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DIGNITY AT WORK: WHY IS INTERNATIONAL LAW FIT FOR THE JOB?

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Résumé de l'article

Cet article vise à démontrer que malgré les efforts déployés par la communauté internationale pour enrayer l'esclavage et les pratiques s'apparentant à l'esclavage tel le travail forcé, celles-ci ne cessent de se multiplier dans le monde. Il sera soumis que dans les pires cas, les conditions de travail que l'on retrouve dans les ateliers de misère correspondent à la définition des formes contemporaines de l'esclavage et des pratiques s'y apparentant. Afin d'éradiquer ce genre de conditions de travail, il sera proposé que les mesures volontaires adoptées par les entreprises multinationales sont insuffisantes et que des mesures plus coercitives sont nécessaires. En effet, comme soumettre des travailleurs aux conditions de travail qui prévalent dans les ateliers de misère peut entraîner la commission d'un crime international, les entreprises multinationales et leurs cadres devraient être poursuivis pour répondre de leurs actes. Cet article veut aussi démontrer qu'il serait possible d'enrayer les ateliers de misère en se servant des concepts développés par le droit pénal international. De plus, des initiatives nationales comme l'ATCA ou RICO aux États-Unis pourraient être entreprises par d'autres pays afin de contrer les problèmes engendrés par la structure corporative et dédommager les victimes des ateliers de misère.

DIGNITY AT WORK: WHY IS INTERNATIONAL LAW FIT FOR THE JOB?

Geneviève Lafond[*]

This article aims to demonstrate that despite the international community's best efforts to eradicate slavery and slavery-like practices, such as forced labour, these phenomenons are still on the rise today. It will be shown that sweatshop conditions, in the worst of cases, fit the definition of modern forms of slavery and slavery-like practices. Moreover, it will be demonstrated that voluntary measures adopted by multinational corporations are insufficient and more coercive measures need to be taken. Indeed, as submitting workers to sweatshop conditions can amount to the committing of an international crime, corporations and Corporate Executive Officers engaging in these practices should be prosecuted for doing so. This article seeks to demonstrate that the eradication of sweatshops could be achieved by using concepts developed by international criminal law. Additionally, other countries could adopt national measures (like the U.S.A.'s ATCA and RICO) in order to avoid problems raised by corporate structure, as well as adequately compensate the victims of sweatshop labour.

Cet article vise à démontrer que malgré les efforts déployés par la communauté internationale pour enrayer l'esclavage et les pratiques s'apparentant à l'esclavage tel le travail forcé, celles-ci ne cessent de se multiplier dans le monde. Il sera soumis que dans les pires cas, les conditions de travail que l'on retrouve dans les ateliers de misère correspondent à la définition des formes contemporaines de l'esclavage et des pratiques s'y apparentant. Afin d'éradiquer ce genre de conditions de travail, il sera proposé que les mesures volontaires adoptées par les entreprises multinationales sont insuffisantes et que des mesures plus coercitives sont nécessaires. En effet, comme soumettre des travailleurs aux conditions de travail qui prévalent dans les ateliers de misère peut entraîner la commission d'un crime international, les entreprises multinationales et leurs cadres devraient être poursuivis pour répondre de leurs actes. Cet article veut aussi démontrer qu'il serait possible d'enrayer les ateliers de misère en se servant des concepts développés par le droit pénal international. De plus, des initiatives nationales comme l'ATCA ou RICO aux États-Unis pourraient être entreprises par d'autres pays afin de contrer les problèmes engendrés par la structure corporative et dédommager les victimes des ateliers de misère.

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"*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*"

- Universal Declaration of Human Rights, Art. 1

During the 18th century, Immanuel Kant, the great German philosopher, developed a theory of morals and ethics based on the intrinsic value of each human being. Kant argued that one should always treat others with respect and never as a means to an end.[1] Kant's ideas of Enlightenment condemned the use of human beings as mere tools. These ideas also served as the founding argument for the anti-slavery movement's fervent support of the abolishing of slavery and the slave trade. The anti-slavery movement began in England. It was endorsed by evangelical leaders, as well as figures of the Enlightenment. The abolition of the Transatlantic Slave Trade was secured by the British government and undertaken by its powerful naval force. Officially, the slave trade was abolished in every jurisdiction by 1888, Brazil having been the last country to adopt a *Golden Law*[2] outlawing it. Ever since, the international community has produced numerous documents prohibiting slavery, although it is still persistent in almost every part of the world.[3] Indeed, a lot still needs to be done to *free* the world**.** Nowadays, slavery and slavery-like practices such as forced labour take multiple forms. Sweatshop conditions, in the worst of cases, are one of them.

Since the 1980s, scandals of multinationals abusing human rights have attracted public attention. Dozens of companies have been put under the spotlight for underpaying their employees and preventing free unionisation. This media attention has prompted many non-governmental organizations to campaign for the boycott of certain products and brands. The end of the last century has also given rise to the anti-sweatshop movement. Activists have campaigned to raise public awareness pertaining to the horrendous conditions of clothing factories. Demonstrations outside retailers' outlets such as Gap, Disney, Nike and Victoria Secret captured public attention and provoked a number of necessary changes from big brands.[4]

Unfortunately, very little is currently done to prevent human and labour rights abuses by corporations that make use of sweatshops. Consumer pressure and self-imposed codes of conduct have failed to eliminate sweatshops. In the following text, it will be argued that sweatshop conditions fit the definition of modern forms of slavery and slavery-like practices such as forced labour and that corporations and

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1 For a discussion on this issue see Immanuel Kant, *The Foundation of the Metaphysics of Morals*, 2nd ed (New York: Macmillan, 1990); Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991).

2 Joel Quirk, "The Anti-Slavery Project: Linking the Historical and Contemporary" (2006) 28 Hum Rts Q 565 at 580-84.

3 International Labour Office, *A Global Alliance Against Forced Labour: Results and Methodology* (Geneva: International Labour Office, 2012) at 17 [ILO, *Results and Methodology*].

4 Iris Marion Young, "Responsibility and Global Labor Justice" (2004) 12:4 The Journal of Political Philosophy 365 at 367.

CEOs should be prosecuted for their breach of international law when using sweatshop labour. By doing so, the *remedy* aspect of the "Protect, Respect, and Remedy" framework, proposed by the U.N. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, would be fulfilled.[5]

I. Sweatshops Conditions are Fit for International Law

Although the definitions of slavery and forced labour have not changed much since their first enactment in 1926 and 1930, the practices corresponding to these definitions have evolved with time. Indeed, contemporary forms of slavery and slavery-like practices sometimes lack the element of ownership central to the traditional definition of chattel slavery. Therefore, determining what constitutes slavery and forced labour is not an easy task; tribunals have only attempted it in a very limited amount of cases. Despite these difficulties, one can safely assert that, in their worst cases, sweatshop conditions fit the definitions of modern forms of slavery and slavery-like practices such as forced labour.

A. Slavery and Forced Labour: Two Similar, Albeit Distinct Concepts

Despite the international community's best efforts to outlaw slavery and slavery-like practices,[6] their occurrence is still prevalent throughout the world.[7] While the definition of slavery and forced labour have not changed much through years of work on the subject, so-called contemporary forms of slavery are slightly different from the classical forms. A major difference lies in the fact that these contemporary forms of slavery and forced labour are confined to the underground world. They are no longer practiced with the approval of governments. Consequently, their occurrence is hard to assess. Tools to determine their existence have been refined over the past decade.[8] Given the multiple evaluations of their occurrence, as globalization unfolds, the number of victims seems to be on the rise. The examination of ownership claims and coercion are at the forefront of debates in this field. Commentators are of differing opinions as to whether contemporary manifestations actually fit a formal definition of slavery and slavery-like practices.

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5 Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNESCOR, 2011, UN Doc A/HRC.17/31 at 6.

6 See International Labour Office, *Giving Globalization a Human Face: Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: International Labour Office, 2008) [ILO, *Giving Globalization a Human face*].

7 ILO, *Results and Methodology*, *supra* note 3 at 17.

8 *Ibid* for more on this topic.

1. Attempting to Outlaw Slavery and Forced Labour

In 1815, the *Declaration Relative to the Abolition of the Slave Trade*[9] was adopted at the Vienna Conference. It was the first international instrument prohibiting slavery ever adopted. At the time, the anti-slavery movement was campaigning for the abolition of the Transatlantic Slave Trade and the freeing of slaves in Europe and the United States. Although the main goal of the Conference was the redistribution of French territorial conquests, England, France, Prussia, Russia and Austria were all moved by abolitionist ideals and agreed to adopt the Declaration. It is estimated that between 1815 and 1957, over 300 international agreements were adopted to suppress slavery both in times of war and peace.[10] Unfortunately, none of them has succeeded in abolishing slavery completely.

Nowadays, as a well established principle of international law, the prohibition of slavery and slavery-like practices, such as forced and child labour, has attained the status of *jus cogens*.[11] Indeed, in 1971, the International Court of Justice identified the prohibition of slavery as an "*obligations erga omnes arising out of human rights law.*"[12] Therefore, as an "*inderogable*"[13] norm, "*In view of the importance of the rights involved, all States can be held to have a legal interest in their protection*".[14] At present, slavery and, slavery-like practices are constitutive of:

> *(a) a* "*war crime*" *when committed by a belligerent against the nationals of another belligerent;*
>
> *(b) a* "*crime against humanity*" *when committed by public officials against any person irrespective of circumstances and diversity of nationality;*
>
> *(c) a common international crime when committed by public officials or private persons against any persons*.[15]

The main instrument relating to the prohibition of slavery was adopted by the League of Nations in 1926. The *Convention to Suppress the Slave Trade and Slavery* defines slavery as "*the status or condition of a person over whom any or all of the powers of the right of ownership are exercised.*"[16] The 1926 Slavery Convention criminalizes the practice of slavery by establishing a duty to prosecute any violation of the act.[17] The notion of ownership appears to be a *sine qua non* condition, required to prove slavery. However, according to Allain, this is not totally accurate. In fact,

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9 *Declaration Relative to the Abolition of the Slave Trade*, 8 February 1815, CTS 63 at 473.

10 OHCHR, *Abolishing Slavery and its Contemporary Forms* (New York: United Nations, 2002).

11 Cherif Bassiouni, "Enslavement as an International Crime" (1990-1991) 23 NYUJ Int'l L & Pol 445 at 445.

12 *Barcelona Traction, Light and Power Co, Ltd (Belgium* v. *Spain)*, [1971] ICJ Rep 1 at 32.

13 Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (Automn 1996) 59:4 Law & Contemp Probs 63 at 63.

14 *Barcelona Traction*, *supra* note 12 at 32.

15 Cherif Bassiouni, *supra* note 11 at 448.

16 *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) as amended by *Protocol Amending the Slavery Convention*, 7 December 1953, 182 UNTS 51 (entered into force 7 December 1953) art 1. There are currently 99 parties to this Convention.

17 *Ibid* art 6.

this definition of slavery encompasses both slavery *de jure* and slavery *de facto*. Slavery *de jure* occurs when an individual possesses another person and has the legal right to buy or sell the said person. Slavery *de facto* happens when **powers attached** to the right of ownership are exercised, hence, it "*does not entail the legal right of ownership*".[18] The 1926 Slavery Convention's French definition describes these powers as "les attributs"[19]. Arguably, the French terms indicate that the 1926 *Slavery Convention* (not altered by the *Protocol Amending the Slavery Convention* adopted in 1953) includes both slavery *de facto* and slavery *de jure*.[20] Weissbrodt and Anti-Slavery International are of the same opinion:

> *By referring to "any or all the powers of ownership" in its definition of slavery, and setting forth as its stated purpose the "abolition of slavery in **all** of its forms" the Slavery Convention covered not only domestic slavery but also other forms listed in the Report of the Temporary Slavery Commission.*[21]

This understanding of the definition relates to the more modern manifestations of slavery; the same definition is included in the *Rome Statute for the ICC*.[22]

International law draws a line between the concept of slavery and the concept of forced labour. The 1926 Slavery Convention defines forced labour as a lesser evil, stating that it is merely undesirable. On the other hand, slavery is considered totally unacceptable.[23] This early instrument provides no definition of forced labour. The definition is found in the *Convention Concerning Forced or Compulsory Labour*[24] adopted in 1930 by the ILO. Article 2 defines forced labour as "*all work or service which is exacted from any person by the menace of any penalty and for which the said person has not offered himself voluntarily.*"[25] From these definitions, one can assume that slavery and forced labour are two different concepts as forced labour lacks the element of ownership, a fundamental element for the establishment of slavery. Nonetheless, both practices inflict "*a similar degree of restriction on the individual's freedom – often through violent means, making forced labour similar to slavery in its effect on the individual.*"[26]

The Convention on Forced Labour calls for the eradication of "*forced or compulsory labour within the shortest possible period."*[27] It also creates certain

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18 Jean Allain, "The Definition of Slavery in International Law" (2008-2009) 52 How LJ 239 at 258 and 261.

19 *Convention to Suppress the Slave Trade and Slavery*, *supra* note 16 art 1.

20 Jean Allain, *supra* note 18 at 262.

21 David Weissbrodt & Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, 2000, UN Doc E/CN4/Sub.2/2000/3 at 5 [Weissbrodt & Anti-Slavery International].

22 *Rome Statute of the International Criminal Court*, 7 July 1998, UN Doc A/Conf.183/0/1988 art 2 c).

23 Cherif Bassiouni, *supra* note 11 at 468.

24 *Convention Concerning Forced or Compulsory Labour (No. 29)*, 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932). [*Convention on Forced Labour*].

25 *Ibid*.

26 David Weissbrodt & Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms,* 2002, HR/PUB/02/4 at 12.

27 *Convention on Forced Labour*, *supra* note 24 art 1.

exceptions of acceptable forced labour. In order to be considered legally acceptable, work must have been exacted "from the authority" for the benefit of the community, and it must have been impossible to have this work completed under normal hiring practices.[28] The Convention lists a number of obligations, notably regarding minimum wage and rest periods. Essentially, as much as possible, the forced labour must compare to voluntary employment.[29] The Convention also states that forced or compulsory labour cannot be used by private individuals, "companies" or association.[30]

In 1957, the ILO adopted the *Convention Concerning the Abolition of Forced Labour*.[31] It provides the same definition of forced labour but limits the exceptions set by its 1930 counterpart. Article one states that member states must suppress and refrain from exacting forced or compulsory labour for the following reasons: political coercion, education or punishment for political views, punishment for participation in strikes, economic development, as a means of labour discipline or discrimination for racial, social, national or religious reasons.[32] Both the *Convention Concerning Forced or Compulsory Labour* and the *Convention Concerning the Abolition of Forced Labour* are part of the fundamental ILO Conventions, as determined by the *ILO Declaration on Fundamental Principles and Rights at Work* of 1998.[33] They are the most ratified conventions of all ILO instruments.[34] According to the Committee of Experts on the Application of Conventions and Recommendations:

> *The prohibition of the use of forced or compulsory labour in all its forms is considered now as a peremptory norm of international law on human rights; it is of an absolutely binding nature from which no exception is permitted.*[35]

The ILO stresses that the definition of forced labour is:

> *not defined by the nature of the work being performed (which can be either legal or illegal under national law) but rather by the nature of the relationship between the person performing the work and the person exacting the work.*[36]

The definition of forced labour implies two necessary elements: 'the menace of penalty' and 'involuntariness'. Hence, forced labour occurs when a person is subjected to coercion, whether physical or psychological, through the menace or actual imposition of penalties. Coercion is exercised in order to force individuals to

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28 *Ibid* arts 9 & 10.
29 *Ibid* arts 12-17.
30 *Ibid* art 5.
31 *Convention Concerning the Abolition of Forced Labour (No. 105)*, 25 June 1957, UNTS (entered into force 17 January 1959).
32 *Ibid* art 1.
33 *ILO Declaration on Fundamental Principles and Rights at Work*, 37 ILM 1237 (1998) (Annex revised 15 June 2010).
34 Convention no. 29 has been ratified by 175 member sates while Convention no. 105 has been ratified by 169 member states.
35 ILO, *Giving Globalization a Human face*, *supra* note 6 at 103.
36 ILO, *Results and Methodology*, *supra* note 3 at 19.

perform work that they would not have accepted under normal conditions, leaving them with no freewill. In practice, the menace of penalty can take on various forms. The most common includes threats of physical violence or death addressed to the victim or a family member, denunciations of irregular status to the immigration authorities and the confiscation of identity papers.[37] The threat of, or actual non-payment of wages in order to extract additional labour from workers is a practice that is widespread in sweatshops. The threat of dismissal following a worker's refusal to work long overtime hours is also extensively used. 'Involuntariness' is determined by analysing the process by which a person has entered labour. The most obvious cases of forced labour include situations in which a person is kidnapped and brought to a working site. In other situations, the individual enters forced labour through fraud and deceit, only realizing that the working conditions are not as expected and they then are unable to leave .[38]

According to the UN Special Rapporteur on contemporary forms of slavery, Gulnara Shahinian, "*Children are often treated by their employers as commodities – replaceable cheap labour to be thoroughly exploited*."[39] The situation prompted the ILO to adopt an additional fundamental convention. The *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182)*[40] was "*unanimously*"[41] adopted in 1999. Its purpose is the elimination of the worst forms of child labour. It includes "*all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour*".[42] The Convention describes the eradication of the worst forms of child labour as a "*universal absolute*".[43]

In addition to being specifically prohibited by targeted conventions, the prohibition of slavery and forced labour can be found in various international instruments. Indeed, the *Universal Declaration of Human Rights* (hereinafter *UDHR*) states that "*no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all of their forms.*"[44] When the *UDHR* was drafted, it was clear that forced labour was considered as a form of servitude.[45] Article 8 of the *International Covenant on Civil and Political Rights*[46] also prohibits slavery as well as

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37 ILO, *Giving Globalization a Human face*, *supra* note 6 at 111 and ILO, *Results and Methodology*, *supra* note 3 at 9.

38 Patrick Belser, Michaëlle de Cock & Farhad Mehran, *ILO Minimum Estimate of Forced Labour in the World* (Geneva: International Labour Office, 2005) at 8 [Belser, de Cock & Mehran].

39 *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, UN HRC, 2011, UN Doc A/HRC/18/30 at 5.

40 *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182)*, 17 June 1999, UNTS (entered into force 19 November 2000) [*Convention for the Elimination of the Worst Forms of Child Labour*].

41 ILO, *Giving Globalization a Human face*, *supra* note 6 at 187.

42 *Convention for the Elimination of the Worst Forms of Child Labour, supra* note 40 art 3.

43 ILO, *Giving Globalization a Human face*, *supra* note 6 at 187.

44 *Universal Declaration of Human Rights*, GA Res 217(111) UNGAOR, 3d Sess, Supp No 13 UN Doc A/810, (1948) art 4 [*UDHR*].

45 Weissbrodt & Anti-Slavery International, *supra* note 21 at 14.

46 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 8: 1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to

forced or compulsory labour subject to a few limited exceptions. According to article 4(2), the provision is non-derogable. In addition, the *International Covenant on Economic, Social and Cultural Rights* prohibits slavery and forced labour by recognizing "*the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.*"[47] Finally, the prohibition of slavery and forced labour is included in regional agreements such as the *European Convention for the Protection of Human Rights*,[48] the *American Convention on Human Rights*[49] and the *African Charter on Human and People's Rights*.[50]

2. Slavery and Forced Labour: Still on the Rise Today

According to the latest survey conducted by the ILO on the subject, it is estimated that 20.9 million people are victims of forced labour around the world. Of these, an estimated 18.7 million (90%) are exploited by private agents. Out of these, it

perform forced or compulsory labour; (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations..

47 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, GA Res 2200A, UN Doc A/6302 (entered into force 3 January 1976), art 6 (1).

48 *European Convention for the Protection of Human Rights and Freedoms*, (1955) 213 RTNU 221, art 4(1). No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour; For the purpose of this article the term forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.

49 *American Convention on Human Rights*, (1979) 1144 RTNU 123, art 6. Freedom from Slavery: 1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women; 2. No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner; 3. For the purposes of this article, the following do not constitute forced or compulsory labour: a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person; b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service; c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or d. work or service that forms part of normal civic obligations.

50 *African Charter on Human and People's Rights*, OAU Doc CAB/LEG/67/3, art 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

is estimated that 14.2 million "*are victims of forced labour exploitation, in economic activities such as agriculture, construction, domestic work and manufacturing.*"[51] Although one may find traces of forced labour in all regions of the world, its occurrence is particularly widespread in Asia and the Pacific as well as Latin America and the Caribbean and Africa[52]. Women and men are almost as likely to be coerced into forced labour by private agents as one another (40% for the former and 60% for the latter).[53] Another ILO report estimates that the "*total amount of unpaid wages to people in forced labour amounts to approximately US$19.6 billion.*"[54]

The rise of modern forms of slavery is attributable, at least partially, to economic globalization.[55] In fact, globalization has allowed for "*greater economic interdependence, deregulation and a dominance of the marketplace that includes a shifting of responsibilities from state to non-state actors.*"[56] Official corruption coupled with the fact that globalization helps multinationals to set up operations in less-developed countries which facilitate the lowering of labour standards and, consequently, makes the use of forced labour possible. Globalization has prompted this situation by heightening international competition, thus increasing pressure to cut costs including labour costs.[57] The trend towards subcontracting and the increasing changing in consumers' tastes also contributed to manufacturers allowing for outrageous working conditions to be upheld.[58]

a) Modern Forms of Slavery and Forced Labour: A difficult Definition

In recent years, the emergence of new forms of slavery has made the task of defining slavery and forced labour difficult. As the concept of legally owning a person is very rare nowadays, the idea of losing one's free will is more suited to the contemporary form of slavery than that of ownership.[59] The difference between slavery and forced labour is also losing its relevance since the ILO now considers slavery to be a form of forced labour.[60] According to Bales and Robbins, three elements must be analysed in order to determine whether slavery is occurring. These elements are:

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51 ILO, *Results and Methodology*, *supra* note 3 at 13.
52 *Ibid* at 16.
53 *Ibid* at 14.
54 International Labour Office. *The Cost of Coercion* (Geneva: International Labour Office, 2009) at 32.
55 Eddy Lee, "Globalization and Labour Standards: A Review of Issues" (1997) 136 Int'l Labour Review 173 at 175 [Lee].
56 A Yasmine Rassam, "International Law and Contemporary Forms of Slavery: An Economic and Social-Based Approach" (2005) 23:4 Penn St L Rev 809 at 825 [Rassam, "International Law and Contemporary Forms of Slavery"].
57 Lee, *supra* note 55 at 175.
58 International Labour Office, *A Global Alliance Against Forced Labour* (Geneva: International Labour Office, 2005) at 52 [ILO, *A Global Alliance*].
59 Kevin Bales & Peter T Robbins, "'No one Shall be Held in Slavery or Servitude': A Critical Analysis of International Slavery Agreements and Concepts of Slavery" (January-March 2001) Human Rights Review 18 at 28 [Bales & Robbins].
60 Belser, de Cock & Mehran, *supra* note 38.

> *(a) whether or not an individual has freedom of movement and choice of work, and, if not, what restrictions are placed on this freedom;*
>
> *(b) whether or not an individual has control over his or her own productive capacity and his or her personal belongings and wages;*
>
> *(c) whether or not an individual has given informed consent and understands the nature of the relationship between himself or herself and the other person(s) involved.*[61]

Economic exploitation and the denial of freedom are inherent to the concept of slavery. This situation is generally prompted by the threat or actual use of violence. Cases of slavery or forced labour both entail elements of coercion in which an individual holds effective domination over an enslaved person's life.[62] Even in cases involving a person that has voluntarily placed himself in a servile position, mainly in cases of bonded labour, the individual is still considered to have been coerced given the limited options available to him.[63] In cases where someone has offered himself voluntarily, the ability to revoke "*freely given consent*"[64] is inalienable.

Some authors argue that economic imperatives can amount to a form of coercion that can be used to determine whether labour is in fact forced.[65] Undeniably, in poorer countries faced with a lack of employment opportunities and a limited social safety net, an increasing amount of citizens consider appalling working conditions to be almost desirable.[66] It is difficult to assess whether poverty is the cause or the consequence of coercive labour arrangements.[67] While the ILO insists that poor working conditions and forced labour are not to be equated, it also points out that extremely low working condition can be a good indication of forced labour.[68] In 1982, the Indian Supreme Court[69] interpreted the failure to pay minimum wage as constituting bonded labour. This precedent is an interesting one given that an increasing number of corporations do not pay the minimum wage.[70] However, it must be noted that the ILO has never endorsed the Indian Supreme Court's vision, considering that failure to pay a minimum wage does not necessarily amount to bonded labour.[71]

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61 Bales & Robbins, *supra* note 59 at 28.

62 A Yasmine Rassam, "Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law" (1998-1999) 39 Va J Int'l L 303 at 320.

63 Garance Genicot, "Bonded Labour and Serfdom: A Paradox of Voluntary Choice" (2002) 67 Journal of Development Economics 101 at 102.

64 ILO, *Giving Globalization a Human face*, *supra* note 6 at 111-112.

65 ILO, *A Global Alliance*, *supra* note 58 at 30.

66 Bales & Robbins, *supra* note 59 at 29.

67 ILO, *A Global Alliance*, *supra* note 58 at 30.

68 Belser, de Cock & Mehran, *supra* note 38 at 8.

69 *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473.

70 ILO, *A Global Alliance*, *supra* note 58 at 21.

71 International Labour office, *Forced Labour and Human Trafficking: Casebook of Court Decisions* (Geneva: International Labour Office, 2009) at 43.

b) Assessing Slavery and Forced Labour: The Virtual Absence of Caselaw

Contemporary forms of slavery have only been assessed by tribunals in a handful of cases.[72] No corporation has ever been tried for using forced labour. At the international level, there are no cases of individuals convicted for participating in the exploitation of sweatshops. Therefore, in order to assess the potential liability of a corporation or CEOs using sweatshop labour, one must resort to rules defined by tribunals in other slavery cases.

In *Kunarac*, the ICTY discussed the elements required to prove enslavement. The Court found two men guilty of capturing women and forcing them to serve as sexual slaves. The Court said:

> *Indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution and human trafficking… The "acquisition" or "disposal" of someone for monetary or other compensation is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor whose importance will depend on the existence of other indications of slavery. [The basic factors include] the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.*[73]

It is clear that powers attached to the right of ownership do not need to go as far as "buying" a slave, as was the case traditionally. Deprivation of freedom and lack of free will are key elements. Simply put, slavery can be defined as total domination over a person through physical or psychological coercion for the purpose of exacting unpaid or grossly underpaid labour.[74]

In order to be considered enslaved, a person does not necessarily have to be treated in a revolting inhuman manner. The US Military Tribunal in the *Pohl* case stated that "*involuntary servitude, even if tempered by humane treatment, is still*

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72 *Ibid*.

73 *Prosecutor* v *Kunarac*, IT-96-23-T & IT-96-23/1-T Trial Judgment (22 February 2001) (International Tribunal for the Former Yugoslavia), online: UNHCR <http://www.unhcr.org/refworld/docid/3ae6b7560.html>.

74 Rassam, "International Law and Contemporary Forms of Slavery", *supra* note 56 at 817.

slavery."[75] In this case, Oswald Pohl and sixteen other defendants, all employed by the Economic and Administrative department of the SS, were charged with crimes against inmates of concentration camps where slave labour was used.

The European Court of Human Rights came to a similar conclusion in *Siliadin*,[76] prosecuted under article 4 of the *European Convention for the Protection of Human Rights and Freedoms*.[77] Siwa Akofa Siliadin, a 15 year old Togolese girl, was sent to France in order to work for two families as a maid and nanny. Her employment would allow her to repay her plane ticket. In exchange for her work, these families agreed to facilitate her immigration process and send her to school. Both families failed to assist her with the immigration procedure and failed to send her to school. She was forced to work long hours (nearly fifteen hours a day, seven days a week) for a pittance or no money at all. She managed to escape with the help of a neighbour. Although the Court determined that Siliadin was allowed to move freely in and out of the house and that no physical coercion was involved, it concluded that some elements of slavery were nonetheless present. Despite being treated in a non-degrading manner, the Court ruled that she was a victim of forced labour and servitude, given that she was brought into the situation through fraud and misrepresentation. In order for her to remain captive, she was psychologically coerced. However, the Court concluded that the facts of the case did not amount to slavery because the elements of ownership were non-existent.[78] Following the mention of the *Van Droogenbroeck v. Belgium* case,[79] in which the definition of servitude was at stake, the Court concluded "*that for Convention purposes 'servitude' means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of 'slavery'*".[80]

B. Sweatshops Fit the Definition of Forced Labour

In recent years, sweatshops have become the ultimate symbol of failed neo-liberalism. The re-emergence of sweatshops in the developed world and the ever-growing number of such factories in the developing world has prompted many debates over the desirability of these premises. The anti-sweatshop movement has achieved much in terms of raising general awareness on the issue. The movement has prompted the development of codes of conduct. Implemented by multinationals, their goal is to ensure that suppliers respect human and labour rights. Unfortunately, sweatshops remain prevalent in most parts of South America and the Caribbean, as well as Asia and the Pacific. Arguably, the working conditions found in these premises can correspond to the definition of forced labour. Undoubtedly, such a

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75 *United States* v *Oswald Pohl and Others* (1947), (V Trials of War Criminals Before the Nuremberg Military Tribunals 958) at 15.

76 *Siliadin* v *France* (2006) 43 EHRR 16 [*Siliadin*].

77 *European Convention for the Protection of Human Rights and Freedoms*, 4 November 1950, 213 RTNU 221.

78 *Siliadin*, *supra* note 76 at para 122.

79 *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443.

80 *Siliadin*, *supra* note 76 at para 124.

qualification will depend on the circumstances of each case. Defining sweatshop labour as forced labour is gaining widespread acceptance amongst the international community.[81]

1. Defining Sweatshops and its Multiple Facets

Given the variety of practices from one factory to another, it is difficult to define the notion of sweatshop. For the sake of this discussion, the definition proposed by Arnold and Hartman will be followed. Hence, a sweatshop is:

> *Any workplace in which workers are typically subject to two or more of the following conditions: systematic forced overtime; systematic health and safety risks that stems from the negligence or the wilful disregard of employee welfare; coercion; systematic deception that places workers at risk; underpayment of earnings; and income for a 48 hour work week less than the overall poverty rate for that country (one who suffers from overall poverty lacks the income necessary to satisfy one's basic non-food needs such as shelter and basic health care).*[82]

Consequently, a workplace is defined as a sweatshop when fitting the aforementioned definition. One may find many factories, especially in the apparel and garment industry as well as toy factories, that correspond to that definition. Many researchers report the existence of these practices in factories throughout the world.[83] The case of Saipan, described further in this text, is a good example of a sweatshop conditions fitting the definition of forced labour.

In most sweatshops, researchers[84] have documented cases in which workers

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81 See Denis G Arnold & Norman E Bowie, "Sweatshops and Respect for Persons" (2003) 13:2 Business Ethics Quartely 221 [Arnold & Bowie, "Sweatshops and Respect"].

82 Denis G Arnold & Laura P Hartman, "Beyond Sweatshops: Positive Deviancy and Global Labor Practices" (2005) Business Ethics Quartely 1 at 35 [Arnold & Hartman, "Beyond Sweatshops"].

83 International Textile Garment and Leather Workers' Federation, *An Overview of Working Conditions in Sportswear Factories in Indonesia Sri Lanka & the Philippines* (Brussels: International Textile Garment and Leather Workers' Federation, 2011) at 11 [ITGLWF].

84 For a complete description of sweatshop conditions, See these reports from non–governmental organizations: War on Want, *Fashion Victims: The True Cost of Cheap Clothes at Primark*, Asda and Tesco (London: War on Want, 2006); War on Want, *Fashion Victims II: How UK Clothing Retailers are Keeping Workers in Poverty* (London: War on Want, 2008); War on Want & Labour Behind the Label, *Taking Liberties: The Story Behind the UK High Street* (London: War on Want, 2010); War on Want, *Up Front: Sweatshops and the Olympics* (London: War on Want, Spring-Summer 2012); Labour Behind the Label, *Let's Clean Up Fashion: The State of Pay Behind the UK High Street* (Norwich: Labour Behind the Label, 2006) [Labour Behind the Label, 2006]; Labour Behind the Label, *Let's Clean Up Fashion: The State of Pay Behind the UK High Street*; *2007 Update* (Norwich: Labour Behind the Label, 2007) [Labour Behind the Label, 2007]; Labour Behind the Label, *Let's Clean Up Fashion: The State of Pay Behind the UK High Street*; 2008 Update (Norwich: Labour Behind the Label, 2008) [Labour Behind the Label, 2008]; *Let's Clean Up Fashion: The State of Pay Behind the UK High Street*; 2009 Update (Norwich: Labour Behind the Label, 2009); *Let's Clean Up Fashion: The State of Pay Behind the UK High Street*; 2011 Update (Norwich: Labour Behind the Label, 2011); Clean Clothes Campaign, *Looking for a Quick Fix: How Week Social Auditing is Keeping Workers in Sweatshops* (Netherlands: Clean Clothes Campaign, 2005) online: http://www.cleanclothes.org; Archon Fung & Dara O'Rourke, *Can we Put an End to Sweatshops?* (Boston: Beacon Press, 2001)

have to work at least ten hours a day, six to seven days a week, for a salary that does not allow them to fulfil their basic needs. Workers are often forced to do overtime in order to meet tight deadlines. In many cases, employees are not paid for extra hours. It is also commonplace for workers to be paid late and to be threatened not to be paid at all if they quit their job, forcing them to remain at the hands of their employer. Surveyed workers report being physically and verbally abused by management for the purpose of reaching determined quotas. Sexual abuse has also been documented.[85] In fear of losing their only possible source of income if they complain to anyone, these abuses generally go unpunished. Most especially since no complaint-monitoring mechanisms exist. Unions are non-existent and any unionization attempt is often severely repressed.[86] Additionally, factories in which employees are forced to work frequently represent health and safety hazards. There are even cases of factory managers locking doors in order to prevent workers from leaving the premises, making it dangerous in case of fire.[87] Finally, many sweatshops make use of child labour on their premises.[88]

For example, in Bangladesh, workers report not having enough to eat despite working several overtime hours. They report that their overtime hours are frequently unpaid because they are not calculated properly by management. Hoping to earn enough to live, all the while faced with the threat of being fired should they refuse overtime, workers in Bangladesh have very limited options.[89] In Thailand, a plate of rice, a coffee, one day's worth of rent and one day's worth of transportation to work represents 90% of a day's wage.[90] In China, it is estimated that the amount of wage arrears owed to employees amounts to £450 million. Cases of bonded labour have also been reported in this region. Many Chinese factories do not pay minimum wage and force their workers to work above the legal limit of daily hours permitted.[91] Mexican workers in *Maquila* factories report suffering from injuries caused by the dangerous conditions in which they are forced to work. They too are threatened with termination, should they not reach their quotas. Many workers are fired for lack of productivity, hence exercising moral coercion on co-workers to have them work faster.[92] Research on Southern India reports the use of child labour in some sweatshops.[93] These examples are only the tip of the iceberg and are widespread throughout Latin America and the Caribbean as well as Asia and the Pacific.[94]

[Fung & O'Rourke]; Anti-Slavery International, *Slavery on the High Street* (London: Anti-Slavery International, 2012).

85 ITGLWF , *supra* note 83.

86 For a detailed analysis see International Textile, *supra* note 85.

87 In 1993, 200 workers were killed and 469 injured when a fire broke out in the Kader Industrial Toy Company in Thailand. As a result of locking the factory doors to prevent workers from leaving the premises, there have been seventeen fires resulting in casualties since 1995 in Bangladesh alone. *See* Arnold & Bowie, "Sweatshops and Respect", *supra* note 81 at 231.

88 Anti-Slavery International, *Slavery on the High Street* (London: Anti-Slavery International, 2012).

89 Labour Behind the Label, 2007, *supra* note 84 at 4.

90 Labour Behind the Label, 2006, *ibid* at 4.

91 *Ibid* at 13-19.

92 Arnold & Bowie, "Sweatshops and Respect", *supra* note 81 at 230.

93 Anti-Slavery International, *supra* note 88 at 10-13.

94 ILO, *Results and Methodology*, *supra* note 3 at 16.

a) Sweatshops and Forced Labour: Assessing the Freedom of Choice

For sweatshop conditions to be defined, as constituting forced labour, workers have to be coerced into working under these conditions and kept in employment under threat or actual penalty. In many cases, the menace of penalty is easy to identify. Whether it is physical or verbal abuse, non-payment of wages or threat of dismissal, penalties are omnipresent in sweatshops. On the other hand, involuntariness is harder to prove and is the subject of much debate amongst authors. Is it possible to consider that individuals are being forced into work when they freely choose to work in sweatshops?

According to some thinkers, notably Matt Zwolinsky, individuals are not forced to work in sweatshops because they choose to do so; it is a preferred option over other opportunities. People who subscribe to this school of thought believe that despite the limited options that people in the developing world may have, they still have a choice and, as a result, their freedom of choice is not breached. If workers have not been forced into labour, can sweatshops present an exploitative situation and thus breach fundamental human rights? According to this school of thought, sweatshops do not offer an exploitative bargain because both parties get a fair deal in these employment relationships. Employers fulfil their need for a workforce, while employees receive a reasonable salary given the market forces.[95]

On the other hand, Arnold and Hartman consider that not only are individuals forced into working in sweatshops through deceit and lack of suitable alternatives, the extreme exploitation from which the workers are victims constitutes a denial of human dignity and is therefore in breach of fundamental human rights.[96] In the words of the Indian Supreme Court:

> *Any factor which deprives a person of a choice of alternative and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or services is compelled as a result of such 'force' it would be 'forced labour'.*[97]

In the developing world, where employment opportunities are scarce and social safety nets non-existent, the alternative choice to sweatshop conditions is often starvation. As such, the choice is not completely free and is, arguably, forced. In many developing countries, people leave rural areas because agriculture can no longer support the population base.[98] These people establish themselves in larger cities hoping to earn a better living. Their choice is often badly informed since they generally believe that working conditions found in sweatshops will be better than they are in reality. As a result, despite the fact that their choice is not completely coerced, it is based on a lack of information and suitable alternatives. Once established in the larger cities and forced to work in sweatshops, returning to the countryside is often

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95 See Matt Zwolinski, "Sweatshops, Choice and Exploitation" (2007) 17:4 Business Ethics Quarterly 689.

96 Denis G Arnold & Laura P Hartman, "Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops*"* (2006) 28 Hum Rts Q 676 [Arnold & Hartman, "How to Avoid Sweatshops"].

97 *People's Union for Democratic Rights* v *Union of India* (1982), AIR SC 1473 [*People's Union*].

98 ILO, *Results and Methodology*, *supra* note 3 at 9.

impossible. They are caught in an arrangement that they have not freely chosen.[99]

b) Sweatshops and Forced Labour: Coercion is Commonplace

Coercion is commonplace in sweatshops. Employees who refuse to work each day of the year and refuse to do overtime are threatened with dismissal and other forms of reprisal.[100] Faced with the possibility of being unable to support themselves and their family, workers are forced to comply with the demands of management. Similar threats are also used to make sure the workers meet their quotas. As these quotas are often unachievable, the supervisor's threats are understood as being coercive. Arguably, these acts of intimidation do not respect a person's inherent dignity and are thus in breach of fundamental human rights.[101] The Committee of Experts on the Application of Conventions and Recommendations has recently confirmed that when an individual accepts to do overtime because he fears losing his job and/or his earnings would not amount to minimum wage without doing so:

> *Such exploitation ceases to be merely a matter of poor conditions of employment and becomes one of imposing work under the menace of penalty which calls for the protection under the convention.*[102]

In accordance with the Indian Supreme Court,[103] supporters of the eradication of sweatshops[104] are of the opinion that the failure to pay minimum wages amounts to slavery. Indeed, in most cases, wages are so low that workers are forced to work overtime in order to make ends meet. Given that legally-imposed minimum wages are not always sufficient to cover basic needs, NGOs such as War on Want, Labour behind the Label and Anti-Slavery International advocate for "living wage" compensation. A living wage varies from one country to another, depending on the cost of living. Basically, it should cover basic needs such as food, shelter and clothing. It should provide for the cost of caring for dependants, as well as include a small amount for discretionary spending. Such amounts respect the right to an adequate standard of living ensured by the *UDHR*[105] and the *International Covenant on Economic, Social and Cultural Rights*.[106] It should be based on a 'normal' working week of 48 hours, excluding any overtime.[107] It can be argued that not paying a living wage or, even worse, minimum wage amounts to slavery or slavery-like practices because the exploitative bargain keeps the employees docile and weak. In fact, workers who cannot meet their daily dietary requirements are more docile and less productive. In these circumstances, employees are more likely to accept coercion

99 *People's Union*, *supra* note 96.
100 ILO, *Giving Globalization a Human face*, *supra* note 6 at 123.
101 Arnold & Bowie, "Sweatshops and Respect", *supra* note 81 at 229-31.
102 ILO, *Giving Globalization a Human face*, *supra* note 6 at 123-24.
103 *People's Union for Democratic Rights* v *Union of India*, *supra* note 69.
104 See Arnold & Hartman, "How to Avoid Sweatshops", *supra* note 96; Arnold & Bowie, "Sweatshops and Respect", *supra* note 81.
105 *UDHR*, *supra* note 44 art 25.
106 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, A/Res/2200A art 7.
107 Labour Behind the Label, 2006, *supra* note 90 at 13.

exercised by management in order for them to meet their quotas. As a result of being less productive, quotas are harder to reach which forces workers to take on more overtime. It is well documented that this vicious circle could be broken though the payment of a living wage.[108]

C. Sweatshops and Accountability: The Emergence of Soft Law

According to leading authors on the subject, respecting human rights is good for business.[109] There are two major reasons for this. Firstly, an increasing amount of customers, have been made aware of the horrendous conditions in which their products are made. They are prepared to boycott corporations making use of sweatshops in order to buy goods that are not the product of human rights' violations.[110] The same can be said for investors. Indeed, more investors are now looking at investing in socially responsible corporations.[111] A recent research on corporate social responsibility, conducted by Market & Opinion Research International, found that when buying a product, seventy per cent of European consumers confer importance to a corporation's commitment to social responsibility and the protection of labour rights.[112] The promoting of respect for human rights enhances a business' reputation, attracting more customers, which, in turn, generates more profits.

Secondly, promoting the respect of human rights leads to an increase in productivity. In fact, corporations dedicated to paying living a wage and providing secure and 'coercion free' working environments are attracting and retaining better, more dedicated employees. Research has shown that good working conditions increase employees' loyalty and reduces absences and staff turnover. As a result, productivity increases and costs related to recruitment and training of new employees are reduced.[113] As Jane Nelson of the Prince of Wales Business Leaders Forum has said:

> *There is clear evidence that a good reputation gains a company more customers, better employees, more investors, improved access to credit, and greater credibility with government.*[114]

Having realized that respecting human rights is good for business, many corporations in the apparel and garment industries have adopted codes of conduct. In addition, many corporations have joined efforts with NGOs and labour organisations in order to create monitoring bodies that watch over human and labour rights

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108 See Arnold & Hartman, "How to Avoid Sweatshops", *supra* note 96 at 29-30.

109 David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Entreprises with Regard to Human Rights" (2003) AJIL 901.

110 *Ibid*.

111 *Ibid* at 901-02.

112 MORI, *The First Ever European Survey of Consumers' Attitudes towards Corporate Social Responsibility* (London: CSR, 2000).

113 Arnold & Hartman, "Beyond Sweatshops", *supra* note 82 at 28-29.

114 Jane Nelson, *Business as Partners in Development: Creating Wealth for Countries, Companies and Communities* (London: The Prince of Whales Business Leaders Forum, 1996) at 47.

throughout the supply chain.[115] For example, Nike and Adidas have implemented codes of conduct imposing decent and safe working conditions for workers, as well as the payment of a living wage as conditions for sub-contracting their work with suppliers all over the world.[116] While these initiatives are welcomed, research shows that they are easily avoidable.[117]

Abundant literature advocates for the creation of voluntary measures as a solution to sweatshops. Regrettably, without appropriate sanctions attached to the non-compliance of codes of conduct, voluntary initiatives appear to have a very limited effect. In recent years, industry-wide monitoring systems have emerged. Their goal is to reduce non-compliance and report on the progresses of code-implementation of multinational corporations. Alas, research shows that social audits are not a strong enough system to force compliance on big brands.[118] In reality, factory managers can simply falsify their books and adapt their behaviours temporarily in order to show observance to the codes of conduct. Most of the time, factory management is aware of the date at which audits take place, and makes sure that health and safety regulations are respected that day. Managers will often show the auditors what they want them to see. They forge their working hour and wage payment books in order to demonstrate that basic human rights are respected, although it is not the case. Managers have been reported to use coercion in briefing their employees before audits, so that they say what is required of them instead of the truth.[119]

Unfortunately, it appears that voluntary codes of conduct and monitoring bodies have failed to eradicate sweatshops. As these initiatives are not mandatory, corporations are implementing them on a good faith basis. Research shows that progress is often very slow.[120] Because sanctions are not applied in cases of non-compliance, the implementation and respect of a code of conduct is often a public relations exercise. Since boycotts and the likes only have a limited effect on a corporation's willingness to improve working conditions, the limits of non-binding instruments are reached quickly.

Finally, some corporations still refuse to implement codes of conduct despite the fact that they have a positive impact on their reputation, which can potentially increase profits. In these circumstances, corporations continue to profit from forced and child labour because they consider it to be more profitable than showing a socially responsible image. Perhaps, the impact of consumer pressures and bad reputation is negligible from a profit-margin perspective. As a result, corporate abuses still remain unpunished.

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115 Fung & O'Rourke, *supra* note 84.
116 Arnold & Hartman, "How to Avoid Sweatshops", *supra* note 96.
117 See Clean Clothes Campaign, *supra* note 84; Fung & O'Rourke, *supra* note 84.
118 See Labour Behind the Label, 2006; Labour Behind the Label, 2007 and Labour Behind the Label, 2008, *supra* note 84.
119 *Ibid*.
120 *Ibid*.

II. Eradicating Sweatshops using International Law

Multinationals create a variety of arrangements and agencies that make holding corporations accountable for wrongdoings a difficult task. Given the principle of territoriality, states are not responsible for the actions of private actors abroad. As such, it is advisable that corporations be prosecuted under international law for their illegal behaviours.

A. Corporations as Subjects of International Law

States have traditionally been the subjects of international law. Over the past fifty years, the gradual development of international human rights and international criminal law regimes has redefined the role of individuals under the auspices of international law.[121] Non-state actors as duty bearers under international law have been contemplated since early treaties prohibiting slavery and piracy. The responsibility of individuals, regardless of official function and/or status as state or non-state actors, is included in the *Genocide Convention*[122] and the *Geneva Conventions*.[123] The Nuremberg trials are a reflection of private individuals' criminal liability under international criminal law, as both states and non-state actors were condemned. The Nuremberg trials established that "*the application of international law to individuals is no novelty.*"[124] Today, it is well established that individuals have rights under international human rights law[125] and obligations under international criminal law.[126]

The *Universal Declaration of Human Rights (UDHR)*[127] goes a little further in its preamble. It calls for "*every individual and every organ of society*" to respect the basic human rights enumerated in its following thirty articles. As was once said:

> *Every individual includes juridical persons. Every individual and every*

[121] "Developments in the Law – International Criminal Law: Corporate Liability for Violations of International Human Rights Law" (2001) 114 Harv L Rev 2025 at 2030-2031.

[122] *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277 (entered into force 12 January 1951).

[123] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: 12 August 1949, entered into force 21 October 1950), online: ICRC,<http://www.icrc.org/ihl.nsf/full/365?opendocument>; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva, 12 August 1949, entered into force 21 October 1950), online: ICRC <http://www.icrc.org/ihl.nsf/full/370?opendocument>; *Convention (III) relative to the Treatment of Prisoners of War* (Geneva, 12 August 1949, entered into force 21 October 1950), online: ICRC <http://www.icrc.org/ihl.nsf/FULL/375>; *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (Geneva, 12 August 1949, entered into force 21 October 1950), online: ICRC <http://www.icrc.org/ihl.nsf/full/380>.

[124] *Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgement of the Tribunal*, 2 August 1950, UN Doc A/1316.

[125] Henry J Steiner & Philip Alston, *International Human Rights in Context: Law, Politics and Morals* (Oxford: Oxford University Press, 2006) at 180-84.

[126] Cherif Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework'' in Cherif Bassiouni ed, *International Criminal Law* (New York: Transnational Publishers, 1986-1087) at 3-12.

[127] *UHDR*, *supra* note 44.

> *organ of society excludes no one, no company, no market no cyberspace. The Universal Declaration applies to them all.*[128]

Articles 30 of the *UDHR* and corresponding articles 5 (1) of the two Covenants[129] stress that no person or private entity shall engage in activities aimed at destroying the rights and freedoms set forth in these instruments. Certain articles have now attained the level of customary law, although there is no consensus as to whether the preamble and the last article are customary or not. However, it is clear that "*human rights theory rejects efforts to limit duty holders to states or to those carrying out state policy*."[130] Even as early as 1948, drafters of the *UDHR* believed that the dichotomy between state and individuals did not fully capture the realities of modern societies, given that other actors were also seen as being potential abusers.[131]

It is a well-established principle of customary law that states have a duty to protect citizens against the abuses of non-state actors perpetrated within their jurisdiction.[132] In fact, state responsibility is at stake when a breach of international law, pertaining to the acts of a private sector actor, arises. In other words, the state can be held responsible for a lack of due diligence in preventing or responding to a given violation.[133] As such, a state is responsible for the infringement of its citizens' rights as well as for its failure to protect citizens from a private actor's illegal acts, or failures to punish the said actor effectively.[134] A state will also be held responsible for the acts of non-state actors if such entities have been empowered to exercise governmental authority. Nevertheless, international human rights law has not evolved to the extent of holding states responsible for the actions of private actors abroad. As a result, home states are not responsible, under international human rights law, for preventing or punishing a corporation's human rights abuses committed overseas.[135]

Recently, authors have argued that non-state actors, like non-governmental organisations and corporations, have some of the attributes associated to international legal personality. According to Clapham:

> *As long as we admit that individuals have rights and duties under*

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128 Louis Henkin, "The Universal Declaration at 50 and the Challenge of Global Markets" (1999) 25:1 Brook J Int'l L 17 at 25 [Henkin, *Universal Declaration*].

129 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 & *International Covenant on Economic, Social and Cultural Rights*, 1966, 993 UNTS 3.

130 Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 Yale LJ 443 at 461.

131 Rebecca M Bratspies, "'Organs of Society': A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities" (2005) 13:1 MSU-DCL J Int'l L 9 at 7 [Bratspies].

132 Human Rights Council, *Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 9 February 2007, A/HRC/4/035 at 5: Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN ESCOR, 2011, UN Doc A/HRC 17/31 at 6-7.

133 *Velasquez-Rodrigues case (Honduras)* (1988), Inter-Am Ct HR (Ser C) No 4, at 151.

134 Silvia Danailov, "*The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations*" (October 1998), online: <http://www.humanrights.ch/home/upload/pdf/000303_danailov_studie.pdf> at 18.

135 Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004) at 12.

> *customary international human rights law and international human rights law, we have to admit that legal persons may also possess the international legal personality necessary to enjoy some of these rights, and conversely to be prosecuted or held accountable for violation of the relevant international duties*.[136]

Characterizing non-state actors (other than individuals) as having international legal personality has been the subject of much debate. While some are afraid that it would weaken the supremacy of states, others refuse to leave these entities outside of the direct scope of international law.[137] The positivist doctrine has always considered that states alone are the subjects of international law. It analyses the notion of international personality on the basis of participation in the development of international norms.[138] According to this school of thought, non-state entities can only be bound by international law through the state's domestic legal order. As previously explained, individuals have obtained certain attributes of international legal personality. As such, nothing prevents legal persons from being endowed with these same attributes. At the other end of the spectrum, the factual realist approach asserts that the weakening of state supremacy coupled with the increasing mobility of individuals as well as the emergence of multi-territorial markets should be acknowledged. Hence, non-state actors should be recognized as subjects of international law.[139] Between these two extremes, state dynamists posit that while the supremacy of states is not declining, new realities impose new sources of international personality.[140]

While states should remain the primary subject of the international sphere, given the increasing power and influence of some non-state actors such as corporations, it is advisable that they be bound by international law directly.[141] Recognizing that states should remain the primary subject of international law does not prevent other actors from acquiring international legal personality. To be considered a subject of international law, non-state actors do not need to possess all the characteristics of a state. There are degrees of international personality and non-state actors should only be considered subjects of international law to the extent that is necessary in order to avoid impunity. Indeed, international legal personality is not a prerequisite for imposing rights and duties upon an entity but it follows the imposition of such rights and duties.[142]

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136 Andrew Clapham, *Human Rights Obligations of Non-States Actors* (Oxford, Oxford University Press, 2006) at 79 & 243.

137 Jessica Howley, "The Non-State Actor and International Law: A Challenge to State Primacy?" online: Dialogue at 3 http://www.polsis.uq.edu.au/docs/dialogue7jesshowley.pdf [Howley].

138 Silvia Danailov, "The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations", online: at 27 <http://www.humanrights.ch/home/upload/pdf / 000303_danailov_studie.pdf>.

139 Howley, *supra* note 137.

140 James E Hickey Jr, "The Source of International Legal Personality in the 21st Century" (1997) 2 Hofstra L Policy & Symposium1 at 12-17.

141 Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNESCOR, UN Doc E/CN.4/2006/97 (2006) at 16 [Commission on Human Rights].

An important step in recognizing elements of international legal subjectivity to non-states actors arose in the *Reparation for injuries*[143] case brought before the International Court of Justice (hereinafter ICJ) in 1949. The Court was concerned with the United Nation's capacity, as an organisation, to bring an international claim against a state. The ICJ came to the conclusion that the UN "*is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims.*" The Court added that:

> *The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of their community.*[144]

Basically, the ICJ opened the door to non-state actors as subject of international law by determining that an international organization possesses international subjectivity as a result of holding some international rights and duties. Therefore, non-states actors (especially corporations) are international legal persons, given that they already have rights and duties at an international level. As the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprise recently wrote:

> *The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.*[145]

B. Prosecuting Corporations: Timid, Yet Enlightening Developments

At an international level, corporate criminal liability was envisioned in negotiations surrounding the adoption of the *Rome Statute of the International Criminal Court* (ICC). In fact, before the final draft, the treaty contained two paragraphs on the liability of legal persons.[146] In the end, the lack of time required to solve procedural and definitional problems led to the withdrawal of the proposition but "*no delegation challenged the conceptual assumption that legal persons are bound by international criminal law*."[147] As a result, the ICC does not have jurisdiction over legal persons even though the concept has been contemplated at an

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142 Emeka Duruingbo, "Corporate Accountability and Liability for Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6:2 Northwestern J Int'l Hum Rts 222 at 241.

143 *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] ICJ Rep 174.

144 *Ibid* at 8.

145 Commission on Human Rights, *supra* note 141 at 13.

146 Bratspies, *supra* note 131 at 20.

147 Andrew Clapham, "The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court" in Menno T Kamminga & Saman Zia-Zarifi, eds, *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law International, 2000) at 191 [Kamminga & Zia-Zarifi].

international level for years. At present, seeing as certain international crimes are addressed solely by international criminal law, it would be advantageous for the ICC to have jurisdiction over legal persons. Moreover, jurisdictions at the national level could interpret rules emanating from the ICC, these being useful during the trial of corporations domestically. The trial of a high profile case at the ICC would send a strong message that corporate abuses will not remain unpunished.

Although no international tribunal has ever tried and convicted a legal person *per se*, such a possibility has been contemplated more than once. If one assumes that legal persons have attained a certain level of international legal personality, nothing should prevent them from being prosecuted under international criminal law.

1. Nuremberg: Industrialists Condemned

The prosecution of industrialists in Nazi Germany under the Control Council Law #10[148] is the basis of international criminal corporate liability. Although the U.S. military tribunal did not have jurisdiction over legal persons, discussions related to the nature of corporations and their role in facilitating the perpetration of certain crimes is very enlightening.

a) I.G. Farben and Krupp: A Group in Charge of a Corporation Condemned

The *I.G. Farben* case[149] illustrates direct complicity in the commission of human rights abuses. I.G. Farben was a major German pharmaceutical company that benefitted from the Nazi regime by using forced labour. Twenty-three employees of I.G. Farben where indicted for plunder, slavery, complicity in aggression as well as mass murder. Five directors were convicted for the corporation's use of forced labour. The defendants were prosecuted for "*acting through the instrumentality of Farben*" to commit their crimes. It was the first time that a court tried to impose liability on a group of people in charge of a corporation.[150] The concept of "instrumentality" of the corporation is emphasized throughout the judgement. I.G. Farben, the corporation in this case, is seen as *"an instrument by and through which*"[151] various crimes were committed. Even though the tribunal could not hold I.G. Farben itself liable, it found the directors guilty because of their affiliation with the company. The judges also stressed that I.G. Farben, as a legal person, had been directly implicated in the commission of war crimes and crimes against humanity, not to mention it had benefitted financially from these crimes.[152] The Court states:

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148 US, *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10* (Washington, DC: US Government Printing Office, 1949-1953).

149 *United States v Krauch et al (The I.G. Farben Case) iii-iv*, (1952) (VIII Trials of War Criminals Before the Nuremberg Military Tribunals) [*The I.G. Farben Case*].

150 Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations" (2002) 20 Berkeley J Int'l L 91 at 106 [Ramasastry].

151 *The I.G. Farben Case*, *supra* note 149 at 1108.

152 Ramasastry, *supra* note 150 at 107-108.

> *The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of rights of private property, protected by the laws and customs of War. (...) Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price of other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly, where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.*[153]

Finally, a German court found I.G. Farben responsible for unpaid wages in a civil law suit.[154]

In addition, the U.S. Military Tribunal indicted twelve defendants from the Krupp firm for plunder and spoliation of civilian properties and factories as well as deportation and use of forced labour, all of which amounted to war crimes and crimes against humanity.[155] The firm was specialized in activities ranging from steelwork to producing machinery destined for factories and coal mines. Eleven of the twelve defendants were found guilty and sentenced by the tribunal. With regards to the accountability of corporations, "*the Krupp case underscores the possibility that in certain instances, it is the action of the enterprise rather than individual defendants that appears criminal.*"[156] Recalling the I.G. Farben decision, the tribunal stressed that Krupp itself violated the Hague Regulations due to its seizure and confiscation of properties in occupied territories. Similar reasoning was used in assessing the defendants' liability on charges related to forced labour.[157] The tribunal stressed the fact that Krupp had an "ardent desire" to use forced labour and, subsequently, rejected the defence of necessity. This decision and the I.G. Farben case both exemplify the idea that a corporation can be criminally responsible, along with its employees for the perpetration of crimes. In fact, the Court concluded that certain criminal acts are the result of planning and execution at the corporate level.[158]

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153 *The I.G. Farben Case*, *supra* note 149 at 1132-1133 & 1140.

154 *Wollheim v I.G. Farben in Liquidation* (June 10 1953), Frankfurt District Court, 2/3/0406/51.

155 *United States v Krupp*, (1948) (IX Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10) 1327 [*Krupp*].

156 Ramasastry, *supra* note 150 at 108.

157 *Krupp*, *supra* note 155 at 1423.

158 Ramasastry, *supra* note 150 at 112.

b) Nazi Industrialists: Opening the Door to Beneficial Complicity

Indirect or beneficial complicity is exemplified by the case of Frederick Flick,[159] tried by the Nuremberg Tribunal. The accused, a German steel industrialist, was convicted of crimes against humanity for using forced labour. He was also found guilty of giving large sums of money to the S.S., knowingly helping them commit atrocities. The court found sufficient proof of a causation link between donated funds and the perpetration of grave human rights violations. The assistance Flick knowingly provided had a substantial effect on the commission of crimes.[160] The tribunal came to the same conclusion in the *Zyklon B* case.[161] Three individuals were convicted for selling poisonous gas used in extermination camps. The conviction was based on their knowledge that the gas would be used to exterminate hundreds of people.

Finally, Karl Rasche, the chairman of the Dresdner Bank, was the only private banker prosecuted under the Charter of Nuremberg. He was charged with facilitating the use of forced labour by knowingly lending money to entities engaging in forced labour. Rasche was not convicted by the tribunal because his actions had not sufficiently contributed to the crime. The Court said:

> *We cannot go as far as to enunciate the proposition that the official of a loaning bank is charged with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrowers.*[162]

In recent trials brought forth by Holocaust survivors, Swiss banks cited the *Ministries* case in order to demonstrate that one's mere presence in a country is not sufficient to trigger accomplice liability.[163] The *Ministries* case must be analyzed within its particular context. More specifically, the relationship between the financier and the perpetrator of human rights abuses must be carefully looked at. For example, if the investor is aware of the abuse and provides continuous financial support that sustains the perpetration of crimes should this not constitute accomplice liability? As it will be demonstrated in the following paragraphs, if one's mere presence is sufficient to trigger accomplice liability under some circumstances, it can be argued that financing the commission of crimes is more than enough proof of benefiting from the commission of crimes, equally subject to prosecution.

Under U.S. and British Military Tribunals, defendants attempted to invoke a duress or necessity, arguing that they had no other choice but to make use of forced labour. They feared losing their assets had they chosen to disregard the Nazi regime. The court determined that unless the defendants had reason to fear for their lives, not

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159 *United States* v. *Friederich Flick* (1949), (XI Trials of the War Criminals Before the Nuremberg Military Tribunal).

160 International Council on Human Rights Policy, *Beyond Volontarism: Human Rights and the Developing International Legal Obligations of Companies* (Switzerland: International Council on Human Rights Policy, 2002) at 127.

161 *Trial of Bruno Tesch and Two Others* (1946), 1 Law Reports 93 (British Military Court).

162 *United States v Von Weizsaecker (Ministries Case)* (1952), 621 at 854 (XIV Trials of War Criminals Before the Nuremberg Military Tribunals).

163 Burt Neuborne, "Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts" (2002) 80 Wash ULQ 795 at 806.

their property, their defence would be discarded.[164] Duress and/or necessity were not accepted in the previously mentioned cases, as the defendants participated consciously in the broadening of the forced labour system.[165] As a result, if prosecuted, a corporation could not argue the loss of a business opportunity to justify the commission of a crime under international law.

2. Condemning Corporations: Recent Developments

More recently, the International Criminal Tribunal for Rwanda (ICTR) discussed the idea of corporate liability and "*marked a big step towards recognizing corporate criminal responsibility*."[166] Indeed, in the *Media Case*[167] the ICTR identified certain corporate acts as constituting crimes against humanity and genocide. As the tribunal had no jurisdiction over legal persons, it only condemned individuals. However, the ICTR recognized that the facilitation of crimes through corporate interference is a crime in itself.[168] Due to the media content they were respectively responsible for, all three defendants were convicted of incitation to commit genocide and crimes against humanity. In no other situation has an international criminal tribunal examined the liability of a corporation for its direct participation in the perpetration of an international crime. The *Media Case* is the closest case that one may find pertaining to such a subject.

At present, large corporations can take advantage of the market of impunity that prevails at the international level and thus, operate sweatshops freely. As detailed above, soft law fails to eradicate sweatshops and corporate abuse remains unpunished. Public awareness and pressure have helped putting the subject in the spotlight. The international community is developing various instruments and initiatives to hold corporations accountable for their violations of labour standards. Unfortunately, sweatshops are still on the rise. Could more coercive measures be taken and help eliminate the worst forms of labour exploitation?

Corporations should be prosecuted for committing international crimes for the reason that it would help victims obtain reparation. Indeed, compared to convicted individuals, corporations are more likely to have the required funds.[169] Additionally, the stigmas attached to a criminal prosecution could deter other corporations from committing similar abuses. In fact, the negative impact that charges could have on a corporation's reputation could lead to reduced profits and potential bankruptcy, which is much like a corporation's death sentence.[170] Moreover, the amount of money that a corporation could be condemned to pay to the victims could have a similar effect.

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164 Ramasastry, *supra* note 150 at 113 & 117-118.

165 Andrew Ridenour, "*Doe v Unocal Corp*, Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claim Act" (2001) 9 Tul J Int'l & Comp L 581 [Ridenour].

166 Bratspies, *supra* note 131 at 18.

167 *Prosecutor v Nahimana (Media Case)* ICTR-99-52-T Judgement and Sentence (3 December 2003) (International Criminal Tribunal for Rwanda, Trial Chamber 1).

168 Bratspies, *supra* note 131 at 17-18.

169 Kamminga & Zia-Zarifi, *supra* note 147 at 139-140 & 147.

a) Accomplice Liability and the Intentional Participation Test

International tribunals have also developed interesting concepts in light of the responsibility of corporations as liability can be difficult to establish when dealing with subsidiaries and subcontractors abroad given the territoriality of laws principle. The concept of accomplice liability could prove to be very useful in those circumstances.

In *Tadic*, the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) developed the 'intentional participation test' related to accomplice liability as aiding and abetting the perpetration of an international crime. The Court stated:

> *First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act*.[171]

Citing the ILC Draft Code, the ICTY added that the accomplice must know that he is providing assistance to the perpetrator of the principal offence. Furthermore, this assistance must contribute directly and substantially to the commission of the crime. The ICTY also stated that to be found guilty of aiding and abetting, the accused must have provided: "*practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime*"[172] Assistance includes providing psychological or moral support when it has a substantial effect on the commission of the main offence. Therefore, one's mere presence can have a significant legitimizing effect on the principal offender, thereby constituting complicity. In *Tadic* the Court said that the requisite *mens rea* of aiding and abetting is "*awareness of the act of participation coupled with a conscious decision to participate.*"[173]As such, to aid and abet the perpetration of an international crime, an individual needs to knowingly participate in the commission of an offence. Therefore, a parent corporation could be held responsible with its sub-contractor for committing an international crime if it is proven that the parent corporation was aware of the sub-contractor's illegal behaviour and still participated in the commission of the crime.

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[170] Diane Marie Amann, "Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights" (2000-2001) 24 Hastings Int'l & Comp L Rev 327.

[171] *Prosecutor* v *Tadic*, IT-94-1-T, Trial Judgement (7 May 1997) at 674 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Tadic*].

[172] *Prosecutor* v *Furundzija*, IT-95-17/1, Trial Judgement (10 December 1998) at 249 (International Tribunal for the Former Yugoslavia, Trial Chamber) [*Furundzija*].

[173] *Tadic*, *supra* note 171 at 662 at 674.

b) When Mere Presence has a Legitimizing Effect

In certain circumstances, failure to act can be deemed sufficient to trigger accomplice liability. Indeed, in *Akayesu* the ICTR condemned a village mayor for complicity with regards to the commission of various sexual crimes because his silence had a legitimizing effect on the perpetrators. This decision also specified that the accomplice does not need to want that the principal offence be committed.[174] However, the accomplice must have foreseen that the principal offence would be committed. The Court, citing another case, illustrated the conclusion by using this very interesting example:

> *An indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor.*[175]

In *Furundzija*, the ICTY specified that the conduct of the accomplice could be completely lawful, but become criminal if he had knowledge or could foresee that his conduct would help perpetrate the main offence.[176] As far as corporate complicity in committing an international crime is concerned, a corporation could be doing business as usual and only be interested in the profits resulting from a transaction, but still stand accused. For example, a company that has sub-contracted its work for an incredibly low price could be presumed to be doing so while knowing or foreseeing that the sub-contractor is using forced or child labour to produce the ordered goods .

Following *Akayesu's* reasoning, one's mere presence in a country that engages in systematic human rights abuses may be enough to generate accomplice liability, if that very presence has a legitimizing effect on the commission of crimes by the state. Would it be possible to say that the payment of high corporate taxes have the required legitimizing effect on a given country to fund the commission of crimes? Surely, if a corporation is powerful enough to generate such influence over a government that has a well known track record of human rights abuses, the answer should be positive.

C. Getting Closer to Eliminating Sweatshops

Even though eliminating sweatshops through international criminal law has the most desirable effect, national initiatives are also welcomed. Indeed, the adoption of laws that counteract the problem of *forum non conveniens* would help in obtaining victims' reparation.

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174 *Prosecutor* v *Akayesu*, IT-95-0-T, Trial Judgement (2 December 1999) at 539 (International Tribunal for Rwanda, Trial Chamber).

175 *National Coal Board* v *Gamble*, [1959] 1 QB 11.

176 *Furundzija*, *supra* note 172 at 249 & 93.

1. MADE IN U.S.A.

All national jurisdictions have provisions allowing for private law suits against corporations. Nonetheless, prosecuting foreign individuals and/or corporations for their extraterritorial actions is not generally permitted in civilian countries, as opposed to common law countries.[177] An American statute has recently been the subject of much discussion with respect to the liability of corporations for their behaviours abroad. The *Alien Tort Claim Act (ATCA)*[178] was enacted by the First Congress of the United States in 1789 as part of the First Judiciary Act.[179] It was designed to prevent the United States from becoming a safe haven for pirates.[180] Although the statute was used in only a handful of cases until 1980, it was scrutinized following the ruling in *Filartiga.*[181] Its contemporary version states that:

> *The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*[182]

The *ATCA* contains three fundamental requirements. First, the subject of the law suit must be a civil tort action. Second, it must be brought forth by an alien and thirdly, the matter must concern the law of the nations or a treaty of the United States.[183] While the first two requirements do not pose substantial problems, the third one has given headaches to American Courts.

The ruling in *Filartiga* attracted much attention because it turned the virtually unknown statute into a vehicle for human rights claims arising from a breach of international standards. The *ATCA* is unique, as no other national laws allow for such claims. The expression 'law of nations' was clarified in the above mentioned case. It was said that the 'law of nations' concerned a wrong that was included in an international treaty. The Court went further stating that universal renunciation in practice and in principle, when endorsed by almost all states, provides evidence of a breach of the 'law of nations'. The Court later confirmed the interpretation of the definition of the 'law of nations' declaring that the *ATCA* "*creates a cause of action for violations of specific, universal and obligatory international human rights standards.*"[184] The Court confirmed the definition in *Kadic*, pointing out that jus *cogen* norms can be prosecuted under the *ATCA*.[185] The *Kadic* case was the first to involve a non-state actor.[186]

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177 Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004) at 15.

178 *Alien Tort Claim Act* 28 USC § 1350 (1993) [*ATCA*].

179 Ridenour, *supra* note 165 at 583.

180 Barnaly Chaudhury, "Beyond the Alien Tort Claim Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses" (2005-2006) 26 Nw J Int'l L & Bus 43[Chaudhury].

181 *Filartigua v Pena-Irala*, 630 F 2d 876 (2d Cir 1980).

182 *ATCA*, *supra* note 178.

183 Chaudhury, *supra* note 180 at 46.

184 *Hilao v Estate of Marcos*, 25 F 3d 1467, 1475 (9th Circ A994).

185 *Kadic v Karadzic*, 70 F 3d 232 (2d Cir 1995) at 239-241.

186 eth Stephens, "Corporate Liability: Enforcing Human Rights through Domestic Litigation" (2001) 24 Hastings Int'l & Comp L Rev 401 at 406.

a) A Corporation Condemned Under the ATCA

For the first time, American tribunals had the opportunity to examine the liability of a corporation under the *ATCA* in the *UNOCAL*[187] case. In this case, a group of Burmese citizens from the Tenasserim region filed a complaint against UNOCAL, a Californian oil corporation. They claimed that UNOCAL had violated international law for having used forced labour during the construction of a pipeline, roads and military barracks.[188] The facts of the case are interesting because they highlight the difficulties that can potentially arise from business associations. In 1992, the military government of Myanmar (formerly Burma), through its state-owned corporation MOGE, entered a joint venture with the French oil company TOTAL. The purpose of this association was to exploit natural gas deposits off the coast of Myanmar. Later that year, TOTAL sold some of its shares in the joint venture to a subsidiary of UNOCAL in Myanmar. UNOCAL was responsible for the construction of a pipeline and transporting gas to the Burmese border with Thailand. This pipeline would pass through Tenasserim, a region controlled by a group of rebels opposed to the military junta. Concerns were expressed about the safety of the project; MOGE agreed to take care of the project's security through SLORC, the military junta. It is well known that the government of Myanmar has been the subject of criticism from the international community for its poor human rights record. Having been made aware of the country's human rights situation, UNOCAL accepted SLORC's declaration. The declaration ensured that no human rights abuses would occur during the pipeline project. UNOCAL was fully aware of the repeated human rights abuses committed by the military junta. SLORC's practices were no different with respect to the construction of the pipeline, as the military junta used forced labour during the construction project. Through violence and intimidation, it relocated villages and was responsible for other crimes like rape, torture and murder. As a result, UNOCAL appeared to consent to the Burmese military government's human rights violations by benefiting from such abuses.

The District Court of California decided that MOGE and SLORC could not be sued in an American tribunal because of sovereign immunities contained in American laws. However, part of the claim, concerning UNOCAL, was upheld by the judge. It was decided that UNOCAL was not an accomplice to the human rights abuses committed by the military junta. The Court argued that the company had no control over the military's decision to commit such abuses. It used the concept of complicity as defined in national law even though the case involved a violation of international law.[189] This decision has been the subject of much commentary. Most authors are of the opinion that the international standard of complicity should be used by the American Courts, when dealing with an *ATCA* claim.[190] During the second

[187] *Doe v Unocal Corp*, 963 F Supp 880 (CD Cal 1997) [*Doe*, 1997]; *Doe v Unocal Corp*, 110 F Supp 2d 1294 (CD Cal 2000) [*Doe*, 1997], aff'd in part, rev'd in part by *Doe v Unocal Corp*, 2002 WL b31063976 (9th Cir 18 Sept 2002), vacated by *Doe v Unocal Corp*, 2003 WL 359787 (9th Cir 14 Feb 2003).

[188] Ridenour, *supra* note 165 at 582.

[189] *Doe*, 1997 & *Doe*, 2000, *supra* note 187 at 1295-1300 & 1305-1310.

[190] See Ridenour, *supra* note 165; Ramasastry, *supra* note 150 and Armin Rosenkranz & David Louk, "*Doe v UNOCAL:* Holding Corporations Liable for Human Rights Abuses on their Watch" (2005) 8

UNOCAL trial, the Court examined certain Nuremberg cases, but found that the directors' liability under international law required more than knowledge of the abuse. The Court argued that UNOCAL's directors did not participate in forced labour practices. This conclusion is strange, given the findings of more recent cases. Indeed, had the Court followed the ICTY and ICTR's reasoning, it could have found UNOCAL responsible for its involvement in the use of forced labour as its financial presence in the project condoned the actions of the military junta. This is especially true, as UNOCAL was made aware of abuses, but still endorsed the government's assertion that no abuses were committed on the pipeline project.

Plaintiffs in the UNOCAL case proceeded to an appeal as they disagreed with the conclusions of the first judge. The U.S. Ninth Circuit Court of Appeals came to a different conclusion with regards to UNOCAL's liability. It found that forced labour, as a violation of *jus cogens*, does not require state action to be actionable under *ATCA*. The Court found that proving active participation was not necessary because it is only required under international law when facing a defence of necessity. UNOCAL did not invoke a defence of necessity. As such, participation in the joint venture was deemed sufficient to trigger accomplice liability. The Court used the definition of aiding and abetting provided by international law, as developed by the ICTY, to assess UNOCAL's liability. As a result, the judges decided that the evidence of UNOCAL providing practical assistance to the military junta that substantially affected the exploitation of forced labour, was sufficient enough to meet the required *actus reus* requirement for aiding and abetting under international law. As for the *mens rea* requirement, the Court determined that UNOCAL was aware of the abuses committed and that its assistance was knowingly provided to benefit the pipeline owners.[191] Before the case was heard by the Supreme Court, the parties announced that they had reached a settlement.[192]

Finally, in 2004, the U.S. Supreme Court had an opportunity to address questions related to the *ATCA* in another case. In *Sosa* the Supreme Court determined that the international norms related to an *ATCA* claim must be specifically contained in an international treaty or have their origins in customary international law.[193] Unfortunately, the case did not involve the liability of a corporation. Therefore, rules concerning these claims remain unclear. Since *Sosa*, lower courts have accepted claims involving violations of international law, notably concerning ILO conventions.[194]

Chapman L Rev 135 [Rosenkranz & Louk].

191 *Doe*, 1997 & *Doe*, 2000, *supra* note 187 at 948-953 & 1310.

192 Rosenkranz & Louk, *supra* note 190 at 148.

193 *Sosa* v *Alvarez-Machain*, 124 S Ct 2739 (2004) at 67.

194 Debra Cohen Maryanov, "Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain" (2010) 14:1 Lewis & Clark L Rev 397 at 420 [Maryanov].

b) A case of Sweatshop Prosecuted

Another interesting American piece of legislation regarding the prosecution of corporations for human rights violations is the *Racketeer Influenced and Corrupt Organization Act (RICO)*.[195] Introduced in 2006, it aims to eliminate organized crime but has been interpreted by the American Supreme Court as applying to legitimate enterprises when necessary.[196] In order to pursue a case under *RICO*, the plaintiffs must prove that the defendant:

> *(i) through the commission of two or more acts constituting a pattern of racketeering activity;*
>
> *(ii) directly or indirectly invested in, maintained an interest in or participated in, an enterprise;*
>
> *(iii) the activities of which affected interstate or foreign commerce*[197]

At the beginning of the twenty first century, garment workers in Saipan filed a class action lawsuit[198] under *Rico* against main American clothing companies such as The Gap, J. Crew and Tommy Hilfiger. The plaintiffs alleged labour violations including servitude and racketeering activities. The plaintiffs all had similar stories: mostly women coming from a variety of impoverished nations that paid as much as five-thousand dollars in recruitment fees to obtain the right to work in Saipan, the Capital of the United States Commonwealth of the Northern Mariana Island. Many of these workers went to Saipan without knowing that despite the fact that it is administered by the United States, Saipan is exempt from many American labour and immigration laws. Upon arrival, many workers had their passports confiscated, making it difficult for them to leave the island at will. The living standards on the island were dire and the workers were very rarely allowed to leave their barracks without permission. The factories also had very low labour standards, including unpaid hours, forced overtime and unsafe working environment as well as physical and mental abuse. Workers were forced to work without pay when they failed to meet their daily quotas, most of which were too high to be met within an eight hour day. They were also subjected to coercive measures such as threats of deportation or threats that they, or their family, would be physically harmed if they failed to comply with their workload or decided to leave.

In the class action lawsuit, plaintiffs brought the case against major retailers that had factories in Saipan. The evidence was filled with examples of human rights violations suffered by many of the victims.[199] In order to prove their case under *RICO*, the plaintiffs had to prove that factory managers hired aliens in a racketeering manner. Therefore, they had to establish the existence of an enterprise as well as a pattern of

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195 *Racketeer Influenced and Corrupt Organization Act* 18 USC § 1961-1968 (2006) [*RICO*].

196 Michael W Holt & Kevin M Davis, "Racketeer Influenced and Corrupt Organizations" (2009) 46:2 Am Crim L Rev 975 at 976.

197 *RICO*, *supra* note 195 at § 1962.

198 *Doe I v The Gap Inc*, No CV-01-0031 (DN 2001) [*The Gap Inc*].

199 Erin Geiger Smith, "Case Study: *Does I v The Gap, Inc.*: Can a Sweatshop Suit Settlement Save Saipan?" (2004) 23 Rev Litig 737 at 739-744 [Smith].

racketeering activities. The Court appeared to have accepted that the denial of wages and unlawful sweatshop conditions were sufficient to establish a pattern of racketeering; these examinations were not specifically discussed by the judges. The Court also found that a pattern of conspiracy amongst factories had been established by the plaintiffs. As such, it concluded that there were corporate entities involved in racketeering activities. Because these behaviours were fully intentional, the necessary *mens rea* was demonstrated.[200] However, the allegations of slavery were dismissed by the Court. It considered that workers had the possibility to terminate their employment, although this would have caused them to be heavily indebted to their recruiters and that some wages would not have been paid.[201] This conclusion seems strange given that extensive literature on the subject suggests the opposite outcome. Though, in the Saipan case, the Court was simply following one of its precedents.[202]

Even though the plaintiffs obtained a positive outcome, they accepted a twenty million dollar settlement from the defendants. It contained an admission of guilt from most retailers. The settlement also provided the implementation of a monitoring system, overseen by three judges, aimed at incorporating basic human rights standards in Saipan's factories.[203] Additionally, some retailers such as Levi-Strauss stopped subcontracting to the island when the matter became public.[204]

The facts of this case fit the definition of forced labour. Indeed, workers were brought to Saipan through fraud and deceit, as they were not aware of the horrendous conditions that they would be forced to work under. Undeniably, they would not have accepted to work in one of Saipan's factories, had they been aware of the working conditions. They were subjected to both physical and psychological coercion once on site and were paid very little for the enormous amount of hours that they worked. The fact that their passports were confiscated made it very difficult for them to leave at will, thus subjecting them to an extra form of coercion. The particular case of Saipan could fit the definition of modern forms of slavery as the workers' freedom of movement was very limited and their environment was completely controlled by the factories. The fact that they needed to work an enormous amount of hours to pay back recruitment fees charged to them resembles strangely the concept of bonded labour, a form of slavery. Hence, a national tribunal under universal jurisdiction could have examined the case with the notion of forced labour and slavery derived from International Law.

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200 *The Gap Inc*, *supra* note 198.
201 Erin Geiger Smith, *supra* note 199 at 749 [Smith].
202 See *United States v Kozminsky*, 487 US 931 (1998).
203 Maryanov, *supra* note 194 at 411.
204 Smith, *supra* note 199 at 753.

"*If we cannot make globalization work for all,*
In the end it will work for none."

- Former U.N. Secretary-General Kofi Annan

In an era where multinational corporations are often more powerful than states, it seems anachronistic to hold the view that they should only be subjected to the horizontal effect of international law. Indeed, the corporate citizen's role in creating and sustaining worldwide poverty should not be overlooked. Nowadays, certain multinationals are wealthier than the Gross Domestic Product (hereinafter GDP) of some states combined. Approximately two hundred transnational corporations now control a quarter of the world's assets. A report from the Institute for Policy Studies published in 2000 claimed that 51 corporations were in the top 100 'economies' of the world.[205] For example, The Royal Dutch / Shell Group's annual revenues are twice the Gross Domestic Product (GDP) of New Zealand. The annual sales of Siemens AG exceed the GDP of Chile, Costa Rica and Ecuador combined.[206] The current global economic context, combined with the desire of many developing countries to attract foreign investments, has bestowed enormous power on some corporations. The increased mobility of capital and increased investment opportunities has prompted certain countries to lower their labour standards in order to lower production costs and therefore attract foreign investments. This situation is often called "social dumping".[207] This power to influence national social policies has made an increasing amount of people believe that multinationals are now more powerful than most states.[208]

While some legally enforceable principles exist at the national level, the transnational nature of corporate operations renders these measures ineffective. Many corporations have realized that it is cheaper to sub-contract most of their operations in developing nations that are prone to low wages. Companies can terminate their contracts with short notice, should wages increase, labour troubles arise, or civil war begin.[209] These practices make it difficult for the corporate entity's home state to enforce human rights standards abroad. The same can be said for subsidiaries, as their use by multinationals abroad is widespread.[210] In many cases, the various arrangements and agencies that characterize corporations in the contemporary world

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205 Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power* (1 December 2000), online: Institute for Policy Studies <http://www.ips-dc.org/reports/top200.htm>.

206 Chris Jochnick, "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights" (1999) 21 Hum Rts Q 56 at 65.

207 Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations* (Geneva, 1998), online: <http://www.humanrights.ch/home/upload/pdf/000303_danailov_studie.pdf> at 10-13.

208 See Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable, 2004).

209 Douglas Cassel, "Human Rights and Business Responsibility in the Global Market" (2001) 11:2 Business Ethic Quaterly 261 at 266.

210 Phillip I Blumberg, "Accountability of Multinational Corporations: The Barriers Presented by the Concepts of the Corporate Judicial Entity" (2000-2001) 24 Hastings Int'l & Comp L Rev 297 at 298.

make it difficult to assess liability. In circumstances where host states are unwilling or incapable of prosecuting sub-contractors or subsidiaries (for a variety of reasons ranging from an inadequate legal system to corrupt governments), multinationals can evade liability. Indeed, difficulties arising from lifting the corporate veil in order to prosecute a parent corporation for the acts of its subsidiary, which is normally considered a separate legal entity, result in human rights abuses going unpunished.[211] In such cases, legal action against the parent corporation in the country of incorporation can lead to rejection from the courts, based on *forum non conveniens*.[212]

In order to avoid difficulties related to corporate liability for the use of sweatshops and to help eradicate these situations, the international community must seriously look at the possibility of prosecuting corporations under international law. In the event that the international community or even a few countries, under universal jurisdiction, were to begin prosecuting corporations and their CEOs for the use of forced labour, a strong message would be sent that exploitation is unacceptable. It would perhaps help reduce poverty and impose dignity at work, thus making the world a safer and fairer place.

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[211] For a detailed discussion on the subject: Olivier De Schutter, "Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations" (2006) Business and Human Rights Resources Center, online: <http://www.policyinnovations.org/ideas/policy_library/data/01420/>.

[212] Josée-Anne Simard, "Les Sociétés Transnationales et leur Responsabilité en Droit International Humanitaire: Regards Croisés sur la Sanction et la Prévention" (2009) 68 R du B 113 at 145-146.