

**BUSINESS, CORRUPTION, AND HUMAN RIGHTS:  
TOWARDS A NEW RESPONSIBILITY FOR  
CORPORATIONS TO COMBAT CORRUPTION**

DAVID HESS\*

Introduction .....	642
I. Business and Human Rights .....	646
A. The Evolution of Soft Law Standards on BHR.....	648
II. Business and Corruption .....	652
A. Criminal Law Enforcement.....	653
1. Enforcement under the FCPA .....	653
2. Criminalizing the Payment of Bribes: A Worldwide Movement .....	655
B. Corporate Social Responsibility Initiatives .....	657
III. Corruption and Human Rights.....	660
IV. Business, Corruption, and Human Rights .....	664
A. Business, Corruption, and Human Rights in the Ready Made Garment Industry.....	665
1. Root Causes of Human Rights Violations .....	665
2. Supply Chain Compliance Audits: Corruption as a Barrier to Solutions .....	667
B. The Problem of Business and Human Trafficking.....	670
V. Towards a New Responsibility to Combat Corruption .....	674
A. Improving Compliance Programs through a Human Rights Perspective on Corruption .....	674
1. Compliance Programs: The Need for Improvement ...	674
2. Changing the Motivation to Combat Corruption: Business, Corruption, and Human Rights .....	677
B. Expanding the Responsibility to Combat Corruption .....	681
1. Structural Injustice and the Social Connection Model of Responsibility.....	681
2. Differences from a Liability Model.....	683
3. Fulfilling the Shared Responsibility to Combat Corruption: Political Corporate Social Responsibility .....	685
a. Responsiveness .....	688
b. Collaboration (Collective Action) .....	689
c. Publicness/Transparency .....	692
Conclusion .....	693

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\* Associate Professor of Business Law, University of Michigan.

## INTRODUCTION

There is a significant disconnect between multinational corporations' (MNCs) recent efforts to respect human rights throughout their operations, and what we know about the link between corruption and human rights violations. Although efforts to respect human rights and combat corruption have expanded significantly in the past few years, these efforts have mostly developed in parallel and have not meaningfully intersected.<sup>1</sup> With respect to human rights, due significantly to the 2011 adoption of the United Nations *Guiding Principles on Business and Human Rights*,<sup>2</sup> MNCs are adopting practices to help ensure that they are not having an adverse impact on human rights.<sup>3</sup> At the same time, due to the recently increased focus on combating corruption throughout the world, MNCs are expending significant resources to implement compliance programs to prevent their employees and agents from paying bribes.<sup>4</sup>

Missing from these corporate efforts (and severely limiting their potential positive societal impact), however, is significant action based on the recognition that high levels of corruption in a country prevent the realization of human rights. Corruption—commonly defined as the abuse of public office for private gain—prevents the realization of individuals' rights to health, safety, education, and other rights.<sup>5</sup>

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1. Norman Bishara & David Hess, *Human Rights and a Corporation's Duty to Combat Corruption*, in *LAW, BUSINESS AND HUMAN RIGHTS* 71, 71–72 (Robert C. Bird et al., eds., 2014).

2. See *infra* notes 56–66 and accompanying text (discussing the importance of the UN Guiding Principles for the business and human rights movement).

3. Due to the impact of the Guiding Principles, “[w]e are not asking anymore whether or not corporations have human rights responsibilities at all, but rather how extensive they are.” Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, 14 *J. HUM. RTS.* 162, 163–64 (2015) [hereinafter Wettstein, *Critical Assessment*].

4. See *infra* Part II.A (discussing the rise of the global anti-corruption movement and the impact on business).

5. See generally INT’L COUNCIL ON HUMAN RIGHTS (ICHR) & TRANSPARENCY INTERNATIONAL (TI), *CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION* 1 (2009), [http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf) [https://perma.cc/87HY-Z58G]. Because of these concerns, some have even proposed that freedom from corruption should be a human right. See David Kinley, *A New Human Right to Freedom from Corruption* 1–16 (Sydney Law Sch., Research Paper No. 14/12, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2393205](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393205) [https://perma.cc/U7HF-V9PR]; Matthew Murray & Andrew Spalding, *Freedom from Official Corruption as a Human Right*, BROOKINGS (Jan. 2015), [https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding\\_v06.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf) [https://perma.cc/LFC6-P7YJ]; see also Anita Ramasastry, *Is There a Right to be Free from Corruption?*, 49 *U.C. DAVIS L. REV.* 703, 705–06 (2015) (quoting the judge in a

Despite this growing awareness, most corporations focus only on avoiding the payment of bribes and do not fully understand how corruption impacts their ability to respect human rights.

The most significant recent tragedy in business and human rights illustrates this problem. Rana Plaza was a building in Bangladesh that housed several factories where workers made garments for many different MNCs. At some point, the building began to show signs of danger, such as cracks in the walls.<sup>6</sup> On April 24, 2013, despite awareness of problems with the building, management ordered workers to report to work.<sup>7</sup> Later that day, the building collapsed, causing the deaths of over 1,100 workers and severely injuring an additional 2,500 workers.<sup>8</sup> This was the worst industrial accident anywhere in the world since the Union Carbide gas leak in Bhopal, India, in 1984.<sup>9</sup> The response from the corporate social responsibility community was immediate and called for improved auditing of safety conditions and practices at the factories.<sup>10</sup>

Missing from the response, however, was any meaningful discussion of the role of corruption in allowing the tragedy to occur and whether corporations should play a more significant role in combatting corruption in such situations. This was a serious omission, as corruption played a substantial role.<sup>11</sup> The building—which was designed for retail and office space instead of factories—was made with substandard materials.<sup>12</sup> In addition, the local government allowed Rana Plaza to be built several stories higher than permitted by the building code.<sup>13</sup> Corruption undoubtedly played a significant role in allowing

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corruption case as stating, “systematic corruption is a violation of human rights as it leads to economic crisis.”).

6. Alexandra Rose Caleca, *The Effects of Globalization on Bangladesh's Ready-Made Garment Industry: The High Cost of Cheap Clothing*, 40 *BROOK. J. INT'L L.* 279, 296 (2014) [hereinafter Caleca, *Cheap Clothing*].

7. *Id.* at 297.

8. *Id.* at 295.

9. Justine Nolan, *Rana Plaza: The Collapse of a Factory in Bangladesh and its Ramifications for the Global Garment Industry*, in *BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE* 27, 27 (Dorothee Baumann-Pauly & Justine Nolan eds., 2016).

10. *Id.* The most well-known initiative was the “Accord on Fire and Building Safety” in Bangladesh. *Id.*

11. Bishara & Hess, *supra* note 1, at 77–78.

12. Caleca, *Cheap Clothing*, *supra* note 6, at 295–96.

13. See Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, *N.Y. TIMES* (Apr. 24, 2013), <http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html> [<https://perma.cc/2TJJ-6PV8>]. The top four floors of the building were built without a permit. *Id.*

Rana Plaza to be built in this manner, and to remain open despite its hazardous condition.<sup>14</sup>

Unfortunately, the Rana Plaza tragedy is not unique. Approximately one year before the Rana Plaza building collapse and just seven miles away, a fire at the Tazreen factory killed over 100 workers.<sup>15</sup> Again, it was corruption that allowed the factory to violate building requirements with disastrous consequences.<sup>16</sup> In just a few years, the Tazreen factory grew from three floors to nine without complying with basic fire safety measures.<sup>17</sup> These tragedies are not confined to Bangladesh. For example, in 2012, a fire in a garment factory in Pakistan killed over 250 workers.<sup>18</sup> Local commentators pointed to corruption as the reason that such buildings were allowed to remain open despite poor construction and clear violations of safety rules.<sup>19</sup> Despite the increased attention to these building safety issues since Rana Plaza, these tragedies continue to occur, such as the death

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14. For an extended description of the role of corruption in the readymade garment industry in Bangladesh, see Sadid Nure Mawla et al., *The Readymade Garment Sector: Governance Problems and Way Forward*, TRANSPARENCY INT'L BANGL. (Oct. 31, 2013), [https://blog.transparency.org/wp-content/uploads/2014/04/2013\\_TIB\\_GarmentSectorExecSum\\_EN.pdf](https://blog.transparency.org/wp-content/uploads/2014/04/2013_TIB_GarmentSectorExecSum_EN.pdf) [<https://perma.cc/NEQ9-C8BS>]. For example, the report notes that rather than inspect construction sites, government officials often accept payment of bribes. *Id.* at 7. Corrupt payments (including the agreement to purchase equipment from vendors associated with the government official) also allow factory owners to obtain exemptions from various fire safety regulations. *Id.* at 8. For a discussion of allegations of corrupt relationships between factory owners and politicians, see Caleca, *Cheap Clothing*, *supra* note 6, at 296 (noting that the garment factories are owned by the well-connected, elite of society, and that these owners hold approximately ten percent of the seats in the Bangladesh's parliament); James Chalmers, *Special Report: How Textile Kings Weave a Hold on Bangladesh*, REUTERS (May 2, 2013, 6:55 PM), <http://www.reuters.com/article/us-bangladesh-garments-special-report-idUSBRE9411CX20130502> [<https://perma.cc/55HM-WDTN>] (discussing how a corrupt political system allows factory owners to avoid punishment for safety violations that harm workers and for violating minimum wage laws).

15. Caleca, *Cheap Clothing*, *supra* note 6, at 291, 295; S.M. Solaiman, *Unprecedented Factory Fire of Tazreen Fashions in Bangladesh: Revising Bangladeshi Labor Laws in Light of Their Equivalents in Australia*, 31 HOFSTRA LAB. & EMP. L.J. 125, 125–28 (2013).

16. Solaiman, *supra* note 15, at 134–35.

17. *Id.* at 134.

18. Zofeen Ebrahim, *Pakistan Factory Blaze Points to Poor Safety Standards, Corruption*, INTER PRESS SERV. (Sept. 14, 2012), <http://www.ipsnews.net/2012/09/pakistan-factory-blaze-points-to-poor-safety-standards-corruption/> [<https://perma.cc/J75C-ARZR>].

19. *Id.*

of over twenty workers in a factory fire near Dhaka, Bangladesh, in September 2016.<sup>20</sup>

To reduce corporations' negative impact on human rights, including the number of deaths of workers in factories in MNCs' supply chains, issues of corruption must be addressed. This requires MNCs to think differently than they have about what it means to combat corruption. Although MNCs may attempt to avoid directly contributing to the problem of corruption in developing countries by ensuring that their employees and agents do not pay bribes, this does not completely address the negative impact that corruption has on human rights related to business. Underappreciated in the discussion over business and human rights responsibilities is the role of corruption in creating the human rights problems that MNCs must contend with in their operating environments. As stated above, corruption allowed the Rana Plaza building to be constructed in a manner that put workers' safety at risk.<sup>21</sup> In addition, corruption impacts the effectiveness of social initiatives designed to help MNCs respect human rights. For example, corruption calls into question the credibility of many inspection reports at garment factories.<sup>22</sup>

Due to the impact of corruption on corporations' human rights obligations, this Article argues for a new conceptualization of what it means for a corporation to combat corruption. This new conceptualization comes from integrating corporations' responsibilities to combat corruption with their responsibilities to respect human rights. Integrating these two responsibilities not only changes what it should mean for a corporation to combat corruption, but also moves corruption directly within the business and human rights movement.

This Article proceeds as follows. Part I provides an overview of the evolution of corporations' human rights responsibilities. In Part II, this Article discusses corporations' responsibilities to combat corruption under both the criminal law and corporate social responsibility initiatives. Part III explores the relationship between corruption and human rights, which is starting to receive greater attention from the international human rights community. Part III brings together business, corruption, and human rights, to show how corruption can be both a cause of human rights violations that must be addressed by

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20. Maher Sattar, *Boiler Explosion at Bangladesh Factory Kills at Least 23*, N.Y. TIMES (Sept. 10, 2016), <https://www.nytimes.com/2016/09/11/world/asia/boiler-explosion-at-bangladesh-factory-kills-at-least-23.html?mcubz=0> [https://perma.cc/M7QQ-UFAY].

21. See *supra* notes 12–14 and accompanying text.

22. See *infra* Part IV.A.2 (discussing reports indicating that corruption severely limits the ability of social audits to help improve human rights conditions in garment factories).

corporations in their supply chains and a barrier to potential solutions to human rights violations. To explore these issues, this Part uses examples of working conditions and labor rights in suppliers' factories and the problem of business and human trafficking.

Part V argues that, in light of the connection between corruption and human rights, there is the need for a new understanding of what it means for a corporation to combat corruption. Current approaches, in both criminal law and corporate social responsibility, utilize a liability model, which focuses on corporations avoiding involvement in a corrupt payment. To better reflect the connection between corruption and human rights, this Article proposes the use of the social connection model as developed by the political philosopher Iris Marion Young. Under this model, responsibility hinges on participation in a system that has significant structural injustices. After exploring Young's social connection model and discussing its connections with recent thinking on "political corporate social responsibility," this Part discusses the implications for business practice and what it should mean for corporations to combat corruption. In addition, this Part also discusses how integrating business, corruption, and human rights can have a positive influence on the effectiveness of corporations' existing anti-bribery compliance programs.

## I. BUSINESS AND HUMAN RIGHTS

Although many in the corporate social responsibility (CSR) field now view business and human rights (BHR) as a subset of CSR, those in the BHR field often view them as having key differences.<sup>23</sup> In fact, it was only recently that human rights issues became a significant part of CSR.<sup>24</sup> Although CSR and BHR are becoming more integrated, the two fields developed separately and have retained many of those

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23. Florian Wettstein, *From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 78, 79–80 (Dorothee Baumann-Pauly & Justine Nolan eds., 2016) [hereinafter Wettstein, *Main Act*].

24. Wettstein, *Critical Assessment*, *supra* note 3, at 162–64. Wettstein argued that because business and human rights thinking focused on legal accountability and the role of the state, corporate responsibility theorists did not view human rights as a "relevant domain worth exploring" for a long time. *Id.* at 164. In addition, other commentators noted that CSR debates and policies rarely used human rights terminology or referenced international standards on human rights. Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 BUS. ETHICS Q. 739, 739 (2012) [hereinafter Wettstein, *Great Divide*]. Up until the appointment of John Ruggie as the United Nation's Special Representative on the issue of business and human rights in 2005, "attempts to make human rights accessible for informing a general conceptual understanding of CSR" were rare. *Id.* at 747.

differences.<sup>25</sup> A key reason for their differences is that BHR had its origins in law, and CSR had its origins in business.<sup>26</sup> While CSR focuses on voluntary efforts to improve society, BHR began with a focus on holding corporations accountable for human rights violations through legal means. In fact, BHR's development was a response to both frustrations with holding states accountable for their human rights violations<sup>27</sup> and the perceived failures of CSR to fill this gap.<sup>28</sup>

BHR focuses on corporations not violating core human rights wherever they operate, and to avoid being complicit in the violation of those rights by others (such as the host country government).<sup>29</sup> In general, while BHR focuses on universal legal obligations, CSR focuses on voluntariness.<sup>30</sup> In addition, while BHR focuses on "do no harm" and holding corporations accountable for the harm they do cause, CSR also focuses on the potential positive impact of business on society as part of the solution.<sup>31</sup> Finally, whereas CSR may be viewed as going beyond legal requirements (and assumes a well-ordered state), BHR has as "its very aim [] to extend corporate responsibility into a domain that

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25. Ramasastry traces the beginning of the BHR field to the investment of MNCs in postcolonial states during the late 1970s and events such as the inability of victims to seek a tort remedy against Union Carbide for its pesticide plant's gas leak that killed thousands of people in Bhopal, India. Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 240 (2015). In the 1990s, the BHR field expanded to focus not just on MNC's direct violation of human rights, but also MNC's complicity in human rights abuses as the MNC's supply chains and operations expanded into more and more countries. *Id.* Wettstein signifies the importance of complicity to the evolution of the BHR field and traces the beginning of the "business and human rights debate" to the 1995 execution of Ken Saro-Wiwa by the Nigerian government following protests against Shell. Wettstein, *Critical Assessment*, *supra* note 3, at 162, 173. Additional events in the 1990s that helped give shape to the BHR movement included environmental harm caused by oil companies that poisoned communities, and child labor in Southeast Asian factories. Joanne Bauer & Elizabeth Umlas, *Making Corporations Responsible: The Parallel Tracks of the B Corp Movement and the Business and Human Rights Movement*, Aug. 24, 2015, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2650136](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650136) [<https://perma.cc/B68Q-B9NG>]. With these events, human rights were no longer considered solely a matter for the state, but opened up discussions of MNCs' human rights responsibilities. Wettstein, *Main Act*, *supra* note 23, at 78.

26. Wettstein, *Main Act*, *supra* note 23, at 78; Ramasastry, *supra* note 25, at 237.

27. Michael A. Santoro, *Business and Human Rights in Historical Perspective*, 14 J. HUM. RTS. 155, 156 (2015).

28. Ramasastry, *supra* note 25, at 238.

29. *Id.* at 240.

30. Wettstein, *Great Divide*, *supra* note 24, at 748–50.

31. Ramasastry, *supra* note 25, at 250; Wettstein, *Main Act*, *supra* note 23, at 83–84; Wettstein, *Great Divide*, *supra* note 24, at 751–52.

has long been viewed as the exclusive responsibility of the state,” which is the protection of human rights.<sup>32</sup>

As BHR expands, however, these two fields are starting to more significantly overlap.<sup>33</sup> An important part of this interaction is that BHR is taking what were moral claims in the field of CSR, and is attempting to codify those responsibilities.<sup>34</sup> The next subsection sets out the development of those standards.

#### *A. The Evolution of Soft Law Standards on BHR*

Throughout the 1980s and 1990s, BHR developed in a piecemeal fashion, such as through individual company efforts or sector-specific efforts.<sup>35</sup> What was lacking for the development of a broader initiative was any type of consensus on the moral norms that should guide corporations in the global economy.<sup>36</sup> That began to change in 2000 due to the work of the United Nations. This subsection provides a brief overview of the development of those standards and where they are today.

The first major attempt to create a universal framework for BHR was the UN Global Compact (UNGC).<sup>37</sup> The UNGC was proposed by UN Secretary General Kofi Annan in 1999<sup>38</sup> and officially launched in July 2000.<sup>39</sup> Initially, the UNGC set out nine principles to guide business conduct, which were divided into the areas of human rights,

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32. Wettstein, *Main Act*, *supra* note 23, at 81.

33. Santoro, *supra* note 27, at 157–58. Santoro states that “[t]his expansion of BHR has been fueled by the ‘discovery’ of CSR by legal scholars in the past decade.” *Id.* at 157.

34. *Id.* at 158.

35. David Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*, 23 MINN. J. INT’L L. 135, 136 (2014).

36. Oliver F. Williams, *The United Nations Global Compact: What Did It Promise?*, 122 J. BUS. ETHICS 241, 241–43 (2014).

37. Ramasastry, *supra* note 25, at 243; Williams, *supra* note 36, at 243. Prior efforts of the UN included the establishment of a Centre and Transnational Corporations, which started, but did not finish, work on drafting a Code of Conduct on Transnational Corporations. Weissbrodt, *supra* note 35, at 136.

38. Kofi Annan, Secretary General of the United Nations, *Business and the U.N.: A Global Compact of Shared Values and Principles*, Address to the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), in 65 VITAL SPEECHES OF THE DAY 260 (1999). In his speech at the World Economic Forum, Annan called on the private sector to adopt and act upon a set of shared values in order to “give a human face to the global market.” *Id.*

39. Betty King, *The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT’L L.J. 481, 481 (2001).

labor rights, and the environment.<sup>40</sup> The mission of the Global Compact is for corporations to internalize the Compact's "principles by making them part of business strategy and operations" and to "facilitate cooperation and collective problem-solving between different stakeholders."<sup>41</sup> Importantly, the UNGC's requirements on labor rights, human rights, and avoidance of complicity with human rights abuses used international legal standards (including the International Labor Organization Core Labor Standards and the Universal Declaration of Human Rights) to evaluate corporations' conduct and did not rely on the legal standards of the host country.<sup>42</sup> In 2004, after the 2003 UN Convention Against Corruption, the UNGC added a tenth principle on combatting corruption.<sup>43</sup>

The UNGC was met with a mixed reaction. Critics, including those in the BHR field, focused on the voluntary nature of the initiative, as the UNGC did not have a mechanism for monitoring compliance or a system for holding corporations accountable.<sup>44</sup> Because the UNGC principles were not binding on corporations as a form of regulation, critics viewed them as simply "pretty words."<sup>45</sup> Others argued that the UNGC allowed corporations to freely make broad claims of compliance with the principles, without having to be concerned about being held accountable for those claims.<sup>46</sup>

Proponents of the UNGC approach state that its primary goals were not regulation, but learning, dialogue, and the development of partnerships between the private, public, and civil sectors.<sup>47</sup> Through these mechanisms, they claim the UNGC has had a lasting impact by creating systematic changes in corporate behavior and encouraging positive action by corporations (whereas a regulatory approach would encourage only compliance with minimum standards).<sup>48</sup> The UNGC has also helped move the global community towards a "growing consensus . . . on shared values or moral norms."<sup>49</sup> Overall, the UNGC did not

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40. Oliver F. Williams, *The UN Global Compact: The Challenge and the Promise*, 14 *BUS. ETHICS Q.* 755, 755-56 (2004); Georg Kell, *The Global Compact: Origins, Operations, Progress, Challenges*, 11 *J. CORP. CITIZENSHIP* 35, 36 (2003).

41. Kell, *supra* note 40, at 36.

42. Ramasastry, *supra* note 25, at 243.

43. Williams, *supra* note 40, at 755-56.

44. *Id.* at 757; *see also* Georg Kell, *The Global Compact: Selected Experiences and Reflections*, 59 *J. BUS. ETHICS* 69, 72 (2005) (noting that "the question of voluntarism versus regulation has remained one of the most contentious issues.").

45. Susan Ariel Aaronson, *Oh, Behave!*, *INT'L ECON.*, Mar./Apr. 2001, at 40, 47.

46. Williams, *supra* note 40, at 762.

47. Kell, *supra* note 40, at 43.

48. *Id.* at 44-45.

49. Williams, *supra* note 36, at 248.

meet the demands of the BHR community and came to be associated more with CSR rather than BHR. This development, however, had the benefit of making all human rights, beyond just labor rights in the supply chain (the primary human rights focus of CSR up to that point), relevant for corporations through CSR.<sup>50</sup>

The second attempt to create a universal framework for BHR was the UN *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* in 2003.<sup>51</sup> The UN Sub-Commission on the Promotion and Protection of Human Rights drafted and adopted the *Draft Norms*, but the UN Commission on Human Rights only debated the *Draft Norms* and did not hold a vote on their adoption.<sup>52</sup> Although the *Draft Norms* were grounded in treaties and customary international law related to human rights,<sup>53</sup> their placement of human rights obligations directly on corporations became too controversial and resulted in no further action being taken on the *Draft Norms*.<sup>54</sup> The debates on the *Draft Norms* over issues of voluntary versus obligatory and hard law versus soft law reflected the differences in the basic approaches of the BHR and CSR fields.<sup>55</sup>

After the UN Commission on Human Rights failed to adopt the *Draft Norms*, the UN Secretary-General appointed John Ruggie as a Special Representative on the issue of business and human rights.<sup>56</sup> This appointment led to the most significant developments in BHR to date: the 2008 United Nations Protect, Respect, and Remedy Framework<sup>57</sup> and the 2011 United Nations *Guiding Principles for Business and Human Rights* (UNGPs).<sup>58</sup> The UNGPs provide guidance for

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50. Wettstein, *Great Divide*, *supra* note 24, at 746–47.

51. Ramasastry, *supra* note 25, at 243–44. For the history of the development of the *Draft Norms*, see David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 903–07 (2003).

52. David Kinley et al., 'The Norms are Dead! Long Live the Norms!' *The Politics Behind the UN Human Rights Norms for Corporations*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 459, 461 (Doreen McBarnet et al. eds., 2007)

53. Weissbrodt & Kruger, *supra* note 51, at 913.

54. Kinley et al., *supra* note 52, at 465–66.

55. *Id.* at 462–63.

56. *Id.* at 461.

57. John Ruggie (Special Representative of the Secretary-General), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶¶ 17–26, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

58. United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect,*

operationalizing the Protect, Respect, and Remedy framework and are credited with significantly elevating the stalled discussion on business and human rights.<sup>59</sup>

The three-pillar approach of protect, respect, and remedy provides the foundation for the UNGPs. Under the first pillar, the responsibility for protecting human rights rests with the state.<sup>60</sup> Under the second pillar, businesses have a responsibility to “respect” human rights, which means corporations should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>61</sup> Finally, in the third pillar, both the state and private parties have an obligation to provide human rights abuse victims with access to remedies.<sup>62</sup>

The UNGPs quickly became the leading framework for understanding businesses’ obligations towards human rights. This is not to say, however, that the UNGPs have escaped criticism. Many of the leading civil society organizations focused on human rights strongly criticized the UNGPs.<sup>63</sup> As happened with the UNGC and the *Draft Norms*, critics noted the voluntary nature of the UNGPs.<sup>64</sup> In addition, the critics noted the failure to give corporations a positive duty to

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*Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter *Guiding Principles*].

59. Wettstein, *Critical Assessment*, *supra* note 3, at 162–63. According to a November and December 2014 survey of 853 senior corporate executives, 83 percent of respondents agree that corporations have a human rights responsibility and 71 percent stated that corporations’ responsibilities go beyond simply following local laws. ECONOMIST INTELLIGENCE UNIT, *THE ROAD FROM PRINCIPLES TO PRACTICE: TODAY’S CHALLENGES FOR BUSINESS IN RESPECTING HUMAN RIGHTS* 2, 4 (2015), [https://www.dlapiper.com/~media/Files/Insights/Publications/2015/03/Challenges\\_for\\_business\\_in\\_respecting\\_human\\_rights.pdf](https://www.dlapiper.com/~media/Files/Insights/Publications/2015/03/Challenges_for_business_in_respecting_human_rights.pdf) [<https://perma.cc/UX83-2QBA>]. In the late 1990s, by contrast, there was no general recognition that companies had any human rights responsibilities. *Id.* at 4.

60. *Guiding Principles*, *supra* note 58, at 3.

61. *Id.* at 13.

62. *Id.* at Part III.

63. Larry Cata Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All*, 38 *FORDHAM INT’L L.J.* 457, 518–21 (2015); Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48 *TEX. INT’L L.J.* 33, 52–54 (2012).

64. Blitt, *supra* note 63, at 53 (quoting the NGO Human Rights Watch as stating that the UNGPs are simply an “endorse[ment] [of] the status quo: a world where companies are encouraged, but not obliged, to respect human rights.”). As Wettstein notes, however, in one sense the UNGPs are not voluntary in that the UNGPs create human rights responsibilities for all companies irrespective of whether the company affirmatively consents to follow the principles or the company’s home government requires it. Wettstein, *Critical Assessment*, *supra* note 3, at 166. However, any enforcement of the UNGPs require action by government. *Id.*

promote the realization of human rights.<sup>65</sup> Those dissatisfied with the non-binding nature of the UNGPs—and viewed the UNGPs as a continuation of the UNGC’s CSR approach—have moved on to another alternative and are seeking a treaty on business and human rights.<sup>66</sup>

Overall, BHR and CSR have come together to create a model—represented by the UNGPs—that has significantly advanced human rights issues but also includes the limitations of both models. Most importantly, this approach uses a “do no harm” approach.<sup>67</sup> It focuses on a corporation using due diligence to avoid causing a human rights violation or being complicit in a human rights violation.<sup>68</sup> This approach, which is grounded in a legal liability view of BHR but without legal accountability, does not include a consideration of the potential positive impacts of business from CSR.

## II. BUSINESS AND CORRUPTION

At the same time that BHR issues started to gain prominence, the last fifteen years have also seen a significant change in worldwide attitudes towards corruption in international business. Although the United States criminalized the payment of bribes to foreign government officials in 1977, the anti-bribery law had very little impact on international business for almost twenty years.<sup>69</sup> During those two decades, the Department of Justice (DOJ) rarely brought cases under the law, and no other nation criminalized transnational bribery.<sup>70</sup> Furthermore, during this time period, international development organizations, such as the World Bank, were reluctant to address issues of corruption and treated corruption as an internal governance issue of states.<sup>71</sup>

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65. Santoro, *supra* note 27, at 158. In other words, corporations only have the negative duty not to infringe on the rights of others, and do not have a positive duty to contribute to improvement of human rights. Wettstein, *Critical Assessment*, *supra* note 3, at 169–71.

66. Ramasastry, *supra* note 25, at 248; Backer, *supra* note 63, at 522–25.

67. Ramasastry, *supra* note 25, at 240.

68. *Id.* at 247.

69. Wesley Cragg & William Woof, *The U.S. Foreign Corrupt Practices Act: A Study of Its Effectiveness*, 107 BUS. & SOC’Y REV. 98, 102 (2002) (stating the conclusion from their study of the FCPA’s impact from 1977 to 1995 that the FCPA “has not had a significant positive impact on general or overall standards of international business conduct of American corporations, at least with respect to bribery of foreign officials.”).

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

71. Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647, 661–62 (2015). Subsequently, the World Bank issued guidelines prohibiting corrupt practices

The attitudes towards corruption began to change in the mid-1990s due to a better understanding of corruption's negative impact on economic development and its contribution to poverty.<sup>72</sup> With respect to MNCs, the changing attitudes led to two general developments that have shaped corporations' current approach to combatting corruption. First, there has been a significant increase in criminal law enforcement of anti-bribery statutes. This development includes increased enforcement of the anti-bribery laws in the U.S., the adoption of international conventions on corruption, and other nations adopting criminal laws consistent with the international conventions.<sup>73</sup> These criminal law changes have forced corporations to address the risk of employees or agents paying bribes. Second, major CSR initiatives changed to include combatting corruption as a social responsibility of corporations.<sup>74</sup> These two developments are discussed in the following two subsections and provide an overview of the current expectations placed on corporations with respect to combatting corruption.

### *A. Criminal Law Enforcement*

#### 1. ENFORCEMENT UNDER THE FCPA

The first nation to criminalize the payment of bribes to officials of foreign countries was the United States with the passage of the Foreign Corrupt Practices Act (FCPA) in 1977.<sup>75</sup> The FCPA prohibits individuals and companies from "corruptly" giving "anything of value" to a foreign official for purposes of "obtaining or retaining business" due to some "improper advantage" or influence over the official in his or her official capacity.<sup>76</sup> However, the FCPA provides an exception for facilitation payments, which are payments to facilitate a routine

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and has fined and debarred contractors and consultants for violations. Low et al., *supra* note 70, at 575–77. This policy was focused upon preventing the economic harms of corruption to a nation's citizens (e.g., distortion of public expenditures), and not with political intervention in the general relationship between citizens and their government. Nichols, *supra*, 661–62. As one example, up until the late 1990s, many OECD countries allowed for the tax deductibility of bribes to foreign officials. Susan Rose-Ackerman, *Corruption and the Global Corporation: Ethical Obligations and Workable Strategies*, in *TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES* 149 (Michael Likosky ed., 2002).

72. Rose-Ackerman, *supra* note 71, at 151.

73. *See infra* Part II.A.

74. *See infra* Part II.B.

75. Low et al., *supra* note 70, at 564. *See also* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 *OHIO ST. L.J.* 929, 930 (2012).

76. 15 U.S.C. § 78dd-1(a) (2012).

government action.<sup>77</sup> In addition to the anti-bribery provisions, the FCPA also contains accounting provisions that require securities issuers to establish internal controls and maintain accurate records.<sup>78</sup> Thus, the failure to properly record payments that the government suspects were used as bribes can result in a violation of these provisions.<sup>79</sup>

The FCPA was largely dormant for its first twenty-five years, but after the turn of the century, the DOJ (and later the Securities and Exchange Commission (SEC)) began a string of enforcement actions that continues through to today.<sup>80</sup> Several of these enforcement actions resulted in corporations paying hundreds of millions of dollars in fines.<sup>81</sup> In addition to these high-profile cases, in 2013, the SEC announced an intention to adopt a “broken windows” approach to enforcement, which involves going after even small infractions to help push all corporations to adopt a zero tolerance approach to securities laws violations.<sup>82</sup>

If a corporation’s employee or agent violates the FCPA by paying a bribe, the corporation’s best hope for obtaining a favorable settlement agreement with the DOJ, or to avoid prosecution altogether, is to be able to show the DOJ that it has adopted an effective compliance program and to cooperate with the DOJ’s investigation.<sup>83</sup> Thus, due to

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77. *Id.* at § 78dd-1(b). For a further discussion of the facilitation payments and anti-bribery laws, see Philip Nichols, *Are Facilitation Payments Legal?*, 54 VA. J. INT’L L. 127 (2013); see also Jon Jordan, *The OECD’s Call for an End to “Corrosive” Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881 (2011).

78. 15 U.S.C. § 78m(a)–(b) (2012).

79. For an overview of both the anti-bribery provisions and the accounting provisions, see Barr Benyamin et al., *Foreign Corrupt Practices Act*, 53 AM. CRIM. L. REV. 1333, 1337–56 (2016).

80. The early 2000s typically saw less than ten enforcement actions per year, but “[t]here were 48 actions in 2011, 23 actions in 2012, 27 actions in 2013, 26 actions in 2014, and 20 actions in 2015.” Benyamin et al., *supra* note 79, at 1385.

81. *Id.* at 1386 (stating that for 2014 enforcement actions, “the average [fine] was \$156.6 million, with a range of \$2 million to \$772 million.”).

82. Beverley Earle & Anita Cava, *The Mystery of Declinations Under the Foreign Corrupt Practices Act: A Proposal to Incentivize Compliance*, 49 U.C. DAVIS L. REV. 567, 577 (2015).

83. The DOJ will also consider such factors as the history of similar misconduct, “pervasiveness of wrongdoing within the organization,” and remedial actions. CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE & THE ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICE ACT 52–53 (2012), <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [<https://perma.cc/FL74-J4XC>] [hereinafter RESOURCE GUIDE]. With respect to the compliance program, the DOJ is asking: 1) is the program well-designed?; 2) is it applied in good faith?; and 3) does it work? *Id.* at 56. Critics, however, complain that the DOJ enforcement attorneys have too much discretion in applying these factors. Peter Reilly, *Negotiating Bribery:*

the increased enforcement environment, and the importance the DOJ places on compliance programs, corporations' compliance departments have significantly increased their attention on bribery issues.<sup>84</sup> Supporting these efforts is what Professor Koehler refers to as "FCPA, Inc."<sup>85</sup> This term refers to the many law, accounting, and compliance consulting firms that have developed practice areas related to FCPA compliance programs and internal investigations.<sup>86</sup> The goal of "FCPA, Inc." is to help corporations avoid paying bribes, or if an employee or agent does pay a bribe, to be able to show that the employee or agent thwarted the company's best efforts to prevent bribe payments.<sup>87</sup>

## 2. CRIMINALIZING THE PAYMENT OF BRIBES: A WORLDWIDE MOVEMENT

For over two decades, the United States stood alone in criminalizing the payment of bribes to foreign officials. This changed in the 1990s when the widespread recognition of the harms of corruption helped push us towards our current global anti-corruption regime.<sup>88</sup> An important event in this process was World Bank President James Wolfensohn's 1996 speech on the "cancer of corruption," which broke the World Bank's silence on the topic.<sup>89</sup> In addition to reformers from the development community that saw the harms of corruption on developing countries, U.S. businesses that believed they were losing business due to foreign competitors paying bribes were also a driving force behind the development of a global anti-corruption norm.<sup>90</sup>

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*Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 387–88 (2014).

84. See Mike Koehler, *A Common Language to Remedy Distorted Foreign Corrupt Practices Act Enforcement Statistics*, 68 RUTGERS U. L. REV. 553, 557–60, 603 (2016).

85. *Id.* at 560.

86. *Id.* at 557–58. Many news publications have also noted that providing FCPA advice to corporations is a "growth industry," "good business," and a "crown jewel practice[]" area. *Id.* at 558–59.

87. Koehler argues that the members of "FCPA Inc." overstate corporations' risk of FCPA enforcement to sell these compliance and investigative services. *Id.* at 570–71; Mike Koehler, *An Examination of Foreign Corrupt Practices Act Issues*, 12 RICH. J. GLOBAL L. & BUS. 317, 364 (2013); Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT'L L. REV. 961, 1021–22 (2014).

88. Nichols, *supra* note 71, at 665.

89. *Id.* at 661.

90. Elizabeth Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1, 6–7 (2013); see also Rose-Ackerman 2002, *supra* note 71, at 151. The end of the Cold War earlier in

The first major event in the development of the global anti-corruption norm was the adoption of the Organization for Economic Co-Operation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials*<sup>91</sup> in 1997.<sup>92</sup> Under the Convention, the signatory countries are obligated to criminalize the act of bribing foreign officials.<sup>93</sup> This was followed by the United Nations *Convention against Corruption* (UNCAC), which was adopted in 2003.<sup>94</sup> Among other provisions, the UNCAC requires nations to pass laws to criminalize the payment of bribes to public officials “in order to obtain or retain business or other undue advantage in relation to the conduct of international business.”<sup>95</sup>

Following these conventions, several countries have adopted new anti-bribery laws, such as Brazil, China, India, and the United Kingdom.<sup>96</sup> One of the most publicized was the United Kingdom Bribery Act (UKBA) of 2010, which—at least on paper—is more onerous than the FCPA.<sup>97</sup> The UKBA covers not only bribes to foreign officials, but also bribes to private individuals or entities (commercial bribery).<sup>98</sup> In addition, it does not include an exception for facilitation payments. The UKBA does, however, create an “adequate procedures” defense. Under this defense, a corporation can avoid liability by presenting evidence that it had adopted an appropriate compliance program at the time of the wrongful payment.<sup>99</sup>

Overall, the criminalization of transnational bribery encourages corporations to undertake efforts, or at least the appearance of efforts, to ensure that their employees and agents do not pay bribes. The

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the 1990s also played a role, as democratic countries no longer needed to support corrupt autocracies for strategic reasons. *Id.*

91. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, ORG. FOR ECON. CO-OPERATION & DEV. (Nov. 21, 1997), [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) [https://perma.cc/PYE7-EPCM].

92. Meg Beasley, *Note: Dysfunctional Equivalence: Why the OECD Anti-Bribery Convention Provides Insufficient Guidance in the Era of Multinational Corporations*, 47 GEO. WASH. INT'L L. REV. 191, 196–97 (2015).

93. Benjamin et al., *supra* note 79, at 1365.

94. G.A. Res. 58/4, *Convention against Corruption* (Oct. 31, 2003), [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) [https://perma.cc/G7FU-SB25].

95. *Id.* at Article 16.

96. Earle & Cava, *supra* note 82, at 585.

97. Spahn, *supra* note 90, at 21 (describing the UKBA as “the strictest and most feared criminal anti-bribery law.”); Benjamin et al., *supra* note 79, at 1370 (stating that the UKBA “has been widely received as one of the most far-reaching anti-bribery laws of any country or international organization.”).

98. Benjamin et al., *supra* note 79, at 1370.

99. *Id.*

corporation's obligation to combat corruption is simply to ensure that it is not a part of a corrupt transaction. Even if a corporation receives benefits from operating in a corrupt environment, its only obligation is to ensure that it is not involved in the payment of any bribes. These developments have had the unintended effect, however, of causing corporations to view corruption as only a criminal law matter, and therefore a legal compliance issue.<sup>100</sup> Thus, a corporation's anti-bribery efforts typically run parallel to, and do not intersect with, its other CSR initiatives, including its efforts to respect human rights. In addition, as discussed in the next subsection, the major, global CSR initiatives seem to reinforce that approach.

### *B. Corporate Social Responsibility Initiatives*

There is a wide range of initiatives that attempt to provide guidance to corporations on what it means to act socially responsibly. In general, these initiatives provide principles or guidelines of responsible business conduct that corporations voluntarily adopt. Although many of these initiatives did not initially include combatting corruption as a matter of CSR, the topic was added around the same time as the emergence of the global anti-corruption norm.

The changed attitudes towards corruption that led to the UNCAC and increased criminal law enforcement also led to changes in the field of CSR. Coinciding with the developments in criminal law described above,<sup>101</sup> various CSR initiatives were modified to include anti-corruption principles. One of the most well-known CSR initiatives is the UN Global Compact (UNGC).<sup>102</sup> The Global Compact was officially launched in 2000 with nine principles, which were divided into the categories of human rights, labor rights, and the environment.<sup>103</sup> Members of the anti-corruption field, however, argued that little progress could be made on the Global Compact's nine principles if corruption was not brought under control.<sup>104</sup> Thus, in 2004, a tenth Principle was added to the Global Compact that stated

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100. Bishara & Hess, *supra* note 1, at 72.

101. *See supra* Part II.A.2.

102. *See supra* notes 37–50 and accompanying text (discussing the United Nations Global Compact in the context of the business and human rights movement). The UNGC currently counts over 9,000 companies as members. UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/> [<https://perma.cc/C77P-37S5>].

103. *See supra* note 40 and accompanying text (discussing the initial version of the Global Compact).

104. Peter Eigen, *Removing a Roadblock to Development: Transparency International Mobilizes Coalitions Against Corruption*, INNOVATIONS, Spring 2008, at 29.

“[b]usinesses should work against corruption in all its forms, including extortion and bribery.”<sup>105</sup>

Others have echoed this need to address corruption in order to make progress towards other CSR goals. For example, one commentator stated that “[i]f ending corruption is not treated as a prerequisite to all corporate [CSR] efforts, CSR practitioners will continue to work upon a foundation of quicksand . . .”<sup>106</sup> However, as discussed below, the most influential CSR standards have defined combatting corruption as simply ensuring that the corporation is not directly involved in a bribe payment; a directive that matches that from the criminal law.

In addition to the UNGC, two of the most influential CSR standards in the past decade are the Global Reporting Initiative (GRI) and the *ISO 26000: 2010 Guidance on Social Responsibility*. The GRI is the leading standard for sustainability reporting by organizations. Through sustainability reports—also referred to as non-financial reports—corporations disclose their policies, management processes, and actual performance on matters related to the corporation’s social and environmental performance.<sup>107</sup> Similar to the UNGC, the GRI did not include corruption and bribery in its original standards in the late 1990s but added those issues in later versions of the standards as the global anti-corruption norm took hold.<sup>108</sup> In the current set of standards, corporations are required to report on anti-corruption matters only if the corporation determines that corruption is a material issue for it.<sup>109</sup> If

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105. Mohamed A. Arafa, *Battling Corruption Within a Corporate Social Responsibility Strategy*, 21 *IND. INT’L & COMP. L. REV.* 397, 406 n.52 (2011) (quoting Principle Ten: Anti-Corruption, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10> [<https://perma.cc/3RJS-JNBB>]).

106. *Id.* at 408.

107. The most recent set of GRI standards define sustainability reporting as: “Sustainability reporting, as promoted by the GRI Standards, is an organization’s practice of reporting publicly on its economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards the goal of sustainable development.” GLOBAL REPORTING INITIATIVE (GRI), CONSOLIDATED SET OF GRI SUSTAINABILITY REPORTING STANDARDS 2016 3 (2016), <https://www.globalreporting.org/standards> [<https://perma.cc/4G3W-R64U>] [hereinafter GRI STANDARDS].

108. David Hess & Thomas Dunfee, *Taking Responsibility for Bribery: The Multinational Corporation’s Role in Combating Corruption*, in *BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS* 269 (Rory Sullivan ed. 2003).

109. GLOBAL REPORTING INITIATIVE (GRI), GRI 205: ANTI-CORRUPTION 2016 4–5 (2016), <https://www.globalreporting.org/standards> [<https://perma.cc/4G3W-R64U>]. “In sustainability reporting, materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them.” GRI STANDARDS, *supra* note 107, at 10. Materiality is defined as “topics that: reflect the

corruption is a material topic for the corporation, then it should report on (1) its “management approach” (which includes a description of the policies and procedures it uses for risk assessments and a description of its policies on anti-corruption communications and trainings for employees and business partners);<sup>110</sup> (2) the results of the corruption risk assessments for its operations;<sup>111</sup> (3) details on who (e.g., board of directors members, employees, and business partners) has received anti-corruption trainings and communications;<sup>112</sup> and (4) any instances of corruption uncovered and the result of those discoveries (e.g., employee disciplinary action and legal cases).<sup>113</sup> Also included within the “management approach” recommended disclosures is whether the corporation participates in “collective action to combat corruption.”<sup>114</sup>

The *ISO 26000: Guidance on Social Responsibility* was the result of a lengthy, multi-stakeholder process to determine the meaning of social responsibility and identify best practices.<sup>115</sup> Although the International Organization for Standardization (ISO) typically creates standards to help ensure efficiency, quality, and safety in organizations’ products and services,<sup>116</sup> the ISO created the *Guidance on Social Responsibility* to provide general guidance to organizations of all sizes and in all locations.<sup>117</sup> The guidelines have only had one edition (created in 2010) and have always included anti-corruption. Under ISO 26000, corporations are encouraged to adopt practices to ensure that their employees, and others they do business with, do not pay bribes.<sup>118</sup>

Overall, the CSR initiatives mirror the focus of criminal law enforcement, which is to encourage corporations to adopt compliance programs to ensure that the corporation is not connected to a bribe

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reporting organization’s significant economic, environmental, and social impacts; or substantively influence the assessments and decisions of stakeholders.” *Id.*

110. GRI 205: ANTI-CORRUPTION 2016, *supra* note 109, at 3. The standards on anti-corruption reporting also direct corporations to the standard “GRI 103: Management Approach,” which provides additional detail on these issues that are generic enough to apply to potential topics (e.g., human rights, non-discrimination, etc.). *Id.*

111. *Id.* at 7.

112. *Id.* at 8.

113. *Id.* at 9.

114. *Id.* at 6. This disclosure item requires the corporation to disclose the “collective action initiatives in which the corporation participates;” its strategy behind its involvement in these activities; and a “description of the main commitments of these initiatives.” *Id.*

115. David Hess, *Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility*, 73 OHIO ST. L.J. 1121, 1125 (2012).

116. *About ISO*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, <https://www.iso.org/about-us.html> [<https://perma.cc/K4N9-KXSA>].

117. ISO, ISO 26000: GUIDANCE ON SOCIAL RESPONSIBILITY 1 (1st ed. 2010).

118. *Id.* at 49.

transaction. It is a compliance focus. These initiatives foster the basic assumption that corporations must sometimes operate in corrupt environments (as opposed to corporations being a corrupting influence), and therefore corporations have the responsibility to ensure that the corporation's employees or agents do not give into the demand for bribes. The initiatives do not encourage corporations to take on a greater role in combatting corruption related to its business activities.

### III. CORRUPTION AND HUMAN RIGHTS

Not long ago, many scholars believed that corruption could have a positive impact on a country's economic development and therefore improve the lives of those in that country.<sup>119</sup> These economists believed that corruption "greases the wheels" of the economy by correcting government failures and inefficiencies.<sup>120</sup> A complete review of the empirical evidence, however, shows that the "greases the wheels" hypothesis is supported only by anecdotal evidence, and that most studies show that corruption slows economic development.<sup>121</sup> For example, corruption does not allow the private sector to bypass inefficient regulations; instead, the opportunity to extract bribes from the private sector incentivizes corrupt officials to impose more inefficient regulations to create more opportunities to extract bribes.<sup>122</sup>

Even if corruption has no impact on economic growth, corruption is harmful due to its other negative impacts on societies, such as waste and misallocation of government resources.<sup>123</sup> For instance, governments are more likely to invest in "white elephant" projects, which are investments in capital-intensive projects that give government officials many opportunities to extract significant bribes, rather than

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119. Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 864–65 (2010) [hereinafter Spahn, *Nobody Gets Hurt?*].

120. Toke S. Aidt, *Corruption, Institutions, and Economic Development*, 25 OXFORD REV. ECON. POL'Y 271, 273 (2009).

121. Aidt provides a review of the evidence at both the microeconomic and macroeconomic levels, and finds that the evidence supports the view that corruption hampers economic development. *Id.* at 275–84, 288. Aidt interprets the macroeconomic evidence as showing that corruption has almost zero impact on economic growth in countries with poor governance (as "things cannot get much worse") and a negative impact on economic growth in countries with otherwise stronger governance. *Id.* at 283.

122. Spahn, *Nobody Gets Hurt?*, *supra* note 119, at 866–67. Aidt identifies a "fallacy of efficient corruption" and states, "it is, at best, misleading to argue that corruption can be efficient when, in fact, the very purpose of many of the most unwieldy and inefficient government interventions are caused by corrupt government officials in the first place. At worst, such an argument is dangerous because it encourages tolerance of corruption." Aidt, *supra* note 120, at 274–75.

123. Aidt, *supra* note 120, at 283–84.

invest in education or healthcare initiatives.<sup>124</sup> As a result, researchers measuring economic growth not in terms of GDP *per capita*, but in terms of a “genuine investment” (a measure of an economy’s ability to sustain living standards over time) find a strong negative relationship with corruption.<sup>125</sup>

Overall, scholars and policymakers have reached a consensus on the negative impact of corruption on societies, and have started the project of explicating its connection to more specific harms.<sup>126</sup> For example, in the United States, the Assistant Attorney General has even stated that combating corruption is a matter of national security.<sup>127</sup> One of the harms that has received increased attention is the negative impact of corruption on human rights. As discussed below, even if corruption did improve a country’s economic development, it would come at too high of a cost due to the negative impact on human rights.

In recent years, scholars and special interest groups have focused on framing corruption’s negative impacts on a country as human rights violations. In 2009, the International Council on Human Rights (ICHR) and Transparency International (TI) published a report showing the connection between corruption and human rights for the purpose of raising “awareness among key stakeholders and the public of the links between corruption and human rights, thereby diminishing public tolerance of corruption and strengthening public support for anticorruption measures.”<sup>128</sup> The focus of the report was on

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124. Spahn, *Nobody Gets Hurt?*, *supra* note 119, at 869–70.

125. Aidt, *supra* note 120, at 284–88.

126. See generally ALEXANDRA ADDISON WRAGE, *BRIBERY AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS, AND SECURITY* (2007).

127. Assistant Attorney General Leslie R. Caldwell stated:

Foremost, corrupt countries are less safe. Corruption thwarts economic development, traps entire populations in poverty, and leaves countries without a credible justice system. Corrupt officials who put their personal enrichment before the benefit of their citizenry create unstable countries. And as we have seen time and again, unstable countries become the breeding grounds and safe havens for terrorist groups and other criminals who threaten the security of the United States. . . . For all of these reasons, fighting foreign corruption is not a service we provide to the global community, but rather a necessary enforcement action to protect our own national security interests and the ability of our U.S. companies to compete on a global scale.

Leslie R. Caldwell, Assistant Att’y Gen., Assistant Attorney General Leslie R. Caldwell Speaks at Duke University School of Law (Oct. 23, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law> [<https://perma.cc/N8UJ-HRX5>].

128. INTERNATIONAL COUNCIL ON HUMAN RIGHTS (ICHR) & TRANSPARENCY INTERNATIONAL (TI), *CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION 1* (2009), [http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf) [<https://perma.cc/3X5T-HCL8>].

corruption's impact on the ability of governments to meet their human rights obligations to respect (i.e., not deprive individuals of rights), protect (i.e., prevent third parties from violating individual's rights), and fulfill (i.e., positive obligation to provide basic needs).<sup>129</sup> The report showed the micro level links between corruption and its negative impact on the rights to non-discrimination, a fair trial, political participation, adequate food, adequate housing, health, education, and other rights recognized in international treaties.<sup>130</sup> To better understand the connection, the report distinguished between corrupt acts that directly or indirectly violate a human right and those acts that have only a more remote connection to a human rights violation.<sup>131</sup>

- *Direct violations.* Direct violations occur when “a corrupt act is deliberately used as a means to violate a right.”<sup>132</sup> An example of a direct violation would be a business paying a bribe to a judge to win a case.<sup>133</sup> The human right violation would be that the other party to the lawsuit has had their right to a fair trial violated.<sup>134</sup>
- *Indirection violations.* Indirect violations occur when corruption is an “essential factor contributing to a chain of events that eventually leads to violation of a right.”<sup>135</sup> In other words, a corrupt act is a “necessary condition for the violation.”<sup>136</sup> For example, if a business pays a bribe to a government official to avoid certain regulations (e.g., health and safety regulations) and an individual is harmed in a manner that the regulation was designed to protect against, then the corrupt payment indirectly caused the violation of a right to health.
- *Remote violations.* This is when corruption is just one of several factors contributing to the violation and it has a more remote connection to the violation.<sup>137</sup> For example, corruption may influence the result of a political election (which directly violates political participation rights), but

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129. *Id.* at 25–26.

130. *Id.* at 31–61. The report also found that corruption has the greatest negative impact on women, children, minorities, and other disadvantaged groups (e.g., indigenous peoples, migrant workers, and the poor). *Id.* at 7.

131. *Id.* at 27–28.

132. *Id.* at 27.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 28.

may also result in remote violations due to the actions of the corruptly elected official.<sup>138</sup>

This distinction between direct, indirect, and remote violations helps us to better understand the causal link between corruption and human rights violations.<sup>139</sup> Especially important for the purposes of this Article is recognizing the impact of indirect violations. For example, in the tragedies in the apparel industry discussed earlier, corruption is indirectly linked to violations of human rights of health and life.<sup>140</sup> Included within this indirect connection to human rights violations is that efforts undertaken by corporations and NGOs to prevent human rights violations are often rendered ineffective due directly to corruption. Being aware of the different possible types of connections between corruption and human rights allows us to identify those connections in practice, and, as discussed further below, allows us to see how corruption impacts a corporation's efforts to respect human rights.

The United Nations has also taken a more active role in identifying the connections between corruption and human rights. This work began in 2003 with the appointment of a Special Rapporteur to draft a comprehensive report on the impact of corruption on human rights.<sup>141</sup> The Special Rapporteur's mandate ended just three years later in 2006, but the UN continued to promote work on the issue.<sup>142</sup> In 2013, the United Nations Office of the High Commissioner for Human Rights passed a resolution recognizing "that corruption constitutes one of the obstacles to the effective promotion and protection of human rights," and requested that an Advisory Committee draft a research report "on the issue of the negative impact of corruption on the enjoyment of human rights."<sup>143</sup> The Advisory Committee issued their final report in

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138. *Id.*

139. *Id.* at 26–28.

140. *See supra* notes 8–20 and accompanying text (discussing the Rana Plaza building collapse and other tragedies).

141. *Former Sub-Commission Special Rapporteur on Corruption and its Impact on the Full Enjoyment of Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/FormerSRCorruption.aspx> [<https://perma.cc/P2KY-X2EZ>].

142. *The Human Rights Case Against Corruption*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 6–7 (2013), <http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCCaseAgainstCorruption.pdf> [<https://perma.cc/9YLH-CLP8>] [hereinafter OHCHR, *Human Rights*].

143. Human Rights Council Res. 23/9, U.N. Doc. A/HRC/RES/23/9, at 2 (June 20, 2013).

2015, which stated that “nearly every human right can be affected by corruption.”<sup>144</sup> The Advisory Committee report builds on the ICHR and TI report’s discussion of direct, indirect, and remote connections between corruption and human rights,<sup>145</sup> and goes on to state that “it is of minor importance whether a single act of corruption leads to a violation of human rights in a strictly judicial sense.”<sup>146</sup> Instead, what is of importance is the “negative impact” of corruption on human rights, which includes the role of corruption in “aggravating an already existing human rights violation concerning specific groups.”<sup>147</sup>

Building off of the work of Office of the High Commissioner for Human Rights, this Article argues that it is now time to consider the role of the private sector in combating corruption to protect human rights. Currently, reforms focused on business and corruption and business and human rights run mostly in parallel. In addition, as shown above, both focus on “do no harm” (do not pay a bribe and do not violate human rights), and do not take the next step of positive action. The next section discusses why business, corruption, and human rights issues need to be integrated.

#### IV. BUSINESS, CORRUPTION, AND HUMAN RIGHTS

In the prior Parts, this Article discussed the developments in the areas of business and human rights, business and corruption, and corruption and human rights. In business and human rights, the focus is currently centered on corporations “respecting” human rights under UNGPs. In the area of combating corruption, developments in criminal anti-bribery laws and in the CSR field push corporations to adopt compliance programs to ensure that employees, agents, and others with whom the corporation has a business relationship (e.g., suppliers), are not paying bribes. Finally, in the area of corruption and human rights, there is increased recognition that corruption has a significant negative impact on human rights. This section argues that to improve corporations’ ability to respect human rights, we must discuss business, corruption, and human rights together. This will not only improve corporations’ human rights performance but also their ability to combat corruption. Overall, by discussing business, corruption, and human

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144. U.N., Human Rights Council, Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights, ¶ 18, U.N. Doc. A/HRC/28/73 (Jan. 5, 2015), [hereinafter HRC, Final Report].

145. *See id.* ¶ 29 (discussing direct and indirect connections between corruption and human rights violations).

146. *Id.* ¶ 21.

147. *Id.* ¶ 20(b).

rights together, we develop a new idea of what it should mean for corporations to combat corruption.

*A. Business, Corruption, and Human Rights in the Ready Made Garment Industry*

Business and human rights cover a wide (and growing) range of rights and situations. To discuss the issues of business, corruption, and human rights, this Article will focus primarily on human rights issues related to labor in the supply chain. This Article focuses on these issues because labor issues in the supply chain, and especially in the garment industry, historically have received the most attention from the general public. In garment factories in developing countries, the employees often face a variety of health and safety hazards due to the factory environment (e.g., fire hazards, exposure to hazardous chemicals) and working conditions (e.g., forced and excessive overtime). In addition, these factories are often found in countries with high levels of corruption.

1. ROOT CAUSES OF HUMAN RIGHTS VIOLATIONS

Developing a system that ensures factories are in compliance with human rights standards requires an understanding of why factories go out of compliance. Corporations and interested stakeholders are recognizing that the problems at these factories are not simply due to unethical local managers, but that well-intentioned factory managers are often pressured into using wrongful practices. By understanding these root causes of non-compliance, we can work to correct those problems and reduce the incentives for factory managers to violate human rights policies.

One well-known root cause results from the ordering practices of buyers that create time and cost pressures on factories. MNCs often give factories very little lead-time and impose financial penalties for missing strict deadlines.<sup>148</sup> When under such time and cost pressures, even the most well-intentioned factory managers may succumb to the pressures to violate the rules.

A less well-understood pressure comes from local infrastructure problems. For example, Bangladesh's infrastructure problems cause inconsistent access to electricity.<sup>149</sup> These unexpected energy shortages

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148. RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* 13 (2013).

149. Sarah Labowitz & Dorothee Baumann-Pauly, *Business as Usual is Not an Option: Supply Chains and Sourcing After Rana Plaza*, 42 (2014),

impair a factory's ability to meet buyer deadlines.<sup>150</sup> In response, the factory managers face significant pressure to bend the rules to meet their contractual obligations.<sup>151</sup>

A common response by factories to any of these time pressures is the use of subcontracting.<sup>152</sup> Subcontracting involves a factory contracting out portions of a buyer's order (often the most basic level work) to smaller factories.<sup>153</sup> In most cases, those smaller factories have the lowest level of working conditions.<sup>154</sup> While subcontracting is always occurring—Labowitz and Baumann-Pauly state that “the business of garment production in its current form would not be possible without subcontracting”<sup>155</sup>—the pressure to meet buyer deadlines adds to their use.<sup>156</sup> The energy infrastructure issues create another problem. The factories do not have an incentive to invest in more productive machines (which would reduce the use of subcontracting), and the cycle continues.<sup>157</sup> Solving the infrastructure problem cannot occur without controlling corruption. Labowitz and Baumann-Pauly state “[t]here is little doubt that corruption is a key limiting factor in expanding much-needed infrastructure.”<sup>158</sup>

Another root cause is the current conditions of the buildings. Labowitz and Baumann-Pauly call for international buyers and others to create a fund to be used for building repairs and remediation for factories that fail compliance audits.<sup>159</sup> Even if adopted, their proposal will be significantly limited by corruption. Corruption was a major cause of the factory fires and building collapse tragedy in Bangladesh

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[http://www.stern.nyu.edu/sites/default/files/assets/documents/con\\_047408.pdf](http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf)  
[<https://perma.cc/2DSL-D6KQ>].

150. *Id.* at 25.

151. *Id.*

152. *Id.* at 25–26.

153. *Id.* at 17–18.

154. *Id.* at 17.

155. *Id.* Subcontracting occurs because the large factories take orders far larger than they can make, and then subcontract out the basic (low margin) work of those contracts to meet the buyer's deadlines. *Id.* at 17–18. This system allows the larger factories to increase their margins and have greater access to capital (since bank financing is based on the factory's sales volume). *Id.* at 25. The small subcontracting factories can survive on the low margins because their business model does not require significant capital investment or developing relationships with international buyers. *Id.* at 19. The international buyers are, of course, aware of subcontracting generally, but some claim that they seek to be purposefully ignorant about the problem as it relates to their orders. *Id.* at 21.

156. *Id.* at 25–26.

157. *Id.* at 25.

158. *Id.* at 42.

159. *Id.* at 48.

and Pakistan<sup>160</sup> and would be expected to be an impediment to remediation. In countries with high levels of corruption, building codes are easily violated, contracts may be given to companies unqualified to do the work and other problems that will impact the quality of the remediation efforts.<sup>161</sup> Overall, this brief analysis shows that certain root causes are outside of the corporation's direct control and cannot be corrected without addressing issues of corruption. The next subsection further illustrates this problem.

## 2. SUPPLY CHAIN COMPLIANCE AUDITS: CORRUPTION AS A BARRIER TO SOLUTIONS

As a solution for human rights problems in the supply chain, many push for MNCs to monitor the conditions of their suppliers' factories. First, corporations establish policies designed to ensure the protection of workers' rights.<sup>162</sup> Then, the corporation hires independent monitors to audit the factories to ensure they meet the established requirements.<sup>163</sup> If a violation is discovered, the factory must remediate the problem to continue its business relationship with the corporation.<sup>164</sup> These compliance audits have become the centerpiece of most efforts to improve labor rights in the supply chain. For example, in response to the Rana Plaza factory collapse two initiatives formed: Bangladesh Accord on Fire and Building Safety ("Accord") and the Alliance for Bangladesh Worker Safety ("Alliance"). Both rely on compliance audits to ensure safe factories.<sup>165</sup>

These initiatives, however, just like the system of auditing factories before them, have their limitations. First, the initiatives cover only a limited number of factories. For example, in Bangladesh, an April 2014 study claimed that less than 2,000 of the more than 5,000

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160. *See supra* notes 8–20 and accompanying text.

161. *See generally* TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2005: CORRUPTION IN CONSTRUCTION AND POST-CONFLICT RECONSTRUCTION (Diana Rodriguez et al. eds., 2005), [http://www.transparency.org/whatwedo/publication/global\\_corruption\\_report\\_2005\\_corruption\\_in\\_construction\\_and\\_post\\_conflict](http://www.transparency.org/whatwedo/publication/global_corruption_report_2005_corruption_in_construction_and_post_conflict) [<https://perma.cc/2MW4-47RW>].

162. *See generally* JILL ESBENSHADE, MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY 1–12 (2004).

163. Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1, 17 (2012) (stating that "[e]ach year, tens of thousands of social audits are commissioned by hundreds of brand-name companies and retailers in these sectors."); *see generally* JILL ESBENSHADE, *supra* note 162.

164. Marisa Anne Pagnattaro, *Labor Rights are Human Rights: Direct Action is Critical in Supply Chains and Trade Policy*, 10 S.C. J. INT'L L. & BUS. 1, 11 (2013).

165. *Id.* at 27–30.

factories were audited.<sup>166</sup> In addition, those factories that are not reached by the initiatives are likely to be those factories where workers face the greatest health and safety risks. Second, the audits themselves have flaws in their design. Labowitz and Baumann-Pauly looked at the design of the initiatives and argued that the initiatives will have a limited impact because they focus only on “rapid” inspections, do not address the common indirect sourcing patterns (i.e., subcontracting), and do not cover labor rights.<sup>167</sup> Third, in practice, factory managers have a wide variety of tricks to fool auditors, such as coaching employees on how to respond to auditor questions,<sup>168</sup> and falsely claiming that products made in an unaudited factory were made in the factory currently being audited.<sup>169</sup>

Further challenges to the usefulness and reliability of a system built on compliance audits can be identified if issues of corruption are considered. In countries with high levels of corruption, including Bangladesh, auditors may be easily bribed.<sup>170</sup> The bribes may originate with the auditor or factory management. For example, an auditor may extort a bribe payment by threatening to give the factory a failing grade.<sup>171</sup> Or, in response to the auditor discovering a deficiency, factory managers may offer a bribe in exchange for the auditor ignoring the problem.<sup>172</sup> In other cases, the bribe may be paid by a consultant hired by the factory to help it pass an audit.<sup>173</sup>

Corruption can also influence the reliability of audits indirectly. Certain health and safety issues at a factory are outside the scope of compliance audits and auditors must rely on the actions of local government officials for those matters.<sup>174</sup> Examples include issuing

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166. Labowitz & Baumann-Pauly, *supra* note 149, at 6.

167. *Id.* at 10–11.

168. Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 774–76 (2014); Declan Walsh & Steven Greenhouse, *Certified Safe, Karachi Factory Quickly Burned*, N.Y. TIMES, Dec. 8, 2012, at A1.

169. Stephanie Clifford & Steven Greenhouse, *Fast and Flawed Inspections of Factories Abroad*, N.Y. TIMES, Sept. 2, 2013, at A1.

170. *Id.* (stating that “[b]ribery offers are not unheard-of.”); *see also* AFL-CIO, RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS 26–27 (2013), <http://www.aflcio.org/content/download/77061/1902391/CSReport.pdf> [<https://perma.cc/SPP6-UKKD>] (noting allegations of social auditors being bribed in other countries).

171. *Corrupt Audits Damage Workers Rights: A Case Analysis in Bureau Veritas Factory Audits*, CHINA LABOR WATCH 3, 5–6 (Dec. 2009), [http://www.chinalaborwatch.org/upfile/2009\\_12\\_9/2009bvcorruption1209.pdf](http://www.chinalaborwatch.org/upfile/2009_12_9/2009bvcorruption1209.pdf) [<https://perma.cc/94WJ-CV4Z>].

172. *Id.* at 5, 8.

173. *Id.* at 6–7.

174. Clifford & Greenhouse, *supra* note 169, at A1.

building permits and conducting building safety inspections,<sup>175</sup> both of which can be heavily influenced by corruption. As discussed above, corruption allowed the Rana Plaza building to violate local building codes by increasing its height by multiple stories.<sup>176</sup> Transparency International Bangladesh has cataloged a variety of other ways corruption impacts factories, such as lax fire inspections in return for purchasing fire safety equipment from specified sellers.<sup>177</sup> Bribes are also used to receive factory design approvals, have officials ignore worker payment irregularities, and other violations of the law.<sup>178</sup>

Similar problems exist in other countries. In Pakistan, where factory fires are relatively common, it is well known that local government building inspectors accept bribes to ignore violations of health and safety regulations.<sup>179</sup> In both Cambodia and Indonesia, the government is responsible for factory audits, and there are reports that corruption significantly affects the credibility of inspectors' reports.<sup>180</sup>

These examples show how a corporate social initiative designed to help the corporation respect human rights—the use of compliance audits—is severely limited by the presence of corruption. This is not to say that compliance audits in the current environment do not provide any benefits. However, implementing plans to conduct more and more audits without addressing the issue of corruption is unlikely to create significant change. The use of audits is similar to a doctor treating only the symptoms of a patient's chronic disease and not the disease itself. In other words, a sustainable model for respecting human rights is not achieved by simply using a deterrence-based approach and conducting more factory audits. Instead, the root causes must be identified and addressed. Corruption should be recognized as a root cause and should be addressed in any reform proposal related to human rights in the ready-made garment industry.

In summary, the attempts to improve the working conditions in garment factories are limited by corruption—directly, indirectly, and

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175. *Id.*

176. *See supra* note 13 and accompanying text.

177. Mawla et al., *supra* note 14, at 7–8.

178. *Id.* at 5–7.

179. Declan Walsh, *Anger Rolls Across Pakistani City in Aftermath of Factory Fire*, N.Y. TIMES, Sept. 14, 2012, at A6.

180. Ockert Dupper et al., *The Interaction of Labour Inspection and Private Compliance Initiatives: A Case Study of Better Work Indonesia*, 21 BETTER WORKS 1, 20–21 (June 2016), <https://betterwork.org/global/wp-content/uploads/2016/07/Discussion-paper-21.pdf> [<https://perma.cc/K8ZK-YMHZ>]; “*Work Faster or Get Out*”: Labor Rights Abuses in Cambodia’s Garment Industry, HUMAN RIGHTS WATCH (March 11, 2015), <https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry> [<https://perma.cc/MKK9-2EK3>].

remotely. Placing a corruption perspective on business and human rights issues shows that corruption is not an issue that can be ignored when seeking solutions to address human rights concerns in the supply chain. Corporations must ensure that they are not contributing to the corrupt environment by implementing compliance programs to ensure that their employees or agents are not paying bribes, but that is not enough. Corruption is a root cause of a local environment that lacks the necessary background institutions to prevent human rights abuses, and therefore requires CSR to replace government action. Corruption, however, is also a barrier to those CSR initiatives. Thus, this Article argues that in all their initiatives to improve their human rights performance, corporations must investigate the potential for corruption to limit the effectiveness of those CSR initiatives. The next section builds on these concerns and uses the example of human trafficking in the supply chain to further discuss a corporation's responsibility to combat corruption beyond just ensuring it is not involved in a corrupt transaction.

### *B. The Problem of Business and Human Trafficking*

In recent years, human trafficking, forced labor, and modern slavery have become significant topics in both CSR and BHR.<sup>181</sup> It is a challenging problem that affects almost all companies with complex supply chains.<sup>182</sup> There are no easy solutions to the problem, as even companies dedicated to removing forced labor from their supply chains are unable to achieve the goal.<sup>183</sup> The issue has also become the focus of government regulation. The first legislative attempt to deal with the problem of human trafficking was the 2010 California Transparency in Supply Chains Act (CTSCA),<sup>184</sup> which requires corporations to disclose

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181. See generally Katherine Taken Smith & Teresa Betts, *Your Company May Unwittingly be Conducting Business with Human Traffickers: How Can You Prevent This?*, 58 BUS. HORIZONS 225 (2015); E. Christopher Johnson Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083 (2015); Nicola Jägers & Conny Rijken, *Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations*, 12 NW. U. J. INT'L HUM. RTS. 47 (2014); Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. INT'L L. & POL. 55 (2013).

182. Gillian B. White, *All Your Clothes Are Made with Exploited Labor*, ATLANTIC (June 3, 2015), <https://www.theatlantic.com/business/archive/2015/06/patagonia-labor-clothing-factory-exploitation/394658/> [https://perma.cc/7VPS-JC4X].

183. See *id.* (discussing Patagonia's challenges in trying to stop the use of human trafficking in its supply chain).

184. CAL. CIV. CODE § 1714.43 (2017).

their efforts (if any) to prevent the use of slavery and human trafficking in their supply chain.<sup>185</sup> Similar legislation requiring corporate disclosure on supply chain efforts was passed in the United Kingdom with the Modern Slavery Act of 2015.<sup>186</sup> Also in 2015, the United States government updated the Federal Acquisition Regulations (FAR) for all federal government contractors to require compliance with human trafficking rules.<sup>187</sup>

The goal of these laws and regulations is for corporations to adopt practices designed to prevent the use of slavery or trafficked labor in their supply chains. Failing to address the issue of corruption, however, will severely limit the effectiveness of these corporate efforts. First, corruption is one of the major factors that creates an environment that allows human trafficking to develop and persist.<sup>188</sup> A high level of

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185. Jägers & Rijken, *supra* note 181, at 60. The CTSCA requires retail and manufacturing corporations doing business in California and with over \$100 million in gross receipts, to make certain disclosures. Kamala D. Harris, *CA Dep't of Justice, The California Transparency in Supply Chains Act: A Resource Guide* 11–21 (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> [<https://perma.cc/K5RF-EDT3>]. In 2014, California estimated that approximately 1,700 companies were subject to the law. *Id.* at 3. The disclosures must be placed on the company's website with a conspicuous link on its homepage. *Id.* at 5. The disclosures include details on the company's efforts "to identify, assess and manage the risks of human trafficking in its product supply chain," if the company audits its suppliers for compliance with company standards, trainings for supply chain management employees on human trafficking, and other procedures used to ensure compliance with company standards. *Id.* at iii.

186. Amol Mehra & Katie Shay, *Corporate Responsibility and Accountability for Modern Forms of Slavery*, 14 J. INT'L CRIM. JUST. 453, 463 (2016). This Act requires similar disclosures to those in the CTSCA. See *Transparency in Supply Chains etc.: A Practical Guide*, HOME OFFICE 11 (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/471996/Transparency\\_in\\_Supply\\_Chains\\_etc\\_\\_A\\_practical\\_guide\\_\\_final\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf) [<https://perma.cc/TNH2-5SR7>].

187. The FAR regulations prohibit certain practices by contractors (and their subcontractors or agents), such as charging employees recruitment fees, and require certain contractors to adopt compliance programs designed to prevent and detect the use of trafficked persons. Johnson Jr., *supra* note 181, at 1109–12. For an overview of the rules requirements (e.g., actions prohibited and required compliance measures), see also Lyndsey Conrad et al., *Mandated Corporate Responsibility for Human Trafficking: New Federal Acquisition Regulation Steps Up Supply Chain Accountability*, 60 ST. LOUIS L.J. 73, 87–92 (2015).

188. A report by TI states:

Many experts indicate that if it were not for corruption, human trafficking would not have expanded so rapidly in the wake of globalisation. Corruption allows the trafficking process to remain protected from prosecution and facilitates the victimisation of innocent people. . . . Corruption assists the victim's movements within a country and across borders. When trafficking is discovered, corruption results in laws and judicial processes being disregarded. . . . In recent decades, the growth of

corruption in a country is a strong predictor of human trafficking.<sup>189</sup> For migrant laborers hoping to leave a country to work elsewhere, a significant amount of paperwork is needed, which creates multiple opportunities for government officials or labor brokers to use bribery to move the process along.<sup>190</sup> Thus, in countries with high levels of corruption, the workers have a strong incentive to avoid the official process and use unofficial channels to seek employment in a foreign country.<sup>191</sup> Unfortunately, it is these unofficial channels that are more likely to result in forced or bonded labor for that worker.<sup>192</sup> In addition, corruption in the destination country allows workers to be allowed into

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public sector corruption has correlated closely with the rise in human trafficking.

TRANSPARENCY INTERNATIONAL, CORRUPTION AND HUMAN TRAFFICKING 2 (June 2011), [https://www.transparency.org/whatwedo/publication/working\\_paper\\_corruption\\_and\\_human\\_trafficking](https://www.transparency.org/whatwedo/publication/working_paper_corruption_and_human_trafficking) [<https://perma.cc/K2SW-TQDA>]. See also INT'L BAR ASSOC., HUMAN TRAFFICKING AND PUBLIC CORRUPTION: A REPORT BY THE IBA'S PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING 15–16 (Sept. 2016), [http://www.ibanet.org/Committees/task\\_force.aspx](http://www.ibanet.org/Committees/task_force.aspx) [<https://perma.cc/4LPD-BZ9A>] (stating that “[c]orruption and human trafficking are indisputably linked” and “[c]orruption enables human trafficking to flourish.”); M. Bashir Uddin, *Human Trafficking in South Asia: Issues of Corruption and Human Security*, 2 INT'L J. SOC. WORK & HUM. SERV. PRAC. 18, 24 (2014) (arguing that: “[c]orruption, human trafficking and human security are inextricably linked to each other. Corruption causes or perpetuates trafficking, and trafficking causes human insecurity.”).

189. VERITÉ, *Corruption & Labor Trafficking in Global Supply Chains* 3 (2013), <https://www.verite.org/sites/default/files/images/WhitePaperCorruptionLaborTrafficking.pdf> [<https://perma.cc/43JG-WCLK>].

190. *Id.* at 4–5.

191. *Id.* at 4. In reference to employment migration from Myanmar to Malaysia, one study stated:

[T]he majority of workers from Myanmar migrating abroad choose informal recruitment channels that use smuggling routes into destination countries like Malaysia and Thailand because of the perceived high cost of corruption associated with the formal process that is invariably passed on to workers through upfront fees or salary deductions after they start work. The cost to workers is perceived to be the same as the formal channels but alternative channels avoid much of the complicated paperwork and deployment is reportedly faster.

*An Exploratory Study of the Role of Corruption in International Labor Migration*, THE FREEDOM FUND & VERITÉ 15 (Jan. 2016), [https://www.verite.org/sites/default/files/images/Verite-Report-Intl-Labour-Recruitment\\_0.pdf](https://www.verite.org/sites/default/files/images/Verite-Report-Intl-Labour-Recruitment_0.pdf) [<https://perma.cc/5U52-XUYS>].

192. VERITÉ, *supra* note 189, at 4. Public officials may still be involved in human trafficking, such as by recruiting victims, helping move victims across borders, and by falsifying documents. INT'L BAR ASSOC., *supra* note 188, at 24–28.

the country under fraudulent contracts that can also result in bonded labor.<sup>193</sup>

Second, corruption frustrates the use of regulatory efforts to combat human trafficking. A recent study of human trafficking stated that although there are many policies in place to protect workers, the protections are “easily and regularly circumvented through corrupt means.”<sup>194</sup> Another report stated that victims often believe that it is futile to seek government help due to corruption.<sup>195</sup> Thus, the victims “conclude that their only option is to keep quiet and submit.”<sup>196</sup>

Overall, it is clear that reducing human trafficking in corporations’ supply chains requires combatting corruption. A recent study by Freedom Fund and Verité stated: “While undoubtedly many policies and procedures still need reform, corruption must be fought as a phenomenon that all too frequently and easily attaches itself to any processes and institutions regardless of the stated purpose and apparent wisdom of policies. Unintended consequences must be expected.”<sup>197</sup> The report concludes by stating:

Now that global attention is squarely focused on reducing the severe, systematic exploitation of migrant workers in multiple sectors and countries around the world, it is imperative that the scourge of corruption that plagues so many recruitment processes and policies be addressed directly. Simply put, migrants’ rights cannot be successfully fulfilled without addressing corruption. The many illegal corrupt payments described in this report add up to more than a crushing financial burden on vulnerable workers; they represent a glaring legal and reputational risk for companies throughout the world with supply chain partners that source workers through recruitment systems similar to those described in this report. Companies cannot be sure of protecting their legal and reputation integrity without squarely taking on the challenge of corruption in their labor supply chain.<sup>198</sup>

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193. VERITÉ, *supra* note 189, at 5–6. The Verité report states, “[c]orruption in countries like Nepal, India, Bangladesh, Indonesia and the Philippines is a root cause of the forced and bonded labor that occurs in the factories and on the farms and plantations of receiving countries in Southeast Asia and the Middle East in particular, which also have high levels of corruption.” *Id.* at 6.

194. *An Exploratory Study of the Role of Corruption in International Labor Migration*, *supra* note 191, at 21.

195. INT’L BAR ASSOC., *supra* note 188, at 18.

196. *Id.*

197. *An Exploratory Study of the Role of Corruption in International Labor Migration*, *supra* note 191, at 21.

198. *Id.* at 22. Likewise, the International Bar Association concluded that “[c]orruption facilitates every aspect of trafficking, from recruitment to transportation

## V. TOWARDS A NEW RESPONSIBILITY TO COMBAT CORRUPTION

By integrating businesses' responsibilities to combat corruption and to respect human rights, a new responsibility to combat corruption emerges. This new responsibility recognizes that not only does corruption have a negative impact on human rights issues connected to a business, but that combatting corruption is necessary for corporations to be able to respect human rights. This Part discusses what that new responsibility should entail.

Before considering this new responsibility, the first subsection below discusses how incorporating human rights concerns into corporations' current internal anti-corruption efforts can assist in improving corporations' compliance programs. The second subsection moves beyond improving existing anti-corruption efforts and argues that this new responsibility to combat corruption requires corporations to take action to reduce corruption in the environment where the corporations, or businesses connected to corporations through their supply chains, operate.

### *A. Improving Compliance Programs through a Human Rights Perspective on Corruption*

#### 1. COMPLIANCE PROGRAMS: THE NEED FOR IMPROVEMENT

Despite the increased enforcement of anti-bribery laws and the entering into force of the UNCAC, the issue of corruption still remains a significant problem for business and it is unclear if corporations are taking sufficient action to ensure that they are not a party to a corrupt transaction. Some corporations simply seek to avoid the problem as much as possible by avoiding doing business in regions of the world that have high levels of corruption.<sup>199</sup> Although this may remove the corporation from the problem, it may actually worsen the problem in those regions because corporations with less of a concern with corruption increase their business in those areas.<sup>200</sup>

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and exploitation. Corruption aids impunity through the obstruction of justice. Anti-trafficking efforts need to fully incorporate a focus on anti-corruption." INT'L BAR ASSOC., *supra* note 188, at 38.

199. ALIXPARTNERS, COMBATING CORPORATE CORRUPTION: THE 2015 ANTICORRUPTION SURVEY 1 (May 2015), <http://legacy.alixpartners.com/en/LinkClick.aspx?fileticket=fyJITCy6fZk%3d&tabid=635> [<https://perma.cc/FP9K-UBB4>] (finding that 34 percent of respondents to their survey "said they had avoided doing business in regions with high risk of corruption.").

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

Some companies will still use bribes if the competitive situation requires it. For example, in Ernst and Young's 2016 Global Fraud Survey, thirteen percent of Chief Financial Officers (CFOs) and sixteen percent of other finance team members admitted that they "would offer cash payments to win or retain business."<sup>201</sup> Presumably, these statements are driven, at least in part, by the belief that the bribe payments are necessary because their competitors are likely to use such payments. For example, almost one-quarter of respondents to one survey indicated that they had lost business to companies that are willing to pay bribes.<sup>202</sup>

For the companies that are attempting to prevent their involvement in corrupt payments, the level of commitment to anti-corruption is often inadequate. Even if a company has adopted a compliance program, the program risks ineffectiveness by not being actively implemented or updated.<sup>203</sup> For example, one compliance consultant stated that companies often believe that they have an effective compliance program due to their adoption of policies and procedures, but the program is likely ineffective because they have not followed through with the appropriate risk assessments and trainings.<sup>204</sup> The failure to conduct an adequate risk assessment is a commonly cited problem with compliance program implementation. In fact, some companies are not even

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201. ERNST & YOUNG, CORPORATE MISCONDUCT – INDIVIDUAL CONSEQUENCES: GLOBAL ENFORCEMENT FOCUSES THE SPOTLIGHT ON EXECUTIVE INTEGRITY: 14TH GLOBAL FRAUD SURVEY 14 (2016), [http://www.ey.com/Publication/vwLUAssets/ey-global-fraud-survey-2016/\\$FILE/ey-global-fraud-survey-final.pdf](http://www.ey.com/Publication/vwLUAssets/ey-global-fraud-survey-2016/$FILE/ey-global-fraud-survey-final.pdf) [<https://perma.cc/9TEW-4EN8>].

202. ALIXPARTNERS, *supra* note 199, at 1 (finding that 22 percent of respondents to their survey "said they thought their companies had lost business or customers because a competitor had made an illicit payment to a government official.").

203. *Id.* at 2 (finding that, during the 12 months before the survey, 22 percent of companies had not reviewed their compliance program and 52 percent had not received a third-party risk assessment). A former DOJ prosecutor stated:

You would be surprised at the number of companies that walk through our doors that have fantastic corporate compliance programs on paper, but find themselves in big trouble even though they were obvious, patently obvious, red flags of criminal conduct that were there to see but were not because of either deliberate ignorance or conscious disregard, or when a well-intentioned compliance officer raises the tough question with the sales executive. In this situation, she was bullied into not following, and did not demand answers, did not demand accountability and senior management.

J. Paul McNulty et al., *What an Effective Corporate Compliance Program Should Look Like*, 9 J.L. ECON. & POL'Y 375, 382–83 (2013).

204. KPMG INT'L, ANTI-BRIBERY AND CORRUPTION: RISING TO THE CHALLENGE IN THE AGE OF GLOBALIZATION 10 (2015), <https://home.kpmg.com/content/dam/kpmg/pdf/2016/06/tr-anti-bribery-corruption-survey-2015.pdf> [<https://perma.cc/95NG-8JH9>].

assessing the specific risks of corruption in a country before making an investment.<sup>205</sup> According to one survey, one-third of companies do not have a formal process for identifying if third parties that the company does business with (including vendors and suppliers) create a risk of corruption.<sup>206</sup> Another survey finds that even for those companies that conduct due diligence on third-party risks, those due diligence efforts fall short due to reasons such as lack of comprehensiveness or failure to adequately address any issues discovered.<sup>207</sup>

For many companies, anti-corruption is not a priority, and it is only when the company directly faces a bribery situation that the company actively responds. One recent empirical study shows that corporations typically take a reactive approach to anti-bribery measures.<sup>208</sup> That is, despite the increased publicity of anti-bribery laws and their enforcement, corporations do not adopt a proactive compliance program (focused on preventing bribe payments) even when operating in countries with a high risk of corruption. Instead, it is only when the corporation is directly confronted with the possibility of a corrupt payment that the corporation responds by implementing the program.<sup>209</sup>

In the United States, for example, some commentators argue that this is expected, as companies are uncertain about what benefits they will receive from DOJ enforcement attorneys for adopting compliance program features. Professor Koehler argues that if the reward is only a lower sanction, as opposed to no sanction, then compliance officials have a difficult time convincing executives to provide their department with the necessary resources.<sup>210</sup> Likewise, the Chamber of Commerce (a fierce critic of current FCPA enforcement practices) argues that because a compliance program could provide the company with information on bribe payments that must then be disclosed, the company is “dissuaded from instituting a rigorous FCPA compliance program for fear that the return on such an investment will be only to expose the company to increased liability and will do little to actually

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205. ERNST & YOUNG, *supra* note 201, at 25 (finding that 36 percent of respondents were examining country specific risks in their anti-corruption due diligence process).

206. KPMG INT’L, *supra* note 204, at 7–8.

207. KROLL & ETHISPHERE, *THE YEAR OF GLOBAL EXPANSION AND ENFORCEMENT: 2016 ANTI-BRIBERY AND CORRUPTION BENCHMARKING REPORT 7* (2016), <http://www.kroll.com/en-us/2016-abc-report> [https://perma.cc/J92H-Y9J7].

208. Christian Hauser & Jens Hogenacker, *Do Firms Proactively Take Measures to Prevent Corruption in Their International Operations?*, 11 EURO. MGMT. REV. 223, 227–28, 233–34 (2014).

209. *Id.* at 233–34.

210. Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 655.

protect the company.”<sup>211</sup> Underlying these arguments is the assumption that corporations view anti-bribery from strictly a legal compliance view. The next section discusses why having only a legal compliance perspective can create problems in some situations, and how integrating business, corruption, and human rights can provide an alternative motivation that helps resolve some of those problems.

## 2. CHANGING THE MOTIVATION TO COMBAT CORRUPTION: BUSINESS, CORRUPTION, AND HUMAN RIGHTS

Currently, the primary motivation for combating corruption is fear of a criminal law enforcement action. Even assuming that a corporation’s only obligation with respect to combating corruption is to avoid actions that would violate anti-bribery criminal laws, adding a human rights perspective to anti-corruption can assist in improving those efforts by moving anti-bribery beyond just a legal compliance viewpoint.

What is currently missing from anti-corruption efforts, and may contribute to corporations’ lack of motivation to improve compliance programs, is a widespread understanding of the harms and immorality of corruption. In general, it seems that many corporate actors view anti-corruption as simply a regulation imposed on business, and not an ethical obligation. This becomes problematic when corporate actors view anti-bribery laws as illegitimate. A significant body of academic research shows that actors feel less of an obligation to follow laws that they view as illegitimate.<sup>212</sup>

Corporate actors give a wide variety of reasons for viewing anti-bribery laws as illegitimate even if these reasons are demonstrably false. These corporate actors may view the use of bribes in international business as a matter of cultural differences between countries,<sup>213</sup> or as a victimless crime.<sup>214</sup> These views contribute to corporate actors questioning the legitimacy of the DOJ, or other home country government, regulating the use of bribes in a foreign country (especially if the corporate actor’s perception is that bribery is a

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211. U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 13–14 (2010).

212. For a review of the research, see generally Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307 (2009); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

213. Spahn, *Nobody Gets Hurt?*, *supra* note 119, at 894.

214. *Id.* at 898–99; David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 320 (2008).

common practice in that country). If the anti-bribery laws are viewed as illegitimate, then there is less motivation for the corporate actors to follow the law. Thus, for example, a manager may ignore obvious red flags that an employee or agent is paying a bribe when there is an incentive to do so (e.g., winning a contract or avoiding costly regulation).<sup>215</sup> In addition, as discussed in the preceding subsection, the corporation may be unwilling to spend the time and resources necessary to implement a rigorous compliance program to prevent bribe payments.

At the individual level, employees and agents in the field have strong incentives to believe these faulty views of corruption. A significant challenge faced by compliance professionals is that employees often find it easy to rationalize corrupt payments. A former international sales executive that served over a year in prison for violating the FCPA argues that employees operating in countries at high-risk for corruption often go through a several stage process.<sup>216</sup> First, the employee may view “compensation and compliance as a zero sum game,” where the employee must decide between paying a bribe to win business or not paying the bribe and losing the contract without a realistic chance of finding a replacement opportunity.<sup>217</sup> Due to their financial incentives for making sales and the risk of job loss for missing their sales numbers, employees start to believe that management favors sales over compliance.<sup>218</sup> At this point, the employee “might embrace the *illusion* that bribery has no victims, or even that it is a win-win at the field level.”<sup>219</sup>

A human rights perspective on issues of corruption should help to change the attitudes of corporate actors towards corruption. A human rights perspective forces corporate actors out of the view of corruption as a victimless crime. The harms are not just slower economic development, but violations of human rights. Bringing a human rights perspective to corruption refocuses attention on the victims. Typically, a corporation’s focus is on avoiding a criminal law enforcement action, which is accomplished by adopting a compliance program. A human rights perspective, however, asks corporations to also focus on the victims of corruption.<sup>220</sup> By forcing corporations to consider the human

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215. Hess & Ford, *supra* note 214, at 320–21.

216. RICHARD BISTRONG, BEHIND THE BRIBE: WHAT COMPLIANCE OFFICERS CAN LEARN FROM A FIRST HAND ACCOUNT OF THE DARK SIDE OF INTERNATIONAL BUSINESS, A GRC WHITEPAPER FROM THE NETWORK 4–6 (2015).

217. *Id.* at 4.

218. *Id.* at 5.

219. *Id.*; see also Hess & Ford, *supra* note 214, at 319–22 (discussing the rationalizations individuals may use when paying a bribe).

220. The Human Rights Council report states:

rights violations caused by corruption, “the social impact of corruption is made visible.”<sup>221</sup> As Professor Spahn states, however, “[a]bstract arguments about harm to society as a whole are generally not effective in motivating people to change profitable, entrenched behaviors.”<sup>222</sup> Instead, corporate actors—from the board level on down to the employees in the field—need to more concretely see the causal link between corruption and the impact on the victims.<sup>223</sup>

The negative effects of corruption are not always easy to see. As identified in the ICHR and TI 2009 report, corruption impacts human rights in direct, indirect, and remote ways.<sup>224</sup> As we move from direct impacts to remote impacts, the causal relationship between corruption and its harm becomes more complex and difficult to conceive. Thus, the question is, how can we move beyond abstract arguments of corruption’s negative impact on society, and show corporate actors how corruption impacts worker safety in developing countries,<sup>225</sup> allows human trafficking to persist,<sup>226</sup> and impacts other human rights problems.

First, corporations need to integrate their anti-bribery compliance programs and their efforts to conduct human rights due diligence. Not only will this strengthen the moral foundations of anti-corruption

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The situating of anti-corruption measures within the criminal law narrows the focus to the perpetrators. The purpose of criminal proceedings is — broadly speaking — to determine the person responsible for the offence. Focusing criminal proceedings on the perpetrator can lead to a loss of focus on the victim of the corruption.

HRC, *Final Report*, *supra* note 144, ¶ 25.

221. *Id.* ¶ 27.

222. Spahn, *Nobody Gets Hurt?*, *supra* note 119, at 892.

223. Recently, one group of psychologists argued that, unlike many other crimes, individuals involved in corrupt transactions do not see the causal connection between their wrongful behavior and the impact on the victim. Eduardo Salcedo-Albarán et al., *Feelings, Brain and Prevention of Corruption*, 3 INT’L J. PSYCHOL. RES. 1, 1 (2008). They argue that a general argument to actors that “corruption is harmful because it affects society as a whole” will not be effective because the causal link is very complex and the impact will not resonate heavily with many actors. *Id.* at 12–13. In addition, it relies on a moral argument of what the actor should do. *Id.* at 13. A more effective approach, they argue, would be to show actors the actual victims, and not rely on abstract arguments. *Id.* The researchers conclude by stating, “[i]n the specific case of corruption it would seem useful (i) to present the concrete victims that suffer the final consequences and (ii) to show the causal links that tie a present act of corruption with its victims.” *Id.* at 14.

224. *See supra* notes 131–139 and accompanying text (discussing the different connections between corruption and human rights violations).

225. *See supra* Part IV.A.1 and Part IV.A.2 (discussing corruption as a cause of safety violations in garment factories and a barrier to possible solutions).

226. *See supra* Part IV.B (discussing corruption as a root cause for human trafficking persistence and a barrier to possible solutions).

efforts, it will also enhance the effectiveness of corporate efforts to respect human rights through due diligence processes. One recent report finds that corporations prefer to address human rights by integrating those processes into existing company systems.<sup>227</sup> This is not to say that the programs should entirely overlap, but that the two processes can benefit each other. For example, a key difference between existing anti-bribery compliance programs and human rights due diligence processes is the framing of the risk analysis. For anti-bribery programs, the focus is on the legal risk to the company. Human rights due diligence programs, on the other hand, should not focus on the legal and reputation risks to the company, but on the risks to the rights' holders. This Article is not suggesting that anti-bribery compliance programs change their focus, but that they expand their focus.

Integrating human rights into anti-corruption programs can occur in multiple ways. For example, compliance training—for employees, suppliers, and other business partners—can incorporate human rights concerns. By doing so, those receiving the training can better understand why corporations are expected to combat corruption and the harms of contributing to a corrupt system. Likewise, risks assessments for corruption in certain geographic regions can be expanded to examine how corruption in that environment creates human rights risks related to the company's operations.

Second, human rights advocacy special interest groups, institutional investors pressuring corporations to improve their human rights performance, and other external stakeholders should include anti-corruption in their human rights campaigns and not treat corruption as a separate issue. The goal is to push corporations to treat anti-bribery laws not as illegitimate intrusions on local business practices, but as a necessary component for preventing human rights violations. Under this perspective, participating in corrupt acts should be viewed as similar to being complicit in human rights violations by the local government.

With this different perspective, corporations will hopefully be motivated to fight corruption not just to avoid criminal liability but also to protect human rights. This is a positive motivation that can influence employee behavior. Implementing a rigorous compliance program and taking actions to avoid corruption in the organization's supply chain will not be viewed by the corporation as an intrusive regulatory

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227. GLOB. BUS. INITIATIVE ON HUMAN RIGHTS & INST. FOR HUMAN RIGHTS & BUS., *STATE OF PLAY: THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS IN BUSINESS RELATIONSHIPS 5* (2012) <https://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf> [<https://perma.cc/E5QP-P8N8>].

requirement that stands in the way of business goals, but as a moral obligation to help prevent human rights violations.

### *B. Expanding the Responsibility to Combat Corruption*

The second implication of integrating business, corruption, and human rights is that we should move towards a new responsibility to combat corruption that goes beyond a legal compliance perspective. This new responsibility requires corporations to proactively combat corruption in the local environment in order to respect human rights. Understanding the moral justification for this new responsibility, as well as the scope of this responsibility, requires a new way of thinking about corporate responsibility. This new way of thinking requires an understanding of the social connection model of responsibility, which is also tied to the developing ideas on political corporate social responsibility.

#### 1. STRUCTURAL INJUSTICE AND THE SOCIAL CONNECTION MODEL OF RESPONSIBILITY

Iris Marion Young's concept of a social connection model of responsibility provides a useful model for thinking through a corporation's responsibility to combat corruption when corruption is intimately tied to its human rights impacts. Her model is concerned with assigning responsibility in relation to injustices in the world.<sup>228</sup> It is an attempt to deal with the problem that "[p]eople have difficulty reasoning about individual responsibility with relation to outcomes produced by large-scale social structures in which millions participate, but of which none are the sole or primary cause."<sup>229</sup> In short, her social connection model of responsibility states that "all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices."<sup>230</sup>

Young developed her model in response to the question of why consumers in the United States, and other developed countries, feel a responsibility to improve the working conditions of workers in garment factories in distant countries.<sup>231</sup> She found inadequacies in the existing

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228. Iris Marion Young, *Responsibility and Global Labor Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y 102, 110 (2006) [hereinafter Young, *Social Connection*].

229. Iris Marion Young, *Responsibility and Global Labor Justice*, 12 J. POL. PHIL. 365, 374 (2004) [hereinafter Young, *Global Labor Justice*].

230. Young, *Social Connection*, *supra* note 228, at 102–03.

231. Young, *Global Labor Justice*, *supra* note 229, at 367–68.

views on how to assign responsibility for these injustices.<sup>232</sup> Some philosophers proposed a restrictive view that extended responsibility only to those individuals under a shared system of government.<sup>233</sup> Others held a more expansive view and believed our responsibilities are the same for all human beings, without regard to whether or not they belong to the same political community.<sup>234</sup> Young took a middle position and focused on an actor's connection to the harm. For Young's model, "[r]esponsibility in relation to injustice thus derives not from living under a common constitution, but rather from participation in the diverse institutional processes that produce structural injustice."<sup>235</sup> It is the connection to the harm that creates responsibility, not an intentional relationship with the human rights violator.<sup>236</sup>

Young's model is focused on "structural injustice."<sup>237</sup> These are situations where the combined operation of various actors creates "social processes [that] put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities."<sup>238</sup> The structural injustice results not from the actions of one corporation or one factory owner, but from various individuals and organizations pursuing their own interests "within given institutional rules and accepted norms."<sup>239</sup> It is not that those in the system intend to treat others unjustly (and most may actually intend the opposite), but their actions within the system create the result nonetheless.<sup>240</sup> Thus, everyone that participates in that particular system bears some level of responsibility for the unjust outcome it generates.<sup>241</sup>

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232. Young, *Social Connection*, *supra* note 228, at 104.

233. *Id.* at 103.

234. *Id.* at 104. Young referred to this as the "cosmopolitan-utilitarian model."  
*Id.*

235. *Id.* at 119.

236. During a discussion of her ideas, Young stated that she selected the term "social connection" over "social relation" because "I am trying to invoke the objective connectedness that the structures produce, even though I might not want a relationship with some of the people in it." Farah Brown & Lydia Tomitova, *Responsibility and Global Labor Justice: Analytical Summary*, CARNEGIE COUNCIL FOR ETHICS IN INT'L AFFAIRS (March 23, 2004), [http://www.carnegiecouncil.org/publications/articles\\_papers\\_reports/4973.html](http://www.carnegiecouncil.org/publications/articles_papers_reports/4973.html) [https://perma.cc/SS5K-PKUZ].

237. Young, *Social Connection*, *supra* note 228, at 103.

238. *Id.* at 114.

239. *Id.*

240. IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* 62–63 (2011) [hereinafter YOUNG, *RESPONSIBILITY FOR JUSTICE*].

241. Young's social connection model has some similarities to Hsieh's arguments on the responsibility of corporations to promote "just background institutions" in the countries in which they operate. Nein-hê Hsieh, *Does Global*

Endemic corruption creates a system of structural injustice that is extremely difficult for any country to break free from. The developing work on corruption and human rights discussed above outlines the injustice.<sup>242</sup> For example, corporate buyers in the ready made garment industry become connected to the system through local factories that are able to avoid labor laws, safety regulations, and building codes due to corruption.

## 2. DIFFERENCES FROM A LIABILITY MODEL

The social connection model is in direct contrast to what Young refers to as the “liability model.”<sup>243</sup> However, it is important to note that the social connection model is intended to supplement the liability model, not replace it.<sup>244</sup> The liability model of responsibility is consistent with a standard legal approach that seeks to determine the individual or corporation that caused the harm and hold that individual or corporation accountable (or deter that party from acting in the first place).<sup>245</sup> Responsibility is assigned to those “whose actions can be shown to be causally connected to the circumstances for which

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*Business Have a Responsibility to Promote Just Institutions?*, 19 BUS. ETHICS Q. 251, 252 (2009). Different from, but complementary to, Young’s social connection model, Hsieh specifically grounds his arguments in the negative duty to not cause harm, and not a positive duty to provide a benefit. *Id.* at 251. Hsieh’s argument builds on the work of political philosopher John Rawls to help provide legitimacy to the idea of corporations being involved in activities typically associated with political institutions, which is central to the developing ideas of political CSR (which is discussed further below). *Id.* at 252, 267–69. Hsieh is concerned about corporations operating in countries that are not “well-ordered,” which means those countries lack the political institutions necessary to protect the rights of its citizens. *Id.* at 257–59. Hsieh states “it is wrong [for corporations] to benefit from a system in which one’s activities give rise to potential harms and persons subject to the possibility of harm lack protection and the basic means to seek redress.” *Id.* at 259. Thus, in addition to attempting to mitigate the harms caused by its activities, corporations should also seek “to help promote the institutions associated with well-ordered societies in those countries on grounds that they ought to do no harm.” *Id.* “The well-ordered institutions under consideration . . . are those legal and political institutions that guarantee basic rights for citizens and provide the means to structure and regulate economic activity.” *Id.* at 268. Examples of such activities include a corporation ensuring that its employees do not pay bribes, and a corporation providing training to local judges on human rights law. *Id.* at 260–61. Hsieh argues, “Rather than focus on the role and responsibility of MNEs to provide services that are lacking because of weak background institutions, this paper focuses on the role and responsibility of MNEs to improve the background institutions themselves.” *Id.* at 252.

242. See *supra* Part III (discussing the connections between corruption and human rights).

243. Young, *Social Connection*, *supra* note 228, at 116.

244. Young, *Global Labor Justice*, *supra* note 229, at 368.

245. *Id.*

responsibility is sought.”<sup>246</sup> This is a backward-looking model that seeks to assign responsibility on some parties, which thereby excludes others from responsibility.<sup>247</sup>

The liability model is also similar to our “common sense” notions of responsibility.<sup>248</sup> This sense of responsibility focuses on what actions we have taken, as opposed to what we have failed to do.<sup>249</sup> This perspective “also tends to restrict responsibility to those persons with whom an agent has special or relatively immediate connection.”<sup>250</sup>

The field of BHR is consistent with this model, as is the current approach to combating corruption. As described above, the field of BHR developed out of the law and seeks to hold human rights violators accountable for their actions. The BHR field’s disappointment with the UNGP’s “respect” approach<sup>251</sup> for corporate responsibility has led to some actors pushing for a business and human rights treaty to increase corporate accountability.<sup>252</sup> Likewise, the current model of anti-corruption focuses on punishing those that pay bribes and using a deterrence model to encourage corporations to adopt compliance programs to prevent bribe payments by their employees or agents.

The social connection model rejects the liability model’s requirement that a corporation must have a direct connection to the harm. Even though a corporation may be many steps removed from the direct cause of harm, it still receives benefits from the system and may be in a position of power to assist in correcting the harm. It is the corporation’s participation in the system that creates the connection to the victim.<sup>253</sup> Thus, even if a corporation does not directly participate in a corrupt transaction, the corporation’s involvement in a system where corruption plays a key role in causing injustice places shared responsibility for the outcome on the corporation. The responsibility for the injustice is shared among all participants.<sup>254</sup> It is a “shared” responsibility because each actor is “responsible for the outcome in a partial way, since [the actor] alone does not produce the outcomes; the specific part that each plays in producing the outcome cannot be

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246. Young, *Social Connection*, *supra* note 228, at 116.

247. Young, *Global Labor Justice*, *supra* note 229, at 368.

248. *Id.* at 374.

249. *Id.* at 373.

250. *Id.*

251. *See supra* notes 56–61 (discussing the responsibility of business to respect human rights under the UNGPs).

252. *See Ramasastry*, *supra* note 25, at 248.

253. Young, *Global Labor Justice*, *supra* note 229, at 368, 385–86.

254. Young, *Social Connection*, *supra* note 228, at 122.

isolated and identified, however, and thus the responsibility is essentially shared.”<sup>255</sup>

The social connection model also rejects the liability model’s sole focus on individually correcting past harms, such as through paying compensation. Instead, the focus should be on correcting the “ongoing set of processes that we understand is likely to continue producing harms unless there are interventions.”<sup>256</sup> The goal is not to seek out actors to blame for the situation but to seek positive results.<sup>257</sup> In other words, the goal is not simply to have actors comply with a duty, but for them to take responsibility for an outcome.<sup>258</sup> With respect to the situation of corruption, this model suggests that corporations should not simply focus on a duty to not pay bribes, but also should focus on their responsibilities to help produce the desired outcome (a system where corruption is not a significant cause of potential human rights violations in the corporation’s operations, either directly, indirectly, or remotely).

A common feature of a system that produces structural injustice is the lack of background institutions. The liability model assumes that background institutions are working and that any harm causing action is a “discrete, bounded event that breaks away from the ongoing normal flow.”<sup>259</sup> The social connection model, however, considers the role of background conditions in causing the harm and forces all actors connected to the system to consider their responsibility to help correct those conditions.<sup>260</sup> As would happen in the case of endemic corruption in a region, it is the background conditions themselves that are called into question.<sup>261</sup> Thus, rather than view corruption as “how business is conducted here,” it should be called into question as one of the key causes of structural injustice.

### 3. FULFILLING THE SHARED RESPONSIBILITY TO COMBAT CORRUPTION: POLITICAL CORPORATE SOCIAL RESPONSIBILITY

What does shared responsibility mean for corporations’ responsibility to combat corruption? According to Young, fulfillment of

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255. Young, *Global Labor Justice*, *supra* note 229, at 380.

256. Young, *Social Connection*, *supra* note 228, at 122.

257. Young, *Global Labor Justice*, *supra* note 229, at 378–79.

258. Young states, “[a] duty specifies a rule that an agent should follow. One has fulfilled the duty if one has performed the required actions. Carrying out a responsibility, on the other hand, consists in seeking to bring about a specified outcome.” *Id.* at 379.

259. *Id.* at 378.

260. *Id.* at 378–79.

261. *Id.* at 378.

a shared responsibility is a “political responsibility.”<sup>262</sup> The responsibility involves engaging in public discourse and working with others “to fashion organized means of changing how the processes work so they will issue in less injustice.”<sup>263</sup> It is a “forward-looking responsibility [that] consists in changing the institutions and processes so that their outcomes will be less unjust.”<sup>264</sup> This can only be achieved “if many actors in diverse social positions work together.”<sup>265</sup>

Consistent with Young’s model, a corporate responsibility to engage in public discourse, to develop and participate in collective action solutions, and even engage in activities typically associated with the government, is gaining greater attention under the idea of “political corporate social responsibility.”<sup>266</sup> Use of political responses, such as those just listed, move corporations from being reactive to a “proactive concept of societal involvement.”<sup>267</sup> The political conception focuses on “how firms shape their institutional environment, often driven by a concern for the public good that goes beyond selfish calculations of economic actors.”<sup>268</sup>

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262. *Id.* at 368, 374; Young, *Social Connection*, *supra* note 228, at 123.

263. Young, *Global Labor Justice*, *supra* note 229, at 380. Young states “what I mean by ‘politics’ here is public communicative engagement with others for the sake of organizing our relationships and coordinating our actions most justly.” Young, *Social Connection*, *supra* note 228, at 123.

264. Young, *Social Connection*, *supra* note 228, at 123.

265. *Id.* Wettstein concisely summarizes Young’s idea of political responsibility as: “[P]olitical responsibility is shared responsibility. It depends on the collaboration between a variety of actors who may not necessarily be directly involved in causing a wrongdoing, but who are structurally linked to it and thus in a position to work toward the betterment of the situation.” Florian Wettstein, *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, 96 J. BUS. ETHICS 33, 42 (2010) [hereinafter Wettstein, *Duty to Protect*].

266. Florian Wettstein, *Corporate Responsibility in the Collective Age: Toward a Conception of Collaborative Responsibility*, 117 BUS. AND SOC’Y REV. 155, 173 (2012) [hereinafter Wettstein, *Collaborative Responsibility*]; *see also* Andreas Georg Scherer & Guido Palazzo, *The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy*, 48 J. MGMT. STUD. 899, 907, 912–14 (2011) (arguing that the idea of political CSR is emerging, in part, because Young’s “idea of social connectedness is replacing the idea of legal liability”).

267. Andreas Georg Scherer & Guido Palazzo, *Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective*, 32 ACAD. MGMT. REV. 1096, 1109–10 (2007).

268. Andreas Georg Scherer et al., *Managing for Political Corporate Social Responsibility: New Challenges and Directions for PCSR 2.0*, 53 J. MGMT. STUD. 273, 273 (2016). The authors’ proposed definition of Political Corporate Social Responsibility (PCSR) is:

PCSR entails those responsible business activities that turn corporations into political actors, by engaging in public deliberations, collective decisions, and the provision of public goods or the restriction of public bads in cases

Overall, this political response must involve working with the relevant stakeholders. Because this is a responsibility shared with others (all those participating in the system bringing about the injustice), the necessary interventions will not be individual efforts, but collective action. The actors with shared responsibility must coordinate their efforts, typically through public discourse. Creating “[s]ocial change requires first taking special efforts to make a break in the processes, by engaging in public discussions that reflect on their workings, publicizing the harms that come to persons who are disadvantaged by them, and criticizing powerful agents who encourage the injustices or at least allow them to happen.”<sup>269</sup> The actors with responsibility must also “hold[] one another to account for what we are doing and not doing to undermine structural injustice.”<sup>270</sup>

How should corporations enact such a political responsibility to combat corruption?<sup>271</sup> To begin to frame an answer to this question, this Article builds on Wettstein’s work on what he referred to as human rights advocacy.<sup>272</sup> Wettstein sought to provide guidance to corporations

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where public authorities are unable or unwilling to fulfil[] this role. This includes, but is not limited to, corporate contributions to different areas of governance, such as public health, education, public infrastructure, the enforcement of social and environmental standards along supply chains or the fight against global warming, corruption, discrimination or inequality. These corporate engagements are responsible because they are directed to the effective resolution of public issues in a legitimate manner, often with the (explicit) aim of contributing to society or enhancing social welfare, and are thus not limited to economic motivations.

*Id.* at 276. Wettstein describes it as “the idea of companies as political actors, deeply involved in the governance of the global market place.” Wettstein, *Critical Assessment*, *supra* note 3, at 172.

269. YOUNG, RESPONSIBILITY FOR JUSTICE, *supra* note 240, at 150.

270. *Id.* at 153.

271. Young discussed four parameters to assist actors in determining how they should meet their responsibilities under a social connection model: power, privilege, interest, and collective ability. Young, *Social Connection*, *supra* note 228, at 130. These parameters help us determine “the kinds of issues the agent should address and the kinds of actions the agent should take.” *Id.* Power is an agent’s ability to influence the processes that create structural injustice. *Id.* at 127. Privilege refers to the benefit that an actor receives from the structural injustice and the actor’s ability to take action without suffering any significant deprivation. *Id.* at 128. Interest refers to one’s interest in changing the system. *Id.* For example, the victims of structural injustice have a strong interest in changing the system (even if they are not able to make progress without the help of others). *Id.* at 128–29. Collective ability refers to the ability to act together to make change; “the relative ease with which people can organize collective action to address an injustice can be a useful decision principle.” *Id.* at 129.

272. Wettstein, *Duty to Protect*, *supra* note 265, at 44; see also Florian Wettstein, *Silence as Complicity: Elements of a Corporate Duty to Speak Out against the Violation of Human Rights*, 22 *BUS. ETHICS Q.* 37, 54 (2012) [hereinafter Wettstein,

for speaking out against human rights abuses, as opposed to engaging in silent complicity by knowingly benefiting from the wrongful acts of others without challenging those wrongful acts.<sup>273</sup> Drawing on the work of Young, Wettstein provides three elements for human rights advocacy: responsiveness, collaboration, and publicness/transparency.<sup>274</sup>

*a. Responsiveness*

First, corporations must practice *responsiveness*. This is a willingness to be “responsive to the concerns of the global public and its institutions.”<sup>275</sup> In other words, Wettstein believes that a corporation’s political responsibilities require that the corporation be responsive to global concerns, as opposed to taking the lead and attempting to establish new visions of morality.<sup>276</sup> As seen by the adoption of the UNCAC, and other actions in the past fifteen years, corruption is a global concern and is universally recognized as a harmful practice.<sup>277</sup> Corruption is no longer a matter of internal governance for a state but raises significant human rights concerns. Thus, it is legitimate for a multinational company to be involved in activities in a developing country to combat corruption that impacts human rights in its supply chain. This is responsive to global norms, and not an external imposition of norms on a country.<sup>278</sup>

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*Silence as Complicity*] (adding the additional element of “scale of human rights violations”).

273. Wettstein, *Duty to Protect*, *supra* note 265, at 37–38. Silent complicity is morally wrong because “their silence is to be interpreted as moral support or encouragement for the perpetrator or at least as a sign of acquiescence.” *Id.* at 37.

274. *Id.* at 43.

275. *Id.*

276. *Id.* (quoting Chandler as stating that corporations are not expected to be the “moral arbiters of the world.”).

277. *See supra* Part II.A.2 (discussing the global movement to criminalize bribery in international business).

278. Academics and policy makers have long recognized that anti-corruption is a global norm and the extra-territorial application of anti-bribery laws is not an intrusion into a country’s governance. Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT’L L.J. 627, 655 (2000) (stating “[a]nti-bribery laws are legally and ethically unremarkable, and no evidence supports a claim they are considered intrusive or generate hostility.”); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT’L L.J. 689, 691 (2000) (stating “the FCPA and progeny–conventions generated by the Organization for Economic Co-operation and Development (OECD) and the Organization of American States (OAS)–promote the efforts of economies entering the world market; reinforce the industrial, financial, and political institutions of emerging and transitional regimes; and restrain the conduct of firms from the United States and other signatory nations that may be tempted to erode the limits of responsible market

In the context of the new responsibility to combat corruption described in this Article, the concept of responsiveness should also include responsiveness to local concerns. Marquette and Peiffer argue that one of the reasons that the anti-corruption movement has made so little progress combatting corruption in the last fifteen years (despite increased attention to the issue) is that many interventions fail to recognize how corruption operates at the local level.<sup>279</sup> They argue that although corruption has a harmful impact on society overall, in the short-term, it can help people solve the “real-life problems” they face.<sup>280</sup> This is part of the problem for the lack of political-will to fight corruption.<sup>281</sup> Thus, steps at reform must take into account these aspects of corruption at the local level, and the interventions should seek to “moderate the costs and risks” to those that take action against corruption.<sup>282</sup> By being responsive to local conditions (in addition to global norms), corporations’ attempts at intervention will not only have legitimacy but are also more likely to be effective.

*b. Collaboration (Collective Action)*

Second, there is the element of *collaboration*.<sup>283</sup> As identified by Young,<sup>284</sup> shared responsibility requires collective action.<sup>285</sup> Because corporations should be responsive to global and local concerns, they are expected to work with those groups in society that are raising those concerns.<sup>286</sup> One point of emphasis of the UNGC for its Tenth Principle on combatting corruption is to encourage collective action.<sup>287</sup> According

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principles.” (citations omitted)); Spahn, *Nobody Gets Hurt?*, *supra* note 119, at 863 (stating “[c]ondemnation of bribing public officials is a universal value expressed in human cultures throughout various periods of history going back to the Code of Hammurabi’s prohibition on bribing judges.” (citations omitted)).

279. HEATHER MARQUETTE & CARYN PEIFFER, *CORRUPTION AND COLLECTIVE ACTION* 1 (Developmental Leadership Program 2015), <http://publications.dlprog.org/CorruptionandCollectiveAction.pdf> [<https://perma.cc/9XKR-8K2L>].

280. *Id.* at 7 n.9.

281. *Id.* at 7.

282. *Id.* at 10.

283. Wettstein, *Duty to Protect*, *supra* note 265, at 43.

284. YOUNG, *RESPONSIBILITY FOR JUSTICE*, *supra* note 240, at 111–12.

285. As Wettstein states, “[c]ollaboration implies that such corporate contributions occur not beyond but together with the contributions of governmental agencies and other institutions. Corporate responsibility, then, is not a substitute for state responsibility, but, to the contrary, geared toward strengthening it.” Wettstein, *Critical Assessment*, *supra* note 3, at 174.

286. *See* Wettstein, *Duty to Protect*, *supra* note 265, at 43.

287. *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10> [<https://perma.cc/UWB4-AR3A>].

to the UNGC office, collective action involves government, civil society, and business, working together to approach the problem from “multiple angles” and to increase the “impact of individual action.”<sup>288</sup> The responsibilities of each group include:

- Governments: Governments should adopt into law the requirements of international conventions on anti-corruption and enforcing those laws.<sup>289</sup>
- Business: “Companies should implement effective compliance programs in their organizations to prevent, detect and address corruption.”<sup>290</sup>
- Civil Society: These organizations should serve a “watchdog role” over the efforts of the other two sectors and raise public awareness of the need to fight corruption.<sup>291</sup>

The new responsibility to combat corruption advocated by this Article would expand the role of business in the above description. Rather than focus only on implementing effective compliance programs, businesses should take on a broader role and actively participate in multi-stakeholder initiatives (MSIs) that attempt to raise awareness of the negative impacts of corruption in that specific region or industry, build the capacity of various actors in society to resist corruption, and implement solutions. In short, business must help build the “political will” to fight corruption at the local level.<sup>292</sup>

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288. *Collective Action in the Fight Against Corruption*, UNITED NATIONS GLOB. COMPACT ET AL. 2 (2010), [https://www.unglobalcompact.org/docs/issues\\_doc/Anti-Corruption/CollectiveAction2010.pdf](https://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/CollectiveAction2010.pdf) [<https://perma.cc/9S25-AXN9>].

289. *Id.*

290. *Id.*

291. *Id.* Using a collective action approach to combat corruption is not new, and there are multiple publications providing practical guidance on establishing collective action efforts to combat corruption. *See generally* UNITED NATIONS GLOB. COMPACT, A PRACTICAL GUIDE FOR COLLECTIVE ACTION AGAINST CORRUPTION (2015), [https://www.unglobalcompact.org/docs/issues\\_doc/Anti-Corruption/CollectiveActionExperiencesGlobal.pdf](https://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/CollectiveActionExperiencesGlobal.pdf) [<https://perma.cc/PL4T-NLA2>]; BEN WHEATLAND & MARIE CHÈNE, BARRIERS TO COLLECTIVE ACTION AGAINST CORRUPTION (U4: Anti-Corruption Resource Center 2015), <http://www.u4.no/publications/barriers-to-collective-action-against-corruption> [<https://perma.cc/U6K2-86BF>]; WORLD BANK INSTITUTE, FIGHTING CORRUPTION THROUGH COLLECTIVE ACTION—A GUIDE FOR BUSINESS (2008), <http://ungc.org.pl/strefa-wiedzy/fighting-corruption-through-collective-action-a-guide-for-business> [<https://perma.cc/FX8Y-WAYR>]. This Article, however, advocates for a different focus for collective actions involving multinational corporations—collective action efforts focused specifically on corruption’s impact on corporations’ ability to respect human rights.

292. *See supra* notes 279–82 (discussing reasons for the lack of political will to fight corruption).

One example of a MSI that appears to be moving in this direction is the Maritime Anti-Corruption Network (MACN).<sup>293</sup> In addition to promoting improved corporate practices to resist corruption (e.g., compliance programs and financial controls), the network also seeks to improve the operating environment where bribes are demanded.<sup>294</sup> MACN “works to raise awareness, report on corruption incidents and trends, and engage in and catalyze collective action by business, government, international organizations, and civil society to drive tangible improvements in the operating environment and promote a culture of integrity.”<sup>295</sup> In the operating environment, MACN takes actions designed to improve the capacity of all stakeholders to adopt anti-corruption management programs and adopt organizational cultures of integrity, and to “[s]trengthen governance frameworks and accountability across the maritime sector.”<sup>296</sup> The collective action works of MACN begin with “root cause analyses” and then “develop solutions that are both beneficial to all [stakeholders] and realistic to implement.”<sup>297</sup> Examples of implemented solutions include new regulations implemented by the local government, new standard operating procedures, and formalized grievance mechanisms.<sup>298</sup>

It is important to notice, however, that the MACN initiative is only focused on reducing the number of wrongful payments that corporations must pay (and does this by focusing on both the supply side of bribery and the demand side). This Article is focused on combating corruption as a necessary component for corporations to be able to respect human rights. Thus, the goal is not simply to reduce the demands on corporations to pay bribes (the legal liability model) but to reduce corruption in the local environment that had a direct, indirect, or even perhaps remote, connection to human rights violations.

To enact their shared responsibility to combat corruption, corporations—working with NGOs and local governments—should provide a leadership role in starting, or supporting existing, multi-stakeholder initiatives focused on combatting corruption. This could

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293. MARITIME ANTI-CORRUPTION NETWORK, <http://www.maritime-acn.org/> [https://perma.cc/68DB-937Q].

294. BSR & MARITIME ANTI-CORRUPTION NETWORK, IMPACT REPORT 3 (2016), [http://www.maritime-acn.org/s/MACN-Impact-Report-2016\\_Web\\_Pages.pdf](http://www.maritime-acn.org/s/MACN-Impact-Report-2016_Web_Pages.pdf) [https://perma.cc/4EWM-GS4T].

295. MARITIME ANTI-CORRUPTION NETWORK, KEMITRAAN PARTNERSHIP, & BSR, MACN COLLECTIVE ACTION BRIEF: INDONESIA 5 (2016), <https://www.bsr.org/reports/BSR-MACN-Collective-Action-Brief-Indonesia.pdf> [https://perma.cc/XT6T-9TMM].

296. BSR & MARITIME ANTI-CORRUPTION NETWORK, *supra* note 294.

297. Maritime Anti-Corruption Network, *MACN's Work*, <http://www.maritime-acn.org/macn-work/> [https://perma.cc/XF6E-AKHG].

298. *Id.*

occur in multiple forms, such as supporting initiatives by a global NGO (e.g., Transparency International) or seeking to incorporate greater coverage of corruption issues in existing MSIs (e.g., the *Bangladesh Accord on Fire and Building Safety*). To truly make progress, however, corporations should also seek to support initiatives that focus on combating corruption to prevent specific human rights violations (e.g., human trafficking in the supply chain in particular countries). MSIs with such objectives may face significant challenges as compared to MACN, such as with identifying the appropriate short-term goals and the necessary stakeholders to bring to the table, but the work of MACN and similar MSIs should provide useful lessons. Overall, corporations have a responsibility to ensure that the MSIs address issues of corruption where relevant and support civil society organizations combatting corruption.

*c. Publicness/Transparency*

Third, Wettstein identifies the element of *publicness/transparency*.<sup>299</sup> As applied to corruption and human rights, this means that corporations must ensure that corruption concerns are brought out into the open and that the MNCs actions in response to corruption must also be public (and subject to political deliberation).<sup>300</sup> To encourage the public discussion of solutions and to work towards holding all relevant stakeholders accountable for their action or inaction, there needs to be transparency. A starting point is simply raising awareness of the harms of corruption. In the garment industry, for example, corporations can play a role in raising awareness of how corruption impacts human rights in the factories. Unlike situations where the corporation is a party to the corrupt transaction and is afraid to speak out on the issue because that could expose the corporation to potential liability under home country anti-bribery laws, the corporation is removed from the actual transactions (though still connected to the harm it causes) and faces no potential liability. This gives the corporation greater freedom to speak out on the problem and attempt to draw other stakeholders into the conversation. Moreover, because other parties that may want to join a MSI on combatting corruption may either be involved in corruption or face retaliation for speaking out against corruption, corporations have a responsibility to ensure these issues are addressed.

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299. Wettstein, *Duty to Protect*, *supra* note 265, at 44.

300. *Id.*

## CONCLUSION

Corruption and human rights violations are intimately connected. Corporations cannot successfully respect human rights without also addressing issues of corruption that impact their supply chain. This creates the need to adopt a new understanding of what it means for corporations to combat corruption. Corporations must move beyond a legal compliance only approach to anti-corruption. Likewise, business and human rights initiatives should not treat corruption as a separate, standalone issue. This new responsibility to combat corruption requires corporations to integrate their anti-corruption efforts and their human rights efforts. It also requires corporations to take on the political responsibility to reduce corruption in the environment where the corporation, or businesses connected to the corporation through its supply chain, operates.