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LABOUR STANDARDS IN INTERNATIONAL LAW: ALL STATES SHOULD HAVE AN OBLIGATION TO PUNISH MISCONDUCTS OF MULTINATIONAL ENTERPRISES UNDER INTERNATIONAL CUSTOMARY LAW

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INTRODUCTION

This article addresses the issues of unethical employment practices and lack of fair labor standards in developing countries. The discussion on such problems, although ongoing since the 1970s, is still of primary importance both within the scholarly community and the wider public. The fact that big, multinational enterprises of developed countries still engage in violations of workers' rights is certainly stunning, yet not so surprising given the connections between such violations and the current structure of the global economy. In the wake of a nearly fifty-years-old process of globalization, the worldwide implementation of competition rules in the labor market stimulates "race to the bottom" outcomes, with millions of workers in developing countries suffering from slavery-like working conditions, wages below subsistence level, and inhumane treatments.

Despite the progress made in the field of labor protection thanks to private and governmental initiatives in the last several decades, the current legal tools used to avoid massive workers' rights violations have been

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proven ineffective. This is due to the apparently unsolvable friction that exists between the huge economic power of enterprises and the desperate need for economic support of developing countries.

Given the global nature of these causes, possible solutions may only achieve success if they entail a global approach to the problem. Remedies should be found in order to create a universal rule for labor protection applicable and enforceable in all countries throughout the world.

The first part of this article explains which are the most widespread violations of workers' rights in relation to the current economic structure of the world, and presents the economic dynamics that lie within them. The second part provides a short account of past and present initiatives in favor of the improvement of labor standards. The third part presents the main critical aspects of these initiatives, by focusing on lack of accountability mechanisms and their inherent voluntary nature. Finally, the fourth part suggests the idea that a possible remedy aimed at stopping labor rights violations is to create and implement a universal rule for labor protection through international customary law. Such a remedy would also perform a change in the way the responsibility for compliance to labor law is placed upon states, by shifting the obligation to punish misconduct of multinational enterprises from developing states to developed ones.

I. PAST AND PRESENT VIOLATIONS OF LABOUR RIGHTS

As of 2015, poor labor conditions and weak labor standards are still the norm in most developing countries.¹ In some cases, national legislation provides for labor protection and minimum standards, however many times these rules remain unapplied.² The problem of poor labor conditions is, in fact, deeply linked with the overall structure of the world economy.³

¹ See JENNY CHAN & CHARLES HO, *THE DARK SIDE OF CYBERSPACE. INSIDE THE SWEATSHOPS OF CHINA'S COMPUTER HARDWARE PRODUCTION* (World Economy, Ecology and Development 2008); FLORIAN BUTOLLO ET AL., *BUY IT FAIR: GUIDELINE FOR SUSTAINABLE PROCUREMENT OF COMPUTERS* (Jan-Peter Hermann trans., World Economy, Ecology and Development 2009); Sophie Stracke et al., *IT Workers Still Pay the Price for Cheap Computers*, *China Lab Watch* (Nov. 2013), <https://www.danwatch.dk/wp-content/uploads/2015/03/IT-workers-still-pay-the-price.pdf>; Charles Duhigg & David Barboza, *In China, Human Costs Are Built Into an iPad*, *N.Y. TIMES*, Jan. 27, 2012, http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?_r=0.

² See, e.g., Ronald B. Davies & Krishna C. Vadlamannati, *A Race to the Bottom in Labour Standards? An Empirical Investigation*, 103 *J. DEV ECON.* 1 (2013); William W. Olney, *A Race to the Bottom? Employment Protection and Foreign Direct Investment*, 91 *J. INT'L ECON.* 191 (2013).

³ See Adalberto Aguirre, Jr. & Ellen Reese, *The Challenges of Globalization for Workers: Transnational and Transborder Issues*, 31 *SOC. JUST. J.* 1, 1 (2004).

According to Harvard researchers Michael J. Hiscox and Nicholas F. B. Smyth, many are the critics of the current globalized model of economy, which allows corporations to exploit cheap labor in developing countries, with the result of generating “race to the bottom” phenomena in labor standards.⁴ In fact, due to being forced to compete between each other, governments of developing countries struggle to keep on lowering labor rights of their workers, so to encourage foreign investments of big multinational employers.⁵

As scholar Lena Ayoub explains, in some cases, developed countries which host multinational enterprises feature national legislations entitling workers of basic labor standards.⁶ However, even with this, the economic pressure multinational enterprises are able to put upon host countries is more effective than the law in the books. The result is that many developing countries are willing to condone the misbehavior of employers operating in their territories, as long as multinational enterprises do not leave the country.⁷ As corporations bring about investments and jobs, with the consequence of an overall improvement of the country’s economic conditions, host countries often directly engage in “advertising campaigns” promoting their low requirements on foreign investments. In turn, multinational enterprises do not hide that, due to high costs related to compliance with higher labor standards, much of the choice on the location of their business depends on local economic conditions in relation with labor costs. As a consequence, developing countries are stuck in a situation in which they are in need for money coming from investors, while they are unable to increase their labor standards, as they are under the risk of losing a significant part of their national income coming from foreign investments.⁸

For what concerns the actual working conditions of workers from host countries, critics have long been concerned about the use of “sweatshops” for the production of a wide range of exporting items, from electronics⁹ to

⁴ Michael J. Hiscox & Nicholas F.B. Smyth, *Is There Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Product Labeling* (Weatherhead Ctr. for Int’l Affairs, Harvard Univ., Working Paper No. 2008-0058, 2005), http://scholar.harvard.edu/files/hiscox/files/consumerdemandfairlaborstandards_evidencesocial.pdf?m=1375386166.

⁵ *Id.*

⁶ Lena Ayoub, *Nike Just Does It – and Why the United States Shouldn’t: The United States’ International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 422-23 (1999).

⁷ *Id.*

⁸ *Id.*

⁹ See, e.g., *Tragedies of Globalization: The Truth Behind Electronics Sweatshops. No Contracts, Excessive Overtime and Discrimination: A Report on Abuses in Ten Multinational Electronics Factories, China Labor Watch* (Jul. 12, 2012.)

clothing.¹⁰

In this regard, Ayoub argues that the practice of subcontracting the manufacturing of their products to sweatshops has been very much common among large multinational corporations, and it still is.¹¹

Following the author's description, some of the main features of sweatshops include the following: "ten to twelve hour work days with forced overtime; work that is performed in unsafe and inhumane conditions (including exposure to poisonous chemicals); punishment for the slightest mistake; locked dormitory work conditions; pay averaging less than a living wage; excessively demanding long hours of work without compensation of overtime pay; systematic abuse and/or sexual harassment of workers by the employer(s); and/or the inability of workers to organize."¹² In many instances, workers perform their duties inside enormous buildings where the employer gathers hundreds of the workers altogether. Not infrequently armed guards patrol the premises of sweatshops, in order to stop people both from entering and leaving the building during work hours.¹³

Early developments of these manufacturing strategies took place in the 1970s, when multinational enterprises first began massively entering developing countries' labor markets, in order to cut off production costs and increase profits.¹⁴ The fact that big multinational enterprises approached developing economies was gladly welcomed by receiving countries. Thanks to the positive conjuncture of the presence of easily corruptible politicians, weak governments, already poor living conditions and huge masses of people willing to work in return for very poor wages, developing countries started to engage in a battle to serve foreign enterprises with environments featuring constantly decreasing labor rights.¹⁵

II. PRESENT

http://www.chinalaborwatch.org/upfile/2011_7_11/20110712.pdf; T. Clarke & M. Boersma, *The Governance of Global Value Chains: Unresolved Human Rights, Environmental and Ethical Dilemmas in the Apple Supply Chain*, J. BUS. ETHICS, DOI 10.1007/s10551-015-2781-3 (July 2015); C. Myers, *Corporate Social Responsibility in the Consumer Electronics Industry: A Case Study of Apple Inc*, Georgetown Univ. (2013), <http://lwp.georgetown.edu/wp-content/uploads/Connor-Myers.pdf>.

¹⁰ See generally Sarah H. Cleveland, *Global Labor Rights and The Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998); John Miller, *Teaching about Sweatshops and the Global Economy*, 61 RADICAL TCHR. 8 (2001); Allie Robbins, *The Future of the Student Anti-Sweatshop Movement: Providing Access to U.S. Courts for Garment Workers Worldwide*, 3 LAB. & EMP. L.F. 120 (2013).

¹¹ Ayoub, *supra* note 7, at 397.

¹² *Id.* at 400.

¹³ *Id.* at 400-01.

¹⁴ *Id.* at 401.

¹⁵ *Id.*

After more than forty years, the situation has unfortunately remained the same. The particular example of working and living condition of Chinese workers is striking. As writer Ross Perlin reports, Foxconn, the second biggest company in the world for number of employees,¹⁶ counts some 1.4 million workers in only its Chinese plants.¹⁷ In those plants, underpaid and exploited workers work up to one hundred hours a week and in extremely unsafe environments in order to reach staggering levels of production of electronic devices.¹⁸ Here, the workers execute the orders made by many of the biggest electronics corporations on the planet, including Apple, Nokia, and Sony.¹⁹ The conditions of Foxconn workers only begun to attract coverage by media when in 2010, fourteen workers jumped off the windows of the dormitories they lived in, in the desperate attempt of giving a voice to their previously unheard outcries.²⁰ As a consequence, the company installed “suicide nets” across Foxconn buildings, created twenty four-hour “care centres,” invented “no suicide agreements,” and engaged in recruiting suicide-free pre-screened personnel. Despite all of these changes, the company still failed in taking any major step to improve workers’ real living conditions.²¹

Once the presence of multinational enterprises in developing countries became more noticeable, governmental organizations on the international train began the draft of a series of legal documents aimed at fixing guidelines for the behavior of multinational enterprises.²² In this regard, the contributions of the International Labour Organization (ILO) and the Organization for Economic Cooperation and Development (OECD) have been particularly significant.

As authors David Kinley and Junko Tadaki recall, these guidelines are typically directed at states rather than corporations themselves and, although not legally binding as they qualify as soft law instruments,²³ they foresee mechanisms of implementation, which enable a certain degree of control on the behavior of firms with regard to labor standards.²⁴

¹⁶ Ross Perlin, *Chinese Workers Foxconned*, DISSENT, Spring 2013, at 46, 47-48.

¹⁷ *Id.* at 46.

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 47-48.

²⁰ *Id.* at 46.

²¹ *Id.*

²² Ayoub, *supra* note 7, at 402.

²³ Broadly defined by George Washington University Professor Dinah Shelton as, “normative provisions contained in non-binding texts.” DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 292 (Oxford, UK: Oxford Univ. Press, 2000).

²⁴ David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human*

However, despite the existence of such mechanisms, the effectiveness of these guidelines in terms of monitoring and punishing firms' misconduct has been rather low.²⁵

As the authors report, "the monitoring bodies do not function as judicial or quasi-judicial bodies, but rather their roles are limited to clarification of the interpretation of the instruments." Furthermore, "they do not make specific findings of misconduct by individual companies and their identities are kept confidential, thereby shielding them from public scrutiny and potential embarrassment."²⁶

In addition, on the side of hard law,²⁷ in recent years, ILO has produced many conventions signed and ratified by a number of states all over the world. According to Ayoub, these conventions are addressed to states and usually leave states the choice of implementing the best mechanism to comply with the normative requirements they need. Traditionally, single conventions cover a specific topic of concern, directly related to the issue of improving poor countries' labor standards and banning labor practices, which clearly breach universally recognized human rights.²⁸ Indeed, the connection between labor law and human rights law are several. There are more than seventy-five ILO conventions directly related to the provisions of the U.N. International Covenant on Economic, Social and Cultural Rights. Among the former, single conventions address the problem of forced labor,²⁹ minimum age of workers,³⁰ minimum wage requirements³¹ and

Rights Responsibilities for Corporations at International Law, 44 VA. J. OF INT'L L. 931, 949 (2004); see also INT'L LABOR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1977); ORG. FOR ECON. CO-OPERATION & DEV. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (1976).

²⁵ "From the point of view of regulation of human rights abuses by TNCs, the implementation mechanisms of the OECD Guidelines and the ILO Declaration can hardly be considered intrusive on states or corporations . . . Furthermore, while the Guidelines and the Declaration encourage TNCs to respect internationally recognized human rights norms, they simultaneously uphold the primacy of national law. Thus, they can do nothing to prevent host States from adopting lax labor and environmental standards, and TNCs cannot be condemned for taking advantage of such standards." Kinley & Tadaki, *supra* note 25, at 950-51.

²⁶ *Id.* at 950.

²⁷ According to Arizona State University Professor Kenneth W. Abbott and Chicago University Professor Duncan Snidal, in the field of International Governance, the term hard law "refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law." K.W. Abbott & D. Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

²⁸ Ayoub, *supra* note 7, at 417-20.

²⁹ Int'l Labour Org., *Forced Labour Convention* (Geneva: ILO, 28 June 1930); Int'l Labour Org., *Abolition of Forced Labour Convention* (Geneva: ILO, 26 June 1957).

³⁰ General Convention of the International Labor Organization, Minimum Age

maximum working hours.³²

However, in most cases, the whole set of conventions elaborated by ILO falls into a trap render many other international law provisions ineffective, namely the fact that conventions “are binding only upon ratifying states and lack effective enforcement mechanisms in which to monitor state party compliance.”³³ It follows that, “if member states do not comply with the standards derived from conventions, such states are not faced with any sanctions or punishments.”³⁴ The evident shortcomings of such legislation may only be overcome by the use of persuasion and by implementing a “name and shame” policy upon states through the mass media.

In fact, media pressure has already proven to be a powerful tool to persuade big firms to behave responsibly.³⁵

It was precisely what happened between the 80s and 90s to corporations which centered their business around their name recognition: once the media started to publicly expose the massive violations of human and workers’ rights they had been responsible for many years, many of them felt obliged to take steps towards changing their firm policies.³⁶ As author Ryan P. Toftoy recalls, in that period, big multinational enterprises became aware of the fact that consumers were actually interested in the issue of establishing safe and fair working standards for the workers who manufactured the goods they could find in stores and shops in the developed world.³⁷ In the U.S. such an interest had remained silent for

Convention, U.N. Doc., A/CONF.(June 26, 1973).

³¹ Int’l Labour Org., *Minimum Wage Fixing Convention*, June 22, 1970, http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312276.

³² Int’l Labour Org., *Hours of Work (Industry) Convention*, Nov. 28, 1919, [http://www.ilo.org/dyn/normlex/en/f?p=normlexpub:12100:0::no:12100:p12100_instrument_id:312146:no; Int’l Labour Org., Weekly Rest \(Industry\) Convention, Nov. 17. 1921, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312159:NO](http://www.ilo.org/dyn/normlex/en/f?p=normlexpub:12100:0::no:12100:p12100_instrument_id:312146:no;Int'l+Labour+Org.,+Weekly+Rest+(Industry)+Convention,+Nov.+17.+1921,+http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312159:NO).

³³ Ayoub, *supra* note 7, at 419.

³⁴ *Id.*

³⁵ *Id.* at 402 (“Once the news media published accounts of the systematic labor violations occurring abroad, there was no economically sound way MNCs could go about business as usual and still profit from their name recognition. While documented corporations felt pressure to respond to the public outcry, corporations not documented for any violations thrived off of the big name corporations being branded as human rights violators . . . Furthermore, many corporations, in order to attract consumer approval and procurement, engaged in product labeling whereby they affixed a label to their products certifying that the products were made under acceptable working conditions.”).

³⁶ *Id.* at 402-03; see also Helen Keller, *Corporate Codes of Conduct and their Implementation: The Question of Legitimacy*, 194 LEGITIMACY IN INT’L L. 219 (2008).

³⁷ Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT’L & COMP. L. 905, 918 (1998).

decades until it finally emerged in 1995. In that year, a survey commissioned by Marymount University in Arlington (Virginia)³⁸ was published revealing that seventy-eight percent of the interviewed U.S. consumers would avoid retailers if aware that they were dealing with sweatshop goods, while only eighteen percent of consumers would shop there anyway.³⁹ For many big American corporations this fact marked a milestone in the history of fair labor. The risk of losing profits due to consumers' awareness of violations of labor rights became a stimulant for engaging in internal reforms aimed at improving employment practices. As a result, many firms in the U.S. drafted and adopted self-imposed Code of Conducts, establishing basic labor standards.⁴⁰ These standards were applicable to all the branches of their worldwide supply chain and banned the most hideous practices such as the use of forced prison labor, as well as child labor.⁴¹

In this regard, the most famous example has been perhaps the Code of Conduct adopted by Nike, the world largest sneaker company,⁴² that became famous throughout the 1970s and 1980s for massive violations of human rights committed against its own workers or workers of its subcontractors around the world.⁴³ Some of the provisions of the 1992 Nike Code of Conduct included the prohibition of the use of forced and under-aged labor.⁴⁴ The code also made efforts to establish standards regarding minimum wage and maximum work hours, besides promoting compliance with local labor law provisions.⁴⁵ Some critics still think that Nike, as well as other companies, which openly publicized campaigns in favor of improving labor standards, only did it in order to regain the trust of their consumers without engaging in any of the operations of improvement they

³⁸ *The Consumer and Sweatshops*, MARYMOUNT UNIV. (last visited Feb. 1, 2016), <https://connect.marymount.edu/news/garmentstudy/overview.html>. This survey, commissioned by Marymount University, Center for Ethical Concerns and conducted by International Communications Research, was repeated three times in 1995, 1996 and 1999.

³⁹ Toftoy, *supra* note 38, at 919.

⁴⁰ *Id.*

⁴¹ Ayoub, *supra* note 7, at 404.

⁴² Toftoy, *supra* note 38, at 919.

⁴³ Ayoub, *supra* note 7, at 407. According to Ayoub, NIKE's operations have been located in South Korea, Taiwan, China, Vietnam, Pakistan, Indonesia and Thailand. Currently, thousands of female workers employed at NIKE factories: are underpaid, earning below a living wage; work twelve to fourteen hours per day, seven days a week; suffer corporal punishment, abuse and sexual harassment; are children; and, have been forced to work overtime in violation of laws regulating overtime wages. After being on the defensive for quite some time, NIKE finally has publicly admitted that the conditions in its factories need to be improved.

⁴⁴ *Id.* at 410.

⁴⁵ *Id.*

had set forth.⁴⁶ Despite this, the inauguration of the Code of Conducts is remarkable. Such a phenomenon brought forth a wholly new approach to the issue of fixing labor standards by moving from a traditional positivist standpoint where international organizations and states are the only actors in the international community responsible for drafting and enacting labor law, to a view that acknowledges and holds private firms responsible as well.

Yet, as Tufts University Professor Jette Steen Knudsen argues, “this approach is still quite new as it has developed only in recent years, when normative expectations about the role of the firm in society have shifted from a traditional shareholder focus to include a diverse range of stakeholder interests.”⁴⁷ Consequently, now investors, NGOs, employees, general customers, and the media have all become more used to the idea of holding firms directly accountable for maintaining high social and ethical standards.⁴⁸

The same new approach lies right in the middle of another soft law instrument, which has been promoted and has later seen the light under the auspices of the United Nations, after being personally sponsored by former-UN Secretary General, Kofi Annan. According to expert in business ethics and Professor at the University of Notre Dame (Indiana), Oliver F. Williams, the new initiative, named UN Global Compact, “intended to increase and to diffuse the benefits of global economic development through voluntary corporate policies and actions.”⁴⁹ The project consisted of the draft of a legal document directly addressing private firms, which includes nine to ten basic principles for firms to follow in order to collectively take action to stop labor and human rights abuses. The UN Global Compact is also concerned with environment and corruption and – according to New York University School of Law Professor Philip Alston – has been largely depicted on another soft law document, the 1998 ILO Declaration of Fundamental Principles and Rights at Work,⁵⁰ to which the scholarly community has often devoted much interest.⁵¹

In this regard, Alston argued that, although the Declaration was a soft

⁴⁶ *Id.* at 411.

⁴⁷ See generally Jette S. Knudsen, *Company Delistings from the UN Global Compact: Limited Business Demand or Domestic Governance Failure?*, 103 J. BUS. ETHICS 331 (2011).

⁴⁸ *Id.* at 331.

⁴⁹ Oliver F. Williams, *The UN Global Compact: The Challenge and the Promise*, 14 BUS ETHICS Q. 755 (2004).

⁵⁰ See generally Hillary Kellerson, *The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future*, 137 INT’L LAB. REV. 223 (1998).

⁵¹ P. Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L LAW 457, 518 (2004).

law document, it constituted a revolution within the labor rights legislation.⁵² The Declaration has had power because it has been claimed to be applicable to every ILO Member State, regardless of the fact that Member States have actually ratified the relevant conventions on the same subject.⁵³ The Declaration focuses on a set of rights, which have been considered to be at the highest level of importance, surprisingly imposing a hierarchy of principles in labor law. This set of “Core Labour Standards” consists of freedom of association, freedom from forced labor, freedom from child labor, and the principle of non-discrimination in employment.⁵⁴ As previously announced the UN Global Compact incorporates these principles while shifting the focus from states to firms, asking the latter to actively join the project on a voluntary basis.

According to Williams, each firm participating in the UN Global Compact is invited to develop a firm policy internalizing the principles within the core of its business activity, as well as to perform periodic checks on the evolution of such a process.⁵⁵ In order to enhance transparency and give incentive for firms to behave in a responsible way, a description of the report has to be submitted to the project website. The initiative also entails a penalty for firms that fail to comply with such a requirement, as firms not submitting any report are delisted from the group of participants.⁵⁶

The idea that lies behind the project, which in turn represents a real novelty in comparison with the Code of Conducts, is to create a network of ethically behaving firms rather than leaving this responsibility to single firms alone. Moreover, such networks should be strongly integrated within the neighboring environment, in order to elaborate the most appropriate collective response to global problems in a local dimension.⁵⁷

III. CRITIQUE

Although the initiative entails a new and potentially striking approach, it nonetheless falls into the same accountability trap as other such projects. Hence, critics of the Compact have strongly stressed the fact that, even though it features a self-monitoring activity, nobody can actually know if the policy a firm claims to have undertaken has been actually followed.⁵⁸ In

⁵² *Id.* at 459.

⁵³ *Id.*

⁵⁴ *Id.* at 458-59.

⁵⁵ Williams, *supra* note 50, at 756. *See also* MALCOLM MCINTOSH ET AL., *LIVING CORPORATE CITIZENSHIP: STRATEGIC ROUTES TO SOCIALLY RESPONSIBLE BUSINESS* (2003).

⁵⁶ Williams, *supra* note 50, at 756.

⁵⁷ *Id.* at 757.

⁵⁸ *Id.*

this respect, as Williams recalls, many scholars denounce the lack of an independent monitoring system, claiming there is a need for a body of monitors capable of transforming general principles into real practices by means of “measuring” and “quantifying” corporate adherence to the programme.⁵⁹ Other critics hold a more radical position against the idea that improvement in labor standards may be achieved through a mere voluntary instrument, as they claim it takes a universally binding legal framework to bring about labor protection and hold violators accountable.⁶⁰ In addition, according to Knudsen, evidence is given that despite the initial enthusiasm that followed the UN Global Compact, in the last years many firms that had previously committed to the humanitarian cause, have recently failed to implement the action they planned, with the consequence of being removed from the initiative.⁶¹

All in all, the UN Global Compact and all the other initiatives, both private and public, have been proven to be far from perfect for the purpose of solving the problem of labor standards inequality between developed and developing countries. It is therefore essential to go beyond the currently existing institutional networks and legal theories to find out which could be the most optimal legal remedy to effectively tackle this problem for the future.

IV. REMEDY FOR FUTURE

As we have seen above, it is not unusual that violations of labor rights take place in developing countries in spite of national legislation, which although formally binding, results in being unapplied in a way or another, even by claiming that visiting multinational enterprises enjoy special exemptions under which domestic law does not apply. Moreover, as Columbia Law School scholar Robert J. Liubicic recalls, host countries normally engage in a competition to host foreign investors by offering the least costly labor law arrangements and minimizing enforcement of labor standards.⁶² According to Ayoub, the consequence is that, although in theory the principal actors responsible for implementing fair labor standards should be the governments of host countries (i.e. where the actual violations take place), realistically the economic weakness of such states prevent them from enforcing both international and domestic labor law provisions against

⁵⁹ *Id.*

⁶⁰ *Id.* at 758.

⁶¹ Perlin, *supra* note 17, at 331.

⁶² Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights through Private Initiatives*, 30 *LAW & POL'Y INT'L BUS.* 111, 149 (1998).

visiting multinational enterprises.⁶³ Given this premise, if we believe that the issue of labor exploitation, due to globalization, has now become a matter of concern for all countries in the world, it is clear that other ways to oblige multinational enterprises to stop unlawful employment practices must be found.

As a solution, the path we may follow to achieve such a goal could be the one of prosecuting multinational enterprises for the violations committed abroad in their *home* country. This idea has been taken further by Ayoub, who places an obligation upon the U.S. to intervene in order to stop worldwide violations of labor rights by convicting multinational enterprises based within its territory.⁶⁴ Hence, in her article, this scholar argues that such an obligation derives from both the International Covenant on Civil and Political Rights, which has been signed and ratified by the U.S.⁶⁵ and from international customary law.⁶⁶ Furthermore, the U.S. itself has a strong domestic legislation on labor rights⁶⁷ which, however, it refuses to enforce towards employees of foreign countries.⁶⁸

With special regards to the Covenant, the author explains that Article 5 places both a right and an obligation upon states to check whether private actors behave in a responsible way so to avoid violations of human rights protected by the convention.⁶⁹ Therefore, it would be the responsibility of the U.S. to ensure private actors such as U.S.-based multinational enterprises not to violate the rights listed in the Covenant, although they are of civil and political nature. In this regard, the author explains “economic, social and cultural measures run hand-in-hand with civil and political protections because economic and social constraints placed upon society lead to the eventual abuse of political and civil violations.”⁷⁰ Thus, the obligation upon the signatory states are not confined within the narrow border of civil and political matters, but cover other basic rights whose respect is of primary importance in order to fulfill civil and political aims.

An even more revolutionary approach to the issue of granting a

⁶³ Ayoub, *supra* note 7, at 422.

⁶⁴ *Id.* at 423-25.

⁶⁵ *Id.* at 425-27.

⁶⁶ *Id.* at 427-30.

⁶⁷ *Id.* at 433 (explaining that this circumstance is also relevant for the purpose of recognizing an obligation to punish misconducts of U.S.-based multinationals under international customary law, as although most of the countries in the world fulfill the requirements of state practice and *opinio juris* we will later focus on, “the traditional definition of custom rests solely upon the individual nations’ behavior,” thus “to hold the United States accountable to enforce international labor norms upon its national corporations, the U.S. must itself evidence state practice and *opinio juris*.”).

⁶⁸ *Id.* at 424.

⁶⁹ *Id.* at 426.

⁷⁰ *Id.* at 427.

worldwide recognition of the obligation to protect workers' rights is to place it under international customary law. Hence, this source of international law is more effective than conventional law, since it is binding on all states the world over, regardless of the single state's willingness to actively make efforts to grant labor protection to its citizens. This source is also relevant for the purpose of holding private violators accountable for labor law violations committed outside the states' borders.

As proposed by Ayoub, placing an obligation on all states to protect worldwide workers would allow and compel developed states to fill the gap of developing states in ensuring and enacting labor law, by applying in national courts universal rules on labor standards.⁷¹ In this respect, the real question is to prove that basic labor standards, such as the prohibition of forced and child labor, the obligation to provide adequate wages and to establish a limit for work hours, are already norms in international customary law.

Traditionally the scholarly community recognizes two main elements for a norm of international customary law to be seen as such. Firstly, the circumstance that the state to which the norm applies must have already engaged in the practice provided by the norm (state practice). Secondly, following such a practice must have been for the state the consequence of considering the fact of conforming to the practice as a binding legal obligation (*opinio juris*).⁷²

In this respect, Pepperdine University (California) Professor of Law Roozbeh Baker explains that since the 1970s, several scholars have started questioning the legitimacy of the traditional definition of custom only based on the adherence to such requirements, by calling for a change in the interpretation of what actually defines international customary law.⁷³ Such scholars⁷⁴ have often argued that the signing of a treaty or a convention,

⁷¹ *Id.* at 411-21.

⁷² "It is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behavior of states, and the psychological or subjective belief that such behavior is 'law' It is understandable why the first requirement is mentioned, since customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do. It is the psychological factor (*opinio juris*) that needs some explanation This is the psychological factor, the belief by a state that behaved in a certain way that it was under a legal obligation to act that way. It is known in legal terminology as *opinio juris sive necessitatis*." MALCOLM N. SHAW, *INTERNATIONAL LAW* 74-75 (2008).

⁷³ Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 174 (2010).

⁷⁴ See, e.g., Louis B. Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347 (1981); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); Louis B. Sohn, "Generally Accepted" *International Rules*, 61 WASH. L. REV. 1073 (1986);

with special regards to the ones concerning human rights provisions, even when it creates new legal norms, may be seen in itself as evidence of the creation of new international customary law.⁷⁵ By drafting from the International Court of Justice finding in *North Sea Continental Shelf*, in which the Court affirms that “widespread and representative participation in a convention”⁷⁶ as well as the passage of a “short period of time”⁷⁷ may suffice to establish an international customary norm binding on all states, this strain of the non-traditional scholarship goes further. Hence, according to Baker, these scholars argue that, instead of being a slow-paced imperceptible movement, the formation of international customary law should be regarded as a fast-moving process therefore capable of producing sudden changes in the world legal sphere.⁷⁸ As a consequence, for the non-traditional scholarship, the role of *opinio juris* in the formation of customary law becomes predominant against state practice, being the latter only a factor of secondary importance to prove the effectiveness of a general acceptance of the rule, rather than the manifestation of single political wills from states.⁷⁹

The view we have presented so far has largely been drafted from the position held by an earlier wave of legal scholars that have consistently questioned the centrality of states in the process of creating international customary law. According to these thinkers, states should no longer be considered as being the only actors on the international train.⁸⁰ For instance, Professor of Law at U.C.L.A. School of Law Isabelle R. Gunning begins her critique of the traditional international legal framework by challenging the definition of “absolute state sovereignty” from a feminist and Afrocentric perspective.⁸¹ As a result she finds that nowadays the notion of state sovereignty should be reviewed as to include a “cooperative” as well as a “coercive” foundation.⁸² In addition, as the world has been called for the recognition of many existing international entities other than states, such as international organizations which have progressively institutionalized within the texture of international relations (the United Nations among the

Ann D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

⁷⁵ Baker, *supra* note 74, at 174.

⁷⁶ *North Sea Continental Shelf* (W. Ger./Den., W. Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

⁷⁷ *Id.*

⁷⁸ Baker, *supra* note 74, at 182.

⁷⁹ *Id.* at 181-82.

⁸⁰ *Id.* at 182.

⁸¹ Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT’L L. 211, 217-18 (1991).

⁸² *Id.* at 213.

others) and non-governmental organizations, a reasonable effect of such developments should be to allow non-sovereign entities into the process of creating customary international law.⁸³

According to her theory, the real challenge of modern times is to see beyond the traditional understanding of international law that considers inconsistent practice by states as a barrier for the formation of new international customary law rules. In this respect the author wonders what consequence stems from consistent behaviors of groups of nations working collectively through an international organization body (such as the UN General Assembly), while their behavior as “individual nations” has been proven inconsistent.⁸⁴ According to Gunning, the consequence is that although disagreements between collective bodies or their members are not uncommon, this bare fact does not exclude an effective regulatory power upon the collective itself.⁸⁵ Therefore, consistent state practices within international organizations should count as relevant for the formation of customary law. At the same time, the international community should recognize the possibility for NGOs to take part in the law making process, by recognizing the importance of their activism for promoting changes in certain legal areas (for instance, women’s rights) and by virtue of their accomplishments in monitoring the enforcement of international rules.⁸⁶

Given these premises, the changes, which have affected the world in the last several decades, urge the international community to take action in order to modernize the current system of international customary law, especially in the light of the fact that it still represents the most powerful legal source at the international level. However, even regardless of this need for a change in the traditional approach, it is not difficult to claim that some basic rules concerning workers’ rights have already gained the status of customary norms.

In this respect, Ayoub argues that a number of provisions deriving from international treaties and conventions regarding the protection of workers’ rights,⁸⁷ even if not directly binding for signatory states, are so widely

⁸³ *Id.* at 220.

⁸⁴ *Id.* at 223.

⁸⁵ *Id.* at 225.

⁸⁶ *Id.* at 227-34.

⁸⁷ *See, e.g.*, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (hereinafter CRC); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (hereinafter CEDAW) International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (hereinafter ICESCR); Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 18, 1951, 96 U.N.T.S. 1341 (hereinafter ILO Convention No. 98);; Convention concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 881 (hereinafter ILO Convention No. 87).

accepted and followed that they fulfill the first requirement, namely state practice, for international customary law provisions to become recognized as such.⁸⁸ Going through the analysis of the actual numbers of states signing the relevant international documents,⁸⁹ the author reaches the conclusion that there is strong evidence to sustain that, for what concerns labor rights regarding forced labor, minimum age, minimum wage and hours of work, most states recognize and consistently assure through practice such rights.⁹⁰ As for the second, requirement, namely *opinio juris*, the author submits that all the states in which the enforcement of provisions in favor of the protection of workers being born at international level amounts to the level of state practice, such enforcement is the result of the state recognition of a binding legal obligation to respect international labor rights.⁹¹ Hence, given the fact the U.S. itself meets both the requirements of state practice and *opinio juris* regarding international labor norms, the author claims that the state is therefore under the obligation of punishing violations of workers' rights committed by U.S.-based multinational enterprises.⁹²

Although the example brought by Ayoub especially refers to the case of the U.S. and the corporations based within its territory, the legal reasoning that lies behind may indeed find application to all nations in the world, with special regard for those developed countries which do not find themselves in a impaired position due to lack of economic strength. In this respect, once established a universal rule against the exploitation of workers, the issue of its violations would primarily fall within the jurisdiction of the national courtrooms of the state in which the corporation is based.⁹³ However it is not excluded that the jurisdiction for such complaints may also extend to the International Court of Justice or any national judicial body entitled to decide upon the violations of norms of international customary law committed abroad, such as the U.S. district courts which are given jurisdiction for breaches of "the law of the nations" under the Alien Tort Claims Act of 1789.⁹⁴

⁸⁸ Ayoub, *supra* note 7, at 430-31.

⁸⁹ *Id.* at 430 ("As of this writing (1999) 142 state parties have ratified ICESCR, 135 have ratified CEDAW, 191 have ratified the CRC, 150 have ratified the ILO Forced Labor Convention, 135 have ratified the Abolition of Forced Labor Convention, 71 have ratified the Minimum Age Convention, 41 have ratified the Minimum Wage Fixing Convention, and 116 have ratified the Hours of Work Convention, No. 14.").

⁹⁰ *Id.*

⁹¹ *Id.* at 432-33.

⁹² *Id.* at 433-38.

⁹³ *Id.* at 439.

⁹⁴ Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2015) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Applying this statute in cases of serious violations of human rights, U.S. courts have invoked the principle of

In addition, this circumstance would also prevent multinational enterprises from avoiding lawsuits concerning violations of workers' rights by relocating their headquarters in developing states, where they may hope for a milder judicial response to the violations they commit.

A possible negative result of a collective worldwide solution process is that the final prices of manufactured goods may significantly rise if multinational enterprises are not willing to cut back on their profits. As Ayoub explains, this circumstance reveals an inherent contradiction between the consumers' will to find inexpensive products and their intention to prevent human rights violations overseas.⁹⁵ However, recent experiments conducted by Harvard and Stanford researchers demonstrate that there is an increasing consumer demand for goods made in workplaces featuring fair labor standards.⁹⁶ In some cases evidence shows that consumers are even willing to pay a 45% premium for ethically labeled goods, hence undermining the bad consequences of an increase in prices as long as such an increase is the effect of rising worldwide labor standards.⁹⁷

Finally, as Ayoub recalls, obliging multinational enterprises to apply enhanced labor standards would create the positive impact of a wage increase for all workers the world over, with the consequent benefit of boosting consumer demand. This would achieve higher levels of competition among countries and reaching higher efficiency trends in the allocation of both labor and final goods.⁹⁸

All in all, the final destination of this whole process of change in the field of labor protection is the formation of a worldwide network of international cooperation aimed at eradicating the practices of labor exploitation, regardless of where they are committed. If both developed and developing countries submit to a universal rule on labor protection, the competition mechanism that nowadays stimulates race-to-the-bottom outcomes in national legislations will finally come to an end.

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universality to support jurisdiction for adjudicating such violations. For further details, see MALCOLM N. SHAW, *INTERNATIONAL LAW* 683-86 (6th ed. 2008).

⁹⁵ Ayoub, *supra* note 7, at 441.

⁹⁶ See Hiscox & Smyth, *supra* note 5, at 15; see also Michael J. Hiscox et al., *Consumer Demand for Fair Labor Standards: Evidence from a Field Experiment on eBay* (April 12, 2011) (unpublished Working Paper) (<http://ssrn.com/abstract=1811788>).

⁹⁷ Hiscox & Smyth, *supra* note 5, at 3.

⁹⁸ Ayoub, *supra* note 7, at 441-42.