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ARTICLES

BOOK REVIEW

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JOURNAL AIMS & SCOPE

Eyes on the ICC is the first peer-reviewed, scholarly journal devoted to the study of the International Criminal Court. The journal seeks to advance the understanding of the ICC and to provide a forum to address the most pressing issues surrounding the establishment and operation of the Court as an international institution. Scholarship on the Court examines the history of its founding; the Court's place within the international legal landscape; the politics of the Court's governance, membership, jurisdiction, investigations, and prosecutions; the Court's current and potential subject matter jurisdiction; the Court's current and potential territorial jurisdiction; the Court's current and potential cases; the Court's jurisprudence; enforcement of the Court's decisions; and implications of the Court's existence and activities on diverse spheres of human and institutional behavior. Submissions from any field of study are encouraged.

ABOUT THE PUBLISHER

The Council for American Students in International Negotiations (CASIN), founded as the Independent Student Coalition for the International Criminal Court (ISC-ICC), began as the only student-based organization in the United States dedicated to educating the American public about the Rome Statute and the International Criminal Court. The ISC-ICC started as a simple petition, signed by U.S. college and university students across the country, asking then-President Clinton to allow the United States to become a signatory to the Rome Statute. The belief of this initial group of students in the value of a relationship between the U.S. and the ICC has since grown into an effective organization that deepens the understanding and commitment of American students to multilateral institutions.

American students from across the country, referred to at the UN as "voices of the future," participated in the preparatory negotiations for the Court under the auspices of the ISC-ICC. Representing the next generation of American leaders, CASIN has continued to participate in negotiations for the Court at meetings of the Assembly of States Parties, the governing body for the Court. Several times a year CASIN sends delegations of students to high-profile international conventions to participate first-hand in the international policy-making process.

CASIN publications are produced by members of the organization, composed of students and young professionals across the country. With the oversight of an advisory board of top scholars and practitioners of international law and policy, CASIN members work to disseminate the best research on international legal issues and human rights to a global audience. By working closely with leading scholars, the students who produce CASIN publications gain valuable insight into the fields of policy and academia. Scholars who contribute to CASIN publications earn the satisfaction of mentoring highly motivated and forward-thinking young Americans.

The *Interdisciplinary Journal of Human Rights Law* (IJHRL) is a peer-reviewed, scholarly journal designed to address international human rights issues more broadly. The journal explores political, philosophical, and legal questions related to international human rights from diverse perspectives and invites contributions from a wide range of fields. It strives to enrich the discourse on human rights and inform international policy.

INFORMATION FOR AUTHORS

Eyes on the ICC is published annually by the Council for American Students in International Negotiations (CASIN). The journal invites quality submissions from practitioners, scholars, jurists, and professionals in fields related to international criminal law and policy. Occasionally, exceptional student work will be accepted. *Eyes on the ICC* also welcomes review essays, book reviews, and comments/notes from the field. Please check the CASIN website for the most up to date information on calls for articles and the submission timeline.

Manuscripts must be computer-generated in MS Word and submitted electronically in .doc format via e-mail to icc@americanstudents.us, or via Berkeley Electronic Press's ExpressO submission service, at http://law.bepress.com/expresso.

Each submission should contain an abstract, 5 to 6 keywords, the author's CV, appropriate contact information, and a cover letter. Articles and Notes may range in length from 25 to 40 pages, double-spaced. Book and movie reviews range from 1,000 to 2,500 words. Submissions should adhere closely to the Chicago Manual of Style and cite sources in standard American legal format according to *The Bluebook: A Uniform System of Citation*. Submissions that do not adhere to the aforementioned guidelines may not be considered for publication. Each submission under consideration is subjected to double-blind external peer review by two anonymous referees.

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BOOK REVIEW

A NOTE FROM THE EDITOR-IN-CHIEF

April 2013

It has been a busy decade for international criminal law. More than ten years ago, on July 1, 2002, the International Criminal Court opened for business, the Rome Statute of the International Criminal Court having been ratified by the requisite 60 states. Ten years later, the Court has issued 22 arrest warrants, charged 16 cases, and initiated seven on-going investigations. Indicative of the Court's increasing stature was the self-surrender in March 2013 of Bosco Ntaganda, the Congolese warlord indicted for war crimes and crimes against humanity. To date, 122 States Parties have ratified the Rome Statute.

In light of this anniversary, it is appropriate for *Eyes on the ICC* to publish a special commemorative volume, including articles that examine both the history of the court and cutting edge issues in international criminal law. The volume opens with excerpts from David Scheffer's award-winning book, *All the Missing Souls: A Personal History of the War Crimes Tribunals*. Along with an original introduction by Ambassador Scheffer, the excerpts demonstrate the urgent need felt by the international community to create a permanent international criminal court after the atrocities of the 90s, including those in Sierra Leone, Liberia, the former Yugoslavia, and Rwanda, and also Ambassador Scheffer's personal efforts both to represent the United States at the creation of the ICC and to persuade President Clinton to sign the Rome Statute.

Australian jurist Harry Hobbs is the author of the second article in this volume, *The Security Council and the complementary regime of the International Criminal Court: Lessons from Libya*. As the title implies, Hobbs examines the complementarity requirement—a founding principle of the Court—in light of Security Council's position on the recent civil conflict in Libya.

The third article in this commemorative volume examines recent domestic initiatives by the United States to combat the pernicious crime of international human trafficking by regulating the supply chains of international contracts. In *The Year that Changed Compliance: New Laws Conscript the World's Business Community Into Global War Against Human Trafficking*, authors Virginia Kendall, T. Markus Funk and Elizabeth Banzhoff posit that laws enacted in 2012 have forever changed U.S.-based corporate compliance as regards human trafficking in supply chains.

This article is followed by *The ICC and Darfur: A Special Case for Genocide Reparations* in which PILC Fellow Jennifer Huang argues that the ICC's pioneering provisions for victims' rights should translate into reparations for the victims of the atrocities in Darfur, a situation that remains the subject of an investigation by the ICC even as it has indicted Sudanese president Omar Bashir and two of his ministers for directing the violence against civilians.

Finally, there is a review of Kendall and Funk's recent book, *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses*, by Shobha L. Mahadev, a Clinical Assistant Professor of Law at the Children and Family Justice Center at Northwestern Law School. An expert litigator in the area, Mahadev examines the premise of the book and suggests additional approaches to addressing child exploitation and trafficking.

The caliber of all of these articles is the direct result of the tireless efforts of managing editor Megan Matthews and her dedicated team of assistant editors, including typesetter Meredith Barges. Without their meticulous attention to quality and detail, the journal would not be the issue I proudly present to you now.

It is fitting that I conclude this note describing the commemorative issue with a tribute to John Washburn. A man who needs no introduction to the readers of this journal, John served in the U.S. Foreign Service from 1963 to 1987 after his graduation from Harvard Law School. From 1977 to 1978, John was a Congressional Fellow of the American Political Science Association, serving as a senior staff member for Senator William Proxmire and Congressman John Cavanaugh. Between 1988 and 1994, John was a director in the Executive Office of the Secretary-General of the United Nations, then a director in the U.N. Department of Political Affairs. Since then, he has served as the Convenor for the American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), as well as the director of activities related to the ICC for the United Nations Association of the United States. The Council of American Students on International Negotiations and *Eyes on the ICC* owe their existence to John's support and encouragement throughout the years.

John's commitment to the rule of law and international justice has been the hallmark of his long career. According to Congressman Cavanaugh, "John Washburn was more than my senior staff; he was the office brain trust. What a crystal clear thinker, matched with intelligent integrity and a contagious commitment to justice. I was so young, and he was so smart; he was one of the best things to happen to me in Congress."

In the words of David Scheffer:

> Among the pioneers of international justice during the last two decades stands John Washburn. No other individual has done more to advance the cause of the International Criminal Court in America—and often elsewhere in the world—than John, whose energy, wit, articulate intelligence, and determination have made an enormous difference in the global debate about international justice. His leadership of the American Non-Governmental Organizations Coalition for the International Criminal Court has been in-

spiring, extremely effective, and the foundation upon which the United States will one day ratify the Rome Statute.

Thank you, John, for everything.

Happy Reading to All,

Juliet S. Sorensen
Editor-in-Chief

THE YEAR THAT CHANGED COMPLIANCE

New Laws Conscript The World's Business Community Into The Global Fight Against Human Trafficking

Hon. Virginia M. Kendall, T. Markus Funk, and Elizabeth M. Banzhoff[*]

In this article, Virginia Kendall, T. Markus Funk, and Elizabeth Banzhoff discuss the pernicious presence of human trafficking in global supply chains, and examine the recent swath of enactments designed to conscript the business world into the expanding anti-trafficking fight. The Executive Order Against Human Trafficking in Government Contracts and the California Transparency in Supply Chains Act lead the way, but there are also other laws and regulations on the books forming a comprehensive—and in the past often under-appreciated—bulwark against human trafficking, forced labor, and other forms of exploitation. The authors examine the substance of these laws and their actual (and potential) impact on the business world, and provide recommendations for compliance with these groundbreaking new regulations.

Key Words: Supply chain, compliance, child labor, human trafficking, California Act, Executive Order on trafficking

Human trafficking is the world's fastest growing criminal industry—and the business community now has good reason to take careful note. In terms of profitability, with global revenue estimated at over $30 billion annually, trafficking ranks second only to the narcotics trade.[1] In terms of prevalence, it is estimated that nearly 21 million people are currently suffering from conditions of forced physical and sex-industry labor as a result of being trafficked—5.5 million of those being children.[2] In terms of geographic scope, 161 countries are affected by trafficking through

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[*] The Honorable Virginia M. Kendall is a judge of the United States District Court for the Northern District of Illinois. Before being elevated to the federal bench, Judge Kendall served as deputy chief in the United States Attorney's Office in Chicago, where for more than ten years she served as the child exploitation coordinator. She travels extensively both domestically and internationally teaching judges and lawyers about crimes against women and children, and is an adjunct professor of law at Northwestern University School of Law and Loyola University School of Law. T. Markus Funk is a Perkins Coie partner and former federal prosecutor who served in the Balkans with the U.S. State Department. He is also the co-head of the firm's Corporate Social Responsibility and Supply Chain Compliance Practice (the first such specialized practice among the AmLaw100 firms) and National Co-Chair of the ABA's Corporate Social Responsibility Committee. Elizabeth M. Banzhoff is an associate with Perkins Coie in Denver. She previously served as a law clerk to Judge Richard Smoak, of the U.S. District Court for the Northern District of Florida, and Chief Justice Michael L. Bender, of the Colorado Supreme Court.

[1] Kamela D. Harris, State of Cal. Dep't of Justice, *What is Human Trafficking?*, www.oag.ca.gov/human-trafficking (last visited 23 Feb. 2013).

[2] Int'l Labour Office, ILO 2012 GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 14, 17 (2012), www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf.

being a source, transit, or destination location of trafficked persons.[3] But, despite these staggering numbers, prosecutions have been limited—and, generally speaking, ineffective.[4] For example, throughout the world in 2006 there were only 5,808 prosecutions and 3,160 convictions for human trafficking.[5] This means that for every 800 people trafficked, only one person was convicted that year.[6]

These low prosecution numbers are not due to a lack of enforcement options. For years a number of national and international laws prohibiting human trafficking have been in place. The United Nations Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography come immediately to mind as they relate to the trafficking of children.[7] Moreover, there are several International Labour Organization Conventions against forced labor,[8] and the International Criminal Court, for its part, has defined human trafficking as a crime against humanity under the Rome Statute.[9] Simply put, however, these laws have been largely ineffective.[10]

Part of the reason for the difficulty in enforcement of anti-trafficking laws can be traced to the fact that most trafficking victims are hidden from the view of law enforcement and society in general, posing significant victim identification challenges.[11] Many trafficking victims are brought to countries illegally, with no sense of their legal rights or the local language, with ties to their families and old life severed, and find themselves in countries with weak and corrupt governments and law enforcement.[12] The hallmark of human trafficking, indeed, is that the increasingly more organized crime groups that conduct the trafficking intentionally prey on young and largely defenseless victims.[13]

In the absence of meaningful enforcement action, anti-trafficking advocates now have a new ally in the battle against trafficking and forced labor: U.S. and foreign businesses' required compliance with groundbreaking new U.S. laws. There, indeed, is a growing agreement that enlisting (or,

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[3] Virginia M. Kendall & T. Markus Funk, CHILD EXPLOITATION AND TRAFFICKING: EXAMINING THE GLOBAL CHALLENGES AND U.S. RESPONSES 29 (2012).

[4] *See id.*

[5] U.N. Global Initiative to Fight Human Trafficking, *Human Trafficking: The Facts*, www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf (last visited 23 Feb. 2013).

[6] *Id.*

[7] Kendall & Funk, *supra* note 3, at 133.

[8] *See* Convention Concerning Forced or Compulsory Labour (I.L.O. No. 29), *adopted* 28 June 1930, 39 U.N.T.S. 55; Abolition of Forced Labour Convention (I.L.O. No. 105), *adopted* 25 Jan. 1957, 320 U.N.T.S. 291.

[9] Jane Kim, *Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute,* COLUM. L. SCH. GENDER & SEXUALITY ONLINE 1 (2011), www.blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf; *see also* T. Markus Funk, Victims' Rights and Advocacy at the International Criminal Court (2010).

[10] Kendall & Funk, *supra* note 3, at 29.

[11] *Id.* at 30.

[12] *Id.* at 30-31.

[13] *Id.* at 31.

perhaps more accurately, conscripting) the business community may well be the most promising method for eradicating human trafficking.[14] Anti-trafficking advocates, judges, prosecutors, government advisors, members of the media, and others involved with this area of law, should be aware of this new "partnership" with the business world, as well as the heavy requirements new laws and regulations are placing on businesses with the objective of eradicating human trafficking from global supply chains.

I. CORPORATE SOCIAL RESPONSIBILITY: NO LONGER JUST A "MARKETING ADD-ON"

There was a time, not so long ago, when mentioning initiatives such as "Corporate Social Responsibility," "conflict-free materials sourcing," and "principled labor recruiting" in corporate boardrooms and law offices resulted in raised eyebrows and debates about the advisability of even discussing such "marketing add-ons."[15] As of 2012, that is the past. Today's compliance reality is that, while "fair trade," "cruelty-free," and "ethically sourced" products may still fall on the "marketing" side of the compliance ledger, recent U.S. legislation has transformed the global effort to fight human trafficking into a surprisingly settled business imperative.

To see how we have gotten here, consider the key piece of legislation that in 2012 roared onto the compliance scene. September 2012's landmark Executive Order aimed at combating human trafficking in government contracts and the groundbreaking California Transparency in Supply Chains Act's disclosure obligations led the way, followed by the pending Business Transparency on Trafficking and Slavery Act (aptly described as "the California Act on steroids").[16] These new laws, as well as the potential reanimation of a duo of powerful anti-smuggling criminal provisions, have prompted a fundamental supply chain compliance re-think (similar to the Foreign Corrupt Practices Act ala 2005). What follows is a summary and candid assessment of these key compliance developments.

II. THE EXECUTIVE ORDER ON TRAFFICKING IN GOVERNMENT CONTRACTING: FIGHT TRAFFICKING IF YOU WANT A FEDERAL CONTRACT (OR SUB-CONTRACT)

On September 25, 2012, President Obama signed a landmark Executive Order aimed at further strengthening protections against trafficking in federal contracting.[17] The United States government has long been the largest single purchaser of goods and services in the world. To make good

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[14] U.N. Global Initiative to Fight Human Trafficking, *The Vienna Forum Report: A Forward Way to Combat Human Trafficking,* www.un.org/ga/president/62/ThematicDebates/humantrafficking/ebook.pdf.

[15] For an analysis of the development of corporate social responsibility in a historical context, see Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77 (2002).

[16] *See* Cal. Civ. Code § 1714.43 (2012); Carolyn Malone, Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Congress (2011).

[17] *See* Exec. Order No. 13627, 77 Fed. Reg. 60029 (25 Sept. 2012), www.gpo.gov/fdsys/pkg/FR-2012-10-02/html/2012-24374.htm.

on its "zero tolerance policy" against trafficking,[18] the Executive Order announces various safeguards, many of which have been proved effective in the private sector, aimed at ensuring that the government does not contribute taxpayer dollars to trafficking in persons.[19] With over 300,000 direct suppliers of the United States government, not to mention the additional hundreds of thousands of sub-suppliers around the world, the Executive Order is guaranteed to transform the usual ripple effect into a series of rolling compliance waves.

To achieve its stated goals, the Executive Order directs the Federal Acquisition Regulatory (FAR) Council, in consultation with other federal agencies, by late 2013, to amend the Federal Acquisition Regulation ("FAR") to prohibit federal contractors from:

- Using misleading or fraudulent practices to recruit employees, including failing to disclose basic information to employees or making material misrepresentations regarding the key terms and conditions of employment (such as wages and fringe benefits, the location of work, employer-arranged living conditions and housing, significant costs to be charged to the employee, and any hazardous nature of the work);
- Charging employees recruitment fees;
- Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents (such as passports or driver's licenses); and,
- Failing to pay certain return transportations costs upon the end of employment.[20]

The Order also requires each contractor and subcontractor to be able to certify, prior to receiving an award (and annually thereafter during the terms of the contract or subcontract), that it has put in place a compliance plan to prevent trafficking, and that, to the best of its knowledge and belief, neither it nor any of its subcontractors have engaged in any such activities.[21] What is more, if the contracting officer "becomes aware of" actual *or* potential abuses or "activities . . . [that are] inconsistent with the requirements of this order or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor . . . ," the contracting officer is required to notify the agency's Inspector General, debarment officials, and, as appropriate, law enforcement.[22]

If referral or self-reporting of activities "inconsistent with" the Executive Order does not sufficiently send shockwaves through even the most forward-leaning in the compliance community, the requirement that contractors and their subcontractors must agree to cooperate fully with en-

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *See id.*
[22] *Id.*

forcement authorities arrives as a guaranteed attention-grabber (to put it mildly).

The executive order also directs the FAR Council to impose additional requirements on those contracts: (1) to be performed outside of the United States; and (2) involving an estimated value of the supplies or services more than $500,000.[23] For the portion of the contract or subcontract to be performed outside of the United States, the contractor or subcontractor must maintain a compliance plan that, at a minimum, includes:

- An anti-trafficking awareness and training program;
- A process for employees to report trafficking activities without fear of retaliation;
- A recruiting and wage plan limiting the use of employee recruitment companies to those with trained employees, prohibiting the charging recruitment fees to employees, and ensuring that wages meet applicable host country legal requirements (or sufficiently explaining any variance);
- A housing plan, if the contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host country housing and safety standards or explains any variance; and
- Procedures to prevent subcontractors at any tier from engaging in trafficking in persons.[24]

President Obama's recent re-election to a second term promises to ensure the continued vitality and enforcement of this notable piece of regulatory intervention.

III. CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: ANSWERING THE "SO WHAT IS YOUR FAVORITE COMPANY DOING TO FIGHT FORCED LABOR?" QUESTION

Effective January 1, 2012, the California Transparency in Supply Chains Act amended California's Civil Code to require that qualifying companies detail and publicly disclose the nature and scope of their efforts to eradicate human trafficking, slavery, child labor, and forced labor from their worldwide supply chains.[25] In terms of its reach, the Act applies to all (1) retail sellers and manufacturers with (2) more than $100 million in annual global gross receipts who (3) *do business* in California (that is, that, inter alia, have more than $50,000 in assets in California or spend more than the same amount in wages in the state).[26]

The Act provides for injunctive relief brought by the California Attorney General.[27] In terms of its timing, the Act required that, on or before November 30, 2012, the California Franchise Tax Board must provide to

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[23] *Id.*
[24] *Id.*
[25] Cal. Civ. Code § 1714.43 (2012).
[26] *Id.*
[27] *Id.*

the Attorney General a (non-public) list of businesses required to comply with this landmark act.[28] Whether a company qualifies, in turn, is based on its tax returns from the previous year.[29]

The Act's required disclosures are, indeed, sweeping. The Act requires that covered companies provide on their homepage[30] a "conspicuous and easily understood link" to a disclosure setting forth the extent, if any, to which the company:

- Engages in verification of its supply chain(s) to evaluate and address risks of human trafficking and slavery, and if the verification was not conducted by a third party;
- Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains, and whether such verification was conducted through independent, unannounced audits;
- Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business;
- Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; and
- Provides company employees and management having direct responsibility for supply chain management with training on human trafficking and slavery, particularly with respect to mitigating supply chain risks.[31]

Of course, a qualifying company has the option of simply stating that it has not done any of these things—but suffice it to say that few, if any, public-facing companies will exercise this option. The legislation, therefore, is uniquely structured to facilitate change through business, legal, and social pressures brought by consumers, advocacy groups, the media, class action attorneys, and the like.[32]

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[28] *Id.*

[29] *Id.*

[30] What exactly constitutes a "homepage" is not clearly defined in the Act. To be safe, companies should ensure that this link is included at any point of entry to its website. Elizabeth Breakstone, T. Markus Funk, & Paul O. Hirose, *The Devil Is In 'Where To Disclose' Supply Chain Details*, LAW360 (14 Feb. 2013), www.law360.com/articles/415030/the-devil-is-in-where-to-disclose-supply-chain-details.

[31] Cal. Civ. Code § 1714.43 (2012) (emphasis added).

[32] *See id.*

IV. THE PENDING FEDERAL BUSINESS TRANSPARENCY ON TRAFFICKING AND SLAVERY ACT: "THE CALIFORNIA ACT ON STEROIDS"

The pending federal Business Transparency on Trafficking and Slavery Act[33] has enjoyed considerable bipartisan support.[34] The Act would amend section 13 of the Securities Exchange Act to require the Securities and Exchange Commission (SEC) to promulgate regulations requiring those companies covered by the Act to disclose their efforts to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within their supply chains.[35] Unlike the California Act, however, its reach is not limited to retail manufacturers and sellers. It would apply to all (1) publicly traded companies with (2) annual worldwide global receipts in excess of $100 million.[36]

More specifically, H.R. 2759 would require the covered companies to disclose the extent, if any, to which they:

- ***Maintain policies*** to identify and eliminate risks of forced labor, slavery, human trafficking, and the worst forms of child labor within their supply chains and prohibiting the use of corporate products, facilities, or services to obtain or maintain someone under conditions of forced labor, slavery, human trafficking, and the worst forms of child labor;
- ***Engage in verification*** of product supply chains to evaluate and address risks of forced labor, slavery, human trafficking and the worst forms of child labor; these disclosures must describe the greatest risks identified within the supply chains and the measures taken toward eliminating those risks, specify whether the verifications were conducted by third parties, and detail whether the verification process includes consultations with independent unions, workers' associations, or workers within workplaces and incorporate the resulting certification or written comments from such independent union, workers' associations, or workers;
- ***Ensure that audits of suppliers*** evaluate supplier compliance with company standards for eliminating forced labor, slavery, human trafficking, and the worst forms of child labor in supply chains, and specify whether the verifications were conducted through independent, unannounced audits;

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[33] *See* Carolyn Malone, Business Transparency on Trafficking and Slavery Act, H.R. 2759, 112th Congress (2011).

[34] *See generally*, Philip Hunter & Quinn Kepes, Human Trafficking & Global Supply Chains: A Background Paper 9 (2012), www.ohchr.org/Documents/Issues/Trafficking/Consultation/2012/BackgroundPaper.pdf. This report was prepared for the expert meeting convened by the UN Special Rapporteur on trafficking in persons, especially women and children, Ms. Joy Ngozi Ezeilo.

[35] *Id.*

[36] *Id.*

- ***Assess supply chain management and procurement*** systems of suppliers in the companies' supply chains to verify whether those suppliers have appropriate systems to identify risks of forced labor, slavery, human trafficking, and the worst forms of child labor within their own supply chains;
- ***Require suppliers in their supply chains to certify*** that materials incorporated into products comply with the laws regarding forced labor, slavery, human trafficking, and the worst forms of child labor of the country or countries in which they are doing business;
- ***Maintain internal accountability standards***, supply chain management and procurement systems, and procedures for employees or contractors failing to meet company standards regarding forced labor, slavery, human trafficking, and the worst forms of child labor and describe such standards and systems;
- ***Provide training*** on forced labor, slavery, human trafficking and the worst forms of child labor, particularly with respect to mitigating risks within the supply chains of products, to employees and management having direct responsibility for supply chain management;
- ***Safeguard that recruitment practices*** at all suppliers comply with company standards for eliminating exploitive labor practices that contribute to forced labor, slavery, human trafficking, and the worst forms of child labor, including by conducting audits of labor recruiters and disclosing the results of such audits; and
- ***Ensure that remediation is provided*** to those who have been identified as victims of forced labor, slavery, human trafficking, and the worst forms of child labor within their supply chains.[37]

Companies subject to the Act would be required to deliver these disclosures in their reports to the SEC, who in turn would make a searchable database with this information available to the public.[38] In addition, like the California Act, H.R. 2759 would require companies to disclose the above information on their company websites through a "conspicuous and easily understood link . . . placed on the homepage of the website" labeled "Policies to Address Forced Labor, Slavery, Human Trafficking and the Worst Forms of Child Labor."[39]

[37] *Id.*
[38] *Id.*
[39] *Id.*

V. LITTLE-KNOWN ANTI-SMUGGLING PROVISIONS PACK A POWERFUL KNOCK-OUT PUNCH

Though the above-described anti-trafficking regulations certainly have the obvious potential of "shaming" companies into compliance through advocacy group pressures, government intervention, consumer boycotts, and class actions, there is also a perhaps less obvious—but certainly very real—potential for significant individual and business criminal liability. There, of course, is the obvious danger of falsely certifying compliance with, say, the strictures of the Executive Order (and thus exposing the signor and company to false statement liability under 18 U.S.C. § 1001). Perhaps less obvious, however, is the intersection of: (1) the federal anti-smuggling statute and (2) the largely disused anti-forced labor provisions of the Tariff Act of 1930.

The second paragraph of the anti-smuggling statute, 18 U.S.C. § 545, creates liability for anyone who:

> [K]nowingly imports or brings into the United States any merchandise *contrary to law*, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. [40]

Section 545, for its part, contains a very unusual burden-shifting provision: "Proof of a defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section."[41] Thus, if a person or company is found in possession of the smuggled products, (say, a pallet of shirts made by forced labor in Pakistan), there is a rebuttable presumption of guilty knowledge. It, therefore, in the end is the accused's burden to convince the jury that they did not, in fact, know the products to be smuggled into the US. Even the most experienced and hard-charging federal prosecutors will likely concede that this little-known provision comes as an unexpected (though, no doubt, welcomed) surprise.

While 19 U.S.C. § 1307 provides that it is illegal to import merchandise "manufactured wholly or in part in any foreign country *by . . . forced labor*."[42] A violation of section 1307's prohibition, moreover, is criminally punishable pursuant to 18 U.S.C. § 1761. Merchandise made with forced labor (Section 1307) is, therefore, imported into the United States "contrary to law."[43]

Far from threatening a mere "slap on the wrist," section 545 carries stiff penalties of up to 20 years' imprisonment, a fine of $250,000, and forfeiture of the value of the imported products.[44] This, in short, provides prosecutors with an exceptionally sizeable stick to wield against those who

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[40] *See* 18 U.S.C. § 545 (emphasis added).
[41] *Id.*
[42] 19 U.S.C. §1307.
[43] *Id.*; 18 U.S.C. § 545 (emphasis added).
[44] *Id.*

the government believes attempt to bring products made by forced labor into the United States (once prosecutors come to fully understand the deterrent impact such prosecutions promise, we can almost certainly expect to see multi-count indictments alleging free-standing violations of section 1307, as well as violations of section 545 (read in tandem with section 1307). From the perspective of the anti-trafficking advocacy community, such creative and aggressive prosecutions will no doubt be celebrated.

VI. PARTING THOUGHTS

Laws and regulations like those that were thrust onto the compliance scene in 2012 will undoubtedly in short order persuade businesses to accept anti-trafficking as the new business (and compliance) norm. In response, potentially impacted businesses (that is almost every business) around the world to take a clear-eyed look at their present compliance programs to determine whether they appropriately:

- ***Map and Assess*** supply chain risk profile and identify the areas of greatest exposure;
- ***Contain*** a concise, understandable, and integrated policy against forced labor, bribery, and corruption;
- ***Include*** focused training programs for employees and managers with direct responsibility over supply chain management that raise awareness and enhance their ability to identify and root out bad actors;
- ***Provide*** for an anonymous reporting hotline and include mechanisms for escalation to qualified outside counsel;
- ***Set forth*** clear accountability standards and procedures for transaction partners and employees;
- ***Contain*** an appropriate system of basic due diligence and vetting for current and prospective suppliers;
- ***Require*** appropriate certifications; and
- ***Encompass*** limited, targeted supplier audits to evaluate supplier compliance with the company's standards for labor exploitation.

It is not an overstatement to argue that 2012's laws and regulations against forced labor and trafficking have (perhaps forever) changed the face of corporate compliance. The questions that remain are how the global business community will respond in the face of these new challenges, the extent to which U.S. enforcers will provide muscle to the new enactments, and whether other countries will begin to emulate the U.S. model. But, in contrast with the Foreign Corrupt Practices Act experience, this time, nobody believes it will take decades for the business community to get its answers.