



2021

## Global Legal Ethics and Corporate Social Responsibility: Where's the Beef?

Heidi Frostestad Kuehl

Follow this and additional works at: <https://scholarship.law.unc.edu/ncilj>



Part of the [Law Commons](#)

---

### Recommended Citation

Heidi F. Kuehl, *Global Legal Ethics and Corporate Social Responsibility: Where's the Beef?*, 46 N.C. J. INT'L L. 111 (2020).

Available at: <https://scholarship.law.unc.edu/ncilj/vol46/iss1/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## **Global Legal Ethics and Corporate Social Responsibility: Where's the Beef?**

*Heidi Frostestad Kuehl*<sup>†</sup>

ABSTRACT: This Article identifies the newer global soft law norms in international business transactions and unique synergies between cultural competency and corporate social responsibility (“CSR”) for corporate lawyers. With the advent of widespread and varied corporate human rights abuses in various contexts, the international community has struggled with appropriate responses to deter harmful corporate action. The United States and its corporate actors are subject to hard U.S. laws, such as those federal and state laws attempting to prevent international human trafficking, environmental harm, use of underage workers, and foreign corrupt practices. This Article provides an overview of the global epidemic of bad corporate actions in international business contracts and subsequent supply chains, and reviews the currently applicable conventions, domestic U.S. laws, and soft law norms which exist to deter illegal activities by multinational enterprises (“MNEs”). To better discourage U.S. and global legal actions in the future, international lawyers should advise MNEs to adopt more stringent CSR policies, anticipate possible harms or bad actors in the supply chain through cultural competence to promote more globally ethical behavior, and identify areas in the contract negotiation process that would favorably protect MNEs through inclusion of applicable soft law norms and hard U.S. law deterrents. This approach will incorporate the current U.N. and OECD Conventions and pave the way for furthering more widespread adoption of global ethics to deter illegal activities and ideally combat the very unfortunate tensions for corporate counsel between profit and harm to individuals, or will hopefully protect disadvantaged groups in countries throughout the world. Overall, the Article will provide a succinct and globally ethical approach

---

<sup>†</sup> Associate Professor of Law and Director of the Law Library, Northern Illinois University College of Law. J.D., M.L.S., B.A. Many thanks to my research assistants, Brittany Miller and Katlin Kiefer, for their wonderful research support. Thanks also to my daughter, Grace, and my parents, Eulyn and Franklin, for their love and support while writing this article.

for professors who are training corporate lawyers to convey the existing international and domestic legal norms and provide a checklist of items for corporate counsel to include in their international business contracts. This will ensure that the attorneys have discussed the vital issues of CSR, international human rights, and cultural norms at the outset of the discussion with clients and that they have researched plausible areas of liability. The three-step approach should better prepare our law students to practice in a global corporate practice.

I.	Corporate Social Responsibility (“CSR”) Norms: A Background.....	113
II.	Case Studies for CSR and Challenges .....	118
	A. Substantial Harm by Corporations in Many Historic Cases .....	118
	1. Bhopal Incident in India (1984).....	119
	2. Unocal Oil Pipeline in Myanmar (1996) .....	121
	3. Pfizer’s Trovan Drug Trial in Nigeria (2001- 2009).....	122
	4. Rana Plaza Factory Collapse in Bangladesh (2013).....	124
	5. <i>Kiobel v. Royal Dutch Petroleum</i> in Nigeria .....	126
	B. Corollary Historical Challenges for International CSR Enforcement .....	128
III.	International and U.S. Promotion of CSR .....	130
	A. Which Laws Apply? — International Soft and Hard Law Norms .....	130
	1. OECD Guidelines .....	132
	2. U.N. Guidance: Ruggie Principles and “Responsibility to Protect and Respect” Framework.....	133
	3. U.N. High Commissioner on Human Rights.....	135
	4. International Labour Organization .....	136
	5. U.N. Environment Programme Guidelines....	137
	6. U.N. Conference on Trade and Development ("UNCTAD") Guidelines .....	138
	B. How to Enforce Domestically? — An Outline of CSR in the United States .....	139
	1. Foreign Corrupt Practices Act .....	139
	2. Alien Tort Statute and Torture Victims Protection Act .....	141
	3. Dodd-Frank CSR Mandates.....	142
	4. California State Law on Supply Chains.....	143
	5. Human Trafficking Statutes.....	143

	6. Environmental Statutes.....	144
	7. U.S. Labor Law Standards.....	145
IV.	Harnessing the Complementary Tools of Cultural Competency and CSR in International Business	
	Contracts.....	145
	A. Overview of Cultural Competency.....	145
	B. Consideration of Cultural Perspectives and CSR Norms.....	149
V.	The Three-Step Approach and Illustrations.....	152
	A. Comparative Example #1: United Kingdom Slavery Act 2015.....	152
	B. Comparative Example #2: German Legislation..	153
	C. Comparative Example #3: European Foreign Tort Claims Act .....	154
VI.	Conclusion: We Must “Find the Beef” for CSR Norms and Enforcement.....	155

## I. Corporate Social Responsibility (“CSR”) Norms: A Background

“The disparities between the world’s richest and poorest nations are wider than ever . . . . [T]he international community can’t continue with ‘business as usual!’”<sup>1</sup>

CSR norms have evolved over time and with greater velocity in recent years. Imagine a multinational enterprise (“MNE”) that sells chocolate for over one hundred years, conducting business throughout multiple jurisdictions that each have different legal systems and, consequently, different labor laws and regulations.<sup>2</sup> As the knowledge of international law grows in international business and the media increasingly sheds light on corporate abuse in the United States, consumers and their attorneys become more savvy about ethical sourcing of chocolate or other goods, and more aware of corporate abuses.<sup>3</sup> Not surprisingly, consumers in the

---

<sup>1</sup> Horst Köhler, Managing Dir. of the Int’l Monetary Fund (“IMF”), Working for a Better Globalization: Remarks at the Conference on Humanizing the Global Economy, ¶¶ 5, 13 (Jan. 28, 2002) (transcript available at <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp012802> [<https://perma.cc/HAA9-8EL6>]).

<sup>2</sup> See, e.g., *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 655–56 (N.D. Cal. 2016) (recounting the factual context and plaintiff’s material legal allegations).

<sup>3</sup> See PAUL O. HIROSE, PERKINS COIE LLP, CORPORATE SOCIAL RESPONSIBILITY IN

United States and abroad demand to know how corporations produce the chocolate to determine responsible sourcing and whether the MNEs are involved in any illegal activities within the various manufacturing jurisdictions.<sup>4</sup> Some consumers have filed lawsuits under emerging State laws that require transparency in the supply chain.<sup>5</sup> In addition, international efforts have been made in certain jurisdictions to prevent supply chain corruption and cultivate more transparency.<sup>6</sup> Numerous human rights issues may arise during the procurement of a corporate factory in a third-world country, such as routinely overworking women and children, regularly subjecting these underprivileged individuals to poor work conditions and a factory in disrepair.<sup>7</sup> Then, one day the factory

---

US SUPPLY CHAINS: BUSINESS BRIEFING (2019), Westlaw 5-590-7966, 1 (database updated 2020); *see also* Constance Z. Wagner, Claudia Feldkamp, Sri Katragadda, Corinne Lewis, Kelly Smallmon & Cindy Woods, *Corporate Social Responsibility*, 51 INT'L LAW. 177, 180–91 (2017) (discussing U.S. actions pertaining to misleading corporate acts as to climate change and disclosure, U.S. federal court decisions under the Alien Tort Statute, international human rights developments, and potential international liability for business officials); VED P. NANDA, SEAN CUMBERLEGE, JONATHAN S. BELLISH & ANJALI NANDA, THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 1:4 (2019), Westlaw (database updated Oct. 2019).

<sup>4</sup> *See, e.g., Dana*, 180 F. Supp. 3d at 652; *see also* Ruiz v. Darigold, Inc./Nw. Dairy Ass'n, No. C14-1283RSL, 2014 WL 5599989, at \*1–3 (W.D. Wash. Nov. 3, 2014); Doe v. Nestle USA, Inc., 766 F.3d 1013, 1016–18 (9th Cir. 2014).

<sup>5</sup> *Dana*, 180 F. Supp. 3d at 655–56.

<sup>6</sup> *See, e.g.,* Council Directive 2014/95, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1, 4–5 (EC), (stating that four categories of information, at a minimum, must be covered in the reporting requirements for large public-interest entities with more than 500 employees including “environmental, social and employment matters, respect for human rights, and anti-corruption and bribery matters”); Special Representative of the U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 1, 3, 23–24, 33, 35, U.N. Doc. HR/PUB/11/4 (2011) [hereinafter *U.N. Guiding Principles: Protect, Respect & Remedy*] (explaining how to properly implement U.N. Guiding Principles, which apply both to States and corporations, in order to “respect, protect and fulfill human rights and fundamental freedoms”).

<sup>7</sup> PAUL M. BARRETT, DOROTHÉE BAUMANN-PAULY & APRIL GU, FIVE YEARS AFTER RANA PLAZA: THE WAY FORWARD 1–10 (2018) (illustrating flaws in the current factory safety standards implemented after Rana Plaza collapse and laying out a plan to amend those flaws); *see also* *Make Rules on Rights Binding for Businesses: ILO Should Create Treaty to Protect Workers*, HUM. RTS. WATCH (May 30, 2016), <https://www.hrw.org/news/2016/05/30/make-rules-rights-binding-businesses> [<https://perma.cc/U8ZX-JSJD>] (calling for development of an international convention to

collapses, hundreds of workers are killed, and hundreds more injured in return for cheap labor and yield for the multinational corporation.<sup>8</sup> These are just a couple of examples of recent bad corporate acts that have attracted media attention and a heightened public consciousness of CSR.<sup>9</sup>

Opportunities are vast for integrating CSR training and cultural competency skills into law schools today. Modern corporate lawyers need to have knowledge of possible international corruption and other abuses in foreign jurisdictions and inculcate globally ethical conduct with the MNEs that they represent to prevent bad conduct and harm overseas.<sup>10</sup> Cultural competency training and conscious infusion of CSR doctrine in law schools may be the best countermeasure to preventing widespread corporate abuses in the future via more knowledgeable international corporate counsel.<sup>11</sup>

protect human rights in supply chains).

<sup>8</sup> BARRETT ET AL., *supra* note 7, at 5; *see also* Press Release, Amnesty Int'l UK, FOI Request Reveals UK Backed Shell and Rio Tinto in Human Rights Court Cases After Corporate Lobbying (Apr. 7, 2014, 1:10 PM) ("The UK government backed the oil giant Shell and mining multinational Rio Tinto in major human rights cases in the US Supreme Court after being lobbied for support[.]").

<sup>9</sup> *See Rules on Corporate Ethics Could Help, Not Hinder, Multinationals*, HUM. RTS. WATCH (June 20, 2005), <https://www.hrw.org/news/2005/06/20/rules-corporate-ethics-could-help-not-hinder-multinationals> [<https://perma.cc/D3VJ-N9AT>] (asserting that private companies have been increasingly interested in enforceable ethical standards); Thomas Donaldson, *Values in Tension: Ethics Away from Home*, HARV. BUS. REV. (1996), <https://hbr.org/1996/09/values-in-tension-ethics-away-from-home> [<https://perma.cc/9PFF-BKSP>] (discussing how to find a balance between cultural relativism and ethical imperialism); *see also* Hum. Rts. Council, Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, at 21–23, U.N. Doc. A/HRC/29/28 (Apr. 28, 2015).

<sup>10</sup> *See generally* John Gerard Ruggie, *global\_governance.net: The Global Compact as Learning Network*, 7 GLOB. GOVERNANCE 371 (2001) (discussing how the Global Compact engages the private sector to work with the U.N. to promote good corporate practices); Ariane Berthoin Antal & André Sobczak, *Corporate Social Responsibility in France: A Mix of National Traditions and International Influences*, 46 BUS. & SOC'Y 9 (2007) (exploring the dynamics of CSR in France to illustrate how a country's traditions impact CSR development); *see also* Juliane Kippenberg, *Should Corporate Social Responsibility Be Voluntary or Binding?: Germany's Next Government Will Decide*, HUM. RTS. WATCH (Sept. 18, 2017), <https://www.hrw.org/news/2017/09/18/should-corporate-social-responsibility-be-voluntary-or-binding> [<https://perma.cc/TY4F-MYMR>] (discussing how Germany's 2017 elections would decide whether Germany's Action Plan, modeled after the U.N. Guiding Principles on Business and Human Rights, would be implemented).

<sup>11</sup> *See* JOHN M. KLINE & LUDGER ODENTHAL, UNITED NATIONS CONFERENCE ON TRADE & DEV., *THE SOCIAL RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS* 18 (1999)

With the advent of widespread and varied corporate human rights abuses in various contexts, the international community has struggled with appropriate responses to deter harmful corporate action.<sup>12</sup> The United States and its corporate actors are subject to hard U.S. laws, such as federal and state laws that attempt to prevent international human trafficking, environmental harm, use of underage workers, and foreign corrupt practices.<sup>13</sup> However, those laws often do not have adequate traction and enforcement overseas with U.S. subsidiaries or when providing responses to plaintiffs who are harmed in an extraterritorial context by MNEs.<sup>14</sup> Further, corporations today must be cognizant of the potential nefarious conduct by commercial entities overseas and anticipate the possible

---

(“Overall, the idea of global corporate citizenship rests on the linkage between the rights granted in an enabling national and international regulatory framework that permits global business activities, and an accompanying set of social responsibility commitments . . . that operate within, and benefit from, an integrating global community.”); Alexandra Guáqueta, Member of the U.N. Working Group on Business & Human Rights., *Global Trends in the Implementation of the U.N. Guiding Principles on Business and Human Rights: Remarks for the First U.N. Annual Forum on Business and Human Rights* (Dec. 4, 2012), <https://www.business-humanrights.org/en/doc-global-trends-in-the-implementation-of-the-un-guiding-principles-on-business-and-human-rights-remarks-for-the-first-un-annual-forum-on-business-and-human-rights> [<https://perma.cc/39D8-843R>] (explaining the purposes of the session as to (1) highlight the political relevance of a data repository, (2) share general trends, and (3) collectively think of a way forward).

<sup>12</sup> See generally, e.g., Benny Santoso, “Just Business”—*Is the Current Regulatory Framework an Adequate Solution to Human Rights Abuses by Transnational Corporations?*, 18 GERMAN L.J. 533 (2017) (exploring the adequacy of the U.N. Framework and guiding principles, centering on (1) the terminology used, (2) the human rights due diligence program, and (3) access to remedies). See Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 N.W.J. HUM. RTS. 262, 262–63 (2008); Special Representative of the U.N. Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect, and Remedy” Framework*, U.N. Doc. A/HRC/11/13, annex (Apr. 22, 2009).

<sup>13</sup> See Michael R. Littenberg et al., *Corporate Social Responsibility Compliance in 2018, and Beyond – An Overview for In-House Legal Counsel*, ROPES & GRAY (Mar. 12, 2018), [https://www.ropesgray.com/en/newsroom/alerts/2018/03/Corporate-Social-Responsibility-Compliance-in-2018-and-Beyond-An-Overview-for-In-House-Legal-Counsel?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](https://www.ropesgray.com/en/newsroom/alerts/2018/03/Corporate-Social-Responsibility-Compliance-in-2018-and-Beyond-An-Overview-for-In-House-Legal-Counsel?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original) [<https://perma.cc/JW95-JR44>] (discussing emerging trends in CSR that in-house counsel need to be aware of).

<sup>14</sup> See ORG. FOR ECON. CO-OPERATION & DEV. (“OECD”), OVERVIEW OF SELECTED INITIATIVES AND INSTRUMENTS RELEVANT TO CORPORATE SOCIAL RESPONSIBILITY, IN ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 236–37 (2009), <https://www.oecd.org/corporate/mne/40889288.pdf> [<https://perma.cc/L4XV-WA8E>].

multijurisdictional criminal activity.<sup>15</sup> These prevalent and tangible abuses in international business transactions may include human trafficking and criminal activity, environmental abuses and damages, use of underage workers, inherently dangerous employment conditions, and fraud or corrupt practices.<sup>16</sup> This Article will first provide an overview of the global epidemic of bad corporate actions in international business contracts and subsequent supply chains and review the currently applicable conventions, domestic U.S. laws, and soft law norms which exist to deter illegal activities by MNEs.<sup>17</sup> The evidence of widespread corporate harm and examples of abuse by MNEs demonstrate a need to further educate corporate counsel while harnessing the complementary tools of CSR norms in contract negotiation and arming attorneys with proficiency regarding foreign cultural norms and cultural competency.<sup>18</sup> To better discourage U.S. and global legal actions in the future, international lawyers should advise MNEs to adopt more stringent CSR policies that align with international and national hard and soft law norms, anticipate possible harms or bad actors in the supply chain through cultural competence to promote more globally ethical behavior, and identify areas in the contract negotiation process that would protect MNEs through inclusion of

---

<sup>15</sup> See, e.g., H.E. Nguyen Trung Thanh, Permanent Representative of Viet. to the United Nations Office at Geneva, *Transnational Cooperation and Corporate Social Responsibility: Enablers for Protection of Children from Sexual Exploitation in Travel and Tourism 4* (Mar. 6, 2013) (transcript available at <https://www.ohchr.org/Documents/Issues/Children/Childrenexploitation/VietNam-Presentation.pdf> [<https://perma.cc/C8C4-9G9E>]); see Sara L. Seck, *Emerging-Market Multinationals, Human Rights, and Sustainable Development: Lessons from the Canadian Experience*, 22 *TRANSNAT'L CORPS.* 75, 75 (2015); U.N. Conference on Trade and Development (“UNCTAD”), *Disclosure of the Impact of Corporations on Society: Current Trends and Issues*, U.N. Doc. TD/B/COM.2/ISAR/20, at 6–8 (Aug. 26, 2004).

<sup>16</sup> See, e.g., UK: *Shell Ruling Gives Green Light for Corporations to Profit from Abuses Overseas*, AMNESTY INT'L (Jan. 26, 2017), <https://www.amnesty.org/en/latest/news/2017/01/uk-shell-ruling-gives-green-light-for-corporations-to-profit-from-abuses-overseas/> [<https://perma.cc/8MJZ-BU3V>] (discussing how the U.K. not having jurisdiction over Shell's Nigerian subsidiary results in a green light for human rights abuses due to a lack of judicial oversight).

<sup>17</sup> See generally Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 *TEX. INT'L L.J.* 33 (2012) (addressing the most recent developments of business-related human rights practices as of 2012).

<sup>18</sup> *Id.* at 41.



soft law norms and hard U.S. law deterrents.<sup>19</sup> This article will finally provide a methodology for infusing CSR themes and cultural competency training into law school curricula to better prepare international corporate lawyers for ethical practice and, more broadly, to hopefully prevent the furtherance of widespread international corporate abuses in the future.<sup>20</sup>

## II. Case Studies for CSR and Challenges

### A. *Substantial Harm by Corporations in Many Historic Cases*

Corporations have long been expanding overseas and encountering difficulties with expansion through subsidiaries and negotiation of work overseas with varying national legal norms and cultural differences.<sup>21</sup> This section will discuss five historic cases including U. S. involvement and attempted legal recovery and then will illuminate the corollary issues of poverty, slavery, and possibilities of bad conduct while multinational corporations are investing in many developing nations.<sup>22</sup> These examples will reveal the challenges for plaintiffs when attempting to recover for egregious extraterritorial harms against corporations in U.S. courts.<sup>23</sup> Sometimes, international dispute resolution and hefty

---

<sup>19</sup> See, e.g., James A. Sonne, *Cross-Cultural Lawyering and Religion: A Clinical Perspective*, 25 CLINICAL L. REV. 223, 223 (2018) (discussing the centrality of religion as a cross-cultural factor); Christine A. Hemingway & Patrick W. Maclagan, *Managers' Personal Values as Drivers of Corporate Social Responsibility*, 50 J. BUS. ETHICS 33, 33 (2004) (discussing how individual values drive change in a corporation).

<sup>20</sup> See, e.g., *id.*

<sup>21</sup> See Ignatius Odongo, *The Influence of Culture on Judgment and Decision Making*, 6 INT'L J. ADVANCED LEGAL STUD. & GOVERNANCE 1, 1 (2016); Yoshimichi Makiyama, *Globalization of Business Lawyering in Japan*, 41 HASTINGS INT'L & COMPAR. L. REV. 137, 137 (2018); John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on "Legal Processes and National Culture"*, 5 CARDOZO J. INT'L & COMPAR. L. 51, 52 (1997).

<sup>22</sup> See, e.g., Katherine Leanne Christ & Roger Leonard Burritt, *Current Perceptions on the Problem of Modern Slavery in Business*, 1 BUS. STRATEGY & DEV. 103, 103 (2018); David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 2017 WIS. L. REV. 641, 645-46 (2017); Ilias Bantekas, *Wealth and Growth-Based Policies Augment Global Poverty and Erode Human Rights: A Return to Human-Centered Thinking*, 1 INT'L HUM. RTS. L. REV. 30, 30 (2012).

<sup>23</sup> See, e.g., Stephen C. McCaffrey, *Accidents Do Happen: Hazardous Technology and International Tort Litigation*, 1 TRANSNAT'L LAW. 41, 42-58 (1988); Upendra Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of*

settlements against corporate actors were the only way to resolve claims.<sup>24</sup> These seminal cases still provide guidance for corporate lawyers today.<sup>25</sup>

### 1. *Bhopal Incident in India (1984)*

The Bhopal environmental disaster is still considered one of the worst international environmental accidents and industrial disasters of our time.<sup>26</sup> On December 3, 1984, thousands were killed and hundreds of thousands were harmed by the release of deadly gases and chemicals from a gas leak at Union Carbide India Ltd. plant in Bhopal, India.<sup>27</sup> The remnants of the disaster and toxins locally lingered near Bhopal for over twenty-five years, and it is still considered one of the world's worst industrial accidents.<sup>28</sup> This case was impossible to resolve in U.S. courts even though it involved a U.S. corporation (Union Carbide Corporation) with over fifty percent ownership in Union Carbide India Ltd., which operated the factory, and was ultimately determined to be a corporate actor through its subsidiary.<sup>29</sup> The Union Carbide Corporation in the

---

*Injustice: Learning from Bhopal Thirty Plus?*, 1 BUS. & HUM. RTS. J. 21, 21 (2016); Shyam Divan & Armin Rosencranz, *The Bhopal Settlement*, 19 ENV'T POL'Y & L. 166, 168 (1989).

<sup>24</sup> David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55, 58 (2005); see also Claire Methven O'Brien et al., *National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool*, 1 BUS. & HUM. RTS. J. 117, 117–18 (2016).

<sup>25</sup> See Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 333 (2004); Shanaira Udawadia, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L.J. 359, 362 (2004); see also O'Brien et al., *supra* note 24, at 120–21; Weissbrodt, *supra* note 24, at 58.

<sup>26</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 809 F.2d 195, 197 (2d Cir. 1987).

<sup>27</sup> See, e.g., Rhitu Chatterje, *Bhopal's Unlikely Legacy in the US*, PUB. RADIO INT'L (Dec. 7, 2009), <https://www.pri.org/stories/2009-12-07/bhopal-s-unlikely-legacy-us> [<https://perma.cc/PDP2-58AC>] (discussing how the Bhopal disaster spurred legislation around industrial hazards in the United States); Lori Ann Olejniczak, *Bhopal Disaster Litigation: A Jurisdictional Odyssey*, 2 EMORY J. INT'L DISP. RESOL. 205, 205 (1987); Hanson Hosein, *Unsettling: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L & COMPAR. L. REV. 285, 285–86 (1993).

<sup>28</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *aff'd, modified*, 809 F.2d 195 (2d Cir. 1987).

<sup>29</sup> See, e.g., Alan Taylor, *Bhopal: The World's Worst Industrial Disaster, 30 Years Later*, ATLANTIC (Dec. 2, 2014), <https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/> [<https://perma.cc/8HLW-YYDH>] (illustrating the depth of the tragedy through photographs); R. Clayton Trotter, Susan G.

United States, as is often the case, was not aware of how many risky toxins and gases were being used at the factory in India.<sup>30</sup> This incident, fortunately, was the impetus for many environmental and industrial disaster laws and additional regulations in the United States,<sup>31</sup> including the National Environmental Policy Act (“NEPA amendments”)<sup>32</sup> and the Emergency Planning and Community Right to Know Act.<sup>33</sup> The Second Circuit reviewed *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* and decided not to allow claims in the United States in favor of recovery in India because of forum non conveniens concerns.<sup>34</sup> On February 14, 1989, the Indian Supreme Court resolved the *Bhopal case* through a mutually agreeable settlement of claims for \$470 million against the United States.<sup>35</sup> The case left a host of lawsuits and tortious

---

Day & Amy E. Love, *Bhopal, India and Union Carbide: The Second Tragedy*, 8 J. BUS. ETHICS 439, 449 (1989).

<sup>30</sup> See, e.g., Taylor, *supra* note 29; Trotter et al., *supra* note 29, at 443 (“The last United States technician left in 1982 after his tour as Plant Manager ended.”); see also Tim Covell, *Bhopal Disaster Litigation: It’s Not Over Yet*, 16 N.C. J. INT’L L. & COM. REG. 279, 281 (1991).

<sup>31</sup> See Matthew E. Kahn, *Environmental Disasters as Risk Regulation Catalysts? The Role of Bhopal, Chernobyl, Exxon Valdez, Love Canal, and Three Mile Island in Shaping U.S. Environmental Law*, 35 J. RISK & UNCERTAINTY 1, 3 (2007); C.M. Abraham & Sushila Abraham, *The Bhopal Case and the Development of Environmental Law in India*, 40 INT’L & COMP. L.Q. 334, 358 (1991); Y.K. Tyagi & Armin Rosencranz, *Some International Law Aspects of the Bhopal Disaster*, 27 SOC. SCI. & MED. 1105, 1105 (1988).

<sup>32</sup> National Environmental Policy Act, as amended, 42 U.S.C. § 4321 et. seq.

<sup>33</sup> Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11001 et seq.; see also ELS REYNAERS KINI & GAUTAMBALA NANDESHWAR, ENVIRONMENTAL LAW AND PRACTICE IN INDIA: OVERVIEW (2019), Westlaw 0-503-2029 (describing various questions and answers about environmental law in India).

<sup>34</sup> See, e.g., *A Timeline of the Criminal Case Outstanding Against Union Carbide in Relation to the 1984 Bhopal Disaster*, BHOPAL MED. APPEAL, <https://www.bhopal.org/a-timeline-of-the-criminal-case-outstanding-against-union-carbide-in-relation-to-the-1984-bhopal-disaster/> [<https://perma.cc/G2HH-KHG7>] (describing the chronology of the *Bhopal* case in both the United States and India); Richard Schwadron, *The Bhopal Incident: How the Courts Have Faced Complex International Litigation*, 5 B.U. INT’L L.J. 445, 445 (1987). See generally Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENV’T L.J. 71 (2005) (creating a model to deconstruct environmental harm to humans and then applying that model to sixteen case studies).

<sup>35</sup> See, e.g., *Union Carbide/Dow Lawsuit (re Bhopal)*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/union-carbidedow-lawsuit-re-bhopal> [<https://perma.cc/TL76-2RM2>] (describing the timeline of the Bhopal litigation); Paul Richter, *\$470-Million Dollar Settlement for Bhopal OKd: Union Carbide to Pay 500,000 Claimants in India Gas Leak*, L.A. TIMES (Feb. 15, 1989),

claims in the United States and India, though, highlighting the complexity and difficulty of resolving such claims against an MNE for bad acts outside the United States.<sup>36</sup>

## 2. *Unocal Oil Pipeline in Myanmar (1996)*

The seminal *Unocal* cases,<sup>37</sup> involving injuries and human rights violations to citizens of Myanmar by Unocal, a U.S. oil corporation with subsidiaries that were building the oil pipeline in former Burma, were the first to allow recovery from a U.S. corporation in California courts for injuries suffered abroad.<sup>38</sup> For over a decade while building a pipeline in Southeast Asia, Unocal arguably facilitated and supported the Burmese military to overwork and commit human rights abuses such as raping, murdering, and torturing the workers involved in the Yadana gas pipeline project.<sup>39</sup> A lawsuit was filed on behalf of the victims in the California courts under the Alien Tort Statute,<sup>40</sup> and then it was appealed to the Ninth Circuit.<sup>41</sup> It was the first lawsuit of its kind,

---

<https://www.latimes.com/archives/la-xpm-1989-02-15-mn-2452-story.html>  
[<https://perma.cc/3VNE-9CHW>] (describing the Bhopal settlement).

<sup>36</sup> See, e.g., Ved P. Nanda, *For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Reflections on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute*, 15 DENV. J. INT'L L. & POL'Y 235, 235 (1987).

<sup>37</sup> See *Doe v. Unocal*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998) (dismissed for lack of personal jurisdiction), *aff'd* 248 F.3d 915 (9th Cir. 2001).

<sup>38</sup> See, e.g., *Doe v. Unocal, Summary and Documents*, EARTHRIGHTS INT'L, <https://earthrights.org/case/doe-v-unocal/#documentsff69-1a905f26-f4b6> [<https://perma.cc/HA5G-KL4E>] (discussing the history of Earthrights' lawsuit against Unocal); Laura Bowersett, *Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments*, 11 TRANSNAT'L LAW 361, 371 (1998).

<sup>39</sup> See, e.g., Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 841 (2009).

<sup>40</sup> See Alien Tort Statute ("Alien Tort Claims Act"), 28 U.S.C. § 1350 (stating that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"). See generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (discussing the evolution of the Alien Torts Act); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (discussing how transnational public law litigation merges private and public litigation).

<sup>41</sup> See *Doe v. Unocal: Timeline (1996-2005)*, EARTHRIGHTS INT'L, <https://earthrights.org/case/doe-v-unocal/#timelineff69-1a905f26-f4b6> [<https://perma.cc/EXF7-MDZC>] (discussing the history of EarthRights's lawsuit against Unocal); Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for*

which involved a successful Alien Tort Statute claim of human rights violation by a multinational corporation, and successful recovery and compensation for those victims with human rights claims in a U.S. court.<sup>42</sup> The State and Federal court cases had very long appeals processes and, in March 2005, Unocal finally agreed to settle the claims and compensate the victims out of court.<sup>43</sup> The cases took almost ten years to get through the courts in the United States, and it was generally considered a victory to get compensation for the victims against a private U.S. corporation in the domestic courts of the United States.<sup>44</sup> This paved the way for further Alien Tort claim lawsuits against complicit or bad behavior by American corporations on international soil under the Alien Tort Statute and provided an avenue for holding MNEs responsible for bad corporate actions abroad by the parent company or by subsidiaries.<sup>45</sup>

### 3. *Pfizer's Trovan Drug Trial in Nigeria (2001-2009)*

In response to genocide and other mass atrocities that have occurred internationally, the doctrine against genocide and punishment for such acts in international human rights, especially during times of war, has solidified as a doctrine of customary international law.<sup>46</sup> Genocide by corporate actors, though, and

*Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 419 (2002).

<sup>42</sup> Hall, *supra* note 41, at 410.

<sup>43</sup> *Doe v. Unocal: Timeline (1996-2005)*, *supra* note 41.

<sup>44</sup> See, e.g., *Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, EARTHRIGHTS INT'L, <https://earthrights.org/blog/historic-advance-for-universal-human-rights-unocal-to-compensate-burmese-villagers/> [<https://perma.cc/8TG9-H5YT>]; see also Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES (Mar. 22, 2005), <https://www.latimes.com/archives/la-xpm-2005-mar-22-fi-unocal22-story.html> [<https://perma.cc/92D7-B97L>]; Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMPAR. L. REV. 339 (2001).

<sup>45</sup> See Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT'L L. & POL. 39, 44-45 (2005); Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 489 (2001); Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 212 (2008).

<sup>46</sup> See, e.g., Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1129 (1982); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 368 (1999); Catharine A. MacKinnon,

punishment for death or genocide by MNEs is a relatively new concept.<sup>47</sup> The first case to involve testing of pharmaceuticals on human subjects by a U.S. corporation, *Pfizer Inc.*,<sup>48</sup> was brought in the U.S. District Court for the Southern District of New York in 2002 by Nigerian guardians for their minor children who suffered grave injuries while being tested with the Trovan drug in clinical trials abroad.<sup>49</sup> Beginning in 1996, Pfizer started clinical trials to test the drug Trovan<sup>50</sup> overseas after an outbreak of meningitis, measles, and cholera in Kano, Nigeria but did not receive proper informed consent for the trials.<sup>51</sup> Some of the children who received the low-dose administration of the Trovan drug during clinical trials also sustained permanent injuries and, tragically, others died from the administration of the trials.<sup>52</sup> After lengthy litigation in the United States and overseas in Nigeria, Pfizer finally agreed to a settlement to compensate victims who were substantially harmed during the clinical trials.<sup>53</sup> Although the U.S. courts seemed

---

*Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 7–8 (1994).

<sup>47</sup> See Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL'Y REV. 339, 341–42 (2012); see also Koh, *supra* note 40, at 2358–59; Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 446 (2001); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112 (2000).

<sup>48</sup> See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), *cert. denied*, 561 U.S. 1041 (2010).

<sup>49</sup> See *id.*; see also *Pfizer Lawsuit (re Nigeria)*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/pfizer-lawsuit-re-nigeria> [<https://perma.cc/53T7-6XU7>].

<sup>50</sup> See, e.g., Donald G. McNeil, Jr., *Nigerians Receive First Payments for Children Who Died in 1996 Meningitis Drug Trial*, N.Y. TIMES (Aug. 11, 2011), <https://www.nytimes.com/2011/08/12/world/africa/12nigeria.html> [<https://perma.cc/5U2W-4LBA>]. See generally Jacqui Wise, *Pfizer Accused of Testing New Drug Without Ethical Approval*, 322 BMJ CLINICAL RES. 194 (2001).

<sup>51</sup> See generally Patrick I. Okonta, *Ethics of Clinical Trials in Nigeria*, 55 NIGERIAN MED. J. 188 (2014); Ayodele S. Jegede, *Understanding Informed Consent for Participation in International Health Research*, 9 DEVELOPING WORLD BIOETHICS 81 (2009); Joe Stephens, *Pfizer Faces Criminal Charges in Nigeria*, WASH. POST (May 30, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052902107.html> [<https://perma.cc/68MC-UTQQ>].

<sup>52</sup> See Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 599 (2007); see also Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U.L. REV. 1117, 1129 (2011); Douglas Andrew Grimm, *Informed Consent for All - No Exceptions*, 37 N.M.L. REV. 39, 46 (2007).

<sup>53</sup> See generally Jeanne Lenzer, *Pfizer Settles with Victims of Nigerian Antibiotic Trial*, 343 BMJ CLINICAL RES. 387 (2011); Benjamin Fishman, *Binding Corporations to*

unwilling to apply the Alien Tort Statute extraterritorially,<sup>54</sup> the Nigerian government put additional pressure on Pfizer through a lawsuit in the Nigerian Federal high court in 2007 which resulted in the eventual settlement for the victims.<sup>55</sup> The *Pfizer* cases highlight a need for a clear international human rights standard for torts and genocide while medical corporations are conducting business in developing nations and testing new pharmaceuticals, which might endanger the already vulnerable local population who desperately need access to costly medicines.

#### 4. *Rana Plaza Factory Collapse in Bangladesh (2013)*

International labor violations and injuries also abound throughout recent corporate history, and international MNEs are not immune.<sup>56</sup> The Rana Plaza garment factory<sup>57</sup> with numerous clothing exports was an accident waiting to happen according to a governmental report of its construction<sup>58</sup> and numerous reports of structural issues plus bribing<sup>59</sup> to build an additional floor of the structure to house more workers and promote illegal work

---

*Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. REV. 1433 (2006).

<sup>54</sup> See Al Parrish, *Developments in the Law – Extraterritoriality*, 124 HARV. L. REV. 1226, 1258 (2011); see also William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1584 (2020).

<sup>55</sup> See Nicole Perlroth, *Pfizer's Nigerian Nightmare*, FORBES (Nov. 20, 2008), <https://www.forbes.com/forbes/2008/1208/066.html#5fbc1bae23a7> [<https://perma.cc/X983-UYJX>]; *Pfizer Lawsuit (re Nigeria)*, *supra* note 49; see also Amy F. Wollensack, *Closing the Constant Garden: The Regulation and Responsibility of U.S. Pharmaceutical Companies Doing Research on Human Subjects in Developing Nations*, 6 WASH. U. GLOB. STUD. L. REV. 747, 759 (2007).

<sup>56</sup> See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 92 (2002); Madeleine Grey Bullard, *Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 Hous. J. INT'L L. 139, 145 (2001); Robert C. Thompson et al., *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 843 (2009).

<sup>57</sup> See Larry Cata Backer, *Are Supply Chains Transnational Legal Orders: What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 U.C. IRVINE J. INT'L TRANSNAT'L & COMPAR. L. 11, 12 (2016); Motoko Aizawa & Salil Tripathi, *Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers*, 1 BUS. & HUM. RTS. J. 145, 145 (2016).

<sup>58</sup> Aizawa & Tripathi, *supra* note 57, at 145.

<sup>59</sup> See *id.* at 148.

conditions such as very low wages and long hours.<sup>60</sup> So, when the clothing factory collapsed in 2013 in the industrial suburb of Dhaka, Bangladesh, and killed 1,134 people, it was not a complete surprise to the clothing manufacturers and management who had received notice of the unsafe conditions.<sup>61</sup> Although the victims and their families have not yet received compensation, it invigorated the international community and MNEs to develop more stringent standards and worker protection regulations in the garment factory industry.<sup>62</sup> It is estimated that over one billion dollars is needed to address unsafe work conditions in the international labor community after Rana Plaza for better protection of workers.<sup>63</sup> Some international initiatives through the International Labour Organization (“ILO”) and Better Work Bangladesh<sup>64</sup> have improved the work conditions in the country,<sup>65</sup> however, many other international labor protections and investments are needed to protect workers in other impoverished nations.<sup>66</sup> In addition,

---

<sup>60</sup> See *The Rana Plaza Accident and Its Aftermath: The Rana Plaza Disaster, Savar, Bangladesh*, INT’L LAB. ORG. (“ILO”), [https://www.ilo.org/global/topics/geip/WCMS\\_614394/lang-en/index.htm](https://www.ilo.org/global/topics/geip/WCMS_614394/lang-en/index.htm) [<https://perma.cc/S98W-24B5>] (last visited Sept. 11, 2020); Michael Safi & Dominic Rushe, *Rana Plaza, Five Years on: Safety of Workers Hangs in Balance in Bangladesh*, GUARDIAN (Apr. 24, 2018), <https://www.theguardian.com/global-development/2018/apr/24/bangladeshi-police-target-garment-workers-union-rana-plaza-five-years-on> [<https://perma.cc/4KHF-ZAZW>]; BARRETT ET AL., *supra* note 7.

<sup>61</sup> BARRETT ET AL., *supra* note 7.

<sup>62</sup> See, e.g., Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 783 (2014); Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMPAR. LAB. L. & POL’Y J. 1, 1–2 (2013); Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT’L L. 1, 2–3 (2017).

<sup>63</sup> Aizawa & Tripathi, *supra* note 57, at 146–47, 150–51; see also *The Rana Plaza Building Collapse in Bangladesh—One Year on*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/the-rana-plaza-building-collapse-in-bangladesh-one-year-on> [<https://perma.cc/TZX7-AJFG>]; STAFF OF S. COMM. ON FOREIGN REL., 113TH CONG., REP. ON WORKER SAFETY AND LABOR RIGHTS IN BANGLADESH’S GARMENT SECTOR 113-22 (Comm. Print 2013); Michelle Chen, *6 Years After the Rana Plaza Collapse, Are Garment Workers Any Safer?*, NATION (July 15, 2019), <https://www.thenation.com/article/rana-plaza-unions-world/> [<https://perma.cc/9LGR-AYAP>].

<sup>64</sup> See, e.g., *Improving Working Conditions in the Ready Made Garment Industry: Progress and Achievements*, ILO (Sept. 2016), [https://www.ilo.org/dhaka/Whatwedo/Projects/WCMS\\_240343/lang-en/index.htm](https://www.ilo.org/dhaka/Whatwedo/Projects/WCMS_240343/lang-en/index.htm) [<https://perma.cc/VC9S-FSJ6>].

<sup>65</sup> *Id.*

<sup>66</sup> See *id.*



international corporate actors for garment industries need to be more aware of their direct control over the garment factories and manufacturing companies overseas and take efforts to eliminate illegal conduct.<sup>67</sup>

### 5. *Kiobel v. Royal Dutch Petroleum*<sup>68</sup> in Nigeria

Many oil companies also perpetrate subtle environmental and human rights atrocities overseas; the most recent examples stem from the Niger Delta and have been litigated in front of the U.S. Supreme Court in the *Kiobel* case.<sup>69</sup> The Shell and Royal Dutch Petroleum oil companies have been having issues with numerous oil spills and containment of environmental damage in the Niger River Delta for a decade.<sup>70</sup> In addition to the alleged environmental harm by the oil corporations abroad, though, the Center for Constitutional Rights, Nigerian families, the Kiobel family (on behalf of the late Dr. Barinem Kiobel), and representatives for eleven other Nigerian activists who were tortured and killed by the Nigerian military dictatorship filed a suit against Shell/Dutch

---

<sup>67</sup> See E. Christopher Johnson, *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083, 1117 (2015); see also Javed Siddiqui & Shahzad Uddin, *Human Rights Disasters, Corporate Accountability and the State*, 29 ACCT., AUDITING & ACCOUNTABILITY J. 679, 696–97 (2016). See generally Office of the U.N. High Commissioner for Human Rights, *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Managing Human Rights Risk in the Garment Sector Supply Chain – What Lessons Learned from the Perspective of the UN Guiding Principles on Business and Human Rights?* (June 20, 2013), [https://www.ohchr.org/\\_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Business/Session5/WG5SessionPanelDiscussion.pdf&action=default&DefaultItemOpen=1](https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Business/Session5/WG5SessionPanelDiscussion.pdf&action=default&DefaultItemOpen=1) [<https://perma.cc/86H7-P3TN>].

<sup>68</sup> See *Kiobel v. Royal Dutch Petrol.*, 569 U.S. 108 (2013).

<sup>69</sup> See *id.*

<sup>70</sup> See, e.g., AMNESTY INT'L, *NEGLIGENCE IN THE NIGER DELTA: DECODING SHELL AND ENI'S POOR RECORD ON OIL SPILLS*, (2018), <https://www.amnesty.org/download/Documents/AFR4479702018ENGLISH.PDF> [<https://perma.cc/987Z-NZWW>]; *Seeking Justice for the Ogoni Nine*, LIVING ON EARTH (June 21, 2019), <https://www.loe.org/shows/segments.html?programID=19-P13-00025&segmentID=6> [<https://perma.cc/2F4U-Y4BH>]; Rod Austin, *Ogoni Widows Testify at the Hague over Shell's Alleged Complicity in Killings*, GUARDIAN (Feb. 12, 2019), <https://www.theguardian.com/global-development/2019/feb/12/ogoni-widows-testify-the-hague-shell-alleged-complicity-killings> [<https://perma.cc/2YFA-MUGJ>]; *Shell Lawsuit (re: Nigeria—Kiobel & Wiwa)*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa> [<https://perma.cc/H3UU-ZSFL>].

Petroleum in the Southern District of New York for a violation of the Alien Tort Statute.<sup>71</sup> They alleged that the corporation was complicit in the torture and killing of activists in their execution by the Nigerian military dictatorship in the Niger Delta.<sup>72</sup> The case made it to the U.S. Supreme Court and then did not survive the jurisdictional application of the Alien Tort Statute,<sup>73</sup> and the Court decided that corporations like Shell or Dutch Petroleum could not be held liable for human rights abuses and torture overseas.<sup>74</sup> This was a huge defeat for international human rights advocates, especially for prosecuting abuses and injuries overseas by corporate actors.<sup>75</sup> However, some jurisdictions have had some success with creating norms through legislative or regulatory models of CSR and subsequent judicial enforcement.<sup>76</sup> The United Kingdom, Germany, and the European Union have articulated more specific CSR plans and regulations with tangible enforcement mechanisms.<sup>77</sup>

---

<sup>71</sup> See *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 123 (2d Cir. 2010); see also *Kiobel v. Royal Dutch Petrol. Co. (Amicus)*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus> [<https://perma.cc/7A7C-YHP9>] (last updated Mar. 29, 2018).

<sup>72</sup> *Kiobel*, 621 F.3d at 131–40.

<sup>73</sup> See *id.* at 125.

<sup>74</sup> See *Kiobel*, 569 U.S. at 115–25.

<sup>75</sup> See, e.g., Ralph G. Steinhardt, *Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations*, 28 MD. J. INT'L L. 1, 21–27 (2013); Andrew Culliver, *The Status of the Alien Tort Statute's Corporate Liability Question in a Post-Kiobel World*, 58 S. TEX. L. REV. 253, 277 (2016); Anna Grear & Burns H. Weston, *The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Landscape*, 15 HUM. RTS. L. REV. 21, 21 (2015).

<sup>76</sup> See generally HM GOV'T, CORPORATE SOCIAL RESPONSIBILITY REPORT (2008), <https://www.educationandemployers.org/wp-content/uploads/2014/06/corporate-responsibility-report-hm-gov.pdf> [<https://perma.cc/5LSX-BHBA>]; FIN. REP. COUNCIL, THE UK CORPORATE GOVERNANCE CODE (July 2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> [<https://perma.cc/5SL2-ECV5>] (setting out a standard of best practices on, *inter alia*, board composition and development, remuneration, and auditing, for the listed U.K. companies); see also *CSR Policies in Germany*, FED. MINISTRY OF LAB. & SOC. AFF., <https://www.csr-in-deutschland.de/EN/Policies/CSR-national/CSR-Policies-in-Germany/csr-policies-in-germany.html> [<https://perma.cc/YVK3-9SMR>] (last visited Oct. 1, 2020); *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 (Oct. 25, 2011).

<sup>77</sup> *Id.*

*B. Corollary Historical Challenges for International CSR Enforcement*

With international corruption and multinational corporate development in numerous developed and developing countries, the corollary issues of poverty, slavery, and surreptitious supply chain bad conduct persist and still present challenges for the international legal community.<sup>78</sup> The lack of incentives to act with proper global ethics and in accordance with the accepted principles of international CSR still pose numerous challenges to global development, and cases of impropriety still exist and persist.<sup>79</sup> Many posit that this is due to several innate issues of international corporate development and investment,<sup>80</sup> labelled as “corollary issues” in this paper. The three corollary issues that seem to drive both international corruption and bad actors in international business transactions are poverty, slavery, and greed in the form of bad acts in the supply chain to gain profit.<sup>81</sup> A 2018 Economic Intelligence Unit report revealed through a study of 800 supply chain executives that two-thirds of the respondents, all from major,

---

<sup>78</sup> See generally Köhler, *supra* note 1; IMF, WORLD ECONOMIC OUTLOOK: GLOBAL MANUFACTURING DOWNTURN, RISING TRADE BARRIERS (Oct. 2019), <https://www.imf.org/-/media/Files/Publications/WEO/2019/October/English/text.ashx> [<https://perma.cc/3T2X-SG7G>] [hereinafter IMF ECONOMIC OUTLOOK OCT. 2019]; IMF, WORLD ECONOMIC OUTLOOK: GROWTH SLOWDOWN, PRECARIOUS RECOVERY (Apr. 2019), <https://www.imf.org/-/media/Files/Publications/WEO/2019/April/English/text.ashx> [<https://perma.cc/75CT-845T>] [hereinafter IMF ECONOMIC OUTLOOK APR. 2019].

<sup>79</sup> See, e.g., Caitlin Fagan, *Corporate Social Responsibility and Foreign Contractors: Corporate Accountability for Worker Safety Abroad*, 62 ST. LOUIS U.L.J. 509, 512 (2018); Seira Shin-Clayton, *The Enforcement of Corporate Social Responsibility Through Contractual Terms in Business to Business Contracts Through the Supply Chain*, 24 AUCKLAND U.L. REV. 231, 253 (2018); Jennifer M. Green, *Corporate Torts: International Human Rights and Superior Officers*, 17 CHI. J. INT'L L. 447, 517 (2017); cf. Neli Frost, *Transnational Corporations as Agents of Legal Change: The Role of Corporate Social Responsibility*, 5 CAMBRIDGE J. INT'L & COMPAR. L. 502 (2016).

<sup>80</sup> See Ying Zhu, *Corporate Social Responsibility and International Investment Law: Tension and Reconciliation*, 2017 NORDIC J. COM. L. 90, 92 (2017); Travis Miller, *The Evolving Regulations and Liabilities Entwined in Corporate Social Responsibility*, 46 TEX. ENV'T L.J. 219, 220 (2017); Kevin Crow & Lina Lorenzoni Escobar, *International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?*, 36 B.U. INT'L L.J. 87, 117 (2018).

<sup>81</sup> See, e.g., Patrick Radden Keefe, *Corruption and Revolt*, NEW YORKER (Jan. 12, 2015), <https://www.newyorker.com/magazine/2015/01/19/corruption-revolt> [<https://perma.cc/FZ6P-AQDJ>]; Michel Dion, *Corruption, Fraud, and Cybercrime as Dehumanizing Phenomena*, 38 INT'L J. SOC. ECON. 466, 467 (2011).

developed economies, ignored major supply chain corruption issues.<sup>82</sup> Some of the supply chain management issues included child labor, living wages, working hour limits, gender equality, workplace safety, compensation for injury, pollution, climate change, corruption and bribery, and sourcing from violent areas or regimes.<sup>83</sup> For example, only 23% of the corporations addressed climate change issues<sup>84</sup> and 22% addressed child labor issues.<sup>85</sup> The gap between the G20 nations and poorer nations for international development and investment continues to widen.<sup>86</sup> Further, although there is heightened awareness now to international and domestic human trafficking in the U.S. and international community,<sup>87</sup> slavery still persists and influences international business, and sometimes is a factor for procurement of business and manufacturing.<sup>88</sup> The U.N. Office on Drugs and Crime has tried to prevent the continued human slave trade through the U.N. Convention on Transnational Organized Crime and its

---

<sup>82</sup> Jonathan Webb, *Two-Thirds of Corporations Ignore Corruption in Their Supply Chains*, FORBES (July 19, 2017), <https://www.forbes.com/sites/jwebb/2017/07/19/two-thirds-of-corporations-ignore-corruption-in-their-supply-chains/#2fac3e12348d> [<https://perma.cc/A6DB-HUTZ>]; see also Eric Blattberg, *32 Slaves Work for Me. How About You?*, WIRED (Sept. 22, 2011), <https://www.wired.com/2011/09/slavery-footprint-app> [<https://perma.cc/YZG9-MRGG>]; IMF ECONOMIC OUTLOOK OCT. 2019, *supra* note 78; IMF ECONOMIC OUTLOOK APR. 2019, *supra* note 78.

<sup>83</sup> Webb, *supra* note 82; see also ECONOMIST INTELLIGENCE UNIT, NO MORE EXCUSES – RESPONSIBLE SUPPLY CHAINS IN A GLOBALISED WORLD 21 (2017), <http://growthcrossings.economist.com/wp-content/uploads/sites/47/2017/07/EIU-SCB-RSC-WP.pdf> [<https://perma.cc/D83V-VHGM>].

<sup>84</sup> ECONOMIST INTELLIGENCE UNIT, *supra* note 83, at 20.

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., *The Role of Trade in Ending Poverty*, WORLD BANK, <https://www.worldbank.org/en/topic/trade/publication/the-role-of-trade-in-ending-poverty> [<https://perma.cc/Z6DQ-QBTG>] (last visited Dec. 29, 2019); *Economic Outlook No. 105 - May 2019*, OECD.STAT., <https://stats.oecd.org/Index.aspx?DataSetCode=EO> [<https://perma.cc/Y7J4-ARQJ>] (last visited Dec. 29, 2019).

<sup>87</sup> See generally INT'L BAR ASS'N, HUMAN TRAFFICKING AND PUBLIC CORRUPTION: A REPORT BY THE IBA'S PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING (Sept. 2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=E34FFA1D-8038-4AEC-A631-E0E2A7E0AD86> [<https://perma.cc/D8J5-9KMP>] [hereinafter IBA REPORT ON HUMAN TRAFFICKING].

<sup>88</sup> See *id.* See generally U.N. OFFICE ON DRUGS AND CRIME (“UNODC”), ISSUE PAPER: THE ROLE OF CORRUPTION IN TRAFFICKING IN PERSONS (2011), [https://www.unodc.org/documents/human-trafficking/2011/Issue\\_Paper\\_-\\_The\\_Role\\_of\\_Corruption\\_in\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/documents/human-trafficking/2011/Issue_Paper_-_The_Role_of_Corruption_in_Trafficking_in_Persons.pdf) [<https://perma.cc/SRX9-7MXU>].

protocols for trafficking in persons and smuggling of migrants.<sup>89</sup> Finally, supply chain corruption is being uncovered in a variety of contexts in international business and human rights organizations, and the ILO is confronting this issue in the context of corporate greed and human capital.<sup>90</sup> These historically tricky issues in the international business context for CSR and the aspirations of globally ethical behavior have also been identified by numerous scholars.<sup>91</sup> More recently, though, the international community has determined a need to more carefully audit the hard and soft law norms applicable to MNEs while conducting international business overseas.<sup>92</sup> The next section of this Article will identify the current established legal standards (“hard law” norms) for CSR and then give an overview of the aspirational norms for corporate behavior in an international context (“soft law” norms) from a U.S. corporate perspective. Then, the Article will briefly give a few comparative law examples of “hard law” CSR initiatives from the United Kingdom, Germany, and the European Union.

### III. International and U.S. Promotion of CSR

#### A. *Which Laws Apply? — International Soft and Hard Law Norms*

One of the struggles for domestic and international corporate actors when envisioning enforcement is identifying the international

---

<sup>89</sup> See *UNODC on Trafficking in Persons and Smuggling of Migrants*, UNODC, <https://www.unodc.org/unodc/en/human-trafficking/> [<https://perma.cc/HH48-B543>] (last visited Oct. 1, 2020). See generally Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445 (2017).

<sup>90</sup> See *Global Supply Chains*, ILO (May 25, 2016), <https://libguides.ilo.org/global-supply-chains-en> [<https://perma.cc/AT2C-ATF2>]; *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD, <https://www.oecd.org/corporate/mne/mining.htm> [<https://perma.cc/6L7B-K6CB>] (last visited Dec. 29, 2019).

<sup>91</sup> See, e.g., Leo E. Strine, *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 136 (2012); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transmittal New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 548 (2009); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 410 (2005); Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327, 328 (1994).

<sup>92</sup> See, e.g., Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS 385, 392–93 (2009).

and soft law norms for CSR.<sup>93</sup> Two international organizations, the Organisation for Economic Co-operation and Development (“OECD”) and the United Nations, have taken the lead in developing global ethical standards for MNEs.<sup>94</sup> This section will discuss the OECD norms, the U.N. norms of the “Ruggie Principles” and “Responsibility to Protect and Respect,” the U.N. High Commissioner for Human Rights norms, the ILO norms, the U.N. Environment Programme Guidelines, and U.N. Conference on Trade and Development (“UNCTAD”) Guidelines for international business.<sup>95</sup> All of these international norms by established international organizations have guided MNEs during recent years and have guided courts when analyzing Alien Tort Statute lawsuits based on injuries overseas by U.S. corporations.<sup>96</sup> They provide goalposts for enforcement in the international community and in the United States according to established and widely-recognized international rules in line with treaties and international principles that are recognized by scholars.<sup>97</sup> When the principles are not widely recognized, though, they provide “soft law” guidelines for corporate counsel to add to the CSR checklist of discussion items for advising their clients in international business transactions.<sup>98</sup>

---

<sup>93</sup> See Christiana Ochoa, *Corporate Social Responsibility and Firm Compliance: Lessons from the International Law-International Relations Discourse*, 9 SANTA CLARA J. INT’L L. 169, 172 (2011); Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 755 (1970); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 765 (2002).

<sup>94</sup> See generally U.N. Comm’n on Hum. Rts., *Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003); OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION* (2011), <https://www.oecd.org/daf/inv/mne/48004323.pdf> [<https://perma.cc/SRZ5-2M8N>]; U.N. GLOB. COMPACT, UNITED NATIONS GLOBAL COMPACT: PROGRESS REPORT (2018), available at <https://www.unglobalcompact.org/library/5637> [<https://perma.cc/8WB3-7HT3>].

<sup>95</sup> See generally John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 29 NETH. Q. HUM. RTS. 224 (2011).

<sup>96</sup> See, e.g., STEPHEN MULLIGAN, CONG. RES. SERV., LSB10147, *THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 2* (2018). For the most recent Alien Tort Statute Supreme Court case, see *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018).

<sup>97</sup> See, e.g., William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT’L L. 1045, 1046 (2012).

<sup>98</sup> See generally Nicolas Croquet, Asif Hameed & Tolga R. Yalkin, *Corporate Social*

### 1. OECD Guidelines

The OECD Guidelines<sup>99</sup> provide non-binding international norms for MNEs operating in a global context and in varying national jurisdictions.<sup>100</sup> It is the only attempt to create a comprehensive code of global ethics for multinational corporations.<sup>101</sup> There are currently forty-two countries, OECD and non-OECD, that have agreed to the norms and the 2011 revisions,<sup>102</sup> which include a substantially new human rights chapter that is consistent with the United Nation's "Protect, Respect, and Remedy" principles<sup>103</sup> for businesses and a new approach to due diligence and supply chain management.<sup>104</sup> The most recent 2011 revision to the OECD Guidelines for Multinational Enterprises require governments to encourage a global corporate code of ethics that regulates MNEs to respect "economic, environmental and social progress,"<sup>105</sup> "human rights of those affected by their activities,"<sup>106</sup> uphold "good corporate governance principles,"<sup>107</sup> and seek to "prevent or mitigate an adverse impact where they have not contributed to that impact,"<sup>108</sup> among other goals.<sup>109</sup> The OECD Guidelines and the more detailed commentary reveal specific

---

*Responsibility Soft Law Developments in the European Union*, OXFORD PRO BONO PUBLICO (July 30, 2009), <https://media.business-humanrights.org/media/documents/f903207305bab4f00b47ddf9f30356f82569847c.pdf> [https://perma.cc/L2EK-FF9V] (containing an unpublished legal research brief prepared for Professor John Ruggie). See Leyla Davarnejad, *In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes Under the OECD Guidelines for Multinational Enterprises*, 2011 J. DISP. RESOL. 351, 358 (2011).

<sup>99</sup> See OECD, *supra* note 94; see also OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [https://perma.cc/2HYD-SPG2]. [hereinafter OECD DUE DILIGENCE GUIDANCE FOR BUSINESS CONDUCT (2018)].

<sup>100</sup> OECD, *supra* note 94, at 3.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 4.

<sup>105</sup> *Id.* at 19.

<sup>106</sup> OECD, *supra* note 94, at 19.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 20.

<sup>109</sup> See *id.*; Ratner, *supra* note 47, at 487; Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 35 (2005).

standards for disclosure of bad acts in the supply chain<sup>110</sup> and codification of the standard that States have a duty to respect human rights and must seek ways to “prevent or mitigate adverse human rights impacts that are directly linked to their business operations.”<sup>111</sup> The guidelines also include provisions on combatting bribery, solicitation, and extortion,<sup>112</sup> and procedural assistance in the form of national contact points for reporting purposes in each jurisdiction.<sup>113</sup> The effectiveness of the national contact points for reporting bad corporate acts and preventing corruption or bribery in OECD countries will be tested during the next decade of mutual legal assistance under the new 2011 OECD guidelines.<sup>114</sup>

## 2. *U.N. Guidance: Ruggie Principles and “Responsibility to Protect and Respect” Framework*<sup>115</sup>

The United Nations (“U.N.”) also has several overarching norms for CSR, including the U.N.’s *Guiding Principles on Business and Human Rights* (“Ruggie Principles”),<sup>116</sup> “Responsibility to Protect and Respect” framework,<sup>117</sup> and other conventions that protect basic human rights such as the *Universal Declaration of Human Rights*.<sup>118</sup> The ILO has also adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>119</sup> The efforts of such international

<sup>110</sup> OECD, *supra* note 94, at 27.

<sup>111</sup> *Id.* at 31.

<sup>112</sup> *Id.* at 47–50.

<sup>113</sup> *Id.* at 71.

<sup>114</sup> *See id.* at 78.

<sup>115</sup> *See U.N. Guiding Principles: Protect, Respect & Remedy, supra* note 6.

<sup>116</sup> *Id.*

<sup>117</sup> *See* John G. Ruggie, Special Representative on Bus. & Hum. Rts. for the U.N. Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); John G. Ruggie, Special Representative on Bus. & Hum. Rts. for the U.N. Secretary-General, *Clarifying the Concepts of “Sphere of Influence” and “Complicity”*, U.N. Doc No. A/HRC/8/16 (May 15, 2008).

<sup>118</sup> *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810, at 71 (Dec. 10, 1948); *see also U.N. Guiding Principles: Protect, Respect & Remedy, supra* note 6.

<sup>119</sup> *See* ILO, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (2017), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf)



organizations bolster the efforts of the U.N. and the OECD, but one common critique is that there is not enough coordination and communication among international bodies.<sup>120</sup> The additional international normative framework for human rights in a corporate context includes the *ILO Declaration on Fundamental Principles and Rights at Work*,<sup>121</sup> the 1992 Rio Declaration,<sup>122</sup> the Millennium Development Goals,<sup>123</sup> the *Johannesburg Declaration on Sustainable Development* (2002),<sup>124</sup> the U.N. Convention Against Corruption,<sup>125</sup> and the 2005 World Summit Outcome.<sup>126</sup> More general public international law norms that might also have synergies with corporate accountability and CSR include the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”),<sup>127</sup> the *International Covenant on Civil and Political Rights* (“ICCPR”),<sup>128</sup> the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment* (“CAT”),<sup>129</sup> the *International Convention on the Elimination of All Forms of Racial Discrimination* (“ICERD”),<sup>130</sup> the *Convention on*

---

[<https://perma.cc/3H87-CKR8>] [hereinafter TRIPARTITE DECLARATION].

<sup>120</sup> See Marina Ottaway, *Corporatism Goes Global: International Organizations, Nongovernmental Organization Networks, and Transnational Business*, 7 *GLOB. GOVERNANCE* 265, 266 (2001).

<sup>121</sup> See Int’l Lab. Conf., 86th Sess., Geneva, Switz., *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, June 18, 1988, 37 *I.L.M.* 1237 (annex revised June 15, 2010).

<sup>122</sup> See U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

<sup>123</sup> U.N. MILLENNIUM DEV. GOAL INDICATORS, OFFICIAL LIST OF MDG INDICATORS (2008), <http://mdgs.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.pdf> [<https://perma.cc/8244-69UG>].

<sup>124</sup> World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002).

<sup>125</sup> U. N. Convention Against Corruption, Oct. 31, 2003, T.I.A.S. No. 06-1129, 2349 *U.N.T.S.* 41.

<sup>126</sup> G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005).

<sup>127</sup> *International Covenant on Economic, Social and Cultural Rights*, Jan. 3, 1976, 993 *U.N.T.S.* 3.

<sup>128</sup> *International Covenant on Civil and Political Rights*, Mar. 23, 1976, 999 *U.N.T.S.* 171.

<sup>129</sup> *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment*, June 26, 1987, 1465 *U.N.T.S.* 85.

<sup>130</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965, 660 *U.N.T.S.* 195.

*the Elimination of All Forms of Discrimination Against Women* (“CEDAW”),<sup>131</sup> and the *Convention on the Rights of the Child* (“CRC”).<sup>132</sup>

### 3. U.N. High Commissioner on Human Rights

The U.N. High Commissioner on Human Rights (“OHCHR”) and her special rapporteurs internationally monitor a variety of human rights norms and instruments,<sup>133</sup> and these issues often relate to the international business issues of CSR and corruption.<sup>134</sup> The OHCHR assists foreign governments with the implementation of international human rights standards, monitors the work and human rights progress in countries through special procedures like special rapporteurs and independent experts or working groups, and serves as Secretariat of the Human Rights Council.<sup>135</sup> Further, the process of Universal Periodic Review (“UPR”) for U.N. Member Nations furthers human rights work and enforcement of human rights treaties plus highlights deficiencies in various nations where countries develop businesses, so it is useful to analyze the business ecosystems of the U.N. member nations through data available at the OHCHR.<sup>136</sup> There are also separate independent fact-finding missions for country-specific issues by the U.N. Human Rights Council, and these may also be helpful for corporate counsel to advise their clients on specific human rights conditions.<sup>137</sup> UPR,

---

<sup>131</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33.

<sup>132</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. OFF. HIGH COMM’R FOR HUM. RTS. (“OHCHR”), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [<https://perma.cc/3V3L-TZPP>] (last visited Dec. 31, 2019).

<sup>133</sup> *See Core International Human Rights Instruments and Their Monitoring Bodies*, *supra* note 132.

<sup>134</sup> *See List of Human Rights Issues*, OHCHR, <https://www.ohchr.org/EN/Issues/Pages/ListOfIssues.aspx> [<https://perma.cc/EZ3S-CHLX>] (last visited Dec. 31, 2019).

<sup>135</sup> *See id.*; *see also About Us, What We Do*, OHCHR, <https://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx> [<https://perma.cc/6YJK-BFTV>] (last visited Oct. 2, 2020); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1408 (1999).

<sup>136</sup> *See Universal Periodic Review*, OHCHR, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> [<https://perma.cc/7593-MK5L>] (last visited Dec. 6, 2020).

<sup>137</sup> *See, e.g., International Commissions of Inquiry, Commission on Human Rights, Fact-Finding Missions and Other Investigations*, OHCHR, <https://www.ohchr.org/EN/>

which was established by the Human Rights Council in 2006, shares the best practices for human rights and provides a regular monitoring mechanism for independent review by working groups or special rapporteurs in U.N. Member countries.<sup>138</sup> There is currently no other global procedure that is similar to this robust review mechanism.<sup>139</sup> The review and critique procedures through the Human Rights Council are straightforward with regular cycles of review and dissemination of reports and other observations to U.N. Member States,<sup>140</sup> and the human rights instruments often interplay with private international law issues and would be relevant for international business lawyers as foundational knowledge.<sup>141</sup>

#### 4. *International Labour Organization*

The ILO<sup>142</sup> has devoted substantial resources toward the codification of international regulatory norms for MNEs.<sup>143</sup> This includes development of ethical standards in the workplace and prevention of bad acts or corruption in the supply chain for multinationals or small and medium enterprises that develop globally.<sup>144</sup> The ILO has made great strides through the *Tripartite Declaration of Principles Concerning Multinational Enterprises*

---

HRBodies/HRC/Pages/COIs.aspx [https://perma.cc/V93M-D477] (last visited Dec. 29, 2019).

<sup>138</sup> See G.A. Res. 60/251, U.N. Doc A/RES/60/251, at 3 (Apr. 3, 2006); *Basic Facts About the UPR*, OHCHR, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> [https://perma.cc/MGH5-XCDM] (last visited Dec. 29, 2019).

<sup>139</sup> *Basic Facts About the UPR*, *supra* note 138.

<sup>140</sup> See, e.g., *Cycles of Universal Period Review*, OHCHR, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx> [https://perma.cc/45DE-52XK] (last visited Sept. 25, 2020); *Documentation by Country*, OHCHR, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> [https://perma.cc/UM64-4N89] (last visited Sept. 25, 2020).

<sup>141</sup> See *Human Rights Council Complaint Procedure*, OHCHR, <https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> [https://perma.cc/3VJW-H5VE] (last visited Sept. 25, 2020); see also Koh, *supra* note 40.

<sup>142</sup> *Statistics and Databases*, ILO, <https://www.ilo.org/global/statistics-and-databases/lang--en/index.htm> [https://perma.cc/A2U2-DZXM] (last visited Dec. 6, 2020).

<sup>143</sup> *Multinational Enterprises*, ILO, <https://www.ilo.org/global/topics/employment-promotion/multinational-enterprises/lang--en/index.htm> [https://perma.cc/XM7G-ECUZ] (last visited Dec. 6, 2020).

<sup>144</sup> *Small and Medium Enterprises*, ILO, <https://www.ilo.org/global/topics/employment-promotion/small-enterprises/lang--en/index.htm> [https://perma.cc/Z47E-N9YF] (last visited Dec. 6, 2020).

*and Social Policy* (“MNE Declaration”)<sup>145</sup> to monitor workplace conditions and create an understanding for good work conditions that will strive to be congruent among nations.<sup>146</sup> Overall, the text of the MNE Declaration provides clear guidance for MNEs and promotes corporate adherence to a uniform ethical resolve to promote good work conditions and corporate behaviors.<sup>147</sup>

### 5. U.N. Environment Programme Guidelines

The U.N. Environment Programme (“UNEP”) also has standard guidelines<sup>148</sup> that are applicable to multinational businesses and should be generally known by international attorneys.<sup>149</sup> The UNEP initiatives mainly stem from sustainability and accounting initiatives related to the environment.<sup>150</sup> However, corporate counsel should also be aware of the unique environmental sustainability goals and globally responsible behavior requirements for MNEs that are members of the U.N. from an investment standpoint.<sup>151</sup> MNEs have an ethical duty to refrain from damaging the environment, such as facilitating climate change, when globally developing their businesses.<sup>152</sup> The *Johannesburg Declaration on Sustainable Development* from 2002 states that businesses have a duty to “contribute to the evolution of equitable and sustainable communities and societies” and “enforce corporate

<sup>145</sup> TRIPARTITE DECLARATION, *supra* note 119.

<sup>146</sup> *See generally id.* (providing corporate guidance via uniform ethical principles promoting quality work conditions and corporate behavior).

<sup>147</sup> *Id.*; *see also What is the ILO MNE Declaration?*, ILO, [https://www.ilo.org/empent/areas/mne-declaration/WCMS\\_570332/lang--en/index.htm](https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm) [<https://perma.cc/87U5-AYG9>] (last visited Dec. 6, 2020).

<sup>148</sup> *See About UN Environment*, U.N. ENV’T PROGRAMME (“UNEP”), <https://www.unenvironment.org/about-un-environment> [<https://perma.cc/UG47-VFSQ>] (last visited Dec. 6, 2020).

<sup>149</sup> *See generally* UNEP, CORPORATE SOCIAL RESPONSIBILITY AND REGIONAL TRADE AND INVESTMENT AGREEMENTS (2011), [https://wedocs.unep.org/bitstream/handle/20.500.11822/25936/csr\\_trade.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/25936/csr_trade.pdf?sequence=1&isAllowed=y) [<https://perma.cc/CP3S-FQE6>] (providing voluntary principles to a wide range of institutional investors for environmentally conscious investing).

<sup>150</sup> *See id.*

<sup>151</sup> *See id.* at 31–42; *see also About the PRI*, PRINCIPLES FOR RESPONSIBLE INV., <https://www.unpri.org/pri> [<https://perma.cc/4FXF-3R9P>] (last visited Jan. 1, 2020).

<sup>152</sup> *See* OECD DUE DILIGENCE GUIDANCE FOR BUSINESS CONDUCT (2018), *supra* note 99, at 105–07.

accountability[.]”<sup>153</sup> The implementation plan for the declaration noted the need to “enhance corporate, environmental, and social responsibility and accountability.”<sup>154</sup> Finally, the U.N. *Framework Convention on Climate Change*<sup>155</sup> and the *Convention on Biological Diversity*<sup>156</sup> were also signed by a majority of governments, and corporate counsel must be attuned to those public international environmental norms.<sup>157</sup>

#### 6. U.N. Conference on Trade and Development Guidelines (“UNCTAD”)<sup>158</sup>

The UNCTAD also promotes globally ethical behavior and CSR in trade and international business.<sup>159</sup> UNCTAD promotes initiatives and research for international finance, investment and enterprise, technology and innovation, trade agreements and regulations, and trade, culture, and the environment, as well as commodities.<sup>160</sup> As a result, it produces many relevant guidelines and publications for CSR and provides a wealth of datasets for corporate counsel.<sup>161</sup> The World Bank also compiles similar comparative data that would be useful for international attorneys in its annual “Doing Business” project compendium of economic data

<sup>153</sup> 17th Plenary Meeting of the World Summit on Sustainable Development, *Report of the World Summit on Sustainable Development*, A/Conf.199/20, ¶¶ 27, 29 (Sept. 4, 2002) [hereinafter *Johannesburg Declaration*]; see also UNEP, UNEP IN 2002 (2002), [https://wedocs.unep.org/bitstream/handle/20.500.11822/8556/UNEP\\_Annual\\_Report\\_2002.pdf?sequence=4&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/8556/UNEP_Annual_Report_2002.pdf?sequence=4&isAllowed=y) [<https://perma.cc/PVG7-R7A3>] [hereinafter UNEP 2002 ANNUAL REPORT].

<sup>154</sup> *Johannesburg Declaration*, *supra* note 153, annex.

<sup>155</sup> See U.N. Framework Convention on Climate Change, May, 9, 1992, 1771 U.N.T.S. 107 (1992).

<sup>156</sup> See U.N. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (1992).

<sup>157</sup> UNEP 2002 ANNUAL REPORT, *supra* note 153, at 3.

<sup>158</sup> See UNCTAD, GUIDANCE ON CORPORATE RESPONSIBILITY INDICATORS IN ANNUAL REPORTS (2008), [https://unctad.org/system/files/official-document/iteteb20076\\_en.pdf](https://unctad.org/system/files/official-document/iteteb20076_en.pdf) [<https://perma.cc/5UM7-G9P4>]; UNCTAD, PUBLICATIONS LIST (2000-2018) (2018), [https://unctad.org/en/PublicationsLibrary/diae2018\\_Bibliography\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diae2018_Bibliography_en.pdf) [<https://perma.cc/8HDQ-Q6E8>] [hereinafter UNCTAD PUBLICATIONS LIST].

<sup>159</sup> See UNCTAD PUBLICATIONS LIST, *supra* note 158; *Themes*, UNCTAD, <https://unctad.org/en/Pages/themes.aspx> [<https://perma.cc/935P-UQSE>] (last visited Oct. 2, 2020).

<sup>160</sup> *Themes*, *supra* note 159.

<sup>161</sup> See *Statistics*, UNCTAD, <https://unctad.org/en/Pages/statistics.aspx> [<https://perma.cc/DK7U-D6UP>] (last visited Jan. 1, 2020).

by country or topic.<sup>162</sup> International organizations, in general, are essential tools and vital resources for international corporate counsel to comprehensively understand the current international business norms for CSR.

*B. How to Enforce Domestically? — An Outline of CSR in the United States*

The United States has evolved in its development of hard and soft law norms for MNEs and standards for international and U.S. corporations. The legislation in the United States is sometimes an implementation of an international standard, such as a treaty or international agreement, but it is sometimes separate Federal or State legislation or a unique common law development for the United States.<sup>163</sup>

*1. Foreign Corrupt Practices Act*

Corporate counsel in the United States should be generally aware of the history of corruption and bribery by MNEs and the regulation of extraterritorial acts by U.S. corporations and public officials abroad through anti-bribery conventions.<sup>164</sup> The United States spearheaded the international anti-corruption movement after the Watergate scandal put international corruption in the spotlight in the 1970s.<sup>165</sup> Until the Foreign Corrupt Practices Act (“FCPA”)<sup>166</sup> passed in 1977 after illegal payments to foreign officials were uncovered, the United States had not adequately addressed foreign corrupt practices in the context of extraterritorial

<sup>162</sup> See, e.g., WORLD BANK GROUP, DOING BUSINESS 2020: COMPARING BUSINESS REGULATION IN 190 ECONOMIES (2020), <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [<https://perma.cc/F6BH-VWV6>].

<sup>163</sup> See Firuza Madrakhimova, *History of Development of Corporate Social Responsibility*, 4 J. BUS. & ECON. 509, 513 (2013) (discussing U.S. developments in CSR beginning in the 1970s).

<sup>164</sup> See, e.g., U.N. Convention Against Corruption, *supra* note 125.

<sup>165</sup> Abiola O. Makinwa, *Researching Civil Remedies for International Corruption: The Choice of the Functional Comparative Method*, 2 ERASMUS L. REV. 331, 332 (2009) (“[T]he Watergate scandal in the U.S. led to the passage of the Foreign Corrupt Practices Act (FCPA).”).

<sup>166</sup> See Foreign Corrupt Practice Act, 15 U.S.C. §§ 78dd-1 to -3; see also *Foreign Corrupt Practice Act*, U.S. DEP’T OF JUST. (“DOJ”), <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> [<https://perma.cc/8HNG-LQXJ>] (last visited Jan. 1, 2020).

business.<sup>167</sup> The Watergate scandal uncovered a myriad of bribery payments by U.S. businesses to foreign public officials.<sup>168</sup> In historically uncharted territory, the United States addressed the illegal, and sometimes criminal, activities that businesses should not undertake when conducting international business.<sup>169</sup>

Few prosecutions ensued from the FCPA in its early years because the anti-bribery statutory language was unclear to the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”) in the 1980s and 1990s.<sup>170</sup> However, the 1998 amendments<sup>171</sup> to the FCPA implemented the treaty obligations of the OECD’s Anti-Bribery Convention.<sup>172</sup> With this 1998 revision, the DOJ and SEC began to more vigorously prosecute FCPA violations for facilitating procurement of business deals in foreign jurisdictions through bribes or other payments to public officials.<sup>173</sup>

Since 1998, the DOJ has increased prosecution of FCPA violations, making the United States the leader in foreign corrupt practices enforcement.<sup>174</sup> Two recent cases highlight this recent

---

<sup>167</sup> See MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 1–45 (2014).

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See, e.g., Justin F. Marceau, *A Little Less Conversation, a Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285 (2007) (identifying recent controversial FCPA cases and discussing particular FCPA provisions).

<sup>171</sup> International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (1998).

<sup>172</sup> S. REP. NO. 105-277 (1998); see also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 19, 1997, S. Treaty Doc. No. 105-43 (1998), 37 I.L.M. 1 (establishing legally binding standards to criminalize bribery of foreign public officials in international business transactions).

<sup>173</sup> See *FCPA Related Enforcement Actions*, DOJ, <https://www.justice.gov/criminal-fraud/related-enforcement-actions> [<https://perma.cc/3AJ3-CVGR>] (last visited Jan. 1, 2020) (listing enforcement actions from 1977 to present); *Opinion Releases Index*, DOJ, <https://www.justice.gov/criminal-fraud/opinion-releases-index> [<https://perma.cc/HGN9-M9KC>] (last visited Jan. 1, 2020) (listing released FCPA opinions from 1980-2014); see also *Foreign Corrupt Practices Act Clearinghouse*, STAN. L. SCH., <http://fcpa.stanford.edu/> [<https://perma.cc/Y3X9-NSJ3>] (last visited Dec. 6, 2020) (reporting mainly bribery cases under Section 78dd-2 of the FCPA).

<sup>174</sup> See generally KOEHLER, *supra* note 167, at 169–233 (providing a history of and rationale for the FCPA).

vigor in prosecution, which often leads to settlement.<sup>175</sup> During the Wal-Mart scandal in Mexico and several other countries in 2011<sup>176</sup> involving illegal payments made to facilitate store openings in Mexico, the DOJ was at the forefront of foreign corrupt practices exposure because a major U.S. corporate entity revealed bribery violations in conjunction with foreign business expansion.<sup>177</sup>

## 2. *Alien Tort Statute*<sup>178</sup> and *Torture Victims Protection Act*<sup>179</sup>

Corporate counsel in the United States should be generally aware of recent private and public international law litigation under the Alien Tort Statute and Torture Victims Protection Act.<sup>180</sup> Further, MNEs and their corporate counsel should also be aware of the succinct nature of the statute and its jurisdictional applicability to corporations post-*Kiobel* because of the prominent line of Alien Tort Statute and Torture Victims Protection Act Supreme Court cases.<sup>181</sup> There is now a more restrictive approach in U.S. Federal

<sup>175</sup> See Roger M. Witten & Jay Holtmeier, *A Spiraling Caseload Under the Foreign Corrupt Practices Act*, Law.com (Feb. 23, 2009), <https://www.law.com/almID/1202428507122/> [<https://perma.cc/4K66-U7DM>]; Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 432 (2012).

<sup>176</sup> See, e.g., *Walmart Inc.'s Involvement in Multiple Countries*, STAN. L. SCH., <http://fcpa.stanford.edu/fcpa-matter.html?id=318> [<https://perma.cc/JU5B-22MN>] (last visited Sept. 13, 2020) (identifying a recent 2019 Wal-Mart bribery scandal in Brazil with over \$4.3 million in sanctions imposed after revealing numerous instances of bribery in Brazil and other countries).

<sup>177</sup> See generally Miguel Bustillo & Joe Palazzolo, *Wal-Mart Discloses a Corruption Probe*, WALL ST. J. (Dec. 9, 2011), <https://www.wsj.com/articles/SB10001424052970203501304577086933145615936> [<https://perma.cc/c4c9-sxy8>].

<sup>178</sup> 28 U.S.C. § 1350 et seq.

<sup>179</sup> Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 et seq.

<sup>180</sup> See *id.* See generally *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (revealing injuries by terrorist acts committed and facilitated by Arab Bank and a claim of CHIPS payments to benefit terrorists via New York branch); *Kiobel*, 569 U.S. 108 (revealing human rights and environmental harm by Royal Dutch Shell); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (involving the FTCA and detention of a Mexican national); *Abdullahi*, 562 F.3d 163 (detailing Pfizer's medical experimentation of drug on human subjects, including children, in Nigeria); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (involving genocide and war crimes); *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (including statute use of torture).

<sup>181</sup> See *Kiobel*, 569 U.S. at 108. For more on the prominence of the Alien Tort Statute litigation in the Supreme Court, see generally MULLIGAN, *supra* note 96; STEPHEN MULLIGAN, CONG. RES. SERV., *THE ALIEN TORT STATUTE (ATS): A PRIMER* (2018); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law*



courts to invoking the Alien Tort Statute and Torture Victims Protection Act for injuries incurred by individuals overseas due to human rights violations or other death or injuries caused by a U.S. corporate entity after the *Kiobel* and *Jesner* cases.<sup>182</sup>

### 3. *Dodd-Frank CSR Mandates*

Corporations should also be generally aware of the new CSR Sections 1502-1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act and associated SEC regulations<sup>183</sup> for conflict minerals from the Democratic Republic of Congo (“DRC”).<sup>184</sup> Sections 1502 through 1504 of the Dodd-Frank Act require greater transparency by businesses overseas for chain of custody for certain minerals like tantalum, tin, gold or tungsten and their commercial development from unstable country regimes, such as the DRC and others, to prevent human rights violations in developing countries.<sup>185</sup> The regulation also focuses on conflict minerals, which are minerals from politically unstable regions that may be used to finance armed groups or corruption,<sup>186</sup> and their disclosure requirements for corporations doing business internationally and procuring business in developing countries.<sup>187</sup>

*Litigation After Kiobel*, 64 DUKE L.J. 1023 (2015).

<sup>182</sup> See, e.g., MULLIGAN, *supra* note 96.

<sup>183</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502-04, 124 Stat. 1376, 2213-23 (2010); see also *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SEC. & EXCH. COMM’N (“SEC”), <https://www.sec.gov/opa/Article/2012-2012-163htm---related-materials.html> [<https://perma.cc/CW6E-SBR8>] (last updated Mar. 14, 2017) [hereinafter *SEC Fact Sheet*].

<sup>184</sup> *SEC Fact Sheet*, *supra* note 183.

<sup>185</sup> *Id.* See generally John B. Bellinger III et al., *New Corporate Social Responsibility Requirements: Dodd-Frank Act Mandates Disclosure of SEC of Payments to Foreign Governments and Use of Minerals from the Democratic Republic of Congo*, in ARE YOU READY?: A COMPENDIUM OF ADVISORIES ON THE DODD-FRANK ACT 104 (2010), [https://www.arnoldporter.com/-/media/files/perspectives/publications/2010/07/are-you-prepared-a-compendium-of-advisories-on-t\\_/files/newsletter-item/fileattachment/doddfrankactadvisoriescompendium.pdf?](https://www.arnoldporter.com/-/media/files/perspectives/publications/2010/07/are-you-prepared-a-compendium-of-advisories-on-t_/files/newsletter-item/fileattachment/doddfrankactadvisoriescompendium.pdf?) [<https://perma.cc/R3HE-CN6X>]; *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC, <https://www.sec.gov/spotlight/dodd-frank.shtml> [<https://perma.cc/BA2X-S4ZS>] (last updated Feb. 14, 2019).

<sup>186</sup> *The Regulation Explained*, EUR. COMM’N, <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/> [<https://perma.cc/34TW-Z66V>] (last updated Dec. 13, 2017).

<sup>187</sup> See 17 C.F.R. pts. 240 & 249b; see also Fatima Alali & Sophia I-Ling Wang,

#### 4. California State Law on Supply Chains

The State of California has furthered the effort of globally ethical behavior by MNEs by enacting the new California State law on transparency in corporate supply chains.<sup>188</sup> The recent law requires qualifying companies, including retailers or manufacturers with more than \$100 million in global receipts and with assets or payroll over \$50,000 in California, to disclose through a link on their website homepage the precise nature and scope of their efforts (or lack of efforts) to eradicate forced labor from their worldwide supply chains.<sup>189</sup> This is the first U.S. State effort to hopefully eradicate unethical and corrupt behavior from the corporate supply chain and other nefarious conduct that might flow into our domestic stream of commerce.<sup>190</sup>

#### 5. Human Trafficking Statutes

Human trafficking continues to be both an international and domestic issue with the investment in overseas ventures and international business transactions, generally.<sup>191</sup> In addition to the U.N. Protocol to Prevent, Suppress, and Punish Trafficking as a Supplement to the U.N. Convention on Transnational Organized Crime<sup>192</sup> and European and Inter-American Conventions Against Trafficking of Human Beings,<sup>193</sup> the United States also has enacted

*Conflict Minerals Disclosure Requirements and Corporate Social Responsibility*, CPA J. (July 2018), <https://www.cpajournal.com/2018/07/18/conflict-minerals-disclosure-requirements-and-corporate-social-responsibility/> [<https://perma.cc/S6T5-7M9F>].

<sup>188</sup> See generally KAMALA D. HARRIS, ATT'Y GEN., CAL. DEP'T OF JUST., CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> [<https://perma.cc/L2E2-8B3V>]. See The California Transparency in Supply Chains Act, S.B. 657, 2009-2010 Session (Cal. 2010); *The California Transparency in Supply Chains Act: Introduction*, ST. OF CAL. DEP'T OF JUST., <https://oag.ca.gov/SB657> [<https://perma.cc/C5C8-TBMB>] (last visited Oct. 2, 2020).

<sup>189</sup> HARRIS, *supra* note 188.

<sup>190</sup> See *id.*

<sup>191</sup> See UNODC on *Trafficking in Persons and Smuggling of Migrants*, *supra* note 89. See generally Gerald T. Hathaway & Matthew A. Fontana, *Business and Human Rights: Threading the Needle of Multiple Jurisdictions in Supply Chain Integrity, Including Human Trafficking Compliance*, 2018 A.B.A. SEC. PUB. LAB. & EMP. L. 10

<sup>192</sup> Protocol to Prevent., Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319.

<sup>193</sup> See Convention on Action Against Trafficking in Human Beings, May 16, 2005,

legislation to prohibit trafficking of women, children, and others through the Trafficking Victims Protection Act of 2000.<sup>194</sup> This Federal statute ensures that any human trafficking is criminally prosecuted and, hopefully, prevented within the United States.<sup>195</sup> Polaris, a U.S. organization devoted to combatting trafficking, provides a helpful U.S. national hotline to help survivors of human trafficking and to report human trafficking cases in coordination with the FBI.<sup>196</sup>

### 6. *Environmental Statutes*

The United States has enacted several environmental statutes,<sup>197</sup> such as the Clean Air Act,<sup>198</sup> Clean Water Act,<sup>199</sup> and National Environmental Policy Act,<sup>200</sup> which MNEs and corporate counsel should be generally aware of in addition to the international conventions and norms. These Federal domestic statutes often work in tandem with their overarching international conventions.<sup>201</sup> It

C.E.T.S. No. 197; *see also About the Convention*, COUNCIL OF EUR., <https://www.coe.int/en/web/anti-human-trafficking/about-the-convention> [<https://perma.cc/9HZM-J9BS>] (last visited Oct. 2, 2020) (providing further context and resources on the Convention).

<sup>194</sup> *See* Trafficking Victims Protection Act of 2000, as amended, 22 U.S.C.A. §§ 7101 et seq.; *see also* 18 U.S.C. §§ 1581, 1584, 1589–92 (making various forms of involuntary servitude unlawful at the federal level); *Involuntary Servitude, Forced Labor, and Sex Trafficking Statutes Enforced*, DOJ., <https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced> [<https://perma.cc/RW8P-5PFF>] (last updated Aug. 6, 2015).

<sup>195</sup> *See* Trafficking Victims Protection Act §§ 7101 et seq.

<sup>196</sup> *See* POLARIS, 2017 STATISTICS FROM THE NATIONAL HUMAN TRAFFICKING HOTLINE AND BEFREE TEXTLINE (2017), <https://polarisproject.org/wp-content/uploads/2019/09/2017NHThStats-1.pdf> [<https://perma.cc/S6D4-WYKL>]; POLARIS, 2019 DATA REPORT: THE U.S. NATIONAL HUMAN TRAFFICKING HOTLINE, (2019), <https://humantraffickinghotline.org/sites/default/files/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf> [<https://perma.cc/A9FY-7KYL>] (reporting a 20% increase in 2019 for the number of human trafficking victims and survivors calling the hotline).

<sup>197</sup> *See* DAVID M. BEARDEN ET AL., CONG. RES. SERV. RL30798, ENVIRONMENTAL LAWS: SUMMARIES OF MAJOR STATUTES ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY (2013).

<sup>198</sup> Clean Air Act, 42 U.S.C. §§ 7401-7515.

<sup>199</sup> Clean Water Act, 33 U.S.C. §§ 1251-1388.

<sup>200</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321-4347.

<sup>201</sup> *See* Heidi Frostestad Kuehl, *A Basic Guide to International Environmental Legal Research*, NYU GLOBALEX RSCH. GUIDE (May/June 2017), *available at* [https://www.nyulawglobal.org/globalex/International\\_Environmental\\_Legal\\_Research1](https://www.nyulawglobal.org/globalex/International_Environmental_Legal_Research1).

would behoove corporate counsel to generally be aware of the environmental standards in the United States when expanding corporations and creating corporate policies. Law students should also learn those basic principles of environmental laws and, likewise, how they may differ from international environmental norms.

### 7. *U.S. Labor Law Standards*

There are also established prohibitions against underage workers and labor law regulations for overtime work and fair pay in the United States<sup>202</sup> that align with the international standards and are important for U.S. corporate counsel. These Federal Acts, including the Fair Labor Standards Act<sup>203</sup> and Lilly Ledbetter Fair Pay Act of 2009,<sup>204</sup> have provisions for equitable wages, minimum age of employment, agricultural work, and regulation of foreign laborers.<sup>205</sup>

## IV. Harnessing the Complementary Tools of Cultural Competency and CSR in International Business Contracts

### A. *Overview of Cultural Competency*

Awareness of cultural competency in the health sciences, business, and education sectors began in the United States in the mid-1960s in conjunction with the Civil Rights Act of 1964<sup>206</sup> and

---

html [<https://perma.cc/2SLZ-RM2H>]. The Clean Air Act and Environmental Protection Act amendments, for example, are the U.S. domestic implementation of the U.N. 1979 Convention on Long-Range Transboundary Air Pollution and U.N. Climate Change Conventions. *See, e.g.*, 1979 Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217; *The Convention and Its Achievements*, U.N. ECON. COMM'N FOR EUR., <https://www.unecce.org/environmental-policy/conventions/envlrtap/welcome/the-air-convention-and-its-protocols/the-convention-and-its-achievements.html> [<https://perma.cc/K2A2-CJEM>] (last visited Oct. 2, 2020).

<sup>202</sup> *See, e.g.*, Fair Labor Standards Act of 1938 (“FLSA”), as amended, 29 U.S.C. et seq.; 29 C.F.R. pt. 570; *Workers Under 18*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/hiring/workersunder18> [<https://perma.cc/Q9N5-PFR3>] (last visited Oct. 2, 2020).

<sup>203</sup> FLSA, as amended, 29 U.S.C. et seq.

<sup>204</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq.).

<sup>205</sup> *See* FLSA, 29 U.S.C. §§ 201-219; Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-12, 123 Stat. 5 1, 2.

<sup>206</sup> *See* Civil Rights Act of 1964, 42 U.S.C. §§ 1975 et seq., Pub. L. 88-352, 78 Stat.

has only grown as an educational movement today.<sup>207</sup> Cross cultural training has been particularly emphasized and successful in the health and business fields with an emphasis on clinical settings.<sup>208</sup> The practice of law is increasingly cross-cultural when dealing with interactions with diverse clients and providing appropriate legal advice.<sup>209</sup> Both Harvard Law School and Stanford Law School have clinical training programs in cultural competency for their clinics.<sup>210</sup>

---

241; 42 U.S.C. §§ 2000a-2000a-6.

<sup>207</sup> See generally Mayia Thao & Mona Tawatao, *Developing Cultural Competence in Legal Services Practice*, 38 CLEARINGHOUSE REV. 244 (2004-2005); VERA A. MYERS, *MOVING DIVERSITY FORWARD: HOW TO GO FROM WELL-MEANING TO WELL-DOING* (2011). See DAVID LIVERMORE, *LEADING WITH CULTURAL INTELLIGENCE: THE REAL SECRET TO SUCCESS* 43-98 (2d ed. 2015).

<sup>208</sup> See Carla Boutin-Foster, Jordan C. Foster & Lyuba Konopasek, *Physician, Know Thyself: The Professional Culture of Medicine as a Framework for Teaching Cultural Competence*, 83 ACAD. MED. 106 (2008). See generally ML Romanello & K Holtgreffe, *Teaching for Cultural Competence in Non-Diverse Environments*, 7 INTERNET J. ALLIED HEALTH SCI. & PRAC. 1 (2009) (revealing the Purnell Model for Cultural Competence which emphasizes cultural competency as an individualized plan of care that begins with performing an assessment through a cultural lens and accepting and respecting cultural differences); Carmen J. Beamon, Vik Devisetty, Jill M. Forcina Hill, William Huang, & Janelle A. Shumate, *Cultural Competency Guide: A Guide to Incorporating Cultural Competency into Health Professionals' Education and Training*, NAT'L HEALTH L. PROGRAM (Mar. 2006), [https://www.migrationpolicy.org/sites/default/files/language\\_portal/CulturalCompetency.052306.pdf](https://www.migrationpolicy.org/sites/default/files/language_portal/CulturalCompetency.052306.pdf) [<https://perma.cc/4CY4-2VKE>]; Dodi Meyer et al., *Training for Better Care: A Cultural Competency Curriculum for the Health Professions*, COLUM. U. MED. CTR. (2006), [http://www.columbia.edu/itc/hs/medical/residency/peds/new\\_compeds\\_site/pdfs\\_new/cultural\\_competency\\_manual-10-25-07.pdf](http://www.columbia.edu/itc/hs/medical/residency/peds/new_compeds_site/pdfs_new/cultural_competency_manual-10-25-07.pdf) [<https://perma.cc/98QU-FJZ3>]; *About Project ReMADE*, STAN. L. SCH., <https://law.stanford.edu/project-remade/about-project-remade/#slnav-our-team> [<https://perma.cc/7ZJ4-MRPU>] (last visited Dec. 6, 2020) (describing program of Stanford training for all volunteers in ReMADE and San Quentin prison course); Veronica Boix Mansilla & Anthony Jackson, *Educating for Global Competence: Learning Redefined for an Interconnected World*, in *MASTERING GLOBAL LITERACY, CONTEMPORARY PERSPECTIVES* 5 (2013); *Developing Cultural Intelligence (Online)*, HARV. DIV. OF CONTINUING EDUC., <https://www.extension.harvard.edu/professional-development/programs/developing-cultural-intelligence-online> [<https://perma.cc/R2HP-GXS3>] (last visited Dec. 6, 2020).

<sup>209</sup> See generally Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, MICH. B.J. 38 (2008); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001-2002); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering, and Race*, 3 FLA. COASTAL L.J. 219 (2001-2002); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010).

<sup>210</sup> See, e.g., *International Human Rights Clinic*, STAN. L. SCH., <https://law.stanford.edu/international-human-rights-and-conflict-resolution-clinic/#slnav-people> [<https://perma.cc/6ZAS-PZCX>] (last visited Oct. 2, 2020); *About*

Cultural competency is generally defined as a recognition and overall awareness of the implications of individualist, moderate, and collectivist cultures.<sup>211</sup> Some cultural competency curricula, such as the program at Fordham Law School's Feerick Center for Social Justice, also integrate "difference" training to develop a more client-centered approach and analyze the impact of poverty.<sup>212</sup> The more traditional Purnell Model for Cultural Competence, which is used in health sciences,<sup>213</sup> may also shed light on a useful definition and application in clinical settings through a detailed chart of concepts of cultural consciousness for variant cultural norms: "age, generation, nationality, race, color, gender, religion, educational status, socioeconomic status, occupation, military status, political beliefs, urban versus rural residence, enclave identity, marital status, parental status, physical characteristics, sexual orientation, gender issues, and reasons for migration (sojourner, immigrant, undocumented status)."<sup>214</sup> One of the most prominent studies in

---

*Project ReMADE*, *supra* note 208; *Case Study Resources*, HARV. L. SCH., <http://casestudies.law.harvard.edu/case-study-resources/> [<https://perma.cc/LAN3-8JAS>] (last visited Dec. 6, 2020). Columbia Law School also discusses cultural competency within the framework of their "Leadership Training Initiative." See *Leadership Training Initiative Launches*, COLUM. L. SCH. (Nov. 30, 2017), <https://www.law.columbia.edu/news/archive/leadership-training-initiative-launches> [<https://perma.cc/2G2H-JTVR>].

<sup>211</sup> LIVERMORE, *supra* note 207. See generally DAVID LIVERMORE, EXPAND YOUR BORDERS: DISCOVER TEN CULTURAL CLUSTERS (2013) (identifying ten cultural clusters of the world and associated characteristics within the broad individualism/collectivism framework as Anglo, Arab, Confucian Asia, Eastern European, Germanic Europe, Latin America, Latin Europe, Nordic Europe, Southern Asia, and Sub-Saharan Africa).

<sup>212</sup> See generally *Feerick Center for Social Justice*, FORDHAM U. SCH. OF L., [https://www.fordham.edu/info/20693/feerick\\_center\\_for\\_social\\_justice](https://www.fordham.edu/info/20693/feerick_center_for_social_justice) [<https://perma.cc/BN6D-EPDR>] (last visited Dec. 6, 2020) (integrating a discussion of the impact of the more than 2.3 million litigants without appropriate counsel each year in New York, the number of New Yorkers [over 6.5 million] who are living at or below poverty level, and a discussion about the United Nations definition of poverty); Kimberly E. O'Leary, *Using a "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65 (1997) (identifying how "difference analysis" might be used in a clinical classroom setting to teach multicultural analysis within client interviewing); Christine Zuni Cruz, *[On the] Road Back in: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999) (analyzing lawyering within native communities and how instructors/students might prepare and confront communities across cultures within a clinical legal setting).

<sup>213</sup> See generally *Purnell Model: Purnell Model for Cultural Competence by Larry Purnell*, NAT'L ASS'N OF SCH. NURSES (Sept. 2013), <https://www.nasn.org/nasn-resources/practice-topics/cultural-competency/cultural-competency-purnell-model> [<https://perma.cc/S6DS-KV8R>].

<sup>214</sup> *Id.*

legal education and cultural competency, though, by Professors Susan Bryant and Jean Koh Peters, identified “Five Habits” and two questions to ask when training culturally competent attorneys:<sup>215</sup> “(1) what is effective cross-cultural lawyering and (2) how can we help ourselves and our students learn to be effective cross-cultural lawyers?”<sup>216</sup> With these background questions in mind, Professor Bryant sets out Five Habits to learn cultural competency in lawyering and recognition of the cross-cultural backgrounds of clients:

**Habit One** provides students with a framework to identify similarities and differences between themselves and their clients, forcing them to focus consciously on the possibility that cultural misunderstanding, bias, and stereotyping can occur.

**Habit Two** asks students to identify the similarities between the client and the legal system and the lawyer and the legal system in order to explore all the ways in which culture may influence a case.

**Habit Three** challenges students to explore alternative explanations for their clients’ behavior.

**Habit Four** focuses on cross-cultural communication, identifying skills that students may leverage in cross-cultural encounters.

**Habit Five** asks the students to engage in self-analysis rather than self-judgment, resulting in more effective lawyering.<sup>217</sup>

Later scholars adapted the Bryant and Koh “Habits” to an international law context and considered navigating culture in the context of clients around the world or in clinical settings via international human rights clinics within law schools today.<sup>218</sup>

---

<sup>215</sup> See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 37 (2001) (providing in-depth examples of how to use steps to build cross cultural skills in tough situations).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 64–78.

<sup>218</sup> See generally Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic*, 56 N.Y.L. SCH. L. REV. 445 (2012) (identifying an approach for inclusion of cultural competency training in a human rights clinic setting). See Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISCOURSE 140, 149–56 (2014) (proposing “five habits” of cultural competency in a seminar setting that includes recognizing cultural biases, stereotypes, and ways of thinking, making “isomorphic attributions” to understand client behavior, remaining nonjudgmental in cross-cultural interactions, and building cross-cultural communication skills through activities in international human rights clinics).

Overall, implementation of cultural competency skills training and discussions about what a culturally competent lawyer should be have traditionally been isolated to a clinical or seminar setting.<sup>219</sup> The time is ripe for inclusion of cultural competency training and discussion of the necessary skills in all doctrinal and experiential learning to enable law students to grapple with diverse clients in an increasingly global practice, assess cultural differences, and acknowledge the impact of poverty<sup>220</sup> on clients for more adequate representation.

### *B. Consideration of Cultural Perspectives and CSR Norms*

Globalization is an increasingly important part of law school curricula in the United States and must be responded to in the same proactive way as technological innovation and its effect on legal

<sup>219</sup> See generally Janus & Smythe, *supra* note 218; Muneer Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); Alexis Anderson et. al., *Challenges of “Sameness”: Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLIN. L. REV. 339 (2012); Tamar Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959 (2010); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

<sup>220</sup> See, e.g., HELAINE M. BARNETT, THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 12 (2010), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf> [<https://perma.cc/J6LS-GXTL>] (“[M]ore than 2.3 million New Yorkers each year navigate the State’s civil justice system without legal assistance.”). The U.N. definition of “poverty” should be woven into curricular planning:

Fundamentally, poverty is a denial of choices and opportunities, it is a violation of human dignity.

It means lack of basic capacity to participate effectively in society. It means not having enough to feed and clothe a family, not having a school or a clinic to go to, not having the land on which to grow one’s food or a job to earn one’s living, not having access to credit. It means insecurity, powerlessness and exclusion of individuals, households and communities. It means susceptibility to violence and it often implies living in marginal and fragile environments, not having access to clean water or sanitation.

Press Release, Statement of Commitment for Action to Eradicate Poverty Adopted by Administrative Committee on Coordination, U.N. Press Release ECOSOC/5759, ¶ 3 (May 20, 1998). See generally AMY TERPSTRA, JENNIFER CLARY & AMY RYNELL, POOR BY COMPARISON: REPORT ON ILLINOIS POVERTY, JANUARY 2015 (2015), <https://www.dph.illinois.gov/sites/default/files/publications/Poor%20By%20Comparison.pdf> [<https://perma.cc/FGS3-N644>] (revealing that Illinois ranks poorly when compared to other States nationwide after analyzing poverty rates, unemployment rates, uninsured rates per household, high school completion rates, food insecurity rates, and asset poverty rates).



practice.<sup>221</sup> Traditionally, the pedagogical response to globalization and, in turn, curricular response has been to establish or increase the number of study-abroad programs or clinical experiences in legal education.<sup>222</sup> This approach, however, does not always address the specific need of training lawyers in cultural competency or a more global range of clients.<sup>223</sup> As such, law schools should examine the relatively vast number of study-abroad programs in relation to the relative dearth of offerings in cultural competency and come up with a cogent plan for the future training of attorneys in cultural competency skills.<sup>224</sup> International human rights clinics, international business courses, or seminars devoted toward cultural competency in a global setting might be an initial solution,<sup>225</sup> but legal educators or curriculum committees should work toward a

---

<sup>221</sup> Carole Silver, *Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 STAN. L. & POL'Y REV. 457, 457–59 (2013). *See generally* Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009) (positing that the Carnegie Foundation's call for curricular innovations and changes to a clinical lawyer practices overlooks the pedagogy for teaching students how to understand differences and represent difference-based clients and communities here and abroad).

<sup>222</sup> *See, e.g.*, Stephen H. Legomsky, *Globalization and the Legal Educator: Building a Curriculum for a Brave New World*, 43 S. TEX. L. REV. 479, 483 (2002).

<sup>223</sup> *See, e.g.*, Roy T. Stuckey, *Preparing Students to Practice Law: A Global Problem in Need of Global Solutions*, 43 S. TEX. L. REV. 649, 650 (2002); *see also* Janus & Smythe, *supra* note 218 (describing lessons learned from Stanford Law School's clinic that can aid cross-cultural competency).

<sup>224</sup> *See Summer Study Abroad Law School Programs*, A.B.A., <https://abaforlawstudents.com/stay-informed/summer-study-abroad-law-school-programs/> [<https://perma.cc/49KW-KQCN>] (last visited Dec. 6, 2020).

<sup>225</sup> *See generally* Marci Seville, *Chinese Soup, Good Horses, and Other Narratives: Practicing Cross-Cultural Competence Before We Preach*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER, 277 (2011) (“Before we undertake teaching our students about cross-cultural competence, we need to examine carefully our own practices, and those of our colleagues and institutions, to ensure that we are not complicit in the very practices of cross-cultural ‘incompetence’ that we hope to train our students to avoid.”); Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. UNIV. J.L. & POL'Y 37, 38 (2008) (“Cultural knowledge, awareness, and skills can be taught and learned in a clinical program using a variety of methods, including research, reading, roleplay, case rounds, observation, and group discussion.”); Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 133 (2006) (“The importance of training lawyers to become cross-culturally adept is likely self-evident to readers of this journal, as it generally is now in the literature on progressive lawyering and clinical education.”); Janus & Smythe, *supra* note 218.

more experiential approach of infusion of cultural competency skills throughout first-year and doctrinal courses, when it would be intuitive, as part of the class discussion or via assignments as a learning outcome.<sup>226</sup> A professional development series approach for cultural competency training might also be considered to provide further preparation and baseline skills for current students, alumni, or other members of the practicing bar.<sup>227</sup>

Opportunities abound for integration of cultural competency skills and consciousness within law schools today. Legal education should be responsive to continued changes in diversity, poverty, and the scope of international legal practice. Curricular goals for cultural competency should acknowledge and analyze the differences between the attorney and clients within the patchwork of society and the evolving nature of legal practice in conjunction with globalization plus the intersection of international law with doctrinal subjects.<sup>228</sup> Legal educators have a duty to challenge students' preconceived notions of what it means to be attorneys within the framework of today's diverse clientele and an increasingly international practice. At the very least, law schools may help students grapple with competency in foreign legal traditions in the international business or public international law context and provide a basic foundation for the legal systems of nations, cultural norms, and knowledge of legal challenges for developing countries.

---

<sup>226</sup> See, e.g., Mary Lynch, *The Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness*, 1 J. EXPERIENTIAL L. 129, 131–32 (2014) (arguing that the time is ripe to systemize the development of cross-cultural communication and experience-based courses are the best environment for law students to learn about cross-cultural issues); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1732 (1993) (exploring presumptions and assumptions of clients that exist within the classroom); Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509, 510 (2008) (“My goal is to change the students’ focus to the client, to hear what the person across the desk, in the chair, or behind the lock-up bars is saying - what her story is, and what that story says about her and the law.”).

<sup>227</sup> Amy Timmer & John Berry, *The ABA’s Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, 20 PROF. LAW. 10, 18 (2010) (citing cultural competency as one of the ethics electives that schools might create in conjunction with the new ABA accreditation standards).

<sup>228</sup> For a complete discussion of the intersection of private international law and public international law and doctrinal legal subjects in a choice of law framework, see generally Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 65 AM. J. COMP. L. 299 (2017).

## V. The Three-Step Approach and Illustrations

This section will provide a three-step strategy for infusing CSR themes and cultural competency training into the law school curriculum to better prepare international corporate lawyers for ethical practice. This three-step international business research process and best practices list for simulation in appropriate law school classes will help pave the way toward edification for corporate counsel in a variety of settings in law schools:

1. First, search for a company's outlined CSR obligations and also research actions in subsidiaries or correlating obligations in the supply chain.
2. Second, thoroughly research governing international conventions or acts that would apply for the corporate action or international contract.
3. Find any national obligations and cooperative international, regional, or domestic agreements or non-binding ("soft law") efforts for globally ethical corporate behavior based on the foreign jurisdictions involved.

In addition, comparative examples or hypotheticals for CSR or ethical corporate advice for an MNE would illuminate class discussions in doctrinal, skills, clinical, and moot court settings. Efforts in other countries could also be used as concrete examples for class application of the complementary principles of cultural competency and CSR. The following three examples may be used as selective case studies of CSR efforts:

### *A. Comparative Example #1: United Kingdom Slavery Act 2015*

The United Kingdom recently enacted a prohibition against slavery in the supply chain to criminalize the use of forced labor and facilitation of any form of servitude in the supply chain.<sup>229</sup> The Act requires all companies doing business in the United Kingdom with a business of approximately \$51 million or at least £36 million, regardless of the industry, to disclose what they are doing to prevent slavery and human trafficking in the supply chain.<sup>230</sup> This may include policies that the company has adopted, due diligence, risk

---

<sup>229</sup> Modern Slavery Act 2015, c. 30 (Eng.)

<sup>230</sup> See *id.* pts. 2 & 6; see also Ashley Walter, *The UK Modern Slavery Act and Supply Chain Responsibility*, JD SUPRA (Jan. 25, 2016), <https://www.jdsupra.com/legalnews/the-uk-modern-slavery-act-and-supply-85807/> [<https://perma.cc/2R5K-EPQS>].

assessments, training, or other disclosures.<sup>231</sup> This new “hard law” U.K. anti-slavery norm aligns with the broader international “soft law” norms of the ILO, such as the 1930 ILO Forced Labour Convention<sup>232</sup> and the 2000 Palermo Trafficking Protocol.<sup>233</sup>

### *B. Comparative Example #2: German Legislation*

Germany has implemented the European Union Non-Financial Reporting Directive (2017)<sup>234</sup> into hard law through Section 289c of the German Commercial Code.<sup>235</sup> Corporations in Germany must now adhere to the human rights standards and consider environmental, labor, and social concerns to represent CSR for companies which employ more than 500 people.<sup>236</sup> Germany is also actively involved in a National Action Plan for Business and Human Rights, which was adopted in 2016.<sup>237</sup> The goal for the National Action Plan is to align with the U.N. Guiding Principles<sup>238</sup> and articulate the government’s expectations for globally ethical

<sup>231</sup> Walter, *supra* note 230.

<sup>232</sup> See Int’l Lab. Conf., 103d Sess., Geneva, Switz., *Protocol of 2014 to the Forced Labour Convention, 1930*, P029, June 11, 2014; Int’l Labour Conference, 14th Sess., Geneva, Switz., *Convention Concerning Forced or Compulsory Labour*, No. 29, June 28, 1930.

<sup>233</sup> U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2237 U.N.T.S. 319 (Nov. 15, 2000).

<sup>234</sup> Communication from the Commission—Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information) (EC), 2017 O.J. (C 215) 1.

<sup>235</sup> See Mina Aryobsei et al., *Germany: Corporate Social Responsibility, Human Rights and the Law*, FRESHFIELDS (Mar. 29, 2019), <https://humanrights.freshfields.com/post/102fhjc/germany-corporate-social-responsibility-human-rights-and-the-law> [<https://perma.cc/723P-6GSP>].

<sup>236</sup> See Council Directive 2014/95, art 1, 2014 O.J. (L 330/1) (“European Commission. Non-Financial Reporting Directive—Transposition Status, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance”).

<sup>237</sup> See FED. FOREIGN OFF., NATIONAL ACTION PLAN: IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, 2016-2020 (2017), <https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf> [<https://perma.cc/JPX7-BYA4>] (adopting the UN Guiding Principles on Business and Human Rights by German’s Federal government and Cabinet).

<sup>238</sup> See *U.N. Guiding Principles: Protect, Respect & Remedy*, *supra* note 6.

behavior in supply and value chains.<sup>239</sup>

*C. Comparative Example #3: European Foreign Tort Claims Act*

The European Union (“EU”) has also regulated corporate behavior<sup>240</sup> and articulated a doctrine of CSR through the European Foreign Tort Claims Act.<sup>241</sup> The Brussels I Regulation<sup>242</sup> includes regulation of cyber-torts<sup>243</sup> and also other disputes involving corporate harm in the context of torts.<sup>244</sup> In addition, the EU has a formal strategy for CSR and an action plan for human rights.<sup>245</sup> The European “hard law” norms align well with the OECD soft law norms for CSR in international business transactions.<sup>246</sup>

These examples may be tethered to discussion of deterring harmful corporate behavior and how to introduce comparative aspects of practice to clients. Case studies and tangible regulations in the international context provide powerful examples of regulation in practice.<sup>247</sup> News commentary may also be useful to set the

---

<sup>239</sup> See *id.*

<sup>240</sup> See *Brussels Regulation: Which Takes Priority – Contract or Tort Claim?*, ASHURST (Apr. 1, 2014), <https://www.ashurst.com/en/news-and-insights/legal-updates/brussels-regulation-which-takes-priority-contract-or-tort-claim/> [<https://perma.cc/LH85-QA2M>].

<sup>241</sup> See Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L12) 1, 4 [hereinafter Brussels I Regulation]. See generally Georgiana Gabriela Georgescu et al., *Jurisdiction over Cyber Torts Under Brussels I BIS Regulation*, THEMIS COMPETITION 2016 (2016), [http://www.ejtn.eu/PageFiles/14777/Written%20paper\\_Romania.pdf](http://www.ejtn.eu/PageFiles/14777/Written%20paper_Romania.pdf) [<https://perma.cc/PZ3X-7SNG>]; *Corporate Social Responsibility & Responsible Business Conduct*, EUR. COMM’N, [https://ec.europa.eu/growth/industry/corporate-social-responsibility\\_en](https://ec.europa.eu/growth/industry/corporate-social-responsibility_en) [<https://perma.cc/N5PM-687G>] (last visited Oct. 2, 2020).

<sup>242</sup> See Brussels I Regulation, *supra* note 241.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See, e.g., Council Directive 2014/95, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1, 4–5 (EU).

<sup>246</sup> See generally Kathryn K. Gordon, *OECD Working Papers on Int’l Inv. 2001/05: The OECD Guidelines and Other Corporate Responsibility Instruments, a Comparison*, OECD (Dec. 2001), [https://www.oecd.org/investment/mne/WP-2001\\_5.pdf](https://www.oecd.org/investment/mne/WP-2001_5.pdf) [<https://perma.cc/K7TA-RX82>] (examining the differences between the OECD guidelines and six other global instruments).

<sup>247</sup> See, e.g., Cristina A. Cedillo Torres, Mercedes Garcia French, Rosemarie Hordijk,

international stage for the case study examples in an international business context.<sup>248</sup>

## VI. Conclusion: We Must “Find the Beef” for CSR Norms and Enforcement

We must improve the landscape of global ethical norms by enlightening students in law school to better prepare for the realities of international corporate lawyering. Internationally and nationally, corporate counsel with U.S. ties will continue to strive toward including CSR norms and cultural competency considerations into contractual negotiations. U.S. lawyers must be knowledgeable about the hard and soft law norms in international contract negotiation and for adequate representation of MNEs. The international climate for businesses is becoming more promising than ever, especially with the “beef” of more universally recognized and normative CSR norms, and the economic outlook for globally ethical behavior has a clear path with the existing and emerging hard and soft law foundations to more certainly train our law students for a multinational practice.

---

Kim Nguyen & Lana Olup, *Four Case Studies on Corporate Social Responsibility: Do Conflicts Affect a Company’s Corporate Social Responsibility Policy?*, 8 *UTRECHT L. REV.* 51, 53 (2012).

<sup>248</sup> See, e.g., *Corporate Social Responsibility*, *ECON. TIMES*, <https://economictimes.indiatimes.com/topic/corporate-social-responsibility> [<https://perma.cc/NV99-24YG>] (last visited Dec. 6, 2020) (demonstrating recent news articles about the value of CSR); Joseph Sarkis et al., *Winds of Change: Corporate Social Responsibility in China*, *IVEY BUS. J.*, (Jan. –Feb. 2011), <https://iveybusinessjournal.com/publication/winds-of-change-corporate-social-responsibility-in-china/> [<https://perma.cc/6DME-E85Q>]; Mark R. Kramer, *Coronavirus is Putting Corporate Social Responsibility to the Test*, *HARV. BUS. REV.* (Apr. 1, 2020), <https://hbr.org/2020/04/coronavirus-is-putting-corporate-social-responsibility-to-the-test> [<https://perma.cc/8ZSH-EATH>]; Paul Klein, *Corporate Social Responsibility in Latin America: Reality or Fantasy?*, *GUARDIAN* (Aug. 7, 2013), <https://www.theguardian.com/sustainable-business/corporate-social-responsibility-latin-america-mining> [<https://perma.cc/2GN7-5QT7>]; see also Chris Jarvis, *51 Great Sites for Corporate Social Responsibility and Sustainability*, *FAST CO.* (Aug. 25, 2009), <https://www.fastcompany.com/1338993/51-great-sites-corporate-social-responsibility-and-sustainability> [<https://perma.cc/76TF-E2MJ>].

