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HUMAN TRAFFICKING, THE RULE OF LAW, AND CORPORATE SOCIAL RESPONSIBILITY

*Anna Williams Shavers**

INTRODUCTION

The “Rule of Law” is defined in various ways, depending upon the goal sought by the user of the phrase. One scholar has described these various definitions as belonging in two categories: “(1) those that emphasize the ends that the rule of law is intended to serve within society . . . and (2) those that [focus on the elements] believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies).”¹ The scholar further identifies for the first category, the five desirable ends: “(1) a government bound by law, (2) equality before the law, (3) [the establishment of] law and order, (4) predictable and efficient [justice], and (5) human rights protections.”² It is this fifth goal or desirable end that is endangered by human trafficking, i.e. trafficking in persons. Below is a definition of the rule of law that is helpful in this context:

Rule of law: equality before the law; laws that are applied consistently (socially, economically, and politically); laws that spell out consequences for illegal activity; laws that serve a conception of order and regulation; laws that serve and inform institutions of society that preserve order and “fairness.”³

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¹ Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, 3 (Carnegie Endowment for Int’l Peace, Paper No. 52005), available at <http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>.

² *Id.*

³ CARR CTR. FOR HUMAN RIGHTS POLICY, IMPLEMENTING THE RULE OF LAW AND HUMAN RIGHTS IN STABILITY OPERATIONS 2 (2006).

The United Nations has recognized that trafficking in persons is one of the most egregious violations of human rights. The existence of trafficking in persons, or modern slavery, indicates that the rule of law is absent or at least threatened.⁴ “The rule of law needs to be strengthened in the fight against human trafficking in order to better protect victims' human rights and ensure them access to justice.”⁵ Thus, the existence of human trafficking requires an international concerted effort of many actors to confront this problem. This includes the business community. There is increasing acceptance of the idea that responsible business conduct in a global context includes a proactive role in preventing human trafficking.

Trafficking exists where social and economic conditions are facilitated by practices that discriminate against women and other vulnerable people, ignore human suffering, and diminish human dignity. Vulnerable persons are denied basic rights to freedom and self-determination. Traffickers are profiting from the sweat and drudgery of others forced into or forced to take substandard wages in mines, farm fields, and factories, performing sex work in hotels, strip clubs, brothels, mansions, and bars. The complex structure of these modern day slavery practices include actions by those that benefit directly from the exploitation of the vulnerable, but we have also come to recognize that those that benefit indirectly may also be a part of the problem. In this article, I address particularly those businesses that benefit indirectly from exploitation, not from the perspective of a business ethicist or a corporate lawyer or scholar, but rather as a proponent of human rights.

⁴ See, e.g., 22 U.S.C. § 7101(b)(8) (2006) (noting that Congress had found that the Trafficking Victims Protection Act was necessary because “[t]rafficking in persons is often aided by official corruption . . . thereby threatening the rule of law”). See generally U.N. OFFICE ON DRUGS & CRIME, AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT, AND ACTION 10 (2008), available at http://www.ungift.org/docs/ungift/pdf/knowledge/background_paper.pdf (summarizing Judith Dixon, *The Impact of Trafficking in Persons*, in U.N. OFFICE ON DRUGS & CRIME, AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT, AND ACTION 81 (2008), and analyzing the global impact of human trafficking, noting that trafficking violates the rule of law).

⁵ Maria Grazia Giammarinaro, OSCE Special Representative and Co-Ordinator for Combating Trafficking in Human Beings, Keynote Address at the Organization for Security and Co-operation in Europe Meeting: Rule of Law Framework for Combating Trafficking in Human Beings (May 14, 2012).

As legislation and lawsuits aimed at eliminating trafficking in persons increase corporations must decide whether they would rather respond to calls for corporate liability or corporate responsibility. The use of the term “corporate” is for convenience, but is meant to include all business enterprises, including small and medium-sized enterprises (SMEs). Part I includes a discussion of the pervasiveness of human trafficking and its recognition internationally and in the United States. Part II examines the risks that businesses must confront when they may indirectly benefit from or facilitate human trafficking, specifically, focusing on the various pieces of legislation and lawsuits available to address injuries incurred by victims of human trafficking. Part III includes a discussion of the option of developing corporate social responsibility models to address the legal risks associated with human trafficking, but even in the absence of real legal risks why businesses should take a proactive approach to examining and addressing the possibility that there are links to human trafficking in their operations. Globalization has been a significant factor in the increasing importance of corporate social responsibility. Customers, investors, and other stakeholders are showing increasing interest in how companies are addressing risks and opportunities related to social and environmental issues.⁶ International businesses, with their growing links across countries and firms, are faced with human trafficking as a significant issue within global supply chains. Accompanying this growth is the need for companies to proactively manage the risks of human trafficking associated with globalization. The article concludes with an examination of voluntary actions taken by various corporations to address the risks of human trafficking.

⁶ See generally ERNST & YOUNG, CLIMATE CHANGE AND SUSTAINABILITY: HOW SUSTAINABILITY HAS EXPANDED THE CFO’S ROLE 1 (2011), available at [http://www.ey.com/Publication/vwLUAssets/Sustainability_extends_CFO_role/\\$FILE/CFOsustain.pdf](http://www.ey.com/Publication/vwLUAssets/Sustainability_extends_CFO_role/$FILE/CFOsustain.pdf); Michael Hopkins, *Corporate Social Responsibility: An Issues Paper* (World Comm’n on the Social Dimension of Globalization, Working Paper No. 27, 2004), available at <http://ssrn.com/abstract=908181>.

I. HUMAN TRAFFICKING AND ATTEMPTS TO ADDRESS ITS WIDESPREAD AFFECTS

It is estimated by the United States that 2 million to 4 million people are trafficked each year worldwide,⁷ and the United Nations estimates that worldwide as many as 12.3 million adults and children may currently be victims of trafficking.⁸ Methods for identifying trafficking victims are unreliable.⁹ The result is that there are varying numbers reported for trafficking victims. For example, Free the Slaves, a non-governmental organization (NGO), estimates that there are 27 million “slaves” in the world today.¹⁰ A slave is defined as a “person held against his or her will and controlled physically or psychologically by violence or its threat for the purpose of appropriating their labor.”¹¹ The International Labour Organization (ILO) estimates that human trafficking generates profits in excess of \$32 billion a year, making it the third most lucrative criminal activity in the world.¹² These statistics reflect illegal activity, as well as the use of products of forced labor by legitimate employers. Traffickers are involved in the recruiting, contracting, transporting, and facilitating of goods and services.¹³ The profits accruing to traffickers, or resulting from the use of lower cost trafficked goods or

⁷ ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 3* (2012), available at <http://digital.library.unt.edu/ark:/67531/metadc87335/>; see also U.N. Global Initiative to Fight Human Trafficking [UN.GIFT], *Human Trafficking: Everybody's Business* (2006) [hereinafter UN.GIFT, *Human Trafficking: Everybody's Business*] (citing United Nations Office on Drugs and Crime, *Trafficking in Persons: Global Patterns* (2006)), available at http://www.ungift.org/docs/ungift/pdf/reports/Story_Survey.pdf.

⁸ PATRICK BELSER ET AL., INT'L LABOUR ORG., *ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 1* (2005).

⁹ *Id.* at 33–35.

¹⁰ KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8-9* (Univ. Cal. Press rev. ed. 2012).

¹¹ *Glossary*, FREE THE SLAVES (Nov. 28, 2012), <https://www.freetheslaves.net/SSLPage.aspx?pid=305>.

¹² See ILO Director-General, 98th Session of the International Labour Conference, Geneva, Switz., June 3–19, 2009, *The Cost of Coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 1 (May 12, 2009)[hereinafter *ILO 2009*], available at http://www.ungift.org/docs/ungift/Steering-committee/ILO_Report_2009.pdf.

¹³ *Id.*

services, place some businesses at a distinct disadvantage.¹⁴ Because of their higher costs, some businesses lose out on business unfairly.¹⁵

There are several United Nations documents that recognize human trafficking conduct as an abuse of human rights, including the fundamental right to be free from slavery.¹⁶ These instruments address the issue of slavery, slave trade, slave-related practices, and forced labor. One report has categorized them into four categories:

1) those specific international instruments which have arisen under the law of peace; 2) general human rights instruments that touch upon the issue of slavery and its associated practices under the law of peace; 3) other international instruments which reference slavery and slave-related practices under the law of peace; and 4) those international instruments which address slavery and its related practices under the law of armed conflicts.¹⁷

The most recent, and particularly focused, documents are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹⁸ and the Protocol against the

¹⁴ *Id.* at 26.

¹⁵ See generally ALEXIS ARONOWITZ ET AL., ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE & U.N. GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING, ANALYSING THE BUSINESS MODEL OF TRAFFICKING IN HUMAN BEINGS TO BETTER PREVENT THE CRIME 29 (2010) (noting that reliance on trafficked labor can “generate unfair market competition allowing businesses which use trafficked persons or exploitative labour and practices to undercut the cost of legal competitors”).

¹⁶ The United Nations adopted the Universal Declaration of Human Rights (UDHR), which lists the fundamental rights deserving a higher degree of protection including the right to freedom from slavery. “It sets out, for the first time, fundamental human rights to be universally protected.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>.

¹⁷ HEATHER J. CLAWSON ET AL., ICF INTERNATIONAL, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 1 (2008).

¹⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations

Smuggling of Migrants by Land, Sea and Air,¹⁹ which supplements the United Nations Convention against Transnational Organized Crime.²⁰ Measures included in these documents are designed to punish the traffickers, protect the victims, and promote cooperation among nations to prevent trafficking.²¹ The United Nations defines human trafficking as:

the recruitment, transportation, transfer, harboring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.²²

The United Nations includes in the list of conduct constituting human trafficking forced involvement in criminal activities such as begging, including child begging, forced marriage, illicit adoption, and exploitation in the military, including child soldiers and forced participation in armed conflicts.²³ Although it is reported that 79% of human trafficking is connected to sexual exploitation while forced labor constitutes about 18%, the United Nations has suggested that

Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), *available at* http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf.

¹⁹ Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), *available at* http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf.

²⁰ The United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex I, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), *available at* http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf.

²¹ *See, e.g.*, G.A. Res. 55/25, Annex II, *supra* note 18, at 31.

²² *Id.* ¶ (a), at art. 3.

²³ UN.GIFT, HUMAN TRAFFICKING: AN OVERVIEW 13 (2008), *available at* <http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf>.

the lower percentage of forced labor may be due to under-reporting of some forms of exploitation such as forced or bonded labor, domestic servitude, and warfare.²⁴ It is generally accepted that the United Nations documents cannot be effective without domestic efforts to curb human trafficking.²⁵

In the 1988 opinion of *United States v. Kozminski*, the Supreme Court recognized the limitations of existing involuntary servitude and slavery statutes, and invited Congress to expand upon them.²⁶ The Court held that Congress intended that “involuntary servitude” under the 1867 Anti-Peonage Act²⁷ refers only to a situation in which the victim “is forced to work . . . by the use or threat of physical restraint or physical injury,” thus victims who were held in servitude through “psychological coercion or trickery” were not covered by the Act.²⁸ On March 11, 1998, President Bill Clinton issued a directive calling for legislative action to combat human trafficking.²⁹ The directive outlined a three-pronged strategy that emphasized prevention, protection, and support for victims.³⁰ Because of the recognition of the severe worldwide problem of trafficking in persons (TIP), it was intended that legislation would have an impact in deterring human trafficking in the United States and abroad.³¹

Although the United States became a signatory to this Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

²⁴ U.N. OFFICE ON DRUGS AND Crime, A GLOBAL REPORT ON TRAFFICKING IN PERSONS, 6 (2009) [hereinafter GLOBAL REPORT ON TIP], available at <http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html>.

²⁵ See generally Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches*, 24 HOUS. J. INT'L L. 551, 551–78 (2002).

²⁶ *United States v. Kozminski*, 487 U.S. 931 (1988).

²⁷ Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. §1581 (2006)).

²⁸ *Kozminski*, *supra* note 26, at 952.

²⁹ Memorandum on Steps To Combat Violence Against Women and Trafficking in Women and Girls from Pres. William J. Clinton to Sec'y of State, Attorney Gen., Admin. of U.S. Agency for Int'l Dev., and Dir. of U.S. Info. Agency, Pub. Papers 358 (Mar. 11, 1998).

³⁰ *Id.*

³¹ See generally Susan Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249 (2006).

Women and Children, on December 13, 2000, U.S. domestic legislation preceded this when, on October 28, 2000, President Clinton signed the Trafficking Victims Protection Act of 2000 (TVPA) into law.³² TVPA made human trafficking a federal crime.³³ It was enacted to prevent human trafficking overseas, to protect victims and help them rebuild their lives in the United States, and to prosecute traffickers of humans.³⁴ Prior to 2000, no comprehensive federal law existed to protect victims of trafficking or to prosecute their traffickers.³⁵

The TVPA, as amended, does not define human trafficking *per se*. However, it does recognize two forms of trafficking in its definition of “severe forms of human trafficking”:

[1] sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or [2] the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.³⁶

In many ways, the problem of human trafficking is getting worse. This is due in part to the globalized economy and the

³² Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scatter sections of 18, 22 U.S.C.). The Act was thereafter supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

³³ *Id.*

³⁴ *See generally*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT 4 (2010), *available at* http://www.justice.gov/crt/about/crm/trafficking_newsletter/tvpaanniversaryreport.pdf.

³⁵ Two bills that would reauthorize the TVPA have received action. S. 1301, 110th Cong. (2011) was reported by the Senate Judiciary Committee on October 13, 2011, and H.R. 2830, 110th Cong. (2011) was reported by the House Foreign Affairs Committee on October 5, 2011.

³⁶ *See* § 103(8), 114 Stat. 1464.

availability of sophisticated technology that can be used to facilitate trafficking.³⁷ A recent Congressional Research Service (CRS) report stated that “[h]uman trafficking is an inherently transnational and multi-dimensional issue that touches on a broad combination of foreign policy, human rights, criminal justice and national security priorities.”³⁸ To adequately address the human trafficking problem it is necessary that in addition to considering the modern methods used, we also consider our history of slavery. The link between anti-slavery efforts early in our history and human trafficking is widely recognized. Eradicating modern-day slavery is linked to the Thirteenth Amendment which states “neither slavery nor involuntary servitude . . . shall exist within the United States.”³⁹ For example, the 2012 CRS report on human trafficking stated:

Current U.S. foreign policy approaches for addressing human trafficking are a modern offshoot of anti-slavery policies that centered initially on reinforcing international prohibitions on forced labor during the first half of the 20th century. With time, U.S. and international perspectives on the global scope of human trafficking have expanded to cover a broader range of victims and prohibited activities, including sex trafficking and the exploitation of children in labor, armed conflict, and the commercial sex industry. The ultimate goal of current U.S. anti-trafficking policy is to

³⁷ See generally KRISTIN M. FINKLEA ET AL., CONG. RESEARCH SERV., R41878, SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 2 (2011) (citing U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, *available at* <http://www.justice.gov/ag/annualreports/tr2009/agreporhumantrafficking2009.pdf>) (noting that commercial sexual exploitation has increased); *UN Says Human Trafficking Appears To Be Worsening*, RADIO FREE EUROPE / RADIO LIBERTY, (Feb. 13, 2009), http://www.rferl.org/content/UN_Says_Human_Trafficking_Appears_To_Be_Worsening_/1492561.html; MARK LATORENO, UNIV. S. CAL. CTR. ON COMM’N LEADERSHIP & POLICY, HUMAN TRAFFICKING ONLINE: THE ROLE OF SOCIAL NETWORKING SITES AND ONLINE CLASSIFIEDS (2011).

³⁸ LIANA SUN WYLER, CONG. RESEARCH SERV., R42497, TRAFFICKING IN PERSONS: INTERNATIONAL DIMENSIONS AND FOREIGN POLICY ISSUES FOR CONGRESS 23 (2012) [hereinafter 2012 CRS Report].

³⁹ U.S. CONST. amend. XIII.

eliminate the problem and support international efforts to abolish human trafficking worldwide.⁴⁰

As the U.N. documents and the TVPA reflect, there are three primary goals, the prosecution, protection and prevention, which are referred to by the U.S. State Department as the “3P” paradigm.⁴¹ The 3Ps require adequate prosecution of those who traffic in human beings, assistance and protection for trafficking victims in the United States, and the establishment of preventative measures against trafficking of humans across U.S. borders.⁴² The passage of laws similar to TVPA in other countries, along with work of NGOs around the world, has made the world aware of the reality of TIP as a modern form of slavery.⁴³ The public and the media are becoming aware that humans prey upon humans for money and prosecutions and convictions are increasing as cases are being brought before the judiciary.⁴⁴

Even with the progress made under the 3P paradigm, the United States recognized that more could be accomplished to combat trafficking.⁴⁵ Therefore, in 2009 the Department of State and other affected agencies added partnership as a fourth element to be emphasized in this campaign.⁴⁶ When making the announcement, Secretary of State Hillary Rodham Clinton stated that the fourth “P,” partnership, was to serve as a “pathway to progress in the effort against modern slavery.”⁴⁷ Thus, the program has four components, the “four Ps”: prevention, protection, prosecution, and partnership. The partnerships created between federal, state, local, and international law enforcement, government agencies, and NGOs have been acknowledged as “perhaps the most notable” advance made

⁴⁰ See 2012 CRS Report, *supra* note 38, at 3.

⁴¹ Office to Monitor & Combat Trafficking in Pers., *Four "Ps": Prevention, Protection, Prosecution, Partnerships*, U.S. DEPT. OF STATE, <http://www.state.gov/j/tip/4p/prosecute/> (last visited Nov. 29, 2012).

⁴² *Id.*

⁴³ Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?* 2 LOY. U. CHI. INTL. R. 193 (2005).

⁴⁴ See, e.g., GLOBAL REPORT ON TIP, *supra* note 24, at 6, 37–40.

⁴⁵ See U.S. DEP’T OF JUSTICE, *supra* note 34.

⁴⁶ See Office to Monitor and Combat Trafficking in Pers., *supra* note 41.

⁴⁷ *Id.*

since the TVPA was enacted.⁴⁸ In addition to the partners mentioned, it is necessary to include the corporations and businesses that indirectly benefit from trafficking. Their assistance in recognizing and reacting to incidents of trafficking can help further eliminate the problem. The businesses affected can be multinational corporations with locations in other countries as well as businesses that are involved with goods or people crossing borders, and having a substantial international as well as domestic effect.

II. BUSINESS RISKS OF LIABILITY IN HUMAN TRAFFICKING

In addition to considering corporations as potential partners in combatting TIP it is also important to recognize that some may be at risk of violating the law because of the benefits they receive from trafficking enterprises.

A. ANTI-TRAFFICKING LEGISLATION

In recent years, there has been significant legislation, both at the federal⁴⁹ and state⁵⁰ level, designed to become an important tool in the fight against human trafficking and intended to strengthen efforts to prosecute human traffickers for acts occurring in the United States.⁵¹ These laws focus on the criminalization of financial benefit from human trafficking⁵² and on allowing victims to take civil action against traffickers.⁵³ Many of these laws reflect “the gradual

⁴⁸ See U.S. DEP’T OF JUSTICE, *supra* note 34, at 3.

⁴⁹ See § 103(8), 114 Stat. 1464. See generally Tiefenbrun, *supra* note 43.

⁵⁰ Press Release, Megan Fowler, Polaris Project, Majority of States Actively Passing Laws to Combat Human Trafficking (Aug. 7, 2012), available at <http://www.polarisproject.org/media-center/press-releases/634-majority-of-states-actively-passing-laws-to-combat-human-trafficking> (noting an increase in legislation evidenced by “47 states and D.C., have sex trafficking criminal statutes, and 49 states and DC have labor trafficking criminal statutes”).

⁵¹ See 18 U.S.C. § 1593 (2006).

⁵² See generally 22 U.S.C. §§ 7108, 7109 (2006).

⁵³ See 18 U.S.C. § 1595 (2006).

extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards.”⁵⁴

Criminal prosecutions for all forms of human trafficking with possible heavy penalties were made possible under the TVPA,⁵⁵ the Protect Act⁵⁶ and the TVPRA.⁵⁷ These laws criminalized the act of

⁵⁴ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 84, U.N. Doc. A/HRC/4/035 (Feb. 19, 2007), available at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>.

⁵⁵ New sections of chapter 77 of Title 18 of the U.S. Code created by the TVPA include: § 1589 (forced labor); § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); § 1591 (sex trafficking of children or by force, fraud, or coercion); § 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor); § 1593 (mandatory restitution); § 1594 (specifying that attempting to violate 18 U.S.C. §§ 1581, 1583, 1584, 1589, 1590, or 1591 is punishable in the same manner as an actual violation). The TVPA also increased mandatory minimum sentences for “peonage,” “enticement into slavery,” and “sale into involuntary servitude” from ten to twenty years in prison. 18 USC. §§ 1581(a), 1583–1584. The TVPA also provided for the criminal sanction of a life sentence for trafficking cases in which kidnapping, sexual abuse or killing (or any attempt thereof) occurs. *Id.*

⁵⁶ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.).

⁵⁷ 18 U.S.C. § 3271 (2006). TVRPA of 2005 identified the separate crime of trafficking in persons offenses committed by federal contractors outside the United States. 119 Stat. 3558. The TVPRA of 2008 criminalized benefitting financially from peonage, slavery, or trafficking in persons, § 222(d)(1), conspiring in an act of trafficking in persons, § 222(c)(2)(B)–(C), and fraud in foreign labor contracting, § 222(e)(2). 122 Stat. 5044. See CHARLES DOYLE, CONG. RESEARCH SERV., R40190, THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 (P.L. 110-4457): CRIMINAL LAW PROVISIONS (2009).

knowingly trafficking another as well as *knowingly* benefitting financially from trafficking ventures.⁵⁸

Corporations that engage in trafficking run the risk of losing government contracts. The TVPRA of 2003 added a provision that allows a federal department or agency that has entered into a contract with a private entity to terminate that contract if the private entity “(i) engages in severe forms of human trafficking, . . . or has procured a commercial sex act during the period of time that the . . . contract . . . [was] in effect, or (ii) uses forced labor in the performance of the . . . contract.”⁵⁹ The corporation can lose contracts based on the action of any party for which it is responsible.⁶⁰

Additionally, numerous civil actions are possible based upon TIP.⁶¹ These actions serve to “provid[e] compensation to victims as well as [deter] traffickers by increasing financial disincentives.”⁶² The private right of action established under the TVPRA permits victims of forced labor, peonage, slavery, involuntary servitude, or sex trafficking to file a civil action against their traffickers “in an appropriate district court . . . and [to] recover damages [actual and punitive] and reasonable attorneys fees.”⁶³ Civil actions provide a means to reduce the financial profitability of human trafficking, by imposing civil damages against the traffickers, thus creating a deterrence effect.⁶⁴ These civil actions may be stayed during criminal proceedings.⁶⁵

⁵⁸ See, e.g., 18 U.S.C. § 1591(a) (2006).

⁵⁹ 22 U.S.C. § 7104(g) (2006).

⁶⁰ *Id.* (e.g. subcontractor or sub-grantee).

⁶¹ For an excellent guide on civil liability, see KATHLEEN KIM & DANIEL WERNER, *CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING* 21 (2005) (a manual for lawyers).

⁶² *Id.*, at iv.

⁶³ 18 U.S.C. § 1595 (2006); see also KIM & WERNER, *supra* note 61.

⁶⁴ Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1 (2004).

⁶⁵ See 18 U.S.C. § 1595(b)(1) (2006); see, e.g., *Lunkes v. Yannai*, No. 12 Civ. 0630(PKC)(JCF), 2012 WL 2914136, at *3 (S.D.N.Y. July 17, 2012) (memorandum and order granting defendants’ motion to stay civil

Even if entities cannot be held liable based upon the TVPRA, they run the risk of liability based upon laws that provide that third parties can be held liable. For example, organizations or companies that could escape criminal prosecution for lack of sufficient evidence to meet the government's high burden of proof can be named as joint employers, joint tortfeasors, or both, in any civil action brought.⁶⁶ Laws existing prior to enactment of TVPA also provide some possibilities for actions.⁶⁷

Recently attention has been focused on the Alien Tort Statute (ATS)⁶⁸ and the Torture Victim Protection Act (VPA)⁶⁹ as possible bases for lawsuits against entities profiting from TIP. The VPA was enacted in 1992, and it enables U.S. citizens to bring actions similar to those available to non-citizens under ATS.⁷⁰ The VPA provided in pertinent part:

Liability — An individual who, under actual or apparent authority, or color of law, of any foreign nation — (1) subjects an individual to torture shall,

action pursuant to 18 U.S.C. § 1595(b)). See generally KIM & WERNER, *supra* note 61, at 18.

⁶⁶ KIM & WERNER, *supra* note 61, at iv.

⁶⁷ The U.S. Constitution prohibits slavery and arguably this prohibition applies to modern forms of slavery. See U.S. CONST. amend. XIII § 1 (“[N]either slavery nor involuntary servitude . . . shall exist within the United States.”); see also Mandatory Victim Restitution Act of 1996, Pub. L. No. 104-132, §§ 201–211, 110 Stat. 1214, (codified in scattered sections of 18 U.S.C.). KIM & WERNER, *supra* note 61, at 22, 23. See generally KIM & HRESHCHYSHYN, *supra* note 64.

⁶⁸ See generally TERRY COLLINGSWORTH, INT’L LABOR RIGHTS FUND, THE ALIEN TORT CLAIMS ACT – A VITAL TOOL FOR PREVENTING CORPORATIONS FROM VIOLATING FUNDAMENTAL HUMAN RIGHTS (2003), available at <http://lrights.igc.org/publications/ATCA.pdf> (discussing the use of the ATS as an avenue to seek enforceability of international law in U.S. courts against corporate conduct).

⁶⁹ VPA is used instead of TVPRA to avoid confusion with the Trafficking Victims Protection Act. See generally Emily M. Martin, Note, *Torture, Inc.: Corporate Liability under the Torture Victim Protection Act*, 31 N. ILL. U. L. REV. 175 (2010).

⁷⁰ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C.A. § 1350 note).

in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.⁷¹

The ATS, sometimes referred to as the Alien Tort Claims Act,⁷² was enacted in 1789 and went largely unused for nearly 200 years until it was revived in the 1980s⁷³ as a means to provide non-citizens of the United States the opportunity to bring a civil suit in U.S. courts for a tort committed in violation of international law.⁷⁴ Some of the possible claims include human rights abuses such as torture, slavery, prolonged arbitrary detention, violence against women, and cruel, inhuman, or degrading treatment.

Other federal statutes that provide possible liability for corporations include the Federal Racketeer Influenced and Corrupt Organizations Act (RICO),⁷⁵ which can be used against U.S. corporations with facilities in foreign countries as well as in the United States if they engage in indirect activities that constitute human trafficking violations. The TVPRA 2003 added human trafficking to the list of RICO charges and "trafficking in persons" is included in the definition of a racketeering activity and can be used as the basis for criminal or civil liability.⁷⁶ The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."⁷⁷ Only a "person" can be held liable under RICO,⁷⁸ but

⁷¹ *Id.*

⁷² *Id.*

⁷³ See discussion *infra* Part II.C.

⁷⁴ 28 U.S.C. § 1350 (2006).

⁷⁵ Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2006).

⁷⁶ *Id.* § 1961(1). See generally Kendal Nicole Smith, Note, *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, 18 GEO. MASON L. REV. 759 (2011) (discussing criminal liability); Kelly Patricia O'Meara, *DynCorp Disgrace*, INSIGHT MAGAZINE, Feb. 4, 2002. (highlighting a RICO lawsuit filed against DynCorp based upon corporate actions in Bosnia).

⁷⁷ S. REP. NO. 91-617, at 76 (1969).

a “person” can be an individual or a corporation.⁷⁹ RICO defines the term “person” to “include[] any individual or entity capable of holding a legal or beneficial interest in property.”⁸⁰ Corporations that *unknowingly* facilitate a defendant’s criminal activities are often named as the “enterprise” or part of the enterprise through which the defendant conducted his pattern of racketeering. However, no liability can attach to a person or entity that is merely named as a member of the enterprise or to the enterprise itself.⁸¹

Companies may also be subject to labor-related claims with a nexus to human trafficking under the Fair Labor Standards Act,⁸² the Migrant and Seasonal Agricultural Worker Protection Act,⁸³ and the Immigration Reform and Control Act (IRCA).⁸⁴

Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank)⁸⁵ requires persons to disclose whether “conflict minerals” are used in their products.⁸⁶ While Dodd–Frank does not directly apply to trafficking, the presence of conflict minerals in

⁷⁸ See 18 U.S.C. § 1961 (2006).

⁷⁹ *Id.* § 1961(3).

⁸⁰ *Id.*; see 18 U.S.C. § 1962(a)–(c) (2006) (using term “person” to describe violator of acts proscribed under RICO).

⁸¹ See *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

⁸² 29 U.S.C. § 215(a)(1) (2006) (establishing civil money or criminal penalties based on violations of minimum wage provisions in FLSA section 6(a) and overtime provisions in FLSA section 7(a)(l); and establishing “hot goods” provision regarding the sale of products produced in violation of other FLSA sections through section 15(a)(1) of FLSA).

⁸³ 29 U.S.C. § 1800 (2006) (requiring agricultural employers to observe standards for working conditions for migrant and seasonal agricultural workers).

⁸⁴ Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified in scattered articles of 8 U.S.C.) (allowing civil money penalties and criminal penalties to be levied against employers for failure to comply with IRCA, including hiring, recruitment, and referral violations).

⁸⁵ Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified as 12 U.S.C. § 5301 (2006)).

⁸⁶ See discussion *infra* Part III.A.

products may indicate that forced labor was used to obtain the minerals and trigger other laws.⁸⁷

State laws also provide potential liability.⁸⁸ These include lawsuits based on intentional torts and negligence, contract and quasi-contract claims, general criminal statutes and recently enacted state anti-trafficking laws.⁸⁹ The number of states, including the District of Columbia, with anti-trafficking laws has increased from twenty-eight in 2007 to forty-eight as of July 2012.⁹⁰

Legislative attempts to hold liable companies that indirectly benefit from trafficking profits have received some resistance. The state of Washington enacted Senate Bill 6251 (SB 6251), which was scheduled to take effect June 7, 2012 and aimed at those companies that facilitate sex trafficking of minors through their advertising.⁹¹ The law would require classified advertising companies to verify the ages of people in sex-related advertisements.⁹² In response to a lawsuit filed by Village Voice Media, on behalf of Backpage.com,⁹³ a federal judge in Washington granted a temporary injunction,

⁸⁷ See, e.g., Alexandra R. Harrington, *Faceting the Future: The Need for and Proposal of the Adoption of a Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market*, 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 353, 354–355 (2009) (noting it is likely that other illicit activities such as human trafficking accompany the mining of diamonds and other gemstones).

⁸⁸ See Fowler, *supra* note 50.

⁸⁹ *Id.*

⁹⁰ See, e.g., Assemb. B. 22, 2005 Gen. Assemb., Reg. Sess. (Cal. 2005) (criminalizing human trafficking and allowing victims to receive restitution from the perpetrator(s)); CAL. PENAL CODE § 236.1 (2008); CAL. PENAL CODE § 1202.4 (2008). See generally POLARIS PROJECT, 2012 STATE RATINGS MAP (2012), available at <http://www.polarisproject.org/what-we-do/policy-advocacy/current-laws>.

⁹¹ S.B. 6251, 62d Leg., Reg. Sess. § 2(1) (Wa. 2012).

⁹² *Id.* § 2(2); See *Backpage.com v. McKenna*, No. C12-954-RSM, 2012 WL 3064543 (W.D. Wash. July 27, 2012) (complaint to declare invalid and enjoin enforcement of Washington Senate Bill 6251 for violation of The Communications Decency Act, the First and Fifth Amendments, and the Commerce Clause of the U.S. Constitution).

⁹³ See *Backpage.com*, 2012 WL 3064543.

halting implementation of the law until the case can be heard.⁹⁴ The plaintiff has asserted that the statute violates the Commerce Clause and the First and Fifth Amendments of the U.S. Constitution⁹⁵ and that the statute is preempted by section 230 of the federal Communications Decency Act,⁹⁶ which limits liability of websites for postings by third parties.⁹⁷

Multinational companies are also at risk based upon laws in the countries where they operate and any duties imposed by international law. Although there are no human rights instruments that impose binding human rights obligations on corporations, customary international law may provide the basis for determining that such obligations exist.⁹⁸ The Department of State's annual Trafficking in Persons Report (TIP Report), issued pursuant to TVPA, provides one source for determining how a country approaches human trafficking. The report details human trafficking prosecutorial efforts in each country.⁹⁹ Although there are no statutes in other countries analogous to the ATS or TVPA, analogous claims may be possible as tort actions in some countries based upon serious human rights violations.¹⁰⁰ There has not been a comprehensive survey of the potential success of these possible claims.¹⁰¹ Some of these claims have been based upon the UN Convention Against Torture. Another source of reference is the ILO Forced Labour and Human Trafficking: Casebook of Court Decisions.¹⁰² A review of cases provides some guidance on laws in various countries and regions.

⁹⁴ *Id.*

⁹⁵ *Id.* at *4.

⁹⁶ 47 U.S.C. § 230 (2006).

⁹⁷ Backpage.com, 2012 WL 3064543, at *4.

⁹⁸ See discussion *infra* at Part III.B.

⁹⁹ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2012, available at <http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm>.

¹⁰⁰ See generally Anthea Roberts, The ATS and TVPA in Comparative Perspective, Remarks at Northwestern Law Public Policy Roundtable: The Alien Tort Statute and U.S. Enforcement of Foreign Judgments 2 (Apr. 30, 2010) (observing that “[i]n the few jurisdictions where the issue has been considered, reactions have ranged from outright hostility . . . to cautious restraint . . . to enthusiastic acceptance. . .”).

¹⁰¹ *Id.*

¹⁰² See INT'L LABOUR ORG., FORCED LABOUR AND HUMAN TRAFFICKING: CASEBOOK OF COURT DECISIONS (2009), available at

There has been some criticism of the European Commission's position that European companies are not liable for human rights abuse committed by their subsidiaries abroad. The criticism is based upon the fact that the parent company receives profits from a subsidiary's operations without liability for human rights abuses.¹⁰³

B. ANTI-TRAFFICKING LITIGATION

The U.S. Department of Justice (DOJ) issued a report in 2010 that reviewed TIP cases charged by the DOJ Civil Rights Division and U.S. Attorneys' Offices. The number of cases has increased from two in 1998 pre-TVPA, to thirty-five cases in 2005, five years after its enactment, and fifty-two in 2010.¹⁰⁴ In another study conducted by ICF International, slightly different numbers were reported because of the research methodology used.¹⁰⁵ The ICF study included interviews with federal prosecutors from ten jurisdictions and a review of thirty-five cases from those jurisdictions.¹⁰⁶ In those cases, only 9% involved male victims while 94% involved female victims.¹⁰⁷ In 60% of the cases, the defendants were U.S. citizens.¹⁰⁸ Foreign nationals were defendants in 57% of the cases.¹⁰⁹ It was reported that there were eighty-one U.S. defendants and seventy-six foreign national defendants prosecuted across twenty-four cases and 71% of those cases involved sex trafficking.¹¹⁰ While there has been

http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS_106143/lang--en/index.htm.

¹⁰³ FILIP GREGOR & HANNAH ELLIS, EUR. COAL. FOR CORPORATE JUSTICE, FAIR LAW: LEGAL PROPOSALS TO IMPROVE CORPORATE ACCOUNTABILITY FOR ENVIRONMENTAL AND HUMAN RIGHTS ABUSES 3, 8–20 (2008), available at http://www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf.

¹⁰⁴ See U.S. DEP'T OF JUSTICE, *supra* note 34.

¹⁰⁵ CLAWSON, *supra* note 17 (noting that a database of cases was created based on DOJ bulletins, reports, and press releases; legal and lay newspapers; law review articles; internet research; and the Public Access to Court Electronic Records (PACER) system).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 18. But see Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 310 n.337 (noting that, as of 2009,

an increase in prosecutions under the TVPRA, they typically involve individual defendants. These cases include the case of two Filipino doctors who brought a nineteen-year-old Filipina to their home to become a domestic servant and then enslaved her for nineteen years;¹¹¹ a case where 250 Vietnamese and Chinese workers, mostly women, were held in involuntary servitude for two years in the U.S. Territory of American Samoa;¹¹² the prosecution of an individual who transported Russian girls to Anchorage, Alaska, for illegal purposes including to dance nude;¹¹³ and the prosecution of a husband and wife who held in peonage and document servitude two Indonesian women they brought to the country illegally and subjected to forced labor.¹¹⁴ The DOJ has stated that it will “vigorously prosecute and convict any perpetrator who engages in or facilitates human trafficking, whether through the internet or by more traditional means.”¹¹⁵ However, some prosecutions may face challenges if charges are brought against defendants who are facilitators but claim they had no knowledge that they were assisting traffickers or purchasing goods or services from traffickers. State prosecutions are an alternative but, as some experts have noted, some state laws require proof of knowledge that force, fraud, or coercion was used.¹¹⁶ Some states may recognize such claims against

approximately thirty civil suits have been brought under 18 USC § 1595 and none of them alleged sex trafficking).

¹¹¹ United States v. Calimlim, 538 F.3d 706 (7th Cir. 2008).

¹¹² United States v. Lee, 159 F. Supp. 2d 1241, 1243 (D. Haw. 2001) aff'd, 472 F.3d 638 (9th Cir. 2006).

¹¹³ United States v. Kennard, 2002 WL 1994523 (9th Cir. 2002).

¹¹⁴ United States v. Sabhnani, 599 F.3d 215 (2d Cir. 2010).

¹¹⁵ Letter from Ronald Weich, Assistant Att’y Gen., Dep’t of Justice, to Frank Wolf, Chairman, Subcomm. on Commerce, Justice, Sci., & Related Agencies, Comm. on Appropriations, U.S. House of Representative (Apr. 25, 2012) (on file with recipient), available at http://wolf.house.gov/uploads/2012-04_25%20Letter%20to%20Chairman%20Wolf.pdf. *But see* Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking* 74 FORDHAM L. REV. 2977 (2006) (critiquing prosecutions under the TVPRA and noting where the alleged conduct of corporations constituted trafficking, but no trafficking charges were brought).

¹¹⁶ *See, e.g.*, Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 265 (2011) (discussing legislative gaps).

companies who indirectly benefit from TIP under theories of agency and vicarious liability.¹¹⁷

C. *Torture Victim Protection Act and ATS Litigation*

In October 2011, the Supreme Court granted certiorari in two cases to determine whether corporations can be sued for torts based upon actions occurring abroad under either the Torture Victim Protection Act (VPA) or the Alien Tort Statute (ATS).¹¹⁸ Tandem oral arguments were heard in both cases on February 28, 2012.¹¹⁹ In *Kiobel v. Royal Dutch Petroleum*, the Court had initially granted certiorari on the issue of corporate liability under the ATS,¹²⁰ but on March 5, 2012 ordered *Kiobel* “restored to the calendar for reargument,” and requested supplemental briefs addressing the issue of extraterritoriality—that is, whether the ATS covers violations of international law committed in foreign countries.¹²¹

The Supreme Court eliminated the possibility of claims against corporations under the VPA when on April 18, 2012, in the *Kiobel* companion case, *Mohamad v. Palestinian Authority*,¹²² it held the statute only allows lawsuits against “individuals” that have engaged in torture. The Court reasoned that because the statute does not define the term “individual,” the Court must look first to the word’s

¹¹⁷ See, e.g., *Doe v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 13–16 (Cal. Super. Ct. Jun. 7, 2002), available at <http://www.earthrights.org/sites/default/files/legal/Unocal-Tort-LiabilityMSA-Ruling.pdf>; *Doe v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 13–16 (Cal. Super. Ct. Jun. 10, 2002), available at <http://www.earthrights.org/sites/default/files/legal/Unocal-Vicarious-Liability-MSA-Ruling.pdf> (granting Unocal’s motions for summary adjudication as to direct liability only on intentional torts and negligence causes of action, but denying Unocal’s motion as to vicarious liability and the California Business and Professions Code § 17200 and claims of unjust enrichment).

¹¹⁸ 28 U.S.C. § 1350 (2006).

¹¹⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (action by Nigerian), cert. granted (U.S. Oct. 17, 2011) (No. 10-1491), available at <http://www.supremecourt.gov/qp/10-01491qp.pdf>.

¹²⁰ *Id.*

¹²¹ *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Mar. 5, 2012) (order for re-argument) available at <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf>.

¹²² *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1710 (2011).

ordinary meaning, which indicates that an individual is a human being and not a corporation or organization.¹²³

Arguably, the VPA is clear that liability attaches to “an individual.” Conversely, the ATS lacks such express language.¹²⁴ On this issue, the Second Circuit created a split in the circuits when it held in *Kiobel* that corporations are not appropriate defendants in ATS cases.¹²⁵ It reasoned that corporations are not currently subject to penalties for customary international law violations before international tribunals (or, put differently, that there is no customary international law norm of imposing liability on corporations).¹²⁶

In *Romero v. Drummond Co., Inc.*,¹²⁷ the Eleventh Circuit became the first circuit court to directly address the question of corporate liability under the ATS. The Court found that there was no express exception for corporations, thus corporations were not protected from suit under the statute.¹²⁸ Corporate liability under the ATS has also been upheld by the D.C.,¹²⁹ Seventh,¹³⁰ and Ninth Circuits.¹³¹

The ATS cases starting with *Filartiga v. Peña-Irala* in 1980,¹³² “can now be categorized with regard to three broad groups of defendants: (i) foreign government officials; (ii) corporations; and (iii) U.S. government officials.”¹³³ The law that has developed in all

¹²³ *Id.* at 1706-08.

¹²⁴ 28 U.S.C. § 1350 (2006).

¹²⁵ 621 F.3d 111.

¹²⁶ *See id.* at 126–45.

¹²⁷ *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

¹²⁸ *Id.*

¹²⁹ *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (Indonesian villagers alleging that Indonesian security forces hired and supervised by Exxon had committed murder, torture, sexual assault, battery, and false imprisonment).

¹³⁰ *See Boimah Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1024 (7th Cir. 2011) (23 Liberian children alleging that Firestone utilized hazardous child labor practices; but dismissal is appropriate where plaintiff's evidence fell short of establishing that defendant violated “customary international law.”).

¹³¹ *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011).

¹³² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹³³ DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 958 (4th ed. 2006), available at <http://www1.umn.edu/humanrts/intlhr2006/chapters/chapter14.html>.

categories is relevant to the question that is currently before the Supreme Court in *Kiobel*. In *Filartiga*, the Court held that deliberate torture perpetrated under the color of official authority violates universally accepted norms of international human rights law, and that such a violation of international law constitutes a violation of the domestic law of the United States, giving rise to a claim under the ATS.¹³⁴

Fifteen years later, the Second Circuit helped further advance the ATS jurisprudence when it held in *Kadic v. Karadzic*¹³⁵ that the president of a Bosnian–Serb political entity could be held liable under the ATS.¹³⁶ The Court found that certain crimes, such as rape, torture, and summary execution, while ordinarily requiring state action under the ATS, do not need to be committed under “color of law” if done so in the furtherance of other more heinous crimes, such as slave trading, genocide, or war crimes.¹³⁷

The case law thus established that the ATS reaches the conduct of private parties where the private actor (1) acted “under color of law” or (2) violated a norm of international law that is recognized as extending to the conduct of private parties.

In 2004, the Supreme Court decided *Sosa v. Alvarez-Machain*,¹³⁸ the only Supreme Court decision interpreting the scope of the ATS. In that case the Court unanimously held that a single illegal detention of less than a day followed by a transfer of custody to lawful authorities and a prompt arraignment did not violate any treaty or norm of customary international law, and thus the plaintiff did not have a valid claim for damages under the ATS.¹³⁹

¹³⁴ 630 F.2d at 884–86.

¹³⁵ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

¹³⁶ 70 F.3d at 239–40, 245 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)). The court also noted that it was persuaded by the executive branch, which urged in the case that private parties could be held liable for “acts of genocide, war crimes, and other violations of international humanitarian law.” *Id.* at 239–40.

¹³⁷ *Id.*

¹³⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹³⁹ *Id.* at 697, 738.

In *Wiwa v. Royal Dutch Shell*,¹⁴⁰ the plaintiffs sued two foreign holding companies. The Second Circuit reversed the district court's dismissal which was based upon jurisdictional grounds.¹⁴¹ In response to their allegations that the companies participated with Nigerian authorities in human rights violations against them, the Court did not directly address corporate liability, but extended corporate liability under ATS to foreign corporations if they maintained "continuous and systematic" ties to the United States.¹⁴² The Court further noted that Congress expressly ratified its holding in *Filartiga* when it passed the Torture Victim Prevention Act, which provides that the U.S. courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation; the Court added that Congress went further by extending its remedy to any "individual," thus covering U.S. citizens.¹⁴³ In 2009, Shell settled with the claimants in the *Wiwa* case for \$15.5 million.¹⁴⁴ This result provided support for the possibility that victims of human trafficking could assert claims against multinational corporations under the ATS. However, the Supreme Court's decision in *Kiobel* could eliminate this possibility of corporate liability.

Some scholars conclude that it is highly unlikely that the Supreme Court will find that claims under the ATS are actionable against corporations¹⁴⁵ while others strongly argue for corporate

¹⁴⁰ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied sub nom *Royal Dutch Petroleum Co. v. Wiwa*, 532 U.S. 941 (2001).

¹⁴¹ *Id.* at 94 (noting that the district court found personal jurisdiction but dismissed the action for forum non conveniens).

¹⁴² *Id.* at 98.

¹⁴³ *Id.* at 104–05.

¹⁴⁴ Press Release, Ctr. for Constitutional Rights, Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009), available at <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell>.

¹⁴⁵ This view is due in part to the extraterritorial question posed during oral argument by Justice Kennedy: Whether any other nation "permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection." Transcript of Oral Argument at 3–4, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 28, 2012) (citing amicus brief of Chevron), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.

liability.¹⁴⁶ As John Ruggie stated, “The implications of the case for human rights go well beyond multinationals domiciled in countries other than the U.S.”¹⁴⁷ If the Court extends liability to corporations, ATS litigation will continue to present a powerful risk that corporations must assess in developing a strategy for corporate social responsibility.

III. CORPORATE RESPONSIBILITY

A. INCENTIVES FOR CORPORATE SOCIAL RESPONSIBILITY

In the event that the Supreme Court limits liability under the ATS, prosecution under TVPRA and other statutes mentioned above are limited to individuals, and there is no new legislation enacted imposing liability on corporate actions that indirectly affect human trafficking, the likelihood of corporate liability in criminal or civil lawsuits may be severely limited to only the most egregious direct actions of human trafficking. This result, however, does not end the inquiry with respect to the need for corporate action when indirect benefits are received from TIP.

Addressing and understanding corporate responsibility in human trafficking requires an approach that understands the basic business theory of supply and demand. Demand refers to the quantity of a given product that consumers will purchase at a given price. Supply refers to the quantity of a particular product that suppliers, i.e.

¹⁴⁶ See, e.g., Wesley V. Carrington, *Corporate Liability for Violations of Labor Rights under the Alien Tort Claims Act*, 94 IOWA L. REV. 1381 (2009) (arguing that corporate liability is not likely); Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 209 (2004) (arguing that corporate liability is possible). The use of the ATS against U.S. corporations for their conduct overseas has been criticized on the ground that it could do enormous damage to U.S. foreign trade and investment. See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003); Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to the Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 25–30 (2004). But see, Steven M. Schneebaum, *The Paquete Habana Sails On: International Law in U.S. Courts After Sosa*, 19 EMORY INT'L L. REV. 81, 95–98 (2005).

¹⁴⁷ JOHN RUGGIE, HARVARD KENNEDY SCH., *KIOBEL AND CORPORATE SOCIAL RESPONSIBILITY* (2012).

producers and sellers, will make available to the market. A market is created when there are individuals or businesses that are willing to supply the product demanded by the customers.¹⁴⁸ TIP relies on a triangle of activity: supply, demand, and distribution.¹⁴⁹ In sex trafficking, the supply is provided by the victims of commercial sexual exploitation, and the consumers provide the demand.¹⁵⁰ The traffickers, i.e. the sellers, provide the distribution, but they are assisted in the distribution by many legitimate businesses that facilitate, often unknowingly, the distribution.¹⁵¹ These facilitators include internet providers, online advertisers, newspapers, hotels, and transportation providers.¹⁵² While some taxi drivers, hotel workers, and workers at sexual entertainment venues, for example, may develop purposeful partnerships with traffickers to assist in the distribution and receive direct remuneration from the traffickers, others may facilitate the distribution without receiving any compensation from the traffickers or perhaps not even being aware that they are important enablers of the distribution of sex trafficking.¹⁵³ The taxi, hotel and entertainment venue owners, if unaware of the activity, receive indirect benefits from the sex trafficking.¹⁵⁴ Others who help facilitate sex trafficking, such as internet advertisers and dating sites, may not enter into formal relationships with the traffickers, but are also enablers who help the traffickers earn profits and allow the facilitators to indirectly benefit from the trafficking.¹⁵⁵

Similarly, manufacturers, retailers, and certain service providers, i.e., the producers and sellers, facilitate the use of products made by

¹⁴⁸ Global Centurion Found., *About Global Centurion*, GLOBAL CENTURION <http://www.globalcenturion.org/about/mission-statement/> (last visited Nov. 30, 2012).

¹⁴⁹ *Id.*

¹⁵⁰ Some have argued that most efforts to reduce or eliminate sex trafficking should be aimed at the demand side because without the demand, there would be no market. *See generally* SHIVELY ET AL., DEVELOPING A NATIONAL ACTION PLAN FOR ELIMINATING SEX TRAFFICKING (2010).

¹⁵¹ Global Centurion Found., *supra* note 148.

¹⁵² Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 288 (2011).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

or services performed by labor trafficking victims.¹⁵⁶ Thus, they profit from the business of trafficking. In labor trafficking, a business may at times be the customer providing the demand for the trafficked labor and at other times the enabler who facilitates the transmission of the services or products of the trafficked labor to the ultimate consumers.¹⁵⁷ These activities reach every aspect of the economy and include the use of labor that a trafficker-recruiter obtained in another country, the transporters who brought the workers from the source to the destination, and the goods or products produced by trafficked labor.¹⁵⁸ While multinational companies may more likely be affected, a business of any size can be affected by TIP.

One method for addressing supply and demand in human trafficking is to reduce profits and raise risks and costs of trafficking.¹⁵⁹ Changes in supply and demand can be produced by a number of factors,¹⁶⁰ including social factors that change the demand for a product. Corporate social responsibility (CSR) can be one of those factors. CSR is considered to be an “evolving concept,” but generally refers to the integration of “social, environmental, and economic concerns” into business operations.¹⁶¹ This integration

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 266–67.

¹⁵⁸ Global Centurion Found., *supra* note 148.

¹⁵⁹ See ARONOWITZ, *supra* note 15, at 68–71. (noting methods of reducing profits that include reducing the supply of potential victims by addressing situations which make people vulnerable such as poverty, homelessness and gender discrimination; reducing demand for labor exploitation through increased monitoring of employment situations and campaigns aimed at reducing consumer purchases of goods produced by trafficked labor; and reducing demand for sexual exploitation by educating customers about the negative consequences of prostitution).

¹⁶⁰ Primarily economic and legal factors.

¹⁶¹ See generally *Corporate Social Responsibility*, INDUSTRY CANADA, GOVERNMENT OF CANADA, <http://www.ic.gc.ca/eic/site/csrse.nsf/eng/rs00129.html> (last visited Nov. 30, 2012); Carole Ramsay, *Corporate Social Responsibility: A Framework for Understanding the Legal Structure*, 57 ROCKY MTN. MIN. L. INST. 17-A (2011); CSR EUROPE, A GUIDE TO CSR IN EUROPE: COUNTRY INSIGHTS BY CSR EUROPE’S NATIONAL PARTNER ORGANISATIONS 4 (2010), available at <http://www.csreurope.org/data/files/2342aguidetocsr02.pdf> (observing, for example, that “growing attention is being paid to the voluntary actions that companies take as part of

results in a business approach that considers responsibility and accountability along with profitability.¹⁶² CSR builds on a base of compliance with legislation and regulations,¹⁶³ but can occur independently of a legal requirement.

The idea of corporate commitment to social responsibility is not new, and it is not always driven by changes in the law or the possibility of corporate liability. Some scholars have defined CSR as “actions that appear to further some social good, beyond the interests of the firm and that which is required by law.”¹⁶⁴ The European Commission has defined CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”¹⁶⁵ CSR has been the focus of a successful business model since the 1970s,¹⁶⁶ but has been the subject of a more intense

their CSR strategies to manage their economic, social and environmental impacts”).

¹⁶² Global Centurion Found., *supra* note 148.

¹⁶³ See generally *Corporate Social Responsibility*, *supra* note 161.

¹⁶⁴ Abigail McWilliams et al., *Corporate Social Responsibility: Strategic Implications*, 43 J. MGMT. STUD., 1 (2006) (quoting Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26 ACAD. MGMT. REV. 117 (2001)).

¹⁶⁵ *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 3, COM (2002) 347 final (July 2, 2002), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:en:PDF> (citing *Green Paper Promoting a European framework for Corporate Social Responsibility*, at 6, COM(2001) 366 final, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366_en01.pdf).

¹⁶⁶ See generally David Silverstein & Daniel C. Hohler, *A Rule-of-Law Metric for Quantifying and Assessing the Changing Legal Environment of Business*, 47 AM. BUS. L.J. 795 (2010) (citing Keith Davis, *The Case for and Against Business Assumption of Social Responsibilities*, 16 ACAD. MGMT. J. 312, 312–13 (1973)); Robert Hay & Ed Gray, *Social Responsibility of Business Managers*, 17 ACAD. MGMT. J. 135, 141–43 (1974); Rama Krishnan, *Business Philosophy and Executive Responsibility*, 16 ACAD. MGMT. J. 658, 665–68 (1973). Some have suggested that CSR was established much earlier. See, e.g., Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC’Y 253, 270 (1999) (quoting HOWARD BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 6 (1953) (“the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which

focus since the exposure of numerous unprincipled business practices in the 1990s.¹⁶⁷ In the late 1990s, for example, Nike was subjected to public disapproval, loss of profits, and loss of reputation when it was reported that Nike engaged in exploitative employment practices in overseas factories.¹⁶⁸ Nike subsequently adopted a corporate social responsibility plan and implemented strict supply chain controls.¹⁶⁹

Although some have argued that CSR is not consistent with the primary economic objectives of a business,¹⁷⁰ the enhanced view of a corporation's reputation and credibility, which flow from a CSR business plan, can lead to increased profits. An examination of the relationships between CSR, corporate financial performance, and other methods of performance, such as the satisfaction of internal stakeholders including employees, may lead a company to realize the benefits of CSR actions.¹⁷¹ One central question involved in the change of business operations to address human rights exists: If costs increase, will the consumers be willing to pay a premium for CSR actions that produce a public good?¹⁷² While these actions may not

are *desirable in terms of the objectives and values of our society*"(emphasis added)).

¹⁶⁷ See Radu Mares, *Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations*, 40 GEO. WASH. INT'L L. REV. 1157, 1159 (2009) (citing DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005)).

¹⁶⁸ See Randall L. Waller & Roger N. Conaway, *Framing and Counterframing the Issue of Corporate Social Responsibility*, 48 J. Bus. Comm. 83, 97–103 (2011), available at <http://www.sagepub.com/cornelissen3e/Online%20reading%20pdfs/Waller.pdf>.

¹⁶⁹ See, e.g., NIKE, INC. CODE OF CONDUCT (2010), available at http://www.nikeresponsibility.com/report/uploads/files/Nike_Code_of_Conduct.pdf; NIKE, INC. CODE OF CONDUCT (2007), available at http://www.itglwf.org/lang/en/documents/Nike_Code_of_Conduct.pdf.

¹⁷⁰ See Milton Friedman, Op-Ed, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17, available at <http://www.umich.edu/~thecore/doc/Friedman.pdf>; MILTON FRIEDMAN, *CAPITALISM AND FREEDOM*, 133 (1962) ("Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.").

¹⁷¹ See McWilliams et al., *supra* note 164, at 4 (discussing CSR viewed as a "form of strategic investment" or as a "form of reputation building or maintenance").

¹⁷² *Id.* at 13 (raising the question and noting difficulty in measuring consumer demand for CSR).

lead to a competitive advantage because competitors are likely to imitate their strategy, it will have the positive effect of standardizing CSR and respect for human rights in the industry, which should eliminate any disadvantage that a business might suffer from adopting CSR standards.¹⁷³ The increased attention to human rights, including human trafficking, has led companies to consider the CSR implications involved in cross-border trade and global supply chains, especially among multinational and multi-divisional companies. These companies must focus on CSR as it relates to their operations in the United States and other countries and the implications for internal stakeholders such as employees as well as customers and partners. One expert has suggested that the impact of international law has created the concept of International Corporate Social Responsibility (ICSR),¹⁷⁴ which is now embraced by the adoption of guidelines, standards and recommendations that apply specifically to international conduct and activities by multinational corporate enterprises.¹⁷⁵

Some CSR actions are precipitated by legislation or recommendations by national or international bodies. For example,

¹⁷³ See, e.g., Kevin Banks & Elizabeth Shilton, *Corporate Commitments to Freedom of Association: Is There a Role for Enforcement under Canadian Law?*, 33 COMP. LAB. L. & POL'Y J. 495, 544 (2012) (citing David Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. TRANSNAT'L L.J. 953, 994–995 (2010)), (noting that “Nike Inc.’s decision to post the names and addresses of all of its global supplier factories in 2005 . . . prompted Levi-Strauss to do the same, which then put other large apparel companies that did not disclose this information on the defensive”).

¹⁷⁴ See Peter Muchlinski, *Corporate Social Responsibility*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 637 (Peter Muchlinski et al. eds., 2008). See also, Sabine Schlemmer-Schulte, *Fragmentation of International Law: The Case of International Finance & Investment Law Versus Human Rights Law*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 422 (2012) (using the term on reference to international finance/investment law and human rights); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) (discussing the internationalization of CSR); Paulette L. Stenzel, *The US and Mexico Sin Fronteras—Without Borders: Sustainable Development from a Local Perspective*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 441, 469 (2003).

¹⁷⁵ See discussion *infra*, Part III.B.

the Sarbanes–Oxley Corporate Responsibility Act,¹⁷⁶ which was enacted in 2002, includes a requirement that company executives certify and report on a public corporation's activities, including whether the company has an ethics code.¹⁷⁷ Regulations adopted by the Securities and Exchange Commission (SEC) pursuant to the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank)¹⁷⁸ enacted in 2010 provide detailed reporting requirements regarding the use of conflict minerals.¹⁷⁹ Dodd–Frank also included authorization in its whistleblower provisions for the SEC to provide monetary awards to eligible individuals who come forward with high-quality original information regarding corporate wrongdoing that leads to certain SEC enforcement actions.¹⁸⁰ The United Kingdom's Public Interest Disclosure Act of 1998¹⁸¹ provides protections for employees who “blow the whistle,” i.e., disclose

¹⁷⁶ Sarbanes–Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18 U.S.C.).

¹⁷⁷ Code of Ethics for Senior Financial Officers, 15 U.S.C. § 7264(a) (2006).

¹⁷⁸ Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of the U.S. Code). Title XV, section 1502 of the Act added § 13(p) (codified at 15 U.S.C. § 78m(p)) to the Securities Exchange Act of 1934 (requiring persons “to disclose annually . . . whether [any] conflict minerals that are necessary” to the production or functioning of a product of the person, as defined in the provision, “originate[d] in the Democratic Republic of the Congo or an adjoining country and, [if so, to provide a report describing, among other matters,] the measures taken [] to exercise due diligence on the source and chain of custody of [those] minerals”).

¹⁷⁹ “The term ‘conflict mineral’ is defined in Section 1502(e)(4) of the Act as (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.” Conflict Minerals, 77 Fed. Reg. 56,274, 56,2705 n.6 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240 and 249(b)).

¹⁸⁰ For example, § 922 applies to the reporting of securities violations. There are a number of other “whistleblower” laws including those enacted at the state level. Dodd–Frank Wall Street Reform and Consumer Protection Act § 922.

¹⁸¹ Public Interest Disclosure Act, 1998, c.23 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1998/23/contents>.

wrongdoing of their employer.¹⁸² There are six covered areas of protected disclosures, including information about the employer's "breach of a legal obligation" or "miscarriage of justice."¹⁸³ CSR is also encouraged by anti-corruption laws such as the U.K. Bribery Act, which came into force July 1, 2011.¹⁸⁴ The act creates offenses for offering or receiving bribes.¹⁸⁵ Methods for combatting the risks of bribery are likely to be included in a business plan that includes CSR.¹⁸⁶ These are just a few of the numerous national laws and international norms that motivate companies to embrace CSR.

B. STANDARDS, GUIDELINES, AND RECOMMENDATIONS

Companies that express a desire to observe human rights can look to the documents commonly referred to as the International Bill of Rights, which is comprised of the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, as well as the International Labor Organization conventions to determine which rights should be

¹⁸² An employment tribunal ruled that Kathryn Bolkovac's employer unfairly dismissed her from her job as a U.N. police officer in Bosnia after reporting an alleged prostitution racket involving her colleagues. Her employer, DynCorp Technical Services, is an American company whose branch in the United Kingdom, DynCorp Aerospace Operations Ltd., dealt with the contracts of the American officers working for the international police force in Bosnia. The employee contracts contained a clause requiring that any lawsuits be brought in the United Kingdom. Tony Robson, *Bosnia: The United Nations Human Trafficking and Prostitution*, WORLD SOCIALIST WEB SITE (Aug. 21, 2002), <http://www.wsws.org/articles/2002/aug/2002/bosn-a21.shtml>.

¹⁸³ Public Interest Disclosure Act, c.23.

¹⁸⁴ Bribery Act, 2010, c.23 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>; accord Organization for Economic Co-operation & Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, available at <http://www.oecd.org/investment/briberyininternationalbusiness/antibriberyconvention/38028044.pdf>; U.S. Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1 to -3 (2006).

¹⁸⁵ Bribery Act, c.23.

¹⁸⁶ PAUL HOHNEN, CORPORATE SOCIAL RESPONSIBILITY: AN IMPLEMENTATION GUIDE FOR BUSINESS 59 (Jason Potts ed., 2007), available at http://www.iisd.org/pdf/2007/csr_guide.pdf.

included in a CSR plan.¹⁸⁷ They may remain uncertain about their obligations under these documents. Some commentators have argued that human rights documents impose obligations only on states and governments,¹⁸⁸ while others have argued for the extension of human rights obligations to corporations.¹⁸⁹ Corporate obligations may now be clarified by recent United Nations documents.

After the U.N. Commission on Human Rights created the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,”¹⁹⁰ and

¹⁸⁷ Fact Sheet, U.N. Office of the High Comm’r of Human Rights, Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights (June 1996), available at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev1.en.pdf>; see, e.g., International Labour Organisation, Worst Form of Child Labour Convention, 1999, Jun. 17, 1999, I.L.O. No. 182 available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_46_en.pdf.

¹⁸⁸ See generally SHELL INT’L PETROLEUM GRP., BUSINESS AND HUMAN RIGHTS: A MANAGEMENT PRIMER 15 (1998), available at http://www.shell.com/static/envirosocen/downloads/management_primers/business_and_human_rights_primer.pdf (noting that the traditional view among business leaders was that “human rights are an issue for governments and NGOs, not for business, whose primary responsibility is to earn economic returns for the benefit of their employees and shareholders” (emphasis omitted)); Denis G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 BUS. ETHICS Q. 371, 374–76 (2010) (noting that attempts to create human rights “nonvoluntary norms” for corporations was viewed as overreaching by the business community); ADIDAS GROUP, HUMAN RIGHTS AND RESPONSIBLE BUSINESS PRACTICES: FREQUENTLY ASKED QUESTIONS (2011), available at http://www.adidas-group.com/de/sustainability/assets/governance/Human_Rights_Responsible_Business_Practices_Q&A_July_2011.pdf (noting much debate about companies and human rights).

¹⁸⁹ See THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS (1991); John Bishop, *The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations*, 22 BUS. ETHICS Q. 119 (2012); Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract*, 27 J. OF BUS. ETHICS 205 (2000).

¹⁹⁰ The U.N. Working Group on the Working Methods and Activities of Transnational Corporations, a group of independent experts, presented the Draft Norms to the Sub-Commission on the Promotion and Protection of Human Rights, which the Sub-Commission then adopted. See Sub-Comm’n on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (Aug. 26, 2003)

most of the business community opposed the Draft Norms, Professor John Ruggie was appointed as a Special Representative on Business and Human Rights to the Secretary-General of the United Nations (SRSG) in July 2005.¹⁹¹ The opposition was based in large part on the view that the Draft Norms attempted to impose human rights obligations on corporations rather than just States.¹⁹² The Special Representative was tasked with identifying standards of corporate responsibility and accountability, enhancing understanding and recognition of these standards, and issuing recommendations on future United Nations work pertaining to business and human rights issues.¹⁹³ Ruggie took the approach that human rights law did not impose the extensive human rights duties on businesses that were contained in the Draft Norms.¹⁹⁴ Instead, he clarified that existing human rights instruments aimed at corporate responsibility were of a voluntary nature for businesses,¹⁹⁵ but some instruments did impose

[hereinafter Draft Norms], available at <http://www1.umn.edu/humanrts/links/NormsApril2003.html>; see also Commentary on Draft Norms, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev. 2 (2003), available at <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html>; David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

¹⁹¹ John Ruggie, a Harvard professor, helped establish the Global Compact when he served as assistant secretary-general for strategic planning under former Secretary-General Kofi Annan. His appointment continued under Secretary-General Ban Ki-Moon through 2011. See Special Representative of the Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 55, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter 2006 Interim Report], available at <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>. For other reports of the Special Representative and related documents see <http://www.business-humanrights.org/SpecialRepPortal/Home>.

¹⁹² See, e.g., 2006 Interim Report, *supra* note 191, at ¶ 60; Bishop, *supra* note 189, at 122 (citing Carolin F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 4 GER. L.J. 1065, 1070 (2003)).

¹⁹³ See Commission on Human Rights Res. 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/RES/2005/69 (Apr. 20, 2005), available at <http://www.unhcr.org/refworld/docid/45377c80c.html>.

¹⁹⁴ See 2006 Interim Report, *supra* note 191, at ¶ 61.

¹⁹⁵ *Id.*

a duty on states to prevent private actors from violating human rights.¹⁹⁶ He also acknowledged that evolving principles of customary international law suggest that corporations “may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and some crimes against humanity.”¹⁹⁷ In his 2008 report¹⁹⁸ to the U.N. Human Rights Council, Ruggie presented a framework that clarified the human rights duties and obligations under a framework of “Protect, Respect and Remedy” based on three pillars:

[(1) T]he State duty to protect against human rights abuses by third parties, including business . . . [(2)] the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others, and to address such adverse impacts [that occur] . . . [and (3)] greater access by victims to effective remedy, both judicial and non-judicial.¹⁹⁹

On June 16, 2011, the U.N. Human Rights Council endorsed Guiding Principles on Business and Human Rights (Guiding Principles) as submitted by Ruggie and based upon the “Protect, Respect and Remedy” framework.²⁰⁰ There is evidence that the Guiding Principles have had an impact on exiting standards and

¹⁹⁶ *Id.* (listing the Convention on the Elimination of All Forms of Discrimination Against Women, the OECD and UN anti-bribery Conventions, and some ILO labor standards as imposing these obligations).

¹⁹⁷ *Id.*

¹⁹⁸ Special Representative of the Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), [hereinafter H.R.C. 8/5 Report], available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

¹⁹⁹ Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 6, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://daccessods.un.org/TMP/5794962.64457703.html>.

²⁰⁰ Human Rights Council Res. 17/4, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), available at <http://daccessods.un.org/TMP/1883139.16325569.html>.

guidelines, and that corporations are adopting CSR due diligence policies based upon this non-obligatory framework.²⁰¹ For example, the International Finance Corporation (IFC), a member of the World Bank Group, has revised its standards and developed an online guide entitled “Guide to Human Rights Impact Assessment and Management” based upon the framework and designed for use by companies.²⁰²

Some of the other non-legislative actions that foster CSR actions include recommendations from the European Commission (EC). For example, in order to direct investors towards enterprises in the light of their CSR results, the EC encourages the following adoptions: “codes of conduct (concerning workers' rights, human rights, protection of the environment, etc.); management standards (in order to integrate social and environmental aspects into the day-to-day activities of enterprises); instruments for measuring performance (such as internal evaluation reports); labels on products; and standards for Socially Responsible Investment (SRI).”²⁰³ The EC has not adopted or proposed binding legislation on CSR,²⁰⁴ but it has

²⁰¹ INTERNATIONAL FINANCE CORPORATION, GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT 11 (June 2010), available at <http://www1.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES>.

²⁰² *Id.*; see also Special Representative of the U.N. Secretary-General for Business & Human Rights, *Applications of the U.N. “Protect, Respect and Remedy” Framework* (Jun. 30, 2011), available at <http://www.business-humanrights.org/media/documents/applications-of-framework-jun-2011.pdf> (identifying instances of practical applications of the UN Framework).

²⁰³ *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM (2002) 347 final (July 2, 2002), available at http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/n26034_en.htm.

²⁰⁴ *See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Implementing the Partnership for Growth and Jobs Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM (2006) 136 final (March 22, 2006), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0136:FIN:en:PDF>.

announced a project to develop guidance based upon the United Nations “Protect, Respect and Remedy” framework.²⁰⁵

Intergovernmental bodies—such as the International Labour Organization (ILO), the United Nations Global Compact, the Organization for Security and Co-operation in Europe, the International Organization for Standardization, and the Organisation for Economic Co-operation and Development—and national as well as local nongovernmental organizations have also created compacts, declarations, guidelines, principles and other instruments that outline standards for responsible business.²⁰⁶

The ILO is an international organization with the mission of “promoting social justice and internationally recognized human and labour rights.”²⁰⁷ The ILO is unique because it is the only tripartite United Nations agency—having government, employer, and worker representatives.²⁰⁸ There are 185 member states in the ILO.²⁰⁹ The ILO’s 2005 and 2009 International Labour Conference reports on forced labor document that forced labor is a severe problem with a global scope.²¹⁰ The reports noted increased allegations that major

²⁰⁵ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed E.U. Strategy 2011-14 for Corporate Social Responsibility*, ¶ 4.8.2, COM (2011) 681 final (Oct. 25, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

²⁰⁶ See, e.g., CSR Worldwide Week, The Netherlands, Nov. 3–10, 2004, *A Call for Globally Accountable Business*, available at <http://germanwatch.org/tw/kw-csr04.pdf>; SINGAPORE COMPACT, <http://csrsinapore.org/c/> (last visited Dec. 1, 2012) (including members such as, big and small companies, institutions, government agencies, trade unions, associations, academia and NGOs).

²⁰⁷ *Mission and Objectives*, INT’L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited Dec. 1, 2012).

²⁰⁸ *Who We Are*, INT’L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited Dec. 1, 2012).

²⁰⁹ *Id.*

²¹⁰ See ILO 2009, *supra* note 12; International Labour Conference, Geneva, Switz., May 31–June 16, 2005, *A Global Alliance Against Forced Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* [hereinafter *A Global Alliance Against Forced Labour*], available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

mainstream industries benefit from forced labor.²¹¹ The ILO defines “forced labour” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”²¹² Forced labor is distinguished from instances of “low wages or poor working conditions” that are not accompanied by “a severe violation of human rights and restriction of human freedom.”²¹³ The reports highlight that the international activities of a multinational company can involve the use of forced labor.²¹⁴ In the 2009 report, as an example of the need for CSR, there is a discussion of the 2008 case involving a UK-based company, Afrimex (UK) Ltd., which the British government censured for not applying due diligence “in sourcing minerals from mines that used forced labor.”²¹⁵ The report recommends that organizations concerned with advancing CSR in certain industries provide assistance to businesses by adopting industry-wide codes of conduct or other instruments that provide guidance.²¹⁶ These guidelines should recommend the adoption of company policies that are clear with respect to conduct expected of

²¹¹ *ILO 2009*, *supra* note 12, at 3.

²¹² International Labour Organization, Forced Labour Convention, 1930, art. 2(1), Jun. 28, 1930, available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-yangon/documents/genericdocument/wcms_191413.pdf.

²¹³ *ILO 2009*, *supra* note 12, at 5 (noting that this standard can be met by various kinds of menace, including physical violence or restraint, death threats, psychological threats, and threats to report victims to immigration authorities).

²¹⁴ *Id.* at 51–52.

²¹⁵ *Id.* at 15 (citing U.K. National Contact Point, *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd.*, (Aug. 28, 2008), available at <http://www.oecd.org/investment/guidelinesformultinationalenterprises/43750590.pdf>). “The statement was made in response to a complaint brought in 2007 by Global Witness, a UK-based civil society organization that investigates the links between natural resources exploitation, armed conflict and corruption.” *Id.* at n.6; see also Global Witness, *Complaint Against Afrimex (UK) Ltd under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises* (Feb. 20, 2007), available at http://www.globalwitness.org/sites/default/files/import/afrimex_ncp_complaint_en.pdf.

²¹⁶ See *ILO 2009*, *supra* note 12, at 50.

all enterprises in the company's product and supply chains.²¹⁷ The report also includes a list of ten “[p]rinciples for business leaders to combat forced labour and trafficking.”²¹⁸ The principles provide suggestions for proactive conduct that should avoid labor-trafficking problems. For example, employers are advised to “[t]reat migrant workers fairly [and m]onitor carefully the agencies that provide contract labour, especially across borders, blacklisting those known to have used abusive practices and forced labour.”²¹⁹ The principles are intended to benefit all businesses and not just those in the “industries commonly perceived to be at risk, such as the agriculture and the garment industry.”²²⁰ The complex supply chains that exist for the goods used in many products cause a wide range of industries to be at risk.²²¹ The ILO suggests a program of action initiated by the organization but including close work “with the academic community and major policy institutions.”²²²

The United Nations Global Compact office²²³ adopted ten principles as guidance for business practice, which can support the establishment of good CSR practices in the areas of human rights. Several are relevant to human trafficking. The two basic principles are: (1) “Businesses should support and respect the protection of internationally proclaimed human rights; and (2) make sure that they

²¹⁷ *Id.* at 50, box 4.1.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 54.

²²¹ *Id.* at 54.

²²² *Id.* at 82.

²²³ In July 2000, then U.N. Secretary-General, Kofi Annan, launched the Global Compact. *UN Global Compact Participants*, UNITED NATIONS GLOBALCOMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last updated Oct. 23, 2012). Today, seven U.N. agencies support the office: (1) the Office of the High Commissioner for Human Rights; (2) the United Nations Environment Programme; (3) the International Labour Organization; (4) the United Nations Development Programme; (5) the United Nations Industrial Development Organization; (6) the United Nations Office on Drugs and Crime; and (7) the United Nations Entity for Gender Equality and the Empowerment of Women. The aim of the office is to encourage corporations to abide by basic principles on “human rights, labour, environment, and anti-corruption.” *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/abouttheGC/index.html> (last updated Dec. 1, 2011).

are not complicit in human rights abuses.”²²⁴ If forced labor is a possibility, principles 3, 4, 5, and 6 are also implicated:

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.²²⁵

Finally, if corruption is involved, Principle 10 is implicated. It provides that “[b]usinesses should work against corruption in all its forms, including extortion and bribery.”²²⁶ To further emphasize the connection between the ten principles and TIP, the Global Compact’s lists six reasons for a proactive role in addressing human trafficking: “because human trafficking is morally unacceptable; to comply with international standards and national law; to manage risk and reputation; to promote codes of conduct and CSR; to enhance stakeholder relationships; [and] to protect global supply chains.”²²⁷

The Organisation for Economic Co-operation and Development (OECD)²²⁸ has adopted guidelines for multinational enterprises, which include non-binding principles and standards for responsible

²²⁴ *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited, Dec 30, 2012).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See UN.GIFT, *Human Trafficking: Everybody’s Business*, *supra* note 7, at 2.

²²⁸ The Convention on the OECD was signed in Paris on December 14, 1960 when the Organisation for European Economic Co-operation (OEEC) (formed in 1947 to administer aid under the Marshall Plan for the reconstruction of Europe after World War II) was reconstituted as the OECD in order to “ensure lasting peace [by] encourage[ing] co-operation and reconstruction” between the nations. The Convention came into force on Sept. 30, 1961. Thirty-four countries, including the United States are now party to the Convention. *History*, OECD, www.oecd.org/history (last visited Dec. 30, 2012).

business conduct in a global context.²²⁹ These guidelines were updated in 2011²³⁰ from their last revision in 2000.²³¹ The 2011 guidelines made substantial revisions to human rights, supply chain and due diligence responsibilities.²³² Peter Muchlinski notes that since due diligence is a concept usually associated with investment risks, as pointed out by the SRSG, “it requires a shift from considering the risk to the company to risk to potential victims of corporate action.”²³³ This revision is based on the Guiding Principles adopted by United Nations Human Rights Council and developed by the SRSG.

The Organization for Security and Co-operation in Europe (OSCE) issued a report on using the business model approach to help prevent TIP.²³⁴ One of its recommendations is that private industry adopt self-regulation codes of conduct regarding fair trade practices and supply-chain management.²³⁵

Several organizations and NGOs also developed standards for CSR. The World Business Council for Sustainable Development (WBCSD), a CEO-led global association of 200 companies dealing with business and sustainable development issued a report on the

²²⁹ OECD, *Guidelines for Multinational Enterprises* (2011), available at <http://dx.doi.org/10.1787/9789264115415-en>.

²³⁰ *Id.*; see also PETER MUCHLINKSKI, ADVOCATES FOR INT’L DEV., THE 2011 REVISION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: HUMAN RIGHTS, SUPPLY CHAINS AND THE “DUE DILIGENCE” STANDARD FOR RESPONSIBLE BUSINESS (2011), available at <http://a4id.org/sites/default/files/%5BA4ID%5D%20Human%20Rights,%20Supply%20Chains%20and%20the%20E2%80%9CDue%20Diligence%20Standard%20for%20Responsible%20Business%20-%20Peter%20Muchlinski.pdf>.

²³¹ OECD, *Guidelines for Multinational Enterprises* (2000), available at <http://www.oecd.org/investment/guidelinesformultinationalenterprises/1922428.pdf>.

²³² See Muchlinski, *supra* note 230, at 3.

²³³ *Id.* at 6 (citing Special Representative of the Secretary-General, *Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect and Remedy” Framework*, ¶¶ 81–83, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010), available at <http://www.reports-and-materials.org/Ruggie-report-2010.pdf>).

²³⁴ ARONOWITZ ET AL., *supra* note 15.

²³⁵ *Id.* at 70.

benefits of CSR.²³⁶ The report is based upon a two-year study and concludes that human rights were one of the top five priority areas that should be addressed in CSR.²³⁷ The other areas are employee rights, environmental protection, community involvement, and supplier relations.²³⁸ All of the areas except environmental protection are directly related to TIP concerns. The report concludes that companies benefit from CSR policies and also provides some practical tools to assist with the creation of a CSR policy.²³⁹

The European Coalition for Corporate Justice (ECCJ) is an organization that represents over 250 civil society organizations, including NGOs, trade unions, consumers' organizations, and academic institutions and promotes corporate accountability in Europe.²⁴⁰ The ECCJ has taken the position that the European Commission should provide legislation to guarantee human rights.²⁴¹

While not technically aimed at developing guidelines or recommendations for CSR, the California Supply Chain Transparency Act encourages CSR. The law became effective on January 1, 2012, and requires certain corporations to provide information to the public regarding the steps they are taking to ensure that their supply chains are free from trafficked labor.²⁴² Initial reports show that companies are imposing new requirements on their suppliers so that accurate determinations can be made about supply

²³⁶ RICHARD HOLME & PHILIP WATTS, WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., CORPORATE SOCIAL RESPONSIBILITY: MAKING GOOD BUSINESS SENSE (2000), *available at* <http://www.wbcd.c h/DocRoot/lunSPdIKvmYH5HjbN4XC/csr2000.pdf>.

²³⁷ *Id.* at 10.

²³⁸ *Id.*

²³⁹ *Id.* at 14–29.

²⁴⁰ *About ECCJ*, EUROPEAN COAL. FOR CORPORATE JUSTICE, <http://www.corporatejustice.org/-about-eccj,012-.html?lang=en> (last visited Dec. 30, 2012).

²⁴¹ Press Release, European Coal. for Corporate Justice, The EU Must Take Further Steps to Hold Companies Accountable, (Oct. 25, 2011), *available at* <http://www.corporatejustice.org/csr-communication-eccj-reaction.html?lang=en>.

²⁴² CAL. CIV. CODE § 1714.43 (West 2012). The law applies to companies doing business in California with annual worldwide gross receipts exceeding \$100,000,000. The disclosures must be accessible through a "conspicuous and an easily understood link" on the company's homepage. *Id.* § 1714.43(b).

chains.²⁴³ U.S. Representative Carolyn Maloney of New York introduced a bill in the 112th Congress similar to the California law.²⁴⁴ The law would require companies to include in the annual report to the SEC information on the company's efforts "to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within the company's supply chains."²⁴⁵

C. SELF-IMPOSED CSR ACTIONS AGAINST HUMAN TRAFFICKING

The SRSRG, John Ruggie, has warned of the dangers faced by companies that do not respect human rights: "Failure to meet this responsibility can subject companies to the courts of public opinion— comprising employees, communities, consumers, civil society, as well as investors—and occasionally to charges in actual courts."²⁴⁶

This warning appears to have been taken seriously by a number of companies and industries concerned about human trafficking. These companies have perhaps observed that the warning is supported by the fact that other companies have seen their image badly tarnished by allegations that they have used child labor or conflict minerals, or otherwise have tainted supply chains. These allegations have affected a number of industries including technology, steel, electronics, footwear, food and beverages, transportation, manpower recruitment, and textiles.²⁴⁷ Some

²⁴³ REMSEN KINNE ET AL., K&L GATES LLP, CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT – FIRST 90 DAYS (2012), available at <http://www.jdsupra.com/legalnews/california-transparency-in-supply-chains-85821/>.

²⁴⁴ Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Cong. (2011).

²⁴⁵ *Id.*

²⁴⁶ H.R.C. 8/5 Report, *supra* note 198, ¶ 54.

²⁴⁷ See *ILO 2009*, *supra* note 12, at 51; see also, e.g., John D. Sutter, *Tech Companies Make Progress on 'Blood Phones' and 'Conflict Minerals'*, CNN (Aug. 16, 2012), <http://www.cnn.com/2012/08/16/tech/gaming-gadgets/congo-blood-phones-report/index.html>; Editorial, *Forced Labor*, N.Y. TIMES, Sept. 7, 2010, available at <http://www.nytimes.com/2010/09/08/opinion/08wed2.html>; Susan Ferriss, *Coca-Cola Accused of Links with Child Labour*, SYDNEY MORNING HERALD, June 11, 2004, available at <http://www.smh.com.au/articles/2004/06/10/1086749841441.html>; John H.

companies realize that not only will allegations affect the particular company but may also negatively affect the entire industry.²⁴⁸ Even when there have been no allegations, some individual companies and industries have taken a proactive approach to guard against human trafficking, and run their business operations in a socially responsible manner by complying with national laws in the countries in which they operate for which they could be held liable, and also by complying with non-binding international guidelines and standards.²⁴⁹ Such actions can help potential victims as well as help the company avoid the risk of human trafficking. Some of them are discussed below. A report by the Global Initiative to Fight Human Trafficking recommends that companies “[take] steps to make it harder for traffickers to traffic people using their products, premises or services and by helping raise awareness of the problem [and by] adopting and implementing corporate policies with commitments to respect human rights, labour standards and anti-corruption.”²⁵⁰

In February 2008, a conference on forced labor was hosted by the Coca-Cola Company in Atlanta, Georgia and sponsored by the U.S. Council for International Business, the U.S. Chamber of Commerce, and the International Organization of Employers in Cooperation with the ILO.²⁵¹ The stated purpose of the conference was to “draw on the experience and knowledge of participants in helping to formulate a practical program for employers that can be used to identify forced labor, to provide means for its elimination and to give guidance on its remediation.”²⁵² The attendees were government officials, NGO representatives, the ILO, and eighty representatives from employers’ organizations and individual

Cushman, Jr., *International Business: Nike Pledges to End Child Labor And Apply U.S. Rules Abroad*, N.Y. TIMES, May 13, 1998, available at <http://www.nytimes.com/1998/05/13/business/international-business-nike-pledges-to-end-child-labor-and-apply-us-rules-abroad.html?pagewanted=all&src=pm>. See generally *Corporate Legal Accountability Portal*, BUS. & HUMAN RIGHTS RES. CTR., <http://www.business-humanrights.org/LegalPortal/Home> (for listing of lawsuits).

²⁴⁸ See *ILO 2009*, *supra* note 12, at 51.

²⁴⁹ See *infra* notes 250–83 and accompanying text.

²⁵⁰ UN.GIFT, HUMAN TRAFFICKING: EVERYBODY’S BUSINESS, *supra* note 7, at 2.

²⁵¹ Meeting Agenda, Coca-Cola Co. et al., *Engaging Business: Addressing Forced Labour* (Feb 20, 2008), available at http://www.ilo.org/sapfl/Events/ILOevents/WCMS_092171/lang--en/index.htm.

²⁵² *Id.* at 1.

companies.²⁵³ The participants discussed case studies of alleged forced labor, the need to address forced labor and methods for implementing business strategies to address forced labor.²⁵⁴ Similar meetings were scheduled around the world.²⁵⁵ A subsequent meeting focusing on human trafficking was held in Atlanta on February 14, 2012.²⁵⁶ In connection with the meeting, ManpowerGroup and Verite released a report detailing a framework for combatting human trafficking and forced labor.²⁵⁷ The partnerships formed at or as a result of these meetings have led to other efforts to combat trafficking. In a speech focusing on the need to shift the focus in addressing human trafficking from corporate liability to corporate social responsibility, Dr. Mohammed Mattar, executive director of the Protection Project, The John Hopkins University School of Advanced International Studies, recognized representatives from Coca-Cola, LexisNexis, and Delta Airlines for their efforts to combat human trafficking.²⁵⁸

The hospitality and tourism industry has been recognized as a facilitator of TIP.²⁵⁹ However, the hospitality industry can also be

²⁵³ See *Engaging Business: Addressing Human Trafficking in Labor Sourcing*, INT'L LABOUR ORG. (Feb. 14, 2012), http://www.ilo.org/sapfl/Events/ILOevents/WCMS_092170/lang--en/index.htm.

²⁵⁴ *Multi-Stakeholder & Multi-Brand Engagement*, VERITÉ, <http://www.verite.org/helpwanted/toolkit/brands/multistakeholder-multibrand-engagement> (last visited Dec. 1, 2012).

²⁵⁵ *Engaging Business*, *supra* note 253.

²⁵⁶ Meeting Agenda, *supra* note 251.

²⁵⁷ See Press Release, PR Newswire, ManpowerGroup and Verite Release Ethical Framework to Combat Human Trafficking and Forced Labor in Cross-Border Recruitment (Feb. 15, 2012), *available for download at* [http://www.bizjournals.com/prnewswire/press_releases/2012/02/15/CG54472; An Ethical Framework for International Labor Recruitment](http://www.bizjournals.com/prnewswire/press_releases/2012/02/15/CG54472;AnEthicalFrameworkforInternationalLaborRecruitment), VERITE, <http://www.verite.org/ethical-framework-for-intl-recruitment> (last visited Dec. 1, 2012).

²⁵⁸ Mohamed Mattar, *Engaging Business in International and Domestic Anti-Trafficking Legislation*, Remarks at Engaging Business: Addressing Human Trafficking in Labor Sourcing (Feb. 14, 2012), *available at* [http://www.protect ionproject.org/speeches/](http://www.protectionproject.org/speeches/).

²⁵⁹ See ILO 2009, *supra* note 12, at 79; see also UNODC, *UNWTO Stress Need for Tourism Industry Cooperation in Combatting Human Trafficking*, U.N. GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING, <http://www.ungift.org/knowledgehub/stories/april2012/unodc-unwto-stress-need-for-tourism-industry-cooperation-to-combat-human-trafficking.html>.

used to combat trafficking. At the twenty-first session of the Commission on Crime Prevention and Criminal Justice held in Vienna, Austria in April 2012,²⁶⁰ a representative of Marriott Hotels International, discussed the hotel chain's proactive approach to training staff and reporting instances of trafficking or sexual exploitation.²⁶¹ The hotel chain is taking an approach which addresses the supply side to trafficking.²⁶² They have adopted a Youth Career Initiative in their economic empowerment program to address the belief that the root cause of the available supply is poverty.²⁶³

Delta Airlines has taken the initiative to educate employees about red flags in product supply chains or actions of customers that may indicate that the airline is being used to facilitate trafficking.²⁶⁴ Delta was also the first airline to sign the End Child Prostitution, Child Pornography, and Trafficking of Children for Sexual Purposes (ECPAT) Code of Conduct.²⁶⁵ ECPAT states that its Tourism Child-Protection Code of Conduct, a joint venture between ECPAT and the tourism private sector, "is the only voluntary set of business principles travel and tour companies can implement to prevent child sex tourism and trafficking of children."²⁶⁶ The Code of Conduct provides that companies that sign on will receive assistance from ECPAT to, among other things, work on issues to create alerts and educate employees to recognize trafficking.²⁶⁷ The prevalence of trafficking in the hotel industry has been highlighted in part by

²⁶⁰ *Commission on Crime Prevention and Criminal Justice*, U.N. OFFICE ON DRUGS AND CRIME (Apr. 23–27, 2012), <http://www.unodc.org/unodc/en/commissions/CCPCJ/session/21.html>.

²⁶¹ *Need for Tourism Industry Cooperation*, *supra* note 259 (noting remarks by Barbara Powell, Senior Director, International Social Responsibility and Community Engagement, Marriott Hotels International).

²⁶² *See id.*

²⁶³ *Id.*

²⁶⁴ *See Human Sex Trafficking in U.S. Raises Concern*, FOX NEWS, <http://www.foxnews.mobi/quickPage.html?page=27677&content=63919099&pageNum=-1>.

²⁶⁵ *Id.*

²⁶⁶ *The Tourism Child-Protection Code of Conduct*, END CHILD PROSTITUTION, CHILD PORNOGRAPHY & TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES U.S.A., <http://ecpatusa.org/what-we-do/the-code/> (last visited Dec. 1, 2012).

²⁶⁷ *Id.*

efforts of a meeting planner in St. Louis, Missouri.²⁶⁸ Based on her expertise and familiarity with the hotels in the area, she recognized specific hotel rooms in Backpage.com's escorts section which were being used by sex traffickers.²⁶⁹ As a result, she has directed her efforts to convincing hotel managers to sign the Tourism Child-Protection Code of Conduct and has helped her firm create a code for meeting planners.²⁷⁰

Voluntary actions are also being taken by companies that might experience goods produced by trafficked labor in their supply chains. In attempt to address the supply side of trafficking, Microsoft has created an "Unlimited Potential" program in Asia, which awards grants to projects in communities where trafficking is concentrated.²⁷¹ It has also assisted local NGOs with the establishment of 135 community technology centers.²⁷² "The program[] has [also] been used as a rehabilitative tool for trafficked victims."²⁷³ OSCE reports that Bettys & Taylors of Harrogate (United Kingdom), a traditional family business specializing in coffees and teas, has developed a system to monitor conditions in their supply chains.²⁷⁴ Its coffee buyers are trained as social auditors, accredited by the Ethical

²⁶⁸ Katia Hetter, *Fighting Sex Trafficking in Hotels, One Room at a Time*, CNN (Mar. 1, 2012), http://www.cnn.com/2012/02/29/travel/hotel-sextrafficking/index.html?eref=rss_travel&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+rss%2Fenn_travel+%28RSS%3A+Travel%29.

²⁶⁹ *Id.*

²⁷⁰ *Id.*; see also Press Release, Nix Conference & Meeting Management, Meeting Planning Firm Leads the Charge to End Child Sex Trafficking (Dec. 19, 2011), <http://www.nixassoc.com/more-about-nix/press-releases/>.

²⁷¹ See JUDITH GILMORE, CTR. FOR INFO. & SOC'Y, UNIV. OF WASHINGTON, EVALUATION OF THE MICROSOFT UNLIMITED POTENTIAL ANTI-TRAFFICKING PROGRAM IN ASIA (2008), available at http://www.childtrafficking.com/Docs/gilmore_08_microsoft_0309.pdf.

²⁷² ARONOWITZ ET AL., *supra* note 15, at 69 (noting that this information was obtained from Microsoft at the UN.GIFT conference in Vienna, March 13–15, 2008); see also *Unlimited Potential*, MICROSOFT, http://www.microsoft.com/india/msindia/msindia_unlimited_potential.aspx (last visited Dec. 1, 2012).

²⁷³ ARONOWITZ ET AL., *supra* note 15, at 69.

²⁷⁴ *Bettys & Taylors of Harrogate - Sustainable Coffee Sourcing Programme*, BUS. IN THE CMTY., http://www.bitc.org.uk/resources/case_studies/afe_1363_bettys.html.

Trading Initiative.²⁷⁵ The buyers visit farms that grow tea and coffee purchased by the company, to ensure that workers throughout their supply chain are fairly treated.²⁷⁶ They report that their product sales have grown and all of their suppliers receive a fair sustainable price.²⁷⁷ Other efforts include the use of a Due Diligence Dashboard database created by LexisNexis.²⁷⁸ The database allows government and corporate procurement officers to search the database to uncover supply chain risks.²⁷⁹ The director of Corporate Responsibility, Rule of Law at LexisNexis reports that a search in the database of Foxconn, a Chinese factory and Apple's main supplier, uncovered negative information dating back to 1997.²⁸⁰ The Apple incident involving Foxconn, although not alleged to be forced labor, illustrates that even if a company has adopted preventive measures through a CSR plan, sometimes a company, in order to protect its image, will be required to respond to specific allegations.²⁸¹ Following media reports of forced labor conditions at Foxconn, Apple immediately engaged an independent auditing company to launch an on-site investigation and Foxconn subsequently made some changes in its working conditions.²⁸²

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*; see also ARONOWITZ ET AL., *supra* note 15, at 70 (citing ALEXIS ARONOWITZ, HUMAN TRAFFICKING, HUMAN MISERY: THE GLOBAL TRADE IN HUMAN BEINGS (2009)).

²⁷⁸ *LexisNexis Introduces Due Diligence Dashboard*, LEXISNEXIS (July 18, 2011), <http://www.lexisnexis.com/community/legalbusiness/blogs/best-practices/archive/2011/07/18/lexisnexis-introduces.aspx>.

²⁷⁹ *Id.*

²⁸⁰ Government Info Pro, LEXISNEXIS (March 2012), http://www.governmentinfopro.com/federal_info_pro/2012/03/uncovers-erling-human-trafficking-in-supply-chains-with-lexisnexis-due-diligence-dashboard.html; see also Lee Chyen Yee, *Rights Group Says Apple Suppliers in China Breaking Labor Laws*, REUTERS, June 28, 2012, <http://www.reuters.com/article/2012/06/28/us-apple-china-suppliers-idUSBRE85R0EA20120628>.

²⁸¹ See, e.g., Kate Knibbs, *Apple Heads Off Criticism with Foxconn Factory Inspections*, MOBILELIDIA (Feb. 13, 2012), available at <http://www.mobiledia.com/news/127854.html>.

²⁸² *Auditors Find Improved Working Conditions at an Apple Supplier*, N.Y. TIMES, Aug. 22, 2012, <http://www.nytimes.com/2012/08/23/technology/23iht-apple23.html>.

Voluntary efforts by these companies and others²⁸³ demonstrate that by focusing on supply and demand to develop market reduction approaches, companies can prosper while improving the conditions that might otherwise lead to more victims being subjected to trafficking.

CONCLUDING REMARKS

As demonstrated by the issues regarding ATS claims²⁸⁴ and efforts by states to reach companies who facilitate trafficking,²⁸⁵ the law is unsettled regarding corporate liability for activities that result in indirect benefits from human trafficking. Although additional laws that might extend liability to these entities are continuing to be considered²⁸⁶ and adopted,²⁸⁷ even if no criminal or civil liability is established, revelations about a company's reliance on trafficked goods or services could be injurious to its reputation. The

²⁸³ See Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 407–08 (2007) (noting voluntary CSR efforts by companies including Shell International Petroleum, Amerada Hess Corporation, Starbucks, and the Gap); Jernej Letnar Černič, *Corporate Obligations Under The Human Right To Water*, 39 DENV. J. INT'L L. & POL'Y 303, 341 (2011) (listing British Petroleum, Chevron, Citigroup, Coca-Cola, Exxon Mobil, Total, General Motors, Wal-Mart, Conoco-Phillips, Daimler-Chrysler, and De Beers as companies with codes of conduct that focus on human rights issues).

²⁸⁴ See discussion *supra* in Part II.A.

²⁸⁵ See, e.g., *supra* notes 91–92 and accompanying text (discussing Washington's bill, S.B. 6251).

²⁸⁶ See, e.g., PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING, Nat'l Conference of Comm'rs on Unif. State Laws 2011 (draft of proposed model state law; imposing liability on businesses for certain acts). See generally *2012 Top Ten List of Emerging Business and Human Rights Issues*, INST. FOR HUMAN RIGHTS & BUS. (Dec. 2011), http://www.ihrb.org/top10/business_human_rights_issues/2012.html (discussing need for legal redress for business participation in human rights violations); U.N.H.R.C., Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04 (2011), available at http://shiftproject.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf.

²⁸⁷ See, e.g., South Carolina Trafficking in Persons Law enacted 2012, S.C. CODE ANN. § 16-3-2010 (1976) (violators include a "business owner who uses his business in a way that participates in a violation").

recommendations for domestic and international corporate social responsibility plans should be implemented not only for the benefit that accrues to the company, but also for the benefits that may be realized by existing and potential victims through a reduction in the supply and demand for trafficked goods or services. Assistance is now readily available for companies desiring to adopt anti-trafficking measures and comply with CSR guidelines such as the Guiding Principles.²⁸⁸ While additional research may be needed in many areas addressed here, including the effect on businesses that adopt corporate social responsibility plans when their competitors do not, business enterprises can help combat human trafficking while benefitting from the adoption of CSR plans and actions rather than simply trying to avoid corporate liability.

²⁸⁸ See, e.g., U.N.H.R.C., *The Corporate Responsibility To Respect Human Rights: An Interpretive Guide* (2012), HR/PUB/12/02, http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.