



# Corporate Liability for Forced Labour and Human Trafficking



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October 2016

*This report maps corporate liability for forced labour and human trafficking across several jurisdictions, highlighting legislation that applies to companies and what duties are expected in business operations and activities (including duties to detect, prevent, mitigate, report and remedy incidences of trafficking and forced labour). This report comprises a detailed legal mapping, most relevant to in-house and external legal advisors.*



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**General disclaimer:** This report is a guide and is not intended, and should not be used, as legal advice.

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# Preface

*"The Leadership Group for Responsible Recruitment welcomes the publication of this report on Corporate Liability for Forced Labour and Human Trafficking. The mapping undertaken by IHRB and Hogan Lovells of forced labour and human trafficking law in eight jurisdictions is a valuable resource for companies in understanding requirements relevant to their operations and supply chains."*

- Steering Committee,  
**Leadership Group for Responsible Recruitment**  
[www.employerpays.org](http://www.employerpays.org)

## About the Leadership Group for Responsible Recruitment

Launched at the London office of Hogan Lovells in May 2016, the Leadership Group for Responsible Recruitment is collaboration between The Coca-Cola Company, HP Inc., Hewlett Packard Enterprise, IKEA, Marks & Spencer and Unilever. Supported by IHRB, the Interfaith Center on Corporate Responsibility (ICCR), the International Organization for Migration (IOM) and Vertié, the founding companies have committed to the **Employer Pays Principle**:

### The Employer Pays Principle

No worker should pay for a job – the costs of recruitment should be borne not by the worker but by the employer.

The aim of the companies is bold – the total eradication of fees being charged to workers in their supply chains within the next ten years.

For more information about the Leadership Group, please visit [www.employerpays.org](http://www.employerpays.org)

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# 1. Introduction

Forced labour and human trafficking are abuses that many would like to think have long been eradicated, but they are prevalent across the world today. The International Labour Organization ("ILO") estimates that nearly 21 million people are victims of forced labour. This includes those who are forced to work under threat of violence or by other means such as accumulated debt, retention of passports or threats of denunciation to immigration authorities.

Companies are increasingly aware of risks associated with issues of forced labour and human trafficking in their supply chains, especially where exploitative recruitment practices are the norm. This report provides an overview of the international laws, regulations and guidelines in place to curtail human trafficking and forced labour, and the specific regimes that apply in a number of jurisdictions, with a focus on the obligations of corporate actors. The eight jurisdictions examined here are the UK, the USA, Qatar, Japan, Brazil, Russia, South Africa and the United Arab Emirates ("UAE"). This range of jurisdictions covers all continents and a number represent host states of recent and forthcoming mega-sporting events, which generate a significant amount of labour migration, a heightened risk of forced labour and trafficking, and a significant degree of scrutiny from civil society, the media, investors and consumers.<sup>1</sup>

It is important to recognise that forced labour and human trafficking are not just supply chain issues. As demonstrated in this report, companies are at risk of criminal liability for any direct use or forced labour or involvement in human trafficking. The main exposure to forced labour and human trafficking risk is through recruitment; particularly the use of agency workers and the actions of employment and recruitment agencies that supply workers to subcontractors. As this report discusses, direct corporate liability for instances of forced labour and trafficking in supply chains is limited; rather the trend internationally is very much towards companies reporting risks and steps required to mitigate risks of violations occurring down the chain. The reputational risk, whether on in-business or supply chain issues, is high.

The legal and regulatory provisions on forced labour and human trafficking vary between jurisdictions. With the exception of Russia, whose relevant domestic law only applies to natural persons, legislation prohibits certain direct acts of trafficking and forced labour (or their equivalent) by corporates in the jurisdictions covered in this note. Companies must avoid any direct involvement in forced labour and human trafficking to avoid liability.

In certain jurisdictions there is also a duty on corporates to issue reports on steps they have taken to prevent human trafficking and forced labour. In the UK, the Modern Slavery Act 2015 aims to ensure transparency by imposing an obligation on companies to report on actions taken to ensure that human trafficking is not taking place in any of their supply chains or in their own business. In the USA, the Federal Acquisition Regulation 2005 requires government contractors to undertake due diligence on certain agents or contractors and for those contractors to provide a certification of compliance with anti-human trafficking rules. The California Transparency in Supply Chains Act requires corporates to issue a statement including suppliers' certification of compliance with applicable laws. In the UAE, there is a duty on corporates to notify authorities of any incidences of human trafficking of which they are aware.

This report maps corporate liability for forced labour and trafficking across the eight jurisdictions under review, highlighting legislation that applies to corporates and what duties are therefore expected in business operations and activities (including duties to detect, prevent,

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<sup>1</sup> In particular the UK and USA are also jurisdictions that represent the home states of many sports events sponsors. The UAE is included to both contextualise the legal framework in Qatar, and because the upcoming

mitigate, report and remedy incidences of trafficking and forced labour). Importantly, several pieces of legislation on this issue have extra-territorial scope and application that affect companies operating internationally and have far-reaching consequences in supply chains and business relationships. This report comprises a detailed legal mapping, most relevant to in-house and external legal advisors.

Some of the legislation is wide-reaching and has extra-territorial effect. For example, the UK's Modern Slavery Act 2015 expressly confers extra-territorial jurisdiction over UK nationals who commit trafficking offences overseas. It also provides that any company (UK or overseas) that carries on a business or part of a business in the United Kingdom, supplies goods or services (this could be anywhere in the world) and has an annual turnover of at least £36 million will be subject to the supply chain transparency provisions of the Act.

## Defining Forced Labour and Human Trafficking

Forced labour refers specifically to extracting work or service from another under threat of penalty and for which that other person has not offered themselves voluntarily. The ILO indicators of forced labour are (i) abuse of vulnerability; (ii) deception; (iii) restriction of movement; (iv) isolation; (v) physical and sexual violence; (vi) intimidation and threats; (vii) retention of identity documents; (viii) withholding of wages; (ix) debt bondage; (x) abusive working and living conditions; and (xi) excessive overtime.

The UN's definition of human trafficking can be broken down into three main components: (i) an act of movement (recruitment, transport, transfer, harbouring and/or receipt of persons); (ii) by certain means (coercion, abduction, threat or use of force and/or giving payments or benefits); and (iii) for a certain purpose (exploitation, forced labour, prostitution of others, slavery or removal of organs).<sup>2</sup>

In practice the offences of forced labour and human trafficking often overlap in part, and cover a broader scope of activities than might be first expected. The offences are often committed through financial exploitation, in which persons may willingly partake, rather than necessarily involving any of the other elements.

## Implications for Corporate Liability

Since production of goods and services has become increasingly fragmented as a result of globalisation, nearly every multinational supply chain will be exposed to risks of forced labour and human trafficking, particularly where migrant or otherwise vulnerable workers are recruited into lower skilled jobs in the supply chain.

Corporates may be directly liable for violations of laws and regulations designed to prevent forced labour and human trafficking and/or have enforceable obligations to report on the risks of forced labour and trafficking in their supply chains.

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<sup>2</sup> United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, which is one of two supplementary protocols to the United Nations Convention against Transnational Organised Crime (collectively known as the "Palermo Protocol").

## 2. International Law Context

There are several international protocols, treaties and conventions that provide a global framework for the international effort to curtail human trafficking. These require states to implement national legislation to give effect to the international protocols and the framework they create. The protocols aim to set out a uniform approach to trafficking and forced labour and to facilitate international cooperation amongst states to tackle the issue of modern day slavery and forced labour.

Human trafficking is a multi-faceted crime. Each act of trafficking commonly breaking a range of laws: such as forced labour, bribery, false imprisonment, corruption, labour and immigration. The range of international legal mechanisms which can be used to combat it is therefore also wide reaching. The US Department of State's 2016 Trafficking in Persons Report lists 8 relevant conventions.

The most comprehensive and important international instrument is the Palermo Protocol. It came into existence in 2000 and into force three years later. The Protocol establishes an agreed and internationally binding definition of human trafficking that has now been universally adopted and laid the foundation for international action on trafficking. The Protocol does not mention corporate liability for complicity in supply chains specifically, either directly or indirectly, but it is clear that the intention is to criminalise any activity which promotes or aids trafficking in any form whatsoever. It includes, for example, obligations to raise awareness of trafficking as well as an obligation to criminalise anyone acting as an "accomplice" to any trafficking offence.

The UN Guiding Principles on Business and Human Rights are a set of global guidelines for states and companies to prevent, address and remedy human rights abuses committed in business operations. One pillar of the Guiding Principles is the corporate responsibility to respect human rights. This provides that businesses should act with due diligence to avoid infringing human rights and address negative impacts of activities with which they are involved. There are various human rights that relate to trafficking and forced labour, including the right not to be subjected to slavery, servitude and forced labour (Article 8 of the International Covenant on Civil and Political Rights). The Guiding Principles encourage corporates to conduct human rights due diligence.

As well as the UN conventions and principles mentioned above, there are several relevant initiatives by other international organisations. The most significant, and relevant to the issue of supply chains, are ILO conventions concerning the exploitation of labour. Adopted in 1998, the ILO Declaration on Fundamental Principles and Rights at Work<sup>3</sup> declares that all member states, even if they have not ratified particular conventions, have obligations arising from the fact of their membership to respect, promote and realise the elimination of all forms of forced or compulsory labour.

More recently, the ILO Protocol of 2014 to the 1930 Forced Labour Convention requires all state members to implement legislation to suppress forced labour and to sanction the perpetrators of forced labour. It includes requirements to develop national policies and plans aimed both at educating people on and the enforcement of the convention. To date, eight states have ratified the Protocol, which will come into force in November 2016.<sup>4</sup>

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<sup>3</sup> ILO, "Declaration on Fundamental Principles and Rights at Work" (1998), available at: <http://www.ilo.org/declaration/lang--en/index.htm>.

<sup>4</sup> As of 30 September 2016 the Protocol of 2014 to the Forced Labour Convention 1930 has been ratified by the Czech Republic, France, Mali, Mauritania, Niger, Norway, Panama and the United Kingdom.

The UN Guiding Principles on Business and Human Rights are mirrored in the Organisation for Economic Co-operation and Development ("OECD") Guidelines for Multinational Enterprises ("MNEs"), which are government-backed comprehensive guidelines on responsible business conduct, adhered to by all 34 OECD countries as well as 12 non-OECD countries. The OECD Guidelines are voluntary principles and standards covering various areas of business ethics, including human rights and employment and labour. They provide a government backed grievance mechanism for addressing the actions of MNEs. They were last revised in 2011 and have been used to address alleged modern slavery issues.

In Europe, the Council of Europe Convention on Action against Trafficking in Human Beings builds on the Palermo Protocol and seeks to strengthen the protections that it provides. It requires that each party to the Convention ensures that any legal person (including a company) can be held liable for a criminal offence that is committed for its benefit by a natural person. The natural person can either be acting individually or as part of an organ of the legal person, if they are able to exercise control over the company. The Convention requires States to ensure that a company which benefits from human trafficking committed by a person of authority within that company commits a criminal offence. There is therefore a clear intention for corporates to be held accountable for acts committed by senior employees and directors as well as the driver to ensure effective procedures to avoid the potential for such acts by other employees.

These international tools create a framework that individual nations must adhere to in national legislation on human trafficking. This report outlines the various measures that governments have taken to date and how these measures can give rise to significant liabilities for international corporations with trafficking in their supply chains. The framework makes clear that the international legal community is working to eradicate trafficking and part of this strategy is imposing liability on companies which benefit, either directly or indirectly, from forced labour. This report is intended as high level guidance on addressing trafficking and forced labour and outlines the main obligations, offences and liabilities that are likely to be most relevant to multinational corporations.

## 3. Investor Impact

Human rights are not a new or fringe concern for investors. The modern development of socially responsible investment can be traced to the 1980s when proponents focused efforts on screening investments to South Africa with the goal of pressuring the government to end apartheid. Since the mid-1990s, socially responsible investment, which integrates environmental, social and governance ("ESG") issues, including human rights, into commercial analysis and decision-making, has grown substantially.

Notable milestones include the adoption of the Equator Principles, a risk management framework for determining, assessing and managing environmental and social risk in project finance. Over 80 financial institutions have adopted the Equator Principles collectively covering over 70 per cent of global project financing. In 2006, the UN Environment Programme launched the Principles for Responsible Investment ("PRI") to provide a framework for investors to incorporate ESG factors into the investment process. Today, the PRI have over 1,500 signatories managing more than \$60 trillion USD of assets.<sup>5</sup>

Investors originally viewed environmental and social issues, including human rights, mainly from the perspective of reputational risk. Many, particularly institutional investors, now recognise the impact on commercial risk, as well as opportunities presented for investment, new business and market access. In terms of commercial risk, these impacts include supply chain disruptions, financial penalties, legal and compliance issues, reputational and brand damage, reduced consumer demand and lack of employee engagement. Supply chain disruptions reduce productivity and result in unanticipated delays in production. Conversely, a positive approach to addressing forced labour and other human rights issues can enhance brand value and reputation (including with customers, partners, employees and local communities), improve the resilience of supply chains, and help to ensure compliance with emerging regulations and obligations.

In response to the policy and regulatory trends mentioned above, companies are introducing increasingly sophisticated due diligence and reporting systems that is leading to significant growth in the amount of information available on human rights impacts. This increased transparency and information allows investors to better assess and manage any human rights risks that might arise in relation to potential investments and their existing portfolio. But it also increases the likelihood that existing portfolio companies will detect latent human rights abuses.

Investors cannot leave it to the companies they invest in to take the lead, but equally they cannot be expected to assess and manage risks presented by every activity by those companies. The approaches taken by investors are guided by several existing guidelines on responsible investment, notably including the Ecumenical Council for Corporate Responsibility ("ECCR") Guide to Investment and Engaging with Companies.<sup>6</sup> Specifically confronting the issue of forced labour and human trafficking, the Interfaith Center for Corporate Responsibility (ICCR) Statement of Principles and Recommended Practices for Confronting Human Trafficking and Modern Slavery provides importance guidance for companies.<sup>7</sup>

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<sup>5</sup> The six principles of the UN PRI are available at: [www.unpri.org](http://www.unpri.org).

<sup>6</sup> ECCR, "Guide to Investment and Engaging" (2008), available at: <http://www.eccr.org.uk/module-htmlpages-display-pid-48.html>.

<sup>7</sup> ICCR, "Statement of Principles and Recommended Practices for Confronting Human Trafficking and Modern Slavery" (2013), available at: <http://www.iccr.org/iccrs-statement-principles-and-recommended-practices-confronting-human-trafficking-modern-day>.

It is becoming increasingly accepted that investors need to integrate modern slavery and broader human rights risks into their investment decision and management processes using a risk based approach. This includes the use of informed pre-investment due diligence tailored to specific geographic, sector or other risks. This requires training investment professionals and their advisors to ensure that any risks or issues can be identified, noting that human rights risks can be difficult to detect particularly in complex international supply chains. Where any significant risks are identified at the due diligence stage, careful consideration as to whether and how to proceed will be required, including as to whether any contractual protection is required.

In relation to existing investments, investors should probe the specific mitigation processes companies engage with to ensure they are evaluating and addressing actual or potential human rights risks in their operations and supply chains, and how these might be improved. Investors increasingly look for companies to have clear policies acknowledging how operations and supply chains might be impacted by human rights risks, evidence of board accountability and a company-wide approach, evidence of engagement with stakeholders including affected local communities, and additional voluntary disclosure, which evidence a pro-active approach to tackling risks.

Robust human rights due diligence is informed by a thorough risk-based understanding of potential human rights impacts. Investors are assisted by initiatives like the recently established Corporate Human Rights Benchmark ("CHRB"), which ranks the world's largest publicly listed companies on their human rights performance. The CHRB (established by partners including IHRB) has been endorsed by major investors including Boston Common Asset Management, Aviva Investors, APG Asset Management, and BNP Paribas Investment Partners. The UN PRI initiative provides further practical information on how investors can embed human rights issues within their investment activities, with specific additional guidance already released on development investment strategies, manager selection, appointment and monitoring, and investment policy.

## 4. United Kingdom

The United Kingdom complies fully with the minimum international standards for eliminating trafficking set by international bodies. The government has launched a modern slavery strategy, and has passed legislation to deal specifically with the issue and appointed the Independent Anti-Slavery Commissioner to coordinate anti-slavery and trafficking efforts.

### 4.1 Anti-Human Trafficking and Forced Labour Laws that Apply to Corporates

#### *MSA*

The Modern Slavery Act 2015 (“MSA”) is the first legislation of its kind in Europe. The purpose of the MSA is to enhance law enforcement in relation to modern slavery offences and address modern slavery and human trafficking more widely by seeking to improve transparency in businesses and their supply chains. The transparency provisions target organisations with significant resources and purchasing power, which are best placed to impact global supply chains and implement policies and best practices to tackle the prevalence of modern slavery in businesses.

For corporates, the principal obligation which arises from the introduction of the MSA is the duty to issue a statement setting out the steps taken by the company to combat human trafficking and slavery in its own business and in its supply chains. This is discussed in further detail in section 4.2 below.

The MSA seeks to consolidate legislation relating to forced labour and human trafficking, and thereby repeals various provisions under the Asylum and Immigration Act 2004 and the Coroners and Justice Act 2009. It is important to note that the offences of forced labour and human trafficking apply to individuals and companies, but that the reporting obligation is only for larger companies.

#### *Gangmasters Act*

The purpose of the Gangmasters (Licensing) Act 2004 (“Gangmasters Act”) is to safeguard the welfare and interests of workers engaged in agriculture, horticulture, shellfish gathering and any associated processing and packaging. While these are industries that certain companies may not be operating in, the definition of agriculture is particularly broad so as to widen the scope of application of the Act. Further, as noted below, certain offences under the Act extend to gangmasters i.e. those who deal with individuals or entities that supply workers in these sectors to third parties.

## 4.2 Duties in Relation to Human Trafficking and Forced Labour

### *MSA*

#### **Slavery, Servitude and Forced or Compulsory Labour Offence**

It is an offence under section 1 of the MSA to hold another person in slavery or servitude, or to require another person to perform forced or compulsory labour.

#### **Human Trafficking Offence**

It is an offence under section 2 of the MSA for a person to arrange or facilitate the travel of another person with a view to that person being exploited. The term covers a range of matters including slavery or forced labour, sexual exploitation, and securing service by force or deception, as well as any offence involving the act of arranging or facilitating the travel – including, aiding, abetting, counselling or procuring an offence under section 2(1) of the MSA.

#### **Aiding and Abetting and Other Offences**

If a person intends that a human trafficking offence be committed even if the event does not occur, they can be prosecuted under the MSA if in the process another offence is committed (section 4). In addition to aiding, abetting, counselling or procuring trafficking, other actions such as bodily harm or unlawful detention would also be an MSA offence.

During 2015, a total of 289 offences were prosecuted for modern slavery and human trafficking in the UK, albeit most were brought under previous slavery and trafficking legislation.

#### **Obligation to Issue a Statement**

Section 54 of the MSA specifically deals with transparency in businesses and supply chains. It applies to any body corporate or partnership that carries on its business or part of its business in the United Kingdom; supplies goods or services anywhere in the world, and has (taken together with the turnover of its subsidiaries) a global annual turnover of at least £36 million. The interpretation of a 'body corporate' and 'partnership' is wide and includes a broad range of commercial companies, partnerships, large charities and not-for-profit organisations.

It imposes an obligation to publish a statement each financial year which sets out the steps the business has taken during the financial year to ensure that slavery and human trafficking is not taking place (in any of its supply chains and in any part of its own business). The MSA reporting obligations only apply in respect of financial years ending on or after 31 March 2016.

It is important to note that if the organisation has taken no steps to ensure that slavery and human trafficking is not taking place, issuing a statement to that effect would still make it compliant with the MSA but negative inferences are likely to be drawn by stakeholders, including customers and business partners.

The MSA provides an indication on the type of information that may be provided, which includes information about:

- the organisation's structure, business and supply chains;
- its policies in relation to slavery and human trafficking;

- its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the corresponding steps it is taking to assess and manage that risk;
- its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
- the training about slavery and human trafficking available to its staff.

Importantly, the statement must be approved by the board (for limited companies) and signed by a senior member of the business, encouraging understanding and accountability within the firm. If the business is a body corporate, the statement will need to be approved by the board and signed by a director. In a limited liability partnership, the members must approve it and it must be signed by a designated member.

If the business has a website, it must publish the statement, and include a link to the statement in a prominent place on the website's homepage. If the business does not have a website, the organisation must provide a copy of the statement to anyone who makes a written request for a copy within 30 days of receipt of the request.

While the obligation to publish a statement is mandatory under the MSA, as set out above, there is no mandatory content for the statement. As such, a company that fails to include the items as prescribed by the MSA would not face any legal consequences, provided it actually issues a statement.

The UK Government has provided some guidance in relation to the form and publication of statements which is a useful starting point.<sup>8</sup> But the statement is, in reality, the end product – a report on what has been done and is being done. As such, obligated businesses will need to review their policies and processes, consider whether changes might be needed to their contracts with suppliers, address training requirements for their staff and possibly their suppliers and assess and identify how they will respond to an incidence of modern slavery.

The Business & Human Rights Resource Centre maintains an online record of published statements which currently lists over 400 corporate reports.<sup>9</sup>

## *Gangmasters Act*

In England and Wales, the Gangmasters Act applies to agricultural work, gathering shellfish and processing or packaging any produce derived from that work. Agricultural work includes:

- dairy-farming;
- production for the purposes of any trade, business or other undertaking (whether carried out for profit or not) of consumable produce; and
- the use of land as:
  - grazing, meadow or pasture land;
  - an orchard or an osier land or woodland; and/or

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<sup>8</sup> UK Government, "Transparency in Supply Chains etc. - A practical guide" (2015), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/471996/Transparency\\_in\\_Supply\\_Chains\\_etc\\_-\\_A\\_practical\\_guide\\_\\_final\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_-_A_practical_guide__final_.pdf).

<sup>9</sup> Business and Human Rights Resource Centre, *Modern Slavery Act Registry* (last accessed Oct. 2016), available at: <https://business-humanrights.org/en/uk-modern-slavery-act-registry>.

- for market gardens or nursery grounds.

There are nuances in the type of work that is targeted by the Act in Northern Ireland and Scotland, but these are slight and the differences mainly relate to the way in which certain terms are defined in the respective jurisdictions.

The Act targets persons who carry out the work set out above and who act as a gangmaster. A person is considered to be acting as a gangmaster if he supplies a worker to do work for another person.

It is irrelevant to the qualification of a gangmaster whether there exists a contractual relationship between the parties. Furthermore, the existence of intermediaries, and whether it is the alleged gangmaster or his intermediary who controls the worker, also has no bearing on such qualification.<sup>10</sup>

### Acting as a Gangmaster, Being in Possession of False Documents

A person falling within the definition of a gangmaster under the Act must be licensed by the Gangmasters and Labour Abuse Authority ("GLAA") in order to carry out its activities, thus helping to ensure regulation and mitigate the risk of modern slavery.

A person will not commit an offence if he breaches a condition of a licence granted by the GLAA.<sup>11</sup> However, a person will commit an offence if he is in possession of a licence or document which (a) is false, or (b) was improperly obtained, or (c) relates to someone else. In the case of (a) and (b), a subjective test applies, i.e. the person must have knowledge or belief of the action taken.

### Entering into Arrangements with Gangmasters

A person commits an offence if (a) he enters into an arrangement whereby the gangmaster supplies him with workers or services, and (b) the gangmaster supplying the workers or services is not duly licensed.

Since it entered into force, there have been over 150 successful prosecutions for offences under the Gangmasters Act.

## 4.3 Extra-territoriality

### *MSA*

The territorial application of the majority of the MSA only extends to England and Wales, with some provisions also applying to Scotland and Northern Ireland.

However, to the extent that non-UK companies are identified by the MSA (as described above) they will be required to comply with the obligation to issue a statement as set out above.

The human trafficking offence specifically has extra-territorial effect to UK nationals regardless of where the arranging or facilitating takes place, and where the travel takes place. The MSA

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<sup>10</sup> Section 4(4), Gangmasters Act.

<sup>11</sup> Section 12(1), Gangmasters Act.

also applies to non-UK nationals, where any part of the arranging or facilitating takes place in the UK or where the travel consists of arrival in, entry into, departure from, or travel within, the UK.

### *Gangmasters Act*

Pursuant to section 5 of the Gangmasters Act, the territorial scope in relation to the work being carried out does not extend beyond the UK (including any portion of the shore or bed of the sea and its coastal waters). However, the location of the gangmaster is irrelevant and as such the Act may apply to any gangmaster, as long as the work is performed within the territorial scope of the UK.

## **4.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage in Human Trafficking or Forced Labour**

### *MSA*

The reporting obligations of organisations under section 54 of the MSA (as set out at 4.2 above) extend to their global supply chain. As such, an organisation is expected to describe in its statement (and to have processes in place underpinning the statement) the measures it has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains and to ensure that suppliers (both direct and indirect) are not engaging in forced labour or human trafficking. While an organisation would still be compliant with the MSA if it issued a statement to the effect that it had taken no such steps, this could expose the company to reputational, legal, financial and operational risks and pressures.

### *Gangmasters Act*

One of the principal offences under the Act is entering into arrangements with gangmasters (see section 4.2 above). Any company entering into an arrangement with a person carrying out or commissioning work in the industries covered by the Act (i.e. agricultural, gathering shellfish and processing or packaging any produce derived from that work) could potentially be liable for dealing with a gangmaster.

In order to minimise exposure to criminal liability, entities should take all reasonable steps to satisfy themselves that the gangmaster was acting under the authority of a valid licence. It is also a valid defence for the body corporate to prove that it did not know, and had no reasonable grounds for suspecting that the gangmaster was not the holder of a valid licence.

## 4.5 Scope of Liability for Corporates

### *MSA*

A person committing an offence under section 1 (slavery, servitude and forced or compulsory labour) or section 2 (human trafficking offence) of the MSA can be convicted to imprisonment for life (if convicted on indictment) or to imprisonment for a maximum of 12 months and/or or a fine (on a summary conviction). These offences are listed as serious offences in England and Wales under the Serious Crime Act 2007.<sup>12</sup>

Secondary related offences under section 4 are punishable by imprisonment up to ten years (if convicted on indictment) but if committed by kidnapping or false imprisonment, the person is liable to life imprisonment. On summary conviction, a sentence of up to 12 months imprisonment and/or a fine can be imposed. The MSA provides that modern slavery offences can also lead to confiscation orders under the Proceeds of Crime Act 2002.

For corporates, failing to comply with the obligation to issue a report under section 54 of the MSA can be enforced by the Secretary of State through civil proceedings by way of injunction. However, pressure from civil society, consumers and investors as well as actual and prospective business partners may have a more immediate bearing.

### *Gangmasters Act*

A person guilty of an offence under the Act is criminally liable under the Act. The penalty for committing an offence is a fine and/or imprisonment.

Conspiring, attempting, inciting, aiding, abetting, counselling or procuring the commission of one of these offences is itself an offence punishable by a fine and/or imprisonment.

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<sup>12</sup> Schedule 1, paragraphs 1A and 2(4) of the Serious Crime Act 2007.

## 5. United States of America

Since passage of the Trafficking Victims Protection Act 2000 ("TVPA"), and its subsequent reauthorisations, the United States government has undertaken significant steps to build an anti-human trafficking infrastructure. Through annual publication of the US Department of State's Trafficking in Persons Report ("TIP Report"), it has called worldwide attention to this blight, and made it difficult for individuals and organisations engaged in businesses where trafficking is found to claim ignorance about the problem.

The governments of the United States of America and several US states have implemented various laws and regulations targeting human trafficking and forced labour. Some of these are aimed specifically at corporates and their supply chains, while others criminalise human trafficking and forced labour more generally. In addition to the TVPA, guidance under the Federal Acquisition Regulation (as amended in 2015) and the California Transparency in Supply Chains Act 2010 ("CTSCA") may be of particular relevance to corporations, while the Racketeer Influenced and Corrupt Organizations Act ("RICO") can be utilised to prosecute those involved in trafficking.

### 5.1 Anti-Human Trafficking and Forced Labour Laws that Apply to Corporates

#### *TVPA*

Originally enacted in 2000, and subsequently repeatedly reauthorised, the TVPA seeks to combat human trafficking by promoting a policy of the "3Ps": Prosecuting traffickers, Preventing trafficking and Protecting victims and survivors of trafficking. The TVPA established human trafficking and related activities - including forced labour and sex trafficking - as federal crimes with severe penalties for those convicted, and mandatory restitution for victims.

#### *RICO*

RICO, Title 8 of the Organized Crime Control Act, criminalizes four types of activities:

- investing income derived from a pattern of racketeering activity or collecting an unlawful debt to obtain an interest in an enterprise affecting interstate or foreign commerce;
- controlling through a pattern of racketeering activity or through collection of an unlawful debt any interest that affects interstate or foreign commerce;
- associating with an enterprise that affects interstate or foreign commerce through a pattern of racketeering activity or through the collection of an illegal debt to manage the enterprise; and
- conspiracy to violate any of the other RICO provisions. Knowingly engaging in human trafficking has been expressly subject to criminal prosecution under RICO since 2003. The Act also provides for civil liability for perpetrators of such acts.

## *Other Federal Legislation*

Other relevant federal legislation includes:

### **The Federal Acquisition Regulation (as amended 2015) ("FAR Rules")**

The FAR Rules 2015 are a set of rules that govern the acquisition process by which the federal government acquires goods and services. Providers of goods and services subject to these rules have affirmative obligations to prevent human trafficking.

### **The Alien Tort Claims Act ("ATCA")**

The ATCA grants jurisdiction to the US Federal Courts over any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. This may extend to breaches of human rights and trafficking conventions in certain instances, although the operation of the ATCA in relation to extraterritorial activity limits its applicability.

### **The Foreign Corrupt Practices Act ("FCPA")**

The FCPA imposes liability for payments made by corporates to officials of foreign governments or foreign state-owned companies to gain an improper business advantage. It has effect regardless of whether there was any knowledge of the wrongdoing. While not yet applied in the trafficking context, the concept of "improper business advantage" has been interpreted broadly and could potentially include indirect financial benefits such as labour and services provided by trafficked individuals.

## *CTSCA*

While other states have enacted laws targeting trafficking activity, the most significant piece of state legislation is the CTSCA in California. The CTSCA applies to companies:

- doing business in the state of California;
- with more than \$100 million USD in annual gross receipts; and
- identified as a manufacturer or retail seller on its California State tax return.

The CTSCA is of key significance given that California is the world's eighth largest economy. According to a Guardian newspaper article from January 2016, more than 2,400 companies are subject to the law (according to the attorney general's office).<sup>13</sup>

Much like the MSA in the UK, the CTSCA requires the disclosure of business' efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale.

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<sup>13</sup> Guardian, "California law aimed at slowing human trafficking and forced labor should do more, report says" (2016), available at: <https://www.theguardian.com/sustainable-business/2016/jan/22/california-anti-slavery-law-development-international-sun-maid-asia-human-trafficking>.

## 5.2 Duties in Relation to Human Trafficking and Forced Labour

### TVPA

The TVPA prohibits obtaining labour or services by means of (1) force, threats of force, physical restraint or threats of physical restraint, (2) serious harm or threats of serious harm, (3) a scheme, plan or pattern intended to cause the person to believe that he or another (such as a victim's family members) would suffer serious harm (physical or non-physical) or physical restraint if he did not perform such services, or (4) the abuse or threatened abuse of law or legal process. A defendant can be convicted of forced labour under the statute if the government proves that the defendant knowingly used one or more of the foregoing means to provide or obtain the labour or services of another person.

The TVPA does not contain an obligation to conduct detailed due diligence on supply chains, but turning a blind eye to evidence of trafficking could give rise to liability. While the TVPA has not been applied in this way to date, it seems that a corporation could be found liable under the statute without directly contributing to the trafficking itself.

### CTSCA

Companies that fall within the scope of the CTSCA must make the following five categories of disclosures on their websites:

- **Verification:** The companies must confirm whether they engage in verification activities to identify and address risks of human trafficking in their product supply chains and whether the verification is conducted by a third party;
- **Audit:** The companies must state whether they audit their suppliers to determine compliance with company standards for human trafficking and whether the audits are independent and unannounced;
- **Certification:** The companies must state whether their suppliers are required to certify that materials incorporated into a product comply with human trafficking laws in the country or countries in which they do business;
- **Internal Accountability:** The companies must disclose whether they have internal procedures to determine whether employees and contractors comply with company standards for human trafficking and describe those procedures; and
- **Training:** The companies must confirm whether they provide training on mitigating human trafficking for employees and management responsible for supply chains and provide a general description of the relevant training.

The required disclosures must be posted on the companies' websites with a conspicuous link on the companies' homepages that easily directs visitors to the information. If a company does not have a website, it must provide a written disclosure within 30 days of receiving a written consumer request.

The Act does not direct companies to implement any "new measures to ensure that their product supply chains are free from human trafficking and slavery", but is only intended to require

disclose of information in order to help consumers make better choices. While the only remedy under the Act for a violation of the disclosure requirements is an action by the Attorney General of California for injunctive relief, the Act states that it shall not limit the remedies available for a violation of any other state or federal law.

## *FAR Rules*

The 2015 amendments to the Federal Acquisition Regulation far exceed the original FAR requirements and strengthen the protections against human trafficking in relation to US Government contracts.

In addition to the existing prohibitions against severe forms of human trafficking, procurement of commercial sex acts and the use of forced labour in the performance of government contracts, the new FAR Rules prohibit federal contractors, subcontractors and their employees and agents from engaging in the following activities:

- Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity or immigration documents;
- Using misleading or fraudulent recruitment practices during the recruitment of employees or offering of employment;
- Using recruiters that do not comply with local labour laws of the country in which the recruiting takes place;
- Charging employees recruitment fees;
- Providing or arranging housing that fails to meet the host country housing and safety standards; and
- Failing to provide an employment contract or other required work document in writing in a language that the employee understands five days prior to the employee relocating if a contract is required by law or contract.

The 2015 amendments also require federal contractors to implement a human trafficking compliance plan for specific types of contracts that involve goods and services that are unique or tailored specifically for the federal government (not commercially off-the-shelf) where all or a portion of the contract is provided outside the United States exceeding \$500,000 USD. Each compliance plan for these types of contracts will be unique and should be appropriate to the "size and complexity of the contract" and the "nature and the scope of the activities to be performed." For these specific contracts, federal contractors must certify on an annual basis that they have such compliance plan in place and (i) have implemented procedures to prevent any prohibited activities from occurring and conducted due diligence to detect any subcontractor or agent engaging in the prohibited activities, and (ii) can certify that, to the best of the contractor's knowledge, no subcontractor or agent has engaged in the prohibited activities or, if abuses have been found, the appropriate remedial actions have been taken.

## *RICO*

The direct involvement prohibitions contained in RICO are summarised in paragraph 5.1 above.

It is important to note that these four actions are potentially wide reaching. Even persons who did not commit any predicate acts or agree to commit any predicate acts could face civil liability under RICO. Under RICO's specific conspiracy provision, a conspiracy charge does not require proof of an overt act "to affect the object of the conspiracy," but only that the defendant agreed to the overall objective of the conspiracy. Further, the existence of a conspiracy may be inferred from the conduct of the participants; direct evidence is not needed.

## 5.3 Extra-territoriality

### *TVPA*

It has been held that the US Courts have jurisdiction to enforce the TVPA against a corporation that has its headquarters in or does business in the United States even where it is not a US company.

Furthermore, it has been held that "the thrust of the TVPA would be severely undermined by a holding that U.S defendants who gained commercial advantage in this country through engaging in illegal human trafficking were free from liability, so long as the trafficking acts themselves took place outside of American borders".<sup>14</sup>

### *CTSCA*

The CTSCA is applicable only to companies doing business in California with more than \$100 million USD in annual worldwide sales. However, in order to qualify as "doing business" in California a company only needs to have sales in California of \$500,000 USD or a Californian payroll of more than \$50,000 USD. The CTSCA also requires disclosure of all supply chains, both in the US and abroad, meaning companies need to report on any business relationships with companies that are not resident in the US or transactions which do not take place in the US.

### *FAR Rules*

The FAR Rules 2015 apply extra-territorially to suppliers to the US government.

### *RICO*

The extra-territorial effect of RICO is subject to judicial debate. Although a majority of cases have held that RICO does not apply to conduct that occurs outside of the United States, one court has held that it applies extraterritorially to the extent that the applicable predicate statute applies extraterritorially.<sup>15</sup> The text of the TVPA explicitly states that it provides extraterritorial jurisdiction over trafficking in persons offences (see TVPA at § 103). Additionally, if the alleged human trafficking scheme has other connections to the United States, such as US actors, victims, co-conspirators, or even the use of US bank accounts or e-mail accounts, it may be deemed "domestic" and thus subject to US laws.

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<sup>14</sup> Aguilera, 72 F. Supp. 3d at 977-79 (citing HR Conf. Rep. 106-939, at 1 (2000)); Adhikari, 697 F. Supp. 2d at 683.

<sup>15</sup> European Cm. v. RJR Nabisco, Inc., 783 F.3d 123 (2d Cir. 2015), cert. granted sub nom., 136 S. CT. 28 (2015).

## 5.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage in Human Trafficking or Forced Labour

Many of the duties that are created under the legislation and regulations described above implicitly or explicitly require engagement with supply chains and business relationships. This means that companies engaged in businesses where trafficking is known to occur must become more vigilant in investigating their suppliers, rooting out the problem at its source, and establishing solid prevention policies and practices.

## 5.5 Scope of Liability for Corporates

### *TVPA*

The TVPA provides for both criminal and civil liability for the offence of knowingly benefiting from any enterprise that is involved with human trafficking.

Criminal liability for a human trafficking offence is punishable by up to 20 years' imprisonment or life imprisonment when there are aggravating circumstances. There are also substantial fines that can be imposed.

Civil liability will result in mandatory restitution for victims (i.e. putting them in a position they would have been in had they not been subject to forced labour) and penal damages.

### *CTSCA*

Pursuant to CTSCA, large retail sellers and manufacturers are required to make website disclosures regarding their "efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale". There is no offence committed if the company were simply to state that they have not taken any steps to verify their supply chains.

The remedy available under the CTSCA for a violation of the disclosure requirements is an action by the Attorney General of California for injunctive relief. The Act does state, though, that it does not limit the remedies available for the violation of any other state or federal law.

Recent class actions have used the Act to argue that companies have committed consumer fraud by failing to disclose slavery in their supply chains, or for making allegedly false statements about their efforts to address such exploitation.

### *FAR Rules*

Failure to comply with the new FAR Rules may render a contractor subject to, among other remedies, (i) suspension of contractor payments, (ii) loss of payment for the period in which the government determines the contractor did not comply, (iii) termination of the contract, (iv) required subcontractor termination or removal of a contractor employee, and (v) suspension or debarment from doing business with the federal government.

## *RICO*

As mentioned above, RICO contains both criminal and civil liability.

The civil cause of action gives rise to a compulsory award of treble damages, costs and attorney's fees to any person who can show that a defendant's racketeering activity proximately caused injury to his business or property. A claimant must satisfy four elements to succeed in a civil RICO suit: (i) conduct (ii) of an enterprise (iii) through a pattern (iv) of racketeering activity. The defendant must be legally distinct from the RICO "enterprise" used to conduct the pattern of racketeering activity. The enterprise can be an association-in-fact enterprise, which is merely a group of persons associated together for the common purpose of engaging in a course of conduct. The defendant need not be convicted of any crime before a civil claimant can sue under RICO.

## 6. Qatar

As a member of the UN Human Rights Council, Qatar is expected to "uphold the highest standards in the promotion and protection of human rights".<sup>16</sup> However, Qatar has not yet ratified key international human rights treaties or certain ILO conventions.<sup>17</sup>

The escalation in construction and resulting surge in migrant workers in the run up to the 2022 FIFA World Cup has shone a spotlight onto issues of forced labour and trafficking in Qatar. There has been media coverage alleging a lack of adequate protection for migrant workers in Qatar and enforcement of existing protections. Qatar has a range of laws which seek to protect workers, but these can be circumvented for migrant workers and lack adequate complaint and enforcement procedures.

### 6.1 Anti-Human Trafficking or Forced Labour Laws that Apply to Corporates

There are three pieces of legislation that regulate forced labour and human trafficking in Qatar: Law No. 15 of 2011 – Combatting Human Trafficking (the "Trafficking Law")<sup>18</sup>; Law No. 4 of 2009 – Regarding Regulation of Expatriates' Entry, Departure, Residence and Sponsorship (the "Kafala Law");<sup>19</sup> and the Labour Law (Law No. 14) of 2004 ("Labour Law").<sup>20</sup>

This legislation criminalises direct involvement with human trafficking and forced labour, but does not impose obligations relating to indirect involvement through business relationships and supply chains.

In summary, the Trafficking Law criminalises human trafficking, importing the definition of trafficking from the Palermo Protocol.<sup>21</sup> Importantly, the legislation also establishes the liability of legal persons for crimes of human trafficking committed by their employees or representatives in their name and for their interest.<sup>22</sup> Management may be personally liable if any of the offences are committed by an employee of the legal person and the management had knowledge of the crime or if the crime took place as a result of a breach of employment duties.<sup>23</sup>

The Kafala Law governs the relationship between employers and migrant workers in Qatar. It has come under intense scrutiny in the wake of Qatar's successful 2022 World Cup bid, as it is

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**DISCLAIMER: The content in relation to Qatar has been prepared based on publically available information and is not an opinion expressed by Hogan Lovells or any of its partners, employees or agents.**

<sup>16</sup> United Nations Office of the High Commissioner for Human Rights, "Suggested elements for voluntary pledges and commitments by candidates for election to the Human Rights Council" (date unknown), available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/Pledges.pdf>

<sup>17</sup> Human Rights Watch, "Building a Better World Cup" (2012). Available at: [https://www.hrw.org/sites/default/files/reports/qatar0612webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/qatar0612webwcover_0.pdf)

<sup>18</sup> For details of the Trafficking Law see, UNODC, "Qatari Law NO. (15) OF YEAR 2011 On Combating Trafficking in Human Beings" (2011), available at: [https://www.unodc.org/res/cld/document/qat/2011/qatari\\_law\\_no\\_15\\_of\\_year\\_2011\\_on\\_combating\\_trafficking\\_in\\_human\\_beings\\_html/Qatari\\_Law\\_NO\\_15\\_OF\\_YEAR\\_2011\\_On\\_Combating\\_Trafficking\\_in\\_Human\\_Beings\\_EN.pdf](https://www.unodc.org/res/cld/document/qat/2011/qatari_law_no_15_of_year_2011_on_combating_trafficking_in_human_beings_html/Qatari_Law_NO_15_OF_YEAR_2011_On_Combating_Trafficking_in_Human_Beings_EN.pdf).

<sup>19</sup> For details of the Kafala Law see: <http://www.almeezan.qa/LawView.aspx?opt&LawID=2611&language=en>.

<sup>20</sup> For details of the Labour Law see: <http://portal.www.gov.qa/wps/wcm/connect/5f30f680423f8a149631df3cb857e4ca/Qatar+Labor+Law.pdf?MOD=AJPERES>.

<sup>21</sup> Article 2, Trafficking Law.

<sup>22</sup> Article 22, Trafficking Law.

<sup>23</sup> Ibid.

seen as severely restricting the freedom of migrant workers.<sup>24</sup> A reform to the Kafala Law was signed in October 2015: Law No. 21 of 2015 on the Regulation of the Entry and Exit of Expatriates. This is expected to be implemented in December 2016.<sup>25</sup>

The Labour Law includes a range of protections for workers in Qatar (including an effective prohibition on forced labour). However, despite these, and many other protections, reports by groups such as Amnesty International and Human Rights Watch have highlighted abuse of these provisions.<sup>26</sup>

## 6.2 Duties in Relation to Human Trafficking and Forced Labour

In addition to provisions of the Trafficking Law which criminalise human trafficking, as Accountability Hub notes, “several provisions of the Qatari Criminal Code criminalise forced labour or practices directly connected with the exaction of forced labour – including Art. 322, on forcing a person to work with or without a salary, and Art. 321 on slavery.”<sup>27</sup> As noted above, Art. 22 of the Trafficking Law establishes the liability of corporations and legal persons for crimes of human trafficking committed by their employees or representatives in their name and for their interest. However, Qatar has reportedly never prosecuted any exploitative employers or recruitment agencies under the 2011 anti-trafficking law.<sup>28</sup>

The Labour Law provides a range of employment related protection for workers. Important protections include:

- prohibition of recruitment fees (fees paid by migrant workers for costs involved in their recruitment)<sup>29</sup>;
- requirement for a written employment contract approved by the Labour Department at the Ministry of Labour<sup>30</sup>; and
- prohibition on employer asking a worker to perform work other than that stipulated in the employment contract (unless necessity requires).<sup>31</sup>

Despite the express prohibition on recruitment fees, the trans-national processes of recruiting migrant workers leave workers vulnerable to being charged extortionate fees in their home countries, which is widespread in practice. To pay these fees migrant workers will often borrow money from a middleman, agent or employer at heightened interest rates and work to repay the debt. Where that is the case, such financial exploitation can amount to debt bondage, an ILO Indicator of Forced Labour.<sup>32</sup>

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<sup>24</sup> Human Rights Watch, “Building a Better World Cup” (2012). Available at: [https://www.hrw.org/sites/default/files/reports/qatar0612webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/qatar0612webwcover_0.pdf).

<sup>25</sup> US Government Trafficking in Persons Report, June 2016

<sup>26</sup> Human Rights Watch, “Building a Better World Cup” (2012). Available at: [https://www.hrw.org/sites/default/files/reports/qatar0612webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/qatar0612webwcover_0.pdf) and Amnesty International (2013), ‘The Dark Side of Migration: Spotlight on Qatar’s construction sector ahead of the World Cup’, available at <https://www.amnesty.org/en/documents/MDE22/010/2013/en/>.

<sup>27</sup> Accountability Hub, “Qatar” (last accessed Oct. 2016), available at: <http://accountabilityhub.org/country/qatar/>.

<sup>28</sup> Ibid.

<sup>29</sup> Article 33, Labour Law.

<sup>30</sup> Article 38, Labour Law.

<sup>31</sup> Article 45, Labour Law.

<sup>32</sup> ILO, “Indicators of Forced Labour” (2012), available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/--declaration/documents/publication/wcms\\_203832.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_203832.pdf).

The Kafala Law aims to balance the needs of migrant workers with those of their employers. However, it has come under criticism from some human rights organisations. The Kafala Law governs the employment of migrant workers in Qatar under a sponsorship system. It provides that each migrant shall have a sponsor (usually the migrant's employer) to be granted an entry visa to Qatar, and that the migrant's visa status and work permit will be tied to the sponsor. The Minister of Interior may determine whether migrants working under the Kafala Law may change employers, and it is understood that migrants may not change employers without a "no objection" certificate (an "NOC") from their employer. Migrants who leave their employers without an NOC can be charged with absconding, which may result in those migrants losing their residence permits.<sup>33</sup> Furthermore, under the Kafala Law, migrants may only exit the country with an exit permit.

There are some protections in the law: for example, sponsors are not allowed to confiscate migrants' passports, are required to fund migrant workers' repatriation costs, and have an obligation to pay an end of service benefit.

However, Accountability Hub notes, "according to recent studies conducted by Qatar University's Social and Economic Survey Research Institute [...] despite laws against passport confiscation, 86 to 90 per cent of expatriate workers' passports are in their employers' possession. While most employers are in violation of the Sponsorship Law, only 27 sponsors were fined in 2013-2014 for withholding passports and none in 2015".<sup>34</sup>

## 6.3 Extra-territoriality

None of the legislation mentioned has extra-territorial application. The Kafala Law applies to all employers in Qatar who wish to employ foreign labour, but covers only Qatari employers who employ foreign workers.<sup>35</sup>

The Labour Law regulates:

- employers based in Qatar employing workers in Qatar; and
- Qatari recruitment agents.

Importantly, there are a number of excluded groups of workers for whom the legislation (and its protections) do not apply. These include domestic workers and casual workers.<sup>36</sup>

It is only applicable to direct employers – i.e. a company further up the supply chain cannot be liable for the actions of its suppliers. It also does not apply to overseas 'middle men' recruitment agencies.

The Trafficking Law applies both to individuals and corporations.

<sup>33</sup> DLA Piper, "Migrant Labour in the Construction Sector in the State of Qatar" (April 2014), available at: <http://www.engineersagainstpoverity.org/documentdownload.axd?documentresourceid=58>.

<sup>34</sup> Accountability Hub, "Qatar" (last accessed Oct. 2016), available at: <http://accountabilityhub.org/country/qatar/>.

<sup>35</sup> Article 19, Kafala Law, which states that a sponsor, whether a natural or legal person, must be a Qatari national or an Expatriate resident under the law or have its main office located within the State of Qatar or operate a branch therein.

<sup>36</sup> Article 3, Labour Law.

## 6.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage in Human Trafficking or Forced Labour

None of the duties described above extend to business relationships. Indeed, one of the major criticisms of the Labour Law and the Kafala Law is that although Qatari corporates may prima facie comply with their provisions, they may employ migrant workers via overseas recruitment agents whose abusive practices would be in breach of the relevant legislation, were they resident agencies. There is nothing in the legislation which can be used to punish companies for using these agents. There are no reporting requirements under Qatari law with respect to human trafficking and forced labour. Therefore, where workers are recruited from countries of origin that poorly regulate or enforce legislation on recruitment agents, there is a widespread risk that forced labour and trafficking violations have occurred in the supply-chain delivering labour into Qatar.

## 6.5 Scope of Liability for Corporates

A person who has committed a human trafficking offence under Article 2 of the Trafficking Law may be punished with imprisonment of up to 7 years and a fine of up to QAR 250,000 (\$69,000 USD). In aggravating circumstances (including if the victim was female or a child) an offence can result in a maximum fine of QAR 300,000 (\$82,000 USD) and up to 15 years' imprisonment.<sup>37</sup>

As noted above, where corporate liability is established, management may be personally liable if any of the offences are committed by an employee of the legal person and the management had knowledge of the crime or if the crime took place as a result of a breach of employment duties can be punished. Managers who are personally liable face penalties of imprisonment for a period of up to five years and a fine of up to QAR 200,000 (\$55,000 USD). The court may also order the suspension of the activity of the body corporate for a period not exceeding two years or to cancel or revoke its license, as the case may be.<sup>38</sup>

The Kafala Law only contains provision for direct liability and fines which can be levied for failure to comply. As noted, concerns about the enforcement of the legislation in practice have been reported.

With regard to the Labour Law, there are currently limited redress mechanisms in place. It is hard in practice for a worker to complain about breaches of the legislation. This is both because of a lack of necessary infrastructure and the position that many workers are in, which is exacerbated when workers are not permitted to retain their own passports and documents. There is criminal liability attached to breaches of certain sections of the legislation, with possible imprisonment or fines depending on the severity of the breach.

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<sup>37</sup> Articles 14 and 15, Trafficking Law.

<sup>38</sup> Article 22, Trafficking Law.

## 7. United Arab Emirates<sup>39</sup>

The US Department of State's TIP Report 2016 notes that the United Arab Emirates (the "UAE") does not fully meet the minimum standards for the elimination of trafficking, but that it is making significant efforts to do so. The UAE government's anti-trafficking efforts continue to focus predominantly on sex trafficking. The liability of businesses for their supply chains is not directly addressed in legislation, albeit any corporate entity must notify authorities of cases of human trafficking of which it is aware.

### 7.1 Anti-Human Trafficking and Forced Labour Laws that Apply to Corporates

The UAE prohibits all forms of trafficking under the Federal Law No.51/2006, as amended, on Combatting Human Trafficking Crimes (the "Law").

The definition of human trafficking extends to the employment or recruitment of persons by means of threat, force, abduction, fraud, deception or exploitation. It also encompasses giving or receiving payments or benefits in connection with a person having control over another as a form of exploitation.

The penalties include one year to life imprisonment, and fines of 100,000 Dirhams to one million Dirhams (\$27,000 USD to \$270,000 USD).

Under article 3(1) of the Law, a corporate is obligated to notify the competent authorities of any commission of human trafficking of which it is "aware".

Additionally, article 5 covers the acquisition, concealment and disposal of proceeds of human trafficking crimes and knowingly helping one or more persons involved in the commission of human trafficking crimes to evade the administration of justice or assisting in concealing the marks of human trafficking crimes.

The penalties for these, as set out in article 7, are fines, and the potential forced closure or dissolution of the corporate.

### 7.2 Duties in Relation to Human Trafficking and Forced Labour

#### *Human Trafficking*

Under the Law, corporates must not attract, employ, recruit, transport, transfer, harbour, host or deliver others by means of threat, force, abduction, fraud, deception for the purpose of exploitation.

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Similarly they must not give or receive payments or benefits in connection with a person having control over another as a form of exploitation.

This extends to the exploitation of children, sexual exploitation and prostitution, forced labour or services, the removal of organs, slavery, begging and servitude.

The Law also contains a positive obligation to notify the competent authorities of any commission of human trafficking of which a person is aware. This establishes liability where a company is aware of human trafficking in its supply chain but does not report the situation. The Law also prohibits:

- forcing or inducing another person to give false testimony or conceal human trafficking;
- the acquisition, concealment and disposal of proceeds of human trafficking crimes and knowingly helping one or more persons involved in the commission of human trafficking crimes to evade the administration of justice or assisting in concealing the marks of human trafficking crimes; and
- The publication of the names or photos of victims or witnesses involved in human trafficking crimes.

## *Labour Law*

The Ministry of Labour, which has now been renamed as the Ministry of Human Resources and Emiratisation, has introduced various initiatives to combat human trafficking with respect to labour issues.

### **The Wages Protection System ("WPS")**

- All establishments registered with the Ministry of Human Resources and Emiratisation must adhere to the WPS which was set up in 2009.
- The WPS was set up to address the issue of non-payment of wages, which is linked to debt bondage of workers.
- This system ensures workers are paid through a monitored electronic platform.

### **Inspections**

- Ministry of Human Resources and Emiratisation officials carry out regular inspections to monitor working hours, vacation, health and safety and overtime. There were 263,944 such inspections in 2014 and 78,847 in 2015.
- Certain companies in the UAE are also subject to inspection to ensure their compliance with the ban on midday work from 12.30pm to 3pm for three months each summer, the precise dates of which vary each year as announced by the Ministry of Human Resources and Emiratisation. Breach of this ban can result in a fine of 5,000 Dirhams (\$1,400 USD) for each worker found working during banned hours with a maximum of 50,000 Dirhams (\$14,000 USD) if a large number of workers are made to work in breach of the ban.

### **Labour Care Units**

- Units have been set up in labour-intensive areas to provide a forum for workers to raise complaints and seek guidance.
- The units also periodically visit owners of companies, to monitor potential human trafficking.

## Labour Disputes

- The Ministry of Human Resources and Emiratization has departments which deal with complaints raised by workers in the UAE and regulate labour conflicts.
- In cases of employers not paying wages, the employer can face fines of 10,000 Dirhams (\$2,700 USD) per worker involved, to a maximum of 5 million Dirhams (\$1,360,000 USD). In case of employers delaying or failing to pay wages, Article 181 of the Labour Code is applied, which includes imprisonment for a maximum of six months and/or a fine. Where the employer is a company, then depending on the length of the delay in paying wages, such company can be given notice that it will not be issued with further permits, or given notice that its operations are to be suspended, or the judicial bodies could be informed in order to take precautionary and punitive measures.
- In 2014, the labour relations office settled 6,798 complaints related to wages, and referred 479 wage disputes for prosecution. In 2015, the labour relations office settled 1,514 wage disputes and 48,850 cases of wage arrears were identified through automated systems and resolved through regulatory actions. The government referred two of these labour violations for potential forced labour crimes for criminal prosecution.

## *Other Examples*

The National Committee to Combat Human Trafficking (the "NCCHT") set up a non-governmental fund in 2013 for the victims of human trafficking. Various private companies have contributed to this fund, which has provided support in particular with housing, children's education and medical expenses.

Minimum wages for private security guards across the UAE were introduced in January 2009.

In June 2014, to improve transparency and provide legal protection to domestic workers, the government introduced a new standard contract for domestic employees and employers, which sets out various employee and employer rights and responsibilities. Pursuant to a Decree issued in 2015, employers are required to give potential employees a standard contract at the time an offer is made which is to be in a language that the employee understands prior to the prospective employee applying for a visa to enter the UAE. The contract must be signed by the employee a second time within one week of entering the UAE, making it legally enforceable in the UAE and eliminating the employer's ability to change the promised terms of the original job offer.

## 7.3 Extra-territoriality

Under Article 2 of the Law, a "transnational" crime carries a sentence of life imprisonment. A transnational crime is defined as one committed in more than one country, or one that is committed in one country but has effects in another country, is planned in another country, or is organised by a criminal group that has activities in several countries.

The UAE government and NCCHT are also involved in initiatives to promote international cooperation to combat human trafficking.

The Ministry of Human Resources and Emiratization has signed agreements with 18 countries and entered into protocols for three countries as a way of monitoring the flow of workers. This cooperation allows for a uniform approach to tackling human trafficking across different countries.

For example, there is an arrangement between the UAE Ministry of Labour (now renamed as the Ministry of Human Resources and Emiratisation) and India's Ministry of Overseas Indian Affairs (this latter ministry has now merged with the Ministry of External Affairs) which has created a web-based platform to check for discrepancies between workers' contracts, and to maintain useful data on terms of employment. There are numerous other examples of bilateral agreements with supplier countries – the ethos being that traffickers and victims often come from the same country, so the problem cannot always be solved solely within the UAE.

## 7.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage in Human Trafficking or Forced Labour

There is a positive obligation to notify the competent authority when a person is aware of any breach of the human trafficking law under article 3(1) of the Law.

A corporate would also be liable if they acquire, conceal or dispose of the proceeds of a human trafficking crime (Article 5 of the Law), or if they knowingly help another to evade the administration of justice.

## 7.5 Scope of Liability for Corporates

Article 7 of the Law provides that if the representatives, directors or agents of a corporate have committed a human trafficking crime on behalf of the corporate, the corporate is liable for a fine of between 100,000 Dirhams (\$27,000 USD) and 1,000,000 Dirhams (\$270,000 USD). The court may also order the dissolution, permanent or temporary closure, or closure of any branch of the corporate.

There is no specific provision in the Law for liability for the acts of intermediaries. Article 5 of the Law would apply, however, if a corporate acquires, conceals or disposes of the proceeds of a crime committed by one of its intermediaries. There is also the positive obligation to notify the competent authority of any breach of human trafficking law.

## 8. Japan

According to the US Department of State's 2016 Trafficking in Persons Report, Japan is a destination, source, and transit country for victims of forced labour and sex trafficking. One tactic reportedly employed by traffickers is fraudulent marriages between foreign women and Japanese men to bring the women to Japan and force them into prostitution. Another is to lure non-Japanese mothers of children to Japanese fathers to Japan on short-term visas on the premise their paternity will be acknowledged and they can live in Japan with their child. Victims are subjected to limited movement, debt bondage, and threats of violence or deportation. Japanese nationals also fall prey to sex trafficking, particularly young girls who have run away from home and children of mixed Japanese and non-Japanese parentage.

On the issue of forced labour in Japan, the ILO has in recent years observed serious violations of labour law in the government's Technical Intern Training Programme. The intent of the programme is for foreign workers to gain skills working in Japan over a 1 - to 3-year period, and then to use those skills on returning home to contribute to their country's economic and industrial development. In reality, however, many cases are reported where interns have signed contracts that subject them to excessive fees, deposits, or punishments, are placed in jobs that do not allow them to develop skills, or are otherwise subjected to poor living and working conditions. In 2015, the Japan Federation of Bar Associations released a statement criticizing the programme for being used by some as a way of dealing with Japan's shortage of unskilled labourers and for facilitating human rights abuses.

### 8.1 Anti-Human-Trafficking and Forced Labour Laws that Apply to Corporates

Japan has ratified the Forced Labour Convention of 1930, and has acceded to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. However, it is only a signatory to and has not yet ratified either the Palermo Convention or the Palermo Protocol.

Japan does not have specific laws dealing exclusively with human trafficking or forced labour. Instead, these issues are provided for in various provisions of different laws, such as the Penal Code, the Labour Standards Act, and the Employment Security Act, as well as the Immigration Control and Refugee Recognition Act, the Anti-Prostitution Act, and other laws and regulations.

#### *The Penal Code*

The Penal Code (Act No. 45 of 1907, as amended) applies to any person who commits a crime in Japan, or on a Japanese ship or aircraft outside of Japan. Part 2 Chapter 33 of the Code makes it a crime (punishable as indicated) to:

- kidnap a minor, whether by force or enticement (three months to seven years imprisonment);
- kidnap a person, whether by force or enticement, for the purpose of profit, indecency, or marriage or to harm the life or body of that person (one to 10 years imprisonment);
- kidnap a person, whether by force or enticement, for the purpose of transporting that person from one country to another country (minimum two years imprisonment);

- buy or sell a person (imprisonment of three months to five years for buying, and one to 10 years for selling);
- transport from one country to another country a person who has been kidnapped, bought, or sold (minimum two years' imprisonment);
- deliver, receive, transport, harbour, or conceal a person who has been kidnapped, bought, or sold where that delivery, etc., is for the purpose of aiding someone who has committed any of the crimes described above (three months to five years imprisonment); or
- deliver, receive, transport, or harbour a person who has been kidnapped, bought, or sold where that delivery, etc., is for the purpose of profit or indecency or to harm the life or body of that person (six months to seven years imprisonment).

Attempting any of the above acts is also punishable as a crime under the Code.

### *The Labour Standards Act*

The Labour Standards Act (Act No. 49 of 1947, as amended) governs employment relations in Japan. Article 5 is the prohibition of forced labour clause. It prohibits employers from forcing workers to work against their will by means of violence, intimidation, confinement, or any other unjust restraint on mental or physical freedom. "Employer" is defined in the Act to mean incorporated and unincorporated business entities as well as managers of the business and also persons who act on behalf of the business entity in connection with matters relating to the workers of the business. A "worker" is a person who is employed by a business or office and receives a wage from it, irrespective of the type of occupation.

### *The Employment Security Act*

The Employment Security Act (Act No 141 of 1947, as amended) punishes any person who carries out or engages in employment placement or the recruiting or supply of workers:

- by means of violence, intimidation, confinement, or any other unjust restraint on mental or physical freedom; or
- for the purpose of making a person do work that is harmful to public health or morals.

The punishment for these crimes is imprisonment for one to 10 years or a fine of up to 3,000,000 yen, (\$30,000 USD) or both.

### *Other Relevant Legislation*

#### **The Immigration Control and Refugee Recognition Act**

The Immigration Control and Refugee Recognition Act (Cabinet Order No. 319 of 1951, as amended) (the "Immigration Control Act"), punishes any person who, for example:

- causes a foreign national to engage in illegal work in connection with business activities; or
- places a foreign national under their control for the purpose of causing that person to engage in illegal work.

The punishment for these crimes is imprisonment for up to three years or a fine of up to 3,000,000 yen (\$30,000 USD), or both, or both.

The Act also denies permission to enter Japan for, and permits the deportation from Japan of, any person who has:

- engaged in, intermediated, solicited, or provided a place for prostitution or engaged in any business directly related to prostitution (unless they did so under the control of another as a result of trafficking in persons);
- committed trafficking in persons or incited or aided another to commit it.

The Act defines "trafficking in persons" as including the kidnapping (by force or enticement), buying, or selling of a person, or the delivery, receipt, transport, or harbouring of a person who has been kidnapped, bought, or sold, for profit or indecent purposes (among other purposes).

If a violation of the Act is committed by a representative, agent, worker, or other such employee of a company in connection with the operation of the company, the company may be fined as well.

### The Anti-Prostitution Act

The Anti-Prostitution Act (Act No. 118 of 1956, as amended) prohibits engaging in prostitution, as the prostitute or the customer, and punishes anyone who, for example:

- solicits another, or holds themselves out so as to be solicited by another, for prostitution purposes in a public place (imprisonment for up to six months or a fine of up to 10,000 yen (\$100 USD));
- intermediates prostitution or solicits prostitution partners for the purpose of intermediating prostitution (imprisonment for up to two years or a fine of up to 50,000 yen (\$500 USD));
- forces another person to engage in prostitution through intimidation or violence (e.g., imprisonment for up to three years, or imprisonment for up to three years and a fine of up to 100,000 yen (\$1000 USD));
- knowingly provides a place where prostitution is engaged in (imprisonment for up to three years or a fine of up to 100,000 yen (\$1000 USD));
- as a business provides a place where prostitution is engaged in ("Article 11 business") (imprisonment for up to seven years and a fine of up to 300,000 yen (\$3000 USD));
- as a business causes another person (the victim) to live in a place owned, managed, or stipulated by the first person (the violator) and causes that other person (the victim) to engage in prostitution ("Article 12 business") (imprisonment for up to 10 years and a fine of up to 300,000 yen (\$3000 USD)); or
- knowingly provides funds, land, or a building required for an Article 11 business (imprisonment for up to five years and a fine of up to 200,000 yen (\$2000 USD)) or an Article 12 business (imprisonment for up to seven years and a fine of up to 300,000 yen (\$3000 USD)).

Save for the first three crimes above, if the crime is committed by a representative, agent, worker, or other such employee of a company in connection with the operation of the company, the company may be fined as well.

## 8.2 Duties in Relation to Human Trafficking and Forced Labour

### *The Penal Code*

The Code does not expressly provide for any obligations to detect, prevent, or report on any of the human trafficking crimes under the Code referred to in 8.1 above that occur within their company or supply chains.

### *The Labour Standards Act*

Some of the particularly relevant obligations and requirements are as follows:

- Employers are prohibited from discriminating, in terms of wages and other such working conditions, based on nationality, creed, and social status.
- Working conditions provided for in employment agreements must comply with the Act. Any that do not are void, and in their place the standards provided for in the Act govern.
- Employment agreements cannot provide for penalties or pre-determined damages for non-performance.
- Employers are prohibited from offsetting wages against advances of money or advances of other credits made as a condition for work.
- An employer cannot, as an incident to the employment agreement, make a worker agree to have the employer hold on to payments as savings or make an agreement with the worker for the employer to manage any such savings of the worker.
- Employers are prohibited from exploiting apprentices, interns, and other such workers, whatever their title may be, by reason of the fact that they are seeking to acquire a skill and from causing workers seeking to acquire a skill to engage in work unrelated to acquiring a skill.

### *The Employment Security Act*

The government may, when it considers it necessary to do so, cause a company to submit a report on the situation relating to the hiring and separation of workers and their wages and other working conditions. It may also, to the extent necessary to enforce the Act:

- cause any company that carries out the employment placement business, labour recruitment business, or labour supply business to report on any necessary matters; and
- enter the place of business or other facilities of such a company, question relevant persons, and inspect the company's accounts, documents, and other such property.

## 8.3 Extra-territoriality

The Penal Code applies to Japanese nationals who commit overseas any of the crimes under the Code referred to in section 8.1 above as well as to non-Japanese nationals who commit any of those crimes overseas against a Japanese national.

Neither the Labour Standards Act nor the Employment Security Act applies extraterritorially.

## 8.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage in Human Trafficking or Forced Labour

There do not appear to be any legislative provisions directly addressing the responsibilities of corporations with respect to human trafficking or forced labour in their supply chains.

Addressing other, but in some respects interconnected, issues are ordinances enacted in every prefecture that aim to eliminate ties with and influence of "organized crime groups". These are defined as groups likely to encourage their members to collectively or regularly carry out violent unlawful acts. To take the Tokyo Metropolitan Ordinance for the Elimination of Organized Crime Groups as an example, it requires "business operators" (which includes companies) to make efforts:

- to confirm that the counter parties, agents, and intermediaries, etc., of business agreements are not related to an organized crime group, if the business operator suspects that the agreement might be facilitating activities, or contributing to the operation, of an organized crime group; and
- to provide in written agreements, or otherwise stipulate in writing, that the business operator will be entitled to cancel the agreement, without notice or time to cure, if it finds that a counter party, agent, or intermediary, etc., of the agreement is related to an organized crime group.

As a result, it is increasingly considered best practice to include in written contracts (such as those with suppliers) clauses that prohibit any involvement with 'anti-social forces' - a broad term generally defined to include organized crime groups, their members, and anyone who engages in violent or illegal demands, intimidation, or other such reprehensible behaviour.

## 8.5 Scope of Liability for Corporates

### *The Penal Code*

The Penal Code applies only to individuals so does not impose liability on corporations per se. For individuals, the circumstances or purpose of the crime can lead to harsher sentences. For example, whereas the act of buying a person is by itself punishable by imprisonment of three months to five years, buying a minor is punishable by up to 7 years' imprisonment, and buying a person for profit, indecency, or marriage or to harm the life or body of that person attracts a sentence of one to 10 years imprisonment.

### *The Labour Standards Act*

A violation of the Article 5 prohibition of forced labour is punishable by imprisonment of one to 10 years or a fine of 200,000 – 3,000,000 yen (\$2,000 USD to \$30,000 USD). Agreements and wage set-offs in violation of the obligations and requirements referred to in section 8.2 above are punishable by imprisonment of 6 months or less or a fine of up to 300,000 yen (\$3,000 USD).

If a violation of the Act is committed by an agent, worker, or other such employee of a company on behalf of the company, the company may be fined as well, unless the company had taken necessary measures to prevent the violation. The company will also be punishable as the violator if, for example, it knew that the violation was planned and did not take the necessary measures to stop it, or knew of the violation and did not take the necessary measures to correct it.

### *The Employment Security Act*

The crimes referred to in 8.1 above are punishable by one to 10 years imprisonment or a fine of 200,000 to 3,000,000 yen (\$2,000 USD to \$30,000 USD). If the crime is committed by a representative, agent, worker, or other such employee of a company in connection with the operation of the company, the company may be fined as well.

## 9. Brazil

Brazil ratified and adopted the Palermo Protocol in March 2004, but it does not fully comply with the minimum standards for the elimination of trafficking. It is making significant efforts to do so by engaging Brazilian authorities in more criminal investigations against potential labour trafficking.

### 9.1 Anti-Human Trafficking And Forced Labour Laws That Apply To Corporates

In Brazil, crimes related to human trafficking, such as sexual exploitation and forced labour, are covered by the Penal Code, the Child and Adolescent Statute ("ECA"), the Brazilian Consolidated Labour Laws ("CLT"), and various Federal Laws,<sup>40</sup> whose acts which amount to crimes are set out in further detail below.

According to Brazilian law, as adopted from the Palermo Protocol, "trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. This includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

#### *The Penal Code*

#### **Facilitating the Displacement of People for Prostitution or Other Forms of Sexual Exploitation**

It is an offence under the Penal Code to engage in the promotion or facilitation of displacement of people, both within Brazil or entering Brazil from another country, for the purpose of prostitution or other forms of sexual exploitation.<sup>41</sup> Violence, threat or fraud constitute aggravating elements of these offences, but are not necessary elements of the crime.

Violation of these articles is punishable by incarceration for periods ranging from two to eight years as well as a fine if the offence generated profit. By comparison, these sentences are commensurate with those prescribed for other heinous crimes, such as rape. However, these articles are inconsistent with international standards because victim displacement is a necessary element of the crime of sex trafficking under these articles. Furthermore, prosecutors sometimes elect to prosecute cases of sex trafficking not involving displacement under pimping

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<sup>40</sup> Relevant Federal Laws include: Law No. 9.975/2000, Law No. 9.434/1997, Law No. 6.815/1980, and Law No. 5.889/1973, and Federal Decree No. 73.626/1974,

<sup>41</sup> Articles 231 and 231A, Penal Code.

provisions instead of the sex trafficking laws and many domestic sex trafficking cases are investigated as other crimes, such as sexual exploitation of children.

In addition, there are the key provisions in Penal Code covering crimes related to human trafficking and forced labour, set out below.

### Slave Labour

Slave labour, or reducing an individual's condition to one analogous to slavery, is prohibited under Article 149 of the Penal Code.

### Human Trafficking

The Penal Code addresses three aspects of human trafficking in or out of Brazilian territory:

- Crimes against labour: recruiting workers by fraud, where the perpetrator induces workers to leave the country by means of false information and/or promises<sup>42</sup>;
- International human trafficking: the promotion or facilitation of entrance into, or exit from, Brazil with the purpose of prostitution (see above);<sup>43</sup> and
- Crime against family assistance: delivering children under the age of 18, with the purpose of financial gain, to an individual in whose hands the child will be in moral or material danger, or will be sent abroad.<sup>44</sup>

### ECA

It is a crime under Article 239 of the ECA to promote or facilitate the dispatching of a child or adolescent to a foreign location, without observance of legal formalities, such as the approval signed either by:

- both parents;
- a legal guardian; or
- for the purpose of financial gain.

### Federal Offences

There are several relevant federal offences related to forced labour and trafficking. Acts which amount to crimes under various federal laws in Brazil include:

- Crime of subjecting a child or adolescent to prostitution or sexual exploitation;<sup>45</sup>
- Crime of buying or selling human tissues, organs or body parts, as well as promoting, mediating, facilitating or receiving any advantages from such a prohibited transaction;<sup>46</sup>
- The clandestine bringing or concealing of an unauthorised foreigner in Brazil is a crime;<sup>47</sup>

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<sup>42</sup> Article 207, Penal Code.

<sup>43</sup> Article 231, Penal Code.

<sup>44</sup> Article 245, Penal Code.

<sup>45</sup> Federal Law No. 9.975/2000.

<sup>46</sup> Federal Law No. 9.434/1997.

<sup>47</sup> Federal Law No. 6.815/1980.

- Pursuant to article 18 of Federal Law No. 5.889/1973, the Ministry of Labour can impose a fine on employers for the employment of undocumented employees for each undocumented rural worker;
- Any violation of Article 29 of Federal Decree No. 73.626/1974, which regulates the labour relationship between employers and rural workers, or of the CLT by an employer will be punishable by a fine ranging from one tenth to up to ten times the regional minimum wage, depending on the gravity of the crime, and doubled in case of recurrent infractions. In the event of an improperly maintained worker registry (as defined by Article 42 of the CLT), or if an employer fails to maintain a worker registry at all, the employer will be subject to a fine equal to one month's regional minimum wage for each irregular or unregistered employee. Paragraph 2 establishes that, in the case of a first offence, the fine will not exceed four times the regional minimum wage. These fines can be imposed by the Ministry of Labour.

## Penalties

Any violation, by means of fraud or violence, of labour rights covered by the CLT will be punishable by incarceration for a period of one to two years (and a fine, in case of violence) with an addition of between a sixth and a third if the victim is under 18 years of age, elderly, pregnant, a member of an indigenous community or has mental or physical disabilities.

## 9.2 Duties in Relation to Human Trafficking and Forced Labour

It is arguable that Brazilian corporates have a duty to detect, prevent, mitigate and remedy incidences of forced labour or human trafficking based on the concept of social responsibility. In this scenario, Brazilian law governing certain limited liability companies<sup>48</sup> set forth that the controlling shareholders, directors and the management of such companies must address morals and values in managing an organization.<sup>49</sup> Accordingly, corporates governed by such law have the duty and responsibility to comply with stakeholders' best interests, albeit the extent and applicability of this social responsibility, as well as the penalties arising from its breach, are still not known.

Finally, in case of non-compliance with applicable laws, corporates might be subject to the sanctions described in this section.

## 9.3 Extra-territoriality

The Penal Code provides that all crimes committed in Brazil by Brazilians, or crimes that Brazil has made a commitment to prevent and eliminate by ratifying and adopting international treaties and conventions, are governed by the Brazilian laws.<sup>50</sup> Therefore all offences under such circumstances have an extra-territorial effect. For instance, penalties arising from human trafficking will apply to both trafficking within Brazil as well as trafficking into and outside the country.

<sup>48</sup> When provided by their Articles of Association that Law No. 6.404/76 is residually applicable.

<sup>49</sup> Articles 116, item (b), and 115, Federal Law No. 6.404/76.

<sup>50</sup> Articles 5 and 7, section II, items (a) and (b), Penal Code.

## 9.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage in Human Trafficking or Forced Labour

Brazilian laws apply to those who commit the illegal practices (e.g. those who employ undocumented workers or conduct a human trafficking ring), but the deliberate omission (e.g. knowingly turning a blind eye on a partner's forced labour practice) could result in the corporate being found guilty of the same misconduct. Even though Brazilian laws apply to those who commit the illegal practices, Brazilian labour courts, for instance, have been holding corporates liable for illegal practices (such as forced labour) engaged by their intermediaries in the course of performing services.

There are no reporting obligations under Brazilian laws. However, wilful omission could result in the corporate being held liable for the same crimes if it turned a blind eye.

## 9.5 Scope of liability for Corporates

The applicability of direct civil liability provided in the Civil Code to corporates is an enforceable and usual concept under Brazilian law.<sup>51</sup> The Civil Code also provides that employers can be indirectly liable for their employees,<sup>52</sup> thus there is civil liability arising from intermediaries engaging in illegal practices.

Nevertheless, corporates cannot be criminally liable under Brazilian law and jurisprudence – in fact, only environmental crimes are applicable to corporates.<sup>53</sup> In other cases the individuals who acted illegally (e.g. directors, legal representatives, employees, and so on) will be responsible for the criminal offence (for instance, if a corporate engages in forced labour, the person responsible for preventing or not engaging in this criminal practice will be the one held liable for such omission, while the legal entity itself might be held liable regarding for civil compensation).

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<sup>51</sup> Articles 186, 187 and 972, Civil Code.

<sup>52</sup> Articles 932, section III, and 933, Civil Code.

<sup>53</sup> RE 548181.

# 10. Russia

Russia is a source, transit and destination country for men, women and children for forced labour and human trafficking, making human trafficking within the country a prevalent issue. The trafficking of migrant workers is prevalent across a wide range of sectors including construction, real estate, transportation, agriculture, textile and retail.

## 10.1 Anti-Human Trafficking and Forced Labour Laws that Apply to Corporates

The Russian Federation is a party to many international declarations and conventions prohibiting human trafficking and/or forced labour. Most notably, it is a party to Forced Labour Convention 1930 and the Palermo Protocol.

The Russian Criminal Code (the "Code") prohibits human trafficking and slave labour. This is punishable by imprisonment under the Code.<sup>54</sup>

The Russian Constitution<sup>55</sup> and Labour Code<sup>56</sup> also provide for the prohibition of forced labour in Russia. Under Article 4 of the Labour Code, forced labour is defined as performance of work under the threat of violent punishment, in particular:

- to maintain labour discipline;
- as a liability for participation in a strike;
- as a means of mobilization and use of labour for the needs of economic development;
- as a measure of punishment for the presence or expression of political views or ideological convictions contradicting the established political, social or economic system; and
- as a measure of discrimination according to racial, social, national or religious affiliation.

Forced labour also includes work which an employee is forced to perform under the threat of punishment (amounting to duress) where they are entitled to refuse to perform such work. For example, forcing the employee to work while withholding his or her salary would amount to a breach of labour protection standards.

Public individuals, unincorporated businesses and body corporates committing an offence can be held to be in violation of the Administrative Offences Code of the Russian Federation and can be liable to pay a fine of up to RUR 5,000 (\$80 USD) in respect of public individuals and unincorporated businesses and up to RUR 50,000 (\$800 USD) in respect of the corporates.<sup>57</sup>

Importantly for this report, only individuals – and not legal entities – can be held criminally liable in Russia. While this means that body corporates cannot be held liable for such crimes, individuals with senior and/or managerial positions of an organisation can be charged with criminal offences.

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<sup>54</sup> Articles 127.1 and 127.2.

<sup>55</sup> Article 37.

<sup>56</sup> Articles 2 and 4.

<sup>57</sup> Article 5.27.

## 10.2 Duties in Relation to Human Trafficking and Forced Labour

### *Human Trafficking*

As stated above, Russia is party to a number of international treaties, including the Palermo Protocol, which Russia has adopted and ratified. There are several provisions in the Palermo Protocol which allow the State to impose duties on private transport companies in order to ensure that passengers have the right to travel across borders.

As mentioned above, the Code provides for criminal law definitions of human trafficking<sup>58</sup> and criminal liability for this crime. Since only individuals are criminally liable under Russian law, this provision does not impose any duties upon legal persons. Article 44 of the Criminal Procedure Code describes the status of a civil claimant in criminal proceedings. A civil claimant is a natural or legal person who has suffered property damage or moral distress resulting from a crime. The civil claimant has the right to recover damages on the basis of Russian tort law provisions<sup>59</sup> or compensation for moral distress<sup>60</sup> which imposes the duty upon the convicted person to compensate the victim. As this is a civil law claim, it can only be pursued by natural persons.

### *Forced Labour*

Forced labour provisions of Russian legislation, which are described above, do not explicitly provide for any specific duty of corporations apart from the duty to make a salary payment in the case set out above.

Article 127.2(1) of the Code sets forth the following definition of slave labour and respective liability:

*" [...] labour of the human being with regard to whom the rights peculiar to property rights are exercised in the case when the person cannot refuse to perform works (or render services) for the reasons beyond his or her control".*

This provision is also not applicable to corporations as only individuals – and not legal entities – can be held criminally liable in Russia.

## 10.3 Extra-Territoriality

Russian law operates on the premise that national laws are binding within the territory of the Russian Federation and do not have extra-territorial scope. Therefore, as a matter of general principle, the respective laws are binding only within the territory of Russia.

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<sup>58</sup> Article 127.1(1) of the Code.

<sup>59</sup> Chapter 59, Russian Civil Code.

<sup>60</sup> Articles 1099-1101, Russian Civil Code.

## 10.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage in Human Trafficking or Forced Labour

While Russian companies are free to have internal policies relating to combatting human trafficking or forced labour in the context of partners / counter-parties, there is no legal obligation to do so. Indeed, there are no mandatory rules in Russian law which would oblige corporates to make an obligatory check on their supply chains or business partners. There are no reporting requirements relating to human trafficking or forced labour that are applicable to corporates under Russian law.

## 10.5 Scope of Liability for Corporates

Russian law provides for administrative liability of corporations with regard to forced labour by imposing a duty to pay a fine in the following cases:

- violation of employment legislation or other enactments containing employment provisions;
- violation of work safety regulations; and
- dismissal of an employee for participation in a strike.

Where the conditions provided for in the paragraphs above are met, corporations may also be administratively liable for the following violations:

- admittance of an employee to work by a person who is not entitled by an employer to do so;
- failure to enter into an employment contract or entering into a civil law agreement de facto regulating employment relations;
- employment of foreign citizens or stateless persons within the Russian Federation without a work permit if such a permit is required under Russian legislation or involvement in work that is not in the permit; and
- failure to notify the authorised state agency of termination of an employment contract with a foreign citizen or failure to do so with regard to entering into such a contract.

Russian law does not provide for any provision on human trafficking or forced labour that would allow holding a parent company liable for violations of its subsidiaries or intermediaries.

The Code provides for criminal liability of company managers and employers for non-payment of salary. This provision is not applicable to corporations as legal entities for reasons set out above.

Under article 127.1(1) of the Code, human trafficking is defined as the purchase and sale of a human being, other transactions with respect to a person, as well as the recruiting, carriage, transfer, concealment or receipt of a person for the purpose of his or her exploitation and is punished with compulsory labour for a term of up to five years or by deprivation of liberty for a term of up to six years.

The trafficking of humans:

- committed in respect of two or more persons or a minor;
- committed by a person through his official position;
- where the victim is moved across the State Border of the Russian Federation or illegally kept abroad;
- using forged documents, as well as seizing, concealing or destroying the documents certifying the identity of the victim;
- with application of force or with the threat of applying it;
- for the purpose of cutting out the victim's organs and tissues;
- with respect to a person who is, knowingly for the guilty person, in a helpless state or is materially or otherwise dependent on the guilty person; or
- with respect to a woman who, with the knowledge of the guilty person, is in the state of pregnancy,

are punishable by deprivation of liberty for a term of three to ten years with deprivation of the right to hold specific offices or to engage in specific activities for a term of up to fifteen years and with restriction of liberty for a term of up to two years.

The same crimes committed by an organised group are punishable by deprivation of liberty for a term of from eight to 15 years with restriction of liberty for a term of up to two years.

Russian law, including the Code, does not contain any requirements for corporations in relation to human trafficking and forced labour and all the above mentioned provisions are applicable to individuals or groups of individuals. As companies cannot be held criminally liable, this does not apply to legal persons.

# 11. South Africa

## 11.1 Anti-Human Trafficking and Forced Labour Laws that Apply to Corporates

South Africa has a legislative framework in place to combat both human trafficking and forced labour.<sup>61</sup> Although the laws below do not specifically state that they are applicable to corporates, they are applicable to all persons (both natural and juristic persons) within South Africa.

### *The Constitution of the Republic of South Africa*

The Constitution (1996) is the supreme law of the land, binding on all organs of state at all levels of government. Forced labour is prohibited under the Constitution. Section 13 of the Constitution (which is also a right in the Bill of Rights) deals with slavery, servitude and forced labour and provides that no-one may be subjected to slavery, servitude or forced labour. Section 23 of the Constitution regulates labour relations and states that everyone has the right to fair labour practices. Section 23(1) of the Constitution aims to give effect to the obligations that South Africa incurs as a member of the ILO.

### *PACOTIP*

The purpose of the Prevention and Combating of Trafficking in Persons Act (Act 7 of 2013) (“PACOTIP”), which finally came into force in June 2015, is to specifically provide a legal framework to combat human trafficking for the purposes of forced labour and forced prostitution in South Africa. Section 4(1) of the Act prohibits trafficking in persons.

PACOTIP also contains provisions prohibiting debt bondage (section 5), using the services of victims of trafficking (section 7) and facilitating trafficking in persons (section 8). In addition, the Act provides for the protection of victims of trafficking, including the granting of a recovery and reflection period, measures for appropriate repatriation and provisions for the compensation of victims.

PACOTIP provides for the adoption of a National Policy Framework to ensure a uniform, co-ordinated and co-operative approach by all government departments, organs of state and institutions, in dealing with matters relating to the trafficking in persons. It also provides that the National Commissioner of the South African Police Services, the Departments of Home Affairs and Labour and the National Director of Public Prosecution Departments must issue national instructions and directives to be followed by their officials when addressing matters of trafficking in persons. Non-compliance with such directives may result in disciplinary steps.

The South African government indicates that the operationalization of the law is dependent on the regulations made by a number of departments, and that this is receiving urgent attention.

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**DISCLAIMER:** This section on South Africa should not be regarded or relied upon as being a comprehensive or exhaustive legal opinion concerning any matters referred to herein. The opinion has been prepared after due research and interpretation of the issues raised by IHRB and the Trust Law Programme, and is the opinion of Shaaista Thabit, a candidate attorney at Hogan Lovells (South Africa) Inc.

## *Common Law Crimes*

In South Africa, existing common law and statutory crimes may be applicable in some human trafficking cases. These legal remedies have no direct bearing on human trafficking itself, but can be used to punish traffickers, for example, to prosecute for rape, abduction and kidnapping. In many cases, traffickers are punished indirectly by being prosecuted for the common law crimes and not for trafficking or forced labour per se.

## *BCEA*

The Basic Conditions of Employment Act (Act 75 of 1997) ("BCEA") is one of the main legislative Acts of South African labour law and prohibits forced labour. In 2014, the government amended it to extend prohibitions to the informal sector, and doubled prescribed maximum penalties for forced labour for both children and adults, from three to six years' imprisonment.

Sections 43 to 48 of the BCEA prohibit employment of children and forced labour. Under South African law, it is a criminal offence to employ a child that is under 15 years of age and children that are under 18 years of age may not be employed to do work that may be inappropriate for their age, or work which places them at risk. Moreover, causing, demanding or requiring forced labour is a criminal offence.

The BCEA concentrates on the regulation of working time, leave, particulars of employment, remuneration and termination of employment. It also deals with prohibition of the employment of children and forced labour. It addresses the variation of basic conditions of employment, sectorial determination, the establishment of an employment conditions commission and the monitoring, enforcement, protection and legal proceedings of employees against discrimination.

The BCEA provides that no person may, for his or her own benefit, or for the benefit of someone else, cause, demand or impose forced labour on any person. A person who violates this provision commits an offence and may be punished with an imprisonment term for three years, along with a fine.

Therefore the BCEA helps to prevent human trafficking indirectly and forced labour directly.

## *ILO Forced Labour Conventions*

South Africa has ratified numerous ILO conventions pertaining to human trafficking and forced labour, ratifying both the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) in 1997.

The Labour Court in South Africa has accepted that the definition of "unfair labour practice" in the Labour Relations Act 66 of 1995 ("LRA"), is not necessarily exhaustive. Other forms may be recognised under the broader constitutional guarantee of fair labour practices. Thus, South African Labour Courts are open to prosecuting people engaged in human trafficking or forced labour, as it will constitute unfair labour practice under the broader constitutional guarantee of fair labour practices.

## *Other Relevant International Law*

South Africa has signed and/or ratified numerous international instruments, including the Palermo Protocol. As a party to the Palermo Protocol, South Africa is obligated to incorporate

the minimum standards laid down in the protocol into its domestic legislation. On 20 February 2004, South Africa ratified the Palermo Protocol.

In order to comply with its international obligations, Parliament passed the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the Act), which was signed by the President in July 2013. On 9 August 2015 the Act came into operation. Thus, South Africa incorporated the minimum standards laid down in the protocol into its domestic legislation. South Africa is therefore under an obligation to adhere to these standards dealing with human trafficking and forced labour.

### *Employment Services Act*

The Employment Services Act (Act 4 of 2014) requires the Department of Labour to license and regulate private employment agencies and prohibits agencies from charging fees for their services unless explicitly authorised by the Minister of Labour. The Act deals with, amongst other topics, the employment of foreign nationals. An individual who is not a South African citizen or does not have a permanent residence permit in accordance with the Immigration Act, is deemed a foreign national.

However, under the Act, foreign nationals employed in South Africa will be protected by fair labour practices and may only perform work as authorised in terms of their work visas. Employers who hire employees without a valid work visa would face consequences. The employee will be entitled to enforce any claim in terms of any statute or employment relationship against the employer or any person in terms of the law. An employer may not have a foreign national engage in work that is contrary to the terms of the employee's work visa.

### *Children's Act*

The Children's Act (No. 38 of 2005, as amended by the Children's Amendment Act (No. 41 of 2007)) criminalises the trafficking of children as well as certain behaviour "facilitating trafficking in children", in order to cast the net wide enough so as to include those who profit from this crime. The penalty for a conviction under the Children's Act is a maximum of ten years' imprisonment.

The Children's Act aims to curb forced labour and trafficking of children by prescribing penalties of five years to life imprisonment or fines for the use, procurement, or offer of a child for slavery, commercial sexual exploitation, or to commit crimes.

The Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 work in conjunction with one another in order to prevent human trafficking and forced labour of children in particular.

### *The Prevention of Organized Crime Act*

The Prevention of Organized Crime Act of 1998 is sometimes used in combination with the Sexual Offences Act to add charges – including money laundering, racketeering, and criminal gang activity – and stronger penalties against offenders who partake in human trafficking.

### *Immigration Act*

The Immigration Act (Act 13 of 2002) regulates the entry into and departure from South Africa and as such, it is of relevance in addressing the trafficking of persons across international

borders. The National Prosecuting Authority reported convictions in the cases of *S v Sayed* and *S v Sawatkan* in terms of this Act for human trafficking related activities.

## 11.2 Duties in Relation to Human Trafficking and Forced Labour

### *PACOTIP*

Chapter 2 of PACOTIP creates offences such as trafficking in persons, debt bondage, the possession, destruction, concealment of and tampering with travel documents, and using the services of victims of trafficking, liability or acting as carriers of trafficked persons. There is a duty on corporates to abstain from the above-mentioned conduct.

Offenders found guilty of this modern day slavery will be fined up to R100 million (\$10 million USD) or risk life imprisonment, or both, if convicted. Perpetrators may also be required to pay their victims compensation.

Section 1 of PACOTIP defines a person as "a natural person, a juristic person and a partnership, unless the context indicates other-wise".<sup>62</sup>

PACOTIP also provides for the liability of juristic persons.<sup>63</sup> Consequently, there is a duty on juristic persons, including corporates, to refrain from the conduct mentioned above.

In addition to these penalties, PACOTIP provides that a court may order that compensation be awarded to the victim of human trafficking and the state for the costs of caring for, accommodating and transporting or repatriating the victim. This will include corporates should they be found guilty of the offence.

With regard to compensating a victim of trafficking, section 29 of PACOTIP provides that:

- (1)(a) A court may, on its own accord or at the request of the victim of trafficking or the prosecutor, in addition to any sentence which it may impose in respect of any offence under Chapter 2, order a person convicted of that offence to pay appropriate compensation to any victim of the offence for:
  - (i) damage to or the loss or destruction of property, including money;
  - (ii) physical, psychological or other injury;
  - (iii) being infected with a life-threatening disease; or
  - (iv) loss of income or support,suffered by the victim as a result of the commission of that offence, where after the provisions of section 300(1)(a), (2), (3) and (4) of the Criminal Procedure Act apply with the necessary changes required by the context with regard to an order made under this section.
- (1)(b) Appropriate compensation includes expenses reasonably expected to be incurred in relation to the matters referred to in paragraph (a)(i) to (iv).

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<sup>62</sup> See also section 12(1)(f) of the PACOTIP.

<sup>63</sup> See clause 1, definition of "person".

- (2) In cases where the amount of the damage, injury or loss suffered exceeds an order for compensation which can be made by a magistrate's court in terms of subsection (1), a civil action may be instituted by the victim for the recovery of the excess.

## *BCEA*

Section 46 of BCEA deals with Prohibitions, whereby corporates are guilty of an offence if they:

- assist any person to require or permit a child to work in contravention of this Act; or
- discriminate against a person who refuses to permit a child to work in contravention of this Act.

Therefore by implication corporates have a duty to abstain from child labour.

Under section 77(1A) of the BCEA, the Labour Court may grant civil relief in respect of a breach of section 48.

BCEA sets minimum employment standards regarding a range of labour matters including maximum working hours, overtime, sick leave, meal intervals and annual leave. Many, if not all, of these provisions are commonly violated in labour trafficking cases.

Consequently, this Act may be used to prosecute perpetrators for a range of labour offences committed during the trafficking process. What is relevant is that this Act explicitly prohibits all forms of forced labour. Furthermore, no-one may, for his or her own benefit, or for the benefit of someone else, cause, demand or impose forced labour. Thus, corporates may also be prosecuted under section 77(1A) of the BCEA. The maximum penalty for these offences is only three years' imprisonment, which is somewhat inadequate in serious cases of prolonged forced labour.

In summary, the duties that corporates have in relation to human trafficking and forced labour in their operations and activities, is to adhere to the minimum employment standards regarding a range of labour matters provided for in the BCEA. Should corporates be in violation of the above, it may be indicative of human trafficking or forced labour.

## *Children's Act*

The Children's Act criminalises the trafficking of children by natural or juristic persons for an exploitative purpose. Contrasting the international standard, this provision only applies to children who are trafficked and not to adult victims. The Children's Act regards child trafficking as a serious offence, for which imprisonment of up to twenty years may be imposed.

By criminalising the exploitation of children, it places a duty on corporates not to employ children who were possibly trafficked or are being forced into labour.

## *Immigration Act*

Section 49(15) of the Immigration Act (as amended) creates a duty on both natural and juristic persons which includes corporates, to refrain from trafficking persons.<sup>64</sup>

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<sup>64</sup> Republic of South Africa, Immigration Act (2002), available at: <http://www.treasury.gov.za/legislation/acts/2002/act13-02.pdf>.

## 11.3 Extra-territoriality

Section 12 of PACOTIP provides for extra-territorial jurisdiction, including cases where there is a juristic person, i.e. a corporate. The extent of the extra-territorial jurisdiction can be seen in the PACOTIP, as it covers instances where the victim is a South African citizen, or ordinarily resident in the Republic and instances and when they are not.

Section 12(1)(f) of PACOTIP provides for extra-territorial jurisdiction where a juristic person or a partnership is registered in terms of any law in the Republic. Therefore by implication it can be said that the duties of corporates to abstain from human trafficking and forced labour apply extra- territorially.

## 11.4 Duties to Ensure that Business Partners, Suppliers and Intermediaries do not Engage In Human Trafficking or Forced Labour

The Companies Act 71 of 2008 ("Companies Act") section 72(4) provides for the establishment of a social and ethics committee which is in line with Corporate Social Responsibility ("CSR") of Corporates. In South Africa, CSR receives unique attention from a legislative point of view. The Companies Act requires a juristic entity to appoint a social and ethics committee, and to contribute to CSR initiatives. In addition to the Companies Act and regulations thereto, the guiding principles are summarised in the King Report on Governance for South Africa (the "King Report").

While these laws do not specifically focus on human trafficking and forced labour, they have put increasing pressure on companies around South Africa to improve and report on their CSR performance and impact, which includes that their workers' rights are not violated and that they are not associated with or related to entities which might be implicated in human trafficking and forced labour.

The role of CSR and the overarching rights to fair labour in terms of section 13 of the Constitution, will place an indirect responsibility on South African corporates and/or corporates established in South Africa, to ensure that their business partners, suppliers and intermediaries do not engage in human trafficking or forced labour.

Additionally, the Constitution, as the supreme law of South Africa, determines the acceptability of conduct of corporates. It contains the Bill of Rights, which includes the rights to fair labour practices, to dignity and to safety and security, which by their nature preclude forced labour and human trafficking. Conduct by a corporate that breaches these rights would be unconstitutional and therefore could be declared invalid.

Taking the above into consideration, it can be said that corporates have a constitutional duty to ensure that their business partners, suppliers and intermediaries do not engage in human trafficking or forced labour.

## 11.5 Scope of Liability for Corporates

PACOTIP is the primary act regulating human trafficking in particular, and to some extent, forced labour.

### *Duty to Report*

Sections 18 and 19 of PACOTIP place a duty on any person, which includes corporates, who knows or ought reasonably to have known or suspected that a child or an adult person is a victim of trafficking, to immediately report that knowledge or suspicion to a police official for investigation.

### *Trafficking and Other Offences*

Section 4(1) of PACOTIP states that: "any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic by means of a threat of harm, the threat or use of force or other forms of coercion, the abuse of vulnerability, fraud, deception, abduction, kidnapping or the abuse of power... for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons."

This definition is encompassing and the scope of a corporate's liability in terms of PACOTIP is wide, as corporates may be found guilty if they were involved in recruiting people who have been trafficked.

PACOTIP recognises a number of ways in which persons can be a victim of trafficking including through forced labour, the removal of body parts, slavery and debt bondage. PACOTIP also criminalises conduct that facilitates trafficking, i.e. allowing persons access to a property which will be used for facilitating or promoting trafficking.

Moreover, the advertising, publishing, printing or distribution of any information which facilitates trafficking is an offence. The same applies to transporting victims of trafficking where it ought reasonably to be known that they were victims of trafficking. The liability for human trafficking is extended from people to juristic persons and partnerships, thus companies cannot hide behind a corporate veil.

### *Ancillary Offences*

Section 10(1) states that any person who incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit or conspires with any other person to commit an offence stated in the Act, is guilty of an offence.

Furthermore, it should be noted that section 11 of PACOTIP deals with liability of persons for offences, and sections 11(2) and 11(3) is of particular importance in respect to the scope of liability that corporates face.

Section 11(2) states that, in order to establish liability in terms of sections 4, 5, 6, 7, 8, 9(1) or 10, of an employer or principal, the conduct of an employee or agent of, or any other person acting on behalf of the employer or principal, may be attributed to the employer or principal if that person is acting:

- within the scope of his or her employment;
- within the scope of his or her actual or apparent authority; or
- with the express or implied consent of a director, member or partner of the employer or principal.

### *Direct and Indirect Liability*

Section 11(3) states that subsection 11(2) does not exclude the liability of an employee or agent of, or any other person acting on behalf of, the employer or principal for committing an offence. Therefore the principal, who in most cases may be the corporate, may be held liable directly and indirectly.

### *Penalties*

In addition, PACOTIP provides that the penalties for the person convicted of an offence referred to in:

- section 4(1) is, subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable to a fine not exceeding R100 million (\$270,000 USD) or imprisonment, including imprisonment for life, or imprisonment without the option of a fine or both;
- section 4(2) is liable to a fine not exceeding R100 million (\$270,000 USD) or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both;
- section 5, 7 or 23 is liable to a fine or imprisonment for a period not exceeding 15 years or both;
- section 6 or 8(1) is liable to a fine or imprisonment for a period not exceeding 10 years or both; or
- section 8(3), 9, 18(9) or 19(13) is liable to a fine or imprisonment for a period 40 not exceeding five years or both.

In conclusion, PACOTIP creates, primarily, criminal liability for corporates, who are found guilty of the offences of human trafficking and forced labour.

The provisions of PACOTIP are of general application and give rise to direct and/or indirect liability of corporates. Businesses can be held indirectly liable and found guilty of an offence, if one of its intermediaries engages in human trafficking in the course of performing services for it.

## 12. Conclusion

Companies doing business across the world need to be aware that legal sanctions and obligations in relation to forced labour and human trafficking exist, and are developing rapidly. Companies and individuals within companies face potential legal liabilities if forced labour or trafficking is taking place anywhere in their business or supply chains.

Awareness of the legal landscape and risks, and the resources available to help companies take proactive measures to prevent human trafficking in their supply chains, offers an opportunity not only to avoid legal liabilities and sanctions, but to play an active role in the elimination of forced labour and human trafficking, which remain prevalent in the modern world.

The US government publishes resources annually that can help companies identify specific risks. The US Department of Labor publishes a list of goods from particular countries that are known to be at high risk for being made with forced or child labour. The Department of State publishes an annual TIP Report that details over 180 countries' human trafficking concerns and efforts to combat the crime. Additionally, Verité, an NGO that helps companies deal with forced labour risks and challenges, publishes a report that details risks of human trafficking in eleven different sectors in specific regions.

For additional support in developing policies and practices to prevent forced labour, Verité works with companies to create compliance plans and trainings. There are also industry specific initiatives such as the Fair Labour Association that provides resources to manufacturers regarding suppliers, and the Electronics Industry Citizenship Coalition has adopted a code of conduct for technology companies in its membership that includes best practices to prevent forced labour in their supply chains.

Globally there are increasing expectations on companies to engage responsibly on issues associated with modern slavery in supply chains. More than ever it is important for companies to utilise available tools, participate in joint initiatives, and advocate for effective legislation and action – all aimed at ending business involvement in these practices.