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In the Shadow of Supply Chains: The EU Draft Due Diligence Directive, Corporate Enslavement, and the Case for the Inclusion of Corporate Reparations

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Abstract

EU corporations have a long and complicated connection to the institution of slavery. Historically, by enabling the creation of the transatlantic slave trade while benefitting monetarily. Modernly, by racing one another to the bottom, in the pursuit of cheaper production and larger profits. Complicated supply chain networks which span the globe and involve the participation of a multitude of producers and subsidiary companies has fueled the abuse of human labor for corporate profit. The European Union has eyed supply chain reform as its newest form of corporate responsibility, with EU Parliament drafting a template directive and submitting it to the Commission to transpose into an official legislative proposal. This draft directive requires any corporation operating within the internal market to verify that their supply chains are free of human rights, environmental, and good governance violations. In this pursuit of corporate accountability, the draft directive has overlooked one major aspect of accountability: reparations. This thesis utilizes the case study of historical and modern corporate enslavement to demonstrate why the failure to provide proper accountability and redress—two concepts which are intrinsic to reparations—for historical conditions of corporate slavery has enabled the institution of slavery to continue to flourish behind the shadow of supply chains.

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I. Introduction

In early 2021, the Parliament of the European Union ("EU") proposed and outlined a directive tasked with addressing human rights and environmental failures in corporate supply chains.[1] This draft directive proposed by Parliament and the Council of the EU ("the Council") seeks to impose positive obligations on European companies to undertake due diligence assessments of their supply chains for any human rights, environmental, or good governance violations.[2] If enacted into law, this would impose legal obligations on companies in a field largely dominated by non-binding recommendations.[3] The recommended text from Parliament and the Council has been submitted to the Commission for drafting and introduction into the EU's two legislative bodies for debate.[4] In analyzing the draft recommendations from Parliament and the Council, there appear to be several shortcomings that may necessitate further consideration from the Commission during drafting.[5] Most importantly, the draft directive fails to consider reparations as a remedial mechanism.[6]

The draft EU due diligence directive is an accomplished piece of legislation which seeks to hold corporations, for the first time, on this scale, *legally* accountable for violations of human rights and environmental crimes occurring in their supply chains.[7] However, the draft directive fails to require corporate reparations for past injustices, meaning anything occurring prior to the date specified in the directive. This paper will draw specifically on the atrocity of slavery, both historical and modern, to show why reparations must be included for the law to be both an effective remedy and a successful deterrent to corporate sanctioned atrocities. Proper corporate

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[1] Gabriela R. Da Costa et al., *European Union Moves Towards Mandatory Supply Chain Due Diligence: Start Gearing up For New Directive*, NATIONAL LAW REVIEW (Apr. 29, 2021), https://www.natlawreview.com/article/european-union-moves-towards-mandatory-supply-chain-due-diligence-start-gearing-new.

[2] *Id.*

[3] *Towards a Mandatory EU System of Due Diligence for Supply Chains*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, 1–2, chrome-extension://cefhlgghdlbobdpihfdadojifnpghbji/https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf.

[4] Da Costa, et al., *supra* note 1.

[5] *See European Parliament Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability*, TA (2021) 0073 final (Mar. 10, 2021) [hereinafter "*EU Draft Directive*"].

[6] *See id*. at art. 10.

[7] There currently exist some national supply due diligence laws across Europe, including in Germany, France, and the Netherlands. *See* Da Costa et al., *supra* note 1. However, this will be the first mandatory due diligence law on such a level and will harmonize the existing laws across the Union, providing clarity and synchronization to European companies. *Id*.

accountability can only be realized when corporations acknowledge and redress violations which they have capitalized on and which have enabled their growth.

This paper will begin by looking to the use of slavery in corporate supply chains, drawing on both historical and modern known examples of EU corporations exploiting human beings for economic gain. This paper will then examine the use of reparations, both on a corporate and state level, as a means for addressing and remedying past atrocities. It will then turn to the draft EU due diligence directive and its content, examining how it addresses human rights and environmental due diligence, the obligations it places on corporations, enforcement mechanisms, and the remedies available, as well as the draft law's shortcomings. It will then propose how the inclusion of reparations is necessary to properly address and abolish atrocities in corporate supply chains, particularly with regards to the atrocity of slavery, which despite being illegal on international, regional, and domestic levels, continues to thrive on a widespread scale. This paper will accomplish this by drawing on the successful features which has led to corporations rehabilitating both their relationship to the impacted community as well as their global reputation. Finally, this paper will conclude by briefly addressing the counter-arguments to reparations and what alternatives may be available should the EU fail to include corporate monetary reparations.

The choice of language in how one conveys past and current atrocities is important. This thesis seeks to humanize enslaved persons in a way in which transnational corporations and exploiters of slave labor have failed to do. The "People First Movement" seeks to humanize vulnerable and exploited human beings by no longer using non-human nouns to describe their status or current state.[8] Terms such as "slave" fail to account for the fact that the state of being enslaved is not an immutable characteristic of a human being.[9] Rather, it is a state they are held in, either for a short or long period of time, and it is not a factor which is intrinsic to who they are as humans.[10] The same can be said for the use the terms of "slave owner" or "master" which

[8] Eric Zorn, *Column: Language Matters: The Shift from 'Slave' to 'Enslaved Person' May be Difficult, but it's Important*, CHICAGO TRIBUNE (Sep. 6, 2019), https://www.chicagotribune.com/columns/eric-zorn/ct-column-slave-enslaved-language-people-first-debate-zorn-20190906-audknctayrarfijimpz6uk7hvy-story.html.
[9] *Id.*; *see also The Vocabulary of Freedom*, UNDERGROUND RAILROAD EDUCATION CENTER, https://undergroundrailroadhistory.org/the-vocabulary-of-freedom/ (last visited Jan. 24, 2022).
[10] *The Vocabulary of Freedom*, *supra* note 9.

attempt to legitimatize the trading of human begins and romanticize the institution of slavery.[11] Instead, this thesis will use terms such as "enslaved person" and "enslaver" which helps to restore enslaved persons' identity and effectively convey the atrocity which they were subjected to.[12]

II. The long standing enslavement of persons in corporate supply chains and the payment of reparations

European businesses have long had a role in the use and exploitation of slave labor since the start of the transatlantic slave trade in the 15th century when Portugal began kidnapping and enslaving West Africans.[13] Initially holding them in slavery in Europe prior to the colonization of the Americas, Portugal's initial exploitation soon influenced the other European powers to join in this abuse of human beings for capital gain.[14] This eventually led to the transportation of enslaved persons to European colonies in the Americas beginning in the early 16th century.[15] The European powers' abolishment of the slave trade began with Denmark in 1803 and continued until Portugal—the last European holdout—officially outlawed the trading of human beings in 1836.[16] During this time, it is estimated that over 10 million Africans were enslaved and exploited for business profit.[17] Portugal's abolishment of the slave trade hardily ended the use of slave labor.[18] Instead, the use of enslaved persons for corporate gain continued throughout the 19th century as enslavement remained legal in the former colonies.[19] Despite the illegality of slavery and the universal understanding that the right to be free from slavery is a *jus cogen* (i.e., non-derogable) human right, slavery continues to exist in all countries regardless of their

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[11] *Id.*; Michael Landis, *A Proposal to Change the Words We Use When Talking About the Civil War*, SMITHSONIAN MAGAZINE (Sep. 9, 2015), https://www.smithsonianmag.com/history/proposal-change-vocabulary-we-use-when-talking-about-civil-war-180956547/.
[12] Zorn, *supra* note 8; *The Vocabulary of Freedom*, *supra* note 9; Landis, *supra* note 11.
[13] Hakim Adi, *Africa and the Transatlantic Slave Trade*, BBC HISTORY (Oct. 5, 2012), https://www.bbc.co.uk/history/british/abolition/africa_article_01.shtml#:~:text=The%20transatlantic%20slave%20trade%20began,they%20enslaved%20back%20to%20Europe.
[14] *Id.*
[15] *Id.*
[16] *Timeline of Atlantic Slave Trade*, ABC NEWS (Jan. 7, 2006), https://abcnews.go.com/US/story?id=96659&page=1.
[17] *Id.*
[18] *Id.*
[19] *Id.*

economic status or stage of development.[20] It is estimated that 25 to 30 million people are held in forced labor around the globe; 1.1 million of which are estimated to be enslaved *within* Europe.[21] The vast majority—16 million—enslaved individuals are exploited by private sector businesses; this is nearly four times the number of individuals subjected to sexual enslavement.[22]

Reparations have long been debated as a remedial mechanism across a myriad of past atrocities.[23] However, reparations effectively act as a tool for reconciliation and repair.[24] While victims and their decedents of atrocity crimes can, in actuality, never be the same as they once were, reparations demand that the responsible party or parties take accountability and try to remedy, either through monetary payments or other forms of social and community building, past injustices.[25] Although reparations for the institution of slavery have caused a great deal of debate and backlash, reparations are hardly a new mechanism for accountability.[26] Reparations have been used as a mechanism by both States and corporations to take responsibility for injustices to which they have outright directed or taken part in.[27]

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[20] *See* Renee Colette Redman, T*he League of Nations and the Right to be Free from Enslavement: The First Human Right to Be Recognized as Customary International Law*, 70 CHICAGO-KENT L. REV. 759, 759 (1994); *see also* ANTI-SLAVERY INTERNATIONAL, A CALL FOR EUROPEAN UNION LEGISLATION ON MANDATORY HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE, TO PREVENT FORCED AND CHILD LABOR IN GLOBAL SUPPLY CHAINS 2 (2020).

[21] *See* ANTI-SLAVERY INTERNATIONAL, *supra* note 20; E*uropean Union External Action Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labour in Their Operations and Supply Chains* (July 12, 2021); *Directorate General for External Policies Briefing Paper Addressing Contemporary Forms of Slavery in EU External Policy*, at 1, 4 (Dec. 2013). Some sources claim the global number of enslaved individuals is around 25 million, while others have given a number around 30 million. *See* ANTI-SLAVERY INTERNATIONAL, *supra* note 20; *Directorate General Briefing Paper*, *supra* note 21. The EU Guidance on Due Diligence, the EU draft law, both of which cite to the Anti-Slavery Report place the number closer to 25 million, while the previous EU Directorate General for External Policy Report claims the number is 30 million. *European Union External Action Guidance on Due Diligence*, *supra* note 21; *EU Draft Directive*, *supra* note 5, at ¶¶ M, 7; ANTI-SLAVERY INTERNATIONAL, *supra* note 20; *Directorate General Briefing Paper*, *supra* note 21. Because the EU Directorate General Report is older, from 2013, it may be the case that instances of enslavement have been reduced in the seven years between the publication of the Directorate General Report and the Anti-Slavery report. *See Directorate General Briefing Paper*, *supra* note 21. However, for safe measure, this thesis will place the number somewhere in between these two counts. It should be noted that both may be a severe undercount given the tendency for slavery to exist in the shadows. *See European Union External Action Guidance on Due Diligence*, *supra* note 21, at 1; *EU Draft Directive, supra* note 5, at ¶ 7; *Directorate General Briefing Paper*, *supra* note 21, at 4; ANTI-SLAVERY INTERNATIONAL, *supra* note 20.

[22] *European Union External Action Guidance on Due Diligence*, *supra* note 21, at 1.

[23] *See, e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

[24] *See id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

A. History of Slavery in Corporate Supply Chains

Slavery can be defined as "controlling a person in such a way as to significantly deprive that person of individual liberty, with the intent of exploitation through the use, management, purchase, sale, profit, transfer, or disposal of that person."[28] This definition was used and adopted by the EU in a briefing paper published by the Directorate-General for external policies of the Union.[29] The Directorate-General's report found it necessary to properly identify a comprehensive and clear definition of slavery in order to effectively address slavery "both externally and internally."[30] This definition was selected to work across varying motivations for enslavement, across states of enslavement, such as sexual enslavement or forced labor, as well as across categories of enslavers.[31] While it is important to adopt a wide-ranging and all-encompassing definition, to properly capture the insidious forms in which slavery has flourished, it is also important to identify those commonalities across all its forms.[32]

What is common across all forms of enslavement throughout history, as the briefing paper notes, is the control of individuals "through violence, used to make money, and lose their free will."[33] The way in which this violence manifests itself is not necessarily *physical*; rather, violence imposed on enslaved persons could also be mental, emotional, or psychological.[34] When determining whether a person or group of persons has been subjected to enslavement, the important factor is whether they can "walk away."[35] Finally, human trafficking is not in itself slavery, and it is not a necessary element to find that a person is or has been enslaved.[36] Trafficking is a mechanism which brings persons into slavery rather than the state of being enslaved itself.[37] Therefore, it is not necessary that an individual has been trafficked in order to find that they were enslaved.[38]

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[28] *Directorate General Briefing Paper*, *supra* note 21, at 6.
[29] *See id.*
[30] *Id.* at 5.
[31] *Id.*
[32] *See id.* at 5–6.
[33] *Id.* at 6.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 7.
[37] *Id.*
[38] *Id.*

In applying this definition, historically, EU corporations have played a critical role in maintaining a modern institution of slavery and furthering the exploitation of human beings.[39] Likely the first thing that comes to mind for many when considering the institution of slavery is the period constituting the transatlantic slave trade, from the early 16th century until the mid-19th century, which resulted in the kidnapping, trafficking, and enslavement of millions of predominantly West Africans to the European colonies.[40] Despite being thousands of miles from any "plantation," Europe contributed immensely to sustaining the institution of slavery on the other side of the Atlantic.[41] Felix Brahm and Eve Rosenhaft, in their book, *Slavery Hinterland*, looked specifically to individuals and businesses in countries historically thought not to be directly linked to the transatlantic slave trade, such as Italy, Germany, and Denmark (i.e., European countries which were not colonial powers), to establish how these European businesses nonetheless developed and benefitted from the enslavement of persons in the Colonies.[42] They labeled this influence as the "hinterlands of the slave economy."[43]

European businesses which contributed to transatlantic enslavement during this period include those involved in the production of Italian made beads.[44] Venetian beads were sold to enslavers by the Liverpool Bead Company for the purpose of "purchasing" human beings.[45] A perfectly harmless product on the surface, these Italian beads were traded in exchange for the freedom and humanity of millions of individuals.[46] The Liverpool Bead Company eventually came to supply 48% of all the purchase beads for English enslavers.[47] One of the principal contributions European companies made in the institution of slavery during this time was the involvement of port city merchants.[48] By 1807, Liverpool was the starting point for 75% of all British enslavement voyages, effectively making the Liverpool the most strategically important port for the entirety of the transatlantic slave trade.[49] In Northern Europe, Danish trading

[39] See ANTI-SLAVERY INTERNATIONAL, *supra* note 20, at 2–3.
[40] *See* Adi, *supra* note 13; *see also Timeline of the Atlantic Slave Trade*, *supra* note 16.
[41] *See* FELIX BRAHM & EVE ROSENHAFT, SLAVERY HINTERLAND: TRANSATLANTIC SLAVERY AND CONTINENTAL EUROPE, 1680-1850, INTRODUCTION 1–3 (2016); *see also* Adi, *supra* note 13; *Timeline of the Atlantic Slave Trade*, *supra* note 16.
[42] BRAHM & ROSENHAFT, *supra* note 41 at 3.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 51, 58–59.
[46] *Id.* at 51.
[47] *Id.*
[48] *Id.* at 48.
[49] *Id.* at 48.

companies strategically placed themselves within the transatlantic slave trade with the explicit purpose of gaining a foothold in the "industry."[50]

While the transatlantic slave trade and the resulting institution of slavery in the western hemisphere is a regularly cited example—the connection to which is highly publicized and undeniable—it is hardly the only historical example of the European commercial connection to enslavement. Rather, one need not look to the other side of the Atlantic to examine cases of historical enslavement for commercial gain. Throughout WWII and the years of Hitler's evil reign which proceeded it, Jews and other minority groups were enslaved in concentration camps not only by the Nazi state, but also, by Nazi-aligned corporations in factories across Germany and other Nazi-occupied countries.[51] Some of the most well-known German products were made by enslaved victims.[52] Companies, such as Hugo Boss, Volkswagen, Mercedes, Deutsche Bank, Siemens, and JAB Holding Company,—the makers of global products from Krispy Kreme Doughnuts to Jimmy Choo Shoes—profited from the enslavement of Europeans during the 12 year-long Nazi rule.[53] 12 million Europeans from over 12 different countries are estimated to have been abducted and enslaved throughout the duration of the war.[54]

Hugo Boss, the well-known, high-end fashion label is well recognized as having been the producer and supplier of uniforms to Nazi officers.[55] In fact, Hugo Boss was responsible for supplying the original "brown shirts" to Nazi party members even prior to Hitler's rise to power.[56] From April of 1940 until the end of WWII in 1945, Hugo Boss enslaved 140 Polish and 40 French works in its Nazi uniform production.[57] Those enslaved in Hugo Boss's operation—primarily women—were held at a separate camp near the Hugo Boss factory, where

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[50] *See id*. at 72, 74, 83; *see also Centre for the Study of the Legacies of British Slavery*, UNIVERSITY COLLEGE LONDON, https://www.ucl.ac.uk/lbs/ (last visited Apr. 9, 2022) (documenting Britain and other European nations' connections to slavery. Once can search the database by the legacy category which is tainted by the economic or political connections to enslavers. The project has categorized and analyzed the types of legacies based on their commercial, cultural, historical, imperial, or physical connection to slavery).
[51] *See, e.g.*, Katrin Bennhold, *Germany's Second-Richest Family Discovers a Dark Nazi Past*, NEW YORK TIMES (Mar. 25, 2019), https://www.nytimes.com/2019/03/25/world/europe/nazi-laborers-jab-holding.html.
[52] *See id.*
[53] *Id*.
[54] *Id*.
[55] *Hugo Boss Apology for Nazi Past as Book is Published*, BBC NEWS (Sep. 21, 2011), https://www.bbc.com/news/world-europe-15008682; *see also Hugo Boss Acknowledges Link to Nazi Regime*, NEW YORK TIMES (Aug. 15, 1997), https://www.nytimes.com/1997/08/15/business/hugo-boss-acknowledges-link-to-nazi-regime.html.
[56] *Hugo Boss Apology for Nazi Past as Book is Published*, *supra* note 55; *see also Hugo Boss Acknowledges Link to Nazi Regime*, *supra* note 55.
[57] *Hugo Boss Apology for Nazi Past as Book is Published*, *supra* note 55.

food was "extremely uncertain at times."[58] After the end of the war, Hugo Boss himself attempted to justify his actions in the name of salvaging his namesake company.[59] He was later put on trial and fined for his Nazi party membership, he was not, however, held specifically responsible for his enslavement of factory workers during the war.[60]

Volkswagen, the well-known German car manufacturer, was provided with their own dedicated concentration camp where they housed the nearly 12,000 workers enslaved in their car factories.[61] Similarly, although on a larger scale, Daimler, the maker of Mercedes, enslaved almost 40,000 individuals throughout the duration of the war.[62]

In addition, JAB Holding Company, the parent company of well-known brands from Calvin Klein perfumes to Krispy Kreme doughnuts to Lysol, recently uncovered its own dark Nazi past.[63] It was discovered that the owners of JAB Holding Company, the Reimanns, enslaved workers in their factories and even in their home.[64] Those enslaved were primarily Eastern European women who were physically and sexually abused, including at the hands of the heads of the Reimann family, a father and son.[65] In 1943, two years before the end of WWII, it is estimated that one third of the Reimann's workers were enslaved.[66]

These several examples are a small sampling of the extensive use of enslaved labor throughout Nazi occupied Europe during WWII.[67] It is believed that, at its height, enslaved workers made up 20 percent of all of Germany's workforce.[68] Nazi officials regularly abducted and enslaved individuals and prioritized them for those companies deemed loyal to the Nazi state or critical to the war effort.[69]

Europe's insidious relationship with slavery in the name of commercial gain is long and tortious. It spans across nations, industries, and periods of historical division and instability. The only commonality linking these cases is the subjugation of peoples deemed by their abusers to be

[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Bennhold, *supra* note 51.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*; *Hugo Boss Apology for Nazi Past as Book is Published*, *supra* note 55.
[69] *Id.*

lower in caste and, therefore, human value,[70] to the cruel and endless condition of enslavement. Despite the repeated opportunity for countries and companies to learn from the dark history of slavery, it is far from a thing of the past. Instead, the institution of slavery has taken on a new form which is not always obvious on the surface. By burring it deep into supply chains and regularly outsourcing it to developing nations in the name of competitive advantage, European companies have continued to capitalize on human exploitation and the enslavement of their workers.[71] "Live with it long enough, and the unthinkable becomes normal. Exposed over the generations, we learn to believe that the incomprehensible is the way that life is supposed to be."[72]

B. Modern Slavery in Supply Chains

Conditions of enslavement have continued to endure across the European Union to this day, most critically in corporate supply chains. The vast majority of enslaved persons globally exist in some form of private forced labor (16 million).[73] While a shockingly large number of individuals are enslaved on EU soil (1.1 million), the majority of the cases of modern-day enslavement occur outside of the EU's borders (28.9 million).[74] In current modern systems of production and trade, a company rarely obtains materials, produces products, or operates their business entirely within in one country's borders.[75] A supply chain is a "sum of activities involved in the creation and sale of a product, often involving complex networks of subcontractors stretching across many countries."[76] The ease with which cross-border supply chains operate has incentivized companies to increase production and drive down costs.[77] As global supply chains have grown increasingly

[70] *See* ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS (2020). Although it is an analysis of the existing caste structure in the United States created by years of exploitation and demonization of African Americans, and therefore outside of the scope of this thesis, CASTE nonetheless presents an excellent recitation and analysis of how years of enslavement produced modern caste structures. *Id.* "And, yes. Not one of us was here when this house was built. Our immediate ancestors may have had nothing to do with it, but here we are, the current occupants of a property with stress cracks and bowed walls and fissures built into the foundation. We are the heirs to whatever is right or wrong with it. We did not erect the uneven pillars or joists, but they are ours to deal with now. And any further deterioration is, in fact, on our hands." *Id.* at 16.
[71] *See* ANTI-SLAVERY INTERNATIONAL, *supra* note 20.
[72] WILKERSON, supra note 70, at 16 (discussing the history of enslavement and caste in the United States).
[73] *See European Union External Action Guidance on Due Diligence*, *supra* note 21, at 1; *EU Draft Directive*, *supra* note 5, at ¶ 7; ANTI-SLAVERY INTERNATIONAL, *supra* note 20, at 2.
[74] *See Directorate General Briefing Paper*, *supra* note 21, at 4.
[75] *See id*.; *see also European Union External Action Guidance on Due Diligence*, *supra* note 21, at 1–2; *Why We Need EU Legislation to Tackle Slavery in Supply Chains*, ANTI-SLAVERY INTERNATIONAL (Apr. 6, 2018), https://www.antislavery.org/eu-legislation-slavery-supply-chains/.
[76] *Why We Need EU Legislation to Tackle Slavery in Supply Chains*, *supra* note 75.
[77] *See id*.; *see also* Seyda SerdarAsan, *A Review of Supply Chain Complexity Drivers*, 66 COMPUTER & INDUSTRIAL ENGINEERING 533 (2013).

larger and more complex, crisscrossing jurisdictions and applicable laws, the risk for human rights violations increases.[78]

This raises the question of how much involvement or responsibility EU corporations bear for the conditions of enslavement which occur outside of the EU's borders. These modern day cases of enslavement can be categorized into two primary groups, the first of which is marked by examples of commercial enslavement *within* the EU's borders, primarily in the food and transport sectors, while the other represents cases of EU companies having a connection to conditions of enslavement operating *outside* of the EU's borders, primarily linked to clothing and other textile manufacturers.

The first grouping of companies with allegations of enslavement *within* EU borders are companies operating within the food/agricultural or transport sectors. A 2019 Oxfam report found "appalling working and living conditions" of SOK Group's tomato growers and producers in Italy.[79] SOK Group is a Finnish network of grocery stores, department stores, among other supply and service businesses, which accounts for more than 1,600 retail stores across Finland.[80] SOK Group obtains its tomatoes primarily from Italy.[81] Italian grown tomatoes account for 40% of the world's processed tomatoes.[82] In their report, Oxfam found that tomato producers in Italy are largely made up of migrant workers, many of whom do not have legal status to work in Italy, making them particularly vulnerable to exploitation and enslavement.[83] The Oxfam report found that on the farms of SOK Group's primary tomato suppliers—La Doria and Mutti—the workers reported having up to 50% of their pay taken for accommodation, phone plans, transportation, less crates of tomatoes filled, among other expenses.[84] Furthermore, workers reported only making around €4 per day (over three euros less than the minimum wage in Italy),[85] working up to 11 hours a day,[86] living in deplorable accommodation settings with sanitary and health

[78] *See* ANTI-SLAVERY INTERNATIONAL, *supra* note 20, at 2.
[79] *See* Katherine Steiner-Dicks, *'We Know Most Global Companies Have Modern Slavery in their Supply Chains'*, REUTERS (Aug. 6, 2019), https://www.reutersevents.com/sustainability/we-know-most-global-companies-have-modern-slavery-their-supply-chains; *see also* TIM GORE, OXFAM, THE PEOPLE BEHIND THE PRICES: A FOCUSED HUMAN RIGHTS IMPACT ASSESSMENT OF SOK CORPORATION'S ITALIAN PROCESSED TOMATO SUPPLY CHAINS (2019).
[80] GORE, *supra* note 79, at 23.
[81] *Id.*
[82] *Id.* at 21.
[83] *Id.* at 35.
[84] *Id.* at 29–33, 35–36.
[85] *Id.* at 36–37.
[86] *Id.* at 39–40.

works,[87] and not receiving access to water or sanitation during their working hours.[88] SOK Group itself requested Oxfam to conduct this investigation and report of their supply chain in order to remedy the identified human rights violations, a rarity within current corporate supply chains.[89]

In 2019, 167 individuals were found enslaved on the French vineyards of four wine makers.[90] All of the 167 victims were from lower income communities in Bulgaria and trafficked to France by a group posing as an "employment agency" in Bulgaria.[91] The enslaved individuals were forced to sign "employment contracts" in French, a language which they could not understand.[92] The individuals were kept on a "campsite" and had their already minimal wages (€60 per day) seized by their enslavers.[93] More recently, an investigation uncovered conditions of enslavement of lorry drivers for major Lithuanian transport companies.[94] Those enslaved were immigrants from outside of the EU who had obtained a visa from the Lithuanian government; the majority of lorry drivers in Europe are on Lithuanian or Polish visas (70%).[95]

Another sector commonly connected to labor and human rights abuses are clothing manufacturers.[96] Global clothing supply chains have recently come under heightened scrutiny as the Chinese government has been the subject of international condemnation for their treatment and internment of Uyghurs—a Muslim minority ethnic group located in the Xinjiang region of China.[97] The internment of Uyghurs likely constitutes the largest internment of an ethnic minority since the Holocaust.[98] It is estimated that China has detained up to 1.8 million Uyghurs

[87] *Id.* at 40–43.
[88] *Id.* at 44.
[89] *See id.* at 2, 4–5.
[90] *Busts at French Vineyards Uncover 165 Suspected Slaves From Bulgaria*, EURONEWS (Sep 24, 2019), https://www.euronews.com/2019/09/24/busts-at-french-vineyards-uncover-over-165-suspected-slaves-from-bulgaria; *See also* ANTI-SLAVERY INTERNATIONAL, *supra* note 20, at 9.
[91] *Busts at French Vineyards Uncover 165 Suspected Slaves From Bulgaria*, *supra* note 90.
[92] *Id.*
[93] *Id.*
[94] *Human Trafficking and Slavery on the Road: The ETF Demands Justice Now!*, EUROPEAN TRANSPORT WORKERS FEDERATION (May 4, 2021), https://www.etf-europe.org/human-trafficking-and-slavery-on-the-road-the-etf-demands-justice-now/.
[95] *Id.*
[96] *See, e.g.*, Alix Kroeger, *Xinjiang Cotton: How do I know If it is In My Jeans?*, BBC NEWS (Mar. 26, 2021), https://www.bbc.com/news/world-asia-china-56535822.
[97] *Id.*
[98] Annie Kelly, 'Virtually Entire' Fashion Industry Complicity in Uighur Forced Labor, Say Rights Groups, Guardian (Jul. 23, 2020), https://www.theguardian.com/global-development/2020/jul/23/virtually-entire-fashion-industry-complicit-in-uighur-forced-labour-say-rights-groups-china.

in internment and forced labor camps in the Xinjiang region.[99] Xinjiang cotton is known to produce "some of the best fabric in the world;"[100] however, it comes at the expense of the freedom of enslaved Uyghurs.[101] China produces 20% of the world's cotton, 85% of which comes from the Xinjiang region.[102] With such a huge share of the global cotton market, it is almost certain that the majority of cotton products have been produced with cotton picked by enslaved individuals.[103] It is estimated that one fifth of all cotton products around the world is connected to the exploitation and enslavement of Uyghurs.[104] "Right now, there is near certainty that any brand sourcing apparel, textiles, yarn or cotton from the Uyghur region is profiting from human rights violations."[105]

A multitude of EU clothing, textile, and furniture companies are sourcing cotton from the Xinjiang, and with the near certainty that any cotton coming from Xinjiang has been produced using slave labor, there is a strong likelihood that those companies have conditions of slavery present in their supply chains.[106] These companies include, H&M, Adidas, Tommy Hilfiger, C&A, and Inditex (the parent company of Zara), among others.[107] Once their supply chains were exposed, some corporations promised they would stop sourcing cotton from the Xinjiang region.[108] Others failed to publicly address their company's enslavement of Uyghurs in their supply chain.[109] Further, some have even attempted to defend their current supply chain and to assure critics that, despite their cotton coming from Xinjiang, it was not produced using slave labor.[110]

As illustrated by the above current-day examples, slavery has permeated the supply chains of EU companies ranging from tomatoes and trucking to textiles and fast fashion. Conditions of enslavement have tainted global supply chains to the point that in many cases, such as cotton grown and produced by enslaved Uyghurs, it is nearly impossible to draw a distinction between a

[99] *Press Release: 180+ Orgs Demand Apparel Brands End Complicity in Uyghur Forced Labour, End Uyghur Forced Labour (July 23, 2020), https://enduyghurforcedlabour.org/news/402-2/.*
[100] Kroeger, *supra* note 96.
[101] *Id.*
[102] *Id.*
[103] *Id.*; Kelly, *supra* note 98.
[104] JAMES GODDARD, UK HOUSE OF LORDS, MODERN SLAVERY IN UK SUPPLY CHAINS (2021).
[105] Kroeger, *supra* note 96; *See also* END UYGHUR FORCED LABOR, *supra* note 99.
[106] *See* Kroeger, *supra* note 96; Kelly, *supra* note 98.
[107] *See* Kelly, *supra* note 98; Kroeger, *supra* note 96.
[108] *See* Kelly, *supra* note 98.
[109] *Id.*
[110] *Id.*

product which has been developed using slave labor and one that has not.[111] Although slavery in the modern day has taken on a new facade, largely moving to the shadows under the guise of complicated supply chains and the cross-border movement of goods,[112] it is a tiger that has not changed its stripes. Enslaved individuals remain trapped in a system of abuse and manipulation, disproportionately targeting vulnerable migrants or developing nations as a source of cheap labor.[113] Without first properly addressing the root causes which have allowed the institution of slavery to prosper, it will continue to exist, simply changing its shape to avoid detection when convenient, but never dying. Without first remedying the historical factors which allowed slavery to permeate supply chains, history will only be bound to repeat itself. "One cannot escape the question by hand-waving at the past, disavowing the acts of one's ancestors, nor by citing a recent date of ancestral immigration. . . A nation outlives its generations."[114]

C. A History of Reparations

Reparations, in its most simplistic definition, can be understood as a "system for redress of egregious injustices."[115] Reparations go far beyond simply writing a check—an idea more akin to damages for a past harm in the legal sense; rather, reparations force a "national reckoning" by demanding that full accountability be taken.[116] Reparations force the perpetrator to fully accept their actions and the consequences which have resulted.[117] Reparations ensure that, not only will the consequences of the perpetrator's actions never cause harm again, but also that the perpetrators actions or beliefs which led to the injustice are overhauled,[118] installing a fairer, more just system of functioning.[119] "It is the price we must pay to see ourselves squarely."[120] Although the debate about reparations is regularly associated, albeit contentiously, with the institution of slavery and America's treatment of its Black citizens,[121] there are a number of historical injustices one can look to where reparations have not only been contemplated but

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[111] *See* Kelly, *supra* note 98.
[112] *See* Steiner-Dicks, *supra* note 79.
[113] *See Why We Need EU Legislation to Tackle Slavery in Supply Chains, supra* note 75*; Anti-Slavery International, supra* note 20.
[114] Coates, *supra* note 23.
[115] Rayshawn Ray & Andre M. Perry, *Why We Need Reparations for Black Americans*, BROOKINGS INSTITUTE (Apr. 15, 2020), https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/.
[116] Coates, *supra* note 23.
[117] *Id.*
[118] *See id.*
[119] *Id.*
[120] *Id.*
[121] *See id.*

paid.[122] While reparations are regularly associated with government redress, reparations have in fact been paid by several different types of perpetrators, including States, companies, and individuals.[123]

Major corporate reparations were paid in the years following the end of WWII when it was discovered that a number of German companies had a dark Nazi connection and enslaved victims on their own concentration camps.[124] In 2000, 55 years after the end of the second world war, Siemens, Deutsche Bank, Daimler, Volkswagen, and the German government came together to establish a €5.1 billion pool of funds to compensate those individuals and their families, who had been enslaved by these German companies.[125] Half of the money in the fund came directly from the companies.[126] More recently, JAB Holding Company has promised a donation of €10 million following the revelation by a historian that the company enslaved a number of individuals from France and Eastern Europe.[127] It is not immediately clear where this €10 million would be donated to and whether it would go directly to the living victims or their families.[128] More would need to be known about the donation to determine if it could be qualified as a form of reparation; however, JAB Holding Company's initiative to request a historian to examine the company's Nazi history is a positive step towards redressing their past injustices.[129]

In comparison, Shell Oil was recently ordered by a Dutch court to pay €94.9 million to clean up the oil spills which destroyed Oganiland in the Niger Delta, displacing the entire Ogani community and causing adverse health effects on the local people.[130] While this court award was a critical step for repairing the land and restoring what was stolen from the Ogani people, it likely cannot be considered to be reparations.[131] Shell has refused to accept responsibility for the

[122] *See, e.g.*, Bennhold, *supra* note 51; Dylan Matthews, *Six Times Victims have Received Reparations—Including Four in the US*, VOX (May 23, 2014), https://www.vox.com/2014/5/23/5741352/six-times-victims-have-received-reparations-including-four-in-the-us.
[123] *See, e.g.*, Bennhold, *supra* note 51; Dylan Matthews, *Six Times Victims have Received Reparations—Including Four in the US*, VOX (May 23, 2014), https://www.vox.com/2014/5/23/5741352/six-times-victims-have-received-reparations-including-four-in-the-us.
[124] Bennhold, *supra* note 51.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *See id.*
[130] Mimi Mefo Takambou & Bello Muhammad, *Shell to Pay $111 million for 1970 Niger Delta Oil Spills*, DW (Aug. 12, 2021), https://www.dw.com/en/shell-to-pay-111-million-for-1970-niger-delta-oil-spills/a-58697881; *Shell Nigeria Ordered to Pay Compensation for Oil Spills*, BBC NEWS (Jan. 29, 2021), https://www.bbc.com/news/world-africa-55853024.
[131] *See* Takambou & Muhammad, *supra* note 130.

oil spill in Oganiland and has condemned the court decision.[132] A key component of reparations is that the perpetrator accept full responsibility for the harm they have caused and take their own initiative to repair and redress such harm.[133] Shell's unwillingness to admit responsibility and only paying compensation when ordered to do so by a court likely means this case is more akin to court-ordered damages as opposed to reparations.[134] However, this case provides a useful comparison to help identify the difference between reparations and other forms of remedy.

Although this paper focuses on corporate reparations, it may be helpful to draw on examples of State reparations, which have been paid far more often than corporate reparations, in order to determine what factors make reparations successful. One of the largest payments in the history of reparations was paid by the German government following WWII.[135] Germany made two key reparations payments, the first of which was paid to the Israeli government.[136] Between 1953 to 1963 the West German government agreed to pay $7 billion to Israel.[137] These reparations came in the form of direct investment, tripling Israel's Gross National Product and creating 45,000 jobs and products, such as ships, adding to Israel's merchant fleet.[138] This, however, constituted only a small fraction of the reparations paid by the German government.[139] As of 2012, Germany has paid out $89 billion to individual Holocaust survivors.[140]

Following the end of the apartheid in South Africa, the Truth and Reconciliation Commission was established to investigate human rights violations which occurred under the previous apartheid government, and to analyze the issue of reparations.[141] The Truth and Reconciliation Commission ended up recommending the South African government pay $360 million to victims of the apartheid regime.[142] However, the government has so far only authorized $85 million to be paid.[143] Additionally, as of 2012, only 16,397 individuals have received reparation payments.[144]

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[132] *Id.*
[133] *See* Coates, *supra* note 23.
[134] *See id.*; Takambou & Muhammad, *supra* note 130.
[135] *See* Coates, *supra* note 23.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*; *see also Conference on Jewish Material Claims Against Germany*, https://www.claimscon.org/ (last visited Apr. 9, 2022).
[140] *Conference on Jewish Material Claims Against Germany*, *supra* note 139.
[141] Matthews, *supra* note 122.
[142] *Id.*
[143] *Id.*
[144] *Id.*

One of the few times the US government authorized the payment of reparations was following the end of WWII and the end of Japanese internment—a cruel policy which saw 120,000 Japanese-Americans forced into camps during WWII simply because they had Japanese heritage.[145] Reparations were paid on two separate occasions.[146] The first was in 1948 with the passing of the Japanese-American Claims Act which provided $38 million to Japanese-American victims and their families.[147] The second came in 1988 with the Civil Liberties Act which authorized an additional one billion or so dollars to the reparations fund,[148] bringing the total authorized amount to $1.6 billion.[149] This is however only a drop in the bucket when it is estimated that forced internment resulted in $6.4 billion lost income and $3.1 billion in lost property for internment victims.[150]

The above examples of reparations—both corporate and state—highlight that on the few occasions throughout a history chocked full of injustices when reparations have been paid, it is usually only a small percentage of what was stolen from the victims.[151] However, they mark an important step in establishing accountability and healing relationships. As a Japanese-American victim of internment turned US Congressman noted, the payment of reparations to internment victims created a "wonderful feeling" one which "lifted the specter of disloyalty that hung over us for 42 years because we were incarcerated. We were made whole again as American citizens."[152] The above examples make clear that reparations must first and foremost be accompanied by an admission of guilt and responsibility from the perpetrators, along with a true willingness to remedy, as opposed to a forced payment, in order to repair the harm caused.[153] In addition, reparations tend to have more success when victims or families can be readily identified and there are clear start and end dates from when reparations can be calculated.[154]

The above historical and modern day examples of corporate enslavement underscore the need for more to be done to repair past harms in order to transform the behavior of corporations and

[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *See id.*
[152] Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here is How It Went.*, NEW YORK TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/reparations-slavery.html.
[153] *Compare* Takambou & Muhammad, *supra* note 130, *with* Hassan & Healy, *supra* note 152.
[154] *See* Hassan & Healy, *supra* note 152.

heal the broken relationships between companies and communities. Reparations should be viewed as an important step forward in achieving such aims. This begs the question how corporate reparations can be achieved. While, as some German corporations have exemplified, individual companies can decide on their own to investigate past atrocities and pay reparations,[155] it is likely not enough to rely on an individual action which is far too slow and far too late. Rather, the majority will likely to continue to choose capital gain above shifting their business practices and paying reparations. Therefore, the push for reparations must come from a larger authority who has the means and the might to require businesses to take check of their supply chains and pay reparations for those harms which they have caused and/or contributed to.

III. The EU's Move Towards Greater Supply Chain Transparency: The Due Diligence Draft Directive

In response to the growing need to address corporate malfeasance in supply chains with regards to human rights and environmental crimes and with the understanding that the majority of these abuses occur further down the line in supply chains,[156] the European Union began debating a corporate due diligence directive.[157] On March 10, 2021, the European Parliament (hereinafter "Parliament") adopted, by a large majority (504 votes to 695), the Draft Directive on Due Diligence and Corporate Accountability.[158] This Parliamentary draft directive proposes both an outline and content of what may be included in the final directive.[159] Parliament's draft directive was sent before the European Commission (hereinafter "Commission") who will draft

[155] *See* Bennhold, *supra* note 51.
[156] *See EU Draft Directive*, *supra* note 5, at ¶ C. "Whereas the [globalization] of economic activity has aggravated adverse impacts of business activities on human rights, including social and labour rights, the environment and the good governance of states; whereas human rights violations often occur at primary production level, in particular when sourcing raw material and manufacturing products." *Id. See also id.* ¶ M. "Whereas the ILO has developed several conventions to protect workers, but their enforcement is still lacking, especially with reference to the labour markets of developing countries." *Id.*
[157] *See* Da Costa et al., *supra* note 1.
[158] *See id.*; *see also EU Due Diligence Act: Changes at the European Level: Scope of Jurisdiction, Standards and the Significance of the New Law for European Companies*, QUENTIC (Sep. 16, 2021), https://www.quentic.com/articles/eu-due-diligence-act/.
[159] Da Costa et al., *supra* note 1; *see also Commentary: The European Parliament's Draft Directive on Corporate Due Diligence and Corporate Accountability*, THE EUROPEAN COMPANY LAW EXPERTS GROUP (Apr. 19, 2021), https://ecgi.global/news/commentary-european-parliament%E2%80%99s-draft-directive-corporate-due-diligence-and-corporate#:~:text=On%20March%2010%20the%20European,and%20good%20governance%E2%80%9D%20(Art.

the official directive and accompanying legislative proposal to be brought before to the Parliament and the Council of the European Union (hereinafter "Council) for consideration.[160] It was initially believed that the Commission would have the legislative proposal before Parliament in the summer of 2021, with the law was expected to come into force in 2022 or 2023, however, that has not been the case.[161]

As of December of 2021, the Commission postponed the legislative proposal.[162] The reason for the delay is currently unclear and the decision to delay has been met with severe criticism from Parliament and civil society organizations.[163] Nevertheless, support for the directive remains steadfast among Members of Parliament (whose initial passing of the draft directive was strong across party lines), civil society organizations, and investors.[164] For example, following the Commission's decision to delay, 47 civil society organizations came forward, demanding full transparency and requesting that President Von der Leyen and the Commission reiterate their intention in bringing forth the mandatory due diligence legislative proposal.[165] Despite this delay in legislation, the Commission has previously expressed their commitment in establishing mandatory due diligence legislation.[166] Therefore, this thesis remains unchanged in its focus on the draft due diligence law and hopes that the delay offers an opportunity for the Commission to bring forth a legislative proposal which includes the suggestions made in this paper. This paper will continue in its analysis of the draft due diligence directive created by Parliament and the potential improvements that can be made by the Commission in the drafting of the legislative proposal.

A. The Inspirations for the Draft Due Diligence Law

In the drafting of their outline mandatory corporate due diligence directive, Parliament drew inspiration from a number of sources and cites to such inspiration in the preamble of the draft

[160] Da Costa et al., *supra* note 1.
[161] *Id.*; *see also Legislative Train Schedule*, https://www.europarl.europa.eu/legislative-train/theme-legal-affairs-juri/file-corporate-due-diligence.
[162] *Legislative Train Schedule*, *supra* note 162; *Business and Human Rights – EU's Proposed Mandatory Human Rights and Environmental Due Diligence Law Faces Further Delay*, MAYER BROWN (Dec. 23, 2021), https://www.lexology.com/library/detail.aspx?g=2d07141b-f929-4daa-9e83-898938ac0cbc.
[163] *Legislative Train Schedule*, *supra* note 162; MAYER BROWN, *supra* note 163.
[164] MAYER BROWN, *supra* note 163.
[165] *Id.* In addition to the civil society organizations, 94 large-scale investors came forward to reiterate their support for the mandatory due diligence law. *Id.*
[166] *See Legislative Train Schedule*, *supra* note 162; MAYER BROWN, *supra* note 163.

directive.[167] These sources included international soft law instruments, such as the 2008 UN "Protect, Respect and Remedy" Framework for Business and Human Rights, the subsequent UN Guiding Principles on Business and Human Rights, and a number of OECD and ILO business guidelines.[168] The UN Guiding Principles apply to both States and private businesses and establish a clear understanding that while States have the Responsibility to Protect human rights and, thus, ensure that businesses are not violating the rights of their citizens, businesses also have a legal responsibility to respect the human rights.[169] These dual responsibilities are "distinct" yet "complementary," and "[n]o matter the context, States and businesses retain these . . . responsibilities."[170]

Furthermore, Parliament drew inspiration from the national due diligence laws of a number of their Member States, including the French law on the "duty of vigilance" of parent undertakings and the Dutch Law which introduced a duty of care to prevent the use of child labor in supply chains.[171] Finally, the draft directive draws on EU-wide laws which are already in force and have been effective in implementing due diligence requirements in some sector specific businesses.[172] These include regulations focused on environmentally high-risk sectors, such as with the extraction of minerals and the cutting and sale of timber.[173] Paragraph Z of the preamble makes clear that these laws, which have already successfully introduced mandatory due diligence requirements into specific sectors, have been "a benchmark for targeted binding supply chain due diligence legislation."[174]

B. Objectives of the Draft EU Due Diligence Law

[167] *See EU Draft Directive*, *supra* note 5, at preamble, ¶ (55).
[168] *See id.* at preamble.
[169] *See* THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: AN INTRODUCTION, THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS 2 (2011) ("States have the *duty* under international human rights law to *protect* everyone within the territory and/or jurisdiction from human rights abuses committed by business enterprises . . . [b]usiness enterprises have the *responsibility* to *respect* human rights wherever they operate and whatever their size or industry. This responsibility means companies must know their actual or potential impacts, prevent and mitigate abuses, and address adverse impacts with which they are involved. In other words, companies must know—and show—that they respect human rights in all their operations.") (hereinafter "AN INTRODUCTION ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS).
[170] *Id.*
[171] *EU Draft Directive*, *supra* note 5, at preamble.
[172] *Id.* at ¶ Z.
[173] *Id.*
[174] *Id.*

Parliament's draft directive establishes a number of objectives for the creation of mandatory supply chain due diligence.[175] The draft directive begins by establishing that, as a result of globalization, businesses are operating transnationally and are often engaging with other businesses at the production level.[176] This trend has aggravated the harm on human rights, labor rights, and the good governance of States by hiding such violations in the shadows, deep within supply chains.[177] The preamble states that when effective due diligence is implemented, businesses will see a "long term benefit from better business conduct with a focus on prevention rather than on remediation of harm."[178] The draft directive identifies that one of the main shortcomings of the current due diligence system is its failure to impose binding obligations on corporations.[179] Instead, the system is by and large a construct of voluntary mechanisms, such as the UN Guiding Principles on Business and Human Rights, which rest on the naïve belief that businesses will willingly implement due diligence checks so as not to risk their reputation,[180] interwoven with few binding requirements imposed by individual nations.[181]

The current due diligence has had a limited effect on the approach of transnational corporations; rather, the overwhelmingly voluntary nature of due diligence mechanisms "hamper[s] their effectiveness" and results in "a restricted number of undertakings voluntarily implementing human rights due diligence in relation to their activities and those of their business relationships."[182] Under the current voluntary system, it is estimated that only one in three businesses in the EU is opting to undertake due diligence checks in their supply chains, demonstrating the ineffectiveness of a system built entirely on voluntary recommendations.[183] Further, a patchwork system of due diligence requirements creates legal uncertainty for businesses and fuels the "race to the bottom."[184] This race to the bottom sees businesses choosing to maximize their short-term gains at all costs, foregoing ethical business practices necessary for

[175] *See id.* at preamble.
[176] *Id.* at ¶ C.
[177] *Id.*
[178] *Id.* at ¶ E.
[179] *Id.* at ¶ W.
[180] *See Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3; *European Union External Action Guidance on Due Diligence*, *supra* note 21.
[181] *See EU Draft Directive*, *supra* note 5, at ¶ Y.
[182] *Id.* at ¶ (4).
[183] *See Anti-Slavery International*, *supra* note 20; *Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3.
[184] *Towards a Mandatory System of Due Diligence for Supply Chains*, *supra* note 3, at 2.

protecting human rights and the environment, in exchange for higher profit margins.[185] Such exploitation inevitably results in businesses moving their production to countries with weak human rights and environmental regulations,[186] limiting the reach and oversight European authorities may exercise over companies' entire operations.[187]

In view of the disregard of voluntary due diligence mechanisms and the monetary incentive to establish a complex network of supply chains to avoid detection by European authorities, the draft due diligence directive recognizes that businesses must retain the primary responsibility to carry out their own supply chain checks, with the full force of EU regulators on their heels prepared to sanction those that fail to do so.[188] The draft directive establishes this obligation on businesses based on what it calls the "do no harm principle."[189] Article One codifies this principle, stating that those "operating in the internal market fulfil their duty to respect human rights, environment and good governance and do not cause or contribute to potential or actual adverse impacts on human rights . . . through their own activities or those *directly* linked to their operations, products or services by a business relationship . . . and that they prevent and mitigate those adverse impacts."[190] In addition to codifying the underlying principle of do no harm, Article One shows the influence of the UN Guiding Principles and the understanding that businesses have the responsibility to respect human rights and redress human rights violations when they are found to exist within their realm of responsibility.[191]

Furthermore, the draft directive contemplates that, when businesses undertake these due diligence measures, it will provide more security and long-term protection of business interests by focusing their efforts on prevention, as opposed to remediation, which inevitably increases litigation expenses and wastes valuable resources.[192] It is noted that, when businesses engage in due diligence, other partner businesses, stakeholders, and consumers will have greater

[185] *See EU Draft Directive*, *supra* note 5, at ¶¶ (4), (5).
[186] *See id.* at ¶ K; *Towards a Mandatory System of Due Diligence for Supply Chains*, *supra* note 3, at 2.
[187] *See European Union External Action Guidance on Due Diligence*, *supra* note 21, at 2–8.
[188] *EU Draft Directive*, *supra* note 5, at ¶¶ (4), (5), art. 1(1).
[189] *See id.* at ¶ G.
[190] *Id.* at art. 1 (emphasis added).
[191] *Id.*; *see also* AN INTRODUCTION ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 170 (stating that businesses have a responsibility to respect which means "companies must know their actual or potential impacts, prevent and mitigate abuses, and address adverse impacts with which they are involved.").
[192] *See EU Draft Directive*, *supra* note 5, at ¶ E; *European Union External Action Guidance on Due Diligence*, *supra* note 21, at 4 ("[D]ue diligence may help protect a company's commercial reputation and reduce litigation costs.").

confidence in the viability and transparency of the company, leading to a higher level of ethical businesses.[193] In addition, the draft directive recognizes that a lack of mandatory due diligence laws, and the patchwork system of mandatory laws within the EU are hampering the freedom of establishment enshrined into EU law.[194] When some Member States, such as France, Germany, and the Netherlands, require mandatory due diligence checks while other Member States remain optional, it hampers a company's ability to move its operations freely within the Union's borders by fueling legal uncertainty.[195] By impacting freedom of movement, a piecemeal system of due diligence laws will inevitably create systems of unfair competition where only large corporations will possess the resources to adjust their business practices to the changing legal requirements.[196] This is why the draft directive explicitly seeks a "level playing field" for all EU businesses.[197]

Finally, the draft directive's preamble recognizes that one of the most important features of a system of due diligence is the access to effective remedies for victims.[198] The preamble explicitly states that "undertakings should be held liable in accordance with national law for the harm the undertakings under their control have caused or contributed by acts or omissions."[199] This clause makes clear that in order for victims to have valuable access to remedies, companies should be held responsible for those violations which were caused by an overt *act* or an *omission* by the undertaking and its subsidiaries.[200] The inclusion of the latter suggests that a business's failure to exercise effective oversight over actors in their supply chains may make them liable.[201] While clause 28 of the preamble stresses that due diligence checks do not "automatically absolve undertakings of liability," due diligence checks will greatly reduce the likelihood of that the harm is caused in the first place.[202]

C. The Content of the Draft Mandatory Due Diligence Directive

i. How to Define Due Diligence

[193] *See EU Draft Directive*, *supra* note 5, at ¶ (17).
[194] *See id.* at ¶ (10).
[195] *See id.*
[196] *See id.*; *Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3, at 2–3; Da Costa et al., *supra* note 1.
[197] *See EU Draft Directive*, *supra* note 5, at ¶ (12).
[198] *See id.* at ¶ (26).
[199] *Id.*
[200] *Id.*
[201] *See id.*
[202] *See id.* at ¶ (28).

The draft due diligence directive first seeks to define due diligence and identify what will be required of businesses. With help from the Commission's Guidance on Due Diligence, Parliament defined the practice of due diligence as "the obligation of an undertaking to take all *proportionate* and *commensurate* measures and make efforts within their means to prevent adverse impacts on human rights, the environment or good governance from occurring in their value chains, and to address such impacts when they occur."[203] This process of due diligence should involve the undertaking "indentify[ing], assess[ing], prevent[ing], mitigat[ing], ceas[ing], monitor[ing], communicat[ing], account[ing] for, address[ing] and remedy[ing] the potential and/or actual adverse impacts…"[204]

The Commission's guidance further emphasized that this due diligence should be "on-going, proactive, and reactive. . . *aimed at achieving continuous improvement*."[205] The goal of continuous improvement is especially key to due diligence efforts. It emphasizes that due diligence mechanisms are not fixed, but rather the measures taken should be fluid and may be subject to change dependent upon new business relationships or developments in the ways in which the business (and their partners) operate.[206] Undertakings should thus adapt their due diligence strategies accordingly.[207] This due diligence process should become commonplace within the business's activities that the due diligence practices are effectively imbedded into all policies and management decisions of the business.[208] Effective due diligence will occur when businesses consider the human rights, environmental, and good governance ramifications of each business endeavor.[209]

ii. What is Required of Businesses When Undertaking Due Diligence Measures

The draft directive establishes the exact categories of EU undertakings that will fall within the mandatory due diligence requirements. These include *all* large undertakings, which is defined as a business with more than 250 employees, with an annual turnover of at least €50 million and a balance sheet which exceeds €43 million.[210] In addition, small and medium

[203] *Id.* at ¶ (20) (emphasis added).
[204] *Id.*
[205] *European Union External Action Guidance on Due Diligence*, *supra* note 21, at 4 (emphasis added).
[206] *See EU Draft Directive*, *supra* note 5, at ¶ (34). "Due diligence should not be a "box-ticking" exercise but should consist of an ongoing process and assessment of risks and impacts, which are dynamic and many change on account of new business relationships or contextual developments." *Id.*
[207] *See id.*
[208] *See id.*
[209] *See id.*
[210] *Id.* at art. 2(1).

undertakings which are either publicly listed or considered "high risk" must undertake due diligence checks.[211] However, the draft directive fails to define what kinds of undertakings may be considered to be "high-risk," a critical missing piece of a directive which seeks to stamp out human rights and environmental violations in all its forms.[212] Some high-risk sectors may be easier to identify such as agricultural, natural resource extraction, or construction, which tend to have complex supply chains, exploit enslaved labor, and commit environmental damage at higher rates.[213] Other sectors may be less identifiable, such as fashion and textile undertakings or hospitality sectors, two industries which violate their workers' human rights yet likely have greater control and oversight of their supply chains.[214]

These requirements will apply to any of the above businesses which operate within the internal market regardless of whether they are headquartered within the Union.[215] Therefore, a business is unable to avoid these mandatory due diligence requirements by simply moving their headquarters or principle place of business outside of the EU's reach.[216] Businesses that wish to access the internal market in order to sell their goods or services must abide by the mandatory due diligence process.[217] Extending the due diligence requirement to any business regardless of whether they are headquartered in the Union is a key component of the draft directive because it will ultimately push trans-national businesses to adjust their business activities accordingly or else risk being shut out of a major global economy, effectively making the EU the most decisive voice of due diligence requirements in the world.[218] This may push other economies to follow the EU's trail blazing model.[219]

Businesses which fall within the scope of the directive are required to adopt a system of due diligence checks which are in line with the "principles of reasonableness and proportionality."[220] What measures may be considered to be reasonable and proportionate to the

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[211] *Id.* at art. 2(2).
[212] *See id.* at art. 3 (Definitions) (showing the lack of a codified definition for "high-risk"); *see also id.* at art. 2(2) (Scope) ("This Directive shall also apply to large undertakings, to publicly listed small and medium-sized undertakings and to small and medium-sized undertakings operating in high risk sectors. . .").
[213] *See, e.g.*, Health and Safety at Work Regulations 2016 Schedule 2, r 5(1)(d) (N.Z.) (classifying "forestry and logging," "coal mining," and "aquaculture" as examples of high-risk sectors).
[214] *See, e.g.*, Kelly, *supra* note 98.
[215] *EU Draft Directive*, *supra* note 5, at art. 2(3)
[216] *See id.*; *see also id.* at ¶ (10).
[217] *See id.* at art. 2(3); *id.* at ¶ (10).
[218] *See id.* at preamble.
[219] *Id.*
[220] *Id.* at ¶ (44).

respective business remains a gray-area of the draft law.[221] Exactly how far a business must go, how many resources it must expunge, or how much money it must be willing to allocate is unclear.[222] It is likely that this will differ for every undertaking depending on the company's size, sector, geographical position, supply chain position, among other factors.[223] Furthermore, the exact obligations on businesses will ultimately vary from Member State to Member State because, as a directive, it will ultimately be up to the Member States to implement it. [224]

At a minimum, businesses will be obliged to identify, to the best of their ability, all suppliers and subcontractors present, both above and below, in their supply chain.[225] It will be insufficient to simply identify those positioned immediately preceding or following the company in question.[226] Once the various supply chain entities are identified, businesses must identify any current or future risks to human rights, the environment, and good governance and "cease, mitigate, and prevent" such risks.[227] This requires companies to adopt measures to immediately end current violations and prevent future violations in the above three areas of concern.[228] Companies are required to make public their findings and the measures that have been adopted to mitigate such risks.[229] These mitigation and prevention measures must not be a one off effort, but rather businesses will be required to codify such measures into their corporate governance policies, effectively ensuring that such policies are permanently part of the corporate structure.[230] This may require businesses adopt "framework agreements, contractual clauses, codes of conduct, or [undertake] certified and independent audits."[231]

For those businesses who are either small or medium-sized or whose supply chain is located entirely within the Union and their "risk based monitoring" uncovered that the business "does not cause, contribute to, or that it is not directly linked to any potential or actual adverse

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[221] *See id.*
[222] *See id.*
[223] Da Costa et al., *supra* note 1.
[224] *See EU Draft Directive*, *supra* note 5, at art. 4(1) (Due Diligence Strategy).
[225] *Id.* at art. 4; Da Costa et al., *supra* note 1.
[226] *EU Draft Directive*, *supra* note 5, at art. 4; Da Costa et al., *supra* note 1.
[227] *See EU Draft Directive*, *supra* note 5, at art. 1(2); *see also The New EU Due Diligence Law: How to Keep Your Supply Chain Secure Now*, QUOINTELLIGENCE (June 17, 2021), https://quointelligence.eu/2021/06/the-new-eu-due-diligence-law/.
[228] *See EU Draft Directive*, *supra* note 5, at art. 1(2); *see also* Da Costa et al., *supra* note 1.
[229] *See EU Draft Directive*, *supra* note 5, at art. 6; *see also* Da Costa et al., *supra* note 1.
[230] *See EU Draft Directive*, *supra* note 5, at ¶ (34) ("Due diligence should not be 'box-ticking' exercise but should consist of an ongoing process and assessment of risks and impacts, which are dynamic and may change on account of new business relationships or contextual developments.").
[231] *Id.* at art. 4(8); Da Costa et al., *supra* note 1.

impact on human rights, the environment or good governance," the processes by which the business reached such a conclusion must still be made public.[232] However, a conclusion of this sort will not immediately absolve the businesses from further due diligence monitoring. Instead, the business must continue to its regular due diligence assessment and must be prepared to amend its previous position should new risks or conclusions emerge.[233] Furthermore, those businesses who have established "no risk statements" are not exempt from the oversight and continued monitoring by Member State authorities.[234]

For large undertakings with supply chain entities located outside of the EU, or small and medium-sized undertakings who are unable to conclude that there is no risk, an additional "due diligence strategy" must be adopted in line with the draft directive.[235] This due diligence strategy requires that businesses at a minimum: (1) "specify the potential or actual adverse impacts on human rights. . . their level of severity, likelihood and urgency and the. . . methodology that led to these conclusions"; (2) "map their value chain and. . . publicly disclose relevant information about the undertaking's value chain"[236]; (3) "adopt and indicate all proportionate and commensurate policies and measures with a view to ceasing, preventing or mitigating potential or actual adverse impacts"; and (4) "set up a [prioritization] strategy" based on the UN's Guiding Principles on Business and Human Rights. [237] This due diligence strategy must be evaluated on an annual basis and adjusted when such evaluation reveals a change in situation for the undertaking.[238]

An additional level of responsibility falls on those undertakings that, in the process of identifying its suppliers, they uncover evidence of human rights, environmental, or good governance injustices.[239] Where such violations cannot be prevented or mitigated, the

[232] *EU Draft Directive*, *supra* note 5, at arts. 4(2) & 4(3).
[233] *Id.* at 4(3).
[234] *See id.* at ¶ (31).
[235] *Id.* at art. 4(4).
[236] *See id.* at ¶ (32). Such value chain mapping involves the undertaking "making all proportionate and commensurate efforts in order to identify their business relationships in their value chain." *Id.*
[237] *Id.*
[238] *See id.* at ¶ (30). Subsidiaries of undertakings which fall within the scope of this directive are allowed to fall under the due diligence strategy of the parent company and thus exempt the subsidiary from undertaking their own due diligence checks. *See id.* at ¶ (35). However, the subsidiary still must "clearly state that is the case in its annual reporting." *Id.* This ensures that there is complete transparency for all undertakings and there is no question whether an undertaking is fulfilling their responsibility under the mandatory due diligence directive. *Id.*
[239] *See id.* at ¶ (37).

undertaking has an obligation to end its business relationship with the violator.[240] However, termination of the business relationship should be done in a holistic manner and only when all other methods of prevention and remediation are impossible for the undertaking.[241]

Finally, Article Five of the draft directive makes clear that stakeholder engagement is critical to a successful and meaningful due diligence process.[242] Stakeholders are defined as "individuals. . . whose rights or interests may be affected by the potential or actual adverse impacts on human rights. . . as well as [organizations] whose statutory purpose is the [defense] of human rights."[243] This may include workers, labor and trade unions, and civil society organizations.[244] Entities, in the due diligence process, are required to carry out "meaningful and informed discussions" with such stakeholders.[245]

iii. The Monitoring and Enforcement Mechanism

It will ultimately be the responsibility of Member States to monitor undertakings and enforce the mandatory due diligence requirements when a business has failed to meet its obligations under the directive.[246] Article 12 of the draft directive imposes an obligation on Member States to designate one or more entities at the national level whose responsibility it will be to implement, monitor, and enforce the directive's minimum standard of conduct on undertakings operating within that Member State's jurisdiction.[247] The Commission shall be responsible for maintaining a public list of the competent authorities of each Member State, in order to provide clarity and transparency to businesses, stakeholders, and other Member State authorities responsible for the sharing of information.[248] The draft directive specifically requires Member States to implement a grievance mechanism as a place for stakeholders to submit their complaints and concerns about potential due diligence violations, as well as a place for mediation between impacted stakeholders and the relevant undertaking.[249] The inclusion of a grievance mechanism grants stakeholders, including employees and others directly affected by a business's human rights or environmental violations, greater influence over a company's

[240] *Id.*
[241] *Id.*
[242] *Id.* at art. 5
[243] *Id.* at art. 3(1).
[244] *Id.*
[245] *Id.* at art. 5(1).
[246] *See, e.g., id.* at arts. 6, 9, 10, 12, 13.
[247] *Id.* at ¶ (49), art. 12.
[248] *Id.* at art. 12.
[249] *Id.* at art. 9(1).

activities—something that is virtually non-existent without this specific inclusion.[250] The inclusion of a grievance mechanism is in line with Principle 31 of the UN Guiding Principles on Business and Human Rights, which recommends effective, non-judicial grievance mechanisms as a way to "[enable] trust from . . . stakeholder groups . . . and being accountable for the fair conduct of grievance processes."[251]

In addition to the national authorities, the draft directive calls on the Commission to establish a European Due Diligence Network made up of the relevant competent authorities to coordinate monitoring and enforcement actions at the Union level and to help ensure uniform application of the directive across all Member States.[252] The European Due Diligence Network will also be key to the sharing of information across relevant Member State authorities, a crucial inclusion for the operation of the internal market.[253] Further Union-wide coordination will come from the Commission, in conjunction with the "European Union Agency for Fundamental Rights, the European Environmental Agency, and the Executive Agency for Small and Medium-sized Enterprises," publication of an "annual due diligence score-board."[254] What exactly such a "score-board" will look like is unclear, but it may be helpful in persuading Member States to monitor and enforce the directive uniformly and consistently.[255]

The relevant national authorities will have the power to investigate business's compliance with the directive.[256] This investigative process may include interviewing stakeholders, examining a business's due diligence strategy, or other checks on the various activities within the business which may impact human rights, the environment, or good governance obligations.[257] These investigations may result in the imposition of fines or sanctions on those businesses which have failed to take the necessary "remedial action."[258] The fines, which may be imposed will be calculated in relation to the business's annual turnover.[259] Other relevant sanctions may include excluding the business from public procurement participation, state aid, or other support schemes

[250] *See id.*; *see also Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3, at 1.
[251] *EU Draft Directive*, *supra* note 5, at art. 9(2); Human Rights Council Res. 17/4, at 33–35 (June 16, 2011) [hereinafter "UN Guiding Principles on Business and Human Rights"].
[252] *EU Draft Directive*, *supra* note 5, at art. 16.
[253] *Id.*
[254] *Id.* at art. 16(2).
[255] *See id.*
[256] *Id.* at art. 13(1).
[257] *Id.* at art. 13.
[258] *Id.* at art. 13(7).
[259] *Id.* at art. 18(2).

or seizing the business's assets.[260] Regardless of the type of sanction imposed, the draft directive makes clear that any sanction or fine must fulfill the objectives of "effective[ness], [proportionality], and dissuasive[ness]."[261] Furthermore, the relevant national authority should consider the severity of the violation and whether the business is a repeat offender when administering sanctions.[262]

iv. Access to Remedies

Parliament, when debating and passing the draft directive, recognized the ability for victims "to obtain an effective remedy," as a critical human right. [263] The preamble recognizes that one of the major flaws of the current voluntary system of due diligence is the inability for victims to access remedies when a harm is suffered.[264] In this sense, the international community has failed victims and allowed corporate perpetrators to continue their assault on human rights and the environment without recompence.[265] In establishing clear access to a remedy, the draft directive recognizes that a due diligence directive would be a hollow promise and an unfulfilled responsibility to protect[266] without the ability for victims to seek redress from harms which they have suffered at the direction or passive acceptance of businesses.[267]

A victim's access to a remedy is laid out in the directive in two primary ways. Article 19 provides for the continued access to civil liability claims for victims when provided for under national law.[268] The fact that an undertaking has fulfilled its obligations under the directive does not automatically extinguish a company's liability for past and/or ongoing harms.[269] Instead, civil liability may arise separately under national law, and the due diligence law shall not forbid such claims.[270] Article 19 further places an obligation on Member States to establish a civil liability regime, if not yet in existence, for businesses which evade human rights, environmental, or good governance commitments.[271]

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[260] *Id.*
[261] *Id.* at art. 18(1).
[262] *Id.*
[263] *Id.* at ¶¶ (26), (55).
[264] *Id.* at ¶ (5).
[265] *See id.*; *see also Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3, at 1–2.
[266] *See EU Draft Directive*, *supra* note 5, at ¶ (2).
[267] *Id.* at ¶¶ (5), (26), (55).
[268] *Id.* at art. 19(1).
[269] *Id.* at arts. 10(5), 19(1).
[270] *Id.*
[271] *Id.* at art. 19(2). Article 19 balances business and victim interests by requiring that Member States allow businesses to be absolved from liability when they are able to prove that "they took all due care." *Id.* at art. 19(3).

The second and arguably more critical provision, established in Article 10, calls for extra-judicial remedies to be made available to victims across the Member States.[272] These extra-judicial remedies must be provided by undertakings when an undertaking "identifies that it has caused or contributed to an adverse impact."[273] Therefore, the key provision is that the *undertaking itself identifies* the harm done.[274] "Extra-judicial" remedies implies that victims may be compensated *outside* of the legal system.[275] This involves a method of redress where victims are not expected to spend the time, money, and resources in pursuit of a court judgment.[276] The draft directive lists some extra-judicial remedies including "financial or non-financial compensation, reinstatement, public apologies, restitution, rehabilitation or a contribution to an investigation."[277] In addition, Member States may opt for extra-judicial remedies to be made available to victims following the use of the grievance mechanism, previously established under the directive which may act as a type of mediation between undertakings and victims.[278] Regardless of the type of extra-judicial remedy, the draft directive makes clear that the remedy should be decided upon with the input of stakeholders and, further, that the employment of extra-judicial remedies *will not* foreclose the right of victims to seek an individual civil liability claim under Article 19 and the relevant national law.[279]

D. *Shortcomings of the Draft Directive: What is it missing?*

Despite the historical importance of the draft mandatory due diligence directive and the utmost necessity to reform the current voluntary system of due diligence recommendations, the draft directive contains several inadequacies which should be addressed prior the Commission's drafting of the legislative proposal. This paper focuses on three inadequacies present in the draft directive, each of which is interlinked and may lead human rights violators to evade responsibility, specifically with regards to the focus topic of this thesis: corporate enslavers.

First, the draft directive requires undertakings to conduct a due diligence assessment and, consequently, imposes liability only for those operations *directly* linked to the relevant

[272] *Id.* at art. 10(1).
[273] *Id.*
[274] *See id.*
[275] *See id.*
[276] *See id.*
[277] *Id.* at art. 10(3).
[278] *Id.* at arts. 9(1), 10(2).
[279] *Id.*; *see id.* at arts. 9(7), 10(5).

undertaking.[280] This can be seen in both Article One, the scope of the directive, and Article 10, establishing extra-judicial remedies.[281] It is unclear whether all suppliers within a value chain would be deemed to be *"directly* linked to [the] operations, products or services" of a business or at what point in the chain suppliers would be deemed to have shifted from *directly* to *indirectly* linked to the relevant undertaking.[282] The majority of human rights abuses, including the use of enslaved and child labor occurs at the very tip of the supply chain, far down the line from the final manufacturer or seller.[283] Would cocoa beans picked by enslaved persons in West Africa be directly linked to European chocolate makers?[284] What about cotton picked by enslaved Uyghurs in Xinjian, China that ends up in the garments of high-street fast-fashion houses?[285] There is no clear answer to how the draft directive would qualify either of these real world examples. However, the draft directive leaves open the possibility that *both* of these cases could fall outside of the scope of the directive and therefore outside of the range of corporate responsibility.[286]

By including the disqualifying term, the draft directive's terminology may lead businesses to simply shift the violations occurring in their supply chains to suppliers whom they have *indirect* links to.[287] In essence, this would create a new corporate veil phenomenon where shady business practices hide behind a veil of intermediary, partner businesses, severing the direct link to the European entity.[288]

Next, the draft directive fails to consider how it will address human rights, environmental and good governance violations currently occurring in supply chains which will cease to occur by the time the directive is entered into force. Will businesses be held responsible *ex post facto*

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[280] *See id.* at art. 1 ("undertakings. . . do not cause or contribute to potential or actual adverse impacts on human rights, the environment and good governance through their own activities or those *directly* linked to their operations, products or services by a business relationship or in their value chains.") (emphasis added). *See also id.* at art. 10(1) ("When an undertaking identifies that it is *directly* linked to an adverse impact on human rights, the environment or good governance, it shall cooperate with the remediation process to the best of its abilities.") (emphasis added).
[281] *See id.* arts. 1, 10.
[282] *See id.* art. 1; *see also* QUOINTELLIGENCE, *supra* note 228.
[283] *See* QUOTINTELLIGENCE, *supra* note 228; *EU Draft Directive*, *supra* note 5, at paras. A, B, F, M, N.
[284] *See* Oliver Balch, *Mars, Nestlé and Hershey to Face Child Slavery Lawsuit in US*, GUARDIAN (Feb. 12, 2021), https://www.theguardian.com/global-development/2021/feb/12/mars-nestle-and-hershey-to-face-landmark-child-slavery-lawsuit-in-us.
[285] *See* END UYGHUR FORCED LABOUR, *supra* note 99.
[286] *See EU Draft Directive*, *supra* note 5, at arts. 1, 10.
[287] *See id.*; *see also* QUOINTELLIGENCE, *supra* note 228.
[288] *See Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3, at 2 (discussing the original corporate veil phenomenon which persists today. It is a system which currently "enables [businesses] to avoid liability for their harmful acts on local communities . . . by hiding behind the 'corporate veil'" by acting thought their subsidiary businesses.)

for the harms they contributed to or directly committed? How will the *ex post* nature of a harm affect corporate civil liability? A clear answer on what point in time the directive applies and how it will handle harms which have been committed before that date is imperative to the proper implementation of the law. Under this paper's case study of enslavement, if businesses can evade responsibility for their use of enslaved labor in their supply chain prior to the directive coming into force, many current and former enslaved persons will be unable to receive a remedy from their enslavers. An inevitable period of transition will give European entities a chance to change their businesses practices, cut ties, and evade all responsibility for profiting from enslaved labor.

Finally, the issue of reparations, closely connected to the previous two inadequacies, remains unaddressed by the draft directive. Article 10—in explicitly allowing for extra-judicial remedies, including "apologies," "rehabilitation," and "financial or non-financial compensation," all elements closely connected to the concept of reparations—tip-toes around reparations without explicitly requiring or allowing them.[289] This leaves open the possibility that, in their implementation of the directive, Member States could create their own national system of reparations in line with the directive; however, that will inevitably lead to continued legal uncertainty for businesses and victims. Furthermore, it will create a new patchwork system of implementation, expressly undermining the draft directive's objectives of uniformity, harmonization of Member State law, and fair competition.[290]

Addressing each of the above shortcomings of the draft directive is critical to ensuring the successful and uniform implementation of a mandatory corporate due diligence law. Furthermore, addressing each of the above is essential to addressing the pervasive and continued use of enslaved labor in corporate supply chains. In order to eradicate enslaved labor from supply chains, undertakings must be held responsible for *all* entities which contribute to their final end-product or service, regardless of whether the contribution is direct or indirect. Furthermore, victims must be able to hold their enslavers accountable for the harm that occurred up until the date the directive enters into force, or else businesses will inevitably drag their feet in the mud, only changing their behavior once profits are on the line. Finally, corporate reparations must be included in the final directive as a uniform, harmonized system for repairing those violations

[289] *EU Draft Directive*, *supra* note 5, at art. 10(3) Draft Directive.
[290] *See id.* at ¶¶ U, AA, Y, (12).

which occurred prior to the directive's implementation, both as a further incentive to keep businesses in line and also as a true vehicle for recompence and relationship building.

IV. The Case for Including Corporate Reparations in the Final EU Due Diligence Directive

Ubi jus, ibi remedium.[291] This doctrine, Latin for "where there is a right there is a remedy," is intrinsic to the rule of law.[292] It is the idea that when one is granted a right, so too must they have access to a system of recovery when said right is violated.[293] The historical foundation for reparations is deep and incontrovertible. John Locke, in his second treatise, argued that one has "a particular right to seek reparation."[294] Philosophers and scholars alive during the height of the transatlantic slave trade argued that survivors of enslavement had a particular right to seek reparation from their captors, and in some cases, those who had escaped enslavement in the Americas were successfully granted individual reparations.[295]

Similarly, the moral justification for reparations, in particular reparations for enslavement, is indisputable. Nowhere was this seen more explicitly than in the Quaker church.[296] In fact, by the 18th century, some Quaker churches forbid membership in the church unless and until "one's former slaves" were given reparations.[297] One famous Quaker recounted that "[a] heavy account lies against us as a civil society for oppressions committed against people who did not injure us . . . and . . . it would appear that there was considerable due to them."[298]

The strong moral and historical support for reparations begs the question, can one find the similar justifications within the modern legal sphere? And if so, how would such legal

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[291] *See* Dinah Shelton, *The Right to Reparation for Acts of Torture: What Right, What Remedies?*, 17 TORTURE 96, 116 (2007).
[292] *See id.*
[293] *See id.*
[294] Coates, *supra* note 23.
[295] *Id.* Belinda Royall received 12 shillings from Massachusetts after a successful petition to the Massachusetts legislature for a payment from her enslaver's estate following his death. *Id.* Belinda Royall was not alone in her fight for reparations. *Id.* Instead, at the foundation of the United States of America, reparations "were actively considered and often effected." *Id.*
[296] *Id.*
[297] *Id.* Ta-Nehisi Coates recounts one remarkable case of reparations where a Quaker emancipated all 78 persons he had enslaved, provided them with 350 acres of land, created a school for them, and ensured their continued access to education. *Id.*
[298] *Id.*

justifications translate to the European Union and the effort to translate such legal justifications into the mandatory due diligence directive? The legal basis for reparations is embedded in a number of sources, including in both hard and soft law instruments. This chapter will seek to analyze the major legal instruments which have acted as either a remedial foundation for reparations or have explicitly granted a right to reparations. These legal instruments are evidence to EU policy makers that the right to reparations has a strong legal foundation, and as a result, supports the inclusion of reparations in the draft due diligence directive.

A. The Legal Basis for Reparations

i. Foundations

The right to seek reparations is inextricably linked to the right to an effective remedy, which is enshrined in a multitude of regional and international treaties.[299] The right *effective* remedy is considered to be a fundamental human right and vital to protect "all other human rights."[300] Whether the right to reparation (or repair) extends from the right to remedy or vice versa is a bit of a chicken-and-the-egg dilemma. Some international treaties establish the right to remedy, enforceable by a court or tribunal, without mention of reparations.[301] Others, explicitly mention the right to reparation within the right to remedy, or consider remedial action to be the first step in seeking reparation.[302] Some international bodies, such as the Human Rights Committee, interpret the right to reparations into an article of the International Covenant on Civil and Political Rights, which appears on its face to focus explicitly on a judicially sanctioned remedy.[303] While others consider the right to reparation to be continuous and always present,

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[299] *See* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, INTERNATIONAL COMMISSION OF JURISTS, 15 (2018), chrome-extension://cefhlgghdlbobdpihfdadojifnpghbji/https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf. The right to remedy and reparation is established in, among others, UDHR, ICCPR, CERD, CAPT, and CRC. *See id.* at 15 n.2.

[300] *Id.* at 53.

[301] *See e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S 171, at art. 2; *see also* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 52 ("In the ICCPR, however, Article 2 only refers to a remedy, and its wording, particularly in the French and Spanish version, would not encompass a substantive right to reparation).

[302] *See* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 52. "The right to a remedy is also linked in several ways to the right to reparation: an independent assessment constitutes the first step in obtaining reparation, and indeed the term remedy is sometimes understood as comprising reparation." *Id.* This is slightly different to the reparations approach taken by Ta-Nehisi Coates. *See* Coates, *supra* note 23. A payment (in some form) to a large and widespread group of victims (and possibly their descendants). *See id.*

[303] *See* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 52–53 n.99; Human Rights Committee General Comment No. 31 on The Nature of the

regardless of whether the particular convention or treaty has included an article addressing remedies.[304] For example, the predecessor to the current International Court of Justice, the Permanent Court of International Justice—also called the World Court—in *Chorzow Factory* stated that "reparation . . . is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[305] Therefore, a treaty need not explicitly codify the right to remedy in order for a victim to seek a reparation.[306] As some scholars have pointed out, "it is not necessary to specify the obligation to afford remedies for breach of the obligation, because the duty to repair emerges automatically by operation of law."[307]

Regardless of whether reparations extend from the right to remedy or vice versa, it is clear that both share in the same common foundations and principles that, when an individual—or group of individuals—has suffered a harm, they deserve to seek retribution and compensation from the perpetrators.[308] In other words, the principle that one should be made whole again.[309] Nevertheless, many of the early human rights treaties focus on the right to remedy and, thus, act as a foundation for subsequent treaties which expand upon the idea and explicitly include reparations.[310] Furthermore, the fact that there are several interpretations of a State's duty to provide reparations and the various ways in which this may be achieved should not be seen as undermining the foundation of reparations.[311] Instead, "the different forms of reparation are complementary and not alternative to one another."[312] Exactly which methods of reparation are provided and to what extent likely depends upon the harm suffered by the individual.[313]

General Legal Obligation Imposed on State Parties to the International Covenant on Civil and Political Rights, U.N. Doc CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[304] *See* Shelton, *supra* note 292, at 96.

[305] *Id.*; *see also* The Factory At Charzow (Germany v. Poland), Judgment, 1928 P.C.I.J (ser. A) No. 17 (Sept. 13).

[306] Shelton, *supra* note 292, at 96; The Factory At Charzow, *supra* note 306.

[307] Shelton, *supra* note 292, at 96.

[308] *See* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 15–16.

[309] *See id.* at xiii. The idea that a victim should, to the best efforts of all involved, be made whole again, is used as the definition for restitution in the Right to a Remedy and Reparation Practitioners Guide. *Id.*

[310] *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 302, at art. 2(3).

[311] *See* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 24.

[312] *Id.*

[313] *Id.* (citing to the International Law Commission which stated that "reparation shall take the form of restitution, compensation and satisfaction 'either singly or in combination' . . . this formulation does not leave the form of reparation to the discretion of the State, but rather clarifies that reparation may only be achieved in particular cases by the combination of different forms of reparation.").

Article Eight of the Universal Declaration of Human Rights ("UDHR")—the pinnacle human rights document which in 1948 established the foundation for the realization of human rights around the world, states that: "[e]veryone has the right to an *effective* remedy . . . for acts violating the fundamental rights granted him by the constitution or by law."[314] The International Covenant on Civil and Political Rights ("ICCPR")—one of two twin covenants which affectively gave teeth to the UDHR and bound by law those who ratified it—extended the right to remedy to encompass those whose rights were violated regardless of the position of their perpetrator.[315] In other words, regardless of whether their perpetrator was acting in an official or unofficial capacity at the time their rights were violated.[316] The inclusion of the right to remedy in the ICCPR was a major step forward by making State Parties legally bound to provide redress.[317] In the Human Rights Committee's ("HRC") interpretative document for the ICCPR, they explicitly connected the concepts of remedy and reparation, by stating that "[w]ithout reparation to individuals whose rights have been violated, the obligation to provide an effective remedy . . . is not discharged."[318]

Almost 50 years after the ICCPR made access to remedy a legally binding right, the European Union drew on the precedent set by the international community and included the right to remedy in the Charter of Fundamental Rights of the European Union (the "Charter").[319] Article 47 states that: "[e]veryone whose rights and freedoms guarantees by the law of the Union are violated has the right to an effective remedy before a tribunal."[320]

The African Charter on Human and Peoples' Rights ("ACHPR") takes on a unique view of the act of remediation or repair—focusing largely on indigenous group rights.[321] Article Seven of

[314] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 8; *See* Christine Evans, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT, CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW 34 (2012).
[315] International Covenant on Civil and Political Rights, *supra* note 302, at art. 2(3); Evans, *supra* note 315.
[316] International Covenant on Civil and Political Rights, *supra* note 302, at art. 2(3)(a).
[317] *See* Evans, *supra* note 315.
[318] Evans, *supra* note 315; Human Rights Committee General Comment No. 31, *supra* note 304 (stating that "[w]ithout reparation to individuals whose Covenants rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, para 3, is not discharged."). Thus, the right to remedy would be ineffective without the right to reparation and, in the opinion of the HRC, States are unable to fulfill their obligations under the right to remedy if they fail to provide for reparations. *See* Human Rights Committee General Comment No. 31, *supra* note 304.
[319] *See* Charter of Fundamental Rights of the European Union, Dec. 12, 2007, 2007 O.J. (C/303) art. 47.
[320] *Id.*
[321] African (Banjul) Charter on Human and Peoples' Rights art. 7, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M.

the ACHPR provides for the standard procedural right to remedy, or, as it is referred to in the ACHPR, "the right to have his cause heard."[322] This includes the "right to an appeal" when your fundamental rights have been violated.[323] This article is akin to the right to remedy under other human rights treaties, such as the ICCPR, because it provides a procedural mechanism.[324] However, the ACHPR's recognition of a victim's right to compensation does not end there. Article 21 extends a right to "adequate compensation" and the "lawful recovery of . . . property" for peoples who have been dispossessed of their land in cases of 'spoilation.'[325] The key aspect of this article is the absence of a requirement to seek this compensation or return of property through a court or tribunal.[326] Instead, the execution of the right is automatic simply because the harm has occurred and is therefore more closely aligned with the idea of reparation.[327] The ACHPR's inclusion of this group right to reparation is likely a result of the ACHPR's focus on repairing the destruction caused by colonization and the foreign exploitation of land and people.[328]

In addition, the other regional human rights organizations—the Inter-American system and the Council of Europe system—have their own provisions regarding remedies versus reparations and help to build on the foundation of the regional understanding of reparations. Article 63.1 of the American Convention on Human Rights contains a right to remedy provision, stating that victims must "be ensured the enjoyment of his right or freedom that was violated" and that "fair compensation" should be paid to the victim.[329] The application of this provision appears to be limited in scope to judicially ordered monetary remedies; however, the Inter-American Court of

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[322] *Id.*; *see also* Shelton, *supra* note 292, at 101.
[323] African Charter on Human and Peoples' Rights, *supra* note 322, at art. 7(1)(1); *see also* Shelton, *supra* note 292, at 101.
[324] *Compare* African Charter on Human and Peoples' Rights, *supra* note 322, at art. 7, *with* International Covenant on Civil and Political Rights, *supra* note 302, at art. 2.
[325] African Charter on Human and Peoples' Rights, *supra* note 322, at art. 21; *see also* Shelton, *supra* note 292, at 101.
[326] *See* African Charter on Human and Peoples' Rights, *supra* note 322.
[327] *Id.*; *see also* Shelton, *supra* note 292, at 101.
[328] *See* African Charter on Human and Peoples' Rights, *supra* note 322, at arts. 20–21. Article 20 of the ACHPR touches on the harm of enslavement, stating that "[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community." *Id.* at art. 20.
[329] American Convention on Human Rights art. 63.1, Nov. 22, 1969, No. 17955; Douglass Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, CENTER FOR CIVIL AND HUMAN RIGHTS, NOTRE DAME LAW SCHOOL, at 91, chrome-extension://cefhlgghdlbobdpihfdadojifnpghbji/https://www.corteidh.or.cr/tablas/r28153.pdf (last visited Apr. 9, 2022).

Human Rights has sought to expand the right to remedy in the inter-American system, interpreting this provision as containing "three kinds of reparations," including: "(1) to ensure enjoyment of rights or freedoms, (2) to remedy consequences of violations, and (3) to award fair compensation."[330] Furthermore, the Inter-American Court has been diligent in its use of this provision, awarding remedies in a multitude of cases since its founding.[331] Article 41 of the European Convention on Human Rights is similar to its inter-American counterpart in that it is a judicially awarded remedy.[332] Article 41—Just Satisfaction—states that "[i]f the Court finds that there has been a violation of the Convention . . . the Court shall, if necessary, afford just satisfaction to the injured party."[333] Although this provision appears on its face to encompass more than monetary payments, the European Court of Human Rights has been strict in its application of the provision, rarely requiring the payment of monetary damages.[334]

With these examples, this paper merely aims to show that the right to remedy and the right to reparation are not fixed concepts. Rather, they may be interpreted differently depending on the region, context, harm caused, and legal nature of the perpetrator. Despite the small differences between each of these treaty provisions, these historical legal precedents all appear to qualify the right to remedy as something that is enforceable before a court or tribunal.[335] The ability to enforce the right to a remedy before a court or a tribunal is an imperative inclusion for remedies which are not freely provided for by the perpetrators;[336] however, this is a key distinction in the development between standard, court-ordered remedies and reparations.[337] A remedy is better understood as a positive obligation on States to access remediation via a procedural

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[330] Cassel, *supra* note 330, at 91.
[331] *Id.*
[332] *Article 41 of the European Convention on Human Rights*, COUNCIL OF EUROPE, https://www.coe.int/en/web/execution/article-41 (last visited Apr. 9, 2022).
[333] *Id.*
[334] *Id.*; Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective*, 23 HARVARD HUMAN RIGHTS JOURNAL 51, 51 ("The remedial practice of the European Court of Human Rights is hardly known for being innovate or progressive. The reparations the Court uses to remedy violations . . . generally consist of declaratory judgments that establish breaches of Convention rights coupled with, depending on the circumstances, damages.").
[335] *See* THE RIGHT TO REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 302, at 52 ("The right to a remedy guarantees, first of all, the right to vindicate one's rights before an independent and impartial body.").
[336] *See, e.g.*, G.A. Res 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, at art. IX ¶ 15 (Dec. 16, 2005).
[337] *See* THE RIGHT TO REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 302, at xiii, 15.

mechanism.[338] A reparation, on the other hand, is the "obligation to provide restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."[339] It requires the active participation of the perpetrator to admit, repair, and restore.[340] Furthermore, right to remedy, as a procedural right, can only be provided for by the State.[341] Reparation, as an obligation, may be provided for by public or private actors and may be provided to either direct or indirect victims.[342]

ii. *Hard Law*

Access to reparations has continued to develop under international law and is legally supported by a number of international hard law instruments, including, treaties, which address a variety of human rights issues and/or violations.[343] In particular, four international human rights treaties relevant to the institution of slavery, and corporate exploitation of slave labor, include relevant provisions allowing victims access to reparations. These are the Convention Against Torture ("CAT"), the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), the Convention on the Rights of the Child ("CRC"), and the Convention or the Protection of All Persons from Enforced Disappearance ("CPPED").[344] This subsection is not merely a legal background chapter, but instead will critically analyze each of these international hard law instruments in order to show that there is an obligation on States, including the European Union, to provide reparations. Similar to the foundational instruments and various regional human rights instruments, each convention addresses the issue of remedy or reparations in its own way, yet each is important to the development of reparations. Most importantly, each

[338] *Id.* at xiii, 19.
[339] *Id.*
[340] *Id.*
[341] *Id.* at 15.
[342] *Id.* at 32 ("The distinction between victims of human rights violations and other persons entitled to reparation is somewhat fluid. Indeed, the two categories overlap frequently, but not always; sometimes, persons who are not the direct victims of human rights violations can be entitled to reparation because they have nonetheless suffered harm; they are sometimes referred to as 'indirect victims.'").
[343] *See, e.g.*, G.A. Res 39/46., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Dec. 10, 1984).
[344] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344; G.A. Res 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, (Dec. 21, 1965); G.A. Res 44/25, Convention on the Rights of the Child, (Nov. 20, 1989); G.A. Res 47/133, International Convention for the Protection of All Persons from Enforced Disappearance, (Dec. 18, 1922).

of the above conventions is binding on the majority of European Union Member States,[345] and thus cannot be derogated from nor ignored in EU policy making.

First, the Convention Against Torture entered into force in 1987 with the explicit goal of eliminating torture and ensuring the inherent dignity of persons.[346] It has been widely ratified, with 173 State Parties to the Convention, including all Member States of the European Union.[347] Article 14 of CAT provides victims of torture a right to "obtain[] redress" and "an enforceable right to fair and adequate compensation.[348] Furthermore, this right extends to the "full rehabilitation" of the victim to the greatest extent possible.[349] CAT is unique in that it explicitly provides a right to reparation for indirect victims of the torture.[350] In particular, Article 14 states that: "In the event of the death of the victim as a result of an act of torture, his [dependents] shall be entitled to compensation."[351] Article 14 in particular focuses heavily on the need to be made whole again, or what it calls "full rehabilitation," in order to fully realize the right to reparation.[352]

The Convention on Elimination of All Forms of Racial Discrimination (CERD) entered into force in 1969 and has 182 State Parties to the convention.[353] All European Union Member States are included as State Parties to the Convention.[354] Article Six of the Convention establishes the right to reparation, stating that victims have the right to seek "effective protection and remedies . . . as well as the right to seek from such tribunals just and adequate reparation or satisfaction for

[345] *See Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://indicators.ohchr.org/ (last visited Mar. 15, 2022).
[346] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344.
[347] *See Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://indicators.ohchr.org/ (last visited Mar. 15, 2022).
[348] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 14; Shelton, *supra* note 292, at 99.
[349] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 14; Shelton, *supra* note 292, at 99. If one looks to the Convention on the Protection of All Persons from Enforced Disappearance (CPPED), it establishes a definition of reparations into international law, which includes rehabilitation as a key aspect, or a key mechanism, for implementing reparations. *See* Convention on the Protection of All Persons from Enforced Disappearance, *supra* note 345, arts. 24(4) & (5). Thus, CAT's specific inclusion for victims to seek full rehabilitation likely entails the implementation of reparations. *See id.*; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 14.
[350] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 14; Shelton, *supra* note 292, at 99.
[351] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 14; Shelton, *supra* note 292, at 99.
[352] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 14.
[353] *See Status of Ratification Interactive Dashboard*, *supra* note 347.
[354] *Id.*

any damage suffered as a result of such discrimination." [355] This article of CERD is important because it explicitly states that individuals have the right to *reparation*.[356] However, article six of CERD still frames this right as one which is *judicially* pursued ("through the competent national tribunals and other State institutions"),[357] rather than being automatically executing, as the right to reparations is under the ACHPR, for example.[358] Nevertheless, CERD is particularly important for the purposes of this paper, which focuses on the institution of slavery, as a case study for reparations, because CERD was passed with the aim of eliminating racial discrimination triggered by a history of colonization and enslavement.[359] CERD thus has a specific importance in keeping modern supply chains free from the features often associated with the subjugation and enslavement of workers.[360]

Next, The Convention on the Rights of the Child is of particular importance when addressing enslavement in corporate supply chains. It is estimated that there are 152 million children trapped in enslaved labor around the world.[361] This number far exceeds the estimated 25 million adults trapped in forced labor conditions.[362] The Parliament saw the particular necessity in addressing child labor when drafting the mandatory due diligence directive, dedicating several paragraphs in the preamble to addressing the extent of child labor practices around the globe and how European corporate supply chains bear responsibility.[363] The importance in protecting children from economic and work exploitation is further evidenced by the fact that the CRC is

[355] International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 345, at art. 6.
[356] *Id.*
[357] *Id.*
[358] *Id.*; *see* African Charter on Human and Peoples' Rights, *supra* note 322, at art. 21.
[359] *See* International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 345, at preamble ("Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith . . . [c]onvinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous . . . [r]eaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin . . . is capable of disturbing peace and security among peoples.").
[360] *See id.* CERD's preamble cites to the International Labor Organization's Convention concerning Discrimination in respect of Employment and Occupation, which notes in its preamble, the importance of maintaining "conditions of freedom and dignity, of economic security and equal opportunity" in work places. *Id.*; *see* Discrimination (Employment and Occupation) Convention, June 25, 1958, ILC Session No. 42, C111.
[361] *See EU Draft Directive*, *supra* note 5, at ¶ M.
[362] *Id.*
[363] *See e.g.*, *id.* at ¶ (1) ("The awareness of the responsibilities of businesses with regard to the adverse impact of their value chains on human rights became prominent in the 1990s, when new offshoring practices in clothing and footwear production drew attention to the poor [labor] conditions that may workers in global value chains, including *children*, faced.") (emphasis added).

the most widely ratified human rights treaty in the world.[364] The CRC has 196 State Parties to the convention.[365] There is only one UN Member Country which is not a State Party to the convention; the United States has signed the CRC but has failed to ratify it.[366]

Article 32 of the CRC establishes a State's obligation to keep children out of conditions of enslavement or other forms of economic exploitation.[367] It states that a child has the right "to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child' health or physical, mental, spiritual, moral or social development."[368] State Parties are further required under this Article to establish clear laws for at what age, how long, and under what conditions a child (i.e., someone under the age of 18) is allowed to engage in work.[369] Article 39 of the CRC calls on State Parties to establish a mechanism for child victims to seek redress and repair when their human rights have been violated. It states,

> "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts."[370]

The CRC's reparations provision is uniquely focused on "physical and psychological recovery" given the nature of the victim the CRC is aimed at protecting—children.[371] Consequently, while purely monetary reparations may still be valuable to survivors of child labor, provided that the individual is still young and in a stage of development, it may be more important to focus on their physical and psychological health and positive development.[372]

In its application of the CRC, the Committee on the Rights of the Child has further interpreted this provision to encompass comprehensive reparations. In review of Colombia's periodic report, the Committee suggested to Colombia that they "[s]ubstantially increase the resources for social integration, rehabilitation and reparations available to demobilized child

[364] *See Status of Ratification Interactive Dashboard*, *supra* note 247.
[365] *Id.*
[366] *Id.*
[367] Convention on the Rights of the Child, *supra* note 345, at art. 32(1).
[368] *Id.*
[369] *Id.* at art. 32(2).
[370] *Id.* at art. 39; *see also* Evans, *supra* note 315, at 55–56.
[371] *See* Convention on the Rights of the Child, *supra* note 345, at art. 39; Evans, *supra* note 315.
[372] *See* Convention on the Rights of the Child, *supra* note 345, at art. 39; Evans, *supra* note 315.

soldiers as well as for child victims of landmines."[373] As has been previously established, measures aimed at rehabilitation can rightly be considered a key reparations mechanism.[374] In addition, the CRC's Optional Protocols—specifically the Optional Protocol on the Sale of Children, which is of specific importance to this study—contain additional articles further emphasizing the need for rehabilitation, and as a result, reparation.[375] The Optional Protocol's Article Eight further emphasizes the "safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offenses."[376]

Lastly, the Convention on the Protection of All Persons from Enforced Disappearance (CPPED) contains the most comprehensive provision of reparations in international human rights treaties, even going so far as to include a definition of what the drafters considered to fall within the concept of reparations with regards to enforced disappeared peoples.[377] CPPED is a relatively recent convention, which entered into force in 2010 and has a relatively small number of State Parties (only 67).[378] Nevertheless, the CPEED remains an important convention when pursuing reparations for conditions of enslavement. Firstly, the CPPED may encompass cases of enslavement within its definition of "enforced disappearance," which include cases of "arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State."[379] Whether or not situations of enslavement in corporate supply chains falls within this

[373] Evans, *supra* note 315, at 56 n.39; Comm. on the Rights of the Child on Its Forty-Second Session, Concluding Observations: Colombia, U.N. Doc. CRC/C/COL/CO/3, at ¶ 81 (2006).
[374] Evans, *supra* note 315, at 13 ("*reparations* consist of five key elements, namely: restitution, compensation *rehabilitation*, satisfaction (disclosure of the truth and guarantees of non-repetition."). This definition extends from the Human Rights Committee's General Comment No. 31 (the HRC's General Comment which was interpreting the ICCPR's Article 2). Human Rights Committee General Comment No. 31, *supra* note 304; *see also* THE RIGHT TO REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at xiii. The HRC noted that "where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations." Human Rights Committee General Comment No. 31, *supra* note 304; *see also* THE RIGHT TO REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at xiii.
[375] Evans, *supra* note 315, at 55–56; *see also* G.A. Res. A/RES/54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, (May 25, 2000), at art. 8.
[376] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, *supra* note 375.
[377] *See* Evans, *supra* note 315, at 56–57.
[378] *See Status of Ratification Interactive Dashboard*, *supra* note 347. It should be noted that the majority of EU countries have both signed and ratified CPPED. *Id.* Several EU Member States have signed but not ratified the convention, including Poland, Romania, Finland, Sweden, Bulgaria, Luxembourg, and Ireland. *Id.* Only Hungary, Latvia, and Estonia have failed to take any action on CPPED. *Id.*
[379] International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 2.

definition may vary from situation to situation and would require proof that the enslavers were working with the support, or at least acquiescence of government authorities.[380] Therefore, this convention remains relevant, along with others, when considering State responsibility for enslavement.[381]

Second, the CPPED marked the first time reparations was defined in a binding, international human rights treaty.[382] The CPPED defines reparations to include "material and moral damages" in addition to "[r]estitution . . . [r]ehabilitation . . . [s]atisfaction, including restoration of dignity and reputation . . . [g]uarantees of non-repetition."[383] This definition is consistent with the definition promulgated by the HRC and consistently reaffirmed by human rights bodies and scholars alike.[384] Despite not furthering the definition of reparations beyond what was already understood within the human rights community, CPPED's inclusion of this definition is important to add clarity and properly hold State Parties responsible when they fail to empower their citizens to obtain reparations.[385] In addition, a consistent, internationally recognized definition may constitute *opinio juris* for customary international law purposes, in order to hold those States accountable who have failed to ratify the CPPED.[386]

Finally, beyond the CPPED's definition, reparation(s) is mentioned in three other places.[387] CPPED's preamble explicitly considers a victim's right to reparation, in conjunction and at the same level of importance as the individual's right "not to be subjected to enforced disappearance" and their right to justice.[388] Article 19 further emphasizes the right to reparations and how it operates with a victim's right to have their personal information kept secret.[389] Article

[380] *See id.*
[381] *See id.*
[382] Evans, *supra* note 315, at 56–57.
[383] International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(5).
[384] *See* Human Rights Committee General Comment No. 31, *supra* note 304; THE RIGHT TO REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at xiii; Evans, *supra* note 315, at 13.
[385] *See* International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(5); Human Rights Committee General Comment No. 31, *supra* note 304.
[386] *See Customary Law*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law (last visited Mar. 18, 2022). Note: in order to constitute customary international law, a principle or practice must have *opinio juris* (be accepted as law) by a sufficient number of States. *Id.*
[387] *See* International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at preamble, art. 19(1), art. 24(4).
[388] *See id.* at preamble.
[389] *Id.* at art. 19.

19 ensures that victims of enforced disappearance have their personal information, such as their medical records, is kept confidential when a search for the disappeared person is undertaken.[390] However, as this Article makes clear, the confidentiality of this information shall not interfere with the individual exercising "the right to obtain reparation."[391]

The actual right to reparation is established in Article 24—just before the establishment of the definition.[392] Article 24(4) provides that "victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."[393] It is of note that the CPPED explicitly separated *reparation* from *prompt, fair and adequate compensation*.[394] While it could be evidence that the drafters of CPPED considered them to be separate and distinct concepts, this is likely not the case.[395] Rather, it emphasizes the need for victims to receive compensation in addition to other forms of reparation including rehabilitation or guarantees.[396] Further, when looking to the definition that CPPED provides, it explicitly includes *restitution* and *material damages* to fall within their concept of reparations.[397] Therefore, the drafters were likely seeking to emphasize a victim of enforced disappearance's unequivocal right to be compensated and restored to their previous position, to the greatest extent possible.[398] The CPPED's massive contribution to the realization of reparations for victims of human rights violations is undeniable. By providing a binding reparations provision, in addition to a clear, binding definition, the CPPED advanced the idea of reparations on an international level.[399] Furthermore, despite CPPED's low level of ratification, it remains well-adopted among EU Member States, and thus carries a considerable amount of influence within the Union.[400]

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[390] *Id.*
[391] *Id.* at art. 19(1).
[392] *See id.* at art. 24.
[393] *Id.* at art. 24(4).
[394] *See id.*
[395] *See id.*
[396] *See id.* at art. 24(4), 24(5).
[397] *Id.* at art. 24(5); *see* THE RIGHT TO REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at xiii (defining restitution as "measures that restore victims to the original situation before they suffered gross violations of international human rights law.").
[398] International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(2); *see* THE RIGHT TO REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at xiii (defining restitution as "measures that restore victims to the original situation before they suffered gross violations of international human rights law.").
[399] *See* International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(4), 24(5).
[400] *Id.*; *see Status of Ratification Dashboard*, *supra* note 347.

Each of the above examples of international human rights treaties contain provisions relating to remedies and reparations. Furthermore, they show a clear development in the international human rights legal field from pure judicial remedies to a more complete concept of reparations which include key features such as rehabilitation and guarantees of non-repetition. Across these hard law measures it is clear that victims have an indisputable right to be restored to their previous position. As treaties of international human rights law, they are binding only to State Parties to the convention.[401] However, this does not eliminate the possibility that, in implementing and adhering to their obligations under the conventions, States create domestic mechanisms for victims to seek reparations against private actors.[402] In fact, failing to do so would likely constitute a State neglecting their responsibility to protect and ensure the enjoyment of human rights.[403]

When one views this in the context of European corporations and their respective responsibility, it is important to know that in each of the above conventions, apart from the CPPED, *all* European Union Member States have ratified the convention, and are, thus, legally bound to it.[404] Therefore, European Union Member States already see the need to provide legally binding mechanisms of reparation to victims of major atrocities. In drafting the final version of the mandatory due diligence law, the EU should see the inclusion of reparations as the natural progression of their commitment to provide victims, particularly victims of corporate enslavement, with the right to seek reparations from their enslavers (as they previously did under such conventions as the Convention on the Rights of the Child).[405] By including an explicit

[401] *See* The Right to Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide, *supra* note 299, at 15, 19 ("[T]here is no contention over the fact that victims of human rights violations and abuses have a right to an effective remedy and reparation. While this right is a recognized consequence of State responsibility for human rights violations, its modalities are often neglected."); Evans, *supra* note 314, at 1 ("There is emerging recognition that it is the responsibility of the state to provide justice for victims of armed conflict, and that sustainable justice requires three different components: judicial accountability, truth and reparations.").
[402] *See* The Right to Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide, *supra* note 300, at 19 ("International human rights law not only recognizes the human rights of every human being, but it also establishes a concurrent obligation on States to ensure, secure or guarantee the effective enjoyment of human rights to all within their jurisdiction . . . [t]he duty to ensure effective enjoyment of human rights requires that the State adopt all necessary legislative and other measures to give effect to the rights guarantees in international law.").
[403] *See id.* at 15, 19; *see also* Evans, *supra* note 315, at 1.
[404] *See Status of Ratification Dashboard*, *supra* note 347; *see also EU Draft Directive*, *supra* note 5, at ¶¶ O, 26, art. 14(4).
[405] *See* Evans, *supra* note 315, at 2 ("Considering the standing individuals have gained in international law, the need to translate consequences of serious violations, such as reparations, in [favor] of individual victims has become an important aspect of affirming the legitimacy and credibility of the international legal order and human rights standards.").

reparations mechanism in the final draft of the directive, the EU would be sending an clear message that the protection of victims, and the restoration of their livelihoods will be put above all, including corporate profit. While hard law mechanisms, such as those analyzed above provide a concrete legal basis for the EU's explicit adoption of corporate reparations in the mandatory due diligence law, they are not the only source of support for reparations.

iii. Soft Law

In addition to the hard law instruments examined above, soft law instruments, or non-binding international law recommendations, may also be helpful to the EU in considering the addition of reparations in the mandatory due diligence directive. Although soft law is, by definition, non-binding, it can be widely influential in policy making and is often the first step towards binding legal instruments.[406] In addition to often being a precursor to legislation, soft law instruments can be widely influential to courts and other tribunals.[407] Furthermore, when soft law and hard law instruments operate together in the same space, it often strengthens legal obligations and provides context and interpretation to hard law instruments.[408]

The leading international soft law instrument on reparations is the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation* (hereinafter "right to remedy and reparation guidelines").[409] Adopted by the UN General Assembly in 2006, the right to remedy and reparation guidelines recognizes that in order to effectively ensure victims' rights to remedy and reparation, the "international community" must keep "faith with the plight of victims, survivors and future human generations and reaffirm[] the international principles of accountability, justice and the rule of law."[410] Rather than create new international legal obligations, the right to remedy and reparation guidelines simply reaffirms pre-existing obligations and compiles such obligations into one singular document which emphasizes the mechanisms, methods, and form in which the obligation to make reparations may take.[411] It can be better understood as an

[406] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. IX; *see also* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 136; Kumaravadivel Guruparan & Jennifer Zerk, *Influence of Soft Law Grows in International Governance*, CHATHAM HOUSE (June 17, 2021), https://www.chathamhouse.org/2021/06/influence-soft-law-grows-international-governance.
[407] *See* Guruparan & Zerk, *supra* note 406.
[408] *See id.*
[409] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 377.
[410] *See id.* at preamble.
[411] *See* Kelly McCraken, *Commentary on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations*

instrument of guidance for governments and lawmakers to better understand their duty to victims.[412] The guidelines explicitly draw on a number of the hard law reparations and remedies instruments addressed above, including the UDHR, ICCPR, CERD, CRC, and CAT.[413] In addition, the guidelines also draw on a series of international humanitarian law treaties.[414]

One of the most important inclusions in the right to remedy and reparation guidelines is contained in the first two articles of the guidelines. Together, they establish that the obligation to provide for remedies and reparations extends from a State's "obligation to respect" and "ensure respect" for human rights which is well-established, as the guidelines note, in international treaties, customary international law, and national law of State Parties.[415] The "obligation to respect" and "ensure respect" requires that States take legislative, judicial, and administrative action, and "provide effective remedies to victims, including reparation."[416] The victim's right to remedy and reparation is further elaborated in Article Seven, stating that a victim's right includes "[e]qual and effective access to justice; [a]dequate, effective and prompt reparation for harm suffered; [and] [a]ccess to relevant information concerning violations and reparation mechanisms."[417] While the guidelines appear to lump together remedies and reparations into one static concept in Article Seven, the guidelines in fact separate the above concepts into three

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of International Humanitarian Law, 76 Revue Internationale de Droit Pénal 77, 77 (2005). An interesting note about the passing of the right to remedy and reparation guidelines, the United States was against the passing of the guidelines because it called for reparations for both international humanitarian law in addition to human rights law. Id. The United States was against the idea that one should have access to reparations for violations of international humanitarian law, as it is a source of hard law, as opposed to human rights law, which is soft law, as the United State argued. See id. This idea was rejected by scholars as both human rights and humanitarian law are sources of hard law and can apply in conjunction, in addition, they overlap with each other significantly. *See id.*

[412] *See id.*

[413] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at preamble (citing specifically article of UDHR, article 2 of ICCPR, article 6 of CERD, article 39 of CRC, and article 14 of CAT).

[414] *Id.* These include the Geneva Conventions (Article 91) and the Rome Statute creating the International Criminal Court (ICC) (Articles 68 and 75). *Id.*

[415] *Id.* at arts. 1, 2.

[416] *Id.* at art. 2. The responsibility to "ensure respect" is better known as the responsibility to protect in international human rights law. *See* AN INTRODUCTION ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 170. While the responsibility to respect demands that States refrain from violating individuals' human rights via their own actors, the responsibility to protect, puts an obligation on States to ensure that others (including corporations) do not violate their human rights, and when they do, the State takes the initiative to investigate, prosecute, and remedy the violation. *Id.* ("The UN Framework unequivocally [recognizes] that States have the *duty* under international human rights law to *protect* everyone within their territory and/or jurisdiction from human rights abuses committed by business enterprises. This duty means that States must have effective laws and regulations in place to prevent and address business-related human rights abuses and ensure access to effective remedy for those whose rights have been abused.").

[417] Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 7.

separate and distinct elements of the overall right. Specifically, Article Eight addresses access to justice, Article Nine addresses reparations, and, finally, Article 10 tackles access to information.[418]

The goal of reparations, under the guidelines, is to "promote justice by redressing gross violations of international human rights law."[419] This burden on States need not be unnecessarily burdensome; however, reparations should be provided in proportion to the severity of the harm suffered.[420] Similar to the hard law mechanisms analyzed in chapter IV(A)(ii), international soft law mechanisms, such as the right to remedy and reparation guidelines, impose the primary obligation to provide remedies on the State itself.[421] Article Nine of the guidelines explicitly states that the "*State* shall provide reparation to victims" for harm "which can be *attributed to the State*."[422] At first reading, this appears to only call for reparations whenever the wrongdoer is the State itself.[423] However, the guidelines go on to state that, when it is a "person, a legal person, or other entity" which is found to be the wrongdoer, that party has an obligation to provide reparations to victims.[424] This inclusion is a major step forward in the field of reparations for international human rights violations. All of the hard law mechanisms analyzed in this paper contain obligations only for State entities.[425] While a State's obligations may include ensuring a victim receives reparation from a private actor, it does not place the obligation on the private actor itself.[426] By including this private obligation in the guidelines, the UN General Assembly is making clear that although it cannot place binding obligation on private actors, private actors still have a duty to respect individuals' human rights, and when they fail to do so, they must repair the harm done.[427]

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[418] *Id.* at arts. 8–10.
[419] *Id.* at art. 9(15).
[420] *Id.*
[421] *See id.*; *see* accompanying text *supra* chapter IV, section A(ii).
[422] Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9(15) (emphasis added).
[423] *See id.*
[424] *Id.* This paragraph also states that if the State has already paid reparations to a victim whose perpetrator is a private actor, that private actor should still repay the State for such payment. *Id.* Thus ensuring that regardless of who pays the victim their reparation, the ultimate burden remains with the private wrongdoer to suffer the consequences of their actions. *See id.*
[425] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 2; *see* accompanying text *supra* chapter IV, section A(ii).
[426] *See, e.g.*, International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note at 345, at art. 24(4) ("Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.").
[427] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9(15).

The private party obligation is further reiterated in the following paragraph of Article Nine, which requires States to assist victims when their private party perpetrators are "unable or unwilling."[428] The extent of this assistance or, whether this paragraph requires States to fill the shoes of the private party wrongdoer and pay the entirety of the reparations, is unclear.[429] Article Nine, in continuation of the positive obligations placed on States in the access to justice in Article Eight, commands States to take positive steps to enable greater access to reparations.[430] These include "national programmes for reparation" as well as other forms of proactive assistance to victims seeking reparation, in addition to, as well as enforcing judgments in favor of the victims.[431]

The guidelines further expand upon reparations, utilizing the well-recognized definition established by the HRC, to explain the methods for implementation of the right to reparations.[432] That is that reparations include "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."[433] The guidelines break down each of these elements and further defines and explains in detail how each element could be implemented in national law.[434] Efforts in restitution, according to the guidelines, should "restore the victim to the original situation" prior to the human rights or humanitarian law violation that occurred.[435] The guidelines provide further examples of what may constitute restitution, including "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."[436] What is notable is that the guidelines include concepts outside of basic monetary compensation.[437] The guidelines understand that true restoration to one's original situation often requires more than just money.[438] Instead, the horrors that one has suffered from as a result of the human rights or humanitarian law violation cannot

[428] *Id.* at art. 9(16).
[429] *See id.*
[430] *See id.* at art. 9(16), 9(17).
[431] *Id.*
[432] *Id.* art. 9(18).
[433] *Id.*
[434] *See id.* art. 9(19)–(23).
[435] *Id.* art. 9(19).
[436] *Id.*
[437] *See id.*
[438] *See id.*

be calculated in terms of pecuniary loss.[439] Instead, pure economic damages likely fit better within the concept of *compensation*.[440]

The right to remedy and reparation guidelines define compensation as "any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law."[441] This includes pecuniary damages for losses where one may be able to calculate an exact loss, such as "[p]hysical or mental harm; [l]ost opportunities, including employment, education and social benefits; [m]aterial damages and loss of earnings, including loss of earning potential; [m]oral damage; [and] [c]osts required for legal or expert assistance, medicine and medical services and psychological and social services."[442] The separation of *compensation* and *restitution* within the guidelines further emphasizes the idea that they are distinct concepts, which, while related, restore the victim in different ways.[443] One could argue that compensation may fall within the notion of restitution, by helping to "restore the victim to their original situation."[444] Yet, some things may be untenable in terms of numbers. The loss of loved-ones, ancestral lands, a childhood, or one's freedom are just a few basic human necessities which cannot be monetized.[445] The understanding that not all can be repaired by money is crucial to protecting human rights and reducing recidivism of perpetrators.[446] The concept of *rehabilitation* within the guidelines is simple and concise, including common concepts like "medical and psychological care" and even "legal and social services."[447] Thus, the remedy and reparations guidelines have extended the notion of rehabilitation beyond physical rehabilitation, and into notions such as restoring an individual's legal or social standing.[448]

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[439] *See id.*
[440] *See* art. 9(20).
[441] *Id.*
[442] *Id.*
[443] *See id.* paras. 19–20.
[444] *See id.*
[445] *See id.*; *see also* Coates, *supra* note 23.
[446] *See* Coates, *supra* note 23 (arguing that reparations are the best way for all parties to move forward and repair the harm that has been done by drawing on historical examples such as West Germany's individual and State reparations payments following the Holocaust); *see also* H. Sofia Galván Puente, *Legislative Measures as Guarantees of Non-Repetition: A Reality in the Inter-American Court, and a Possible Solution for the European Court*, 49 REVISTA IIDH 69, 71.
[447] Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9(21).
[448] *See id.*

In the next two elements of reparations—satisfaction and guarantees of non-repetition, the guidelines take the time to establish a comprehensive, yet non-exhaustive list of what a perpetrator should do to satisfy the element.[449] Satisfaction may be met with "any or all of the following," including: (1) an end to the violations by way of "effective measures;" (2) ""full and public disclosure of the truth" leading to an end to the harm or threats of harm to the victim(s) or those associated with them; (3) in cases of enforced disappearance, searching for the disappeared, identifying kidnapped children and murdered individuals, and when possible, the recovery and reburial of the deceased in accordance with their cultural practices; (4) an "official declaration" from the perpetrators admitting wrong doing with an effort towards "restoring dignity, the reputation and the rights of the victim and of persons closely connected with the victim;"[450] (5) public apology and acknowledgement of wrongdoing; (6) holding individuals responsible, either via judicial or administrative means; (7) [c]ommemorations and tributes to the victims; and (8) the "[i]nclusion of an accurate account of the violations that occurred" and the "education material at all levels" from the responsible party.[451]

Guarantees of non-repetition is key to the prevention of harm.[452] The measures established by the guidelines aim to make prevention a key component; they include: (1) establishing "civilian control of military and security forces;" (2) requiring "all civilian and military proceedings abide by international standards of due process, fairness and impartiality;" (3) ensuring an independent judiciary; (4) protecting "legal, medical, and health care professions, the medial and other related professions, and human rights defenders;" (5) providing education on human rights and humanitarian law requirements on a "continued basis" to "all sectors of society" as well as "training for law enforcement . . . military and security forces;" (6) promote and ensure "the observance of codes of conduct and ethical norms" within civil society, law enforcement, and the military; (7) "[p]romoting mechanisms for preventing and monitoring social conflicts and their

[449] *Id.* at art. 9(22)–(23).
[450] *Id.* at art. 9(22). One can see here the connection to the previously addressed idea of rehabilitation. *See Id.* at art. 9(21). That rehabilitation includes more than mere rehabilitation in the sense of mental or physical health, but also of restoring an individual's previous physical, emotional, monetary, social, and employment standing in all cases, thus connecting to the previously addressed notion of restitution, that an individual should be restored to their "original situation." *See id.* at art. 9(19), 9(21). One can see that each of these elements of reparations are interlined and draw on one another. *See id.* at art. 9(19)–(22). In other words, it is not sufficient to merely have monetary damages if you are not going to address the need for a public apology, or cessation of the harm, and how can one be fully restored if they are still suffering physically or mentally from the harm done to them. *See id.*
[451] *Id.* at art. 9(22).
[452] *See id.* at art. 9(23); Puente, *supra* note 446, at 69–71.

resolution;" and, finally, (8) "[r]eviewing and reforming laws contributing to or allowing violations of international human rights" and humanitarian law.[453] These requirements for prevention and non-repetition emphasize the need for systematic change within institutions and the public sector which enable human rights violations to occur in the first place.[454] Also, one should note that these guarantees of non-repetition are required of State entities regardless of whether the perpetrator was a private party.[455] Thus, even in situations when the wrongdoer is a private individual or entity, it still a fundamental failure of the State to either ignore the harm being inflicted on their citizens or fail to have the mechanisms necessary to recognize and address the harm.[456]

The last several articles of the right to remedy and reparations guidelines contain a provision emphasizing the need for victims to have access to information.[457] This includes a requirement on States to make the right to remedy and reparations *known* to their citizens so they may be able to exercise said right efficiently.[458] Furthermore, the State must impart onto their citizens the knowledge of all possible forms of reparation that they may seek, including legal and medical, among others.[459] The right to know also includes a victim's ability to seek information and documentation on the "causes" of the harm they as well as the "causes and conditions" of the human rights and/or humanitarian law violation.[460] The Guidelines include a provision on non-discrimination, making clear that these rules should apply universally to all individuals without exception, and non-derogation.[461] The non-derogation article makes clear that the right to remedy and reparations is consistent with all other duties and obligations arising under international human rights or humanitarian law.[462] Thus, a State should have no issue applying the guidelines

[453] Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9(23).
[454] *Id.*
[455] *See id.* The article fails to include any requirement that the perpetrator is a public entity or individual. *See id.* In addition, it fails to mention at all private actors. *See id.* Suggesting that these requirements continue regardless of the nature of the perpetrator. *See id.*
[456] *See id.*
[457] *See id.* at art. 10(24).
[458] *Id.*
[459] *Id.* The article also includes "social, administrative and all other services to which victims may have a right of access" as aspects which must be made known to the public in order for them to properly exercise. *Id.*
[460] *Id.*
[461] *Id.* at art. 11–12(25)–(26).
[462] *Id.* at. art.12(26).

to their domestic law and remaining within the confines of their other international legal obligations.[463]

The right to remedy and reparations guidelines add a number of key considerations to the field of reparations. Among these is the guideline's inclusion of private party obligations, an addition which was surely made because the guidelines are soft law provisions and, thus, can only act as a source of recommendations.[464] The guidelines offer the simple realization that private actors, although they cannot be bound to international law treaties, nonetheless have reparations obligations.[465] In addition, the guidelines clearly separate the concepts of remedy and reparation and expand upon both the monetary and non-monetary methods of reparation; making clear that reparations cannot be complete without the full restoration of the victim in all regards, including mentally, physically, economically, and socially.[466] Finally, the guidelines further reiterate that the right to reparations cannot be exercised when an individual is unaware of it.[467] States must do their part in making the public aware of their rights and how they may go about exercising them.[468]

In addition to the right to remedy and reparations guidelines, the UN Guiding Principles on Business and Human Rights ("Guiding Principles") contain soft law provisions on accessing remedies in the event of a business's due diligence failings.[469] The Guiding Principles, addressed above,[470] focus heavily on due diligence recommendations and are cited as a source of inspiration for the EU mandatory due diligence draft directive.[471] The Guidelines were established to further the "Protect, Respect and Remedy Framework."[472] In addition to the due diligence provisions, the Guiding Principles make clear that there exists a corporate responsibility to respect, which applies at all times, and "to all internationally recognized human

[463] *See id.*; *see also id.* at art. 13(27) ("Rights of others.").
[464] *See id.* at art. 9; *see also* Guruparan & Zerk, *supra* note 406.
[465] *See supra* notes 411-16 and accompanying text.
[466] *See* Basic Principles and Guidelines on the Right to a Remedy, *supra* note 337, at art. 9.
[467] *Id.*; *see* McCraken, *supra* note 411.
[468] *See* Basic Principles and Guidelines on the Right to a Remedy, *supra* note 337, at art. 9; *see also* McCraken, *supra* note 411.
[469] *See* UN Guiding Principles on Business and Human Rights, *supra* note 252; AN INTRODUCTION ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 170.
[470] *See supra* notes 411-16 and accompanying text.
[471] *See* UN Guiding Principles on Business and Human Rights, *supra* note 252; *EU Draft Directive*, *supra* note 5, at ¶ (3).
[472] *See* UN Guiding Principles on Business and Human Rights, *supra* note 252; AN INTRODUCTION ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 170.

rights."[473] Furthermore, the guiding principles reinforce the principle that businesses "must prevent, mitigate and, where appropriate, remedy human rights abuses that they cause or contribute to."[474] The corporate remediation obligation is contained in the Guiding Principles' third due diligence element, which requires businesses to "have a process in place to enable remediation for any adverse human rights impact they cause or contribute to."[475] This obligation further requires businesses to establish a grievance mechanism to facilitate the remediation process.[476] The grievance mechanism should be "legitimate, accessible, predictable, equitable, transparent, and rights compatible."[477]

The Access to Remedy principle, set out in the third section of the Guiding Principles, states that, consistent with their responsibility to protect, "States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[478] The commentary further emphasizes the right to remedy's origins in the responsibility to protect and makes clear that, without proper access to remedies, the "duty to protect can be rendered weak or even meaningless."[479] Although the principle focuses on *remedies* as a judicially or administratively dispensed mechanism, the commentary elaborates on the concept and includes aspects which one may consider to be more in line with the concept of *reparations*.[480] This includes the need to "counteract or make good any human rights harms that have occurred."[481] This is in line with idea of restitution, examined above, which aims to make the victim whole again.[482] The guiding principles explicitly include the basic elements of reparations, including "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanction . . . as well as the prevention of harm through . . . guarantees of non-repetition."[483] Furthermore, the Guiding Principles' commentary concludes by noting that remedial

[473] *See* UN Guiding Principles on Business and Human Rights, *supra* note 252, at 13; AN INTRODUCTION ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 170, at 3.
[474] AN INTRODUCTION ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 170, at 3.
[475] *Id.*
[476] *Id.* at 4.
[477] *Id.*
[478] UN Guiding Principles on Business and Human Rights, *supra* note 252, at 27.
[479] *Id.*
[480] *Id.*; *see* Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 337, at art. 9.
[481] UN Guiding Principles on Business and Human Rights, *supra* note 252, at 27.
[482] *See supra* notes 424–25 and accompanying text; Basic Principles and Guidelines on Right to Remedy and Reparation, at art. 9(19).
[483] UN Guiding Principles on Business and Human Rights, *supra* note 252, at 27.

mechanisms may be "supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms."[484] Thus, the Guiding Principles' reiterate that while judicial mechanisms of remedy may always be available, collaborative mechanisms more akin to reparations may be favorable.[485]

Although the Guiding Principles commentary positions the right to remedy to be interpreted in line with the concept of reparations, there are several shortcomings which remain. First, despite some signs that the Guiding Principles may support the provision of reparations, they are still heavily focused on accessing the right via judicial, administrative, or other State institutional mechanisms.[486] Furthermore, the Guiding Principles fail to place any responsibility on private actors to provide remedies or reparations, unlike how the right to remedy and reparations guidelines does.[487] Instead, the Guiding Principles discuss only the obligation that the State has to ensure remedial mechanisms are available.[488] This is somewhat surprising given that the Guiding Principles, like their sister soft law right to remedy and reparations guidelines, are non-binding.[489] Therefore, the Guiding Principles could have taken the extra step of making clear that private actors also have a responsibility to provide reparations when they are the wrongdoer and further that, when a private actor fails to, the obligation will revert to the State to sanction the private entity.[490] Finally, as previously mentioned, the Guiding Principles, as a source of soft law, are thus far failing to change the behavior of businesses.[491] This is seen most clearly in the global failure to adopt voluntary due diligence policies.[492] When only 37% of EU businesses conduct voluntary due diligence of their supply chain, the majority are failing to identify, and thus rectify, those human rights abuses which are occurring in their supply chains.[493]

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[484] *Id.* at 28.
[485] *See id.*
[486] *Id.* at 27. The principle explicitly states that States must provide the right "through judicial, administrative, legislative, or other appropriate means." *Id.*
[487] *Id.* at 27–28; *see* Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 337, at art. 9(19); *see also supra notes* 413–14. and accompanying text.
[488] *See* UN Guiding Principles on Business and Human Rights, *supra* note 252, at 27–28.
[489] *See id.*; Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337; *see also* Guruparan & Zerk, *supra* note 406.
[490] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9; *see also* Guruparan & Zerk, *supra* note 406.
[491] *See supra* notes 180–83 and accompanying text.
[492] *Id.*; *see also* ANTI-SLAVERY INTERNATIONAL, *supra* note 20; *EU Draft Directive*, *supra* note 5, at ¶ X.
[493] *See supra* notes 180–83 and accompanying text; *see also* Anti-Slavery International, *supra* note 20; *EU Draft Directive*, *supra* note 5, at ¶ X..

V. Why Should Reparations Be Included in the EU Mandatory Due Diligence Directive and what might they look like

A. Why?

There is undoubtably international legal support for the payment of reparations for gross human rights violations.[494] However, the interpretation of the right to reparations and how it works in conjunction with the right to remedy is mixed across the legal instruments.[495] These varying interpretations include international conventions, such as CAT, which provides an economic right to "fair and adequate compensation" as well as a right for victims to seek "full rehabilitation."[496] Another example is CERD, which explicitly provides a right to reparations but qualifies this as one that is judicially sought.[497] Or, lastly, the CPPED, which is the first binding treaty to provide a clear definition of reparations, including concepts like restitution, rehabilitation, and guarantees of non-repetition.[498] Despite the varying interpretations, all international legal instruments—both hard and soft—contemplate that victims have the right to be restored to the position they were in prior to the human rights violation.[499] This includes an obligation on States to, at a minimum, provide mechanisms for the realization of reparations by any means possible, whether that be judicial, administrative, or collaborative means of working with the perpetrator.[500]

Despite the wide-ranging remedial and reparations obligations international law has established, they nevertheless fall short. Current legal reparations obligations fall on States and State action alone.[501] Whether the perpetrator is the State itself or a private actor, it is only the

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[494] *See* discussion *supra* Chapter IV.
[495] *Id*.
[496] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 2; *see also* discussion *supra* Chapter IV, Section A(ii).
[497] *See* International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 345, at art. 6*; see also* discussion *supra* Chapter IV, Section A(ii).
[498] *See* International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24; *see also* discussion *supra* Chapter IV, Section A(ii); Evans, *supra* note 315.
[499] *See, e.g.*, Human Rights Committee General Comment No. 31, *supra* note 304; *see also* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9.
[500] *See, e.g.*, Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 337, at art. 9(15) (showing that States have a twofold responsibility to provide reparations when harm can be attributed to the State and ensure such payment, or step in, when harm is caused by a private party).
[501] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 2; *see also* Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 337, at art. 9(15). By State Action this could be both States committing the human rights abuses themselves, and thus have an obligation as the perpetrator to repair the harm done. *See* Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 337, at art. 9(15). Or, alternatively, the State failing to provide the means and mechanisms for victims to seek reparations against private actors. Basic Principles and Guidelines on the Right to

State's action, or inaction, which is regulated by international law.[502] This is due to the very nature of international legal obligations, which only have the power to regulate States, leaving corporations to remain free to abuse human rights extraterritorially without any responsibility outside of individual domestic law to repair the harm done.[503] Although the right to remedy and reparation guidelines explicitly place an obligation on private actors, this instrument is non-binding and thus could push a bit further in its language.[504] This is similar to current due diligence obligations, whose international sources are predominately soft-law instruments only and thus constitute a source of recommendations only.[505] Although some individual EU Member States, such as France, Germany, and the Netherlands, are moving towards greater corporate responsibility, the lack of a singular Union-wide approach to reparations will fuel legal uncertainty for EU corporations and limit free and fair competition across the single market.[506] The EU should therefore take the lead on establishing a uniform system of reparations in connection with the mandatory due diligence directive. If the EU has ambitions to repair the legal gap in supply chain due diligence, so too should it repair the legal reparations gap.

At a time when every global fashion brand's product, from high-end to high street, likely benefit from enslaved labor[507] and only one in three EU corporations currently engage in due diligence checks,[508] there must be a way to for corporations to repair gross violations of human rights. It is clear that only a small portion of EU corporations currently possess the willingness to engage in voluntary due diligence, and for those few who do, very rarely do they go beyond their

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Remedy and Reparation, *supra* note 337, at art. 9(15). In any case, whether the perpetrator is the State itself or a private actor, it is the State's action alone which is regulated by international law. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 2; *see also* Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 337, at art. 9(15).

[502] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 344, at art. 2; *see also* Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 337, at art. 9(15); McCraken, *supra* note 411; Guruparan & Zerk, *supra* note 406.

[503] *See Understanding International Law Fact Sheet #1*, UNITED NATIONS, chrome-extension://cefhlgghdlbobdpihfdadojifnpghbji/https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf (last viewed Apr. 10, 2022). By the very nature of international law, that it only possesses the ability to be legally binding on State Parties (which has led to the result of things like the UN Principles on Business and Human Right, which only offer recommendations to businesses to carry out due diligence), it must be up to States to pass legally binding due diligence and reparations obligations for corporations. *See id.*

[504] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art.9; *see also* discussion *supra* Chapter IV, Section A(iii).

[505] *See* discussion *supra* Chapter I; *see also Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3.

[506] *See Draft Directive*, *supra* note 5, at ¶ (8).

[507] Kelly, *supra* note 98; Steiner-Dicks, *supra* note 79.

[508] ANTI-SLAVERY INTERNATIONAL, *supra* note 20, at 2.

first tier of suppliers, where enslaved labor is unlikely to be present.[509] Beyond this, even fewer companies are willing to provide a remedy when such due diligence checks uncover the use of enslaved labor.[510] Currently, three-quarters of EU companies "fail to provide adequate remedy to victims of forced labor."[511] It is abundantly clear that companies cannot be relied upon to undertake voluntary action which may affect their bottom line or damage their public persona.[512] The responsibility thus falls on governments.[513]

Furthermore, by requiring corporations operating within the EU to provide reparations for harms caused, the EU would be following the larger trend towards piercing the corporate veil and pursing greater corporate liability.[514] The idea of piercing the corporate veil demands that corporations, parent companies, shareholders, and directors be held properly responsible for their subsidiary operations which take place beyond the EU's borders.[515] In addition, as some international legal instruments, such as the right to remedy and reparations guidelines, have shown, it may be within EU Member States' international legal obligations, particularly under their responsibility to protect,[516] to facilitate individuals' access to corporate reparations.

Finally, the EU should include an explicit reparations provision as part of their moral responsibility to atone for their contribution to the institution of slavery and the modern-day form which persists to this day.[517] Many EU Member States are either directly responsible for, or benefitted from, the institution of slavery which existed at the height of the transatlantic slave trade.[518] Further, the EU and its Member States continue to derive benefits through the multitude of EU-based corporations with extraterritorial operations which often include the use of enslaved labor.[519] Even though European governments have outlawed slavery and supply chains have

[509] *Id.*
[510] *Id.*
[511] *Id.* at 9.
[512] *See id.*
[513] *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9 (placing the ultimate burden to repair on the States, when private actors fail to).
[514] *See Piercing the Corporate Veil*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/piercing_the_corporate_veil (last viewed Apr. 10, 2022).
[515] *See id.*
[516] *See supra* notes 402, 411–16 and accompanying text. Or as the right to remedy and reparations guidelines call it, the duty to respect and "ensure respect." *Id.*; Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9.
[517] *See* Coates, *supra* note 23 (arguing that there is a moral debt, or moral responsibility, demanding the payment of reparations for enslavement).
[518] *See* discussion *supra* note Chapter II, Section A; *see also* BRAHM & ROSENHAFT, *supra* note 41; *Timeline of the Atlantic Slave Trade*, *supra* note 16.
[519] *See* discussion *supra* Chapter II, Section B; *see also* Bennhold, *supra* note 51.

transformed, the use of enslaved labor has not gone away.[520] Rather it has become hidden deep within complicated supply chains, masked by the corporate veil.[521] One cannot declare the institution of slavery to be a thing of the past simply because it has changed its form. Companies have continued to profit off enslaved labor because historic, state-sanctioned slavery was never properly repaired.[522] It was outlawed of course; however, victims were never given the chance to be made whole again, and perpetrators were never held to account.[523] It is this that has signaled to modern-day enslavers that they have nothing to lose by exploiting and enslaving their workers.[524] "It is as though we have run up a credit-card bill and, having pledged to charge no more, remain befuddled that the balance does not disappear. The effects of that balance, interest accruing daily are all around us."[525]

Enslaved labor has continued to survive in the modern-day because companies are encouraged to pursue profit above human rights and race one another to the bottom by finding countries, in particular developing countries, where the use of exploited labor may be further from its end product.[526] By demanding that companies engage in supply chain due diligence, companies and Member State governments may be better able to detect when a corporation is utilizing enslaved labor,[527] but what use is the identification if there is no source of repair? It is when these two ends are pursued together—due diligence plus reparations—that companies will no longer be able to see the profit that is to be gained in human exploitation. If the EU can require reparations be paid by European corporations for victims found anywhere, there will no longer be places where companies can hide the dark side of their business away from the EU's eyes. As Ta-Nehisi Coates declared in *The Case for Reparations*, to overcome the indebtedness

[520] *See* discussion *supra* Chapter II, Section B; *see also Timeline of the Atlantic Slave Trade*, *supra* note 16; Bennhold, *supra* note 51.
[521] *See* Bennhold, *supra* note 51; *Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3.
[522] *See Timeline of the Atlantic Slave Trade*, *supra* note 16; Coates, *supra* note 23; *Why We Need EU Legislation to Tackle Slavery in Supply Chains*, *supra* note 75.
[523] *See Timeline of the Atlantic Slave Trade*, *supra* note 16; Coates, *supra* note 23; *Why We Need EU Legislation to Tackle Slavery in Supply Chains*, *supra* note 75.
[524] *See* Coates, *supra* note 23; Steiner-Dicks, *supra* note 79.
[525] Coates, *supra* note 23. Discussing how one cannot merely blame past actors for the horrors of slavery and refuse reparations as a result, he said, "[o]ne cannot escape the question by hand-waving at the past, disavowing the acts of one's ancestors, nor by citing a recent date of ancestral immigration. The last slaveholder has been dead for a very long time. The last soldier to endure Valley Forge has been dead much longer. To proudly claim the veteran and disown the slaveholder is patriotism à la carte. A nation outlives its generations." *Id.*
[526] *See Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3; Steiner-Dicks, *supra* note 79.
[527] *See Why We Need EU Legislation to Tackle Slavery in Supply Chains*, *supra* note 75.

of enslavers, their enablers, and their decedents, one must imagine something anew. In Coates's argument, this was a new country; in this context, it is a new system of corporate accountability.[528] "Reparations—by which I mean the full acceptance of our collective biography and its consequences—is the price we must pay to see ourselves squarely."[529]

B. What Could Reparations Look Like in the EU Mandatory Due Diligence Directive

The current mandatory due diligence draft directive does contain a provision on remedies.[530] Article 10 of the draft directive is titled extra-judicial remedies and considers that such remedies should be made "in consultation with affected stakeholders" and may encompass such things as "reinstatement, public apologies, restitution, rehabilitation, or contribution to an investigation."[531] Without a doubt, this is a great starting place. It explicitly calls for corporations to work with "affected stakeholders," surely referring to victims themselves as well as being a concept which will exist extra-judicially— i.e., outside of the judicial or court system.[532] In addition, it includes important aspects which are integral to the concept of reparations, including a public apology and rehabilitation.[533] However, it likely falls short of the ultimate goal of establishing a mechanism for reparations. First, the draft directive neglects to explicitly call for *reparations* themselves, instead choosing solely to refer to a remedy, a concept which is in conflict with the extra-judicial nature of this Article.[534] In addition, although it provides a non-exhaustive list of what may be considered a remedy, it fails to include some provisions which are essential to the international legal community's definition of reparation, including restoration of dignity and reputation and the need for a victim to be restored to their original position.[535] Finally, the draft directive's remedial provision fails to conceive of times when the person who is receiving the reparation (or remedy in the draft directive's case) is not the victim themselves.[536]

Adding to the draft directive article by extending it to include the provision of reparations could take many forms. The definition of reparations which was first promulgated by the HRC

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[528] Coates, *supra* note 23.
[529] *Id.*
[530] *See EU Draft Directive*, *supra* note 5, at art. 10.
[531] *Id.* at art. 10(3).
[532] *Id.*
[533] *Id.* at art. 10.
[534] *See* discussion *supra* Chapter IV, Section A(i).
[535] *See* Human Rights Committee General Comment No. 31, *supra* note 304; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(5).
[536] *See* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 32–34.

and adopted in the CPPED, may be a good place for an EU provision to begin, because it is widely adopted on the international level.[537] Adopting this definition would require the draft directive to expand the current Article 10 provision to include "material and moral damages," "satisfaction, including restoration of dignity and reputation," and "guarantees of non-repetition, in addition to those aspects already contemplated in Article 10.[538] EU policy makers may also consider including reparations elements which are specific to extremely vulnerable victims, such as formerly enslaved children. This could mean including "resources for social integration" and promoting "physical and psychological recovery."[539] This inclusion would be in line with the draft directive's preamble which explicitly mentions child labor as a significant problem which mandatory due diligence seeks to address.[540] In addition, EU policy makers should look to the right to remedy and reparation guidelines's definition of compensation in order to expand upon what non-judicial monetary compensation victims may be entitled to.[541] These could include monetary losses associated with employment, education, or social benefits, costs associated with physical or mental care, or legal costs.[542] These additions would place the draft due diligence directive in line with international hard law human rights instruments; however, because the EU is seeking to establish legal obligations on corporations, they must take it one step further and place this obligation on private actors themselves, something even international hard law instruments are unable to do.[543]

Consistent with the right to remedy and reparation guidelines, the EU draft directive's reparations provision should reiterate that corporations have an undeniable legal obligation to *respect* human rights, and when a "legal person or other entity" causes harm, they must provide reparations to their victims.[544] Furthermore, the draft directive should make clear that it is not only the direct victim who may be entitled reparations payments, but also their direct decedents,

[537] *See* Human Rights Committee General Comment No. 31, *supra* note 304; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(5).
[538] Human Rights Committee General Comment No. 31, *supra* note 304; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(5).
[539] *See* Convention on the Rights of the Child, *supra* note 345; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, *supra* note 375.
[540] *See EU Draft Directive*, *supra* note 5, at ¶ M.
[541] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9.
[542] *See id.*
[543] *See id.*; *Understanding International Law Fact Sheet #1*, *supra* note 504.
[544] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337, at art. 9; *see also Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3.

in cases when direct victims are no longer living.[545] Most importantly, the draft directive should seek to clearly state and define reparations.[546] This will ensure that Member States, corporations, and victims are made well aware of what is required of them or what they are entitled to.[547]

Despite the multitude of historical reparations examples, and the understanding that wrongdoers should repair the harm they have caused, the provision of reparations continues to be a misunderstood and contentious topic.[548] If EU policy makers failed to explicitly include reparations in the draft mandatory due diligence directive, there may still be ways in which corporate reparations may be pursued. The first would be on the Member State level. As a directive, it will ultimately be the responsibility of the EU Member States to implement the provisions into their domestic legal systems.[549] EU directives are always the *minimum* action that Member States must take, but individual Member States may decide to go above and beyond those provisions laid down in directives.[550] Therefore, individual Member States could decide on their own to extend the elements established in Article 10 of the draft directive and require specific reparations payments in their own national implementing legislation.[551] However, this option is unsatisfactory for two primary reasons. First, it is unlikely that a significant number of Member States would decide to unilaterally adopt reparations provisions in their national legislation.[552] Instead, they may fear that should they go beyond their neighboring Member States and require more from private wrongdoers, corporations may pack up and move their operations to "friendlier" Member States.[553] Second, leaving the inclusion of reparations up to the individual Member States would render European due diligence legislation in a no better position than it currently is in.[554] Instead, it would be a mix between those that have adopted

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[545] *See* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 32–34.
[546] *See* Human Rights Committee General Comment No. 31, *supra* note 304; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(5).
[547] *See* Human Rights Committee General Comment No. 31, *supra* note 304; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 345, at art. 24(5).
[548] *See* Coates, *supra* note 23.
[549] *See Types of Legislation*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en (last visited Apr. 10, 2022).
[550] *See id.*
[551] *See id.*
[552] *See id.*; *see also Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3; *Why We Need EU Legislation to Tackle Slavery in Supply Chains*, *supra* note 75.
[553] *See Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3 (discussing the so called "race to the bottom").
[554] *See id.*; *see also* discussion *supra* Chapter I.

reparations and those that have not, fueling legal uncertainty among corporations and victims and harming free movement and competition principles.[555]

The other alternative to an explicit reparations provision is to leave Article 10 extra-judicial remedies as is, and, similar to the ICCPR and the American Convention on Human Rights, reparations could be interpreted into the directive by courts and implementing institutions.[556] While a European-wide reparations interpretation may be a comparably better alternative to individual Member State reparations provisions, because it would be uniform in application, it still may fuel confusion, particularly among victims who may not have ability to access and understand European Court of Justice case law.[557] The rights to remedy and reparations should first and foremost put victim access as a primary importance.[558] In addition, there is no reason to believe that courts will or should interpret something into a directive which was not explicitly included by the drafters, particularly in circumstances when the drafters considered the inclusion but ultimately failed to come to a consensus.[559] Instead, EU policy makers should take it upon themselves to explicitly include reparations in the draft due diligence directive. Because the Commission has not yet transformed Parliament's draft directive into a legislative proposal, the time is ripe to unambiguously call for the inclusion of corporate reparations.[560]

Even the most critical historical reparations payments were met with criticism. When the West German government began paying reparations for the Holocaust, to do so was extremely unpopular.[561] Both Germans and Holocaust survivors initially contested the payment of reparations, with some Israeli citizens saying that it would be akin to "mortgaging the memory of their dead."[562] But with reparations comes the chance to begin anew. "Won't reparations divide us? Not any more than we are already divided."[563] West Germany's reparations to Israel transformed the Israeli economy while individual reparations payments allowed Holocaust

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[555] *See Towards a Mandatory EU System of Due Diligence for Supply Chains*, *supra* note 3, at 2; *EU Draft Directive*, *supra* note 5, at ¶ (17).
[556] *See* Human Rights Committee General Comment No. 31, *supra* note 304; Cassel, *supra* note 330.
[557] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 337.
[558] *See id.*; *see also* THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE, *supra* note 300, at 32–34.
[559] *See* EIRIK BJØRGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 9–14 (2014).
[560] *See Legislative Train Schedule*, *supra* note 160.
[561] Coates, *supra* note 23.
[562] *Id*.
[563] *Id*. "What I'm talking about is more than recompense for past injustices—more than a handout, a payoff, hush money, or a reluctant bribe. What I am taking about is a national reckoning that would lead to spiritual renewal." *Id.*

victims to seek treatment for their trauma and reestablish themselves monetarily.[564] Reparations will surely not result in the immediate forgetting nor forgiving of the harm done; however, it does provide a way to move beyond the past, and the harm that came with it, in a holistic, inclusive, and understanding way.[565] Most importantly, reparations provide a clear end date from which future generations can learn from the horrors that came before them, so that future generations can ensure that these atrocities never take place again.[566] After all, "[r]eparations could not make up for the murder perpetrated by the Nazis. But they did launch Germany's reckoning with itself, and perhaps provided a road map for how a great civilization might make itself worthy of the name."[567]

VI. Conclusion

In 2021, Parliament sent to the Commission their draft directive which seeks to tackle a supply chain loophole that has enabled EU Businesses to evade responsibility for the human rights, environmental, and good governance violations which occur further down their supply chains. If passed, this directive would mark a significant step forward in the field of supply chain due diligence. It would be the first time that corporations are *legally* required to check their supply chains for violations. Currently, global corporations are not legally bound to check their supply chains for such violations; instead, such instruments as the UN Guidelines on Business and Human Rights simply set recommendations. Several countries have begun to take the lead in passing national legislation aimed at tackling this loophole; however, by and large, the uptake has been minimal. Should the EU pass this directive into law, all corporations operating within the internal market, including those that are headquartered abroad, will be required to conduct annual checks and publish their findings for the public. In addition, should corporations fail to abide by the due diligence directive, the EU and Member State authorities will be empowered to impose fines and penalties. Nevertheless, there are several areas on which the draft directive may improve upon before it becomes law; the most important of which is the failure to establish a clear requirement for reparations.

[564] *Id.*
[565] *Id.*
[566] *Id.*
[567] *Id.*

Reparations have historically been a mechanism for redressing extreme human rights violations. They have been paid by individuals, States, and corporations alike when they are involved in the severe deprivation of an individual or group of individuals' human rights. Some of the most significant reparations payments occurred following the end of WWII when the German government made reparations payments to the State of Israel and individual Holocaust survivors. In addition, several well-known German corporations came together to give monetary reparations payments to individuals who survived being enslaved and held in concentration camps specifically for German companies. Reparations have also been paid by the US government following the end of Japanese internment camps during WWII, by South Africa following the end of the Apartheid, and by individual enslavers, predominantly in the Quaker church. These historical examples of reparations should be considered significant and distinct from other forms of remedy. For example, court ordered remedies or damages are distinct from reparations payments in that they very rarely involve the perpetrator willingly coming to the table and offering an apology in addition to monetary payments or community building initiatives, which are more akin to the idea of reparations.

While Article 10 of the EU's draft directive does provide a mechanism for non-judicial remedies, which includes many important aspects which extend the Article beyond the notion of pure economic damages, such as public apologies and rehabilitation, it cannot yet be considered a reparations mechanism. First and foremost, it fails to explicitly call for reparations, instead opting to identify the Article as a remedy provision. It also fails to encompass aspects intrinsic to the notion of reparations, including guarantees of non-repetition. Second, by only requiring a mechanism for remedy, businesses may not be held responsible for past human rights violations which occurred up until the time the directive enters into force. In essence, all corporate human rights atrocities will be forgiven so long as the business ceases such activity by the time the directive becomes binding on them. In addition, by only requiring companies to conduct due diligence checks on those businesses directly in their supply chain, there may be a significant number of violations which go unrepaired because they are considered *indirectly* related to the company.

Should EU policy makers amend the draft directive, policy makers would find that there is significant international legal support for reparations. The legal development of reparations on the international level can be seen in both hard and soft law mechanisms. Beginning with the

UDHR and the ICCPR, reparations were not explicitly included, but rather were interpreted into the remedial articles by implementing institutions. Reparations eventually came to be explicitly included in international conventions with the CRC and CERD, although some failures remained due to the requirement that such "reparations" be judicially sought. The CPPED marked the first time that reparations were given a clear definition in an internationally binding convention, and although it has thus far had limited State ratification, it remains widely ratified within the EU. In addition, soft law mechanisms such as the right to remedy and reparation guidelines and the guidelines on business and human rights, have been helpful in identifying how the State obligation to provide mechanisms for remedy or repair operate in conjunction with private wrongdoers. In particular, the right to remedy and reparation guidelines make clear that private party perpetrators also have an obligation to provide reparations to their victims.

The inclusion of reparations is critical when one puts it in the context of historical and modern corporate enslavement. Historically, EU corporations played a major part in upholding the transatlantic slave trade and contributing to enslavement on the continent of Europe, particularly during WWII. Today, it is estimated that 25 to 30 million individuals are enslaved around the world, 16 million of which are held in forced labor conditions by private companies. While a shockingly large number of individuals are enslaved *within* Europe (1.1. million), the vast majority are held in enslavement abroad. This is due, in large part, to the current operation of supply chains. In our significantly globalized world, supply chains have grown increasingly complicated and convoluted. By removing production further away from the end-product or service, corporations have been able to insulate themselves from human rights responsibility. Current examples of modern-day corporate enslavement include Zara cotton goods grown and picked by enslaved Uyghurs, French wine produced by enslaved Bulgarians, and major Finnish grocery chains enslaving individuals on tomato farms in Italy. The current abuse of enslaved labor has been able to permeate supply chains of European corporations, in part, because of a failure to address and repair historic corporate enslavement. While the mandatory due diligence directive will undoubtably be a significant step forward in corporate accountability, it cannot successfully deter and sanction corporate atrocities without first demanding a corporate "reckoning"—something which cannot take place without reparations.

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