceed either a balance sheet total of EUR 20 million or a net turnover of EUR 40 million, the review shall also include a non-financial statement containing information relating to at least environmental, social, and employee matters, respect for human rights, and anti-corruption and bribery matters, including: (i) a description of the policy pursued by the company in relation to these matters; (ii) the results of these policies; (iii) the risks related to these matters and how the company manages those risks. Where a company does not pursue policies in relation to one or more of these matters, it shall provide an explanation for not doing so. In providing such information the company may rely on national, EU-based or international frameworks and, if so, shall specify which frameworks it has relied upon. *Id.*



A. *The Corporate Responsibility to Adopt a Policy against THB*

¶52 The first core element of the corporate responsibility to respect requires that corporations have a human rights policy expressing commitment to human rights in place. In the context of this article, this implies that corporations must adopt a policy aimed at preventing THB for the purpose of labor exploitation.

¶53 Guiding Principle 16 provides:

As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

- (a) Is approved at the most senior level of the business enterprise;
- (b) Is informed by relevant internal and/or external expertise;
- (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
- (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
- (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.<sup>68</sup>

¶54 This Guiding Principle focuses on rather procedural aspects such as who should approve the policy and how should it be adopted. It does not say much about the content of a corporate human rights policy. The content of such a policy will depend on the outcome of the other steps identified in the GPs, such as the process aimed at identifying and assessing the adverse human rights impact of the activities of a corporation, which will be discussed below. This makes it clear that the elements of the corporate responsibility to respect, and in particular the process of human rights due diligence, are to be approached in a holistic manner. In an ongoing process, a corporation must fulfill all elements.

¶55 Notwithstanding the fact that the content of a corporate policy aimed at preventing THB for labor exploitation depends on issues such as the identification and assessment of human rights risks, a few preliminary remarks are in order here concerning the question of what such a policy should imply from a normative perspective.

¶56 A policy concerning a commitment to prevent THB, first and foremost, should include that the corporation itself does not exploit persons, or, in the words of the AEPs, to establish a zero tolerance policy towards THB. This implies that corporations act in accordance with national laws prohibiting THB as well as with the prohibition in the Palermo Protocol. However, what the corporation can consider exploitation is not straightforward. Here, the difficulty in defining THB discussed in paragraph 2 becomes apparent again.<sup>69</sup> In Spain, for instance, every breach of a labor law toward a foreign

<sup>68</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, supra, note 22, at ¶ 15.

<sup>69</sup> In paragraph 2 it was discussed that a lack of clarity on the distinction between bad labor conditions, exploitation in the context of THB, and forced labor hampers a full understanding of these phenomena since they are not well defined, overlap, and may be differently understood by scholars and practitioners. This makes it difficult for corporations to adopt an anti-trafficking policy.

citizen is considered exploitation, whereas in the Netherlands, the scope of exploitation is more narrowly defined in case law.<sup>70</sup> Some States have criminalized forced labor or slavery apart from THB. This means that a situation of exploitation in one country might not qualify as such in another. This is not problematic *per se* as long as corporations follow national laws and these national laws adhere to the Palermo Protocol and the international human rights and labor law standards. However, when a company makes a commitment, they should be very precise and avoid general and vague terms that have various interpretations.

¶57 If national laws are absent or do not reflect the previously mentioned internationally accepted rights and standards, reference must be made to the international level where the ILO has established a solid body of core labor rights conventions. Additionally, the Declaration on Fundamental Principles and Rights at work and the Palermo Protocol, which provide the internationally agreed definition of THB, can be referenced. Given the definition of forced labor as explained above, any practice that limits the freedom of movement for employees and the right to leave employment willfully must be addressed in such a policy. Furthermore, dependency on the employer can be seen as an indication of possible exploitative practices (see also below in the context of the third element on integrating commitments and assessments), and therefore avoidance of such practices, like forms of debt-bondage, must be included in such an anti-trafficking policy. The AEPs draw attention to the prohibition of excessive recruitment fees as a practice that facilitates a situation of dependency, either from the employer or a third person.

¶58 Regarding the measures addressed to suppliers and affiliates, it was explained previously that the corporate responsibility to respect reaches beyond the activities of the core company to include harmful activities of affiliates and of business relations, including those down the supply chain. In other words, in the context of the current topic, it implies that a corporation has to have a human rights policy in place that aims not only to prevent involvement of the company itself in THB, but also to prevent subsidiaries and other businesses they are associated with from being involved in such practices. According to the SRSG, there are two factors that are relevant in shaping the corporate responsibility to respect down the supply chain: leverage and the question whether the supplier is to be considered crucial.<sup>71</sup> This interpretation of the scope of the corporate responsibility to respect is far reaching and has for that reason been criticized. The PRR Framework and the GPs remain silent on how the expansion of the corporate responsibility to respect beyond the activities of the core company relates to other legal concepts such as the principle of the separation of legal entities.<sup>72</sup> It is problematic from a

<sup>70</sup> Conny Rijken, *Challenges and Pitfalls in Combating Trafficking in Human Beings for Labour Exploitation*, in *COMBATING TRAFFICKING IN HUMAN BEINGS FOR LABOUR EXPLOITATION* 393 (Conny Rijken, ed., 2011).

<sup>71</sup> A crucial supplier is one that provides an essential product or service for which no other reasonable alternative source exists. See SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON HUMAN RIGHTS AND TRANSACTIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, *CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS IN SUPPLY CHAINS* 3 (June 30, 2010), <http://www.oecd.org/investment/mne/45535896.pdf>.

<sup>72</sup> For more on this shortcoming in the PRR Framework and the GPs, see Radu Mares, *Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights*, in *SIEGE OR CAVALRY CHARGE? THE UN MANDATE ON BUSINESS AND HUMAN RIGHTS* 2-3 (Radu Mares ed., 2011).

legal perspective to simply state that a corporation bears the responsibility for the actions of all corporations it is associated with. Mares argues that the PRR Framework and GPs, by not addressing the legal foundation of this far-reaching responsibility, face a “real danger that this part [of the responsibility to respect] will come to be seen as merely aspirational rather than having the imperative character given to the [responsibility to respect] by its definition as ‘the baseline expectation for all companies in all situations.’”<sup>73</sup>

¶59 In sum, according to the PRR Framework and the GPs, corporations carry the responsibility to adopt a human rights policy aimed at preventing THB by its affiliates. The fact that the SRSB has not articulated how this responsibility relates to other legal concepts which it seems at odds with, and to what extent there is solid legal ground to consider this a corporate obligation—for instance, in the case of prevention of slavery—runs the risk that this will remain a mere aspiration. Despite these flaws in the PRR Framework, a certain level of responsibility for activities down the supply chain can no longer be denied. This was confirmed in the debates after the collapse of the Rana Plaza building, which housed garment factories in Dhaka, Bangladesh on April 24, 2013, and where at least 400 people died.<sup>74</sup> In relation to the responsibilities down the supply chain, the AEPs include it under their zero tolerance policy that all employers, including those working in affiliated businesses, receive an orientation on the standards and that the policy is part of the contracts with the corporations they do business with. In addition, transparency for the labor recruiters, contractors, and sub-contractors must be part of an anti-trafficking policy.

¶60 An example of responsive action down the supply chain is the Fair Labor Association (“FLA”), which promotes, for instance, the use of contracts between the various actors in the supply chain in which they agree to respect human rights. Again, however, the legal foundation of such responsibility and to what extent this can be considered an obligation is absent. As explained previously, in the area of conflict minerals, legislation has been adopted—the Dodd-Frank Act, which is more demanding than anything currently in place concerning the fight against THB.

¶61 The first legislative initiative dealing with the role of corporations in relation to THB for labor exploitation, the California Transparency Act, does not include the responsibility to adopt a human rights policy as laid down in the GPs. The Act does not require corporations to adopt such a policy, but merely mandates corporations to communicate what, if anything, they are doing in this field.<sup>75</sup> The importance of communicating a human rights policy is acknowledged in GP 16. The commentary to this GP states: “[t]he statement of commitment should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations . . . and, in the case of operations with significant human rights risks, to the potentially affected stakeholders.”<sup>76</sup>

<sup>73</sup> *Id.* at 24.

<sup>74</sup> *Disaster at Rana Plaza*, THE ECONOMIST (May 4, 2013), <http://www.economist.com/news/leaders/21577067-gruesome-accident-should-make-all-bosses-think-harder-about-what-behaving-responsibly>.

<sup>75</sup> California Transparency in Supply Chains Act, *supra* note 58, at 1-2.

<sup>76</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra*, note 22 at ¶ 15.

¶62 In sum, the first element of the corporate responsibility to respect implies that corporations adopt a human rights policy that, firstly, states their commitment to live up to national and international standards aimed at combating THB. Secondly, business partners down the supply chain and business affiliates must come within the ambit of the human rights policy. At least, where it concerns the prevention of violations of a *jus cogens* nature, the policy must include a human rights due diligence process. The human rights policy must be made publicly available and actively communicated to business relations and other stakeholders.

*B. Assessment of Actual and Potential Human Rights Impact*

¶63 The second core element of the corporate responsibility to respect, part of the responsibility to act with due diligence, concerns the responsibility to assess the adverse human rights impact of corporations' activities. This element of the responsibility is operationalized in Guiding Principle 18, which states that:

[i]n order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- (a) [d]raw on internal and/or independent external human rights expertise;
- (b) [i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders ....<sup>77</sup>

¶64 Translating this responsibility to the topic of this article, it points at assessing the actual and potential impact of corporate activities on THB for labor exploitation.

¶65 The commentary to GP 18 states that prior to any business activity the corporations must:

find out the specific impacts on specific people, given a specific context of operations. Typically, this includes . . . identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impact on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the differences that may be faced by women and men.<sup>78</sup>

¶66 In the context of preventing THB, this requires special attention be paid to the potential impact of corporate activities on groups vulnerable to exploitative practices such as undocumented migrants, Stateless persons, people from minority groups, minors and young people, and disabled people. Corporations should study whether their

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<sup>77</sup> *Id.* at ¶ 17.

<sup>78</sup> *Id.*

operations will possibly conflict with national standards that are set in migration law, refugee law, minority protection laws, etc. Corporate activities that are particularly subject to scrutiny from the perspective of THB are those activities not necessarily directly related to labor law, which increase the level of dependency of the worker on the employer. Examples of such activities are: housing arranged by employer, transport to work, sleeping on work premises, and medical care arranged by the employer. This creates a dependency of the workers on their employer reaching beyond the work sphere and creates an increased vulnerability to exploitative practices. The ILO has identified a set of indicators of exploitative practices, which might be helpful for corporations to identify and assess risks and generally give guidance in establishing a THB preventive policy.<sup>79</sup>

¶67 In addition, the groups at risk may be country specific or even determined locally. To that end, the assessment should be country specific as well, reflecting the vulnerability risks in the particular country or area. Input for such an assessment by external and local THB experts is therefore inadmissible. The GPs stress the focus of any due diligence activity on rights holders. According to the commentary to GP 17, “[h]uman rights due diligence can be included within broader enterprise risk-management systems, provided it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.”<sup>80</sup> In other words, a corporation must seek to answer the question of what risk exists for people falling victim to trafficking as a consequence of its business activities. It should be noted that not only business activities might increase the likelihood of trafficking taking place, but also the policies adopted to combat the crime might have an unintended negative impact on human rights.

¶68 Recently, there is increasing concern as to whether anti-trafficking measures based on a human rights approach have the desired effect. This is particularly true if such an approach takes the protection rather than the agency of the victim as the sole reference point for initiating activities.<sup>81</sup> It has been stated by the Global Alliance Against Trafficking in Women (“GAATW”) that counter-trafficking measures might have positive consequences for the person directly addressed, but can have negative side effects for others.<sup>82</sup> Examples of such measures are the requirement of cooperation before a victim can make use of protective measures, criminalization and regularization of sex work, restrictive migration laws that also prevent people from leaving a violent or abusive situation, and shelters in countries of origin that can easily be approached by traffickers and can be stigmatizing. Some of these measures can facilitate abusive practices, for example by corporations, and must be taken into account when assessing actual and potential THB impacts of corporations.

<sup>79</sup> INT’L LABOUR ORG., OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS 3 (2009), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_105023.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf).

<sup>80</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra*, note 22 at ¶ 16.

<sup>81</sup> GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 8 (2007), [http://www.gaatw.org/Collateral%20Damage\\_Final/singlefile\\_CollateralDamagefinal.pdf](http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 107 (2012).

<sup>82</sup> GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, *supra* note 81.

¶69 Surprisingly, neither the AEPs nor the Luxor Protocol prescribe a risk assessment for the company itself, but point 5 of the AEPs requires such an assessment for a company's business partners and suppliers.<sup>83</sup> The activities to monitor the supply chain are concretized and include, among other activities, the promotion of agreements and codes of conduct with the suppliers, auditing by independent bodies when using products from a black list and publishing of the auditing results, and blacklisting of sub-contractors known for abusive practices.

¶70 The California Transparency Act does not address this dimension of the corporate responsibility to respect: the responsibility to assess actual and potential impact. As mentioned previously, the Act does not require corporations to adopt a policy. It merely requires communicating about any policy they have adopted.<sup>84</sup>

¶71 In sum, the second element of the corporate responsibility to respect requires corporations to identify areas within their business or their business relationships where THB might occur and assess the questions whether and to what extent their operations contribute to the crime of THB. Moreover, and this shows the ongoing nature of the corporate responsibility,<sup>85</sup> corporations must assess whether the counter-measures they adopt negatively impact human rights. The outcome of this part of the corporate responsibility gives impetus for the development of an anti-trafficking policy required under the first element as well as the third element of the PRR Framework that will be discussed in the following section.

### *C. Integrating Commitments and Assessments Into Internal Control and Oversight Mechanisms*

¶72 The third core element of corporate responsibility to respect logically follows the former two, and concerns the responsibility to integrate commitments and assessments into internal control and oversight mechanisms.

¶73 According to Guiding Principle 19, corporations, in order to prevent and mitigate adverse human rights impact, must:

integrate the findings from their impact assessment across relevant internal functions and processes and take appropriate action.

(a) Effective integration requires that:

(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

(ii) Internal decision-making, budget allocation and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to;

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is

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<sup>83</sup> Point 5 of the AEPs states that corporations need to encourage business partners, including suppliers, to apply ethical principles against human trafficking. *Athens Ethical Principles*, *supra* note 56.

<sup>84</sup> California Transparency in Supply Chains Act, *supra* note 58.

<sup>85</sup> Human rights due diligence needs to be conducted at "regular intervals." *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 22, at ¶ 18.

directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the impact.<sup>86</sup>

¶74 THB preventive strategies from all parts of a company must be integrated in an overall policy that must be subject to internal control mechanisms. Such policy must be adopted on all levels of the hierarchical chain. This element very much relates to the implementation of a human rights policy and the holistic character of such a policy.

¶75 What does this mean for the policy corporations must have in place aimed at the prevention of exploitative practices? Here again a distinction must be made between preventive measures *vis-à-vis* its own employees and preventive measures *vis-à-vis* suppliers and affiliates. To start with the first, prevention of exploitative practices by the business enterprise itself can only be achieved if workers are well aware: of their position, their rights and obligations, and possibilities to change such situations. In that regard, corporations have a responsibility to ensure that workers are well informed and aware of the national labor laws. Many practices and acts of the business enterprise can contribute to this, such as obligatory representation of employees within a country, obligation to allow people from trade unions to talk to employees, obligatory and unannounced visits from labor inspectors, transparency on payment policy, labor rights education for employers and for managers within a business enterprise or for self-employed persons when they want to register at the chamber of commerce, and training for managers on prevention of THB. Many of these aspects are included in the AEPs, which additionally focus on monitoring compliance. Adopting and implementing such activities requires a fundamental change in mentality for employers and is not easily achieved. States must be creative to challenge corporations to make this mental shift.

¶76 Where a corporation does not potentially cause an adverse impact on human rights but possibly contributes to such an impact through its business relationships, it should, according to the commentary to GP 19, take the necessary steps “to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.”<sup>87</sup> As mentioned previously, the corporate responsibility to respect, and therefore also this element of integrating commitments and assessments into internal control and oversight mechanisms, extends beyond the corporation to all business relations. In the commentary to GP 19 it is acknowledged that this responsibility is complex in situations where the corporation is not directly causing or contributing to the adverse human rights impact, but rather is linked to it by the operations, products, or services of a business relation.<sup>88</sup> The commentary lists several factors that enter into the determination of what constitutes appropriate action in such a case, *inter alia*, leverage, how crucial the relationship with the business entity is, and *the severity of the abuse*.<sup>89</sup> In other words, where a corporation runs the risk of becoming linked to a severe human rights violation such as with THB, there will be a strong responsibility to extend oversight mechanisms to prevent this crime

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<sup>86</sup> *Id.* at ¶ 19.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

to business relations. In this regard, the example given above on the Fair Labor Association might be illustrative.

¶77 According to the commentary, in case a corporation lacks leverage, it should aim to enhance it, and if that is not possible, the corporation should consider ending the relationship. The commentary states: “the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship.”<sup>90</sup> Again, given the gravity of the crime of THB, corporations will need to see swift change in the operations of business relations that are causing THB. Otherwise, ending the relationship will be considered the appropriate action.

¶78 As mentioned above, the AEPs give detailed guidance to corporations regarding their behavior towards businesses down the supply chain. In addition to the activities mentioned above in section V.B, it requires the companies in the supply chain to develop a training module on trafficking and trafficking-related aspects for all employers and the monitoring of all measures in place to prevent THB.

¶79 The responsibility to integrate commitments and assessments into internal control and oversight mechanisms is also included in the California Transparency Act. Several provisions are relevant for this dimension of the corporate responsibility to respect. Subdivision (c), section 4 of the Act states that corporations should maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.<sup>91</sup> Strictly speaking, this provision falls within the remit of remediation (the third element of the PRR Framework), but because it is so closely linked to the element of internal control it is worth mentioning this aspect of the California Transparency Act.

¶80 Section 5 of the California Transparency Act requires that company employees and management, who have direct responsibility for supply chain management, receive training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chain of products,<sup>92</sup> giving another clear example on how commitments can be integrated.

¶81 In sum, corporations carry the responsibility to integrate commitments and assessment horizontally throughout the oversight and control mechanisms of the corporation to prevent causing or contributing to THB through labor exploitation. Given the gravity of the crime, this oversight and control will have to incorporate businesses to which the corporation is linked to by means of services or products—the vertical aspect of this element.

#### *D. Tracking and Reporting Performance*

¶82 The fourth core element of corporate responsibility to respect concerns the responsibility to track and report on performance.

¶83 According to Guiding Principle 20, in order to verify whether adverse human rights are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

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<sup>90</sup> *Id.*

<sup>91</sup> California Transparency in Supply Chains Act, *supra* note 58.

<sup>92</sup> *Id.*



- (a) be based on appropriate qualitative and quantitative indicators;
- (b) draw on feedback from both internal and external sources, including affected stakeholders.<sup>93</sup>

¶84 In relation to corporate activities, the effect of their policy on THB must be disclosed. One way to measure the effect in absolute terms is counting the number of victims, since a successful THB-preventive strategy would cause a decrease in the number of victims. The problem is, however, that no reliable figures on the number of exploited persons or victims of human trafficking are available, and a referral mechanism for trafficking victims does not exist in many countries. In those countries where such mechanism exists, it is believed that only a small number of the victims are identified or registered and become known to the authorities.<sup>94</sup>

¶85 Only rarely are businesses convicted of THB. Therefore they can easily say that it does not exist within their company. Logically, corporations do not want to be associated with exploitative practices, and some consider THB-preventive actions as a confirmation that such practices occur within their business or sector. Here, the difficulty is to convince employers and managers of the THB risks in their businesses in the first place, to encourage them to take action, and finally to visualize the impact of their actions. However, if there are no hard figures on the existence or risks of THB in their businesses, it appears to be hard to measure the impact of these actions by looking at the number of victims. Therefore other ways must be employed to measure the potential impact.

¶86 To that end, and based on GP 20, in order to measure the human rights impact, corporations must include measurable indicators as to human rights.<sup>95</sup> These indicators include the aims to be achieved by the human rights policy in concrete terms. These indicators can then serve to fulfill the responsibility to assess the human rights impact in general and on the prevention of THB in particular. Examples of such measurable indicators are the requirement that the council representing the employees will meet once a month during working hours, that the council has periodic meetings with the employer, that leaflets with payment policies are given to new employees and posted at a visible place at the workplace, and that no one below the age of eighteen is working in the corporation unless national law allows.

¶87 In relation to migrant workers, the *Dhaka Principles* devised by the Institute for Human Rights and Business in consultation with a broad range of stakeholders might be helpful to formulate measurable indicators to prevent exploitative practices.<sup>96</sup> Measurable indicators have been drafted by the ILO in 2009 and can be translated into measurable indicators for businesses. They include indicators on six dimensions of the trafficking definition: deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative conditions of work, coercion at destination, and abuse of

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<sup>93</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 22, at ¶ 20.

<sup>94</sup> THEDA KRÖGER ET. AL., NATIONAL REFERRAL MECHANISMS. JOINING EFFORTS TO PROTECT THE RIGHTS OF TRAFFICKED PERSONS, A PRACTICAL HANDBOOK 8 (Peter Eicher ed. 2004)

<sup>95</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 22, at ¶ 20.

<sup>96</sup> *Dhaka Principles: For Migration With Dignity*, INST. FOR H. RTS. AND BUSINESS (December 18, 2012), <http://www.dhaka-principles.org/pdf/2012-12-18-Dhaka-Principles-Long-Version-English.pdf>.

vulnerability at destination.<sup>97</sup> Each indicator within these six dimensions is qualified as either strong, medium, or weak.<sup>98</sup> The operational indicators are a good starting point for drafting the measurable indicators for corporation. The AEPs require monitoring and verification based on independent metrics but do not indicate how such monitoring would take place in practice, although it gives some guidance for monitoring the supply chain.

¶88 In relation to the human rights impact of affiliates and suppliers, corporations must undergo a comparable exercise and include measurable indicators in the THB-preventive policy. Although the ILO operational indicators of THB might be helpful to address a corporation's own activities, it does not provide for such indicators in relation to activities of corporations in the supply chain or affiliates.

¶89 Not only should a corporation track and internally report on the impact of their policies, they should also be prepared to communicate the outcome externally. Or to use the words of the SRSG, "it is not only about knowing, it is also about showing."<sup>99</sup>

¶90 Guiding Principle 21 provides that:

to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders.

Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

Be a form and frequency that reflects an enterprise's human rights impacts and that are accessible to its intended audiences;

Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.<sup>100</sup>

¶91 This element concerning external communication should be considered of vital importance for compliance with the corporate responsibility to respect. As mentioned previously, the corporate responsibility to respect is of a non-legally binding nature. Rather, it depends on societal expectations to prompt corporations to live up to their responsibilities. The PRR Framework and the GPs have been criticized for not providing the necessary tools for stakeholders to monitor what corporations are doing.<sup>101</sup> The GPs only expect formal reporting in cases where there is a risk of severe human rights impacts. It is however not clear who is to determine when that is the case.

<sup>97</sup> INT'L LABOUR ORG., *supra* note 79, at 3.

<sup>98</sup> *Id.*

<sup>99</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 22, at ¶ 15.

<sup>100</sup> *Id.* at ¶ 21.

<sup>101</sup> *See, e.g.*, TARA J. MELISH & ERROL MEIDINGER, PROTECT, RESPECT, REMEDY AND PARTICIPATE: 'NEW GOVERNANCE' LESSONS FOR THE RUGGIE FRAMEWORK (Radu Mares ed. 2011); NICOLA JÄGERS ET. AL., HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO PROTECT (Surya Deva & David Bilchitz eds.) (forthcoming Nov. 2013); *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *supra* note 22.

¶92 Transparency is crucial for the prevention of THB as to labor exploitation. The outside world, especially the consumer, needs to be able to monitor whether corporations are living up to their responsibility with respect to this field. However, the effect of informing consumers must not be overestimated. The enormous increase in certificates for fair trade for various products has led to overkill, which is not to the benefit of informed consumers. Moreover, the duty of the State to give incentives to corporations, and the responsibility for corporations in the field of human rights, including THB, should not be shifted solely on to the shoulders of consumers. One simply cannot expect the consumer to be informed of all rules and regulations that come with certification or information on obligations. This does not take away from the importance of transparency of corporate policy on THB-preventive strategies. Other stakeholders such as governments, monitoring bodies, and consumer organizations can build on information provided by the corporations to shape their activities.

¶93 The California Transparency Act and the proposed HR 2759 do not require corporations to put policies combating slavery and THB in place. Strictly speaking, corporations will be living up to their obligations if they simply state that they have no such policies. However, these laws do give consumers the possibility of reading on the website of corporations (or in their annual reports) what, if anything, they are doing to eradicate THB. There are no guidelines on how they must report, if they do, and what information must be provided. The aforementioned Dodd-Frank Act is more demanding and implies an obligation to perform a due diligence research if it is unclear whether minerals from their suppliers originate from DRC or adjoining States, submit reports on this to the SEC, and publish these reports on their corporate websites.

¶94 Transposing such an obligation to the context of the prevention of THB would imply that corporations show they live up to the internationally agreed standards and that they check labor conditions in the corporations down the supply chain. They have to be transparent on payment policy, representation of employees, education policy, and complaint procedures for employees, etc. Implementing the corporate responsibility to respect in this way is important in light of providing information to stakeholders that are designated in the PRR Framework to act as gatekeepers of the corporate responsibility to respect. Only if and when stakeholders know about (the lack of) a corporate policy on the prevention of THB will these stakeholders be able to put pressure on the corporation to live up to its responsibility.

¶95 In sum, in order to prevent THB for labor exploitation, corporations should not only know about the impact of their preventive policies, they should also show the results. This needs to be done both internally and externally allowing for stakeholders to monitor if and how a corporation is complying with its responsibility in this context. In order to live up to their obligation to protect, States should provide incentives to corporations to disclose such information and if needed should oblige corporations to take action to that end.

## VI. CONCLUSION

¶96 THB for labor exploitation is a severe crime taking place on a massive scale and violating a range of basic human rights. According to the international legal framework, States are obliged to combat it. To effectively combat this crime, multidisciplinary and multilevel action must be taken, including at the business level. The U.N. Protect,

Respect, and Remedy Framework and Guiding Principles provide an authoritative focal point on the issue of business and human rights. In this article, an attempt is made to operationalize the PRR Framework and the GPs on business and human rights in relation to the prevention of THB for labor exploitation. To that end, four elements of the corporate responsibility to respect human rights were identified and translated to the context of THB for labor exploitation. Legislative and policy initiatives specifically addressing corporate responsibility in the field of THB were utilized to provide guidance to corporations to develop a preventive strategy in this field. Moreover, the analyses flesh out what the State duty to protect implies in this context.

¶97 THB may amount to slavery-like practices. It is argued that the *jus cogens* character of such a crime provides legal ground both for States to interfere in corporations' policies and for corporations to take action on the matter of THB. The peremptory norm that is violated in the case of some forms of THB implies a legal obligation on the part of both States and corporations and, in this context, fills the legal vacuum identified in the PRR Framework and GPs regarding the lack of legal basis for the corporate responsibility to respect. The State duty to protect and the corporate responsibility to respect in relation to the prevention of THB are linked and mutually affect each other. States should take action *vis-à-vis* corporations to oblige corporations to adopt preventive policies for THB and *vis-à-vis* corporations that do not take their responsibility and obligations seriously. As such, the corporate responsibility to respect human rights in the context of THB is translated into a legal obligation.