

# Human Trafficking: identifying forced labor in multinational corporations & the implications of liability\*

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## Abstract

This paper explores multinational corporations and use of human trafficking. More specifically, the type of human trafficking depicted in this paper deals with the use of forced labor. Multinational corporate involvement within the use of forced labor is explored and the depth regarding criminal and civil modes of corporate liability is explained. The main purpose of the paper is to exemplify how multinational corporations contribute to the increase of human trafficking practices and how difficult it is to assess liability or punishment for these violations. Unfortunately, the human trafficking industry is consistently increasing, due to its prevalence in the corporate world. There are laws and acts that have been created that prohibit the use of human trafficking, yet due to jurisdictional implications, regarding foreign-based corporations and extenuating costly litigation, the laws do not become effective for assigning liability. The ambiguities and lack of transparency in corporate structures along with the narrow reach of U.S. laws, creates an inability for victims to seek appropriate justice. The fight against human trafficking diminishes when multinational corporations use forced labor practices within business models.

**Key words:** Human trafficking. Forced Labor. Corporations. Human Rights Violations. Liability. Alien Torts Statute. Extraterritorial Jurisdiction. Trafficking In Persons Victims Protection Act

## 1 Introduction

Human trafficking has become a worldwide epidemic and is the most egregious form of abuse human beings commit against each other. Trafficking involves the sole trade of human beings. These crimes are committed solely for the purpose of commercial profit.<sup>1</sup> The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 3, defines human trafficking as “the recruitment, transportation, transfer, harboring or receipt of persons, by means of 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 [...]”<sup>2</sup> The trafficking of humans is successful due, in part, to the vulnerability its victims may exhibit. This vulnerability is present because victims are usually promised a United States visa or compensation, yet these promises never come true.<sup>3</sup> Unfortunately, the human trafficking business has become extremely profitable and there remains an insurmountable demand. Human

1 Sophia Eckert, The Business Transparency on Trafficking and Slavery Act: Fight Forced Labor in Complex Global Supply, 12 J. Int'l Bus. & L. 383, 384 (2013).

2 Human Trafficking, Background on Human Trafficking (2011) available at <http://www.northeastern.edu/humantrafficking/background-on-human-trafficking>.

3 *Id.*

\*Recebido em 07.02.2014

Aceito em 20.03.2014

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trafficking represents an estimated thirty-two billion dollar per year in international trade.<sup>4</sup>

Not only has human trafficking become a national problem, but it has also become a recurrent obstacle throughout the world. The trafficking industry has immensely increased due to numerous factors like globalization, government corruption, and organized crime. However, the multinational corporate community has become a major player in fueling this industry. Specifically, there exist two forms of human trafficking: sexual exploitation trafficking and forced labor trafficking. The forced labor practices are typically used throughout the corporate world. Corporations stand as a façade allowing forced labor to conceal itself and thus succeed. Multinational corporations are very important to our global economy, yet when these entities continuously foster the use of forced labor within their businesses, major dilemmas arise.

The trafficking industry is consistently growing, due to its prevalence in the corporate world. With the aid of increased globalization and government corruption, these factors foster an environment for corporations to commit human rights violations. While present laws do prohibit the use of human trafficking, the laws are not effective for assigning liability, due to jurisdictional implications regarding foreign-based corporations and extenuating costly litigation. Corporations are usually subject to litigation within their domestic jurisdictions, yet most areas where the human rights violations occur are in underdeveloped nations. These nations lightly respond to the violations thus corporate liability is rarely achieved. Furthermore, the current laws, which do grant victims a right to bring suit against these violations, lack extraterritorial jurisdiction.

Additionally, the complexity of corporate structure helps mask the use of human trafficking violations within the business structure. As an example, many multinational corporations include parent companies and subsidiaries, which creates a convoluted environment placing limits in the ability to successfully assign criminal and civil liability. The lack of transparency in corporate structures along with the narrow reach of United States laws manifests an inability for the victims to seek justice. The long and arduous fight against human trafficking becomes

obsolete when multinational corporations use forced labor within their business models. Ultimately, there is a need for corporate transparency in order to identify and rectify corporately concealed forced labor practices. Further, the current laws prohibiting human rights violations should be extended in order to encompass those foreign-based corporations whom usually escape liability.

This article is separated into various sections in order to analyze how human trafficking is concealed throughout corporate structures and the ramifications victims face. Specifically, section II explores the history of human trafficking while section III explores the particular forms of human trafficking. Section IV provides a description of the trafficking economy and section V thoroughly investigates multinational corporations involvement within the field of human trafficking. Finally, section VI analyzes the legislation tailored to human trafficking crimes while section VII provides solutions in response to the worldwide human trafficking dilemma.

## 2 History of human trafficking

According to the 2012 Congressional Research and Service Report on human trafficking, current United States foreign policy addressing human trafficking relates to the anti-slavery policies that centered initially and reinforced international prohibitions on forced labor during the first half of the 20<sup>th</sup> century.<sup>5</sup> In 1988, the Supreme Court recognized the “limitations of existing involuntary servitude and slavery statutes, and invited Congress to expand upon them” in *United States v. Kozminski*.<sup>6</sup> The Court held that Congress intended that “involuntary servitude” under the 1867 Anti-Peonage Act 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.<sup>7</sup> So in response to this realization, on March 11, 1998, President Clinton issued a directive calling for legislative action to combat human trafficking.<sup>8</sup> This directive outlined a three-pronged strategy that emphasized prevention,

5 Shavers, *supra* note 4 at 48.

6 *United States v. Kozminski*, 487 U.S. 931, 937 (1988).

7 Shavers, *supra* note 4 at 48.

8 *Id.*

4 Anna Williams Shavers, Human Trafficking, The Rule of Law, And Corporate Social Responsibility, 9 S.C.J. Int'l. L. & Bus.39, 47-81 (2012).

protection, and support for victims.<sup>9</sup> The intent of the legislation was to deter human trafficking in the United States as well as abroad. When the Trafficking Victims Protection Act (TVPA) was signed in December of 2000, human trafficking became a federal crime.<sup>10</sup> The TVPA 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.<sup>11</sup> Prior to 2000, federal law did not exist to protect the victims of trafficking or to prosecute their traffickers.<sup>12</sup> However, in 2009 the Department of State and other affected agencies added partnership as a fourth element to the strategy. As a result of this addition, the components consist of prevention, protection, prosecution, and partnership.<sup>13</sup>

Even though establishment of the TVPA produced major strides in the awareness and fight against human trafficking, there are still about two to four million people being trafficked each year worldwide.<sup>14</sup> There are many multinational corporations that are directly and indirectly involved with using forced labor. Ultimately, individuals are still held against their will as domestic workers; working for little or no pay, and with no other ways to find other employment.<sup>15</sup> Specifically, “twenty-million persons are victims of forced labor around the world today.”<sup>16</sup> Of these twenty million forced laborers, fourteen million are exploited for economic activities in industries that are relevant to global supply chains such as agriculture, construction, and manufacturing.<sup>17</sup> The complex structure of these modern day slavery practices continues and corporations are indirectly and directly reaping benefits through the exploitation of humans.

### 3 Types of human trafficking

There are two main types of human trafficking- sex trafficking and forced labor trafficking. Sex trafficking is “the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes

of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age.”<sup>18</sup> Forced **labor trafficking** is “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>19</sup> Labor trafficking involves domestic servitude and forced farm or factory labor. Victims of trafficking and their traffickers live and work amongst us; their lives are frequently and often unknowingly embedded in our own.<sup>20</sup> “With victims of forced labor working in the cotton, chocolate, steel, rubber, tin, sugar, and seafood industries, we encounter products manufactured by trafficking almost daily.”<sup>21</sup>

A majority of forced labor victims come from developing countries. They are usually recruited and trafficked by the use of deception and coercion and find themselves held in conditions of slavery in a variety of jobs.<sup>22</sup> “The traffickers use many tactics to supply their operations, enticing individuals of low social or political status and providing economic incentives with promises of money, education, or steady employment opportunities.”<sup>23</sup> Major multinational corporations use forced labor because of the low costs, which in turn enables very high profits. Multinational corporations are only concerned about the bottom line (profit), so obtaining forced labor in order to decrease their overall costs has become a sole priority.

The second type of human trafficking is sex trafficking. These victims, similar to the forced labor victims, often come from developing countries and are trafficked into or through all-developing and developed countries like the United States.<sup>24</sup> It is estimated that fifty thousand (50,000) people are trafficked into the United States every year and many are sold into prostitution.<sup>25</sup> Victims of human trafficking have

9 Shavers, *supra* note 4 at 45.

10 *Id.* at 46.

11 *Id.*

12 18 USCA § 1589 (2000).

13 Shavers, *supra* note 4 at 48.

14 *Id.* at 42.

15 *Id.*

16 Eckert, *supra* note 1 at 384.

17 *Id.*

18 Shavers, *supra* note 4 at 46.

19 *Id.*

20 Jennifer A.L. Sheldon-Sherman, *The Missing “P” Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 444-60 (2012).

21 Sheldon-Sherman, *supra* note 21 at 444.

22 Shavers, *supra* note 4 at 46.

23 Sheldon-Sherman, *supra* note 20 at 444.

24 *The Future Group*, HUMAN TRAFFICKING (2007), available at <http://www.thefuturegroup.org/id20.html>.

25 *Id.*

very few resources and often go unrecognized by law enforcement, social services representatives, and other service providers.<sup>26</sup> “Somewhere around one-half of trafficking in the United States is for purposes other than commercial sex, but about two-thirds of federal human trafficking cases are sex trafficking cases.”<sup>27</sup>

Both forced labor and sex trafficking involve the use of cheap labor. Traffickers use coercion and force in order to attain this use of labor.<sup>28</sup> “The TVPA’s distinction between sex trafficking and labor trafficking is not representative of any difference in the way that captors treat victims of each form of trafficking.”<sup>29</sup> Regardless of the form of exploitation that the captors intend for the trafficked persons, “the captors use many of the same techniques to frighten and control their victims.”<sup>30</sup> Additionally, both types of trafficking involve an extreme minimal monetary transaction for the use of human service.

#### 4 The human trafficking economy

It is important to understand the mechanics of the human trafficking industry in order to take steps to combat its growth. The human trafficking industry exhibits a monopolistic competition model.<sup>31</sup> There are numerous sellers in the market and many buyers demanding human trafficking victims for low cost employment.<sup>32</sup> Different attributes of victims are needed for the different services; meaning there is a sense of product differentiation.<sup>33</sup> As for the concept of supply and demand, the traffickers supply the product in many forms. The price the trafficker will receive is based on the availability of the desired product, characteristics of the product, and the number of similar products available.<sup>34</sup>

In cases of labor trafficking, consumers provide the demand as well as the profit incentive, to the traffickers.<sup>35</sup> The consumers include various companies that subcontract certain types of services, end-consumers who buy cheap goods produced by trafficking victims, or individuals who use the services of trafficking victims.<sup>36</sup> Human trafficking is ultimately fueled by a demand for cheap labor or services, or for commercial sex acts. “Human traffickers are those who victimize others in their desire to profit from the existing demand.”<sup>37</sup> The successful human trafficker’s business is dynamic, adapting as populations become vulnerable and as areas of demand shift.<sup>38</sup> The human traffickers take advantage of the difference between low wages and lack of employment opportunities in some areas.<sup>39</sup> Furthermore, an increased cost to human traffickers becomes a way to affect the supply side of the market.<sup>40</sup> Coordinated international law enforcement and legal cooperation as well as increased punishment for those caught transporting individuals illegally, can increase the expected costs of trafficking.<sup>41</sup> Understanding this entwined market will help inform policy-making decisions in the future.

Trafficking in persons relies on a triangle of activity: supply, demand, and distribution.<sup>42</sup> In sex trafficking, the victims of commercial sexual exploitation provide the supply, and the consumers provide the demand. The traffickers, i.e. the sellers, provide the distribution through many legitimate businesses and major corporations that facilitate, often unknowingly, the distribution.<sup>43</sup> In forced labor trafficking, a business/corporation 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.<sup>44</sup> These activities include the use of labor that a trafficker-recruiter obtained in another

26 *Id.*

27 Rebecca L. Wharton, A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation In the Trafficking Victims Protection Act, 16 Wm. & Mary J. Women & L. 753, 774-5 (2010).

28 Wharton, *supra* note 28 at 770.

29 *Id.* at 772.

30 Wharton, *supra* note 28 at 773.

31 Elizabeth M. Wheaton, Edward J. Schauer & Thomas V. Galli, *Economics of Human Trafficking*, INTERNATIONAL MIGRATION, 123-124 (2010), available at <https://www.amherst.edu/media/view/247221/original/Economics%20of%20Human%20Trafficking.pdf>.

32 Wheaton, *supra* note 27 at 124.

33 *Id.*

34 Wheaton, *supra* note 27 at 122.

35 *The Polaris Project*, FOR A WORLD WITHOUT SLAVERY (2014) available at <http://www.polarisproject.org/human-trafficking/overview/why-trafficking-exists>.

36 *The Polaris Project*, *supra* note 36.

37 *Id.*

38 Wheaton, *supra* note 27 at 124.

39 *Id.*

40 *Id.*

41 *Id.*

42 Shavers, *supra* note 4 at 64.

43 *Id.*

44 *Id.* at 65.

country, the transporters who brought the workers from the source to the destination, and the goods or products produced by trafficked labor.<sup>45</sup>

Methods for addressing supply and demand in human trafficking is to reduce profits, raise the risks, as well as the costs of trafficking.<sup>46</sup> This is difficult since the current laws leave room for trafficking to flourish. However many corporations attempt to adopt corporate social responsibility (CSR). Corporations adopt CSR policies in order to promote transparency and to avoid dealing with the use of forced labor. 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.”<sup>47</sup> For example, in the late 1990s, Nike Inc. was subjected to public disapproval, loss of profits, and loss of reputation when it was reported that the company engaged in exploitative employment practices in overseas factories.<sup>48</sup> Nike subsequently adopted a CSR plan and implemented strict supply chain controls.<sup>49</sup> Implementing CSR into the business model happens to affect the supply and demand of the trafficking market in a positive way, but the sole use of a corporate responsibility plan may not suffice. In *Abdullahi v. Pfizer, Inc.*, “plaintiffs alleged that Pfizer had conducted nonconsensual medical experimentation on Nigerian children in the hopes of obtaining more rapid regulatory approval for a new drug.”<sup>50</sup> The plaintiffs further alleged that the Nigerian government had been complicit in the testing by providing a hospital facility knowing its intended unlawful use, by skirting various regulatory requirements, and by covering up Pfizer’s activities after the fact.<sup>51</sup>

## 5 Multinational corporate involvement in human trafficking

The United States government estimates that about twenty-seven million persons globally are victims of

trafficking in persons involving the use of fraud, force, or coercion to obtain labor or commercial sex acts.<sup>52</sup> There has been evidence pertaining to United States government contractors using forced labor. The United States government hires Third Country Nationals (TCNs) to work in support of United States military and diplomatic missions in Iraq and Afghanistan.<sup>53</sup> This civilian workforce acts like the “army behind the army” and the workers come from places such as Nepal, India, The Philippines, and Uganda.<sup>54</sup> They do not get paid very well and conduct essential services like construction, security, and food services. Moreover, the United States Government Contractors rely upon 70,000 TCNs to support the United States operations in Iraq and Afghanistan.<sup>55</sup> To recruit TCNs, contractors use local recruiting agents, who target vulnerable workers whom are told they will receive compensation however these are just false promises in order to acquire cheap labor.<sup>56</sup> Even Victoria’s Secret was investigated for using child labor in 2012. These traces of child labor are present in the lingerie retailer’s organic and fair-trade cotton program.<sup>57</sup> Chevron has also been accused of human rights violations as well. These human rights violations have occurred in Burma, claiming that the soldiers guarding Chevron and Total’s natural-gas pipeline in the country have murdered locals and forced others to do backbreaking, unpaid labor in order to keep the gas exports flowing smoothly.<sup>58</sup>

Generally, the industries of mining, construction, agriculture, textiles and hospitality are always looking

52 Brittany Prelogar, Laura Ardito, & Michael Navarre, *New Human Trafficking Laws and U.S. Government Initiatives Make Anti-trafficking A Compliance Priority for Businesses in 2013*, STEPTOE & JOHNSON LLP (2013), available at <http://www.steptoec.com/publications-8618.html>.

53 Allard K. Lowenstein, *Victims of Complacency- The Ongoing trafficking and Abuse of Third Country Nationals by U.S Government Contractors*, AMERICAN CIVIL LIBERTIES UNION (2012), available at [https://www.aclu.org/files/assets/hrp\\_traffickingreport\\_web\\_0.pdf](https://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf).

54 *Id.*

55 Lowenstein, *supra* note 47.

56 *Id.*

57 Cam Simpson, *Child Labor for Victoria’s Secret Cotton Examined by U.S.*, BLOOMBERG, Jan. 13, 2012, available at <http://www.bloomberg.com/news/2012-01-13/child-labor-for-fair-trade-cotton-probed-by-u-s-investigators.html>.

58 Vivienne Walt, *Chevron, Total Accused of Human Rights Abuses in Burma*, TIME WORLD, July 6, 2010, available at <http://content.time.com/time/world/article/0,8599,2001962,00.html>.

45 *Id.*

46 *Id.*

47 Shavers, *supra* note 4 at 67.

48 *Id.* at 67.

49 *Id.*

50 Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under The Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2169 (2012).

51 Sykes, *supra* note 44 at 2161.

for low wage, migrant, and overseas workers.<sup>59</sup> Since corporations are looking to make high profits, they will do anything to acquire cheap labor, even when it involves the exploitation of people. Multinational corporations like Apple base their success on their ability to innovate and adapt to the changing needs of their environment.<sup>60</sup> However, the formula that has made Apple and many other multinational corporations profitable is one that maximizes profits through the outsourcing of labor and production.<sup>61</sup> Multinational corporations are an important foundation to the global economy and some of the most successful corporations are based within the United States, where it is more viable for victims to bring suit against corporations. However, being able to identify and prevent human trafficking practices within major global corporations is very challenging and is an important realization in order to combat human trafficking violations. Corporations affect our global markets everyday and many of these corporations use cheap labor in order to increase profits. Consequently, in order to limit the amount of human trafficking and adequately identify the uses of forced labor, the current scope of the laws must expand globally and clear business models must become available.<sup>62</sup>

The subsistence of trafficking in persons indicates that there is an absence of law and that the existing law is threatened.<sup>63</sup> The current laws prohibiting and regulating human trafficking should be reformed in order to address the gaps created by narrow laws as well as the difficulties in identifying the use of forced labor within the corporate models. Hence, corporate transparency is needed and the existing laws should be tailored to punish all corporations; those based in the United States as well as abroad.

The methods for identifying human trafficking are unreliable. There are varying numbers reported for trafficking victims. For example, Free the Slaves, a non-governmental organization (NGO), estimates that there are twenty-seven million “slaves” in the world

today.<sup>64</sup> Human trafficking is the third most lucrative criminal activity in the world.<sup>65</sup> These statistics include the use of products produced by forced labor acquired by legitimate employers.<sup>66</sup> The traffickers are involved in the recruiting, contracting, transporting, and facilitating of goods and services.<sup>67</sup> The most recent documents dealing with human trafficking issues are the Protocol to Prevent, Suppress and Punish Trafficking in Persons.<sup>68</sup> These documents are designed to punish the traffickers, protect the victims, and promote cooperation among nations to prevent trafficking.<sup>69</sup> But, these documents have not come to life in order for human trafficking to be reduced. Crimes of trafficking under the TVPA are under-prosecuted, which evidences the law’s limitations in the investment in punishing traffickers and protecting the victims.<sup>70</sup> For example from 2001 to 2005, “the Department of Justice (DOJ) prosecuted only 91 trafficking cases, and convicted only 140 of 248 defendants.”<sup>71</sup> Many critics of the TVPA mention that the TVPA is “top heavy”.<sup>72</sup> The Act “lacks informed and trained implementers at the local level where traffickers most commonly operate and are apprehended.”<sup>73</sup>

Due to the limitations of the TVPA multinational corporations tend to contribute to human trafficking through their massive global production chains, thus increasing the chances that products could be made by trafficked workers. Corporations also have a tendency in shifting liability for its acts onto the overseas suppliers or subsidiaries through “arm’s length” global supply contracts.<sup>74</sup> Therefore, despite the 2003 passage of a private right of action under the United States universal anti-trafficking laws such as the TVPA, the likelihood of victims’ obtaining justice against these multinational corporations in court is dismally low.<sup>75</sup>

59 Prelogar, *supra* at note 46.

60 Christina Larmon, How to Reform and Regulate Multinational Corporations, DEMOCRACY CHRONICLES, December 20, 2012 available at, <http://www.democracychronicles.com/how-to-reform-and-regulate-multinational-corporations/>.

61 Larmon, *supra* note 54.

62 Prelogar, *supra* note 46.

63 *Id.*

64 Shavers, *supra* note 4 at 42.

65 Shavers, *supra* note 4 at 42.

66 *Id.*

67 *Id.*

68 18 USCA § 1589 (2000).

69 18 USCA § 1589 (2000).

70 Sheldon-Sherman, *supra* note 20 at 460.

71 *Id.*

72 *Id.*

73 *Id.*

74 Shavers, *supra* note 4 at 45.

75 Shavers, *supra* note 4 at 45.

## 6 Legislation

As mentioned previously, trafficking efforts began in the United States with the enactment of the Trafficking Victims Protection Act of 2000 (TVPA). The Act modernized the involuntary servitude and peonage statutes originating from the Thirteenth Amendment of the United States Constitution that had been limited by the Supreme Court to physical coercion, which is far less prevalent in human trafficking than psychological coercion.<sup>76</sup> The TVPA also made sentencing appropriate with other serious crimes, ranging from twenty years to life.<sup>77</sup> Moreover the TVPA initiated global awareness pertaining to the human trafficking industry.

Specifically, anti-trafficking legislation for multinational corporations has become more prevalent since corporations became the vehicles increasing the use of forced labor. In response to corporate involvement, there legislation has reached the state and federal levels designed to combat human trafficking within the United States.<sup>78</sup> These laws primarily focus on the criminalization of the financial benefit from human trafficking.<sup>79</sup> Criminal prosecutions for all forms of human trafficking with possible heavy penalties were made possible under the TVPA and the TVPRA.<sup>80</sup> This was the Act's initial goals, despite the vast limitations experienced today.

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."<sup>81</sup> The corporation can lose contracts based on the action of any party for which it is responsible.<sup>82</sup> Under the TVPRA, when corporations engage in trafficking they run the risk of

losing government contracts. Additionally, according to Article 10 of the United Nations Transnational Organized Crime Convention, both natural and legal persons (corporate persons) may be held liable for trafficking in human beings.<sup>83</sup>

In the case of corporate liability, commercial entities, associations, etc., are liable for the criminal actions, which are performed on their behalf or by anyone who holds a leading position in them.<sup>84</sup> This means that these persons may be held accountable if they fail to supervise or check on an employee or agent of the company and that employee or agent commits the offense of trafficking.<sup>85</sup> However, the human rights violations are not usually identified rather they are concealed within the corporation. Human rights violations are successfully concealed within corporations because "many states are unwilling to hold multinational corporations liable or assert domestic relations and international investment agreements."<sup>86</sup> Ultimately, states are opposed to international human rights regulations for businesses.<sup>87</sup>

### a Modes of Corporate Criminal Liability

Criminalization of trafficking is widely considered an essential component of a comprehensive national response to trafficking, providing the basis for efforts aimed at ending impunity for traffickers and securing justice for victims.<sup>88</sup> An obligation to criminalize trafficking is established in international treaty law.<sup>89</sup> The Organized Crime Convention (OTC) and the European Trafficking Convention (ETC) both require States to consider enacting legislation to provide for the administrative, civil, and criminal liability of natural persons.<sup>90</sup> The European Trafficking Convention (ETC) provides additional details. It envisions corporate liability for trafficking-related offenses,

76 Kelly Heinrich & Kavitha Sreeharsha, *The State of Human Trafficking Laws*, AMERICAN BAR ASSOCIATION (2013), available at [http://www.americanbar.org/publications/judges\\_journal/2013/winter/the\\_state\\_of\\_state\\_humantrafficking\\_laws.html](http://www.americanbar.org/publications/judges_journal/2013/winter/the_state_of_state_humantrafficking_laws.html).

77 Heinrich, *supra* note 70.

78 *Id.*

79 Shavers, *supra* note 4 at 51.

80 *Id.*

81 Alan O. Sykes, Corporate Liability for Extraterritorial Torts Under The Alien Tort Statute and Beyond: An Economic Analysis, 100 GEO. L.J. 2161, 2169 (2012).

82 *Id.*

83 Liability of Trafficking, LEGISLATION ONLINE (2013), available at <http://legislationline.org/en/topics/subtopic/47/topic/14>.

84 Liability of Trafficking, *supra* note 77.

85 *Id.*

86 Daniel Aguirre, Corporate Liability For Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation. 42 CAL. W. INT'L L.J. 123, 126 (2011).

87 Aguirre, *supra* note 80 at 126.

88 ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 371, 371 (2010).

89 Gallagher, *supra* note 82 at 371.

90 *Id.*

including aiding and abetting, committed on behalf of an entity and for its benefit by “a person who has a leading position within the legal person.”<sup>91</sup>

Furthermore, United States domestic laws used to punish corporations include the Racketeer Influences and Corrupt Organizations Act (RICO), the Foreign Corrupt Practices Act (FCPA), and the Securities and Exchange Commission (SEC) regulations and laws. Under RICO, only a “person” can be held liable, but a “person” can be an individual or a corporation.<sup>92</sup> RICO defines the term “person” to “include any individual or entity capable of holding a legal or beneficial interest in property.”<sup>93</sup> 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.<sup>94</sup> Typically when assessing liability, RICO is applied as an alternative basis for liability. This concept will be explained in more detail in a subsequent section titled Additional Modes of Liability. Additionally, corporations can be criminally liable under international law, yet this liability is difficult to identify and the United States laws that prohibit these acts do not extend to foreign-based corporations. However, the United Nations Trafficking Protocol of 2000 does not pronounce directly on whether foreign-based corporate acts of trafficking should be criminalized.<sup>95</sup> The European Trafficking Convention requires States Parties to consider criminalizing “the use of services or products which are the object of trafficking related exploitation [...] with the knowledge that the person is a victim of trafficking.”<sup>96</sup>

There is a basis for corporate criminal liability at common law, especially within the United States. However, this common law notion is limited to individual state applicability.<sup>97</sup> Common law covers many areas of law, including property, contracts, torts, and criminal law. According to common law, crimes are defined as a union of *mens rea* (the criminal intent) and *actus reus* (the criminal act).<sup>98</sup> The burden

of proof in criminal law lies with the prosecution. Most jurisdictions attribute *mens rea* to a corporation via its employees, directors or shareholders.<sup>99</sup> But there is a problem because *mens rea* is not a requirement in international law.<sup>100</sup> So the more logical argument for international corporate criminal liability is to not base the law on the common concept of *mens rea*; but base it on customary international law.<sup>101</sup> Almost all states recognize a domestic criminal liability of corporations but lack enforceability.<sup>102</sup> Consequently, many foreign nations do not prioritize the laws regarding the prohibition of human rights violations in corporations. Unfortunately, criminalization of the use of trafficking is not currently an established international legal obligation.<sup>103</sup>

Even though international law regarding the prohibition of trafficking is not a priority, there are some theories used by the United States in which criminal liability may be assessed. Liability can be imputed to a corporation based on a theory of agency, or on a theory of identity or through accomplice liability.<sup>104</sup> Under the agency theory the company is liable for the wrongful acts of its employees, also known as vicarious liability.<sup>105</sup> The corporation can be sued for *mala prohibita*.<sup>106</sup> Under the theory of identification the corporation is liable for the blameful conduct of an officer or director, thereby allowing prosecution for *mala in se*.<sup>107</sup> Corporations can also be criminally liable under accomplice liability. This is when the corporation is an accomplice to criminal acts of others (aiding and abetting the commission of a crime).<sup>108</sup> There are three types of accomplice liability (complicity) in which a corporation will be liable; there is direct corporate complicity, beneficial complicity, and silent complicity.<sup>109</sup> Direct corporate complicity

91 Gallagher, *supra* note 82 at 371.

92 Shavers, *supra* note 4 at 53.

93 *Id.*

94 *Id.*

95 Engle, *supra* note 89 at 288.

96 *Id.*

97 *ml.*

98 Engle, *supra* note 89 at 293.

99 *Id.* at 294.

100 *Id.*

101 *Id.* at 295.

102 *Id.* at 296.

103 Gallagher, *supra* note 82 at 375.

104 Engle, *supra* note 89 at 296.

105 *Id.*

106 *Mala prohibita* are acts that are “crime[s] merely because they are prohibited by statute, although the acts themselves are not necessarily immoral.” BLACK’S LAW DICTIONARY 971 (7<sup>th</sup> ed. 1996).

107 *Mala in se* are “act[s] that [are] inherently immoral, such as murder, arson, as “wrongs in themselves” or “acts morally wrong” or “offenses against conscience,” BLACK’S LAW DICTIONARY 956 (6<sup>th</sup> ed. 1990).

108 *Id.*

109 *Id.* at 298.



occurs when a corporation directly participates in illegal acts that involve intentional participation.<sup>110</sup> In beneficial complicity, corporations may also be liable as accomplices merely by benefitting from the principal's acts.<sup>111</sup> Corporations can also be liable for passively and knowingly, benefitting from a regime that violates human rights.<sup>112</sup> Lastly, silent complicity occurs where a corporation does not verify complaints of human rights abuses or protest against human rights abuses.<sup>113</sup> Silent complicity has the least successful conviction rate and many corporations fall into this category.<sup>114</sup>

Nevertheless there are many limits to accomplice liability.<sup>115</sup> Not every immoral action or trace of human trafficking violations will give rise to liability.<sup>116</sup> There is also a major regulatory problem since multinational corporate structures become very complex. Multinational corporations operate an integrated command and control system through two separate institutional structures.<sup>117</sup> The first is the collection of discrete corporate units: parent, subsidiary, sister, and cousin companies that make up the MNC group.<sup>118</sup> The second is the global system of separate nation-states in which those corporations are registered and do business.<sup>119</sup> So the complex structures and places in which corporations are based, limit the amount of liability imposed upon corporations. Ultimately, corporations often structure their operations to disguise the fact that they profit from human rights abuses by using subsidiary business associations or by sub-contracting illegal acts.<sup>120</sup> Many courts are willing to hold these corporations liable thus piercing the corporate veil, however there are still many limitations regarding the laws. United States corporations can be criminally liable before a United States court for its illegal acts overseas. But criminal liability of head offices for crimes committed in a foreign country by their partners, subsidiaries, or host governments is

much more difficult to address.<sup>121</sup> Prosecutors have not yet established a clear standard of how far the long arm of the law reaches.<sup>122</sup>

Moreover, in 2008 the TVPA became the Trafficking in Persons Reauthorization Act and was revamped to enhance measures to combat trafficking in persons. The TVPRA of 2008 includes relief for victims.<sup>123</sup> The TVPRA was initially considered a criminal statute and has always imposed criminal penalties for forced labor and sex trafficking.<sup>124</sup> The TVPRA criminalizes many acts such as confiscation of identification documents as part of a trafficking offense, attempts or conspiracies to commit a trafficking offense, and obstruction of a trafficking investigation.<sup>125</sup> In particular, the conspiracy offense, which was created as part of the 2008 TVPRA, carries the same maximum sentence as the underlying substantive offense instead of the five-year statutory maximum available under the general conspiracy statute.<sup>126</sup> However, even when victims are successful in a criminal case, compensation is not guaranteed. Furthermore, the fact that judges may order restitution means nothing unless the prosecutor is able to locate and seize the defendant's assets.<sup>127</sup> This is where civil liability becomes important in order for victims to seek justice from the traffickers.<sup>128</sup>

### **b Modes of Corporate Civil Liability**

For victims, an adequate and appropriate remedy could include compensation payable (by the offender or by the State) for physical and psychological harm, lost opportunities, loss of earnings, moral damage as well as medical and legal expenses as a result of the human rights violations.<sup>129</sup> However, the right to a remedy is often not available to trafficked persons. National laws prevent non-citizens, including those unlawfully

110 *Id.*

111 *Id.*

112 Engle, *supra* note 89 at 297.

113 *Id.* at 298.

114 *Id.*

115 Engle, *supra* note 89 at 298.

116 *Id.*

117 Engle, *supra* note 89 at 300.

118 *Id.*

119 *Id.*

120 Engle, *supra* note 89 at 301.

121 *Id.*

122 *Id.*

123 Naomi Jiyoung Bang, Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work, 43 U.MEM.L.REV. 1047,1082 (2013).

124 *Id.*

125 Bang, *supra* note 119 at 1082.

126 Bang, *supra* note 119 at 1081.

127 *Id.*

128 *Id.*

129 Gallagher, *supra* note 82 at 367.

present, from accessing certain forms of remedies such as criminal and civil compensation.<sup>130</sup>

Conversely, there are private rights of action that can be established under the TVPRA. The TVPRA action allows victims of forced labor to file a civil action against their traffickers “in an appropriate district court [...] and to recover damages (actual and punitive) and reasonable attorneys fees.”<sup>131</sup> Civil actions provide a means to reduce the financial profitability of human trafficking, by imposing civil damages against the traffickers.<sup>132</sup> These civil actions may be stayed during criminal proceedings.<sup>133</sup> On the other hand, it becomes difficult for victims to bring suit against multinational corporations. There are some laws that help the victims seek justice, but these laws are extremely narrow and do not extend to foreign-based corporations. These laws become narrow because there is a lack of extraterritorial jurisdiction. Extraterritoriality is when Congress has the power to regulate the conduct of United States employers outside the territorial jurisdiction of the United States.<sup>134</sup> Nevertheless, there is a strong presumption that Congress is primarily concerned with domestic issues and the intention is to avoid conflicts with foreign laws, which are likely to result from extraterritorial legislation.<sup>135</sup> Thus, absent clear contrary intent, the legislation is presumed to apply solely within the territorial jurisdiction of the United States<sup>136</sup>

Primarily, a viable way in which a victim may bring suit may be under the Alien Torts Claim Act also known as the Alien Tort Statute (ATS). The ATS was enacted in 1789 and was not used for nearly two hundred years, until it was revived in the 1980s as a means to provide non-citizens of the United States the opportunity to bring a civil suit in United States courts for a tort committed in violation of international law.<sup>137</sup> This act is exceptionally important to the topic of human trafficking. Specifically, the ATS will be

revisited in detail to fully understand the complexities of multinational corporate liability.

Moreover, The Dodd-Frank Wall Street Reform (Dodd-Frank) and Consumer Protection Act (CPA), requires persons to disclose whether “conflict minerals” are used in their products.<sup>138</sup> This may be an indirect approach to regulating corporations and their supply chains, yet the presence of conflict minerals in products may indicate that forced labor was used to obtain the minerals and may possibly trigger other laws.<sup>139</sup> There is also the Sarbanes-Oxley Corporate Responsibility Act, which was enacted in 2002 and includes a requirement that company executives certify and report on a public corporation’s activities, including whether the company has an ethics code.<sup>140</sup> Regulations adopted by the Securities and Exchange Commission (SEC) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in 2010, provide detailed reporting requirements regarding the use on conflict minerals.<sup>141</sup> According to an International Classification of Functioning (ICF) study, including interviews with federal prosecutors from ten jurisdictions, sixty percent (60%) of cases, the defendants were United States citizens and foreign nationals were defendants in fifty-seven (57%) of the cases.<sup>142</sup>

All of these laws and regulations intend to limit human trafficking and help victims seek justice. However, corporate liability is still difficult to achieve since the ATS and RICO laws do not extend to corporations based in foreign countries. These foreign corporations are usually subject to lenient domestic laws, which allow corporations to escape liability. Criminal liability, as well as civil liability, is nonexistent when corporations are based in foreign countries. Corporate liability is minimal even for United States based corporations, however the corporations that are foreign based experience a lower rate of liability.

As mentioned earlier, corporations such as Nike and Pfizer have been forced to change their sweatshop practices in order to adapt to a consumer economy that is more concerned about where their products come from and the condition under which the laborers

130 *Id.* at 368.

131 Shavers, *supra* note 4 at 49.

132 *Id.*

133 *Id.*

134 Alan R. Berkowitz, *Extraterritorial Application of U.S. Employment Laws*, EMPLOYMENT LAWYERS ASSOCIATION, May 18, 2009, available at <http://bingham.com/Publications/Files/2009/05/Extraterritorial-Application-of-US-Employment-Laws>.

135 Berkowitz, *supra* note 130.

136 *Id.*

137 29 U.S.C § 1350 (2006).

138 12 U.S.C. § 5301 (2006).

139 Shavers, *supra* note 4 at 54.

140 15 U.S.C. § 7264(a) (2006).

141 *Id.*

142 Shavers, *supra* note 4 at 57.

work.<sup>143</sup> There must be increased regulation over multinational corporations behavior abroad, but forced compliance to a universal standard has been difficult to achieve.<sup>144</sup> Also the complexity of corporate structures does not make assigning liability any better. Many corporations claim they are not liable for the human rights violations committed by the subsidiaries abroad. But the fact that the parent companies receive profits from their subsidiary's operations should impose a chain of liability. The complex structure of corporations and lack of extraterritorial jurisdiction within the current laws, keep the human trafficking industry thriving within the United States and throughout the global world.

### 1 The Narrow Scope of the Alien Torts Statute

There are many traces of human trafficking within business models, which exacerbates the problem. In addition, there is extreme difficulty successfully bring claims against traffickers especially internationally. "The ATS provides domestic remedies for plaintiffs for egregious violations of international law. It authorized civil lawsuits in United States courts for damages by persons injured by violations of international law. The ATS provides federal court subject matter jurisdiction over suits by aliens (noncitizens of the U.S.) for a "tort [...] in violation of the law of nations."<sup>145</sup>

The first problem regarding civil liability pertains to the ATS. In 1948, the Universal Declaration of Human Rights was signed and human rights today have become a legal reality.<sup>146</sup> Today, the ATS gives victims of the human rights abuses, the right to sue the traffickers in the United States.<sup>147</sup> It is a federal statute that grants original jurisdiction in the United States district courts "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>148</sup> Since 1980, the ATS

has been used successfully in cases many cases.<sup>149</sup> The TVPA gives similar rights to United States citizens and non-citizens alike to bring claims for torture and extrajudicial killing committed in foreign countries.<sup>150</sup>

Beginning in the mid-1990s, a new class of ATS suits emerged.<sup>151</sup> However, not one disputed corporate ATS case has resulted in a jury verdict in favor of the plaintiffs.<sup>152</sup> Furthermore, the new suits adopted the concept of "aiding and abetting" as a theory of secondary liability under the ATS.<sup>153</sup> As mentioned earlier, the three main categories of responsibility are (1) direct responsibility, (2) indirect responsibility, and (3) the mere presence in a country, dealing with participation through silence or inaction.<sup>154</sup>

Most ATS cases involve corporations that have provided support or funding, or have contracted with tortfeasors in the serious violations against human rights.<sup>155</sup> Yet, there is a major hurdle when plaintiffs base suit upon a violation of the ATS. There is a particularly high standard to proving aiding and abetting. The elements of aiding and abetting for tort liability in the civil context include the following: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation."<sup>156</sup> Unfortunately, in *Doe v. Nestle*, the court found that the plaintiffs, Malian children, whom were forced to labor in cocoa fields in Cote d'Ivoire, failed to prove the requisite *mens rea* in order to prove the corporation's aiding and abetting liability; where the multinational corporations assisted with the production and cultivation of cocoa beans and as a result, the ATS claim was dismissed.<sup>157</sup> Consequently, on December 19, 2013, this case was reviewed by the Court of Appeals and held that the "District Court of California erred in requiring plaintiffs to allege specific intent in order to satisfy the applicable purpose *mes rea*

143 Larmon, *supra* note 54.

144 *Id.*

145 Anita Ramasastry, Corporate Complicity from Nuremberg to Rangoon and Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations 20 BERKELEY J. INT'L L. 91, 102 (2002).

146 The Center For Justice and Accountability, ALIEN TORTS STATUTE (2013), available at <http://www.cja.org/article.php?id=435>.

147 *Id.*

148 Naomi Jiyounng Bang, Navigating the Complexities of Corporate Liability in Human Trafficking and Forced Labor, 75 TEX B.J. 766, 767 (2012).

149 Bang, *supra* note 149 at 767.

150 The Center For Justice and Accountability, *supra* note 146.

151 *Id.*

152 *Id.*

153 *The Center For Justice and Accountability, supra* note 146.

154 Ramasastry, *supra* note 145 at 91.

155 Bang, *supra* note 149 at 767.

156 *Id.*

157 *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1058 (C.D.Cal. 2010).

standard.”<sup>158</sup> This case was vacated and remanded for further proceedings. This case demonstrates the high burden of proof, which prevents many claims from being addressed and resolved.

In 2004 the Supreme Court set the ground rules in *Sosa v. Alvarez Machain*, that the ATS authorizes federal courts to recognize causes of action for certain types of sufficiently particularized “violations of the law of nations,” determined according to customary international law.<sup>159</sup> More recently, in *Kiobel v. Royal Dutch Petroleum*, the United States Supreme Court directly addressed its second ATS case ever. As it came to the Court, the case initially centered on a question mentioned but left unaddressed in *Sosa*: “whether a corporation, as opposed to an individual, could be sued under the ATS for allegedly committing human rights violations abroad or aiding and abetting their commission.”<sup>160</sup> In *Kiobel*, Nigerian citizens contended that the foreign oil companies aided the Nigerian government in violently suppressing resistance to the oil companies’ drilling operations in the 1990s.<sup>161</sup> Furthermore, in the Supreme Court’s decision of *Kiobel*, the Court had initially granted certiorari on the issue of corporate liability under the ATS, but on March 5, 2012 ordered *Kiobel* for re-argument and requested supplemental briefs addressing the issue of extraterritoriality.<sup>162</sup> This issue of extraterritoriality regards whether the ATS covers violations of international law committed by foreign countries.<sup>163</sup> In *Kiobel*, the Nigerian residents also filed a putative class action, under ATS, claiming that oil corporations aided and abetted the Nigerian government in committing human rights abuses against them.<sup>164</sup> The Second Circuit held that customary international law did not recognize corporate liability and neither should ATS.<sup>165</sup> According to the Supreme Court’s decision since both the plaintiff and defendant are foreign based, the ATS claim would not suffice. According to the Court’s reasoning in *Kiobel*, an ATS action may be brought “where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an

important American national interest.”<sup>166</sup> Chief Justice Robert’s opinion in *Kiobel*, does not support the extension or extraterritoriality of United States law to conduct occurring abroad.<sup>167</sup> Ultimately, the Court in *Kiobel* held that the plaintiffs’ “case seeking relief for violations of the law of nations occurring outside the United States is barred.”<sup>168</sup> The *Kiobel* decision severely narrowed the scope of ATS claims and severely limits corporate liability; thus enhancing the industry of human trafficking in foreign corporations and throughout the world.

## 2 Additional Modes of Liability

RICO offers an alternative basis for liability. Under RICO “plaintiffs must prove that the corporation engaged in labor trafficking on a systematic, widespread scale, that the American defendant gained substantial economic benefit through this activity, and this gain occurred at the expense of trafficked workers.”<sup>169</sup> Also the pleading requirements of RICO are extensive and severely complex.<sup>170</sup> The courts reject the statute from being used in an extra-territorial manner.<sup>171</sup> And the statute of limitations for a claim is four years, and this is a relatively short for a victim whom has suffered from years of terrible abuse.<sup>172</sup> Another theory of possible liability attempted by plaintiffs in trafficking or forced labor cases is that of the principal-agent.<sup>173</sup> Although agency law is a matter of state law, the main doctrines of agency tests appear anchored to common law notions.<sup>174</sup>

In *Adhikari v. Daoud & Partners*, plaintiffs alleged an agency relationship seeking liability over KBR, a military contractor, for the actions of its sub-contractor which committed various human rights violations

158 *Doe I. v. Nestle USA, Inc.*, 738 F.3d 1048, 1050 (9<sup>th</sup> Cir. 2013).

159 *Sosa v. Alvarez Machain*, 542 U.S. 692, 724-725 (2004).

160 *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659, 1666 (2013).

161 *Kiobel*, 133 S.Ct. at 1666.

162 Shavers, *supra* note 4 at 59.

163 *Id.*

164 Bang, *supra* note 149 at 767.

165 *Id.*

166 Anton Metlitsky, What’s Left of the Alien Torts Statute, SCOTUSBLOG, (April 18, 2013), available at <http://www.scotusblog.com/2013/04/commentary-whats-left-of-the-alien-tort-statute/>.

167 *Kiobel*, 133 S.Ct. at 1666.

168 Kobi Kastiel, Supreme Court: Presumption Against Extraterritoriality Applies to Alien Torts Statute, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, (May 1, 2013), available at <http://blogs.law.harvard.edu/corpgov/2013/05/01/supreme-court-presumption-against-extraterritoriality-applies-to-alien-tort-statute/>.

169 Bang, *supra* note 149 at 767.

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 Bang, *supra* note 149 at 767.

including trafficking.<sup>175</sup> Even though the court found that the plaintiffs had met the Twombly-Iqbal<sup>176</sup> plausibility standard in establishing the principal-agency relationship, this initial agency determination appears based on both the existence of the contract and additional allegations that the contractor “had the authority to supervise, prohibit, control, and/or regulate (the subcontractor).”<sup>177</sup> This claim may prevail in the global-contracting context, yet it depends on the existence of evidence supporting the “control aspect of the principal-agent relationship.”<sup>178</sup> However TVPRA is expressly extra-territorial unlike ATS, which is silent about extra-territorial application.<sup>179</sup> Section 1596 of the TVPRA, states “the courts of the United States have extra-territorial jurisdiction over any offense [...] if an alleged offender is a national of the United States.”<sup>180</sup> Claims under TVPRA are usually the most successful, however the lack of liability still persists.<sup>181</sup>

Ultimately, there are many legal hurdles regarding corporate liability and the routes in which victims may bring claims. Claims under the principal-agency theory and under RICO have failed and ATS claims have been severely narrowed by the *Kiobel* decision. There is a major problem with being able to designate corporate liability when these corporations are based within foreign nations. There is a need for an adoption of a universal standard or law in which victims are able to make corporations liable for human rights violations.

## 7 Proposed solutions

The obstacles preventing victims from seeking justice against corporations, is the lack of transparency in corporate business models, complicity of its structures and the narrow scope of current laws which are unable to reach to foreign based corporations. There have been many attempts in order to successfully charge corporations with criminal and civil liability, yet there

are still many loopholes in which these corporations escape liability.

Nevertheless, there has been some national progress in the fight against human trafficking. California has created the California Supply Chain Transparency Act, which highly encourages corporate social responsibility.<sup>182</sup> This law became effective on January 1, 2012 and requires certain corporations to provide information to the public regarding the steps taken to ensure that their supply chains are free from trafficked labor.<sup>183</sup> Many companies are imposing new requirements on their suppliers in which accurate determinations can be made about supply chains.<sup>184</sup> The California Act has also influenced the state of New York to introduce a bill in the 112th Congress, similar to the California law.<sup>185</sup> The law requires 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.”<sup>186</sup> A recent federal proposal for mandatory disclosure is the Business Transparency Act (BTA).<sup>187</sup> The BTA “mandates that publicly-traded or private entities with a minimum of \$100 million in annual global receipts disclose the measures they take to address forced labor, slavery, human trafficking, and the worst forms of child labor within their supply chains.”<sup>188</sup>

Corporations should take steps to ensure that their operations and supply chains are free of forced labor and the other severe forms of trafficking. On February 12, 2013, the United States Senate approved the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2013 as an amendment to the Violence Against Women Reauthorization Act.<sup>189</sup> The TVPRA of 2013 would “reauthorize appropriations from 2014-2017 for various programs designed to assist victims of trafficking, impose additional reporting, and accountability measures on government agencies involved in anti-trafficking programs, and enhance

175 *Adbikari v. Daoud & Partners*, No. 09-cv-237, 2012 WL 718933 at \*3 (Tex. S.D. 2012).

176 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007). (Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true).

177 Bang, *supra* note 149 at 768.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 Prelogar, *supra* note 46.

183 *Id.*

184 *Id.*

185 *Id.*

186 Shavers, *supra* note 4 at 81.

187 Eckert, *supra* note 1 at 388.

188 Eckert, *supra* note 1 at 388.

189 Prelogar, *supra* note 46.

anti-trafficking measures in existing laws.<sup>190</sup> The TVPRA of 2013 also directs various United States government agencies to establish partnerships with private entities, including corporations, to ensure that United States citizens do not use materials produced by the use of trafficked labor and that private entities do not contribute to trafficking in persons involving sexual exploitation.<sup>191</sup> Furthermore, on September 25, 2012, President Obama issued an executive order, “Strengthening Protections Against Trafficking In Persons In Federal Contracts,” to help ensure that United States government contracts are performed free of trafficking and forced labor.<sup>192</sup> These are some of the most recent advancements in the prevention against human trafficking practices.

On January 2, 2013 President Obama signed the National Defense Authorization Act of 2013 (NDAA) containing Title XVII, entitled Ending Trafficking in Government Contracting.<sup>193</sup> Title XVII of the Act is similar to provisions of the President’s Executive Order, but also expands on other areas of trafficking enforcement.<sup>194</sup> For example, “the law amends the TVPA by increasing criminal penalties for contractors who engage in severe forms of trafficking or forced labor, and by enlarging the scope of punishable actions.”<sup>195</sup> Moreover, to achieve stability between the goals of the TVPA, and to make improvements within the current system, there should be “a uniting of the goals of the TVPA and increasing collaboration between the agencies working to combat trafficking.”<sup>196</sup> The NDAA prohibits contractors, subcontractors, grantees, and sub-grantees from engaging in “acts that directly support or advance trafficking in persons.”<sup>197</sup> The act also requires agencies to obtain certifications regarding compliance with anti-human-trafficking procedures from all overseas contractors for work performed outside the United States valued at more than \$500,000.<sup>198</sup> These compliance procedures include “maintaining a compliance plan designed to prevent, monitor, detect, and remedy human trafficking and

human trafficking-related activities.”<sup>199</sup> Contractors must also certify that they and all subcontractors, or any agents of any sub-contractors, have not engaged in severe forms of human trafficking, the use of forced labor, or the procurement of commercial sex acts during contract performance.<sup>200</sup>

In addition to the revamped policies and the adoption of new provisions, companies must incorporate anti-trafficking into their ethics and compliance programs. These compliance systems will help ensure that their businesses and supply chains are free of forced labor and trafficking.<sup>201</sup> For example Apple has published reports identifying risks in its supply chain on the company’s website since 2007.<sup>202</sup> However the reports contained non-specific information about human rights violations uncovered in its supply chain and did not reveal any identifying information about the facilities where forced labor was found or specific details on the violations.<sup>203</sup> Apple did discuss forced labor in its supply chain in the disclosure reports, but this information was not noticed until news agencies published detailed factual information about the labor conditions in the facilities of Apple’s suppliers.<sup>204</sup>

Consequently, corporations should always conduct risk assessments in order to “understand the traffic-related risks that exist in the company’s industry, its particular operations, and supply chain.”<sup>205</sup> Human trafficking can occur in any industry, yet some industries present a higher risk than others. It is important to engage a range of stakeholders to gain an accurate understanding of the risks.<sup>206</sup> As a result, companies can tailor other compliance measures to address the specific risks identified.<sup>207</sup> Furthermore, there should be corporate codes of conduct that clearly prohibit trafficking and forced labor.<sup>208</sup> The United States Department of Labor (DOL) recommends that a resilient code of conduct should address the International Labor Organization’s (ILO) core labor

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 Prelogar, *supra* note 46.

195 *Id.*

196 Sheldon-Sherman, *supra* note 20 at 501.

197 Prelogar, *supra* note 46.

198 *Id.*

199 *Id.*

200 *Id.*

201 Prelogar, *supra* note 46.

202 Eckert, *supra* note 1 at 400.

203 *Id.*

204 *Id.*

205 Prelogar, *supra* note 46.

206 *Id.*

207 *Id.*

208 *Id.*

standards, which include employment discrimination, and freedom of association and collective bargaining.<sup>209</sup> The 2012 Trafficking in Persons (TIP) Report issued by the United States Department of State's Office of Trafficking in Persons emphasizes that "companies must be responsible for the full length of their extended supply chains."<sup>210</sup> As a result, companies should attempt to conduct due diligence on third parties presenting potential risks throughout all levels of their supply chains.<sup>211</sup>

## 8 Conclusion

There have been many laws enacted to fight the prevalence of human trafficking. Even though there have been numerous advancements within the policymaking process, there is still a major question regarding victims being able to seek justice against corporations for violating their human rights. The revamped acts such as the TVPRA of 2013 and President Obama's order will definitely aid in the regulation of human trafficking,

however many victims are still unable to redress the human rights violations they have experienced. There are still many problems regarding the identification of forced labor within the corporate structure since it is left up to the corporation to instill awareness within its own structure. Additionally, a major setback for the advancements in combating human trafficking was the *Kiobel* case in which the Supreme Court affirmed the narrow scope of ATS, thus making it more difficult for victims to seek justice. Instead of narrowing the scope of the ATS, the law should be broadened in order to allow foreign plaintiffs to file suit against foreign-based corporations. Furthermore, there have been major advancements in the fight against human trafficking, yet there are many gaps that need to be filled in order to help victims seek justice. The narrow scope of United States statutes, lack of priority in upholding international anti-trafficking laws, as well as the difficulty in identifying forced labor within multinational corporations, helps foster the continuing use of human trafficking throughout the world.

209 *Id.*

210 Prelogar, *supra* note 46.

211 *Id.*