

Combating Modern Day Slavery

To what extent is the existing legislation on the national and international level able to protect victims of forced labour in global supply chains?

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i. List of Abbreviations

ACHR	American Convention on Human Rights
CTSC	California Transparency in Supply Chains Act
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
IGWG	Intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organization
IUU fishing	Illegal, Unreported and Unregulated fishing
MSA	Modern Slavery Act
Palermo Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
PIPO	Port-in Port-out
TIP Report	Trafficking in Persons Report
TNC	Transnational corporation
UK	United Kingdom
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights
US	United States

1.Chapter 1: Introduction

The prohibition of slavery is well established under international law. It is included in the major international and regional treaties as a non-derogable right, it is recognised as customary law and it is widely considered to be *erga omnes*, owed to the whole international community.¹ Nevertheless, the International Labour Organization estimates that there are more than 40 million people worldwide living in conditions of modern day slavery. Out of these 40 million, about 24.9 million are estimated to be living in forced labour and 15.4 in forced marriage.² They are both extremely important issues, but due to the complexity of them this paper is focusing primarily on forced labour. The definition of forced labour can be found in Article 2 of the ILO Forced Labour Convention 1930, which describes it as "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily." It can take various forms, such as debt-bondage and human trafficking³ and it is present in all sectors of activity. Victims may be forced to work as domestic workers, in the agricultural sector, on construction sites, on fishing boats or in the sex industry, just to mention some of them.⁴ Today's rapid globalisation brought about the emergence of large and complicated supply chains, which makes it possible that the manufacturing processes of some everyday products, ranging from clothes to cat food, involved some form of forced labour without the consumer necessarily being aware of it.

Despite the potential lack of knowledge about the realities of supply chains, the existence of modern day slavery is not by any means unheard-of. Not only have human rights organisations been frequently producing detailed reports about labour abuses, there has also been a lot of media coverage of modern day slavery. Investigative reports unearth stories about human trafficking and forced labour on a regular basis.⁵ From time to time a particular headline

¹ Helen Duffy 'Litigating Modern Day Slavery in Regional Courts' (2016) 14 Journal of International Criminal Justice 375, 376.

² International Labour Organization and Walk Free Foundation 'Global estimates of modern slavery: forced labour and forced marriage' (2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf> accessed 24/04/19, 9.

³ The International Corporate Accountability Roundtable and Focus on Labour Exploitation 'Full Disclosure: Towards Better Modern Slavery Reporting' (2019) https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5caf92140852294a37e36bb2/1555010068494/ICAR+Full+Disclosure+Report_Apr10-WEB.pdf accessed 24 April 2019, 8.

⁴ ILO Global estimates of modern slavery (n 2), 10.

⁵ The Freedom Fund 'Ending Impunity, Securing Justice- Using Strategic Litigation to Combat Modern Day Slavery (2015) <http://www.htprobono.org/wp-content/uploads/2015/12/FF_SL_AW02_WEB.pdf> accessed 18/02/19, 1.

will grab widespread attention and cause public outrage on an international scale. One example of this is the 2014 *Guardian* investigation exposing slave-like labour conditions in the Thai fishing industry and linking these practices to seafood exported and consumed in the European market. The reports were followed by further research in the Thai fishing industry by the *New York Times* and *Associated Press*.⁶ This global media coverage drew attention to the issue of modern day slavery and the public outrage it generated helped in the process of introducing much needed reforms in both Thai and international policy and law making.

1.1 Research Problem and Research Question

There is an increasing number of national laws and international guidelines addressing the issue of forced labour in corporate supply chains. In the past few years the US, the UK and Australia already introduced supply chain transparency legislation requiring businesses to help mitigate the risk of forced labour within their supply chains by reporting on the preventive and remedial action they take in their business operations. A growing number of countries also intend to introduce modern slavery legislation.⁷ Despite the attention that the issue has received both in the media and by legislators, the risk for modern slavery perpetrators is still shockingly low. According to The Freedom Fund's research, even though there are 25 million people estimated to be in forced labour, only 418 criminal cases were brought against this crime in 2014 with only 216 ending in convictions.⁸

Based on these numbers there appears to be a gap between the law and victims' access to effective justice. In light of the growing international scrutiny on labour practices in corporations' supply chains, this paper seeks to explore the following research question: *to what extent is the existing legislation on the national and international level able to protect victims of forced labour in global supply chains?* Keeping in mind that the majority of forced labour is happening in the private economy, this paper is going to look at the various hurdles victims of forced labour have to face in bringing a claim against corporations and at the remedies that are available to them.

Public discourse often uses the terms of modern day slavery and forced labour interchangeably. In order to eradicate slave labour from supply chains it is necessary to look at how the term is defined in law. It is therefore appropriate for this paper to consider the legal

⁶ Melissa Marschke and Peter Vandergeest 'Slavery scandals: Unpacking labour challenges and policy responses within the off-shore fisheries sector' (2016) 68 *Marine Policy* 39, 39.

⁷ ICAR 'Full Disclosure: Towards Better Modern Slavery Reporting' (n3), 8.

⁸ The Freedom Fund 'Ending Impunity, Securing Justice' (n5), 4.

relationship between slavery and forced labour and the sub-question of *whether international legal norms can characterise forced labour as a form of slavery* will be raised.

1.2 Methodology, Sources and Thesis Structure

The basis of this thesis is doctrinal research. It is a legal thesis; however, the research question required the use of an approach that is broader than purely legal analysis. This reflects in the wide variety of sources used as well. Beyond the study of traditional legal sources, such as legal instruments, case law and academic literature, this thesis also used a number of NGO and media reports. It is important to be aware of the limitations of this paper. Some of the legal initiatives analysed in this paper are quite recent. The consequences of this are two-fold: for once, it needs to be considered that there might not be enough available literature in order to draw a definite conclusion to the questions raised. The other is the fact that not enough time has passed in order to consider the long-term effects of some of the legislation that is discussed. The approaches used to tackle the research question might vary throughout the different chapters. The structure of this thesis is as it follows:

Chapter 2 is a problem analysis establishing a link to the law. It outlines the problem of forced labour in global supply chains in detail. The largest absolute number of people living in modern slavery can be found in Asia and the Pacific region. According to ILO estimates, 62 per cent of all victims can be located in this area.⁹ To illustrate the issue, the chapter presents a case study of the Thai fishing industry. Thailand is a high vulnerability country to modern slavery on the Global Slavery Index¹⁰ and labour abuses in its fishing industry have received widespread attention in the past years. This Chapter is looking at both international responses to these labour scandals and the Thai government's attempts to tackle the issue of forced labour by introducing comprehensive legislative and regulatory reforms. This chapter ends with the conclusion that governments on the most basic levels of supply chains are not always able to effectively tackle these complex issues and that a multi-sectoral and multi-governmental approach is necessary.

Chapter 3 is a legal analysis of the contemporary international legal norms on modern day slavery. It considers all the key international instruments regulating this area, such as international and regional treaties and examines whether international law is able to

⁹ ILO Global estimates of modern slavery (n 2), 27.

¹⁰ Global Slavery Index 'Country Data- Thailand' < <https://www.globalslaveryindex.org/2018/data/country-data/thailand/> > accessed 15/08/19

characterise forced labour as slavery. In order to do that, this chapter develops a definition of slavery in international law through case law.

Chapter 4 is an empirical and critical analysis of new legal models on the national level as a means to protect victims of forced labour in global supply chains. It looks at recent modern day slavery and transparency laws in the US and the UK. The analysis is limited to these countries for two reasons: first, they are some of the largest market states with relevant transparency legislation. Second, their transparency laws have been effective longer than others', which allows for more valuable conclusions to be drawn. This Chapter also considers the effectiveness of these laws by looking at the results of consumer legal activism and concludes that these new supply chain disclosure laws mostly fail to provide effective protection and remedies due to imprecise drafting and a lack of enforcement.

Finally, Chapter 5 discusses some examples of alternative legal and non-legal strategies as a means to protect victims of human rights violations committed in the context of business activities.

2.Chapter 2: Prevalence of Forced Labour in the Thai Fishing Industry- A Case Study

2.1 Background

It is estimated that the livelihoods of around 12 percent of the world's population is connected to, either directly or indirectly, by the fishing and aquaculture industries.¹¹ It is also an industry where human and labour rights abuses are often so grave that they are referred to as 'modern day slavery'. Case studies refer to fraudulent and misleading recruitment processes, child labour, physical, mental and sexual abuse, homicide and withholding of payment and identification documents.¹²

¹¹ Fish Wise 'Social Responsibility in the Global Seafood Industry: Background and Resources' (2018) <https://fishwise.org/human-rights/social-responsibility-global-seafood-industry-background-resources/> accessed 18/02/19, 10.

¹² *Ibid.*

Thailand is one of the top fish producing nations with their fishing sector accounting for nearly two million people¹³. However, as noted, many people working in the industry do it under circumstances of coercion and abuse. Forced labour on Thai fishing vessels especially affects highly vulnerable groups, such as migrant workers. The labour-intensive and often low-paying jobs associated with the industry do not attract enough domestic workers, so Thai fishing mainly relies on international migrant workers. In fact, up to 90 percent of workers are estimated to come from the neighbouring countries with weaker economies, such as Myanmar, Cambodia and Laos.¹⁴ They are often victims of brokers recruiting in their local villages who trick them into working on Thai fishing boats for months or even years with promises of monthly earnings in Thailand. The workers often do not speak the same language as their employers, have no knowledge about fishing or swimming and must endure inhumane working conditions, inadequate sustenance and little sleep once on board.¹⁵ Migrant workers are also generally more vulnerable to exploitation due to, among other factors, the lack of a supportive network, lack of knowledge about local customs and laws, and a fear of potential deportation.

Atrocities in the Thai fishing industry are often committed by captains and senior crew members. The United Nations Inter-Agency Project on Human Trafficking conducted an interview with 49 Cambodian men who were trafficked to work in Thai fishing vessels. All of them reported enduring beatings to the head and body, threats to life, hazardous working conditions, sleep deprivation and inhumane working hours; as much as up to three days and nights straight. More than half of them admitted having witnessed a fellow crew member being murdered.¹⁶ Once out in the high seas, fishers are isolated and vulnerable to abuse. Supply boats provide fuel, supplies and even new workers, trading them from boat to boat.¹⁷ Escaping is nearly impossible in the open sea and these boats sometimes do not come to shore for months or even for years.

¹³ Katharine Fischman 'Adrift in the Sea: The Impact of the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 on Forced Labor in the Thai Fishing Industry' (2017) 24:1 Indiana Journal of Global Legal Studies 227, 230.

¹⁴ Fish Wise 'Social Responsibility in the Global Seafood Industry' (n11),13.

¹⁵ Fischman (n13), 230.

¹⁶ United Nations Inter-Agency Project on Human Trafficking 'Exploitation of Cambodian Men at Sea- SIREN Case Analysis' (2009) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_143251.pdf> accessed 22/05/19

¹⁷ *Ibid.*, 5.

2.2 Challenges to Reform

The issue of forced labour in the Thai fishing industry is made even more challenging because enforcement of law is difficult for multiple reasons. For once, out in the high seas jurisdictional issues may arise. As a rule, nations do not have jurisdiction over another nation's fleet unless they are in within their national waters or exclusive economic zones.¹⁸ Instead, customary international law as well as Article 92(1) of the UN Convention on the Law of the Sea dictates that ships shall be subject to the jurisdiction of the state under whose flag they sail. Even though there are international standards that apply on high seas, they are often not widely ratified, enforced, or are not mandatory.¹⁹

Furthermore, in many cases fishermen have not been able to rely on the intervention of the Thai government. Inspections of vessels are few and the bribery of officials poses a serious problem. On Transparency International's Corruption Perceptions Index in 2018, Thailand ranked 36 on a scale between 0-100, putting it on the highly corrupt end of the scale. This number is also a decline compared to previous years.²⁰ In certain cases the Thai authorities have been accused of participating directly in the acquisition and trade of fishing workers.²¹ Without local authorities willing or able to enforce laws written on either the national, regional or international levels, the lives of fishermen are unlikely to improve. This is an especially serious issue for fishers on long-haul ships who spend a limited amount of time on land with little opportunity to report abuse.²² Additionally, the area is well-known for high incidences for IUU (Illegal, Unregulated or Unreported) fishing vessels.²³ That means that these long-haul ships are often unregistered, and the Thai government does not even know about their existence.²⁴

John Ruggie, former UN Special Rapporteur on Human Rights and Business, argued in his 2008 report to the UN Human Rights Council that "the root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their

¹⁸ Fish Wise 'Social Responsibility in the Global Seafood Industry' (n11), 26.

¹⁹ *Ibid.*, 23.

²⁰ Transparency International 'Corruption Perceptions Index' (2018) <<https://www.transparency.org/cpi2018>> accessed 10/06/19

²¹ Fischman (n13), 231.

²² Fish Wise 'Social Responsibility in the Global Seafood Industry' (n11), 28.

²³ Environmental Justice Foundation 'All at Sea- The Abuse of Human Rights Aboard Illegal Fishing Vessels' (2010) <https://ejfoundation.org//resources/downloads/report-all-at-sea_0_1.pdf> accessed 06/06/19, 11.

²⁴ Fischman (n13), 231.

adverse consequences.” He attributes to these governance gaps the frequent occurrence of human rights abuses by companies without adequate sanctioning or remedies²⁵. The gap is also present in the seafood industry. Growing consumer demand for a large quantity of seafood products at a low cost is a direct motive for suppliers to use low-cost labour in order to acquire revenues.²⁶ The markets of the global North have enough power to influence labour practices in places like the Greater Mekong Region. The global North provides the majority of the demand of seafood that is produced in the global South. The exports of fish products from developing countries amounted to up to 67% in 2010.²⁷ Considering the imbalance of access to wealth and political influence in the importing countries is crucial when discussing the issue of forced labour in the Thai fishing industry. Importing nations and their businesses often have an advantage over what regulations to pass and enforce on both national and international levels and even to influence less powerful governments to their advantages.²⁸

Furthermore, it is important to consider consumer habits as well. Consumers are often sensitive to the prices of some fish products that they perceive as traditionally cheap sources of seafood, such as cans and fish sticks.²⁹ In fact, one of the fastest growing Thai export of fish is canned pet food, with the US being its largest importer. As a point of reference, a pet cat in the US may consume almost 14 kilograms of fish per year, almost twice as much as the average American.³⁰ As costs for suppliers increase due to several factors, such as regulations or more difficulty in attaining fish stocks due to overfishing, they often cut costs on the labour force and safety measures. The result is often that the products of successful seafood based pet food companies are based on effectively slave labour.³¹ What is needed is the realisation that forced labour is a global issue which requires an international and multi-sectoral awareness and will to tackle. This includes the need for recognition by the whole supply chain that the final price point of products should include fair wages and working conditions.³²

Lack of transparency and difficulty in monitoring supply chains is a prevailing problem in business and human rights and it is also important to consider to when assessing forced labour

²⁵ UNHRC, ‘Protect, respect and remedy: a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (2008) A/HRC/8/5, 3.

²⁶ Fischman (n13), 232.

²⁷ Fish Wise ‘Social Responsibility in the Global Seafood Industry’ (n11), 25.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Fischman (n13), 232.

³¹ *Ibid.*

³² Fish Wise ‘Social Responsibility in the Global Seafood Industry’ (n11), 25.

in the Thai fishing industry. Rapid globalisation of markets brought about long and complex supply chains which in the current legal environment makes it extremely difficult to assign responsibility. In many cases it is almost, if not entirely impossible to trace back the exact source of products and materials which allows for the use of forced labour to go either unnoticed or unpunished.³³ For this reason, several countries have recently introduced or are planning to introduce supply chain transparency legislation, which will be considered in detail later in this paper. By achieving full supply chain transparency, it should be possible to monitor human rights abuses occurring at any stage of production or even to prevent them from entering the supply chain at all.³⁴

2.3 Slavery Scandals and the Thai Government's Responses

The Thai seafood industry has received increased attention and scrutiny in recent years. In 2014, the *Guardian* released its 6-months investigation exposing one of Thailand's largest companies on its use of forced labour and linking it to European and American retailers. Around the same time the US Department of State released its annual Trafficking in Persons report (TIP), in which they downgraded Thailand to the lowest Tier 3 ranking for failing to effectively deal with human trafficking.³⁵ Media reports by *Associated Press* and *New York Time* followed, uncovering more of the human rights atrocities being committed in the Thai fishing industry and increasing public attention and outrage over the issue. In April 2015 the EU issued a yellow card to Thailand "for not taking sufficient measures in the international fight against illegal fishing".³⁶ An EU yellow card is issued to third-party countries that the Commission deemed not to have taken appropriate measures to keep up with the standards set in the EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. If the situation does not improve, the country in questions risks being issued a red card and ultimately, they will be unable to sell their fish in the EU market.³⁷

Following these repercussions from some of their largest fish product importers, Thailand issued substantial reforms that in theory constitute some of the most comprehensive initiatives

³³ Fischman (n13), 233.

³⁴ Fish Wise 'Social Responsibility in the Global Seafood Industry' (n11),28.

³⁵ The Freedom Fund and Humanity United 'Assessing Government and Business Responses to the Thai Seafood Crisis'(2016) <https://humanityunited.org/wp-content/uploads/2016/05/FF_HU_Assessing-Reponse_FINAL_US-copy.pdf> accessed 18/02/19, 6.

³⁶ European Commission 'EU acts on illegal fishing: Yellow card issued to Thailand while South Korea & Philippines are cleared' < http://europa.eu/rapid/press-release_IP-15-4806_en.htm> accessed 11/06/19

³⁷ IUUWatch 'EU carding decisions' <<http://www.iuuwatch.eu/map-of-eu-carding-decisions/>> accessed 11/06/19

that have happened in the industry.³⁸ In response to the pressure it was facing from the international community, in 2015 Thailand introduced the Fisheries Act B.E.2558 (2015) and Royal Ordinance on Fisheries B.E. 2558 (2015), reforming the regulations governing its fish industry since 1947. The new legislation entails a promising framework of improvements in areas of working hours and conditions, stricter regulations for long-haul fishing and enhanced tracking and control mechanisms on ships.³⁹ The legislation mandates action under the coordination of the Royal Thai Navy that reports directly to the Prime Minister, demonstrating that the government places a high priority to these issues.⁴⁰ In addition, the media scandals also inspired reforms in the private sector. The most significant initiative was the establishment of the Shrimp Sustainable Supply Chain Task Force (now Seafood Task Force), led by Charoen Pokphand Foods, one of the businesses accused in the *Guardian* article. The Task Force in fact grew out to be a major coalition of international stakeholders in the Thai fishing industry and they are developing their own set of guidelines to reform their supply chains.⁴¹

2.4 Challenges in the Enforcement of the New Legislation

Thai legislative attempts to reform its fishing industry are certainly encouraging and show a change in the rhetoric and priorities of the authorities. These efforts have not gone unnoticed by the international community. On the US Trafficking in Persons Report Thailand was upgraded to a Tier 2 level due to demonstrating significant efforts to eliminate trafficking.⁴² Similarly, the EU Commission recently lifted the yellow card on Thailand for having “successfully addressed the shortcomings in its fisheries legal and administrative systems”⁴³. Nevertheless, abusive practices in the industry are deeply rooted after decades of failures to address the regulatory defects and challenges.⁴⁴

While an ambitious and welcome initiative, the new inspection systems set up were questioned in their ability to effectively identify and help victims of forced labour. First, ongoing political instability diverts resources necessary for effective implementation and often results in a difficulty in coordinating between the various agencies and ministries involved, not

³⁸ The Freedom Fund and Humanity United ‘Government and Business Responses’ (n34), 6.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, 11.

⁴¹ *Ibid.*, 6.

⁴² US Department of State ‘2018 Trafficking in Persons Report: Thailand’ < <https://www.state.gov/reports/2018-trafficking-in-persons-report/thailand/>> accessed 11/06/19

⁴³ European Commission ‘Commission lifts “yellow card” from Thailand for its actions against illegal fishing’ < http://europa.eu/rapid/press-release_IP-19-61_en.htm> accessed 11/06/19

⁴⁴ The Freedom Fund and Humanity United ‘Government and Business Responses’ (n34), 8.

in the least because of the frequently changing personnel.⁴⁵ This, combined Thailand's poor record in its government officials' willingness to recognise abuse, contributes to a limited success in prosecutions.⁴⁶

An example is the key reform of is the Port-in/Port-out (PIPO) inspection system, which was introduced by the government. Under the PIPO system, boats above a certain size, when departing or arriving at the port, must report for inspection of crew details, documentations, equipment, logbooks and so on.⁴⁷ However, the Thai government noted that in a 2015 inspection, officials failed to identify a single case of forced labour out of 474,334 fishery workers.⁴⁸ The reasons of these kind of failures are various. Insufficient training and corruption are the main challenges, which results in the inspections being either uncoordinated or pre-arranged. For example, according to the research of the Freedom Fund and Humanity United, people working at the port often alert captains at sea to ongoing inspections in the area, warning them against returning to port.⁴⁹ This lack of effective enforcement of the legislative reforms reinforces the need for strong international regulation to successfully eliminate forced labour from global supply chains.

3.Chapter 3: International Legal Norms on Forced Labour

3.1 Relevant International Instruments on Forced Labour

In a report in 2005 the ILO highlighted that extracting forced labour is “one of the most hidden problems of our times”⁵⁰. It found that the offence was rarely prosecuted, even when there were relevant provisions under national laws and sanctions were often very low compared to the gravity of the crime.⁵¹ However, in the following years awareness of the issue has been growing in the global community. In an ILO report published less than a decade later, Lee

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 13.

⁴⁷ *Ibid.*,16.

⁴⁸ Human Rights Watch 'Hidden Chains- Rights Abuses and Forced Labor in Thailand's Fishing Industry' (2018) <<https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>> accessed 11/06/19

⁴⁹ The Freedom Fund and Humanity United 'Government and Business Responses'(n34),17.

⁵⁰ ILO 'A Global Alliance Against Forced Labour' (2005) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081882.pdf> accessed 27/06/19, 17.

⁵¹ *Ibid.*

Swepton, former Senior Advisor of Human Rights of the ILO, stated that “the elimination of compelled labour is a central tenet of international human rights law today”.⁵² This fairly rapid growth of international attention has resulted in a more active law making and enforcement in the area, which is a welcome development. However, it means that judges and prosecutors might have to address cases of forced labour without precedent, often dealing with concepts that have different definitions under different legal traditions such as slavery, forced or compulsory labour and trafficking.⁵³ Lack of clear definitions in turn can create confusion over the recognition of the abuse and over what measures to apply to combat these offences. This section will introduce the core definitions by identifying some of the most important international instruments that govern the area of forced labour today in a variety of legal areas, such as human rights law, labour law and criminal law.

UN Instruments

In 1926 the League of Nations adopted the Slavery Convention, which reflected the concern of the international community towards continuing slave trades despite the century long fight against slavery. The Convention became the first international instrument ever providing a definition of slavery which is still considered to be the authoritative definition in international law.⁵⁴ It can be found in Article 1(1), which provides that “slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” It is important to note the potential issue with the interpretation of Article 1 of the Convention that arises in the context of modern day slavery: whether it is possible to use an interpretation of the concept of “ownership” that is suitable to modern circumstances, since today there is almost no country that allows for the formal rights of ownership over a person. “Ownership of persons, in that sense, is a legal impossibility in the modern world”.⁵⁶ How and whether the issue of interpretation is resolved in case law will be discussed later in this chapter.

⁵² Lee Swepton ‘The elimination of compelled labour is a central tenet of international human rights law today’ (International Labour Office , 2014) < https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_342966.pdf> accessed 04/07/19, 1.

⁵³ ILO ‘Forced Labour and Human Trafficking Casebook of Court Decisions’ (2009) < https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_106143.pdf> accessed 04/07/19

⁵⁴ *Ibid.*

⁵⁵ Swepton (n51), 5.

⁵⁶ Robin Hickey, ‘Seeking to Understand the Definition of Slavery’ in Jean Allain (ed.) *The Legal Understanding of Slavery* (Oxford University Press 2012),232.

In 1956 the UN decided to adopt a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. It refers to the 1926 definition but expands it in Article 1 by introducing “institutions and practices similar to slavery (...) whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention”. The Supplementary Convention identifies these practices and institutions as debt bondage, serfdom, servile marriage and certain forms of child labour.

Other core human rights instruments also contain provisions on slavery and forced labour. The International Covenant on Civil and Political Rights modelled its own prohibitions on the earlier definitions of the offence found in the UN Slavery Conventions and the ILO Forced Labour Convention ⁵⁷ and prohibits slavery, servitude and forced or compulsory labour in Article 8.

It is also important to mention the UN Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (or the Palermo Protocol), which is the first international instrument broadening the definition of trafficking to include forced labour.⁵⁸ It defines trafficking in Article 3(a) as the “recruitment, transportation, transfer, harbouring or receipt of persons (...) for the purpose of exploitation.” It also gives a definition for exploitation in the same paragraph: “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. The Protocol reconceptualises slavery in terms of the moving of persons for the purpose of exploiting them and contributes to the current international focus on combatting human trafficking in the context of modern day slavery.⁵⁹

ILO Views

The ILO Forced Labour Convention (No. 29) of 1930 was drafted around the same time as the Slavery Convention. Read together, the two instruments provide an important insight to how the concept of slavery was viewed at the time. Originally, the areas of slavery and forced labour were to be dealt as two separate (even though related) concepts.⁶⁰ While the League of

⁵⁷ ILO Casebook (n52), 9.

⁵⁸ *Ibid.*, 15.

⁵⁹ Janne Mende ‘The Concept of Modern Slavery: Definition, Critique, and the Human Rights Frame’ (2019) 20(2) Human Rights Review 229, 231.

⁶⁰ Swebston (n51), 5.

Nations focused its attention on the prohibition of slavery, the ILO turned to the prevention of forced and compulsory labour. Today, in the context of modern slavery, the concepts of slavery and forced labour have grown much more integrated and they are often used interchangeably.

The Forced Labour Convention defines forced labour in Article 2(1) as such: “the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” In contrast to the Slavery Convention, the Forced Labour Convention contains a list of exceptions in Article 2(2) that are excluded under forced or compulsory labour, such as compulsory military service or work extracted in emergency. From the ILO definition three integral elements can be determined that will be crucial in recognising whether a situation amounts to forced labour. First, there needs to be a work or service performed. Second, the work needs to be performed under conditions of menace or penalty. The ILO Committee of Experts on the Meaning of Forced Labour advised that this phrase should be interpreted broadly, not only to mean “forms of penal sanction” but also “a loss of rights or privileges”.⁶¹ The third element is the lack of voluntariness. It is distinct from the previous element, however, the Committee of Experts have noted that there can never be a voluntary offer under the threat of menace and penalty.⁶²

International Criminal Instruments

Both the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Rome Statute list “enslavement” as a crime against humanity under their jurisdictions. The Rome Statute’s definition of enslavement starts similarly to the Slavery Convention: Article 7(2)[c] provides that enslavement means “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” However, the addition of the second part of the definition indicates that the offence was meant to be interpreted in a broader way.⁶³ Footnote 11 expands the definition of enslavement even further by explaining that “such deprivation of liberty may, in some circumstances, include exacting forced labour

⁶¹ ILO General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ‘Abolition of forced labour’ (1979) <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1979-65-4B\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1979-65-4B).pdf)> accessed 09/07/19, para 21.

⁶² ILO Casebook (n52), 12.

⁶³ *Ibid.*, 17.

or otherwise reducing a person to a servile status”.⁶⁴By underlining that the offence of enslavement is not exclusive to traditional forms of slavery, the Statute is a more meaningful instrument in the context of modern day slavery .⁶⁵

Regional Instruments

The prohibition of slavery and forced labour are crucial parts of regional human rights standards as well. The European Convention on Human Rights provides in Article 4 (1) that “no one shall be held in slavery or servitude”, in Article 4(2) that “no one shall be required to perform forced or compulsory labour” and a list of exceptions in Article 4(3), essentially combining the concerns of the UN Slavery Convention and the ILO Forced Labour Conventions.⁶⁶ The European Court of Human Rights has been fairly active compared to other courts in issuing decisions on slavery, forced labour and trafficking. Some of the most important ones, such as *Siliadin v France*, in which the Court draws a distinction between slavery and servitude, will be discussed in more details shortly.

The American Convention on Human Rights also have a detailed provision prohibiting forced labour and slavery in Article 6, the wording largely resembling that of the European Convention. The African Charter on Human and Peoples’ Rights has a slightly different approach, prohibiting “all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment” in a brief provision in Article 5.⁶⁷

Regrettably for the victims of human rights abuses in the Thai Fishing Industry is that Asia has not yet adopted a regional human rights convention. The 2012 ASEAN Declaration on Human includes a provision on slavery and forced labour in Article 13, which states that “no person shall be held in servitude or slavery in any of its forms or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs.” However, there is a lack of a regional human rights system with a binding human rights treaty and a court with jurisdiction over forced labour complaints. This gap in international human rights law

⁶⁴ International Criminal Court ‘Elements of Crimes’ (ICC-ASP/1/3)

<http://www.iccnw.org/documents/ElementsofCrimes_English.pdf> accessed 09/07/19, 117.

⁶⁵ ILO Casebook (n52), 18.

⁶⁶ Swepston (n51), 18.

⁶⁷ *Ibid.*, 19.

needs to be overcome, especially when considering the population and the increasing political and economic power of the region and the reports of grave human rights abuses in the area.⁶⁸

3.1.2 Instruments Specialising on the Rights of Sea Workers

There are also a number of important international standards with provisions dealing specifically with the rights of sea workers. The United Nations Convention against Transnational Organized Crime, guardian of the Palermo Protocol⁶⁹, is the main international agreement to combat organized crime. The importance of the Convention expands beyond the Palermo Protocol, as it contains specific provisions on the trafficking and smuggling of migrants at sea and aboard vessels.⁷⁰ It is widely ratified, with the number of signatories at 147 as of July 2019.⁷¹

The ILO Maritime Labour Convention is intended specifically to ensure decent working conditions to seafarers. It sets out minimum requirements for nearly all aspects of sea workers' working conditions, including recruitment practices, maximum working hours, payment of wages, living conditions and safety and health provisions. The Convention has recently been amended, with provisions against bullying and harassment, including sexual harassment, added to improve crew safety and welfare.⁷²

The ILO Work in Fishing Convention (No.188) addresses major issues affecting workers in the fishing industry. It sets out binding requirements related to work on board commercial fishing vessels, including decent living conditions, working hours and rest periods, occupational safety and health, medical care, written work agreements, and social security protection.⁷³ Importantly, the Convention puts responsibilities for ensuring crew safety and living conditions on vessel owners and captains.⁷⁴ On 30th January 2019 Thailand became the first country in Asia to ratify the Convention, reflecting a welcome commitment by the Royal Thai Government to improve working conditions in its prominent fishing industry and

⁶⁸ Chang-ho Chung 'The Emerging Asian-Pacific Court of Human Right in the Context of State and Non-State Liability' (2016) 57 Harvard International Law Journal 44,45.

⁶⁹ Fish Wise 'Social Responsibility in the Global Seafood Industry' (n11), Appendix II.

⁷⁰ *Ibid.*

⁷¹ UN Treaty Collection 'United Nations Convention against Transnational Organized Crime' < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en > accessed 28/07/2019, Chapter XVIII.

⁷² Seafarers' Rights 'International 'Maritime Labour Convention' < <https://seafarersrights.org/seafarers-subjects/maritime-labour-convention-mlc/> > accessed 28/07/19

⁷³ ILO 'Thailand ratifies Work in Fishing Convention' (30 January 2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_666581/lang--en/index.htm>accessed 28/07/19

⁷⁴ Fish Wise 'Social Responsibility in the Global Seafood Industry' (n11), Appendix II.

eliminate forced labour. The Convention will come into force in Thailand a year after ratification, on 30th January 2020.⁷⁵

3.2 Forced Labour and Slavery in International Human Rights Law

In order to answer the main research question, that is to what extent is international law able to protect victims of forced labour, it is necessary to define forced labour in the international legal context. There seem to be a confusion in the discourse over the interpretation of terms connected to modern day slavery, both in public discourse and by courts and academics. Slavery and forced labour (and in recent discourse, trafficking as well) are terms that are most often used interchangeably in order to describe a category of human rights abuses. They are obviously interconnected concepts, but at the time of their legal definition they were intended to cover separate offences. For the sake of consistent law making and judgements it would be important to agree whether and to what extent the different terms are distinct from each other. However, scholars and international courts alike seem to be unable to agree on this issue.⁷⁶

Public discourse uses the term modern day slavery as an umbrella term for a variety of offences, including domestic slavery, forced labour, trafficking, debt bondage and child labour. Since it is not a term that is defined in any core human rights instruments, it raises the question of what exactly makes slavery modern, and is the abuse (or abuses) it encompasses still covered by the traditional prohibitions on slavery in international law? This is increasingly important to consider, since several countries have recently enacted or are planning to enact modern slavery laws. Yet, different legal areas and legal instruments might have different definitions of each of these terms that are usually understood to be encompassed by modern day slavery. In order to correctly assign responsibilities and duties, it is necessary to have a clear understanding of what the different concepts entail under international law.

Another debated area in the modern day slavery discourse is the emergence of a prominent anti-trafficking movement and the adoption of the Palermo Protocol⁷⁷. While it introduced some further confusion into the discussion, it also inspired a welcome debate over the relationship between the different abusive practices it intended to combat.⁷⁸ Some criticise the

⁷⁵ ILO 'Thailand ratifies Work in Fishing Convention'(n70)

⁷⁶ Nicholas McGeehan 'Exploitation rebranded: How international law sold slavery as forced labour' in David Keane and Yvonne McDermott (eds) *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012), 221.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

Protocol for distracting international efforts to combat slavery. For example, James Hathaway argues that ‘the decision to take action against human trafficking, rather than against slavery in all of its contemporary forms, has given comfort to those who prefer not to tackle the claims of the majority of enslaved persons.’⁷⁹ Meanwhile, Jean Allain holds the view that the issue is more of a question of interpretation.⁸⁰ In any case, the active discussion over the topic shows that the relations between slavery and other “slavery-like” exploitative practices is a debated area of law. To determine whether victims of forced labour are able to get protection under international law, it is necessary to look at the secondary research question of this paper, that is whether international legal norms are able to characterise forced labour as a form of slavery.

3.2.1 Can international human rights law characterise forced labour as slavery?

International courts often struggle with the definition of slavery, since slavery in its modern context more often involves the use of coercion or force, characteristics of forced labour, than legal ownership.⁸¹ The general agreement of courts is to follow the 1926 Slavery Convention which defines slavery in terms of “powers attaching to the right of ownership”. Notably the ICTY decision in *Prosecutor v Kunarac et al*⁸², which decision since then has become a reference point for other courts as well, stated that the Convention definition is the “abiding” one.⁸³

Prosecutor v Kunarac et al.

The judgement is important on many accounts in the human rights law discourse on slavery. First, the ICTY determines that the Convention definition on slavery is to be considered customary international law.⁸⁴ Second, it calls for an evolutive interpretation of the definition of slavery since the “concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery” has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership”⁸⁵. According to the Appeals Chamber, slavery has evolved in such a way that it is more suitable to refer to a condition rather than legal status.⁸⁶ Furthermore, in line with the

⁷⁹ James Hathaway, ‘The Human Rights Quagmire of “Human Trafficking” (2008–2009) 49 Va. J. Int’l L. 1, 5.

⁸⁰ McGeehan (n66), 222.

⁸¹ Holly Cullen ‘Contemporary International Legal Norms on Slavery’ in Jean Allain (ed.) *The Legal Understanding of Slavery* (Oxford University Press 2012), 304.

⁸² *Prosecutor v. Kunarac et al.*, (Trial Judgment) IT-96-23-T & IT-96-23/1-T ICTY 22/02/2001

⁸³ Cullen (n71), 306.

⁸⁴ *Prosecutor v. Kunarac et al.*, (Trial Judgement) (n72), para 520.

⁸⁵ *Prosecutor v. Kunarac et al.*, (Appeal Judgment) IT-96-23-T & IT-96-23/1-T 12/06/2002, para 117.

⁸⁶ McGeehan (n66), 226.

idea of evolutive interpretation, it disapproves of an exhaustive approach of enumerating the different slavery-like practices falling within the definition, but comes up with a list of indicators for slavery:

“The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea”⁸⁷

The extract shows that the Appeals Chamber considers forced labour to be an indicator for the presence of enslavement. The use of control is central in their analysis, however, the blurring of lines between control relating to ownership and control relating to coercion and force illustrates the difficulty of separating slavery and forced labour in practice.⁸⁸ The *Kunarac* judgement is very important, as it is the first contemporary decision by an international court on slavery⁸⁹ and it begins the discussion on modern day slavery. It is also an important case for answering the sub-question of this thesis, since the ICTY decision on the issue indicates that forced labour may be characterised as slavery in international law.

Siliadin v France

The relevant case law of the ECtHR adds some confusion to the legal distinction between slavery and forced labour. The first case of the Court to address modern day slavery and a claim on an Article 4 violation was the case of *Siliadin v France*.⁹⁰ The case concerned a 15 year old Togolese national girl who was brought to France under an agreement to work as a domestic worker until the cost of her travels were reimbursed, with a promise of being able to continue her education and finalise her immigration status. In reality, her passport was confiscated on her arrival by her employer and she became an unpaid housemaid. She was required to work 15 hour work days every day with no days off and she received no remuneration for her services. She could not go to school and was rarely even allowed to leave the house for four

⁸⁷ *Prosecutor v. Kunarac et al.*, (Appeal Judgment) (n75), para 119.

⁸⁸ Cullen (n71), 307.

⁸⁹ *Ibid.*

⁹⁰ *Siliadin v. France* Application no. 73316/01 (ECHR 26 July 2005)

years, after which the authorities were alerted by a neighbour.⁹¹ The applicant's employers were charged under French criminal law with breaching her right to human dignity and for obtaining her services without payment.⁹² While the Court of Appeal found a breach of the latter offence, the defendants were only required to pay a compensation in terms of missing wages and holiday payments, and they found that the applicant's living conditions did not amount to be incompatible with human dignity.⁹³ Ultimately a claim was brought before the European Court of Human Rights relying on Article 4 of the ECHR.

Since the Court had no previous judgement on the issue, the position it took on slavery, servitude and forced labour is very important. Regrettably, it decided to interpret the definition of slavery narrowly. First, the Court briefly examined whether the applicant was subjected to forced labour and found that based on her vulnerability as a minor and as an unlawful resident in France, she was.⁹⁴ It then moved on to examine whether she was subjected to slavery or servitude and found that a distinction between the terms is applicable. They noted that the Convention does not define servitude, but that it refers to "a situation of exploitation which did not require that the victim be objectified to the point of becoming merely another person's property".⁹⁵ In their view, slavery must include the element of "a genuine right of legal ownership" over another person, this reducing that person "to the status of an object".⁹⁶ Therefore, they found that the applicant was subjected to servitude but not to slavery.

The decision has been heavily criticised for its too narrow interpretation on slavery. Holly Cullen argues for instance, that the requirement of genuine legal ownership essentially "denuded the prohibition on slavery of any utility".⁹⁷ Even though the outcome of the judgement was favourable to the applicant, it is questionable how victims in the contemporary context of slavery could be protected by the prohibition on slavery in the ECHR. This interpretation by the Court suggests that the concept of slavery is exclusively reserved to the traditional "chattel" type slavery and leaves no space for the inclusion of other slavery-like practices, such as forced labour. This approach leaves no flexibility to an evolutive interpretation and could possibly render the Slavery Convention outdated. Furthermore, by

⁹¹ *Ibid.*, paras 9-19.

⁹² Andre Nicholson 'Reflections on *Siliadin v. France*: slavery and legal definition' (2010) 14:5 The International Journal of Human Rights 705, 706.

⁹³ *Ibid.*

⁹⁴ *Siliadin v. France* (n80), paras 117- 120.

⁹⁵ *Ibid.*, para 103.

⁹⁶ *Ibid.*, para 122.

⁹⁷ Cullen (n71), 309.

failing to give space to the inclusion of *de facto* slavery to the definition of slavery, the Court fails to recognise the degree and reality of violation victims suffer.⁹⁸

Another criticism is that the ECtHR misinterpreted the words of the Slavery Convention, which was never intended to give rise to such limited interpretations.⁹⁹ Allain argues that the Court's narrow approach does not match the intentions of the *travaux préparatoires* and might be the first example of the fragmentation of the slavery discourse in international human rights law. The judges, by drawing a clear distinction between what they view to be the "classic" meaning of slavery and servitude, raise the threshold for the offence.¹⁰⁰ However, Allain reminds us that the ICTY already ruled on enslavement as a crime against humanity and took a preferable approach to the issue more in line with the general contemporary agreement on slavery.¹⁰¹

Rantsev v Cyprus and Russia

The ECtHR had the opportunity to turn back to the definition of slavery in the case of *Rantsev v Cyprus and Russia*.¹⁰² In its judgement the Court reconsidered its previous approach, developing an analysis more compatible with the 1926 definition.¹⁰³ The applicant of the case was the father of the victim complaining about the lack of adequate investigation about his daughter's death and lack of sufficient protection while she was still alive¹⁰⁴. The case concerned a Russian woman who was brought to Cyprus where she was employed as a prostitute and later died in suspicious circumstances after expressing her wish to return home. Her case arguably fit the definition of human trafficking in the Palermo Protocol which has increasingly been associated to be a part of the modern day slavery discourse, so the Court took the chance to develop an opinion on the issue.¹⁰⁵

One of the most noteworthy elements of the judgement is that the Court indicated its criticism of the *Siliadin* judgement.¹⁰⁶ In *Rantsev*, the ECtHR refers to the ICTY decision in *Kunarac* and asserts that the "exercise of any or all of the rights of ownership" over a person

⁹⁸ *Ibid.*

⁹⁹ Nicholson (n82), 711.

¹⁰⁰ Jean Allain 'The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute' in Jean Allain (ed) *Law and Slavery: Prohibiting Human Exploitation* (BRILL 2015), 446.

¹⁰¹ *Ibid.*, 447.

¹⁰² *Rantsev v Cyprus and Russia* Application no. 25965/04 (ECHR 10 May 2010)

¹⁰³ Cullen (n71), 309.

¹⁰⁴ *Rantsev v Cyprus and Russia* (n92) para 3.

¹⁰⁵ Cullen (n71), 309.

¹⁰⁶ McGeehan (n66), 225.

is the determining factor for slavery, as opposed to the “genuine right of legal ownership” that was suggested in *Siliadin*.¹⁰⁷ Furthermore, referring to the ICTY judgement, the Court observes the evolution of the traditional concept of slavery to also involve other contemporary forms of slavery and emphasizes the importance of control, including control over a person’s movement or environment, the existence of psychological control, control of sexuality and forced labour as indicators.¹⁰⁸

It appears that the ECtHR has started to move away from its original approach to slavery and slave-like practices laid down in *Siliadin*. However, it is unfortunate that the *Rantsev* decision could not bring more clarity to the discourse of what practices fall within the scope of slavery. The Court decided that there was a breach of Article 4 of the ECHR without elaborating on exactly which provision was breached- slavery, servitude or forced labour, and without elaborating more on the relationship between human trafficking and the listed offences.¹⁰⁹ The result is that the answer to whether international law is able to characterise forced labour as a form of slavery is still unclear. The position after the decision seems to be that the definition of slavery requires elements of “rights of ownership”. However, this is tied to the whole of Article 4 ECHR, rather than to the concept of slavery.¹¹⁰ Further case law is required so that the Court can analyse the issue in more detail and bring more precision to the definition.

Brasil Verde v Brasil

The Inter-American Court of Human Rights had very few occasions to consider the concept of slavery. In its report on the Guaraní indigenous people and contemporary forms of slavery in the Bolivian Chaco, the Inter-American Commission on Human Rights recognised three fundamental elements of slavery: “control by another person, the appropriation of labour power, and the use or threat or use of violence.”¹¹¹ An important outcome of the report is the finding of the existence of forced labour and debt bondage, which offences it explicitly

¹⁰⁷ Cullen (n71),310.

¹⁰⁸ *Rantsev v Cyprus and Russia* (n92), para 280.

¹⁰⁹ Cullen (n71),310.

¹¹⁰ *Ibid.*

¹¹¹ Inter-American Commission on Human Rights ‘Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco OEA/Ser.L/V/II. Doc. 58 (24 December 2009), para 50.

acknowledged as “contemporary forms of slavery”¹¹². This gives an idea about the position of the Commission on the relationship between the offences under Article 6 of the ACHR.

The definition of slavery is taken into consideration by the Inter-American Court of Human Rights in the judgement of *Brasil Verde v. Brasil*.¹¹³ The case concerned farm workers who were recruited from poor communities and were forced to work unpaid and in inhumane working conditions. They were kept under supervision and prevented from leaving the farm. The Court found the existence of slavery.¹¹⁴ Similarly to the *Kunarac* and *Rantsev* decisions, the Court in the *Brasil Verde* case remarked on the evolution of the concept of slavery to include more than the traditional legal ownership over another person. Another similarity is that elements of control were also central to the Court’s analysis in finding the existence of slavery in the contemporary context.¹¹⁵

Available case law from international courts dealing with the definition of slavery and its contemporary forms describe the current position of international law be the following: the prohibition of slavery is customary international law after the ICTY decision in *Kunarac*. Forced labour, at least originally, was intended to be dealt with as a separate, although arguably overlapping offence. However, the realities of modern times mean that the definition of slavery needs reconsideration. The confusion in the legal discourse over what is meant under slavery in a contemporary context materialised most prominently in the *Siliadin* judgement, and it can be a hinderance in the fight against modern day slavery if not resolved.¹¹⁶ It is a positive development in the area that multiple contemporary international court decisions stated that the concept of slavery has evolved to involve other practices than the traditional, chattel type legal ownership over another person. That forced labour falls within the category of modern forms of slavery is implied by the ICTY and supported by both the European and Inter-American regional courts. More case law would be required however, so that courts can elaborate more on the issue and clarify the relationship between forced labour and slavery.

This chapter has indicated that since the drafting of the Slavery Convention prohibiting slavery and the ILO Forced Labour Convention covering the offence of forced labour, an overlapping of the definitions has been developing. Clarity of legal definitions is important for

¹¹² *Ibid.*, para 166.

¹¹³ *Brasil Verde v. Brasil* Inter-Am. Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016)

¹¹⁴ Vladislava Stoyanova, 'United Nations against Slavery: Unravelling Concepts, Institutions and Obligations' (2017) 38 MICH J INT'L L 359, 419.

¹¹⁵ *Ibid.*

¹¹⁶ McGeehan (n66),235.

two main reasons. The first is that states must know what exactly is prohibited in order to give way to effective enforcement mechanisms.¹¹⁷ Simply prohibiting slavery, without specifying what practices exactly fall under the offence may not be sufficient in eliminating modern day slavery. The other reason is that clarity of terms is important in the way the offences need to be addressed.¹¹⁸ Debt bondage, forced labour and human trafficking might all fall under the scope of slave-like practices but they all need to be addressed differently if they are to be tackled in an effective manner. If slavery is defined in a way that is too general and universal, covering a wide range of social injustices, it falls into the danger that its meaning becomes too diluted. The unwelcome effect of that could be that resources set aside for anti-slavery campaigns will eventually have to be used for too many areas of human rights violations which will not be enough to handle each of them properly.¹¹⁹ What is needed is an international consensus on the practices that fall under the prohibition on slavery and a definition that is flexible enough to allow the evolution of the concept to fit contemporary realities.¹²⁰

4. Chapter 4: New legal models in market states as a means to protect victims of forced labour in supply chains

The production of goods has become a highly fragmented process under globalisation. Multi-national corporations operate with increasingly long and complex supply chains in the background that stretch all across the world. For example, Apple listed their 200 top suppliers in their annual Apple Supplier List, which represented “98 percent of procurement expenditures for materials, manufacturing, and assembly of our products worldwide”¹²¹ in 2018. Due to this fragmentation that characterises contemporary business practices, it has become increasingly difficult for governments to control whether products entering the domestic markets have been produced in a way that is up to international and national labour standards. The risk that production involved forced labour or other forms of modern day slavery grows as the distance

¹¹⁷ Swepston (n51), 23.

¹¹⁸ *Ibid.*

¹¹⁹ Kevin Bales and Zoe Trodd ‘Addressing Contemporary Forms of Slavery in EU External Policy’ (European Parliament 2013) <[http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433703/EXPO-DROI_NT\(2013\)433703_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433703/EXPO-DROI_NT(2013)433703_EN.pdf)> accessed 27/07/19, 5.

¹²⁰ *Ibid.*

¹²¹ Apple Inc. ‘Supplier List’ <<https://www.apple.com/supplier-responsibility/pdf/Apple-Supplier-List.pdf>> accessed 29/07/19

between the most basic levels of supply chain and the controlling entity gets bigger.¹²² In an effort to reduce this risk, some countries have tried to come up with ways to effectively monitor supply chains. This has proved to be difficult to achieve and attempts have produced results with varied levels of success. Most initiatives involve measures regulating the market solely on the national market or international approaches that do not adequately address the role that businesses play in global supply chains.¹²³ This is a crucial shortcoming, since today the vast majority of forced labour offences are committed in the private sector and not by states (around 16 million people were in forced labour in the private economy and 4.1 imposed by state authorities based on ILO's estimates in 2017¹²⁴).

However, it is highly problematic to hold companies responsible for their human rights violations under international law, mainly because private actors do not fall under their scope.¹²⁵ Another option would be to rely on domestic laws in the country where the human rights abuses occur but, as illustrated by the Thai case study, governments are not always able to adequately enforce laws even when there are relevant laws in place. The use of extraterritorial measures has been supported as the appropriate measure to bring justice to corporate human rights violations committed abroad, however, its use in human rights litigations has brought disappointing results so far, as illustrated by the case of *Kiobel v Royal Petroleum*¹²⁶. In *Kiobel*, Shell was sued for violating a wide range of human rights in the 1990s in the Niger Delta region. The case relied on the USA's Alien Torts Claim Act, which has frequently been used to try to hold corporations responsible for their human rights violations committed abroad. However, the Court dismissed the claim on grounds of a "presumption against extraterritoriality" and therefore, seriously limited the possibility to bring legal action against foreign multi-national corporations for violations outside of the US.¹²⁷ The decision could be relevant to the Thai fishing industry as well, considering that the US is among the largest importers of Thai seafood. The potential use of extraterritorial measures to protect victims of forced labour in supply chains should be considered therefore.

¹²² Marieke Koekkoek, Axel Marx and Jan Wouters 'Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains' *Global Policy* (2017) Vol 8 (4) 522,522.

¹²³ *Ibid.*

¹²⁴ ILO Global estimates of modern slavery (n 2), 10.

¹²⁵ Koekkoek and others (n121), 522.

¹²⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)

¹²⁷ Judith Schrempf-Stirling and Florian Wettstein 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' *Human Rights Policies* 145 [2017] *J Bus Ethics* 545,559.

Recent years have brought about the emergence of new legal models in market states to protect victims of human rights abuses in supply chains. In an effort to reduce the risk of goods entering the market that have been produced by the use of forced labour and other forms of slavery, several countries have come up with initiatives to secure the availability of detailed information on the process of products entering the consumer markets.¹²⁸ These supply chain transparency measures are increasingly seen to be the appropriate way to hold corporations responsible for how they treat their workers in their supply chains. This chapter is focusing on discussing these transparency measures by looking at some of the most important transparency legislation enacted recently and looking at whether they can be an effective way of protecting victims of forced labour in global supply chains.

4.1 Supply Chain Transparency Legislation

The main aim of transparency measures is to create greater accountability for businesses. The idea behind them is that by obliging companies to disclose the measures they take to eliminate for example forced labour from their supply chains, greater accountability can be achieved. This accountability can be created through different mechanisms, such as consumer and investor awareness or civil society action (“naming and shaming”).¹²⁹ Recent years have brought about an increasing popularity among states to enact supply chain transparency legislation as a tool to tackle modern day slavery with. Importantly, some of the greatest market states are included on the list. The USA, UK, Australia, New Zealand, The Netherlands and France all have recently passed or are about to pass transparency laws. This section is going to look at the USA’s California Transparency in Supply Chains Act 2012 (CTSC) and the UK’s Modern Day Slavery Act 2015 (MSA) in detail and examine their effectiveness in fulfilling their purpose, which is to make supply chains more transparent and ultimately, to protect victims of human rights abuses in supply chains.

4.1.1 California Transparency in Supply Chains Act

The US Bureau of International Labour Affairs provides a list of goods available on the US market that are believed to be produced by child or forced labour. Their list of 20 September 2018 comprises of 148 goods from 76 countries.¹³⁰ However, the average consumer is unaware

¹²⁸ Koekkoek and others (n121), 522.

¹²⁹ Ibid, 523.

¹³⁰ U.S. Department of Labour ‘List of Goods Produced by Child Labor or Forced Labor’ (2018)< <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>> accessed 01/08/19

of the potential human rights abuses behind the purchases they make in their day-to-day lives. That is why the California legislation attempted to amend the situation and enacted the California Transparency in Supply Chains Act of 2010, effective from 2012. It is one of the first legislative acts intended to close the governance gap between the impact of businesses and the impossibility of assigning responsibility to them transnationally based on domestic labour standards.¹³¹ The Act was designed to have a two-fold effect on supply chains. On the one hand, it was supposed to set some human rights standards to retailers and manufacturers whilst operating in a globalised economy. On the other hand, it was meant to give consumers the opportunity to make a conscious purchase by making it easier to know if their spending is contributing to modern day slavery.¹³²

The CTSC requires sellers or manufacturers with annual worldwide gross receipts exceeding \$100 million, who are doing business in the state of California to disclose information on their websites about their efforts to eradicate modern day slavery from their supply chains. They have to do it in five different areas: verification, audits, certification, internal accountability, and training.¹³³

Can the CTSC protect victims of forced labour in global supply chains?

To be able to answer whether the California transparency legislation is able to protect victims of forced labour in global supply chains, it is necessary to look at the impact that the Act has had so far. The CTSC is estimated to cover around 3200 companies directly and thousands of suppliers indirectly.¹³⁴ This is a significant number; however, the scope is much more limited compared to what it would cover if the legislation was to apply nation-wide. In terms of enforcement, the CTSC, being a disclosure law, is expected to inspire a self-regulatory effect. The logic behind it is that it is in companies' best interest to regulate their own policies, so they do not have to publicise unflattering information about their practices and risk a decline in their reputation¹³⁵. However, if that fails, the CTSC also provides the California Attorney General with the power of injunction in case of insufficient or lacking reporting.¹³⁶ Importantly,

¹³¹ Koekkoek and others (n121), 523.

¹³² Julie A. Gutierrez 'Less than Transparent: How California's Effort to Shine Light on Modern Slavery May Ultimately Keep Consumers in the Dark' (2017) 19 Loy. J. Pub. Int. L. 57, 58

¹³³ State of California Department of Justice 'The California Transparency in Supply Chains Act' <<https://oag.ca.gov/SB657>> accessed 02/08/19

¹³⁴ Koekkoek and others (n121), 524.

¹³⁵ Gutierrez (n131), 79.

¹³⁶ Benjamin Thomas Greer & Jeffrey G. Purvis 'Corporate supply chain transparency: California's seminal attempt to discourage forced labour' (2016) 20:1 The International Journal of Human Rights 55, 60.

most companies complied with the requirements of the Act as opposed to withdrawing their businesses from California; however, only a few went beyond the most basic level of compliance. These mainly include big, globally known companies such as Nike and Apple, but it is questionable whether their wide disclosure is a direct effect of the Act rather than their own marketing techniques to publicise their efforts in the fight against forced labour in supply chains.¹³⁷

The Act's impact on consumers is difficult to evaluate. There is no available evidence that transparency laws directly contribute to consumer behaviour.¹³⁸ Even if the information is openly available on companies' websites, it is hard to assess whether a wide range of consumers had the opportunity to use that particular information. NGOs could potentially reach more people by collecting data and then making that data available to citizens through "naming and shaming" campaigns¹³⁹. For example, KnowTheChain assesses companies across different themes to identify forced labour risks and makes the information not only accessible, but also comparable by offering a company comparison tool.¹⁴⁰ However, it is not evident to what extent, if at all, this information reaches the public and what kind of effects it ultimately has.¹⁴¹ Furthermore, the CTSC does not allow private citizens to bring a claim under it. Instead, in the state of California they can sue businesses for fraud or misleading statements under Unfair Competition Law, False Advertising Law or the Consumer Legal Remedies Act. However, it provides a source of inspiration alongside existing laws and as such, it has been invoked in litigation on multiple occasions (although unsuccessfully, so far).¹⁴²

It should be highlighted that the CTSC has not been passed without any effect on companies and their policies. In fact, the California legislation's attempt to bring businesses' contribution to forced labour in their supply chains to the attention of consumers is a welcome development on its own. However, the CTSC has been severely criticized for failing to come up with an effective method of enforcement and shortcomings of design.

¹³⁷ Koekkoek and others (n121), 525

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ KnowTheChain '2018 Food and Beverage Benchmark'

<https://knowthechain.org/benchmarks/comparison_tool/5/> accessed 04/08/19

¹⁴¹ Koekkoek and others (n121), 525.

¹⁴² Gutierrez (n131), 72.

Criticism of the CTSC

Ideally, compliance with the provisions of the CTSC is enforced in two different ways, both of which have been subjected to criticism. The first is by the injunctive relief ordered by the Attorney General, which is the only remedy that the Act offers in case of non-compliance¹⁴³. There are three different ways that the injunction could be ordered: first, ordering the company to put the required information on their homepage; second, issuing a monetary fine and third, banning the company from doing business in the State of California.¹⁴⁴ However, Greer and Purvis argue that it is highly unlikely that a court would ever decide that anything else that a warning to comply would be appropriate, since “the potential harm suffered by a company in restricting significant levels of business or blocking their website would substantially outweigh the harm the California citizenry suffers by not having access to a company’s anti-trafficking policies”¹⁴⁵. Therefore, the effectiveness of the only enforcement mechanism set out in the Act is questionable at the least.

The other, alternative “enforcement mechanism” would be through consumers and company reputation, which means that concerned customers can look at supplier chain disclosure information on companies’ websites and potentially boycott those businesses whose standards in eliminating modern day slavery they find lacking. However, the CTSC does not provide a list of businesses that fall under its scope. If interested customers look at a company’s website and find no transparency disclosure at all, they would not necessarily know whether the reason is non-compliance with the Act, or simply non-requirement since the company in question did not cross the \$100 million mark.¹⁴⁶ It is also not clear to what extent depending on informed consumer choice is a reliable enforcement mechanism. It has to be taken into consideration that the average consumer might not prioritise the sorting of companies by their potential labour abuses in their shopping habits. It is worth looking at Krispy Kreme’s example. Krispy Kreme’s disclosure statement under the CTSC states:

“We do not engage in verification of product supply chains to evaluate and address risks of human trafficking and slavery, nor conduct audits of suppliers to evaluate supplier compliance with company standards against trafficking and slavery in supply chains. We do not require direct suppliers to certify that materials incorporated into the product comply with the laws

¹⁴³ Greer & Purvis (n135), 62.

¹⁴⁴ *Ibid.*, 63.

¹⁴⁵ *Ibid.*

¹⁴⁶ Gutierrez (n131), 71.

regarding slavery and human trafficking of the country or countries in which they are doing business.

We do not maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking nor do we provide company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.”¹⁴⁷

Despite their explicit statement about taking absolutely no action to eliminate slavery risks within their supply chain, there is no evidence supporting that Krispy Kreme has suffered any reputational damage at all and neither have experienced any measurable negative effect on their sales.¹⁴⁸

The CTSC has been criticised on other aspects as well. A basic flaw in design that has been pointed out on several occasions is that the Act only requires a vague disclosure of a company’s efforts in eliminating modern slavery from their supply chains¹⁴⁹. In practice the company need not to have taken any steps at all. Simply stating that they do not engage in trafficking and forced labour risk assessment at all will suffice. That means that the above mentioned statement made by Krispy Kreme is perfectly satisfactory in terms of compliance with the CTSC. This way the requirement of disclosure may be rendered meaningless as a tool to inform consumers since they are effectively left “at a disadvantage in being able to force the eradication of slavery and trafficking by way of their purchasing decisions.”¹⁵⁰

Deriving from the vagueness of the effort-based requirement is that the Act is not specific enough with regards to the quality of information supplied by company disclosures.¹⁵¹ In the case of *Barber v Nestlé*¹⁵² the claimant sued Nestlé for buying fish products that go into Fancy Feast (a pet food company owned by Nestlé) from Thai Union, a company previously revealed to source some of their fish from boats using forced and child labour. They argued that Nestlé used numerous misrepresentations on their websites that would reasonably lead consumers to

¹⁴⁷ Krispy Kreme Doughnuts ‘S.B. 657 Supply Chains Act’ < <https://www.krispykreme.com/legal/s-b-657-supply-chains-act> > accessed 05/08/19

¹⁴⁸ Stephen J. New ‘Modern slavery and the supply chain: the limits of corporate social responsibility’ (2015) 20:6 Supply Chain Management: An International Journal 697, 701.

¹⁴⁹ Gutierrez (n131), 73.

¹⁵⁰ *Ibid.*

¹⁵¹ Koekkoek and others (n121), 526.

¹⁵² *Melanie Barber v Nestlé USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015)

think that Nestlé does not allow their suppliers to use forced labour.¹⁵³ However, the Court agreed with Nestlé's argument that the statements on their website are merely "aspirational" and "idealistic" and that no reasonable customer would think that "Nestlé's suppliers comply with Nestlé's requirements in all circumstances"¹⁵⁴. The consequence of the ambiguity of the legislative design is unfortunately harmful. Gutierrez goes as far as to argue that the disclosures required by CTSC amount to little more than "incentivized false advertising"¹⁵⁵. In any case, they allow businesses to benefit from the appearance of ethical business practices while they do not actually have to do anything that they state in their declaration of aspirations.

4.1.2 UK Modern Slavery Act 2015

The need for modern slavery legislation was brought to the UK's policy agenda after a line of cases from the ECtHR, including *Siliadin* and *Rantsev*, highlighted the need to address grave labour violation issues. In 2013, after an influential report was prepared by the Centre of Social Justice titled 'It Happens Here: Equipping the United Kingdom to fight modern slavery', a Joint Committee was established to draft a Modern Day Slavery Bill.¹⁵⁶ The Modern Slavery Act was enacted in 2015 and it is an important piece of legislation in the protection of victims of slavery and punishment of perpetrators. It brings together the UK's international obligations under UN Trafficking Protocol, the Council of Europe Anti-Trafficking Convention, and the EU Anti-Trafficking Directive into one piece of criminal legislation. Among many other ambitious developments in the area, the Act establishes offences for human trafficking, slavery and forced labour, increases sentences for offenders, makes it easier for authorities to force exploiters to pay reparations and establishes the office of the Independent Anti-Slavery Commissioner¹⁵⁷. Importantly to the scope of this paper, it also contains a Supply Chain Transparency section that is similar to the Californian legislative initiative.

According to Section 54 (2), businesses that supply goods or services in the UK and have a turnover of £36 million¹⁵⁸, need to produce a slavery and human trafficking statement annually.

¹⁵³ Gutierrez (n131), 73.

¹⁵⁴ *Barber v Nestlé* (n150) para 964.

¹⁵⁵ Gutierrez (n131), 73.

¹⁵⁶ Virginia Mantouvalou 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81:6 Modern Law Review 1017, 1020.

¹⁵⁷ Jason Haynes 'The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37:1 Statute Law Review 33, 34.

¹⁵⁸ Specified in the Explanatory Memorandum to the Modern Slavery Act 2015 No.1833 <http://www.legislation.gov.uk/ukxi/2015/1833/pdfs/ukxiem_20151833_en.pdf> accessed 06/08/19

It is further specified in paragraph 6 that the statement must be signed by a director or equivalent, giving the matter into the consideration of the highest level of authorities in the company structure. The statement should include information about the organisation's structure, its due diligence processes and the steps the company has taken to eliminate the risk of forced labour and trafficking in its supply chain in each year.¹⁵⁹ The Act is a progressive development in the area of slavery legislation and its merits are worth highlighting. The requirement of the annual update is a welcome addition that the CTSC did not contain. There is also evidence that the Act generated some important discussion in the area and led to some big companies taking up the issue. After the first year, 1700 companies released modern slavery statements, including companies such as Marks & Spencer and SAB Miller demonstrating a heightened engagement.¹⁶⁰ While the MSA is driving some positive change it also needs to be mentioned that the Supply Chain Transparency section shares some of the weaknesses of design with its Californian equivalent.

Weaknesses of the MSA's Supply Chain Transparency Provisions

First of all, the MSA's only mechanism for enforcement of disclosure is an injunction brought by the Secretary of State.¹⁶¹ Another similarity to the CTSC is that the effectiveness of the Act is further hindered by the lack of a central list containing which companies are covered by its provisions and a lack of monitoring mechanisms to make sure that companies that are covered actually produce and update their statements on a yearly basis. The lack of awareness is also worrying: Mantouvalou, assessing the three year effects of the MSA points out that around a third of businesses were uninformed about the existence of the Act.¹⁶² The ineffectiveness of the legislative design has also showed up in the quality of the statements, with a lot of them falling below even the basic requirements of the MSA. An analysis done by the Business and Human Rights Resource Centre found that in fact, only 56 % of the examined companies complied fully with the minimum requirements.¹⁶³ Many reports are not signed by a director or equivalent and most of the statements are identical, revealing a mechanical "ticking-the-boxes" exercise done with a template that does not reflect a substantial and

¹⁵⁹ Modern Day Slavery Act 2015, Section 54 para 5

¹⁶⁰ Mantouvalou, 1041-1042.

¹⁶¹ Modern Day Slavery Act 2015, Section 54 para 11

¹⁶² Mantouvalou, 1041.

¹⁶³ Business and Human Rights Resource Centre 'FTSE 100 at the Starting Line - An analysis of company statements under the UK Modern Slavery Act' < <https://www.business-humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf> > accessed 06/08/19

meaningful engagement with the issue.¹⁶⁴ This worrying detachment from the issue is fuelled by the weak legal requirements in the design of the Act which leads companies to believe that they can get away with not taking any serious steps towards tackling the issue of forced labour within their supply chains¹⁶⁵. This concludes that at least as of now, it is hardly likely that the MSA can seriously contribute to the elimination of slave-like practices in supply chains and protect victims of forced labour.

The emerging trend of enacting supply chain transparency legislation in a number of countries shows an increasing priority on labour standards globally. However, in order to ensure that these initiatives are effective in fulfilling their purpose, that is in protecting victims of forced labour and other inhumane practices, important changes need to happen. Meaningful reporting, effective monitoring and enforcing mechanisms and a clarity of expectations are necessary to consider in both existing and future transparency legislations.

4.2 Consumer Legal Activism: The Way Forward?

Alongside the new legal models, a new possibility emerged to enforce businesses to comply with their human rights obligations in supply chains: consumer legal activism. In past years, several lawsuits were filed in the US against large retailers by socially conscious customers who felt that by unknowingly purchasing a product that have been made by forced labour their rights as consumers have been infringed. The cases so far have not been able to convince the judges that a discernible harm was suffered by consumers who unwillingly purchased products tainted by forced labour.¹⁶⁶ Furthermore, relying on the CTSC has complicated matters with unexpected hurdles, such as the “safe harbour doctrine”. This section will look at whether despite the unsuccessfulness of cases so far, there is still a potential in consumers using existing legal norms to bring companies to face their human rights responsibilities and ultimately protect victims of forced labour in global supply chains.

4.2.1 Hurdles of Protecting Victims of Forced Labour through Transparency Legislation in Case Law

In 2015, the first lawsuit was filed by consumers against Costco for failing to disclose the occurrence of slave labour in their supply chain. This was shortly followed by seven other

¹⁶⁴ Mantouvalou, 1042.

¹⁶⁵ *Ibid.*, 1045

¹⁶⁶ Andrew G. Barna ‘The Early Eight and the Future of Consumer Legal Activism to Fight Modern-Day Slavery in Corporate Supply Chains’ (2018) 59 Wm. & Mary L. Rev. 1449, 1454.

lawsuits against big multinational corporations, including Nestlé, Hershey, Mars.¹⁶⁷ All of the eight lawsuits were dismissed on different grounds, but their merit is still significant as they brought awareness to the hurdles that consumers face in the fight to hold corporations responsible for their grave human rights violations.

Cause of Action

Existing disclosure regimes, such as the CTSC and MSA, aim to empower consumer activism so that it may become an effective enforcement mechanism. This effectiveness is prevented by flaws in design at the most basic level and it has already proved to be a hurdle in litigation: these legislations do not provide a right of action for private citizens under which they could sue.¹⁶⁸ That means that while consumers might rely on the CTSC in their argument, they have to base their claim on other consumer protection laws. Alleging a proper standing in private claims can be a complicated issue, however. *Monica Sud v. Costco Wholesale Corporation et al*¹⁶⁹ is another case concerning the alarming occurrence of slave labour in the Thai fishing industry. In *Sud*, Costco was sued for knowingly selling prawns that were farmed with forced labour in Thailand and failing to disclose them on their packaging. The Court applied a strict standard to establishing a proper standing. The plaintiffs must show that they “(1) suffered injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by a favourable judicial decision.”¹⁷⁰ Traceability was key to the Court’s analysis which was not found in the case of *Sud v Costco*, as the prawns that were purchased could not be traced back to a ship in Thailand.¹⁷¹

Safe Harbour Doctrine

The main hurdle that consumers have been facing when suing corporations using the CTSC is the safe harbour doctrine. The doctrine bars liability from California’s consumer protection laws if the Court finds that the act that provides the basis of the lawsuit has already been considered and condoned in another statute, which in these cases is the CTSC.¹⁷² The defendants in *Barber v Nestlé*, *Wirth v Mars*¹⁷³, *Hodson v Mars*¹⁷⁴, *De Rosa v. Tri-Union*

¹⁶⁷ *Ibid.*, 1453.

¹⁶⁸ *Ibid.*, 1473.

¹⁶⁹ *Monica Sud v. Costco Wholesale Corporation et al*, 229 F.Supp.3d 1075 (N.D. Cal. 2017)

¹⁷⁰ *Ibid.*, 1081.

¹⁷¹ *Barna* (n164) 1473.

¹⁷² *Gutierrez* (n131), 76.

¹⁷³ *Christina Wirth, et al. v Mars Inc.* Case No. SA CV 15-1470-DOC (KESx) (C.D.Cal., 2016)

¹⁷⁴ *Robert Hodson v Mars Inc.* Case No. 15-cv-04450-RS (N.D.Cal., 2016)

*Seafood*¹⁷⁵ and *Hughes v. Big Heart Pet Brands*¹⁷⁶, so more than half of the California consumer lawsuits, relied on the safe harbour doctrine as a ground to avoid liability.

Wirth made similar claims to *Barber* against Mars, who is the manufacturer and retailer of the pet food brand Iams. The plaintiff in *Wirth* claimed that in order to source its seafood that go into cat food products, Mars partners with Thai Union, a company infamous of its involvement in forced labour in the Thai fish industry and fails to disclose this on their products.¹⁷⁷ According to the Court's analysis, the California legislature had already considered the issue at hand in the CTSC. Because the Act prescribes exactly "who must disclose information about forced labour in their supply chains, what they must disclose, and how they must disclose it", the Court agreed that the safe harbour doctrine exists and bars the plaintiffs' claims.¹⁷⁸

The safe harbour doctrine is indeed a significant hinderance in consumer activist cases. It indicates that the CTSC limits remedies that would be available under other consumer protection laws¹⁷⁹. Since the Act does not offer any satisfactory remedies on its own, it is hard to believe that this had been the intent of the legislators. However, it shows that ineffective design compromises the usefulness of transparency laws in consumer legal activism and ultimately in protecting victims of forced labour. Nevertheless, there is hope for future claims for a different outcome. In *Hodsdon v Mars*¹⁸⁰ and *Dana v Hershey*¹⁸¹ the Court raised questions about the application of the doctrine. In *Hodson*, the judges found ambiguity in the conditions that state that the safe harbour doctrine should apply when the legislature already "considered a situation and concluded no action should lie" and issued caution against it¹⁸². Second, they found it anomalous that a large business with earnings over \$100,000,000 would be protected from liability while smaller companies would not.¹⁸³ In *Dana*, the Court distinguished between companies advertising the steps they have taken to eliminate forced labour from their supply chains on the one hand(which in their opinion what the CTSC

¹⁷⁵ *Donna De Rosa v. Tri-Union Seafoods LLC* Case No. CV 15-07540-CJC(AGR) (C.D.Cal., 2016)

¹⁷⁶ *Hughes v. Big Heart Pet Brands* Case No. CV 15-08007-CJC(AGR) (C.D.Cal., 2016)

¹⁷⁷ Gutierrez (n131), 77.

¹⁷⁸ *Wirth v Mars* (n171) *8

¹⁷⁹ Gutierrez (n131), 77

¹⁸⁰ *Hodsdon v Mars* (n174)

¹⁸¹ *Laura Dana v The Hershey Company* Case No. 15-cv-04453-JCS (N.D.Cal., 2016)

¹⁸² *Hodson v Mars* (n174), *1029

¹⁸³ Ibid.

requires), and claiming that forced labour exists in their supply chains (which Dana argued) on the other. In their opinion therefore, it cannot be accepted that the latter could never be covered by consumer protection law under the safe harbour doctrine¹⁸⁴. Regrettably, the Court dismissed these claims as well, which leaves it for future cases to decide the appropriate application of the safe harbour doctrine, but the existence of judicial criticism is a positive sign.

The failure of the eight consumer lawsuits against multinational corporations casts a disheartening shadow on the effectiveness of transparency laws as a tool of trying to hold businesses responsible for using forced labour in their supply chains. However, while Barna argues that the time of consumer legal activism might not be ripe yet, he holds an optimistic view on the outcome of future cases. Importantly, he highlights the recent enactment of the UK's MSA, which covers a significantly larger portion of companies and states that it could potentially create a basis for future misrepresentation claims with positive judgements.¹⁸⁵ It seems like more cases are necessary for courts to consider the issue in detail in order for these new legal models to show their efficiency.

5. Chapter 5: Alternative legal and non-legal strategies

To find an answer to what extent international and national legal norms are able to protect victims of forced labour in global supply chains, this paper looked at state obligations under international human rights standards, national labour standards, and national transparency legislation trying to regulate business conduct. However, based on the cases that were analysed, their application in practice often lacks efficiency. It is therefore a good idea to look at what alternative legal or non-legal strategies could be able to help combat forced labour and modern day slavery.

5.1 Soft Law

Soft law measures have been the preferred way to handle corporations' human rights responsibilities internationally. The leading instrument in the field is the United Nations Guiding Principles (UNGP), developed by UN Special Representative John Ruggie. The UNGP is rooted in the "protect, respect and remedy" framework, under which states' duty to

¹⁸⁴ Gutierrez (n131), 78.

¹⁸⁵ Barna (n164), 1490.

protect human rights, corporate responsibility to respect human rights, and the need for access to effective remedies are intertwined.¹⁸⁶ The UNGP does not provide a precise set of human rights standards that companies are required to respect. Instead, the framework relies upon due diligence as a central tool for businesses to respect all internationally recognised human rights, for example by maintaining internal human rights policies and carrying out impact assessments.¹⁸⁷

The UNGP deserves some praise for its achievements in the business and human rights discourse. Its main advantage potentially lies in “breaking the stalemate”¹⁸⁸ that characterised the discourse beforehand and attaining wide support, which in theory could be beneficial for widespread human rights protection in the context of business activities. Furthermore, while under the framework the obligation to protect human rights remains with states, it nonetheless reinforces the expectation that companies also have responsibilities when it comes to human rights violations within their operations. In that way it is an innovative instrument, as it addresses and ties commitments to business entities, which are actors, but not yet subjects of international law¹⁸⁹.

However, the framework also received a lot of criticism for being ineffective in protecting human rights in business activities. As a soft law mechanism, it relies mainly on self-regulation, a method which, as this paper has already pointed out, has many weaknesses. It also has been argued that achieving the wide consensus over the framework only became a possibility by reducing the UNGP to the “lowest common denominator and minimalism”¹⁹⁰, which weakens the protection it is able to offer. Wide international support of the UNGP is welcome, but if it is achieved by sacrificing monitoring and enforcement mechanisms (which the framework does not offer), it might undermine efficiency.

5.2 Binding Treaty on Business and Human Rights

The creation of a binding international treaty on the human rights responsibilities of corporations has been at the centre of discussion within the international community for a long

¹⁸⁶ Surya Deva, *Regulating Corporate Human Rights Violations* (Routledge 2012), 106.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*, 105.

¹⁸⁹ Stéphanie Lagoutte ‘The UN Guiding Principles on Business and Human Rights- A Confusing ‘Smart Mix’ of Soft and Hard International Human Rights Law’ in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds) *Tracing the Roles of Soft Law in Human Rights* (Oxford Scholarship Online 2017), 252.

¹⁹⁰ Astrid Sanders ‘The Impact of the ‘Ruggie Framework’ and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation’ (2014) 18 LSE Law, Society and Economy Working Papers, 6.

time. In 2014 the Human Rights Council adopted a resolution that called for the establishment of “an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”¹⁹¹ After a long process of negotiations, a Zero Draft of the proposed treaty on Business and Human Rights was presented, which was last revised in July 2019.

The current international soft law regime has faced criticism for being ineffective, stemming from its voluntary nature and lack of enforcement and monitoring mechanisms.¹⁹² A binding treaty could close the gap between the responsibilities of corporations and their powers to harm human rights. It is also expected to bring clarity to the debate surrounding the issue of extraterritoriality. It has been suggested that there is an “emerging state obligation to prevent and punish corporate human rights violations committed abroad¹⁹³”, but under the current UNGP framework, states have very limited requirements to regulate the extraterritorial activities of corporations registered in their territories. A treaty with explicit extraterritorial obligations would add clarity to the scope of state and business responsibilities regarding human rights.¹⁹⁴

It is too early to claim that the treaty will efficiently protect the victims of forced labour in global supply chains, such as the slave workers on some Thai fishing boats. It will take a considerable amount of time before any treaty will be enacted, as negotiations are slow, and many states and corporations would prefer the current soft law regime to a binding legal one. In any case, the newest version of the Draft Treaty is seen as a “step in the right direction¹⁹⁵”; for example, it widens the scope of the Zero Draft from applying only to transnational corporations to “all business activities, including particularly but not limited to those of a

¹⁹¹ United Nations Human Rights Council, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (26 June 2014) A/HRC Res. 26/9, para. 9

¹⁹² Schrempf-Stirling and Wettstein (n127), 547.

¹⁹³ Nadia Bernaz ‘Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?’ (2013) 117 J Bus Ethics 493, 503.

¹⁹⁴ Olivier De Schutter ‘Towards a New Treaty on Business and Human Right’ (2015) 1 Business and Human Rights Journal 41, 46.

¹⁹⁵ Nicolás C Santarelli ‘A step in the right direction: corporate responsibility under the 2019 revised draft. Part I: beyond transnational conduct and corporations by means of non-reductionist approaches (Cambridge Core Blog, 05/08/19) < <https://www.cambridge-org.ezproxy.uio.no/core/blog/2019/08/05/a-step-in-the-right-direction-corporate-responsibility-under-the-2019-revised-draft-part-i-beyond-transnational-conduct-and-corporations-by-means-of-non-reductionist-approaches/> > accessed 12/08/19

transnational character”.¹⁹⁶ This development is also a step towards the EU’s position, who in their 2018 briefing expressed their requirement that any binding treaty should ensure “that the scope of the discussion is not limited to TNCs”¹⁹⁷ in light of the fact that many atrocities are being committed by local businesses. The fifth session of the IGWG will be held from 14 to 18 October 2019 where further discussions of the proposed treaty will take place and the question of whether the changes made in the revised Draft Treaty achieved an increased political support.

5.3 Initiatives by the Private Sector

Beyond the increasing number of legislative attempts to combat forced labour by assigning human rights responsibilities to companies, important initiatives have also been taking place within the private sector. Focusing on the context of slave labour in the Thai fishing industry, several region-specific initiatives are worth mentioning.

The Seafood Task Force was formed after numerous media and NGO reports about cases of slave labour in Thailand’s seafood supply chain emerged in 2014. The Task Force was initiated by Charoen Pokphand Foods and Costco and consists of a large number of retailers, suppliers, NGOs and Thai feed and processor companies.¹⁹⁸ Their aim is to tackle forced labour and trafficking in the Thai fishing industry, and they work together with the Thai government to develop traceability and port control measures.¹⁹⁹

Thai Union also introduced a social sustainability programme called Sea Change. It has three main objectives to achieve by 2020: ensuring the environmental sustainability of sea farming, ensuring worker safety, legality and empowerment and ensuring legal and responsible vessel operations. To achieve these goals, they emphasize contributing an open dialogue with the industry, government and civil society as key aspects in their programme.²⁰⁰ They also plan community development and educational programmes for migrant and local employees.²⁰¹

¹⁹⁶ Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, Revised Draft 16/07/2019, Article 3

¹⁹⁷ European Parliament, ‘Towards a binding international treaty on business and human rights’ (April 2018) < [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)> accessed 13/08/19

¹⁹⁸ The Freedom Fund and Humanity United ‘Government and Business Responses’ (n34), 27.

¹⁹⁹ Fish Wise ‘Social Responsibility in the Global Seafood Industry’ (n11), 30.

²⁰⁰ Sea Change ‘About Sea Change’ < <https://seachangesustainability.org/about-seachange/>> accessed 13/08/19

²⁰¹ Fish Wise ‘Social Responsibility in the Global Seafood Industry’ (n11),31.

The Good Labour Practices Programme in Thailand, supported by the ILO, is another noteworthy initiative. It is a collaboration between the Department of Labour Protection and Welfare, the Department of Fisheries and industry members and the only tripartite initiative to address labour issues Thai supply chains.²⁰² It is a combination of various activities aiming to open the discussion between workers and managers and promote stakeholder understanding of good labour practices in the industry. It leads training programmes assisting individual businesses and encourages employee participation in addressing problem areas. It also has a special focus on critical issues, such as child labour, forced labour and protection of migrant workers.²⁰³

All these efforts mentioned above, and similar ones in other industries and regions are necessary in the fight against modern day slavery. They do not substitute, but they complement legislative efforts in improving working conditions globally. The involvement of various stakeholders, such as members of the industry, NGOs and government bodies in the efforts to improve conditions in the Thai seafood industry is a step towards the right direction in the efforts to address the roots of forced labour and eventually eradicate its existence from global supply chains.

6. Conclusion

Forced labour is a global issue and its elimination requires global measures. This paper looked at some of the legislative attempts aimed and combating forced labour in global supply chains and pursued to analyse to what extent they are able to protect its victims. The answer to the question is something along the lines of this: to a little extent. This is not to diminish the important achievements in the area so far. Luckily the issue has been gaining widespread attention in the past years and it is now very much on the international policy agenda. Relevant legal instruments have been put in place on both the national and the international level, which signals a will to end abusive legal practices and means that the foundations of the mechanisms that could potentially protect modern slavery victims are already laid down. Unfortunately, the

²⁰² ILO 'Fishers First-Good practices to end labour exploitation at sea' (2016) < https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_515365.pdf> accessed 13/08/19

²⁰³ ILO 'Good Labour Practices (GLP) programme addressing child labour and forced labour in Thai fisheries industry' < https://www.ilo.org/asia/WCMS_221455/lang--en/index.htm> accessed 13/08/19

sheer number of people living in conditions of forced labour proves that the legislative efforts taken so far to eliminate slave-like conditions are not effective enough.

On the international level, one crucial issue is legal clarity. Public discourse increasingly uses the umbrella term “modern day slavery” to refer to a range of slave-like practices, such as forced labour, trafficking, child labour and debt bondage. This trend is important when it comes to policy considerations: the international community might tackle the challenge of eradicating modern slavery in a different way to how they would approach the individual abusive practices. There is a lot to be said in favour of this approach, since it has the potential of fully realising the degree and reality of abuse that victims suffer, offer appropriate remedies and come up with effective methods of prevention. However, for this approach to be efficient in protecting victims of forced labour, international law must be able to recognise forced labour as a form of slavery and that is why the additional sub-question was raised. In order to answer this question positively, it needs to be concluded that the definition of slavery, on which the leading authority is still the 1926 Slavery Convention, is flexible enough to evolve and be suitable in a modern context. Based on available case law, international law has not yet been able to fully recognise forced labour as slavery, but it is on the right path towards that. Courts have on several occasions expressed an approval of a dynamic interpretation on forced labour and slavery and the features of the two offences seem to develop to be increasingly intertwined. However, even in a dynamic approach there is need for precision, otherwise the legitimacy of legislation might be undermined. Since no decision have satisfactorily achieved that yet, more cases are necessary so that courts can expand on the issue and reach clarity.

As an illustration of the issue on the national level this paper chose to look at the Thai fishing industry, where forced labour is a prevailing problem. The revelations by media and NGO reports of human rights atrocities committed on some of the fishing boats in Thailand caused a public outcry, followed by some serious repercussions from the international community. Thailand’s response was an impressive and comprehensive legislative reform intended to improve the working conditions in the industry. However, these legislative initiatives failed to live up to the expectations and effectively protect victims of forced labour at the basic level of global supply chains. Some obstacles to legislation can be identified, such as the corruption of officials and lack of training, which might explain the phenomenon. In conclusion, similarly to the international level, there is existing legislation intended to protect victims of forced labour in supply chains on the national level as well. However, legislation alone is not able to provide protection to a sufficient extent without the will or capability to enforce it.

Supply chain transparency legislation are innovative legislative initiatives that could help protect victims of forced labour. These laws attempt to give consumers the opportunity to make conscious decisions in their purchasing habits by requiring businesses to disclose the efforts that they have taken to eradicate modern slavery from their supply chains. The idea is that corporations will apply self-regulation to avoid sharing unflattering information with the public and instead use it as a platform to advertise their human rights policies. However, as discussed previously, it is too easy for companies to comply with the requirements under the disclosure laws that were examined and in many cases their reports are low in quality with no substance behind them. The lack of enforcement mechanisms and remedies also hinder their efficiency. What is even more worrying however, how some transparency laws, such as the California Supply Chain Transparency Act, had been used to hinder consumer efforts to hold corporations responsible for their involvement in human rights abuse. Since that is fundamentally counter-productive to what these laws should thrive to achieve, hopefully future cases will settle the issue in a more satisfactory way.

To end on a positive note, all the legal attempts that were analysed in this paper are important developments in the protection of victims of forced labour in global supply chains. They might be lacking in a variety of ways, but their existence reflects engagement with the issue and paves the way for further discussion and improvement. There are also a number of important changes that are happening in the context of business and human rights right now. Laws have been enacted recently that might need more time to have a real effect and there are proposals of laws that are still in the negotiating phase. Hopefully, if the research question is asked again in a few years, the answer could be that legislation on both the international and national level have made a significant contribution to the efforts to eliminate forced labour from global supply chains.

Table of Reference

Books & Journal Articles

- Allain, J. 'The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute' in Jean Allain (ed) *Law and Slavery: Prohibiting Human Exploitation* (BRILL 2015),
- Barna, A. G. 'The Early Eight and the Future of Consumer Legal Activism to Fight Modern-Day Slavery in Corporate Supply Chains' (2018) 59 Wm. & Mary L. Rev. 1449
- Bernaz, N. 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 J Bus Ethics 493
- Chung, C. 'The Emerging Asian-Pacific Court of Human Right in the Context of State and Non-State Liability' (2016) 57 Harvard International Law Journal, 44
- Cullen, H. 'Contemporary International Legal Norms on Slavery' in Jean Allain (ed.) *The Legal Understanding of Slavery* (Oxford University Press 2012)
- De Schutter, O. 'Towards a New Treaty on Business and Human Right' (2015) 1 Business and Human Rights Journal 41,
- Deva, S. *Regulating Corporate Human Rights Violations* (Routledge 2012),
- Duffy, H. 'Litigating Modern Day Slavery in Regional Courts' (2016) 14 Journal of International Criminal Justice 375
- Fischman, K. 'Adrift in the Sea: The Impact of the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 on Forced Labor in the Thai Fishing Industry' (2017) 24:1 Indiana Journal of Global Legal Studies 227
- Greer, B. T. and Purvis, J. G. 'Corporate supply chain transparency: California's seminal attempt to discourage forced labour' (2016) 20:1 The International Journal of Human Rights 55
- Gutierrez, J. A. 'Less than Transparent: How California's Effort to Shine Light on Modern Slavery May Ultimately Keep Consumers in the Dark' (2017) 19 Loy. J. Pub. Int. L. 57
- Hathaway, J. 'The Human Rights Quagmire of "Human Trafficking"' (2008–2009) 49 Va. J. Int'l L. 1

- Haynes, J. 'The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37:1 Statute Law Review 33
- Hickey, R. 'Seeking to Understand the Definition of Slavery' in Jean Allain (ed.) *The Legal Understanding of Slavery* (Oxford University Press 2012)
- Koekkoek, M., Marx, A. and Wouters, J. 'Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains' *Global Policy* (2017) Vol 8 (4) 522
- Lagoutte, S. 'The UN Guiding Principles on Business and Human Rights- A Confusing 'Smart Mix' of Soft and Hard International Human Rights Law' in Lagoutte, S., Gammeltoft-Hansen, T. and Cerone, J. (eds) *Tracing the Roles of Soft Law in Human Rights* (Oxford Scholarship Online 2017)
- Mantouvalou, V. 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81:6 *Modern Law Review* 1017,
- Marschke, M. and Vandergeest, P. 'Slavery scandals: Unpacking labour challenges and policy responses within the off-shore fisheries sector' (2016) 68 *Marine Policy* 39
- McGeehan, N. 'Exploitation rebranded: How international law sold slavery as forced labour' in David Keane and Yvonne McDermott (eds) *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012),
- Mende, J. 'The Concept of Modern Slavery: Definition, Critique, and the Human Rights Frame' (2019) 20(2) *Human Rights Review* 229
- New, S. J. 'Modern slavery and the supply chain: the limits of corporate social responsibility' (2015) 20:6 *Supply Chain Management: An International Journal* 697
- Nicholson, A. 'Reflections on Siliadin v. France: slavery and legal definition' (2010) 14:5 *The International Journal of Human Rights* 705
- Sanders, A. 'The Impact of the 'Ruggie Framework' and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' (2014) 18 *LSE Law, Society and Economy Working Papers*,
- Schrempf-Stirling, J. and Wettstein, F. 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' *Human Rights Policies* 145 [2017] *J Bus Ethics* 545
- Stoyanova, V. 'United Nations against Slavery: Unravelling Concepts, Institutions and Obligations' (2017) 38 *MICH J INT'L L* 359

Legal

National Legislation

- Alien Tort Statute 28 U.S.C. § 1350; ATS (US)
- California Transparency in Supply Chains Act 2012 (US)
- Fisheries Act B.E.2558 2015 (Thailand)
- Modern Slavery Act 2015 (UK)
- Royal Ordinance on Fisheries B.E. 2558 2015 (Thailand)

Treaties and Conventions

- African Charter on Human and Peoples' Rights 1981
- American Convention on Human Rights 1969
- European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
- ILO Forced Labour Convention (No.29) 1930
- ILO Maritime Labour Convention 2006
- ILO Work in Fishing Convention (No. 188) 2007
- International Covenant on Civil and Political Rights 1966
- Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, Revised Draft 16/07/2019
- Rome Statute of the International Criminal Court, last amended 2010
- Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended on 17 May 2002
- UN Convention on the Law of the Sea
- UN Slavery Convention 1926
- UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956
- UN Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime 2000

Cases

- *Brasil Verde v. Brasil Inter-Am.* Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016)
- *Christina Wirth, et al. v Mars Inc.* Case No. SA CV 15-1470-DOC (KESx) (C.D.Cal., 2016)
- *Donna De Rosa v. Tri-Union Seafoods LLC* Case No. CV 15-07540-CJC(AGRx) (C.D.Cal., 2016)
- *Hughes v. Big Heart Pet Brands* Case No. CV 15-08007-CJC(AGRx) (C.D.Cal., 2016)
- *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)
- *Laura Dana v The Hershey Company* Case No. 15-cv-04453-JCS (N.D.Cal., 2016)
- *Melanie Barber v Nestlé USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015)
- *Monica Sud v. Costco Wholesale Corporation et al*, 229 F.Supp.3d 1075 (N.D. Cal. 2017)
- *Prosecutor v. Kunarac et al., (Appeal Judgment)* IT-96-23-T & IT-96-23/1-T 12/06/2002
- *Prosecutor v. Kunarac et al., (Trial Judgment)* IT-96-23-T & IT-96-23/1-T ICTY 22/02/2001
- *Rantsev v Cyprus and Russia* Application no. 25965/04 (ECHR 10 May 2010)
- *Robert Hodson v Mars Inc.* Case No. 15-cv-04450-RS (N.D.Cal., 2016)
- *Siliadin v. France* Application no. 73316/01 (ECHR 26 July 2005)

Reports

NGO Reports

- Environmental Justice Foundation 'All at Sea- The Abuse of Human Rights Aboard Illegal Fishing Vessels' (2010)
<https://ejfoundation.org/resources/downloads/report-all-at-sea_0_1.pdf>
accessed 06/06/19
- Fish Wise 'Social Responsibility in the Global Seafood Industry: Background and Resources' (2018) <<https://fishwise.org/human-rights/social-responsibility-global-seafood-industry-background-resources/>> accessed 18/02/19
- Human Rights Watch 'Hidden Chains- Rights Abuses and Forced Labor in Thailand's Fishing Industry' (2018)

- <<https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>> accessed 11/06/19
- International Labour Organization and Walk Free Foundation ‘Global estimates of modern slavery: forced labour and forced marriage’ (2017)
<https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf> accessed 24/04/19
 - The Freedom Fund and Humanity United ‘Assessing Government and Business Responses to the Thai Seafood Crisis’ (2016) <https://humanityunited.org/wp-content/uploads/2016/05/FF_HU_Assessing-Reponse_FINAL_US-copy.pdf> accessed 18/02/19
 - The Freedom Fund ‘Ending Impunity, Securing Justice- Using Strategic Litigation to Combat Modern Day Slavery (2015) <http://www.htprobono.org/wp-content/uploads/2015/12/FF_SL_AW02_WEB.pdf> accessed 18/02/19
 - The International Corporate Accountability Roundtable and Focus on Labour Exploitation ‘Full Disclosure: Towards Better Modern Slavery Reporting’ (2019)
<https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5caf92140852294a37e36bb2/1555010068494/ICAR+Full+Disclosure+Report_Apr10-WEB.pdf> accessed 24/04/2019

ILO Reports

- ILO ‘A Global Alliance Against Forced Labour’ (2005)
<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081882.pdf> accessed 27/06/19
- ILO ‘Fishers First-Good practices to end labour exploitation at sea’ (2016)
<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_515365.pdf> accessed 13/08/19
- ILO ‘Forced Labour and Human Trafficking Casebook of Court Decisions’ (2009)
<https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_106143.pdf> accessed 04/07/19
- ILO General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ‘Abolition of forced labour’ (1979)
<[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1979-65-4B\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1979-65-4B).pdf)> accessed 09/07/19

- ILO ‘Good Labour Practices (GLP) programme addressing child labour and forced labour in Thai fisheries industry’ < https://www.ilo.org/asia/WCMS_221455/lang-en/index.htm> accessed 13/08/19
- ILO ‘Thailand ratifies Work in Fishing Convention’ (30 January 2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_666581/lang-en/index.htm>accessed 28/07/19
- Lee Swepston ‘The elimination of compelled labour is a central tenet of international human rights law today’ (International Labour Office, 2014) < https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_342966.pdf> accessed 04/07/19

EU Publications

- Bales, K. and Trodd, Z. ‘Addressing Contemporary Forms of Slavery in EU External Policy’ (European Parliament 2013) <[http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433703/EXPO-DROI_NT\(2013\)433703_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433703/EXPO-DROI_NT(2013)433703_EN.pdf)> accessed 27/07/19
- European Commission ‘Commission lifts “yellow card” from Thailand for its actions against illegal fishing’ < http://europa.eu/rapid/press-release_IP-19-61_en.htm> accessed 11/06/19
- European Commission ‘EU acts on illegal fishing: Yellow card issued to Thailand while South Korea & Philippines are cleared’ < http://europa.eu/rapid/press-release_IP-15-4806_en.htm> accessed 11/06/19
- European Parliament, ‘Towards a binding international treaty on business and human rights’ (April 2018) <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf)> accessed 13/08/19

UN Documents

- UNHRC ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (26 June 2014) A/HRC Res. 26/9
- UNHRC ‘Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of

Human Rights and Transnational Corporations and Other Business Enterprises’ (2008) A/HRC/8/5

- UN Treaty Collection ‘United Nations Convention against Transnational Organized Crime’
<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en> accessed 28/07/2019, Chapter XVIII

Online Sources

- Apple Inc. ‘Supplier List’ <<https://www.apple.com/supplier-responsibility/pdf/Apple-Supplier-List.pdf>> accessed 29/07/19
- Business and Human Rights Resource Centre ‘FTSE 100 at the Starting Line - An analysis of company statements under the UK Modern Slavery Act’
<<https://www.business-humanrights.org/sites/default/files/documents/FTSE%20100%20Modern%20Slavery%20Act.pdf>> accessed 06/08/19
- Global Slavery Index ‘Country Data- Thailand’
<<https://www.globalslaveryindex.org/2018/data/country-data/thailand/>> accessed 15/08/19
- IUUWatch ‘EU carding decisions’ <<http://www.iuuwatch.eu/map-of-eu-carding-decisions/>> accessed 11/06/19
- KnowTheChain ‘2018 Food and Beverage Benchmark’
<https://knowthechain.org/benchmarks/comparison_tool/5/> accessed 04/08/19
- Krispy Kreme Doughnuts ‘S.B. 657 Supply Chains Act’
<<https://www.krispykreme.com/legal/s-b-657-supply-chains-act>> accessed 05/08/19
- Seafarers’ Rights ‘International ‘Maritime Labour Convention’
<<https://seafarersrights.org/seafarers-subjects/maritime-labour-convention-mlc/>> accessed 28/07/19
- Santarelli, N. C. ‘A step in the right direction: corporate responsibility under the 2019 revised draft. Part I: beyond transnational conduct and corporations by means of non-reductionist approaches (Cambridge Core Blog, 05/08/19) < <https://www-cambridge-org.ezproxy.uio.no/core/blog/2019/08/05/a-step-in-the-right-direction-corporate-responsibility-under-the-2019-revised-draft-part-i-beyond-transnational->

- conduct-and-corporations-by-means-of-non-reductionist-approaches/> accessed 12/08/19
- Sea Change ‘About Sea Change’ < <https://seachangesustainability.org/about-seachange/>> accessed 13/08/19
 - State of California Department of Justice ‘The California Transparency in Supply Chains Act’ < <https://oag.ca.gov/SB657>> accessed 02/08/19
 - Transparency International ‘Corruption Perceptions Index’ (2018) < <https://www.transparency.org/cpi2018>> accessed 10/06/19
 - United Nations Inter-Agency Project on Human Trafficking ‘Exploitation of Cambodian Men at Sea- SIREN Case Analysis’ (2009) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_143251.pdf> accessed 22/05/19
 - U.S. Department of Labour ‘List of Goods Produced by Child Labor or Forced Labor’ (2018) < <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>> accessed 01/08/19
 - US Department of State ‘2018 Trafficking in Persons Report: Thailand’ < <https://www.state.gov/reports/2018-trafficking-in-persons-report/thailand/>> accessed 11/06/19

Other

- Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration 2012
- Explanatory Memorandum to the Modern Slavery Act 2015 No.1833 <http://www.legislation.gov.uk/uksi/2015/1833/pdfs/uksiem_20151833_en.pdf> accessed 06/08/19
- Inter-American Commission on Human Rights ‘Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco OEA/Ser.L/V/II. Doc. 58 (24 December 2009),
- International Criminal Court ‘Elements of Crimes’ (ICC-ASP/1/3) <http://www.iccnw.org/documents/ElementsofCrimes_English.pdf> accessed 09/07/19